



IMPLICATIONS OF THE FAILURE OF THE INDIGENOUS PEOPLES EXCEPTION IN USMCA FOR THE TREATY OF WAITANGI EXCEPTION (January 2025)

The Crown has included a standard Treaty of Waitangi Exception in free trade and investment agreements since 2001. Concerns about deficiencies in that Exception have been raised consistently, including in the Waitangi Tribunal, Tiriti o Waitangi assessments, and during negotiations. The Crown has rejected these concerns and continues to assert in National Interest Analyses and on its website that the Treaty Exception fully protects the policy space to meet the Crown's Treaty obligations.

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".¹ However, the Tribunal concluded in its later report on the electronic commerce chapter that the Treaty Exception, even when combined with a number of other policy space protections, did not provide adequate in relation to those Tiriti obligations.² The Crown subsequently included additional protections in some, but not all, agreements for digital trade rules, but not for any other matters.

Until now, there has been no jurisprudence on the Treaty Exception, or similar exceptions, that would illustrate how it is likely to be interpreted in practice in a trade dispute. In December 2025, a state-state arbitral panel determined a dispute brought by the USA against Mexico under the United States Mexico Canada Agreement (USMCA) over trade in genetically engineered corn.³ That panel considered, and rejected, Mexico's argument that the Indigenous People's exception in the USMCA, which is broader than the Treaty Exception, was a defence to breaches of the trade rules. The panel concluded that:

Mexico is obligated to ensure that any measures adopted to fulfill these objectives [on protection of native corn] comply with specific limitations to which it agreed, including in trade agreements that Mexico has ratified. These limitations include the proviso in [the Indigenous Peoples' exception]. ... The Panel finds that the Measures ... are not justified under the exception ... for measures that otherwise are inconsistent with the requirements of the USMCA.⁴

The panel's decision, and the reasoning behind it, substantiates repeated warnings that the Treaty of Waitangi Exception does not provide effective protection of Māori responsibilities, rights and interests, let alone their rangatiratanga under Te Tiriti o Waitangi, and reinforces the need for more effective protection in both existing and future agreements. This memorandum analyses the implications of the panel's findings and reasoning for the current Treaty of Waitangi Exception.

¹ Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement (Wai 2522), 2016, p.51

² Waitangi Tribunal, Report on the Comprehensive Agreement for Trans-Pacific Partnership (Wai 2522), 2021, p.185:

"Cumulatively, we conclude that the risk to Māori interests arising from the e-commerce chapter of the CPTPP is significant and that reliance on the agreement's exceptions and exclusions to mitigate that risk falls short of the Crown's duty of active protection."

³ *Mexico – Measures Concerning Genetically Engineered Corn*, MEX-USA-2023-r31-01, Final report, 20 December 2024

⁴ *Mexico – Measures Concerning Genetically Engineered Corn*, p.101

USMCA Indigenous Peoples' Provision

The USMCA, which succeeded the North American Free Trade Agreement (NAFTA), was negotiated under the Trump administration and entered into force on 1 January 2020. The Agreement contained a number of changes that reflected domestic criticism of existing agreements.⁵

The USMCA also includes a new agreement-wide exception for Indigenous Peoples Rights that was advanced by Canada. The wording was based on the Treaty of Waitangi Exception that had been included in the TPPA,⁶ which the US, Canada and Mexico all negotiated, and currently applies in relation to Mexico and Canada under the successor Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

The wording was adapted to the north american context by referring to the state's "legal obligations" to Indigenous Peoples, rather than the Treaty of Waitangi. The necessity of measures adopted to meet these legal obligations is self-judging and not subject to reviewed by a dispute panel, although it does not refer explicitly to the power of dispute bodies in relation to the exception. The provision also omitted the contentious limitation of the Treaty Exception to measures according "more favourable treatment" to Māori. However, it retained the "chapeau" from the Treaty Exception that effectively negates the exception where the measure is found to constitute arbitrary or unjustified discrimination against persons of another party or a disguised restriction on trade in goods, services and investment.

Article 32.5: Indigenous Peoples Rights

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, services, and investment, nothing in this Agreement shall preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.⁷

⁷ *For greater certainty, for Canada the legal obligations include those recognized and affirmed by section 35 of the Constitution Act 1982 or those set out in self-government agreements between a central or regional level of government and indigenous peoples.*

Canadian First Nations were optimistic that this clause would provide comprehensive protection so Indigenous Peoples' rights could not be held hostage to trade or investment rules.⁷ 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."⁸

⁵ These include the phased termination of investor-state dispute settlement and stronger enforceable labour provisions.

