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Making sense of the numbers

EU-NZ FTA

Māori economy

Pipiri 2019

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1 Introduction

New Zealand is negotiating a free trade agreement with the European Union (EU), one of the world's largest trading entities. Apart from the United States, the EU is New Zealand's largest trading partner we do not yet have a free trade agreement (FTA) with.

Business and Economic Research Ltd (BERL) has completed work for Te Puni Kokiri (TPK) and the Ministry of Foreign Affairs and Trade (MFAT) on the opportunities for the Māori economy in FTAs with both the Pacific Alliance (PAFTA) and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC). BERL interviewed a significant proportion of Māori entities that are exporting, or are looking at expanding into the export market. From this work it was evident that the EU is an important market for the Māori exporters. Hence, BERL was commissioned by MFAT and TPK to investigate the opportunities for the Māori economy in the European Union-New Zealand (EU-NZ) FTA.

This report provides an overview of the Māori economy and Māori exporters, and identifies specific issues of interest to Māori in the EU-NZ FTA negotiations, including:

- Māori engagement in the EU-FTA negotiations
- Geographical Indications
- Intellectual property rights, Mātauranga Māori and taonga species
- Te Tiriti o Waitangi clause
- Potential trade opportunities for Māori small-to-medium enterprises (SMEs).

2 Summary

Goods and services flowing through mainstream (non-Māori) export channels are, and will be, well-supported, and will benefit from any and all tariff and access improvements. Larger Māori exporters are positive about Europe, and are confident about managing the markets with lower tariffs and greater access.

SMEs have greater challenges exporting to the EU, which is a big market opportunity for Māori SME, particularly those trying to capture premium value through branding and positioning. Hence, a key focus is supporting SMEs as much as possible in general, with reciprocal acknowledgement of growth opportunities for SMEs in the EU.

For Māori businesses, cultural elements, including visual devices, kupu and intellectual property (IP), are key parts of their unique advantage and these need to be more strongly protected and supported. That means seeking active cooperation through the right instrument in the EU-NZ FTA around traditional knowledge protection and addressing misappropriation, offensive and derogatory use in the EU. It also necessitates more effective support provided to SMEs through domestic policy initiatives.

3 What is the Māori economy?

A broad definition of the Māori economy has been adopted for the purposes of this report, encompassing all people, entities and enterprises that self-identify as Māori. The Māori economy is quantified through Māori population (employment and income), Māori business, Māori collective assets as well as Māori freehold land. However, it should be noted that the Māori economy is an (integrated) subset within the broader New Zealand economy and cannot be seen in isolation.

In Statistics New Zealand's (StatsNZ) Census collection, Māori in business are defined as Māori employers and self-employed Māori. Māori businesses include Māori-owned entities with multiple or collective ownership. A key point of difference is that the beneficial owners in a collectively owned Māori business are there by inheritance or whakapapa. Their equity interest or shares also denote their tāngata whenua (the iwi, or hapū, that holds customary authority over an area) status and the tūrangawaewae (place where one has rights of residence and belonging through kinship) of the beneficiary.

3.1 Māori value-add to the economy dominated by land and resource based sectors

Māori value-add to the economy remains dominated by the $1.8 billion arising from the land and natural resource-based primary sector. Following closely are the manufacturing, equipment hire and property services, and business services sectors. These sectors contribute, respectively, $1.3 billion, $1.3 billion, and $1.1 billion.

The primary sector gross domestic product (GDP) contributions predominantly result from trusts, incorporations, and other collectively-owned Māori organisations. In contrast, the GDP contribution of the manufacturing, construction, and transport sectors comes mainly from enterprises of individual Māori employers and self-employed Māori.

3.1.1 Meat and dairy exports lead the Māori export economy

Determining the size and value of Māori exports, BERL estimated that Māori economy exports are about $3.4 billion, or 5.6 percent of New Zealand's total exports, with meat and dairy exports totalling $1.3 billion as shown in Graph 1. These estimates are based on an extension of our earlier (2011) report The Asset Base, Income, Expenditure and GDP of the 2010 Māori Economy.[1] Consequently, the provisos and caveats associated with that report also apply to these estimates. In particular, the definition of the Māori economy and Māori enterprises remains a point of conjecture[2].

