TE TIRITI O WAITANGI ASSESSMENT OF THE FREE TRADE AGREEMENT BETWEEN NEW ZEALAND AND THE UNITED KINGDOM

(Revised as of 27 March 2022)

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INTRODUCTION

1. This Tiriti o Waitangi Assessment has been prepared by the Ngā Toki Whakarururanga Establishment Group as part of our mandate set out in the Mediation Agreement with the Crown arising from the Wai 2522 Inquiry into the Trans-Pacific Partnership Agreement (TPPA) and the subsequent Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[1]

2. The National Interest Analysis tabled with the Free Trade Agreement signed by New Zealand United Kingdom on 28 February 2022 was prepared by the Ministry of Foreign Affairs and Trade (MFAT) that negotiated the Agreement.[2] It is not independent of the Crown, let alone an assessment against the Crown's obligations under Te Tiriti o Waitangi.

3. This document sets out to balance that failure by reviewing the FTA through a Tiriti o Waitangi lens and to hold the Crown accountable for its Tiriti obligations, before a decision is made on whether the FTA should be ratified.

4. The UK FTA is measured against two related reference points:

   (i) the UK/NZ Crown's obligations under the four articles of Te Tiriti o Waitangi; and

   (ii) the Tiriti-based Kaupapa of Ngā Toki Whakarururanga in the Mediation Agreement, which sets out our mandate.

5. Te Tiriti o Waitangi

   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.

6. The kaupapa for Ngā Toki Whakarururanga is informed by the Mediation Agreement:

   "Mana whakahaere in the global domain is informed by Rangatiratanga and Kāwanatanga working together in a mana-enhancing relationship of equals consistent with Te Tiriti o Waitangi and He Whakaputanga o Te Rangatiranga on Nu Tireni."

[1] The Mediation Agreement is Annexed to the Waitangi Tribunal Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2021.
https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf
[2] https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/NZ-UK-FTA-National-Interest-Analysis.pdf

Specifically, the claimants' kaupapa in the Mediation Agreement requires

(i) shared authority in the international domain;

(ii) preservation of mana tuku iho and mana whakahaere;

(iii) responsibilities of Rangatira as leaders to preserve and uphold the mana and rangatiratanga of their hapū and the responsibilities of the Crown to represent tauiwi;

(iv) the importance of tikanga-based trading relationships;

(v) the exercise of mana and tino rangatiratanga through effective participation in decision making;

(vi) a new approach to trade policy and negotiation of international trade agreements that gives effect to the Tiriti relationship by collective, participatory, and accountable processes;

(vii) giving effect to Te Tiriti o Waitangi/the Treaty of Waitangi as a relationship of equals.

7. This Tiriti-based assessment of the NZ UK FTA is organised into six parts:

1. Te Tiriti o Waitangi and Rangatiratanga
2. Māori Trade and Economic Cooperation chapter
3. Mātauranga Māori, Wai 262 and Te Pae Tawhiti
4. Mātauranga Māori, data and digital trade
5. Māori exporters, wāhine and kaimahi
6. Te Taiao

PART 1. TE TIRITI O WAITANGI AND TINO RANGATIRATANGA

8. Ngā Rangatira and 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.

9. In Tikanga terms, a relationship that is built on principles of honour does not allow the British Crown to delegate its responsibilities under Te Tiriti o Waitangi to the New Zealand Kawana, without the prior free informed consent of Ngā Rangatira.

10. The constitutional relationship of Rangatiratanga to Kawanatanga must underpin any international treaty between the UK and Aotearoa NZ, with Māori at the negotiating table as an independent equal party to the Crown in its UK and NZ forms.

Te Tiriti in the FTA Text

11. There is no reference to He Whakaputanga o Te Rangatiratanga o Nu Tireni in the FTA text.

12. 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. That unilateral renunciation is a violation of the good faith obligations of the British Crown under Te Tiriti o Waitangi.

13. Every other reference to Te Tiriti o Waitangi, and often to Māori, is limited to "in the case of New Zealand".

14. There are only four references to Te Tiriti/The Treaty in the 33-chapter FTA:

    (i) **The Preamble** "notes" that Britain was an original signatory to 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).

    (ii) **Chapter 26 Māori Trade and Economic Cooperation** repeats most of the Preamble. The chapter does not give effect to the Crown's Tiriti obligations, 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,* presumably as defined by the Crown, and to tikanga, although it is totally unclear how that joint committee would do so.

    (iii) Provision for an early **Review of digital trade** (Art 15.22.2(a)) says NZ (only) intends to engage Māori to ensure the review takes account of the need to support Māori to exercise rights and interests, and meet the Crown's obligations under Te Tiriti/ The Treaty and its "principles". The UK makes no such commitment and there is no requirement for this review to agree to amend the chapter to comply with the Crown's Tiriti obligations of active protection of mātauranga Māori.

(iv) The **Treaty of Waitangi Exception** (Art 32.5) allows the Crown to accord "more favourable treatment" to Māori to fulfill its Treaty of Waitangi (not Tiriti o Waitangi) obligations, subject to certain conditions. This Exception remains unchanged since 2001, despite expectations from the Waitangi Tribunal, the Mediation Agreement, and the Trade for All Advisory Board's report of dialogue to identify more effective protection for Tiriti rights and Crown obligations.

No status as equals or shared governance

15. The authority of Rangatiratanga includes the power of Rangatira to make international treaties that affect Māori rights, interests, duties and responsibilities. Māori have never conceded nor delegated that authority to the Crown.

16. When the UK and NZ governments negotiated and signed the free trade agreement on 28 February 2022 only the Crown was at the table.

17. The FTA negotiations were totally controlled by Kāwanatanga. Ministers of the Crown made high level decisions, advised by officials. The Crown alone decided the negotiating mandate for the UK FTA, what proposals were tabled for each other to consider, what compromises were acceptable, what trade-offs should be made, what the final text should say, how the agreement should be governed and the provisions for review.

18. Research that MFAT commissioned from Māori business[3] said, *inter alia*:

    (i) Te Tiriti must be central to the FTA. However, in practice it was marginal and always treated as less important than "trade".

    (ii) Māori must have a seat at the table. However, the only Māori at the negotiating table were from the Crown. Once the FTA comes into force, non-Crown Māori will only sit on an "Inclusive Trade Sub-committee" for the unenforceable Māori Trade chapter and an open-ended review committee on traditional knowledge.

    (iii) The FTA must ensure Tiriti rights are recognised, included and protected. But Māori proposals for full recognition of Tiriti o Waitangi and He Whakaputanga and for effective protections are not in the final text, the flawed Treaty of Waitangi Exception is not fixed, and no other effective protections are included in the Agreement.

