Ngā Toki Whakarururanga
Establishment Group

TIRITI O WAITANGI ASSESSMENT OF NZ UK FTA:

TE TIRITI O WAITANGI ME HE WHAKAPUTANGA –
SYMBOLISM WITHOUT SUBSTANCE

*This analysis is as accurate as possible within the time available

BRITAIN WASHES ITS HANDS OF HE WHAKAPUTANGA ME TE TIRITI O WAITANGI

Ngā Rangatira and the King and Queen of England were responsible for Te Tiriti o Waitangi, and He Whakaputanga o te Rangatiratanga o Nu Tireni it is based on.

That constitutional relationship must underpin any international treaty between NZ and the UK, and Māori must be at the negotiating table as an independent equal party to the Crown.

Britain can't delegate its Tiriti relationship with Ngā Rangatira without their prior free informed consent and wash its hands of its responsibilities. BUT that is exactly what it does in the NZ UK FTA.

The Preamble recognises the unique relationship of Māori and the UK as original Tiriti signatories, then says the New Zealand Crown has assumed all those rights and obligations.

Every reference after that to Te Tiriti, and often to Māori, is limited to "in the case of New Zealand". There is no reference to He Whakaputanga at all.

TE TIRITI O WAITANGI IN THE FTA TEXT

There are only 3 references to Te Tiriti/The Treaty in the 33-chapter Agreement:

1. **The Preamble**
   - "notes" that Britain was an original signatory of Te Tiriti/The Treaty but no longer has any responsibilities,
   - "acknowledges" Te Tiriti/The Treaty as a constitutional foundation, but only for New Zealand, and
   - "recognises" the right to regulate including to meet Tiriti/Treaty obligations, subject to the FTA's rules.

TE TIRITI O WAITANGI IN THE FTA TEXT

2. Chapter 26 **Māori Trade and Economic Cooperation** repeats most of the Preamble,
   - but does not guarantee any activities or outcomes and is unenforceable.
   - The "Inclusive Trade Sub-committee" that oversees the chapter will operate, *for NZ only*, according to Tiriti/Treaty *principles* and tikanga. (Art 26.7, 30.8)
3. The **Treaty of Waitangi Exception (Art 32.5)** remains unchanged since 2001, even though almost everyone except the Crown says it does not provide effective protection for Tiriti rights and responsibilities.

THE TREATY OF WAITANGI EXCEPTION (ART 32.5)

What's good about the Treaty Exception?

- Its existence, in itself, recognises that the FTA's rules may conflict with Te Tiriti/The Treaty
- The UK is not able to challenge the Crown's interpretation of The Treaty and its obligations

What's wrong with the Treaty Exception?

- It depends on the Crown seeing a Treaty issue, acting on it despite the FTA's rules, and being prepared to defend it if challenged.
- It only protects "more favourable treatment to Māori" not
  - a failure to do things the FTA requires (eg not applying intellectual property rules)
  - or adopting Tiriti and tikanga-based policies that breach the FTA (eg Māori data sovereignty)
- Additional conditions in the Exception open the Tiriti-based policy or law to challenge
- A dispute would be judged by a panel of foreign trade experts with no Māori rights to participate.

THE CROWN REFUSES TO FIX THE TREATY EXCEPTION

Waitangi Tribunal

- the Treaty Exception was not perfect,
- the Crown was wrong that it fully protects its ability to honour its Treaty obligations
- found the Exception "was likely to provide a reasonable degree of protection" to Māori
- urged the Crown and Māori to work together to consider future changes.

The Crown's own Trade for All Advisory Board

- the Treaty Exception was not strong enough

Wai 2522 Mediation Agreement

- the Crown and Māori should identify options for change.

Tribunal's 2021 report on digital issues

- found the Treaty Exception (and other exceptions) didn't provide effective protection for Māori.

Still, the Crown's Ministers and MFAT won't revisit it

Research MFAT commissioned from Māori said:

Te Tiriti must be central to the FTA

- but it is marginal and always less important than "trade"

Māori must have a seat at the table

- but the only Māori at the negotiating table were from the Crown and
- Māori will only sit on an "Inclusive Trade Sub-committee"
- for the unenforceable Māori Trade chapter in the FTA.

The FTA must provide protections and opportunities

- but the Treaty Exception hasn't been fixed up,
- proposals for more effective recognition of Tiriti and He Whakaputanga have not been adopted,
- and there are no effective protections in the Agreement.