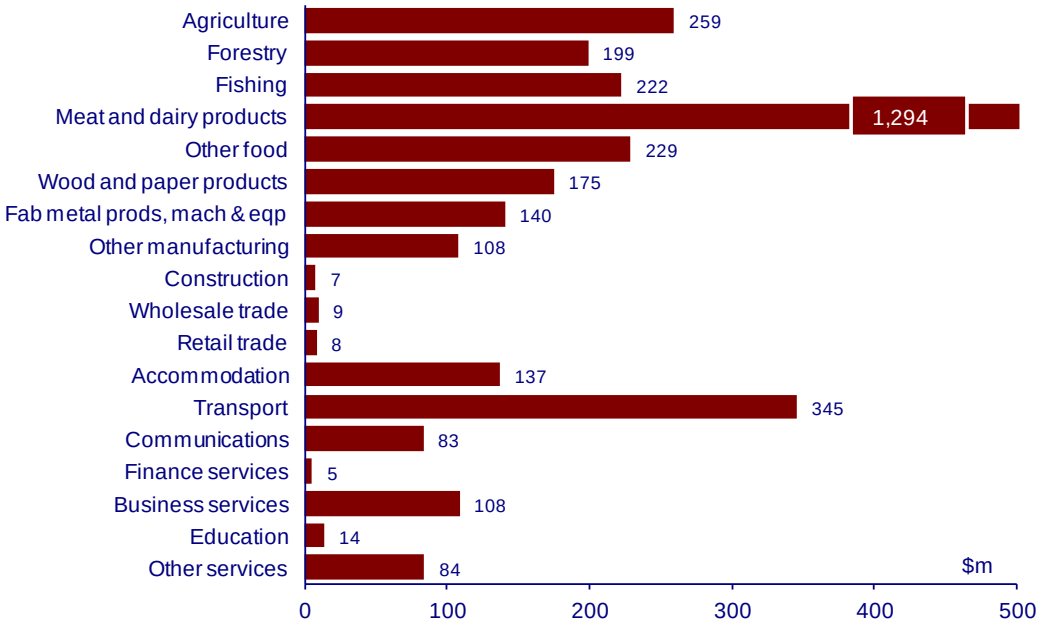
Meat and dairy product exports are substantially larger than the rest of the export products. These figures include the export share from Māori interest in Fonterra. The Māori economy is well integrated into the current export markets through its supply and shareholding in these companies. The majority of dairy exports go through Fonterra, and for meat exports through current supply chains. Therefore, these exports are not uniquely Māori branded. There are a few exceptions, such as Integrated Foods and Miraka.

[1] BERL. (2011). The Asset Base, Income, Expenditure and GDP of the 2010 Maori Economy. Wellington: BERL and Te Puni Kokiri. Available from: http://www.tpk.govt.nz/en/in-print/our-publications/publications/the-asset-base-income-expenditure-and-gdp-of-the-2010/

[2] Within the officials statistics gathered in New Zealand on enterprise, ethnicity information is not gathered.

With the growth and diversification of the Māori asset base, Māori enterprises are set to play an increasingly important role in New Zealand's exports and trade. Māori enterprises contribute to value-added across most sectors of the economy.

Graph 1: Māori economy export estimates by industry, 2012



3.2 Māori Authorities export goods worth $485 million

The StatsNZ Business Register covering the 2013-15 period identified some 1,200 Māori authorities. The definition of a Māori authority according to StatsNZ is:

- Business with a collectively managed asset, which uses current Inland Revenue eligibility criteria to be a Māori authority (irrespective of whether the enterprise elects to be a Māori authority for tax purposes)
- Commercial business that supports the Māori authority's business and social activities, and sustains or builds a Māori authority's asset base
- Businesses that are more than 50 percent owned by a Māori authority.

In 2015, Māori authorities exported goods worth $485 million to 65 countries. By comparison Māori SMEs exported goods to 53 countries worth $44 million, up 15 percent from 2014. More than 50 percent of Māori exports were food and beverage, 25 percent were manufactured, and 20 percent were in ICT. Kaimoana (seafood) was the top export commodity in 2015, and accounted for $304 million, or 63 percent of all merchandise exports by Māori authorities.

