



SUBMISSION ON THE NZ – UAE ECONOMIC PARTNERSHIP AGREEMENT

As a by-Māori, of-Māori, with-Māori and for-Māori entity, Ngā Toki Whakarururanga's duty and responsibility is to protect and advance Māori responsibilities and rights according to Te Tiriti o Waitangi me He Whakaputanga o te Rangatiratanga o Nu Tireni, and to hold the Crown to account to meet its responsibilities under Te Tiriti and He Whakaputanga in the arena of trade policy, negotiations and agreements.

Ngā Toki Whakarururanga was established through a Mediation Agreement with the Crown in the Waitangi Tribunal (Wai 2522) claim on the Trans-Pacific Partnership Agreement, with a mandate to promote and protect Māori responsibilities, duties, rights and interests, and hold the Crown to account, under Te Tiriti o Waitangi. The agreement promised genuine and meaningful influence on trade negotiations, such as the free trade agreements with the United Arab Emirates (UAE) and the Gulf Cooperation Council (GCC).

Ngā Toki Whakarururanga made extensive inputs at several stages of the intensive UAE negotiations. These inputs focused on intellectual property rights (including on genetic resources), trade in services, investment, digital, sanitary and phytosanitary and technical standards, trade and sustainable development, and the Indigenous Peoples Economic and Trade Cooperation chapter. Virtually none of this input influenced the final texts, as a politically determined timeframe drove the negotiation of New Zealand's "fastest ever trade deal".

The final draft UAE FTA texts were provided to Ngā Toki Whakarururanga under a strict confidentiality agreement on 13 September 2024, with a request for responses by 20 September. After providing extensive and considered input to MFAT on 19 September, Ngā Toki Whakarururanga was advised that the agreement would be concluded 5 days later on 26 September 2024. Clearly the response to MFAT'S request for input was a waste of our rōpū's very limited resources. We note there was even less opportunity for influence on the GCC negotiations because the core texts were negotiated almost two decades ago and additional texts were rushed through in parallel to the UAE.

Misrepresentation of Te Tiriti o Waitangi to UAE

Ngā Toki Whakarururanga was especially critical of a "non-paper" on Māori and Indigenous Trade that the Crown provided to the UAE that purported to explain Te Tiriti o Waitangi and justify various negotiating proposals. This paper seriously misrepresented Te Tiriti o Waitangi, describing it as a treaty:

“signed in 1840 between Tribal Chiefs and the British Crown, establishing an ongoing and enduring relationship whereby sovereignty was assumed by the British Crown while Māori were guaranteed the undisturbed possession of their lands, forests, fisheries, estates, and other precious possessions held individually and collectively.”

It failed to acknowledge that Māori never ceded sovereignty to the Crown and that Te Tiriti guarantees the continued exercise of rangatiratanga or sovereign authority over whenua, kainga and all taonga, delegating limited powers to the Crown over its own, as confirmed by the Waitangi Tribunal’s report on Te Tiriti (Wai 1040).

That “non-paper” was never discussed with Ngā Toki Whakarururanga, despite our explicit Tiriti-based mandate and extensive expertise. Ironically, the non-paper says the Treaty principles “include opportunities for Māori to partner and participate in decisions that affect them, as well as an obligation on the government to actively protect Māori interests”. There was no such opportunity on this paper, and no genuine partnership or participation in decisions that affected Māori in these negotiations. To restore the integrity of te Tiriti and the Tiriti relationship, Ngā Toki Whakarururanga asked for the paper to be corrected with the UAE. That appears not to have happened.

Indigenous Peoples Economic and Trade Cooperation (Chapter 15)

Ngā Toki Whakarururanga engaged most intensively with this chapter. Despite that input, this chapter follows the pattern of recent agreements: it lacks any substantive commitments by the parties, is unenforceable and has no impact on the rest of the agreement. The parties’ agreement to implement this chapter in a manner consistent with Te Tiriti and the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) is relegated to “objectives and principles”. We acknowledge the work of officials to achieve even that outcome in this context, but continue to question whether such chapters have any value.

Our input into this chapter included proposals for a Tiriti-based approach that aimed to balance economic opportunities for Māori and Indigenous Peoples with effective protections across the Agreement for Māori responsibilities, rights and interests. That did not occur.

Article 15.3 lists other chapters of the agreement that are said to enhance Māori participation in trade and investment opportunities. Despite repeated requests, those provisions have never been identified to enable the substance of that claim to be assessed.

