NGĀ TOKI WHAKARURURANGA

TE TIRITI O WAITANGI ASSESSMENT OF THE AGREEMENT ON CLIMATE CHANGE, TRADE AND SUSTAINABILITY (ACCTS)

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INTRODUCTION

1. This Tiriti o Waitangi Assessment of the Agreement on Climate Change, Trade and Sustainability (ACCTS) 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. At the United Nations Climate Change Conference (COP25) in Madrid in December 2019, Costa Rica, Fiji, Iceland, New Zealand, Norway and Switzerland announced they were launching negotiations to "apply trade rules and trade-related measures to contribute to the global efforts to limit the temperature increase". After 15 rounds of negotiations, the conclusion of an Agreement on Climate Change, Trade and Sustainability between four of the six countries - Costa Rica, Iceland, New Zealand and Switzerland was announced on 2 July 2024. The Agreement was signed in Lima, Peru on 16 November 2024.

3. The text of the agreement has remained secret throughout the negotiations and was still not released when the parties announced its conclusion. The text was only made public after the signing on 16 November 2024. The Crown's National Interest Analysis (NIA) that, in practice, seeks to justify the agreement, followed several days later.[2]

4. This Tiriti assessment sets out to balance the Crown's NIA by reviewing the ACCTS against the Crown's obligations under Te Tiriti o Waitangi before a decision is made on whether the agreement should be ratified. It is informed by Ngā Toki Whakarururanga's kaupapa:

> *Recognising He Whenua Rangatira ("We are an Independent and Sovereign Nation"), our duty and responsibility is to protect and advance Māori rights and obligations 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.*

5. Despite reference to Climate Change and Sustainability in its title, we conclude that the ACCTS shows no genuine commitment to the environment and makes no material contribution to mitigating the climate crisis. The Crown's trade liberalisation agenda provided no space for the recognition and exercise of rangatiratanga, and the responsibilities of kaitakitanga, in relation to te Taiao, consistent with tikanga Māori, which could have helped to provide a meaningful outcome.

6. Instead, the ACCTS uses the pretense of a climate agreement to advance economic interests by liberalising goods and services, just like any other free trade agreement, and makes a minimalist

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

[2] MFAT, Agreement on Climage Change, Trade and Sustainability. National Interest Analysis, November 2024, https://www.mfat.govt.nz/assets/Trade-agreements/ACCTS/ACCTS-NIA-draft-contents-outline-15-November-2024.pdf

commitment to limit fossil fuel subsidies. Trade Minister Todd McClay conceded as much in his press release that accompanied its signing:

> *ACCTS is about opening new markets, growing domestic jobs, and adding value across the economy. As more countries join, the economic benefits will only grow.*[3]

7. While this assessment focuses on Aotearoa, we also acknowledge the other Indigenous Peoples whose traditional territories are located within the geographical boundaries of the majority of states involved in these negotiations. As with Māori, they have fundamental responsibilities, duties, rights and interests as guardians of their homelands that are impacted upon by the climate crisis. They also all have rights under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to self-determination and to participate in decisions in matters that affect their rights. Yet they have also been excluded from these negotiations.

8. As a result, Indigenous Peoples, and Indigenous values, responsibilities, and solutions to the climate crisis, are invisible in the ACCTS. Indigenous Peoples are mentioned in the text only twice: once in the Preamble and once as an "endeavour" to engage them alongside "other stakeholders" in implementing an agreement they had no role in negotiating. The only reference to te Tiriti o Waitangi is the outdated and largely irrelevant Treaty of Waitangi Exception, which the Crown's NIA continues to claim "reserves the policy space for the Government to fulfil its obligations to Māori including under the Treaty",[4] when it is fully aware that it does not.

