

APPENDIX A: FURTHER QUESTIONS IN WRITING

Bryan Smith and Simon Mandal-Johnson

Cost containment reserve

1. Mr Mandal-Johnson indicated that officials “do not think” about the cost containment reserve as being a form of price control (or influencing price). Do you agree that, if the volume of NZUs supplied to the secondary market increases, that will in principle reduce the price of NZUs?
2. Do you agree that the cost-containment reserve is triggered when a particular price threshold is met?
3. Do you agree that, if a price threshold is met, and Crown policy is to supply the market with additional NZUs in response to that price threshold, the effect of that policy is therefore to put downward pressure on the NZU price at certain price thresholds?

Auction prices

4. Have you read the brief of evidence of John Stacey Ballingall dated 13 May 2025 [#A108]?
5. Do you accept that the most recent quarterly auctions (2025; first quarter 2026) have not attracted any bids that met the Government’s reserve/minimum price?
6. Do you agree that, if the purpose of the auction process is to provide greater volume of NZUs to the secondary market, the failures of the auction process suggests that there is an excess of supply in the secondary market?
7. Do you agree with Mr Ballingall that the failure of NZUs to sell at the minimum auction price may be indicative of a failure of the market and/or regulatory design (at [41])?
8. Do you agree with Mr Ballingall and the Climate Change Commission that there is an excess supply of NZUs (see [43])?

2023 Review of the ETS

9. Have you read the paper prepared by Sense Partners “Analysis of MfE ETS policy options” dated 30 August 2023 (“SP Report”) [#A108(a)]?

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10. In June 2023, MfE officials circulated the discussion paper “Te Arotake Mahere Hokohoko Tukunga: Review of the New Zealand Emissions Trading Scheme”. Officials stated: “The total supply of NZUs from removals, however, is forecast to increase over the same period. If NZU prices remain at current levels, the resulting exotic afforestation would result in the supply of NZUs from forests exceeding NZU demand. When this occurs, prices are likely to fall” (at 27).

Do you agree with the SP Report that: “The **first supply scenario is implausible**” (original emphasis; at i)?

11. Do you agree that, in principle, if price for a product decreases, supply for that product will decrease?
12. Do you therefore agree that, in principle, if NZU prices decrease, planting rates for exotic forests would slow?
13. The SP Report states that: “the ETS cannot be de-linked from forestry removals. As long as the government’s emissions reduction targets include removals – i.e. net emissions – the amount of removals will affect ETS caps and therefore ETS prices”. Do you agree? If not, why not?
14. Do you agree that circulating a discussion paper that makes predictions about supply and demand of NZUs, and which may inform changes to the ETS, is likely to affect the NZU price?
15. Mr Ballingal states in his brief, discussing the Discussion Paper, that: “Quite how officials wanted to implement any of the options to reduce the ‘value’ of forestry removals was unclear” (at [65]). Do you accept that, if officials are going to discuss or propose policy changes to the ETS, they need to be as clear as possible about:
 - 15.1. what changes they want to make to the ETS;
 - 15.2. why they want to make them; and
 - 15.3. the (quantified) costs and benefits of doing so?

Vangelis Vitalis

2001 Cabinet strategy for Crown engagement with Māori on international treaties

16. At [18.1] of your brief, you refer to the 2001 Cabinet Strategy for Engagement with Māori on International Treaties, which was incorporated largely unchanged into the 2021 International Treaty Making Guidance. Is this 2001 Strategy still the basis for MFAT's approach to engagement with Māori on international treaties today?
17. This strategy requires lead agencies to identify, at an early stage, any treaties of interest or relevance to Māori and ensure appropriate engagement occurs. Would you accept that officials may not recognise when a treaty negotiation or implementation is of relevance to Māori and/or that it requires a high priority - for example, the e-commerce chapter in the CPTPP that was subject of the Wai 2522 finding against the Crown, and MBIE's approach to the IPEF Critical Minerals Dialogue and subsequent international critical minerals negotiations?
18. Are you aware that the Waitangi Tribunal in the Wai 262 and Wai 2522 inquiries were both critical of the 2001 Strategy from a Tiriti o Waitangi perspective, but that no action has been taken to change it in response to those criticisms?
19. During MFAT's review of international treaty making in 2021-23 Te Puni Kokiri pressed for a review of the 2001 Strategy to be given priority, but MFAT rejected that proposal. Can you explain why?

