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 **Donna Kerridge, Pita Tipene, Moana Maniapoto, Dr George Laking, India Logan-Riley, Professor Maria Bargh,** and **Aroha Te Pareake Mead** for and on behalf of **Ngā Toki Whakarururanga (WAI 3395)**

CLOSING SUBMISSIONS ON BEHALF OF NGĀ TOKI WHAKARURURANGA

Dated at Rotorua, on this 2nd day of October 2026

RECEIVED
Waitangi Tribunal
2 Oct 26
Ministry of Justice
WELLINGTON

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TĒNĀ E TE TARAIPIUNARA

INTRODUCTION

1. These closing submissions are filed for and on behalf of Wai 3395, a claim by Donna Kerridge, Pita Tipene, Moana Maniapoto, Dr George Laking, India Logan-Riley, Professor Maria Bargh, and Aroha Te Pareake Mead for and on behalf of Ngā Toki Whakarururanga and is filed in accordance with the filing timetable for hearing week nine of the Climate Change Priority Inquiry.

2. The Tribunal's Statement of Issues advised that:

> "*submissions and evidence may address past Crown conduct to the extent this material provides historical context, seeks to establish alleged patterns of Crown conduct, or helps to establish what mitigation and adaptation measures are required to remedy any (proven) past Crown acts or omissions. The Tribunal's Statement of Issues does not supplant the claimants' statements of claim, which remain the primary expression of the claimants' allegations against the Crown.*"

3. Accordingly, these submissions address past and present Crown conduct in the international trade, investment and climate spheres, with reference to the causes of action pleaded in the Statement of Claim and the relevant issues and sub-issues identified in the Tribunal's Statement of Issues.

4. In particular, the submissions examine the Crown's exercise of its international treaty-making powers, the relationship between international trade and investment policy and climate change, and the implications of that conduct for Māori rangatiratanga and the Crown's obligations under Te Tiriti o Waitangi.

5. Historical Crown conduct is addressed not merely as background, but insofar as it demonstrates alleged patterns of conduct that continue to inform the Crown's contemporary approach to international trade, investment and climate policy, and assists in identifying the findings and recommendations required in this inquiry.

A. SCOPE OF THE SUBMISSION

A.1 Introduction

6. The Claimants approach this inquiry in the knowledge that "climate change is upon us".[1] Its catastrophic effects are already being borne disproportionately by Māori, and other Indigenous Peoples, who do not profit from the economic and political systems that have caused the crisis, bear no responsibility for it, and lack adequate resources to adapt to its impacts.[2]

7. The Waitangi Tribunal in *Te Tinihanga o Ngā Mātāpono* (Wai 3565) inquiry on Treaty Principles recognised the disproportionate threat that climate change poses to Māori:

> *"climate change is the single-most important environmental issue facing the nation and so of particular importance to all Māori. The Treaty/Tiriti interest most obviously engaged by the Climate Change Response Act is the mitigation of climate-change-related harm suffered by Māori.* ***The impacts of climate change are and will be disproportionately felt by Māori communities****, particularly those in rural or coastal areas. These communities are particularly impacted by rising sea-levels and increasingly severe storm-events which threaten to destroy marae, urupā, and papākainga, and which damage infrastructure crucial to keeping these communities connected. A 2026 report from the Bioeconomy Science Institute stated that* ***these impacts heighten not only economic uncertainty*** *as forestry and farming infrastructure is damaged****, but also physical and mental health decline, and risk leading to 'long-term cultural fragmentation' of hāpori Māor****i. Compounding these risks, the report found that* ***Māori are often marginalised in climate governance, with Treaty/Tiriti obligations 'poorly recognised' in the current policy environment****."*[3] (emphasis added)

8. For the Claimants this inquiry is about the very survival of a world in which they can live as Māori and fulfil their responsibilities to te Taiao, to the tupuna and to future generations. The Wai 2522 Tribunal said in its Stage 3 Report, when addressing the threat of an international trade treaty to Māori digital sovereignty and mātauranga Māori:

> "*Perhaps the* ***most fundamental*** *of te Tiriti/the Treaty guarantees* ***to Māori is of the right to cultural continuity.*** *… This is nothing less than the* ***right to continue to organise and live in Aotearoa New Zealand as Māori in accordance with tikanga Māori****."*[4] (emphasis added).

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[1] Wai 3325, #4.1.003, Transcript for hearing week one at 175 line 22.
[2] Wai 3325, #4.1.003, Transcript for hearing week one at 179 lines [25]-[30]
[3] Waitangi Tribunal (Wai 3565, 2026) *Te Tinihanga o Ngā Mātāpono* at 57-58.
[4] Waitangi Tribunal *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific*

9. As Professor Maria Bargh observed, that guarantee is under threat in the climate context because "we are out of balance with Papatūānuku and each other".[5] This imbalance is reflected in how climate change policies and practices have been pursued by the Crown at the domestic and international level. The climate crisis knows no territorial boundaries, when it is understood through both Māori cosmogony and mātauranga and Western science. Every nation has an obligation to play its role in seeking to avert this catastrophe in the inter-related domestic and international spheres.

10. Indigenous Peoples' solutions to the climate crisis are thwarted by being marginalised domestically and at an international level through State-based organisations and agreements that deny them an independent and equal voice in the decision making.[6] This undermines the mana whenua and mana motuhake of Hapū and Iwi Māori, including their ability to protect the whenua from further degradation and carbon extraction, and themselves against the impacts of climate change, in a manner consistent with tikanga Māori and is prejudicial to the wellbeing of te Taiao, te oranga o te iwi and future generations.

11. This closing submission primarily focuses on the nexus between international trade treaties and investment agreements, and their domestic impacts, as they relate to climate change. While free trade and investment agreements sit within a broader framework of international obligations that relate to climate change, they are unique in imposing binding obligations on the State under international law that are generally enforceable by other States, and at times by foreign investors. This makes them functionally inseparable from the domestic context in which they are developed and applied, despite the State's formally dualist approach to international law.

12. Professor Bargh emphasised this continuum of Crown action and inaction on the climate crisis.[7] Mandates for international negotiations are based on the Cabinet

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Partnership (Wai 2522, 2021) at 180–182.

[5] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 202*4; Wai 3325, #4.1.003, Transcript for hearing week one - Claimant Opening submissions (Wai 3325, #3.3.001) at 175.

[6] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024*; Wai 3325, #4.1.003, Transcript for hearing week one – Claimant Opening submissions (Wai 3325, #3.3.001) at 174.

[7] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024* at [8].

policy settings of the government in power. Yet these agreements create enduring, binding obligations that can be enforced on the State extra-territorially. That can lock in a particular government's policy prescriptions in the climate space in ways that are antithetical to Te Ao Māori, tikanga, Māori values and responsibilities, and mātauranga, as well as a violation of Rangatiratanga and exceeding the authority of Kāwanatanga.

13. That continuum has direct consequences for the Crown's Tiriti obligations. Free trade and investment treaties conceptualise, normalise and promote solutions to the climate crisis that are rooted in Western capitalism and colonial extractivism. They have the potential to pre-empt, prevent or chill the adoption of strategies, policies and laws that genuinely reflect a Māori and Indigenous worldview, and Te Tiriti, and which could provide tangible redress for Māori affected by the climate crisis. These impacts put the Crown in conflict with He Whakaputanga o Te Rangatiratanga o Nu Tireni and Te Tiriti o Waitangi.

14. While most international trade and investment rules are, on their face, agnostic in relation to climate change, they incentivise activities and practices that have anthropogenic climate impacts. Those that purport to address the climate crisis commonly advance false solutions that are designed to allow the continuation of practices that cause climate change. Disciplines that might have some genuine effect are weak, ignored, or eschewed altogether as in the case of New Zealand's failure to address agricultural emissions. Risks that guaranteed rights to foreign investors may be enforced through investor-initiated disputes pose a further potential obstacle to Tiriti-compliant climate action.

15. Looking forward, the Claimants emphasise that it is the actions and inaction of the Crown domestically and internationally, not Māori, that have brought Aotearoa New Zealand to this point of crisis.

16. To play its role in a tika transition, the Crown must take coherent action across the domestic and international spheres in a manner consistent with He Whakaputanga o te Rangatiratanga o Nu Tireni me te Tiriti o Waitangi and the principles of Te Tiriti o Waitangi that are derived primarily from those sources.

17. Rebalancing to achieve a just Tiriti-compliant transition in Aotearoa New Zealand must recognise tikanga Māori as a source of law, alongside Te Tiriti and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Achieving the goal of a tika transition will be threatened by the Crown continuing to replicate practices that have been significant contributors to the climate crisis. As Professor Bargh warned:

> *"**We cannot repeat previous mistakes in our transition**, otherwise it will entrench and deepen existing inequalities amongst peoples and between us and the natural environment. **Māori have solutions grounded in tikanga Māori and acknowledging te Tiriti o Waitangi**. We can see these solutions all around the country often where hapū and iwi have laboured to clear up their rivers, protect forests, whenua, wetlands, or coastal areas [and] to stop the Crown's environmentally reckless, uncaring and extractivism approach*".[8] (emphasis added)

18. As the planet faces this existential crisis, there is no time for the incrementalism or "strategic patience" touted by the Crown's leading trade negotiator,[9] let alone for prioritising the interests of colonial capitalism to avoid disrupting the status quo and commercial interests or raising the political costs of climate action for the Crown and international treaty partners.

19. Equally, inaction cannot be justified as necessary to protect Māori economic interests that have become captive of the colonial capitalist model because of historical dispossession and more recent Treaty settlements. The Crown must find alternative forms of redress to compensate Hapū and Iwi when climate mitigation actions compound their historic deprivation.

20. Recognising, as the Waitangi Tribunal did in its Orakei report, that the preamble to the Treaty of Waitangi Act 1975 says "*the Treaty is to be always speaking—it must be made relevant to our times*",[10] the Claimants seek recommendations in relation to the international trade, investment and climate space under section 6(3) that genuinely and effectively *"remove the prejudice or to prevent other persons from being similarly affected in the future."*

21. In anticipation that the Crown will argue that this has to be balanced with "the national interest" and within the limits of what a small state can achieve

[8] Wai 3325, #4.1.003, Transcript for hearing week one at 176 lines [5]-[19].
[9] Wai 3325, #4.1.010, Transcript for hearing week six, 16–20 March 2026 at 339 line [28].
[10] Waitangi Tribunal (Wai 9, 1987) *Report of the Waitangi Tribunal on the Orakei claim* at 40.

internationally, they also emphasise "*that in making recommendations, there is no requirement that the Tribunal make only practical recommendations*".[11] The Tribunal needs to draw a line in the sand that requires the Crown to deliver on its Tiriti obligations.

A.2 Statement of Claim

22. The Claimants say the Crown has breached its obligations under Te Tiriti o Waitangi, and the Tiriti principles of Rangatiratanga, Kāwanatanga, partnership, mutual recognition and respect, active protection and redress in the negotiation, adoption, continuation, implementation and renewal of international trade and investment agreements as they relate to or impact on the climate emergency. This has had negative consequences for the physical, spiritual, cultural and socioeconomic wellbeing of Māori.

23. The Claimants' submission focuses on three causes of action and is structured accordingly:

    a) **Denial of Rangatiratanga and Mana Māori.** In asserting an exclusive prerogative to represent Aotearoa New Zealand in the international domain, including in relation to treaty making, the Crown has failed to recognise and give effect to the principle of "Rangatiratanga", and has exceeded the principle of "Kāwanatanga". That breach applies to the *process* of mandating, negotiating and implementing international climate treaties and trade and investment agreements as they relate to the climate emergency, and to the *substance* of those agreements, as well as broader representation in the international sphere. By denying Māori a seat at the decision-making table, the Crown continues to disempower and prejudice the authority of Māori to help determine appropriate international and domestic responses and solutions to this crisis in a manner consistent with tikanga, kaitiakitanga and mātauranga.

    b) **Western Capitalism and Green Extractivism prevent Tika Transition**. Acting unilaterally on behalf of Aotearoa New Zealand, the Crown has

[11] Waitangi Tribunal (Wai 22, 1989) *Report of the Waitangi Tribunal on the Muriwhenua fishing claim* at 297.

adopted international trade and investment agreements that intensify, yet purport to provide climate "solutions" for, the climate emergency. These "solutions" promote and impose concepts, legal and economic instruments, technologies and techniques, and practices that reflect Western worldviews and capitalist interests that allow the continuation of harmful practices of colonial extractivism and legitimise "green extractivism" which are antithetical to tikanga, mātauranga Māori and kaitiakitanga, even where agreements purport to reflect and give effect to Māori and Indigenous Peoples' values and knowledge. Positive commitments to meet climate obligations are weak or ignored. These practices breach the Crown's obligations under the principles of "mutual recognition and respect" and "active protection" and exacerbates harm to tangata and te Taiao.

c) **Foreign Investors' Rights Threaten Te Tiriti and Climate Action**. The Crown has signed a number of international treaties that confer special rights and guarantees on foreign investors and their investments to protect their value or profit from laws, decisions or actions that adversely affect them. That elevates the rights of foreign investors above those of Māori, who have no equivalent guarantees, protections or enforcement mechanisms in relation to Te Tiriti o Waitangi or the UNDRIP. Most of these treaties allow the investor to enforce those rights directly against the New Zealand State in private offshore tribunals through investor-state dispute settlement (ISDS). That mechanism is used extensively by foreign investors internationally to challenge and deter (or "chill") climate change measures and there is a tangible risk of such disputes being brought or threatened in Aotearoa New Zealand. The exceptions in these agreements do not provide effective protection against such impacts. The prejudice arising from this breach of "active protection" is that the Crown may refuse to adopt Tiriti-compliant responses to the climate crisis, or to terminate or reduce climate-damaging activities by foreign investors, for fear of an ISDS dispute being brought over such actions or of losing such a dispute.

A.3 Tribunal's Statement of Issues

24. The Statement of Issues (SoIs) says Parties should be primarily guided by four parent issues, three of which are most relevant for the Claimants:

> *2. What relevant Tiriti/Treaty principles should the Crown consider when addressing the impacts of climate change on Māori?*
>
> *3. Has the Crown's conduct (including actions and omissions) in response to climate change been consistent with Tiriti/Treaty principles?*
>
> *4. What recommendations should the Tribunal make in terms of how the Crown should conduct itself consistently with Tiriti/Treaty principles when forming future climate change policies?*

25. This submission engages with the following sub-issues:

> ***2.1 What Tiriti/Treaty principles should the Crown apply when:***
>
> *2.1.5 Complying with international climate instruments and developing domestic legislation and policies in light of relevant international jurisprudence?*
>
> *2.1.7 Working with Māori in relation to international instruments (including trade agreements in terms of whether they are Tiriti/Treaty compliant with respect to the climate change consequences of those agreements)?*
>
> ***2.2 What are the Crown's duties and obligations to Māori arising from those Tiriti/Treaty principles in terms of:***
>
> *2.2.2 Protecting Māori society, communities, land, resources, indigenous biodiversity, and taonga species from the impacts of climate change, including impacts from beyond the borders of Aotearoa?*
>
> *2.2.4 Compliance with the United Nations Declaration on the Rights of Indigenous Peoples and other international instruments, insofar as these instruments relate to the impacts of climate change on Māori?*
>
> ***3. Has the Crown met its Tiriti/Treaty obligations to Māori in its conduct concerning climate change mitigation and adaptation?***
>
> *3.2 What steps has the Crown taken to inform itself of the physical, spiritual, cultural, social, health and other impacts of climate change on Māori*

when formulating climate change legislation and policies [taken to include trade policy]?

3.5 How has the Crown engaged with Māori on climate change policies, in light of its Tiriti/Treaty obligations?

3.7 Does climate change legislation and policy [taken to include trade policy] allow Māori to exercise rangatiratanga and develop their own climate change response in accordance with te mātāpono o te whai hua Kotahi me te matatika mana whakahaere (the principle of mutual benefit and the right to development), or other Tiriti/Treaty principles?

3.8 Has the Crown enabled Māori to exercise rangatiratanga in addressing the impacts of climate change on Māori communities?

4. What recommendations should the Tribunal make in terms of how the Crown should conduct itself consistently with Tiriti/Treaty principles when forming future climate change legislation and policies?

4.1 How should the Crown meaningfully engage and consult with Māori as Tiriti/Treaty partners in the development and implementation of climate change related legislation and policies [taken to include trade policy]?

4.1 How should the Crown engage and consult with Māori to enable and assist Māori to develop and implement climate change response, prevention, adaptation, and mitigation strategies in Māori communities?

A.4 Relevant Tiriti o Waitangi principles

26. This submission adopts and builds on the statement of relevant Tiriti o Waitangi principles in the Claimants' Generic Submissions,[12] which are summarised here.

(i) Te mātāpono o te Tino Rangatiratanga me Mana Motuhake

27. Rangatira would, and could, never have "ceded" their mana to the Crown, including the right to treat with other polities.[13] Rangatira expected that, in accordance with He Whakaputanga o te Rangatiratanga o Nu Tireni me Te Tiriti o Waitangi, their mana and authority would continue to be recognised and respected by the Crown, and they would continue to exercise their rights and responsibilities to their Hapū

[12] Wai 3325,#3.3.32, Generic closing submission concerning international free trade implications dated 22 September 2026.
[13] Wai 3325, #A14(a) Exhibit "A" to *the affidavit of Elizabeth Jane Kelsey dated 21 October 2024* - Wai 2522, excerpt of Document B9(a), Brief of Evidence of Moana Jackson as appended to his Second Brief of Evidence dated 17 October 2019.

in accordance with tikanga. This authority would apply seamlessly across their domestic and inter-national domains – domains that are also inseparable in the climate crisis. At most, the Rangatira could delegate to the Crown the exercise of aspects of that authority, but always within the parameters, and guaranteeing the protection, of their Tino Rangatiratanga.

