

BEFORE THE WAITANGI TRIBUNAL

WAI 3325
WAI 3395

IN THE MATTER OF

the Treaty of Waitangi Act
1975

AND

IN THE MATTER OF

the Climate Change Priority
Inquiry (Wai 3325)

AND

IN THE MATTER OF

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

AFFIDAVIT OF ELIZABETH JANE KELSEY

Dated this 21st day of October 2024



**ANNETTE
SYKES & Co.**
barristers & solicitors

Annette Sykes & Co
8 – Unit 1 Marguerita Street
Rotorua, 3010
Phone: 07-460-0433

Counsel Acting: Annette Sykes / Sam Vincent
Email: asykes@annettesykes.com / sam@annettesykes.com

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





A. INTRODUCTION

1. I am a Professor Emeritus of the Faculty of Law at the University of Auckland. I hold a Bachelor of Laws (First Class Honours) from Victoria University of Wellington, postgraduate law degrees from Oxford University and the University of Cambridge, and a PhD in Law from the University of Auckland. I was appointed to the Faculty of Law at Auckland University in 1979 as a lecturer, was awarded a personal chair in law in 1997, and retired in December 2021.
2. I am Pākeha. Throughout my career I have researched and taught on three main areas: Te Tiriti o Waitangi and decolonisation; contemporary law and policy; and international economic regulation. I am widely published in all fields.

A.1 Relevant experience in free trade and investment agreements

3. As part of my academic work since 1990 I have closely monitored multilateral, regional and bilateral negotiations for free trade and investment agreements, which are binding and generally enforceable by other state parties, and in the case of investment are commonly enforceable by foreign investors directly against governments through international arbitration.
4. I am an internationally-recognised academic expert on the negotiation, analysis and implementation of such agreements. I have written numerous books and many articles on the subject; delivered invited keynote addresses at international conferences; analysed negotiating texts; briefed and advised government delegations, officials and parliamentarians from a number of countries; prepared technical reports, submissions and formal documents; and advised and trained professional, business, trade unions and non-government organisations.

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5. From 2015 to 2018 I had a Marsden Grant to research Options and Strategies to Transcend Embedded Neoliberalism in International Economic Regulation. International investment agreements were one of four case studies.
6. Prior to Covid-19 I attended a number of bi-annual negotiating sessions of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) on the reform of investor-state dispute settlement (ISDS), variously as an intervenor and delegate of the Third World Network, an adviser to a number of developing countries, and a speaker on panels with the heads of delegation from key countries.
7. I have made numerous presentations at the World Investment Forum of the United Nations Conference on Trade and Development (UNCTAD), the lead intergovernmental agency on investment agreements, and been a reviewer of their draft annual investment reports.
8. Specifically on climate change, I monitored particularly closely the Trans-Pacific Partnership Agreement (TPPA) negotiations, and analysed the leaked TPPA Environment Chapter, including in relation to climate change.

A.2 Expertise on Te Tiriti o Waitangi

9. A second relevant area of my academic expertise is contemporary Te Tiriti o Waitangi policy. I have written extensively on the tensions between the Crown's obligations under Te Tiriti o Waitangi and the New Zealand state's obligations under free trade and investment agreements.
10. I have given evidence in a number of Waitangi Tribunal inquiries, including *He Maungo Rongo: Report on Central North Island Claims*, Stage One, (WAI 1200); *Wānanga Capital Establishment Inquiry* (Wai 718); *Te Paparahi o Te Raki* Stage Two (Wai 1400); *Te Rau o te Tika* (Wai 3060); *Tomokia ngā tatau o Matangireia* (WAI 3300).



11. My evidence to the initial *National Fresh Water and Geothermal Resources Inquiry* (WAI 2358) addressed the potential chilling effect of ISDS on the Crown's future compliance with its Tiriti o Waitangi obligations. From 2015 to 2021 I was the claimants' expert in the three hearings of the *Trans-Pacific Partnership Agreement Inquiry* (Wai 2522) and their mediation with the Crown. The resulting Mediation Agreement led to the establishment of Ngā Toki Whakarururanga.

A.3 Role as Pūkenga for Ngā Toki Whakarururanga

12. Since 2020 I have been a technical pūkenga for Ngā Toki Whakarururanga. Ngā Toki Whakarururanga's foundational kaupapa is to uphold Te Tiriti o Waitangi and He Whakaputanga o te Rangatiratanga o Nu Tireni by protecting and advancing Māori responsibilities, duties, rights and interests, in the international trade space and holding the Crown to account against its Tiriti obligations in trade policy and negotiations.¹

13. The Crown promised in the Mediation Agreement to ensure that Ngā Toki Whakarururanga would have genuine and meaningful influence at all stages of trade policy and negotiations.² In my capacity as a pūkenga, I have engaged with Ministry of Foreign Affairs and Trade (MFAT) officials on numerous negotiations that are relevant to this hearing. Often I have worked in conjunction with Maui Solomon (Moriōri, Ngāi Tahu) as another technical pūkenga.

14. These inputs are almost always on a confidential basis, which limits the ability to engage with Māori who have expertise on the relevant subject matter. The evidence I place before the Tribunal in this affidavit does not draw on confidential information that has been sourced only from MFAT in that capacity.

¹ Statement of Claim of Pite Tipene and others (Ngā Toki Whakarururanga) at [2], Wai 3395, #3.1.1.

² Waitangi Tribunal, *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (Wai 2522)*, 2021 (CPTPP Report), Appendix II at paragraphs 11 and 13.4.



15. One of Ngā Toki Whakarururanga's functions under the Mediation Agreement is to conduct Tiriti o Waitangi assessments of trade agreements. I was the lead writer for Ngā Toki Whakarururanga's Tiriti assessments of the Indo-Pacific Economic Framework (IPEF), including the agreements on Clean Economy (climate change) and Supply Chains, the Free Trade Agreement (FTA) with the European Union, as well as MFAT's Inclusive Trade Action Group (ITAG) report that reviewed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). I also prepared a Tiriti o Waitangi assessment for Ngā Toki Whakarururanga on the revised ASEAN Australia New Zealand Free Trade Agreement (AANZFTA), which includes ISDS provisions that are relevant to climate change. An assessment of the Agreement on Climate Change Trade and Sustainability (ACCTS) is in draft pending the formal release of the text; for confidentiality reasons, only publicly available information on ACCTS is referred to in this affidavit.
16. With Counsel Ms Annette Sykes, I interacted with MFAT on the development of a protocol for potential ISDS disputes that affect Māori and in which the Treaty of Waitangi Exception might be argued.
17. These various documents are referenced in evidence below and annexed to this affidavit.
18. I confirm that I have read the Code of Conduct for Expert Witnesses.³ I agree to comply with this Code. This evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

³ High Court Rules 2016, schedule 4.



B. SCOPE OF EVIDENCE

19. This evidence addresses three main elements:

- (i) The Crown's failure to recognise and give effect to the principle of Rangatiratanga in the process of negotiating, and in the substance of, international trade and investment agreements as they relate to the climate crisis, and the Crown's exceeding of its authority under the principle of Kāwanatanga. Further breaches relate to Tiriti-derived principles of Mutual Recognition and Respect, Partnership, and Active Protection.
- (ii) The Crown's adoption of international free trade and investment agreements that either seek to avoid any binding commitments on climate change, or actively promote "green technologies" and investments, including "nature-based", "blue carbon" and carbon trading, as solutions, while not reducing or altering trade-related activities that exacerbate the climate crisis.

Both approaches promote and adopt concepts, legal and economic instruments, technologies and techniques, and practices that embody western capitalist worldviews that are contradictory to tikanga, mātauranga and kaitiakitanga, and have often impacted negatively on the responsibilities, rights and wellbeing of Indigenous Peoples around the world.

- (iii) The Crown has adopted international obligations in a number of trade and investment treaties that provide foreign investors with access to the controversial enforcement regime of investor-state dispute settlement (ISDS). ISDS enables foreign investors to sue governments directly in international arbitral tribunals for alleged breaches of special rights that the host government has guaranteed under investment agreements or investment chapters in FTAs and to seek large compensatory awards.


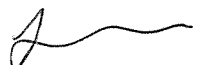


The ISDS regime has been disproportionately used by foreign investors in resource-based activities and, recently, to challenge measures to address the climate crisis.

New Zealand governments since 2017 have adopted a policy not to include ISDS in future agreements, but existing agreements retain the ISDS mechanism. That potentially opens to legal challenge any new Tiriti-compliant climate change measures and Crown actions to stop or prevent climate-toxic activities, including changes to the terms of extraction licenses that may be awarded under the current coalition government. Threats to bring such disputes can have a chilling effect on governments' willingness to adopt such measures.

20. The approaches referred to in paragraph 18(ii) will be illustrated by reference to:

- (i) The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the successor to the TPPA, that involves Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam, and the recent accession of the United Kingdom. This includes the Inclusive Trade Action Group 3-year review conducted by MFAT of the CPTPP.
- (ii) The Agreements on "Clean Economy" and "Supply Chains" as part of the IPEF, signed by the Crown on behalf of Aotearoa New Zealand in May 2024 and November 2023, respectively. The IPEF negotiations were driven by the United States (US), and included Australia, Brunei Darussalam, India, Indonesia, Fiji, Japan, Malaysia, Philippines, Singapore, South Korea, Thailand, United States and Viet Nam.
- (iii) The Agreement on Climate Change Trade and Sustainability (ACCTS) between New Zealand, Costa Rica, Iceland and

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Switzerland, concluded in July 2024. As noted above, this is based on publicly available information, as the text has not been publicly released.

- (iv) The Trade and Sustainable Development chapter of the New Zealand European Union FTA that entered into force on 1 May 2024.

21. With reference to paragraph 18(iii) on ISDS, my evidence will address:

- (i) The Hong Kong New Zealand Agreement for the Promotion and Protection Investment 1995, which is a stand-alone bilateral investment agreement with Hong Kong;
- (ii) The China New Zealand Agreement for the Promotion and Protection Investment 1988 and the investment chapter of the New Zealand China Free Trade Agreement 2008;
- (iii) The CPTPP (see paragraph 19(i) above), which contains ISDS powers for investors of the Parties and for which New Zealand has bilateral side agreements with some parties not to use ISDS between them; and
- (iv) The second protocol to the ASEAN Australia New Zealand FTA (AANZFTA), involving Australia, Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Philippines, Singapore, Thailand, Viet Nam and New Zealand. The original agreement entered into force in 2010. The Protocol, which was signed in June 2024, retains the rights in the original AANZFTA for investors from those countries to bring an ISDS dispute against Aotearoa New Zealand.

C. RANGATIRATANGA IN TREATY MAKING

22. To date, no Waitangi Tribunal has directly addressed the constitutional authority to make international treaties under Te Tiriti o Waitangi.



C.1 Rangatiratanga and the right to treat

23. The starting point for understanding rangatiratanga in the international treaty-making space is the briefs of evidence that Dr Moana Jackson submitted in a series of Waitangi Tribunal inquiries: *Te Rohe Potae* (Wai 898), *Te Paparahi o te Raki* (Wai 1040) and TPPA (Wai 2522) claims.⁴ The Tribunal in the Wai 2522 TPPA inquiry deferred the matter of international treaty-making authority to the Constitutional Kaupapa inquiry.⁵ Ngā Toki Whakarururanga has relied on Dr Jackson's evidence in its Statement of Claim to that inquiry.

