TE TIRITI O WAITANGI ASSESSMENT OF THE SECOND PROTOCOL TO AMEND THE AGREEMENT ESTABLISHING THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AREA (AANZFTA)

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CONTENTS

INTRODUCTION

1. This Tiriti o Waitangi Assessment of the Second Protocol to the ASEAN Australia New Zealand Free Trade Agreement (AANZFTA) has been prepared by Ngā Toki Whakarururanga as mandated in the Mediation Agreement with the Crown in the Wai 2522 Inquiry into the Trans-Pacific Partnership Agreement (TPPA).[1]

2. The National Interest Analysis written by the Crown claims that "care has been taken to ensure there are no commitments that would impair the Crown's ability to fulfil its obligations to Māori".

3. This assessment sets out to balance the Crown's National Interest Analysis by reviewing the AANZFTA against the Crown's obligations under Te Tiriti o Waitangi and aims to hold the Crown accountable before a decision is made on whether the FTA should be ratified. It is informed by our Kaupapa:

> *Recognising He Whenua Rangatira ("We are an Independent and Sovereign Nation"), our duty and responsibility is to protect and advance Māori rights according to Te Tiriti o Waitangi me He Whakaputanga o te Rangatiratanga o Nu Tireni, and to hold the Crown to account to meet its responsibilities under Te Tiriti and He Whakaputanga in the arena of trade policy, negotiations and agreements.*

4. The original AANZFTA between the ten ASEAN Member States, Australia and Aotearoa New Zealand was signed in 2009 and entered into force in 2010. The second protocol to amend the AANZFTA was signed in August 2023. The original agreement was limited in scope because it was almost 15 years ago and involved many developing countries.

5. This revision has added substantial new obligations that have Tiriti implications. For example, a new chapter on electronic commerce raises issues addressed in the Waitangi Tribunal findings in Wai 2522 that the e-commerce chapter in the Trans-Pacific Partnership Agreement/ Comprehensive Agreement for Trans-Pacific Partnership (TPPA/CPTPP) breached the Crown's Tiriti obligations.

6. The latest text also retains controversial elements of the original agreements, notably special protections for foreign investors that they can enforce directly against the government in offshore tribunals, seeking massive awards of damages. The Coalition Government is currently adopting a range pro-investor laws and policies that are hostile to Te Tiriti o Waitangi; this investor-state dispute settlement (ISDS) power could have serious consequences for future attempts to reverse them.

[1] The Mediation Agreement is Annexed to the Waitangi Tribunal Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2021, and at https://ngatoki.nz/wp-content/uploads/2024/06/2b-final-mediation-agreement-signed.pdf

7. Indigenous Peoples live in the territories of many of the countries in this agreement and will also be affected by this Agreement. Yet the text basically ignores their existence. Māori are mentioned in the actual text only in the outdated and inadequate 2001 Treaty of Waitangi Exception that the Crown continues to include, despite promises to revisit it. There are four specific references to Māori and Tiriti in annexes on services and investment, discussed below. This reflects genuine attempts by the Crown, with input from Ngā Toki Whakarururanga, to secure more effective protections. However, this assessment is clear that the Agreement still fails to meet the Crown's Tiriti obligations.

8. This Tiriti-based assessment will measure AANZFTA against the Crown's obligations under the four articles of Te Tiriti o Waitangi and is organised into seven parts:
    1. Te Tiriti o Waitangi and Indigenous Peoples
    2. Investment and Investor-State Dispute Settlement
    3. Mātauranga Māori, data and digital trade rules
    4. Māori Producers
    5. Trade and Sustainable Development
    6. Protections and Exceptions
    7. Tiriti Assessment and the Way Forward

PART 1. TE TIRITI O WAITANGI & INDIGENOUS PEOPLES

9. Ngā Rangatira and the British Crown together established He Whakaputanga o Te Rangatiratanga o Nu Tireni in 1835 and signed Te Tiriti o Waitangi in 1840. Both guaranteed that Māori would continue to exercise tino rangatiratanga, or complete control over their people, resources and lives, while the Crown assumed responsibility for its own.

10. The four articles of Te Tiriti underpin this assessment:

    Kawanatanga – Article 1: Government exercises authority over its own and any authority positively delegated by Māori, subject to the obligation to recognise rangatiratanga and ensure the protection of Māori rights, interests, duties and responsibilities.

