

# NGĀ TOKI WHAKARURURANGA

## BRIEFING PAPER ON DIGITAL SOVEREIGNTY AND GOVERNANCE

IPEF – Singapore Round, May 2023

Ngā Toki Whakarururanga brings a Te Tiriti o Waitangi perspective to the trade policy space, which requires the Government of Aotearoa New Zealand (the Crown) to uphold and actively protect Māori rights to exercise authority over our lands, waters, resources and all taonga, including data and the digital ecosystem, as well as Māori laws, beliefs and philosophies.

**We are deeply concerned that the IPEF in its various pillars, especially Pillars 1 and 2, will contain rules that, if adopted by Aotearoa New Zealand, would breach the Crown's obligations to Māori under Te Tiriti o Waitangi, as occurred under the TPPA/CPTPP. We are determined to see that does not happen.**

### INDIGENOUS RIGHTS IN THE DIGITAL DOMAIN

- ☉ Knowledge/information/data – mātauranga – is fundamental to Māori being. It is a “taonga” over which Māori exercise rangatiratanga or supreme authority under Te Tiriti o Waitangi.
- ☉ Māori have rights, interests, duties and responsibilities to preserve, protect and continue to develop our mātauranga (knowledge – in all its forms) and ensure it is used for the collective good.
- ☉ United Nations Rapporteurs on Health and on Privacy have highlighted the need to develop regimes for indigenous data sovereignty and governance of the digital ecosystem, consistent with Indigenous Peoples' rights and state parties' commitments in The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Special Rapporteur on Privacy in his report on Big Data and the right to privacy in 2017:

*“encourages Governments and corporations to recognise the inherent sovereignty of indigenous peoples over data about them or collected from them, and which pertain to indigenous peoples' knowledge systems, customs or territories.”*

### CPTPP BREACHED NZ'S TIRITI OBLIGATIONS TO MĀORI

- ☉ In 2020 The Waitangi Tribunal found that the rules in the electronic commerce chapter of the Trans-Pacific Partnership Agreement/Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPPA/CPTPP) breached the Crown's obligations to protect mātauranga Māori and the future ability to establish a system of indigenous data sovereignty and governance.
- ☉ The Waitangi Tribunal said:

*“Because mātauranga Māori is at the heart of Māori identity it is not an interest or consideration that is readily amenable to some form of balancing exercise when set against other trade objectives, or the interests of other citizens or sectors.”*

*“We are not convinced that reliance on exceptions and exclusions [which includes the Treaty of Waitangi Exception] is sufficient to meet the active protection standard. ...<sup>1</sup>*

- ☉ We are working with the Government of Aotearoa NZ to remedy these breaches in the CPTPP and DEPA, and prevent them recurring in future trade agreements, including IPEF.

<sup>1</sup> Waitangi Tribunal, *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, (Wai 2522), 183, 170, November 2021, published 2023

[https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_195473606/Report%20on%20the%20CPTPP%20W.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_195473606/Report%20on%20the%20CPTPP%20W.pdf)

## POTENTIAL IMPACTS OF IPEF ON INDIGENOUS KNOWLEDGE AND IDENTITY

Based on past experience, existing US agreements, and tech lobbyists demands, we foresee:

- ☉ Closure of policy space and policy options to meet state obligations under Te Tiriti o Waitangi and UNDRIP.
- ☉ Rules on data that entrench the control of Big Tech over the digital ecosystem, including a near-monopoly on the raw material of data and the ability to set the terms for participation by Indigenous Peoples and businesses in the digital domain.
- ☉ Secrecy of source codes and algorithms that perpetuate racism, profiling and other bias and protect violators from scrutiny and accountability.
- ☉ Ability of offshore digital operators to circumvent domestic jurisdiction and effective enforcement.
- ☉ “Transparency” rules that empower Big Tech, and the US, lobbies to seek changes to existing laws, and to prevent the adoption of new laws, they don’t like, such as indigenous data and governance regimes.

## EFFECTIVE PROTECTIONS IN IPEF MUST ...

- ☉ Ensure that Parties retain their domestic policy space, including through a comprehensive carve-out to protect the rights, interests, responsibilities and duties of Indigenous Peoples. Aotearoa NZ has proposed such a carveout in the Joint Statement Initiative on E-commerce being negotiated by some members of the WTO:

*1. Nothing in this Agreement shall preclude a Party/Member from adopting or maintaining measures it deems necessary to protect or promote rights, interests, duties, and responsibilities of indigenous peoples in its territory, including in fulfilment of its obligations under its legal, constitutional or Treaty arrangements with those indigenous peoples.*

*2. The Parties/Members agree that the interpretation of a Party’s/Member’s legal, constitutional or Treaty arrangements with indigenous people in its territory, including as to the nature of its rights and obligations under it, shall not be subject to the dispute settlement provisions in this agreement.<sup>2</sup>*

- ☉ Ensure that governments can require that data, including financial data and data governed by telecommunications rules, is held within the source country to enable the effective governance of the digital eco-system, including a regime of indigenous data sovereignty and digital governance.
- ☉ Ensure that any rules, such as those on source codes and algorithms and presence of cross-border suppliers of digital and digitalised services, enable effective and proactive identification of human rights breaches, legal action, and enforcement of decisions, by public agencies and bypersons who are adversely affected.
- ☉ Require effective protection of *collective* privacy, including of metadata, not just providing a regime for the privacy of an individual’s personal information.
- ☉ Provide positive incentives for Indigenous Peoples, and Indigenous small businesses to develop digital systems and digital products based on Indigenous values, including through public procurement and local preferences, and reject any rules that constrain those developments.
- ☉ Reject proposals in IPEF that empower Big Tech corporations, or foreign states, to seek changes to existing laws or to lobby against new laws and policies that provide effective protections for Indigenous peoples.

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<sup>2</sup> See the full text in WTO, Discussion Paper on Digital Inclusion Language for Consideration by JSI Participants. Communication from New Zealand, INF/ECOM/70, 25 November 2022. <https://www.mfat.govt.nz/assets/Trade-agreements/WTO-e-commerce-negotiations/Joint-Statement-Initiative-on-E-commerce-discussion-paper-on-Digital-Inclusion.pdf>