24. Although a conclusive analysis in the Constitutional Kaupapa inquiry is still pending, Dr Jackson's evidence that Rangatira never ceded any power to the Crown to make international treaties on behalf of their hapū is critical to this inquiry when considering the authority of Rangatiratanga and the limitations on Kāwanatanga and the related principles.

25. The following extract from Dr Jackson's evidence is pivotal to the principle of Rangatiratanga in relation to the mana and authority to treat:

Like all concepts of power, mana or tino rangatiratanga is made up of a number of different but inseparable constituent parts that may be called the specifics of power. These included:

a. The power to define – that is, the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;

b. The power to protect – that is, power to be kaitiaki, to manaaki and maintain the peace, and to protect everything and everyone within the polity through an ultimate authority to wage war when necessary;

⁴ 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. Annexed as Exhibit "A"

⁵ Waitangi Tribunal, CPTPP Report, p. 22.

c. *The power to decide – that is, the power to make decisions about everything affecting the wellbeing of the people;*

d. *The power to reconcile – that is, the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo;*

e. *The power to develop – that is, the power to change in ways that are consistent with tikanga and conducive to the advancement of the people; and*

f. *The power to treat - that is the power to negotiate and commit to formal collective agreements with other polities.*

31. *This expansive reach necessarily presupposed that mana was an absolute political and constitutional power. It was absolute because it was absolutely the prerogative of Iwi and Hapū, but it was also absolute in the sense that it was commensurate with independence. 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.*

32. *Mana was in fact absolutely inalienable. It was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna, and no matter how powerful rangatira might presume to be, they never possessed the authority nor had the right to give it away or subordinate it to some other entity. The fact that there is no word in Te Reo Maori for 'cede' is not a linguistic shortcoming but an indication that to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible.*

33. *And just as mana as a totalising authority could never be ceded, so its constituent parts were inalienable. Thus the right to declare war was as jealously guarded as the right to hold the land and would never be ceded or delegated to another polity to exercise on one's behalf. It would have been impossible for example for Ngāti Kahungunu to*



delegate its authority to maintain peace or declare war to say Ngai Tahu.

34. Similarly the 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. It would have been impossible for example for Ngāti Manawa to delegate its authority to treat and make agreements with others to say Ngāti Mutunga.

26. The role of Kāwanatanga in international treaty making is therefore constrained by the ongoing constitutional and authority of mana and the exercise of rangatiratanga, and the principle of Kāwanatanga is to be understood accordingly.

27. The Tiriti-derived principles of Mutual Recognition and Respect and Partnership are consequent on those two principles. Logically, the principle of Active Protection cannot assume or legitimate any presumed authority by the Crown that is inconsistent with the principle of Rangatiratanga.

C.2 Ngā Toki Whakarururanga's Tiriti o Waitangi assessments

28. The Tiriti o Waitangi assessments of IPEF,⁶ EU NZ FTA⁷ and AANZFTA⁸ conducted by Ngā Toki Whakarururanga, and its report on the review of the ITAG linked to the CPTPP,⁹ show that the Crown has consistently breached the principle of Rangatiratanga and exceeded the principle of Kāwanatanga by unilaterally assuming the exclusive power

⁶ Ngā Toki Whakarururanga, *Te Tiriti o Waitangi Assessment of the Indo-Pacific Economic Framework Negotiations and Agreements on Supply Chains, Clean Economy, Fair Economic and Overview*, 16 July 2024. Attached as Exhibit "B".

⁷ Ngā Toki Whakarururanga, *Te Tiriti o Waitangi Assessment of the New Zealand European Union Free Trade Agreement*, 15 May 2023. Attached as Exhibit "C".

⁸ Ngā Toki Whakarururanga, *Te Tiriti o Waitangi Assessment of the Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, 15 July 2024. Attached as Exhibit "D".

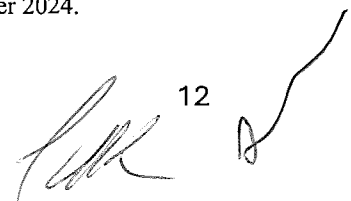
⁹ Ministry of Foreign Affairs and Trade, *Aotearoa New Zealand Inclusive Trade Action Group Three-Year Review of CPTPP*, June 2023, (ITAG Review). Attached as Exhibit 'E'.

of international treaty making, including free trade and investment agreements.

29. The Executive currently determines, on behalf of Aotearoa New Zealand, whether to negotiate an international agreement, about what, with whom, what positions to advocate, who sits at the table as negotiators, what rights and interests to recognise and which to subordinate, what compromises to make and what the final deal will look like. It then claims executive authority to make the agreement binding on Aotearoa New Zealand as an exercise of Crown prerogative. That includes free trade and investment agreements that address and/or impact on the climate crisis.
30. Contrary to Te Tiriti o Waitangi, Māori are denied a seat at this table, have no power to define (or co-define) the substance of an international treaty, and hence have no control over those decisions that impact on them. Māori responsibilities, duties, rights and interests are subordinated by the Crown without any free, prior and informed consent (FPIC) - and commonly without any information or disclosure of the likely implications.
31. Just as there is no place for Rangatiratanga in the Crown's assumed right of international treaty making, there is no place for tikanga, mātauranga, kaitiakitanga or Te Ao Māori in the agenda setting, conceptual paradigm, norms or rules of these agreements. Instead, the Crown deploys this presumed authority within a western capitalist colonial paradigm of the kind Professor Maria Bargh describes in her affidavit.¹⁰
32. There have been incremental steps to address some of these concerns since the Waitangi Tribunal's Wai 2522 report and the Mediation Agreement arising from that inquiry. But, as Tiriti assessments show, these relationships and practices are still far from Tiriti compliant and do not in any way recognise the authority of Rangatiratanga and limitations on Kāwanatanga as they apply to international treaty making.

¹⁰ Affidavit of Professor Ema Maria Bargh for this Inquiry, dated 21 October 2024.

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33. In the context of the climate crisis, there are strong parallels and overlaps with the process of Climate Change conventions and negotiations that India Logan-Riley, a Kaihautū of Ngā Toki Whakarururanga, identifies in their affidavit.¹¹

C.3 The ITAG Review of TPPA/CPTPP

34. Ngā Toki Whakarururanga's Tiriti o Waitangi assessment of the TPPA/CPTPP, set out in MFAT's three-year review of the ITAG in 2023,¹² revealed breaches of Te Tiriti and Tiriti-derived principles in the treaty-making process and in its provisions, including those relating to the climate crisis and the inclusion of ISDS, and made recommendations for change in the current review of the CPTPP.
35. On the treaty-making process, Ngā Toki Whakarururanga observed that:¹³

Māori and other Indigenous Peoples had no effective voice during the negotiation of the TPPA/ CPTPP. Nor do they have a place in its governance or implementation. There is no recognition of Māori or other Indigenous Peoples in any of the institutional mechanisms, nor is there empowerment of them to participate in decision making that directly affects them. The chapter-based structure of the TPPA/CPTPP and its committees means there is no committee, even comprised of State Parties, that has oversight of the positive and/or negative impacts of its implementation on Māori and other Indigenous Peoples.

The Joint Declaration Fostering Progressive and Inclusive Trade was developed and signed three years after the Wai 2522 claim was lodged. Yet, there was no attempt to discuss the Joint Declaration with the claimants or, we believe, other Māori entities. Presumably, the same applied to Indigenous Peoples in the territories of other

¹¹ Affidavit of India Miro Logan-Riley for this Inquiry, as filed unsworn on 21 October 2024.

¹² ITAG Review. Attached as Exhibit 'E'.

¹³ ITAG Review, pp. 61-62. Attached as Exhibit 'E'.

state signatories to the Declaration. It seems ironic that an “inclusive trade” instrument was prepared in secret with no inclusion of those it purports to “include” and provides no place for them in its decision-making or implementation. ...

It is our expectation that tino rangatiratanga of Māori as guaranteed under Te Tiriti o Waitangi and the rights of Indigenous Peoples to have and to exercise self-determination over the global domain will be protected and not be undermined by this Agreement.

To address this we propose steps to see that both the ITAG and the CPTPP include processes to empower Māori, and other Indigenous Peoples within the territories of the CPTPP Parties, to examine and address the negative as well as positive impacts on them of the TPPA/CPTPP and to identify and seek redress for breaches of their rights, interests, duties and responsibilities under Te Tiriti and the UN Declaration. This includes having seats at the decision-making tables with due accountability to their people and independence from the state.

34. To date, those changes have not happened.

D. CLIMATE CHANGE IN TRADE AGEEMENTS

35. Over the past fifteen or so years the interface between trade and climate, and the role of FTAs in exacerbating or mitigating the climate crisis, has proved a thorny issue in negotiations. Even where it is addressed, the adoption of a technological and market-based approach to climate change enables states to continue business as usual, following a western capitalist model without addressing the related causes of the climate crisis, and avoiding changes to production, extraction and trade practices that are major contributors to the climate crisis.
36. There is no space in that paradigm for Indigenous Peoples’ worldviews or voices. Even where there is reference to their potential contribution,

that is generally aspirational or confined to the preamble, and is contradicted by the substantive measures promoted in the text.

37. Four examples are provided here: the TPPA/CPTPP, IPEF Clean Economy and Supply Chain agreements, the ACCTS, and the New Zealand EU FTA.

D.1 TPPA/CPTPP

38. The TPPA negotiations began formally in 2010 and the agreement was signed in February 2016 in Auckland. The United States subsequently withdrew from the TPPA. The remaining eleven parties, including New Zealand, suspended a number of provisions and renamed it the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The CPTPP has been in force since December 2018.
39. The TPPA and CPTPP were negotiated in secret. No texts were released until they were signed. It is apparent from the Wai 2522 inquiry that Māori had no effective input into these negotiations. There was therefore no engagement with Māori on the approach to the climate crisis in the TPPA/CPTPP.

TPPA/CPTPP text on climate change

40. There is no specific reference to climate change in the TPPA. A draft version of the text of the Environment Chapter from November 2013,¹⁴ and a chair's commentary that recorded the position of various parties, were posted on wikileaks in January 2014.¹⁵ These revealed a proposal for a provision headed Trade and Climate Change and that the US and Australia opposed the wording. New Zealand's position is not mentioned.

¹⁴ "Secret TPP Treaty. Environment Chapter for all 12 Nations. Consolidated Text", 24 November 2013. Attached as Exhibit 'F'.

¹⁵ "Secret TPP Treaty: Report from Chairs of Environment Chapter for all 12 nations", 24 November 2013. Attached as Exhibit 'G'.

41. My analysis of that draft text, also posted on wikileaks, pointed out that:

Instead of a 21st century standard of protection, the leaked text shows that the obligations are weak and compliance with them is unenforceable. Contrast that to other chapters that subordinate the environment, natural resources and indigenous rights to commercial objectives and business interests. The corporate agenda wins both ways. ...