(ii) Te mātāpono o te Kāwanatanga/ the principle of Kāwanatanga

28. Rangatira exercised their Tino Rangatiratanga in Te Tiriti o Waitangi by delegating authority to the Crown over, and responsibility for, its own people in Aotearoa.[14] They expected parity to apply in those respective spheres, consistent with the maintenance and protection of Mana Motuhake and Tino Rangatiratanga. As new matters arose, questions of relative authority would be negotiated through discussion and agreement between the parties.

(iii) Te mātāpono o te whakaaronui tētahi ki tētahi; the principle of mutual recognition and respect

29. In the delivery of their Tiriti o Waitangi responsibilities, the Crown and Rangatira must each recognise and respect the values, laws, and institutions of the other. Mutual respect complements the principles of Rangatiratanga and Partnership, through recognition of the mana and responsibilities attached to the guaranteed exercise of Rangatiratanga. This includes co-governance in the international domain.

(iv) Te mātāpono o te houruatanga/the principle of partnership:

30. Partnership necessarily reflects and respects the inter-relationship of Rangatiratanga and Kāwanatanga co-operating as equals within Aotearoa New Zealand and internationally.

(v) Te mātāpono o te mataporore moroki/ the principle of active protection

31. The Waitangi Tribunal said in *Te Paparahi o te Raki* (Wai 1040):

> *"We consider that active protection is not a Crown duty arising from its sovereign authority. Rather, it* ***requires the Crown to help restore balance to a relationship*** *with [Māori]* ***that had become unbalanced*** *as the Crown assumed an authority* ***far beyond the bounds understood ... when they signed te Tiriti****."*[15] *(emphasis added)*

[14] Wai 3325, #A155(b) Response to Questions in Writing for Graeme Morton dated 2 July 2026 at [19]–[42].
[15] Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry, Part I* (Wai 1040, 2023) vol 1 at 86.

32. The Tribunal further observed that the "*Crown cannot paternalistically protect what it has no authority over*".[16] An effective strategy to halt global warming and a tika framework for transition in Aotearoa New Zealand must therefore uphold and support tikanga and te Tiriti o Waitangi, including with respect to te Taiao, and minerals and mining.

(vi) Te mātāpono o te whakatika/the principle of redress

33. Māori have the right to redress from their Tiriti partner for breaches of Te Tiriti o Waitangi that have caused, or will cause, harm in the past, present and future, including physical and spiritual harm, and from the denial of Mana Motuhake and Tino Rangatiratanga, mātauranga, and kaitiakitanga, and application of tikanga. That includes harm caused by ongoing colonisation, extractivism and climate change. Redress is not compensation; it requires positive action to stop the breach and protect against its future recurrence. Section 6(3) of the Treaty of Waitangi Act 1975 says:

> "*If the Tribunal finds that any claim submitted to it under this section is well founded, it may if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future."*

34. Any practical application of the principle of redress must look at how to provide Tiriti-consistent redress for the climate emergency in practice – not whether genuine solutions are assessed to be "practical" in the current political and economic climate. This is clear from the long title to the Treaty of Waitangi Act, which refers to "*recommendations on claims relating to the* ***practical application of the Treaty***", where "practical application" refers to the nexus between the claims and the Treaty, not to the recommendations.

35. This was confirmed by the Tribunal in the Orakei report which, having reviewed the Act, concluded that "*Recommendations may be made in our opinion, for full and just compensation* ***untempered by the convenience of the result***."[17] The Muriwhenua Fishing Report reiterated the interpretation, following the Orakei

[16] Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, Part I (Wai 1040, 2023) vol 1 at 81.
[17] Waitangi Tribunal (Wai 9, 1987) *Report of the Waitangi Tribunal on the Orakei claim* at 261-262.

and Waiheke[18] reports, "*that in making recommendations,* ***there is no requirement that the Tribunal make only practical recommendations***".[19]

36. In determining its recommendations, this Tribunal therefore does not need to, and should not, limit itself to recommendations that the Crown considers to be "practical" in the current domestic and international regime, otherwise a tika transition will never happen.

A.5 The United Nations Declaration on the Rights of Indigenous Peoples

37. In addition, the United Nations Declaration on the Rights of Indigenous Peoples, to which Aotearoa New Zealand is a signatory, should guide the development of international trade, investment and climate agreements in a manner consistent with te Tiriti o Waitangi. The following articles are of particular relevance:

    a) **Article 3,** the right of self-determination;

    b) **Article 26,** which recognises the right of Indigenous Peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; and the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States have an obligation to give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous Peoples concerned.

    c) **Article 28** affirms that Indigenous Peoples have the right to redress, by means that can include restitution or, when this is not possible, a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

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[18] Waitangi Tribunal (Wai 10, 1987) *Report of the Waitangi Tribunal on the Waiheke Island claim* at 40.
[19] Waitangi Tribunal (Wai 22, 1989) *Report of the Waitangi Tribunal on the Muriwhenua fishing claim* at 297.

d) **Article 29** affirms the right of Indigenous Peoples to the conservation and protection of the environment and the productive capacity of their lands or territories and resources, and obliges the State parties to implement programmes for Indigenous Peoples to achieve such conservation and protection.

e) **Article 32** states that Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources, and State parties cannot approve projects affecting their lands or territories or other resources without cooperating in good faith to obtain their free and informed consent. Article 32 requires State parties to "*provide effective mechanisms for just and fair redress for any such activities, and appropriate measures ... to mitigate adverse environmental, economic, social, cultural or spiritual impact*".

38. The **principle of "Indigenous consent**", which emerges from the reaffirmations of Free Prior and Informed Consent and the right of self-determination in UNDRIP, provides an avenue for solutions to climate change.

B. TINO RANGATIRATANGA, KĀWANATANGA AND CLIMATE CHANGE

B.1 Tino Rangatiratanga and the Power to Treat

39. The Crown tried unsuccessfully to exclude consideration of the core Tiriti o Waitangi principles of Rangatiratanga and Kāwanatanga in the international space from this inquiry.[20] The fact that Ngā Toki Whakarururanga has raised the broad question of constitutional authority in the international domain in the Wai 3300 Tribunal Inquiry cannot give the Crown a free pass in this inquiry. As the Crown itself identified, the Presiding Officer in the Wai 3300 inquiry explicitly left the question of Rangatiratanga in relation to climate change to this Tribunal.

> *The Presiding Officer qualified the theme, noting that issues relating to climate change would not be considered in the Wai 3300 inquiry as they are being inquired*

[20] Wai 3325, #3.2.46 *Memorandum of Counsel in response to Crown's memorandum* dated 26 March 2025.

into in the Climate Change Priority Inquiry.[21]

40. In addressing the principle of Rangatiratanga in the international treaty-making space, the Claimants draw on Dr Moana Jackson's evidence in a series of Waitangi Tribunal inquiries, set out in Professor Jane Kelsey's first affidavit.[22] Dr Jackson identifies a number of different, but inseparable, constituent parts of power, mana or tino Rangatiratanga. These include:

> "***The power to treat*** *- that is the power to negotiate and commit to formal collective agreements with other polities. … This expansive reach necessarily presupposed that mana was an absolute political and constitutional power. … It was of course always bound by tikanga but it was a totalising authority that could not be tampered with by that of another polity. …* ***Mana was in fact absolutely inalienable*** *… to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible. …* ***[T]he right to treat was also fundamentally inalienable and would never, could never, be ceded or delegated to another polity to exercise on one's behalf.*** *"(emphasis added)*

41. The Letter of Transmission to the first Waitangi Tribunal report in *Te Paparahi o te Raki* (Wai 1040) confirms Dr Jackson's understanding that there was, and could be, no blanket authorisation for the Crown to represent Aotearoa New Zealand in international affairs. Where the Crown did operate in that domain it was only where that was agreed to be necessary *and* the intention of doing so was to protect Māori independence, not to relinquish their sovereignty.

> "*The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs,* ***where that was necessary****. If so, however, the intention of signatory rangatira was that* ***Britain would protect their independence, not that they would relinquish their sovereignty****."*[23] *(emphasis added)*

42. The role of Kāwanatanga in international treaty making is thereby constrained by the constitutional power and authority intrinsic to mana and the exercise of Rangatiratanga. The principle of Kāwanatanga must be understood accordingly.

B.2 The Deceit of Crown Prerogative

43. When the Ministry of Foreign Affairs and Trade (MFAT)'s Deputy Secretary of Legal Affairs Victoria Hallum cited the Waitangi Tribunal's interpretation of

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[21] Wai 3325, #3.2.041 *Crown Memorandum of Counsel dated 26 March 2025* at [12].
[22] Wai 3325, #A14 *Affidavit of Elizabeth Jane Kelsey dated 21 October 2024* at [25].
[23] Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) vol 1 at xxii; *Waitangi Tribunal Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, Part I (Wai 1040, 2023) vol 1 at xxxiv and 529.

Kāwanatanga in the international sphere she omitted the qualification "where necessary" and the overriding condition that the intervention was intended to protect Rangatiratanga and retain Māori sovereignty. Instead, she claimed a blanket exclusive authority for the Crown in the international domain, including in international trade and investment agreements and climate negotiations.[24] While Ms Hallum later acknowledged that omission,[25] her correction made no difference to her evidence. Indeed, she repeated that "*historically, treaty making is part of the Executive's foreign affairs prerogative, which I understand to be a core part of the Crown's kāwanatanga under Te Tiriti o Waitangi as acknowledged in the Wai 262 and the Wai 1040 report*".[26]

44. That misrepresentation enabled her to deny Māori the Tiriti-affirmed rights to self-determination, including a seat at the decision-making table when determining Aotearoa New Zealand's appropriate international responses and solutions to the climate crisis.

45. The prerogative power Ms Hallum asserted for the Crown is practiced as the unfettered authority of Ministers of the Crown exercised in Cabinet. In support of the approach in the climate change COP, she referred to the practices of Australia and Canada who have Indigenous Peoples [27] - a bootstraps argument, given they are former British colonies whose governments' claims to sovereignty are based on a similar colonial deceit derived from the racist ideology of the Doctrine of Discovery.

46. Counsel Ms Sykes also put to Ms Hallum the Wai 262 Tribunal's statement that:

> "*There are times when the Crown's core position [on an issue] that is of core importance to Māori* ***must be developed by consensus and preferably by a negotiated agreement with Māori****. … There may even be times when the Māori interest is so overwhelming and other interests by comparison so narrow or limited that the* ***Crown should contemplate delegation of the decision-making powers or delegation of its role as New Zealand's one voice in international affairs***".

47. Ms Hallum "acknowledged" the Tribunal said that. But she limited any such role to

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[24] Wai 3325, #A137 *Brief of Evidence of Victoria Hallum* dated 29 September 2025 at [17]-[18].
[25] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 398 lines [5] – [22], 417 line [20] – 418 line [27].
[26] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 399 line [30] – 400 line [3].
[27] Wai 3325, #A137 *Brief of Evidence of Victoria Hallum* dated 29 September 2025 at [85]-[89].

"the most exceptional cases" in a "sliding scale" under the 2001 Engagement Strategy with Māori on International Treaties, which gives the Crown total control of every decision.[28] She declined to treat a decision on whether to invoke the 2001 Treaty of Waitangi Exception in an ISDS dispute as something that, at the least, would require consensus.[29] The existential climate crisis and its disproportionate impact on Māori surely meets that threshold?

48. Ms Hallum said she was not aware of any case where the Crown did consider delegation of the treaty-making role to Māori. That would require some "novel practical and constitutional design questions", including how it would operate within the Executive's foreign affairs powers and how it would be perceived by international partners.[30] She seemed unaware, for example, that the National Māori Congress had been a formal part of Aotearoa New Zealand's delegation to the United Nations Conference on Environment and Development (known as the Rio Summit) in Brazil in 1992 and was led by Te Arikinui, Dame Atairangikaahu, who addressed the summit. [31]

49. Aside from these responses, Ms Hallum does not attempt to justify her assertion of Crown prerogative. When asked by Ms Sykes to explain its source, she said she could only provide information about the current practice and understandings that the Crown operates under today and her understanding that the Crown prerogative "*is derived from a range of documents that form New Zealand's unwritten constitution*". [32]

50. While Ms Hallum claimed that MFAT is "*committed to acting as a te Tiriti partner with authenticity and integrity*",[33] all the power in this partnership resides with the Crown. When Professor Williams pressed her on the nature of the Tiriti partnership, Ms Hallum said she would need to seek more information to provide a fully

[28] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 418 line [28] – 419 line [35].
[29] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [112].
[30] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 422 lines [3]-[9].
[31] Rāhui Papa and Paul Meredith "Te Atairangikaahu Korokī Te Rata Mahuta Tāwhiao Pōtatau Te Wherowhero" Dictionary of New Zealand Biography (2020) Te Ara – The Encyclopedia of New Zealand.
[32] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 414 line [13] – 417 line [10].
[33] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 404 line [32] – 405 line [2].

considered answer. [34] Her answer to a question in writing about the power relationship between Rangatiratanga and Kāwanatanga as a Tiriti partnership deflected the constitutional question, preferring to set out "in practical terms" MFAT's current practices.[35]

B.3 Speaking for Aotearoa New Zealand with "One Voice"

51. Ms Hallum emphasised the need for the State of New Zealand to speak with one voice internationally, which she insisted is exclusively that of the Crown and grounded in a mandate authorised by Ministers of the Crown.[36] Consequently, "*if you join an official delegation as a non-government participant, you are required in effect to accept that you are part of that one voice*".[37] If individuals are approved by the Head of Delegation to speak on behalf of the official delegation those "*individuals need to present agreed New Zealand positions in accordance with the mandate approved by Ministers*".[38] Māori can only speak if authorised by the Crown to do so, and only within the ministerial mandate.

52. The evidence also invites a derogatory inference that Māori do not have the "*high level of technical subject matter expertise and an understanding of the Government's ability to implement potential negotiation outcomes*" required in such negotiations.[39] Not only is there significant Māori expertise sourced in both mātauranga and Western knowledge, but the Crown has shown repeatedly that it does not have the necessary expertise on Te Tiriti and matters affecting Te Ao Māori.

53. Ms Hallum's account of how the Crown operates is directly reflected in the negative Māori experiences of the international climate space, especially the various COP meetings, as set out in India Logan-Riley's evidence.[40] Presence, access,

[34] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 441 line [22] – 442 line [12].
[35] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [39]-[42].
[36] Wai 3325, #A137 *Brief of Evidence of Victoria Hallum* dated 29 September 2025 at [16], Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 413 lines [9]-[14].
[37] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 426 lines [31]-[33], Wai 3325, #A137 *Brief of Evidence of Victoria Hallum* dated 29 September 2025 at 83.
[38] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 413 lines [17] – [22].
[39] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 413 lines [15-16].
[40] Wai 3325, #A024, *Affidavit of India Logan-Riley dated 29 October 2024* at [19]-[53]

information and voice are all controlled by the Crown. There is no consistent commitment from the Crown to provide resources for Māori to have an effective voice in those fora to advance Indigenous perspectives and solutions and ensure that Tiriti responsibilities and rights are protected.

54. States define what climate solutions to pursue, including standards and rights protections, and how they should pursue them, expectations around climate finance, loss and damage, and inter-governmental cooperation. Indigenous Peoples' aspirations and views are often not clearly represented by State representatives, particularly when those aspirations conflict with the State's priorities. For the Crown to rely on advice from within itself on such matters is both unreliable and a direct conflict with its Tiriti obligations.

55. As a result, Indigenous Peoples and Indigenous knowledge and solutions are marginalised in climate negotiations, even though the agreements that result from them can have far-reaching impacts for Indigenous Peoples.

56. There is even less compliance with the principles of Rangatiratanga, or even Partnership in the international trade space, which operates as a closed zone. The mandate is pre-set by the Cabinet and the officials pursue the negotiations under a veil of secrecy. Even Māori entities that are subject to confidentiality agreements will only be told what the Crown is prepared to disclose and are not allowed into the negotiations.

57. By seeking to rationalise and normalise practices that are silencing Māori, the Crown closes the space to do things differently, including through tika transitions, that involve regulatory and legal frameworks that resource and empower marae, Hapū and Iwi to support their rohe. As Professor Bargh points out, these practices even close off spaces that are meant to be available within the colonised State:

> *"Trade agreements are negotiated by marginalising indigenous voices or excluding them altogether, in the context of a state-based world. Colonisation has meant that indigenous peoples have been, to begin with, forcibly marginalised in that state-based world. But indigenous peoples also have rights even in state-based systems and these aren't being upheld".*[41]

[41] Wai 3325, #4.1.003, Transcript for hearing week one at 178 lines [22]-[27].