MFAT's review of international treaty making

20. In relation to that review of international treaty making,
 - 20.1. Presumably you were involved as Deputy Secretary at a senior level in the review of international treaty making conducted by MFAT under the previous government. Documents show that review did not engage with Māori and deliberately avoided addressing any constitutional issues relating to international treaty making and Te Tiriti o Waitangi. Can you tell us why Māori, especially our clients Ngā Toki Whakarururanga, were never informed of, let alone invited to contribute to, that review?

Rory McLeod's paper on trade and climate

21. At [48] of your brief you note Professor Kelsey's evidence that trade agreements exacerbate the climate crisis. I assume you are aware that Rory McLeod, a mainstream economist and former New Zealand negotiator, wrote a paper on trade and climate for the Pacific Economic Cooperation Council (PECC) in 2024. In his view, efforts to tackle climate change may be hindered by trade rules and regulations that send signals and create incentives that sit at odds with policies needed to address issues involved with climate change. Do you agree?
22. In a number of places in your brief [e.g. [12.1], [49], [68], [97-100]] you identify "environmentally harmful subsidies" as contributors to climate change and matters where trade policy tools can play a role. Mr McLeod specifically points to "implicit subsidies" to the fossil fuel and agriculture industries as providing incentives for those industries to continue emissions-intensive activities and he suggests that New Zealand may provide quite high levels of implicit subsidies. Would you agree with him that these matters could be disciplined in trade agreements, but that the current international trade rules are totally unsuited to do so?
23. Has New Zealand ever proposed to extend trade rules to discipline implicit subsidies to industries like agriculture and fossil fuels, and if not, why not?

Climate change in trade and investment agreements

24. Would you agree that many references to climate change in New Zealand's trade and investment agreements, and that many references to Māori values and concepts like mātauranga, are aspirational or "soft" references, such as in the preamble or using language like "recognise" and "affirm"?
25. You say in [51.2] to [51.3] that the binding environment chapter in the CPTPP prohibits the weakening of laws to attract trade or investment. Professor Kelsey cites Minister for Resources Shane Jones saying he was "not overly concerned" over MFAT officials' advice that an oil and gas ban would likely breach requirements in the free trade agreements with the EU and UK not to reduce environmental standards so as to attract trade and investment. Have the CPTPP parties challenged New Zealand for doing that? What does their

action or inaction say about the effectiveness of those rules in the climate context?

26. You point in [80] to legally binding and enforceable commitments in the New Zealand European Union FTA (NZ EU FTA) to effectively implement the Paris Agreement. The Government has admitted that New Zealand will not meet its Nationally Determined Commitments by domestic action and buying offshore carbon credits. Has the Environment and Climate Change Sub-committee of the NZ EU FTA raised New Zealand's potential breach of its FTA obligations? If not, what does this say about the value of the obligation to prevent such action in the climate context?

Te Tiriti, Critical Minerals and negotiations with the United States

27. The promotion of green extractivism, including of critical minerals, through trade agreements is a key concern to the claimants.

27.1. The claimants asked the Tribunal to seek information from the Crown on negotiation of a bilateral agreement on critical minerals with the United States. The existence of these negotiations were confirmed. Can you please update us on the status of that negotiation, and in particular how both the Tiriti o Waitangi and the climate change dimensions of critical minerals mining in Aotearoa are being addressed in the substance of those negotiations?

27.2. You are presumably aware that the US administration has also proposed to establish a preferential trade zone for critical minerals and intends to invite "dozens of countries to join as members of the trading bloc" to develop an action plan to "explore a plurilateral trade initiative" relating to aspects of critical minerals and their supply chain. The Tribunal suggested that we ask you our questions on this in cross-examination. So, can you please inform us:

27.2.1. As the lead negotiator for the Crown in trade agreements, do you know if Aotearoa New Zealand has been asked to participate in the negotiation of such a trade agreement and if it has not been approached, whether you expect it will be?

27.2.2. Assuming the answer is yes, what would you expect to be the scope of the matters the US wants covered in that agreement?

27.2.3. How will you ensure that such an agreement addresses the negative climate change implications of mining critical minerals?

27.2.4. How will you actively protect the whenua and moana and the ability of mana whenua to exercise responsibilities and duties to Papatūānuku and Tangaroa, including through prior informed consent, and profit sharing where such consent is given?

