

AMANDA SPRATT

**RUNNING OFF THE SMELL
OF AN OILY RAG:
WILL MAORI CLAIMS TO PETROLEUM
HAVE ENOUGH GAS?**

**LLB (HONS) RESEARCH PAPER
NATURAL RESOURCES AND ENERGY LAW:
LAWS 582**

**LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON
1999**

e
AS741
VUW
A66
S767
1999

VICTORIA UNIVERSITY OF WELLINGTON
LAW LIBRARY

S767
SPRATT, A.
Running of the smell of an oily rag.

2472
A. T. 1898
Te Whare Wananga
o te Upoko o te Ika a Maui
Law Library

VICTORIA
UNIVERSITY OF
WELLINGTON

*Te Whare Wananga
o te Upoko o te Ika a Maui*



LIBRARY

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

- I INTRODUCTION**
- II JURISDICTION OF THE WAITANGI TRIBUNAL**
- III THE CLAIM AND ALLEGED BREACHES**
- IV THE PRINCIPLES OF THE TREATY**
 - A Sovereignty in Exchange for Rangatiratanga**
 - 1 Duty of active protection
 - 2 Right of tribal self-regulation
 - 3 Duty to consult
 - 4 Right of redress
 - B The Principle of Partnership**
- V DEVELOPMENT**
 - A Principle or Sub-principle?**
 - B The Three Roles of Development**
 - 1 Role one - flexibility of the Treaty
 - 2 Role two - the right to develop a right
 - 3 Role three - development simpliciter
- VI TOWARDS A PRINCIPLES-ONLY APPROACH?**
 - A The Interplay Between Article Two and the Treaty Principles**
 - B The Spectrum Report and Development**
 - 1 The majority
 - 2 The minority
 - C Summary**

VII SUBMISSION ONE - ONSHORE PETROLEUM AS AN INCIDENT OF LAND

A The Doctrine of Aboriginal Title

1 General status

2 Relationship between aboriginal rights and aboriginal title

3 Establishing aboriginal title

4 Content of an aboriginal title

5 Does aboriginal title to land include minerals?

B The Treaty Right to Land

1 The principles

2 Summary

VIII SUBMISSION TWO - ONSHORE PETROLEUM AS TAONGA

A Taonga Described

B Did Maori Value Petroleum?

C Taonga - Its Scope in Practice

1 The spectrum claim

2 Is the spectrum of itself a taonga?

3 Taonga by association

4 Taonga and development

5 The geothermal claim

D Summary

IX RIGHTS TO OFF-SHORE PETROLEUM

A The Legal Status of the Continental Shelf

B Do Aboriginal or Treaty Rights Exist Beyond the Territorial Zone?

1 Recognised sovereign entities

- 2 *Extension of the common law to the continental shelf*
- C ***Aboriginal Title and Treaty Rights to Off-shore Petroleum***
 - 1 *As an incident of the seabed*
 - (a) Other Jurisdictions
 - 2 *Offshore petroleum as a taonga*
- D ***Summary***
- XVI APPENDIX II
- X ***APPLYING THE RIGHT OF DEVELOPMENT TO THE CLAIMS***
 - A ***Petroleum as an Incident of Land and Development***
 - 1 *Aboriginal title and the right to development*
 - 2 *Support from the tribunal*
 - B ***Petroleum as Taonga and Development***
- XI ***SEVERANCE OF SUBSURFACE RIGHTS***
 - A ***Ownership Issues***
- XII ***EXTINGUISHMENT***
 - A ***General Principles of Extinguishment***
 - B ***Has the Right to Onshore Petroleum been Extinguished?***
 - C ***Has The Right to Offshore Petroleum Been Extinguished?***
- XIII ***COMPENSATION***
 - A ***No Free Consent by Maori***
 - B ***No Consultation Apparent***
 - C ***Statutory Bars to Compensation***
 - 1 *Onshore petroleum*

2 *Offshore petroleum*

D Compensation despite Statutory Bar

E Recent Developments Regarding Compensation

XIV CONCLUSION

XV APPENDIX I

XVI APPENDIX II

WORD COUNT: 14,103 (excluding footnotes)

INTRODUCTION

ABSTRACT

This paper examines how Maori should frame a claim to petroleum before the Waitangi Tribunal. The paper contains a summary of the relevant Treaty principles to apply in a claim to petroleum. Particular focus is placed on the right of development and its status.

The paper then discusses the possible submissions Maori claimants may make. Specifically, the paper outlines a binary claim to petroleum; first, that petroleum is an incidence of land, over which Maori have rangatiratanga, and second, that petroleum itself is a taonga of Maori. The paper highlights the issues with respect to both onshore and offshore petroleum resources and measures the actions of the Crown against the Treaty principles. Finally the paper considers whether any rights have been extinguished by statute or Crown action.

The nature of such a claim is relatively novel. It is difficult to predict how the Tribunal will receive a claim to petroleum. It is the tentative conclusion of this paper that a claim to petroleum as an incidence of Maori land will be accepted. The vesting of this petroleum in the Crown without compensation for, consultation with, or the consent of Maori is a breach of the principles of the Treaty of Waitangi. Compensation should be recommended.

WORD COUNT: 14,103 (excluding footnotes).

¹ The Appearances to Justice in Chief of New Zealand, 27 November 1987 "Papers Relative to the Petition of the Fishing Fleet of the Waitangi and the Thames" AIRC 163, 174, 3.
² D. Henry, *Oil Fields of New Zealand* (London, 1911) 4.
³ Interview with Professor John Collins of the Geography Department of Victoria University of Wellington, 24 May 1989.
⁴ D. Henry, *Oil Fields of New Zealand* (London, 1911) 10.
⁵ References to "petroleum", "oil" and "gas" and "hydrocarbons" refer to the petroleum resources generally for the purposes of this essay.
⁶ *Treaty of Waitangi* (Wellington: Whitcombe and Tombs Publishing Co Ltd, 1985).
⁷ Interview with Professor John Collins of Geography Department of Victoria University of Wellington, 24 May 1989.
⁸ Waitangi Tribunal, *Meremere Fishing Report - Part 22* (Department of Justice, Wellington, 1985) 1-9 (Meremere Fishing Report).
⁹ *Ordinance petroleum 1911*, but within the 12-mile territorial limits of New Zealand.

I INTRODUCTION

“Farewell; hold fast to the land, however small it may be.”¹

Long before white settlers arrived in New Zealand, Maori noticed a thick, dark and greasy substance floating on the sea around Taranaki. The local tribes accounted for the phenomenon and the accompanying unusual odour by legend.² They believed that an atua, or spirit, had drowned in the ocean and was still undergoing decomposition.³

They were not far off the mark. In 1865 white settlers started exploring the region of Taranaki.⁴ As a result of the decomposition of mineral deposits over thousands of years, Taranaki is an area rich in petroleum and natural gas.⁵ Taranaki is now New Zealand's major commercial energy region, and companies are exploring the value of petroleum resources throughout the country.⁶ Petroleum resources are invaluable today. Almost every man-made product, from clothes to computers to cars, relies on petroleum itself or a derivative of petroleum.⁷

However a claim to petroleum by Maori has a significance beyond economic value. Maori are claiming back their rangatiratanga, guaranteed to Maori by the Treaty of Waitangi. Petroleum is a part of the land. Pre-European Maori had a holistic world-view; creation is one total, united entity.⁸ The land could not be separated from the rivers, the air, the subsoil, the minerals within that subsoil. Land is their ancestry, their culture base, their source of mana. Thus to take away a part of Maori land was to take a lot. It is redress of this grievance for which Maori are fighting in a claim to petroleum.

This paper outlines what form a Maori claim to petroleum before the Waitangi Tribunal may take. Part II of the paper outlines the jurisdiction of the Waitangi Tribunal. Part III looks at the basic points of the claim. Parts IV addresses the principles of the Treaty of Waitangi which the Tribunal must apply in this claim. Parts V and VI focus on the status of development as a principle of the Treaty. The paper will then examine the substantive parts of a claim to onshore and offshore petroleum respectively.⁹ The issues regarding the valid extinguishment of any Treaty or aboriginal rights are then examined in Part XII. The paper will not suggest what form a Tribunal recommendation might or should take, but it does speculate as to whether the Tribunal will recommend redress.

¹Per Aperehama Te Reiroa, in Chiefs of Hauraki to McLean, 27 November 1857 “Papers Relative to the Probability of Finding Gold at the Waikato and the Thames” AJHR, 863, D-8, 3.

²J D Henry, *Oil Fields of New Zealand* (London, 1911), 9.

³Interview with Professor John Collen of the Geography Department of Victoria University of Wellington, 24 May 1999.

⁴J D Henry, *Oil Fields of New Zealand* (London, 1911), 10.

⁵References to “petroleum”, “oil and/or gas” and “hydrocarbons” refer to the petroleum resource generally for the purposes of this essay.

⁶Paydirt's *New Zealand Petroleum Handbook* (Louthean Publishing Pty Ltd, 1999).

⁷Interview with Professor John Collen of Geography Department of Victoria University of Wellington, 24 May 1999.

⁸Waitangi Tribunal *Muriwhenua Fishing Report - Wai 22* (Department of Justice, Wellington, 1988) 179 [*Muriwhenua Fishing Report*].

⁹Onshore petroleum is that within the 12 mile territorial limits of New Zealand.

II JURISDICTION OF THE WAITANGI TRIBUNAL

The Waitangi Tribunal (the Tribunal) derives its jurisdiction from the Treaty of Waitangi Act 1975 (the 1975 Act). In a nutshell, the Tribunal was established to observe and confirm the principles of the Treaty of Waitangi (the Treaty).¹⁰ To do this, the Tribunal may make recommendations on claims relating to the Treaty in practice and whether particular matters are inconsistent with the Treaty's principles.¹¹ Section 2 of the 1975 Act directs the Tribunal to refer to the Treaty as set out in English and Maori.¹² Thus the Tribunal has a true focus on the principles of the Treaty.

A claim to the Tribunal must comply with section 6 of the 1975 Act. The claimant/s must be Maori and affected prejudicially by any legislation,¹³ Crown policy or Crown practice or Crown action,¹⁴ that same legislation, policy or action being or having been inconsistent with the Treaty. If a claim is well-founded, the Tribunal may recommend to the Crown that "action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future".¹⁵ The Tribunal's recommendations do not legally bind the Crown.¹⁶ Tribunal decisions are, however, well respected.¹⁷

The Tribunal is undoubtedly the preferred forum for such an investigation; claimants may need to present customary unwritten stories, waiata, perhaps even carvings to support their claim. The Waitangi Tribunal Act 1975 allows parties to submit evidence of this nature to a greater extent than the courts.¹⁸

III THE CLAIM AND ALLEGED BREACHES

A claim to petroleum would begin with the assertion by the claimants that all petroleum within their land and sea based territory without seaward boundary are taonga and protected by the Treaty of Waitangi for the benefit of the claimants.¹⁹ Using the Treaty and/or the doctrine of aboriginal title, claimants should argue that tino rangatiratanga and rights analogous to ownership rights over petroleum belong to Maori.