58. The Wai 2522 Stage 3 Tribunal remarked that the Crown's insistence that it be "at the table" in these agreements does not remove the risk to the Crown's ability to perform its Tiriti / Treaty obligations and "*highlights that before entering into such agreements the necessary domestic measures should first be developed with Māori involvement*."[42]

59. The importance the Crown accords to the notion of a "single voice" to justify its Crown's unitary authority therefore conflates two issues. The Claimants have no problem with the requirement that Aotearoa New Zealand speaks with one voice internationally. The problem is the assumption that the one voice can only be the Crown's, unless the Crown steps aside.[43]

60. International law does not prevent a State from determining its own constitutional configuration. The problem of the "one voice" no longer arises if Māori are recognised as co-equals in the State of Aotearoa New Zealand, including in the international sphere. Full and effective participation would mean Māori being able to help conceptualise what the problem is and what the solutions are, being part of setting the agenda and being at the decision-making table. Then the unitary State's position can reflect te Tiriti and actively protect te Taiao and mātauranga Māori in accordance with tikanga and kaitiakitanga.

61. That requires coherence across the domestic and international spheres. As the Wai 2522 Stage 3 Tribunal said:

> *However hard it may be,* ***the question of the appropriate level of protection*** *for mātauranga Māori in international trade agreements, … ,* ***is first and foremost a matter for dialogue between te Tiriti/the Treaty partners****."*[44]

62. The ability to reach that common position should be entirely possible on a matter such as the climate crisis, reflecting the common interests of all of Aotearoa New Zealand. The only thing preventing a Tiriti-consistent "one voice" is the will of the Crown to do so.

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[42] Waitangi Tribunal (Wai 2522, 2023) *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* at 149.
[43] Wai 3325, #A137 *Brief of Evidence of Victoria Hallum* dated 29 September 2025 at [16].
[44] Waitangi Tribunal (Wai 2522, 2023) *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* at 174.

B.4 Silencing Māori Voices and Solutions in Aotearoa

Internal MFAT processes

63. Ms Hallum confirmed that the Crown's domestic international treaty making process remains largely unchanged since 1998. Outlining various steps in that process she claims "*there are a number of opportunities for engagement with interested parties, stakeholders, and Māori*", naming consultation with "interested parties, stakeholders, and Māori" during the initial negotiation period, parliamentary treaty examination and on any implementing legislation.[45] She acknowledges that these "opportunities" are circumscribed by the unfettered power of the Executive. [46]

64. Her list of opportunities excludes the crucial decisions of the Cabinet mandate, all the key stages of negotiation, Cabinet approval of final text, signature, and the Crown's preparation of the treaty's National Interest Analysis.[47] These are secretive processes over which the general public, let alone the Tiriti partner, have no rights of access or influence. Whatever access is granted depends on the Crown. Even Ngā Toki Whakarururanga's right of access and influence under the Mediation Agreement is subject to numerous caveats, and can simply be denied - as the case study on Critical Minerals Framework negotiations with the United States (US) shows.[48] The PowerPoint Professor Kelsey provided to the Tribunal on request shows how this process operates in practice.[49]

65. Ms Hallum refers to the Ministry's Māori Engagement Strategy from 2017. That is not something familiar to the Claimants. Likewise, her reference to a "*refreshed strategy with a focus on strengthening consistent, ministry-wide engagement and reducing reliance on individual capability*" [50] is news to them.

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[45] Wai 3325, #A137 *Brief of Evidence of Victoria Hallum* dated 29 September 2025 at [23], Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 400 lines [28]-[30].
[46] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [44]-[48].
[47] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 401 line [1] – 403 line [2].
[48] See below at [141]–[155].
[49] Wai 3325, #A38(e), PowerPoint Presentation of Emeritus Professor Jane Kelsey, *Te Tiriti & Treaty Making*, slide 14; see also Wai 3325, #3.2.73, Memorandum of Counsel Filing Professor Kelsey's PowerPoint Presentation on Treaty Making to Ngā Kaihautū, dated 23 April 2025.
[50] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [25].

66. Ms Hallum may have been referring to the creation of Houtina and Hurumanu after the "Rata/Hislop report"[51] (Mātauranga Māori Review) in August 2021 that documented serious flaws in MFAT's understanding of, and commitment to, Te Tiriti. Yet, Ngā Toki Whakarururanga were not aware of the creation of Hurumanu to develop a ministry-wide engagement process and it has never had any interaction with them. There has been only sporadic engagement with Houtina, despite numerous requests. The case study on critical minerals, below, shows endemic problems of silos within MFAT, as well as with other Crown agencies dealing with the same matter at the domestic and international levels.

2001 Strategy for Engagement with Māori on International Treaties

67. The deceits of Crown sovereignty, and a Crown prerogative vested in the Executive, are operationalised through the 2001 Crown Strategy for Māori Engagement on International Treaties and its incorporation into 2021 Guidelines. Mr Vitalis described these as the basis for engagement with Māori in international climate and trade and investment spaces.[52] Ms Hallum referred to it repeatedly as the basis on which MFAT operates. This Strategy gives the Crown absolute control to decide whether a matter is of interest to Māori, to what degree, hence what if any engagement is required, after which the Crown retains absolute decision making authority.

68. Ms Hallum accepted that the 2001 strategy for engagement with Māori on international treaties had been criticised by several Waitangi Tribunals and the Trade for All Advisory Group Report. [53] Despite that, it remains unchanged. Ms Hallum said there was not sufficient time to review it within the MFAT treaty making review,[54] and sought to deflect criticism that MFAT's undisclosed review of international treaty-making did not re-examine this much-criticised strategy, saying it was more appropriately part of Te Puni Kōkiri's Te Pae Tawhiti review.[55] Yet, Ngā Toki Whakarururanga's research paper shows this pou of Te Pae Tawhiti was subsumed by MFAT's review of international treaty making, and that MFAT

[51] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [3].
[52] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [19.1].
[53] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [82]-[83].
[54] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [88].
[55] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [87] – [90].

repeatedly blocked attempts by Te Puni Kōkiri to secure a review of the 2001 strategy in the MFAT review.[56] Te Pae Tawhiti was later terminated by the current government. As a result, there has been no significant change in formal policy on engagement with Māori on international treaties since 2001.

Review of international treaty making 2021-2023

69. Mr Vitalis acknowledged the creation of the Trade for All Advisory Board was a response to the lack of social license for such agreements exposed by the TPPA. There was a two year lag in responding to the Board's recommendations by establishing a review of international treaty making between 2021 and 2023.[57] It was conducted purely internally within the Crown and was limited in scope by the Minister and advice from officials.[58]

70. The review consciously and explicitly turned its back on considering constitutional questions, especially of the Crown's exclusive prerogative, as part of a "first-principles review" in favour of "pragmatic" and "incremental improvements to the existing process". Officials advised a first principles review "*would require significant constitutional change, which could be challenging to navigate*" and acknowledged that "*the changes proposed in this paper will not fully meet the expectations of some Tiriti partners who advocate for systemic constitutional change*." Further, there was *"no indication that the Government is interested [in] significant constitutional reform"*. [59] The review itself was kept secret from Ngā Toki Whakarururanga even though it was within the scope of the Mediation Agreement. Māori, and others outside government, were not to be engaged with until Cabinet had determined the proposed changes.[60] However, the final draft paper was never presented to Cabinet.

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[56] Exhibit "R" Ngā Toki Whakarururanga, Mana and Constitutional Transformation of Treaty Making, pp.54-56 in Wai 3325, #A142(a), Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025.
[57] Ngā Toki Whakarururanga, *The Crown's secret review of the international treaty making process 2021-2023,* Wai 3325, #A114 *Brief of evidence of Elizabeth Jane Kelsey* dated 10 June 2025.
[58] Wai 3325, #4.1.010, Transcript for hearing week six, at 408 lines [1] – [14].
[59] Briefing Paper "The Crown's secret review of the international treaty-making process 2021 – 2023", Wai 3325, #A142(a) Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025. [102] – [111] at Exhibit "R" *Ngā Toki Whakarururanga, Mana and Constitutional Transformation of Treaty Making in*; Wai 3325, #A147(d), *Reply evidence of Elizabeth Jane Kelsey dated 24 July 2026* at 45-47.
[60] Wai 3325, #4.1.10 Transcript of Hearing Week Six held on 16 March 2026 – 20 March 2026 at 408 lines [21]-[25].

71. In parallel, MFAT advised the Foreign Affairs, Defence and Trade Committee in Parliament that the peremptory international treaty examination process that takes place after international negotiations, which is largely unchanged from 1998, "remained fundamentally sound" based on New Zealand's constitutional arrangements and long-standing practice, and "is not inconsistent with the principles of the Treaty of Waitangi".[61] The committee therefore agreed it was unnecessary to conduct a review recommended by the Standing Orders Committee. The Ministry was asked for advice for the Standing Orders Review of the 2023-2026 Parliament, whose report notes that the Minister told the Committee the current process is "fundamentally sound and fit for purpose".[62]

Crown's Unbridled Power

72. Ms Hallum frankly conceded that:

> *"Changes to the treaty process and how the Executive's prerogative and constitutional power to enter into treaties would amount to significant constitutional change and require deliberate decisions to do so, under a Westminster system of government like New Zealand's Parliament could make these changes at any time but has chosen not to do so. I observe that neither of the two members bills in the last 20 years seeking a significantly increased role for Parliament in the treaty making process proceeded past the second reading."*[63]

73. It suited the Crown in this Inquiry to say they can only talk about what is today, just as it suited the Crown to selectively cite from Tribunal reports, suited the Crown to exclude "constitutional questions" from its secret review of the treaty-making process, and suited the Crown to advise the parliamentary committee dealing with international treaties that the current process does not need reform.

74. This unwavering defence of Crown sovereignty and determination to protect the exclusive Crown prerogative in the international and domestic domains, including on free trade, investment and climate empowers a government, such as the current Coalition, that is overtly hostile to Te Tiriti o Waitangi and retreating from commitments to climate action, to do so with impunity.

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[61] Wai 3325, #A142, Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence, 12 November 2025 at [117]–[121]; Wai 3325, #4.1.10, *Transcript of Hearing Week Six held on 16–20 March 2026* at 409, lines 1–14; Wai 3325, #A137(c), *Response in writing of Victoria Hallum*, 26 May 2026 at [106].
[62] Standing Orders Committee *Review of Standing Orders 2026* (September 2026) at 64.
[63] Wai 3325, #A137(c) *Response in writing of Victoria Hallum* dated 26 May 2026 at [48].

75. The Claimants do want to acknowledge that MFAT, specifically its Trade and Economic Group led by Mr Vitalis, have upped their game since the Wai 2522 Inquiry and there is no question of Mr Vitalis' personal commitment. But these changes remain limited, totally controlled by the Crown, and contingent on their other priorities, as reflected in Mr Vitalis' comment they "*ensured that Māori interests are considered to the extent possible within the constraints of international trade negotiations*".[64]

76. Examples of positive developments with Ngā Toki Whakarururanga, such as funding, confidentiality agreements, consultation on various negotiations, and unenforceable Māori trade and economic chapters, [65] all remain Crown controlled and are at times contentious and problematic. None have advanced Tiriti-compliant climate action. They are also subject to the whim of the political parties in government. Likewise, trade outcomes cited as positive for Māori[66] are either commercial, soft language "recognition" and "acknowledgement" or on digital issues. The example of Ngā Toki Whakarururanga's input to the Inclusive Trade Action Group review did include climate matters to be addressed in the CPTPP review,[67] but those changes are not happening, and they have been told there is no money for those kinds of activities again.

77. In sum, the parallels and continuities between the Crown's approaches domestically, and in the international space for both trade and investment agreements and climate change agreements:

    a) presume that all natural resources belong to the State;

    b) assume the sole right to determine domestic and international law, without substantive and Tiriti-compliant Māori participation;

    c) presume to be able to solely set the agenda and do so to advance capitalist strategies and interests;

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[64] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [20].
[65]Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [23]-[26].
[66] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [34]-[36].
[67] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [37], Wai 3325, #A14 *Affidavit of Elizabeth Jane Kelsey dated 21 October 2024* at [31]-[39].

d) fail to recognise or require genuine free, prior and informed consent;

e) make ineffectual, if any, references to Māori; and

f) fail to honour Rangatiratanga in related decision-making.[68]

78. Put bluntly, there is no Rangatiratanga or even an undefined "partnership". There is only unbridled, colonial imposition of power.

C. CONFLICTING WORLDVIEWS IN THE TRADE-CLIMATE NEXUS

C.1 Silencing the Māori Worldview

79. Free trade and investment agreements are creatures of Western capitalism, which is primarily concerned with protection of property and generating wealth and profit from exploitation of resources and people. As Professor Bargh explains, the Western worldview is human centred. Its notion of the "rational economic man" is a self-interested and self-maximising individual, which included large corporations that Western law treats as legal persons. Their needs are prioritised over the non-human world, operating within commodified and financialised markets said to operate on supply and demand. The perceived flow-on benefits are jobs and income for people to buy and consume products of the capitalist economy.[69] It is treated as universal, when it is not.

80. The holistic and relational worldview of Māori and other Indigenous Peoples is sourced instead in Indigenous legal traditions with the aim to live in balance with the planet. That worldview prioritises relational connections rather than merely elevating humans.[70] Māori economics is concerned with balancing many different dynamics, maintaining the health of the collective and continuation of the whakapapa ethic for future generations.[71] For example, a te ao Māori approach to extraction, use and development of minerals is commonly situated in the context of reciprocal relationships - Hirini Moki Mead talks about the system of utu.[72]

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[68] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024* at [52].
[69] Wai 3325, #A015 *Affidavit of Ema Maria Bargh dated 22 October 2024* at [54].
[70] Wai 3325, #4.1.003, Transcript for hearing week one at 178 lines [10]-[20].
[71] Wai 3325, #4.1.003, Transcript for hearing week one at 415 line [32]- 416 line [30].
[72] Wai 3325, #4.1.003, Transcript for hearing week one at 176 lines [21]-[23].

81. India Logan-Riley reminds us this whakapapa relationship is rooted in the Pacific Ocean and Indigenous Peoples are accountable to the ancestor. So any threat to Pacific wellbeing, especially the climate emergency, is a threat to the living whakapapa of mātauranga Māori and the taonga it is connected with.[73]

82. Professor Kelsey highlighted the tension created in the climate context when the Western capitalist world view is embedded in and through international trade and investment agreements that encapsulate

> "*the promotion and adoption of 'concepts, legal and economic instruments, technologies and techniques and practices that embody capitalist worldviews that are contradictory to tikanga, mātauranga and kaitiakitanga*".[74]

83. At one point, Mr Vitalis appeared to agree, saying it was clear from his discussions with Treaty partners that:

> "*the tensions between worldviews are complex and not quickly or easily reconciled, particularly given the contraints of trade negotiation tools, their international context and where New Zealand's interests must be balanced".* [75]

84. The tension was illustrated by the revision of the Crown's Environment and Climate Change Framework in 2022, where "reconciliation" involved the subordination of the Māori worldview. Mr Vitalis quotes the new framework as saying that environmental laws and standards should be "*non-discriminatory, science and evidence-based, proportionate to the environmental risk, and not used for protectionist trade purposes*".[76] That formula assumes Western science-based models of knowledge and risk assessment that have no place for (and in the view of some scientists, deny) mātauranga Māori. The notion of "proportionality" militates against Indigenous approaches that give primacy to te Taiao over humans and commercial interests.

85. As Mr Vitalis said, Ngā Toki Whakarururanga was invited to comment on the draft review of the framework.[77] But their substantive input from a te Ao Māori

[73] Wai 3325, #A024, *Affidavit of India Logan-Riley dated 29 October 2024* at [53].
[74] Wai 3325, #A14 *Affidavit of Elizabeth Jane Kelsey dated 21 October 2024* at [35].
[75] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [11].
[76] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at fn 36.
[77] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [62].

perspective was not incorporated. [78] Nor were they permitted to make their input public, and hence hold themselves and the Crown accountable.

C.2 False Climate Solutions

86. The Crown's enabling of, and failure to mitigate, the climate crisis is inextricably tied to colonial capitalism and the extractivist economy. Its climate strategy relies on, and embeds, various forms of carbon offsetting that operates within that paradigm and enable individuals, businesses and the State to continue consuming and producing greenhouse gases.[79]

87. The Crown plans to meet its Paris Agreement obligations through devices that do not address the causes of the climate crisis, such as buying (sometimes fraudulent) carbon credits in international markets, carbon farming, the emissions trading scheme (ETS) from which agriculture is omitted, and "green extractivist" mining.[80] These artifices that allow harmful extractive and production practices to continue raising the level of emissions allows the Crown and corporations to greenlight new extraction projects while appearing to comply with their climate obligations.

88. It is a fact that Māori are involved in selling carbon credits and have interests in the ETS. But there are reasons for that, which India Logan-Riley attributes to colonisation and contemporary Treaty settlements: "*there is an ongoing coercion for Māori to participate in market-based mechanisms and the free market because we don't really have the choice*".[81] Similar pressures are evident in financially stressed Pacific communities.[82] Defending that form of coercion is not a Tiriti-based form of "active protection".

89. The Crown's avoidance strategy is operationalised in the international domain by recent trade and investment agreements, and climate change treaties, adopting a range of concepts, legal, economic and financialised instruments, technologies and techniques, and practices, in the name of climate change mitigation.