9. This Tiriti-based assessment will measure the ACCTS against the Crown's obligations under the four articles of Te Tiriti o Waitangi. It is organised into five parts:

    1. Te Tiriti o Waitangi, Rangatiratanga, UNDRIP and the ACCTS Process
    2. The ACCTS: A Fake "Solution" to the Climate Crisis
    3. Te Tiriti, the Climate Crisis and the Waitangi Tribunal Climate Inquiry
    4. Exceptions and Protections
    5. Tiriti o Waitangi Assessment

[3] "NZ signs trade deal with Costa Rica, Iceland and Switzerland", 16 November 2024, https://www.scoop.co.nz/stories/PA2411/S00116/nz-signs-trade-deal-with-costa-rica-iceland-and-switzerland.htm
[4] National Interest Analysis, p.27

PART 1. TE TIRITI O WAITANGI, RANGATIRATANGA, UNDRIP, AND THE ACCTS PROCESS

10. 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.

11. 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.

12. 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 therefore 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.

13. 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 New Zealand. As with previous FTAs, the Crown exercised exclusive control over the ACCTS negotiations and outcomes, far exceeding its limited authority under Te Tiriti in the international domain.

14. Complementing Te Tiriti o Waitangi, all the negotiating parties have adopted the UNDRIP, or in the case of Fiji has announced it will do so. That includes the intrinsic right to self-determination – rangatiratanga in their own spheres. As noted above, despite the rights and responsibilities of

Indigenous Peoples in relation to the climate crisis, they have been excluded throughout the ACCTS negotiations and the agreement fails to reflect an Indigenous worldview and solutions to the mounting climate emergency.

15. In the Mediation Agreement, the Crown committed to ensure that Ngā Toki Whakarururanga has genuine and meaningful influence over trade policy and negotiations. However, attempts to influence the ACCTS were made under strict conditions of confidentiality. For most of the negotiations that did not include the actual text, because not all the other states would allow that. The information the Crown did provide could not be shared with other Māori. Without access to real information, that meant Māori who are affected by and have an interest in the climate crisis could not effectively promote and protect their responsibilities and interests. Equally, they were unable to hold those Māori who are in limited dialogue with the Crown to account, where necessary and appropriate.

16. The Crown's NIA summarises Ngā Toki Whakarururanga's Tiriti-based inputs during the course of these negotiations, and critique of the ACCTS failure to meet the Crown's Tiriti obligations, thus:

> *Ngā Toki Whakarururanga has provided feedback on the ACCTS, including through the attached Annex 1. Ngā Toki Whakarururanga's criticisms of the Agreement included: its lack of recognition of Māori leadership, tikanga (custom/protocol) and mātauranga (knowledge); lack of specific references to the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP), amongst other international instruments; the lack of direct role for Māori in its negotiation and implementation; its position that the Treaty of Waitangi clause does not provide adequate protections for Māori; the absence of reference to "Te Tiriti o Waitangi"; the scope of environmental services commitments; and the Agreement's perceived lack of impact in alleviating climate change.*[5]

17. Our attempts to shift the ground towards a Tiriti-compliant approach that reflects Indigenous values and solutions had zero impact on the final text, which shows no genuine commitment to the environment, to genuinely addressing the climate emergency, or to empowering Māori and other Indigenous Peoples to "contribute to efforts to pursue sustainable development objectives" as promised in the ACCTS Preamble.

[5] National Interest Analysis, p.26.

PART 2. A FAKE "SOLUTION" TO THE CLIMATE CRISIS

18. Ngā Toki Whakarururanga prepared a detailed assessment of the ACCTS, which is annexed to the Crown's NIA[6]. It sets out in more detail the points made in the introduction above.

