BEFORE THE WAITANGI TRIBUNAL **WAI 3325**
WAI 3395

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the Climate Change Priority Inquiry (Wai 3325)

AND

IN THE MATTER OF a claim by **Pita Tipene, Moana Maniapoto, George Laking, India Logan-Riley, Donna Kerridge, Aroha Te Pareake Mead,** and **Maria Bargh** for and on behalf of **Ngā Toki Whakarururanga (Wai 3395).**

BRIEF OF EVIDENCE OF ELIZABETH JANE KELSEY

(Reply to evidence of Vangelis Vitalis)

Dated this 1st day of September 2026

RECEIVED
Waitangi Tribunal
1 Sep 26
Ministry of Justice
WELLINGTON

ANNETTE SYKES & Co.
barristers & solicitors
Annette Sykes & Co
8 – Unit 1 Marguerita Street
Rotorua, 3010
Phone: 07-460-0433
Counsel Acting: Annette Sykes / Sam Vincent
Email: asykes@annettesykes.com / sam@annettesykes.com

I, **Elizabeth Jane Kelsey**, Professor Emeritus of Law, Auckland, solemnly affirm:

Introduction

1. This is the seventh brief of evidence or affidavit I have given in this inquiry relating to Te Tiriti o Waitangi, the climate crisis and international trade and investment policy and agreements.

2. My credentials and expertise on this matter have been set out in my first affidavit dating 21 October 2024 and subsequently.

3. I confirm that I have read the Code of Conduct for Expert Witnesses.[1] I agree to comply with this Code. This evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

4. In this affidavit I reply to the evidence of Crown witness Vangelis Vitalis, Deputy Secretary of the Trade and Economic Group ("TEG") at the Ministry of Foreign Affairs and Trade ("MFAT").

5. I have chosen to focus on the answers of Mr Vitalis to written questions put to him after Hearing Eight. Where I refer to paragraph numbers, I am referring to the paragraphs in the document filed containing Mr Vitalis's answers to written questions.[2]

Barriers to genuine and meaningful influence

6. The advances MFAT has made on the process of engagement with Māori on international trade and investment treaties, and officials' understanding of Tiriti o Waitangi and Māori issues, outlined by Mr Vitalis in [3] – [9], reflect a good faith attempt by the Crown to improve the Tiriti relationship in response to Māori pressures, including at the Waitangi Tribunal.

[1] High Court Rules 2016, schedule 4.
[2] Wai 3325, #A123(c).

7. Ultimately, however, all the power remains in the hands of the Crown and falls far short on the Tiriti principles of rangatiratanga and mutual recognition and respect, and which result in a lack of active protection.

8. In practice, effective engagement, including in relation to the climate crisis, let alone the influence over negotiations that Ngā Toki Whakarururanga is promised in the Mediation Agreement, is undermined by numerous factors. These include the disposition of ministers and coalition parties, the siloed nature of MFAT and other Crown agencies, shifts in leadership and staff rotations, and sinking lid funding.

9. The implications of this are increasingly evident. The Māori official in TEG with whom Ngā Toki Whakarururanga developed a relationship over several years has been rotated and his position is currently not filled. The six-monthly meetings with other agencies, including Te Puni Kokiri and MBIE, which Mr Vitalis refers to in [12], have not been confirmed and have yet to occur. Nor have the expected meetings with Houtina, the official Māori division and policy unit in MFAT, which is also without the director with whom Ngā Toki Whakarururanga developed a relationship. Ngā Toki Whakarururanga has never had any contact with Te Hurumanu referred to in [14].

10. Operationalisation of the relationship with the Crown through the Trade and Economic Group of MFAT has also made it difficult to establish broader relationships with other agencies, such as MBIE. It is also difficult to promote Indigenous trade-related initiatives even within MFAT. For example, a proposal by Ngā Toki Whakarururanga for an event on Indigenous perspectives on climate, trade and investment agreements at the forthcoming pre-COP meeting in Fiji in October was considered not appropriate for TEG. Despite requests, Ngā Toki Whakarururanga has not been supported to discuss the proposal with the climate and Pacific divisions of MFAT.