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[78] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [12]-[17], Wai 3325, #A142(a), *Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025* – Exhibit "C" *Ngā Toki Whakarururanga, Draft Aotearoa New Zealand Trade, Environment and Climate Change Framework, 20 May 2023* and Exhibit "B" *Ngā Toki Whakarururanga, Ngā Toki Whakarururanga response to MFAT's summary report ACCTS and the Trade, Environment and Climate Change Frameworks, 7 November 2022*.
[79] Wai 3325, #4.1.003, Transcript for hearing week one at 185 lines [30-31].
[80] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024* at [38].
[81] Wai 3325, #4.1.009, Transcript for hearing week five at 430 lines [14]-[18].
[82] Wai 3325, #4.1.009, Transcript for hearing week five at 431 [22]-[24]. Blue Herrings exhibit.

90. Euphemisms such as "green technology" and a "clean" or "low-carbon" economy are increasingly common. So are commitments to expand and cooperate on carbon markets, carbon farming, and Carbon Capture, Utilisation and Storage (CCUS). India Logan-Riley describes the notion that emissions can be cancelled out through carbon farming, as turning "*nature into an equation where harm over here can somehow be magicked away by some good stuff over here*".[83] Carbon trading, as in the ETS, was ever only a stop gap and cannot address the harmful social and environmental impacts of high-emitting industries and fossil fuel extraction, or other obligations that are an integral part of an emissions reduction pathway, such as retraining people or relocating marae.

91. "Nature-based solutions", such as "blue carbon", is another fashionable euphemism found in both international trade agreements and climate discourse. India Logan-Riley describes how "blue carbon" erases the holistic ways that oceans and their ecosystems work and flattens the distinctiveness of ocean spaces into a homogenous entity that is defined by its commodifiable value in the market and its usefulness in offsetting climate pollution.[84]

92. These "green-washing" and "nature-washing" approaches impact disproportionately on Indigenous Peoples and local communities whose resources are commonly exploited in the name of climate action. They also undermine alternative world views and meaningful solutions based on tikanga and mātauranga that align with climate justice in Aotearoa, the Pacific and the world. When the Crown points out that some agreements now include references to Māori and Indigenous Peoples' values and knowledge,[85] it needs to acknowledge that this compounds the contradictions of worldviews.

C.3 Trade Imperatives Trump Climate and Te Tiriti

93. The priority on economic growth in international trade and investment agreements means Tiriti-based climate action is a subordinate consideration for the Crown,

[83] Wai 3325, #4.1.009, Transcript for hearing week five at 429 lines [21]-[23].
[84] Wai 3325, #A024, *Affidavit of India Logan-Riley dated 29 October 2024* at [62].
[85] Ministry of Foreign Affairs and Trade "Māori interests – New Zealand-European Union Free Trade Agreement" New Zealand Ministry of Foreign Affairs and Trade, noting the Agreement's references to Te Ao Māori, Mātauranga Māori, Tikanga Māori and other Māori concepts, and to Indigenous knowledge, participation and leadership.

which can only be assimilated within its dominant paradigm. Mr Vitalis describes Māori interests at issue in negotiations being "*protected to the extent reasonable and practicable in the circumstances of our work. ... This includes understanding and acknowledging the interests at stake, the challenges and constraints we face, and being honest and open about what is achievable—and what is not—within the context of international trade negotiations*".[86]

94. But it is the Crown that determines what is "reasonable and practicable" and does so within the economic imperatives of Western capitalism and economic growth.

95. In defending the need for such compromises Mr Vitalis states that Māori and non-Māori are heavily invested in the current economic structure, with the Māori economy heavily based in the primary sector and reliant in part on the extractivist economy to profit.[87] Many counter-arguments can be made to that. For the purpose of this inquiry on the climate crisis, five will suffice:

    i. The current international trade model of globally-integrated supply chains depends on large scale industrial production of commodities that are moved between multiple countries using fossil-fuelled air and sea transportation. That is a major contributor to the climate crisis and ecologically unsustainable; at the same time it disconnects people from the whenua and inter-relationship with the natural environment.[88]

    ii. Assessments of economic gains to Aotearoa New Zealand from these agreements are never counter-balanced by their climate change impacts, such as the growth of greenhouse gas emissions from the expansion of agricultural production or the increased hazards created by expanding forestry and log exports.[89] The paper by Rory McLeod, cited in Professor Kelsey's evidence, points out that contemporary free trade agreements eschew rules that could have a real impact on the climate crisis, such as disciplines on implicit subsidies to activities like agriculture that are major contributors to climate change and "*which occur when emitters are not taxed or charged for the*

[86] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [12.2].
[87] Wai 3325, #4.1.003, Transcript for hearing week one at 190 lines [5]-[10].
[88] Wai 3325, #4.1.003, Transcript for hearing week one at 182 lines [20]-[30].
[89] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [42].

social costs of their emissions." He argues that "*implicit subsidies are probably even more harmful than explicit subsidies, but their role is only starting to be explored*." [90]

iii. Contemporary trade agreements are not simply about commodity exports. Many include, for example, investor protections and ISDS, whose fiscal impacts can far outweigh the economic gains from these agreements and can constrain policy and regulatory options for climate action in ways that are costly and harmful.

iv. Professor Bargh contextualises Mr Vitalis' concept of the Māori economy through a Tiriti lens in similar ways to India Logan-Riley, above. Māori economics in te Ao Māori is concerned with the balancing of many different dynamics and maintaining the health of the collective. But many Māori interests have been trapped through colonisation in certain industries, geographical areas and practices, whether by historical land theft or contemporary Treaty settlements. Without those Crown impositions, they might have adopted a more respectful and reciprocal economic relationship[91] and maintained the whakapapa ethic for future generations.[92] That coerced dependency is why Māori need to be a key part of a tika transition that includes redress that is capable of restoring that holistic balance.

v. A final factor takes us back to the Crown's Tiriti responsibilities and the survival of Māori as Māori in Aotearoa. The Crown has an obligation in international trade agreements to actively protect Māori rights, interests and responsibilities, not just be concerned with advancing Māori business and exporters' interests. The Wai 2522 Stage 3 Tribunal was very clear where the priorities lay:

> *"Because mātauranga Māori is* ***at the heart of Māori identity*** *it is* ***not an interest or consideration that is readily amenable to some form of balancing exercise*** *when set* ***against other trade objectives, or the interests*** *of other*

[90] Rory McLeod, "Trade and Climate Change", Pacific Economic Cooperation Council (PECC) in June 2024, page 4. Attached as Exhibit "D" to Wai 3325, #A142(a), Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025.
[91] Wai 3325, #4.1.003, Transcript for hearing week one at 190 lines [11]-[19].
[92] Wai 3325, #4.1.003, Transcript for hearing week one at 415 line [32]- 416 line [30].

> *citizens or sectors. It is certainly* ***not a matter the Crown can or should decide unilaterally****."*[93]

C.4 Green Extractivism

96. These contradictions have come to the fore with the rise of "green extractivism", which is driven by demand for, and super-power competition over, "critical minerals". It is undeniable that mineral extraction, especially of fossil fuels, is a primary contributor to the climate crisis and a direct threat to tika transition. Yet it has been actively revitalised by the Coalition Government, overriding responsibilities to, and of, mana whenua.

97. The Crown has long assumed the sole right to own and manage minerals in Aotearoa New Zealand, denying Rangatiratanga, preventing kaitiaki responsibilities, excluding Māori from a substantive role in decision making, let alone free prior and informed consent under the UNDRIP, and exceeding the authority of Kāwanatanga, which exists only so far as it maintains and protects Rangatiratanga.[94]

98. This power imbalance is replicated at the international level where the Crown unilaterally negotiates and signs agreements that impact on natural resources to the exclusion of Māori, as if they have the exclusive ownership of those resources.

99. Colonial extractivism has a new rationale in the context of climate change. The "critical minerals" narrative seeks to legitimise intensified mining of certain minerals as essential for a "green transition", for example powering of electric vehicles and solar panels. Increased extraction becomes the rationale for saving the planet. Professor Bargh articulated the contradiction of proposing to "*save nature by commodifying its life giving and life sustaining capacities*" through an "*environmentally reckless, uncaring and extractivism approach*".[95] India Logan-Riley described "green colonialism" as a "*kind of maladaptation ... done incorrectly that leaves people behind*".[96]

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[93] Waitangi Tribunal (Wai 2522, 2023) *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* at xiv.
[94] Wai 3325, #4.1.003, Transcript for hearing week one at 177 lines [13-20].
[95] Wai 3325, #4.1.003, Transcript for hearing week one at 176 lines [5]-[19].
[96] Wai 3325, #4.1.003, Transcript for hearing week one at 420 lines [7]-[9].

100. Professor Bargh explained how green extractivist solutions *"continue an extractivist mindset, tend to privilege a capitalist logic, and assume decision-making power over, and access to minerals which many Māori argue they have rangatiratanga over."*[97] As with old-style colonial extraction, these resources are commonly on Indigenous Peoples' lands or ocean beds, but are claimed by the colonial State without any free prior informed consent. The imperative to mine as a solution to climate change is then used to justify moving Indigenous Peoples out of the way. As a result:

> "*The ongoing and indeed projected increase in, exploitation of such minerals fails to carefully consider, first, the options other than increased consumption or to ensure recycling and reuse of existing extracted minerals. Instead,* ***Crown proposals maintain a mentality and cycle of extraction, consumption and waste which cuts across Māori aspirations for forms of wellbeing that maintain a balance with te taiao and cuts across Indigenous rights****, for example to develop strategies and priorities for the use of their lands and territories".* (emphasis added)

C.5 The Crown's Mineral Strategy

101. The Coalition Government aimed to catalyse the exploitation of Critical Minerals as part of the 2025 *Minerals Strategy for New Zealand to 2040*. The principal objective is to boost New Zealand's income from mineral extraction and double the value of New Zealand's minerals exports by 2035, strengthen global minerals supply chains, and leverage relationships and international partnerships.[98] According to Minister for Resources Shane Jones in his foreword to the Minerals Strategy in January 2025:

> *"There is potential for us to deliver critical minerals, including those needed for new technologies and a clean energy transition. The International Energy Agency estimates that to reach zero-net emissions by 2050 the world would need six times more minerals for low emissions technology than currently being extracted ... .* ***We have a choice to make – do we contribute to and benefit from this growing market, or do we become the recipients of other countries' economic effort and output****?"*[99] (emphasis added)

102. The first Guiding Principle of the Crown's Mineral Strategy says the Crown, through the Ministry of Business Innovation and Employment (MBIE), is "*taking an active, deliberate and coordinated approach for New Zealand's mineral*

[97] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024* at [8].
[98] MBIE, A Minerals Strategy for New Zealand, January 2025; Wai 3325, #A122 *Brief of evidence of Paul Gerard Stocks dated 11 September 2025* at [48].
[99] Further Memorandum on Critical Minerals framework dated 3 Feb 2026.

development that honours Te Tiriti o Waitangi and upholds Treaty settlements and commitments".[100] The strategy does not include any reference to the UNDRIP, nor to free, prior and informed consent or profit sharing where mana whenua approve extraction.

103. The Ministry's witness Mr Paul Stocks could only provide very vague answers to how the responsibilities of Rangatiratanga, mana whenua and kaitiakitanga over whenua and moana were being given effect. Referring, without elucidating, to the Crown's Cabinet Office Treaty of Waitangi Guidance Circular (19)5 of 2019, he said:

> *"With respect to this one, tino rangatiratanga Article II and protection that is how I'd see that being applied in the critical mineral space. The Critical Mineral Strategy says that we will be looking for development and doing it responsibly. Having the Treaty there is an underlying principle and basically guides thinking on that."* [101]

104. Mr Stocks confirmed that he used the word "protection", not "active protection", which was "an obligation to protect taonga and other interests. That is not an unfettered protection ...".[102] When asked how that was evident in the Minerals Strategy, he said the second chapter of the minerals programme "*is all about the role of te Tiriti and the rules and processes that we need to follow as the regulator in allowing access to minerals*." When asked exactly "where protecting Māori comes in", he said "*I think it's one of the things that we would have to consider under the Act*."[103] The extent MBIE does so would appear to be limited to the impacts on Treaty settlements.[104]

C.6 The Trade Agreement-Climate Nexus

105. Professor Kelsey said in evidence that trade agreements exacerbate the climate crisis. Similar views were expressed by former trade negotiator Rory McLeod, who wrote:

> *it is now becoming clear that the* ***regional and global trading system includes features that may act as a significant hindrance to the efforts of member***

[100] Wai 3325, #3.2.259 Memorandum of Counsel Filing Notice of President Trump's Proclamation of Critical Minerals, 23 January 2026 at [10].
[101] Wai 3325, #4.1.11 Transcript for hearing week seven at 510 lines [19]-[25].
[102] Wai 3325, #4.1.11 Transcript for hearing week seven at 511 lines [26]-[34].
[103] Wai 3325, #4.1.11 Transcript for hearing week seven at 510 [14] – 511 [9].
[104] Wai 3325, #A122(e), *Responses to questions in writing from Robert Stocks dated 12 June 2026* at [30]-[31]; Wai 3325, #A122 *Brief of evidence of Paul Gerard Stocks dated 11 September 2025* at [42] and [51].

> ***economies to tackle climate change**. Such features result largely from the fact that **the types of policies needed to tackle the market failure, externality and public good issues involved with climate change may sit at odds with signals and incentives that are created by trade rules and regulations**.*[105] (emphasis added)

106. Mr Vitalis admitted that agreements can have negative impacts on climate change, but can make positive contributions as well:

> *"the **relationship between trade and climate change** is not a straightfoward one of cause and effect, the interactions between the two spheres are complex and **include both positive and negative contributions to climate change mitigation and adaptation globally**",*

with trade policy having "*a responsibility and opportunity to support the transition to a low-carbon, climate resilient global economy*".[106]

107. It is unclear how Mr Vitalis sees the balance between the (new) positive and the (current) negative contributions. Assuming, for argument, that he means a net zero outcome, that would assume that:

i. the current extractivist form of capitalism and economic growth model is survivable, let alone desirable;

ii. maintaining the current climate conditions is a survivable, let alone desirable, future outcome;

iii. the elements put forward as positive contributors actually work as such (viz. assumptions on the ETS) and are not outweighed by other negative impacts; and

iv. it is not desirable to pursue other alternatives, such as those informed by Indigenous knowledge and solutions.

108. Rory McLeod's paper, cited by Professor Kelsey, made it clear that there are positive ways that agreements could be framed to advance climate action and remove impediments, far beyond the liberalisation and limited disciplines that Mr Vitalis identifies in his evidence. These include disciplines on implicit subsidies,

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[105] Rory McLeod, "Trade and Climate Change", Pacific Economic Cooperation Council (PECC) in June 2024, page 4. Attached as Exhibit "D" to Wai 3325, #A142(a), *Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025*.
[106] Wai 3325, #A123, Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025 at [48].

including agriculture, discussed above.[107] But these are not on the Crown's agenda.

109. The lack of ambition is described as "strategic patience" by Mr Vitalis.[108] Some examples of international agreements to which Mr Vitalis refers show how incremental this is, summoning Dr Moana Jackson's much-repeated aphorism that "*incrementalism is stasis if it does not lead to transformation*".[109] These include:

    i. The reference to "sustainable development" in the preamble to the WTO's Marrakesh Agreement, which has had no impact on multilateral trade rules;

    ii. The Doha Development Round, which was effectively declared dead in 2015 by wealthy WTO members, including New Zealand;

    iii. Multilateral negotiations to achieve liberalisation of environmental goods and services at the WTO, which were principally about new trading opportunities, not climate action, which remain stalled. These were taken up by their proponents plurilaterally in the Agreement on Climate Change Trade and Sustainability (ACCTS), discussed below.

110. Mr Vitalis claims New Zealand has been a leader on these issues, and excuses the limited scope of international trade disciplines by saying it is difficult to get other negotiating countries on board. But the ambitions are low to start with. There is no evidence of seeking alternative approaches with alliances of the most severely affected by the climate crisis, including Pacific Island States. And existing climate-related commitments the Crown has made in FTAs are not being practiced in Aotearoa New Zealand, as set out below.

111. There is no need to canvass the various agreements in detail, as they are set out in Professor Kelsey's evidence.[110] This submission focuses on four agreements: the Agreement on Climate Change Trade and Sustainability[111] and the Clean Economic

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[107] Rory McLeod, "Trade and Climate Change", Pacific Economic Cooperation Council (PECC) in June 2024, page 4. Attached as Exhibit "D" to Wai 3325, #A142(a), *Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025.*
[108] Wai 3325, #4.1.010, Transcript for hearing week six, 16–20 March 2026 at 339 line [28].
[109] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [56] – [58].
[110] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [38]-[99].
[111] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [89] – [106].

Agreement of the Indo-Pacific Economic Framework (IPEF)[112], which Mr Vitalis says provide "practical tools" to "support the transition to low-emissions economies"; the free trade agreements with the United Kingdom (UK) and European Union (EU) that have specific climate action obligations; and a case study on the Critical Minerals Dialogue under the Clean Economy and Supply Chain Agreements of IPEF. To avoid repetition, the exceptions, including the Treaty of Waitangi Exception, are addressed, again at a high level, in Part D on ISDS.

C.7 Agreement on Climate Change, Trade and Sustainability (ACCTS)

112. Mr Vitalis gives the ACCTS as an example of "norm building agreements".[113] The agreement has four pillars: environmental goods, environmental services, fossil fuel subsidies, eco-labelling. There were only four negotiating parties (Costa Rica, Iceland, New Zealand and Switzerland), three of which need to ratify it before it enters into force. The agreement was signed in November 2024, but only Iceland and New Zealand have so far ratified. Fiji was an initial participant, but withdrew during the negotiations.