> *The Mediation Agreement between Ngā Toki Whakarururanga and the Crown commits to ensure that Māori have genuine and meaningful influence over trade policy and negotiations at every stage. That has not occurred with this agreement, despite the disproportionate impacts of the climate crisis on Māori as evidenced by repeated climate-related disasters in recent years.*
>
> *The text was kept secret throughout the negotiations and was only provided to our trade pūkenga on a confidential basis as, when and how the Crown has decided to do so. There was no consultation on several critical entries in the schedule of commitments on environmental and environmentally-related services (including foreign investment) that are intended to provide protections for Māori.*
>
> ***Indigenous Peoples are invisible in the ACCTS***
>
> *The ACCTS is even weaker than the IPEF [Indo-Pacific Economic Framework] "clean economy" agreement in giving effect to te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples on trade and climate change. There is a single passing reference to Indigenous Peoples, which is located in the Preamble. That "emphasises" the essential role of the environment in the wellbeing of citizens and communities, "including Indigenous Peoples", and the importance of their contribution to Sustainable Development.*
>
> *Nothing in the rest of the agreement addresses the major threats to the environment that endanger the wellbeing of Indigenous Peoples; nothing provides any role for them to make that "important contribution"; and nothing recognises the leadership of Māori and other Indigenous Peoples in finding and delivering solutions to the climate crisis. Specifically in terms of Te Tiriti o Waitangi, there is nothing that recognises and gives effect to the fundamental responsibilities of rangatiratanga and kaitiakitanga or the application of tikanga Māori in the trade and climate space.*
>
> *The only specific reference to Māori in the text is the inadequate 2001 Treaty of Waitangi Exception. This applies only to "more favourable treatment" to Māori and is subject to the standard, and contestible, trade agreement chapeau on arbitrary or unjustified discrimination or disguised restriction on trade in goods, services and investment.*
>
> *The Crown is fully aware of the limitations of this exception and that it will not provide effective protection, for example, for Tiriti-related measures that restrict foreign investment in, and impose conditions on, a variety of environmentally-related services. Many Waitangi*

[6] National Interest Analysis, pp.29-32

Tribunal claims, and active protests by affected hapū and hapori, show how sensitive these services are and how critical it is that the Crown meets its Tiriti obligations in relation to them. It has not done so here.

19. The assessment provided to MFAT challenged the agreement a sham that seeks to advance trade liberalisation objectives while pretending to address the climate crisis.

This is not an agreement on climate change

The stated aim of the ACCTS is to foster the contribution of international trade to addressing climate change and other serious environmental challenges in 4 ways:

1. *Liberalising trade in "environmental goods";*
2. *Liberalising trade in "environmental and environmentally related services";*
3. *Disciplining and eliminating "harmful fossil fuel subsidies";*
4. *Providing guidelines fo voluntary eco-labelling.*

This agreement is not a bona fide initiative to address the climate crisis. It is essentially a vehicle for the four parties (New Zealand, Switzerland, Costa Rica and Iceland) to achieve the liberalisation of trade in environmental goods and services that they have sought in the WTO for many years.

20. Ngā Toki Whakarururanga's commentary to MFAT observed that:

No credible evidence has been provided that liberalisation of these products and services through the ACCTS will advance climate mitigation or adaptation, especially when the Parties are free to liberalise those services and remove import duties unilaterally. They do not need the ACCTS to do that.

At the same time, the agreement does not address <u>the</u> major trade issue which could make a difference in Aotearoa New Zealand, which is greenhouse gas emissions from agriculture, or other priorities such as forestry practices that have devastated Māori communities.

The only potentially meaningful element is Chapter 4 to discipline and eliminate 'harmful' fossil fuel subsidies, but that chapter is full of conditions, safeguards and exceptions. These were presumably negotiated to satisfy oil-producing Norway, which then declined to join the final agreement.

21. In relation to trade in goods, the four state parties sought to link the removal of tariffs on more than 300 environmental goods (including solar panels, wind and hydraulic turbines, electric vehicles, wool fibre, recycled paper, electric static converters, and wood products) to "climate change" and "sustainability" by claiming that "elimination will make such products cheaper to buy, thereby incentivising use and investment in related technologies".[7] This makes numerous

[7] Joint Ministerial Statement on Conclusion of the Negotiations for the Agreement on Climate Change, Trade and Sustainability, 2 July 2024, https://www.mfat.govt.nz/en/media-and-resources/joint-ministerial-statement-on-conclusion-of-negotiations-for-the-agreement-on-climate-change-trade-and-sustainability

questionable assumptions: that the ACCTS was necessary to achieve these tariffs cuts, which can be adopted unilaterally; that new technologies will replace old ones, when the same products may just be imported from a different country (trade diversion); that the lower prices will be passed on to consumers and change their consumption patterns; and above all, that the miniscule market size of these four countries would have any signficant impact at all.