19. There was correspondence between Māori and NZ Ministers, meetings with the United Kingdom High Commissioner, and discussions on calls with senior MFAT officials, but to limited effect.

20. MFAT set up a Reference Group of leaders from the Federation of Māori Authorities (FoMA), Iwi Chairs Forum, Te Taumata, and Ngā Toki Whakarururanga, but it only discussed the Māori Trade chapter, again with very limited final effect. Despite requests, it did not discuss the risks from other chapters.

Crown's monopoly over access to Information

21. Without information Māori cannot effectively promote and protect their interests, provide analysis that empowers others to do so, and hold those Māori who are involved in dialogue with the Crown to account.

[3] Te Ao Pakihi: Māori Enterprise Perspectives on a New Zealand-United Kingdom Free Trade Agreement, ACE Consulting, 14 July 2021.

22. The UK FTA text was secret until after it was signed on 28 February 2022.

23. Because the NZ and UK Crown held a monopoly on information, they decided what information to share, with whom, including to which Māori, and under what conditions of confidentiality.

24. The only information publicly available was the Crown's account of the expected benefits on MFAT's website, webinars with its main officials, and the Agreement in Principle written by MFAT and the UK after most negotiations were concluded.[4]

25. As a result of the Mediation Agreement, the Crown did allow more access to information than previously, under strict conditions of confidentiality.

26. When Ngā Toki Whakarururanga's technical advisers were provided with an edited version of the draft text in late December 2021 the contents had to be kept secret, which meant they could not share their concerns or seek views from affected Māori outside the rōpū. Most of the input from the advisers on this text was too late to be effective and had a minimal impact on the final FTA.

Flawed Treaty of Waitangi Exception is Unchanged

27. 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.

28. The Treaty of Waitangi Exception in the UK FTA (Art 32.5) is the same wording that the Crown has used since the Singapore NZ FTA 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. 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 31 Dispute Settlement shall otherwise apply …*

29. The Treaty Exception only covers policies, laws, actions or decisions of the Crown that give "more favourable treatment" to Māori. Additional conditions must be satisfied: the Crown's measure must not be considered arbitrary or unjustifiable discrimination or impose disguised barriers to trade.

30. The Treaty Exception would not protect:

    (i) the Crown's decision *not* to do something the FTA requires, such as not apply the intellectual property rules to taonga;

    (ii) regulatory changes that require non-Māori to take steps to protect Tiriti rights, such as new regulations that require certain foreign investments to secure approval of those with mana whenua;

[4] https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/New-Zealand-UK-FTA-Agreement-in-Principle.pdf

(iii) adopting general Tiriti- and tikanga-based policies that breach the FTA, such as a regime for Māori data sovereignty; or

(iv) general laws and policies on matters of particular concern to Māori, such as water or mining.

31. 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.

32. The UK cannot challenge the Crown's interpretation of The Treaty of Waitangi and its obligations therein. However, the UK could challenge whether another aspect of the exception applies, including whether it involves "more favourable treatment". Such 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.[5]

33. 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.

34. The current exception dates back to the NZ Singapore FTA in 2001. The Waitangi Tribunal originally recognized 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. While the Tribunal initially concluded that the Exception "was likely to provide a reasonable degree of protection" to Māori, it urged the Crown and Māori to enter into dialogue on its wording.[6]

35. The Tribunal's 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.[7]

36. 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.[8]

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

38. Despite all this, the Crown refuses to revisit the Treaty of Waitangi Exception, and has repeated it changed in the UK FTA.

No Rangatiratanga in the FTA's governance

39. Once the FTA comes into force there is no seat at the table for Māori in the overall governance of the FTA. That will be undertaken by a Committee of the NZ and UK Crown, who "may" seek advice from business, unions, civil society, the public – and Māori "in the case of NZ".

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

40. There are a number of sub-committees and working groups to oversee and implement specific chapters. Māori are only participants in two of these.

41. The Inclusive Trade Sub-committee, whose mandate is to oversee the Māori Trade and Economic Cooperation chapter along with chapters on gender, small and medium enterprises and development - all of which are unenforceable.

42. Under Article 30.8.1 non-Crown Māori will be invited to sit on the Inclusive Trade sub-committee with officials when it deals with the Māori Trade chapter. In doing so, the sub-committee is to function in a "manner consistent with Te Tiriti/The Treaty" - but only in the case of NZ, and in a manner sensitive to tikanga. How would a Tiriti-based approach to the sub-committee's functions operate, especially if that applies only to New Zealand? Equally, how would the joint committee's proceedings be sensitive to tikanga, when the text makes it clear that neither the NZ nor UK Crown understand what tikanga means in the context of this agreement?

43. Despite those criticisms, at least there is participation by Māori in that sub-committee. What is not clear is how many independent Māori could be on the sub-committee, compared to the number from the UK and NZ Crown. There is certainly no suggestion of parity.

44. What non-Crown Māori could achieve on that sub-committee will also be limited by its function, which is to discuss the chapter's cooperation activities (discussed below) and to hear from experts on "issues relevant to the chapter".

45. Any decisions of the sub-committee will presumably require consensus, meaning the UK will have to agree. The Māori Trade chapter explicitly states that there are no legal or financial obligations on the UK or NZ to undertake any of individual cooperation activities (Art 26.5.1 fn 1), so it is uncertain what, if anything, will be agreed to and resourced.

46. Conversely, it is unclear whether non-Crown Māori on the sub-committee would be able to block consensus where they consider proposed decisions are contrary to Te Tiriti, tikanga or other Māori rights and interests. Presumably not.

47. There is no similar provision for Māori to be on any other committees, including those responsible for chapters that have particular Tiriti implications, such as Environment, Intellectual Property or Cross-border Services and Investment (which includes digital trade).

48. The only other body is the review of Section C of the Intellectual Property chapter dealing with Intellectual Property and Issues Related to Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions. Article 17.20 provides for a review "with a view to considering provisions" on those matters. When conducting this review, the Intellectual Property Working Group shall include Māori (Art 17.4.1). As discussed below, there is no deadline for its deliberations and no requirement of an agreed outcome.

Little realistic prospect for review and rewrite

49. The only way to revisit the text and try to get the Tiriti relationship right will be in the review set down for 7 years after the FTA comes into force (Art 30.3).

50. That review must "take into account" input from various sectors and sources, including Māori "for New Zealand".

51. The purpose of such reviews of FTAs is usually to agree to further liberalisation. They almost never introduce more protections and doing so would require agreement between the NZ and UK Crown; the latter has made its antipathy to concrete rights and protections relating to te Tiriti very clear.