¹⁰Taken from the preamble to the Treaty of Waitangi Act 1975.

¹¹The Treaty of Waitangi Act 1975, s 5.

¹²Both versions of the Treaty as in the First Schedule of the Treaty of Waitangi Act 1975 are attached in Appendix 1.

¹³The Treaty of Waitangi Act 1975, s 6(1).

¹⁴The Treaty of Waitangi Act 1975, s 6.

¹⁵The Treaty of Waitangi Act 1975, s 6(3).

¹⁶Pursuant to s 8B of the Treaty of Waitangi Act 1975, in conjunction with ss 27-27D of the State-Owned Enterprises Act 1986, the Tribunal can give a binding order for the resumption of land transferred to a State-owned enterprise in certain defined circumstances.

¹⁷Praise for the Tribunal's innovative procedures and well-written reports abound. See generally A Shields (ed) *Brooker's Resource Management Act* (Brookers, Wellington, 1991) para 1.03 (updated 16 August 1996) [*Brooker's RMA*].

¹⁸See generally Richard Boast "The Waitangi Tribunal: Conscience of a Nation or Just Another Court?" 16 *Univ NSW Law Rev* 223.

¹⁹See the Ngati Kahungunu Statement of Claim, attached at Appendix I.

The claimants should allege that the Crown breached those rights and the Treaty by: failing to recognise Maori rangatiratanga over petroleum, failing to consult Maori upon introduction of the Petroleum Act 1937 and Crown Minerals Act 1991 ("the legislation"), failing to acknowledge that the legislation was and is contrary to the Treaty, and failing to compensate for the purported extinguishment of Maori rights. Thus the claimants must prove that these actions are inconsistent with the principles of the Treaty of Waitangi.

IV THE PRINCIPLES OF THE TREATY

There are two versions of the Treaty of Waitangi.²⁰ The English and the Maori versions translate somewhat differently.²¹ To focus on the written content of one or the other would be to ignore and negate the true spirit and meaning of the Treaty. The Treaty is an agreement made between two parties, one which had an oral culture, the other a literal culture. To understand the meaning of the Treaty, consideration must be given to what was said and agreed to as well as what was written down.²²

Thus the Treaty was a political blueprint for the future,²³ a plan to forge a working relationship between two peoples. The Treaty must therefore be seen in light of the parties' objectives. The Tribunal must "steer a middle ground" between the two Treaties and the two parties' expectations.²⁴

The Treaty of Waitangi Act 1975 recognises this by requiring the Tribunal to measure State action against the principles of the Treaty. The Tribunal has commented at length on what these principles are.²⁵ As principles, exact definitions are neither possible nor appropriate. The existing body of principles considered by the Tribunal and the courts is far from static or settled.²⁶ The principles do not negate the literal terms of the Treaty, they enlarge the terms.²⁷ The principles of the Treaty are ventilated by both the document itself and the surrounding experience.²⁸

²⁰ Attached at Appendix II.

²¹ See generally Cooke P in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*New Zealand Maori Council*].

²² Waitangi Tribunal *The Te Roroa Report* (Brooker and Friend Ltd, Wellington, 1992) 42, as cited in AL Mikaere & D V Williams "Maori Issues" [1992] NZRLR 152, 163.

²³ Waitangi Tribunal *Ngai Tahu Sea Fisheries Report - Wai 27* (Brooker and Friend Ltd, Wellington, 1992) 269; 5 WTR 689 [*Ngai Tahu Sea Fisheries*].

²⁴ Waitangi Tribunal *The Radio Spectrum Management and Development Final Report - Wai 776* (Brooker and Friend Ltd, Wellington, 1999) 37 [*Spectrum Report*].

²⁵ The Court of Appeal has also formulated specific Treaty principles. See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

²⁶ See generally *Brooker's RMA*, above n 17, 3.03 (Updated 2 February 1994). It should be noted that principles formulated by the Tribunal are not binding. Only those principles established by the courts are binding. See also S E Kenderdine "The Treaty Jurisprudence" in *Applications under the Resource Management Act 1991* (NZ Law Society Seminar, 1993), 7-24.

²⁷ *Muriwhenua Fishing Report*, above n 8, 213.

²⁸ The Tribunal has approved the view of the Canadian courts in *R v Taylor and Williams* (1981) 62 CCC (2d) 227, which held that surrounding circumstances and contemporary experience may be considered notwithstanding the fact that the treaty is technically clear and certain.

The principles of the Treaty guide claimants and the Crown alike to frame and develop their arguments. The principles define and enhance the terms of the Treaty. The principles also provide the standards against which alleged breaches by Crown are measured.²⁹ The principles can also be useful in deciding whether a remedy should be recommended and if so, what form it should take.

This sprawling nature means that the principles do not slot nicely in to an essay aiming for a logical structure. The principles hover over and permeate every facet of the claim. Thus, before reviewing the substantive arguments, the paper will discuss the principles of the Treaty relevant to a claim to petroleum.

A *Sovereignty in Exchange for Rangatiratanga*

This principle is referred to as over-arching and far-reaching; the most fundamental of the principles.³⁰ It recognises that the cession of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga, or full tribal authority and control over their lands, forests, fisheries, and other valued possessions for so long as they wished to retain them. Therefore, "the right to govern which it acquired was a qualified right".³¹

The Crown must act towards Maori "fairly, equitably and in accordance with the high standards of justice that a fiduciary relationship entails."³² In the case of *Te Runanga O Wharekauri Re Kohu Incorporated v Attorney-General*, Cooke P found that the Treaty supported a fiduciary duty on the part of the Crown.³³ Cooke P accepted the approach in both the United States and Canada that the ideas of fiduciary duties and constructive trust are necessary parts of protection and partnership.

The principle is the essence of articles 1 and 2 of the Treaty. It is often called the principle of protection. The principle contains what could be described as a subset of principles. Some reports refer to the concepts in this subset as individual principles, but they are essentially inherent to and derived from this essential principle of protection.³⁴ These concepts will be outlined next.

1 *Duty of active protection*

Of course, the Crown's duty of active protection applies to the interests guaranteed to Maori under article 2 of the Treaty. Crown needs to ensure Maori can use, enjoy and protect their resources in accordance with their spiritual and cultural beliefs. Any exercise of the Crown's right to govern must not impinge on these rights. The degree of protection to be given to Maori resources depends on the nature and value of the resource to Maori.³⁵

²⁹*Muriwhenua Fishing Report*, above n 8, 212.

³⁰*Ngai Tahu Sea Fisheries* above n 23, 269; 5 WTR 689.

³¹*Ngai Tahu Sea Fisheries* above n 23, 5 WTR 269.

³²Waitangi Tribunal *Muriwhenua Land Report - Wai 45* (GP Publications, Wellington, 1997) 385 [*Muriwhenua Land Report*].

³³*Te Runanga O Wharekauri Re Kohu Incorporated v Attorney-General* [1993] 2 NZLR 301, 306 (CA).

³⁴The author does not mean to imply that the principles are in any way "sub" as inferior.

³⁵Waitangi Tribunal *Ngawha Geothermal Resource Report - Wai 304* (Brooker & Friend Ltd,

2 *Right of tribal self-regulation*

The Tribunal has stated that the right of tribal self management is one part of rangatiratanga. Rangatiratanga, or "full exclusive and undisturbed" possession (the English version), is seen as all rights of authority, management and control.³⁶ Maori were guaranteed not only possession of their taonga but the right to control both their own uses and the rights of others to the taonga in accordance with Maori cultural preferences.³⁷ The Crown can enact in the interests of conservation and the wider public interest in preservation of the resource.³⁸ But this Crown right must not impinge on the exercise of tribal management by Maori over their resources.

3 *Duty to consult*

If the Crown intends to act or make a decision which may affect the rangatiratanga of an iwi or hapu over their taonga, the Crown must discuss the matter to the fullest extent practicable with Maori.³⁹ If Crown does not consult those who appreciate the nature and significance of the taonga, the Crown may not realise what rangatiratanga over the taonga entails. Thus the Crown will not be able to actively protect this Maori Treaty right.⁴⁰

4 *Right of redress*

If the Crown fails to protect tino rangatiratanga in any of these ways, the Crown is obligated to make redress.⁴¹

B *The Principle of Partnership*

The principle of partnership requires the two Treaty partners to act towards each other reasonably and with the utmost good faith. This principle results from the bi-partite nature of the Treaty. It is a covenant which establishes a continuing, temporally flexible relationship defined by an interplay between kawanatanga and rangatiratanga.

In the *Manakau Report* the Tribunal stated that the precise terms of the partnership were yet to be worked out. That appears to be the case today as well. In *Tainui Maori Trust Board v Attorney-General*,⁴² Cooke P stated that "partnership certainly does not mean that every asset or resource in which the

Wellington, 1993)100-101 [*Ngawha*]; see also Waitangi Tribunal *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims - Wai 153* (Brookers, Wellington, 1993) 40.

³⁶Waitangi Tribunal *The Whanganui River Report* (GP Publications Ltd, Wellington, 1999) 338 [*Whanganui River*].

³⁷Waitangi Tribunal *Motonui-Waitara Report - Wai 6* (Wellington, 1983) 51.

³⁸*Muriwhenua Fishing Report* above n 8, 230-232.

³⁹*Ngawha* above n 35, 101-102.

⁴⁰If the Crown has knowledge sufficient to enable it to have proper regard to the Treaty, then Crown has no duty to consult. Per Cooke P in *New Zealand Maori Council*, above n 21, 674-5.

⁴¹Per Somers J in *New Zealand Maori Council*, above n 21, 693.

⁴²*Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) [*Tainui*].

Maori have some justifiable claim to share must be divided equally".⁴³ Cooke P justified this by stating that one party may have made the greater contribution to the available asset base. It is submitted, as an aside, that Cooke P neglected the fact that historically Maori were denied the means to contribute fully.

The partnership principle also has offshoots. Other principles which derive from partnership are the concepts of mutual benefit and development. The former concept allows Maori to share in the benefits of European colonisation. This includes a right to new technologies. The latter concept, which is very similar to the idea of mutual benefit, deserves fuller treatment.

V DEVELOPMENT

"At its making all lay in the future."⁴⁴

Justice Somers was, of course, referring to the Treaty and its ability to adapt. The courts and the Tribunal have waxed lyrically about the character of the Treaty as a living document. The Treaty is a covenant which does not petrify rights as they existed at 1840, but rather provides for "future growth and development".⁴⁵ Such comments justify the use of the principles of the Treaty to interpret its terms. It also justifies the recognition of a right of development under the Treaty.

A Principle or Sub-principle?

