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

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| **IN THE MATTER OF** | the Treaty of Waitangi Act 1975 |
| **AND** | |
| **IN THE MATTER OF** | the Climate Change Priority Inquiry (Wai 3325) |
| **AND**<br>**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 TBC).** |

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**STATEMENT OF CLAIM**

Dated at Rotorua, on this 8th day of July 2024

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**TĒNĀ E TE TARAIPIUNARA**

**THE CLAIMANTS**

1. This claim is submitted on behalf of

    a) Pita Tipene, Ngāti Hine, co-convenor of Ngā Toki Whakarururanga, resident of Kawakawa and Poutaki Kaupapa of Ngāti Hine, Chair of Ngāti Hine Forestry Trust and Waitangi National Trust;

    b) Moana Maniapoto, Te Arawa and Ngāti Tūwharetoa, co-convenor of Ngā Toki Whakarururanga, trustee of Toi Iho Māori Made Mark, artist, documentary maker and resident of Muriwai Beach which was hit by Cyclone Gabrielle in 2023;

    c) Dr George Laking, Te Whakatōhea, medical oncologist, executive board member of Ora Taiao, the New Zealand Climate and Health Council, Kaihautū of Ngā Toki Whakarururanga;

    d) India Logan-Riley, Ngāti Kahungunu ki Ngāti Hawea, Rongomaiwahine and Rangitāne, climate justice campaigner for Pacific Network on Globalisation (PANG), previously Climate Justice Organiser at ActionStation and a community researcher for the research project, Generation Kāinga, Kaihautū of Ngā Toki Whakarururanga;

    e) Donna Kerridge, Ngāti Tahinga and Ngāti Mahuta, rongoā practitioner and founder and director of Ora New Zealand, Kaihautū of Ngā Toki Whakarururanga;

    f) Aroha Te Pareake Mead, Ngāti Awa, Ngāti Porou and Tūhourangi, an independent Māori researcher specialising in mātauranga Māori/Indigenous knowledge and conservation, Pūkenga of Ngā Toki Whakarururanga; and

    g) Dr Maria Bargh, Te Arawa and Ngāti Awa, Professor whose research includes Māori rights and interests in international trade and foreign policy particularly in relation to questions of

sovereignty, environmental protections, climate change and hidden economies, Pūkenga of Ngā Toki Whakarururanga;

on behalf of themselves, Ngā Toki Whakarururanga and Māori affected by the climate crisis.

2. Ngā Toki Whakarururanga was established through a Mediation Agreement with the Crown in the Wai 2522 Waitangi Tribunal Inquiry on the Trans-Pacific Partnership Agreement (TPPA). Following a mandated establishment process, the entity operates on and is accountable to the following Kaupapa:

> "As a by-Māori, of-Māori, with-Māori and for-Māori entity, Ngā Toki Whakarururanga's duty and responsibility is to protect and advance Māori responsibilities and rights according to Te Tiriti o Waitangi me He Whakaputanga o te Rangatiratanga o Nu Tireni, and to hold the Crown to account to meet its responsibilities under Te Tiriti and He Whakaputanga in the arena of trade policy, negotiations and agreements."

3. For the purposes of this inquiry, the claimants say the Crown has breached its obligations under Te Tiriti o Waitangi, and principles derived from Te Tiriti of rangatiratanga, kāwanatanga, partnership, mutual recognition and respect, active protection and redress, in the negotiation, adoption, continuation and renewal of international trade and investment agreements as they relate to and impact on the climate emergency, with negative consequences for the physical, spiritual, cultural and socioeconomic wellbeing of Māori.

4. Other claimants have highlighted as an issue the Crown's approach to international climate instruments and its relationship to domestic legislation and policies in light of relevant international jurisprudence.[1] International trade and investment treaties are an integral part of the genre

[1] For example, Statement of Claim by Mere Brooks and others, 1 July 2024

of international climate instruments, but have not been expressly identified as such.