In 2015, 44 percent of Māori Authorities sampled in the StatsNZ Business Operations Survey sold goods and services to overseas markets. All of them considered that staff experience, a unique intellectual property (mana whakairo hinengaro) or valuable brand (waitohu whaipainga), and quality or customisable goods and/or services were the key factors for competing in overseas markets. Price was the least important factor.

4 EU an important export market for New Zealand and the Māori economy

Partnering with EU countries represents a huge opportunity for New Zealand exporters, opening up a market with a combined population of half a billion people. The EU currently includes five of New Zealand's top 20 trading partners – Germany, the United Kingdom (UK), France, Italy and the Netherlands. Two-way trade between New Zealand and the EU was worth nearly $26 billion in 2018, and excluding the UK, about $20 billion.

New Zealand annual goods exports to the EU are worth NZ$5.5 billion and services exports are worth NZ$4.9 billion. Our main goods exports to the EU are wine, fruit and meat. Our services exports are mainly tourism and transportation services. New Zealand imported $4.5 billion in services and $11 billion in goods from the EU in 2018. Overall, 16 percent of our total trade in goods and services is with the EU.

For those marketing goods and services overseas (Authorities and SMEs), the United States of America (USA) and Australia were the most common markets they accessed or engaged with. Australia and the USA were the markets for 44 percent of sampled Māori Authorities (in other words, for all of the Māori authorities that marketed goods or services overseas), while the EU and the UK, China, and Japan were not far behind, at 33 percent of exported goods and services. The UK was the biggest single market for Māori SMEs, worth $13.4 million.

Benefits from an EU-NZ FTA will advantage all New Zealand businesses, including Māori-owned entities. Larger Māori businesses are positive about the potential for tariff and access improvements in an agreement, and are capable of executing against that. However, further support is needed for SMEs where the EU and UK are focal points. This is discussed further in section 9.

5 Māori engagement in EU-NZ FTA negotiations

The Māori economy has a significant share of New Zealand exports, and has established value chains, capacity, and capability. Research on indigenous economic development within the EU identifies indigenous business as small scale and linked to traditional livelihoods and culture. We cannot assume that the EU will be fully informed on how well-developed the Māori economy is and how embedded it is in the mainstream architecture of the overall New Zealand economy. Therefore, a key undertaking in FTA negotiations and in the trade relationship moving forward is emphasising the Te Tiriti o Waitangi principles and the desire of the Crown to work in genuine partnership with Māori.

5.1 A Hui was held to gather insights

A Hui was held to discuss the EU-NZ FTA on 25 February 2019 at the MFAT offices in Wellington. The Hui was attended by key Māori exporters, as well as officials from MFAT, TPK, and the Ministry of Business, Innovation and Employment (MBIE). The meeting was chaired by the Chief Operating Officer of the Federation of Māori Authorities (FOMA). Stakeholders subsequently fed back to BERL through a range of mechanisms, including email, phone conversations, and kanohi-ki-te-kanohi (face-to-face).

5.1.1 Key observations from the Hui

MFAT advised that both parties are aiming to have completed the EU-NZ FTA negotiations by the end of 2019. EU negotiators would be visiting New Zealand on 13-17 May 2019 for the fourth round of negotiations, with the goal of clearing away less contentious issues by the European summer. They indicated that a presentation on the Māori economy would be made at the May round for the benefit of the EU delegation.

MFAT stated that the most difficult issues in the negotiations were likely to be:

- Market access, including for New Zealand's most important agricultural exports
- Intellectual property issues, including geographical indications
- Government procurement.

On the services side, there was generally shared ambition, and a high quality agreement was expected. For New Zealand, the areas of focus are business, education, professional, and aviation-related services. However, MFAT noted that there would be no legal commitments on audio-visual services, since these had been rejected by the EU before the outset of negotiations.

