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Constitutional Law-making by International Law: The Indigenization of Free Trade Agreements

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Abstract

New Zealand's free trade agreements (FTAs) with the European Union and the United Kingdom break new ground by elevating Indigenous customary protocols to a vector in the regulation of international trade. While in the past the focus has been on securing policy space to protect Indigenous rights, this has shifted: Māori, the Indigenous people of Aotearoa New Zealand, have entered the trade arena, and with them their protocols and customs, as a means of enshrining participation rights for Māori, as a touchstone for international cooperation, as a benchmark for reviewing FTAs and as a method of addressing problems ranging from environmental degradation to unsustainable fisheries. Māori are not just another stakeholder; they have a seat at the table, and this article will canvass to what extent. Other countries with an Indigenous population will develop their own paths to better integrate Indigenous peoples in their foreign trade policies. New Zealand presents one notable example.

1 Introduction

In modern-day New Zealand (NZ), there is a political push to 'indigenize' different aspects of public life, ranging from governance structures[1] and public health[2] to legal

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[1] Claire Charters *et al.*, *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (2020).

[2] The Māori Health Authority was established in 2022. See *Māori Health Authority*, available at www.teakawhaiora.nz.

education.[3] To what extent the outcome of the 2023 general election, which has seen a centre-right government take office, will dampen this development is too early to tell.[4] Proposals to provide for co-governance between Māori and non-Māori ('Pākehā' in te reo Māori, the Indigenous language of NZ and one of the official languages of the country) have received fierce backlash, however.[5] The salient issue is whether Māori involvement – in the sense of organized entities as opposed to an individual capacity – in political decision-making should be given heightened weight and even include veto rights for matters concerning the whole country (not just intra-Māori affairs) – in other words, parity between Māori and Pākehā,[6] irrespective of the fact that Māori (NZ's Indigenous population) make up around 17 per cent of the NZ population.[7] NZ's recent free trade agreements (FTAs) with the United Kingdom (UK) and the European Union (EU) have become a focal point of this internal constitutional discourse. The former entered into force in May 2023,[8] the latter in May 2024.[9]

The present article assesses the role of FTAs in addressing NZ's constitutional arrangements *vis-à-vis* its Indigenous population and critically appraises the different regulatory techniques employed in the covered FTAs to realize Indigenous rights, thereby showcasing the Indigenous influence in modern NZ treaty drafting in that sphere. It will be demonstrated that, although the pertinent provisions remain below what Māori would have wished to see,[10] taken together they amount to more than just window dressing. While this article focuses upon trade and Indigenous peoples, its findings equally hold true for the investment and Indigenous peoples linkage, given the practice, epitomized by the UK-NZ Free Trade Agreement (UK-NZ FTA),[11] of including chapters on investment protection in FTAs[12] and the fact that many of the

3 See 'Te Ao Māori and Tikanga Māori', *NZ Council of Legal Education*, available at https://nzcle.org.nz.

4 The new government, for instance, disestablished the Māori Health Authority. See Shane Reti, 'Māori Health Authority Disestablished', *Beehive* (28 February 2024), available at www.beehive.govt.nz/release/m%C4%81ori-health-authority-disestablished.

5 See, e.g., Kerry Burke, 'The Need to Cut Through the Confusion over Co-governance', *Stuff* (9 February 2023), available at www.stuff.co.nz/opinion/131162099/the-need-to-cut-through-the-confusion-over-cogovernance.

6 The Waitangi Tribunal defines co-governance as meaning '50 : 50' representation. See Interim Report on Māori Appointments to Regional Planning Committees, Doc. WAI 2358, 1 September 2022, paras 2.4.2, 2.6.

7 'Māori Population Estimates: At 30 June 2023', *Stats NZ*, available at www.stats.govt.nz/information-releases/maori-population-estimates-at-30-june-2023.

8 Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northern Ireland (UK-NZ FTA) (signed 28 February 2022, entered into force 31 May 2023).

9 Free Trade Agreement between the European Union and New Zealand (EU-NZ FTA) (signed 9 July 2023, entered into force 1 May 2024).

10 *Cf.* Ngā Toki Whakarururanga, 'Te Tiriti o Waitangi Assessment of the Free Trade Agreement between New Zealand and the United Kingdom', available at https://static1.squarespace.com/static/62d0af606076367ebf83b878/t/6396c3ecf6ab3a5fe9a1cab2/1670824943722/NTW+Tiriti+Assessment+UK+FTA+14+March+2022.pdf; Ngā Toki Whakarururanga, 'Te Tiriti o Waitangi Assessment: New Zealand and European Union Free Trade Agreement' (2023), available at https://static1.squarespace.com/static/62d0af606076367ebf83b878/t/6463471db83ddc54d78978dc/1684227873906/NZ+EU+FTA+ToW+Assessment.pdf.

11 UK-NZ FTA, *supra* note 8.

12 *Ibid.*, Ch. 14. Other examples include the investment chapters in the United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2018, entered into force 1 July 2020) (Ch. 14);

Indigenous-related provisions also have a bearing upon foreign investment (such as the Treaty of Waitangi exception, which will be elaborated later;[13] cooperation activities; or when investment matters come under the terms of reference of bodies established under the FTAs).[14]

Even though the 'trade and Indigenous peoples' debate is also live in other parts of the world,[15] that linkage is particularly acute in Aotearoa New Zealand – to a large extent, due to its unique constitutional set-up. Whilst all constitutional law is evolving, the seismic shifts are more pronounced in NZ – for the main part, in relation to the powers held by Māori. It is highly controversial within NZ how far these powers should go – Indigenous rights are pitted against democratic considerations.[16] The Treaty of Waitangi, or te Tiriti o Waitangi in te reo Māori, concluded between the British Crown and Māori chiefs in 1840,[17] has had a troubled history, partly due to the differing language versions[18] and partly due to changing attitudes towards Māori, its status oscillating from 'nullity'[19] to a foundational document.[20] The discrepancies of the two language versions go to the heart of NZ's nationhood, to wit: whether Māori ceded sovereignty and what level of Māori authority is guaranteed.[21]

Why so much uncertainty reigns to the present day cannot adequately be explained by the fact that NZ, like the UK, has no formal written constitution but harks back to the ambiguity of the principles derived from te Tiriti that govern the relationship

Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (CETA) (signed 30 October 2016, provisionally applied since 21 September 2017) (Ch. 8); and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, entered into force 30 December 2018) (Trans-Pacific Partnership Agreement (TPP), Ch. 9, as incorporated into the CPTPP by virtue of Art. 1(1) thereof).

13 See section 4.A of this article.

14 For the investment and Indigenous peoples linkage, see Gunn, 'International Investment Agreements and Indigenous Peoples' Rights', in J. Borrows and R. Schwartz (eds), *Indigenous Peoples and International Trade* (2020) 194.

15 For Latin America, see IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, paras 164–165; Anaya and Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples', 67 *University of Toronto Law Journal* (2017) 435. For North America, see Schwartz, 'Developing a Trade and Indigenous Peoples Chapter for International Trade Agreements', in J. Borrows and R. Schwartz (eds), *Indigenous Peoples and International Trade* (2020) 248, at 248–273.

16 Concretized by Sergio Puig as 'procedures that accord equal weight to all members', see S. Puig, *At the Margins of Globalization* (2021), at 137.

17 Treaty of Waitangi | Te Tiriti o Waitangi between the British Crown and Māori Chiefs (signed 6 February 1840).

18 For a comparison of the language versions, see 'The Full Text of Te Tiriti o Waitangi | The Treaty of Waitangi', *Museum of New Zealand*, available at https://www.tepapa.govt.nz/discover-collections/read-watch-play/maori/treaty-waitangi/treaty-close/full-text-te-tiriti-o.

19 *Wi Parata v. Bishop of Wellington*, (1877) 3 NZ Jur (NS) SC 72. For a summary, see 'Chief Justice Declares Treaty "Worthless" and a "Simple Nullity"', *New Zealand History* (2020), available at https://nzhistory.govt.nz/the-chief-justice-declares-that-the-treaty-of-waitangi-is-worthless-and-a-simple-nullity.

20 For an historical overview, see M. Palmer and D. Knight, *The Constitution of New Zealand* (2022), at 208–219. For treaties with Indigenous peoples in general, see G. Alfredsson, 'Indigenous Peoples, Treaties with', in *Max Planck Encyclopedia of Public International Law* (2022).

21 'Meaning of the Treaty', *Waitangi Tribunal*, available at https://www.waitangitribunal.govt.nz/treaty-of-waitangi/meaning-of-the-treaty/.

between Māori and the NZ government.[22] Those principles embody a 'modern interpretation of mutual obligations' under te Tiriti.[23] They also influence NZ's approach to FTA negotiations.[24]

FTA negotiations are complicated at the best of times; the strong emphasis upon Indigenous interests and rights adds, for better or worse, another layer of complication. In addition to public consultation, Māori organizations[25] and other Indigenous stakeholders have been part of the negotiations,[26] and, as some would argue, as a result, Indigenous interests are reflected in the legal text of the two agreements with the EU and the UK. In order to successfully conclude a trade deal with a country that has an Indigenous population, negotiators need to be aware of the existing constitutional relationships and surrounding sensitivities. The term 'Māori' is mentioned no less than 70 times in the EU-NZ Free Trade Agreement (EU-NZ FTA),[27] and more than a hundred times in the UK-NZ FTA. This is quite a change to previous FTAs.[28] Both new FTAs contain an entire chapter on Māori trade and economic cooperation.[29] Negotiators had to understand, and anticipate, the legal implications of incorporating Māori concepts like 'whakapapa',[30] 'te ao', 'tikanga' and 'kaupapa' into the FTAs.[31]

In the past, NZ merely sought to secure policy space in its FTAs, through an exception clause, with a view to actualizing te Tiriti o Waitangi domestically. In the FTAs with the EU and the UK, NZ continues to use the Treaty of Waitangi exception,[32] but it also breaks new ground: by specifying the role of Māori in the area of foreign trade. NZ thus intensified the 'indigenization' of its FTAs, which arguably started with the inclusion of a chapter on 'Cooperation on Indigenous Issues' in the FTA with Chinese Taipei.[33] It gained traction following the adoption of a Joint Declaration on Fostering Progressive and Inclusive Trade with Canada and Chile,[34] which was updated

[22] For the Treaty of Waitangi principles, see Hayward, 'Principles of the Treaty of Waitangi: Ngā Mātāpono o te Tiriti o Waitangi', in *Te Ara: The Encyclopedia of New Zealand* (2023), at 1–5.