The majority judgment in the *Spectrum Report* included the right of development among the principles of the Treaty. The Tribunal in the *Ngai Tahu Fisheries Report* stated that "inherent in the Treaty of Waitangi is a right of development".⁴⁶ Whether a development right is an individual principle or whether it exists within a subset to the principle of partnership is not yet established. The 'principle' of development is clearly linked to and derived from the principle of partnership.

Regardless of what exact semantic label it is given, some right of development was clearly contemplated and expected by both Treaty partners. But what exactly is the scope of this right to develop?

B The Three Roles of Development

The concept of development and its relationship with the Treaty is, to be frank, confusing. The present author submits that 'development' plays three different roles.

1 Role one - flexibility of the Treaty

At one level development refers to the Treaty and its application in society and

⁴³Tainui, above n 42, 527.

⁴⁴Per Somers J in *New Zealand Maori Council* above n 21, 692.

⁴⁵Per Bisson J in *New Zealand Maori Council* above n 21, 715.

⁴⁶*Ngai Tahu Sea Fisheries*, above n 23.

law. This is the role which demands a principled approach to the Treaty,⁴⁷ and was expanded on in Part IV above.

2 *Role two - the right to develop a right*

On a second level, 'development' encompasses the rights of Maori and the Crown on behalf of New Zealand to develop their resources. It is this role to which the rhetoric of 'frozen rights' and the principle of 'mutual benefit' refer. This paper will refer to this role as the right of development.⁴⁸

The Tribunal and even the Crown have generally accepted a Maori developmental right in regard to properties specified in the Treaty.⁴⁹ These properties include land, fisheries and forests. Thus Maori need not only fish from canoes with flax lines and hooks of bone.

Whether this right extends to "other properties" not specified in the Treaty is not established, but is strongly arguable. It must be remembered that the Treaty's spirit floats, it is not captured. Nor should it be.

The right to development is inextricably linked to the other principles of the Treaty, particularly the principle of partnership and protection. When claiming a right to develop a resource, claimants should argue that not to allow full rights to exploit the resource is inconsistent with these fundamental principles and their related concepts.⁵⁰

The Tribunal has referred to the issue of development as creating a tension between conservationists and developers. The Tribunal concludes that this is a "necessary and beneficial battle amongst any people who neither wish to stagnate, nor through depletion, to starve". Surely the principles of protection and partnership allow an expansive right of Maori to develop those resources over which Maori have rangatiratanga guaranteed under article 2 of the Treaty.

In 1984 Koro Wetere, then Minister of Maori Affairs, stated that "the pace of development for Maori had to be two steps to everyone else's one, if Maori were to catch up with non-Maori".⁵¹ This leads neatly to the next role of development.

3 *Role three - development simpliciter*

There is a third role, but the present author submits that, at this stage, development is just auditioning. The role is a spin-off, to continue the wordplay, from the principle of development. It is widely accepted that the development of

⁴⁷The present author acknowledges that the language difficulties regarding the two versions of the Treaty are also the reason behind this focus on Treaty principles.

⁴⁸This is to keep the discussion simple, not to assert that development in this sense is a right rather than a principle.

⁴⁹The courts have not referred directly to a right of development but have impliedly recognised the principle within the principles of partnership and the ability of the Treaty to adapt to new circumstances.

⁵⁰*Muriwhenua Fishing Report* above n 8, 163, 184.

⁵¹Koro Wetere at the 1984 Maori Economic Development Summit Conference as quoted in the *Spectrum Report*, above n 24, 42.

Maori culturally, socially and economically needs encouragement. The tragedies of the past and the imposition of a foreign way of life have undeniably disadvantaged Maori.⁵² But when Maori claim a Treaty right to a resource, what scope does this general need for protection of Maori development have ?

In other words, does the Treaty of Waitangi secure the principle of development of a right, or does it extend to the right to develop in a general sense, a right to development simpliciter? Can the principle of development found a claim to petroleum on its own; in other words, as a claim separate to the submissions that petroleum is an incident of land or a taonga?⁵³ Could Maori claim that their right of development simpliciter, in conjunction with the principle of good faith and mutual benefit and a right to adapt to new circumstances, protects and guarantees Maori an equitable share of every and all resources that New Zealand has to offer, regardless of whether Maori knew of or used those resources at 1840?⁵⁴

The general public today would instinctively answer in the negative. But if the answer is no, Maori can only claim mana over those resources known of at 1840. Sure, Maori will have the right to benefit from new technology to develop those resources, but this is hardly what one would expect from a Treaty which established a partnership. It can hardly be what the Maori expected at 1840 either. Whether development will get this part depends on the casting powers of the Tribunal and the mindset of the government. The paper will now briefly outline the direction the Tribunal has taken thus far.

VI TOWARDS A PRINCIPLES-ONLY APPROACH?

A *The Interplay Between Article Two and the Treaty Principles*

The Tribunal has referred frequently to the principles of the Treaty. That is the purpose of their establishment. But comments on the relationship between the written terms and the principles, while prolific, are somewhat ambiguous. In the *Muriwhenua Fishing Report* on fisheries, the Tribunal stated that a review of Crown actions based upon a literal approach to the Treaty terms is not the proper approach. The Tribunal rejected this approach and favoured the broader construction according to the principles. Again, in ambiguous terms, the Tribunal stated:⁵⁵

The essential task is not to apply the Treaty's literal words but to locate the correct principle. In that respect the words are most important, of course; but they are essential, not because they define the right but because they describe the principle that gives rise to it.

⁵²The Rt Hon Sir Douglas Graham recently claimed that Maori youth today "know and live" the grievances of their ancestors, and that this sense of being wronged is affecting their performance in the educational sector. Rt Hon Sir Douglas Graham, An Address to the Rotary District Conference, 25 April 1999.

⁵³Again, it is acknowledged that the submissions of claimants never stand alone entirely - the other principles of the Treaty are fused into all branches of a claim.

⁵⁴1840 is the year Maori ceded sovereignty to the Crown. The time of acquisition of sovereignty by a new power is the usual reference point used to establish the cut-off of traditional Maori customs.

⁵⁵*Muriwhenua Fishing Report* above n 8, 213.

Do these comments mean that the principles, though derived from the terms, can have practical effect without reference to them? Does the principle of partnership and the qualification on *kawanatanga* extend this far? The *Muriwhenua Fishing Report* approved rights to commercial fishing, saying that whether Maori used their fisheries commercially was not important. But nonetheless, the basic *taonga* - their fisheries - was already established.⁵⁶ Thus it is support for development in its second role - the right to develop a right - rather than the role three.

B The Spectrum Report and Development

1 The majority

The judgment in the *Spectrum Report* gave the principles of partnership and development such a wide scope that it appears to allow Maori to claim natural resources *simpliciter*. The Tribunal did find that the spectrum was a *taonga* of sufficient value to acquire the protection under article 2's specific terms. But it must be acknowledged that the Tribunal found the spectrum a *taonga* on somewhat broad examples of usage. The judgment impliedly pushes the Treaty in the direction that allows for a right to develop in general, without having to confine that development to established *taonga* or properties under the Treaty.

2 The minority

In his dissent in the spectrum claim, Savage J espouses a persuasive and vigorous rejection of any general right to development. He wholeheartedly accepted the submission that Maori may develop those resources which they made customary and traditional use of prior to the Treaty. He wholeheartedly rejected the submission that the right of the partnership principle to develop to include resources not known about or used in a traditional manner at 1840.

He rejected the latter submission as it was based on an unfounded and exaggerated interpretation of the partnership principle. A partnership, Savage stresses, is not a marriage.⁵⁷ He agrees that Maori have a right to *rangatiratanga* without Crown intrusion, but that this right to *rangatiratanga* does not guarantee Maori an equitable and fair share in resources over and above those specifically referred to in article 2. His view was largely based on his belief that "the Treaty does not make promises of economic outcomes".⁵⁸ To conclude, he asserts:⁵⁹

We all accept or should accept that the Treaty is not locked in time or current knowledge or technological capacity. But it seems to me that the principle contended for by the claimants goes further to the point of attempting a new edition of the Treaty.

The limitations Savage places on the general right to development find support in

⁵⁶Although the scope in terms of whether it was a site-specific right etcetera was not.

⁵⁷Savage J is of course assuming that partners in marriage have equal shares in marital property.

⁵⁸*The Spectrum Report* above n 24, 61. With all due respect, the author notes that surely the claim was not to a security of a right to guaranteed financial outcomes, but the security of a right fullstop.

⁵⁹*The Spectrum Report* above n 24, 64.

the comments of Cooke P. In *Te Runanganui o Te Ika Whenua Inc Soc v A-G*,⁶⁰ Cooke P stated that the Treaty is a living instrument. Cooke P continued, however, by arguing that even with the most liberal interpretation, Maori customary and Treaty rights "could not sensibly be regarded today as meant to safeguard rights to generate electricity."⁶¹ Thus the President of the Court of Appeal dismissed any implication that a resource not known of at 1840 deserves protection.

Other comments from the former President of the Court of Appeal could support Savage's idea that partnership is not a marriage. In the *Tainui* case,⁶² Cooke P stated that the principle of partnership does not require equal division of resources. However, Cooke P was referring to the division of properties fitting the protection of article 2, not resources completely unknown of by Maori in 1840. It should be remembered that if a right to resource development simpliciter is established, Maori would probably be granted an equitable share, not necessarily an equal share.

C Summary

The argument is circular, and is indeed viciously so. Treaty principles are derived essentially from the cession of kawatanga by Maori and the guarantee of Maori tino rangatiratanga by the Crown - two of the express terms of the Treaty. Tino rangatiratanga was guaranteed over all taonga of the Maori. At this stage, then, it appears that the principles cannot exist apart from the express terms, as their very existence stems from these express written terms. But then it must be asked: what constitutes "taonga"? How is taonga reconciled with "other properties"? Did the references to possession for as long as the Maori wish to retain them connote possession then and not possession of future goods and resources? This requires a consideration of the literal terms of both texts, of the understandings and expectations of both Maori and Pakeha and the spirit of the Treaty. In other words, a consideration of the principles of the Treaty. It appears that the principles are the very source of the express terms.

It is the principle of partnership which is at the heart of the scope of development. The Tribunal in the *Muriwhenua Fishing Report* stated that the fiduciary undertakings of Crown are broader than the terms of the Treaty and assure that Maori survive and progress. The issue is, ultimately, whether the principle of partnership means a sharing of all resources. The hierarchy of and precise scope of the relationship between kawatanga and rangatiratanga are the essential elements of partnership. It is interesting that whereas the authorities could have defined the relationship in terms of a trusteeship of guardian/ward proportions, they instead adopted the term "partnership".