22. When Trade Minister Todd McClay announced the conclusion of the ACCTS, he effectively confirmed that the ACCTS was really just another trade liberalisation agreement, describing it as

> *"opening up commercial opportunities for New Zealand businesses by focusing on trade in sustainable goods and services. Crucially for New Zealand it will see tariffs removed on key exports including 41 wood products and wool. It will also remove tariffs on hundreds of other products, including wool fibre, slag wool for insulation, recycled paper along with energy saving goods like LED lamps and rechargeable batteries. In addition, it supports New Zealand's renewable energy sector by establishing rules to prevent harmful fossil fuel subsidies; and sets guidelines for ecolabelling."*[8]

23. The Minister reinforced this "business-as-usual" export-driven agenda in his statement at the time of signing:

> "*ACCTS is about opening new markets, growing domestic jobs, and adding value across the economy. As more countries join, the economic benefits will only grow."*[9]

24. The same economic rationale applies to the trade in services aspect of the ACCTS, which liberalises and restricts the regulation of over 100 (of an approximate total of 160) services sub-sectors, which are described as "environmental and environmentally related". New Zealand has been seeking, unsuccessfully, to achieve this level of liberalisation of trade in services in the World Trade Organization for years.

25. In an attempt to legitimise these services as being related to the environment and climate change, the long list of eligible services excludes a number of services-related investments that *"*may significantly harm one or more environmental purposes". These include a number of services that the Coalition Government's Fast-Track policy seeks to advance, and which Māori have insisted will harm the environment and the climate. By excluding them from the ACCTS list, the government appears to agree. Ngā Toki Whakarururanga pointed this out to the Crown in its comments on the proposed agreement.

> ***The ACCTS confirms that Coalition Government policies harm the environment***
>
> *We note that the list of services sectors, subsectors, or parts thereof that are defined as "environmental and environmentally related services" in Annex IV ... "excludes parts of services subsectors which may significantly harm one or more environmental purposes"*

[8] https://www.beehive.govt.nz/release/nz-wood-and-wool-benefit-through-new-trade-deal
[9] https://www.scoop.co.nz/stories/PA2411/S00116/nz-signs-trade-deal-with-costa-rica-iceland-and-switzerland.htm

*listed in Annex III (Environmental Purposes – Trade in Environmental Services). Certain parts of service sectors or subsectors marked with * were identified as having a greater risk of significantly harming an environmental purpose in Annex III (Environmental Purposes – Trade in Environmental Services).*

This List excludes any services supplied in relation to the following activities because they are deemed to significantly harm at least one environmental purpose: Unsustainable logging; Mining (including, inter alia, mining for coal, oil and gas); and Oil, gas and coal exploration and extraction, as well as any related activities.

This confirms what many hapū, iwi, other Māori and many others have said: the policies of the current Coalition Government to promote mining, and oil and gas exploration and extraction, including the proposed Fast Track Approval Bill, will have serious adverse effects on the environment and intensify the Climate Crisis.

26. Ngā Toki Whakarururanga's commentary emphasised to MFAT the real world implications for Māori of liberalising many of the "environmental" services on the list:

Our initial comments on the early version of the schedule drew attention to the extreme sensitivity of such services relating to te Taiao, especially sewage (right from the earliest Waitangi Tribunal claims on the Manukau Harbour, Motunui Outfall and Kaituna River), waste disposal (the current Dome Valley issues, and disposal of toxic wastes at industrial sites), and sanitation (the tikanga relating to noa). Private, and foreign, providers are actively involved in all these areas and they will subcontract other private companies. Measures that "affect" those services become subject to the ACCTS disciplines. We do not believe that the Treaty of Waitangi Exception or the horizontal limitations provide effective protection.