5. These agreements are critical to the interface between international treaties and domestic legislation and policies. They conceptualise and promote solutions to the climate crisis in ways that are antithetical to Te Ao Māori, tikanga, Māori values and mātauranga. They also have the potential to pre-empt or chill the adoption of strategies, policies and laws that genuinely reflect a Māori and Indigenous worldview, and Te Tiriti, and that can provide tangible redress for Māori affected by the climate crisis.

6. The resulting undermining of te iwi Māori and mana whenua, including their ability to protect the whenua from further degradation and carbon extraction (kaitiakitanga) and themselves against the impacts of climate change, including the effects of growing CO2 emissions (rangatiratanga), in a manner consistent with tikanga Māori, is prejudicial to the wellbeing of te Taiao, te oranga o te iwi and future generations.

**Claim: Causes of Action**

7. In the interest of brevity for this priority Kaupapa inquiry, this claim is limited to three causes of action:

(i) **Cause of Action 1**: The Crown has failed to recognise and give effect to the principle of Rangatiratanga in the process of negotiating, and in the substance of, international trade agreements that relate to the climate emergency.

Māori are disproportionately impacted on by the climate emergency in Aotearoa New Zealand.

The denial of the principle of Rangatiratanga and exceeding the principle of Kāwanatanga through international trade and investment agreements disempowers and prejudices Māori by

denying a seat at the table to determine appropriate international responses and solutions to this crisis.

(ii) **Cause of Action 2**: The Crown's adoption of international trade and investment agreements that relate to the climate emergency promote and adopt concepts, legal and economic instruments, technologies and techniques, and practices that reflect western worldviews and capitalist interests that have been rejected by Indigenous Peoples around the world.

The resulting commitments by the Crown on behalf of Aotearoa New Zealand are antithetical to tikanga, mātauranga and kaitiakitanga, even where agreements purport to reflect and give effect to Māori and Indigenous Peoples' values and knowledge. This breach of the Crown's obligations under the principles of "mutual recognition and respect" and "active protection" exacerbates harm to people and te Taiao through many of those "solutions".

(iii) **Cause of Action 3**: The Crown has adopted international obligations that allow for investor-state dispute settlement (ISDS) in a number of existing trade and investment treaties. ISDS enables foreign investors to enforce rights to protect assets and future profits from measures taken to mitigate the climate emergency, including compliance with te Tiriti. This is being used extensively by foreign investors internationally to challenge and deter (or "chill") climate change measures and there is a tangible risk of such disputes being brought or threatened in Aotearoa New Zealand. The Treaty of Waitangi Exception contained in these agreements does not provide effective protection against this occurring.

The prejudice arising from this breach of active protection is that the Crown may refuse to adopt Tiriti-compliant responses to the climate crisis or to terminate or reduce climate-damaging activities by

foreign investors, for fear of an ISDS dispute being brought over such actions or of losing such a dispute.

**Scope of application**

8. For the sake of brevity given this is a priority Kaupapa inquiry, these three causes of action will be illustrated in evidence by reference to:

(i) Three free trade and investment agreements:

(a) 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;

(b) The Agreement on Climate Change Trade and Sustainability (ACCTS) between New Zealand, Costa Rica, Iceland and Switzerland, concluded in July 2024; and

(c) The Agreement on "Clean Economy" as part of the Indo-Pacific Economic Framework (IPEF), led by the United States, and signed in May 2024 by the Crown on behalf of Aotearoa New Zealand along with Australia, Brunei Darussalam, India, Indonesia, Fiji, Japan, Malaysia, Philippines, Singapore, South Korea, Thailand, United States and Viet Nam.

(ii) Two agreements that contain ISDS and to which New Zealand is a Party:

(a) The CPTPP, which contains ISDS powers for investors of the Parties. As part of the adoption of the CPTPP by the Crown, side letters were signed with a number of those Parties. However, these relate solely to ISDS under the CPTPP and not

to other agreements with those Parties. There are no side-letter with Canada, Japan and Mexico.