The way this currently works:

the Crown alone decided the negotiating mandate for the UK FTA

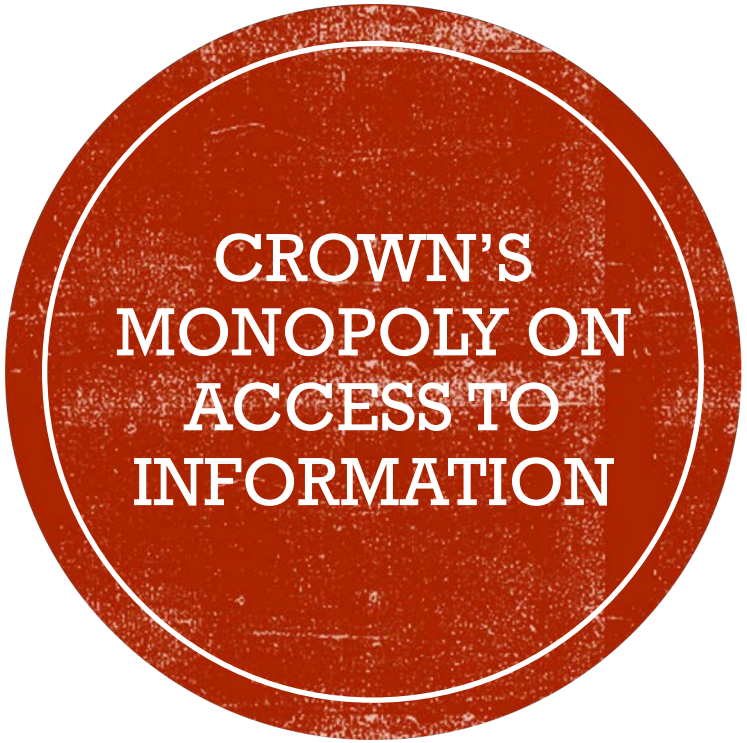
- what proposals were tabled for the UK to consider,
- what compromises were acceptable,
- what trade-offs should be made.

The FTA negotiations were totally controlled by Kāwanatanga through MFAT officials.

- Ministers made high level decisions, advised by MFAT officials.
- There were letters to Ministers and phone calls with senior officials, but with limited outcomes.
- MFAT set up a Reference Group of leaders from FoMA, Iwi Chairs, Taumata, and NTW, but it only discussed the Māori Trade chapter, with very limited final effect, and despite requests did not discuss the risks from other chapters.

CROWN'S MONOPOLY ON ACCESS TO INFORMATION

- **Without information Māori cannot**
  - effectively promote and protect their interests,
  - hold Māori who are involved in dialogue with the Crown accountable.
- Because **the NZ and UK Crown** have a monopoly on information, they **decided**
  - what information to share,
  - with whom, including which Māori,
  - under what conditions of confidentiality.



- The **only <u>public</u> information was the Crown's good news version** on
  - MFAT's website
  - webinars with its main negotiator.
  - the Agreement in Principle written by MFAT and the UK after most negotiations were done.
- When **NTW got special access** to specific information on 22 December 2021 it **was**
  - too late to be effective,
  - had to be kept secret so it couldn't be shared, and
  - most input had no effect.

GOVERNANCE OF THE FTA RESTS WITH THE CROWN

This is a deal between the NZ and UK Crown.

- Just as there was no seat at the negotiating table for non-Crown Māori, there is no seat at the table for governing the UK FTA, except at the very margins.

The FTA will be run by a Committee of the UK and NZ Crown,

- who "may" seek advice from business, unions, civil society, the public – and Māori "in the case of NZ"
- with a series of sub-committees and working groups to oversee and implement other chapters.

Unenforceable chapter

- The Environment and Labour chapters (ch 22 and 23) have their own sub-committees but the Māori Trade and Economic Cooperation chapter (26) is under the Inclusive Trade Sub-committee with other unenforceable chapters on gender, SMEs and development.

- **The Māori Trade and Economic Cooperation chapter (26) is weak**
  - only about cooperation between UK and NZ,
  - has no guaranteed activities, and
  - is unenforceable

  (see the Tiriti Assessment of the Māori Trade chapter)
- **Non-Crown Māori may be invited to sit on** the Inclusive Trade **Sub-committee with officials**, and it is to function in a
  - "manner consistent with Te Tiriti/The Treaty" (but only in the case of NZ) and
  - manner sensitive to tikanga (however that might work with the UK).

- **This sounds like real progress, but**
  - it's not clear what independent Māori presence can achieve because the sub-committee can only
    - discuss the limited cooperation activities under the chapter and
    - hear from experts on "issues relevant to the chapter"

AS GOOD AS IT GETS?

The only way to revisit the text, and try to get the Tiriti relationship right, is in the review set down for 7 years after the FTA become effective (Art 30.3).

Input from various sectors, including Māori "for New Zealand", must be "taken into account".

A review of the digital chapter's implementation and operation is earlier, in 2 years (Art 15.22) but that's not a review of its rules, and there is no guarantee of any agreed outcome

(see the Tiriti Assessment on Mātauranga and digital trade).

So, the current text is likely to be as good as it gets for Te Tiriti and Māori.