    Tino Rangatiratanga - Article 2: Rangatira have unfettered ongoing power and responsibility to ensure the exercise of Māori authority collectively over their own affairs and resources in a manner consistent with tikanga Māori.

    Oritetanga - Article 3: Māori and the Crown's people have parity and equity in rights and outcomes, meaning equal rights to define and pursue aspirations according to a people's fundamental principles, laws and beliefs.

He Whakapono - 4th Article: guarantees the active protection of philosophies, beliefs, faiths and laws.

11. The authority of Rangatiratanga includes the power of Rangatira to make international treaties that affect Māori duties, responsibilities, rights and interests. Māori have never conceded nor delegated that authority to the Crown. The constitutional relationship of Rangatiratanga to Kāwanatanga must underpin any international treaty that is entered into by Aotearoa New Zealand. Ngā Toki Whakarururanga and other Māori entities have repeatedly insisted that Māori need to be at the decision-making and negotiating tables as an independent party equal to the Crown. Ngā Toki Whakarururanga is currently pursuing the recognition of this authority in the Constitutional Kaupapa (Wai 3300) inquiry before the Waitangi Tribunal.

12. Contrary to the Tiriti relationship of Rangatiratanga and Kāwanatanga, the Crown considers itself to have the exclusive authority to negotiate international treaties on behalf of the state of Aotearoa New Zealand. As with previous FTAs, Kāwanatanga exercised exclusive control over the AANZFTA negotiations. Ministers of the Crown made the high-level decisions, including the negotiating mandate, on advice of Ministry of Foreign Affairs and Trade (MFAT) officials who conducted the negotiations. The Crown alone decided what proposals and trade-offs should be made, what the final text should say, how the agreement should be governed and the provisions for review. Once the AANZFTA comes into force there is no seat at the table for Māori in the governance arrangements to try to influence implementation.

13. Despite repeated requests from Crown officials, the ASEAN parties were not even willing to allow the text to be shared on a confidential basis during the negotiations. Ngā Toki Whakarururanga's input was limited to comments to MFAT on specific matters that MFAT officials referred to those trade pūkenga who had signed a confidentiality agreement. This information could not be shared. Without information, Māori who are affected by and have an interest in these negotiations cannot effectively promote and protect their responsibility and interests and, where necessary and appropriate, to hold those Māori who are involved in dialogue with the Crown to account.

14. Ngā Toki Whakarururanga's restricted interactions with officials were friendly and constructive, but had a limited impact on the final text. The revised agreement makes no reference to He Whakaputanga o Te Rangatiratanga o Nu Tireni or Te Tiriti o Waitangi. As discussed in Part 6, Māori and The Treaty of Waitangi are mentioned only in the outdated 2001 Treaty of Waitangi Exception. [2] There are four references in the New Zealand-specific annex on services and investments that reserves the Crown's ability to deviate from some of the rules in those chapters.

15. It is not just Māori who are invisible. There are Indigenous Peoples in many AANZFTA countries who also have the intrinsic right to self-determination – Rangatiratanga in their own spheres. The majority of the 12 state parties are signatories to the UN Declaration on the Rights of

[2] Article 18.5

Indigenous Peoples (UNDRIP) which recognise that. Although the AANZFTA affects the rights and responsibilities of those Indigenous Peoples, the original 2009 text ignored their existence. Nothing has changed in the latest "refreshed" version: in the 33-chapter agreement, just two footnotes refer to "indigenous"; these refer to "indigenous traditional practice and contemporary cultural expression" in the context of the "creative arts" within a general exception that is very hard to satisfy.[3]

16. This silence comes at a time when Aotearoa New Zealand and Australia claim a commitment to addressing the nexus between Indigenous Peoples and trade agreements, "enabling and empowering Indigenous Peoples, promoting Indigenous Peoples' perspectives and voices and recognising and respecting the importance of developing, expanding and facilitating trade and investment opportunities for Indigenous Peoples including through Indigenous-led processes".[4] Ngā Toki Whakarururanga has been critical of these steps as inadequate when measured against both Te Tiriti and the UNDRIP.[5] The silence on Indigenous Peoples in AANZFTA is a step backwards even from those approaches.