In Article SS15 the parties merely agree to discuss ways to deal with climate change with possible links to the APEC process. The US and Australia oppose even that provision. There is no reference to the regional carbon-trading scheme that Trade and Climate Change Minister Tim Groser has been promoting, which would expose climate change measures even more deeply to speculative finance markets, although there is general recognition of market-based mechanisms.¹⁶

42. I was also provided with a tracked copy of the draft and final text of the Environment Chapter,¹⁷ whose authenticity I can attest to. This shows a significant downgrading of the already weak text, including replacement of the heading “Trade and Climate Change” with “Transition to a low-emissions economy”.

43. Wikileaks also posted a chart showing one delegation’s analysis of the positions of the negotiating parties on various provisions, including climate change. This indicated that New Zealand had reserved its position on shortening the article.¹⁸

44. The final version in the TPPA,¹⁹ retained in the CPTPP, is a soft provision that promotes cooperation on technical solutions without requiring any

¹⁶ Jane Kelsey, “TPPA Environment Chapter & Chair’s Commentary Posted by Wikileaks Issues for NZ”, 16 January 2014. Attached as Exhibit ‘H’.

¹⁷ TPP, “Article SS.X. Transition to a Low-Emissions Economy”. Attached as Exhibit ‘I’.

¹⁸ “TPP Country Positions (6 November 2013)”. Attached as Exhibit ‘J’.

¹⁹ TPPA/CPTPP Chapter 20: Environment. Attached as Exhibit ‘K’.

change in climate-harming practices and is not subject to dispute settlement:

Article 20.15: Transition to a Low Emissions and Resilient Economy

1. The Parties acknowledge that transition to a low emissions economy requires collective action.

2. The Parties recognise that each Party's actions to transition to a low emissions economy should reflect domestic circumstances and capabilities and, consistent with Article 20.12 (Cooperation Frameworks), Parties shall cooperate to address matters of joint or common interest. Areas of cooperation may include, but are not limited to: energy efficiency; development of cost-effective, low emissions technologies and alternative, clean and renewable energy sources; sustainable transport and sustainable urban infrastructure development; addressing deforestation and forest degradation; emissions monitoring; market and non-market mechanisms; low emissions, resilient development and sharing of information and experiences in addressing this issue. Further, the Parties shall, as appropriate, engage in cooperative and capacity-building activities related to transitioning to a low emissions economy.

45. Subsequently, the Environment Committee of the CPTPP agreed in 2022 to four priority areas for cooperation, including “Climate change (low emissions technologies, clean energy, and international carbon markets)”.²⁰ It is unclear whether this has been actioned. Even if it was activated, it would perpetuate the western market-based strategy to address the climate crisis, and provides no place for tikanga-based options that embody matāuranga Māori and give effect to kaitakitanga responsibilities.

²⁰ ITAG Review, pp. 39-41. Attached as Exhibit ‘E’.



Treaty of Waitangi Exception

46. It was clear from the Wai 2522 hearings that the Crown did not consider whether the inclusion of its standard, and contested, Treaty of Waitangi Exception in the TPPA would protect future Tiriti-informed measures that the Crown might take to address the climate crisis, where these measures allegedly breached New Zealand's obligations under the TPPA.
47. That Treaty Exception was first devised by the Crown for adoption in the Singapore FTA in 2001, before climate change was recognised as such an existential crisis.
48. The Treaty of Waitangi Exception, contained in Article 29.6 of the TPPA/CPTPP, reads as follows:²¹

1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. [Cross reference] shall otherwise apply to this Article. A panel established pursuant [Cross reference] may be requested to determine only whether any measure (referred to in Paragraph 1) is inconsistent with their rights under this Agreement.

49. The Treaty Exception is the only potential protection in the TPPA/CPTPP that relates directly to Māori and Te Tiriti.²²

²¹ TPPA/CPTPP, Chapter 29 Exceptions and General Provisions. Attached as Exhibit 'L'.

²² There is one very specific Annex on the International Union for the Protection of New Varieties of Plants (UPOV) 1991.

50. The application of the exception is severely limited because it applies only to Crown measures that give “more favourable treatment to Māori”, which in trade-speak conveys a form of affirmative action or privilege. It would not apply, for example, to a government decision to revoke an exploration or extraction license in compliance with the Crown’s duty to actively protect hapū responsibilities to Te Taiao, or to prevent harm to a hapū in their rohe by prohibiting clear-felling of pine forests that are causing devastating flooding, or by banning sand mining that is destroying carbon-sequestering sand dunes over which mana whenua have rangatiratanga and kaitiaki responsibilities.
51. Further, the Treaty Exception is subject to a “chapeau” that allows a measure to be challenged as arbitrary or unjustifiable discrimination or a disguised barrier to trade or investment. Additional problematic issues with the Treaty Exception in relation to ISDS cases are discussed below.
52. Defences to the kind of actions described in paragraph 50 would have to rely on an even more limited general exception that is subject to numerous filters,²³ including the “chapeau”, and has a very poor record of success when relied upon in a dispute.²⁴ That exception does not apply to the key investor protections that may be cited in an ISDS dispute.
53. The Crown committed in the Mediation Agreement with Ngā Toki Whakarururanga to examine alternatives to the 2001 Treaty of Waitangi Exception, but that dialogue has only just begun. Meanwhile, the Crown has continued applying that Exception, or something less, in its subsequent agreements that also impact on climate-related measures.

Inclusive Trade Action Group (ITAG)

54. The Tribunal will recall that there was strong opposition in Aotearoa New Zealand to the TPPA, including amongst Māori as reflected in the

²³ TPPA/CPTPP, Chapter 29 Exceptions and General Provisions. Attached as Exhibit ‘L’.

²⁴ “WTO General Exceptions: Trade Law’s Faulty Ivory Tower”, Public Citizen, 4 February 2022, Executive Summary. Attached as Exhibit ‘M’.

Wai 2522 claim, widespread protests and a hikoi to Waitangi in February 2016.

55. As part of their attempt to establish a degree of social license for such agreements at the time the successor CPTPP was signed, New Zealand, Canada and Chile made a Joint Declaration on Fostering Progressive and Inclusive Trade in March 2018.²⁵ They committed to work together, *inter alia*, to:

- *Affirm the inherent right of each Participant to regulate within its territory to achieve legitimate public policy objectives such as the protection of health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity;*
- *Uphold our respective commitments for an ambitious and effective implementation of the Paris Agreement and support the achievement of Sustainable Development Goal 13 (Climate Action);*
- *Reaffirm our intention to work together in the transition to a low emissions and resilient economy, helping our collective and individual actions to combat climate change thereby contributing to achieving the collective long-term temperature goal of the Paris Agreement, and reducing the adverse effects of climate change;*
- *Affirm the objectives of the Declaration on the Rights of Indigenous Peoples adopted by the United Nations on 13 September, 2007;²⁶*

56. The parties to the Declaration, and the accompanying Inclusive Trade Action Group (ITAG), committed to a three year review of:

²⁵ Joint Declaration on Fostering Progressive and Inclusive Trade, adopted March 2018. Attached as Exhibit 'N'.

²⁶ ITAG Review, p.52. Attached as Exhibit 'E'

the effectiveness of the Agreement with respect to sustainable development, gender, Indigenous Peoples, domestic regional economic development, SMEs, labour rights, the environment and climate change.

57. New Zealand conducted its ITAG review in 2023. Ngā Toki Whakarururanga prepared its own comprehensive report on the CPTPP's lack of Tiriti compliance, which was included in the Crown's final document.²⁷ Ngā Toki Whakarururanga made recommendations for amendment of the CPTPP during the forthcoming review of the Agreement, which the parties were required to conduct within three years of its entry into force. That review process began when New Zealand was the CPTPP chair in 2023.
58. Ngā Toki Whakarururanga's report described the CPTPP Chapter 20 Environment as weak and not requiring any specific action to be taken, and observed that there was no effective protection for environment and climate actions taken pursuant to Te Tiriti o Waitangi.
59. The report noted that a 2020-2022 plan had named "Trade and Indigenous Peoples and Trade and Climate Change" among its a key priorities for consideration of further work, including possible negotiation of new instruments. The report accompanying the ITAG work plan for 2022-2024 shows nothing was actioned on that.²⁸ As a consequence, issues of importance to Māori and other Indigenous Peoples remained invisible to the ITAG and CPTPP Parties.
60. Ngā Toki Whakarururanga also observed that "Māori and iwi taketake (Indigenous People) have no voice whatsoever" at an institutional level in CPTPP, for instance a dedicated committee. It recommended the adoption of an institutional mechanism to examine and address the

²⁷ ITAG Review, pp. 58-73. Attached as Exhibit 'E'

²⁸ Inclusive Trade Action Group (ITAG), Work Programme 2022-2024. Attached as Exhibit 'O'. See also ITAG Review, p. 61. Attached as Exhibit 'E.'

impacts of CPTPP in a manner consistent with Article 18 of the UNDRIP. In relation to Māori that should be considered an obligation under Te Tiriti o Waitangi.

61. The Crown's own ITAG report said Ngā Toki Whakarururanga had identified a range of areas

... where implementation efforts should be improved, and/or changes to the text of the Agreement be considered, to actively protect Māori rights, interests, duties, and responsibilities in compliance with Te Tiriti o Waitangi.

62. These areas included:

- *Climate change policies and measures in relation to the Environment Chapter (Chapter 20) and the connected risk of Investor State Dispute Settlement (ISDS) under the Investment Chapter (Chapter 9);*
- *Recognition and protection for mātauranga Māori and kaitiakitanga in relation to the Intellectual Property Chapter; Cross-Border Services Chapter, and Environment Chapter.²⁹*

63. Ngā Toki Whakarururanga's recommendations were presented to the CPTPP Commission in 2023 by co-convenor Moana Maniapoto. The review of the CPTPP is now underway. However, there are almost-impenetrable systemic barriers to implementing Ngā Toki Whakarururanga's recommendations. Securing change to what the Crown has previously agreed to, and creating space for tikanga-based solutions to the climate crisis, would require (a) consensus of all of the CPTPP parties and (b) abandoning the western capitalist market-based that is intrinsic to their free trade paradigm the Crown has consistently espoused.

²⁹ ITAG Review, pp. 46-47. Attached as Exhibit 'E'.



D.2 Indo-Pacific Economic Framework (IPEF)

64. The IPEF was negotiated by sixteen parties (described in paragraph 19(ii)) in 2022 and 2023. It was an unorthodox trade negotiation, driven by the US according to its domestic imperatives. It had four pillars:
1. Trade pillar, which included an environment chapter;
 2. Supply Chain pillar;
 3. Clean Economy pillar (on climate change);
 4. Fair Economy pillar, dealing with corruption and tax.
65. The Supply Chain Agreement entered into force on 24 February 2024.³⁰ The Clean Economy³¹ and Fair Economy agreements entered into force on 11 October 2024, along with an overview institutional agreement. The trade agreement has not been concluded.
66. There was no capacity or resourcing for Māori outside the Crown to attend, or to effectively intervene in, those negotiations. Ngā Toki Whakarururanga prepared briefing papers that the Crown circulated to other parties during various negotiating rounds.
67. Ngā Toki Whakarururanga's IPEF briefing paper on "Te Taiao (ecosystem) and the Climate Crisis" warned IPEF negotiators:³²

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

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.