⁶ 1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods, trade in services, or 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 X (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article X may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with its rights under this Agreement.

⁷ Perry Bellegarde, then National Chief of the Assembly of First Nations, cited in Written Submission of the Institute for Agriculture and Trade Policy, The Rural Coalition, and the Alianza nacional de Campesinas (IATP brief), 14 March 2024, fn 9

⁸ Cited in IATP brief, fn 13

Facts of the USMCA GE corn dispute

The USMCA exception was put to the test for the first time in a dispute brought by the US against Mexico in 2023⁹ over genetically engineered corn. At issue were two parts of a decree¹⁰ made on 13 February 2023; this (a) banned the use of GE corn in tortillas or dough, and (b) instructed government agencies to gradually substitute non-GE corn for GE corn in all products for human consumption and for animal feed.

The US claimed the measures breached two USMCA rules: those on Sanitary and Phytosanitary (SPS) measures, which set strict conditions for restricting imports for health and related reasons; and non-discrimination between domestic and imported corn. Most of the Panel's report focuses on SPS.

Mexico cited the Indigenous Peoples Rights provision as part of its defence. Its 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 (IATP brief).

This memorandum relates the arguments and findings on that defence to the Treaty Exception.

1. The Treaty of Waitangi exception enables the Crown to give more favourable treatment to Māori, including in meeting its obligations under the Treaty of Waitangi. The USMCA uses a different reference point: the state's legal obligations to Indigenous Peoples.

The Treaty exception is entitled "Treaty of Waitangi". Direct reference to the Treaty in the exception means its legal status is immaterial. However, the exception refers to Crown obligations under the Treaty, not Te Tiriti o Waitangi. Significantly, the "inclusive" reference to the Treaty means it is just one of the permissible grounds for special treatment of Māori. This leaves open the possibility of other or additional rationale for the Crown to accord special treatment, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). That possibility has rarely been discussed, but assumes a new significance given the wide range of reference points on Indigenous Peoples Rights that are cited in the USMCA dispute.

The USMCA Exception relates to the Party's legal obligations to Indigenous Peoples. These may be domestic and/or international, but imply some formal legal recognition. In this case, such obligations were found in four types of legal orders: i) the international treaties or agreements that Mexico has signed; ii) the political constitution; iii) federal laws; and iv) state laws.

Mexico pointed to extensive steps it had adopted in domestic¹¹ and international¹² law, supported by judicial decisions, to recognise Indigenous Peoples' rights in relation to biodiversity and native corn.

⁹ Mexico – Measures Concerning Genetically Engineered Corn,

¹⁰ DECRETO por el que se establecen diversas acciones en materia de glifosato y maíz genéticamente modificado. *Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn (Decreto por el que se establecen diversas acciones en materia de glifosato y maíz genéticamente modificado)*, 13 February 2023 (USA- 3 and MEX-167)

¹¹ Domestic measures include the General Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Populations and Communities adopted in 2022. Specifically on corn, Mexico passed a federal law in 2019 for the Promotion and Protection of Native Maize whose objectives included "encouraging sustainable development, promoting biodiversity of native corn and supporting the activities of native producers of native corn." It was motivated by concerns that native seed varieties could be patented by foreign companies under NAFTA, and that the diversity of species was already eroding, with evidence-based studies supporting concerns that transgenic contamination by GE corn. The law designated over 60 varieties developed with indigenous agricultural methods and elevating their conservation to a human right.

¹² International legal obligations include Articles 11.1, 20.1, and 31.1 of the UN Declaration on the Rights of Indigenous Peoples, ILO Indigenous and Tribal Peoples Convention #169 (which New Zealand has not ratified), American Convention on Human Rights, and the UN Convention on Biological Diversity/ Kunming-Montreal Global Diversity Framework 2022.

These built on the broader recognition and guarantee in Article 2 of the Constitution of “the right of Indigenous Peoples and communities ... to preserve and enrich their languages, knowledge and all the elements that constitute their culture and identity”.