113. Ngā Toki Whakarururanga's Tiriti o Waitangi Assessment pointed out the two main pillars were standard free trade agreements that sought to remove tariffs on a very long list of goods and liberalise almost all services under the redesignation "environmental".[114] This plurilateral negotiation followed failure to achieve similar liberalisation in the WTO.

114. In announcing the agreement, Trade Minister Todd McClay described the Agreement on Trade and Sustainability (omitting the reference to Climate Change) as a means for expanding New Zealand's forestry and wool exports. "*ACCTS is about opening new markets, growing domestic jobs, and adding value across the economy. As more countries join, the economic benefits will only grow*."[115] For the Minister, at least, this was not about climate change. The export goals also gave no consideration to potential climate-related harms that might be caused, especially to Māori communities, by an anticipated expansion of exotic forests in Aotearoa New

[112] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [88].
[113] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [89].
[114] Wai 3325, #A029, *Second affidavit of Professor Jane Kelsey dated 20 November 2024* at Exhibit "B".
[115] Wai 3325, #A029, *Second affidavit of Professor Jane Kelsey dated 20 November 2024* - Exhibit "B" at [6], [22] and[23].

Zealand.

115. The third pillar aims to discipline "harmful fossil fuel subsidies". Mr Vitalis identifies ACCTS as an example of positive initiatives and cites, as a key example of what can be achieved in trade agreements, the ability to:

> "*discipline the rising subsidisation of fossil fuels which directly contribute to global warming. This is a position that New Zealand strives to uphold whether bilaterally, plurilaterally or multilaterally – and our trade agreements are an importance vehicle for action in these areas*".[116]

116. But oil-producing Norway secured definitions and exceptions while it was a negotiating party that minimised its scope and potential impact. Norway then did not sign. Significantly, the Crown itself appears not to view ACCTS as a constraint, announcing its own fossil fuel subsidy through a $200 million co-investment for gas exploration and proposed funding for an LNG import facility for liquefied natural gas (LNG).[117] The latter has been put on hold until after the November 2026 election, but the governing parties remain committed to it.

117. The fourth pillar was voluntary eco-labelling.

118. It is correct that there was engagement with Ngā Toki Whakarururanga during the negotiations. That was under conditions of confidentiality that precluded involvement of kaihautū and pūkenga with expertise and responsibilities in the climate space, let alone with other Māori such as claimants to this inquiry. As their Tiriti Assessment of the Agreement explains, the commercial export focus and limited scope of the agreement meant their inputs made no meaningful difference.

119. Mr Vitalis says Te Taumata, FoMA and National Iwi Chairs Forum were "broadly supportive". It is unclear how actively they were engaged, whether that was from a commercial perspective rather than Ngā Toki Whakarururanga's climate and Tiriti base, and what reservations they expressed.

C.8 New Zealand FTAs with the United Kingdom and European Union

120. There was an extensive process of engagement with Ngā Toki Whakarururanga

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[116] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [49].
[117] Lawyers for Climate Action NZ Inc *A Credibility Gap: Assessment of New Zealand's Fossil Fuel Subsidies and International Commitments* (May 2026).

during negotiation of the free trade agreements with the United Kingdom (UK) and European Union (EU). However, the Crown controlled all information flows and outcomes. The two agreements have similarities on climate change that reflect their former union, but the EU agreement is stronger.

121. The Trade and Sustainable Development chapter in the EU FTA addresses climate change. In June 2022, the EU mandated that all its free trade agreements must have such a chapter and specified the content. The agreement with New Zealand was one of the first. It has two significant binding obligations related to climate change:

    i. Article 19.6 requires the Parties to "*effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to Nationally Determined Contributions*", and to "*refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement".*

    ii. Article 19.2.4 says: "*A Party shall not weaken or reduce the levels of protection afforded in its environmental or labour law in order to encourage trade or investment*."

122. The relevant chapter of the UK agreement is Chapter 22 Trade and Environment. Soft references "recognise the importance" of Māori concepts of kaitiakitanga and mauri, including in relation to climate change, but have no substantive effect. The limited provision to eliminate environmentally harmful subsidies focuses on fisheries and fossil fuels; it is not replicated in the provision on "sustainable agriculture". Article 22.6 on Climate Change is weaker than the EU provision. The only climate-related provision with teeth is the non-derogation Article 22.4, which is similar to the EU's Article 19.2.4.

123. The two paragraphs in Mr Vitalis' evidence that reference the EU climate provisions note that these commitments are legally binding and enforceable, with breach of the Paris Agreement commitments having the potential for trade sanctions as a last resort. He does not mention the UK non-derogation obligation.

124. That lack of engagement is surprising, given that potential breaches of those provisions have been highlighted by Professor Kelsey, many other commentators, as well as officials' advice, in relation to various laws, policies and decisions in

which the Coalition Government has rolled back climate measures explicitly to attract investment and has undermined the State's ability to meet its Paris obligations and NDCs.[118]

125. An unredacted version of the Regulatory Impact Statement on the legislation to repeal the offshore oil and gas exploration ban disclosed that:

> *"MFAT assessed that reversing the 2018 ban would likely be inconsistent with the obligations in several of New Zealand's free trade agreements (FTA) not to reduce environmental protections for the purposes of encouraging trade or investment" and "could be perceived as New Zealand not intending to meet its national determined contribution under the Paris Agreement unless appropriate measures are taken to demonstrate the additional emissions will be offset. This gives rise to international legal risk."*[119]

126. Ministers seemed cavalier about the prospects of breaching the agreements, with Resources Minister Jones quoted saying he was not "overly concerned that somehow I've stepped on a legal landmine".[120] Officials advice referred to possible breach of the EU FTA but downplayed the risks of the EU enforcing it. So did Mr Vitalis,[121] noting that a challenge relies on "*another government forming the view that the threshold has been met and choosing to pursue the issue through the mechanisms of the agreement, which involves diplomatic, evidential, and legal considerations."*

127. Officials and the minister seemed unaware of a mechanism for civil society groups in the EU to lay a complaint over New Zealand's breach of those two obligations. Such a complaint was lodged with the European Commission on 30 September 2026 by Both Ends, a Netherlands based civil society organisation that works closely on issues of trade and climate justice.

128. In summary, the complaint asks the European Commission:

> *"to examine whether Aotearoa New Zealand has broken two promises both sides made in the EU-New Zealand Free Trade Agreement: not to weaken or set aside*

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[118] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [31] – [41].
[119] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [36].
[120] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [36].
[121] Wai 3325, #4.1.010, Transcript for hearing week six, 16–20 March 2026 at 361 line [8] – 365 line [18]; Wai 3325, #A123(c), *Responses to questions in writing from Vangelis Vitalis dated 3 July 2026* at [25].

environmental laws in order to encourage trade or investment, and to effectively implement the Paris Agreement." [122]

129. The complaint was supported by statements from Mike Smith, whose litigation against major emitters was curtailed by the Climate Change Response (Tort Liability) Amendment Act in August 2026; Ngāti Pukenga Iwi ki Tauranga Trust who have been fighting climate battles on the ground in Tauranga; Ora Taiao, health professionals in Aotearoa working for climate justice; the Environmental Law Initiative; Greenpeace Aotearoa; and Professor Kelsey.

130. That complaint sets in train a process for accountability that requires the Crown to explain how its actions to wind back climate measures comply with its obligations in the EU FTA.

C.9 The Indo-Pacific Economic Framework (IPEF)

131. The IPEF was a US-led initiative of the Biden administration negotiated by sixteen parties between 2022 and 2023. It was an unorthodox trade negotiation, driven by the US domestic sensitivities and imperatives. It had four pillars: Trade, Supply Chain, Clean Economy, and Fair Economy.[123] The Supply Chain and Clean Economy agreements entered into force in February 2024. The trade pillar, which included an environment chapter, was never concluded. The Trump administration in 2024 effectively terminated the trade negotiations and its participation in implementation of the other agreements.

132. These agreements are not enforceable. In part, they are what Mr Vitalis describes as "norm creators". But their implementation includes information sharing and cooperation that are a foundation for action or binding commitments, and can intersect with other initiatives among all or some of the parties. They also form part of the continuum of domestic and international actions by the Crown in pursuit of its economic and strategic objectives, trade and investment policies, minerals strategy and approach to climate change.

133. The Clean Economy Agreement is the most obviously related to climate change. Ngā Toki Whakarururanga sought to influence the negotiations with numerous

[122] Appendix A to the Memorandum of Counsel filed with these submissions.
[123] Wai 3325, #A14 *Affidavit of Elizabeth Jane Kelsey dated 21 October 2024* at [40] – [60].

briefing papers, but were confined to the sidelines. The briefing paper on Te Taiao and the Climate Crisis warned IPEF negotiators:

i. *The climate crisis is of existential importance to Māori, to Aotearoa and the world and this fact needs to be acknowledged within IPEF*.

ii. *The title of Pillar 3 "Clean Economy" suggests an economic focus that ignores the holistic inter-relationship of our shared planet's economic, social, cultural, ecological and spiritual dimensions.*

iii. *We remain deeply sceptical at the over-reliance on "solutions" to the climate crisis that rely on economic incentives, carbon markets, and technological innovations as a means of solving the climate crisis, while ignoring the potential solutions that Indigenous innovation can provide.*[124]

134. Mr Vitalis says Ngā Toki Whakarururanga's criticism and urging an alternative "*holistic response to the climate crisis that builds on indigenous values, strategies and leadership to implement real solutions*"[125] had a direct influence on New Zealand's negotiating approach, although his example of "nature-based solutions" was not something Ngā Toki Whakarururanga supported.

135. However, the Agreement exemplifies the contradictions between the Western capitalism and Te Ao Māori paradigms. While "traditional knowledge" (not Indigenous knowledge) is to be "taken into account", the agreement advances CCUs, ocean-based solutions, carbon markets, and other technologies and financial instruments as potential solutions to the climate crisis. A major thrust of the agreement is to promote investment in and demand for "green" technologies and instruments. That was expected to benefit the corporations that produce them, principally from the US, and help counteract China's dominance of critical minerals.

136. Mr Vitalis also identifies "greenhouse gas emissions in priority sectors" as one of the themes identified by Ministers to guide further negotiation.[126] Logically, "priority sectors" for Aotearoa New Zealand should include agricultural emissions, but there is no reference to that, presumably to maintain consistency with the Cabinet's domestic policy settings.

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[124] Wai 3325, #A14(a) Index and appendices to the Affidavit of Elizabeth Jane Kelsey dated 21 October 2024 at Exhibit "R".
[125] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [117].
[126] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [111].

137. He also refers to the many references to Indigenous Peoples in the Clean Economy Agreement. Most of them use preambular or soft language like "recognition" and "principles". However, there is a "commitment to engage Indigenous Peoples in developing policies to achieve the objectives of the Agreement."[127] That would be tested, and fail, in the IPEF Critical Minerals Dialogue.

138. The implications of the Supply Chain Agreement for climate change are much more direct and there is a strong synergy with the Minerals Strategy and the Fast-Track Act as part of the supply chain. Professor Bargh observed that:

> *"the creation of lists of 'critical' supply chain items in the IPEF Supply Chain Agreement is framed by the prevailing capitalist logic. The agreement by State parties to commit to "minimizing unnecessary restrictions or impediments creating barriers to trade affecting the reliance ... of IPEF supply chains" and to facilitating foreign direct investment into its market, in effect categorises Māori objections to each stage of the mineral extractive process as contrary to the Agreement".*[128]

139. In contrast to the Clean Economy Agreement, this Agreement only mentions Indigenous Peoples in relation to workers and training opportunities as part of a list of affected categories. Mr Vitalis makes no reference to that.

C.10 Critical Minerals case study

140. The IPEF Critical Minerals Dialogue was pursued under the IPEF Supply Chain and Clean Economy pillars with the aim of supporting the expansion, development, competitiveness and diversification of the full critical mineral supply chain from mining to processing, to grow the "green economy" and deliver "economic security".

141. Professor Kelsey's evidence provides a case study of "green extractivism" in operation across the domestic and international domains and how Māori alternatives are shut out through systemic and systematic breaches of the principles of Rangatiratanga, Kāwanatanga, mutual recognition and respect, partnership, active protection and redress. That is in part due to ignorance of officials and in part because of the siloed approach to engagement with Māori by officials in different agencies on the same matter. It also exposes the chasm between the rhetoric of

[127] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [122].
[128] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024* at [32], Wai 3325, #4.1.003, Transcript for hearing week one at 183 lines [6]-[26], Wai 3325, #4.1.003, Transcript for hearing week one at 184 lines [16]-[31].

agreements in relation to Indigenous Peoples and how the Crown operates in practice.[129]

142. The IPEF Critical Minerals Dialogue was led by MBIE, not MFAT, illustrating what Professor Bargh described "*as part of a continuum of Crown action and inaction on the climate"* that is *"normalising green extractivist thinking and using the climate crisis to justify extractive and profit-focused objectives."* [130]

143. The witness for MBIE, Paul Stocks, said his Ministry was responsible for policy and decisions on critical minerals in the domestic domain. However, one objective of the Crown's Minerals Strategy (MBIE's responsibility) was to build international partnerships on critical minerals with economic partners.[131] MBIE was therefore the lead agency in the IPEF Critical Minerals Dialogue. Its mapping of critical minerals for the domestic strategy fed seamlessly into the IPEF process (prompting India Logan-Riley to liken MBIE officials' "mapping exercise" to the survey pegs that preceded land seizure under colonisation).[132] Mr Stocks said MBIE also advised the Minister to join a plurilateral Minerals Security Partnership and a non-binding critical minerals framework with the US.[133]

144. According to Mr Stocks this was an international government-to-government engagement. MBIE would be guided by MFAT about the appropriate engagement of Māori and Iwi in international relations. Information to the Māori entities working in the international space therefore depended on MBIE channeling that information through MFAT based on MFAT's advice or following requests from MFAT (not from Māori) for direct engagement.[134] Mr Stocks said MBIE and MFAT officials specifically discussed where the primary relationship would lie and MFAT said that they already had that engagement facility; [135] the same applied to the later negotiations with the US on a critical minerals framework.

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[129] Wai 3325, #A038, *Third Affidavit of Professor Elizabeth Jane Kelsey evidence dated 13 March 2025* at [44] – [77].
[130] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024* at 8(iii).
[131] Wai 3325, #A122 *Brief of evidence of Paul Gerard Stocks dated 11 September 2025* at [20].
[132] Wai 3325, #A038, *Third Affidavit of Professor Elizabeth Jane Kelsey evidence dated 13 March 2025* at [70].
[133] Wai 3325, #A122 *Brief of evidence of Paul Gerard Stocks dated 11 September 2025* at [20].
[134] Wai 3325, #4.1.11 Transcript for hearing week seven at 511 lines [24]-[30].
[135] Wai 3325, #4.1.11 Transcript for hearing week seven at 512 lines [10]-[18].

145. This made MFAT the intermediary and gatekeeper for the Māori entities on the IPEF Dialogue. But no official in MFAT with whom Māori were dealing had their eyes on these developments. They apparently only contacted MBIE when pressed by Ngā Toki Whakarururanga to do so. When Ngā Toki Whakarururanga finally secured their only call with MBIE on the IPEF Critical Minerals Dialogue, the officials admitted that raised a systemic issue, which has never been addressed.[136] They seemed unaware that the IPEF Clean Economy Agreement required Indigenous Partnerships, or that multiple requests for follow-up dialogue never took place.[137] Whether MFAT failed to ask or MBIE refused is irrelevant.

146. Despite the evidence from Professor Kelsey,[138] Mr Stocks insisted there was not a problem that MBIE was doing a lot of the work, but not involving Māori in that work, because:

> ***we are the Crown. The Ministry of Foreign Affairs and MBIE are not different parties. We operate as the Crown.*** *The tasking for Foreign Affairs again is the international engagement, and they had pre-existing relationships around international engagements with iwi Māori and it was agreed that they will continue to maintain that. One of the things we've heard in other contexts is how frustrating it can be to have multiple departments trying to deal with different iwi at the same time so this is one of the ways in which the Government is trying to streamline those engagements.*[139] (emphasis added)

147. The evidence from MFAT on critical minerals was from Grahame Morton of the Americas Division, who has only held that position since January 2025. He described his role as the senior official responsible for MFAT's engagement, along with MBIE as the lead on domestic policy on critical minerals, including recent discussions with the US.[140] Like Mr Stocks, he depicted a high-level coherence that met the Crown's Tiriti responsibilities:

> ***"New Zealand's international engagement*** *is undertaken in a coordinated way that reflects the government's policy priorities and* ***reflects the Crown's commitment under Te Tiriti o Waitangi****, for example MFAT works closely with MBIE to support the implementation of the Minerals Strategy internationally, including advice to Ministers and to support Cabinet and/or Ministerial approved engagement with key*

[136] Wai 3325, #A038, *Third Affidavit of Professor Elizabeth Jane Kelsey evidence dated 13 March 2025* at [73].
[137] Wai 3325, #4.1.11 Transcript for hearing week seven at 513 lines [26]-[31].
[138] Wai 3325, #A038, *Third Affidavit of Professor Elizabeth Jane Kelsey evidence dated 13 March 2025* at [44] – [77].
[139] Wai 3325, #4.1.11 Transcript for hearing week seven at 513 lines [11]- [19].
[140] Wai 3325, #A155, *Brief of evidence of Grahame Robert Morton dated 22 April 26* at [4].

partners."[141] ...