³⁰ The Indo-Pacific Economic Framework for Prosperity (IPEF) Agreement Relating to Supply Chain Resilience. Attached as Exhibit 'P'.

³¹ The Indo-Pacific Economic Framework for Prosperity (IPEF) Agreement Relating to a Clean Economy. Attached as Exhibit 'Q'.

³² Ngā Toki Whakarururanga, "Position Paper on Te Taiao (ecosystem) and the Climate Crisis", IPEF Busan Round, July 2023. Attached as Exhibit 'R'.



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.

IPEF Clean Economy Agreement

68. Those technical and market “solutions” are exactly what the final IPEF Clean Economy Agreement espoused.³³ The Agreement advances carbon capture, utilisation and storage (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 those technologies and instruments, which was expected to benefit the corporations that produce them, principally from the US, and to counteract China’s dominance of critical minerals.³⁴

69. References to Indigenous Peoples in the agreement are token. One part of the Preamble proposes to

advance efforts and cooperation that use best available science, sound data, and evidence-based analysis, including taking into account local and traditional knowledge, to make informed decisions, measures, activities, and reviews of progress.

70. The status of “traditional knowledge” (not Indigenous knowledge) in this Preamble is implicitly subordinated to other forms of “science” by merely being “taken into account”. As recent debates in Aotearoa have

³³ IPEF Clean Economy Agreement. Attached as Exhibit ‘Q’.

³⁴ US Treasury Secretary Janet Yellen said: “*We cannot allow countries to use their market position in key raw materials, technologies, or products to have the power to disrupt our economy or exercise unwanted geopolitical leverage. Let’s build on and deepen economic integration. . . . with the countries we know we can count on.*” Quoted in Emily Benson and Ethan Kapstein, “The limits of ‘Friend-Shoring’”, Centre for Strategic and International Studies, 1 February 2023. Attached as Exhibit ‘S’.



shown, mātauranga Māori risks being contested by western scientists as not being “science” or “evidence-based”.³⁵

71. Article 13 of the Agreement asserts that “ocean-based solutions are nature-based solutions and ecosystem-based approaches” that the Parties aim to accelerate “with appropriate social and environmental safeguards”. Those approaches include recognising “the important role of ocean-based clean energy, including tidal energy, wave energy, and offshore wind”, considering “policies and opportunities to drive increased development of offshore wind energy” and cooperating on supply chains with a view to attracting investment. The “appropriate” social and environmental safeguards are unspecified and there is no reference to safeguards for Indigenous Peoples, including FPIC.

72. The Agreement goes on to

recognize the importance of blue carbon ecosystems for climate change mitigation and adaptation, and the importance of robust methodologies for measuring, reporting on, verifying, and managing blue carbon stocks. ... [The Parties] intend to explore opportunities to cooperate to mobilize finance for blue carbon protection and restoration activities in the region as appropriate, including by collaborating on pilot projects and, potentially, through carbon markets.

73. “Nature-based” solutions, such as “blue carbon” ecosystems of mangroves and seagrasses, are treated as “carbon sinks”, without recognising the authority and kaitiaki responsibilities of mana whenua to care for and determine appropriate uses of their taonga and environments, their connected waterways, ecosystems and the mātauranga and tikanga surrounding all of them.

³⁵ Māni Dunlop, “University academics’ claim mātauranga Māori ‘not science’ sparks controversy”, *Radio New Zealand*, 28 July 2021. Attached as Exhibit ‘T’.



74. I have read the affidavit of Professor Maria Bargh³⁶ and the affidavit of India Logan-Riley and her accompanying paper “Blue Herrings”³⁷, for this inquiry. This IPEF agreement exemplifies the tensions they identify.

75. In similar vein, researchers writing in *The Conversation* point out how:³⁸

Indigenous peoples have cared for their land and seascapes for generations, using traditional knowledge and practices. But our research on marine justice shows Indigenous peoples face ongoing challenges as they seek to assert their sovereignty and authority in marine spaces.

We don't need to wait for innovative Western science to take better care of the oceans. We have an opportunity to empower traditional and contemporary Indigenous forms of governance and management for the benefit of all people and the ecosystems we are part of.

76. The Indigenous Environmental Network also vigorously challenged the kind of contradictions embodied in the IPEF Agreement:³⁹

Climate change will not be solved by nature-based solutions (NBS) – they will make it worse. Real solutions are led by Indigenous Peoples, not co-opted with more greenwash. Nature-based solutions (NBS) is a greenwashing tool that does not address the root causes of climate change. Nature-based solutions coopt effective ecological practices based on Traditional Indigenous Knowledge. The narrative and framework of nature-based solutions transforms effective ecological practices into financialized instruments that exacerbate the climate and biodiversity crises.

³⁶ Affidavit of Professor Ema Maria Bargh for this Inquiry, dated 21 October 2024.

³⁷ Affidavit of India Miro Logan-Riley for this Inquiry, as filed unsworn on 21 October 2024.

³⁸ Meg Parsons and Lara Taylor, “Why Indigenous Knowledge should be an essential part of how we govern the world’s oceans”, *The Conversation*, June 2021. Attached as Exhibit ‘U’.

³⁹ Indigenous Environmental Network, “Nature-based solutions. Indigenous Environmental Network Climate Justice Program Series”, November 2022. Attached as Exhibit ‘V’.

The legacy of colonial power continues through nature-based solutions. Conservation NGOs, large development institutions, international financial institutions, (colonial) governments, and the private sector are all pushing for nature-based solutions. Projects included under the NBS framework are often implemented without the full recognition of the rights of Indigenous Peoples to be consulted under the standards of Free, Prior, and Informed Consent (FPIC), as recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Nature-based solutions are a continuation of colonialism and extractivism through: stolen lands, removal of Indigenous Peoples, nation-state resistance to demarcation of ancestral Indigenous lands and territories, the privatization and commodification of Nature and Mother Earth, and with banks continuing to invest in fossil fuel expansion.

77. A British Academy paper in 2022 on “Indigenous thinking about nature-based solutions and climate justice” challenges the power and colonial dynamics that underpin the conceptualisation of “nature-based” solutions in pursuit of climate justice:⁴⁰

Underpinning an Indigenous approach to nature-based solutions is the commitment to climate justice. Climate justice is founded on the truth that power and privilege cut across climate policy and climate law. Climate causes, consequences and remedies must be informed by analysis of power and intersectional identities. Climate justice recognises and seeks to empower Indigenous knowledge. This is explained by Climate Justice, a community organisation in Aotearoa New Zealand which supports Indigenous knowledge in climate justice:

“... The urgent action needed to prevent climate change must put priority on community-led solutions and the well-being of local communities, Indigenous Peoples and the global poor, as well as

⁴⁰ Mercia Abbott, Tokintekai Bakineti, Lyn Carter, Anita Latai-Niusulu, Willy Missack, Ihaia Puketapu and Rebecca Kiddle, “Indigenous thinking about nature-based solutions and climate justice”, British Academy, 2022. Attached as Exhibit ‘W’.

biodiversity and intact ecosystems. Indigenous Peoples, peasant communities, fisherfolk, and especially women in these communities, have been able to live harmoniously and sustainably with the Earth for millennia. They are now not only the most affected by climate change, but also the most affected by false solutions to climate change such as agrofuels (that replace food crops and further deforestation) / biofuels (notably tree crops that release isoprene and forms ozone), mega-dams (that flood ecosystems and displace communities), genetic modification (that leads to privatisation and bio disasters), tree plantations (that displace Indigenous tribes and destroy natural ecosystems), carbon offset schemes (which actually increase greenhouse gas emissions) and geoengineering (quick fixes with unmanageable side-effects).

78. The IPEF Clean Economy Agreement mainly seeks to create incentives and commitments to these “solutions”, rather than making them enforceable. Nevertheless, New Zealand is obliged to comply with the Agreement as a matter of international law.
79. The Agreement does say that a Party may promote and protect the rights, interests, duties, and responsibilities of its Indigenous Peoples in fulfilment of its obligations to its [sic] Indigenous Peoples under its law or a treaty (Article 3.3(a)). However, that does *not* open the door to substituting an alternative paradigm. The article states explicitly that “this paragraph does not operate as a carve out from, or as an exception to, this Agreement”. In other words, how the state meets its obligations to Indigenous Peoples, and promotes and protects Indigenous Peoples’ rights and responsibilities, must still comply with the agreement. That is a step backwards even from the 2001 Treaty of Waitangi Exception and creates a dangerous precedent.
80. There is an additional consequence of normalising these climate-related techniques. As has happened in many countries, some Indigenous



Peoples can be expected to exercise their rangatiratanga/self-determination to say no to wind and wave farming,⁴¹ or carbon sequestration, which are often located on their whenua without consent.⁴² If they succeed in shutting down these activities, foreign investors may well claim a breach of their “legitimate expectations” in an ISDS dispute, discussed below.

IPEF Supply Chain Agreement and Critical Minerals Dialogue

81. The IPEF Supply Chain Agreement requires parties to develop lists of critical sectors or key goods (Article 10).⁴³ “Critical sectors” means sectors that “produce goods and supply any related essential services critical to a Party’s national security, public health and safety, or prevention of significant or widespread economic disruptions”. Criteria for deciding what sectors to list include national security, dependence on a single supplier, and regional location, among others.
82. In November 2023, IPEF Leaders also announced a Critical Minerals Dialogue “to strengthen collaboration in critical minerals supply chains and to boost regional competitiveness.”⁴⁴ There is no public information available on this dialogue and no suggestion that it has engaged with Indigenous Peoples within IPEF territories.
83. When announcing the Critical Minerals Dialogue, Australian Prime Minister Albanese reinforced Professor Bargh’s argument that scarcity of critical minerals is becoming a geopolitical, geological and commercial issue:⁴⁵

⁴¹ Business and Human Rights Resource Centre, “Renewable Energy and Human Rights Benchmarks. Key findings from the wind and solar sector 2021”. Attached as Exhibit ‘X’.

⁴² Sara LaBrecque, “Why solar and wind developers ignore indigenous land claims at their peril”, *Reuters*, 7 April 2023. Attached as Exhibit ‘Y’. Fabio Teixeira and Diana Baptista, “Wind turbines in Brazil stir conflicts with Indigenous Rights”. Attached as Exhibit ‘Z’.

⁴³ IPEF Supply Chain Agreement. Attached as Exhibit ‘P’.

⁴⁴ Prime Minister of Australia, “Landmark Indo-Pacific Framework Agreements”, Media Release, 17 November 2023. Attached as Exhibit ‘AA’.