[23] Knight, 'New Zealand: Te Tiriti o Waitangi Norms, Discretionary Power and the Principle of Legality (At Last)', *Public Law* (2022) 701, at 701.

[24] World Trade Organization (WTO), Trade Policy Review: Report by New Zealand, WTO Doc. WT/TPR/G/426, 6 April 2022, paras 1.3, 3.3–3.6, 3.14, 7.16.

[25] Relevant Māori organizations are Te Taumata, Ngā Toki Whakarururanga, National Iwi Chairs Forum, and the Federation of Māori Authorities.

[26] 'Māori Interests', *Foreign Affairs and Trade*, available at www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/maori-interests/ and www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/new-zealand-united-kingdom-free-trade-agreement/maori-interests/.

[27] EU-NZ FTA, *supra* note 9.

[28] See, e.g., Free Trade Agreement between New Zealand and the Republic of Korea (signed 23 March 2015, entered into force 20 December 2015): two mentions; New Zealand-Malaysia Free Trade Agreement (signed 26 October 2009, entered into force 1 August 2010): one mention.

[29] EU-NZ FTA, *supra* note 9, Ch. 20; UK-NZ FTA, *supra* note 8, Ch. 26.

[30] EU-NZ FTA, *supra* note 9, Art. 20.1(f)–(g); UK-NZ FTA, *supra* note 8, Art. 26.1.

[31] See, e.g., EU-NZ FTA, *supra* note 9, Art. 20.2.4; UK-NZ FTA, *supra* note 8, Art. 26.2.3.

[32] EU-NZ FTA, *supra* note 9, Art. 25.6; UK-NZ FTA, *supra* note 8, Art. 32.5.

[33] Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (signed 10 July 2013, entered into force 1 December 2013), Ch. 19.

[34] Joint Declaration on Fostering Progressive and Inclusive Trade (signed 8 March 2018), available at www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Joint-Declaration-Progressive-and-Inclusive-Trade-Final.pdf.

and replaced in 2023 by the Tāmaki Makaurau Joint Declaration on Inclusive and Sustainable Trade, now also including Mexico, Costa Rica and Ecuador.[35]

One finds different types of Indigenous-related provisions in the EU-NZ FTA as well as in the UK-NZ FTA: some are rather boilerplate and simply consider products in which Māori have particular commercial interests, such as products derived from Mānuka,[36] or reserve regulatory autonomy, notably the repeated reaffirmation of the right to regulate[37] and the aforementioned Treaty of Waitangi exception.[38] That said, there are other provisions, such as on the participation rights of Māori in decision-making and the exercise of constitutional rights, that one would normally expect in domestic constitutional law.[39] Those latter commitments are of particular interest to our investigation. Their purport is summarized in the FTAs as follows: '[T]o enhance Māori participation in trade and investment opportunities derived from this Agreement that, in the case of Aotearoa New Zealand, further contribute to the ability for Māori to exercise their rights and interests under te Tiriti o Waitangi.'[40]

The analysis in this article proceeds in the following manner. To set the scene, section 2 presents the commitment theory that conceptualizes the phenomenon of how FTA commitments are used to 'lock in' preferred outcomes – usually of a commercial nature, though in the present context they are of a political nature. This phenomenon does not stop at constitutional law. Next, section 3 succinctly expounds upon the status of te Tiriti o Waitangi on the domestic and international plane. Section 4 examines how the two FTAs at hand preserve policy space for domestic regulators to protect Indigenous rights and interests. Exceptions and carve-outs are the two regulatory techniques utilized to that effect. Section 5 discusses the participation rights of Māori as guaranteed under the FTAs in comparison to NZ's constitutional law as well as general international law. This will be the main focus of our investigation, mindful that there are other areas of concern to Māori in relation to FTAs, such as the regulation of traditional knowledge. Participation can take different forms: it can signify Māori representation on committees or consultation requirements, and it can occur in international or domestic decision-making. Specifically, we look at the various consultation mechanisms established under the FTAs, the cooperation activities envisaged and the Māori input in the review of the agreements. As we will see,

[35] Tāmaki Makaurau Joint Declaration on Inclusive and Sustainable Trade (signed 16 July 2023), available at www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Tamaki-Makaurau-Joint-Declaration-on-Inclusive-and-Sustainable-Trade.pdf. For further Indigenous-related trade initiatives, see WTO, *supra* note 24, paras 3.15–3.16, 5.13.

[36] 'Mānuka' signifies 'the tree Leptospermum scoparium grown in Aotearoa New Zealand and products including honey and oil deriving from that tree', see EU-NZ FTA, *supra* note 9, Arts 20.1(i), 20.4(a). For a similar provision in the USMCA, *supra* note 12, see Art. 6.2.

[37] EU-NZ FTA, *supra* note 9, Rec. 11 Preamble, Arts 10.1.2, 12.3, 19.2.1; UK-NZ FTA, *supra* note 8, Rec. 8 Preamble, Arts 6.3.1, 10.2.4, 23.4.1.

[38] EU-NZ FTA, *supra* note 9, Art. 25.6; UK-NZ FTA, *supra* note 8, Art. 32.5.

[39] See, e.g., EU-NZ FTA, *supra* note 9, Art. 12.4.5(b); see also Art. 20.2.4; Art. 20.5.3; Art. 20.6.2, n.; Art. 20.6.3, n.; Art. 24.7.3, 3rd sentence; Art. 24.6.1, 4th sentence; UK-NZ FTA, *supra* note 8, Arts 15.17.2, 15.20.1–2, 15.22.2(b), 17.14.1, 17.17.2, 17.19.2, 22.3.3(d), 25.5.2, 26.2.3–4, 26.5.1–2, 30.3.3(c), 30.8.1.

[40] EU-NZ FTA, *supra* note 9, Art. 20.4; UK-NZ FTA, *supra* note 8, Art. 26.4.

there are differences between the two FTAs in terms of Māori involvement. Section 6 finally concludes.

2 Commitment Theory

It has been a long-known phenomenon of international trade law to 'lock in' a particular economic theory with respect to free trade in international agreements to help governments resist the lobbying pressures of domestic constituencies for protectionism.[41] It is also a tactic employed by lobbyists, for example in connection with digital trade regulation.[42] The previous Labour-led NZ government transposed the question of whether and when Māori participation is required – in bodies established under the FTAs, in cooperation activities with the other contracting party or when reviewing the FTAs – in the international realm, thereby locking in its preferred outcome. Once locked in, the international solution is not only binding upon future governments but also reflects back on domestic constitutional law.[43]

Another case in point where international economic law was used to transform municipal law, including constitutional law, is the labour reform in Mexico in response to the Trans-Pacific Partnership (TPP) negotiations:[44] the protection of freedom of association and the right to collective bargaining – now enshrined in Article 19.3.1(a) of the TPP as incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[45] – prompted amendments to Article 123 of the Constitution of the United Mexican States,[46] the effective implementation of which in Mexican labour laws was subsequently particularized in the United States-Mexico-Canada Agreement (USMCA).[47]

41 Instead of all, see E.-U. Petersmann, *The GATT/WTO Dispute Settlement System* (1997), at 36–37. For someone who is critical of the commitment theory, see A. Sykes, *The Law and Economics of International Trade Agreements* (2023), at 49–50.

42 D. Rangel and L. Wallach, 'International Preemption by "Trade" Agreement: Big Tech's Ploy to Undermine Privacy, AI Accountability, and Anti-Monopoly Policies', *Rethink Trade* (2023), available at https://rethinktrade.org/reports/international-preemption-by-trade-agreement/.

43 Von Bogdandy and Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', in A. von Bogdandy and I. Venzke (eds), *International Judicial Lawmaking* (2012) 3, at 22–23; Puig, *supra* note 16, at 136–137.

44 TPP, *supra* note 12; G. Bensusán, 'The Transformation of the Mexican Labour Regulation Model and Its Link to North American Economic Integration', *International Labour Organization*, available at https://webapps.ilo.org/static/english/intserv/working-papers/wp015/index.html.

45 CPTPP, *supra* note 12.

46 Constitución Política de los Estados Unidos Mexicanos, *Justia México*, available at https://mexico.justia.com/federales/constitucion-politica-de-los-estados-unidos-mexicanos/titulo-sexto/.

47 USMCA, *supra* note 12, Art. 23.3.1(a), in conjunction with Annex 23-A; see also the Facility-specific Rapid Response Labor Mechanisms in Annexes 31-A and 31-B thereof. *Cf.* G. Bensusán Areous and L.P. Briseño Fabián, 'The USMCA between the US and Mexico', *Friedrich Ebert Stiftung* (2022), at 4–5, 15, available at https://library.fes.de/pdf-files/iez/19039.pdf; G. Bensusán and K. Middlebrook, 'Democratic Labor Reform in Mexico', *Wilson Center* (2020), at 1, 4–5, 11, available at www.wilsoncenter.org/sites/default/files/media/uploads/documents/Bensus%C3%A1n%20%26%20Middlebrook%20-%20Democratic%20Labor%20Reform%20in%20Mexico.pdf.