Similar concerns apply to services incidental to agriculture, forestry and logging. The forestry commitment applies to "services directly linked to sustainable forest management". The Crown will be fully aware of concerns that Māori have been effectively excluded from applying mātauranga and exercising kaitikitanga in relation to Indigenous and plantation forests to ensure sustainability and prevent further disasters arising from unsustainable and profit-driven forestry practices. This commitment would guarantee foreign firms the right to provide those services, further marginalising Māori.

The agriculture commitment applies to consultancy services that directly contribute to sustainable farming practices, on-farm climate change mitigation or adaptation practices, organic agriculture, or natural resource management and conservation". These are all practices in which Māori currently apply unique approaches sourced in mātauranga Māori and applied according to tikanga. While recognising this commitment is limited to consultancy services, there are similar concerns that this could further marginalise Māori practices and practitioners. The Treaty Exception and horizontal limitations would not assist.

Both forestry and agriculture are examples where the Preamble could have been given genuine effect to provide sustainable solutions relating to trade and climate change that are Māori led and underpinned by mātauranga and tikanga Māori. Instead, the schedules provide guarantees for foreign services providers who have no responsibilities to or understanding of Te Taiao and Te Ao Māori.

27. The only part of the ACCTS that could potentially impact on the climate crisis is the chapter on fossil fuel subsidies, which aims to reduce support and incentives to use fossil fuels. But the wording for this has been so diluted that it would have no effect. The subsidies have to meet the definition of "harmful". Using the mechanism set up in the chapter for assessing the net total price of emissions from fossil fuel use is optional. And the restrictions on existing and new fossil fuels subsidies are full of complicated conditions and exceptions. Presumably, that was the work of Norway as the main subsidiser among the six participating countries, which then did not sign the agreement anyway.

28. The chapter on fossil fuel subsidies explicitly does not apply to the allocation of units in the emission trading scheme of a Party, shielding New Zealand's de facto subsidies through the design of the ETS and by excluding agriculture. It also only applies to fossil fuel subsidies, not to fossil fuel extraction that would capture the Coalition's reversal of the ban on new offshore oil and gas exploration.

29. The analysis provided to MFAT concluded that:

    In sum, the ACCTS will not make one iota of difference to the climate emergency and does not provide effective and active protection for Māori responsibilities, duties, rights and interests and the Crown's obligations under Te Tiriti o Waitangi.

    These issues have been raised in the Statement of Claim to the Waitangi Tribunal Inquiry on Climate Change on behalf of Ngā Toki Whakarururanga. The ACCTS will form part of our arguments in that claim.

PART 3. TE TIRITI, THE CLIMATE CRISIS AND THE WAITANGI TRIBUNAL CLIMATE INQUIRY

30. Ngā Toki Whakarururanga is a party to the Waitangi Tribunal inquiry into the Climate Crisis (Wai 3395). The inquiry has been given priority by the Tribunal, with the first hearings for the inquiry in the week of 25 November.

31. Ngā Toki Whakarururanga's argument and evidence is grounded in the Tiriti-based understanding that Māori retain the authority to treat in the international domain. Dr Moana Jackson refers to this as one of the inseparable constituent parts of power, mana or tino rangatiratanga:

> ***The power to treat*** *- that is the power to negotiate and commit to formal collective agreements with other polities. … This expansive reach necessarily presupposed that mana was an absolute political and constitutional power. … It was of course always bound by tikanga but it was a totalising authority that could not be tampered with by that of another polity. … Mana was in fact absolutely inalienable … to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible. … [T]he right to treat was also fundamentally inalienable and would never, could never, be ceded or delegated to another polity to exercise on one's behalf.*

32. The role of Kāwanatanga in international treaty making is therefore constrained by the ongoing constitutional authority of mana and the exercise of rangatiratanga, and the principle of Kāwanatanga is to be understood accordingly.