⁴⁵ Maria Bargh, and Estair Van Wagner. “Participation as Exclusion: Māori Engagement with the Crown Minerals Act 1991 Block Offer Process” *Journal of Human Rights and the Environment*, Vol. 10:1, 2019, 118-139. Attached as Exhibit ‘AB’.

this will mean using our critical minerals to assist the region in transitioning to clean energy and in turn will create diverse, resilient and sustainable supply chains, building Australia's capacity and standing as a renewable energy superpower.⁴⁶

84. Nowhere in the need or criteria for the list of critical sectors, or in the public information on the Critical Minerals Dialogue, is there any question of whose resources might be involved, the need for the FPIC of Indigenous Peoples (or any affected communities), or impacts on the climate crisis. The state is simply presumed to have ownership, or at least control, of those resources and the solutions are effective and justified.
85. Unlike the Clean Economy pillar, the 2001 Treaty of Waitangi Exception does apply to the Supply Chain Agreement. However, it is difficult to see what kind of “more favourable treatment to Māori” might be applicable here that would address the fundamental paradigmatic conflicts over concepts and power.

D3. Agreement on Climate Change, Trade and Sustainability (ACCTS)

86. During the COP25 in 2019 several middle-powers (Costa Rica, Fiji, Iceland, New Zealand, Norway and Switzerland) announced their intention to “apply trade rules and trade-related measures to contribute to the global efforts to limit the temperature increase”. The conclusion of an Agreement on Climate Change, Trade and Sustainability (ACCTS) between Costa Rica, Iceland, New Zealand and Switzerland was announced on 2 July 2024.⁴⁷
87. The negotiations were conducted in secret. There was therefore no ability for Māori, or Indigenous Peoples from the territories of the other

⁴⁶ Prime Minister of Australia. Attached as Exhibit ‘AA’.

⁴⁷ Joint Ministerial Statement on Conclusion of Negotiations for the Agreement on Climate Change, Trade and Sustainability, 2 July 2024. Attached as Exhibit ‘AC’.

participating states, to engage in and influence the negotiations, let alone have a seat at the table.

88. Ngā Toki Whakarururanga made some comment on texts provided under confidentiality that were consistent with their views on IPEF, but was not able to discuss the provisions with climate experts. The final text has not been released, so the draft Tiriti assessment of ACCTS by Ngā Toki Whakarururanga is not public. The following observations are based on my analysis of information that is in the public domain.
89. In brief, ACCTS has 4 pillars that follow the western capitalist market-based approach to climate change that, aside potentially from (iii), have no discernible impact on the crisis:
- (i) Liberalising trade in environmental goods;
 - (ii) Liberalising trade in environmental services;
 - (iii) Disciplines to eliminate “harmful” fossil fuel subsidies;
 - (iv) Voluntary eco-labelling.
90. It is unclear if a Treaty of Waitangi or Indigenous Exception applies and, if it does, what use it would be to protect Māori responsibilities, rights and interests in the trade and climate space.
91. A brief analysis of ACCTS that I prepared for the WTO Public Forum this year concluded that the

... ACCTS is a sham agreement on climate change and a Trojan Horse for the “free trade” agenda that is fuelling the climate catastrophe. It is likely to be pushed in the WTO in the name of trade, sustainability and climate resilience by countries opportunistically using the climate crisis to advance their trade liberalisation agenda.⁴⁸

⁴⁸ Jane Kelsey, “An Agreement on Climate Change, Trade and Sustainability (ACCTS)” Attached as Exhibit ‘AD’.

92. New Zealand Trade Minister Todd McClay effectively confirmed my view that this is a liberalisation agreement masquerading as a climate agreement when he welcomed the ACCTS as “opening up commercial opportunities for New Zealand businesses by focusing on trade in sustainable goods and services.”⁴⁹

D.4 New Zealand European Union FTA

93. Negotiations between New Zealand and the European Union for a free trade agreement concluded in July 2023 and it came into force on 1 May 2024. Chapter 19 on Trade and Sustainable Development recognises Māori knowledge and practices are important to conservation and biodiversity.⁵⁰ But this is merely aspirational, with its articles mainly “recalling”, “recognising”, “affirming” existing international agreements and obligations at the UN and ILO that the parties have adopted, and promising to implement and not renege on them.
94. However, rather than embracing, or even enabling, an Indigenous-led approach to the environment, sustainability and the climate crisis and rethinking the trade paradigm, the chapter promotes a commodity-based and market-driven model of trade as the means to pursue a range of environmental objectives. There is no recognition that this model itself is a major contributor to the concerns it expresses about social inequality, precarious labour, environmental degradation, the collapse of biodiversity, and the climate crisis.
95. The chapter, and the broader Agreement, provide no effective protections for Te Tiriti and Te Taiao. Only the limited 2001 Treaty of Waitangi Exception and the general exceptions apply. Nor is there any role for Māori in its governance. The Committee on Trade and Sustainable Development to oversee this chapter (Article 19.15) is comprised solely of officials. It must “give due consideration” to communications and

⁴⁹ Hon Todd McClay, “NZ wood and wool to benefit through new trade deal”, 2 July 2024. Attached as Exhibit ‘AE’.

⁵⁰ New Zealand European Union Free Trade Agreement, Chapter 19: Trade and Sustainable Development. Attached as Exhibit ‘AF’.

opinions from the public on matters in the chapter and *may* pass those views to the parties' Domestic Advisory Groups, which is to include Māori.

96. There is one interesting difference from the CPTPP, IPEF and ACCTS model. The FTA's Article 19.6 Trade and Climate Change requires New Zealand to implement effectively the Framework Convention on Climate Change (FCCC) and the Paris Agreement, including Nationally Determined Contributions, and to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement. This obligation is enforceable - but the decision to enforce those obligations would rest with the EU as it weighs its own interests, and certainly not with Māori.

97. Despite the potential for enforcement of the FCCC and Paris Agreement under the EU FTA, its "solutions" to the climate crisis are the same, to:

(a) promote the mutual supportiveness of trade and climate policies and measures, thereby contributing to the transition to a low greenhouse gas emission, resource-efficient and circular economy and to climate-resilient development;

(b) facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy and energy efficient products and services, for instance through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of best available technologies; and

(c) promote emissions trading as an effective policy tool for reducing greenhouse gas emissions efficiently, and promote environmental integrity in the development of international carbon market.

97. Ngā Toki Whakarururanga's Tiriti o Waitangi assessment of this part of the agreement said, in relation to climate change:

188. *An inescapable question in light of this year's catastrophic floods and Cyclone Gabrielle is whether the NZ EU FTA will genuinely confront climate change that is now devastating Aotearoa, with Māori communities bearing the brunt of a crisis created by the actions and failures of others.*
189. *The principal means for advancing climate action under the FTA is through classic trade liberalisation measures to remove tariffs on "green goods" and restrictions on foreign providers of "environmental services" (which each Party could do unilaterally) and to promote emissions trading and integrity in international carbon markets. Plus "cooperation".*
190. *The commitment in Article 19.7 to work to "reform and progressively reduce" fossil fuel subsidies is conditioned by "national circumstances" with full account of the "specific needs of populations affected".*
191. *In the Trade and Climate Change provision (Article 19.6) the EU and Aotearoa NZ promise to implement their existing commitments under the UNFCCC and Paris Agreement effectively (Article 19.6).*
192. *Theoretically, this makes each party's Nationally Determined Contributions enforceable by the other. That could call the NZ government to account for failure to even meet those targets. The Climate Commission recently warned that Aotearoa NZ is at risk of not meeting its international obligations and that it cannot achieve the emissions targets by relying on planting trees.*
193. *It seems unimaginable that the EU would take action against the NZ government under this FTA to require more effective action to meet its obligations. But even if it did, that would not strengthen those commitments or require a more effective approach that does not rely on market instruments and offshore carbon credits.*




98. The government also seems to assess the likelihood of action by the EU as very low. Resources Minister Shane Jones said he was “not overly concerned” over MFAT officials’ advice that an oil and gas ban would likely breach requirements in the free trade agreements with the EU and UK not to reduce environmental standards so as to attract trade and investment (not advice that they would breach the Paris Agreement climate obligations, which have looser wording).⁵¹
99. The four recent FTAs discussed in this section illustrate the consequences of excluding Māori and other Indigenous Peoples from the process of determining a tika approach to trade and climate in the context of free trade negotiations: even where there is reference to the climate crisis, and also to Indigenous Peoples, the agreements perpetuate western colonial capitalist models and technical and extractionist solutions that are intrinsically hostile to fundamental Indigenous values and responsibilities, and deny the space for genuinely innovative, Indigenous solutions to the climate crisis.


E. INVESTOR STATE DISPUTE SETTLEMENT (ISDS)

100. Bilateral Investment Treaties, sometimes called Investment Protection and Promotion Agreements, and the investment chapters of many recent free trade agreements, contain guarantees of how foreign investors and investments from one party will be treated by the other party/ies as host states.
101. Those special rights can be used by foreign investors to challenge new laws, policies, administrative and tribunal decisions made at central or local government levels, and even court judgements, where these allegedly have an adverse effect on the investor or investment’s assets or profitability.

⁵¹ Marc Daalder, “Govt advised repealing gas ban likely to breach trade deals”, 1 October 2024. Attached as Exhibit ‘AG’.



35



102. This section briefly discusses those rules and the controversial mechanism by which investors can enforce them directly against host states through international arbitration, seeking potentially billions of dollars in compensation. The bulk of ISDS claims have related to natural resources and more recently to measures adopted to address the climate crisis.
103. This is of concern not simply because a successful challenge would require the government to rescind the measure or pay huge compensation if it was retained. As discussed below, several Waitangi Tribunals have recognised that the legal and fiscal risks of an investor-state claim, whether an actual threat or apprehension of a claim, may have a 'chilling effect' on the Crown's willingness to comply with its Tiriti o Waitangi obligations. That would include climate action that impacts negatively on a covered investment.

E.1 Investment protection rules

104. There are six standard rules, which that can be very broadly summarised as:⁵²
- i. *Non-discrimination ("national treatment")*, which requires foreign investors and investments to receive no less favourable, but possible better, treatment than comparable domestic investors and investments. In New Zealand's FTAs this is subject to a threshold and the then-existing foreign investment laws, although further domestic liberalisation is often locked in automatically.
 - ii. *Non-discrimination ("most-favoured-nation treatment")* that requires foreign investors and investments of a party to receive the best treatment that the host state gives to investors and investments of another country. This can sometimes be subject to exceptions.

⁵² My intention here is to explain the general rules that are subject to variable interpretations by ISDS tribunals. A more detailed legal analysis can be provided in a subsequent affidavit if required.

- iii. *Fair and equitable treatment*, to a minimum standard of treatment under international law. Investors commonly argue that this creates a “legitimate expectation” that the terms on which they invested will not be changed adversely for the lifetime of their investment.
 - iv. *Direct expropriation*, where the investment is nationalised, destroyed, or terminated, with a right to non-discriminatory treatment and full and timely compensation.
 - v. *Indirect expropriation*, where regulatory or other measures have significantly eroded the value and profitability of the investment. Some policy justifications might, or might not, apply.
 - vi. *Full protection and security* requires the host state to take non-discriminatory steps that are reasonably necessary to ensure the physical protection and security of the investment.
105. The specific wording of these protections varies across agreements. Where the drafting has attempted to restrict their scope, and even where arbitrators are required to follow an interpretation agreed by the parties, they remain sufficiently open to allow investors’ counsel, and arbitrators, to give them expansive pro-investor meanings.