27.2.5. How will Māori exercise their rangatiratanga in such negotiations?

Tiriti o Waitangi in trade and investment agreements

28. In [13] you accept the 2001 Treaty o Waitangi Exception “alone is not sufficient” to actively protect Māori interests. Yet in [150] you say the Treaty Exception “provides protection for climate change measures that reflect Māori interests and Treaty obligations, ensuring that New Zealand’s pathway to net-zero emissions can incorporate indigenous perspectives and traditional knowledge without risk of ISDS challenge”. How do you reconcile those two statements?

29. There is no Treaty of Waitangi Exception in the Hong Kong or China investment treaties. That is hardly a “technical difference” from other agreements, as you describe them in [157], is it? Why hasn’t New Zealand exercised its right to withdraw from those agreements?

30. Do you accept that the limitation on the scope of the Treaty Exception to “more favourable treatment” of Māori means it would not cover measures that are designed to protect Te Taiao, or at least that there is a risk that an investment arbitration panel read the limitation in that way?

31. The new Tiriti/Treaty protection that MFAT has co-designed with Ngā Toki Whakarururanga omits the problematic parts of the Treaty Exception and makes it clear that it applies to ISDS. This follows the Wai 2522 Tribunal Stage 3 finding that the Treaty Exception even when combined with other protections did not meet the standard of active protection. How can you continue to claim that the 2001 Treaty Exception provides effective protection?

General Exceptions in trade and investment agreements for climate change measures

32. You say in [138.4] that “measures necessary to protect human health” includes “measures to implement multilateral environment agreements such as the Paris Agreement”. But the agreements you footnote do not refer to multilateral environment agreements or climate change and extending them in that way would require a dispute panel to interpret “human health” very broadly. Do you accept that a dispute body might not agree with that interpretation?
33. Even if it did accept that broad definition, isn't it true that other conditions in the exception, such as the necessity test or chapeau, could lead the panel to reject the application of the exception?
34. In the CPTPP, the General Exception does not apply to the investment chapter, does it? And Article 9.16 Environmental, Health and other Regulatory Objectives in the investment chapter says a government can adopt environmental, health and other measures, provided those measures comply with the investment chapter's rules, is circular – it's not an exception, it just says a party can do what the rules allow it to do. Correct?

ISDS and climate change actions

35. Mr McLeod, in point iv on page 5 of his paper, echoes Professor Kelsey's view that ISDS can be used to challenge climate change policies and regulations and can “have a chill impact on government and business seeking to promote green products and technologies”. Do you agree with Mr McLeod that ISDS could have that chilling effect?
36. You recognise in [125] that ISDS is increasingly invoked by fossil fuel companies to challenge climate change actions, which is consistent with UNCTAD reports cited by Professor Kelsey. But then you say definitively in [138] that actions taken pursuant to New Zealand's climate commitments “cannot be undermined through ISDS challenges”. Are you saying that New Zealand's agreements are qualitatively different from those used to challenge climate action, and if so, how are they different?
37. In [166] you claim that most ISDS cases that challenge environment measures “do not succeed where governments follow proper processes”. Are you

suggesting that those many governments that have lost ISDS disputes over climate change measures have lost because they didn't follow proper processes?

38. In [126] and [127] you talk of a balancing act in New Zealand's approach to ISDS; in [130] a "cautious case by case approach" between 2001 and 2017 that "safeguards the government's right to regulate"; and in [160] that "ISDS risk has not increased since the Wai 2522 Stage 1 Report — in fact, the landscape has shifted in NZ's favour with strengthened safeguards and reduced exposure through treaty design and side instruments". If all this is true, why have successive New Zealand governments maintained the policy of no ISDS in new agreements since the CPTPP?
39. How do provisions in post-2001 agreements like Article 10.13 Investment and Environment in the Investment Chapter of the New Zealand Korea FTA, and Article 9.16 Environmental, Health and other Regulatory Objectives in the CPTPP Investment chapter, which say governments can adopt environmental measures provided they are consistent with the rules of the chapter, constitute safeguards?
40. In [135] you describe the omission of ISDS with Australia as illustrative of New Zealand's "strategic approach". Isn't it more accurate to describe the Australia-New Zealand position as exceptional, given that all CER agreements since 1983 have not included either state-state or investor-state disputes for the unique reasons you provide?
41. Isn't it true that bilateral side-letters to exclude ISDS in agreements with other countries only started with CPTPP; they only apply to some CPTPP countries and not to major capital exporters like Japan, Canada, Mexico or Singapore who have refused to sign them; and they do not affect ISDS in other agreements with the same countries, such as the ASEAN Australia NZ FTA (AANZFTA)?
42. The AANZFTA dates back to 2009 and covers all the ASEAN countries and has just been renewed despite the Government's ISDS policy. Doesn't that leave New Zealand vulnerable to ISDS cases from investors in all the countries of ASEAN and potentially neutralise some of the side letters in CPTPP?