52. In addition to the specific review of traditional knowledge, discussed above, there is an early review of the digital chapter's implementation and operation that must be undertaken within 2 years after the FTA enters into force (Art 15.22).

53. The review provision explicitly refers to the Waitangi Tribunal's report on e-commerce in the TPPA/CPTPP, which found the Crown had breached its Tiriti obligations by not actively protecting mātauranga Māori.

54. However, that is a review of the *implementation and operation* of the existing chapter. It is not a review of that rules that the Tribunal found breached the Crown's Tiriti obligations.

55. The NZ Crown inscribes its intention to engage Māori in the review, but does not provide a seat at the table, as the Inclusive Trade Committee does. Moreover, the purpose of the engagement is to ensure the review "takes account of" Māori rights and Crown obligations, presumably among other unrelated factors.

56. Further, the obligation is only to hold a review. There is no requirement for the UK or NZ to agree to any outcome.

PART 2: CHAPTER 26 MĀORI TRADE AND ECONOMIC COOPERATION

57. This chapter is a "first" for New Zealand. Given the UK's attitude to Te Tiriti throughout the FTA, it will have been hard for NZ to get the UK's agreement even to this outcome.

The context of the chapter

58. Members of the Māori Reference Group on the UK FTA called for a Tiriti o Waitangi chapter that was principled and pragmatic, had Te Tiriti o Waitangi at its centre, provided benefits for Māori businesses *and* protections for Māori rights, interests and responsibilities, and brought Māori to the table as the Crown's Tiriti partners.

59. The final text has not addressed those concerns. This is not a Tiriti o Waitangi chapter. It says nothing about protecting Māori rights, interests, duties and responsibilities under Te Tiriti o Waitangi and ignores how the agreement creates risks to those rights and the need for effective exclusions or protections.

60. The chapter focuses on cooperation to assist Māori commercial interests participating in trade and investment in the FTA, which is seen as the pathway to advancing Māori wellbeing.

The stated "context and purpose"

61. The chapter has a long "context and purpose" provision (Art 26.2.1-2) that repeats the FTA's Preamble: Te Tiriti/The Treaty is a foundational document of constitutional importance, *but only to NZ;* and the UK "notes" its role as an original signatory to Te Tiriti/The Treaty, but has no obligations today.

62. Other elements of "context and purpose" highlight Māori leadership and promote a relational approach to trade, mātauranga Māori and kaupapa Māori methodologies (Art 26.2.4).

63. That recognition contrasts to the main enforceable chapters of the Agreement that deal with goods trade, digital trade, intellectual property, foreign investment, services, etc , which do not reflect this "context" at all. They are based on Western, capitalist, commodified, and transactional approaches to commerce. Recognition of those concepts in the Māori Trade chapter does nothing to alter that reality.

64. A subsequent article (26.4) headed "Provisions across the Agreement Benefitting Māori" lists seven other chapters of the FTA, including Digital Trade, Intellectual Property and Government Procurement. The Article asserts that these chapters enhance Māori trade and investment opportunities and further contribute to the ability of Māori to exercise their rights under Te Tiriti/The Treaty. Those purported benefits are disputed elsewhere in this Tiriti assessment. The article simply ignores the known risks, limitations and lack of protections for Māori rights, interests, duties and responsibilities in those chapters.

65. A further provision (Art 26.3) weakly "notes" the commitments, objectives, rights and responsibilities of the UK and NZ under four international instruments:

    (i) The UNESCO Convention on Cultural Diversity;

    (ii) The UN 2030 Agenda for Sustainable Development;

    (iii) The Convention on Biological Diversity; and

(iv) The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), noting the national positions of UK and NZ on the UNDRIP that limit their obligations.

66. The point of this provision is unclear. It refers to the NZ and UK states' rights and obligations, but makes no reference to Māori rights arising from these instruments, nor how they relate to this chapter or the FTA generally.

Three possible cooperation activities

67. The Māori Trade chapter requires the UK and NZ to do very little. The main commitment relates to "cooperation activities" on three possible matters (Art 26.5):

    (i) Collaborating to enhance Māori-owned enterprises' ability to access and benefit from opportunities in the FTA;

    (ii) Collaborating on developing links between UK and Māori-owned enterprises and entrepreneurs, which "may" include various commercial opportunities or activities such as road shows; and

    (iii) Continuing to support science, research, and innovation links.

68. At first glance, these proposed forms of cooperation have the potential to provide some benefits to some Māori businesses, provided they are Māori-led and fully resourced. That potential is seriously undermined by the precise wording of the provision.

69. The "context" of the chapter "recognises" the importance of implementing cooperation under the Chapter in a manner consistent with Te Tiriti/The Treaty and "where appropriate" informed by Te Ao Māori, Mātauranga Māori, and tikanga Māori (Art 26.2.3). However, recognising the importance of behaving in a certain way is not a commitment to do so.

70. Accordingly, NZ "may" invite Māori views and participation in these cooperation activities in accordance with Tiriti/Treaty "principles", not Te Tiriti itself (Art 26.5.2). These principles are not identified, but presumably they are the Crown's standard Treaty principles that preclude genuine Rangatiratanga and co-governance.

71. Further the careful wording (Art 26.5.1) means there is no guarantee that any of these three cooperation activities will take place. There is a long sequence of filters:

    (i) NZ and UK "may facilitate" the 3 activities – "may" means that is discretionary and the role is only to facilitate", and

    (ii) only where it is "appropriate and practicable" to do so, and

    (iii) when one Party asks for cooperation on one of these activities, and

    (iv) both NZ and UK agree on the terms, and

    (v) both NZ and UK agree on the details and resources for any cooperation activities, and

    (vi) subject to the resources "available" to (meaning made available by) each country, and

    (vii) using *existing* ways of organising UK NZ cooperation activities on Māori-related issues.

72. A footnote to the cooperation provision says explicitly that the chapter does "not impose any legal or financial obligations requiring the Parties to explore, commence or conclude any individual cooperation activities", which could reduce the cooperation commitment to an empty shell.

Governance of the Māori Trade chapter

73. The Māori Trade chapter is not enforceable (Art 26.8).

74. Unlike the labour and environment chapters, there is no separate sub-committee to oversee its implementation and operation. Instead, the Māori Trade chapter comes under an Inclusive Trade Sub-committee along with the trade and gender, SME and development chapters, which are also unenforceable (Art 26.7, 30.8).

75. As noted above, there is provision for (non-Crown) Māori to sit on that sub-committee (Art 30.8.1), although it is not clear how many and whether they have full rights of participation, including on decisions.