E.2 Investor to state arbitration (ISDS)

106. The system of investor–state dispute settlement (ISDS) allows foreign investors from a party to an agreement to sue the host government over alleged breaches of its guarantees which the investor claims have damaged the investment. This right is additional to the right of one state party to the agreement to bring a dispute against the other state party alleging breaches of its investment rules.
107. These ISDS disputes take place in offshore arbitral tribunals, mostly through the World Bank’s International Centre for the Settlement of



Investment Disputes (ICSID) or under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

108. The investors' rights are not counter-balanced with obligations and there is rarely room for counter-claims by the state against the investor, let alone by affected communities. Nor is there any prospect of compensation for those communities. Only the investor is entitled to damages, if they win the dispute.
109. The arbitral tribunals have the power to make extremely large damages awards, including for lost future profits for the life of the investment, irrespective of the capital applied to date, with compound interest. Investors can and do claim hundreds of millions, or even billions, of dollars in damages under ISDS, even when they have made minimal actual investments. Sometimes this includes punitive damages against the government.
110. Increasingly, ISDS disputes are bankrolled by third party funders who work on a contingency fee basis for a share of any award. That has removed the financial risk from investors bringing speculative claims.
111. These tribunals are *ad hoc*, no system of precedent, which leads to varying and unpredictable interpretations of the rules. There is no provision for appeal.
112. The composition of arbitral panels is also problematic because arbitrators in one dispute can act as counsel for investors in another, raising serious conflicts of interest.
113. These investment arbitrations often remain secret from people within the country being sued even after they have been resolved. In some cases, not even the elected legislature will know there has been a dispute. Release of documents often requires agreement of the parties, although summaries are becoming more common. The final outcome

may not be published, even when the award is for a large portion of a government's annual budget.

114. Over the past two decades ISDS has been in a state of crisis. For a number of years Working Group III of UNICTRAL has been discussing major reform of ISDS to address its many flaws. I was an active participant in those discussions prior to Covid-19. The crisis confronting ISDS was also a part of the Marsden Grant research from 2015 to 2018.

115. A number of states have been withdrawing from investment agreements that contain ISDS. That includes previously leading advocates. The EU is following many of its Member States and withdrawing from the Energy Charter Treaty, a fossil-fuel friendly agreement that includes ISDS and has been responsible for many of the most extreme claims.⁵³ Even the Biden Administration in the US has eschewed ISDS in agreements, although it remains in many of its existing agreements.⁵⁴

E.3 Indigenous Peoples and ISDS

116. Foreign investments, especially resource and infrastructure projects that involve large transnationals, frequently impact negatively on Indigenous Peoples and their human and treaty rights, domestically and at international law. Successful resistance and/or redress can result in an investor lodging an ISDS case.

117. An empirical study in 2021 analysed 10 of the 20 publicly available and identifiable ISDS disputes from 2000 to 2020 that directly or indirectly involved Indigenous Peoples. Most of the 10 disputes

⁵³ "Historic Victory: Council gives green light for EU withdrawal from climate-wrecking Energy Charter Treaty", Climate Action Network Europe, 30 May 2024. Attached as Exhibit 'AH'.

⁵⁴ Letter from Senator Elizabeth Warren and others to US Trade Representative Catherine Tai and Secretary of State Anthony Blinken, 1 November 2023. Attached as Exhibit 'AI'

involved “lawful” activity by foreign investors who had been granted rights to exploit resources by local governments.⁵⁵

118. Their analysis shows that international investment disputes do not provide a space for Indigenous Peoples’ voice to be heard. There are usually two options for non-parties’ participation. One is the participation of non-disputing parties to the agreement, which either party to the ISDS dispute can block. The other is an *amicus curiae* brief, to which the arbitral tribunal has to consent and it sets the terms for any participation and determines the relevance and value of the evidence. If participation is permitted, the proceedings are lengthy, technical and expensive.
119. Even where Indigenous Peoples were allowed to appear in the proceedings, their submissions were rarely influential, or even considered, in the outcome. Arbitrators were ignorant and/or disinterested.
120. By contrast, international agreements that recognise Indigenous rights, such as ILO Indigenous and Tribal Peoples’ Convention 169 (which New Zealand has not ratified) and the UNDRIP, do not have enforceability and are generally excluded from the scope of investment tribunals’ inquiries.
121. As the authors observe, 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

⁵⁵ Chao Wang, Jing Ning and Xiaohan Zhang, “International Investment and Indigenous Peoples’ Environment: A Survey of ISDS Cases from 2000 to 2020”, *International Journal of Environmental Research and Public Health*, 2021, 18, 7798-7811. Attached as Exhibit ‘AJ’.

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.

122. Chilean academic Nicolas Perrone, spells out how this works:⁵⁶

Foreign investors and states frequently cooperate to facilitate investment projects in the natural resource sector. National elites tend to be involved in these cases, acting like partners to the foreign investors, because they often benefit economically and have an interest in the continuation of extractivism. Meanwhile, local communities are in a weak position, with limited or no public support and few legal options. They may still resist a project, sometimes forcing the state to cancel it, yet cancellation may only be a pyrrhic victory. Foreign investors can rely on investment treaties and ISDS to interpret and enforce the political signals and givings granted by the host state. The cases analysed in this chapter show how ISDS tribunals overlook investor misconduct and the context of extractivist projects while making local communities invisible.

123. These concerns have been reinforced by UN Rapporteurs. In March 2019 a number of Rapporteurs, including the Special Rapporteur on the Rights of Indigenous Peoples, submitted a letter to the Chair of the UNCITRAL Working Group III relating to the reform of ISDS. In calling for systemic change, they said:⁵⁷

special attention should be paid to differentiated and disproportional negative impact of IIAs and the ISDS mechanism on women as well as on indigenous peoples, particularly in

⁵⁶ Nicolas Perrone, "Local Communities and ISDS", in *Investment Treaties and the Legal Imagination. How foreign investors play by their own rules*, 2021, 172-198, abstract. Attached as Exhibit 'AK'.

⁵⁷ Statement from United Nations Rapporteurs to the Chair of the UNCITRAL Working Party III, 7 March 2019, OL ARM 1/2019. Attached as Exhibit 'AL'.

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relation to resource extraction in or near indigenous peoples' territories.

E.4 ISDS and the Climate Crisis

124. The preponderance of investment disputes under ISDS involve natural resources, and increasingly climate change measures. The UNCTAD reported in 2022 that:⁵⁸

The urgency of climate action has added attention to the need to reform the international investment agreements (IIA) regime. The risk of ISDS being used to challenge climate policies is a major concern.



Many past ISDS cases were related to measures or sectors of direct relevance to climate action. Investor claimants brought at least 175 IIA-based ISDS cases in relation to measures taken for the protection of the environment.

Investors in the fossil fuel sector have been frequent ISDS claimants, initiating at least 192 ISDS cases against different types of State conduct.

The last decade has also seen the emergence and proliferation of ISDS cases brought by investors in the renewable energy sector, with 80 known cases.

125. In 2023 the UN Special Rapporteur on Human Rights and the Environment warned that the surge in fossil-fuel related ISDS claims could see governments liable to oil and gas corporations for \$340 billion in future ISDS cases for fulfilling their commitments under the

⁵⁸ UNCTAD, "Treaty-based investor-state dispute settlement cases and climate action", September 2022. Attached as Exhibit 'AM'.

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Paris Agreement on climate change – a major disincentive for ambitious climate action.⁵⁹

E.5 The example of Clive Palmer

126. The risk of an ISDS dispute in Aotearoa New Zealand is not hypothetical. Australia currently faces three ISDS claims brought by Australian mining magnate Clive Palmer through companies he has incorporated in Singapore to take advantage of the AANZFTA, which has just been updated and still includes ISDS.

127. Palmer’s claims relate to matters he has litigated on and lost in the Australian courts.⁶⁰ His first claim, for A\$300 billion, seeks compensation for legislation passed by the Western Australian Parliament as part of a commercial dispute with the state government over licensing of an iron ore project. Two further claims, totalling A\$110 billion, relate to the refusal of coal mining licenses in Queensland for environmental reasons, including their impact on carbon emissions.

128. Hearings on the first of those cases has begun and are expected to continue for several years. The idiosyncrasies of arbitral panels and lack of precedent and appeals means makes it impossible to predict whether one or more of the three tribunals might accept jurisdiction, and they could well produce different answers. Even if Clive Palmer’s claims fail at the first hurdle of jurisdiction, he will have put the Australian government to significant expense and introduced a potential chilling effect into future decision making at local, state and federal levels.

⁵⁹ UN Human Rights Office, “Investor-state dispute settlements have catastrophic consequences for the environment and human rights: UN expert”, 20 October 2023. Attached as Exhibit ‘AN’.

⁶⁰ Patricia Ranald, “Clive Palmer’s claims against Australia for billions renew pressure to remove investor rights to sue governments from trade agreements”, *The Economic and Labour Relations Review*, (2024) 1-13. Attached as Exhibit ‘AO’.

129. Clive Palmer has a propensity for forum-shopping and treaty-shopping. Back in 2019 he reincorporated a business in New Zealand with the apparent intention of bringing an investment dispute against the West Australian government under the Australia New Zealand Closer Economic Relations Trade Agreement (CER).⁶¹ Palmer seemed to be poorly advised, as CER does not have ISDS (or state-state disputes).
130. There is a clear risk that Clive Palmer could threaten to bring an ISDS dispute against New Zealand if he is unhappy with decisions that adversely impact on his mining investments here.⁶² His companies have several investments in Aotearoa New Zealand, which include “climate-related” minerals such as rare earth elements and lithium, as well as fossil fuels. As of 2023, Palmer’s company Mineralogy had 10 permits to prospect and explore for minerals and another eight applications were under consideration.⁶³ A Green Party petition opposed his applications on Conservation land.⁶⁴
131. Ngāti Kahu ki Whangaroa protested in April 2023 against the granting of prospecting licenses to Mineralogy for lithium and rare earth elements in areas around the Puketī Forest and the Whakarara Conservation Area.⁶⁵ That grant was under a Labour Government.
132. If objections or resistance by mana whenua to Mineralogy’s activities succeed, Palmer could well threaten or launch an ISDS claim against New Zealand by attempting to claim jurisdiction under one of our agreements that provide ISDS, including the AANZFTA. He is perfectly capable of doing so.

⁶¹ “Billionaire Aussie miner moves business to NZ”, *Newsroom*, 22 January 2019. Attached as Exhibit ‘AP’.

⁶² I can provide more detailed legal analysis on how this might occur should the Tribunal require.

⁶³ “Mining giant sets sights on NZ, including conservation land”, *TVNZ*, 25 May 2023. Attached as Exhibit ‘AQ’.

⁶⁴ “Greens launch petition to protect conversation land from mining by Mineralogy International Limited”, 1 May 2023. Attached as Exhibit ‘AR’

⁶⁵ “Hapū, Forest and Bird oppose Northland lithium mine”, *Te Ao News*, 12 April 2023. Attached as Exhibit ‘AS’

133. There is a further risk that another foreign investor – or even a New Zealand investor - may do as Palmer has done and bring an action using one of these agreements by incorporating their company within that foreign jurisdiction. They may not win. But even the threat of a dispute may be sufficient to have a chilling effect on a government’s decision.

