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PROTECTING POLICY SPACE FOR INDIGENOUS DATA SOVEREIGNTY UNDER INTERNATIONAL DIGITAL TRADE LAW

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ABSTRACT

The impact of economic agreements on Indigenous peoples' broader rights and interests has been subject to ongoing scrutiny. Technological developments and an increasing emphasis on Indigenous sovereignty within the digital domain have given rise to a global Indigenous data sovereignty movement, surfacing concerns about how international economic law impacts Indigenous peoples' sovereignty over their data. This Article examines the policy space certain governments have reserved under international economic agreements to introduce measures for protecting Indigenous data or digital sovereignty (IDS). We argue that treaty countries have secured, under recent international digital trade chapters and agreements, the benefits of a comprehensive economic treaty and sufficient regulatory autonomy to protect Indigenous data sovereignty.

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I. INTRODUCTION

International economic treaty negotiators have traditionally sought to strike an adequate balance between reducing trade barriers, promoting investment, and maintaining sufficient policy space to pursue other public policy objectives.[1] Indigenous peoples stand to benefit immensely from expanding trade and investment,[2] but the impact of economic agreements on their broader rights and interests has been subject to

1. *See* Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1,4 (2014); ANDREW MITCHELL, ELIZABETH SHEARGOLD & TANIA VOON, REGULATORY AUTONOMY IN INTERNATIONAL ECONOMIC LAW: THE EVOLUTION OF AUSTRALIAN POLICY ON TRADE AND INVESTMENT 4 (2017) (describing "policy space" and "regulatory autonomy" as "the ability of a State to determine its regulatory goals . . . and to adopt and implement policies to pursue those goals"). *See also* Tomer Broude, Alexander Thompson & Yoram Z Haftel, *Who Cares About Regulatory Space in BITs? A Comparative International Approach, in* COMPARATIVE INTERNATIONAL LAW 527, 536 (Anthea Roberts et al. eds., 2018).

2. *See* WAITANGI TRIBUNAL, REPORT ON THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP 86–87 (2021) [hereinafter CPTPP Report]. *See also id.* at 58–67.

ongoing scrutiny.[3] Criticism has focused mainly on their marginalization in the treaty-making process and the subordination of their rights and interests to trade and investment liberalization goals.[4] Recent debate has centered around "Indigenous sovereignty"—a concept or collective of ideals and aspirations relating to the self-determination, autonomy, and recognition of Indigenous peoples and their land, cultures, and languages within Western legal systems.[5] Indigenous sovereignty can also describe a corresponding bundle of legal, political, and human rights,[6] global and domestic social and political movements, or regulatory regimes that seek to fulfill these objectives.[7]

Although aspects of Indigenous sovereignty have been realized in domestic legal jurisdictions to varying degrees,[8] its more systemic realization has been much slower and piecemeal, leading to the development of Indigenous sovereignty movements worldwide.[9] In light of technological developments, advocates for Indigenous sovereignty and members of Indigenous sovereignty networks now place greater emphasis on Indigenous sovereignty within the digital domain. Thus, a global "Indigenous data sovereignty" (IDS) movement, led by members of Indigenous communities and Indigenous rights advocates, has emerged in parallel in multiple countries,[10] surfacing concerns about how international economic law impacts Indigenous peoples' sovereignty over their data.

This Article examines the policy space that certain governments have reserved under international economic agreements for protecting Indigenous data or digital sovereignty. We focus on countries with

3. *See generally* JOHN BORROWS & RISA SCHWARTZ, INDIGENOUS PEOPLES AND INTERNATIONAL TRADE: BUILDING EQUITABLE AND INCLUSIVE INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS 1, 31, 248, 250 (John Borrows & Risa Schwartz eds., 2020).

4. Amokura Kāwharu, *Process, Politics and the Politics of Process: The Trans-Pacific Partnership in New Zealand*, 17 MELBOURNE J. OF INT'L L. 1, 286 (2016).

5. LARISSA BEHRENDT, ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA'S FUTURE 87, 101–02 (2003).

6. WAITANGI TRIBUNAL, HE WHAKAPUTANGA ME TE TIRITI: THE DECLARATION AND THE TREATY: THE REPORT ON STAGE 1 OF THE TE PAPRAHI O TE RAKI INQUIRY xxii (Legislation Direct 2014).

7. CPTPP Report, *supra* note 2, at 39–40.

8. Harry Hobbs, *Aboriginal and Torres Strait Islander Peoples and Australian Governance*, *in* INDIGENOUS ASPIRATIONS AND STRUCTURAL REFORM IN AUSTRALIA 17, 49–50 (2020). *Cf.* Dianne Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 SYRACUSE J. OF INT'L L. 65, 102 (1995).

9. Julian Brave NoiseCat, *Indigenous Sovereignty Is on the Rise. Can It Shape the Course of History?*, THE GUARDIAN (May 30, 2017), https://www.theguardian.com/commentisfree/2017/may/30/indigenous-sovereignty-growth-history-australia.

10. *See infra* Section II.

particularly advanced IDS movements: Australia, Canada, New Zealand, and the United States.[11] Our reference points are these countries' preferential trade agreements (PTAs) and regional trade agreements (RTAs), particularly their digital trade chapters and provisions that might expand or restrict policy space in this area,[12] such as exceptions and reservations or non-conforming measures. All these countries except the United States are parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[13] which revived the Trans-Pacific Partnership (TPP) and introduced a seminal framework for international digital trade provisions.[14] Australia and New Zealand are parties to the Regional Comprehensive Economic Partnership (RCEP), an RTA between twelve Indo-Pacific countries;[15] and New Zealand is a party to the Digital Economy Partnership Agreement (DEPA) with Chile (also party to CPTPP) and Singapore (also party to CPTPP and RCEP).[16] Countries not party to these treaties maintain bilateral PTAs with one another *inter se* (e.g., the Australia-United States Free Trade Agreement (AUSFTA)[17] and the United States-Mexico-Canada Agreement (USMCA)).[18] As many of these agreements follow the CPTPP model,[19] we use it as a starting point, noting key differences between the CPTPP and these later agreements where relevant.

In Part II, we explore IDS movements and their objectives, to better understand how international digital trade law might impact governments' capacity to introduce measures that can fulfill those objectives.

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11. IDS is also prominent in other regions and countries; *see, e.g.*, Per Axelsson & Christina Storm Mienna, *The Challenge of Indigenous Data in Sweden, in* INDIGENOUS DATA SOVEREIGNTY AND POL'Y 99 (Maggie Walter et al. eds., 2021).

12. We use "digital trade" and "e-commerce" synonymously.

13. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 28, ¶ 12, Mar. 8, 2018, 3337 U.N.T.S. [hereinafter CPTPP]. For simplicity, all references to the CPTPP in this Article are to the provisions of the TPP as incorporated into the CPTPP, other than references to the TPP's original preamble and schedules.

14. Mira Burri, *Towards a New Treaty on Digital Trade*, 55 J. OF WORLD TRADE 77, 83 (2021).

15. Regional Comprehensive Economic Partnership, Nov. 15, 2020, [2022] A.T.S. 1 [hereinafter RCEP].

16. Digital Economy Partnership Agreement, June 12, 2020, U.N.T.S. No. 57541 [hereinafter DEPA].

17. Australia–United States Free Trade Agreement, May 18, 2004, [2005] A.T.S. 1 [hereinafter AUSFTA].

18. U.S.-Mex.-Can. Agreement Dec. 10, 2019, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited March 30, 2024) [hereinafter USMCA]; Closer Economic Relations Trade Agreement, Austl.-N.Z., Mar. 28, 1983, 1536 U.N.T.S. 400 [hereinafter ANZCERTA] does not contain a digital trade chapter.

19. We do not consider the AUSFTA's e-commerce chapter in detail in this article.

However, we do not attempt to provide a comprehensive or precise perspective on what these concepts or initiatives might mean to unique and diverse Indigenous populations.[20] In Part III, we offer a brief overview of potential IDS measures advocated for to protect Indigenous peoples' data and digital sovereignty. In Part IV, we argue that each jurisdiction has secured the benefits of a comprehensive economic treaty and sufficient regulatory autonomy to protect IDS. Part V considers how this issue has been dealt with by New Zealand's Waitangi Tribunal, a non-international trade and investment adjudicator that has concluded on the CPTPP's potential prejudice to Māori. In Part VI, we conclude by contrasting the policy space retained by CPTPP parties through the treaty text with the political and regulatory risk identified by the Waitangi Tribunal. We argue that there exists a disjunct between the policy space embedded in the treaty text and the undue weight given by the Waitangi Tribunal to other considerations, including normative and geopolitical factors.

II. Indigenous Data Sovereignty

IDS has emerged alongside broader notions of "data sovereignty" and "digital sovereignty"—terms often associated with state sovereignty over domestic data and the digital sphere.[21] Aside from their obvious focus on Indigenous interests and values,[22] Indigenous sovereignty and IDS are different from the international concepts of sovereignty and digital sovereignty because—at least in their pluralist manifestations—they often involve a compromise between two claims to sovereignty within a single territory: the state's claim and claims by one or more Indigenous groups. This distinction has given rise to a taxonomy of "internal" and "external" sovereignties.[23] Under this framework, "internal" sovereignty is a formulation of sovereignty in which "Indigenous

20. Otto, *supra* note 8, at 73.

21. *See generally* Stephane Couture & Sophie Toupin, *What Does the Notion of "Sovereignty" Mean When Referring to the Digital?*, 21 New Media & Society 2305 (2019).

22. There is no internationally accepted definition of "Indigenous Peoples." The United Nations Declaration on the Rights of Indigenous Peoples states that Indigenous peoples have the right "to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned" and "to determine their own identity or membership in accordance with their customs and traditions. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]. *See* United Nations Human Rights Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System*, Fact Sheet No. 9/Rev. 2, at 2 (2013).

23. Jane Robbins, *A Nation Within? Indigenous Peoples, Representation and Sovereignty in Australia*, 10(2) Ethnicities 257, 258–59 (2010).

peoples are given a formal sphere of authority in the political system, within the framework of a single nation."[24] In other words, internal sovereignty describes the sovereignty of one group vis-à-vis another group or polity (e.g., a government) within the borders of an internationally recognized state. In contrast, external sovereignty describes states' sovereignty vis-à-vis other states.[25]

A. *Conceptualizing IDS*

Perhaps the most comprehensive definition of IDS appears in the Indigenous Data Sovereignty Communique, written by the Maiam nayri Wingara Indigenous Data Sovereignty Collective and the Australian Indigenous Governance Institute in Canberra in 2018, which states: "the right of Indigenous peoples to govern the creation, collection, ownership and application of their 'data,' where 'data' refers to 'information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.'"[26] This definition is similar to the Māori Te Mana Raraunga Charter's definition but is broader than some others.[27] For example, some refer to "the right of Indigenous peoples to own, control, access and possess data that derive from them, and which pertain to their members, knowledge systems, customs or territories."[28]

While not legal definitions, fundamental differences between these various descriptions reflect critical issues raised by IDS movements and reveal that the sovereignty claimed over Indigenous data can vary significantly in scope. For example, the first definition refers to data about and that "may affect" Indigenous peoples, not merely information that derives and pertains to them, potentially encompassing a much broader range of Indigenous data. While the latter might include data about Indigenous peoples' health records or unique customs within a given geographical area, the former might consist of public data about a range of more general issues that could indirectly affect local Indigenous populations.

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24. *Id* (citing DOMINIC O'SULLIVAN, BEYOND BICULTURALISM: THE POLITICS OF AN INDIGENOUS MINORITY 4 (2007)).

25. *Id.* at 258.

26. MAIAM NAYRI WINGARA INDIGENOUS DATA SOVEREIGNTY COLLECTIVE & THE AUSTRALIAN INDIGENOUS GOVERNANCE INSTITUTE, INDIGENOUS DATA SOVEREIGNTY COMMUNIQUE (2018).

27. *Māori Data Sovereignty Network Charter*, TE MANA RARAUNGA (May 6, 2021), https://www.temanararaunga.maori.nz/tutohinga.

28. MAIAM NAYRI WINGARA INDIGENOUS DATA SOVEREIGNTY COLLECTIVE ET AL., *supra* note 26.

One aspect of IDS is "sovereignty," which may be likened to ownership and things ancillary to ownership: creation, collection, access, analysis, interpretation, management, dissemination, and reuse.[29] Another aspect of IDS is Indigenous data *governance*, which may be characterized as the right to autonomously decide what, how, and why Indigenous data are collected, accessed, and used.[30]

The right to govern, rather than merely own and control, is based on the rights of self-determination and governance that Indigenous peoples have over their people, territories, and resources, as recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[31] Data governance means autonomy over decision-making about data throughout its nonlinear lifespan—from conception to access, control, and use.[32] It means a central and defining role in decision-making rather than merely second-priority or peripheral consultation.[33]

In one sense, IDS is better likened to an end and Indigenous data governance as a tool for achieving that end. Because Indigenous peoples may not own or control all data that is created by or pertains to them, Indigenous data governance as a tool for ensuring access, control, and use of such data has become embedded as a central focus of IDS movements.[34] Relevantly, these data control, ownership, and governance issues are at the heart of the debate about the relationship between IDS and trade and investment.

B. *IDS Movements and Current Issues*

IDS is taking a substantial hold in certain countries, particularly in Australia, Canada, New Zealand, and the United States, where the following networks lead IDS movements in these countries, respectively: Maiam nayri Wingara Indigenous Data Sovereignty Collective;[35] the

29. *Id.*

30. *Id.*

31. UNDRIP, *supra* note 22, at 4–5. *See generally* Maggie Walter & Stephanie Russo Carroll, *Indigenous Data Sovereignty, Governance and the Link to Indigenous Policy*, *in* Walter et al., *supra* note 11; Tahu Kukutai, *Reflections on Indigenous sovereignty*, 4(1) J. OF INDIGENOUS WELLBEING 3, 3 (2019).

32. Maggie Walter & Michele Suina, *Indigenous Data, Indigenous Methodologies and Indigenous Data Sovereignty*, 22(3) INT'L J. OF SOC. RSCH. METHODOLOGY 233, 237 (2019).

33. International Work Group for Digital Affairs, *Indigenous World 2020: Indigenous Data Sovereignty*, IWGIA (May 11, 2020), https://www.iwgia.org/en/ip-i-iw/3652-iw-2020-indigenous-data-sovereignty.html.

34. *See id.*

35. *About us*, MAIAM NAYRI WINGARA, https://www.maiamnayriwingara.org/founding-members (last visited Mar. 30, 2024).