11. Negotiations to formalise these enhanced processes in a new instrument, pursuant to [8] in the Mediation Agreement, are stalled after MFAT proposed major last-minute revisions to a largely agreed text in a manner that downgrades the core Tiriti o Waitangi relationship between Ngā Toki Whakarururanga and the Crown.

2001 Cabinet Strategy for Engagement with Māori on International Treaties

12. The 2001 Cabinet Strategy for Engagement with Māori on International Treaties, now 25 years old, remains the official document to guide Crown officials. Mr Vitalis says in [2] that successive governments have not directed a revision. He omits to say that MFAT blocked the inclusion of a recommendation in a paper intended for Cabinet that the 2001 Strategy should be revisited as a priority.

13. My evidence on the review of international treaty making led by MFAT from 2021 to 2023[3] shows that Te Puni Kokiri (TPK) repeatedly sought to include a commitment to review the 2001 Strategy as a priority in Cabinet's work plan to reform the international treaty process. Clearly, TPK viewed this as a matter that was within the scope of the treaty making review, unlike Mr Vitalis' position in [16].

14. Mr Vitalis' rationale in [18] for not consulting Māori on the review of international treaty making is circular. He says Māori would have been engaged as "Treaty partners" if there was a comprehensive review of the 2001 Strategy, something that it blocked. That left Māori with no rights of input into a paper that was intended for Cabinet on the international treaty-making process. That rationale also does not address the failure to meet MFAT's obligation to engage with Ngā Toki Whakarururanga on such matters under [13.4] of the Mediation Agreement.

[3] Brief of Evidence of Elizabeth Jane Kelsey, 10 June 2025. Wai 3325, #A114.

15. As a result, the "evolution" referred to at [3] of engagement beyond the 2001 Strategy remains at the discretion of the various Crown agencies, in particular MFAT, and depends on varying levels of MFAT's institutional knowledge and the Crown's commitment.

The critical minerals strategy

16. Unfortunately, the process Mr Vitalis describes in [11] differs from how it has played out in practice. The experience with the Critical Minerals Dialogue under the Indo-Pacific Economic Framework (IPEF) agreements, set out in my affidavit and evidence,[4] is a recent example from October 2024. To contextualise this in terms of the claim, I refer the Tribunal back to the evidence of Professor Maria Bargh[5] and India Logan-Riley[6] on the significance of green extractivism in the context of climate change, in which agreements on the mapping, extraction and trade in critical minerals have a central role.

17. The engagement on the IPEF Critical Minerals Dialogue was initiated by Ngā Toki Whakarururanga. MFAT officials were either unaware of the dialogue or did not recognise there was an Tiriti issue related to the IPEF agreements. The MBIE officials who had taken the lead on that work were reluctant to engage with Ngā Toki Whakarururanga and did so only one time, despite repeated requests. The evidence from Mr Morton, the MFAT official whom we now understand is in charge of the negotiations for a critical minerals framework agreement with the United States, shows he has never directly engaged with Ngā Toki Whakarururanga.

18. Instead, engagement on critical minerals with the officials in MBIE was intermediated at arms-length through a senior Māori official in the Trade and Economic Group (TEG). He has been unable to update Ngā Toki Whakarururanga on recent developments on the negotiations with the US, even under the confidentiality agreements, including whether Tiriti o Waitangi protections have been included in the draft text that was sent to the

[4] Affidavit of Elizabeth Jane Kelsey, 7 March 2025, especially at [44] – [77]. Wai 3325, #A38.
[5] Affidavit of Ema Maria Bargh, 21 October 2024. Wai 3325, #A15.
[6] Affidavit of India Logan Riley, 29 October 2024. Wai 3325, #A24.

US. This is consistent with Mr Morton's approach in his response to counsel's questions at [24], [30] and [34]. Mr Vitalis has also declined to provide any information to the co-convenors about the current negotiations with the United States.