These positive domestic and international obligations are far more extensive than the Crown has adopted in Aotearoa, which is currently moving in the opposite direction on both Te Tiriti¹³ and genetic engineering (GE).¹⁴ That inter-relationship between domestic recognition of Māori/Indigenous Rights and the exceptions in the trade agreements is critical.

The differences between Mexico and Aotearoa highlight the importance of addressing the constitutional authority in Aotearoa to make such decisions, and to determine what factors, including domestic and international obligations, shape the adoption of measures that may need the protection of this exception.

The Crown currently exercises authority based on its unilateral assumption of sovereignty to the exclusion of rangatiratanga, and interprets its obligations according to political whim. The Crown also decides whether it considers it necessary to act on those obligations, including in ways that may breach its obligations under the trade agreement, and if so, whether to trigger the exception to defend an allegation of a breach. Māori are denied any authority in making such decisions, aside from a limited involvement under the Crown’s ISDS protocol in a dispute involving the Treaty Exception.¹⁵

2. The Treaty Exception is self-judging, and interpretations of the Treaty cannot be reviewed by a state-state dispute panel. In the USMCA, the necessity of the measure to fulfil a party’s legal obligations is also self-judging, but there is no reference to what dispute panels can consider.

The Treaty Exception is self-judging and cannot be reviewed by a state-state dispute panel in relation to both the necessity of a measure to give more favourable treatment to Māori and the Crown’s interpretation of the Treaty. However, the latter only refers to state-state disputes, leaving the door open for investor-state dispute panels to review the Crown’s interpretations of its Treaty obligations and necessity of the measures it adopts.

The USMCA also uses the self-judging language of what the party “deems necessary” to meet its obligations. However, it is unclear whether that only applies to the necessity for the particular measure to implement the legal obligation, or whether the nature of the legal obligation itself is also self-judging. Unlike the Treaty Exception, the USMCA does not refer explicitly to what any dispute panel can and cannot consider.

Mexico contended that since the phrase in the Exception is “a measure [the Party] deems necessary,” it is sufficient that Mexico considers the measure under dispute, and the entire 2023 Decree, was necessary to comply its legal obligations to Indigenous Peoples.¹⁶

The US rejected Mexico’s argument that the 2023 Decree fulfilled specific legal obligations

¹³ Waitangi Tribunal, *Ngā Mātāpono. The Principles*, Wai 3300, 2024

¹⁴ Gene Technology Bill 2024

¹⁵ <https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/an-isds-protocol>

¹⁶ *Mexico – Measures Concerning Genetically Engineered Corn*, p.98

to indigenous peoples, arguing that “vague, highly generalized concepts such as protecting the cultural heritage of Indigenous peoples and communities” do not constitute a concrete legal obligation.¹⁷ It suggested that Mexico’s legal obligation really was “to preserve the exact genetics of what [Mexico] views as native corn,” and, if so, challenged Mexico to explain the constant evolution in genetics that takes place irrespective of the presence of GE corn. However, the US focused more on the second part of the exception, the chapeau.

3. Trade agreements are self-contained codes that do not accord equivalence to the state’s non-trade obligations, including rights of Indigenous Peoples.

Free trade agreements entered into by the Crown, and the USMCA, are instruments of western colonial capitalism. They define the state’s obligations to the exclusion of other, competing, responsibilities and the rights and interests of Indigenous Peoples.

This dispute highlights the conflict between the Western capitalist paradigm and Indigenous Peoples’ values, responsibilities and worldviews. Mexico 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.*”¹⁸ Equally, the farming method of milpa (rotating swidden (slash and burn) fields of corn and other crops) is integral to their knowledge system and its inter-generational transmission.

Protection therefore needs to cover both the native corn and the milpa. A key objective of the 2023 Decree was to protect the natural biodiversity and natural genetic integrity of Mexico’s unique native landraces and varieties of corn from the risks of transgenic contamination arising from the spread of unauthorized, illegal, unintended, or uncontrolled GM corn plants in Mexico.

The problem for Mexico was that these arguments were only relevant to the dispute if, and to the extent that, they could be brought within the legal terms of the Agreement and the provisions put in issue by US. According to the dispute panel of trade arbitrators:

*The Panel hears, respects and credits Mexico’s dedication to fulfilling its legal obligations towards indigenous peoples, including its international obligations. The Panel further recognizes Mexico’s right to take measures to protect native corn to the extent it considers this linked to its obligations to the rights of indigenous peoples. Such measures may need to evolve over time. The Panel’s legal assessment, however, is limited to the Measures that the USA has placed at issue in these proceedings. ...*¹⁹

4. The rules, standards and tests to be applied to GE reflect the primacy of trade liberalisation and western science, and associated institutions. Indigenous arguments have to be distorted to fit those boundaries.