Whereas the labour reform in Mexico was driven by its trading partners – the USA and Canada[48] – the NZ lock-in is of its own accord. What is novel about NZ's treaty drafting is that it would prescribe Māori participation not only internationally but also domestically, hence making the distribution of power between different internal actors a trade matter. Even though the concept of 'international trade constitutionalism' may be disputed (especially after the demise of the World Trade Organization's Appellate Body),[49] FTAs have not been used, at least in the past, to settle constitutional conflicts of this kind. This form of law-making raises concerns about legitimation that are different from, for instance, international judicial law-making (for example, in regard to *ultra vires*, choice of forum, democratic governance).[50] What is more, Māori participation, which is ethnicity based, differs from other involvement of civil society such as non-governmental organizations, lobby groups or trade unions, which is interest based;[51] some Māori organizations may be protectionist, others not.

Cognizant that the composition of Māori representation – that is, the decision of which Māori organizations are to represent Māori interests in matters covered by the FTAs – is left to domestic law, the question when a group within a society is given special weight in decision-making processes is not merely procedural in nature but also inherently constitutional. A loose comparison can be made to the guaranteed involvement of certain state organs in the process of international decision-making.[52] This aspect distinguishes the NZ approach to recognize Māori rights in its recent FTAs

[48] Bensusán and Middlebrook, *supra* note 47, at 1; Bensusán, *supra* note 44.

[49] C. Carmody, *A Communitarian Theory of WTO Law* (2023), at 19–21; *Pro* Cottier, 'Gedanken zur vertikalen Gewaltenteilung', in C. Stumpf, F. Kainer and C. Baldus (eds), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht* (2015) 1157; Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism', in C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (2011) 5, at 5–6, 30–35, 46–47, 55–57. *Contra* Langille, 'Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out through Regional Trade Agreements', 86 *New York University Law Review* (2011) 1482, at 1491–1497, 1513–1518; Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 *European Journal of International Law* (*EJIL*) (2003) 907, at 909, 937–940, 949–951.

[50] For the latter, see von Bogdandy and Urueña, 'International Transformative Constitutionalism in Latin America', 114 *American Journal of International Law* (*AJIL*) (2020) 403, at 404, 430–440; von Bogdandy and Venzke, 'Beyond Dispute', *supra* note 43, at 21–26; von Bogdandy and Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking', in von Bogdandy and Venzke, *International Judicial Lawmaking*, *supra* note 43, 473.

[51] For the latter, see von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *EJIL* (2004) 885, at 903–904; von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions: The Role of "Civil Society" and the Rise of the Principle of Participation of "the Most Affected" in International Institutional Law', 32 *EJIL* (2021) 125, at 143–147; Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-making', 28 *EJIL* (2017) 89, at 90–91, 112–113, who derives a 'right to participate in international lawmaking' for the benefit of civil society from Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.

[52] See, e.g., German Basic Law (entered into force 24 May 1949, as amended 19 December 2022), Art. 23(2)–(3), available at www.gesetze-im-internet.de/englisch_gg/index.html.

from other linkage debates, such as trade and labour,[53] and the regulation in FTAs of trade-related policy fields, such as intellectual property (IP).

3 Status of te Tiriti o Waitangi

At this juncture, it is worth briefly surveying the unique constitutional set-up of NZ, with te Tiriti o Waitangi as its linchpin.[54] The FTAs refer to te Tiriti as 'a foundational document of constitutional importance to New Zealand'.[55] The Treaty of Waitangi exception in the FTAs confirms, internationally, that there are 'obligations under the Treaty of Waitangi' owed by the government to Māori. On the domestic plane, it is not surprising in light of the country's dualist tradition that te Tiriti o Waitangi is not deemed legally binding as such within the NZ legal order.[56] NZ does not have a 'Supremacy Clause' as found in the US Constitution, equating particular – self-executing – treaties with municipal law.[57] That said, the principles derived from te Tiriti are binding by virtue of statutory law.[58] The NZ Supreme Court further confirmed the applicability of the doctrine of consistent interpretation[59] with respect to te Tiriti by holding that 'there is a presumption that statutes are to be interpreted consistently with Te Tiriti as far as possible'.[60] In addition, statutory decision-makers, when exercising their discretion, must heed the Treaty principles,[61] for te Tiriti 'must colour all matters to which it has relevance'.[62] Te Tiriti thus occupies an interstitial constitutional position – 'half in and half out'.[63]

Moreover, the Waitangi Tribunal, a standing commission of inquiry,[64] is competent to hear complaints about alleged inconsistencies with the 'principles of the Treaty',

[53] For this linkage, see Santos, 'The New Frontier for Labor in Trade Agreements', in A. Santos, C. Thomas and D. Trubek (eds), *World Trade and Investment Law Reimagined* (2019) 215.

[54] For more details, see Palmer and Knight, *supra* note 20, Ch. 10.

[55] EU-NZ FTA, *supra* note 9, Rec. 6 Preamble, Art. 20.2.1; UK-NZ FTA, *supra* note 8, Rec. 5 Preamble, Art. 26.2.2.

[56] 'Te Tiriti o Waitangi – Treaty of Waitangi', *Ministry of Justice* (2023), available at www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/treaty-of-waitangi/ ('Treaty rights can only be enforced in a court of law when a statute or an Act explicitly refers to the Treaty'); High Court, *Huakina Development Trust v. Waikato Valley Authority*, [1987] 2 NZLR 188, at 210 ('the Treaty is not part of the municipal law of New Zealand in the sense that it gives rights enforceable in the Courts by virtue of the Treaty itself').

[57] For an analysis, see Vazquez, 'The Four Doctrines of Self-executing Treaties', 89 *AJIL* (1995) 695.

[58] 'Te Tiriti o Waitangi', *supra* note 56; Palmer and Knight, *supra* note 20, at 221–222.

[59] For the doctrine in European Union (EU) law, see Case C-61/94, *Commission v. Germany* (EU:C:1996:313), para. 52. For US law, see *Alexander Murray v. The Schooner Charming Betsy*, 1804, 6 U.S. (2 Cranch) 64, para. 18.

[60] *Peter Hugh McGregor Ellis v. R*, [2022] NZSC 114, para. 98; see also *NZ Māori Council v. Attorney-General* (*Lands*), [1987] 1 NZLR 641, 656 (Court of Appeal) ('the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty … when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty').

[61] *Trans-Tasman Resources v. Taranaki-Whanganui Conservation Board*, [2021] NZSC 127, para. 151 (Supreme Court) ('[a]n intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear').

[62] *Barton-Prescott v. Director-General of Social Welfare*, [1997] 3 NZLR 179, 184 (High Court).

[63] Palmer and Knight, *supra* note 20, at 220.

[64] Treaty of Waitangi Act 1975, s. 8(1), available at www.legislation.govt.nz.

inter alia, by international agreements concluded by NZ.[65] Although the rulings of the Waitangi Tribunal are 'recommendations' to the government with no legal effects,[66] they do carry significant political weight.[67] When, for instance, in 2015, the TPP had been challenged by Māori before the Waitangi Tribunal,[68] the Tribunal's subsequent report was one of the reasons that led the government to drop investor-state dispute settlement (ISDS) clauses in future agreements,[69] and it propelled the then government's Trade for All Agenda,[70] resulting in the establishment of Te Taumata, a Māori-led advisory body on trade policy.[71]

Having established the status of te Tiriti, we canvass next how NZ seeks to preserve policy space in its FTAs with a view to realizing te Tiriti domestically. To that end, we investigate specifically the Treaty of Waitangi exception as well as a carve-out to the digital trade chapter in the EU-NZ FTA. Given the fluidity of NZ constitutional law, and due to the evolutionary reading of te Tiriti adopted in modern times, the preservation of policy space is a necessity so as to avoid a potential conflict between domestic law and NZ's FTA obligations.

4 Preservation of Policy Space

Before parsing the exception and the carve-out, a word on preambles to FTAs is in order. Preambles are, commensurate with Article 31(2) of the Vienna Convention on the Law of Treaties, of significance to a contextual interpretation.[72] Both FTA preambles in question recognize the protection of Indigenous rights as a legitimate public welfare objective, which is indicative that those rights are able to trump FTA commitments in cases of conflict.[73] The trope of the 'right to regulate' in the public interest is how state parties to contemporary trade and investment agreements attempt to sort out potential conflicts between competing rights and interests.[74]

[65] *Ibid.*, s. 6(1). As per subpara. (d) thereof, 'any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown' qualifies as a subject matter of inquiry. That is, technically speaking, the subject matter is the ratification act when it comes to international agreements.

[66] Except for land transferred to or vested in state-owned enterprises (*ibid.*, ss 8A, 8HJ) and Crown forest land (*ibid.*, s 8HB).

[67] *Ibid.*, s. 5; see also J. Ruru, P. Scott and D. Webb, *The Aotearoa New Zealand Legal System* (2022), at 246–247.

[68] Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement, Doc. WAI 2522, 17 June 2016.

[69] V. Small, 'Renamed TPP "A Damned Sight Better", Could Be in Place in a Few Months', *Stuff* (12 November 2017), available at www.stuff.co.nz/national/politics/98795622/renamed-tpp-a-damned-sight-better-could-be-in-place-in-a-few-months.

[70] Report of the Trade for All Advisory Board, November 2019, recommendations 18, 36; see also WTO, *supra* note 24, paras 3.3–3.6, 3.14.