76. The sub-committee is to function in a manner that, *for NZ,* is consistent with Te Tiriti/the Treaty (Art 30.8.2(c)(iv)). It is unclear what that means and how the committee could function that way for NZ, but not for the UK.

77. The sub-committee is also to function in a manner sensitive to tikanga (Art 30.8.2(c)(iv)). Questions of definition and competency arise for both the UK and NZ Crown. It is also unclear what a tikanga-based approach would mean in the context of this sub-committee's operations.

78. The sub-committee's role is limited to discussion and reflection on the chapter's cooperation activities, and to consider input from experts or representatives on relevant issues (Art 30.8.2(c)). It has no real power.

PART 3. MĀTAURANGA MĀORI, WAI 262 AND TE PAE TAWHITI

79. As the Wai 262 claim acknowledged, the Western system of Intellectual Property Rights (IPR) does not (and cannot in its present form) adequately recognise or protect the rights, responsibilities and knowledge of Maori or other indigenous peoples. Māori names, knowledge, stories, symbols and expressions Māori culture remain open for exploitation and misappropriation by third parties, locally and internationally.

80. International agreements such as this need a commitment by state parties to develop a *sui generis* or bespoke system, in full collaboration with Māori, for the appropriate recognition, protection and promotion of Maori cultural and intellectual rights and responsibilities.

81. The digital trade chapter of this FTA at least makes reference to the Wai 2522 Waitangi Tribunal Inquiry on e-commerce in the CPTPP. There is no recognition in the Intellectual Property chapter of how this system impacts negatively on Te Ao Maori, which was one of the main planks of the Wai 262 Claim *Ko Aotearoa Tēnei*. There is no recognition of Māori concepts in the Chapter and no protection for Tiriti rights. It does not reflect Māori values or world views or protect intergenerational and collective rights and responsibilities.

82. Instead, the Intellectual Property chapter 17 locks NZ even more deeply into the Western IPR system than the CPTPP.

83. What happened with Mānuka Honey illustrates this conflict. Kaitiakitanga of Mānuka as a taonga is integral to Māori production of Mānuka Honey and a Tiriti responsibility to be protected. But in December 2021 the UK's Intellectual Property Office, in a decision based on cultural ignorance and culturally inappropriate legal tests, denied the Mānuka Honey Appellation Society a trademark on Mānuka Honey. It agreed with Australia's claim that its producers also use the term manuka for its honey, and UK consumers know that, so it refused to grant the trademark.

84. Nothing in the UK FTA will address that denial of Tiriti rights. Instead, the Intellectual Property Chapter 17 will lock in the UK's existing rules.

85. The Treaty of Waitangi Exception (Art 32.5) would not apply in this situation because the problem lies with the UK law and its application, not with the actions of NZ.

Genetic Resources and Traditional Knowledge

86. Section C of Chapter 17 on Intellectual Property and Issues Related to Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions provides no protections and no effective Māori voice.

87. Article 17.17 Cooperation identifies potential issues for cooperation that include "issues connected with traditional knowledge associated with genetic resources, and genetic resources" and "matters of interest to Māori relating to intellectual property, and issues relating to genetic resources, traditional knowledge, and traditional cultural expressions."

88. However, the provision merely requires the UK and NZ to "*endeavour* to cooperate" through their intellectual property agencies or similar to "enhance the *understanding*" of the Parties on those matters. It does not require them positively to do anything, let alone to make any changes to their IP regimes as a consequence.

89. Likewise, provision for patent examination (Art 17.18) is so contingent that nothing needs to, or is likely to, change. Again the Parties "shall endeavour" to pursue "quality" patent examination, which "may" include a discretion (may) "take into account" relevant publicly available documented information related to traditional knowledge associated with genetic resources; "may" include an opportunity for third parties to cite, in writing, prior art disclosures that may be relevant; "may" include use of databases "if applicable and relevant", and "may" include training of patent examiners to examine these issues.

90. The commitment to work to promote an outcome of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is another empty vessel. Working to promote an outcome says nothing about any shared objectives for that outcome, let alone one that reflects mātauranga Māori and Te Tiriti. Again, the language for Māori involvement is so contingent as to be easily circumvented: cooperation through sharing information and having dialogue "to the extent appropriate" with inclusive participation of Māori "where appropriate and practicable".

91. Even with stronger wording, experts in mātauranga Māori involved with the WIPO process over the past 20 years do not believe it will deliver anything of value to Māori or other Indigenous Peoples.

92. The provision in Article 17.20 for a future review of Section C is similar to the digital trade chapter. There is a specific time frame to enter into consultations, and subsequently review the Section "with a view to considering provisions on genetic resources, traditional knowledge, and traditional cultural expressions". The Working Group on IP shall "endeavour to complete" the review in a "timely manner". But there is no commitment to any outcome.

93. As noted above, the Māori Trade chapter (Art 26.2.10) confirms the UK's hostility to recognition of mātauranga Māori. It says nothing in that chapter gives rise to obligations relating to IP. Nor does the UK recognise that genetic resources, traditional knowledge and traditional cultural expressions are IP rights, or that examples of them are protectable as IP, except as far as UK law currently recognises them.

New risks to Te Pae Tawhiti and Wai 262

94. The Waitangi Tribunal in Wai 262 *Ko Aotearoa Tenei* said NZ needs a dual strategy to: (i) introduce a regime to protect mātauranga Māori and taonga works; and (ii) advocate for minimum standards of protection in free trade agreements.

95. Ten years later, Te Pae Tawhiti is only slowly working its way towards the first step, with proposals to address the three kete of taonga works me te mātauranga Māori, taonga species me te mātauranga Māori, and Kawenata Aorere (international treaties). All are negatively impacted upon by IPRs in trade agreements. Yet the Crown signs more FTAs that override mātauranga Māori and taonga and circumscribe the possible outcomes.

96. In addition to the Intellectual Property chapter, the Investment Chapter 14 defines intellectual property rights as investments that are protected by rules on non-discrimination (Art 14.6) and from policies, laws or practices that undermine their value (Art 14.11, 14.14).

97. While there is no investor-state dispute settlement in this FTA, there are still risks that policies to implement Wai 262 and Te Pae Tawhiti would be subject to regulatory chill by a cautious Crown or a dispute by the UK, similar to the risks the Waitangi Tribunal identified relating to electronic commerce/digital trade in the CPTPP (digital and data are part of Te Pae Tawhiti).

98. There are no effective protections for the affected Māori rights, interests, duties and responsibilities in Chapter 17 or elsewhere in the UK FTA.