New Zealand negotiators would insist on a Te Tiriti o Waitangi exception clause, as it has done in previous FTAs. The EU had already agreed in principle to this in scoping and had included it in its negotiating mandate.[3]

New Zealand would also seek provisions relating to trade and indigenous peoples, which would support Māori economic development. Discussions between negotiators had begun on this, but the form and scope of these provisions was still to be worked through. A reciprocal indigenous chapter, such as Chapter 19 in the ANZTEC agreement, is highly unlikely as EU indigenous groups are not exporting, and have capacity constraints and limited capability.

[3] For further information please see https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-7661-2018-ADD-1-DCL-1

It was evident from the Hui in February that a long-term strategy to protect taonga in overseas markets needs to be put in place. The government will need to consult on this with Māori to ensure that this strategy is included in the negotiations. Hui participants indicated that consultation should not only be with iwi, but also with land and business owners, and hapū and whanau. Critical to developing a strategy for any international agreement would be finally determining how such issues would be dealt with in New Zealand law.

Unique intellectual property (mana whakairo hinengaro) or valuable brand (waitohu whaipainga), and quality or customisable goods and/or services are key factors for Māori entities competing in overseas markets. These would also need to be taken into account in such a strategy.

From MFAT's overview and input from Māori entities represented at the Hui, the following areas of interest in the EU-NZ FTA for Māori were identified:

- Market access for Māori products and services
- Developing potential trade opportunities for SMEs.
- Intellectual property (including geographical indications), Mātauranga Māori and cultural elements
- Te Tiriti o Waitangi exception clause.

These interests are expanded upon in Sections 6-9.

Stakeholders have also fed back after the February Hui that it is essential to have appropriately qualified people working within government to deal with Māori concerns in free trade agreements. They recommended such people be able to speak to economic, business and legal concerns, have a broader skill base than understanding of tikanga, and provide crucial links to domestic policy issues.

A Hui in Rotorua on 17 April agreed that a working group should be established as a matter of urgency. This working group would consider the details of a dedicated Māori – MFAT engagement mechanism (Taumata) to deepen discussions on priority trade policy issues. The working group will also provide an interim and representative voice for Māori on priority trade policy issues until the Taumata is stood up.

6 What defines a Geographical Indication in New Zealand?

As part of the EU-NZ FTA, the EU has proposed a list of wine, spirit, and foodstuff names for protection as geographical indications in the New Zealand market. There is also an opportunity for New Zealand to propose product names to be protected as GIs in the EU.

A Geographical Indication (GI) is an indication which identifies a good as originating in a particular territory, or a regional locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.[4] GIs are a form of regional branding and in this respect can support local economies to the extent that those economies have a unique regional marketing proposition to sell to consumers. The GI scheme in the EU is extensive with several thousand names for wine, spirits and foodstuffs registered as GIs, and they see GIs as an important tool for maintaining small rural communities and their lifestyles. Well-known EU export products covered by GIs include Champagne and Scotch whisky.

Although GIs are seen as important for the internal market of the EU (there are currently thousands of registered GIs in the EU), the range and number of different products with protected GIs outside of the EU is small. Successful GI protection requires significant investment in establishing a product's reputation. As one academic from Massey University has put it, the GI does not make the product; the product makes the GI. Once a product reputation is established and a GI acquired, further investment is needed to enforce the GI against use by those who might seek to unfairly benefit from it.

Despite the large number of registered GIs in the EU, each FTA is specifically negotiated. The EU has provided a list of around 2,200 names it wants protected in New Zealand as GIs as part of the EU-NZ negotiations, and they want provision to add additional names in the future. Many of these names are sensitive; they are in common usage in New Zealand and elsewhere and are used by New Zealand producers to describe their products. If New Zealand were to negotiate protection for these names, the questions for negotiators are: how can the rights and interests of New Zealand users be catered for, and how much the EU would be prepared to pay for those protections, i.e. through increased market access for New Zealand exporters.

GIs in New Zealand are currently protected under the Geographical Indications (Wine and Spirits) Registration Act 2006, which came into force in 2017.[5] The Act covers wines and spirits only, and provides a regime for registering New Zealand regional names, such as Marlborough, Hawkes Bay, Waiheke Island, as GIs, as well as allowing foreign wines or spirits GIs to be registered in New Zealand. Other protection mechanisms include the Trade Marks Act 2002 and the Fair Trading Act 1986.