(b) The ASEAN Australia New Zealand Free Trade Agreement (AANZFTA), involving Australia, Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Philippines, Singapore, Thailand, Viet Nam and Aotearoa New Zealand. which contains ISDS. A protocol to update that agreement was signed in June 2024, which retains full powers for investors from those countries to bring, or threaten to bring, an ISDS dispute against Aotearoa New Zealand.

**Findings**

9. The Claimants seek definitive findings that:

(i) The constitutional authority and responsibilities of Mana Motuhake and Tino Rangatiratanga need to be exercised on at least equal terms with the authority of Kāwanatanga in international treaty making on matters relating to the climate emergency, including in international trade and investment treaties. The Crown has failed to do so.

(ii) The climate crisis is a global emergency that requires a synergy between legislation, policies and other actions the Crown commits to in Aotearoa New Zealand to mitigate and reverse that emergency and those it commits to through international treaties, including those on trade and investment. The Crown needs to comply with its obligations to adopt Tiriti-compliant responses to the crisis in both jurisdictions. The Crown has failed to do so in the international trade and investment sphere.

10. The Claimants seek recommendations that:

(i) the Crown adopts a mechanism that re-empowers Māori to exercise equal authority in the international domain when addressing the climate emergency, including in the making of international trade and investment treaties;

(ii) pursuant to recommendation (i) the Crown proactively takes immediate steps to review existing provisions that relate to climate change to make them compatible with the exercise of rangatiratanga and tikanga and consistent with Mātauranga Māori;

(iii) the Crown takes immediate steps to remove the potential liability of Aotearoa New Zealand to investor-state dispute settlement in existing trade and investment agreements and enacts legislation that prevents a future government from adopting or maintaining such a dispute mechanism.

**Relevant principles**

11. Pursuant to its functions and powers under the Treaty of Waitangi Act 1975, the Waitangi Tribunal is called upon in this Inquiry to examine the Crown's failure to honour its constitutional obligations to the Claimants and other Māori under Te Tiriti o Waitangi, and the principles derived therefrom, and to make practical recommendations on the constitutional transformation that is required to honour Te Tiriti o Waitangi today and into the future.

12. Consistent with the approach taken in *Te Paparahi o te Raki,* the Tribunal should apply the following principles to this inquiry:[2]

***(i) Te mātāpono o te tino rangatiranga me mana Motuhake:*** Rangatira expected that, in accordance with te Tiriti, their authority would

[2] *Paparahi o te Raki Inquiry* Stage 2, pp.52-53

continue to be recognised, and respected and they would continue to exercise their rights and responsibilities to their hapū in accordance with tikanga.[3] This authority would apply seamlessly in the international as in the national domain.

**(ii)** ***Te mātāpono o te kawanatanga/ the principle of kāwanatanga****:* Māori expected that their authority in their sphere would be equal to that of the Crown in its sphere; and that questions of relative authority would be negotiated as they arose through discussion and agreement between the parties. The duty of the Crown was (and is) to foster tino rangatiratanga (Māori autonomy), not to undermine it, and to ensure its laws and policies were just, fair, and equitable, and would adequately give effect to treaty rights and guarantees, notably those affecting hapū autonomy and tikanga, and hapū retention and management of their lands and resources. In accordance with the principle of Kāwanatanga, the Crown had a further duty to ensure that its treaty duties are not abrogated, equally in the international and the national domain.[4]

**(iii)** ***Te mātāpono o te houruatanga/the principle of partnership:*** Kāwanatanga, the authority granted to the Crown was not a superior authority, an overarching power, albeit "qualified" by the right of Māori to exercise tino rangatiratanga. Rather, the Crown's authority was expressly limited to its own sphere. Alongside and equal to it, was that of tino rangatiratanga. Negotiating and managing their respective spheres of authority, as well as shared spheres as the two populations intermingled, was the key issue for the treaty partners in the years after te Tiriti was signed. The Crown could not unilaterally decide what Māori interests were or what the sphere of tino rangatiratanga encompassed; that was for Māori to negotiate with the Crown. The Crown's duty was and is to engage actively with Māori on how it should recognise tino rangatiratanga and, where agreed,

