



INPUT FROM NGĀ TOKI WHAKARURURANGA TO THE ITAG REVIEW OF THE CPTPP: SUMMARY

21 Pipiri 2023

Ngā Toki Whakarururanga has its origins in the Waitangi Tribunal claim (Wai 2522) lodged in 2015 that the Trans-Pacific Partnership Agreement (TPPA), and later its successor the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), breached the obligations of the Crown (the New Zealand Government) under Te Tiriti o Waitangi.

The Mediation Agreement adopted in November 2020 between the claimants and the Crown provided for the establishment of Ngā Toki Whakarururanga, with a commitment to ensure it would exercise effective and genuine influence over all stages of trade policy and negotiations.

The Kaupapa and mandate of Ngā Toki Whakarururanga is to uphold the rangatiratanga o ngā hapū affirmed in He Whakaputanga o te Rangatiratanga o Nu Tirenī and Te Tiriti o Waitangi to ensure the Crown is acting in a Te Tiriti-compliant manner in relation to trade policies and agreements it enters into on behalf of Aotearoa New Zealand.

Ngā Toki Whakarururanga has prepared a detailed input into New Zealand's three-year review of the CPTPP, conducted as part of the Inclusive Trade Action Group (ITAG) that was established under the Joint Declaration for the Fostering of Inclusive and Progressive Trade between Aotearoa New Zealand, Canada and Chile. We appreciate the Crown's willingness to co-design the Indigenous Peoples' section of its ITAG Review and to ensure that our voice is heard by attaching our memorandum to its report. Our memorandum is also available at www.ngatoki.nz.

Ngā Toki Whakarururanga's input to and reflections on the ITAG Review cover the following:

- A. Rangatiratanga and Indigenous Self-determination
- B. Compliance with Te Tiriti o Waitangi Obligations to Māori in the TPPA/CPTPP:
 - i) Article 29.6 Treaty of Waitangi Exception
 - ii) Taonga Species: Chapter 18 (Intellectual Property) Article 18.7.2 & Annex 18-A
 - iii) Digital: Chapter 9 (Investment), Chapter 10 (Cross-border Services), Chapter 11 (Financial Services) & Chapter 14 (Electronic Commerce)
 - iv) The Climate Crisis: Chapter 9 (Investment) & Chapter 20 (Environment)
 - v) Natural Resources, Chapter 9 (Investment) Section B: Investor-State Dispute Settlement, Chapter 10 (Cross-border Services)

- vi) Mātauranga Māori and Kaitiakitanga (other than digital): Chapter 10 (Cross-border services), Chapter 18 (Intellectual Property), Chapter 20 (Environment)
- vii) Hua Parakore and Genetic Modification: Chapter 2 Section C (Agriculture)
- viii) Waipiro/Alcohol: Chapter 8 (Technical Barriers to Trade), Chapter 9 (Investment), Chapter 10 (Cross-border Services), Chapter 26 (Transparency)
- ix) Rongoā: Chapter 8 (Technical Barriers to Trade), Chapter 18 (Intellectual Property)

C. Assessing the Economic Impacts of the CPTPP for Māori

For the reasons set out in the memorandum, among others, we believe that the TPPA/CPTPP fails to provide the necessary protections for Māori rights, interests, duties and responsibilities under Te Tiriti o Waitangi and He Whakaputanga.

As we have noted in previous kōrero and submissions to MFAT over the past few years, Ngā Toki Whakarururanga perceives real and present risks to Māori and Indigenous Peoples generally, from the current approach to the negotiation of free trade agreements, including the TPPA/CPTPP, that is almost exclusively commercially driven even though their scope is much broader. Our worldview and perspectives on these matters are crucial to bring a much needed and unique balance to these discussions and negotiations. That is why it is important for Māori and Indigenous Peoples to have a seat and a voice around the negotiating tables. This is what Te Tiriti promised Māori – tino rangatiratanga me o rātou taonga katoa.