It is impossible from the information currently available to assess what genuinely new commercial benefits Māori exporters may achieve from the market access provisions. The UAE is a very minor market for New Zealand exporters and the projected increase of

exports to the UAE is both small, and potentially involves trade diversion from other markets rather than new commercial opportunities. The NIA notes that exporters already receive the benefits of a unilateral UAE duty exemption programme. We cannot see how this creates significant opportunities for Māori firms to grow and diversify, especially our many SMEs.

Conversely, there is no recognition that numerous provisions in the agreement may be detrimental to Māori and the Crown's responsibilities under Te Tiriti.

The list of potential areas for cooperation between the UAE and Aotearoa New Zealand in Article 15.4 looks promising, but each specific activity must be mutually agreed by the states and is subject to resource availability. It is becoming clear that the inclusion of more of these chapters in FTAs is not matched by action and is beyond the capacity of MFAT to deliver even if the parties are willing to do so.

The Treaty of Waitangi Exception

The Waitangi Tribunal in the Wai 2522 inquiry urged the Crown to revisit the 2001 Treaty of Waitangi Exception and its finding in the hearing on the E-commerce chapter of the TPA that it did not provide effective protection for mātauranga Māori, even when combined with other exceptions. The Crown also committed in the Mediation Agreement to work with Ngā Toki Whakarururanga on options for more effective protection. That work has just begun.

Meanwhile, the Crown continues to roll over the flawed Treaty of Waitangi Exception that was drafted over 20 years ago. The Exception does not neutralise many of the current FTA's rules that are problematic for Māori. That is because it only applies to measures adopted by the Crown that give "more favourable treatment" to Māori, and is subject to additional conditions. As noted below, it would also not protect measures that are designed to benefit Māori and other communities, such as social procurement programmes. Despite knowing all these limitations, the Crown continues to misrepresent the Treaty Exception in its National Interest Analysis as protecting its policy space to meet its obligations under Te Tiriti o Waitangi.

Intellectual Property Rights

Ngā Toki Whakarururanga also provided extensive comments on the intellectual property (IP) chapter of the UAE FTA. This chapter reinforces the western intellectual property model that Māori have challenged in the Wai 262 inquiry and elsewhere, and which has no protections for the exercise of rangatiratanga, mātauranga Māori or kaitiaki responsibilities over taonga. Officials rejected our detailed critique of the chapter, and disingenuously includes it in the Māori trade and economic cooperation chapter as one of the chapters that has benefits for Māori.

For example, the provision on geographical indications provides no recognition of Māori terms, such as mānuka. Instead, the “sharing of information on promoting and protecting manuka honey” is listed as one possible area of cooperation in Article 15.4 of the unenforceable Indigenous Peoples Economic and Trade Cooperation Chapter.

The IP chapter’s provision on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (Article 13.35) is equally weak: the UAE and Aotearoa New Zealand “may” establish “appropriate measures” for their protection, but only where their domestic laws and other international obligations allow. They should also “endeavour” to create a data base or digital library for such information, a move that carries real dangers for Māori unless they also exercise rangatiratanga or control over that information.

A provision on the Convention on Biological Diversity is relegated to Article 14.15 of the unenforceable Trade and Sustainable Development chapter. While it recognises that knowledge, innovations and practices of Indigenous Peoples contribute to the conservation and sustainable use of biological diversity, there is nothing that gives effect to that recognition, and it can be overridden by intellectual property rights in the enforceable intellectual property chapter.

Trade and Sustainable Development

There was limited opportunity for input into this chapter, which is largely rhetorical and is again unenforceable. As with other chapters that contain references to the importance of Indigenous Peoples, it does nothing to operationalise them.

Article 14.2 headed “Context” recognises “the importance of ensuring the rights and economic interests of Indigenous Peoples, including Māori in the case of New Zealand, are appropriately integrated in, and are reinforced and not undermined by, international trade and investment policy and activity, including ensuring Indigenous perspectives, voices and effective participation are appropriately embedded in trade and investment activities.” But nothing in this or any other chapter gives effect to that context and it would have minimal relevance as a tool to interpret other provisions.