The role of trade agreements in climate action

19. New Zealand's FTA with the European Union (EU) in Chapter 19 (Trade and Sustainable Development) has a "non-derogation" provision that requires parties not to weaken or reduce environmental protection in order to encourage trade or investment. Mr Vitalis claims in [23] that policy decisions taken on oil and gas exploration were matters of energy security, distinct from attracting trade or foreign investment. That ignores the inseparable inter-relationship of the two. Moreover, Minister for Resources Shane Jones made it clear that this Government's oil and gas policies are designed to attract foreign investment.[7]

20. Mr Vitalis also talks in [25] of a specific legal threshold before that provision is breached. But the unredacted version of advice from MFAT to Minister Jones said there was a likely breach of obligations not to lower standards to attract investment, about which Minister Jones said he was not concerned.[8]

21. Mr Vitalis in [33] and [38] claims a similarly high threshold for the commitments to effectively implement the UNFCCC including commitments with regard to Nationally Determined Contributions (NDCs), and to refrain from actions that materially defeat the object and purpose of the Paris Agreement and NDCs. He claims at [40] that the Government is still committed to its targets, without any evidence. He also seeks to distinguish the conduct of climate policy from specific outcomes of NDCs. But conduct is what affects outcomes - the two are inseparable – and New Zealand's conduct is what is in issue here.

[7] Affidavit of Elizabeth Jane Kelsey, 21 October 2024 at [98]. Wai 3325, #A14.
[8] Affidavit of Elizabeth Jane Kelsey, 21 October 2024 at [98]. Wai 3325, #A14.

22. Mr Vitalis' evidence at [25] notes, for example, that the EU would need decide the threshold for a breach of the non-derogation provision had been met and "choose to pursue the issue through the mechanisms of the agreement, which involves diplomatic, evidential, and legal considerations". To date it has not. That supports my scepticism that this chapter is a form of greenwashing.

23. It is important to note, however, that there is a second option to hold New Zealand to account that does not depend on the EU taking action. Members of the Domestic Advisory Group (DAG) established under the Article 24.6 of the Agreement, which comprises environmental, labour and business representatives, can lay a complaint with the European Commission that New Zealand has breached the above obligations in the Trade and Sustainable Development chapter.

24. One such group made a submission to the Climate Change Response (Tort Liability) Bill in July 2026 pointing to that possibility. While a complaint would be made at the EU end, the corresponding DAG in Aotearoa, which includes several Māori representatives including from Ngā Toki Whakarururanga, would have an opportunity for input and put New Zealand's recent environment and climate record to the test. That could provide an important test case for whether these agreements can have any teeth, especially as they could ultimately result in trade sanctions.[9] I would be happy to provide further information on this if the Tribunal wishes.

25. Mr Vitalis says, quite rightly, in [29] that trade rules should not be the sole or primary instrument for addressing climate change. But stronger trade rules could make a significant difference, such as those dealing with implicit subsidies, discussed by economist and former MFAT negotiator Rory McLeod.[10] Mr Vitalis does not address the reasons for not doing so.

---

[9] This is the link wherer the operational guidelines can be found: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/f00caa15-b3d3-4025-8823-c43ca069ffee/details

[10] Fourth Affidavit of Elizabeth Jane Kelsey, 12 November 2025, at [24] to [28]. Wai 3325, #A142.

The Treaty of Waitangi Exception

26. Mr Vitalis' position on the 2001 Treaty of Waitangi Exception is contradictory. In [45] he still makes the unconditional claim that the 2001 Exception "preserves the Government's ability to take measures to meet its Treaty obligations, including in areas like climate policy, without the risk of being successfully challenged by an investor".

27. Yet in [10] he refers to co-development of "evolved" Treaty of Waitangi exception language, which actually takes the form of a carveout for Tiriti measures. The new provision that was agreed between the Crown and Ngā Toki Whakarururanga, and endorsed by other Māori entities, provides a much higher level of active protection than the 2001 Exception and implicitly accepts that the 2001 Exception is flawed.

