

Te Tiriti & Treaty Making

**(presentation to Kaihautū on 8 April 2025,
adapted for Waitangi Tribunal (Wai 3325) on request)**

**NGĀ TOKI
WHAKARURURANGA**



3 parts

**1. Tino Rangatiratanga,
the power to treat &
contrasting worldviews**

**2. How the Crown makes
international trade and investment
treaties & space for Māori
intervention**

3. Example of the ACCTS

The right to treat: Moana Jackson's evidence to Wai 1040/2322/2522 tribunals

The constitutional authority of ngā Rangatira to treat with other nations, whether they are other hapū, the English or other foreign nations, was and is an integral function of mana and responsibility of the exercise of tino rangatiratanga to be conducted according to tikanga Māori.

“Treaties and the power to treat did not suddenly fall out of the sky on unaware or ignorant Māori polities in 1840. ... The authority and understanding of treaties was an integral part of tikanga as law.”

The very nature of mana as a taonga meant it could not be alienated to another authority.

“No matter how powerful rangatira might presume to be, they never possessed the authority nor had the right to give it away or subordinate it to some other entity.”

**Ngā Toki
Whakarururanga
Statement of Position
to
Constitutional
Kaupapa Inquiry**

The Claimants' position is that the exercise of mana in *both* the domestic and international domains are intrinsic and inseparable elements of the rangatiratanga that the authorised representatives of the British Crown affirmed and guaranteed by in He Whakaputanga o te Rangatiratanga o Nu Tirenī 1835 and Te Tiriti o Waitangi 1840. That guaranteed the continuance of their authority and responsibilities, including treaty making. The authority of Crown was expressly limited and it has repeatedly overstepped that authority.

**Critique of the
Crown's position in
Constitutional
Kaupapa Inquiry**

Crown says “The Executive is responsible for negotiating international agreements” as Crown prerogative.

It is silent on the source of “sovereignty” and seeks to ignore and capitalise on a history of dishonour.

Passage of time does not and cannot make Tiriti breach legitimate.

He Whakaputanga me Te Tiriti expected Crown to protect rangatiratanga from other states, not deny rangatiratanga and mana.

Te Ao Māori view of trade and economy

Relational, holistic, value-based, collective, inter-generational.

Benefits carry responsibilities to protect the mauri of the living world and ecosystem, according to tikanga and governed through mana motuhake / rangatiratanga.

“Worldview” of current trade agreements

Market-based capitalism, individualised and decontextualised, transactional relationships in commercial markets.

Deals in disembodied abstract commodities, including of labour and resources, exploited for profit.

Private ownership gives exclusive proprietary rights, no corresponding responsibilities.

Illusion of parity of players and states in markets.

Genuine Indigenous to Indigenous agreements do not fit into a space designed by and for colonial capitalist powers for their corporate interests.

They need to be created outside that paradigm, eg. Mataatua Declaration.

New buzzword of “**inclusivity**” in FTAs seeks to bridge the gap in worldviews.

But **Indigenous participation** in FTAs is on terms determined by colonial power, within their paradigm.

Eg. “**Indigenous Trade and Economic Cooperation**” chapters in FTAs are about how Indigenous Peoples can benefit from these agreements and are unenforceable. They don’t address the bad stuff in the FTA.

Similar in other “Indigenous” arrangements, eg the **Inclusive Trade Action Group (ITAG)** attached to TPPA/CPTPP

Part 2

How does the Crown make international treaties, from start, to signing, to implementation?

Where does rangatiratanga sit?

What role is there for Māori?



**Starting point for any
NZ negotiation**

Negotiations do not start from a zero base.

Crown's main reference points are:

- Existing NZ policy settings
- Rules of the World Trade Organization
- NZ's existing FTAs
- Other party/ies existing FTAs

Negotiations occur within those boundaries.

Significant changes are very rare,

Paradigm changes are, by definition, almost impossible



**NZ's current
template for
FTAs**

Preamble

2. Trade in Goods

4. Customs & Trade Facilitation

6. Technical Barriers to Trade

8. Trade in Services

10. Financial services

12. Entry of business persons

14. Investment

16. Intellectual Property Rights

18. SOEs and Monopolies

20. Trade and Labour

22. Trade and Gender

24. Transparency

26. Dispute settlement

28. Final Provisions

1. Initial provisions

3. Rules of Origin

5. Sanitary & phytosanitary

7. Trade Remedies

9. Domestic regulation

11. Telecommunications

13. Government procurement

15. Digital trade

17. Competition

19. Environment

21. SMEs

23. Māori Trade & Economic Coop

25. Institutional provisions

27. General Exceptions (incl Treaty)

Crown's executive treaty making process

Cabinet decides to start or join a new negotiation. Reasons may be political, strategic, commercial

Or there may be a new "round" of negotiations/ review of existing agreements

MFAT briefs Cabinet, gets a mandate, based on status quo policies.

Public is consulted on "benefits", not on downsides.

Negotiating governments agree on the scope, process, secrecy of text.

Texts build on existing agreements & templates. Hard to get change

Rounds of negotiations. to and fro on draft texts, trade-offs in & between chapters

Final decisions are political. Ministers depend on advice of MFAT, other ministries.

Each party signs text. Then ratifies its adoption thru its domestic process.

Enters into force when enough parties ratify.

Parliamentary treaty examination, in Standing Orders

Since 1998, final FTA text is tabled in Parliament once signed

MFAT prepares its own “national interest analysis” (NIA)

Treaty & NIA are referred to Foreign Affairs, Defence & Trade committee

Committee usually seeks submissions. Giving only 5 mins for individuals, 10 mins for groups

Select committee reports to Parliament, which may debate the report.