33. The statement of claim argued that:

> *Commitments in trade and investment agreements, and climate change treaties, made by the Crown unilaterally, purporting to act on behalf of all Aotearoa New Zealand, adopt concepts, legal and economic instruments, technologies and techniques, and practices, such as extractivist and financialised "solutions", and reflect western worldviews and capitalist interests, that are antithetical to tikanga, Māori values, mātauranga and kaitiakitanga. The inclusion of references that purport to reflect and give effect to Māori and Indigenous Peoples' values and knowledge in such agreements compound those contradictions.*
>
> *Investment agreements, or investment chapters of trade agreements, that have been unilaterally adopted by the Crown confer special rights on foreign investors to protect their assets and future profits from measures taken to mitigate the climate emergency, including compliance with Te Tiriti o Waitangi. The mechanism of investor-state dispute settlement (ISDS) empowers foreign investors to enforce those rights extra-territorially through controversial private international arbitral tribunals, claiming hundreds of millions or even billions of dollars in compensation. This ISDS mechanism is so discredited that the Crown has determined since 2017 not to include it in agreements. Yet it continues to apply in existing*

agreements, constituting a grave potential prejudice to Tiriti-based measures to address the climate crisis, including a chilling effect on the adoption of such measures.

The normative, disciplinary, and often enforceable nature of trade and investment agreements creates actual and potential prejudice to the claimants and other Māori by deferring necessary action to address the climate crisis, denying their role and responsibilities in addressing and mitigating the climate crisis, and deterring or chilling the Crown from taking effective steps to meet its obligations to Māori in relation to that crisis.

The resulting undermining of te iwi Māori and mana whenua, including the ability to protect the whenua from further degradation and carbon extraction (kaitiakitanga) and themselves against the impacts of climate change, including the effects of growing CO2 emissions (rangatiratanga), in a manner consistent with tikanga Māori, is prejudicial to the wellbeing of te Taiao, te oranga o te iwi and future generations.

34. It concludes that these actions, omissions and consequences breach the Crown's obligations by:

    (a) refusal to recognise and enable the exercise of rangatiratanga under "***Te mātāpono o te tino rangatiranga me mana Motuhake****";*

    (b) exceeding the Crown's conferred authority under "***Te mātāpono o te kawanatanga/ the principle of kāwanatanga****";*

    (c) denying "***Te mātāpono o te whakaaronui tētahi ki tētahi; the principle of mutual recognition and respect"*** and a Tiriti-based relationship of Rangatiratanga to Kāwanatanga under "***Te mātāpono o te houruatanga/the principle of partnership";***

    (d) failing to ensure the right and ability of Māori to exercise their responsibilities, duties, rights and interests under Te Tiriti, consistent with "***Te mātāpono o te mataporore moroki/ the principle of active protection";*** and

    (e) ignoring and preventing application of mātauranga and tikanga Māori to contribute effectively to the mitigation of the current climate crisis and its future impacts, contrary to ***"Te mātapono o te whakatika/the principle of redress".***

35. In addition, the UNDRIP, to which the Crown is a signatory, provides an instrument at the international level that could be used to reconcile trade and climate agreements in a Tiriti-consistent manner.

36. The ACCTS is cited as one example of such agreements, along with the Agreement on "Clean Economy" as part of the Indo-Pacific Economic Framework (IPEF) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the successor to the TPPA, and the Free Trade Agreement between New Zealand and the European Union.

PART 4. EXCEPTIONS AND PROTECTIONS

37. The Crown's NIA claims that the Treaty of Waitangi Exception "reserves the policy space for the Government to fulfil its obligations to Māori including under the Treaty of Waitangi."[10] The Crown well knows that is untrue.