The Treaty has been at issue before the courts and Tribunal for many years. Yet a coherent, consistent application of the Treaty's founding principles has eluded such judicial experts. The list is certainly not finished. The *Spectrum Report* arguably does open wide the application of the principle of development and the

⁶⁰*Te Runanganui o Te Ika Whenua Inc Soc v A-G* [1994] 2 NZLR 21 (CA) [*Te Ika Whenua*].

⁶¹*Te Ika Whenua*, above n 60, 25.

⁶²*Tainui*, above n 42, 527.

Treaty itself. With the claims submitted to the Tribunal coming thick and fast, it may not be long before development gets a call-back for a second audition. While a claim to petroleum may be successful relying on taonga and land-based arguments below, development may need to perform in a claim to offshore petroleum in particular.

VII SUBMISSION ONE - ONSHORE PETROLEUM AS AN INCIDENT OF LAND

Maori could claim that they had Treaty or aboriginal rights to petroleum as incidents of their land, over which they hold tino rangatiratanga under Article 2 of the Treaty. The vesting of petroleum ownership in the Crown would then be a potential breach of Treaty principles.⁶³

At this point, the author must clarify the interplay between aboriginal and Treaty rights. Essentially claims to aboriginal title are heard by the common law courts of New Zealand. The jurisdiction of the Waitangi Tribunal, on the other hand, extends only to Treaty claims. Given the Tribunal's jurisdiction, how can the claimants ask that the Tribunal address aboriginal rights? The Tribunal appears willing to hear claims based on aboriginal title alternatively with Treaty rights. The Tribunal has adopted the view that treaty rights and aboriginal rights exist side by side.⁶⁴ In fact, the Treaty arguably grants Maori wider interest to land than aboriginal title.⁶⁵ Aboriginal title can be used as an interpretative guide, and can elucidate on the content of the Treaty right to land.

A comprehensive review of aboriginal title law is unfortunately not within the scope of this paper.⁶⁶ This section will only outline the jurisprudence on the doctrine of aboriginal title, using this doctrine to interpret the scope of the Treaty rights. The claimants may expand on the doctrine, as the claims laid before the Tribunal have argued protection of petroleum pursuant to both the Treaty and the doctrine of aboriginal title.⁶⁷

A *The Doctrine of Aboriginal Title*

1 *General status*

⁶³If the claimants can show that had their land not been unjustly confiscated by the Crown, they would still have tino rangatiratanga over those resources today. Unfortunately such an argument runs into problems with respect to the purported vesting of petroleum ownership in the Crown under the Petroleum Act 1937. Therefore the claimants need to show that the Crown's taking of petroleum itself is a breach of the Treaty.

⁶⁴RP Boast "Treaty Rights or Aboriginal Rights?" (1990) NZLJ 32, 34 [Treaty Rights].

⁶⁵It should be noted here that the Treaty did not extinguish or cede aboriginal rights of the Maori. Some argue that the Treaty is merely declaratory of aboriginal rights. The Tribunal rejected this view in the *Muriwhenua Fishing Report*. The prevalent view, however, is that the Treaty enhances aboriginal rights and that the two exist side by side. See generally Treaty Rights, above n 63; *Muriwhenua Fishing Report*, above n 8, 209.

⁶⁶The author will refer to articles on specific aboriginal title issues throughout the discussion. However for an excellent review of Canadian jurisprudence with reference to other jurisdictions, see William Flanagan "Piercing the Veil of Real Property" (1998) 24 Queen's L.J. 307; Brian Slattery "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev. 727.

⁶⁷For example, please refer to Ngati Kahungunu's statement of claim attached in Appendix I.

Aboriginal rights attach to land and have their origin in the historic occupation of the land by certain peoples. New Zealand law clearly upholds the doctrine of aboriginal title.⁶⁸ The courts first recognised aboriginal title as part of New Zealand law in 1847.⁶⁹ It is generally accepted that aboriginal title, and the rights within that title, exist as a burden on the Crown's sovereignty over the land. In other words, the acquisition of sovereignty by a new power does not automatically extinguish aboriginal rights.⁷⁰ Land held under aboriginal title is alienable only to the Crown.⁷¹ Aboriginal title is a matter of fact.⁷²

These are about the only points regarding aboriginal title which can be stated so assertively.⁷³ The doctrine on aboriginal title is young yet the jurisprudence is both prolific and contentious.⁷⁴ The source of the doctrine, the scope of the rights, the content of the title and other significant issues are still uncertain.

2 *Relationship between aboriginal rights and aboriginal title*

Aboriginal rights appear to exist along a spectrum. Where the rights of a particular native community lie on this spectrum depends on how these peoples used the land and the nature of their occupancy. At one end of the spectrum lies full, beneficial, aboriginal title to land. At the other end fall aboriginal rights to land, where the claimants have specific usage rights on the land, not title to the land itself. An example of an aboriginal right is the right to hunt, or to perform a traditional ritual.⁷⁵

3 *Establishing aboriginal title*

In the recent case of *Delgamuukw v B.C.*,⁷⁶ the Canadian Supreme Court discussed the content of aboriginal title.⁷⁷ To prove aboriginal title, Lamer CJC required two main criteria. First, the claimants must have occupied the land prior to the

⁶⁸*Te Runanganui o Te Ika-whenua v AG* [1994] 2 NZLR 20 (CA), 23-4. Brooker's RMA, above n 15, at TW1.05 (Updated 16 August 1996).

⁶⁹*The Queen v Symonds* [1847] NZPCC 387.

⁷⁰J Gavin Adlam "The Implications of the Treaty of Waitangi and Maori Rights for the Oil and Gas Industry" [1994] 4 OGLTR 126, 129.

⁷¹*The Queen v Symonds* [1847] NZPCC 387.

⁷²Paul McHugh *The Aboriginal Rights of New Zealand Maori at Common Law* (Cambridge, 1987); see also *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382-383.

⁷³The author notes that even these statements are fuzzy around the edges. But is that not the nature of law?

⁷⁴McNeil states that the doctrine is "probably the most uncertain and contentious body of law in Canada". Kent McNeil "Aboriginal Title and Aboriginal Rights - What's the Connection?" 35 *Alberta L. Rev.* 117, 118.

⁷⁵Or perhaps even the right to extract oil! The interplay between aboriginal title and aboriginal rights could, the author speculates, also be described in terms of sets and subsets, the rights being subsets of the superset that is aboriginal title. For a thorough view on the aboriginal spectrum see Kent McNeil "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 35 *Alberta L. Rev.* 117.

⁷⁶[1997] 3 S.C.R. 1010 [*Delgamuukw*].

⁷⁷The native appellants in *Delgamuukw* claimed ownership of 58 000 square kilometres of disputed territory. The Court ordered a new trial because of defects in the pleadings and the trial judge's approach to oral evidence. Therefore the comments on aboriginal title may strictly be obiter. Even so, obiter from the Supreme Court of Canada are highly persuasive.

acquisition of sovereignty by the new power. Second, the occupancy must have been, before European sovereignty, exclusive.⁷⁸ In establishing occupancy, the judiciary will consider both the common law view of physical occupation and the aboriginal perspective on occupancy and exclusivity. Of course, if these requirements are not satisfied, the claimants may still have a right which falls more towards the other end of the spectrum.

4 *Content of an aboriginal title*

It is not established whether aboriginal title is akin to the common law fee simple estate. Previous case law tended to categorise aboriginal title as a mere a usufructary right of enjoyment of the land according to the claimants' pre-sovereignty traditions.⁷⁹

It is widely recognised that aboriginal title gives the native title holders full undisturbed rights to benefit from their land. In New Zealand it is argued that the aboriginal title held by Maori (or Maori title) was closer to a freehold interest than in other jurisdictions.⁸⁰ Governments treated Maori as owners of the entire country and this ownership could be extinguished only in the same way that a freehold interest could be extinguished. Aboriginal title could not, for example, be extinguished by an inconsistent Crown grant to a third party.

5 *Does aboriginal title to land include minerals?*

Furthermore, it is now said to be accepted that aboriginal title to land includes both surface and subsurface minerals. As stated in *Delgamuukw*, "aboriginal title encompasses exclusive use and enjoyment of land...[including] mineral rights".⁸¹ United States jurisprudence on aboriginal title claims also sustain claims to minerals. In *United States v Shoshone Tribe of Indians*⁸² and *Klamath and Moadoc Tribes*,⁸³ aboriginal title was held to extend to commercial exploitation of minerals and timber. In addition, compensation for the extinguishment of aboriginal title often included the value of minerals into account.⁸⁴ It is significant that the federal government granted the native tribes subsurface rights to minerals even after the government realised that they could split ownership and give the tribes the surface estate only, reserving the subsurface estate for the government.⁸⁵ In New Zealand, Cooke P has implied that Maori can have either aboriginal or Treaty rights to minerals.⁸⁶ Cooke P stated that Maori knowledge and limited use of coal could

⁷⁸The court outlined the same requirements in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 [*Mabo No 2*].

⁷⁹*St Catherine's Milling and Lumber Co. v R* (1885) 10 OR 196 (Ch).

⁸⁰*Brooker's RMA*, above n 17, para 1.05 (Updated 12 March 1999).

⁸¹*Delgamuukw*, above n 76, affirming the Supreme Court decision in *Blueberry River Indian Band v Canada* [1995] 4 S.C.R. 344.

⁸²(1938) 304 US 111, 118 (SC) [*Shoshone*]. Though *Shoshone* involved rights given by treaty, the court decided that the claim to minerals and timber derived from an inherent aboriginal right rather than solely from the treaty. See Leshy "Indigenous Land Claims and Mineral Development" (1985) 8 UNSW Law J 271, 273-282 [Leshy].

⁸³(1938) 304 US 119 [*Klamath*].

⁸⁴See generally Leshy, above n 82, 277-8; Raymond Cross "Sovereign Bargains, Indian Takings and Preservation of Indian Country in the 21st Century" 40 *Ariz Law Rev* 425.

⁸⁵See Leshy, above n 82, 287-290.

⁸⁶*Tainui Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA).

establish coal as a taonga.⁸⁷

B The Treaty Right to Land

Article 2 of the Treaty guaranteed to Maori exclusive and full possession of their lands. The Maori version gave them tino rangatiratanga over their lands. This protection is to continue until the Maori voluntarily exercise their right to sell their land to the Crown. The Treaty is silent on ownership of minerals under the surface of that land.

In defining the scope and content of land under article 2 of the Treaty again evokes consideration of the eternal interpretational issue. The correct approach is to interpret the article 2 protection of land using the principles of the Treaty.