43. In [165] you cite the example of the ISDS dispute over plain packaging that Philip Morris brought and lost against Australia and the award of costs. Do you accept that the Australian Government was not reimbursed for all the costs it incurred as a result of the dispute?
44. The New Zealand Government's admission that it was not proceeding with plain packaging tobacco until the Philip Morris case was over has often been cited as an example of regulatory chill. Wouldn't you agree?
45. Regarding the disputes brought by Clive Palmer against Australia under the AANZFTA, are you aware that Mr Palmer is seeking a review in the Swiss courts of the dispute he lost on jurisdiction, and that his other three ISDS disputes remain active?
46. Wouldn't you agree that Clive Palmer's history of such litigation shows how a wealthy investor can drag these expensive proceedings out for years with the explicit goal of chilling governments' decisions?

Waitangi Tribunal on ISDS and Regulatory Chill

47. You say in [158] that the Waitangi Tribunal's findings on ISDS provisions in the Wai 2522 inquiry are directly applicable to the current proceedings, and provide "a well-informed foundation for assessing similar investment-related concerns". At pages 50-51 of the Stage 1 urgency report the Tribunal said: "We do not accept the Crown's argument that claimant fears in this regard are overstated" and "we remain unconvinced that ISDS under the TPPA is low risk or not substantially different from exposure to ISDS under existing FTAs to which New Zealand is party." So you would agree with those statements from the Tribunal?
48. At [156-157] you only cite the Wai 2522 Stage 1 report on the urgency hearing. The Stage 3 report on the CPTPP e-commerce chapter said, when discussing regulatory chill on page 161: "The risk is not just that the Crown would lose a dispute if another TPPA / CPTPP Party challenged it before a trade tribunal. There is a significant likelihood of interventions at various stages of the policy and legislative process by foreign corporations and their governments, which is supported by recent evidence of foreign corporate and state pressure on governments in the adoption of digital policies. That pressure is designed to chill the decision making process. The risks of threatened or actual state-state

and investor–state disputes would intensify should the US re-engage with the TPPA. The examples cited by the Crown to negate the risk of chill are either wrong or not substantiated by evidence” ...

49. and further at page 176: “This stage of our inquiry recognises that risk extends beyond the risk of an ISDS claim and includes the broader scope of regulatory chill across the policy and legislative process. We recognise the cumulative effect of these risks and the potential that they have to circumscribe the ability of the Crown to legislate in ways that would address Tiriti / Treaty interests ...”

So do you accept that Tribunal finding as well?

The chilling effect of ISDS on oil and gas exploration policy

50. In relation to claims by former Climate Minister James Shaw about the chilling effect of ISDS on government policy on the ban on oil and gas exploration, you cite in [168] MFAT’s response to an Official Information Act request by Professor Kelsey that MFAT provided no investment-related advice to Ministers. Are you now aware that MFAT officials subsequently directed Professor Kelsey to MBIE as the lead agency on this matter, and that MBIE provided her with a number of documents relating to the policy decision, which include advice on legal risks, legal considerations, reputational risks and sovereign risks?
51. And are you aware that MBIE provided a later briefing to Minister Jones dated 11 March 2024 on Options to Increase Investment in Petroleum Exploration, which included advice from MFAT that refers in [46] to free trade agreements with the EU and UK, and ACCTS negotiations, although the substance is redacted under 9(2)(j)?
52. Would you not agree that this shows MFAT has been involved in extensive advice on the legal impacts of the ban on fossil fuel exploration and its possible future reversal, which include FTAs and are highly likely to include the advice referred to by Minister Shaw?