[71] 'Annual Report 2019–20', *Ministry of Foreign Affairs and Trade*, at 51, available at www.mfat.govt.nz/assets/About-us-Corporate/MFAT-corporate-publications/MFAT-Annual-Report-2020/MFAT-Annual-Report-2019-20.pdf.

[72] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[73] UK-NZ FTA, *supra* note 8, Rec. 8 Preamble; EU-NZ FTA, *supra* note 9, Rec. 11 Preamble; see also Arts 10.1.2, 12.3.

[74] See also CETA, *supra* note 12, Art. 8.9(1); CPTPP, *supra* note 12, Rec. 6 Preamble; USMCA, *supra* note 12, Rec. 9 Preamble.

In a way, it encapsulates how international trade and investment law can be conceptualized.[75]

Far more impactful than general statements like a reaffirmation of the 'continued ability to support and promote Māori interests',[76] however, is the Treaty of Waitangi exception clause used in NZ FTAs, including the ones with the EU[77] and the UK.[78] The right to regulate is reified primarily in exception clauses.[79] As an aside, there is a special exception in the UK-NZ FTA for 'measures necessary … to support creative arts of national value',[80] the import of which is reduced by excising the IP chapter from its remit.[81]

A *Treaty of Waitangi Exception*

As far as the operational aspects of the Treaty of Waitangi exception are concerned, the wording has remained unchanged. It was first employed in the original NZ-Singapore Closer Economic Partnership[82] and in all subsequent FTAs concluded ever since (13 in total).[83] NZ has thus a Treaty of Waitangi exception in place with all the trading partners with which it has FTA relations, barring the earlier Closer Economic Relations Trade Agreement with Australia.[84]

The Treaty of Waitangi exception can only be fully fathomed against NZ's constitutional backdrop as set out above.[85] It is important for NZ to make certain that its international law obligations leave sufficient leeway for the exegesis of te Tiriti to evolve. By permitting NZ 'to accord more favourable treatment to Māori', the exception provides the policy space needed to ensure equity for Māori as compared to non-Māori (national or foreign). Without it, preferential treatment – affirmative action – would be at odds with the non-discrimination obligations of the respective FTA:[86] if the product or investment discriminated against were of foreign origin, this would trigger the national treatment obligations.[87] Remarkably, no other policy tools (such as trade/

[75] For WTO law, see WTO, *US – Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body*, 24 April 2012, WT/DS406/AB/R, para. 174; WTO, *Argentina – Measures Relating to Trade in Goods and Services – Report of the Appellate Body*, 9 May 2016, WT/DS453/AB/R, para. 6.114.

[76] EU-NZ FTA, *supra* note 9, Art. 12.4.5(a); UK-NZ FTA, *supra* note 8, Art. 15.22.2(a).

[77] EU-NZ FTA, *supra* note 9, Art. 25.6.

[78] UK-NZ FTA, *supra* note 8, Art. 32.5. For the exception in general, see Kawharu, 'The Treaty of Waitangi Exception in New Zealand's Free Trade Agreements', in J. Borrows and R. Schwartz (eds), *Indigenous Peoples and International Trade* (2020) 274.

[79] For international investment law, see L. Wandahl Mouyal, *International Investment Law and the Right to Regulate* (2016).

[80] UK-NZ FTA, *supra* note 8, Art. 32.1.4.

[81] *Ibid.*, 2nd sentence.

[82] Agreement between New Zealand and Singapore on a Closer Economic Partnership (signed 14 November 2000, entered into force 1 January 2001, upgraded in 2020), Art. 74.

[83] *Cf.* 'Free Trade Agreements', *Ministry of Foreign Affairs and Trade*, available at www.mfat.govt.nz/en/trade/free-trade-agreements (note that the FTA with Chinese Taipei is not listed).

[84] NZ-Australia Closer Economic Relations Trade Agreement (signed 28 March 1983, entered into force 1 January 1983).

[85] See section 3 of this article.

[86] See generally Cottier, 'Der Grundsatz der Nichtdiskriminierung im Europa- und Wirtschaftsvölkerrecht', 134 *Zeitschrift für schweizerisches Recht* (2015) 325, at 331–332, 334–345.

[87] See, e.g., EU-NZ FTA, *supra* note 9, Arts 2.4, 10.6, 10.16, 18.6; UK-NZ FTA, *supra* note 8, Arts 2.3, 9.5, 11.5, 14.6, 17.7.

investment-restrictive measures) are reserved under the exception. That the type of measures available to the government under the exception in order to fulfil its obligations arising from te Tiriti is restricted to 'more favourable treatment' makes Māori question whether the clause would be up to the task if ever tested.[88]

It bears emphasizing that the Treaty of Waitangi exception applies across the entire agreement ('nothing in this Agreement'),[89] which is why the footnote to the protection of plant varieties in the EU-NZ FTA, reiterating the application of that exception to plant variety rights,[90] is superfluous. NZ thus takes a more sweeping approach towards securing policy space for the domestic implementation of Indigenous rights than other countries with an Indigenous population, such as Australia, which predominantly relies upon annexing non-conforming measures in relation to services, foreign investment and state-owned enterprises.[91] That said, the use of a specific Indigenous rights exception seems to gain some currency. The USMCA employs an exception clause for measures deemed 'necessary to fulfill … legal obligations to indigenous peoples',[92] be they of a constitutional or international nature.[93] This obviates the issue of whether Indigenous rights and interests can be subsumed under the public morals exception (especially in the context of multi-purpose measures).[94]

For a measure to be justified under an exception clause, it is not sufficient for the measure to just pursue a legitimate public welfare objective. All exception clauses link a policy tool – that is, the measure – to public welfare objectives. In the case of the Treaty of Waitangi exception, the relevant part is couched as follows: 'nothing 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.' Here, the nexus element 'necessary' is always 'deemed' satisfied, which means that the element is self-judging.[95] Consequently, when the NZ government adopts a particular measure as being necessary, its assessment is to be accepted.

Additionally, both FTAs at hand 'recognise the value that Māori approaches … can contribute to the design and implementation of policies and programmes in New Zealand that protect and promote Māori trade and economic aspirations'.[96] If this led to positive discrimination, it would be justified under the exception. The allegation that a discriminatory measure, however spurious, is covered by te Tiriti cannot be checked because a tribunal established under the FTAs has no jurisdiction to interpret 'the

[88] *Cf.* Waitangi Tribunal, *supra* note 68, para. 5.1.6. So far, the Treaty of Waitangi exception has not been litigated in a trade forum.

[89] Schwartz, *supra* note 15, at 257.

[90] EU-NZ FTA, *supra* note 9, Art. 18.45, n. 1.

[91] For the CPTPP, *supra* note 12, see Annexes II and IV; see also the carve-out to Chapter 15 on government procurement in Annex 15-A, s. G.1(c)–(d).

[92] USMCA, *supra* note 12, Art. 32.5.

[93] *Cf. Ibid.*, Art. 32.5, n. 7; see also Schwartz, *supra* note 15, at 267.

[94] General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194, Art. XX(a), and General Agreement on Trade in Services 1994 (GATS), 1869 UNTS 183, Art. XIV(a), as incorporated into the USMCA by virtue of Article 32.1 thereof. For an example of a multi-purpose measure, see WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body*, 18 June 2014, WT/DS400/AB/R, WT/DS401/AB/R, para. 5.146.

[95] Schwartz, *supra* note 15, at 257.

[96] EU-NZ FTA, *supra* note 9, Art. 20.2.5; UK-NZ FTA, *supra* note 8, Art. 26.2.4.

Treaty of Waitangi, including as to the nature of the rights and obligations arising under it'.[97] The question of whether this includes ISDS tribunals – the exception contains a blanket reference to 'dispute settlement provisions of this Agreement' – is moot because neither the EU-NZ FTA nor the UK-NZ FTA has an ISDS mechanism.[98]

The exception further stipulates that an FTA panel may only determine whether the measure at issue is inconsistent with the FTA (and not domestic law).[99] It is generally accepted that domestic law, as construed by domestic courts, is treated by international tribunals as a matter of fact in determining whether the domestic law breaches international law.[100] Other than that, it is notable that the NZ approach to the relationship of international law / te Tiriti is not dissimilar to the one taken by the EU in relation to EU law with a view to ensuring its autonomy.[101] In the EU-Canada Comprehensive Economic and Trade Agreement, for instance, the parties agreed that '[t]he Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. … [T]he Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party'.[102]

Criticism levelled against the Treaty of Waitangi exception from a Māori perspective, calling for further concessions towards Māori (business) interests,[103] should also consider the commercial interests of NZ's trading partners against the background that the importance of Māori businesses to the NZ economy as a whole is on the rise.[104] To basically exclude big parts of the economy, notably the primary sectors,[105] from the purview of (reciprocal) FTA obligations may not be acceptable, or fair, to them. The exception, by shielding te Tiriti – 'a foundational document of constitutional importance' – from FTA commitments, has as a consequence the reversal of a fundamental principle of international law – namely that, from the vantage point of international law, it is international law that takes precedence over domestic constitutional law.[106]

[97] UK-NZ FTA, *supra* note 8, Art. 32.5.2; EU-NZ FTA, *supra* note 9, Art. 25.6.2; see also Art. 12.1.2(c), 2nd sentence; Art. 26.2.2(g).

[98] *Cf.* Kawharu, *supra* note 78, at 288.

[99] EU-NZ FTA, *supra* note 9, Art. 25.6.2, 3rd sentence; UK-NZ FTA, *supra* note 8, Art. 32.5.2, 3rd sentence.