> *"In relation to critical minerals, Ngā Toki Whakarururanga raised questions with MFAT in the context of the Critical Minerals Dialogue held with Indo Pacific Economic Framework (IPEF) participations in 2024.* ***MFAT noted those matters and sought to ensure appropriate visibility of the concerns across the Crown,*** *including with MBIE as the responsible domestic policy agency."*[142]

148. When asked where Rangatiratanga has been operational in the critical minerals process pursuant to the Crown's own questions set out in Cabinet Circular 19(5), Mr Morton provided a vague summary that he said "enabled consideration of Māori interests, including questions of participation, potential impacts and how Māori perspectives are reflected in advice".[143] Despite having clearly flagged this as an issue of importance with both MFAT and MBIE, Ngā Toki Whakarururanga never had any contact with Mr Morton and was not even aware he was responsible for the US negotiation. Mr Morton explained that consultation was carried out by officials who engaged with Māori and reported to him.[144]

149. Further, Mr Morton claimed in July 2026 that MFAT's work on critical minerals "is at an early stage".[145] Yet the IPEF negotiations had been in train since September 2022, the Dialogue since November 2023 and the IPEF Clean Economy Agreement mandated engagement with Indigenous Peoples on its implementation. He did not answer whether the climate change division of MFAT was involved on international critical minerals developments and how that division relates to Māori. [146]

150. MFAT's gatekeeping intensified during the negotiations for a Critical Minerals Framework with the US from late 2025. The US Australia Framework showed this would be a purely commercial and security initiative with no climate, environment, or Indigenous protections.[147] Because the framework would be a non-binding instrument, it was said not to require a Climate Implications of Policy Assessment.[148] But that did not alter its status as an international legal obligation.

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[141] Wai 3325, #A155, *Brief of evidence of Grahame Robert Morton dated 22 April 26* at [7].
[142] Wai 3325, #A155, *Brief of evidence of Grahame Robert Morton dated 22 April 26* at [13].
[143] Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 Jul 26* at [40].
[144] Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 Jul 26* at [2].
[145] Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 Jul 26* at [10].
[146] Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 Jul 26* at [9]-[10].
[147] Wai 3325, #3.2.259 Memorandum of Counsel Filing Notice of President Trump's Proclamation of Critical Minerals, 23 January 2026 - *United States–Australia Framework for Securing of Supply in the Mining and Processing of Critical Minerals and Rare Earths* (20 October 2025).
[148] Wai 3325, #4.1.11 Transcript for hearing week seven at 493 [11]-[14]; Wai 3325, #A155, *Brief of evidence*

There was also a very real possibility of unilateral policing by the US Government through retaliatory tariffs – something Mr Morton declined to address.[149]

151. These negotiations were not announced publicly and became known only when the Tribunal sought information.[150] Pressure by Ngā Toki Whakarururanga for input led MFAT to engage with them, FoMA and Taumata on a confidential basis under very rushed conditions.[151] Their common opposition was documented in a Cabinet paper that was publicly released. The Crown's openness proved short-lived. No public information has been released since then. The ministers in charge, being Foreign Minister Peters and Resources Minister Jones, also instructed officials there would be no further disclosure to Māori beyond that Cabinet had authorised officials to re-engage the US bilaterally on the framework.[152]

152. Mr Morton refused to provide any further information about the negotiations even to the Tribunal.[153] His replies to written questions relating to the negotiations were evasive, including whether the amended version provided to the US had been shown to Māori and whether parameters decided by Cabinet included if and how Te Tiriti and Māori should be addressed in the negotiation and text. He could not comment on the current text while negotiations were underway and matters were before Cabinet; on whether Cabinet had decided what, if any, Tiriti protections or references would be included in the agreement; or on the risk that there would be no references to Māori or Te Tiriti. Nor would it be "appropriate" to provide the text to the Tribunal to assess the adequacy of protections.[154]

153. The claimants reiterate that, if Ngā Toki Whakarururanga had not raised the critical minerals issue back in 2024 even this level of engagement may not have occurred. Māori are being kept on the margins, permitted insights and voice only when, and the extent to which, the liaison person in MFAT is authorised or moved to provide

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of Grahame Robert Morton dated 22 April 26 at [20].
[149] Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 Jul 26* at [22].
[150] Wai 3325, #3.2.259 Memorandum of Counsel Filing Notice of President Trump's Proclamation of Critical Minerals, 23 January 2026; Further Memorandum on Critical Minerals Framework Discussions with the United States, 11 February 2026.
[151] Wai 3325, #A155, *Brief of evidence of Grahame Robert Morton dated 22 April 26* at [27].
[152] Wai 3325, #A155, *Brief of evidence of Grahame Robert Morton dated 22 April 26* at [22].
[153] A Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 July 26.*
[154] Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 July 26* at [24] – [34].

information. That may not occur until after the negotiations are concluded. It also remains unknown whether negotiations for a US-driven binding plurilateral agreement on critical minerals has started and if the Crown is participating secretly on behalf of Aotearoa New Zealand.

154. In justifying this approach, Mr Morton cross-referenced the evidence of Ms Hallum saying:

> *Decisions on how the government will proceed, including in relation to the proposed framework, are ultimately made by Ministers or Cabinet, consistent with New Zealand's constitutional arrangements for the conduct of foreign affairs.*[155]

155. The Crown previously questioned the relevance of the various critical minerals negotiations to the climate inquiry and sought to minimise disclosure.[156] The Claimants point to this case study as illustrating themes that run throughout their submission, that the Crown:

i. pursues its "green extractivist" agenda across the domestic and international spheres;

ii. sidelines references to Indigenous Peoples' mātauranga in an agreement that purports to advance climate action;

iii. shuts Māori out from implementation of that Agreement, despite its promises of partnership, even under confidentiality, through a mixture of officials' ignorance or disinterest, fragmented Crown silos, a culture of secrecy, and political antipathy.

Alternatives

156. Professor Bargh emphasised that extractivist logic is a construction and the futures it proposes are not, in fact, inevitable. Repeating previous mistakes in our transition will entrench and deepen existing inequalities amongst peoples and with the natural environment. Alternative possibilities still exist and the planet desperately needs them. That involves rebuilding the reciprocal relationship with Papatūānuku, not

[155] Wai 3325, #A155(b) *Responses to questions in writing from Grahame Morton dated 3 Jul 26* at [37].
[156] Wai 3325, #3.2.254 Memorandum of counsel for the Crown relating to inquiry matters dated 2 Feb 26.

pushing past the limits of the planet. [157]

157. The way of life would be quite different in a flourishing and abundant Aotearoa with more localised solutions, smaller scale, rejuvenation of native forests and wetlands, communities in good relationships with each other. Some communities are already doing so: māra kai at the marae, very small scale renewable energy projects, promoting positive relationships, Parakore Zero Waste networks, replanting the ngahere and water storage.[158]

158. Bold decisions are needed to keep us safe in 2050 and beyond, including changes to land use and agricultural practices, reducing consumption, retraining and reskilling people, support for rural communities, smaller-scale renewable energy close to the community not massive offshore wind farms. Māori need to be a part of it. Having Māori at the decision making table, domestically and in the international domain, would enable these solutions.

[157] Wai 3325, #A015, *Affidavit of Ema Maria Bargh dated 22 October 2024* at [61].
[158] Wai 3325, #4.1.003, Transcript for hearing week one 201 line [7] - 203 line [29].

D. INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

D.1 ISDS and the Climate Crisis

159. Professor Kelsey has explained the nature of and controversy over investor-state dispute settlement in some detail in several briefs of evidence,[159] and annexed a report on ISDS, Indigenous Peoples and Climate Change.[160] It is unnecessary to repeat that detail, as the risks ISDS poses to climate change are well recognised internationally. These are summarised in the report by the UN Special Rapporteur on the Human Right to a Clean, Healthy and Sustainable Environment in 2023 that:

> *"chronicles the compelling evidence that a secretive international arbitration process called investor-State dispute settlement has become a major obstacle to the urgent actions needed to address the planetary environmental and human rights crises. Foreign investors use the dispute settlement process to seek exorbitant compensation from States that strengthen environmental protection, with the fossil fuel and mining industries already winning over $100 billion in awards. These cases create regulatory chill. The Special Rapporteur identifies specific actions that States must take to avoid future claims under the investor-State dispute settlement process and fulfil their human rights obligations."*[161]

160. The Rapporteur warned that governments may be liable to oil and gas corporations for $340 billion in future ISDS cases for fulfilling their commitments under the Paris Agreement on climate change, which is a major disincentive for ambitious climate action.[162]

161. The UNCTAD reported in 2024 that about one third of total ISDS cases from 1987 to 2023 involved energy supply and extractive industries. Disputes involving extractive activities and energy, including critical minerals, had been escalating dramatically. The average amount of damages awarded has escalated: the average claim over the decade to 2023 was USD1.1 billion and awards in favour of investors averaged USD385 million, excluding pre- and post-award interest. The share of disputes about extractive activities and energy supply grew further in 2024.[163]

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[159] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [42]-[72].
[160] Wai 3325, #A142(a), *Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025* attached as Exhibit "G" Ngā Toki Whakarururanga, *Weaponising Investment Disputes Against Indigenous Peoples and Climate Action: Risks for Aotearoa*, September 2025.
[161] Wai 3325, #A14(a) *Appendices to the affidavit of Elizabeth Jane Kelsey dated 21 October 2024* attached as Exhibit "AN" David Boyd, "Paying Polluters; The catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights", UN A/78/168, 13 July 2023, Summary report of UN Rapporteur on Human Rights and the Environment.
[162] Ibid p.4
[163] Wai 3325, #A038, *Third Affidavit of Professor Elizabeth Jane Kelsey evidence dated 13 March 2025* at

162. These statistics understate the reality, because they reflect only *known* disputes and outcomes. The UN Special Rapporteur on Human Rights and the Environment David Boyd noted that over 50% of fossil fuel-related ISDS cases are kept entirely confidential, effectively hiding corporate challenges to state environmental and energy policies from public scrutiny. Almost one-third of known fossil fuel arbitrations were settled before reaching final decisions and all settlement documents were confidential.[164]

163. This has significant implications for Māori and te Tiriti. Professor Kelsey's first affidavit cites a study of ISDS disputes affecting Indigenous Peoples that finds Indigenous Peoples traditionally reside in resource rich regions to which foreign investors are attracted, driven by the quest for profit. This often has disastrous consequences of dispossession, dislocation, deforestation, pollution and loss of food sources and potable water. The investor's presence and impacts can result in tragic incidents and disputes. Indigenous Peoples often continue their struggle through various forms of direct action to defend their territories and environment. That can escalate into situations that investors cite as further breaches of their rights and for which they demand compensation. If governments respond positively to Indigenous Peoples' concerns, investors can and do resort to ISDS as well.

164. She further cites analysis of ISDS cases by Chilean academic Nicolas Perrone that "*show how ISDS tribunals overlook investor misconduct and the context of extractivist projects while making local communities invisible"* because they have no right of representation, even as *amicus* briefs on matters of profound significance to them.[165]

165. In Aotearoa New Zealand such disputes could arise where successful legal or protest action by Māori and others result in the rejection or termination of specific projects, or future climate policies, legislation or council action, such as repeal of the Fast-track Approvals Act 2024, withdrawal of subsidies to fossil fuel activities, reinstatement of the oil and gas ban or re-imposing requirements on forestry investors to clean up slash.

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[80].
[164] Wai 3325, #A14(a) *Appendices to the affidavit of Elizabeth Jane Kelsey dated 21 October 2024* attached as Exhibit "AN".
[165] Wai 3325, #A14 *Affidavit of Elizabeth Jane Kelsey dated 21 October 2024* at [92]-[99].

D.2 Aotearoa New Zealand's ISDS exposure

166. New Zealand has less exposure to ISDS than some other countries, but it is still a very real threat. New Zealand has pre-consented to investors bringing ISDS disputes in ad hoc offshore arbitral tribunals under agreements with Brunei, Cambodia, Canada, China, Hong Kong, Indonesia, Japan, Laos, Malaysia, Mexico, Myanmar, the Philippines, Singapore, Thailand, South Korea and Viet Nam.

167. Some of these agreements are currently being used by foreign investors to challenge climate action, legislation and judicial decisions. In the case of Australian billionaire Clive Palmer, the disputes under the ASEAN Australia New Zealand FTA are against his own government.[166] The purpose is harassment, deterrence and regulatory chill as much as substantive outcomes.

168. An extensive review of these agreements is provided in Professor Kelsey's first and fourth affidavits.[167] The Tribunal is not being asked to engage with a fine legal interpretation of specific agreements and provisions, although enough is provided in those affidavits to rebut the Crown's claims that there is no legal risk. The Tribunal is asked to find there are genuine and significant risks to Tiriti-compliant climate action from ISDS disputes or regulatory chill, as previous Tribunals have done on other matters.

169. In denying the risks from ISDS, Mr Vitalis argues that New Zealand has never been subject to a (known) dispute. But Australia could have made the same claim until it too faced a dispute from Philip Morris in 2011 and Clive Palmer in 2023. Those two direct experiences, within the broader rejection of ISDS internationally, were enough to trigger an Australian government policy of no new ISDS provisions. The Trade and Investment Agreements (Consultation) Bill 2026 introduced to the Parliament in August 2026 would make that policy law.[168] Australia's Department of Foreign Affairs and Trade has also embarked on an active review of existing BITS with a view to termination or renegotiation.[169]

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[166] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [81]-[117].
[167] Wai 3325, #A14 *Affidavit of Elizabeth Jane Kelsey dated 21 October 2024* at [100] – [183], Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [42]-[72].
[168] Parliament of Australia Trade and Investment Agreements (Consultation) Bill 2026 (2026).
[169] Australian Government Department of Foreign Affairs and Trade "Australia's Bilateral Investment

170. This exposure is hardly a "peripheral issue" for the Tribunal as Mr Vitalis claims.[170] Indeed, he accepted that, while the investment "*obligations provide certainty for investors, they also raise important questions about how investment rules may interact with climate change measures*."[171]

171. The Crown itself has accepted that ISDS poses an unacceptable risk. Crown witnesses had an impossible task to square the circle by defending New Zealand's existing agreements with ISDS as posing no risk, while affirming the post-2017 policy of successive governments not to include ISDS in agreements because the risks of ISDS are too high.

172. On one hand, Mr Vitalis claims that:

> "*New Zealand's long-standing approach to investment rules and ISDS has been to preserve regulatory space for environmental measures (including climate action) while maintaining investor confidence*".[172]

173. On the other hand, the policy of "no ISDS" that the Labour-NZ First coalition government adopted in 2017 following the loss of social license for ISDS during opposition to TPPA and:

> "*reflected concerns from the public about sovereignty, transparency, and the need to preserve policy space for public interest regulation – including for growing international trend to rethink ISDS, reflected recognition of widespread concerns about sovereignty, transparency and policy space including environment and climate measures ... and aligned New Zealand with a growing international trend to rethink ISDS including in light of climate and sustainability goals."*[173]

174. But those issues were not new in 2017. Concerns over legal, fiscal, regulatory and Tiriti risks of ISDS had been raised since the 1990s, including by Māori.[174] Despite that, the Crown had continued signing free trade agreements with strong investor protections, enforceable by ISDS. The first of these, with Singapore, required the state's consent to being sued under ISDS, which Mr Vitalis refers to,[175] but that was dropped from all later agreements that pre-consent to ISDS and was overridden by

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Treaties" <www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties>.
[170] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 167.
[171] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 131.
[172] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 131.
[173] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 127.
[174] Wai 3325, #A142(a), *Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025* attached as Exhibit "G" Ngā Toki Whakarururanga, Weaponising ISDS Against Indigenous Peoples" at 18-24.
[175] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 132.

later agreements with Singapore.

175. Side-letters that the Crown secured between New Zealand and several CPTPP parties following the adoption of the no ISDS policy in 2017 vary in scope. Some countries that are major capital exporters, like Japan, Canada, South Korea, Indonesia have refused to sign side-letters. Those that have signed them apply them only to that agreement, not to other agreements with the same parties.[176] There are no retrospective side-letters for existing agreements. This does not meet the standard of "active protection" required by the Crown's Tiriti obligations.

D.3 Ineffective Exceptions and safeguards

176. Mr Vitalis claims that agreements with ISDS contain "*carefully negotiated carve outs, reservations and exceptions*" that "*preserve New Zealand ability to regulate in respect of the environment, public health, an other important regulatory objectives*" and that these "*extend to New Zealand's climate change policies and enviromental initiatives ensuring that our commitments under international climate frameworks – including our obligations under the Paris Agreement and our pathway to net-zero emissions by 2050 – remain fully within our domestic regulatory space and cannot be undermined through ISDS challenges*".[177]

177. If that were true, and these policy protections were so watertight, there would not be any need for the "no ISDS policy". Nor would Ministers be advised to avoid the legal risks of ISDS, as James Shaw said occurred on the offshore oil and gas exploration ban, discussed below.

178. The Wai 2522 Tribunal's Stage 1 urgency report said in relation to ISDS, following the Crown's argument that exceptions in the CPTPP protected regulatory autonomy:

> *"**We do not accept the Crown's argument that claimant fears in this regard are overstated**. While we think the Crown fairly pointed to various provisions in the TPPA designed to preserve state regulatory autonomy and improve the operation of ISDS **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."*[178] (emphasis added)

[176] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 143.
[177] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 138.
[178] Waitangi Tribunal Report on the Trans-Pacific Partnership Agreement (Wai 2522, 2016) at 50–51.