99. As explained above, the Treaty of Waitangi Exception (Art 25.5) applies to "more favourable treatment" for Māori. It would not save most measures to give effect to Māori rights, such as those to implement Wai 262 and Te Pai Tawhiti if they breach the various FTA rules.

100. There is no space to exercise rangatiratanga in the face of these threats to Māori rights, interests, duties and responsibilities under Te Tiriti o Waitangi. Māori participation in the entire IP chapter is limited to participation in the Section C review. Broader invitations to experts may include "appropriate Māori representatives", including to provide advice, but such invitations presumably require a consensus decision of the parties. There is no Māori presence in the dispute process when matters central to Te Tiriti are under attack.

101. The UK FTA could therefore compound the problems of addressing Wai 262 and have a chilling effect on the recommendations adopted in Te Pae Tawhiti and the Crown's willingness to implement them if they potentially conflict with the FTA.

PART 4. MĀTAURANGA MĀORI, DATA AND DIGITAL TRADE

102. The UK FTA has a digital trade chapter (Ch 15) similar in key aspects to the electronic commerce chapter in the TPPA/CPTPP. Its core rules are not really about "trade". They are about control over data and the digital space.

103. Everything today is digital, but there are very few laws that effectively limit dominant tech companies. The Internet is often referred to as being "open" and "free". That ignores the reality that Big Tech corporations like Google, Facebook, Amazon, Netflix, or specialists like banks and insurers, run that space and control most of the data, its location and use.

104. The UK FTA "trade" rules guarantee UK-based tech firms can transfer and store the data, including Māori data, that they mine in Aotearoa to anywhere in the world.

105. Having very few regulations may sound good for Māori start-ups, but they are competing in a very unlevel playing field against those tech giants, including for data.

106. There is a commitment by the UK and NZ to cooperate on "digital inclusion" to assist SMEs, including Māori-led and women-led enterprises, and address barriers they face (Art 15.20). Yet the chapter's main enforceable rules will work to reinforce Big Tech's dominance over search engines and platforms, digital marketplaces, mining and processing of data that informs the algorithms, which pose those barriers and result in their exclusion.

107. The digital trade rules are subject to limited and unclear protections for other rights and policy priorities. The Waitangi Tribunal found the same exclusions and exceptions in the TPPA/CPTPP would provide inadequate protection for mātauranga Māori.[9]

Rangatiratanga in the digital domain

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

109. The need for rights and protections for indigenous data sovereignty and indigenous data governance, including data privacy as a collective, not an individual, right are being discussed internationally, including by various United Nations rapporteurs.[10]

110. Aotearoa does not yet have a regime of Māori data sovereignty and Māori data governance, or of effective protections against abuses in the digital ecosystem. Discussions to develop them are still embryonic, including in Te Pae Tawhiti.

Waitangi Tribunal's report on e-commerce (Wai 2522)

111. The Waitangi Tribunal's Report 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.

[9] https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf
[10] Eg. https://www.ohchr.org/Documents/Issues/Privacy/SR_Privacy/FINALHRDDOCUMENT.pdf

112. The Tribunal said …

"at the heart of the e-commerce issue explored in this report is the question of governance and control of Māori data" which involves "matters fundamental to Māori identity, such as whakapapa, mana, mauri and mātauranga. ... Perhaps the most fundamental of te Tiriti/the Treaty guarantees to Māori is of the right to cultural continuity. This is nothing less than the right to continue to organise and live in Aotearoa New Zealand as Māori in accordance with tikanga Māori."(180-2)

113. The Tribunal warned against trading off the need for active protection of that right against other goals:

"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. ... It is certainly not a matter the Crown can or should decide unilaterally. ... 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." (174)

114. The Tribunal found the protections in the TPPA/CPTPP, which includes the Treaty of Waitangi Exception, were inadequate and resulted in prejudice to Māori rights:

"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." (185)

The Crown has repeated its Tiriti breach

115. The Crown failed to remedy that breach in the UK FTA. The UK FTA "digital trade" rules and their exceptions are almost the same as the TPPA/CPTPP "e-commerce" rules, especially in relation to data.

116. The Crown's failure to remedy the breach must have been a conscious decision. The Waitangi Tribunal hearing on CPTPP e-commerce was in late 2020, when the UK FTA negotiations were already underway, so the Crown was on notice of the potential breach. The Tribunal Report came out in November 2021, making it clear that active protection of mātauranga Māori was paramount, and warned against trading it off against business and exporters' interests. Judging by the final text, that is exactly what the Crown decided to do.

117. The only way this breach can get fixed is to change the text of the digital trade chapter or through a robust and comprehensive agreement-wide Tiriti o Waitangi Exception.

118. The digital trade chapter requires a review to be conducted within 2 years of the FTA coming into force (Art 15.22). New Zealand describes the Waitangi Tribunal report on e-commerce as "context" for the review, and says it intends to engage with Māori to ensure the review takes account of NZ's need to support Māori to exercise their rights and interests, and to meet its responsibilities under Te Tiriti/The Treaty.

119. As noted above, this review clause does not guarantee any change. The review is only of the chapter's *operation and implementation*, not the text. Only NZ refers to the Waitangi Tribunal report as context; the UK does not. The requirement is only to hold the review; the UK does not have to agree to anything.

120. The only review of the *rules* in the digital trade chapter would begin 7 years after the FTA comes into force. As noted earlier, imposing new restrictions through such reviews is extremely rare. Moreover, the UK has clearly signalled that it has no intention of honouring its obligations under Te Tiriti.

121. The Crown has still not responded to the Waitangi Tribunal's report or indicated how it will remedy those breaches and prevent them happening again. Largely the same rules are now found in the TPPA/CPTPP, UK FTA, and the Digital Economic Partnership Agreement with Singapore and Chile, which other countries including China have applied to join, and the Crown continues to negotiate further agreements on the same issues. As the Tribunal recognised, there is a serious risk that repeating these Tiriti breaches will create precedents that become so embedded that they are impossible to remedy.

The UK denies Māori cultural rights

122. The Māori Trade chapter contains provisions relating to intellectual property that appear to be unrelated to the rest of the chapter. The UK explicitly protects its intellectual property (IP) laws from any hint of challenge arising from recognition of mātauranga Māori.

123. Art 26.2.10 says that nothing in the chapter

(i) gives rise to any obligations relating to IP;

(ii) creates any requirement for the UK to change its IP laws or policies;

(iii) means the UK recognises genetic resources, traditional knowledge or traditional cultural expressions are forms of IP; or

(iv) means the UK recognises that any examples of genetic resources, traditional knowledge or traditional cultural expressions can be protected as IP, except where UK law says so.