[100] *Certain German Interests in Polish Upper Silesia*, 1926 PCIJ Series A, No. 7, at 19; WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products – Report of the Appellate Body*, 16 January 1998, WT/DS50/AB/R, para. 66.

[101] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* (EU:C:2008:461), para. 316 ('the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement').

[102] CETA, *supra* note 12, Art. 8.31.2.

[103] Ngā Toki Whakarururanga, *UK-NZ FTA*, *supra* note 10, paras 14(iii), 18(iii), 27–38; Ngā Toki Whakarururanga, *NZ-EU FTA*, *supra* note 10, paras 12–22, 207(c); Kawharu, *supra* note 78, at 276, 294.

[104] 'Tatauranga Umanga Māori – Statistics on Māori Businesses: 2022', *Stats NZ*, available at www.stats.govt.nz/information-releases/tatauranga-umanga-maori-statistics-on-maori-businesses-2022-english.

[105] WTO, *supra* note 24, para. 3.13; H. Schulze and A. Reid, 'EU-NZ FTA: Māori Economy', (2019), at 3–4, available at www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/BERL-report.pdf.

[106] VCLT, *supra* note 72, Art. 27; International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Supplement no. 10, Doc. A/56/10, November 2001, Art. 32. *Cf.* Riffel,

Put differently, under the exception clause, NZ can invoke its own constitutional law as a justification for its failure to perform its FTAs; te Tiriti and acts of the NZ state fulfilling it do not need to be compliant with the country's FTA commitments.

As for digital trade, there is a specific carve-out in the EU-NZ FTA to which we turn next. The systemic difference to an exception is that an exception saves a measure found inconsistent,[107] whereas a carve-out already forecloses the inconsistency with the FTA by restricting its scope of application.[108]

B *Digital Trade Carve-out*

Under the EU-NZ FTA, measures deemed necessary to protect Māori rights and interests, including Māori traditional knowledge, are carved out from the entire chapter on digital trade.[109] As in the case of the Treaty of Waitangi exception, the nexus element is self-judging.[110] The usual good-faith caveat applies as a limitation: 'provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or a disguised restriction on trade …' In light of the carve-out in Article 12.1.2(c) of the EU-NZ FTA, one might speculate as to the purpose of Article 12.4.5 thereof concerning the review of the provision on cross-border data flows. When it comes to the promotion of Māori interests, the carve-out already guarantees NZ regulatory autonomy with respect to digital trade. The former prescription seems to be directed more inwards than outwards towards the EU, such as when it 'affirms [the] intention to engage Māori to ensure the review … takes account of the continued need for New Zealand to support Māori to exercise their rights and interests'.[111] This is an example of how NZ tries to accommodate conflicting strands of its constitutional law.

This brings us to the core question of our analysis: Indigenous participation in government decision-making. It is particularly in this regard that the framers of the FTAs have broken new ground. So far, other countries with an Indigenous population have not assured participatory rights in favour of Indigenous peoples in their FTAs. Canada had proposed an Indigenous rights chapter to the USMCA, which would have included a committee representing Indigenous peoples, but it never eventuated.[112] To be able to assess the level of engagement with Māori, we will use as benchmarks the constitutional and international framework. We address those frameworks first, before canvassing Māori participation/consultation rights as guaranteed under the FTAs.

'Regulatory Safeguards in Mega-regionals Against Sovereignty Loss', 20 *Max Planck Yearbook of United Nations Law* (2016) 322, at 356.

[107] *Cf.* EU-NZ FTA, *supra* note 9, Art. 25.6.2, 3rd sentence; UK-NZ FTA, *supra* note 8, Art. 32.5, 3rd sentence.

[108] EU-NZ FTA, *supra* note 9, Art. 12.1.2 ('[t]his Chapter does not apply to'); see also Henckels, 'Should Investment Treaties Contain Public Policy Exceptions', 59 *Boston College Law Review* (2018) 2825, at 2827–2829.

[109] EU-NZ FTA, *supra* note 9, Art. 12.1.2(c) (see corresponding note).

[110] See section 4.A of this article.

[111] EU-NZ FTA, *supra* note 9, Art. 12.4.5(b); see also UK-NZ FTA, *supra* note 8, Art. 15.22.2(b).

[112] For the USMCA negotiations, see Schwartz, *supra* note 15, at 261–270.

5 Indigenous Participation in Decision-making

A *Constitutional Framework*

Barring a statutory duty to consult, the question of whether, and to what extent, Māori participation in government decision-making is mandatory is contested. The NZ Court of Appeal in *Forestry Assets* found that 'the good faith owned [*sic*] to each other by the parties to the Treaty [of Waitangi] must extend to consultation on *truly major issues*'.[113] It is generally accepted that consultation is required on issues of particular concern to Māori. The regulation of te reo Māori would be a case in point.[114] What about major issues that do not specifically affect Māori but that affect Māori and Pākehā equally? This is where the fault line appears to be. Two years prior to *Forestry Assets*, the same Court in its landmark ruling in *NZ Māori Council v. Attorney-General* rejected a general duty to consult with Māori on the grounds that this would be 'elusive and unworkable … [and] could hold up the processes of Government in a way contrary to the principles of the Treaty'.[115] This view is borne out by Lord Harry Woolf's pronouncement in the later *Broadcasting Assets* case that the obligations assumed by the government under te Tiriti are 'not absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown'.[116] What does this mean for our present context?

On one end of the spectrum, the Treaty of Waitangi's principle of partnership is held to entail a duty to consult.[117] The Waitangi Tribunal's report on the TPP confirmed Māori consultation rights for 'matters that go to the heart of the Crown-Māori relationship, and Māori Treaty interests'[118] and subsumed foreign trade and investment matters thereunder.[119] However, as mentioned earlier, Waitangi Tribunal reports are not legally binding.[120] Another view, on the other end of the spectrum, maintains that '[t]he Treaty does not impose on governments a duty to consult Māori before taking legislative or executive action *affecting* Māori'.[121]

B *International Framework*

At the international level, several legal instruments refer to participatory rights for the benefit of Indigenous communities – some are general, others are contingent upon the policy field concerned. The International Labour Organization's (ILO) Convention no. 169 on Indigenous and Tribal Peoples contains the broadest legally binding provision

[113] *NZ Māori Council v. Attorney-General*, [1989] 2 NZLR 142, 152 (emphasis added).
[114] *Cf.* Māori Language Act 2016, s. 44, in conjunction with s. 18; see also *Attorney-General v. NZ Māori Council*, [1991] 2 NZLR 129 (Court of Appeal).
[115] *Lands*, *supra* note 60, at 665.
[116] *NZ Māori Council v. Attorney-General*, [1994] 1 NZLR 513, at 517 (Privy Council).
[117] Waitangi Tribunal, Final Report on the Radio Spectrum Management and Development, Doc. WAI 776, 28 June 1999, para. 3.3.1.
[118] Waitangi Tribunal, *supra* note 68, para. 5.2.2.
[119] *Ibid.*; see also Kawharu, *supra* note 78, at 283–284.
[120] See section 3 of this article.
[121] P. Joseph, *Joseph on Constitutional and Administrative Law* (2021), at 45 (emphasis added).

in that respect, making consultation with Indigenous peoples mandatory 'through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'.[122] That said, with 24 ratifications, Convention no. 169's impact remains limited. The Convention on Biological Diversity (CBD) guarantees 'involvement' in the promotion of the wider application of 'knowledge, innovations and practices … embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.[123] The United Nations (UN) Convention to Combat Desertification (UNCCD) calls for the participation of 'local communities' in 'the design and implementation of programmes to combat desertification and/or mitigate the effects of drought'.[124] Furthermore, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) acknowledges 'the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture'.[125] Finally, the Human Rights Committee deduced from the right of members of a minority to enjoy their own culture, as enshrined in Article 27 of the International Covenant on Civil and Political Rights, a right 'to participate in the decision-making process' in relation to 'measures which substantially compromise or interfere with the culturally significant economic activities' of the minority in question.[126]

Under the universally supported UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Indigenous peoples have the 'right to participate fully, if they so choose, in the political, economic … life of the State'.[127] While it may be questionable whether an institutionalized role in government decision-making ensues from this 'right to participate', it would be a stretch to derive veto powers from 'participation'.[128] Participatory rights under the UNDRIP are subject to two limitations: first, the principle of democracy, and second, a confinement to internal Indigenous matters whenever special consideration must be given to the interests of Indigenous peoples.

[122] International Labour Organization (ILO) Convention no. 169 Concerning Indigenous and Tribal People in Independent Countries 1989, 1650 UNTS 383, Art. 6(1)(a); see also the specific consultation requirements regarding natural resources pertaining to land (Art. 15(2)), land rights (Art. 17(2)), special training programs (Art. 22(3)), educational minimum standards (Art. 27(3)) and the teaching of Indigenous languages (Art. 28(1)).

[123] Convention on Biological Diversity 1992, 1760 UNTS 79, Art. 8(j).

[124] United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994, 1954 UNTS 3, Art. 3(a).

[125] International Treaty on Plant Genetic Resources for Food and Agriculture 2001, 2400 UNTS 303, Art. 9.2(c) (as per Art. 9.1, 'indigenous communities' are among the beneficiaries of this 'right to participate in making decisions').

[126] Human Rights Committee, *Poma Poma v. Peru*, UN Doc. CCPR/C/95/D/1457/2006, 24 April 2009, paras 7.5–7.6; ICCPR, *supra* note 51.

[127] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN Doc. A/61/49, 13 September 2007, Art. 5.

[128] The older ILO Convention no. 107 on Indigenous and Tribal Populations 1959, 328 UNTS 247, Art. 5(c), speaks of 'participation in elective institutions'.