PART 2. INVESTMENT & INVESTOR-STATE DISPUTE SETTLEMENT

17. The original AANZFTA gave expansive rights and guarantees to foreign investors who were investing, or seeking to invest, in the other parties. This includes equal treatment to local investors and not imposing requirements on the foreign investors, such as local content (including local processing), as a condition of investment. The investors also gain special protections against new laws, regulations, decisions of courts, denial of consents, or other actions taken at central or local government level that may have a significant negative impact on their value or profits.

18. Investors from the other parties can sue the New Zealand government directly in an international arbitral tribunal for alleged breaches of the AANZFTA through what is known as Investor-State Dispute Settlement (ISDS). The investors can seek hundreds of millions, or even billions, of dollars in damages for breaches of their special protections. ISDS has become very controversial internationally. Governments all over the world have been withdrawing from similar agreements because of the threat to their sovereignty and the awarding of massive windfalls to foreign investors by arbitrators who are often criticised as having conflicts of interest.

19. The mere threat of an ISDS dispute may have a "chilling effect" on the Crown's willingness to adopt Tiriti-compliant approaches that investors oppose because it would adversely affect their investments. This was a major issue in initial Wai 2522 inquiry on the TPPA. The Tribunal

[3] Footnotes 1 and 2 to the General Exception in Chapter 18, Article 1.3 and 1.4
[4] Inclusive Trade Action Group (ITAG) Joint Statement on Sustainable and Inclusive Trade, 26 February 2024, Adbu Dhabi, https://www.dfat.gov.au/trade/organisations/wto-g20-oecd-apec/inclusive-trade-action-group-and-global-trade-and-gender-arrangement/mc13-abu-dhabi-inclusive-trade-action-group-itag-joint-statement-sustainable-and-inclusive-trade
[5] Ngā Toki Whakarururanga ITAG Review of the CPTPP, 21 Piripi 2023, https://ngatoki.nz/treaty_assessments/itag-review-of-the-cptpp/

outlined concerns about the potential chilling effect of threats to bring such a dispute on the willingness of a government to adopt Tiriti compliant policies, measures or decisions.[6] Although it felt unable to speculate on the extent of prejudice given the information available, the Tribunal urged the Crown to develop a protocol to apply should such a dispute arise. That Protocol falls short of the Tribunal's proposals and is not Tiriti-compliant as it leaves all the power with the Crown.[7] Similar issues were addressed in National Freshwater and Geothermal Resources Claim relating to the Mixed Ownership Model back in 2012; that was resolved by the then government pledging that it would not succumb to such pressures.[8]

20. The evidence of legal and fiscal risks has since become more compelling. In 2017 the Labour-New Zealand First coalition government adopted a policy of no ISDS in future agreements. The current Coalition Government has apparently maintained that policy. But both the Labour and now the Coalition Governments have agreed to keep ISDS in this revised AANZFTA. There are two new, limited restrictions on its application,[9] but these do not remove the serious risks to the adoption of Tiriti-compliant policies, laws and decisions in Aotearoa New Zealand.

21. In the TPPA/CPTPP the Crown sought bilateral side letters by which some Parties opted out from applying ISDS in relation to New Zealand. This included several countries that are also parties to AANZFTA. But those side-letters only applied to the TPPA/CPTPP and did not neutralise the continued operation of ISDS in AANZFTA. Australia and New Zealand have similar side-letters in all their agreements. However, the Crown has not secured any additional side-letters from ASEAN countries in this revised AANZFTA.

22. This situation poses a genuine legal, policy and financial risk with potential flow-on effects to compliance with te Tiriti. The ISDS powers in AANZFTA are currently being used by Australian mining billionaire Clive Palmer to sue his own government through a back door reincorporation in Singapore over matters he lost on in the Australian domestic courts.[10] Palmer is currently claiming A$300 billion from the Australian Government under three ISDS claims, two under AANZFTA.

23. This example highlights the risks associated with the Coalition Government policies, including the Fast Track Approvals Bill. Future reversal of that policy and legislation, or even tightening up of the rules and processes, such as requirements for and withholding of tangata whenua consent, could result in an ISDS dispute lodged via an ASEAN country, such as Singapore, Malaysia or Indonesia. The threat may have a chilling effect, and even if the claim proceeds and is dismissed, defending it will cost the Crown many millions of dollars.