First Nations Information Governance Centre;[36] Te Mana Raraunga Māori Data Sovereignty Network;[37] and the United States Indigenous Data Sovereignty Network.[38] The Global Indigenous Data Alliance represents an alliance of the latter three networks, whose goal is to "progress International Indigenous Data Sovereignty and Indigenous Data Governance in order to advance Indigenous control of Indigenous Data."[39] The Pacific Data Sovereignty Network also operates in New Zealand and "aims to establish a unified voice and collective guardianship and advocacy of data and information about Pacific peoples living in New Zealand."[40]

In New Zealand, IDS can be considered part and parcel of the Treaty of Waitangi/Te Tiriti o Waitangi (collectively, Treaty of Waitangi) framework for recognizing and ensuring *tino rangatiratanga* over *taonga* (loosely, absolute sovereignty [*tino rangatiratanga*] over treasured possessions of cultural significance [*taonga*]).[41] Thus, IDS is simply a continuation of Māori peoples' ongoing pursuit to protect their rights and interests over their customs, traditions, knowledge, and possessions, including their land, language, and stories. One may conceptualize IDS as technologically necessary to preserve traditions, customs, knowledge, experiences, and familial and environmental relationships for future generations living in a digital world.[42] These aspects of Indigenous culture now often appear in the data medium. Therefore, just as governments are compelled to govern society through data regulation, Indigenous peoples are confronted with a need to assert control over their data to maintain their self-determination and rights over their knowledge and possessions in the digital domain. In other words,

36. *About us*, First Nations Information Governance Centre, https://fnigc.ca/about-fnigc (last visited Mar. 30, 2024).

37. Te Mana Raraunga, https://www.temanararaunga.maori.nz (last visited Mar. 30, 2024).

38. *About*, U.S. Indigenous Data Sovereignty Network, https://usindigenousdatanetwork.org/about-2/ (last visited Mar. 30, 2024).

39. *Purpose*, Global Indigenous Data Alliance, https://www.gida-global.org/purpose (last visited Sept. 7, 2024); *Who We Are*, Global Indigenous Data Alliance, https://www.gida-global.org/whoweare (last visited Sept. 7, 2024).

40. *About Us*, Pacific Data Sovereignty: Reclaiming Pacific Data, https://pacificdatasovereignty.com/about-us/. (last visited Sept. 7, 2024).

41. *See* Carwyn Jones & Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity 254 (2011); Māui Hudson et al., *He Matapihi ki te Mana Raraunga: Conceptualising Big Data Through a Māori Lens*, *in* He Whare Hangarau Māori: Language, Culture & Technology 64, 66 (Hēmi Whaanga, Te Taka Keegan & Mark Apperley eds., 2017).

42. *See* Stephanie Russo Carroll et al., *The CARE Principles for Indigenous Data Governance*, 19 Data Sci. J. 1, 2 (2020).

Indigenous data is no different from other *taonga*.[43] Thus, the Te Mana Raraunga Charter stipulates that Māori data is subject to the rights articulated in the Treaty of Waitangi.[44]

IDS is also relevant to more specific priorities about Indigenous peoples' health, privacy, role in representative government, and financial and commercial interests. Particularly relevant to this Article is a concern with maintaining a balance between achieving IDS and allowing Indigenous populations to utilize novel technologies to compete effectively in the digital economy.[45] Most recently, the intersection between IDS and Indigenous health came to the fore during the COVID-19 pandemic.[46] For example, studies showed that significant gaps existed in the reporting of COVID-19 amongst Indigenous populations, including in Australia, Canada, and New Zealand,[47] and "knowledge gaps" have led to constraints on government assistance for Indigenous peoples.[48]

IDS is sometimes used to refer primarily or even exclusively to how Indigenous populations are represented, underrepresented, or not represented in statistics and research—and, in turn, how that representation drives the popular narratives about Indigenous peoples.[49] Statistics also inevitably affect the development of public health and social policies, among other areas,[50] making IDS not just an issue of "too much" or misappropriated data, but also one of "too little" data or

43. Loosely, "treasured possessions of cultural significance." *See* JONES, *supra* note 41.

44. *Charter*, TE MANA RARAUNGA, *supra* note 27. *See* Kukutai, *supra note* 31, at 3. *Cf.* CPTPP Report, *supra* note 2, at 180.

45. CPTPP Report, *supra* note 2, at 38 (describing balancing IDS and access to novel technologies as a "balance between opportunity and threat to Māori interests").

46. *See* Adam Phelan, *'We Need to Be Seen': Why Data Is Vital in the Fight Against COVID-19*, UNSW SYDNEY (Mar. 25, 2020), https://newsroom.unsw.edu.au/news/health/we-need-be-seen—why-data-vital-fight-against-covid-19.

47. Alistair Mallard et al., *An Urgent Call to Collect Data Related to COVID-19 and Indigenous Populations Globally*, 6 BMJ GLOB. HEALTH 1, 2 (2021).

48. Kerrie Pickering et al., *Indigenous Peoples and the COVID-19 Pandemic: A Systematic Scoping Review*, 18 ENV'T RSCH. LETTERS 1, 1–2 (2023).

49. Chidi Oguamanam, *Indigenous Data Sovereignty: Retooling Indigenous Resurgence for Development*, 234 CIGI PAPERS, December 5, 18 (2019).

50. *See* Darin Bishop, *Indigenous Peoples and the Official Statistics System in Aotearoa/New Zealand*, *in* INDIGENOUS DATA SOVEREIGNTY: TOWARD AN AGENDA 291, 294–95 (Tahu Kukutai & John Taylor eds., 2016); Maggie Walter, *Data Politics and Indigenous Representation in Australian Statistics*, *in* INDIGENOUS DATA SOVEREIGNTY: TOWARD AN AGENDA (Tahu Kukutai & John Taylor eds., 2016); Reremoana Theodore et al., *Māori Linked Administrative Data: Te Hao Nui—A Novel Indigenous Data Infrastructure and Longitudinal Study*, 14 THE INT'L INDIGENOUS POL'Y J. 1, 1 (2023).

the "Indigenous data failure."[51] Such issues are particularly important for the Te Mana Raraunga Māori Data Sovereignty Network, whose "Principles of Māori Data Sovereignty" prioritize the "individual and collective benefit" of Indigenous data.[52]

In the United States, Indigenous peoples have established and are seeking to further establish governance mechanisms related to "self-determined research," including authorization and approval processes for research activities, and review processes related to the collection, storage, and publication of Indigenous peoples' data.[53]

In Australia, the Australian Government has announced an Australian Public Service (APS)-wide Framework for Governance of Indigenous Data, to be developed with First Nations partners and aimed at improving "accessibility, relevance, interpretability, and timeliness of government-held data for First Nations peoples."[54] A draft of the Framework available at the time of writing provides for four key guidelines: "[p]artner with First Nations peoples at all stages of the data lifecycle"; "[i]mprove the capabilities of APS staff and First Nations partners relating to Indigenous data across the data lifecycle"; "develop straightforward methods for First Nations peoples to know what data are held relating to their interests, its use, and [access]"; and "[b]uild towards organisational and culture change to support the inclusion of First Nations peoples in data governance."[55]

C. *Framing Policy Space for IDS*

Debate continues about the appropriate policy agenda governments can or should adopt to address these various issues.[56] For instance, as

51. Maggie Walter, *The Voice of Indigenous Data: Beyond the Markers of Disadvantage*, 60 GRIFFITH REV. 256, 257 (2018); *see, e.g.*, Ann M. McCartney et al., *Balancing Openness with Indigenous Data Sovereignty*, 119 PROC. OF THE NAT'L ACAD. OF SCI. 1, 2 (2021).

52. *Principles of Māori Data Sovereignty*, TE MANA RARAUNGA MAORI DATA SOVEREIGNTY NETWORK (Oct. 2018), https://static1.squarespace.com/static/58e9b10f9de4bb8d1fb5ebbc/t/5bda208b4ae237cd89ee16e9/1541021836126/TMR+Ma%CC%84ori+Data+Sovereignty+Principles+Oct+2018.pdf.

53. Ibrahim Garba et al., *Indigenous Peoples and Research: Self-determination in Research Governance*, 8 FRONTIERS IN RSCH. METRICS AND ANALYTICS 1, 4–5 (2023).

54. *APS-wide Framework for Indigenous Data and Governance,* NATIONAL INDIGENOUS AUSTRALIANS AGENCY, https://www.niaa.gov.au/our-work/closing-gap/aps-wide-framework-indigenous-dataand-governance (last visited Apr. 4, 2024).

55. *Framework for Governance of Indigenous Data: Practical Guidance for the Australian Public Service*, NATIONAL INDIGENOUS AUSTRALIANS AGENCY (May 30, 2024), https://www.niaa.gov.au/resource-centre/framework-governance-indigenous-data.

56. *See generally* Walter & Carroll, *supra* note 31, at n 32.

outlined in Part III, governments' digital sovereignty in the international realm (i.e., the ability to introduce measures to protect data within territorial borders) may be one way to achieve IDS at the national level.[57] But many questions still need to be answered: how do we reconcile IDS as a domestic issue within the framework of the UNDRIP with the international and cross-border nature of data, including data that belong explicitly or pertain to Indigenous peoples? How do we deal with the conflict between the interests of Indigenous individuals compared with Indigenous communities?[58] How do we address the potential conflict between external claims to data sovereignty by governments and internal claims by Indigenous groups?[59]

We do not comment here on how or to what extent countries should address IDS issues, or what policy approaches they should adopt. Instead, we focus on the scope that Indigenous population-rich states have under certain international economic agreements to address such issues.[60]

III. Indigenous Data Sovereignty Measures

Growing concerns about the impact of trade and investment treaties on IDS and Indigenous interests coincided with the culmination of TPP negotiations in 2016[61] and its effective entry into force through the CPTPP in 2018.[62] Specific digital trade provisions were said to severely inhibit governments' ability to introduce laws that could secure local Indigenous peoples' data sovereignty.[63] Two particularly novel

57. *See generally* Andrew D. Mitchell & Theodore Samlidis, *Cloud Services and Government Digital Sovereignty in Australia and Beyond*, 29 Int'l J.L. & Info. Tech. 364, 364–94 (2021).

58. *See* Rebecca Tsosie, *Tribal Data Governance and Informational Privacy: Constructing "Indigenous Data Sovereignty,* 80 Mont. L. Rev. 229, 229–67 (2019).

59. *See* Tsosie, *supra* note 58, at 259; Stephanie Carroll Rainie et al., Native Nations Institute, Policy Brief: Data Governance for Native Nation Rebuilding 2 (2017).

60. As we have chosen to focus on novel data obligations and non-operative provisions that affect their enforcement, we have excluded from the scope of this Article the level of intellectual property (IP) protection given by international economic agreements to Indigenous traditional knowledge. *See generally* Oluwatobiloba Moody, *Trade-Related Aspects of Traditional Knowledge Protection, in* Borrows & Schwartz, *supra* note 3, at 166–67; Matthew Rimmer, The Trans-Pacific Partnership Intellectual Property and Trade in the Pacific Rim 486–524 (2020). *See, e.g.,* The AfCFTA Protocol on Intellectual Property Rights, *opened for signature* Feb. 19, 2023 (not yet in force), arts. 3, 11, 18–19, 23, 42.

61. William David, *Recognizing the Rights of Indigenous Peoples in International Trade and Environment, in* Borrows & Schwartz *supra* note 3 at 133.

62. CPTPP, *supra* note 13.

63. Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement (2016) [hereinafter TPP Report]; Ian Pool, *Colonialism's and Postcolonialism's Fellow Traveller: the Collection, Use and Misuse of Data on Indigenous People, in* Indigenous Data Sovereignty: Toward an Agenda 57, 71 (Tahu Kukutai & John Taylor eds., 2016).

and significant obligations that made their debut in the CPTPP and became a mainstay of subsequent digital trade chapters were at the center of such arguments: a prohibition on data localization and a commitment to allow the cross-border electronic transfer of information for the conduct of a business.[64] While the former is a negative restriction on localizing data, the latter is a positive obligation to allow its transfer across borders.

As explained below,[65] the presence of data localization and commitments to cross-border information flow are not necessarily mutually exclusive, as there may be circumstances in which a government requires or facilitates the localization of some data onshore while also more broadly committing to the cross-border transfer of information. Although data localization measures have been posited as critical to securing IDS, we note that the cross-border transfer of information may also aid IDS in numerous circumstances, particularly the aspect of IDS that calls for data governance. For example, cross-border transfer may be necessary where Indigenous peoples require access to and control over their data in different territories. As data localization obligations have been the focus of arguments that digital trade provisions inhibit IDS, we focus on these provisions in particular.

Data localization measures are regarded as particularly instrumental to achieving IDS because they facilitate government control over, or safekeeping of, Indigenous peoples' data to the exclusion of foreign governments. For example, the Waitangi Tribunal, in its CPTPP Report, as explained below, described the claimants' central position as follows: "the CPTPP prevents any requirement for Māori data to be held exclusively within Aotearoa New Zealand. . . . As a result, Māori data can readily pass into the hands of other interests . . . ."[66] 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."[67]

Although the New Zealand Crown's custodial role may have taken on greater significance due to the protective obligations it owes to Māori

64. CPTPP, *supra* note 13, arts 14.11, 14.13. *See infra* Section IV.A(1).

65. *See infra* Section IV.

66. CPTPP Report, *supra* note 2, at 98.

67. *Id.* at 46–47. *Tino rangatiratanga* loosely translates to "absolute sovereignty" or "self-determination."

under the Treaty of Waitangi,[68] domestic governments in other jurisdictions are also likely to play a significant role in securing IDS outcomes for Indigenous populations, given their role as lawmakers and administrators across a broad range of areas, including Indigenous affairs. For example, in Australia, Indigenous affairs at the federal level of government come within the remit of the Minister for Indigenous Australians and the National Indigenous Australian Agency.[69] In the United States, the Bureau of Indian Affairs is responsible for administering laws related to Native Americans and for fulfilling a constitutionally mandated "federal trust responsibility," described as "the federal government's commitment to tribal sovereignty and the individual well-being of Native Americans . . . combined with the obligation to manage Indian lands and funds."[70]

In this regard, the control and authority that governments might maintain over Indigenous peoples' data vis-à-vis foreign governments and other actors through data localization and other national (or subnational) law and policy measures (what we term "international" or "external" IDS) can be distinguished from the unmediated control and authority that Indigenous groups might *themselves* maintain within national borders (what we term "national" or "internal" IDS).[71] While data localization policies may be conducive or even essential to specific international IDS objectives, because they are said to protect Indigenous data from outside actors, these policies may not be sufficient to address aspects of national IDS prioritized by Indigenous groups, such as Indigenous data governance vis-à-vis government control or custodianship. This is because these policies necessarily have an international locus. Therefore, even if international obligations in agreements like the CPTPP (such as prohibitions on data localization measures and requirements to commit to the cross-border transfer) could threaten the achievement of

68. *See* WAITANGI TRIBUNAL, TE MANA WHATU AHURU: REPORT ON TE ROHE PŌTAE CLAIMS, PARTS I AND II 189 (Wellington: Waitangi Tribunal, 2018); WAITANGI TRIBUNAL, PRELIMINARY REPORT ON THE TE ARAWA REPRESENTATIVE GEOTHERMAL RESOURCE CLAIMS 33 (Wellington: Brooker and Friend Ltd., 1993).