[3] *Paparahi o te Raki Inquiry* Stage 2, p.84
[4] *Paparahi o te Raki Inquiry* Stage 2, p.84

give effect to it in New Zealand law. Partnership was and is the framework for governance in New Zealand; both parties must act honourably and in good faith.[5]

**(iv)** ***Te mātāpono o te whakaaronui tētahi ki tētahi; the principle of mutual recognition and respect.*** In their delivery, the Crown and Rangatira must each recognise and respect the values, laws, and institutions of the other. "The Crown for its part must respect tikanga, which is at the heart of [Māori] values, law, and the Māori was of life, as are mana, whanaungatanga, mātauranga, and kaitiakitanga."[6]

**(v)** ***Te mātāpono o te mataporore moroki/ the principle of active protection.*** This must be understood in a manner compatible with te Tiriti, and not a form of protection that superimposes a hierarchical and paternalistic relationship on a relationship of equals. As the Tribunal in *Te Raki* observed: "the Crown cannot paternalistically protect what it has no authority over".[7] Further,

> "We consider that active protection is not a Crown duty arising from its sovereign authority. Rather, it requires the Crown to help restore balance to a relationship with [Māori] that had become unbalanced as the Crown assumed an authority far beyond the bounds understood .. when they signed te Tiriti.[8]"

*(vi)* ***Te mātapono o te whakatika/the principle of redress.*** Māori have the right to redress from their treaty partner, including financial and other compensation.[9] As with active protection, that right is framed as a subordinate principle that arises consequent on a breach.

[5] *Paparahi o te Raki Inquiry* Stage 2, p. 85
[6] *Paparahi o te Raki Inquiry* Stage 2, p.85
[7] *Paparahi o te Raki Inquiry* Stage 2, p.81
[8] *Paparahi o te Raki Inquiry* Stage 2, p. 86
[9] *Te Paparahi o te Raki* Stage 2, p.87

**Wai 2522 context**

13. The original Statement of Claim for Wai 2522 remains applicable here:

> "The TPPA procedurally and substantively prejudices and undermines the guarantees to Māori under the Treaty to the exercise of their tino rangatiratanga in governance decisions that affect them, including their health and wellbeing and their authority and responsibilities as kaitiaki over their lands and resources, esteemed institutions, knowledge systems and customs me o rātou taonga katoa; and the Crown's performance of associated obligations under the [United Nations Declaration on the Rights of Indigenous Peoples] UNDRIP."[10]

14. In *Te Mana Whatu Ahuru* of the Te Rohe Potae Inquiry, the Waitangi Tribunal confirmed in relation to Te Tiriti:[11]

> "Under the Treaty, Māori were guaranteed that their right to exercise tino rangatiratanga (and therefore mana) would continue. The Treaty in turn created an obligation on the Crown to protect Māori communities in possession of and authority over their lands, resources, and all other valued things. Māori would have understood this as including their mana, their tino rangatiratanga, and their tikanga – their systems of authority and law, including systems for managing relationships among people, among groups, and with the environment and natural resources. In this respect the Treaty did not diminish Māori authority, but affirmed it."

15. Te Tino Rangatiratanga represents the mana embodied in rangatira.[12] It

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10 Wai 2522, #1.1.1 at [32].
11 Waitangi Tribunal, *Mana Whatu Ahuru* (Wai 898, 2018) at 187.
12 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 67; Waitangi Tribunal, *Motunui–Waitara Report* (Wai 6, 1983) at 51; see also Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 186.

is a guarantee of enduring relationships with land and resources, and of the authority necessary to maintain those relationships as iwi and hapū see fit[13] – that is, in accordance with their own knowledge and ways of seeing (mātauranga) and ways of understanding what is right and proper (tikanga).[14]

16. These fundamental rights and obligations are reinforced in the UNDRIP through, *inter alia,* Articles 18:

> "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

Article 29.1:

> "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. … "

and Article 31(1):[15]

> "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. …. "

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13 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 181.