Article 14.7 on climate change recognises the unique connection of Indigenous Peoples to the environment, the right to protect and develop their systems of knowledge, practices and values, and the valuable contribution indigenous knowledge can make towards sustainable trade and investments, including solutions to climate change. Yet, the article promotes the kind of financial and technological solutions that Ngā Toki Whakarururanga has cited in the Waitangi Tribunal’s climate change inquiry as antithetical to Māori values, knowledge and practices, and is designed to avoid changing corporate, and national, practices that significantly contribute to the climate crisis.

The impact of Services and Investment rules

A number of long-standing concerns were raised over rules and reservations in the trade in services chapter, and which remain not addressed.

The UAE FTA has a very short, unenforceable investment chapter with a loose obligation to “endeavour to facilitate” meetings of both parties’ investment authorities to exchange knowledge and approaches, including to “partnering and engaging with Māori”.

Unusually, there is a separate agreement for the protection and promotion of investments instead of an investment chapter within the FTA. As a stand-alone agreement, it can be terminated after 10 years, but existing investors would continue to have the benefits for a further 10 years. Ngā Toki Whakarururanga expressed disappointment that this shift was never discussed, given the precedent it may create.

The Crown has taken some important steps to limit the potential negative impacts of special protections for UAE investors on domestic policy and on meeting its Tiriti obligations. In particular, it has maintained the policy of the previous government not to include the controversial right of UAE investors to enforce these special protections directly against the government through offshore arbitration, known as investor-state dispute settlement (ISDS). It has also sought to limit the broad scope of investor protections by defining them quite closely and it excludes local government from the rules. Decisions of the Overseas Investment Office on consent for overseas investment transactions are also protected from a dispute.

These steps are welcome changes on matters that were raised in the Waitangi Tribunal (Wai 2522) claim. However, the UAE itself can still challenge alleged breaches of the special investor protections through international arbitration. This poses a number of significant risks for Māori, especially where policies, decisions, or actions to address Māori concerns and improve compliance with Te Tiriti impact adversely on the value or profits of the UAE investor or its investment. These concerns were raised in various ways with the Crown.

While there has been significant progress towards Tiriti-compliance in relation to investment rules, a number of serious concerns remain. The agreement uses a definition of investment that includes contracts, licenses and authorisations, as well as intellectual property rights. That is especially concerning given the Coalition Government’s intention to fast track investments based on criteria that do not include Tiriti compliance or environmental impacts. Licences for exploration and extraction of natural resources have been excluded, but authorisations to UAE investors for wind farms and forestry operations, or granting of intellectual property rights over native species, would still be among the investments it protects.

The investment agreement includes a controversial rule on “fair and equitable treatment” that would allow a UAE investor to challenge government actions or decisions as “targeted discrimination on manifestly wrongful grounds, such as gender, race”. An investor might well argue the same kind of misrepresentations of Tiriti protections as “race-based” that the ACT Party has been promoting. There is no guarantee that the Treaty of Waitangi Exception would counter this, given the various conditions that limit its application. If the UAE brought such an investment dispute it would be decided by an offshore arbitral tribunal whose judges have no knowledge or expertise to assess that question. There is no provision, let alone any requirement, for Māori involvement in such a dispute process.

Another investment rule of concern (Article 9: Performance Requirements), raised in other agreements as well, says investors cannot be required to meet certain performance requirements, such as investors in forestry having to process a proportion of logs locally rather than just exporting them all whole. That “performance requirement” would benefit Māori workers and communities in provinces that face mounting unemployment; but it would also clearly advantage others, including local competitors of the investor, which makes the 2001 Treaty of Waitangi Exception problematic as a “disguised restriction on trade in goods”.

There is a schedule in the investment agreement that also excludes a specific list of Crown actions from some of the rules, including those performance requirements. The Crown has tried to include in that list some references to rights, interests, duties and responsibilities of Māori related to Te Tiriti o Waitangi/ The Treaty of Waitangi, but it is unclear what the legal impact is.

One example of a protection from some of the rules relates to the collection, purification and distribution of water, including water for human use. However, this explicitly does not cover the wholesale and retail distribution of bottled water by a UAE investor. Māori have previously raised concerns about licences for water extraction granted, for example for agriculture, being diverted to water bottling enterprises. That has been corrected in some other recent FTAs (eg. the EU FTA reserves the right to adopt or maintain any measure with respect to water, including the allocation, collection, treatment and distribution of drinking water), but that is not corrected here.

Beyond these specific concerns, the annex of exclusions does not apply to the most problematic protections for UAE investors on direct and indirect expropriation and “fair and equitable treatment”.