124. NZ's position is more subtle. The Māori Trade chapter (Art 26.2.6) says NZ "*may* adopt measures to respect, preserve, promote, protect traditional knowledge and traditional cultural expressions, *subject to its international obligations*". However, those international obligations include this and other FTAs that may prevent them doing so.

Protection for Haka Ka Mate is not guaranteed

125. Both NZ and the UK "acknowledge" the significance of Haka Ka Mate to Ngāti Toa Rangatira.

126. A side-letter records NZ's (but not the UK's) recognition of the historical importance of Haka Ka Mate, and Ngāti Toa Rangatira's responsibility to ensure its performance respects the values of ihi, wehi and wana, and to protect it from mistreatment.

127. However, the fine print in the Māori Trade chapter (Art 26.6) says NZ and the UK only agree to jointly *endeavour* to *identify appropriate* means to *advance* the recognition and protection of Haka Ka Mate. New Zealand will invite Ngāti Toa Rangatira to take part in these "cooperation activities".

128. This is an important development, in that it recognises the widespread cultural appropriation and abuses of Haka Ka Mate and of Ngāti Toa Rangatira's kaitiakitanga responsibilities to protect it.

129. However, there is no joint commitment that any effective action to recognise and protect Haka Ka Mate will result from this.

130. This lack of commitment is consistent with the UK's opposition in the same chapter to recognising cultural property rights and denial that cultural expressions can constitute intellectual property rights. That attitude suggests the UK is very unlikely to support positive protections for Haka Ka Mate.

131. It is not clear why these provisions related to cultural taonga and intellectual property are located in the Māori Trade and Economic Cooperation chapter.

PART 5. MĀORI EXPORTERS, WĀHINE AND KAIMAHI

132. A study on Te Taumata's website says the UK FTA could result in "hundreds of new jobs and more than $13 million of additional GDP" for Māori.[11] If correct, that is an extremely small return (after costs) to a Māori asset base estimated at $68 billion of around 0.0002%.

Māori exporters

133. There are no benefits in the FTA specifically for Māori exports or exporters. Their gains would be a share of general gains in sectors where Māori businesses are strong.

134. Those gains would come from reducing red tape, which is intended to make exporting easier, and removing UK taxes on imports (tariffs) from NZ for goods like fish, forestry, wine, kiwifruit, Manuka honey immediately, and for beef, sheep, butter, cheese over between 6 and 16 years.

135. However, those overall gains are also minimal according to the modelling cited by the government: 0.1% of GDP by the time the FTA is fully in force in 15 years.[12]

136. That figure is highly speculative and likely to be an over-estimate because:

    (i) new exports to the UK may be products that would have been sold to other markets eg China, and not involve new production and jobs;

    (ii) UK middlemen may pocket the tariff cuts and keep price to UK consumer the same, which removes the incentive to buy more NZ products; and

    (iii) UK supermarkets may decide to support local products even if they cost more and UK consumers may choose to "Buy British".

137. Increasing production of primary products needs to be balanced with known downsides, such as negative climate impacts from more methane emissions; increased irrigation and polluted waterways; and incentives to increase overfishing and dumping of lower value catch.

138. It is interesting that the modelling the government relies has assumed that beef and sheep meat production would not increase because of the environmental constraints, but does not reach the same conclusion for dairy! The Environment Chapter 22 says the UK and NZ will cooperate on addressing issues such as climate change and over-fishing. That is assessed in the section below on Te Taiao.

Small businesses

139. Both Wāhine Māori and Rangatahi Māori are usually in small businesses (called small and medium enterprises or SMEs). Streamlining the import/export process should help some SMEs. But they will still have to compete with larger corporations that are the main beneficiaries of the FTA.

[11] https://www.tetaumata.com/news/2021/10/21/nz-uk-free-trade-agreement-a-game-changer-for-maori/
[12] https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/ImpactECON-UK-NZ-FTA-Final-Report-23-Feb-2022.pdf

140. The same imbalance applies with the Digital Trade chapter. Article 15.20 promises "digital inclusion" and cooperation to assist SMEs, including Māori-led and women-led enterprises and address barriers they face. As noted above, such cooperation could be useful, but the principal rules in the same chapter are likely to reinforce those barriers.

141. Chapter 24 on SMEs says the UK and NZ will help them with online information, cooperate to facilitate various programmes, and "promote the participation in international trade of SMEs owned by under-represented groups, such as women, youth, Māori and minority groups". Again, that is potentially useful but takes place on an unlevel playing field that the main chapters of the FTA will reinforce.

Wāhine Māori

142. The chapter on Trade and Gender Equality defines Wāhine Māori as indigenous women of NZ.

143. The chapter recognises the importance of "gender-responsive policies" and "inclusion" and eliminating all forms of gender discrimination "in trade". The UK and NZ promise to promote a gender perspective in their trade and investment relationship.

144. The chapter aims to "advance women's economic empowerment and promote gender equality" by

    (i) implementing their existing international obligations (which they are obliged to do anyway);

    (ii) identifying barriers to women's participation; and

    (iii) cooperating to help women in business to benefit from the FTA through a long list of possible activities, to be determined after discussion "as appropriate" with government agencies, business, unions, civil society, academics, NGOs, and *for NZ* Māori.

145. One possible area of cooperation is *for NZ* to provide "opportunities for Wāhine Māori to engage in trade activities, including with a Te Ao Māori framework". As this is only "for NZ" it is unclear why it needs to be done through a bilateral FTA, and equally unclear how it involves cooperation with the UK under this chapter.

146. There may be some benefits for Wāhine Māori from these activities, provided they are properly resourced and if they can design and run them.

147. However, the chapter is only about women entrepreneurs. It does not address structural impacts of other FTA chapters on women's lives. For example, Big Tech's platforms and algorithms are infamous for their gender bias, as are lending practices of banks and insurers; intellectual property rules give private property rights over taonga that Wāhine Māori use for rongoā; and profit-driven foreign multinationals such as mining companies violate Papatuanuku.

148. The Labour chapter has a provision (Art 23.8) to address non-discrimination and gender equality in the workplace. Each Party will implement policies "it considers appropriate" to ensure equal opportunities and inclusive labour market, protect against discrimination, reduce pay gaps, and develop cooperation activities on non-discrimination and gender equality to "improve capacity and conditions for women in trade and the workplace". "Appropriate policies" are likely to reflect the status quo. The provision does not refer to Wāhine Māori or commit to addressing the specific harms they face.