179. None of New Zealand's agreements with ISDS has water-tight carveouts for environment policy or climate change. Some do not mention the environment. For example, New Zealand has two old-generation bilateral investment treaties adopted with China in 1988 and Hong Kong in 1995 (and two with Chile and Argentina that never entered into force). Mr Vitalis downplays the differences from later agreements as "largely technical in nature".[179] They are anything but. These treaties contain very strong investor protections and guarantees that are enforceable by ISDS. They have very weak exceptions and zero reference to or exception for Māori or Te Tiriti o Waitangi. They could have been terminated in 2003 and 2010 respectively, as UNCTAD has recommended for such BITs, and the 15-year survivor period that allows existing investors to maintain benefits of the agreement would also have expired.

180. The footnotes Mr Vitalis cites as examples of policy space are very selective and particular to specific agreements. His interpretations are tenuous and extremely vulnerable to tribunal interpretations. The suggestion that a highly conditional general exception relating to health could substitute as a protection for climate measures is fanciful in the hands of an investment tribunal.[180] Professor Kelsey addressed these exceptions in response to Crown questions.[181]

181. The TPPA/CPTPP investment chapter explicitly excludes the limited environment exception to the chapter . That cannot be rescued by a reference to environment in the chapter's preamble,[182] especially as the parties' conscious rejection of the term "climate change" in the environment chapter shows their antipathy to the issue. That is in marked contrast to the explicit inclusion of a narrow carveout to protect tobacco control measures from ISDS in the CPTPP. There are similar problems with the circular provision in the Investment Chapter of the New Zealand Korea FTA that only allows governments to adopt environmental measures that are consistent with the rules of the chapter. [183]

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[179] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [157].
[180] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 138.4.
[181] Wai 3325, *Brief of Evidence of Jane Kelsey in response to Vangelis Vitalis dated 1 September 2026* at [33]-[39].
[182] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 138.5.
[183] Free Trade Agreement between New Zealand and the European Union, art 10.13 ("Investment and Environment").

182. Mr Vitalis suggests that other "important features of arbitration rules" would dissuade investors from initiating action or limit the awards of costs. These examples are all drawn from the CPTPP, [184] but most are not in earlier agreements with ISDS. A dispute under the CPTPP would still require the State to incur significant legal costs with no guarantee of winning or recovery of full costs, while investors are increasingly bankrolled by third party funders. For wealthy habitual litigants like Australian mining magnate Clive Palmer cost is simply not an issue.[185]

183. Professor Kelsey outlined Palmer's four ISDS disputes against Australia under the AANZFTA claiming A$430 billion through a company that also operates in Aotearoa.[186] Recent developments show the "denial of benefits" clause to stop investors from treaty shopping is no deterrent to a determined litigant. Palmer's first case failed at the arbitration tribunal stage and on review in the Swiss courts, on this ground; but his three other claims continue because the arbitration system does not operate on precedent.

D.4 The 2001 Treaty of Waitangi Exception

184. Arguments about ISDS and the Treaty of Waitangi Exception that the Crown has used since 2001 are not new to the Waitangi Tribunal.[187] Mr Vitalis helpfully stated that the Wai 2522 Tribunal's findings on ISDS provisions are directly applicable to the current proceedings and provide "*a well-informed foundation for assessing similar investment-related concerns*".[188] A careful reading of the Tribunal's reports sustains the Claimants' position, not the Crown's.

185. Mr Vitalis claims that the 2001 Treaty of Waitangi 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****. This protection is particularly relevant as New Zealand develops climate policies that integrate mātauranga Māori and recognise Māori rights and interests in natural resources and environmental stewardship*".[189] (emphasis added)

[184] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 139.
[185] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 165.
[186] Wai 3325, #A038, *Third Affidavit of Professor Elizabeth Jane Kelsey evidence dated 13 March 2025* at [81]-[117].
[187] Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at 50–51.
[188] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [158].
[189] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 150.

186. Leaving aside the wishful thinking about mātauranga Māori and Māori rights in New Zealand's climate policies, it is simply not true that there is no risk of an ISDS challenge to climate change measures that reflect Tiriti obligations. That would be correct if agreements contained the new Tiriti o Waitangi protection that was co-designed with Ngā Toki Whakarururanga in 2025 pursuant to the Mediation Agreement,[190] but they do not.

187. Professor Kelsey's explanation is set out in her responses to Mr Vitalis' evidence.[191] In brief: the China and Hong Kong BITs have nothing. The other agreements contain the 2001 Treaty of Waitangi Exception that applies only to measures that provide "more favourable treatment" to Māori and is subject to being overridden by the chapeau. The legal issues with this are discussed in Professor Kelsey's first affidavit.[192]

188. The Wai 2522 Tribunal's urgency report said the Treaty Exception is "likely to provide a reasonable degree of protection". But it went on to observe that:

> *The expert witnesses agree that the* ***Treaty exception does not cover each and every act which the Crown might perform in fulfilment of its Treaty of Waitangi obligations.*** *In part this is because* ***the phrase 'more favourable treatment' narrows the scope*** *of measures to which the exception might apply. There was significant disagreement over exactly which measures would be covered, but* ***it may exclude a range of law and policy in fulfilment of the Treaty of Waitangi****.*[193](emphasis added)
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> …
>
> *"by qualifying the Treaty exception clause to that aspect of the Treaty relationship which may allow the Crown to adopt or implement measures more favourable to Māori,* ***the full constitutional reach of the Treaty relationship may not be as clearly protected and preserved under the TPPA as it might be****."*[194] (emphasis added)

189. Moreover, the Exception only prevents a dispute body involved in state-state disputes from reassessing the Crown's interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it. It does not extend this to a dispute under the investment chapter, and hence ISDS. The Urgency

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[190] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 151.
[191] Wai 3325, *Brief of Evidence of Jane Kelsey in response to Vangelis Vitalis dated 1 September 2026* at [26]-[32].
[192] Wai 3325, #A14 *Affidavit of Elizabeth Jane Kelsey dated 21 October 2024* at [46]-[53].
[193] Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at 39.
[194] Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at 50.

Tribunal expressed concern over and was "troubled by" this "ambiguity".[195]

190. Further, despite concluding that the 2001 Treaty of Waitangi Exception was generally "likely to provide a reasonable degree of protection" (which Professor Kelsey explains is implicitly contradicted in the Stage 3 report[196]), it said:

> *"Despite this finding, we do have concerns. The protections and rights given to foreign investors under the TPPA are extensive.* ***The rights foreign investors have to bring claims against the New Zealand Government in our view raise a serious question about the extent to which those claims, or the threat or apprehension of them, may have a chilling effect on the Crown's willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measures****. This issue and the appropriate text for a Treaty exception clause for future free trade agreements are matters about which there should, in our view, be further dialogue between Māori and the Crown."*[197]

191. That dialogue between MFAT and Ngā Toki Whakarururanga finally concluded in 2026 with a co-designed Tiriti protection that omits the references to "more favourable treatment" and the chapeau and operates as a carveout from obligations rather than an exception. Mr Vitalis' attempt to claim this substantially strengthened protection does not impugn the Crown's claim that the 2001 Exception provides total protection[198] is untenable. However, the provision has yet to be included in any agreement.

192. The Waitangi Tribunal urgency report also proposed the development of a protocol for disputes in which the Treaty Exception might be raised. An ISDS Protocol was prepared in discussions between MFAT and Wai 2522 claimants, but MFAT dictated the content which saw the Crown retain all control, even over the decision whether to invoke the exception. Ms Hallum confirmed that was so.[199]

D.5 The Chilling Effect of ISDS

193. Mr Vitalis acknowledges that ISDS matters for climate change and is a flashpoint in the climate debate. He gives several examples, including Rockhopper

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[195] Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at 41 and 49.
[196] Wai 3325, *Brief of Evidence of Jane Kelsey in response to Vangelis Vitalis dated 1 September 2026* at [29]-[30].
[197] Waitangi Tribunal, Letter from Presiding Officer Judge Doogan to the Prime Minister and other Ministers, at page xii of the Stage 1 Report, Wai 2522, 2016.
[198] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at [151].
[199] Wai 3325, A137(c) *Responses to questions in writing of Victoria Hallum from hearing week six dated 26 May 26* [107]-[110], Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 152-153.

Exploration suing Italy after it banned offshore oil drilling. He then says these cases are not accepted as evidence of regulatory chill (without explanation) and "these cases do not reflect the regulatory or legal environment in New Zealand".[200] That is directly contradicted by the evidence of former Climate Minister James Shaw that advice on ISDS was directly affected the decisions made in 2018 on the oil and gas ban, discussed below.[201]

194. Despite the Crown's attempt to downplay the chilling effect of ISDS, there is abundant evidence of its impacts on decision making, supported by concerns from the Waitangi Tribunal, whether that effect is the result of direct threats by an investor or internalised risk-aversion of officials and ministers. The example of delays to the introduction of plain packaging of tobacco products is well-documented,[202] and recognised by the Wai 2522 tribunal.[203] Even a former Crown negotiator, Rory McLeod, identified ISDS and the chilling effect on government policies as an example of "the incompatibility of specific trade rules with climate policies" that can exacerbate the climate crisis.[204]

195. But the best evidence about regulatory chill is from ministers who received and acted on this advice at the decision-making table. The Claimants' evidence on the chilling effect of ISDS included an article in *The Guardian* quoting former Climate Minister James Shaw saying the scope of the ban on offshore oil and gas exploration in 2018 was limited because advice from officials on the risks of ISDS.[205]

196. In cross examination, Mr Shaw explained how the chilling effect worked.[206] As a Minister, he was committed to acting within the law and within the trade agreements, which included investor rights and protections in the investment chapters of those agreements that could be enforced through ISDS.

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[200] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 125.
[201] Wai 3325, #A123, *Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025* at 168; Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [58]-[60].
[202] Wai 3325, #A147(a) Index and appendices to the Fifth brief of evidence of Elizabeth Jane Kelsey dated 29 January 2026 attached as Exhibit "I" and "J".
[203] Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement (Stage 1 Report),* (Wai 2522, 2016) at 70.
[204] Wai 3325, #A142, *Fourth affidavit of Elizabeth Jane Kelsey in response to Crown evidence dated 12 November 2025* at [29], referring to point (iv) on page 5 of the McLeod paper.
[205] Wai 3325, #A38 *Third affidavit of Elizabeth Jane Kelsey dated 7 March 2025* at [75]; Wai 3325, #A38(a) attached as Exhibit "R".
[206] Wai 3325, #4.1.11 at 405–408 Hon James Shaw, transcript, 30 April 2026.

> *"The advice that we got from officials was always very conservative and that's probably appropriate. But my sense of it, and I'm choosing my words carefully,* ***my sense of it was that there was generally more latitude than we were advised if we kind of really wanted to push something****, but you know obviously if you did really want to push the boundaries that was going to increase the risk, and given the scale of kind of economic interest involved, you know,* ***we could easily find ourselves in court and then what would otherwise be a fairly significant policy win would turn into a loss, so we didn't want to risk that****".*[207](emphasis added)

197. Mr Shaw went on to note that the cost of ISDS litigation is on the public record "*so anybody is going to be cautious about sort of engaging in that*"[208] and "***the advice that I received was that we should limit the law to limit the Crown's potential liability***".[209] When asked specifically about the implications of the chilling effect on Tiriti compliant policies in the climate context, Mr Shaw said:

> ***"Those clauses I believe do constrain the Crown's ability to pass environmental regulations that would meet the scale of the climate crisis*** *and other environmental challenges that we face. And therefore, if you also accept that Māori are disproportionately exposed to risks from climate change and you believe that or accept the proposition that the Crown has an obligation under te Tiriti in order to ensure that that does not happen, then it would follow that these causes [sic][210] do make it more challenging for the Crown to meet its Treaty obligations as you've suggested."*[211] (emphasis added)

198. The Claimants note that Crown counsel intervened to query whether legally privileged advice to Ministers could be subsequently released.[212] That intervention, in itself, illustrates the difficulty of proving the chilling effect when official or legal advice has been withheld from scrutiny.

199. Mr Vitalis also cited an MFAT response to an Official Information Act request by Professor Kelsey to show officials had not given advice on the ISDS implications of oil and gas policy.[213] In fact, documents secured by Professor Kelsey regarding policy decisions included advice on legal risks, legal considerations, reputational risks and sovereign risks that, while heavily redacted, clearly indicate that advice on ISDS and FTAs was given. [214]

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[207] Wai 3325, #4.1.11 at 406 [13]-[14].
[208] Wai 3325, #4.1.11 at 407 [29]-[30].
[209] Wai 3325, #4.1.11 at 408 [6]-[8].
[210] This should read "clauses".
[211] Wai 3325, #4.1.11 at 408 [20]-[28].
[212] Wai 3325, #4.1.11 at 407 [5-14].
[213] Wai 3325, #A123, Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025 at [168].
[214] Wai 3325, #A142(a), *Index to the exhibits of Elizabeth Jane Kelsey's fourth affidavit dated 12 November 2025* as Exhibits "L", "M", "N", "O", "P".

200. As above, Mr Vitalis relied on the Urgency stage report of the Wai 2522 TPPA claim on regulatory chill. However, it was in its Stage 3 report that the Wai 2522 Tribunal considered the question of regulatory chill in depth. It said:

> **"*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."*[215]
>
> **...**
>
> "*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*** *..."*
>
> *The argument at the centre of the claims before us is* ***whether the standard of active protection has been met by the Crown in light of the potential risk posed to Māori by the e-commerce provisions. We see regulatory chill as potentially contributing to that risk.*** (emphasis added) [216]

D.6 The fallacy of "investor confidence"

201. Mr Vitalis defends ISDS as important to give foreign investors confidence. That is not supported by other governments' assessments. For example, the Australian Productivity Commission found in 2010 that the absence of ISDS provisions does not result in any statistical variation in the pattern of foreign investment, and recommended against incorporating them in agreements.[217] Logic also suggests that many other factors are more important determinants of investment in a small, remote country like Aotearoa New Zealand.

202. Additional challenges to Mr Vitalis' economic rationale include:

    i. Why should foreign investors have more enforceable rights than Māori in

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[215] Waitangi Tribunal *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership Report* (Wai 2522, 2020) at 161.
[216] Waitangi Tribunal *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership Report* (Wai 2522, 2020) at 176.
[217] Australian Productivity Commission *Bilateral and Regional Trade Agreements* (Research Report, November 2010) at 269.

Aotearoa?

ii. Why should foreign investors, whose motive is to make a profit, receive a subsidy through ISDS to lower the perceived risk of their investment?

iii. Why can't New Zealand investors offshore, or foreign investors in Aotearoa take out political risk insurance if they are still concerned after doing due diligence?

iv. Why should rights of investors in controversial activities or projects, or where Māori have made it clear they consider Te Tiriti is being breached, or in activities where there are demands for stricter climate regulation, be more important than those priorities?

v. Why should one government's pro-investors policies or actions, such as the current Coalition Government, create a liability for future government's decisions, the public purse, and future generations?

D.7 Exiting ISDS

203. The Crown will try to say it is not possible for New Zealand as a small, relatively powerless state, to do more than the current policy, even though that could be reversed by a Cabinet decision. That does not constitute "active protection".

204. Developments with international investment agreements and ISDS show what is possible.

i. The growing international backlash against ISDS has seen many States terminate standalone BITs and/or withdraw from the World Bank investment arbitration convention, including Indonesia, India, South Africa, Ecuador, Pakistan, Bolivia, Venezuela.

ii. As Mr Vitalis observed, for some countries this is in response to climate and sustainability goals. In 2020, 23 EU Member States signed an agreement to terminate intra-EU BITs, and the EU finalised its withdrawal from the Energy Charter Treaty in June 2025.

iii. The North American Free Trade Agreement 1994 (NAFTA) between

Canada, the US and Mexico was the landmark for ISDS. Its renegotiation as the US Mexico Canada Agreement concluded in 2018 removed ISDS between the US and Canada and severely truncated it for Mexico. This shows parties can agree to remove ISDS or circumscribe its continuance.

iv. South Africa's Parliament passed The Protection of Investment Act in 2015. This is domestic legislation that aims to provide investors with redress in the domestic courts, where appropriate, subject to the constitution and other international obligations. That followed an ISDS case that challenged South Africa's post-apartheid Black Empowerment Act that required partial divestment of a mining company, claiming discrimination and expropriation. The government watered down the legislation and the claim was dropped.[218]

v. Australia is actively reviewing all its bilateral agreements with ISDS and has already terminated some. A government Bill before the Australian Parliament, the Trade and Investment Agreements (Consultation) Bill, in Clause 16 says the Minister must not sign a proposed free trade agreement that includes provisions for investor-state dispute settlement.

205. The 2023 report of the UN Special Rapporteur on the Human Right to a Clean, Healthy and Sustainable Environment provided a list of measures on ISDS that states should take immediately to foster urgent and ambitious climate and environmental action and fulfil their human rights obligations, including those related to the right to a clean, healthy and sustainable environment. The following are particularly relevant in light of the Tiriti context and the Claimants' evidence to the Tribunal:

i. Unilaterally or jointly terminate existing BITs that include ISDS.

ii. Negotiate the removal of ISDS mechanisms from all existing IIAs and the termination of survivor clauses for existing investments.

