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THE FAILURE OF AN INDIGENOUS PEOPLES EXCEPTION IN A US-MEXICO TRADE CASE ON GE CORN SHOWS THE TREATY OF WAITANGI EXCEPTION IS NO PROTECTION

For more than 30 years Māori have objected that free trade and investment agreements threaten their fundamental responsibilities and rights under te Tiriti o Waitangi. The Crown insists that a Treaty of Waitangi Exception it has included in those agreements since 2001 fully protects the policy space to meet its Treaty obligations.

Until now, there have not (as far as we know) been any trade disputes involving the Treaty Exception, or a similar provision in another country's agreement, to see who is right. Now we have the first. In 2023 the USA brought a trade dispute against Mexico under the United States Mexico Canada Agreement (USMCA) over trade in genetically engineered corn. Mexico said its 2023 decree banning the use of genetically engineered corn in tortillas or dough was in part to protect native corn from risks of transgenic contamination.

A trade dispute over genetic engineering epitomises the conflict between Western colonial capitalism and Indigenous Peoples' identity, values and worldviews and the protection of them through their own authority, knowledge and methodologies.

The Waitangi Tribunal addressed this conflict in the Wai 262 inquiry. The claimants asked the Tribunal to re-establish rangatiratanga over traditional knowledge, including responsibilities to protect tāonga species *per se* and their use for foods, rongoā , and examine the threats that GM poses to "indigenous flora and fauna and thus to Māori food systems, te taiao, tikanga Māori and ourselves more broadly". Genetic engineering itself - "the movement of genes within an organism and across special impacts on the mauri – the essential life force derived from the atua which all living things possess, wairua and whakapapa of that organism and its wider surrounding" - is a violation of tapū. "The role of kaitiaki is to protect and maintain the mauri of our flora and fauna whanaunga for future generations, including at the molecular level".

In this dispute, the Mexican government argued that native corn is central to cultural identity of Mexican Indigenous communities and their creation narrative: *"the fact of planting corn is linked to their own history, to their identity, to the way they conceive the world, to being part of a whole".* (Note that Indigenous Peoples themselves have no right to speak for themselves in this dispute between colonial states).

The panel of trade judges said the Indigenous worldview was outside their remit. Mexico's arguments were only relevant to the dispute if, and to the extent that, they could be brought within the legal terms of the USMCA and the provisions the US had put in issue. The US complaint related to the "Sanitary and Physosanitary" rules of the USMCA, which expanded on the equivalent in the World Trade Organisation. So the legitimacy of restrictions on GM could only be viewed through a trade law lens. The purpose of those rules is to advance western capitalism by minimising restrictions on commerce in GM foods; the tools are limited to western science; and the criteria for assessing the risk posed by GM are the standards set by international bodies that are heavily influenced by powerful corporate interests, including biotech.

Mexico was found to have breached those rules. The panel of trade experts said the ban discriminated against US exports and was not supported by science.

This bring us to the Indigenous Peoples' Rights clause in the USMCA. Mexico argued that the breach of the trade rules was justified by the that exception. The wording in the USMCA is similar, but not identical, to the Treaty of Waitangi Exception:

- The USMCA protects a broader range of measures that breach a FTA; the Treaty Exception applies only to those that accord "more favourable treatment" to Māori.
- Conversely, the Treaty Exception refers to Crown obligations to Māori, including under the Treaty of Waitangi whose interpretation cannot be reviewed by a dispute panel.
- The USMCA refers to the state's "*legal* obligations" to Indigenous Peoples, which need to be proven. That would lead to all sorts of argument in relation to Te Tiriti, which a panel of trade experts should never be empowered to review.
- Both exceptions make the necessity of a measure to meet those obligations self-judging.
- But critically, they are both subject to a "chapeau" that negates the exception where the panel finds arbitrary or unjustified discrimination or a disguised restriction on trade in goods, services and investment.

Canadian First Nations had been optimistic that the USMCA clause was going to provide them with comprehensive protection, so Indigenous Peoples' rights could not be held hostage to trade or investment rules. Both Canada and Mexico publicly shared that optimism, with the Mexican government's fact sheet boldly interpreting the Article as stating that "legal obligations to Indigenous people cannot be defeated or interfered with by commitments under trade rules." That sounds just like the Crown, as its justification for continuing to roll out the same provision into each new agreement.

In arguing that Indigenous Peoples Rights exception applied, Mexico was still limited to the specific words of the text. Mexico pointed to extensive steps it had taken in domestic and international law, supported by judicial decisions, to recognise Indigenous Peoples' rights in relation to biodiversity and native corn, consistent with its constitution, and said it considered the decree was necessary to meet those obligations. These arguments were supported by a pro bono amicus curiae brief filed on 14 March 2024 by the Institute for Agricultural Trade Policy, the Rural Coalition and the Alianza Nacional de Campesinas. However, Indigenous Peoples did not have a seat at the table to argue for themselves.

Despite what they previously said about the Indigenous Peoples exception, both the US and Canada rejected the defence using narrow trade law arguments. The panel agreed that Mexico did have legal obligations to Indigenous Peoples to protect native corn, and accepted the necessity of the measure to fulfil those obligations was self-judging. But it found there were discrimination and disguised trade restrictions because GE corn (mainly imported from the US) was treated differently from non-native non-GE corn (also grown domestically), when both could contaminate native corn. The fundamental difference for Indigenous Peoples between contamination by GE and non-GE was irrelevant.

Even if the exception had been framed to allow more expansive arguments, the panel of three trade/ investment experts was neither competent nor appropriate to assess questions involving Indigenous responsibilities, rights, beliefs and knowledge. That requires experts in the relevant tikanga of the

relevant Indigenous people. A monocultural decision making process that is seriously devoid of any Indigenous cultural context just deepens the systemic bias in the trade and investment regime.

The initial response from New Zealand trade officials is that this decision turns on the facts of Mexico's ban, and does not show that either the USMCA or Treaty Exception is itself flawed. But the evidence now weighs even more heavily against them.

In 2016 the Waitangi Tribunal concluded in the urgency hearing on the Trans-Pacific Partnership Agreement (TPPA) (Wai 2522) that the Treaty Exception was not perfect, but was "likely to provide a reasonable degree of protection for Māori interests". However, its later report on e-commerce found that the Treaty Exception, even when combined with a number of other policy space protections, did not provide adequate in relation to mātauranga in the digital space.

The Crown subsequently included additional protections in some, but not all, agreements for *digital* trade rules, but not for any other matters. As part of its mediation agreement with Ngā Toki Whakarururanga in 2020, the Crown promised to discuss what an alternative protection might look like, while not conceding the existing Exception is flawed. Those discussions have just begun.

The example of GM shows how deep these agreements can reach and how colonial capitalism prevails in agreements designed to serve them. At the very least a new approach needs to ensure that Māori responsibilities and rights under Te Tiriti, and the UN Declaration on the Rights of Indigenous Peoples, are comprehensively carved out from the scope of these agreements. But a Tiriti-compliant approach needs to go much further. It needs to embed rangatiratanga and tikanga in the concepts and objectives of trade agreements. Māori need to have a place, as of right, in deciding whether to negotiate, what to negotiate, with whom, what demands to make, what trade-offs are acceptable, and what protections are required.

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