The first limitation can be inferred from Article 46(2) thereof, which provides for the restriction of Indigenous rights 'for meeting the just and most compelling requirements of a democratic society'. This is buttressed by the preamble to the UNDRIP, which calls for 'cooperative relations between the State and indigenous peoples, based on principles of … democracy'.[129] In a legal instrument dedicated to the protection of Indigenous rights, a limitation clause is exactly the place where one would expect to find a reference to democracy in accordance with general human rights drafting practice.[130] The fact that democracy is couched as a limitation on Indigenous rights does not entail that the former is secondary to the latter. That is to say, a hierarchy of values – a categorical prioritization of Indigenous rights over democratic principles – does not follow, even when taking account of the Siracusa Principles.[131] The distinction between Indigenous rights as defensive rights, on the one hand, and participatory rights, on the other hand, matters. In their defensive guise, their function is to ward off the so-called 'tyranny of the majority' – as a shield against encroaching acts of state.[132] As for their participatory configuration, the challenge is to ensure that the tyranny of the majority is not converted into a tyranny of a minority (to the disadvantage not only of the majority but also of all other minorities living in the same society). This brings us to the second limitation of Indigenous rights.

The second limitation becomes clear from the wording of the provisions that guarantee specific participatory rights in the UNDRIP: in accordance with Article 27, second sentence, Indigenous peoples have a right to participate in adjudication processes 'pertaining to *their* lands, territories and resources'[133] and, more generally, as per Article 18, 'in decision-making in *matters which would affect their rights*, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'.[134] In addition, the UNDRIP requires consultation with Indigenous peoples 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative *measures that may affect them*'[135] and 'prior to the approval of any *project affecting their lands or territories and other resources*'.[136] Other provisions in the

[129] UNDRIP, *supra* note 127, Rec. 18.

[130] *Cf.* Universal Declaration of Human Rights (UDHR), GA Res. 217A (III), 10 December 1948, Resolution 71; ICCPR, *supra* note 51, Arts 21–22; International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3, Art. 4; Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222, Arts 8(2), 9(2), 10(2), 11(2); American Convention on Human Rights 1969, 1144 UNTS 123, Art. 22(3).

[131] United Nations (UN) Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, 28 September 1984, para. 3 ('[a]ll limitation clauses shall be interpreted strictly and in favour of the rights at issue').

[132] *Cf.* IACtHR, *Case of Gelman v. Uruguay*, Judgment (Merits and Reparations), 24 February 2011, para. 239.

[133] Emphasis added. See also Committee on the Elimination of Racial Discrimination, Concluding Observations on the Eighteenth to the Twentieth Periodic Reports of New Zealand, UN Doc. CERD/C/NZL/CO/18-20, 17 April 2013, para. 18.

[134] Emphasis added.

[135] UNDRIP, *supra* note 127, Art. 19 (emphasis added).

[136] *Ibid.*, Art. 32(2) (emphasis added).

UNDRIP establish the requirement of 'free, prior and informed consent' – which implies consultation as a necessary step[137] – in relation to matters affecting Indigenous peoples, such as relocation[138] or 'storage or disposal of hazardous materials … in the[ir] lands or territories'.[139] The UNDRIP participatory rights thus go further than the narrow reading of te Tiriti and its principles, which does not recognize a duty to consult on the part of the government even for matters that affect Māori.[140]

It should be noted that NZ has ratified the CBD and the UNCCD and, after initial resistance, endorsed the UNDRIP,[141] but it is neither a party to the ITPGRFA nor to the ILO's Convention no. 169. The UNDRIP is mentioned once in the FTAs under investigation when the parties 'note' the declaration.[142] This kind of provision is nugatory because it does not give the UNDRIP a status beyond the one it currently occupies in international law: taking 'note' cannot turn a resolution of the UN General Assembly into a legally binding instrument, bearing in mind that soft law may reflect customary international law.[143] In the following section, we will explore whether the level of Māori involvement in decision-making under the FTAs exceeds those international benchmarks and, in particular, what NZ constitutional law, as it stands, would demand.

C *FTA Framework*

The Māori interest in participation in the sphere of international economic law is spelled out throughout the FTAs. The agreements not only state the positive attitude of Māori towards trade in principle ('in enabling and advancing Māori wellbeing'),[144] which is not surprising in light of the history of Māori as a trading people,[145] but also concretize the primary Māori interest in the agreements – to wit, access to 'trade and investment opportunities', with a view to 'increased Māori participation in international trade and investment',[146] including 'access to new and existing supply

[137] Expert Mechanism on the Rights of Indigenous Peoples, Free, Prior and Informed Consent, UN Doc. A/HRC/39/62, 10 August 2018, para. 14.

[138] UNDRIP, *supra* note 127, Art. 10.

[139] *Ibid.*, Art. 29(2).

[140] See section 5.A of this article.

[141] See 'United Nations Declaration on the Rights of Indigenous Peoples', *UN Department of Economic and Social Affairs*, available at https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples.

[142] EU-NZ FTA, *supra* note 9, Art. 20.3(1)(a); UK-NZ FTA, *supra* note 8, Art. 26.3(d).

[143] For the legal nature of the UNDRIP, see van Genugten and Lenzerini, 'Legal Implementation and International Cooperation and Assistance', in J. Hohmann and M. Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples* (2018) 539, at 569–571; McCorquodale, 'Group Rights', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (2022) 359, at 378. *Contra* J. Anaya, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc. A/68/317, 14 August 2013, para. 61 ('to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight'). But see UNDRIP, *supra* note 127, Rec. 24 Preamble ('a standard of achievement to be pursued').

[144] EU-NZ FTA, *supra* note 9, Rec. 15 Preamble, Art. 20.2.2–3; UK-NZ FTA, *supra* note 8, Art. 26.2.8.

[145] M. Love and T. Love, 'Ngā Umanga – Māori Business Enterprise: History of Māori Enterprise', in *Te Ara: The Encyclopedia of New Zealand* (2010).

[146] EU-NZ FTA, *supra* note 9, Rec. 15 Preamble, Arts 20.2.6, 20.4, 20.5.2(a); UK-NZ FTA, *supra* note 8, Arts 26.4, 26.5.1(a).

chains'.[147] Regarding the level of participation, the FTAs distinguish between mandatory and facultative participation as well as domestic and international participation. We will investigate Māori participation in three respects: (i) participation in bodies established under the FTAs; (ii) cooperation activities with the other contracting party; and (iii) consultation in relation to the review of the FTAs.

1 Bodies Established under the FTAs

The bodies established under the FTAs can be further differentiated between FTA bodies and public consultation bodies that operate at the domestic level, displaying elements of deliberative democracy. We will appraise FTA bodies first. The Joint Committee established under the UK-NZ FTA,[148] being the top steering committee in charge of monitoring the operation of the agreement,[149] 'may … seek the advice of … Māori in the case of New Zealand … on any matter falling within the Joint Committee's functions'.[150] Because the Joint Committee is a bilateral body made up of 'senior officials or Ministers',[151] taking decisions 'by mutual agreement',[152] it is not obvious how that will work, even if the competent senior official or minister happens to be of Māori descent. This is because the Māori senior official or minister represents the NZ government and not some Māori organization. Therefore, it would have made more sense if the pertinent provision stipulated that the government position on the Joint Committee is to be determined subsequent to, and in light of, internal consultation with Māori. In any event, the 'may' is indicative that, barring the general review of the FTA, consultation with Māori is facultative as far as the work of the Joint Committee is concerned; in other words, under which circumstances advice is sought is up to the discretion of the NZ government.

Under the UK-NZ FTA, both the IP Working Group and the Inclusive Trade Sub-Committee envisage Māori representation. In the former case, Māori representation is facultative: 'Experts *may include*, among others, … appropriate Māori representatives.'[153] The primary function of the IP Working Group is to monitor the implementation of the IP chapter and to review it should an international instrument for the protection of traditional knowledge and traditional cultural expressions come to fruition or, alternatively, should NZ's geographical indications regime be substantively changed (for example, by virtue of the EU-NZ FTA).[154] As for the Inclusive Trade Sub-Committee, it 'shall be composed of representatives of each Party or their designees, and with Māori in the case of New Zealand';[155] Māori representation is, in short,

[147] EU-NZ FTA, *supra* note 9, Art. 20.5.2(b); UK-NZ FTA, *supra* note 8, Art. 26.5.1(b).
[148] UK-NZ FTA, *supra* note 8, Art. 30.1.
[149] *Ibid.*, Art. 30.2.1.
[150] *Ibid.*, Art. 30.2.2(f).
[151] *Ibid.*, Art. 30.1.
[152] *Ibid.*, Art. 30.4.1.
[153] *Ibid.*, Art. 17.14.1, n. 8 (emphasis added).
[154] *Ibid.*, Arts 17.14.3, 17.20, 17.33.1, 4(a). The EU-NZ FTA, *supra* note 9, *inter alia*, imposes a *sui generis* scheme for the protection of geographical indications for agricultural products or foodstuffs – in particular, cheeses, as per Articles 18.34, 18.40 thereof. See also European Union Free Trade Agreement Legislation Amendment Act 2024, Part 3, *New Zealand Legislation*, available at www.legislation.govt.nz.
[155] UK-NZ FTA, *supra* note 8, Art. 30.8.1.

mandatory. Accordingly, the functions of the subcommittee 'are to be carried out … in a manner sensitive to tikanga Māori', that is, 'Māori protocols, customs, and normal practice'.[156] At this juncture, it should be pointed out that tikanga systems can differ among iwi (Māori tribes).[157]

Under the EU-NZ FTA, domestic advisory groups are established for public consultation purposes, whereby NZ's 'domestic advisory group shall include Māori representatives'.[158] The domestic advisory groups are to hold annual meetings,[159] and their terms of reference are not confined to the environment and labour linkages as under the UK-NZ FTA.[160] Their designated function is rather to advise each party 'on issues covered by this Agreement … and … submit recommendations on the implementation'.[161] There is a certain overlap with the functions of the Civil Society Forum established under the EU-NZ FTA, which is to 'conduct a dialogue on the implementation of this Agreement'.[162] Again, '[i]n the case of New Zealand, the Civil Society Forum shall include Māori representatives'.[163] Māori representatives are included as a matter of international law, decoupling this issue from the constitutional question.

