

NGĀ TOKI WHAKARURURANGA

OPTIMAL TIRITI O WAITANGI PROTECTION IN FREE TRADE AND INVESTMENT AGREEMENTS

(January 2025)

Further to the aide de memoir on the Treaty of Waitangi Exception, this memorandum looks at the optimal form of protection. The two should be read cumulatively. In practical terms it provides a gold standard that can apply for future negotiations. There is a bigger challenge to renegotiate existing agreements with the 2001 Exception, or without any Tiriti protections (eg CER and the Hong Kong IPPA).

Gold standard protection

1. This Agreement shall not apply to measures adopted or maintained by New Zealand that it deems necessary to protect or promote rights, interests, duties, and responsibilities of Māori [Indigenous Peoples in its territory], including in fulfilment of its obligations under Te Tiriti o Waitangi [its legal, constitutional or treaty arrangements with those Indigenous Peoples.
2. The Parties agree that the interpretation of Te Tiriti o Waitangi, including as to the nature of responsibilities, rights and obligations arising under it, shall not be subject to the dispute settlement and review provisions of this Agreement.

Explanation

(a) A carveout rather than an exception or a reservation.

A *carveout* excludes the subject matter from the scope of the agreement (or less comprehensively, for a chapter). If a complaint is made, the complainant carries the burden of proof to show the measure it objects to falls outside the carveout and hence falls under the rules it seeks to enforce. That may avoid a dispute from occurring.

By contrast, an *exception* is invoked as a defence in a dispute once a breach has been shown. The burden of proof would be on Aotearoa New Zealand to show the exception applies and justifies the breach. That involves a potentially lengthy and costly dispute that a carveout can help avoid.

A *reservation* can act as a carveout, but may only be taken where provided for in an agreement. This may take different forms, for example on services, investment, government procurement, state-owned enterprises. The reservations often only apply to certain rules in those chapters. The interface between chapters can also be complex and ambiguous, eg between digital trade and services chapters. Because reservations are limited, and some chapters (eg intellectual property) do not provide for them, this cannot provide effective full protection.

A carveout is the approach taken in the recent EU FTA and UAE FTA digital trade chapters, and there are some reservations in the services annex, but otherwise the 2001 Treaty Exception applies.

(b) Is self-judging

The risk that a panel of trade lawyers makes decisions about matters on which they are both inappropriate and not competent to rule on needs to be avoided. That obviously includes interpretation of Te Tiriti o Waitangi; even more so, reference to The Treaty of Waitangi and or its “principles”. The 2001 Treaty Exception prevents those references from being examined by a panel. However, other parts of the Exception are not self-judging.

Some provisions, including reservations, use the term “necessary” – eg measures necessary to deliver the Crown’s obligations and Māori responsibilities, duties and rights. “Necessity” is a term of art in trade law that is objectively assessed and is commonly applied so as to minimise the extent of the action taken. For a trade panel to determine necessity in the context of Te Tiriti and Māori concepts is just as problematic as interpreting te Tiriti itself.

To avoid these risks and to safeguard decisions that are properly made in the domestic domain from external review a protection needs to be fully self-judging.

(c) Protect from review

An essential element of self-judging is to remove the risk that a dispute body, or even committee’s established under an agreement, may seek to exercise jurisdiction on creative grounds. The protection therefore needs to be removed explicitly from any review, dispute and enforcement mechanisms in the agreement. This needs to be worded broadly to avoid the ambiguities that apply to the 2001 Treaty Exception that only explicitly excludes state-state disputes bodies from reviewing the Crown’s view of measures necessary to meet its Tiriti obligations, and does not refer to investor-state disputes.

That comprehensive exclusion is increasingly adopted, for example, with national security provisions. Essential security exceptions used to have a mix of self-judging and objective (challengeable) terms, which the US has never accepted is subject to review in a dispute. Increasingly, security exceptions in some (not all) FTAs are entirely self-judging. Their use relies on the international treaty parties to comply with their obligations in good faith.

(d) Avoid language that qualifies the protection and becomes contestible.

The more complex the drafting, the more opportunities there are to contest the application of the protection. That includes language such as “more favourable treatment” and conditions, such as the chapeau, which would be interpreted by trade dispute panels through a trade lens, not a Tiriti lens.

(e) Broad framing of the sources of protection.

It is important to define appropriately and broadly what is to be protected to avoid challenge. The phrase being used most recently of “responsibilities, duties, rights and interests of Māori, including under Te Tiriti o Waitangi” allows for international instruments as well as a range of domestic arrangements, including those like Tuhoe who never signed Te Tiriti and Ngāti Whakaue who reference the Fenton Agreement. The narrower the reference to what is to be protected (eg.

to legislation, constitution, recognised by legal system, etc.) the more risk of omissions and contested interpretations.