This dispute involved the SPS chapter of the USMCA, which is based on the WTO SPS agreement, and applies to food safety and animal and plant regulations. The rules aim to ensure that restrictions on imports designed to protect human or animal, plant life or health are based on science and risk

¹⁷ Mexico – Measures Concerning Genetically Engineered Corn, p.100

¹⁸ Mexico – Measures Concerning Genetically Engineered Corn, Mexico’s rebuttal, 28 May 2024, p.43

¹⁹ Mexico – Measures Concerning Genetically Engineered Corn, p.101

assessments, using standards developed by international institutions, and are the minimum required to achieve that protection. The US contested Mexico's compliance with each of these elements.

Mexico tried to fit cultural rights arguments within the straitjacket of the SPS rules that the US was seeking to enforce, arguing for a holistic approach to its 2023 decree and to the trade rules that recognises the relationship between corn and Indigenous Peoples as indivisible. The US ignored the Indigenous rights arguments, and argued Mexico's ban relating to use of GE corn for food did not meet the criteria required under the SPS rules.^{20 21}

In relation to the Risk Assessment, Mexico submitted:

*It was appropriate for Mexico, in conducting its Risk Assessment, to take into consideration the unique circumstances in Mexico and the goals specific to its legal regime for the protection of biodiversity, native corn and the rights and interests of indigenous people. By doing so, the Risk Assessment was tailored and appropriate to the circumstances of the risk to the health of native corn in Mexico.*²²

The US countered that Mexico was required demonstrably to "take into account relevant guidance of the WTO SPS Committee and the relevant international standards, guidelines, and recommendations of the relevant international organization" in conducting its risk assessment.²³ Mexico's Measure did not do so.

The Panel rejected Mexico's approach that sought to contextualise the SPS requirements. Mexico's argument that it did not apply international standards because none meet its appropriate level of protection, and it had conducted a more appropriate risk assessment to reflect its context, was also rejected. The panel said this was an SPS measure; because a measure has some non-SPS objectives does not make it a non-SPS measure. Non-SPS objectives belong to the exceptions.

The Panel said it was necessary to have an objective standard against which assess to the nature and source of the risk and the necessity of the measure to protect against the risk. "Because Mexico did not base its Measures either on relevant international standards, guidelines or recommendations, or an appropriate risk assessment, it has failed to ensure that they are based on relevant scientific principles."²⁴

²⁰ In relation to the science, the US claimed the international scientific community has regarded GE corn crops as safe for human consumption and animal and plant life and health for over three decades. When Mexico signed the USMCA, it allowed import, sale and use of GE corn based on those principles. The abrupt change in policy was not based on science, an adequate risk assessment or application of international standards.

²¹ This was similar to the Crown's approach in the Waitangi Tribunal inquiry on e-commerce that declined to engage with the Māori evidence as irrelevant to its obligations under the trade agreement: "The Crown did not engage with concepts relating to mātauranga Māori. It accepted claimant evidence about such matters on its face for the purposes of this inquiry, subject to the proviso that the concerns raised by the claimants remain speculative and abstract, unless they could point to specific Crown actions or omissions. In addition, Crown counsel argued that matters raised by the claimants were outside the scope of the e-commerce chapter and that its provisions in no way restricted Māori rights or interests in the digital domain. Notwithstanding the Crown's acknowledgements, we are troubled by what this stark divergence in viewpoint between the claimants and the Crown may signify. Of particular concern is the possibility that the Crown has misunderstood, mischaracterised, or simply not made itself aware of the nature and extent of the Māori interests at issue". Wai 2522, CPTPP report, pp.183-184

²² Mexico – Measures Concerning Genetically Engineered Corn, Mexico's rebuttal, 28 May 2024, p.122

²³ Mexico – Measures Concerning Genetically Engineered Corn, p.54

²⁴ Mexico – Measures Concerning Genetically Engineered Corn, p.69

Mexico had defended the distinction between GE and non-GE corn, arguing that:

Transgene flow is not equivalent to natural, "non-transgene" flow because, unlike natural gene flow, transgenic contamination involves the replacement of natural corn genes with foreign genes. ... Mexico acknowledged that it is not possible to eliminate the risks of transgenic contamination in Mexico. So it was seeking to mitigate the damage by slowing or stopping the rate of transgenic contamination.