Victoria Hallum

The treaty making process and engagement with Māori

53. In [32] you say MFAT is committed to acting as a Tiriti partner. Can you explain how you understand the power relationship between rangatiratanga and kāwanatanga as Tiriti partners?
54. In [30] you describe seven opportunities you say exist for Māori involvement in all phases of the international treaty making process. All of these are controlled by the Crown and none vest any authority in Māori. How do you describe that as a Tiriti partnership?
55. According to [28] the international treaty process was introduced in 1997, made permanent in 2000, and has not been changed since 1998. But you would agree that the scope and impact of international trade and investment treaties and rules have expanded massively since then, as have their implications for domestic policy?
56. Sir Kenneth Keith says in the Cabinet Manual that more and more law is made through international processes that are currently the prerogative of the executive. Don't you see the continuation of a process dating back to 1998 as a problem?
57. You would also agree that the reports of the Waitangi Tribunal, especially Wai 1040, have deepened the understanding of Te Tiriti o Waitangi from that which informed the Crown's position in 1998?

MFAT's review of international treaty making

58. In your position as the Deputy Secretary Legal in charge of international treaty making were you also responsible for the review of international treaty making conducted by MFAT from 2021 to 2023?
59. You will be aware there have been proposals, even from a former Clerk of the House and the Law Commission, to reform the international treaty process, and that other former British colonies have made significant changes to their processes, including Australia?

60. It was decided that review would not revisit the Crown prerogative. Why was that?
61. You knew, to quote the Cabinet paper, that it was “likely that the changes proposed in this paper will not fully meet the expectations of some Tiriti partners who advocate for systemic constitutional change.” So you were aware that Māori would see this review as a further denial of tino rangatiratanga. Were you deliberately trying to avoid opening up that constitutional discussion?
62. Was it a conscious decision to keep this review secret and not to engage with Māori, outside those who work from the Crown, or even to inform them the review was being conducted? Did you not consider the review was significant enough to involve them at the earliest possible stage, rather than only giving an opportunity to comment once Cabinet had decided what changes it would accept? Again, how is that Tiriti consistent?
63. We can presume that you are aware of the Mediation Agreement between the Crown and Wai 2522 claimants, represented by Ngā Toki Whakarururanga, correct?
64. And that [6.1] and [6.2] of the Mediation Agreement has a commitment from MFAT to “engage with authenticity and integrity to continue to build a genuine and respectful mutually beneficial relationships between the claimants and Aotearoa New Zealand’s international trade policy and practices” and to be “open and honest”. Do you believe that the process of this review meets that standard?
65. In [42] you describe this secretive approach as an “orthodox policy process”. As this review directly impacts on Māori, how does that process reflect a Tiriti partnership?

Cabinet Strategy for Engagement with Māori on International Treaties

66. Are you aware that several Waitangi Tribunals and the Trade for All Advisory Board report have criticised the 2001 Cabinet Strategy for Engagement with Māori on international treaties and called for change?
67. Yet the 2001 Strategy was incorporated unchanged in the International Treaty Making: Guidance for Government Agencies in 2021. Were you involved in the decision not to update it?

68. Te Puni Kokiri (TPK) was also dealing with international treaty making as part of Te Pae Tawhiti. They pressed hard for a commitment to a priority review of the 2001 strategy to be included in the Cabinet paper on the review of treaty making. Why did MFAT block that and only propose some possible review some time in the future?

69. As a consequence of MFAT's advice, and the Cabinet paper not being presented, the 2001 Strategy remains unchanged despite repeated criticisms that it fails to meet the Crown's Tiriti obligations. Do you consider that acceptable and if so, why?

Foreign Affairs Defence and Trade Committee's failure to review treaty examination process

70. Turning now to the Standing Orders Committee recommendation for a review of Parliament's treaty examination process, presumably the responsibility for MFAT's advice in relation to that falls within your role as the head of MFAT's legal division?

71. You will be aware that multiple reviews have been conducted in governmental and parliamentary systems of countries that are derived from English colonial systems? For example, the Australian Parliament's specialist Joint Standing Committee on Treaties has conducted multiple reviews. The latest in May 2024 recommended improved transparency, accountability, and oversight in the negotiation process. The International Agreements Committee of the House of Lords has conducted a series of reviews, most recently in September 2025. So why does MFAT oppose such an inquiry here? It seems very self-serving, doesn't it?

72. In [22.6] you refer to select committee consideration of treaties that have been negotiated and signed by the Executive. As you know, the select committee controls that process. It may choose to call for submissions or not. It routinely gives individuals 5 minutes and groups 10 minutes to present submissions on an agreement that may have 20- 30 chapters. It must report within 15 sitting days of presentation to the House unless it seeks more time. Its report may or may not be discussed in Parliament. How is that process Tiriti compliant?