1 The principles

The relevant Treaty principles will be summarised again. A central principle is that of partnership. Part of this partnership is the need to preserve Maori taonga and land. An important consequence of partnership, as recognised by the Tribunal in the *Ngai Tahu Sea Fisheries Report*,⁸⁸ is the principle of mutual benefit. In recent years, the Tribunal and the courts have recognised a fiduciary obligation. The Crown is obligated to act in the best interests of Maori pursuant to the principles of the Treaty. The duty of the Crown is not merely passive but extends to active protection of Maori and the use of their lands and water to the fullest extent practicable.⁸⁹ This rangatiratanga over Maori resources gives Maori full authority, control and management over their resources

It is again helpful to look at North American jurisprudence, where principles of protection and fiduciary obligations also apply.⁹⁰ In Canada, the Crown has been held to owe fiduciary obligations to the native peoples due to the Crown's historic powers and responsibilities. These obligations have been held to require that the native peoples have full and undisturbed benefit of native land.⁹¹ These fiduciary duties have also seen a number of recent settlements including subsurface mineral rights.⁹²

The United States Supreme Court in *Shoshone* considered a treaty which had reserved a mineral rich area of land (known to the Government to contain minerals) for the absolute and undisturbed use and occupation of the tribe.⁹³ The

⁸⁷*Tainui Trust Board v Attorney-General* [1989] 2 NZLR 513, 527-9. Curiously, Cooke P also implied that the Maori contribution to the coal industry, working as "a truck and a miner in the Huntly coalfields", is also relevant to their rights to the resource.

⁸⁸See *Ngai Tahu Sea Fisheries*, above n 23, 273.

⁸⁹See the more expansive review of these principles at Part IV above.

⁹⁰The Tribunal willingly hears evidence on the position of other jurisdictions with regard to aboriginal issues. See *Muriwhenua Fisheries Report*, above n 8, 168-173.

⁹¹See *R v Sparrow* (1986) 36 DLR (4th) 246 (BC CA), (1990) 70 DLR (4th) 385 (SCC).

⁹²See the description of the Yukon and Northwest Territories contemporary claims settlements in Brian Crane "Native Rights and Resource Development in Canada" (1994) 2 *Jnl of Energy and Nat Res* L 407, 419.

⁹³See *Shoshone*, above n 82.

Supreme Court found, in light of that phrase and the policy of the government to deal fairly with native peoples according to their fiduciary duties, that minerals and standing timber were constituent elements of the land itself. As such, the tribe owned the minerals.

2 *Summary*

The Treaty principles can only lead to the conclusion that Maori are guaranteed all rights to their lands and any natural incidents. Maori must have rangatiratanga over minerals if they are guaranteed use of their land to the fullest extent possible. This is supported by the conclusive case law that aboriginal title includes minerals. Given that the Treaty promises something more than the aboriginal right, Treaty land must include minerals. The paper addresses the development of this right in Part X.

If so, then again using the principles as the standard, Crown's taking of petroleum is arguably a breach of those principles and redress should be given.

It is highly arguable that complete Crown ownership and control of the petroleum resource is inconsistent with the Treaty principle of partnership and protection. It may be a breach of Crown's fiduciary obligations to Maori. Crown may also be breaching the tribal right of self-regulation under the principle of protection. Crown may also not have discharged their duty to consult relevant Maori when considering the nationalisation of petroleum.⁹⁴

VIII *SUBMISSION TWO - ONSHORE PETROLEUM AS TAONGA*

Maori could argue that the petroleum resource itself is a taonga. Article 2 of the Treaty guarantees Maori rangatiratanga over their taonga. The Waitangi Tribunal has commented extensively on the nature and definition of taonga in recent reports.

A *Taonga Described*

Taonga is best translated as "all valued customs and possessions" of Maori.⁹⁵ Taonga can be those things which support or sustain other taonga.⁹⁶ Taonga are prized, protected and conserved by Maori, and are imbued with a sacredness and spirituality.⁹⁷ Taonga can be material or non-material.⁹⁸ Land, fisheries,⁹⁹ pounamu,¹⁰⁰ and the Maori language¹⁰¹ are examples of generally accepted taonga

⁹⁴The Petroleum Act 1937, and also the continuance of nationalisation in the Crown Minerals Act 1991.

⁹⁵*Spectrum Report*, above n 24, 9. For a comprehensive review of the meaning of taonga, see the *Muriwhenua Fishing Report*, above n 8, 173-181.

⁹⁶Waitangi Tribunal *Claims Concerning the Allocation of Radio Frequencies - Wai 26 and Wai 150* (Brooker & Friend Ltd, Wellington, 1990) [*Radio Frequencies Report*].

⁹⁷*Ngawha*, above n 35, 20.

⁹⁸*Ngawha*, above n 35, 20.

⁹⁹See generally *Ngai Tahu Sea Fisheries*, above n 23.

¹⁰⁰Greenstone.

¹⁰¹*New Zealand Maori Council*, above n 21, 578.

protected under Article Two of the Treaty.

To argue that petroleum is a taonga stands quite distinct from the other taonga found by the Tribunal. Twenty years ago, any claim to petroleum would have been dismissed as ridiculous, let alone a claim that petroleum was a taonga itself. Today, that view may be different. Of course, the success of such a claim will depend largely on the evidence presented by the claimants regarding the extent Maori valued the resource of petroleum, or if they valued it at all.

B Did Maori Value Petroleum?

The claimants will have to conduct extensive research to produce all evidence of the value of petroleum to Maori. The author understands that many iwi have stories and songs which refer to a dark, sticky substance widely believed to be oil. While fishing, Maori in the Taranaki region reported seeing a dark substance on the sea surface - oil slicks. The local tribes accounted for this phenomenon and the accompanying unusual odour by legend. Maori believed that Seal Rock, a submerged reef off the coast of Taranaki, was once an island of bituminous matter which had been ignited by a supernatural agency and had burnt down to sea level.¹⁰² Other stories spoke of an atua, or spirit, which had drowned in the ocean and was still undergoing decomposition.¹⁰³ Reports assert that the oil and gas seeps were explained to be the breath and fire of the gods.¹⁰⁴ There are even allegations that southern Maori used oil as a salve for wounds.¹⁰⁵

These references to the extent Maori valued petroleum are far from exhaustive. However these uses do appear to neatly summarise the general way Maori valued petroleum.

C Taonga - Its Scope in Practice

1 The spectrum claim

The Tribunal's recent and controversial decision in the spectrum claim supports a wide definition of taonga.¹⁰⁶ In the *Spectrum Final Report* the Tribunal addressed a claim by Maori to the electromagnetic spectrum used to broadcast radio waves. The majority of the Tribunal found that the Crown had acted in breach of the Treaty, and recommended that Maori be given a fair and equitable share of the spectrum.

The Tribunal approved the statement that Maori were aware of "various natural

¹⁰²J D Henry, *Oil Fields of New Zealand* (London, 1911), 9.

¹⁰³From the research of Ernest Diffenbach, in 1939, cited in J D Henry, *Oil Fields of New Zealand* (London, 1911), 9.

¹⁰⁴Paydirt's *New Zealand Petroleum Handbook* (Louthean Publishing Pty Ltd, 1999).

¹⁰⁵Interview with Professor John Collen of the Geography Department of Victoria University of Wellington, 24 May 1999. Though there are no surface seepages of oil in the area of the South Island referred to, surface seepages can dry up over time.

¹⁰⁶Two of the three judges in the claim found that the spectrum on its own is a taonga, but it should be noted that the decision of the majority is the decision of the Tribunal; see *The Spectrum Report*, above n, vii.

phenomena".¹⁰⁷ Maori explained these phenomena in mythological stories, thus incorporating scientific phenomena into the Maori spiritual-physical world philosophy.¹⁰⁸ The Tribunal also heard evidence that Maori used the spectrum to communicate at a distance by shouting, a use more directly connected with the use of the spectrum today.¹⁰⁹ Consequently the majority found that the spectrum itself is a taonga which, in conjunction with the broad right of development applied, is guaranteed protection under Article 2 of the Treaty.¹¹⁰

The claimants could compare the petroleum resource with the electromagnetic spectrum.¹¹¹ Both are economically valuable and scarce. In 1840 neither Treaty party had the technology to exploit the spectrum or petroleum, nor did they know the potential the resources held. Petroleum, like the airwaves, invites complexities in establishing ownership.¹¹² The Tribunal based their findings on a broad definition of taonga. The evidence that Maori valued and used the spectrum traditionally is in its nature similar to evidence the applicants in a claim to petroleum will present. Maori claimants have a strong argument that the Tribunal's definition of taonga would include petroleum.

2 *Is the spectrum of itself a taonga?*

At this point the author must qualify the *Spectrum Report* findings. With respect to the spectrum as taonga, the claimants in the *Spectrum Report* submitted a binary argument; that the spectrum itself is a taonga, of value for economic, cultural and social development, and/or that spectrum is a taonga as it is essential to and sustains the taonga of New Zealand's native language and culture.¹¹³ The Tribunal agreed separately with both branches.

3 *Taonga by association*

However it appears that the second arm of the argument, that the preservation of Maori language demands protection of the spectrum, influenced the Tribunal's upholding of the first argument. Throughout the report, the Tribunal stressed the direct relationship and influence the modern spectrum has on Maori language and culture.¹¹⁴ The Tribunal lamented the near extinction of programmes to ensure the promotion of this language. The Tribunal continuously cited the report on the radio frequencies allocation as the basis for their findings. The *Radio Frequencies Allocation Report* found that radio frequencies are taonga only because they secure the place of taonga of Maori language in broadcasting.¹¹⁵

¹⁰⁷*The Spectrum Report*, above n 24, 41.

¹⁰⁸*The Spectrum Report*, above n 24, 41.

¹⁰⁹*The Spectrum Report*, above n 24, 59.

¹¹⁰*The Spectrum Report*, above n 24, 42.

¹¹¹In fact, the Tribunal stated a claim to the spectrum was analogous to oil. *The Spectrum Report*, above n 24, 34.

¹¹²The issue of ownership of petroleum resources will be addressed in further detail below. The spectrum cannot be restricted and one can only own rights to the spectrum; oil is migratory and can be extracted by any one owner of the properties which overlie the petroleum pool. In other words, the owner of the land does not own the oil, she or he merely has a right to extract it.

¹¹³*The Spectrum Report*, above n 24, 28.

¹¹⁴See generally the decision on the second limb of the claim in *The Spectrum Report*, above n 24, 43-56, 65-70.

¹¹⁵*Radio Frequencies Report*, above n 90, 43.

Maori claiming petroleum will find it difficult argue that petroleum sustains or is essential to the preservation of another taonga. Part VII of this paper discusses the argument that petroleum is part of arguably the most important of Maori taonga - their land. This argument is slightly different from the argument that a resource becomes a taonga because it preserves another taonga. However, both arguments are to an extent creating a taonga by association.

The dissenting judge, Savage, rejected the submission that the spectrum itself is a taonga.¹¹⁶ Savage stated that it was "a difficult and dubious voyage" to go from the evidence of knowledge of the spectrum to finding a Treaty right.¹¹⁷ While taonga has many definitional levels, the word must not become so indefinite as to be meaningless.¹¹⁸ Taonga which have an aura of tapu and sacredness. Savage J found that use of the spectrum to shout at long distances, or stories of using the space occupied by the spectrum to snare the sun did not give the spectrum this sacredness.¹¹⁹ He felt that to allow the claimant's argument would be to extend the meaning of taonga too far, and would enable Maori to claim almost anything as taonga.