For the EU to grant GI protection to New Zealand products under the FTA, those products would need to currently benefit from a form of recognition in New Zealand , either as a registered wine or spirit under the GIs (Wines and Spirits) Act or, possibly, as a certification trade mark. Similarly, for EU or New Zealand foodstuffs to be registered as a GI in New Zealand would require amendment to the GI Act. It is unlikely current GI legislation will be amended to allow for registration of food product GIs that are not wines or spirits during the negotiation time frames. To the extent there are any changes to New Zealand's legislation, they will likely occur after the deal is complete as part of New Zealand 's ratification.

[4] https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/geographical-indications/

[5] https://www.iponz.govt.nz/about-ip/geographicalindications/register/?location=nz&sort=alphabet&status=live Retrieved 5 March 2019

7 Providing protection for IP and Māori cultural elements

The New Zealand story is an essential part of building brand value, relationships and trade with export partners. The Māori story is integral to this and is a point of difference for Māori businesses exporting, as cultural elements contribute to the uniqueness of Māori-owned enterprises. Cultural identity, origin stories, integrity in supply chains, and sustainability of products and services are keys to branding.

There are three broad areas of concern for Māori:

- Intellectual Property (IP) – general IP protections where trademarks or patents may have a Māori cultural or design element.
- Mātauranga Māori – traditional Māori knowledge and epistemology, including artistic and cultural expressions (taonga works).
- Use of, and rights to, taonga species.

In recognition of this, New Zealand officials will seek to ensure that the IP chapter of the EU-NZ FTA preserves the ability to put in place protections for Māori interests where possible. During scoping discussions, the EU agreed with New Zealand that negotiations should explore issues related to genetic resources, traditional knowledge and folklore.

Securing protections in the EU-NZ FTA could be limited where New Zealand has yet to fully develop its domestic policy position or appropriate protection mechanisms to address Māori IP concerns. However, these concerns are not limited to the EU-NZ FTA. This was reflected at the February Hui, and in subsequent feedback, where participants expressed their concerns about New Zealand trade policy more broadly, stating that a Trade for All agenda that does not include protection of Mātauranga Māori, taonga works and taonga species in international free trade agreements would be inadequate. They were clear that all FTA negotiations should include discussions around the recognition and protection of Māori IP.

Therefore, it is vital that there is clear understanding and cohesion of current examples of where Mātauranga Māori, taonga works and taonga species are currently protected and to identify a strategy for integrating future domestic provisions into FTAs where appropriate. Existing regulations include:

- The Ngāi Tahu Claims Settlement Act 1998 lists a large number of flora and fauna taonga species, and the Crown has acknowledged the cultural, spiritual, historic, and traditional association of Ngāi Tahu with those taonga species.
- The Haka Ka Mate Attribution Act 2014 specifies a right of attribution to Ngāti Toa Rangatira in respect of the Ka Mate Haka.

New Zealand is also a signatory to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 31 of which, establishes that:

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect

and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".[6]

There is a tendency to cover such traditional knowledge and cultural expressions in IP discussions in FTA negotiations. However, while some Māori businesses may choose to utilise patent, copyright, and geographical indication protections for example, the commercial notion of IP can be problematic and insufficient where it cannot accommodate the distinctive features of traditional knowledge and cultural expression.[7]

World Intellectual Property Organization (WIPO) states while many forms of traditional knowledge are or could be protected as IP, existing IP mechanisms are not able to fully protect all forms. This is because existing IP mechanisms cannot fully respond to the characteristics of certain forms of traditional knowledge, namely, their holistic nature, collective origination and oral transmission and preservation.[8]

7.1 Commercial IP is covered by IPONZ

Commercial IP assets, namely trademarks, designs, and patents, can be registered with the Intellectual Property Office of New Zealand (IPONZ) through an application process. These assets may also be bought, sold and licensed.

IPONZ has Māori Advisory Committees for patents and trademarks, and they consider applications with Māori cultural elements, including imagery, words, music, dance, designs, taonga species, or Mātauranga Māori. To raise concerns, the Māori cultural element must have particular cultural or spiritual significance to Māori, and its use must be considered offensive. Stakeholders were concerned that trademark laws prevented Māori from using Te Reo.