14 Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wai 262, 2011) at 22–23.

15 Wai 2522, #1.1.1 at [55].

17. These rights, duties and obligations of Indigenous Peoples and the Crown are central to the climate crisis and remain unresolved, despite the previous government's commitment in Te Pae Tawhiti to implement the Wai 262 recommendations.

**Cause of Action 1: Denial of the exercise of rangatiratanga and excessive exercise of kāwanatanga, through effective and equal participation in the negotiation and decision making relating to these agreements and their subsequent implementation**.

18. The secrecy surrounding the negotiation of free trade and investment agreements means most Māori outside the Crown have been excluded from any input, let alone the exercise of Rangatiratanga, on how those agreements respond to the climate emergency.

19. Since the Mediation Agreement in October 2022 Ngā Toki Whakarururanga has been consulted during the course of such negotiations. However, detailed input has been limited to nominees who have signed confidentiality agreements with the Crown. Those pūkenga have developed a generally cordial, constructive and good faith relationship with the relevant officials in the Ministry of Foreign Affairs and Trade. However, they have been unable to share texts with other Māori affected by these negotiations and agreements and to seek their inputs on the texts under discussion.

20. The Crown insists on the exclusive right to sit at the negotiation table and exercise all powers to determine submissions, trade-offs and outcomes, despite repeated challenges that this does not comply with the Tiriti relationship of Rangatiratanga and Kāwanatanga.

21. As a result, inputs made by Ngā Toki Whakarururanga can be, and have been, ignored or diluted through unilateral decisions made by the Crown, including as trade-offs for other matters it considers more important. No

one outside Ngā Toki Whakarururanga will know what advice the Crown has received and adopted or ignored.

22. The Crown also has total control over the decision of what degree of protection to seek and accept to ensure that the Crown and Māori can exercise their responsibilities and duties under Te Tiriti. Ngā Toki Whakarururanga has repeatedly insisted that the standard Treaty of Waitangi Exception that dates back to 2001 would not apply to many domestic measures that relate to Te Taiao, including the climate crisis.

23. The systemic denial of Rangatiratanga in international treaty making forms part of the Statement of Claim by Ngā Toki Whakarururanga to the Constitutional Kaupapa Inquiry (Wai 3300). For this claim, the argument is limited to the Crown's failings in relation to international trade and investment treaties as they relate to climate change.

**Cause of Action 2: Denial of mutual respect and active protection by advancing climate "solutions" that deny mana whenua and kaitiakitanga and have the potential to harm Te Taiao and tangata whenua**.

24. Free trade and investment agreements entered into by the Crown on behalf of Aotearoa New Zealand fail to actively and effectively advance and protect Māori responsibilities and rights under Te Tiriti o Waitangi and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), including through the exercise of tikanga and mātauranga Māori and kaitiakitanga.

25. Instead, the "solutions" they promote violate those foundational principles. The harms and prejudice they cause to Indigenous Peoples are well documented internationally. These "solutions" include:

(a) Legal and financial instruments such as carbon capture, utilisation and storage (CCUS),[16] carbon markets,[17] and liberalisation of related financial and environmental services, which create opportunities for corporate profit and encourage offsets for "net zero emissions", but do not address the core causes of the climate crisis, a crisis that impacts disproportionately on Indigenous Peoples;[18]

(b) Concepts such as "ocean-based" solutions,[19] "ocean based renewable energy", "sustainable ocean economies", and associated practices like wind and wave farming.[20] These approaches demand "stable economic and regulatory frameworks" and reduction of "barriers" (usually seen as regulatory) to stimulate investments in the supporting infrastructure";[21]