4 *Taonga and development*

There is a second qualification to the Tribunal's decision that the spectrum is a taonga. The claimants clouded their submission that the spectrum is a taonga by stating that the spectrum was a taonga because of its value to Maori development.¹²⁰ Effectively, the claimants were arguing that the development of Maori, and the right of Maori to develop, are taonga themselves. Part VI has discussed this debate. To summarise, the finding of the Tribunal that the spectrum is a taonga depended on an expansive view of the right of development.¹²¹

5 *The geothermal claim*

In the *Ngawha Report* on geothermal claims,¹²² the Tribunal arguably posits narrower requirements of what constitutes taonga. The Tribunal considered whether the components of the Ngawha geothermal resource - surface and subsurface - were taonga. The geothermal resource is a resource closely analogous to petroleum.¹²³ Both are liquid and fungible. Both are found underground, and both come to the surface in the form of pools. Both resources have uses which were not known by either Treaty partner at 1840. Both are important sources of energy and are highly valued economically.

¹¹⁶Savage J did agree with the claimant's second limb of the taonga argument. See *The Spectrum Report*, above n 24, 65.

¹¹⁷*The Spectrum Report*, above n 24, 59.

¹¹⁸*The Spectrum Report*, above n 24, 59.

¹¹⁹*The Spectrum Report*, above n 24, 59.

¹²⁰*The Spectrum Report*, above n 24, 28.

¹²¹*The Spectrum Report*, above n 24, 41. The majority stated that the spectrum was a taonga under the paragraph heading: "Development".

¹²²*Ngawha*, above n 35.

¹²³Richard Boast *The Legal Framework for Geothermal Resources - a historical study* Evidence for the Waitangi Tribunal, 43.

The claimants adduced comprehensive testimony that Maori knew not only of the surface thermal pools but also that these pools were connected to some larger body beneath the earth.¹²⁴ Extensive reference was made to the "miraculous healing powers" from this "spiritual source".¹²⁵ The Tribunal heard legends of gods travelling through the subsurface passages of the resource, of the subsurface areas being the heart of the taniwha, the surface pools the eyes. The evidence established that the iwi had exercised management and control of the resource.¹²⁶ Maori denied that they had disposed of their rangatiratanga over the resource upon purported sale of the land on which lay the geothermal pools. The claimants presented historical documentation to prove this.¹²⁷

D Summary

Comparisons and conclusions are hard to draw in an area where the result depends on the particular facts of each case. It is not yet known to what extent the Maori valued and used petroleum. The claimants have in their favour evidence to support a claim to petroleum as taonga which the Tribunal relied on in both the Spectrum and the Ngawha reports. Specifically, both Tribunals gave weight to mythological oral stories and events relating to the resource. The Tribunals also pointed out that the resource and its powers were believed to be gifted by or pertain to a God. The Tribunal referred to the evidence that Maori protested the loss of the resource.¹²⁸ As outlined above, all of these elements appear to accord with the Maori view and use of petroleum.

However, the ritual prohibition and sanction of the geothermal resource by Maori, which gave it the value of a taonga, does not appear to compare favourably with Maori treatment of petroleum.¹²⁹ If the Tribunal finds that petroleum is a taonga, complete Crown ownership is arguably inconsistent with the principle of protection, and Crown will also have breached the principle to act in good faith and reasonably towards their Treaty partner.

IX RIGHTS TO OFF-SHORE PETROLEUM

Maori have a strong case that Crown has not extinguished aboriginal or Treaty rights to petroleum beneath the seabed of the continental shelf.¹³⁰ A claim to these petroleum resources involves three main branches. First, the claimants must establish that aboriginal and/or Treaty rights can be extended to areas beyond New Zealand's territorial limits. Second, the claimants must prove that aboriginal or Treaty rights to petroleum exist. Third, the Tribunal must find that these rights have not been extinguished.

¹²⁴*Ngawha*, above n 35, 21.

¹²⁵Kaumatua evidence given by Kereama Rankin to the Waitangi Tribunal, as cited in the *Ngawha*, above n 35, at 21.

¹²⁶See *Ngawha*, above n 35, ch 2 at 7.

¹²⁷See *Ngawha*, above n 35, ch 3 at 27.

¹²⁸Maori opposed the vesting of petroleum solely in the Crown. See Part XIII A below.

¹²⁹*Ngawha*, above n 35, 20.

¹³⁰This will be discussed below in Part XII.

A *The Legal Status of the Continental Shelf*

New Zealand's territorial limits end 12 miles from the low water mark on the shore.¹³¹ Within this area New Zealand domestic law applies completely. Beyond the 12 mile zone, New Zealand's rights are determined by the 1958 Geneva Convention on the Law of the Sea. The United Nations Convention on the Continental Shelf gives New Zealand, as a coastal state, all sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources.¹³² The New Zealand Parliament has vested these sovereign rights in the Crown.¹³³ These are the Crown's only rights to this area. The Crown does not have sovereignty over the sea of the continental shelf (the High Seas) nor the airspace above these waters.¹³⁴

Thus only some New Zealand legislation applies further than this 12 mile limit. This essay will only address those relevant to the issue. The Continental Shelf Act 1964 (the 1964 Act), as mentioned, gives New Zealand rights to legislate for the exploitation of minerals under the shelf.¹³⁵ Section 4(1) of the 1964 Act states that the Crown Minerals Act 1991 (the CMA) applies with respect to the exploitation of petroleum under the shelf.

However section 4(1) of the 1964 Act states that section 10 of the CMA does not apply to the shelf. Section 10 of the CMA, it will be recalled, vests ownership of petroleum in the Crown. The upshot of this regime? The Crown in respect of New Zealand has sovereign rights to exploit petroleum, but it does not own the petroleum in situ.¹³⁶ This point will be addressed further in relation to extinguishment.

B *Do Aboriginal or Treaty Rights Exist Beyond the Territorial Zone?*

1 *Recognised sovereign entities*

Maori claimants will have a number of hurdles to overcome in establishing that aboriginal rights to the continental shelf can be recognised. First, the Crown may argue that Maori cannot possess any rights to the continental shelf. These sovereign rights are accorded by international law only to internationally recognised entities - usually only sovereign states. This point is discussed by Richard Cullen with respect to Australia.¹³⁷ Cullen argues that if the aboriginal tribes were granted any aboriginal rights and interests in the territorial or

¹³¹The Territorial Sea and Exclusive Economic Zone Act 1977, s 2.

¹³²Convention on the Continental Shelf, article 2. This Convention was ratified in June 1964.

¹³³The Continental Shelf Act 1964, s 3.

¹³⁴C. John Colombos *International Law of the Sea* (6 ed, Longmans Green & Co Ltd, London, 1967) 79.

¹³⁵The Continental Shelf Act 1964, s 3.

¹³⁶DE Fischer "Energy Development in New Zealand - Public ownership and public enterprise" (1984) NZLJ 49, 50.

¹³⁷See Richard Cullen "Rights to Offshore Resources After *Mabo* 1992 and the Native Title Act 1993 (Cth)" [1996] 18 Syd LR 125, 138-141 [Cullen]. The present author notes that the laws on jurisdiction in Australia, being a pluralist state, complicates the issue of aboriginal title and differs from the unitary New Zealand situation.

continental shelf seabed, it would be irreconcilable with the fact that states were denied any such rights. States were denied such rights because they were not internationally recognised entities, just like aboriginal peoples.

It is the view of the present author that such an argument here is neither on point nor appropriate to the New Zealand situation. The issue here seems to concern sovereignty over the seabed rather than native rights in the seabed. The international legal regime gives recognised sovereign rights over the continental shelf to the Crown in New Zealand (and the Commonwealth in Australia). The granting of rights to the seabed is at the international level, to regulate between sovereign states. But this does not exclude nor affect aboriginal rights at a domestic level, as between the Crown and its Treaty partner.

In other words, how the Crown decides to exercise their sovereign rights to those resources in relation to their Treaty obligations is a matter for the Crown and its domestic obligations. Maori do not need to be recognised internationally to have their protections guaranteed under the domestic law of aboriginal title or the Treaty. As we have seen, sovereignty and rangatiratanga can, and do, co-exist. Cullen also signals the argument that the international law could retrospectively recognise the international entity of Maori.¹³⁸

2 *Extension of the common law to the continental shelf*

Second, can these aboriginal and/or Treaty rights extend to the continental shelf without express legislative extension? Only rights ceded or recognised by international law have validity in the area of the continental shelf. Thus the domestic law of New Zealand does not automatically apply beyond the territorial zone and consequently nor does the common law of New Zealand. The Crown may argue that aboriginal title is given its recognition and even existence by common law. Therefore since the common law is not recognised in the continental shelf area, aboriginal rights cannot be recognised either. The Crown could run the same argument with respect to Treaty rights as well, as the Treaty is a part of domestic law.

This argument would receive support from the comments in *Mabo*. The decision in *Mabo* found that the common law is crucial to the recognition of native property rights.¹³⁹ The decision in the *Sea and Submerged Lands* case found that the common law ends at the low water mark.¹⁴⁰

However it is submitted that the Tribunal will not accept this submission. To uphold Crown's argument effectively means that aboriginal rights cannot exist in the area merely because the common law does not apply to the continental shelf. The claimants could argue that the domestic law in New Zealand does apply to the

¹³⁸See Cullen, above n 137, 139, referring to albeit out-of-context comments made by Moana Jackson in Moana Jackson "Changing Realities: Unchanging Truths" (1994) 10 AJLSoc 115.

¹³⁹See the judgment of Brennan J in *Mabo No 2*, above n 74, 68. See generally Cullen, above n 137, 138-9.

¹⁴⁰Per Barwick CJ, *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337, 368-9. See also Kate Guilfoyle "The Relationship between the Crown and the Subject - Changes to the Position of the Crown as a Consequence of the Judicial Process" (1998) 17 ABR 1, 37-38.

continental shelf where Parliament has extended New Zealand law in accordance with its Convention rights. As outlined in Part IX, the Continental Shelf Act 1964 and the Crown Minerals Act 1991 validly apply to the continental shelf. The claimants could argue that the extension of this complex statutory regime to the continental shelf, coupled with the Crown's sovereign rights to explore and exploit the natural resources under the shelf, is sufficient to extend the common law of New Zealand to the shelf.

It is highly arguable that Crown's sovereign rights in the shelf vest only radical title in the Crown, burdened by the Maori or aboriginal title.¹⁴¹ The claimants could argue that the common law would have not effect international law, in disputes between states, but that it would define and regulate the status of the Crown's rights in the seabed vis-a-vis New Zealand's citizens. Moreover, the Crown Minerals Act 1991 states that all people exercising functions under the Act are to have regard to the Treaty of Waitangi. Does this not suffice to extend the Treaty and the Crown's rights and obligations under it to the continental shelf, at least, again, at a domestic level?