[6] Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement, Wai 2522, 2016, at 41-42, 45, 50-52
[7] https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/an-isds-protocol
[8] Waitangi Tribunal, Stage 1 Report of the National Freshwater and Geothermal Resources Claim, Wai 2358, 2012, pp.129-134
[9] Chapter 18 Article 6 protects a decision under a foreign investment screening mechanism from a state-state or an investor-state dispute.
[10] https://www.iisd.org/itn/en/2024/01/13/billionaire-clive-palmer-files-another-arbitration-against-australia/

24. The AANZFTA requires a review of ISDS to begin within 18 months of entry into force, to be completed within 12 months (which will not happen if they fail to agree).[11] Removing or restricting ISDS through that review would require consensus of all the Parties. If they were unwilling to do so during these negotiations, there seems little prospect of them changing their position in another 3 years.

PART 3. MĀTAURANGA MĀORI, DATA AND DIGITAL TRADE

25. Te Tiriti affirmed continued Rangatiratanga and Kaitiakitanga responsibilities in relation to taonga, mātauranga Māori and whakapapa. That authority and those duties apply today to the digital ecosystem, including data.

26. The Waitangi Tribunal's Report on the Wai 2522 inquiry in November 2021 found that the electronic commerce (digital trade) rules in the TPPA/CPTPP could restrict the adoption of Tiriti-based governance and protections in the future, and prejudice Māori Tiriti rights, interests and responsibilities in relation to mātauranga Māori. It said

> "*the question of governance and control of Māori data"* involves *"matters fundamental to Māori identity, such as whakapapa, mana, mauri and mātauranga."*[12]

27. The Tribunal found the Crown had breached its obligation of active protection of mātauranga Māori and that the protections in the TPPA/CPTPP, which includes the Treaty of Waitangi Exception, were inadequate:

> *"We are not convinced that reliance on exceptions and exclusions is sufficient to meet the active protection standard. ... We conclude that there is a material risk of regulatory chill and risk arising from the precedent and ratchet effect of the CPTPP e-commerce provisions."*[13]

28. The Tribunal recognised there was a serious risk that repeating these Tiriti breaches would create precedents that become so embedded that they are impossible to remedy and stressed that protections were not a matter for the Crown to decide alone:

> "*However hard it may be, the question of the appropriate level of protection for mātauranga Māori in international trade agreements, and the governance of the digital domain, is first and foremost a matter for dialogue between te Tiriti/the Treaty partners."*[14]

29. Despite that, the Crown has agreed to similar rules in the revised AANZFTA. A new e-commerce chapter guarantees the right of tech companies, including the tech giants, to

[11] Chapter 11 Article 17
[12] Waitangi Tribunal, Report on the CPTPP, November 2021 (Wai 2522) pp.180-182
[13] Waitangi Tribunal, Report on the CPTPP, November 2021 (Wai 2522) p. 185
[14] Waitangi Tribunal, Report on the CPTPP, November 2021 (Wai 2522) p. 174

transfer and store data, including Māori data, offshore. It is quite similar to the Regional Comprehensive Economic Partnership Agreement (RCEP) that includes the same countries and came into force in January 2022. However, the RCEP chapter is not enforceable. The AANZFTA's rules will be enforceable immediately or within 3 years (for all except the least-developed countries).

30. That shift raises the stakes for Māori as it adds another agreement that will be hard to undo. The AANZFTA has some variations on the TPPA/CPTPP flexibilities and exceptions, but they have multiple conditions that remain problematic.[15]

31. There is also a New Zealand-specific protection that applies to rules in the services and investment chapter. It is similar to the carveout in EU FTA digital trade chapter that provides the best level of protection to date, although it raises some difficult issues of interpretation.[16] The EU FTA carveout applies to measures the Crown

> *deems necessary to protect or promote Māori rights, interests, duties and responsibilities in respect of trade enabled by electronic means, including in fulfilment of its obligations under Te Tiriti o Waitangi/The Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or] as a disguised restriction on trade in services and investment.*

32. Clearly, the Crown was not able to get this included as a carveout in the e-commerce chapter in AANZFTA. Whether and how far it applies to the rules in that chapter requires some quite complex legal interpretation of a cross-over provision with the services chapter. It appears not to apply to the core data rules, which were a major concern in the Waitangi Tribunal inquiry because they can foreclose future possibilities of Māori data sovereignty and digital governance.

33. The only way to fix this is to amend the text of the e-commerce chapter or through a robust and comprehensive agreement-wide Tiriti o Waitangi Exception, neither of which are in AANZFTA.