(c) Similarly, "nature-based" solutions,[22] such as "blue carbon" ecosystems of mangroves and seagrasses, that are treated as "carbon sinks" without recognising the authority and kaitiaki

[16] "7 first nations in Alta. want answers on carbon capture and storage plans", *CBC,* 18 February 2024, https://www.cbc.ca/news/canada/edmonton/7-first-nations-in-alta-want-answers-on-carbon-capture-and-storage-plans-1.7119106; Chloe Alexander et al, "The colonialism of carbon capture and storage in Alberta's Tar Sands", vol 5(4), *Environment and Planning E. Nature and Space,* 2021, https://doi.org/10.1177/251484862110528; https://www.reuters.com/sustainability/climate-energy/comment-carbon-capture-storage-is-dangerous-distraction-its-time-imagine-world-2023-12-11/; https://www.ienearth.org/environmental-justice-organizations-post-comments-on-carbon-capture-and-storage-to-the-white-house-council-on-environmental-quality/

[17] Maria Parazo Rose, "Indigenous people rush to stop 'false climate solutions', *ICT*, 23 April 2024, https://ictnews.org/news/indigenous-people-rush-to-stop-false-climate-solutions;

[18] Aarti Lile Ram and Eric Shahzar, "Land, loss and liberation: Indigenous struggles amid the climate crisis", World Economic Forum, 9 February 2024, https://www.weforum.org/agenda/2024/02/indigenous-challenges-displacement-climate-change/

[19] Meg Parsons and Lara Taylor, "Why Indigenous Knowledge Should be an essential part of how we govern the world's oceans", *Conversation*, June 2021, https://anzsog.edu.au/news/why-indigenous-knowledge-should-be-an-essential-part-of-how-we-govern-the-worlds-oceans/

[20] Business and Human Rights Resource Centre, *Renewable Energy and Human Rights Benchmarks. Key findings from the wind and solar sector 2021*, https://media.business-humanrights.org/media/documents/2021_Renewable_Energy_Benchmark_v5.pdf,

[21] K. Wood and A. Ashford, "The Ocean can play a bigger role in climate change than previously thought", World Resources Institute, 20 September 2023, https://www.wri.org/insights/ocean-based-climate-change-solutions

[22] Indigenous Environmental Network, "Nature-based solutions. Indigenous Environmental Network Climate Justice Program Series", November 2022; Mercia Abbot et al, "Indigenous thinking about nature-based solutions and climate justice", British Academy, 2022, https://www.thebritishacademy.ac.uk/publications/indigenous-thinking-about-nature-based-solutions-and-climate-justice/

responsibilities of mana whenua to care for and determine appropriate uses of those resources;

(d) Technologies such as wind farms, often on Indigenous Peoples' lands without consent,[23] and nuclear power with attendant risks of leaks, meltdowns and toxic disposal;[24]

(e) "Green energy" options, including both the processes of categorising some minerals as "critical minerals" and the programmes and policies that support the mining of such minerals. These impact on Rangatiratanga and the authority mana whenua have over their taonga and environments, and the role of mana whenua as kaitiaki of those minerals, places, and their connected waterways, ecosystems and the mātauranga and tikanga surrounding all of them. [25]

26. These approaches in free trade and investment agreements either ignore the rights and views of, impacts on, and alternatives available from Māori and other Indigenous Peoples or pay only lip service to them.

27. They also fail to recognise that these solutions rely on resources that are being harmed by actions that these agreements do not address, or actions that the agreements positively authorise and protect in other parts of their texts, such as investment chapters. Clear examples of the potential prejudice of advancing such "solutions" without effective protections for Māori are the impacts on Pakiri beach of the ongoing sand mining that has seriously eroded the dunes and related ecosystem, and the many