Domestic engagement under the UK-NZ FTA is less institutionalized and is reduced to a recognition of 'the importance of promoting greater engagement and participation from a range of domestic stakeholders' and to listing relevant chapters.[164] The engagement rights are quite weak, such as an acknowledgement of 'the importance of engaging with Māori in the long-term conservation of the environment'.[165] Māori representation is not explicitly mentioned in the independent advisory group for either environmental or labour matters.[166]

2 Cooperation Activities

Both FTAs contain chapters on 'Māori Trade and Economic Cooperation', the provisions of which are non-actionable.[167] In undertaking cooperation activities, the NZ government 'may invite the views and participation of … Māori in accordance with te Tiriti o Waitangi'.[168] As is apparent from the aforementioned Waitangi Tribunal

[156] *Ibid.*, Art. 30.8.2(c)(iv).

[157] For an overview, see 'He Poutama', *Law Commission* (21 September 2023), available at www.lawcom.govt.nz/our-work/tikanga-maori/tab/study-paper. For the status of tikanga within NZ law, see *Ellis*, *supra* note 60, para. 19 ('tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies').

[158] EU-NZ FTA, *supra* note 9, Art. 24.6.1, 4th sentence, reiterated in Art. 20.6.2, n., thereof.

[159] *Ibid.*, Art. 24.6.2.

[160] *Cf.* UK-NZ FTA, *supra* note 8, Arts 22.22, 23.14.

[161] EU-NZ FTA, *supra* note 9, Arts 20.6.2, 24.6.1–2.

[162] *Ibid.*, Arts 20.6.3, 24.7.1.

[163] *Ibid.*, Art. 24.7.3, 3rd sentence, reiterated in Art. 20.6.3, n., thereof.

[164] UK-NZ FTA, *supra* note 8, Art. 30.7; see, e.g., Art. 17.86, 2nd sentence.

[165] *Ibid.*, Art. 22.3.3(d).

[166] *Ibid.*, Arts 22.22, 23.14.

[167] EU-NZ FTA, *supra* note 9, Arts 20.7, 26.2.2(d); UK-NZ FTA, *supra* note 8, Art. 26.8.

[168] EU-NZ FTA, *supra* note 9, Art. 20.5.3; UK-NZ FTA, *supra* note 8, Art. 26.5.2.

report on the TPP, consultation, from a Māori perspective, is not optional in matters covered by those chapters, which 'go to the heart of the Crown-Māori relationship, and Māori Treaty interests',[169] such as scientific cooperation with Māori communities or facilitating cooperation between European and Māori-owned enterprises 'on trade in Māori products'.[170] Thus, on that basis, the permissive word 'may' seems misplaced. That said, when implementing the FTAs within the NZ legal system, 'may' is sufficiently flexible to be future compliant. What is more, the chapter on Māori Trade and Economic Cooperation is to be 'implemented … in a manner consistent with … the Treaty of Waitangi and where appropriate informed by te ao Māori, mātauranga Māori, tikanga Māori and kaupapa Māori'.[171] This being the case, a conflict with constitutional law can be avoided, however it may evolve in terms of Māori participatory rights in governance.

While cooperation under the Māori Trade and Economic Cooperation chapters 'may' be facultative,[172] this is not the case for the trade and gender equality linkage. Under both FTAs, the parties 'shall facilitate cooperation between relevant stakeholders', including Indigenous women.[173] This cooperation obligation is actionable under the EU-NZ FTA[174] but not the UK-NZ FTA.[175] Express cooperation with Māori under the EU-NZ FTA is confined to trade and gender equality and the chapter on Māori Trade and Economic Cooperation,[176] whereas the UK-NZ FTA envisages cooperation with Māori in the additional policy fields of digital trade and IP. This wider coverage of cooperation activities is, to a certain extent, reflective of 'the unique relationship that exists between Māori and the United Kingdom, noting that representatives of the British Crown and Māori were the original signatories to Te Tiriti o Waitangi'.[177]

Under the digital trade chapter of the UK-NZ FTA, 'each Party is encouraged to expand the coverage of government data and information digitally available for public access and use, through engagement and consultation with interested stakeholders, and Māori in the case of New Zealand'.[178] Māori are thus mentioned as 'interested stakeholders' to be consulted with respect to the expansion of open government data. It should be noted that the 'encouragement' refers to the expansion, not the consultation. The digital trade chapter provides for flexibility ('tailored approaches') when it comes to 'removing barriers to participation in digital trade' faced by Māori.[179] Those tailored approaches are to be 'developed in consultation with Māori'.[180] The pertinent article also lists cooperation activities with the UK to 'promote digital inclusion'.

[169] See section 5.A of this article.
[170] EU-NZ FTA, *supra* note 9, Art. 20.5.2; UK-NZ FTA, *supra* note 8, Art. 26.5.1.
[171] EU-NZ FTA, *supra* note 9, Art. 20.2.4; UK-NZ FTA, *supra* note 8, Art. 26.2.3.
[172] EU-NZ FTA, *supra* note 9, Art. 20.5.2; UK-NZ FTA, *supra* note 8, Art. 26.5.1.
[173] EU-NZ FTA, *supra* note 9, Art. 19.4.7; UK-NZ FTA, *supra* note 8, Art. 25.5.1, 1st sentence.
[174] *Cf.* EU-NZ FTA, *supra* note 9, Art. 26.2 (Ch. 19 is not mentioned therein).
[175] UK-NZ FTA, *supra* note 8, Art. 25.8.
[176] EU-NZ FTA, *supra* note 9, Arts 19.4.7, 20.5.
[177] UK-NZ FTA, *supra* note 8, Rec. 4 Preamble, Art. 26.2.1.
[178] UK-NZ FTA, *supra* note 8, Art. 15.17.2, 2nd sentence.
[179] UK-NZ FTA, *supra* note 8, Art. 15.20.1, 2nd sentence.
[180] *Ibid.*

However, except for subparagraph (d), the activities listed will have to be addressed domestically – that is: '(a) … promoting business development services; (b) identifying and addressing barriers to accessing digital trade opportunities; (c) improving digital skills and access to online business tools'.[181] As in the context of gender equality,[182] Māori consultation is mandatory here under the FTA. In contradistinction to that, Māori participation is merely envisioned if 'relevant and practicable' for cooperation activities in relation to IP.[183] As mentioned above, from a constitutional perspective, things might look different. Given the policy fields covered ('genetic resources, traditional knowledge, and traditional cultural expressions'),[184] Māori participation is mandatory according to the Waitangi Tribunal as per the Treaty principle of partnership.[185]

Having analysed Māori participation rights under the FTAs, we will move on to Māori consultation rights relating to review processes. Two can be distinguished: one concerning the agreement as such and one concerning a specific provision therein.

3 Input in Review

There is an explicit general review article in the UK-NZ FTA.[186] When reviewing the entire agreement, the Joint Committee '*shall* take into account … input sought from … Māori in the case of New Zealand'.[187] In connection with the review of the article on cross-border data flows under both FTAs, the NZ government, as seen, 'affirms its intention to engage Māori' on digital policy.[188] Yet the affirmation of an intention does not amount to a legal obligation. The problem with that provision is that it is neither fish nor fowl. The rationale behind the provision – its unilateral self-binding character – appears to be inward-looking and intended to pre-empt a possible complaint against the FTAs before the Waitangi Tribunal, as has happened in the cases of the CPTPP[189] as well as the TPP.[190]

In this section, we have explored the varied ways in which Māori participate under the two FTAs at hand. Table 1 juxtaposes the different areas of Māori participation in those agreements. Even though Māori participation under the FTAs may be facultative in some instances, as explicated before, there might be a constitutional right to participate for the benefit of Māori organizations. This concerns particularly the cooperation activities under the chapters on Māori Trade and Economic Cooperation. Conversely, depending upon the reading of NZ constitutional law to which one subscribes,[191]

[181] *Ibid.*, Art. 15.20.2.
[182] *Ibid.*, Art. 25.5.2.
[183] *Ibid.*, Arts 17.17.2, 17.19.2.
[184] *Ibid.*, Art. 17.17.2.
[185] See section 5.A of this article; see also Waitangi Tribunal, Ko Aotearoa Tēnei, Doc. Wai 262 (2011), paras 9.2.3–4, 9.2.8, 9.2.11.
[186] UK-NZ FTA, *supra* note 8, Art. 30.3.
[187] *Ibid.*, Art. 30.3.3(c) (emphasis added).
[188] EU-NZ FTA, *supra* note 9, Art. 12.4.5(b); UK-NZ FTA, *supra* note 8, Art. 15.22.2(b).
[189] Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Doc. WAI 2522, 19 November 2021.
[190] Waitangi Tribunal, *supra* note 68.
[191] See section 5.A of this article.