34. The UK FTA, which also reiterated the TPPA/CPTPP rules, scheduled a review on grounds that specifically refer to the Waitangi Tribunal's findings and the intention to engage with Māori to ensure the review takes account of New Zealand's need to support Māori to exercise their rights and interests, and to meet its responsibilities under Te Tiriti/The Treaty. There is no such review scheduled in the AANZFTA.

[15] Chapter 10, Articles 17 and 18

[16] The phrases "in respect of" and "trade enabled by electronic means" are potentially narrower than the scope of the rules in services and investment chapters. The final phrase also imposes some very problematic conditions (known as the "chapeau").

PART 4. MĀORI PRODUCERS

35. The National Interest Analysis is very muted when describing potential benefits to Māori businesses, most of which appear to rely on highly speculative gains from "trade facilitation":

> *A high proportion of New Zealand's trade with ASEAN is in significant sectors for the Māori economy. The trade facilitation benefits described in section 7.1.2 will also accrue to Māori businesses. The growing Māori economy is increasingly engaging in international trade, and in 2021 Māori authorities and other Māori enterprises exported around $1.1 billion of goods – the highest on record.*[17]

36. There is a generalised cooperation provision to assist Small and Medium Enterprises, but unlike the recent UK and EU FTAs it does not even refer to Indigenous Peoples.

37. It is unclear without a detailed comparison of all New Zealand's current agreements whether the chapters on Sanitary and Phytosanitary Measures and on Standards, Technical Regulations and Conformity would pose additional complications for production, certification and export of hua parakore and organics or rongoā Māori. These are matters of concern raised in relation to other agreements and negotiations, but there was no engagement on these issues during the course of these negotiations.

38. The flexibilities for "legitimate objectives" in those chapters do not include references to compliance with obligations to Indigenous Peoples. While both chapters impose legal obligations, the risks are reduced by soft language for some key provisions and the exclusion of the SPS chapter from state-state dispute settlement.

PART 5. TRADE AND SUSTAINABLE DEVELOPMENT

39. There is a new Chapter 13 on Trade and Sustainable Development. There is nothing in the chapter that recognises Te Taiao or Indigenous Peoples' values, worldviews, or leadership.

40. The chapter itself lacks any substance and is unenforceable. Most of the provisions use "recognise", "affirm", "respect" language about aspects of sustainable development, including labour and environment.

41. Ngā Toki Whakarururanga is concerned, however, that the subjects listed for economic cooperation activities include the "green" and "blue" economy. Those concepts commonly involve exploitation of Te Taiao in ways that are incompatible with Rangatiratanga and Kaitiakitanga and there is no recognition here that mana whenua have responsibilities in relation to those resources. These are issues being pursued by Ngā Toki Whakarururanga in the Waitangi Tribunal Priority Kaupapa Inquiry on the Climate Crisis (Wai 3325).

[17] MFAT, National Interest Analysis, pages 7 and 56

PART 6. PROTECTIONS AND EXCEPTIONS

42. The NIA, written by the Crown, claims that "care has been taken to ensure there are no commitments that would impair the Crown's ability to fulfil its obligations to Māori".[18]

43. The existence of an exception for measures the Crown adopts in relation to the Treaty of Waitangi is itself a recognition that the FTA's rules may conflict with Te Tiriti/The Treaty. However, the Crown has been unwilling to fix the well-traversed inadequacies of the 2001 Treaty of Waitangi Exception set out below and instead tries to insert additional protections in strategic parts of the Agreement that simply can't be reconciled with Rangatiratanga, Tikanga and Kaitiakitanga in Te Ao Māori.

44. Even where the Crown tries to do so, other Parties have proved unwilling to recognise Indigenous Peoples or agree to specific exceptions for Aotearoa New Zealand. The Tiriti breaches lie in the nature of these agreements, not simply with the approach of the Crown.