73. Professor Kelsey's evidence says that MFAT advised the Foreign Affairs Defence and Trade committee that the treaty examination process was fit for

purpose and did not need the review recommended by the Standing Orders Committee. Were you involved in giving that advice?

74. Did you consider the Tiriti consistency of the current process when giving that advice?

The ISDS Protocol

75. You were the MFAT legal official in charge of drafting the protocol for an ISDS dispute that might involve the Treaty of Waitangi exception, correct?

76. Would you agree that all the power over decisions relating to the Treaty of Waitangi exception under that protocol remains with the Crown?

77. Going back to the Wai 262 Report that you rely on for the authority of the Crown, would you not agree that a decision on whether to invoke the Treaty of Waitangi Exception and the arguments to be presented, by whom is, to quote the tribunal, a matter “when the Māori interest is so overwhelming, and other interests by comparison so narrow or limited, that the Crown should contemplate delegation of its decision-making powers, or delegation of its role as New Zealand’s ‘one voice’ in international affairs”, or at the very least is a “time when the Crown’s position on matters of core importance to Māori must be developed by consensus, and - preferably - by a negotiated agreement with Māori”?

The ICJ Advisory Opinion

The following questions relate to the Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change.

78. You said in your brief you were not in a position to comment on the details of the ICJ Advisory Opinion, but presumably you have read it quite closely given your role in MFAT, correct?

79. Noting the following to paragraphs of the Advisory Opinion, which is on the Tribunal’s record:

Paragraph [374] quotes from the Preamble to the Paris Agreement that:

Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on

... the rights of indigenous peoples ...

Paragraph [382], which recalls that preamble, observes that:

Climate change may also impair the enjoyment of the rights of women, children and indigenous peoples.

Paragraph [384] further observes that:

The IPCC has found that women and indigenous peoples may be more severely affected by the impacts of climate change. ... The Court therefore considers that the enjoyment of human rights by such groups is at risk of being affected by the adverse effects of climate change.

Would you accept that the Advisory Opinion anticipates the Crown should and would accept a special obligation to Indigenous Peoples in developing and implementing climate change policies, irrespective of Te Tiriti o Waitangi, but especially because of it?

Setting the mandates for the climate change COPs in 2023 and 2024

80. Would you concede that the consultation with Māori you have described before the setting of the 2023 and 2024 mandates for the climate COPs (in your brief at [63] to [67] could be described as shallow?
81. Going back once more to the Wai 262 Report that you rely on for the authority of the Crown, would you not agree that the setting of the mandate for the climate change COPs is a “time when the Crown’s position on matters of core importance to Māori must be developed by consensus, and - preferably - by a negotiated agreement with Māori”?
82. Have you considered the issue of free, prior and informed consent, when it comes to the Crown advancing a negotiating mandate for the climate change COPs which Māori have not consented to?
83. What is your view on how free, prior and informed consent applies in this situation?

Māori participation in the climate change COPs

84. This question regards the status of Māori attending the climate change COPs who are non government participants. We've heard from Alison Cole (a witness for the Wai 3382 claim filed by two hapū of Ngāruahine) who was in the official delegation for COP 26 in 2021 as a representative of the Iwi Chairs Forum, and also from India Logan-Riley (a witness for the claim filed by Ngā Toki Whakarururanga) who attended in a civil society capacity between 2015 and 2021. Both of them said that they had no real role in the negotiations beyond attempts to influence from the sidelines. This appears to be consistent with your evidence. Is there anything you would add to this?

Kay Harrison

The climate change COPs

85. One of our witnesses for the claim filed by Ngā Toki Whakarururanga in this inquiry is India Logan-Riley, who attended COPs 21 through to 26 as a civil society participant.

In India's view, rangatiratanga means that Māori deserve a negotiating seat at the table equal to states at the climate change COPs. Notwithstanding that, India said in their evidence that if the approach was to be that there is a shared negotiating position between Māori and the Crown at the climate change COPs, Māori and the Crown would need to be able to come to things together in forming the mandate. Is it fair to say that what you observed in 2015, in terms of how the INDC was determined, was no such coming together between Māori and the Crown?

86. Would you agree that the process of determining the INDC fell far short of the mark on compliance with Te Tiriti?

87. One of our witnesses for the Wai 3382 claim filed by two hapū of Ngāruahine was Alison Cole, whose evidence you have discussed in your affidavit. You've disagreed that Ms Cole's position as an Iwi Chairs Forum representative with a party badge was akin to the position of any member of civil society from Aotearoa (such as India Logan-Riley), and you referred to her privileged access to the negotiating team.