69. NATIONAL INDIGENOUS AUSTRALIANS AGENCY, https://www.niaa.gov.au (last visited Apr. 7, 2024); *The Hon Linda Burney MP*, AUSTRALIAN GOVERNMENT: DEPARTMENT OF PRIME MINISTER AND CABINET, *https://ministers.pmc.gov.au/former-ministers/burney* (last visited Apr. 7, 2024). The Commonwealth Parliament has legislative power to make laws with respect to enumerated matters and these powers do not delineate between Indigenous and non-Indigenous peoples: *see Australian Constitution* s 51 and especially s 51(xxvi).

70. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians,* 19 BYU J. PUB. L. 1, 1–161, X (2004).

71. Couture & Toupin, *supra* note 21 (noting that this distinction mirrors the more general distinction between "external" and "internal sovereignty").

external IDS objectives, other more bespoke measures that target national issues may still be required to achieve internal IDS outcomes. In this sense, protecting external IDS within the realm of international economic law through flexibilities in trade agreements is an important but not definitive step to facilitating IDS more broadly, including at the national level. Moreover, given the governance of relations between states under international law, external IDS is primarily an example of "*de jure* (from the law) sovereignty,"[72] whereas internal IDS can be exercised as either de jure or "*de facto* (in practice) sovereignty,"[73] depending on the legal and social status of Indigenous peoples' rights within states.

In the following parts, we assess governments' regulatory autonomy to introduce measures conducive to external IDS, as a form of indirect, international de jure sovereignty only, taking the CPTPP as a starting point. We do so by interpreting the ordinary meaning of treaty terms in light of their context and the treaty's object and purpose, on the basis that the parties have deliberately chosen these words in communicating their common intention.[74]

We also consider World Trade Organization (WTO) jurisprudence as persuasive guidance on the meaning of provisions. In this regard, CPTPP paragraph 28.12.3 states that, "[w]ith respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall . . . consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body."[75] Although strictly speaking this rule applies to WTO provisions incorporated into the CPTPP, its inclusion indicates the broader relevance ascribed by CPTPP parties to WTO jurisprudence when construing instruments in the international trade regime.[76]

IV. Assessing Digital Data Sovereignty Measures Under International Trade Law

In this Part, we argue that regulatory space for IDS has been factored into the final balance of rights and obligations granted to parties to the CPTPP and subsequent PTAs/RTAs between these jurisdictions. The

72. *See* Garba et al., *supra* note 53, at 2.

73. *Id.*

74. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331 [Hereinafter VCLT]. *See* CPTPP, *supra* note 13, art. 28.12.3.

75. CPTPP, *supra* note 13, art. 28.12.3. *See* RCEP, *supra* note 15, art. 19.4.2.

76. *See generally* Pamela Apaza Lanyi & Armin Steinbach, *Promoting Coherence Between PTAs and the WTO Through Systemic Integration*, 20 J. of Int'l Econ. L. 61, 81–83 (2017); Locknie Hsu, *Applicability of WTO Law in Regional Trade Agreements: Identifying the Links*, *in* Regional Trade Agreements and the WTO Legal System 525 (Lorand Bartels & Federico Ortino eds., 2006).

CPTPP as a whole has been negotiated to ensure that each party can undertake domestic regulation, and the scope for such domestic regulation is particularly broad under the "Electronic Commerce" chapter (e-commerce chapter),[77] where the provisions are generalized rather than prescriptive, and were drafted to provide for flexibility, in light of the degree of rapid evolution in developments in this area.

Our analysis considers the various sources of policy space for states to introduce IDS within the e-commerce chapter and the CPTPP as a whole (and their equivalents in similar digital trade agreements): (i) operative obligations (particularly data flow and personal privacy protection obligations); (ii) scope provisions; (iii) exclusions for non-conforming measures and reservations; and (iv) both specific and general exceptions.

A. *Operative Obligations*

This Section provides an overview of the operative obligations at the center of claims that the CPTPP and other digital trade agreements negatively impact IDS by restricting governments' policy space in this area. In the following Sections, we seek to show that such obligations are not unduly restrictive, especially when taken in the context of the broader e-commerce chapter and the CPTPP as a whole.

Two principal claims have been relied on to argue that the CPTPP reduces regulatory space or government authority to introduce or maintain measures that facilitate IDS: (i) CPTPP data flow obligations prevent governments from implementing regulatory requirements that Indigenous data not be transferred offshore, and only be held in the territory where the relevant Indigenous population is based (i.e., data localization and the requirement to commit to cross-border data transfer); and (ii) the CPTPP does not recognize and is thus incompatible with the concept of collective privacy maintained by various Indigenous populations.[78]

As outlined in Part III, such claims are necessarily concerned with international IDS, i.e., *government custodianship* over Indigenous data vis-à-vis foreign actors (government or private). The regulatory requirements targeted by data flow obligations are intended to ensure Indigenous data localization within territorial borders—but not necessarily Indigenous peoples' autonomous control and governance over their data independently of government. The CPTPP data flow obligations are in Articles 14.11 and 14.13, which are discussed further below.

77. CPTPP, *supra* note 13, at ch. 14.

78. *See, e.g.*, CPTPP Report, *supra* note 2, at 41.

1. Limitations on Data Flow

While Articles 14.11 and 14.13 impose relatively stringent limitations on data flow restrictions, they do not entirely prohibit regulatory requirements that Indigenous data not be transferred offshore or be held only onshore. This is apparent from Articles 14.11 and 14.13, the broader e-commerce chapter, and the CPTPP as a whole.

> Article 14.11:
>
> 1. The Parties recognise that each Party may have its own regulatory requirements concerning the [electronic] transfer of information . . . .
>
> 2. Each Party shall allow the [electronic] cross-border transfer of information . . . including personal information, when this activity is for the conduct of the business of a covered person.[79]
>
> Article 14.13:
>
> 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.[80]

Article 14.11 recognizes that cross-border data flows, combined with users' trust that their personal data is protected, are central to modern international trade, the digital economy, and global businesses. Allowing cross-border data flows facilitates trade in multifaceted ways, contributing to enhanced productivity and a more efficient allocation of resources.[81] Conversely, restricting such flows can distort economic activities and increase the costs associated with less efficient resource allocation.[82] Data flow restrictions can be a tacit barrier to market access

79. *Id.* art. 14.11 (a "covered person" does not include a "financial institution" or a "cross-border financial service supplier of a Party" as defined in art 11.1); *see id.* art. 14.1. *See also* RCEP, *supra* note 15, art. 12.1(b); USMCA, *supra* note 18, art. 19.1.

80. CPTPP, *supra* note 13, art. 14.13.

81. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], MAPPING APPROACHES TO DATA FLOW AND DATA FLOWS: REPORT FOR THE G20 DIGITAL ECONOMY TASK FORCE 8 (2020).

82. Anupam Chander & Uyen P Le, *Data Nationalism*, 64(3) EMORY L.J. 677, 681 (2015).

for goods or services that rely on such flows for their trade.[83] Data flows are also important for consumers, facilitating access to goods and services from foreign markets and providing a platform to share commercial and social information and experiences.[84] Paragraph 14.11.1 also explicitly recognizes the importance of a regulatory framework within which data flows across borders and implicitly recognizes that guaranteeing such flows, as required by paragraph 14.11.2, must be balanced by the need to protect legitimate public policy objectives.

Article 14.13 recognizes that offshore cloud computing affords companies flexibility, agility, and opportunities for market access at lower cost and with fewer impediments. Article 14.13 also reinforces the importance of a regulatory framework and the need to balance offshore cloud computing with protecting legitimate public policy objectives.

Paragraph 14.11.1 affirms that how a party "shall allow the [electronic] cross-border transfer of information" can involve a regulatory framework, by explicitly confirming that "each Party may have its own regulatory requirements concerning the [electronic] transfer of information."[85] When paragraphs 14.11.1 and 14.11.2 are considered together, it is apparent that a regulatory framework for the cross-border electronic transfer of information is not inherently inconsistent with the requirement to "allow" such transfers. Accordingly, the text of Article 14.11 indicates that 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. For example, a party's compliance requirements could be to protect the group privacy rights of a particular group of Indigenous peoples.

Similarly, paragraph 14.13.1 recognizes that how a party implements the prohibition against localization requirements for computing facilities can involve "its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications."[86] When paragraphs 14.13.1 and 14.13.2 are considered together, it is apparent that the existence of a regulatory framework governing the circumstances under which the prohibition in paragraph 14.13.2 is applied is not inherently

83. Anupam Chander, *Is Data Localization a Solution for Schrems II?*, 23 J. OF INT'L ECON. L. 771, 782–83 (2020).

84. Martina F Ferracane, *The Costs of Data Protectionism*, *in* BIG DATA AND GLOB. TRADE L. 63, 63, 70, 75 (Mira Burri ed., 2021).

85. CPTPP, *supra* note 13, art. 14.11.1.

86. *Id.* art. 14.13.1.

inconsistent with paragraph 14.13.2. Because the prohibition is limited to instances where the party imposes "a condition *for conducting business* in that territory,"[87] paragraph 14.13.2 could be interpreted as affording parties space to set conditions or minimum protections for *other* purposes under its regulatory framework regarding the use or location of computing facilities, including concerning security or confidentiality.

Nevertheless, implementing regulatory requirements that Indigenous data not be transferred offshore and kept only in the home territory would be prima facie inconsistent with paragraphs 14.11.2 and 14.13.2, respectively.[88] However, multiple exceptions and exclusions could be available. Their applicability would depend on what objective is intended to be achieved by restricting the transfer of Indigenous data to other CPTPP parties and requiring that it be retained in the home territory. In Sections IV(B)-(D), we discuss the potential objectives available under these exceptions and exclusions.

Equivalent provisions in the USMCA and RCEP phrase the obligation to allow the cross-border transfer of information negatively by restricting parties from prohibiting or restricting such transfers: "No Party shall prohibit or restrict the cross-border transfer of information . . . if this activity is for the conduct of a business of a covered person"[89] or "[a] Party shall not prevent cross-border transfer of information . . . ."[90] While the provision in the USMCA contains no opening paragraph recognizing that each party may have its own regulatory requirements, this is made implicit in the specific exception to this obligation (discussed in Section IV(D)), as well as paragraph 19.2.1, which states that the "parties recognize . . . the importance of *frameworks* that promote consumer confidence in digital trade and of avoiding necessary barriers to its use and development."[91]

2. Personal Information Protection

As stated above, another argument raised to support the contention that the CPTPP is consistent with IDS is that the CPTPP does not recognize and is thus incompatible with the concept of collective privacy

87. *Id.* art. 14.13.2 (emphasis added).

88. *Id.* art. 14.11.2 (assuming that the "activity is for the conduct of the business of a covered person").

89. USMCA, *supra* note 18, art. 19.11.1.

90. RCEP, *supra* note 15, art. 12.15.2.

91. USMCA, *supra* note 18, art. 19.2.1 (emphasis added).

maintained by various Indigenous populations.[92] Article 14.8 of the CPTPP covers the personal information protection and reads:

> 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 . . . .[93]

Article 14.8 requires parties to maintain a domestic legal framework that protects personal information. Still, it does not specify the level of protection a party must afford, nor does the Article identify how it must be afforded.[94]

As is apparent from its text, Article 14.8's underlying policy rationale is to ensure that all parties have a domestic legal framework to protect personal information. The CPTPP's broader purpose is facilitating and expanding trade between the parties.[95] A mutual guarantee that they will take measures to protect personal information serves this purpose by ensuring consumer confidence and trust in e-commerce. Privacy protections facilitate consumers' participation in e-commerce by alleviating concerns that their personal information may be vulnerable and unprotected if they engage in online transactions with entities based in other CPTPP parties.[96] Accordingly, promoting confidence in personal data protection among consumers in the CPTPP parties could expand trade and create a more robust competitive environment within the CPTPP area by encouraging consumers to look beyond their domestic market with respect to online goods and services or obtaining digital and computing-related services such as cloud storage.

Although the policy rationale behind Article 14.8 is clear, its implementation is made more complex by the different meanings that can be ascribed to various concepts. For example, Article 14.8 concerns the related but different concepts of data protection and consumer data privacy.[97] While data protection typically encompasses technical or

92. CPTPP Report, *supra* note 2, at 41.

93. CPTPP, *supra* note 13, art. 14.8.

94. However, see the transparency and cooperation obligations in CPTPP arts. 14.8.4–8.5; RCEP, *supra* note 15, arts. 12.8.3–5; USMCA, *supra* note 18, art. 19.8.6.

95. *See generally* CPTPP, *supra* note 13, pmbl.

96. *See id.* art. 14.8.1.

97. *Id.* art. 14.8.

procedural requirements to secure data against unauthorized access, data privacy typically concerns keeping personal data private, including through data protection mechanisms.

The nature of the "legal framework" that paragraph 14.8.2 requires parties to adopt or maintain is not prescribed. However, its policies, tools, and mechanisms must "provid[e] for the protection of the personal information . . . ."[98] Further, paragraph 14.8.2 provides that in developing this legal framework, "each Party should take into account principles and guidelines of relevant international bodies,"[99] although these are not identified or defined in this provision. Thus, the absence of a legal framework for protecting users' personal information would give rise to a violation of paragraph 14.8.2. However, because a level of protection is not specified, a legal framework that simply provides *some* protection of personal information is likely to comply with paragraph 14.8.2.

As mentioned, paragraph 14.8.2 is not prescriptive, and thus, it leaves significant latitude for parties to choose their preferred means of implementation. Footnote six of Chapter 14 provides an indicative list of the approaches to a "legal framework" that could be adopted to implement paragraph 14.8.2, including: "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."[100]

These two groups of operative provisions—data flow and personal privacy protection obligations—are further discussed in the following Sections, in the context of various exclusions, reservations, and exceptions located in Chapter 14 and the broader CPTPP—the principal sources of flexibility allowing parties to adopt measures for IDS in certain circumstances.