7.1.1 Highlighting the value proposition of established Māori brands

Trading with a registered brand (certification trademark or registered trademark) domestically provides a clear pathway for protection internationally, and brand protection is vital in ensuring the protection of Māori taonga in the global marketplace. Hui participants indicated that there are already strong Māori brands exporting, and that there needs to be a concerted effort to protect these brands in the EU-NZ FTA.

7.2 Protection for taonga works and species internationally is crucial for Māori

Protection of Mātauranga Māori, taonga works and taonga species are sensitive areas for Māori given it has been 25 years since the commencement of the WAI 262 claim, also known as the intellectual property, or flora and fauna claim, and eight years since the release of "Ko Aotearoa Tēnei", the Waitangi Tribunal (the Tribunal) report on the claim.[9] The media release that accompanied the report stated:

[6] United Nations, Declaration on the Rights of Indigenous Peoples adopted by General Assembly Resolution 61/295 13 September 2007 (New York). Available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

[7] Drahos, P. & Frankel, S. (2012). Indigenous Peoples Innovation: Intellectual Property Pathways to Development. Canberra: ANU Press.

[8] https://www.wipo.int/tk/en/resources/faqs.html#a2 Retrieved 12 April 2019

[9] Waitangi Tribunal (Wai 262, 2011). Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity: Te Taumata Tuarua

"Current laws, for example, allow others to commercialise Māori artistic and cultural works such as haka and ta moko without iwi or hapū acknowledgement or consent. They allow scientific research and commercialisation of indigenous plant species that are vital to iwi or hapū identity without input from those iwi or hapū. They allow others to use traditional Māori knowledge without consent or acknowledgement. They provide little or no protection against offensive or derogatory uses of Māori artistic and cultural values."

The Tribunal considered that, while the Treaty of Waitangi does not guarantee ownership in taonga species or Mātauranga Māori, it does guarantee tino rangatiratanga. This guarantee requires Crown recognition and protection of the kaitiaki (guardian) relationships that Māori have with taonga species and Mātauranga Māori.

As part of the review of the Copyright Act 1994, MBIE is consulting on how the government should work with Māori in developing a legal framework for the protection of taonga works and Mātauranga Māori.

7.2.1 Disclosure of origin requirements are being considered

In September 2018, MBIE released a discussion document on possible options to introduce a disclosure of origin requirement in the patents regime.[10] This requirement was one of the WAI 262 recommendations as part of protecting kaitiaki interests, and to facilitate consideration of Māori rights and interests in taonga species and Mātauranga Māori. The Tribunal recognised that "patent examiners are often trained in Western science but not in tikanga Māori, and so may not recognise the existence of the Māori interest in a particular patent application", and that this may have a negative aspect on kaitiakitanga.[11] It recommended that patent applicants be required to disclose, where applicable:[12]

> a) The source and country of origin of any genetic or biological resource that contributed in any material way to the invention
>
> b) Mātauranga Māori that was used in the course of research, including traditional knowledge that is not integral to the invention that led to the relevant patent application.

MBIE stated in their discussion document:

"There is currently a risk that patent applications for inventions that involve indigenous plant and animal species or Mātauranga Māori may be missed during the patent examination process, and therefore not be referred to the Patents Māori Advisory Committee for consideration. A disclosure of origin requirement would help to ensure relevant applications are put before the Committee…It is difficult for interested groups, including Māori, the public and government, to find information on uses of New Zealand genetic resources and/or Mātauranga Māori. This is an issue for all providers of genetic resources and traditional knowledge. A disclosure of origin requirement would allow New Zealand's patents register to be used by interested groups to potentially identify some uses and users of genetic resources and/or traditional knowledge that they have an interest in."

While MBIE's preferred option is to implement a requirement that patent applicants disclose the origin of genetic resources and traditional knowledge used in their inventions, a decision on the

[10] https://www.mbie.govt.nz/dmsdocument/3706-disclosure-of-origin-discussion-paper Retrieved 1 April 2019
[11] Waitangi Tribunal (Wai 262, 2011). Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity: Te Taumata Tuarua. Vol 1 at 204
[12] Ibid, Vol 1 at 204

consultation has yet to be made. As at April 2019, MBIE are working through submissions and developing advice for government accordingly.