Hence, the Panel accepted US arguments that:

Mexico failed to prove the harmfulness of GE corn, whether through an adequate risk assessment or otherwise. Specifically, it did not show that transgenic introgression from GM corn was somehow "worse" or more disruptive to the genetic integrity of native corn than traditional hybridization between different non-GM varieties of corn.²⁵

In relation to the least-trade restrictive requirement, the US argued there were numerous less onerous measures available to mitigate gene flow between corn plants, irrespective of whether the plant is GE or non-GE.²⁶ Mexico argued that its "End-Use Limitation" only applied to the extent necessary to protect human health and native corn in Mexico.

Finally, SPS measures must not "arbitrarily or unjustifiably discriminate" between countries with similar conditions, a phrase similar to the chapeau in the Treaty/Indigenous Peoples' exception. Mexico conceded that

the measures clearly discriminate against GM corn, but this discrimination is neither arbitrary nor unjustifiable. It is integral to the objectives. The fact GM corn is not commercially produced in Mexico is not a reason to interpret the discrimination against GM corn as protectionist because it is rationally connected to the same objectives. Mexico's concerns relate specifically to GM corn in Mexico, regardless of where it comes from, and not to imported corn.²⁷

The panel accepted the US argument that this was discriminatory and protectionist. The fact that the measure was drafted in language that could, on its face, apply to both imported and domestic products did not mean that it might not function as a restriction on imports. *These Measures "unduly target imports" by imposing restrictions only on GM corn, while not imposing any restrictions on "non-native" non-GM corn in Mexico, especially in the context of the Moratorium [on growing GE crops in Mexico].²⁸*

At the same time, the Panel acknowledged the importance to Mexico of protecting the traditions and livelihoods of indigenous and peasant communities, particularly as these are intertwined with the cultivation of native corn, and said it respected these objectives and Mexico's prerogative to

²⁵ Mexico – Measures Concerning Genetically Engineered Corn, p.93

²⁶ Mexico – Measures Concerning Genetically Engineered Corn, p.65

²⁷ Mexico – Measures Concerning Genetically Engineered Corn, Mexico's rebuttal, 28 May 2024, p.177

²⁸ Mexico – Measures Concerning Genetically Engineered Corn, p.89

pursue them. But Mexico's non-SPS objectives when introducing the Measures were of particular relevance to its defences, not to the breach of SPS obligations themselves.²⁹

Genetic engineering is a matter of utmost importance to Māori in hua parakore production and rongoā practitioners. This case makes it clear that SPS rules that apply to risk assessment must be based on western science and priorities of commercial interests, and have no ability to accommodate for indigenous responsibilities, values and priorities, even if the state is prepared to argue it.

5. The Treaty/Indigenous Peoples exception needs to be established as a defence to a breach; it is not a carveout from the rules.

The relationship between the rules and the Treaty/Indigenous Peoples exception has two further consequences, reflected in this case.

1) The state carries the burden of proof that all elements of the exception are satisfied, whereas a carveout puts the initial burden on the complaining party to show the rules and obligations do apply to the measure in dispute. Mexico failed to meet the burden of proof that the measures complied with all parts of Indigenous Peoples exception.

2) Exceptions are distinct from the rules and only come into play if there is a breach of obligations. They are not relevant to determining a breach. Mexico was unsuccessful in its attempt to incorporate factors affecting Indigenous Peoples into its substantive arguments about the appropriate criteria for risk assessments under SPS rules.

6. The Treaty Exception applies only to measures that give “more favourable treatment” to Māori, the meaning and application of which is not self-judging.

Whether a measure for which the Treaty Exception is invoked constitutes “more favourable treatment” for Māori is not self-judging.

The USMCA exception deliberately omitted this phrase, so it was not addressed in the dispute. However, the US's arguments about the scope of the USMCA exception confirm that a complainant is likely to challenge whether a measure under the Treaty Exception constitutes “more favourable treatment”, even though other elements of the exception are self-judging. Equally, the interpretations applied to the USMCA exception confirm that a trade panel would apply trade law jurisprudence to the phrase “more favourable treatment”, which refers to discriminatory treatment in favour of Māori.