[23] "Why solar and wind developers ignore indigenous land claims at their peril", 7 April 2023, https://www.reuters.com/default/why-solar-wind-developers-ignore-indigenous-land-claims-their-peril-2023-04-06/; "Wind turbines in Brazil stir conflicts with Indigenous Rights", https://www.context.news/net-zero/wind-turbines-in-brazil-stir-conflict-with-indigenous-rights
[24] Joe Heath, "The Violence of Nuclear Energy Against Indigenous Peoples, Land, Water and Air", 2020, Sierra Club, https://www.sierraclub.org/atlantic/blog/2020/08/violence-nuclear-energy-against-indigenous-peoples-land-water-and-air
[25] M. Bargh, and Van Wagner, E. "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. DOI: https://doi.org/10.4337/jhre.2019.01.06 Scott, Dayna Nadine, Impact Assessment in the Ring of Fire: Contested Authorities, Competing Visions and a Clash of Legal Orders ( 2023). Osgoode Legal Studies Research Paper No. 4441505, Available at SSRN: https://ssrn.com/abstract=4441505

submissions by hapū and Māori entities opposing the Fast Track Approvals Bill 2024 because of their impacts on Te Taiao.

28. There are no effective protections for Māori or Indigenous Peoples generally in these agreements. The Treaty of Waitangi Exception dating from 2001 is limited to "more favourable treatment" and does not protect non-compliance with broader commitments or obligations.

**Cause of Action 3: Denial of active protection by empowering foreign investors to threaten and sue governments over Tiriti-compliant climate measures.**

29. The investment chapters of a number of New Zealand's free trade and investment agreements include guarantees that foreign investors can and do use to challenge new policies, laws or decisions of central or local governments that adversely affect their commercial interests. These rights can be enforced directly against the government in offshore arbitral tribunals through ISDS. The ad hoc tribunals that hear these disputes are renowned for their conflicts of interest and pro-investor approach. These disputes often remain secret from people within the country being sued even after they have been resolved.

30. 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. The arbitral tribunals have the power to make extremely large damages awards, including for lost future profits for the life of the investment with compound interest.

31. The preponderance of investment disputes under ISDS involve natural resources, and increasingly climate change measures. The UNCTAD reported in 2022 that: [26]

[26] UNCTAD, "Treaty-based investor-state dispute settlement cases and climate action", September 2022, https://investmentpolicy.unctad.org/publications/1270/treaty-based-investor-state-dispute-settlement-cases-and-climate-action

"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."

32. 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 Paris Agreement on climate change – a major disincentive for ambitious climate action.[27]

33. Australia currently faces three ISDS claims totalling around $300 billion brought by Australian mining magnate Clive Palmer through companies he has incorporated in jurisdictions of convenience. These claims relate to matters he has litigated on and lost in the Australian courts. Two are under the ASEAN Australia New Zealand FTA, of which New Zealand has just updated, but retained ISDS. A third is under the Singapore Australia FTA.[28]

[27] "Investor-state dispute settlements have catastrophic consequences for the environment and human rights: UN expert", 20 October 2023, https://www.ohchr.org/en/press-releases/2023/10/investor-state-dispute-settlements-have-catastrophic-consequences

[28] "Billionaire Clive Palmer files another arbitration against Australia", *Investment Treaty News,* 13 January 2024, https://www.iisd.org/itn/en/2024/01/13/billionaire-clive-palmer-files-another-arbitration-against-australia/

34. The risks that investment protections and ISDS could be used to challenge Crown measures to comply with Tiriti obligations or redress Tiriti breaches have been addressed in several previous Waitangi Tribunal inquiries. The Tribunal reports have expressed concern regarding ISDS, but ultimately felt unable to make findings. The evidence of risk today, especially in the context of climate measures, is much more compelling.

35. Eight years ago, the Waitangi Tribunal's urgency report on the TPPA 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.[29] Similar issues were addressed in National Freshwater and Geothermal Resources Claim relating to the Mixed Ownership Model back in 2012; that was resolved by the then government pledging that it would not succumb to such pressures.[30]

36. Since then, the Crown, through successive governments, has acknowledged that these risks are unacceptable. The coalition government of Labour and New Zealand First formed in 2017 adopted a policy of no 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. The current government appears to be maintaining the policy of no ISDS. However, it is not yet law. Negotiators and the Executive can still agree to include ISDS in free trade and investment agreements.