28. However, whether the stronger protection is adopted in an agreement still depends on the Crown's willingness to insist on it during a negotiation and the other party agreeing. The first time it was proposed was the FTA negotiations with India, and India rejected the new protection. The Agreement has the 2001 Exception. In the case of IPEF and other WTO agreements the Crown adopted problematic wording that was not shared with Ngā Toki Whakarururanga before it was agreed.[11] I am unclear what the unspecified WTO example is that Mr Vitalis refers to in [10].

29. Mr Vitalis continues to rely in [49] on the Tribunal's finding in the Wai 2522 urgency hearing that the 2001 Treaty of Waitangi exception "provides a reasonable degree of protection to Māori interests". That weakly-worded finding was made before the Wai 2522 Tribunal included an expert on trade and investment law, Professor Frankel. After she joined the panel for the Issue 3 CPTPP e-commerce hearing the Tribunal found that the Treaty Exception did not meet the requirements of active protection even when it was supplemented by other "safeguards".

[11] Affidavit of Elizabeth Jane Kelsey, 21 October 2024 at [79]. Wai 3325, #A14.

30. Mr Vitalis is clutching at straws in [58] to distinguish the Issue 3 finding from the urgency hearing. Both examined the problematic language of "more favourable treatment" and the chapeau relating to disguised trade restrictions. Further, if Mr Vitalis was correct in his claim in [52] that reference to "more favourable treatment" might apply to climate change measures because "treatment" in the 2001 Treaty Exception includes "relationships and responsibilities", the same rationale would logically have applied in the Issue 3 hearing for measures relating to data sovereignty.

31. The 2001 Treaty Exception is especially problematic for ISDS. The Stage 1 urgency Tribunal recognised that the exception only explicitly precludes *state-state* dispute bodies from re-examining the Crown's interpretation of te Tiriti of Waitangi and the nature of rights and obligations under it.[12] It does not refer to investor–state disputes, which leaves it open for an ISDS tribunal to assert the power to review the Crown's understandings of Te Tiriti and its obligations.

32. Finally, Mr Vitalis does not acknowledge the absence of even the 2001 Treaty of Waitangi exception from the Hong Kong and China bilateral investment treaties, which have strong investor rights and minimalist exceptions.

Application of other exceptions to the climate crisis

33. Mr Vitalis says in [47] that in terms of safeguards in trade agreements, the Crown does not rely on the Treaty of Waitangi exception alone.

34. The question in [62] relates to [138.4] in Mr Vitalis' brief that says: "Except for CPTPP, the agreements at issue include a general exception that allows the relevant parties to adopt and maintain non-discriminatory environmental measures necessary to protect human health, including measures to implement multilateral environment agreements such as the Paris Agreement". It footnotes the China and Hong Kong BITS, which are old-

[12] Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at pp 39-41.

generation agreements from last century in which the exceptions are extremely narrow.

35. The general safeguards referred to in [138] of Mr Vitalis' brief of evidence are very contingent. At [63] to [68] of his answers to written questions Mr Vitalis makes a number of broad claims about the health exception, the general exception, WTO jurisprudence and how a dispute panel would approach interpretation. These are not supported by references involving climate change.

36. Nor does Mr Vitalis's argument recognise fundamental differences between how a state-state and how an investor-state tribunal would approach a dispute. An ISDS tribunal is not a WTO panel. It does not operate under a system of precedent, let alone trade law precedent. Arbitrators are often criticised for being selective in their reference to previous disputes in support of investor claims. Rather than addressing these issues directly, Mr Vitalis euphemistically acknowledges at [54] "there is always a degree of interpretive uncertainty".

37. In [70] – [73] Mr Vitalis excuses the omission of the general exception from the investment chapter in the CPTPP by saying the chapter has its own set of safeguards. If so, why is there a carveout for tobacco-related policies, and why has New Zealand sought side-letters from other parties that promise not to apply ISDS as between them?