E.6 The Crown’s Rejection of ISDS

134. Since 2017, the Crown, through successive governments, has acknowledged that the legal and fiscal risks of ISDS are unacceptable. This major shift in position implicitly acknowledges the validity of the concerns over ISDS that have been raised, including by Māori, since they were proposed in a Multilateral Investment Agreement in the late 1990s, and during previous Waitangi Tribunal inquiries discussed below.

135. The coalition government of Labour and New Zealand First, formed in October 2017, adopted a policy of not including ISDS in future agreements. This followed New Zealand First’s tabling of a private members bill (Fighting Foreign Corporate Control Bill) in 2015 to prevent ISDS being included in future agreements. That Bill was defeated at its introductory stage by a single vote.⁶⁶

136. The current government has maintained the “no ISDS” policy. However, it remains just a policy and is not in legislation. Negotiators and the Executive can still agree to include ISDS in free trade and investment agreements and have done so.

E.7 New Zealand’s exposure to ISDS

137. Despite this shift in policy, New Zealand is still subject to ISDS in a number of treaties, including with China, Hong Kong China, Japan, Canada, South Korea, Mexico, Indonesia, Malaysia, among others.

⁶⁶ Fighting Foreign Corporate Control Bill 2015 – First Reading, *Hansard*, Volume:707, p. 5252, 22 July 2015. Attached as Exhibit ‘AT’.



Many of these countries have active investors in fossil fuel, forestry, agriculture, water, transportation, waste management, and a range of other activities related to the climate crisis. They can also become vehicles for investors from other countries. This evidence highlights several key agreements which carry that risk.

Hong Kong New Zealand Investment Agreement

138. Arguably, the most problematic is the Hong Kong New Zealand Agreement for the Promotion and Protection Investment (IPPA), signed in July 1995.⁶⁷ This was expected to be renegotiated following the entry into force of the Hong Kong New Zealand Closer Economic Partnership Agreement in March 2010. That renegotiation broke down, so this agreement remains in force.
139. The Hong Kong IPPA can be described as an old-style investment treaty that has strong guarantees to foreign investors, couched in very general terms that are open to broad interpretation by investment arbitral panels.
140. An investment is defined broadly as “every kind of asset invested in lawfully” and includes moveable and immovable property, intellectual property rights, and “business concessions and licenses, including concessions to search for, cultivate, extract or exploit natural resources” (Article 1.5).
141. The guarantees to investors’ investments, which includes their returns, are also extremely broad. They must at all times be “accorded fair and equitable treatment, protection and security”. Under Article 3.2:

Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management,

⁶⁷ Hong Kong New Zealand Agreement for the Promotion and Protection Investment 1995. Attached as Exhibit ‘AU’.

maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party.

142. Protection against expropriation of the investment includes not only termination or seizure of the investment, but also regulatory measures, decisions and actions considered to have an equivalent effect.

143. The agreement predates even the 2001 Treaty of Waitangi Exception and there is no specific protection for actions taken to meet Crown obligations under Te Tiriti.

144. The Agreement has a very broad exception (Article 8) that

the provisions shall not in any way limit the right of either Party to take measures directed to the protection of its essential interests, or to the protection of public health, or to the prevention of diseases and pests in animals and plants, provided the way they are applied does not amount to arbitrary or unjustified discrimination.

145. Justification for measures taken wholly or in part in response to the climate crisis and the Crown's Tiriti obligations would need to be justified as "protection of its essential interests", "protection of public health", or "animal or plant life or health". However, those are not self-judging categories, so whether the measure is directed to that purpose can be challenged in an arbitral tribunal. Moreover, it is subject to a "chapeau" that allows further challenge that it is a means of arbitrary or unjustified discrimination.

146. I am aware that attempts by the Crown to revise this agreement to exclude ISDS failed some years ago. It is possible for New Zealand to exit this agreement at one year's notice, although investments existing prior to the date of termination continue to benefit from it for another 15 years. However, the agreement has not been terminated.



Investment obligations to China and ISDS

147. The UNCTAD repository of international investment agreements also records that a bilateral investment treaty with China, signed in 1988, is still in force.⁶⁸ That may be so, although I had understood it was superseded by the investment chapter in the FTA that came into force in 2008.

148. It has a specific provision (Article 4) that neither China nor New Zealand shall

... in its territory subject the investment related activities of nationals and companies of the other Contracting Party involving the purchase, sale and transport of raw and secondary materials, energy, fuels and means of production and operation of all types to treatment less favourable than that accorded to the investment related activities carried out by nationals and companies of any third State. There shall be no impediment to the normal exercise of such activities provided they are carried out [in accordance with the national laws and with the agreement].

149. This agreement has an even narrower general exception than the Hong Kong IPPA. Article 11 says the agreement does not in any way restrict the right to apply prohibitions or restrictions for “the protection of public health or the prevention of disease and pests in animals or plants”.

150. As with the Hong Kong IPPA, New Zealand could have terminated it in writing at any time after 2002. It appears not to have done so.

151. The China IPPA therefore appears to co-exist with Chapter 11 Investment in the New Zealand China Free Trade Agreement.⁶⁹ That

⁶⁸ China New Zealand Agreement for the Promotion and Protection Investment 1988. Attached as Exhibit ‘AV’.

⁶⁹ China New Zealand Free Trade Agreement 2008, Chapter 11: Investment. Attached as Exhibit ‘AW’.

chapter has a similarly broad asset-based definition of investment that explicitly includes “concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources”, as well as rights under licenses and permits.

152. The chapter also has the standard investor guarantees referred to above in paragraph 104 and is enforceable through ISDS, following the (possible) submission of the dispute to administrative review or the domestic courts.
153. The 2001 Treaty of Waitangi Exception applies. However, analysis of the Exception in relation to ISDS highlights a further major deficiency: the Exception only precludes a state-state dispute body from reviewing the interpretation of the Treaty of Waitangi and the nature of rights and obligations arising under it, not an investor-state dispute body. This omission was canvassed in depth at the Wai 2522 claim as discussed below.
154. The Agreement also incorporates the limited general exceptions from the WTO agreements on trade in goods and trade in services, referred to in paragraph 51 above. In addition to their other limitations, those exceptions would not apply to the investor protection rules because they fall outside their scope.
155. Unlike the IPPAs, free trade agreements like this that have an investment chapter are difficult to exit for a specific reason, such as terminating ISDS, because they have multiple chapters with other interests at stake. They can be renegotiated to exclude ISDS but the other Party has to agree.

TPPA/CPTPP

156. The TPPA contained a then-standard US-style investment chapter with ISDS (with an exception for ISDS on tobacco control measures). This



created new ISDS obligations for New Zealand with Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, United States and Viet Nam. There was a side-agreement between New Zealand and Australia not to apply ISDS between themselves, consistent with their existing bilateral arrangement under CER that has no state-state or investor-state dispute mechanism.

157. After the US withdrew from the TPPA, the CPTPP negotiations were concluded under the newly elected Labour/New Zealand First coalition government, whose Cabinet had agreed to no further ISDS in trade agreements. This policy was adopted following the TPPA protests and the Wai 2522 Waitangi Tribunal urgency hearing on the TPPA, including on ISDS. Despite that context, there was no engagement on this issue with the Wai 2522 claimants or apparently with other Māori.
158. Despite genuine attempts by Crown negotiators to suspend the ISDS provisions from the TPPA, it was not possible to get agreement from the other CPTPP parties.⁷⁰ Instead, side-letters were signed with Brunei, Malaysia, Peru and Viet Nam not to apply the ISDS provisions in the now-CPTPP between them. However, the side-letters did not extend to the application of ISDS under other agreements with those same Parties. There are no side-letters with Canada, Japan, Mexico and Singapore.
159. A subsequent side-letter with Chile followed the common format (although there are some minor variations), and was accompanied by an informative Cabinet memorandum and National Interest Analysis (NIA).⁷¹ These documents explained that the purpose of the side-letter was to reduce New Zealand's risk of international litigation before international arbitral tribunals, consistent with New Zealand's policy since 2017 to exclude ISDS from future trade agreements. The Cabinet memorandum set out New Zealand's preference for a complete

⁷⁰ As explained in Cabinet Paper, "CPTPP Approval and Authorisation to sign an ISDS Side Letter with Chile", released 11 August 2023. Attached as Exhibit 'AX'.

⁷¹ Attached as Exhibit 'AX'



exclusion of ISDS to remove exposure to legal risk, with application of ISDS that requires consent of the country being sued being a fall back option. The Cabinet Paper and NIA make no reference to Te Tiriti.

160. The MFAT website incorrectly asserts that the Treaty of Waitangi Exception protects the Crown's interpretation of the Treaty from review by an ISDS panel.⁷² This misrepresentation continues to be made, despite being pointed to on many occasions. As explained above, the Treaty Exception refers only to "more favourable treatment" and applies the "chapeau". Crucially, it only excludes state-state dispute bodies from reviewing Crown interpretations of its Tiriti obligations; that exclusion does not refer to the provisions providing for ISDS. As explained below, the Wai 2522 Tribunal agreed that this was problematic.

161. Ngā Toki Whakarururanga articulated these concerns in the ITAG review, as summarised by the Crown in its report:

Ngā Toki Whakarururanga said that Māori Tiriti rights are currently vulnerable to ISDS in relation to climate change measures involving Indigenous Peoples, and in relation to decisions around natural resources such as water and mining, given that New Zealand does not have side letters to exclude ISDS between New Zealand and all CPTPP Parties (New Zealand has such side letters with Australia, Brunei, Chile, Malaysia, Peru and Viet Nam). There was also concern around current general protections for natural resources.⁷³

162. Ngā Toki Whakarururanga recommended that:

The Crown seeks the support of the other ITAG Parties to promote, as an implementation issue, the exclusion of ISDS from the CPTPP during the forthcoming review; for those

⁷² MFAT, "Investment and ISDS". Attached as Exhibit 'AY'.

⁷³ ITAG Report, p.30. Attached as Exhibit 'E'.

*Parties that have signed side-letters with New Zealand committing to non-application of ISDS to extend them to cover all agreements between them; and for ITAG Parties that have not yet signed such side-letters to do so.*⁷⁴

163. As noted above, any such amendment to the Agreement would require consensus of the existing parties, which is extremely unlikely. Further side-letters are a political decision of those who have not yet agreed, despite strong efforts from MFAT to secure them.

AANZFTA

164. In 2010, the original AANZFTA entered into force between Australia, New Zealand and the ten ASEAN nations. It contained standard investor protection rules and ISDS. Despite the post-2017 government policy of no ISDS in new agreements, the review of AANZFTA signed in 2024 retains ISDS.

165. Despite vigorous efforts by officials, there are no AANZFTA side-letters with any of the other parties except Australia.⁷⁵ This means that New Zealand is subject to ISDS disputes under AANZFTA from investors claiming through Brunei, Cambodia, Indonesia, Laos PDR, Malaysia, Myanmar (Burma), Japan, Philippines and Viet Nam, even though some had signed ISDS side-letters relating to the CPTPP.