B. *Scope*

Most CPTPP chapters, like most trade treaty chapters, are delimited by a "scope" provision that defines the legal contours of what measures or activities the chapter covers. As a chapter's obligations apply to measures only where the chapter's scope covers those measures, Chapter 14's scope provisions expand available policy space by specifying circumstances in which data flow obligations cannot be enlivened. Chapter 14 applies to

98. *Id.* art. 14.8.2.

99. *Id.*

100. *Id.* ch. 14, n.6.

"measures adopted or maintained by a Party that affect trade by electronic means,"[101] which appears on its face to cover *any* act by a party that impacts trade by electronic means.[102] The scope provision in the "Digital Trade" chapter of the USMCA is identical,[103] while the RCEP's scope provision is similar, applying to measures adopted or maintained that "affect electronic commerce."[104] However, the CPTPP's e-commerce chapter (and equivalent chapters in the USMCA and RCEP) excludes from its application "government procurement" (the government procurement limb) or "information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection" (the government information limb).[105]

1. Government Procurement

The CPTPP and USMCA define "government procurement" 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."[106] A CPTPP party may purchase cloud services from third-party suppliers required to retain Indigenous peoples' data (however defined) exclusively within the party's territorial borders. If such services have been acquired and used by a government for governmental purposes—the public policy purpose of protecting Indigenous data—then they would not be subject to Chapter 14. A CPTPP party would therefore be unrestrained, for instance, in requiring access to the source code of the cloud service suppliers' software, to ensure there are no cybersecurity vulnerabilities in the software before it is purchased.

However, in our view, because government procurement refers to the *process* by which a government obtains the use of or acquires goods

101. *Id.* art. 14.2.2. *See also* RCEP, *supra* note 15, art. 12.3.1; USMCA, *supra* note 18, art. 19.2.2.

102. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 220, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997) [hereinafter Appellate Body Report, EC—Bananas III]. This term would not be limited to instances where there are "actual" trade effects: Panel Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 7.88, WTO Doc. WT/DS453/R (adopted May 9, 2016) [hereinafter Panel Report, Argentina—Financial Services].

103. USMCA, *supra* note 18, art. 19.2.2.

104. RCEP, *supra* note 15, art. 12.2.1.

105. CPTPP, *supra* note 13, art. 14.2.3. *See also* RCEP, *supra* note 15, arts. 12.3.2–3; USMCA, *supra* note 18, art. 19.2.3.

106. CPTPP, *supra* note 13, art. 1.3 (emphasis added); USMCA, *supra* note 18, art. 1.5. "Government procurement" is undefined in RCEP.

or services, an impugned measure would be excluded only from the operation of provisions affecting that process.[107] For example, a requirement to store Indigenous data onshore might violate paragraphs 14.11 and 14.13 (which require the free flow of data and prohibit the localization of computing facilities). Still, in our view, the requirement would not itself involve or otherwise affect the "process" by which goods or services are acquired by a government while also violating these provisions. This is so even if the localization requirement would in some way relate to, or have an effect on, data held—as a result of some procurement process—by commercial entities on behalf of a government.

Aside from this element, the definition of "government procurement" is drafted broadly. The term "commercial" connotes an arm's-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 seller's part.[108] Thus, one could imagine only a limited number of circumstances where a government purchased goods and services for governmental purposes but also with a view to selling or reselling those goods or services for a profit.

2. Government Information

Even if the limited application of the "government procurement" exclusion placed constraints on the possibility of excluding specific measures from the scope of the CPTPP, those measures may be excluded by the "government information" limb in subparagraph 14.2.3(b) of the CPTPP.[109] The term "information" in the CPTPP and RCEP is undefined. According to its ordinary meaning and context and in the absence of a specific definition, it would likely be construed broadly to capture any form of knowledge, including (but not limited to) data, personal information, commercial information, and non-commercial

107. Compare the government procurement exclusion in GATS, which refers to laws, regulations or requirements "governing the procurement by governmental agencies of services purchased for governmental purposes . . .": General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

108. Appellate Body Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-in Tariff Program*, ¶¶ 5.70–71, WTO Docs. WT/DS412/AB/R, WT/DS426/AB/R (adopted May 23, 2013) [hereinafter Canada—Renewable Energy]; *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 478–79, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011) [hereinafter US—Anti-Dumping and Countervailing Duties (China)].

109. *See also* RCEP, *supra* note 15, arts. 12.3.2–3; USMCA, *supra* note 18, art. 19.2.3.

information.[110] The term "government information" is specifically defined in the USMCA as non-proprietary information, including data, held by the central government.[111]

On a narrow interpretation, the term "on behalf of" in subparagraph 14.2.3(b) would mean something akin to "instead of," suggesting that the holding or processing of information covered by subparagraph 14.2.3(b) pertains to instances where a government would ordinarily undertake this, but it is instead being undertaken "on behalf of" the government on a given occasion. However, elsewhere in the text of the CPTPP, more precise terms like "delegation" are used to convey action that a government would itself ordinarily undertake, which militates against attributing a narrow meaning to "on behalf of."[112] On a broader interpretation, any requirement imposed by a government on private entities to hold or process certain information could be captured by the term "information held or processed . . . on behalf of a Party." However, some subsequent Chapter 14 provisions either permit governments to require certain information to be processed in a certain way or require governments themselves to process information provided by traders in a certain way.[113] Including such provisions in Chapter 14 would be inconsistent with an overly broad interpretation that extends the exclusion in subparagraph 14.2.3(b) to any requirement imposed by a government on private entities to hold or process certain information.

In our view, therefore, the correct interpretation would fall somewhere in between these extremes, but it is difficult to pinpoint a precise definition in the abstract. An understanding of the term "on behalf of" would likely hinge on a particular fact pattern and be guided by indicia such as: (i) whether the party would ordinarily have access to the information being processed or held by a private entity; (ii) whether the processing or holding of the information is in pursuit of a public purpose; and (iii) whether the nature of the information is such that it would ordinarily be processed and held by the private entity.

If, for example, a CPTPP party were to create certain cloud computing facilities in partnership with a private company and Indigenous peoples to store and process Indigenous data, such as traditional knowledge or

110. *See, e.g.*, CPTPP, *supra* note 13, art. 14.1 (defining "computing facilities" and "personal information").

111. USMCA, *supra* note 18, art. 19.1.

112. *See, e.g.*, CPTPP, *supra* note 13, art. 9.2(b), n.13, art. 17.3; USMCA, *supra* note 18, art. 1.3. *See also* GATS, *supra* note 107, art. I(3)(a)(ii): "non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."

113. *See, e.g.*, CPTPP, *supra* note 13, art. 14.9; RCEP, *supra* note 15, art. 12.5; USMCA, *supra* note 18, art. 19.9.

health data, the fact that a private entity stores and processes the data would not exclude it from the term "on behalf of." Instead, its storage and the processing of the data would likely qualify as being "on behalf of" the relevant government in the sense of subparagraph 14.2.3(b), due to the government's instigation of the partnership and the public purpose for which the data is being stored and processed.

A broader interpretation is also supported by the WTO Appellate Body's (AB) expansive interpretation of "procurement by government agencies" as encompassing "entities acting for or on behalf of government in the public."[114] Although given in the context of the government procurement exception, the AB's interpretation indicates that government-related exclusions are likely to be construed broadly. As subparagraph 14.2.3(b) altogether excludes from the scope of Chapter 14 such information (and measures related to such information), neither obligation under paragraph 14.11.2 or paragraph 14.13.2 would apply.

C. *Reservations & Non-Conforming Measures*

CPTPP paragraph 14.2.5 provides that the data flow obligations are "subject to the relevant provisions, exceptions and non-conforming measures" of Chapters 9, 10, and 11, and must be "read in conjunction with any other relevant provisions [of the CPTPP]."[115] Paragraph 14.2.5 thereby curtails the scope of these obligations by paring them back to the level of policy space afforded elsewhere in the CPTPP. Paragraph 14.2.6 also provides that these obligations "shall not apply to the non-conforming aspects of measures adopted or maintained in accordance with" the party-specific schedules to Chapters 9, 10, and 11.[116]

Australia, Canada, Chile, Malaysia, and Peru have further secured the ability to protect Indigenous peoples' interests through certain reservations and non-conforming measures inscribed in the CPTPP Schedules. New Zealand did not do so, perhaps because it had secured a higher level of protection for Māori through Article 29.6.1 of the CPTPP, which provides for the Treaty of Waitangi-based exception (discussed below in Section IV(D)(4)). While the United States has not become a party to the CPTPP, its TPP Schedule included similar reservations.

Australia, in its Annex II Schedule, reserves "the right to adopt or maintain any measure according preferences to any Indigenous person or organisation or providing for the favourable treatment of any

114. Canada—Renewable Energy, *supra* note 108, ¶¶ 5.61, 63, 68.

115. CPTPP, *supra* note 13, art. 14.2.5.

116. *See also* RCEP, *supra* note 15, arts. 12.3.4–12.3.5; USMCA, *supra* note 18, art. 19.2.4.

Indigenous person or organisation in relation to acquisition, establishment or operation of any commercial or industrial undertaking in the service sector . . . [and] with respect to investment that accords preferences . . . or favourable treatment" to such persons or organizations.[117] Australia also reserves the right to adopt or maintain any measures concerning the creative arts, Indigenous traditional cultural expressions, and other cultural heritage.[118]

Chile's reservations are much broader, covering "any measure according rights or preferences to Indigenous peoples."[119] Peru's reservation is of similar scope but extends to "socially or economically disadvantaged minorities and ethnic groups, which means 'indigenous, native, and peasant communities.'"[120] The U.S. Schedule (currently ineffective) includes a similar reservation that applies to measures "according rights or preferences to economically disadvantaged minorities, including corporations organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act."[121] Each of these reservations applies to the same treaty obligations to which Australia's reservations apply.[122] However, Malaysia's reservations are limited only to measures that assist Bumiputera to support their participation in the Malaysian market through the creation of new and additional licenses or permits.[123]

Additionally, CPTPP Article 29.8 states that, "[s]ubject to each Party's international obligations, each party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions."[124] Notably, Article 29.8 is somewhat limited in the policy space it provides. First, it is subject to each party's international obligations, presumably including their obligations elsewhere in the CPTPP and other international economic agreements. Second, it is concerned with just one, albeit important, area of Indigenous sovereignty: traditional knowledge and traditional cultural expressions. Third, the

117. CPTPP, *supra* note 13, annex II, sched. of Australia, 2. This reservation applies to national treatment, performance requirements, senior management and boards of directors, market access and local presence. "Indigenous person" means "a person of the Aboriginal and Torres Strait Islander peoples."

118. *Id.* annex II, sched. of Australia, 12.

119. *Id.* annex II, sched. of Chile, 7.

120. *Id.* annex II, sched. of Peru, 4.

121. *Trans-Pacific Partnership Agreement, Annex II, Schedule of United States, Feb. 4, 2016*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents (last visited Mar. 30, 2024) [hereinafter TPP].

122. *See supra* note 70.

123. CPTPP, *supra* note 13, annex II, sched. of Malaysia, 5.

124. *Id.* art. 29.8.

provision is limited to "appropriate measures that respect, preserve and promote."[125] The term "appropriate" has been used in WTO Agreements in the context of levels of protection that each Member deems appropriate.[126] However, the term "appropriate measures" in Mexico's GATS Schedule of Commitments Reference Paper was interpreted to mean "specially suitable" and "proper" in the sense that the measure is suitable for achieving its purpose."[127] While CPTPP Article 29.8 does not include the term "protect," the term "respect"—meaning "refraining from interfering with"[128]—is likely broad enough to include the protection of Indigenous knowledge.

Nevertheless, Article 29.8 as a whole is consonant with the key objectives of the IDS movement in many countries. There is no clear warrant to read the provision to exclude measures intended to "respect, preserve and promote traditional knowledge and cultural expressions in the digital or electronic medium,"[129] or that Article 29.8 cannot operate in harmony with Chapter 14's substantive obligations (although the reference to each party's international obligations may place limitations on such measures in narrowly defined circumstances).

RCEP parties have maintained broadly similar reservations,[130] and RCEP contains an analogous provision to CPTPP Article 28.9, covering measures concerning traditional knowledge and cultural expressions.[131] It is noteworthy that, although the permissive clause is still subject to the parties' "international obligations," the term "appropriate measures" is accompanied by a footnote clarifying that this is for each party to determine and may not necessarily involve its IP system,[132] affording a wide margin of deference and reflecting the broader significance of traditional knowledge.

The reservations in USMCA Annexes are limited to specific service sectors and sub-sectors. For example, Mexico's Annex grants concessions in

125. *Id.*

126. Agreement on the Technical Barriers to Trade pmbl., art. 2.4, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 154 [hereinafter TBT]; The WTO Agreement on the Application of Sanitary and Phytosanitary Measures annex IA, art 5.6 [hereinafter SPS]. *See* Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 373, WTO Doc. WT/DS384/AB/R WT/DS386/AB/R (adopted July 23, 2012) [hereinafter US—COOL].

127. Panel Report, *Mexico—Measures Affecting Telecommunications Services*, ¶ 7.265, WTO Doc. WT/DS204/R (adopted June 1, 2004).

128. *Respect*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/respect (last visited Sep. 8, 2024).

129. *See* CPTPP, *supra* note 13, pmbl.

130. *See, e.g.*, RCEP, *supra* note 15, annex III, sched. of Australia, 30.

131. RCEP, *supra* note 15, art. 11.53.

132. *Id.* art. 11.53.1.

respect of communications (broadcasting) for Indigenous social use to Indigenous people and Indigenous communities of Mexico, "with the object to promote, develop and preserve language, culture, knowledge, tradition, identity and internal rules that, under principles of gender equality, allow the integration of Indigenous women."[133] A similar concession is granted with respect to telecommunications.[134] The United States maintains a reservation similar to that contained in the TPP with respect to "socially or economically disadvantaged minorities."[135] Canada's Annex reserves it the right to adopt or maintain measures conferring rights or preferences to aboriginal purposes," including those "set out in self-government agreements between central or regional level[s] of government and indigenous peoples."[136]

D. *Exceptions*

Unlike scope provisions and reservations, which create exclusions and carve-outs for obligations, exceptions provide a defense in the event of an established prima facie breach. The CPTPP contains both specific exceptions, which attach to data flow obligations, and general exceptions, which apply to the treaty as a whole.