Digital trade

The Crown continues to recognise its Tiriti obligations in digital trade chapters following the Waitangi Tribunal Wai 2522 finding that the TPPA chapter breached its Tiriti

obligations. In this agreement it has successfully carved out measures to meet those obligations, in similar terms to the FTA with the European Union.

Unfortunately, the Crown has not addressed concerns about a less fail-safe protection for Māori data sovereignty and digital governance in the schedule to the trade in services chapter.

The digital trade chapter is enforceable, so a commitment to cooperate on digital inclusion has the potential to provide some positive benefits to Māori business, especially Māori digital innovators, if they can help set the agenda and it is fully resourced. But neither of those conditions is guaranteed.

Article 10.22 Digital Inclusion “recognises the importance of expanding and facilitating digital economy opportunities by removing barriers. This may include enhancing cultural and people-to-people links, including between Indigenous Peoples”, who are mentioned along with a list of other currently excluded groups.

However, this “may” be a topic for cooperation activities, which requires agreement between the UAE government and the Crown, and there is no commitment of resources. Moreover, Article 22.4 on coordination of cooperation activities refers specifically to trade unions, enterprises, civil society, academics, but not to Indigenous Peoples – just “among others”. This lack of substance and active participation in decisions was raised, but was not addressed.

Government procurement

Ngā Toki Whakarururanga has consistently flagged government procurement as a Tiriti-related issue that needs more attention. That includes social procurement programmes where preferences for Māori are mixed with other communities, such as Pasifika, to achieve social, employment and poverty-reduction objectives. This is especially important for procurement contracts that require offsets that can benefit local producers, and for conditions in contracts that require cultural knowledge and competency.

Such initiatives are unlikely to be protected by the Crown’s Treaty of Waitangi Exception because, although they are more favourable treatment for Māori they are broader and apply to other beneficiaries. Ngā Toki Whakarururanga indicated the intention to look at this more closely in 2025, and made several suggestions in the interim that were not adopted in the UAE FTA.

Food and products standards, including rongoā

Chapter 6 (Sanitary and Phytosanitary Measures/SPS) and Chapter 7 (Technical Barriers to Trade) that govern standards for food exports and imports and the labelling of products are not sensitive to hua parakore, rongoā and other products and processes sourced in mātauranga and tikanga Māori. Te Waka Kai Ora and others have raised

concerns over many years that the western meaning attributed to “science-based” standards is used to exclude production, approval and promotion of safe foods, organics and rongoā that are source in mātauranga and regulated by mana whenua.

These problems date back to international trade rules on sanitary and phytosanitary measures and technical barriers to trade in the World Trade Organization. The Treaty of Waitangi Exception does not help as effective recognition and protection for Māori food and plant production, and practices and products such as rongoā, do not fit the criteria for “more favourable treatment”. The Crown did not take up the offer to jointly develop language to allow for effective recognition of mātauranga and mana whenua authority in the UAE context.

These concerns were confirmed in December 2024 by the rejection of the Indigenous Peoples exception by a panel in a dispute brought by the US under the SPS chapter of the United States Canada Mexico Agreement over Mexico’s ban on GE corn in food.

Dispute settlement

There is no requirement under Chapter 20 Dispute Settlement for any dispute to recognise Indigenous knowledge or processes, or for suitably qualified adjudicators to participate in a dispute under the FTAs, even where the Treaty Exception is involved.

As noted above, the investment agreement with the UAE may also involve issues of critical importance to Māori, including specific provisions that refer to Māori responsibilities, rights and interests. Even though there is no investor-state dispute, that is still a serious issue for Māori if there is a state-state dispute. While dispute settlement is a broader matter for discussion with the Crown, interim proposals to include some such provision about qualification of arbitrators were not adopted.

Conclusion

Throughout its input on these negotiations, Ngā Toki Whakarururanga has emphasised the right of Māori under Te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to self-determination and to participate in decision-making on matters that affect them through representatives chosen by themselves in accordance with their own procedures. That never occurred.

Ngā Toki Whakarururanga recognises that officials were themselves under intense pressure in these negotiations. However, it is undeniable that the process and substance of these negotiations have once again subordinated Te Tiriti o Waitangi to other priorities determined unilaterally by the Crown in breach of its Tiriti obligations.

We wish to be heard by the Select Committee on this submission.