Report can have minority views. But Committee can't propose changes to FTA.

Ratification is executive decision, irrespective of committee report.

Parliament only has power if laws need to be amended to comply with FTA. But govt has a majority.

**Ngā Toki
Whakarururanga's
role:
Mediation
Agreement**

Wai 2522 Mediation Agreement:

Crown promised “genuine” and “meaningful” influence on future trade policy and negotiations at all stages of decisions.

Conduct Tiriti assessment of all new agreements

Once NTW was established, both will develop a process and instrument to define the ongoing role of their relationship, including legal obligations & security.

What really happens

NTW hears about new negotiations via MFAT officials, other sources, in media.
Calls to discuss. Main contact is MFAT Trade and Economic Group

Only those who sign confidentiality agreement see information about negotiations and only if other party/ies agree.
Limits NTW's ability to discuss issues and inputs with other Māori.
Taumata may also see information. Their inputs are not shared.

Different officials in negotiations, often in silos, limited institutional memory.
Effectiveness of NTW inputs varies depending on context and subject.

Technical comments on texts and papers are limited by template, precedents, mandate from Ministers, other party.
No genuine influence on paradigm, rare to get significant text changes from previous FTAs. Conceptual arguments have no impact.

Everything is mediated through the Crown.
No seat at the table. No role in decisions. Direct engagement with other party only occurred with UK on digital, resulting from Wai 2522

Voice is thru Tiriti assessments, annexed to official NIA.
Select committee gives 10 minutes for submission, incl Q&A.

Ngā Toki Whakarururanga Tiriti o Waitangi Assessments

Preparing Tiriti assessments of agreements part of the Mediation Agreement

Assesses both process and substance of a new agreement, and impact of inputs

Template is based 4 articles of Te Tiriti

Tiriti assessment initially sent to Ministers & Māori MPs, no response. Not done recently.

Presented as select committee submission. Minimal impact.

Why do it? Puts the Tiriti critique on record. MFAT is sensitive to it.

MFAT now includes summary of advice from NTW and other Māori in the NIA.

Tiriti assessments have formed part of evidence in Waitangi Tribunal claims.

Crown has reviewed treaty making process – underground

Crown's 2001 strategy to engage Māori on treaties: it decides if there is a Tiriti issue, how important, & what engagement

Criticised in Wai 262; Wai 2522 (TPPA); Trade for All Advisory Group (TfAG).

Deferred action on TfAG recommendn. 2021 MFAT was mandated to review treaty process.

Minister Mahuta set up Te Pae Tawhiti to implement Wai 262, incl international treaties

Internal Crown process. Took a pragmatic incremental approach, explicitly to avoid "difficult issue of constitutional reform"

OIA documents show TPK pushed to review 2001 strategy, blocked by MFAT

After 2 years of review, Cabinet paper was approved by Minister but never presented.

So nothing has changed.

Part 3
Case study:
Agreement on
Climate Change,
Trade &
Sustainability
(ACCTS)

How was ACCTS developed?

**What impact did Māori voice
have on the approach and
outcome?**

What can change?



ACCTS

Goal: liberalise environmental goods & services.
Same negotiations in WTO failed 10 years ago.
6 countries (Costa Rica, Fiji, Iceland, Norway, NZ, Switzerland) proposed a non-WTO agreement.
WTO & APEC provided the starting point.
Cabinet approved mandate proposed by MFAT.
Online invitation to “have your say”,
within parameters of what was being negotiated
Negotiations secret, parties refused to release texts.
MFAT website gave brief summary of rounds.
Ministers issued generalised joint statements.



**Ngā Toki had no
influence on ACCTS**

NTW pūkenga who signed confidentiality agreement shown texts that Crown chose to share. Detailed Tiriti-based inputs were ignored.

Final text

- does not not address the climate crisis,
- one Preamble reference to Indigenous Peoples,
- rolls over flawed 2001 Treaty Exception,
- weak protective language in schedules.

NTW's Tiriti assessment says Crown failed in process and substance.

10 minutes for select committee submission.

Taumata gave more general positive input, contrasting positions were set out in MFAT's NIA.

**Genuine influence on
trade and climate
negotiations and agreements
requires constitutional change**

Tiriti & rangatiratanga need to be taken seriously
in decision-making from the start and
at the table.

Claims to Crown prerogative prevent that.
Māori have no voice as of right in the process.

Crown is not willing to share power.
and rethink pre-determined “trade” paradigm,
excludes & often conflicts with Te Ao Māori.

Need urgent open review of
2001 Strategy on Engagement with Māori on
International Treaty Making,
as per Wai 262, Wai 2522 and
Trade for All Group Report.

**What immediate steps can give
Māori more influence on
trade and climate
negotiations and agreements?**

Existing agreements are hard to change.
Crown can at least exit existing BITs.

Current ad hoc process has Māori at the margins.

Tribunal could recommend, **as a Tiriti right:**

- stronger protections & exceptions in texts;
- more disclosure of text to enable informed input;
- seat at the table alongside Crown;
- speaking directly to other party in negotiations;
- Tiriti-based audits of process and outcomes.

Tribunal can have an influence:

Wai 2522 finding of CPTPP breach has increased
Ngā Toki's leverage on digital trade rules,
secured some stronger protections,
some direct voice. **But Crown still decides.**

**NGĀ TOKI
WHAKARURURANGA**

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