38. The wording of the Treaty of Waitangi Exception is unchanged from the New Zealand Singapore free trade agreement in 2001:

> *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/ Tiriti o Waitangi. The Parties agree that the interpretation of the Treaty of Waitangi/Tiriti o 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 7 (Dispute Settlement) shall otherwise apply to this Article. …*

39. Previous Tiriti o Waitangi assessments, and numerous other interventions by Ngā Toki Whakarururanga and others,[11] including the Waitangi Tribunal,[12] have pointed out the flaws in this Exception.

40. The well recognised problems with the wording include:

    (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 specifically Tiriti- and tikanga-based policies in relation to the climate crisis that breach the ACCTS, or general laws and policies on matters of particular concern to Māori as Tiriti issues, of the kind mentioned above.

    (ii) While other parties to the ACCTS cannot challenge the Crown's interpretation of the Treaty of Waitangi and its obligations therein, they could challenge whether another

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[10] National Interest Analysis, p.27.

[11] 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 (https://www.mfat.govt.nz/assets/Trade-General/Trade-policy/Trade-for-All-report.pdf).

[12] The Waitangi Tribunal concluded in the urgency hearing on the Trans-Pacific Partnership Agreement that the Treaty Exception was not perfect. The Tribunal did not accept the Crown's claim that nothing in the agreement would prevent the Crown from meeting its Treaty obligations. Despite that view, the Tribunal concluded that the Exception "was likely to provide a reasonable degree of protection" to Māori - but it urged the Crown and Māori to enter into dialogue on its wording (https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_104833137/Report%20on%20the%20TPPA%20W.pdf). 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 o Waitangi (https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf)

aspect of the exception applies, including whether it involves "more favourable treatment".

(iii) An additional condition must be satisfied: the Crown's measure must not be considered arbitrary or unjustifiable discrimination or impose disguised barriers to trade. That is not exempt from challenge in a dispute, and opens the door to arguments of unfair discrimination against foreign investors.

(iv) 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.[13]

(v) The effectiveness of the Treaty Exception also relies on the Crown recognising there is a Tiriti issue and being prepared to act on it when doing so would breach the ACCTS' rules. 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. The Crown would also need to be prepared to defend its actions by invoking the Treaty Exception if it is challenged.

41. The Wai 2522 Mediation Agreement provides for dialogue with the Crown to identify options for a different exception, a process that has just begun.

42. Ngā Toki Whakarururanga emphasised the particular importance of getting the protections right in the ACCTS because of the very broad scope of its application, especially in relation to services, and impact on how services, including environmental services, can be regulated at all levels of government:

Annex V Environmental services commitments

The obligations in chapter 3 on environmental and environment-related services have a very broad scope. They apply to "measures affecting the supply of the service", which means any law, regulation, by-law, decision of a regional council, or anything else, at the central and local levels (the latter being subject to reasonable steps to ensure compliance). The scope also extends to delegated authorities, which in some situations may be mana whenua or a Māori entity that has decision making authority conferred on it.

"Measures affecting" includes environmental regulations and resource consents, as well as conditions and requirements for consultation and consent.These are fundamental matters relating to the Crown's Tiriti o Waitangi obligations and recognition of rangatiratanga, mana motuhake and kaitiakitanga in relation to Te Taiao. The Treaty exception does not address them, not do any of the horizontal limitations.

[13] https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_195473606/Report%20on%20the%20CPTPP%20W.pdf

43. Despite this, the Treaty of Waitangi Exception remains effectively unchanged in the ACCTS and the Crown continues to overstate its effect.

Other protections

44. Aside from the Treaty of Waitangi Exception, Ngā Toki Whakarururanga made extensive technical inputs to MFAT in relation to trade in services under the ACCTS.