Finally, in *R v Cote*,¹⁴² Lamer C.J.C. stated that the application of the doctrine of aboriginal title did not depend on the introduction of common law, but instead was part of "a body of fundamental constitutional law...logically *prior* to the introduction of English common law".¹⁴³ It must be noted, however, that the doctrine arguably still relies on the common law for its recognition and its enforcement domestically.

Such a finding would also be in accord with Maori expectations and understanding of the extent of their guarantees under the Treaty. Under the Treaty, the protection of Maori taonga was to be in accordance with Maori customary laws and beliefs. The doctrine of aboriginal law, too, takes the native peoples perspective into account to define aboriginal rights. It was the view of Maori that their sovereignty pre-1840 extended without some arbitrary cut-off point.¹⁴⁴ The idea of a 12 mile zone and an exclusive economic zone was and still is foreign to Maori. The lands, seas and all incidental resources are indivisible under Maori customary law. Thus Maori believed that the Treaty guaranteed protection of their rangatiratanga over taonga without territorial boundary.¹⁴⁵

Maori would at least have expected that this protection continue until the ends of Maori sovereignty which they were ceding. And as stated, the Maori view of their mana did not contain precise seaward boundary. In line with the principles of mutual benefit and good faith, when the Crown extended protection of its rights over resources to the shelf, they had the power, opportunity and obligation to extend this protection to any Maori interests to that area.

¹⁴¹See Richard Trainer *In Re the Marlborough Sounds Foreshore Case* (Honours Legal Research Paper, Victoria University of Wellington, 1998) 17.

¹⁴²(1996) 138 DLR 385.

¹⁴³*R v Cote* (1996) 138 DLR 385, 405. Emphasis added.

¹⁴⁴See *Muriwhenua Fishing Report*, above n 8, 184.

¹⁴⁵Of course, if this argument were taken to its logical end, Maori may claim aboriginal rights to Europe. But Maori did not sign a Treaty with the Continental nations, only the Crown on behalf of New Zealand.

It is worth noting that the Tribunal in the *Ngai Tahu Sea Fisheries* claim rejected a complicated Crown argument regarding international law and the Treaty.¹⁴⁶ Crown argued that if Maori are to claim an exchange of their sovereignty over the offshore waters for rangatiratanga, then Maori must have been not just recognised but also bound by international law. Thus since the international law at 1840 only gave state control to a 3 mile limit, the Crown must have intended that the Treaty only ever guaranteed rangatiratanga to that three mile limit. The Tribunal relied on a number of factors to reject the argument, including the fact that Maori were not told of this restriction, and that even Crown did not have international limitations at the "forefront of their minds."¹⁴⁷ The Tribunal emphatically stated:¹⁴⁸

Crown counsel's argument rests on the proposition that Maori in 1840 were bound by a so-called rule of which they had never heard, and to which, like many European nations where the rule had some limited urgency only, they had not assented.

C *Aboriginal Title and Treaty Rights to Off-shore Petroleum*

Of course, if the Tribunal does find that aboriginal title or Treaty title can be claimed to the continental shelf and subsoil, Maori must prove they have aboriginal or Treaty rights to the territory. In the case of petroleum, Maori again have two main lines of claim.

1 *As an incident of the seabed*

The claimants can also argue that their rangatiratanga over petroleum is guaranteed either because they have aboriginal title to the seabed which thus constitutes land or other properties/taonga under article 2, or that the reference to land under article 2 extends to land under the High Seas. A claim to the submerged soil of the continental shelf would be argued on the same basis as a claim of aboriginal title to dry land.¹⁴⁹ Again, much of the discussion in Part VII regarding aboriginal title as an interpretative instrument applies to this claim.

The claimants have an onerous task in establishing either full aboriginal title or even a more limited aboriginal right to the seabed or offshore petroleum. The paper will now address the ways Maori could argue such a right does exist and the obstacles Maori may encounter.

Aboriginal title to land involves exclusive occupation and/or use of the land prior to the arrival of the new sovereign power.¹⁵⁰ Obviously it will be near impossible to prove that Maori "occupied" the seabed. But Maori could assert that they have title to the seabed under their traditional fishing grounds. Maori could claim that Maori exclusively occupied and used the area above the seabed and that these rights gave them concomitant rights to the seabed, subsoil and any mineral

¹⁴⁶*Ngai Tahu Sea Fisheries*, above n 23, 5 WTR 262.

¹⁴⁷Many states ignored this 3 mile limit anyway.

¹⁴⁸*Ngai Tahu Sea Fisheries*, above n 23, 262.

¹⁴⁹Richard Boast "The Foreshore" Rangahaua Whanui National Theme Q (First Release, Waitangi Tribunal, Rangahaua Whanui Series, November 1996 6) 18

¹⁵⁰*Delgamuukw* above n 76; also *Hamlet of Baker Lake and Others v Minister of Indian Affairs and Northern Development & Ors* (1979) 107 DLR (3 ed) 513, 542.

resources therein. Of course, Maori would have to prove that they fished in the 188 mile area. The Tribunal in the *Ngai Tahu Sea Fisheries Report* accepted that Maori had fished well beyond the foreshore of New Zealand.¹⁵¹ Maori must also establish that petroleum resources were or are located under these fishing areas.

Alternatively, Maori could claim an aboriginal right to petroleum under the continental shelf. Proof of an aboriginal right, however, requires evidence of traditional use of the resource. The present author is not aware of any Maori use or even knowledge of petroleum that far out to sea.¹⁵²

It must be remembered that the doctrine of aboriginal title has its source in and takes into account the perspective of the native peoples. The Treaty also requires that tikanga Maori are incorporated into the principles.

Maori could argue that in accordance with their holistic view of the world and its resources, land above water is indivisible from land under water. They do not view land as ending at the low water mark, or at a 12 mile cut-off point. Thus Maori could argue that their rangatiratanga over land protected under article 2 includes land under the High Seas.

A claim to offshore petroleum could of course be successful if the third role of development discussed in Parts V and VI is followed by the Tribunal. Failing that, the success of the claim depends on a very broad recognition of the principle to develop and the application of principles such as partnership and fiduciary obligation.

(a) Other Jurisdictions

Internationally, indigenous claims to offshore resources, other than fisheries, are rare. Ironically, it is more common that native tribes bring actions to stop offshore resource development because the development is interfering with their rights to fish and hunt in the area. The author knows only of two cases to date which specifically involve claims to the mineral resources themselves.

A claim to seabed petroleum was made in the United States. The case involved the Alaska Native Claims Settlement Act 1971 (ANCSA). ANCSA was to be a comprehensive settlement of all claims to aboriginal title by the indigenous peoples of Alaska.¹⁵³ Aboriginal title was extinguished in return for land and monetary compensation. However whether ANCSA extinguished aboriginal claims to the continental shelf was unclear. The claimants in *People of Village of Gamble v Clark*¹⁵⁴ attempted to stop the Secretary of Interior granting exploration leases for oil and gas. The claimants argued that their rights to hunt and fish in the sea above the continental shelf gave them concomitant rights to any mineral resources, including petroleum, beneath those fishing grounds.¹⁵⁵ The court found that the term "in Alaska" in the settlement extended to the continental shelf and

¹⁵¹*Muriwhenua Fishing Report*, above n 8, 178.

¹⁵²It by no means follows that there is no such evidence.

¹⁵³43 USCA ss 1601-1628.

¹⁵⁴746 F.2d 572 (1984).

¹⁵⁵*People of Village of Gamble v Clark* 746 F.2d 572 (1984) 573.

therefore ANSCA did extinguish any interests in the continental shelf.¹⁵⁶ Thus the court did not have to decide whether rights to fish and hunt allowed a valid concomitant of mineral resource rights. However, it is significant that the court did not refute the argument.

The Federal Court of Australia recently considered the issue of aboriginal title to the territorial sea and seabed.¹⁵⁷ The applicants in *Yarmirr* claimed, among other matters, that they had native title to the minerals existing in the sea, seabed and subsoil of the region.¹⁵⁸ They claimed a right to control access to these areas and to trade in these resources. The claimants were given non-exclusive inalienable rights to fish, hunt, perform cultural rituals and to visit and protect places which are of cultural and spiritual importance to the community.¹⁵⁹ But their claim to any mineral interests in the seabed or subsoil failed.

The judge found that the evidence did not establish any traditional custom, acquisition, use or trading in minerals exercised by the indigenous claimants in relation to the sea, sea-bed or subsoil.¹⁶⁰ The decision required high evidentiary proof of exclusive possession, control of access and control of the resources.¹⁶¹ Even if the claimants had proven a right existed, the judge held that due to a complex statutory regime the Crown had taken full beneficial ownership of the claimed minerals.¹⁶²

The decision in *Yarmirr* is not completely unhelpful to a Maori claim to offshore petroleum. The judge did confirm that aboriginal rights to the territorial sea and seabed and subsoil can exist and be recognised. A claim for exclusive access to and/or rights to minerals in the subsoil was technically denied on the facts, not on law. The arguments presented by the claimants were very vague.¹⁶³ It seems that the claim to seabed minerals was not the focus of their case. Furthermore, Maori claimants could distinguish *Yarmirr* on the basis that the legislative regime in Australia is entirely different to that in New Zealand.¹⁶⁴ However the case does reiterate that use of the resource may be crucial for a successful claim.

¹⁵⁶*People of Village of Gamble v Clark* 746 F.2d 572 (1984) 575, 579.

¹⁵⁷*Yarmirr v Northern Territory (the Croker Island Case)* Fed C of A, Olney J, 6 July 1998, unreported [*Yarmirr*]. The case has since been reported: see *Yarmirr* (1998) 156 ALR 370, but this report was unavailable to the present author at the time of writing. All paragraph references are therefore to the unreported judgment.

¹⁵⁸*Yarmirr*, above n 157, 4(c), 4(d). The legal regime of the territorial seabed is analogous to that of the continental shelf, except for the difference in Crown ownership of petroleum.

¹⁵⁹*Yarmirr*, above n 157, para 161(i), 161(iii).

¹⁶⁰*Yarmirr*, above n 157, para 158.

¹⁶¹Neville Henwood "Casenote on the Croker Island Case" (1998) 3(10) Native Title News 146.

¹⁶²*Yarmirr*, above n 157, para 158.

¹⁶³Olney J stated that the claim of the Croker Island community to resource rights in their region merely *appeared* to encompass a claim to seabed minerals; *Yarmirr*, above n 157, para 158.