149. The Trade and Gender chapter is unenforceable and overseen by an "Inclusive Trade Sub-committee" of officials. The sub-committee is expected to facilitate communication with and participation of Wāhine Māori, among others, in its activities. But the committee is made up of officials. There is no independent seat at the table for women, let along Wāhine Māori.

150. Nor is there any requirement that Māori participation that is provided for on the sub-committee when dealing with the Māori Trade chapter includes Wāhine Māori.

Kaimahi Māori

151. The Taumata said its research shows the FTA will create "hundreds of new jobs". However, there is no guarantee that any new jobs that do emerge from the FTA would go to Māori.

152. The FTA may make it easier for NZ professionals to work in UK, and vice versa, but that is unlikely to benefit a substantial number of Māori.

153. But other rules may reduce job opportunities within Aotearoa:

    (i) British contractors can bring offshore workers in various skill categories to fulfill contracts in NZ; (Ch 13)

    (ii) British investments can't be made to hire local labour; (Art 14.8.1(i))

    (iii) British investors can't be made to process their products (eg logs) here; (Art 14.1(b))

    (iv) British firms can bid for more NZ government contracts and perform them offshore; (Ch 16)

    (v) services can be delivered into NZ from the UK without any local presence. (Art 9.7)

154. NZ firms could do the same, but in reality this arrangement is likely to benefit predominantly UK firms. It is not obvious if or how *Māori* workers will benefit.

The Labour chapter

155. The FTA has a Labour chapter (Ch 23). There is no specific reference to Māori workers. The chapter confirms UK and NZ's existing international obligations (Art 23.3), commits the Parties to action to combat Modern Slavery (Art 23.9), to apply their domestic laws effectively (Art 23.6), and support good labour practices (Art 23.2.2).

156. Businesses will be encouraged to adopt voluntary corporate responsibility initiatives, but not required to do so. (Art 23.10)

157. NZ and UK will each implement policies "it considers appropriate" to ensure equal opportunities and inclusive labour market, protect against discrimination, reduce pay gaps, and develop cooperation activities on non-discrimination and gender equality to "improve capacity and conditions for women in trade and the workplace". (Art 23.8) As noted above, there is no specific reference to Wāhine Māori.

158. The Chapter requires NZ and UK each to establish and consult an independent advisory group of workers, employers and experts (Art 23.4). Again, no reference to Māori.

159. Although the chapter is "soft", using words like "recognise", "encourage", "strive to ensure" or "endeavour", it is enforceable through a tailored process. (Art 23.18-22).

160. There is a specific sub-committee to oversee the chapter (Art 23.17), but there is no guaranteed voice on it for Kaimahi Māori.

PART 6. TE TAIAO

161. As with most contemporary "trade" agreements, many chapters and rules in this FTA restrict what governments can do in ways that go far beyond "trade". There is a specific chapter on Environment. But many other chapters also affect Te Taiao:

- **Foreign investment** (mining, water, forestry, tourism, transport, …) (Ch 14)
- **Services** (environmental services, services related to agriculture, fisheries, …) (Ch 9-11)
- **Goods** (impacts of intensified agriculture, international transport of goods) (Ch 2-5)
- **Intellectual property rights** (Wai 262, manuka honey, climate technologies) (Ch 17)
- **Labelling of products** (organics, residues, origin labelling, health warnings) (Ch 7)
- **Technologies** (no border taxes on green machinery and products) (Ch 7, 22)
- **Māori trade** and economic cooperation (UK excludes IP on genetic resources) (Ch 26)

162. Māori have no role in governance of any of those chapters (except the Māori Trade chapter 26 and one element of Intellectual Property Chapter 17).

No positive protection in the Environment chapter

163. In the Environment Chapter 22 the UK and NZ "*recognise … that the environment plays an important role in the economic, social and cultural well-being of Māori, in the case of New Zealand, and acknowledge the importance of engaging with Māori in the longer term conservation of the environment".* (Art 22.3.3(d))

164. The Chapter defines "kaitiakitanga" and "mauri" (Art 22.2). But it then applies them in the provisions on "sustainable agriculture", "marine capture fisheries" and "sustainable forestry management" in ways that are inappropriate, because they are used to advance production, not Māori values, and in ways that are not tika because they misrepresent trade as part of the solution, when modern trade practices are often toxic to the mauri of eco-systems.

165. The chapter does not empower Māori or positively protect taonga, consistent with Te Tiriti.

No change on climate change?

166. There are a lot of references to climate change, but nothing that will require NZ and UK to make significant changes in their current policy settings, for example with the use of market mechanisms and trading in carbon credits.

167. The Environment Chapter 22 recognises the need to address the urgent threat of climate change (Art 22.6). But while the UK and NZ "affirm" their commitments to the UNFCCC and the Paris Agreement, and can decide their own approach to "mitigation" and "adaptation", the way they do so must not involve "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade". In other words, the FTA limits how they can implement those obligations.

168. They also promise (Art 22.6.3) to cooperate on
- trade-related aspects of climate change policies,
- endeavour to resolve air pollution, and
- end fossil fuel subsidies (carefully worded with loopholes).

169. There is also provision to ensure various goods that are considered supportive of environmental and climate initiatives are tariff free, and to promote foreign investment in environment-related services (Art 22.7). The provision on fossil fuel subsidy reforms and transition to clean energy (Art 22.8) likewise reflects trade economy arguments about trade-distorting impacts of subsidies. This reflects the trade liberalisation approach of countries like NZ and the UK that seek market solutions to the climate crisis, and which advocate similar moves in the World Trade Organization.

170. If this means business as usual, as it appears, this chapter would make no real difference to the impact of climate change on Māori communities or Te Taiao.

Marine capture fisheries

171. Māori opposed the creation of the quota management system (QMS) and Individual Transferrable quotas (ITQs) because they commodified Tangaroa, overrode the kaitiaki responsibilities of those who hold mana o te moana, and created private property rights in fish that excluded most Māori from exercising their Tiriti rights. While some Iwi Māori are now major commercial quota holders, the fundamental objections sourced in tikanga Māori and Te Tiriti remain.

172. The long provision on fisheries (Art 22.9) starts by "*recognising the importance of kaitiakitanga in conserving and sustainably managing fisheries and the mauri of marine ecosystems"* (Art 22.9.1).

173. Despite recognising its importance, the chapter does not provide any mechanism for Māori to exercise mana o te moana and kaitiaki responsibilities in protecting the *mauri of te moana*.

174. Instead, it mainly focuses on three matters that are under discussion in the World Trade Organization:
    (i) fisheries management,
    (ii) subsidies, and
    (iii) illegal and unreported fishing.