1. Specific Exceptions: Legitimate Public Policy Objectives

Articles 14.11.3 and 14.13.3 (and their equivalents in USMCA and RCEP) contain specific exceptions to the respective obligations in Articles 14.11.2 and 14.13.2. For example, Article 14.11.3 of the CPTPP reads:

> 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.[137]

The terms of paragraph 14.13.3 are identical, except that its last subparagraph instead reads "does not impose restrictions on the use or

133. USMCA, *supra* note 18, annex I, sched. of Mexico, 11.

134. *Id.* at 13.

135. *Id.*; USMCA, *supra* note 18, annex II, sched. of United States, 4.

136. USMCA, *supra* note 18, annex II, sched. of Canada, 1.

137. CPTPP, *supra* note 13, art. 14.11.3.

location of computing facilities greater than are required to achieve the objective" due to the difference in substantive obligations imposed by Article 14.11.3.[138] Each of these exceptions contains a test with three elements, each of which is discussed in turn in the following sections: (i) the objective of the measure must be demonstrably "legitimate"; (ii) the measure must not be applied in a manner constituting a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (iii) the measure must not impose restrictions on information transfers or the use or location of computing facilities that are greater than are required to achieve the legitimate objective.

a. Legitimate Exception

The CPTPP's e-commerce chapter—unlike, for example, the WTO Technical Barriers to Trade Agreement—does not provide examples of "legitimate" objectives.[139] The term "legitimate" in the context of an "objective" has been interpreted in WTO jurisprudence as referring "to an aim or target that is lawful, justifiable, or proper," including by reference to objectives protected elsewhere in the relevant treaty. The CPTPP endorses several objectives of immediate relevance to a measure directed at protecting or benefiting Indigenous information. The CPTPP's preamble, amongst other things, reaffirms "the importance of promoting . . . cultural identity and diversity, environmental protection and conservation . . . *Indigenous rights* . . . and traditional knowledge, as well as the importance of preserving [parties'] right to regulate in the public interest."[140] The original TPP preamble, as incorporated into the CPTPP, also refers to "the importance of cultural identity and diversity among and within the Parties."[141] In the preamble to the USMCA, the parties explicitly resolve to recognize the "importance of increased engagement by indigenous peoples in trade and investment" and the parties' "inherent right to regulate" and to "preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives."[142] The RCEP lays less explicit emphasis on themes of cultural identity and diversity and Indigenous rights but nevertheless reaffirms

138. *Id.* art. 14.13.3

139. TBT, *supra* note 126, art. 2.2.

140. CPTPP, *supra* note 13, pmbl. (emphasis added). *See id.* art. 29.8; USMCA, *supra* note 18, pmbl. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶ 153, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter US—Shrimp].

141. TPP, *supra* note 121, pmbl.

142. USMCA, *supra* note 18, pmbl.

"the right of each Party to regulate in pursuit of legitimate public welfare objectives."[143]

The CPTPP and USMCA also describe certain *illegitimate* objectives, e.g., "bribery and corruption in trade and investment" and "the provision of unfair advantages to state-owned enterprises."[144] The CPTPP's basic rationale and structure reveals that protectionist objectives—measures designed solely to accord an unfair competitive advantage to domestic products and services—would likely be illegitimate for these purposes.

Accordingly, if measures directed at protecting or benefiting Indigenous information can be explained and substantiated in terms of protecting "cultural identity," preserving "traditional knowledge and traditional cultural expressions," and promoting "Indigenous rights," such measures would highly likely qualify as "achiev[ing] a legitimate public policy objective" under Articles 14.11.3 and 14.13.3.

In our view, Articles 14.11.3 and 14.13.3 could protect a CPTPP party's right to regulate issues raised by digital economy developments not able to be foreseen when the CPTPP was negotiated. Where a CPTPP or other treaty provision applies only vis-à-vis the current state of affairs prevailing at the conclusion of the CPTPP, this is typically made explicit in the provision text through the use of the term "existing." The term "existing" is defined in the CPTPP and other trade agreements as "in effect on the date of entry into force of this Agreement"[145] and is used to limit certain provisions in Chapter 14[146] and elsewhere in the CPTPP.[147] The absence of this term or any equivalent qualification concerning Articles 14.11.3 and 14.13.3 indicates that the exceptions are not limited to public policy concerns that were known or foreseen when the CPTPP entered into force. Further context in support of this is provided by the preambular recital describing the TPP as "[e]stablish[ing] an Agreement to address future trade and investment challenges and opportunities, and contribut[ing] to advancing their respective priorities over time."[148] The USMCA preamble contains an identical recital.[149] This suggests that these treaties' provisions should be construed as being capable of adapting to new and

143. RCEP, *supra* note 15, pmbl.

144. TPP, *supra* note 121, pmbl. *See* USMCA, *supra* note 18, pmbl.

145. CPTPP, *supra* note 13, art. 1.3. *See also* RCEP, *supra* note 15, art. 1.2(f); USMCA, *supra* note 18, art. 1.5.

146. *See, e.g.*, CPTPP, *supra* note 13, art. 14.18. USMCA, *supra* note 18, arts. 19.14, 19.15, n.7.

147. *See, e.g.*, CPTPP, *supra* note 13, arts. 1.2, 2.4, 2.5, 2.12.3, 8.7, 9.7.3, 9.12. *See also* USMCA, *supra* note 18, arts. 11.6.3, 11.13.3, 13.9.1, 14.2.3, 14.6.2.

148. TPP, *supra* note 121, pmbl.

149. USMCA, *supra* note 18, pmbl.

changing circumstances over time unless a different intention is apparent from the immediate text.

Moreover, the AB has adopted interpretative approaches that recognize the coverage of certain terms can change over time. For instance, in *US — Shrimp*, the term "natural resources" was found to be "evolutionary" in its content and capable of expanding in scope over time.[150] In *China — Publications and Audiovisual Products*, the AB appeared to endorse a finding in 2009 by the International Court of Justice that the term "commerce" contained in an 1858 treaty referred to both goods and services, even if it only referred to goods at the time the treaty was concluded.[151]

Against that background, there is no reason to suppose that the term "legitimate public policy objective" in Articles 14.11.3 and 14.13.3 is limited to matters known or foreseen during the CPTPP's negotiation. As discussed above, the interpretation of "legitimate" in a given instance would be informed, *inter alia*, by the values espoused and protected elsewhere in the CPTPP, including, for example, "Indigenous rights," "traditional knowledge and traditional cultural expressions," and "cultural identity and diversity."[152] Such terms are sufficiently generic that they could adapt to new issues affecting future values and interests, including those of Indigenous peoples in the digital domain.

b. Chapeau Requirement

According to subparagraphs 14.11.3(a) and 14.13.3(a), the relevant measure cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade."[153] This requirement replicates the *chapeau* found in Article XX of the General Agreement on Tariffs and Trade and Article XIV of the WTO General Agreement on Trade in Services (GATS).[154] The *chapeau* is intended to prevent parties from abusing exceptions by precluding the justification of any measure that engenders discrimination or restrictions

150. US—Shrimp, *supra* note 140, ¶¶ 129–30.

151. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, n. 705, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [hereinafter China—Publications and Audiovisual Products] (citing International Court of Justice, Judgment, Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), July 13, 2009).

152. *See* CPTPP, *supra* note 13, pmbl., art. 29.8.

153. *Id.* arts. 14.11.3, 14.13.3. *See* RCEP, *supra* note 15, arts. 12.14.3, 12.15.3; USMCA, *supra* note 18, art. 19.11.2.

154. Marrakesh Agreement annex 1A, *General Agreement on Tariffs and Trade 1994*, art XX [hereinafter GATT]; GATS, *supra* note 107, art. XIV.

on trade in an "arbitrary," "unjustifiable," or "disguised" manner.[155] Measures typically fail the *chapeau* when they exhibit an element of discrimination or trade restrictiveness that is unconnected from the pursuit of the objective listed in the applicable subparagraph of Article XIV, or where the discrimination or restriction bears no rational connection to the measure's pursuit of the relevant objective.[156] Conversely, if the discrimination or restriction is a logical consequence of the measure's pursuit of the objective, it will unlikely be "arbitrary," "unjustifiable," or a "disguised" restriction.[157] The text of the *chapeau* addresses not so much the effect of the measure in question, but rather its application or enforcement.[158]

The following hypothetical example illustrates how the *chapeau* test operates. Assuming that a measure disallowing overseas transfers of sensitive Indigenous information is found to achieve a "legitimate public policy objective," businesses that can process online transactions without any relevant sensitive Indigenous information leaving the relevant territory would likely benefit from a competitive advantage. This competitive advantage would likely be a natural consequence of the measure's operation, as opposed to an "arbitrary" or "disguised" outcome. However, if the measure additionally prohibited foreign-owned businesses operating within the relevant territory from engaging in transactions involving Indigenous information—even though Indigenous information would never leave the territory because of those transactions—such discrimination between domestic- and foreign-owned businesses in the territory would likely be "arbitrary" or "disguised." This is because such discrimination would be unrelated to the achievement of the relevant "legitimate public policy objective," namely the prevention of overseas transfers of Indigenous information.

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155. The AB has held that whether a measure is "applied" in a particular manner can be discerned from the "design, the architecture, and the revealing structure of a measure." *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.302, WTO Doc. WT/DS400/R WT/DS401/R (adopted June 18, 2014) [hereinafter EC—Measures Seal Products].

156. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 288, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [228] [hereinafter Brazil—Retreaded Tyres]; US—Shrimp, *supra* note 140, at 165.

157. *Id.*

158. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter US—Gasoline]; Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 399, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter US—Gambling]. *See* Panagiotis Delimatsis, *Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US – Gambling and China – Publications and Audiovisual Products*, 14(2) J. OF INT'L ECON. L. 257, 265 (2011).

Applying this understanding to a hypothetical measure to protect "collective privacy," such a measure could frustrate DNA tracing services providers because, for example, an Indigenous user would first be required to obtain the consent of the whole collective that might have an interest in the information. Requiring the consent of the entire collective as a precondition could effectively restrict domestic and foreign DNA tracing services providers' ability to access the domestic market of the relevant party. However, such a requirement would not by itself give rise to an "arbitrary," "unjustifiable," or "disguised" trade barrier because it would be rationally connected to protecting the group's "collective privacy." Yet, suppose the requirement prohibited foreign DNA tracing service providers from operating in the domestic market while allowing domestic providers to operate. In that case, this could well qualify as an "arbitrary," "unjustifiable," or "disguised" trade barrier because the resulting discrimination would be unrelated to difficulties faced in obtaining consent as part of protecting "collective privacy."

c. "restrictions . . . greater than . . . required to achieve the objective"

CPTPP subparagraphs 14.11.3(b) and 14.13.3(b) require that the measure does "not impose restrictions" on "transfers of information" or "the use or location of computing facilities" that are "greater than . . . required to achieve the objective."[159] Conceptually, this assessment is, on its face, similar to the "necessity" test that forms part of GATS Article XIV.[160] Broadly, a measure will be found "necessary" if it is the least trade-restrictive option for achieving the regulator's objective.[161] The corollary is that a complaining party can point to a less trade-restrictive alternative(s) that is reasonably available to the regulator, to demonstrate that the relevant measure is not "necessary" and therefore not justified under the exception.[162]

159. CPTPP, *supra* note 13, arts. 14.11.3(b), 14.13.3(b).

160. See the general exceptions provision in GATS, *supra* note 107, art. XIV.

161. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 322, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter US—Tuna II Mexico]; US—COOL, *supra* note 126, ¶ 3747; Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5)*, ¶ 5.197, WTO Doc. WT/DS384/AB/RW (adopted May 18, 2015) [hereinafter US—COOL Recourse to Article 21.5]; Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 7.1324, WTO Doc. WT/DS457/R (adopted June 28, 2018) [hereinafter Australia—Tobacco Plain Packaging].

162. Australia—Tobacco Plain Packaging, *supra* note 161, ¶ 7.1325.

Importantly, treaty parties generally have a sovereign right to choose their level of protection concerning the objective being pursued,[163] and any less trade-restrictive alternative must be equivalent to that party's chosen level of protection before the impugned measure can fail the "necessity" test.[164] For example, Australia prevailed in *Australia — Plain Packaging* because the complainants could not demonstrate the existence of less-trade restrictive alternatives that contributed to Australia's public health objective *to an equivalent degree* to Australia's measures, which was, in turn, determined by Australia's chosen level of protection.[165]

Notwithstanding similarities to the WTO "necessity" test, it is significant that the CPTPP parties did not replicate the language of "necessity" in subparagraphs 14.11.3(b) and 14.13.3(b), and chose the term "required" instead of "necessary." The term "necessary" is used in GATS Articles XIV (a)-(c) as incorporated into the CPTPP through Article 29.1.3,[166] and is also used elsewhere in the CPTPP where the parties appear to have intended to replicate the corresponding language from the WTO Agreements.[167] According to the principle of effectiveness in treaty interpretation, one would ordinarily ascribe a difference in meaning to terms that seem to have been intentionally differentiated in this way.[168] For instance, WTO adjudicators have ascribed differences in meaning to measures that are described alternatively as "necessary," "essential," or "relating to" an objective.[169] Against that background, the term "required"—the ordinary meaning of which connotes what is desired or sought after by someone or something—seems to indicate a greater

163. *See* CPTPP, *supra* note 13, pmbl. *See also* US—Gasoline, *supra* note 158; Brazil—Retreaded Tyres, *supra* note 156; *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.115, WTO Doc. WT/DS461/R (adopted June 22, 2016) [hereinafter Colombia—Textiles]; *Korea—Various Measures on Beef*, ¶¶ 176, 178, WTO Doc. WT/DS161/AB/R WT/DS169/AB/R (adopted Jan. 10, 2001).

164. China—Publications and Audiovisual Products, *supra* note 151, ¶ 335; US—COOL Recourse to Article 21.5, *supra* note 161, ¶ 5.266.

165. Australia—Tobacco Plain Packaging, *supra* note 161, ¶¶ 7.1368, 7.1731.

166. CPTPP, *supra* note 13, art. 29.1.3 (incorporating GATS art XIV *mutatis mutandis*).

167. *Id.* arts. 8.2, 8.5.1, 9.10.3(d), 10.8.2.

168. *See, e.g.*, US—Gasoline, *supra* note 158, ¶¶ 17–18, 23; *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 325, WTO Doc. WT/DS394/AB/R WT/DS395/AB/R WT/DS398/AB/R (adopted Feb. 22, 2012) [hereinafter China—Raw Materials]; *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 133, WTO Doc. WT/DS103/AB/R WT/DS113/AB/R (adopted Oct. 27, 1998).