Treaty of Waitangi Exception

45. The Crown's National Interest Analysis falsely claims that The Treaty of Waitangi Exception "is designed to ensure that nothing in the NZ-UK FTA [sic] would prevent the Crown from meeting its obligations to Maori."[19]

46. The wording of the Treaty of Waitangi Exception in Chapter 18 Article 5 is unchanged from the original AANZFTA:

> *Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi. The Parties agree that the interpretation of the Treaty of Waitangi, including the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 20 (Consultations and Dispute Settlement) shall otherwise apply to this Article …*

47. This Exception dates back to the NZ Singapore FTA in 2001. In the urgency hearing on TPPA the Waitangi Tribunal concluded that the Treaty Exception was not perfect and did not accept the Crown's claim that nothing in the agreement would prevent the Crown from meeting its Treaty obligations. Despite that, the Tribunal concluded that the Exception "was likely to provide a

[18] MFAT, National Interest Analysis, page 7
[19] MFAT National Interest Analysis page 55

reasonable degree of protection" to Māori - but it urged the Crown and Māori to enter into dialogue on its wording.[20]

48. The Tribunal's subsequent report on the TPPA/CPTPP e-commerce chapter went further, finding that all the exceptions in the CPTPP taken together, which included the Treaty of Waitangi Exception, did not provide effective protection for affected Māori rights and interests under Te Tiriti.[21]

49. The Crown's own Trade for All Advisory Board encouraged dialogue on a stronger protection than the current Treaty Exception, a recommendation which the Cabinet declined to accept.[22]

50. The Wai 2522 Mediation Agreement provides for dialogue between claimants and the Crown to identify options for a different exception.

51. Despite all this, the same Treaty of Waitangi Exception remains unchanged in the "modernised" AANZFTA.

52. There are numerous well recognised problems with the wording:

    (i) The Exception only covers policies, laws, actions or decisions of the Crown that give "more favourable treatment" to Māori. The Treaty Exception would not protect regulatory changes that adopt general Tiriti- and tikanga-based policies that breach the FTA, or general laws and policies on matters of particular concern to Māori, such as water or mining.

    (ii) Additional conditions must be satisfied: the Crown's measure must not be considered arbitrary or unjustifiable discrimination or impose disguised barriers to trade.

    (iii) The Exception refers only to The Treaty of Waitangi. It does not acknowledge te Tiriti o Waitangi, which invites the Crown to reduce its Tiriti obligations to the English text or to some version of the "principles" of the Treaty, including what might be adopted through the proposed Principles of the Treaty Bill.

    (iv) While other parties to AANZFTA cannot challenge the Crown's interpretation of The Treaty of Waitangi and its obligations therein, they could challenge whether another aspect of the exception applies, including whether it involves "more favourable treatment".

[20] https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_104833137/Report%20on%20the%20TPPA%20W.pdf
[21] https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf
[22] https://www.mfat.govt.nz/assets/Trade-General/Trade-policy/Trade-for-All-report.pdf

(v) A dispute would be judged by a panel of foreign trade experts. Māori would have no right to participate. The Waitangi Tribunal report on the e-commerce chapter of the TPPA/CPTPP recognised that would be seriously problematic.[23]

(vi) The Exception refers only to the provision dealing with disputes between states under the FTA. It does not refer to the controversial ISDS process, so an investor can argue that the exception does not apply to disputes it brings against the government. That was a major concern to the Waitangi Tribunal in Wai 2522.

(vii) The Crown's subsequent development of a "protocol" in the case of an ISDS dispute where Tiriti issues arise is not Tiriti-compliant.[24] It does not empower Māori affected by the dispute and leaves all the power of what, if anything, to argue in the hands of the Crown, and the decision making in the hands of investment arbitrators who are renowned for being pro-investor and have no understanding of Te Tiriti and tikanga Māori.

(viii) The effectiveness of the Treaty Exception also relies on the Crown recognising there is a Tiriti issue, being prepared to act on it when doing so would breach the FTA's rules, and being willing to defend its actions by invoking the Treaty Exception if it is challenged. An illustration of that problem arose with the e-commerce chapter in the TPPA, where Crown negotiators did not see there was a Tiriti issue, even though the Tribunal subsequently described the issue at stake – mātauranga Māori – as going to the heart of Māori identity.

<u>Other Tiriti and Māori exceptions</u>

53. There are three other specific references to Māori in the agreement.

(i) The explanatory note to the Annex of reservations for the trade in services and investment chapters preserves "*the right to regulate for legitimate policy objectives, including the promotion and protection of the rights, interests, duties and responsibilities of Māori related to Te Tiriti o Waitangi/the Treaty of Waitangi*".[25] However, this right to regulate is still subject to obligations adopted in the AANZFTA. It does not override those obligations unless the right to do so has been expressly reserved. At most, it provides some support for interpreting other reservations in that Annex.