Would you agree that Ms Cole and other Iwi Chairs Forum representatives at the climate change COPs sit outside the negotiating team and don't have decision-making power?

88. To return to the evidence of India Logan-Riley, they described the role of Māori civil society participants like themselves at the climate change COPs as a stakeholder role, the same as any other New Zealand attendees who make their way to the climate change COPs. Would you agree with that?

89. You have said in your brief at [62] that Professor Jane Kelsey (another one of the witnesses for the Ngā Toki Whakarururanga claim) gave a view in her evidence that the negotiations during COP25 in 2019 were conducted in secret. Would you accept that you've mistaken what Professor Kelsey said and that she was actually referring to the negotiations for the Agreement on Climate Change, Trade, and Sustainability concluded in 2024 being conducted in secret? See [86] of Professor Kelsey's first affidavit.

90. You nonetheless went on to explain in your evidence at [63] that at times, the climate change COP negotiations do proceed on a "one per party" or "Minister plus one" basis.

Would you agree that a particular problem of Tiriti compliance arises when Māori representatives on the official delegation such as Alison Cole at COP 26 can no longer track what is going on in the negotiations?

Carbon markets

91. At [71] of your brief, where you discussed the Clean Development Mechanism under the UNFCCC, you raised the serious issues involved with that carbon trading mechanism. You said that "[s]ome countries or businesses saw buying these units as an "excuse" to keep emitting at home."

What would you say to the suggestion that this logic can apply to ongoing carbon offsetting within Aotearoa, where forest offsets can be seen to have expanded the near term carbon budget? In other words – isn't our government relying on growing trees as an excuse to not reduce emissions at source?

92. In India Logan-Riley's evidence, and with reference to the paper they authored (Blue Herrings: Carbon markets and the empty promises of blue carbon, which is Exhibit C to their affidavit at **A24(a)** and Tab 31 of our cross-examination

bundle), India has said carbon trading was only meant to be a stopgap, and it is a flawed concept insofar as it “turns nature into an equation where harm over here can be magicked away by some good stuff over here”. What is your response to this? See the Blue Herrings paper at pages 2 – 3 under the subheading *History of carbon markets*.

93. India also criticised the policy space taken up by carbon trading. They wrote as follows in the Blue Herrings paper at page 12: “[Another] issue with the efficacy of carbon markets is the amount of space they take up in the suite of emissions reduction tools. Emissions have to come down, and they have to come down rapidly. This happens through solutions such as public transport, respecting Indigenous sovereignty, and no more new oil, gas and coal projects.”

India also said in their evidence that “because the ETS has been the primary emissions reduction tool for the Crown, we can see as an outcome of that a narrowness of imagination in being able to actually tackle climate change and the emissions that come from Aotearoa.”

What is your response to India’s criticisms here?

94. Up until 2015, the New Zealand ETS was linked to the Kyoto international market for carbon credits. You accept that our ETS is now a fully domestic market?
95. Would you accept that, while the New Zealand ETS was linked to the Kyoto market, there was an oversupply of international units which led to a decrease in the price of emissions units?
96. Would you agree that a decrease in the price of emissions units means there is less incentive for polluters to decrease their carbon emissions?
97. Would you agree that, while international trading took place under the Kyoto Protocol (the Clean Development Mechanism), there were significant problems with trading of emissions units that lacked integrity insofar as they did not represent a genuine reduction or removal of carbon emissions?
98. New Zealand has considerably more mature regulatory systems and market governance than some countries. Would you agree that there is considerable

risk in New Zealand relying on international markets for carbon credits given this, and the history of the Kyoto international market?

99. In their evidence, India Logan-Riley explained that “best practice finance is additional, so it’s not just shuffled around pots of money – it’s more; it’s predictable, so we know when it’s coming; it’s consistent, so it regularly comes; and it is grant-based, so it’s given as a grant. In carbon markets, you’re giving something in exchange for it and it may require the alteration of your land tenure, it may require the locking up of the development of your land...”

With particular reference to the fluctuating price of emissions units we have seen in New Zealand, what would you say to the suggestion that when we view carbon market mechanisms such as the ETS as a way to finance Indigenous communities to sequester carbon on their land, carbon markets are actually a poor form of financing?