169. *See, e.g.*, Appellate Body Reports, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.62, WTO Doc. WT/DS456/AB/R (adopted Oct. 14, 2016); US—Gasoline, *supra* note 158, ¶¶ 17–19; *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, ¶ 5.87, WTO Doc. WT/DS431/AB/R WT/DS432/AB/R WT/DS433/AB/R (adopted Aug. 29, 2014).

emphasis on what has been required by the regulator to achieve a given objective.[170]

In this regard, the term "required" also appears in Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures in a similar context, namely "measures [being] not more trade-restrictive than required . . . ."[171] As elaborated in that provision's footnote, this language is intended to afford a higher degree of deference to regulators: a measure is only more trade-restrictive than "required" if there is evidence of a "significantly" less trade-restrictive alternative.[172] The CPTPP's sanitary and phytosanitary measures chapter takes a similar approach.[173]

Accordingly, the term "required" instead of "necessary" in subparagraphs 14.11.3(b) and 14.13.3(b) indicates an intention to afford a margin of deference to the regulator adopting the relevant measure. That is not to suggest that less trade-restrictive alternatives are irrelevant. On the contrary, the language "greater . . . than" in these provisions points to the comparative nature of the test.[174] A comparative test necessarily requires the impugned measure to be assessed against a comparator, which would be a less trade-restrictive means of achieving the legitimate objective.[175] However, the deliberate use of the term "required," particularly given its use elsewhere in the CPTPP, suggests a greater margin of deference to the relevant regulator than what one might expect if the term "necessary" had been used.

If the objective at issue relates to the protection of privacy, and if the complainant party cannot demonstrate factually that it will protect the privacy of Indigenous information in an equivalent way and to an equivalent degree as the implementing party's chosen level of protection, then it is unlikely that the measure would fail the "required" test (especially given the margin of deference afforded by the use of the term

170. *Required*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/required (last visited Sep. 8, 2024).

171. SPS, *supra* note 126, art. 5.6 (emphasis added).

172. Wagner, *supra* note 1. *See also* Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶¶ 194, 199, WTO Doc. WT/DS18/AB/R (adopted Nov. 6, 1998); Panel Report, *Korea—Import Bans, and Testing and Certification Requirements for Radionuclides*, ¶ 7.153, WTO Doc. WT/DS495/R (adopted Apr. 26, 2019).

173. CPTPP, *supra* note 13, art. 7.9.6. *See* RCEP, *supra* note 15, art. 5.7.2; USMCA, *supra* note 18, art. 9.6.10.

174. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 320, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter US—Tuna II (Mexico)].

175. No comparative assessment would be necessary if the measure is not trade restrictive or is trade restrictive but makes *no* contribution to the achievement of the legitimate objective. US—Tuna II (Mexico), *supra* note 174, at 77 n.647.

"required"). Applying this understanding to a hypothetical measure to protect "collective privacy" that requires the consent of a group before an individual can use a DNA tracing service, a state complainant would need to identify and substantiate a less trade-restrictive way of protecting the group's "collective privacy." Although an exhaustive assessment of such potential alternative measures is beyond the scope of this Article, it is helpful to postulate what form such an alternative might take.

For instance, a legally enforceable undertaking by users and providers of a service not to disclose relevant data could conceivably represent an alternative means of protecting "collective privacy" without obtaining prior consent from the group. Designating certain group representatives to provide prior consent could also streamline the consent process, as could implementing a time-bound "opt-out" system requiring group members to object within a given period. Whether these alternatives would provide a less trade-restrictive and equivalent level of protection to requiring the prior group consent would depend on evidence. If any such alternative exhibited a demonstrably higher risk that data would be released without the group's consent, it would be unlikely to achieve an equivalent level of protection vis-à-vis actively obtaining the group's prior consent.[176]

Notably, RCEP Articles 12.14.3 and 12.15.3 contain a "necessity" test instead of a "required" test.[177] Notwithstanding this, a footnote accompanies each of subparagraphs 12.14.3(a) and 12.15.3(a) affirming that "the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party."[178] Thus, although RCEP utilizes the more stringent necessity test, it is more explicit in conferring on parties a significant margin of deference to determine the necessity of a measure.

Different language is also used in the USMCA. Article 19.11.2(b) permits measures that do "not impose restrictions on transfers of information greater than are necessary to achieve the objective."[179] According to footnote five, the exception will not be satisfied where "[a] measure . . . accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of

176. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 174, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001); Brazil—Retreaded Tyres, *supra* note 156, ¶ 175. *See also* Australia—Tobacco Plain Packaging, *supra* note 161, ¶¶ 7.1459, 7.152628.

177. RCEP, *supra* note 15, arts. 12.14.3,12.15.3.

178. *Id.* at ch. 12, nn.12, 144.

179. USMCA, *supra* note 18, art. 19.11.2(b).

another Party."[180] While this provision appears to import a more stringent necessity test without clarifying the parties' margin of deference, a party would likely be able to rely on this exception to justify an IDS measure with a legitimate objective, provided it does not amount to an "arbitrary," "unjustifiable," or a "disguised" restriction on trade. Significantly, the location of computer facilities obligation of the USMCA is not accompanied by a "legitimate public policy objective" exception,[181] indicating the importance of preventing data localization to the parties. However, other sources of flexibility, discussed in the following subsections, would also be available.

2. General Exceptions and Security Exceptions

In addition to the more specific exceptions and exclusions in Chapter 14 and associated Annexes in the CPTPP (and their equivalents in other agreements), there are more general exceptions incorporated *mutatis mutandis* from WTO Agreements.[182] These provisions apply to Chapter 14 and other exceptions, exclusions, or policy space applicable to Chapter 14, despite the potential for a degree of overlap, because nothing in the CPTPP (or other agreements) suggests that they are mutually exclusive.[183] Subject to satisfaction of the *chapeau*,[184] GATS paragraphs XIV(a)-(c) permit measures that are "necessary to": (a) "protect public morals or to maintain public order"; (b) "protect human, animal or plant life or health"; and (c) "secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . ."[185]

In addition to being subject to the "*chapeau*" and "necessity" tests, an impugned measure would need to be shown to pursue one of the listed objectives. GATS subparagraph XIV(a) permits measures to protect "public morals."[186] According to WTO jurisprudence, the ordinary meaning of the term "public morals" refers to a set of habits of life relating to right and wrong conduct (i.e., societal values) that belong to, affect, or concern a community or a nation.[187] The following are

180. *Id.* at ch. 19, n.5.

181. *Id.* art. 19.12.

182. CPTPP, *supra* note 13, art. 29.1.3. *See* RCEP, *supra* note 15, art. 17.12.2; USMCA, *supra* note 18, art. 32.1.2.

183. *See* China—Raw Materials, *supra* note 168, ¶¶ 333–34.

184. *See* Marrakesh Agreement annex 1A, GATT, art XX; GATS, *supra* note 107, art. XIV.

185. GATS, *supra* note 107, art. XIV (footnotes and subparagraphs XIV(c) (i)–(iii) omitted).

186. *Id.* art. XIV(a).

187. US—Gambling, *supra* note 158, ¶ 6.465; China—Publications and Audiovisual Products, *supra* note 151, ¶ 7.759; *European Communities—Measures Prohibiting the Importation and Marketing of*

examples of policies that WTO adjudicators have found to pertain to "public morals":

> prevention of underage gambling and the protection of pathological gamblers; restricting prohibited content in cultural goods, such as violence or pornographic content, as well as protection of Chinese culture and traditional values; protecting animal welfare; combatting money laundering; or bridging the digital divide within society and promoting social inclusion.[188]

Given the breadth of matters encompassed by the term "public morals," it is conceivable that certain values or features of Indigenous life belonging to, affecting, or concerning a particular Indigenous community or group that warrant protection could be available under subparagraph XIV(a).

Subparagraph XIV(c) permits measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement," including privacy laws.[189] In our view, Article 14.8—a provision of the CPTPP with which measures under subparagraph XIV(c) must not be inconsistent—is not limited to protecting individual privacy but can also extend to measures that protect collective privacy or Indigenous concepts of privacy (assuming that a party chooses to include these concepts in their domestic privacy and data protection laws).

It could be said that, where indigenous data is being held offshore in another CPTPP country, then there is no guarantee of what privacy rules might apply in that other country, regardless of the privacy regime in place in the Indigenous persons' country of residence. However, for example, Australia's and New Zealand's data protection laws take accountability-based approaches.[190] This means that irrespective of where a resident's data is stored and processed, or who is supplying the service, every service supplier remains accountable for their data protection practices, including ensuring that they comply with the relevant party's domestic laws. CPTPP Articles 14.11 and 14.13 do not exempt

Seal Products, ¶ 7.380, WTO Doc. WT/DS400/R WT/DS401/R (adopted June 18, 2014) [hereinafter EC—Measures Seal Products]; Colombia—Textiles, *supra* note 163, ¶ 7.299; *Brazil—Certain Measures Concerning Taxation and Charges*, ¶ 7.520, WTO Doc. WT/DS472/R WT/DS497/R (adopted Jan. 11, 2019).

188. Panel Report, *United States—Tariff Measures on Certain Goods from China*, ¶ 7.118, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020).

189. GATS, *supra* note 107, art. XIV(c).

190. *See* Privacy Act 2020, ss 22–24 (N.Z.); Privacy Act 1988, ss 14–15, sch 1, sub-cl. 8.1 (N.Z.).

any supplier from the requirement to abide by domestic data protection laws.

Whether any resulting discrimination is "arbitrary" or "unjustifiable" would be informed by the CPTPP's recognition of values relating to Indigenous rights, cultural identity, protecting traditional knowledge, and a party's right to take measures that advance Indigenous interests in certain circumstances. In this regard, the underlying function and certain features of Article 14.8 are relevant: paragraph 14.8.1 refers to "enhancing consumer confidence in electronic commerce";[191] the provisions of Article 14.8 apply to "personal information,"[192] which, as defined in Article 14.1, means "any information, including data, about an identified or identifiable natural person";[193] and the term "identifiable" in the definition of "personal information"[194] broadens the scope and makes the notion future-proof as identification technologies evolve.

More specifically, Article 14.1 applies to the "personal information *of the users of electronic commerce*."[195] This is extremely broad in that most digital activities, even if they are free and for personal purposes, involve consuming e-commerce. Subparagraph 14.8.4(a) encourages the publication of information on how "individuals can pursue remedies,"[196] as juxtaposed by subparagraph 14.8.4(b), which pertains to how a "business can comply with any legal requirements."[197] Based on this context, Article 14.8 appears to be intended to promote confidence in online retail transactions between individual consumers (i.e., end-users) and businesses, including in the use of free online services. It is not immediately apparent how this underlying function could accommodate the concept of collective privacy. Collective privacy can be related to consumer confidence in e-commerce, but these are best addressed by national laws rather than international trade agreements. So, for example, the Australian or New Zealand governments could introduce their own data protection laws if they consider it necessary to accommodate Australian Aboriginal and Torres Strait Islander or Māori collective privacy rights. Due to the functioning of the general exceptions and other

191. CPTPP, *supra* note 13, art. 14.8.1.

192. *Id.* art. 14.8. *See also* USMCA, *supra* note 18, art. 19.8.2; RCEP, *supra* note 15, art. 12.8.

193. CPTPP, *supra* note 13, art. 14.1. *See also* USMCA, *supra* note 18, art. 19.1.

194. CPTPP, *supra* note 13, art. 14.1. *See also* USMCA, *supra* note 18, art. 19.1.

195. CPTPP, *supra* note 13, art. 14.1 (emphasis added). *See also* USMCA, *supra* note 18, art. 19.8.2; RCEP, *supra* note 15, art. 12.8.1.

196. CPTPP, *supra* note 13, art. 14.8.4(a). *See also* RCEP, *supra* note 15, art. 12.7.4(a).

197. CPTPP, *supra* note 13, art. 14.8.4(b). *See also* RCEP, *supra* note 15, art. 12.7.4(b).

CPTPP provisions, we believe nothing in the CPTPP would prevent Australia or New Zealand from doing so.

Subparagraph XIV(c)(ii) of GATS does refer specifically to the "privacy of *individuals* . . . ."[198] However, subparagraph XIV(c)(ii) is only one illustrative example of the *kinds* of measures that can be justified under subparagraph XIV(c). Subparagraph Article XIV(c) generally applies to measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement,"[199] and nothing suggests that the protection of privacy-related measures afforded by this exception is limited only to an individualized concept of privacy. Moreover, subparagraph XIV(c) is incorporated into the CPTPP *mutatis mutandis*.[200] Nothing in the CPTPP suggests that measures to protect Indigenous values or notions of privacy would be "otherwise inconsistent" with its provisions. On the contrary, the CPTPP's context reveals the opposite.[201] Thus, a measure necessary to ensure compliance with privacy laws tailored to Indigenous needs and values—including values of collective privacy—could be justified under subparagraph XIV(c).

In any case, subparagraph XIV(a) would offer an alternative avenue insofar as it covers measures necessary to protect "public morals." Given the breadth of matters that that term can encompass,[202] if there were particular values or features of Indigenous life in various CPTPP territories that warranted a certain type of privacy regulation that is not available under subparagraph XIV(c), it would nonetheless very likely be available under subparagraph XIV(a).

3. Article 29.7: Disclosure of Confidential Information

Article 29.7 of the CPTPP relevantly provides that "[n]othing in this Agreement shall be construed to require a Party to furnish or allow

198. GATS, *supra* note 107, art. XIV(c)(ii) (emphasis added).

199. *Id.* art. XIV(c).

200. *See generally* AARON X FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 224 (2009). *See also* USMCA, *supra* note 18, art. 32.1.2; RCEP, *supra* note 15, art. 17.12.2 (incorporating all of GATS art. XIV).

201. CPTPP, *supra* note 13, pmbl.

202. GATS, *supra* note 107, art. XIV; US—Gambling, *supra* note 158, ¶ 6.465; China—Publications and Audiovisual Products, *supra* note 151, ¶ 7.759; *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.380, WTO Doc. WT/DS400/R WT/DS401/R (adopted June 18 2014) [hereinafter EC—Measures Seal Products]; Colombia—Textiles, *supra* note 163, ¶ 7.299; *Brazil—Certain Measures Concerning Taxation and Charges*, ¶ 7.520, WTO Doc. WT/DS472/R WT/DS497/R (adopted Jan. 11, 2019); Panel Report, *United States—Tariff Measures on Certain Goods from China*, ¶ 7.118, WTO Doc. WT/DS543/R (adopted Sep. 15, 2020).

access to information, the disclosure of which would be contrary to its law . . . or otherwise be contrary to the public interest . . . ."[203] Under this exception, a party can disallow access to information—including access effected through a cross-border transfer or access required to operate computer facilities storing such information overseas—if allowing such access would be contrary to its law or the public interest.