Table 1 Areas of Māori participation in the EU-NZ FTA and the UK-NZ FTA

Areas of Māori participation	**EU-NZ FTA**	**UK-NZ FTA**
Bodies established under the FTAs		
Trade/Joint Committee	Not expressly mentioned	Facultative
Inclusive Trade Sub-Committee	n/a	Mandatory
IP Working Group	n/a	Facultative
Advisory Groups	Mandatory	Facultative
Civil Society Forum	Mandatory	n/a
Cooperation activities		
Māori Trade and Economic Cooperation	Facultative	Facultative
Gender equality	Mandatory	Mandatory
Open government data/digital inclusion	n/a	Mandatory
IP	n/a	Facultative
Review		
Entire agreement	Not expressly mentioned	Mandatory
Cross-border data flows	Facultative	Facultative

Māori participation on NZ's part may be mandatory as a matter of international law, that is, as per the FTAs (such as in the field of gender equality), and not necessarily from the viewpoint of NZ law.

6 Concluding Remarks

In the past, FTAs have been used to lock in a particular economic doctrine with a view to furthering trade and investment liberalization. Modern FTAs are also used to actively protect other societal interests and values, including Indigenous rights. In the case of NZ, a domestic constitutional debate has reached the international arena – to wit, what is the proper relationship to, and involvement of, Māori as a group?

In terms of FTAs, Indigenous people are, like trade unions or employers' organizations, 'relevant stakeholders'[192] or 'interested stakeholders'.[193] But they are so much more than that. The core issue for NZ is whether and to what extent Māori – in the sense of organized entities – can and should exercise public powers, internally and externally. Under the FTAs, Indigenous customary protocols – tikanga Māori[194] – have gained international significance in that international cooperation has to be 'where appropriate informed by … tikanga Māori',[195] and an international committee has to be run 'in a manner sensitive to tikanga Māori' when dealing with Māori trade and economic cooperation with Māori.[196] In light of this enhancement, accessibility to

[192] EU-NZ FTA, *supra* note 9, Art. 20.5.2; UK-NZ FTA, *supra* note 8, Art. 26.5.1.

[193] UK-NZ FTA, *supra* note 8, Art. 15.17.2. For the phenomenon of 'multi-stakeholderism' in global governance, see Raustiala, 'Public Power and Private Stakeholders', in J. Pauwelyn *et al.* (eds), *Rethinking Participation in Global Governance* (2022) 457.

[194] See the definition in EU-NZ FTA, *supra* note 9, Art. 20.1(d); UK-NZ FTA, *supra* note 8, Art. 26.1.

[195] EU-NZ FTA, *supra* note 9, Art. 20.2.4; UK-NZ FTA, *supra* note 8, Art. 26.2.3.

[196] UK-NZ FTA, *supra* note 8, Art. 30.8.2(c)(iv).

tikanga, which is often oral, becomes an issue, especially for NZ's trading partners.[197] Furthermore, it is not clear how to address conflicting tikanga when different iwi follow differing protocols.[198]

This article has looked at the status of te Tiriti o Waitangi in NZ's FTAs and has demonstrated in what way te Tiriti has informed NZ's recent treaty drafting in that area. Commensurate with the UK-NZ FTA, the NZ government has 'assumed all rights and obligations' under te Tiriti.[199] This is an important affirmation ensuring that te Tiriti would not lose its relevance should NZ become a republic. As seen, te Tiriti's status within the NZ legal order is not settled.[200] On the one hand, as the law stands, it is not legally binding *eo ipso*; only principles derived therefrom, such as the principle of partnership, are by way of statutory references and case law. On the other hand, the FTAs stop short of elevating te Tiriti to the level of a constitution for NZ – 'a foundational document of constitutional importance to New Zealand'[201] – and confirm, internationally, that there are certain 'obligations under the Treaty of Waitangi' that the country owes to Māori.[202] Taken together, these are significant lock-ins, given that there is no consensus in the country around the Crown–Māori relationship.

In line with a broad reading of the principles of the Treaty of Waitangi, and as promulgated by the Waitangi Tribunal,[203] Māori assert stronger participatory rights than guaranteed under international law. Even democratic certainties – democratic equality and equal voting power[204] – are called into question against the UNDRIP, which, however, contains a non-derogation clause to that effect.[205] This transcends the notion of Indigenous rights as defensive rights ('autonomy or self-government in matters relating to *their internal and local affairs*', plus 'control by indigenous peoples over developments *affecting them and their lands, territories and resources*').[206] Whereas Indigenous rights, like other minority group rights,[207] are designed '[t]o ensure the

[197] G. Adlam, 'Tikanga: Respect, Trust and te Reo Key', *Capital Letter* (6 July 2023), available at www.capital-letter.co.nz/news/tikanga-maori/141837/tikanga-respect-trust-and-te-reo-key.

[198] *Cf. Hart v. Director-General of Conservation*, [2023] NZHC 1011, paras 117, 119 (High Court); *Ngāti Whātua Ōrākei Trust v. Attorney-General* (Judgment no. 4), [2022] 3 NZLR 601, at 606, 623, 632, 821; 'He Poutama', *supra* note 158, para. 8.132.

[199] UK-NZ FTA, *supra* note 8, Rec. 4 Preamble, Art. 26.2.1.

[200] See also the discussion in 'Regulating Lawyers in Aotearoa New Zealand', *NZ Law Society*, March 2023, at 102–103, 106–107, available at www.lawsociety.org.nz/assets/Independent-Review/IR-Report-Received/Regulation-of-lawyers-final-report-for-submission.pdf.

[201] EU-NZ FTA, *supra* note 9, Rec. 6 Preamble, Art. 20.2.1; UK-NZ FTA, *supra* note 8, Rec. 5 Preamble, Art. 26.2.2.

[202] UK-NZ FTA, *supra* note 8, Art. 32.5.1; EU-NZ FTA, *supra* note 9, Arts 12.1.2(c), 18.45, n. 1, 25.6.1.

[203] See, in particular, the pronouncements in relation to co-governance in note 6 above.

[204] UDHR, *supra* note 130, Art. 21(3); ICCPR, *supra* note 51, Art. 25(b) ('equal suffrage'). *Cf.* Petersmann, *supra* note 49, at 25.

[205] UNDRIP, *supra* note 127, Art. 37(2) ('[n]othing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements').

[206] *Ibid.*, Art. 4, in conjunction with Rec. 10 Preamble (emphasis added); see also Arts 20, 26, 31, 33–34 thereof; ICCPR, *supra* note 51, Art. 27; Convention on the Rights of the Child 1989, 1577 UNTS 3, Art. 30.

[207] While Indigenous and minority group rights are not congruent (*cf.* Puig, *supra* note 16, at 39, 42–43), the need for special protection of Indigenous rights subsides if the Indigenous population forms the majority in a democratically organized society.

cultural survival of vulnerable groups and to protect group identities from assimilation pressures'[208] – that is, to preserve the Indigenous realm – Māori rights rise above it: they approach the exercise of public power and, as far as foreign trade is concerned, external powers.

In connection with FTAs, one goal from a Māori perspective has been to secure a seat at the table – in other words, being in a position to influence decisions made in respect of matters covered by the FTAs. With respect to the two FTAs under investigation, this has only been partly achieved and is dependent upon the policy field concerned. Even the detailed provisions listing the respective FTA's benefits for Māori[209] appear to be rather inward-looking and intended to pre-empt a possible complaint against the FTAs before the Waitangi Tribunal. In regard to cooperation activities under the EU-NZ FTA, the parties 'may' coordinate with, and invite, Māori as relevant stakeholders.[210] The Joint Committee established under the UK-NZ FTA 'may … seek the advice of … Māori'.[211]

Still, the piecemeal guarantees under the FTAs in terms of Māori participation show the way for the further development of NZ constitutional law, bearing in mind that FTAs have no direct effect within NZ's dualist system. Importantly, self-imposing international obligations to protect Māori interests in FTAs locks the contemporary drift in an ongoing constitutional discourse. The use of international agreements to advance domestic constitutional causes in this way is remarkable and constitutes a reversal of past NZ practice to shield 'the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it', from international interference.[212]

Every country with an Indigenous population will need to find its own path towards the recognition of Indigenous rights and the consideration of Indigenous interests in political decision-making, including in the fields of foreign trade and investment. As expounded above, the NZ situation is exceptional due to the interstitial constitutional position of te Tiriti. This makes it difficult to transpose NZ legal thinking and its novel treaty drafting to other parts of the world. Whatever the regulatory approach chosen, negotiators representing Indigenous interests will face the task of explaining to their counterparts in what way Indigenous trade differs from other trade and, following from this, why it should be treated differently.[213] When it comes to foreign trade, it is not obvious that Indigenous peoples are 'more affected' by the intensified competition that ensues with new market entrants than other vulnerable societal groups.[214] The plain invocation of Indigenous rights, understood as exceeding defensive rights, is no panacea as it does not resolve the underlying issue of whether Indigenous rights trump the competing rights of others.

[208] *Cf.* N. Wenzel, 'Group Rights', in *Max Planck Encyclopedia of Public International Law* (2011), para. 7.
[209] EU-NZ FTA, *supra* note 9, Art. 20.4; UK-NZ FTA, *supra* note 8, Art. 26.4; see also Art. 30.7.
[210] EU-NZ FTA, *supra* note 9, Art. 20.5.2–3.
[211] UK-NZ FTA, *supra* note 8, Art. 30.2.2(f).
[212] Treaty of Waitangi exception, para. 2, 1st sentence.
[213] *Cf.* 'Digital Economy Partnership Agreement (DEPA) – Non-Paper from New Zealand: The Treaty of Waitangi', *Ministry of Foreign Affairs and Trade* (2019), available at www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Treaty-of-Waitangi-New-Zealand-August-2019.pdf.
[214] For the relevance of 'affectedness' to the question of civil society participation in international institutions, see von Bernstorff, *supra* note 51, at 126–128, 147–157.