45. Because trade in services rules and obligations are complicated and fragmented, and there is no overriding protection for Indigenous Peoples, or Māori, responsibilities, duties, rights and interests in the ACCTS, it is critically important and very difficult to devise effective protections. This was pointed out to MFAT, to no avail (page references are omitted):

> *The fractured and abstract description of services that are committed in schedules makes it very difficult to identify what issues may arise in practice. That is why carveouts or comprehensive exceptions in the text are so important. Having failed to provide those here, protection has to be provided through extensive limitations that apply horizontally across all commitments.*
>
> *Ngā Toki Whakarururanga commented on an early draft of New Zealand's ACCTS schedule. We never saw more developed versions of the annex that included entries of particular relevan[ce] to Māori. The Crown appears to have rolled over old and inappropriate wording in schedules from several decades ago or imported, sometimes disputed, wording from other agreements without checking how appropriate and effective that would be in this context.*
>
> *There are only two horizontal limitations in New Zealand's services schedule. The first is protection for measures "necessary" to protect "archaeological heritage of national value". It is unclear whether "archaeological heritage of national value" would apply to a localised marae urupa or the wahi tapu of a hapū. "Necessary" is also a deeply problematic term in trade agreements and opens measures to challenge for going further than is necessary to achieve the government's objective, as adjudged by a panel of trade experts.*
>
> *A second horizontal reservation is intended to provide protection for Māori in relation to digitalised services. Those services and associated data are especially sensitive as they relate to climate events and remediation. This is important in the ACCTS because the schedule liberalises the cross-border supply of many services, which would necessarily include the cross-border movement of data. The list of environmentally related services includes software, data base and data processing commitments generally. It also includes financial data, which would include information on insurance and disaster relief.*
>
> *The horizontal limitation preserves the policy space to introduce Tiriti-compliant measures for "trade enabled by electronic means". That wording is imported from the services schedule of the NZ EU FTA. Ngā Toki Whakarururanga has previously raised concerns that its meaning*

and scope are uncertain, including where the commitment applies to a foreign investor rather than a supplier from outside the country. The Crown should have used the wording of the broader carveout in the digital trade chapter of the NZ EU FTA, which applies to "matters covered by this agreement". In addition, the limitation is subject to the chapeau.

The specific sectors of greatest concern are obviously Environmental Services: sewage, waste disposal and sanitation. Commitments on non-consultancy aspects of these services apply only to services contracted by private industry, ie. not public procurement. The Crown will be constrained in relation to "measures affecting" those contracted services. ...

Lastly, the Article 3.10.4 reference to disciplines that apply to technical standards and licensing requirements ... [relies on] both the JSI and New Zealand's GATS schedule [which] contain only a very weak limitation for national treatment relating to preferential treatment to "Māori commercial or industrial undertakings" that dates back to 1994. This needs to be remedied in the future.

PART 5. TIRITI O WAITANGI ASSESSMENT OF THE ACCTS

46. This is the sixth Tiriti assessment conducted by Nga Toki Whakarururanga pursuant to the Mediation Agreement.[14] It highlights once again the failure of the Crown in both the process and substance of the ACCTS to meet its Tiriti obligations.

47. ***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.

48. ***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 approach to the climate crisis it has adopted that fails to empower Māori to fulfil responsibilities of kaitiakitanga. Instead, it requires the liberalisation of services and foreign investments, and applies restrictions on their regulation, which could intensify the harm caused by those activities to te Taiao and to Māori communities that are disproportionately impacted on by the climate crisis.

49. ***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 recognises the authority of Māori to define and pursue appropriate and effective responses to the climate crisis that reflect their responsibilities, aspirations, relationships and duties in relation to te Taiao, in accordance with tikanga.

50. ***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 the responsibilities of kaitiakitanga, over matters affected by this Agreement.

51. 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.

[14] https://ngatoki.nz/

52. In some other agreements, the Crown has taken small steps to increase protections to implement what it considers Tiriti/Treaty obligations. Even those are lacking in this agreement.

53. In the forthcoming Waitangi Tribunal inquiry, Ngā Toki Whakarururanga will vigorously challenge the Crown's failure to empower Māori in advancing solutions to the climate crisis, and its pursuit instead of agreements that advance its commercial and ideological objectives. Regrettably, the Tribunal's report will be too late to change the ACCTS, which goes on record as another missed opportunity for the Crown to honour its obligations as an honest and ethical Tiriti partner.