On its face, this exception is subject to neither the "necessity" test nor the "*chapeau*" described above. Instead, if a party maintained or adopted a domestic law under which certain information could not be transferred or held overseas, this could be conceivably justified under Article 29.7. Likewise, in light of the analysis of "legitimate public policy objectives" above,[204] if measures directed at protecting or benefiting Indigenous information could be explained in terms of pursuing "the public interest," then prohibiting the overseas transfer of such information could be permitted under Article 29.7.[205]

Notably, Article 29.7 does not appear to be limited to information in the possession of a party. Instead, it applies to instances where a party "furnishes" information as well as where a party "*allow*[*s*] *access* to information" in terms that mirror paragraph 14.11.2.[206] Moreover, the reference to "disclosure" is not limited to instances where the party itself discloses the information, as distinct from the drafting of analogous provisions in other agreements.[207] Accordingly, the covered "information" can extend to any information over which a party can regulate "access" and "disclosure" in its jurisdiction without regard to the identity of the entity currently possessing—and thus in a position to "disclose"—that information.

Though broad on its face, this exception is not without limits. It cannot be interpreted to afford CPTPP parties *carte blanche* to deviate from "information"-related disciplines by adopting a domestic law opting out of such disciplines.[208] Such an interpretation would lead to an absurd result—contrary to Article 32 of the Vienna Convention on the

203. CPTPP, *supra* note 13, art. 29.7.

204. *See supra* Section IV.D(1)(C).

205. For an analogous assessment of "public purpose", *See* Vestey Group Ltd v. Bol. Rep. of Venez., ICSID Case No. ARB/06/4, ¶¶ 294–300 (Apr. 19, 2019); Rusoro Mining Ltd. v. Bol. Rep. of Venez., ICSID Case No. ARB(AF)/12/5, ¶ 385 (Aug. 22, 2016), 28 WORLD TRADE AND ARB. MATERIALS 1321 (2016).

206. CPTPP, *supra* note 13, art. 29.7 (emphasis added).

207. Closer Economic Relations Trade Agreement (ANZCERTA), *supra* note 20, at 4; GATS, *supra* note 107, art. III bis; GATT, *supra* note 154, arts. X.1, XVII:4(d).

208. *See* Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. 2005-04/AA227, ¶ 315–19 (July 18, 2014), IIC 652 (2014); Philip Morris Brands Sàrl v. Uru., ICSID Case No. ARB/10/7, ¶ 171 (July 8, 2016), 56 ILM 4 (2017).

Law of Treaties—in which the balance of rights and obligations in the CPTPP concerning "information" is subverted.[209] It is a fundamental principle of international law that parties are required to perform their obligations in good faith.[210] The adoption of a domestic law by a CPTPP party solely to circumvent its obligations would not be consonant with performing those obligations in good faith, especially if the law's effect is to afford domestic enterprises a competitive advantage.

Some adjudicators have interpreted analogous language (i.e., "in accordance with domestic law") to refer to the preclusion of sanctioning illegal acts and violations of respect for the law, and thus as a manifestation of a principle of international public policy that protects respect for a state's laws.[211] Ultimately, the lack of clarity and capacious drafting of Article 29.7—particularly the "contrary to its law" aspect—makes for an uncertain basis on which to justify deviations from "information"-related obligations. It could potentially be understood as an implicit iteration focusing specifically on "information" of the preambular recital that recognizes the "inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities."[212]

4. Treaty of Waitangi Exception

Perhaps the clearest expression of New Zealand's right to regulate to advance and protect Māori interests is the Treaty of Waitangi exception in paragraph 29.6.1 of the CPTPP (also appearing in identical form in the RCEP and DEPA). Following a *chapeau*, the exception reads:

> 1. [n]othing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under 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

209. VCLT, *supra* note 74, art. 32.

210. As enshrined in VCLT, *supra* note 74, art. 26. *See generally* GOOD FAITH AND INTERNATIONAL ECONOMIC LAW, (Andrew Mitchell et al. eds., 1st ed. 2015).

211. *See* Inceysa Vallisoletana S.L. v. Rep. of El Sal., ICSID Case No. ARB/03/26 245–50 (Aug. 2, 2006), 23 ICSID Rev. (2008).

212. TPP, *supra* note 121, pmbl.

> provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article . . . .[213]

This is an express recognition that New Zealand can enact measures without these measures violating treaty provisions if New Zealand deems it necessary to do so in order to give more favorable treatment to Māori.

Doubt has been raised about where the self-judging term "it deems" attaches: is it as to New Zealand's view about whether the *measure* is necessary to accord more favorable treatment to Māori? Or is it as to New Zealand's view about whether it is necessary—in any given case—to accord more favorable treatment to Māori?[214] The compound expression "measures it deems necessary to" makes it clear that New Zealand's view about necessity is as to the *measure*, and not whether it is necessary to accord more favorable treatment to Māori. The treaty text reveals an implicit recognition that certain objectives relating to the welfare, interests, or values of Indigenous peoples might be fulfilled by according Māori more favorable treatment, without the need to particularize further what this "more favourable treatment" might entail. On this view, it would be sufficient to address any potential prejudice to the other CPTPP parties through the *chapeau* test alone.

The exception is contentious, perhaps because it combines two elements that ordinarily feature and operate independently in many trade agreements. On the one hand, it features a concept of "more favourable treatment"—state conduct that anti-discrimination provisions typically prohibit.[215] On the other hand, the provision features the term "necessary"—a qualifying term that conditions the legality of certain defined actions. Thus, while many trade agreements prohibit "more favourable treatment," they also leave scope for such treatment or other prohibited measures to be justified because they are "necessary" to achieve a legitimate objective.[216] Paragraph 29.6.1 shows treaty negotiators' clear intention to frame the "more favourable treatment" of Māori (and thus beneficial discrimination toward Indigenous peoples) not as

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213. CPTPP, *supra* note 13, art. 29.6.1. *See also* RCEP, *supra* note 15, art. 17.16; DEPA, *supra* note 16, art. 15.3.

214. Amokura Kāwharu, *The Treaty of Waitangi Exception in New Zealand's Free Trade Agreements, in* INDIGENOUS PEOPLES AND INTERNATIONAL TRADE 274, 285 (John Borrows and Risa Schwartz eds., 1st ed. 2020). *See also* Kāwharu, *supra* note 4, at 18–19.

215. Andrew D Mitchell, Elizabeth Sheargold & Caroline Henckels, *Non-discrimination, in* PRINCIPLES OF INTERNATIONAL TRADE AND INVESTMENT LAW 125, 136 (Andrew D. Mitchell & Elizabeth Sheargold eds., 2021).

216. *See, e.g.*, GATS, *supra* note 107, art. XIV.

prohibited conduct, but as a legitimate end in itself, and the relevant measure must be necessary to fulfill this particular end.

While this wording is unorthodox compared to traditional anti-discrimination provisions, departure from ordinary treaty practice does not render the provision unworkable. Instead, the ordinary meaning of the terms used can be ascertained to derive a common-sense meaning: that New Zealand may take certain action that would otherwise violate CPTPP disciplines if New Zealand deems it necessary to do so to provide whatever more favorable treatment to Māori it deems appropriate. Indeed, the language is similar to that found in many security exception provisions, including the CPTPP's security exception.[217]

But where does this leave the question of more favorable treatment to Māori? Some commentators have highlighted a lack of helpful guidance regarding the policy objectives to be pursued.[218] However, the language implies that there are valid reasons for providing Māori with more favorable treatment, and that nothing limits the reasons for doing so, provided that the treatment is in respect of matters covered by the Agreement. The term "includes" indicates that some reasons may, but need not, relate to fulfilling New Zealand's obligations under the Treaty of Waitangi. Paragraph 29.6.2 precludes dispute settlement about the interpretation of that Treaty and rights and obligations arising under it,[219] indicating that whether more favorable treatment should be accorded to Māori to fulfill New Zealand's Treaty of Waitangi obligations is a matter entirely up to New Zealand (and the Waitangi Tribunal itself).[220]

The Waitangi Tribunal, discussed below, has found that the Waitangi exception "would be likely to operate . . . substantially as intended" and "could be said to offer a reasonable degree of protection to Māori interests."[221] While the Tribunal maintained certain reservations that the phrase "more favourable treatment" does not "encompass the entire Treaty relationship," because not all Crown actions or policies necessary to protect Māori Treaty interests consist of measures that accord such treatment,[222] the Tribunal's overall conclusions in relation to

217. CPTPP, *supra* note 13, art. 29.2 (reading "[n]othing in this Agreement shall be construed to . . . preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.").

218. Kāwharu, *supra* note 4, at 18–19.

219. CPTPP, *supra* note 13, art. 29.6.2.

220. Treaty of Waitangi Act 1975, ss. 5–6 (N.Z.).

221. TPP Report, *supra* note 63, at 38.

222. Treaty of Waitangi Act 1975, s.5 (N.Z.).

paragraph 29.6.2 demonstrate the provision has reserved sufficient policy space for New Zealand.

The CPTPP e-commerce chapter's operative provisions leave considerable policy space for measures conducive to IDS, while the exceptions both within and outside the digital trade chapter further reinforce the legitimacy of such measures. Despite minor differences between the CPTPP and subsequent trade agreements entered into by states with significant domestic IDS movements, these differences should not affect implementing parties' regulatory autonomy to introduce or maintain digital trade measures for Indigenous peoples.

V. Indigenous Data Sovereignty in New Zealand: The Waitangi Tribunal

In 2021, the Waitangi Tribunal found that New Zealand had not fulfilled its obligations to Māori under the Treaty of Waitangi, by committing New Zealand to the obligations in the CPTPP e-commerce chapter. As explained below, implicit in such a finding was that New Zealand had foregone the policy space it otherwise would have maintained to implement measures conducive to IDS. However, as we seek to argue in this part, the findings of the Tribunal, a non-international trade law adjudicator, are not reflective of the policy space enjoyed by New Zealand under the CPTPP (and other countries that are parties to subsequent digital trade agreements that follow the CPTPP model).

A. *The Treaty, Tribunal, and Recent Claims*

The Treaty of Waitangi was signed in 1840 between English residents and more than 240 Māori *rangatira* (Māori chiefs)[223] and, although recognized as a treaty of cession at international law,[224] has been found by the Tribunal not to have effected a cession of sovereignty by Māori *rangatira*.[225] Its significance lies in the formal recognition by the Crown of Māori rights and possessions,[226] and the Crown's obligations of active protection toward *taonga*.[227] A central Treaty principle is partnership, which flows from the Treaty's recognition of the Crown's right

223. Claudia Orange, The Treaty of Waitangi 1 (Bridget Williams Books, 1st ed. 1987).

224. Benedict Kingsbury, *The Treaty of Waitangi: Some International Aspects*, *in* Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi, 121, 125–26 (Hugh Kāwharu ed. 1989).

225. *He Whakaputanga me te Tiriti*, *supra* note 6, at 526–27.

226. J.D. Sutton, *The Treaty of Waitangi Today,* 11 Victoria Univ. of Wellington L. Rev. 17, 18 (1981).

227. Waitangi Tribunal, *supra* note 68, at 189.

to govern in exchange for guaranteeing Māori autonomy or self-government.[228]

The Tribunal is a standing commission of inquiry established under the Treaty of Waitangi Act 1975 to adjudicate claims that the Crown's actions were or are inconsistent with its Treaty obligations, with the result that some prejudice or harm has been or is likely to be suffered by Māori.[229] One such claim, brought in 2016, was that the TPP's signing by New Zealand constrained the government's ability to fulfill its obligations to Māori.[230] These claims—not specifically related to New Zealand's e-commerce commitments—were addressed in two stages, including concerning the Treaty of Waitangi exception (discussed in Section IV(D)(4)).[231] The third and final stage addressed claims that the CPTPP placed undue constraints on New Zealand's regulatory autonomy to implement measures for the protection of Māori data, which the claimants argued constitutes a *taonga*.[232] The Tribunal focused on the following "overarching" question: "What (if any) aspects of the E-commerce chapter . . . are inconsistent with the Crown's obligations under Te Tiriti/the Treaty?"[233]

B. *The Tribunal's Approach*

The claimants alleged that Chapter 14 "contains binding e-commerce obligations that damage the ability of Māori to exercise *mana motuhake* over the digital domain" and that such 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."[234] In contrast, the Crown claimed that "the CPTPP preserves these policy options entirely."[235] The claimants' fundamental complaint was that the "CPTPP forecloses regulatory options, which . . . may be necessary for the Crown to develop a Tiriti/Treaty-compliant regime for governing data and digital technologies."[236]

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228. TPP Report, *supra* note 63, at 6.

229. Treaty of Waitangi Act 1975, ss. 4–6 (N.Z.).

230. TPP Report, *supra* note 63.

231. CPTPP Report, *supra* note 2, at 1–3.

232. *Id.* at 52 (defining "taonga" as loosely meaning treasured possessions). "Taonga" means, loosely, "treasured possessions." See *supra* note 43.

233. CPTPP Report, *supra* note 2, at 4.

234. *Id.* at 3 (defining "mana motuhake" as loosely meaning self-determination, sovereignty or authority).

235. *Id.*

236. *Id.* at 40, 122.

While the Tribunal did not directly address whether Māori data constitutes a *taonga* for Treaty purposes, it concluded from the claimants' evidence that "protecting mātauranga Māori encompasses digital governance issues,"[237] thus reinforcing the importance of the Crown's capacity to introduce appropriate IDS measures. As to the broader question of a breach of Treaty obligations, the Tribunal found that "in committing . . . New Zealand to the CPTPP e-commerce provisions," the Crown had failed "to meet the standards required by . . . the Treaty principles of partnership and active protection."[238]

In the third stage of inquiry, the Tribunal's task was to identify any risk that the CPTPP's e-commerce might pose to Māori interests and apply the relevant Treaty standard by determining whether any such risk is reasonable in the circumstances.[239] In this regard, the Tribunal distinguished between the claimants' and the Crown's respective notions of "risk": the risk arising from a lack of policy space in the CPTPP, including any potential "chilling effect" and the alleged psychological effect of provisions on policymakers; and the risk of another state successfully challenging, under CPTPP dispute resolution procedures, a measure adopted by New Zealand to recognize or protect Māori Treaty interests.[240]

To provide further context for our remarks in the next section, we comment here on the phenomenon known as "regulatory chill."[241] Jane Kelsey describes regulatory chill as "the reluctance of policy makers to adopt legislation or other regulation after factors external to the merits of the proposal are injected into the decision-making process with the intention of influencing the regulatory outcome."[242] Kelsey distinguishes between "direct chill," which is characterized by specific threats of litigation or legal challenge (e.g., under international economic agreements), and "systemic chill," which "occurs when similar considerations are internalised through the policy criteria, procedures and bureaucratic hierarchy of the government's own processes."[243]

Two aspects of the "regulatory chill" concept should be noted. First, the actual existence of a chilling effect on regulators is extraordinarily difficult to prove. As Kelsey acknowledges, "it is notoriously difficult to

237. *Id.* at 66; *See also id.* at 180 (defining "mātauranga" as loosely meaning "Māori knowledge").