It is also clear from that dispute that, in the situation where a measure has mixed purposes, such as Mexico's 2023 GE Decree that includes, but is not solely, about Indigenous Peoples rights, the Treaty Exception alone would not be sufficient to override the obligation.

7. A panel in a dispute will review whether the measure in issue meets requirements in the exception that are not self-judging, notably the chapeau. Failure to meet all its elements means the exception does not apply.

²⁹ Mexico – Measures Concerning Genetically Engineered Corn, p.90

As noted above, the panel in the USMCA dispute made it clear that Mexico had to comply with any limitations on the Indigenous Peoples exception, notable the chapeau that says the measure in issue must not be used as a means of “unreasonable or unjustified discrimination” or a “disguised restriction on trade in goods, services or investment” from the other party.

The US argued that the disputed measures in the 2023 Decree *constitute a disguised restriction on trade and arbitrary or unjustified discrimination as they are designed and applied to restrict imports of GE corn while not affecting domestic production or consumption of non-native, non-GE corn.*³⁰

The Panel agreed:

*Mexico says that the Measures are necessary to protect the genetic integrity of native corn, which it argues is inextricably linked to the traditions and cultural heritage of indigenous peoples. The Panel does not doubt the significance of native corn to the indigenous peoples of Mexico. However, ... the Measures single out GM corn and do not address other forms of gene flow to native corn by non-native, non-GM corn. Otherwise put, the Measures take aim only at a type of non-native corn that is imported from abroad, and not at any types of non-native corn that are grown domestically or imported.*³¹

Nor do they seek to address underlying issues like informal seed sharing, and unauthorised sharing of corn, by Indigenous Peoples. Hence, they are a disguised restriction on trade. Since the Panel found that the Measures constitute a disguised restriction on international trade, there was no need for it to address whether they also constituted a means of arbitrary or unjustifiable discrimination.

8. References to Māori/Indigenous Peoples in some chapters, such as Environment chapters, do not alter binding obligations in other chapters unless that is made explicit. They are not even interpretive context where that interpretation is not compatible with the binding rules being interpreted.

References to Indigenous Peoples in trade agreements are generally hortatory, non-binding and/or promise cooperation. The USMCA’s Environment Chapter Article 25.2 explicitly recognises

that the environment plays an important role in the economic, social and cultural well-being of Indigenous peoples and local communities, and acknowledge the importance of engaging with such groups in the long-term conservation of our environment.

Article 25.15 Trade and Biodiversity commits each Party to “promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy.”

The Parties

“recognize the importance of respecting, preserving and maintaining knowledge and practices of indigenous peoples and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity. ...

The Parties further recognize that some Parties may require, through national measures, prior informed consent to access such genetic resources in accordance with national

³⁰ Mexico – Measures Concerning Genetically-Engineered Corn, (MX-USA-2023-31-01) Opening Statement by the USA, 26 June 2024, p. 35

³¹ Mexico – Measures Concerning Genetically-Engineered Corn, p.101

measures and, where such access is granted, the establishment of mutually agreed terms, including with respect to sharing of benefits from the use of such genetic resources, between users and providers.

Panel noted that Mexico was not raising these provisions as a defence, rather as context for its legal obligations to Indigenous Peoples and the exception.³² As context, they had no visible impact on the panel's interpretations of SPS rules or the Indigenous Peoples exception.

9. Other exceptions that do not explicitly refer to Māori/Indigenous Peoples are open to challenge and interpretation and even less effective as a protection.

General exceptions are specific to named policy goals, use highly contestable terms such as “necessary”, and are subject to the common chapeau. Because other exceptions have a similar chapeau, failure on one is likely to mean failure of them all, even if the wording is slightly different.

Mexico argued that the GE corn measures come within the general exception on “public morals” that is imported from the WTO. That has a two-stage test of meeting the scope of the exception (including the “necessity test”) and the chapeau. It failed on both.