38. The claim in [76] and in [104] that ISDS disputes tend to challenge the way a measure is implemented, rather than the regulatory objective itself, is extremely vague and not illustrated by any evidence. I would be happy to provide the Tribunal with extensive examples where that is not correct, including in relation to fossil fuels and climate measures. The burgeoning number of ISDS cases involving climate change measures[13] shows how vulnerable government measures are to such disputes.

[13] Affidavit of Elizabeth Jane Kelsey, 7 March 2025, [80]. Wai 3325, #A38.

39. I infer that Mr Vangelis is arguing here that a government has a right to pursue a regulatory objective of climate mitigation, but the manner in which it does so must comply with investor protections and guarantees. If so, that severely constrains the options available to a government – almost equivalent to the circular provision in Article 10.13 of the Korea New Zealand FTA that allows governments to adopt environmental measures so long as they are consistent with the chapter.[14]

"No ISDS" policy and regulatory chill

40. Mr Vitalis fails to resolve the conundrum of the Crown's "no ISDS" policy. In [96] – [98] he observes the Crown's preference to exclude ISDS, and where that is not possible, to attempt to limit New Zealand's exposure including through side agreements. He attributes that to a judgement about "risk and public confidence", as well as not considering ISDS necessary. This inescapably contradicts Mr Vitalis' attempts to defend ISDS in all New Zealand's existing agreements.

41. I strongly reject what I consider to be tenuous legal arguments that seek to minimise the risks of ISDS and that are not supported by references, and I refer the Tribunal back to the extensive robust examination of ISDS in the Issue 3 report of the Wai 2522 Tribunal, including the significant risk of regulatory chill.[15]

42. Removing ISDS from existing agreements through reviews requires the consent of the other party/ies, which to date has been refused. The China and Hong Kong BITs are different as it is easier for New Zealand simply to withdraw.

43. Mr Vitalis effectively dismisses the risks of regulatory chill at [75] and [125]. While he is correct that governments do not make decisions based on ISDS alone, the evidence I cite from Mr Shaw, including his public commentaries,

[14] Fourth Affidavit of Elizabeth Jane Kelsey, 12 November 2025, at [46.2]. Wai 3325, #A142.
[15] Waitangi Tribunal *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522, 2023) at pp 160-178.

shows how the chilling effect can and has operateed in the climate context.[16] The delays in introducing plain packaging of tobacco products is another well-documented example.[17] Mr Vitalis is correct at [125] that the legislation was applied after Philip Morris lost the dispute, but the company still delayed its introduction for several years.

44. The Waitangi Tribunal in the Stage 3 Wai 2522 report extensively discussed the chilling effect.[18] It understood that the purpose of an ISDS claim is not simply to win, as Mr Vitalis suggests in [90]-[91], but also to impact on policy, regulatory, administrative and judicial decisions. This may be achieved through direct threats of a dispute that are intended to deter a measure or to delay its introduction, as occurred in the case of plain packaging of tobacco products. A chilling effect may also become internalised in policy advice, as occurred with the offshore oil and gas ban.[19]

45. There are other questions that were asked and that Mr Vitalis elected not to answer on the basis, in footnote 1, that these were addressed in cross-examination. My understanding of the reason for asking them in follow up questions was to address matters that would have been pursued during cross-examination but could not be due to pressures of time. Where there is an absence of clarification, it may be open to draw inferences from the verbal responses given.

Signed:

Jane Kelsey

Date: 1 September 2026

[16] Affidavit of Elizabeth Elizabeth Jane Kelsey, 21 October 2024, at [98]. Wai 3325, #A14.
[17] Brief of evidence of Elizabeth Jane Kelsey, 29 January 2026, at Appendix A (answers to Crown cross-examination).
[18] Affidavit of Elizabeth Jane Kelsey, 21 October 2024, at [174] – [178]. Wai 3325, #A14; Fourth Affidavit of Elizabeth Jane Kelsey, 12 November 2025 at [55] to [56]. Wai 3325, #A142.
[19] Fourth Affidavit of Elizabeth Jane Kelsey, 12 November 2025 at [57] to [63]. Wai 3325, #A142.