166. As noted above, the potential for treaty shopping does not mean that investors threatening or bringing disputes under AANZFTA would actually have to originate from those states. AANZFTA is the agreement that Clive Palmer is using to sue Australia in two of his three current investment disputes via a company that he incorporated in Singapore, claiming over A\$400 billion in damages and compound interest.

⁷⁴ Ibid, p. 69

⁷⁵ MFAT, Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, National Interest Analysis, 2024, pp. 30-31. Attached as Exhibit 'AZ'.

167. The 2001 Treaty of Waitangi Exception remains unchanged in the revised AANZFTA, carrying the same legal exposure to challenge before an ISDS tribunal as the TPPA/CPTPP.

E.8 Waitangi Tribunal on ISDS and regulatory chill

168. Several previous Waitangi Tribunal inquiries have considered the risks that investment protections and ISDS could be used to challenge or deter (“chill”) Crown measures whose rationale is, in whole or in part, to comply with its Tiriti obligations or to redress Tiriti breaches. Their reports have expressed increasingly strong concern regarding ISDS.

169. I first raised these issues in evidence on behalf of claimants in National Freshwater and Geothermal Resources Claim relating to the Mixed Ownership Model in 2012. There, the concern over ISDS was resolved by the then government pledging that it would not succumb to such pressures.⁷⁶

Wai 2522 Urgency Hearing and ISDS Protocol

170. The Waitangi Tribunal’s urgency report on the TPPA (Wai 2522) in 2016 (before the Crown’s “no ISDS” policy) outlined concerns about ISDS and the potential chilling effect of threats to bring such a dispute on the willingness of a government to adopt Tiriti-compliant policies, measures or decisions. The Tribunal, however, felt unable to speculate on the extent of prejudice given the information available.⁷⁷

171. The Waitangi Tribunal nevertheless recognised the risks posed by ISDS and the potential for any reliance on the Treaty of Waitangi Exception to be challenged. It recommended the development of a protocol for ISDS disputes in which the Treaty Exception might be raised:

⁷⁶ Waitangi Tribunal, *Stage 1 Report of the National Freshwater and Geothermal Resources Claim*, Wai 2358, 2012, pp.129-134.

⁷⁷ Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, Wai 2522, 2016, at 41-42, 45, 50-52 (Report on TPPA).

We also suggest to the Crown the adoption of a protocol that would govern New Zealand procedure in the event it becomes a party to an ISDS under the TPPA (or any other FTA) in which the Treaty exception clause is, or is likely to be relied upon. Any such protocol should be developed in dialogue with Māori. All experts who appeared before us agreed that such a protocol could include the following:

- *a commitment to invoke the Treaty exception if there is an ISDS case concerning Māori;*
- *a policy to lead expert Māori evidence where the Treaty exception may be invoked ;*
- *amicus curiae briefs for Māori to be encouraged;*
- *a policy commitment to regular dialogue and consultation over the course of an ISDS case if it raises issues of concern to Māori;*
- *in a case where the Treaty exception clause may be raised, Māori representation could be included as part of the New Zealand team;*
- *a commitment to select an arbitrator with knowledge of Treaty principles and tikanga (and investment arbitration); and*
- *if necessary, cooperate with the State of the investor to make a joint submission on interpretation of the Treaty exception (in the event it was considered that the arbitration tribunal was at risk of coming to an erroneous view).*

These are ideas to be developed and not all will necessarily be applicable in the context of a specific dispute. However, given the increased exposure to ISDS under the TPPA, we believe it would be both prudent and Treaty-consistent for the Crown to engage in a dialogue with Māori, with a view to reaching agreement over measures such as these.⁷⁸

⁷⁸ Ibid, p.57

172. Wai 2522 Counsel Annette Sykes and myself as the claimants' expert in the inquiry entered into dialogue with the MFAT legal division over this protocol. However, the Protocol that was unilaterally finalised by MFAT does not meet the Tribunal's recommendations.⁷⁹ All control remains in the hands of the Crown. Ngā Toki Whakarururanga conveyed its objections to the Minister for Trade, Foreign Affairs and Minister of Justice on 21 December 2022 that "kāwanatanga subordinates any exercise of rangatiratanga in this process" and challenged the competency of MFAT to "make decisions about Māori interests and the proper legal interpretation of exceptions without effective Māori input".⁸⁰

173. The letter to ministers noted that MFAT's protocol could only be an interim measure and sought "active dialogue with the legal division for a successor instrument that addresses the above concerns and applies to these additional circumstances in a manner that reflects the relationship of rangatiratanga to kāwanatanga." That has not happened. This is another example of MFAT dictating the terms of Māori participation and protection in breach of the principles of Rangatiratanga, Mutual Recognition and Respect, Partnership and Active Protection.

Wai 2522 report on E-commerce, ISDS and Regulatory Chill

174. The risks associated with ISDS were discussed further in the Wai 2522 hearing on the Electronic Commerce chapter of the CPTPP. The key concern about ISDS was, and is, not whether an actual case against New Zealand would succeed. It is what we refer to as the "chilling effect" of the existence of ISDS on decisions. The Wai 2522 Tribunal in its E-commerce report set out the concerns:

⁷⁹ MFAT, "Protocol to apply in the event of an ISDS case where the Treaty of Waitangi exception is likely to be relied on". Attached as Exhibit 'BA'

⁸⁰ Letter from Moana Maniapoto and Pita Tipene to Minister Damien O'Connor and others, 21 December 2022. Attached as Exhibit 'BB'.

In our Stage One report, the focus was on the chilling effect created by investor–state dispute settlement (ISDS); that is, the effect that either actual or potential litigation has on government action. In this stage of our inquiry, regulatory chill has a broader application.

Previously, we cited ‘Expert Paper #5: The Economics of the TPPA’, which noted that the true essence of the chill process is threat, not necessarily the actualisation of repercussions. The threat is compounded by uncertainty over:

- *how serious the threat is;*
- *the outcome of legal proceedings in which novel decisions are made – especially when those decisions do not have to follow precedent, lie outside of a country’s jurisdiction, and may be following unfamiliar legal rules; and*
- *whether the policymaker’s democratic mandate might suffer at the hands of the electorate if a dispute with a foreign corporation turns ugly.*

The Stage One report also registered concerns about the breadth of rights conferred upon foreign investors by the TPPA and the potential chilling effect that this may have on Tiriti/Treaty-compliant Crown conduct. While we did not make findings about the extent to which an ISDS under the TPPA may cause prejudice to Māori Tiriti/Treaty rights and interests, we defined the chilling effect as meaning governments would be deterred from passing laws or making policy by the threat or the apprehension of an ISDS claim.⁸¹

175. In its findings, the Tribunal summarised the claimants’ arguments relating to e-commerce, which are very similar to those on the climate crisis:

⁸¹ Waitangi Tribunal, *CPTPP Report*, pp.160 - 161

Throughout this report we refer to our evaluation of the e-commerce rules as a 'risk assessment'. ... The claimants have raised a number of issues relating to the operation of the e-commerce provisions, which they say give rise to risks including:

- *regulatory measures enacted for the benefit of Māori being subject to State-to-State and investor-state dispute resolution mechanisms;*
- *the conceptual incompatibility between the Māori worldview and the views and interests which underpin the CPTPP; ...*
- *the possibility of regulatory chill occurring at various stages of the policy and legislative process; ...*
- *external pressure from States and multinational corporations seeking to protect their interests.*⁸²

176. The Tribunal considered these concerns were well-founded in relation to Tiriti-compliant approaches to digital and data:

*Having considered the arguments before us, we agree with Professor Kelsey that the concept of regulatory chill extends beyond ISDS, encompassing the risk of potential impact on aspects of both the policy and legislative process. ...*⁸³

Stage One of this inquiry recognised that we did not have the time, expertise, or evidence to make findings as to whether the investment regime in the TPPA/CPTPP was likely to impede the capacity, or willingness, of the Aotearoa New Zealand Government to honour Tiriti/Treaty obligations. This stage of our inquiry recognises that risk extends beyond the risk of an ISDS claim and includes the broader scope of regulatory chill

⁸² Ibid, p. 185

⁸³ Ibid, pp. 175 - 176



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 in Māori Data Sovereignty, Māori Data Governance, and collective privacy. The claimants and the Crown agreed that it is impossible to measure regulatory chill. The Crown therefore considered it is not a significant problem and that any risk is, at best, negligible. The claimants, in effect, saw that the difficulty of measuring the risk points to heightened risk. ...

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.”

177. While noting it was unclear whether a breach of an obligation under the e-commerce chapter could constitute part of a complaint under the investment chapter, the Tribunal remarked:

Even if it should not, it does not seem that investors who can bring claims would necessarily feel this restraint. This, even if tangentially, contributes to the regulatory chilling effect and related risk to the Crown’s ability to meet its Tiriti/Treaty obligations.⁸⁴

178. The Tribunal found that there was “a material risk of regulatory chill”⁸⁵ and hence a contributing factor in the Crown’s failure to provide active protection.

⁸⁴ Ibid, p. 175

⁸⁵ Ibid, p. 185



E.9 Significant risk from ISDS to Tiriti-compliant climate measures

179. For the reasons outlined above, the risks posed by ISDS to Tiriti-compliant approaches to the climate crisis make these arguments even more compelling than they were when the Waitangi Tribunal previously considered them.
180. The Crown, which rejected these arguments on ISDS in the Wai 2522 hearings, has effectively conceded the risks are sufficiently significant to exclude ISDS from future agreements. Yet, ISDS obligations remain active and potent in a number of agreements that investors who are major contributors to the climate crisis may seek to use.
181. In my opinion, the negotiation of these agreements over many years, despite Māori objections, constitutes a failure of the principles of Rangatiratanga and an overreach of Kāwanatanga. Today, the Crown's failure or inability to terminate or amend ISDS powers poses a significant risk of prejudice to Māori that foreign, or even local, investors will threaten to, or actually, use ISDS to challenge governments for the adoption of Tiriti-compliant climate mitigation measures, and seek billions of dollars in compensation.
182. These risks have been intensified by policies and legislative proposals under the current Coalition Government, irrespective of their breaches of the Crown's Tiriti obligations. These include the Fast Track Approvals legislation, and proposed changes to oil and gas laws as well as foreign investment laws. As discussed above, some Māori can be expected to resist such investments. If they succeed in shutting down those activities, or if those investments are reversed or altered by a future government, an ISDS dispute is a very real possibility.
183. As the Tribunal recognised in the Wai 2522 inquiry, the potential chilling effect on the Crown's compliance with its Tiriti o Waitangi obligations is a real and present risk.



F. Conclusion

184. For the reasons set out above, it is my opinion as an expert in both free trade and investment agreements and Te Tiriti o Waitangi that the Crown has breached its Tiriti-based obligations in relation to the principles of Rangatiratanga, Mutual Recognition and Respect, Partnership, Active Protection and Redress, and exceeded its authority as Kāwanatanga.

185. I remain available to the Tribunal to expand on any of these matters as the inquiry proceeds.

Dated this 21st day of October 2024

Affirmed at Auckland this)


21st day of October 2024)

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Elizabeth Jane Kelsey

Before me:


_____ Jedi M Carthy

A barrister and solicitor of the High Court of New Zealand

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