175. NZ and UK are required to have a fisheries management system to address overfishing, by-catch, and adverse impacts on marine ecosystems, based on "best scientific evidence", and a precautionary and eco-system approach. New Zealand can be expected to claim the QMS and ITQs achieves that, despite research that has exposed poor reporting of catches, the dumping of bycatch, unsustainable seabed trawling practices, and labour abuses on vessels operating leased quotas.[13]

Sustainable agriculture

176. Article 22.10 says: *"The Parties recognise the increasing impact that global challenges to kaitiakitanga of mauri such as land degradation … have on the development of productive sectors such as agriculture"* …

[13] https://morganfoundation.org.nz/fishing-quota-management-system-needs-reform/; https://www.researchgate.net/publication/262841518_New_Zealand%27s_fisheries_management_system_Forced_labour_an_ignored_or_overlooked_dimension https://rescuefish.co.nz/theissue/the-problem/; https://www.nature.org/media/asia-pacific/new-zealand-fisheries-quota-management.pdf

177. Again, the reference to mauri is concerned with the impact on the development of agricultural production and the content of the provision has nothing to do with the mauri of the whenua or the role of mana whenua and kaitiaki to protect it.

178. NZ and UK are required to take measures to
(i) reduce greenhouse gas emissions for agricultural production and
(ii) promote sustainable agriculture and trade, and
(iii) cooperate to develop and implement policies that promote sustainable agriculture.

179. New Zealand can be expected to say that its existing policies and practices meet these standards, despite criticism of special treatment for agriculture under the ETS, the crisis in effluent and fertiliser runoff and pollution of waterways, and excessive water demands to irrigate dairy conversions on marginal land.

Sustainable forestry management

180. The sustainable forestry management provision (Art 22.11) follows the same pattern. It refers to "*kaitiakitanga in the conservation of the mauri … of forests … and the role of trade in pursuing this objective …".* (Art 22.11.1)

181. NZ and the UK "acknowledge" the need for sustainable supply chains in addressing greenhouse gas emissions and loss of biodiversity, then say they must "promote", "contribute to", "endeavour to" do various things to advance that objective, and "cooperate on ways to promote" sustainable management in several possible ways.

182. There is no commitment to do anything concrete to change their current practices, nothing that gives any meaning to kaitiakitanga of the mauri of forests, and no role for Māori as kaitiaki in these activities.

Conservation of Biological Diversity (CBD)

183. In the provision on CBD (Art 22.12) NZ and the UK *"recognise the importance of respecting, protecting, preserving and maintaining knowledge, innovations, and practices of Māori in the case of New Zealand embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity".*

184. That does not connect to the rest of the article on the CBD. The things UK and NZ "must" do are very specific, such as take "appropriate" actions to protect native wild flora and fauna, not trade in ivory, and promote sustainable use of biodiversity *in trade-related activities* and *according to existing law*. Otherwise the language is "recognize", "acknowledge" or "affirm".

185. The UK and NZ "may" cooperate on matters such as access to genetic resources and fair and equitable benefit sharing, consistent with the Convention on Biological Diversity. That is not explicitly linked to the review on genetic resources in the Intellectual Property Chapter, discussed earlier. However, as also noted above, the UK was clear in the Māori Trade chapter that it intends to shield its intellectual property rights regime from any recognition of Māori rights over genetic resources or traditional knowledge.

Water

186. The Environment Chapter does not address water and ignores its relevance in other provisions, such as "sustainable agriculture". (Art 22.10)

187. However, other chapters have rules that could limit new Tiriti-based policies on water, such as:

(i) Protection of UK investments in water against direct or indirect expropriation (Art 14.14) and "unfair treatment", (Art 14.11) which they might claim if new laws or resource decisions adversely affect their water rights. The good news is that UK investors are not able to sue the government directly under this FTA (what is called investor-state dispute settlement or ISDS) and would have to rely on the UK government to enforce these guarantees through the FTA's dispute process.

(ii) UK services firms who supply "environmental services" involving water (which the environment chapter aims to liberalise) could not be limited by quotas (Art 9.4), unless the difficult general exception was seen to apply. Nor could they be required to have some Māori ownership (Art 9.5) or Māori directors and managers (Art 14.9); however, the Treaty Exception (Art 32.5) might (not would) apply to the ownership and directors rules.

(iii) These entitlements for UK services suppliers and investments do not apply to those supplying drinking water, because there is an exception for that.

No Rangatiratanga or Kaitiakitanga over Te Taiao

188. The Environment Chapter says in Art 22.3.3(d) that the UK and NZ recognise *"the environment plays an important role in the economic, social and cultural well-being of Māori … and acknowledge the importance of engaging with Māori in the long-term conservation of the environment".*

189. Despite that, Māori are not mentioned in the Chapter's engagement mechanisms:

(i) the Environment and Climate Change sub-committee that oversees the chapter, including cooperation activities, comprises officials only (unlike the Inclusive Trade Sub-committee); (Art 22.20)

(ii) there is no reference to Māori in relation to:

- public input on relevant matters and a public session at each meeting of the sub-committee; (Art 22.20.7)
- independent advisory groups for NZ and UK to engage with about implementing the chapter; (Art 22.22)
- opportunities to make written submissions about the chapter's implementation. (Art 22.21)

THE WAY FORWARD

This Tiriti-based assessment of the free trade agreement between New Zealand and the United Kingdom calls the Crown in both countries to account for its failure to honour its obligations under Te Tiriti o Waitangi.

The Agreement has not yet been ratified by either New Zealand or the United Kingdom. There is still time for both governments to step back, acknowledge their failure to meet their shared obligations as the Crown under Te Tiriti o Waitangi and its foundation in He Whakaputanga o Te Rangatiratanga o Nu Tireni, and renegotiate a Tiriti-based alternative with Māori genuinely at the table.

That alternative needs to bring the Tiriti relationship of Rangatiratanga and Kawanatanga into the 21st century through a trade agreement that is truly transformative, not a continuation of the status quo.

Delivering that Tiriti-based agreement will maintain the mana of the Queen of the United Kingdom and of the Rangatira o Ngā Hapu o Aotearoa, lay down and apply a tika and pono foundation for future relations between our nations, and honour what our ancestors envisaged in 1835 and 1840, as reflected in the Kaupapa of Ngā Toki Whakarururanga:

> *"Mana whakahaere in the global domain is informed by Rangatiratanga and Kāwanatanga working together in a mana-enhancing relationship of equals consistent with Te Tiriti o Waitangi and He Whakaputanga o Te Rangatiranga on Nu Tireni".*