(ii) The protections for electronic transactions on services and investment, discussed above, is limited by the wording "trade enabled by electronic means" and requirements to not being used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in services and investment. This also

[23] https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf
[24] https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/an-isds-protocol
[25] Annex 3, List A para 8 and List B, para 8

does not appear to apply to key rules in the electronic commerce chapter affecting Māori data.

(iii) There is a reference to culture and creative arts in the reservations to the services and investment chapters:

> *New Zealand reserves the right to adopt or maintain any measure necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value.*[14]
>
> [14.] *"Creative arts" include ngā toi Māori (Māori arts), the performing arts – including theatre, dance, and music, haka (traditional Māori posture dance), waiata (song or chant) – visual arts and craft – such as painting, sculpture, whakairo (carving), raranga (weaving), and tā moko (traditional Māori tattoo) – literature, film and video, language arts, creative online content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution, and interpretation of the arts; and the study and technical development of these art forms and activities*.

This is limited to services and investment and the right to provide support for the creative arts. It does cover moves to protect those taonga from exploitation, for example digitally through the e-commerce chapter or under the intellectual property chapter. It is further limited by the word "necessary", which is a term of art in trade law to mean the least necessary to achieve that purpose. That can be contested and end up before a panel of trade experts with no knowledge of or empathy with Te Ao Māori.

A more generic reference to "creative arts", including "indigenous traditional practice and contemporary cultural expression" is included in the General Exceptions on goods and services. Again, this is limited to providing "support" for the creative arts and is subject to the "necessity" test and the chapeau that the support does not involve arbitrary or unjustifiable discrimination or a disguised trade advantage.

(iv) The Intellectual Property chapter has a weak provision (Article 9) on cooperation relating to Genetic Resources, Traditional Knowledge and Folklore that does not refere to Indigenous Peoples, adds nothing to what governments can already do and remains subject to restrictions under other international agreements:

> *Subject to each Party's international obligations, each Party may establish appropriate measures to protect genetic resources, traditional knowledge and folklore.*

PART 7. TIRITI ASSESSMENT AND THE WAY FORWARD

54. This is the third Tiriti assessment conducted by Nga Toki Whakarururanga. It highlights once again the failure of the Crown in both the process and substance of the AANZFTA to meet its Tiriti obligations.

55. ***Kawanatanga – Article 1*:** Government exercises authority over its own and any authority positively delegated by Māori, subject to the obligation to recognise rangatiratanga and ensure the protection of Māori rights, interests, duties and responsibilities.

    Assessment: The Crown has exceeded that authority by asserting a unilateral and exclusive right to negotiate and implement this Agreement.

56. ***Tino Rangatiratanga - Article 2**:* Rangatira have unfettered ongoing power and responsibility to ensure the exercise of Māori authority collectively over their own affairs and resources in a manner consistent with tikanga Māori.

    Assessment: The Crown has denied the exercise of Rangatiratanga in the process of negotiation and in the rules and institutional arrangements it has adopted. Selective consultation on specific texts under conditions of confidentiality with no authority over decisions is not Rangatiratanga.

57. ***Oritetanga - Article 3**:* Māori and the Crown's people have parity and equity in rights and outcomes, meaning equal rights to define and pursue aspirations according to their fundamental principles, laws and beliefs.

    Assessment: There is nothing in this agreement that reflects the responsibilities and aspirations of Māori according to tikanga.

58. ***He Whakapono - 4th Article**:* guarantees the active protection of philosophies, beliefs, faiths and laws.

    Assessment: There is no active protection that would guarantee the exercise of tikanga, including kaitiakitanga, over matters affected by this Agreement.

59. The Crown needs to bring the Tiriti relationship of Rangatiratanga and Kawanatanga into the 21st century through trade agreements that are truly transformative, not a continuation of the status quo. It seems determined not to do so.

60. There have been small steps to increase protections *for the Crown* to implement what it considers Tiriti/Treaty obligations. But these are inadequate and remain within a framework that is alien, and sometimes hostile, to Māori responsibilities, duties, rights and interests in He Whakaputanga and enshrined in Te Tiriti o Waitangi. Ngā Toki Whakarururanga will bring these arguments to the Waitangi Tribunal Constitutional Kaupapa inquiry (Wai 3300), firstly in the priority hearing on the climate crisis, and then in the fuller inquiry into constitutional transformation.