Mexico argued that “public morals” reflects “values pertaining in the society at the time”, as evidenced by its national and international legal obligations. *“These Measures were necessary to protect native corn, the milpa, the biocultural wealth and the gastronomic heritage of Mexico”*. The US defined public morals as *“standards relating to right and wrong conduct of the people as a whole”* and argued that Mexico had not adequately explained *“what it means by preservation of native corn and seeking to maintain unique gastronomic traditions.”*³³

The Panel said that both Parties appeared to agree that the notion of public morals is linked to concepts of “right and wrong conduct”. But it did not have to determine whether Mexico's particular objectives in this case qualified as matters of “public morals” because Mexico had not shown why GM corn poses a “public morals” issue on account of the risk of transgenic introgression, while cross-pollination or hybridization between native and non-native, non-GM corn does not.³⁴

10. Even if the Treaty/Indigenous Peoples exception is found to override the obligation in the trade or investment rules, the complaining party may make a non-violation complaint that the measure nullifies or impairs the benefits it expected from the agreement.

The US raised the possibility that, if the panel found the Indigenous Peoples exception applied, it should consider if there was a nullification or impairment of an expected benefit from the USMCA (a non-violation complaint). That means a benefit it reasonable expected to accrue was nullified because of the application of the Measures. The Panel discussed the “serious arguments” of each side in some depth.³⁵ But because the panel did not uphold the Indigenous Peoples' exception, it did not make a determination on the question.

³² Mexico – Measures Concerning Genetically-Engineered Corn, p.80

³³ Mexico – Measures Concerning Genetically-Engineered Corn, p.81

³⁴ Mexico – Measures Concerning Genetically-Engineered Corn, p.91

³⁵ Mexico – Measures Concerning Genetically-Engineered Corn, p.102- 108

The possibility of a non-violation complaint is not an issue that has been raised previously on the Treaty Exception, but the US arguments in this case highlight that additional risk.

11. Arbitral panels in a state-state or investor-state dispute are appointed for their trade expertise and are not required, or likely, to have knowledge or empathy on Indigenous rights let alone Te Tiriti.

The three panelists were all experts in trade and investment law, negotiations and disputes.³⁶ There is no indication that knowledge of, let alone expertise in, Indigenous Peoples' rights was a consideration in their appointment or that any of them had that expertise. That lack of knowledge and empathy may have contributed to their trade-centric approach.

12. Only the other parties to the Agreement have a right to participate in such disputes.

Canada, as a party to USMCA, had rights to participate as a third party. Despite Canada's advocacy for the Indigenous Peoples' exception in the USMCA and its claim that the exception would provide effective protection for Indigenous Peoples,³⁷ Canada supported most of the US trade-centric arguments that rejected its application in this dispute.

13. There is no right for third parties, including affected Māori or other Indigenous Peoples, to participate in disputes. At best they can seek to provide an *amicus curiae* brief, the acceptance and scope of which are decided by the panel.

The Panel received requests from 14 non-governmental entities ("NGEs") to submit written views in respect of the dispute. The panel granted nine and denied five.

One from the Institute for Agriculture & Trade Policy, the Rural Coalition and Alianza Nacional de Campesinas focused on the Indigenous Peoples exception (IATP). That submission outlined the history of the exception and the expectations of Indigenous Peoples and state parties when it was adopted.

Their analysis centred on the cultural, symbolic and spiritual significance of native corn to Indigenous Peoples and the struggle to protect the corn from the risks posed by transgenic maize. It cited the Declaration of Santa Domingo, Indigenous Peoples' International Conference on Corn, that says "cannot be separated from our struggles to defend our rights to land, water, traditional knowledge and self-determination".³⁸ The final report made only one reference to this submission and barely acknowledged any others.

Concluding observation

Statements from the Canada and Mexico governments at the time the USMCA was signed promised comprehensive protection for Indigenous Peoples Rights, similar to the Crown's assertions about the Treaty Exception. This case exposes the flaws in those arguments, especially as the USMCA is stronger than the Treaty Exception.

³⁶ Christian Haberli (Swiss former trade negotiator and investment and trade dispute panelist), Hugo Perezcano Diaz (Mexican investment and trade arbitrator and former negotiator), Jean Engelmayer Kalicki (American international investment lawyers and arbitrator)

³⁷ IATP brief, fn 13

³⁸ Quoted in IATP fn 41

There is a question of whether a differently designed law might have fared better, but that seems very unlikely. More importantly, the dispute shows how irrelevant Indigenous rights, responsibilities and worldviews are in the face of binding and enforceable trade and investment agreements.