238. *Id.* at 193.

239. *Id.* at 128.

240. *Id.* at 127.

241. *Id.* at 120.

242. Jane Kelsey, *Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law*, 17 QUT L. REV. 21, 23 (2017).

243. *Id.*

prove why something [i.e., regulatory action] has not happened."[244] This necessarily leads to hypotheses about "likely factors" and the need to "suspect" rather than substantiate the influence of extraneous factors on regulatory decision-making.[245] While legal threats and challenges in the international economic law context undoubtedly occur,[246] inferences about the negative impact of such threats on legislative progress, usually by reference to protracted legislative processes, are inherently conjectural.

Second, arguments that invoke regulatory chill can falsely equate perceptions of legal and political risk with actual foreclosure of policy space in legal agreements. This occurs when they replace an assessment of the likely permissibility of a measure under an agreement with speculation about how the uncertainty of legal challenge might affect normative political behaviors. In this regard, Amokura Kawharu distinguishes between regulatory chill and "regulatory restraint," which is imposed by the rules of an agreement.[247] Regulatory restraint may be described as an actual tightening of policy space through legal obligations and the absence of flexibility in exceptions and exclusions. In comparison, regulatory chill refers to the effect that purported deficiencies in policy space are said to have on policymakers.

In contrast to the parties, the Tribunal identified its risk assessment as encompassing the Crown's potential inability to protect Māori interests and Māori's potential inability to exercise *tino rangatiratanga* in respect of their *taonga*.[248] The Tribunal explicitly excluded from this assessment "the risk that the Crown will be successfully challenged at a dispute resolution tribunal."[249] Instead, it focused on "whether aspects of the e-commerce chapter . . . pose a material risk to Māori Tiriti/Treaty interests."[250]

Nevertheless, it is apparent that the risk of dispute settlement was a *de minimis* consideration for the Tribunal, and the Tribunal was conscious not to *limit* its risk assessment to this possibility. A significant source of risk for the Tribunal was the "uncertainty surrounding the language

244. *Id.* at 22.

245. *Id.*

246. *See* Simon Chapman, *Legal Action by Big Tobacco Against the Australian Government's Plain Packaging Law,* 21 TOBACCO CONTROL 80, 80 (2012).

247. *See* CPTPP Report, *supra* note 2, at 120.

248. Loosely, "absolute sovereignty [*tino tangatiratanga*] over treasured possessions of cultural significance [*taonga*]." JONES, *supra* note 41.

249. *Id.*

250. *Id.* 140.

and application of the provisions."[251] For example, the Tribunal stated:

> The nature of the legitimate public policy exception is that it is open to challenge. This is a kind of risk . . . [which] 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.[252]

Later, the Tribunal stated: "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."[253] These conclusions show that the possibility of challenge created by any uncertainty in treaty language was sufficient to demonstrate the existence of some level of risk.

C. *Implications and Critiques of the Tribunal's Findings*

The Tribunal's risk assessment exercise and ultimate conclusion that New Zealand's CPTPP obligations had surpassed an acceptable level of risk raises several interesting implications in the context of international economic law and warrants some clarifications. Our aim in making these clarifications is to remove any doubts that might flow from the Tribunal's findings about the CPTPP not being diminutive of governments' policy space to implement IDS measures.

First, it should be clarified that the Tribunal was not offering an authoritative interpretation of CPTPP provisions,[254] and its conclusions about risk to Māori should not be taken as confirmation or indication of any limited policy space in the CPTPP to introduce IDS measures, especially in light of our further observations below.

Second, the Tribunal's Report highlights that a finding of *non-legal* risk in international law frameworks can form the basis of a domestic tribunal's finding of a breach of legal obligations. While this notion is not novel in the Treaty context,[255] it raises questions about the potential

251. *Id.* 140.

252. *Id.* at 142.

253. *Id.* at 148.

254. *Id.* at 7. *See also* WAITANGI TRIBUNAL, THE REPORT ON THE CROWN'S REVIEW OF PLANT VARIETY RIGHTS REGIME 39 (Legislation Direct 2020).

255. *See* WAITANGI TRIBUNAL, *supra* note 254, at 39.

impact of domestic legal obligations on New Zealand's and other nations' international treaty-making practices, and vice-versa.[256]

Where a state is found to have breached PTA obligations, it must bring the non-compliant measure(s) into conformity with the agreement.[257] Otherwise, a state generally has the sovereignty to adopt or maintain whatever measure it wishes. Thus, treaty dispute resolution proceedings are the only way in which a party such as New Zealand might be formally precluded from adopting or maintaining an IDS measure, and any direct legal risk to Māori and other Indigenous groups arising from the CPTPP's entry into force would arise solely from this source.

The Tribunal appeared to accept the limited scope for challenge against New Zealand's measures as a CPTPP party, concluding 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,"[258] and that "the cumulative nature of [the CPTPP] exceptions . . . gives some support to the argument that the Crown can regulate to protect Māori interests."[259] However, it concluded that such a possibility is insufficient to mitigate existing risk, which, when taken cumulatively, is "significant."[260]

As we have sought to show, given the significant policy space left for CPTPP parties (particularly New Zealand) to implement measures for the benefit of Indigenous groups in the digital domain, the likelihood of a successful claim against IDS measures—especially by another state with comparable interests—is particularly low. Nevertheless, the very possibility of such a challenge, and its potential impact on legislators' willingness to adopt IDS measures, were significant factors in the Tribunal's assessment, indicating that the mere commitment to international obligations may be sufficient where a failure to protect Indigenous interests is found. In this regard, the Tribunal placed significant emphasis on the possibility of a chilling effect on regulators.[261] However, it could not establish the existence or otherwise measure the

256. *International Treaties*, AGREEMENTS TREATIES AND NEGOTIATED SETTLEMENTS, https://www.atns.net.au/international-treaties (last visited Oct. 16, 2022) (discussing how the Treaty of Waitangi is unique in its scope and constitutional significance compared to other countries' Indigenous treaties); Pat Anderson & Paul Komesaroff, *Why a First Nations Voice should come before Treaty,* THE CONVERSATION (Oct. 20, 2022), https://theconversation.com/why-a-first-nations-voice-should-come-before-treaty-192388 (discussing a growing traction for similar frameworks).

257. *See, e.g.*, CPTPP, *supra* note 13, art. 28.19.2; Marrakesh Agreement annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, arts 19.1, 22.1.

258. CPTPP Report, *supra* note 2, at 177.

259. *Id.* at 148.

260. *Id.* at 177.

261. *See, e.g.*, CPTPP Report, *supra* note 2, at 175–78.

extent of any "regulatory chill" caused by the e-commerce provisions, instead seeing it as "potentially contributing" to the risk posed to Māori.[262]

Third, the Tribunal's Report unveils an apparent incompatibility between the binary rule—exception structure of international economic agreements,[263] and the standard that the Tribunal is required to be upheld under the Treaty. The claimants viewed the mere requirement that a "Māori Data Governance regime" be made to fit within the exceptions in the CPTPP as being, by itself, inconsistent with the Treaty of Waitangi.[264] The Tribunal sympathized with this claim, stating: "We ask why reliance on exceptions, where reliance constitutes a base level of risk, are still the starting point for protecting Māori interests?"[265] The Tribunal concluded that "predominant reliance on exceptions falls short of the active protection standard."[266]

While exclusions, carve-outs, and reservations offer more direct and targeted sources of flexibility to pursue specific non-trade and investment objectives, more general exceptions offer a heterogeneous source of regulatory autonomy across a broad range of public policy areas. Rather than being subordinate or second-order sources of regulatory flexibility, exceptions in economic agreements reflect the fact that non-trade issues are often not these treaty's main objects but may nevertheless take higher priority over the achievement of trade and investment goals.[267] However, the Tribunal's Report indicates that this commonplace exceptions-based model is inherently inconsistent with the standards of protection owed to Māori under the Treaty. On one view, the Tribunal's symbolic criticism of exceptions may be addressed, and its concerns about regulatory chill overcome, by more accurately characterizing the specific exceptions in paragraphs 14.11.3 and 14.13.3 as permissions that limit substantive treaty obligations, rather than defenses to an established prima facie breach.[268] Support for characterizing these exceptions in this way may be derived from their proximity in the treaty text to the operative data flow obligations.[269]

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262. CPTPP Report, *supra* note 2, at 176.

263. Caroline Henckels, *Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law*, 69 INT'L AND COMPAR. L. Q. 557, 557–58 (2020).

264. CPTPP Report, *supra* note 2, at 127.

265. *Id.* at 177.

266. *Id.*

267. *Cf.* Henckels, *supra* note 263, at 562.

268. *Id.* at 561–62.

269. Henckels does not analyse specific exceptions in proximate clauses because they involve what Schauer terms an "internal defeat" of the rule before the rule is applied. Henckels, *supra*

Fourth, a significant factor for the Tribunal was that "the legitimate public policy exception is . . . open to challenge," in itself constituting a kind of risk.[270] However, at the Tribunal's threshold, almost all treaty provisions with the potential to affect Māori in some way that are yet to be adjudicated would create an unacceptable level of risk. Therefore, in addition to a perceived risk of "regulatory chill," the uncertainty inherent in the e-commerce chapter's unadjudicated provisions was enough to substantiate prejudice toward Māori interests. This raises the question of whether Treaty principles and the Tribunal's Report will foreclose New Zealand's entry into future, innovative, and novel economic agreements.

Relevantly, however, the significance of the risk identified by the Tribunal was "underscored when considering that subsequent agreements both clarified and sometimes expanded on . . . CPTPP Parties' . . . e-commerce obligations following the uncertainty that the CPTPP made evident."[271] The Tribunal gave the example of the Digital Economy Partnership Agreement's (DEPA's) equivalents to CPTPP Articles 14.11 and 14.13, each beginning with: "The parties affirm their level of commitment relating to location of [computing facilities/cross-border transfer of information by electronic means]."[272] This indicated to the Tribunal that, "following the CPTPP, negotiating parties recognized some uncertainty surrounding the term 'legitimate public policy objective' and softened the wording," supporting the claimants' arguments that a degree of uncertainty exists in the legitimate public policy exception's likely interpretation, thus increasing the potential risk to Māori interests.[273]

The Tribunal's approach to assessing the risk to Māori arising from the CPTPP by contrasting it with subsequent agreements is intriguing. Adding clarification to subsequent agreements is a healthy process of legislative refinement. However, in our view, it does not necessarily indicate intractable or prejudicial ambiguity in earlier, less elaborately drafted provisions. Later, the Tribunal noted that these subsequent agreements' e-commerce provisions "signal important developments which incorporate greater regulatory flexibility."[274] It is not clear from the Tribunal's remarks whether these newer provisions would meet the protective standard required by the Treaty. The Tribunal's reference to "greater" regulatory flexibility introduces a notion of comparability,

note 263, at 559–60 (citing Frederick Schauer, *Rules, Defeasibility, and the Psychology of Exceptions*, *in* EXCEPTIONS IN INT'L L. 55 (Lorand Bartels & Frederica Paddeu eds., 2020)).

270. CPTPP Report, *supra* note 2, at 142.

271. *Id.* at 177; *see id.* at 174.

272. *See* DEPA, *supra* note 16, arts. 4.3-4.4.

273. CPTPP Report, *supra* note 2, at 141.

274. *Id.* at 188.

indicating it was using the presence of greater regulatory flexibility in subsequent agreements as an inference for insufficient flexibility in the CPTPP. However, two aspects were left unclear: the requisite threshold or acceptable standard that New Zealand would need to meet, and how perceived issues of regulatory chill might be differently overcome in the context of DEPA and other subsequent agreements yet to be tested before a panel or tribunal.

Notwithstanding these observations, the Tribunal's Report has reinforced the need for greater consideration of, and engagement with, Māori and other Indigenous interests during the treaty negotiation process. In particular, the Crown's collaboration in DEPA negotiations with Te Taumata, a Māori representative body for international trade, is highly positive.[275] Because of the "significant shift" in the Crown's position in this regard, the Tribunal decided it was "not appropriate" to make recommendations on the CPTPP.[276]

VI. Conclusion

The protection of Indigenous interests, particularly in the digital domain, ranks amongst the many other public policy objectives for which sufficient regulatory space has been reserved in trade agreements like the CPTPP. Agreements like the CPTPP do not seek to govern non-trade-related issues. Instead, they seek to strike a balance between trade liberalization, investment promotion objectives, and other public policy objectives. To this end, the drafters of these agreements have incorporated positive obligations while clarifying through exceptions and exclusions what action states can take without falling foul of such rules. This balance has been achieved in other agreements to which countries with strong IDS movements (Australia, Canada, and the United States) are parties, such as the USMCA and RCEP.

Although the CPTPP and these other trade agreements preserve policy space for IDS measures, mere preservation of policy space might be regarded as a minimum or passive standard of protection. Further research is required to reveal how international trade and other agreements might be negotiated to offer more proactive protections for Indigenous data at the international level. This might involve including in international agreements positive obligations and other mechanisms for recognizing and enforcing Indigenous data rights, including those that cover more specific aspects of how Indigenous data is accessed,

275. *Id.*

276. *Id.* at 194.

used, and protected, such as Indigenous data governance and intellectual property rights.

While the Tribunal became the first adjudicative body to make a finding on regulatory space in a digital trade chapter of an international trade agreement, the Tribunal's findings do not diminish the actual policy space left to states under these agreements. The primary source of risk and prejudice to Māori arising from New Zealand's entry into the CPTPP identified by the Waitangi Tribunal appears to have been the potential for "regulatory chill," rather than the actual prospects of a successful state-state claim. Therefore, governments wishing to introduce measures for IDS may wish to thwart that risk of "regulatory chill" entirely, by retaining the confidence to introduce measures for the benefit of Indigenous peoples, including in the digital domain.