Disclosure of origin requirements are also being considered as part of a review on the Plant Variety Rights Act 1987. A Plant Variety Right (PVR) is an intellectual property right designed to encourage plant breeding, development and dissemination of new plant varieties. The Act provides for exclusive rights (for up to 23 years) for commercialisation of propagating material (e.g. spores, seeds or cuttings) of new cultivated varieties of plants. In Te Ao Māori, indigenous plant species are considered taonga.

The WAI 262 report made four recommendations in relation to the PVR Act:[13]

- That the Commissioner of Plant Variety Rights:
    - Be empowered to refuse a PVR that would affect the kaitiaki relationship
    - Be supported by a Māori Advisory Committee in his/her consideration of the kaitiaki interest
    - Be empowered to refuse a proposed name for a plant variety if its use would be likely to offend a significant section of the community, including Māori
- That the level of human input into the development of a plant variety required for PVR protection be clarified (to address concerns that varieties may be 'discovered' in the wild).

There is concern among Māori businesses that Commissioners of Patents and Plant Variety Rights may not understand the Māori world view. For them it is vital that any proposed Māori advisory committee has influence over PVR grant decisions that affect taonga species and the kaitiaki relationship. This would enable tino rangatiratanga in respect of "the right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna".[14]

The lack of domestic policy for protection of taonga species, Māori kupu and cultural elements, and Mātauranga Māori is considered a risk by Māori businesses. Although work is happening in this area, legislative change is several years away. Due to the complexity of protecting taonga works and species, we propose that alternative options and or mechanisms could be explored to achieve future proofing for Māori in the EU. This could include a chapter on active co-operation on misappropriation of Māori intellectual property (IP), a memorandum of understanding on cultural elements, or even a member states non-binding declaration.

[13] Waitangi Tribunal (Wai 262, 2011). Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity: Te Taumata Tuarua. Vol 1 at 206

[14] Ibid, Vol 1 at 204

8 The Te Tiriti o Waitangi exception clause will be as per previous FTAs

New Zealand and the EU agreed during scoping that an exception clause regarding Te Tiriti o Waitangi (Treaty of Waitangi) should be included in the FTA. This agreement was also reflected by the EU in its negotiating directive (mandate) for the negotiations, which states that: "The Agreement should address the New Zealand government's obligations related to the Treaty of Waitangi. In this regard, any measures taken pursuant to this provision should not be used as a means of arbitrary or unjustified discrimination against persons of the other side as a disguised restriction on trade in goods and services and foreign direct investment."

Combined with other provisions in the Agreement, the inclusion of this exception will protect the ability of the Crown to implement domestic policies that fulfil its obligations to Māori, including under the Te Tiriti o Waitangi, without being obliged to offer equivalent treatment to members of the EU. MFAT indicated that New Zealand's proposed wording for the clause is the same as for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement.

The clause wording in the CPTPP is:[15]

1) Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a 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.

2) The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

As expressed in the Wai2522 report, due to ramifications on FTAs currently in force, there is no room for relitigation of the wording, and it will remain the same in the EU-NZ FTA. However, some concerns exist in Māori business community around the clause. Some stakeholders thought trade could still be prioritised over such rights as it will be governmental interpretations of legal objections rather than Māori interpretations of Treaty obligations.

In particular, the Investor-State Dispute Settlement (ISDS) clause in many FTAs is considered to allow foreign investors enforceable rights that Māori may not have as the indigenous peoples of New Zealand over Mātauranga Māori, taonga works, and taonga species and resources, e.g. water, fishing, mining. The Waitangi Tribunal found that although the exception clause was "likely" to offer "reasonable" protection for Māori, it recommended continued discussions to improve protection.

MFAT has advised, however, that ISDS provisions will not be included in the EU-NZ FTA. This is not included in the EU's mandate. MFAT advised that, to its knowledge, the EU has no current plans to pursue an investment protection agreement (bilateral investment treaty) with New Zealand. We understand the EU is engaging with the United Nations Commission on International Trade Law

[15] https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/29.-Exceptions-and-General-Provisions.pdf Retrieved 5 April 2019

(UNCITRAL) on multilateral reforms of ISDS clauses, and has proposed establishing a permanent multilateral investment court.