37. Moreover, ISDS remains in a number of FTAs, including with China, Japan, Canada and Malaysia among others. These countries have investors in Aotearoa New Zealand with investments in fossil fuel, forestry,

[29] Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement, Wai 2522, 2016, at 41-42, 45, 50-52
[30] Waitangi Tribunal, Stage 1 Report of the National Freshwater and Geothermal Resources Claim, Wai 2358, 2012, pp.129-134

agriculture, water, transportation, waste management, and a range of other activities related to the climate emergency.

38. There is also a risk that a New Zealand investor may do as Australia's Clive 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.

39. Given his propensity for "forum-shopping", there is a risk that Clive Palmer himself could bring an ISDS dispute against New Zealand should he be unhappy with decisions that adversely impact on his mining investments. These investments include "climate-related" minerals such as rare earth elements and lithium.

40. This is not a hypothetical risk. Back in 2019 Palmer reincorporated his 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);[31] however, CER does not have ISDS. As of 2023, his company Mineralogy had 10 permits to prospect and explore for minerals in Aotearoa New Zealand, including on Conversation land, and another eight applications were under consideration.[32] A Green Party petition opposed such applications on Conservation land,[33] which could have an impact on future decisions of future governments.

41. The prejudice to Māori under this cause of action arises from the Crown's failure to terminate or amend those powers which are used extensively by foreign investors to challenge and seek billions of dollars from governments for Tiriti-compliant climate mitigation measures. These risks

[31] "Billionaire Aussie miner moves business to NZ", *Newsroom,* 21 January 2019, https://newsroom.co.nz/2019/01/22/billionaire-aussie-miner-moves-businesses-to-nz/
[32] "Mining giant sets sights on NZ, including conservation land", *TVNZ,* 25 May 2023. https://www.1news.co.nz/2023/05/25/mining-giant-sets-sights-on-nz-including-conservation-land/
[33] https://www.greens.org.nz/greens_launch_petition_to_protect_conservation_lands_from_mining_by_mineralogy_international_limited

are compounded by policies and legislative proposals, such as the Fast Track Approvals Bill, to advance foreign investment with minimal review, including of their Tiriti implications. Māori are likely to resist such investments as breaches of Te Tiriti and those investments may be reversed or altered by a further government, making ISDS disputes a very real possibility.

**Recommendations and Redress**

42. The Claimants seek definitive findings that:

i. The constitutional authority and responsibilities of Mana Motuhake and Tino Rangatiratanga need to be exercised on at least equal terms with the authority of Kāwanatanga in international treaty making on matters relating to the climate emergency, including in international trade and investment treaties. The Crown has failed to do so.

ii. The climate crisis is a global emergency that requires a synergy between legislation, policies and other actions the Crown commits to in Aotearoa New Zealand to mitigate and reverse that emergency and those it commits to through international treaties, including those on trade and investment. The Crown needs to comply with its obligations to adopt Tiriti-compliant responses to the crisis in both jurisdictions. The Crown has failed to do so in the international trade and investment sphere.

43. The Claimants seek recommendations that:

i. the Crown adopts a mechanism that re-empowers Māori to exercise equal authority in the international domain when addressing the climate emergency, including in the making of international trade and investment treaties;

ii. pursuant to recommendation (i) the Crown proactively takes immediate steps to review existing provisions that relate to climate change to make them compatible with the exercise of rangatiratanga and tikanga and consistent with Mātauranga Māori;

iii. the Crown takes immediate steps to remove the potential liability of Aotearoa New Zealand to investor-state dispute settlement in existing trade and investment agreements and enacts legislation that prevents a future government from adopting or maintaining such a dispute mechanism.

This Statement of Claim is filed by **Annette Sykes,** Solicitor for the Claimant. Documents for service on the Claimant may be left at the address for service or;

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