[218] *Protection of Investment Act 22 of 2015* (South Africa), commenced 13 July 2018; *Piero Foresti, Laura de Carli and Others v Republic of South Africa* (ICSID Case No ARB(AF)/07/1, Award, 4 August 2010); South African Government "Government welcomes outcome of international case against South Africa (SA) mining law" (5 August 2010).

iii. Refuse to include ISDS procedures in new IIAs.

iv. Guarantee States' ability to take actions intended to fulfil their human rights obligations.

v. Designate domestic courts as the appropriate forum for resolving investor-State disputes.

vi. Preclude compensation claims in domestic courts by foreign investors that violate domestic legislation, commit human rights abuses or otherwise fail to comply with national, regional and international standards.

vii. Cap any compensation at the amount the foreign investor can prove it has invested in a project and not recouped.

viii. Impose enforceable human rights responsibilities on foreign investors, including mandatory human rights and environmental due diligence;

ix. Ensure timely and affordable access to justice with effective remedies for communities and individuals whose human rights are threatened or affected by foreign investors.

x. Promote the values of transparency, accountability, equality, non-discrimination, prevention and sustainable development.

xi. Conduct, in line with the Guiding Principles on Business and Human Rights, impact assessments of trade and investment agreements, ex ante, and ex post impact assessments of IIAs on human rights and the environment and implement all recommendations;

xii. Support negotiations towards the proposed international treaty on transnational corporations and human rights, and swiftly ratify it once an agreement is reached.[219]

206. Mr Vitalis argued that New Zealand was relatively powerless to do more than seek to exclude ISDS from new agreements or seek side-letters where that is not

[219] David R Boyd *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights* UN Doc A/78/168 (13 July 2023) at [68]–[69].

possible in multi-party treaties. However, the Crown could do much more. In addition to those referred to above it could, specifically in relation to ISDS:

i. Unilaterally terminate the China and Hong Kong BITs, especially as there are similar investment rules in their FTAs with marginally better protections.

ii. Legislate not to include ISDS in agreements, as the Australian Federal Government has proposed in the Trade and Investment Agreements (Consultation) Bill 2026 currently before the Parliament.

iii. Legislate to require the stronger Tiriti o Waitangi carveout in agreements for compliance, which would provide additional leverage in negotiations where the Crown claims New Zealand is a small player.

iv. Empower the Waitangi Tribunal to mediate or determine investment disputes that involve Māori or Tiriti o Waitangi responsibilities, duties, rights or interests.

v. Pending this, rewrite the ISDS Protocol to ensure Māori have effective control of decisions specifically relating to Tiriti issues and shared decision making and advocacy in all disputes.

FINDINGS AND RECOMMENDATIONS

207. Te Tiriti o Waitangi guarantees the fundamental right of Māori to live as Māori in Aotearoa New Zealand, to continue to exercise their tino rangatiratanga, and to maintain their whakapapa relationships with, and responsibilities as kaitiaki of, te Taiao. The Crown accepted the responsibility to ensure those duties, responsibilities and rights were maintained and protected as a condition of its presence in Aotearoa. The Crown has systematically failed to comply with its obligations under te Tiriti over the past 146 years, most recently in relation to the climate crisis.

208. Today's climate emergency poses an existential threat to delivering on the vision of the tupuna when they adopted Te Tiriti o Waitangi, not just for the benefit of Māori but for everyone and everything in Aotearoa New Zealand. This inquiry has exposed the many ways in which the Crown has breached its Tiriti o Waitangi obligations by acts and omissions, domestically and internationally, that have

contributed to and have failed to prevent or mitigate this existential crisis for Aotearoa New Zealand.

209. The Claimants have shown that the Crown cannot meet its Tiriti responsibilities through domestic action alone. Its conduct in the international sphere, including the negotiation and implementation of international climate, trade and investment agreements, has direct consequences for Māori, te Taiao, and the ability of Māori to exercise Tino Rangatiratanga, Mana Motuhake and kaitiakitanga according to tikanga Māori.

210. Because the climate emergency is global and the national and international domains are inextricably intertwined, effective responses require urgent action at the domestic level through legislation, policy, decisions and actions, and through international commitments and treaties related to or impacting on the climate crisis that are entered into or maintained on behalf of Aotearoa New Zealand.

211. The evidence adduced by the Claimants shows the Crown has excluded Māori from participation, representation and decision-making and failed to ensure active protection in the international trade and investment sphere through actions and omissions that:

    i. embed an extractive economic model that exacerbates the climate crisis;

    ii. eschew obligations that could significantly reduce the country's emissions;

    iii. promote false solutions to the climate crisis that enable the continuation of anthropogenic climate change; and

    iv. maintain commitments to foreign investment and enforcement mechanisms that put the ability to take effective action at significant risk.

212. The urgency and scale of the climate crisis require a more transformative Tiriti-consistent approach that recognises Māori authority and enables tikanga, mātauranga and kaitiakitanga to inform both Aotearoa New Zealand's domestic response and its conduct internationally. Specifically in the international sphere, the principles of Rangatiratanga, Kāwanatanga, partnership, mutual recognition and respect, active protection and redress require a fundamental shift in power, process

and substance to achieve that tika transition, one that is based upon shared authority in all decisions that affect the climate emergency and the future of te Taiao.

213. The Claimants accordingly ask the Tribunal to find that the Crown's approach to the international domain in general, and trade and investment agreements in particular, is inconsistent with its obligations under te Tiriti and it has failed to protect Māori from the disproportionate effects of the climate crisis.

214. The Crown is likely to argue that the capitalist economic growth and extraction model is inevitable and immutable – the TINA syndrome (There Is No Alternative) – even while it is consuming the planet, and that its duty is merely to mitigate its impacts to the extent it can do so within the limitations of a small state in inter-state negotiations and the existing trade and investment model. But the TINA thesis is a recipe for catastrophe. Nor can it be reconciled with te Ao Māori, the authority of Rangatiratanga and Mana, the cosmological inter-relationship of all species and te Taiao, the duties of kaitiaki in relation to taonga and safeguarding a world for future generations, the recognition and application of mātauranga Māori, and conduct and decisions conducted according to tikanga. Its continuation is not 'redress'.

215. Solutions to the climate crisis – genuine Tiriti-compliant redress - cannot be found in replicating the mistakes of the past. Alternative possibilities still exist and the planet desperately needs them. For a 'tika transition', tikanga, Te Tiriti and the UNDRIP must inform the transition to a low emissions economy. That transition must be based in a relational understanding of the world, in Tikanga Māori values of whanaungatanga, utu, kaitiakitanga, aligned with Te Tiriti o Waitangi, tino rangatiratanga and partnership with shared decision-making and smaller scale, localised energy production, food and water resilience, recycling, parakore. The Crown has a duty to provide that redress.

216. Genuinely alternative international trade and investment agreements are possible – are essential – to the future of the planet. The Crown has a duty to advance them in a Tiriti-compliant manner.

217. Given the extremity of the challenge posed by the climate crisis and the existential consequences of the Crown's breaches, the Claimants emphasise the need for the Tribunal when considering its findings and recommendations to recall previous

Tribunal's interpretations of the Act "*that in making recommendations, there is no requirement that the Tribunal make only practical recommendations*".[220]

Findings

218. The claimants seek the following findings and recommendations that are necessary to restore the balance between Rangatiratanga and Kāwanatanga and ensure that Aotearoa New Zealand's response to the climate emergency, both domestically and internationally, is grounded in and gives effect to Te Tiriti o Waitangi. They are framed in terms of the three elements of the statement of claim that are focused on in this submission.

Tino Rangatiratanga, Kāwanatanga and Climate Change

Findings

219. Te Tiriti o Waitangi does not cease to apply when the state of Aotearoa New Zealand acts internationally. The constitutional authority and responsibilities of Mana Motuhake and Tino Rangatiratanga have never been ceded to the Crown, including on international treaties. The Crown has relied upon an illegitimate unilateral assertion of its exclusive authority in international affairs to negate the guarantee to continued exercise of Tino Rangatiratanga and its other Tiriti obligations.

220. In claiming an exclusive prerogative to design, negotiate, sign, ratify and implement international treaties relating to climate change the Crown exceeds the limited privileges conferred on Kāwanatanga to represent the state in international affairs, only when it is necessary to do so and for the purpose of protecting Rangatiratanga.

221. Activities conducted by and for Aotearoa New Zealand in the international domain on matters relating to the climate emergency, including in climate and international trade and investment treaties, must therefore be exercised in a manner consistent with Te Tiriti o Waitangi, and the principles of Rangatiratanga and Kāwanatanga. The Crown has failed to do so.

[220] Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 297.

222. When Aotearoa New Zealand speaks with “one voice” internationally that can and must be in a manner that is consistent with the Rangatiratanga Kāwanatanga relationship.

223. The Crown’s assertion of a prerogative to enter into international treaties that can be mandated, negotiated and concluded exclusively by the Executive, in secret and to the exclusion even of Parliament, fails even to comply with its own constitutional tenets of parliamentary sovereignty, democratic governance and transparency. This removes accountability for decisions to enter into and maintain international trade and investment agreements that compound the climate emergency and constrain the ability and willingness of the Crown to adopt Tiriti-compliant climate action.

Recommendations

224. The Claimants seek cumulative recommendations that the Crown:

225. Ceases to claim and exercise exclusive executive authority to engage in the international domain on behalf of Aotearoa New Zealand, to the exclusion of Māori, including in the making of international trade and investment treaties;

226. The Crown develops, with Māori, as a matter of urgency a mechanism to restore the exercise equal authority and speak with one voice for Aotearoa New Zealand in the international domain when addressing the climate emergency, as anticipated by Te Tiriti o Waitangi, including in the making of international trade and investment treaties;

    i. As an interim measure pending the adoption of the Tiriti-consistent approach to international negotiations under (ii), the Crown

    ii. immediately works with Māori to jointly reform the process for international treaty-making to ensure active protection of the ability to take Tiriti-compliant climate action; effective protection of Te Tiriti o Waitangi in existing and future trade and investment agreements; and full transparency, Māori participation and parliamentary accountability in decision-making during the interim period; and

iii. develops jointly with Māori effective processes for the co-design of mandates, joint participation and voice in delegations, adequate resourcing, open information sharing, and development of tika climate initiatives and Tiriti-based protections.

Conflicting Worldviews in the Trade Climate Nexus

Findings

227. The Western capitalist economic model that is built on and perpetuates colonial extractivism, and is the foundation of free trade and investment agreements, is, itself, the major cause of the global emergency. It is both unsustainable and unjust.

228. Redress cannot be achieved without changing both the economic paradigm that has created the current crisis, and the international trade and investment agreements that lock in its practices and causes.

229. Nor can redress be achieved by:

i. financialised, technological or market-based "solutions" that allow that paradigm and those practices to continue unabated;

ii. failure to address significant anthropogenic climate factors, such as agricultural emissions and fossil fuels extraction and use, in international trade rules; or

iii. inserting ineffectual or speculative exceptions into trade and investment agreements that perpetuate that model.

230. Solutions to the crisis can only be found in alternatives. Māori and other Indigenous Peoples have those alternatives, sourced in values, duties and responsibilities to Te Taiao, and developed and practiced over time immemorial. But the Crown has subordinated Māori authority, tikanga, mātauranga and kaitiaki responsibilities to those economic, trade and investment objectives domestically and internationally through free trade and investment agreements.

Recommendations

231. The Claimants seek recommendations that the Crown:

i. develops, with Māori, an alternative model for international trade and investment relationships that advance a tika transition that is grounded in the fundamental values of tikanga, mātauranga, kaitiakitanga, and actively seeks to advance that model with like-minded peoples across the Pacific nations and beyond;

ii. stops negotiating new agreements that embed the model of capitalist economic growth and extractivism that is exacerbating the climate crisis, and advancing concepts and instruments that offer false solutions to the climate crisis that enable anthropogenic climate impacts to continue, including new forms of "green extractivism";

iii. proactively and immediately takes steps to review, jointly with Māori, existing trade and investment agreements that contribute to anthropogenic climate change with a view to rendering them compatible with the exercise of rangatiratanga and tikanga and consistent with mātauranga Māori;

iv. specifically, terminates current and rejects future negotiations for "critical minerals" that would cause further harm to Papatūānuku and Tangaroa;

v. while recommendation (i) is underway, develops coherent arrangements across and within its agencies for genuinely Tiriti-based engagement and joint decision-making on international negotiations in relation to climate change.

Investor-State Dispute Settlement

Findings

232. Investor-state dispute settlement gives stronger enforceable rights to foreign investors than Māori enjoy under te Tiriti o Waitangi, in fundamental breach of all the Crown's Tiriti obligations.

233. The risks that ISDS poses to climate action and fulfilling the State's commitments under the Paris Agreement on climate change are well recognised internationally.

234. By adopting a policy since 2017 of rejecting ISDS in new free trade and investment agreements as part of an international trend, the Crown has confirmed the Claimants' argument that ISDS poses a major risk to sovereignty, transparency, and

the need to preserve the authority to adopt public policies, including climate and environmental measures.[221]

235. However, that is only a policy and subject to reversal through the Executive's claim to prerogative treaty-making power.

236. Aotearoa New Zealand still has exposure to ISDS through a number of existing bilateral investment treaties and investment chapters in free trade agreements that creates potential prejudice to Tiriti-consistent climate action. The Crown's denial that those agreements pose risks to Te Tiriti and climate action is not convincing and contradicts its own rationale for the "no ISDS" policy.

237. The Tribunal endorses the findings of the Wai 2522 Urgency Inquiry that more recent free trade and investment agreements, which the Crown says provide stronger protections for State sovereignty, still pose significant risks:

> *"We do not accept the Crown's argument that claimant fears in this regard are overstated. While we think the Crown fairly pointed to various provisions in the TPPA designed to preserve state regulatory autonomy and improve the operation of ISDS 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."*[222]

238. The Tribunal confirms that ISDS poses serious risks of regulatory chill to Tiriti-compliance by the Crown, as

(i) recognised by the Waitangi Tribunal in the Wai 2522 urgency hearing:

> *"The protections and rights given to foreign investors under the TPPA are extensive. The rights foreign investors have to bring claims against the New Zealand Government in our view raise a serious question about the extent to which those claims, or the threat or apprehension of them, may have a chilling effect on the Crown's willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measures."*[223]

(ii) in the Wai 2522 Stage 3 inquiry:

> "*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*

[221] Wai 3325, #A123, Brief of evidence of Evangelos (Vangelis) Vitalis dated 3 October 2025 at [127].
[222] Waitangi Tribunal *The Trans-Pacific Partnership Agreement Inquiry Report* (Wai 2522, 2016) at 50–51.
[223] Waitangi Tribunal *The Trans-Pacific Partnership Agreement Inquiry Report* (Wai 2522, 2016) at xii, letter from Judge M J Doogan, Presiding Officer, to the Prime Minister and other Ministers.

foreign corporate and state pressure on governments in the adoption of digital policies. That pressure is designed to chill the decision making process." [224]

(iii) and further on the Wai 2522 Stage 3 inquiry:

"*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 …"*

(iv) and affirmed specifically in relation to Tiriti obligations in the climate space by former Climate Change Minister James Shaw:

"Those clauses I believe do constrain the Crown's ability to pass environmental regulations that would meet the scale of the climate crisis and other environmental challenges that we face. And therefore, if you also accept that Māori are disproportionately exposed to risks from climate change and you believe that or accept the proposition that the Crown has an obligation under te Tiriti in order to ensure that that does not happen, then it would follow that these causes [sic] do make it more challenging for the Crown to meet its Treaty obligations as you've suggested."[225]

Recommendations

239. The claimants seek recommendations that the Crown:

(i) immediately terminates the bilateral investment treaties with China and Hong Kong;

(ii) proactively initiates all available steps to remove ISDS from existing trade and investment agreements;

(iii) enacts legislation that prevents a future government from adopting or maintaining such a dispute mechanism and requires the ongoing review of possibilities for termination of ISDS as recommended in (ii);

(iv) works with Māori to examine options for alternatives to ISDS, including those identified in paragraphs [204] to [206] of this submission, which would ensure effective compliance with, and primacy of, Te Tiriti o Waitangi and the UNDRIP, protect climate action, and ensure

[224] Waitangi Tribunal *The Trans-Pacific Partnership Agreement Inquiry Report* (Wai 2522, 2016) at 161.
[225] Wai 3325, #4.1.11 at 408 lines [20]-[28].

responsibility of investors for actions that adversely impact on climate change; and

(v) reconvenes with Ngā Toki Whakarururanga to revise the Investor-State Dispute Settlement Protocol to genuinely reflect the Tiriti relationship through joint decision-making to identify potential Tiriti issues in an ISDS dispute, the appropriate form of defence and representation, and the delegation to Māori of the obligation of representation in those aspects of a dispute that are of major significance.

240. Such other recommendations as the Tribunal considers appropriate to provide effective redress for the Crown's past and present breaches of its Tiriti o Waitangi obligations in relation to the climate crisis.

CONCLUSION

241. For the reasons set out above, the Claimants submit that the Crown's conduct in relation to international trade and investment agreements has failed to give proper effect to its obligations under Te Tiriti o Waitangi and has contributed to, and constrained Tiriti-consistent responses to, the climate crisis.

242. The Claimants accordingly seek the findings and recommendations set out above, together with such other recommendations as the Tribunal considers appropriate to provide effective redress and prevent further prejudice.

DATED at Rotorua this 2nd day of October 2026

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