Māori businesses indicated that they were unlikely to have the resources or inclination to engage with technical and win/lose processes, such as current World Trade Organization dispute settlement mechanisms. Diplomatic methods of dispute settlement, including negotiation, enquiry, mediation, conciliation, and good offices, were considered more relational and less litigious processes. A clause that included such methods was preferred, and stakeholders suggested a focus on social contracts to be desirable.

9 Potential trade opportunities for SMEs

Some 97 percent of enterprises in Aotearoa New Zealand are SMEs. Māori business is dominated by SMEs, and forms a small but growing proportion of total SMEs in New Zealand, representing 4.7 percent of the total SMEs. According to Census 2013 there were 14,900 Māori businesses with no employees, and 6,800 with employees, including micro and small businesses. According to data from the Statistic New Zealand Business Register, the number of SMEs in New Zealand grew 11.9 percent from 2013 to 2018. Consequently, it is likely that the number of Māori SMEs has also grown.

Māori SMEs are represented in all industries and across the whole of Aotearoa New Zealand. However, the majority of SMEs are in agriculture, forestry, fishing and the construction sector.

Smaller Māori businesses are stretching their nets to dozens of countries around the world as they come up with new ways to grow. StatsNZ has published Tatauranga Umanga Māori 2016: Statistics on Māori businesses that looked at the performance of 660 Māori SMEs.[16] Despite their relatively small individual size, the SMEs reeled in exports worth $44 million in 2015. The United Kingdom was the biggest single market in 2015 for Māori SMEs, worth $13.4 million (30.5 percent of total export value).

For many SMEs, the EU market is complex and expensive to access. Consequently, the UK is often the doorway into the EU, with offices or distribution channels established in the UK and exporters trading into Europe through the UK. The implications of a “no-deal” or “hard” Brexit, could be catastrophic for these businesses. There is also a need for broad support for SMEs where market channels need to adjust as a result of Brexit, and an increase in capability development for SMEs to access trade opportunities in the EU.

Such capability development can benefit all SMEs, including Māori SMEs, by providing assistance with or training on:

- Legal protections, such as trademarking or registering a name or device with cultural elements, and registered rights
- Customs compliance reporting obligations and costs
- Regulatory agencies, consents and licenses
- Understanding the EU food business landscape, including agri-food chain requirements, food labelling, and food business operators (FBO) for pre-packaged food or caseins
- Accessing export assistance, including through New Zealand Trade and Enterprise (NZTE)
- Supporting Poutama Trust to support exporters.

The EU’s impact assessment of an FTA with New Zealand identified heterogeneous regulatory trade barriers as having a greater impact on SMEs than larger companies, due to limitations in financial and human resources.[17] The report considered a more liberal trade relationship would therefore be beneficial to EU SMEs through reducing customs red-tape and costs. It is also likely the same would

[16] http://archive.stats.govt.nz/browse_for_stats/people_and_communities/maori/tatauranga-umanga-2016-sme-mr.aspx
At the time of writing, Tatauranga Umanga Maori 2019 was not available and was due to be released by Statistics New Zealand in early June 2019.
17 https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-289-F1-EN-MAIN-PART-1.PDF Retrieved 18 March 2019

be true in reverse, and decreased nontariff barriers for exporters going into the EU would open the market up for New Zealand SMEs.

Using existing IP mechanisms to full advantage, like many Māori businesses do now, would be encouraged by the FTA's provisions on IP. Implementation strategies around the FTA can seek to advise and assist Māori business on how they can do this.

Empowerment through economic development for indigenous people is also recognised by the EU. The EU's commitment to this is an important lever. It may be beneficial to explore avenues to strengthen support for indigenous SMEs both through FTA instruments and through domestic policy developments, potentially under the auspices of regional development, and inclusive and sustainable development agendas. This reinforces the need for the policy direction being explored as part of the Trade For All consultation process, including the Trade For All Advisory Board (TFAAB).