However, recognising the limitations of the ITAG Review to address these fundamental issues, we are recommending a number of interim steps towards Tiriti-compliance that we urge the Crown to take, and for the ITAG to support, through a revised Joint Declaration and Work Programme, and in the forthcoming review of the TPPA/CPTPP itself.

We **recommend** that the Crown:

- (a) *proposes to the other ITAG Parties the adoption of an institutional arrangement that ensures Indigenous Peoples have rights of representation and effective participation in decision-making in all ITAG activities, consistent with the UN Declaration and Te Tiriti o Waitangi;*
- (b) *seeks the support of the other ITAG Parties, as an implementation issue, for a revision of the TPPA/CPTPP's institutional arrangements in the forthcoming CPTPP review to ensure the Agreement provides rights of representation and effective participation of Māori and other Indigenous Peoples in decision-making, consistent with the UN Declaration and Te Tiriti o Waitangi;*
- (c) *proposes to extend the scope of the Joint Declaration to include examining and addressing the negative as well as positive impacts of the TPPA/CPTPP on Māori and other Indigenous Peoples, to be included in the next ITAG Work Programme;*
- (d) *seeks agreement from other ITAG Parties, as part of their Work Programme, to co-design with Indigenous Peoples who live in the territories of those parties a broad and comprehensive Indigenous rights carveout to the CPTPP and to propose the adoption of that carveout during the forthcoming review of the CPTPP;*

- (e) as part of the current ITAG review, informs the ITAG Parties that the ongoing Te Pae Tawhiti process is likely to have implications for the Intellectual Property chapter of the CPTPP that may require it to seek a review of that chapter, and specifically that the Crown may need to revisit the sui generis legislation developed pursuant to Annex 18-A on UPOV 1991 in light of the outcome of the Te Pae Tawhiti review, and seeks their support to take these necessary steps;*
- (f) conveys the findings of the Wai 2522 Waitangi Tribunal on CPTPP Chapter 14 Electronic Commerce, and the Crown's obligations under Te Tiriti o Waitangi, to the other ITAG Parties and seeks their support for the adoption of a comprehensive Indigenous rights carveout in Chapter 14 in the forthcoming review of the CPTPP. Failing that, any lesser measures need to be more robust than those in the EU NZ FTA and co-designed with Māori and other Indigenous Peoples to the point of final drafting and adoption;*
- (g) seeks the support of the other ITAG Parties to promote, as an implementation issue, the exclusion of ISDS from the CPTPP during the forthcoming review; for those Parties that have signed side-letters with New Zealand committing to the non-application of ISDS to extend them to cover all agreements between them; and for ITAG Parties that have not yet signed such side-letters to do so;*
- (h) seeks the support of the other ITAG Parties to initiate, as part their Work Programme, a thorough review of how non-conforming measures in Investment and Cross-border Services chapters of CPTPP can provide better protection for measures that are based in whole, or in part, on meeting the Parties' obligations under Te Tiriti o Waitangi and/or the UN Declaration, and take action to implement those findings in the forthcoming CPTPP review;*
- (i) seeks agreement from other ITAG Parties to conduct, as part of their Work Programme, an Indigenous-led investigation of the implications of CPTPP provisions relating to biotech and GMOs for the right of Māori and other Indigenous Peoples to exercise rights, interests, duties and responsibilities in relation to food, seeds, and the natural domain consistent with Te Tiriti o Waitangi and the UN Declaration, and to take action to ensure more effective protection for them during the review of the CPTPP itself;*
- (j) works with experts in Kaupapa Māori methodology and the Productivity Commission in Aotearoa to develop an appropriate methodology that combines embodied data and narratives to allow a fully informed assessment of the implications of the TPPA/CPTPP for Māori, through the lens of Te Ao Māori; and*
- (k) seeks the support of the ITAG Parties to incorporate a similar initiative to (j) into the ITAG Work Programme to develop a broadly common methodology based on Indigenous knowledge systems for future use in assessing the implementation and impacts of the TPPA/CPTPP on all affected Indigenous Peoples.*