¹⁶⁴The extinguishment of any title to the seabed or subsoil was said to be achieved by the combined effect of the Atomic Energy (Control of Materials) Act 1946 (Cth), the Atomic Energy Act 1953 (Cth), the Minerals (Acquisition) Ordinance 1953, the Petroleum (Prospecting and Mining) Ordinance 1954, the Northern Territory (Self Government) Act 1978 (Cth) and the Coastal Waters (Northern Territory Title) Act 1980 (Cth).

2 Offshore petroleum as a taonga

Maori could also claim that petroleum is a taonga. This would run substantially along the same track as the taonga-based claim to onshore petroleum. For a discussion of such a claim to offshore petroleum the reader is referred to Part VIII above. However, two points must be emphasised.

First, it is almost certain that Maori did not use the petroleum found in slicks on the ocean's surface, let alone under the seabed. It is not even yet known if those oil slicks occurred beyond the territorial zone. However, the inclusion of the phenomena of oil in Maori legends and songs is just as, if not more so, apparent as the references to onshore petroleum. Thus the extent of the 'principle' of development,¹⁶⁵ the scope of article 2 and the persuasiveness of the judgment in the *Spectrum Report* are crucial to the success of this claim. In a similar vein lies the second point - proof of customary title is a matter of evidence.¹⁶⁶

D Summary

It is submitted that a claim to petroleum under the continental shelf is tenuous. The issues of whether such rights can extend to the continental shelf, and whether those rights had been extinguished will arguably favour the claimants. The result hangs on the proof of the aboriginal or Treaty right to petroleum. The arguments that title to land onshore or a non-territorial fishing right extends to land beneath the sea is a stretch. Indeed it will be full of complexities for both sides. Ultimately, as with all aspects of this claim, the answer will depend on the evidence, the make-up of the Tribunal and the scope of partnership on the day.

There is some cause for optimism. Comments such as those in the Tribunal reports about the importance of the holistic Maori world-view provide hope. The rejection of the wastelands argument weakens the need for exclusive control over entire areas.¹⁶⁷ Of course, the growth of a principled approach to Treaty claims champions a successful claim to offshore petroleum. If the Tribunal finds that the principles of partnership and development extend far enough, evidence that Maori used or knew of the resource at 1840 will be irrelevant,¹⁶⁸ and a claim to offshore petroleum may just succeed.

X APPLICATION OF THE RIGHT OF DEVELOPMENT TO THE CLAIMS

A Maori claim to petroleum will need to claim the right to develop with respect to the resource. In other words, may Maori only use the resource as they did traditionally, pre-1840, or may they exercise their right of development and take

¹⁶⁵See Part VI above.

¹⁶⁶Paul McHugh *The Aboriginal Rights of New Zealand Maori at Common Law* (Cambridge, 1987); see also *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382-383.

¹⁶⁷The Crown in *Tainui* argued that since Maori did not occupy all areas of New Zealand, the Crown acquired unburdened title to those areas upon acquisition of sovereignty. The court rejected this argument. See *Tainui*, above n 42,

¹⁶⁸See the discussion in Part VI above.

advantage of new technology to exploit the resource? As stated in Part V of this paper, it is generally accepted that the right exists in regard to properties specified in the Treaty,¹⁶⁹ but the position regarding unspecified properties, like petroleum, is unclear.

A petroleum claim is full of contradictions. On the one hand, there is a trend to try and preserve Maori culture and community. It is often queried how petroleum development fits in with maintaining Maori beliefs and culture. Is this not assuring Maori assimilation into the pakeha culture? However the development of Maori is essential in ensuring that Maori do not stagnate. It is important that such considerations do not affect the analysis of the legal claims to petroleum. These contradictions should be developed when deciding the nature of a remedy or settlement.

A Petroleum as an Incident of Land and Development

The present author submits that with respect to the claim that petroleum is an incident of land, the claimants need not argue that they have a right to develop the resource. The author would argue that the content of a Treaty right to land is akin to a freehold estate. Treaty title to land includes all minerals, and the fact that Maori did not know of or use the resource must be irrelevant - Maori have full rangatiratanga over it.

Aboriginal title entails more than a collection of specific aboriginal rights, it is an interest in land that is not limited to specific traditional uses. These customs and traditional usages of the land establish a connection to the land and are crucial to establish aboriginal title to that land. But the present author prefers the argument that these traditional usages do not determine the actual content of the title to the land.¹⁷⁰ Thus Maori rights to their land are not limited to traditional or customary uses.

To limit indigenous peoples to uses of the land pre-sovereignty is inequitable and a breach of the Crown's fiduciary duty and status as a partner of Maori. Maori own full beneficial title to the land, and may use and enjoy it without any inherent limits based on the source of aboriginal title. All societies must adapt to survive, and it could not have been the intention of either Treaty partner to deny Maori the right to survive.

This argument is supported by growing jurisprudence in North America on the nature of aboriginal title to land.

1 Aboriginal title and the right to development

The issue under the doctrine of aboriginal rights is also controversial. Some argue that the rationale for the recognition of aboriginal title as allowing exclusive use

¹⁶⁹*The Spectrum Report*, above n 24, 41.

¹⁷⁰See Kent McNeil "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 35 *Alberta L Rev* 117. McNeil argues that these traditional rights may regulate aboriginal peoples internally, within say, a hapu or iwi, but they do not have effect externally, as between Maori and the Crown, beyond establishing the connection with the land in the first place.

and enjoyment of the land is a rationale of equality.¹⁷¹ Thus in the quintessential American case of *Mitchell v United States* the Supreme Court of America stated:¹⁷²

[Indian] hunting grounds were as much in [the Indians'] actual possession as the cleared field of the whites and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected.

A rationale of equality leads to the conclusion that aboriginal title should not be impaired in any way. Aboriginal title should give the aboriginal group complete rights over their land or full beneficial ownership of the land.¹⁷³ Therefore aboriginal title should not be frozen according to traditional uses.

The Supreme Court of Canada in the landmark decision of *Delgamuukw* found that the uses of land held under aboriginal title are not limited to traditional aboriginal traditions and customs. However Lamer C.J.C. then stated that land held under aboriginal title "cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title".¹⁷⁴

Notwithstanding the newness of the decision in *Delgamuukw*, articles both lauding and deploring the decision are easily found. Generally the decision in *Delgamuukw* broadens the scope of aboriginal title. Flanagan argues that the decision effectively requires that any use of aboriginal land must not interfere with traditional usage.¹⁷⁵ Similarly McNeil argues that there should be no inherent limits on the use of lands held under aboriginal title.¹⁷⁶

The right to land under the Treaty can be compared to reserve lands in America. Boast argues that Maori freehold land is not dissimilar from reservation land.¹⁷⁷ On reservation land, the tribes are given full rights to the land and its resource, because the reservations were set up as a homeland for the native Indians, an area where they could exercise self-government and be self-sustaining. The tribes may use their lands in whatever fashion they desire, without any historically-based restrictions.¹⁷⁸

¹⁷¹Richard Bartlett "Native Title Includes Minerals!" (1998) 17 AMPLJ 43.

¹⁷²*Mitchell v United States* (1835) 1Ed 283, 296; 34 US (9 Pet) 711, 746.

¹⁷³This has been recognised in all major jurisdictions internationally; for authority from Australia and Canada respectively, see *Mabo No 2* (1992) 175 CLR 1, 217; *Delgamuukw* [1997] 3 S.C.R. 1010, 1083; for the United States, see *Shoshone*, above n 18, and generally the discussion in Richard Bartlett "Native Title Includes Minerals" (1998) 17 AMPLJ 43, 48-49. From the African continent, see the Privy Council decision in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

¹⁷⁴*Delgamuukw*, above n 76, 1088. Though Lamer C.J.C.'s findings were based on a view of the land and resources from the native Indian perspective, their belief that the land must be conserved as a living resource for all their descendants appears similar to the Maori perspective. See the summary in *Muriwhenua Fishing Report*, above n 8, 173-181.

¹⁷⁵William Flanagan "Piercing the Veil of Real Property" (1998) 24 Queen's L.J. 307.

¹⁷⁶Kent McNeil "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 35 Alberta L Rev 117; see also Richard Bartlett "Native Title Includes Minerals!" (1998) 17 AMPLJ 43.

¹⁷⁷R P Boast *The Legal Framework for Geothermal Resources: A Historical Study: A Report to the Waitangi Tribunal* (Wellington, 1991) 54.

¹⁷⁸For an excellent review on the legislative regime on tribal mineral development in the United

The comments of the dissenting judge himself, Savage J, in the *Spectrum Report* support this argument. He comments twice on petroleum claims in his judgment. First he refers to a claim to petroleum as absurd due to the fact that Maori did not know of or value petroleum.¹⁷⁹ After then making clear his rejection of such a right to resources simpliciter, he makes an exception of Sir Apirana Ngata's claims to petroleum. Savage stated that Ngata was claiming petroleum as an incidence of Maori land ownership, not as a right to petroleum irrespective of any property right.¹⁸⁰ He indicates, then, that a claim to petroleum as outlined in Part VII, would not be absurd. Thus Maori may be able to claim petroleum regardless of the fact that Maori did not know or use the resource prior to 1840.

B Petroleum as Taonga and Development

Using the recognised Treaty principle of partnership, which encompasses mutual benefit and the duty to act fairly and reasonably towards one another, Maori must be allowed to exploit petroleum using technology not known about at 1840. In the *Muriwhenua Fishing* claim,¹⁸¹ the Tribunal used these principles to extend the protection of fishing rights to include use of sophisticated detection equipment. The right of development also lead to an extension of traditional inshore Maori fishing rights to the seas beyond the continental shelf.

The Tribunal in the *Ngai Tahu Sea Fisheries Report* said that implicit in the recognition of the Treaty right to make use of new technology is the right to take full advantage of it. Otherwise the Treaty would be saying that for Maori the Treaty rights are frozen at 1840, whereas for Crown the rights can evolve. While the Crown (arguably) acquired sovereignty under the Treaty, it is doubtful that this right of kawanatanga was intended nor expected to have such a restrictive effect on Maori rangatiratanga. There was to be a mutual benefit to both parties to the Treaty. Furthermore, the concepts of resource exploitation and economic development were not at all foreign to Maori before 1840. In fact, the Tribunal in the *Muriwhenua* case stated that Maori were "major developers" by 1840.¹⁸²

Given these comments, Maori can argue that the right to oil includes the right to exploit and develop it. If the Tribunal takes a very broad tack, the right to enjoy full advantage of technology may even allow a right to develop offshore petroleum. This would be argued by way of an analogy to the fisheries argument - that while Maori fished inshore (Maori has rangatiratanga over inland petroleum), the principle of mutual benefit allows them to extend those fisheries rights to the continental shelf and beyond (Maori are able under the Treaty to extend their

States, see Judith V Royster "Mineral Development in Indian Country: The Evolution of Tribal Control over Minerals" (1993) 29 *Tulsa L J* 541.

¹⁷⁹*The Spectrum Report*, above n 24, 63-4.

¹⁸⁰*The Spectrum Report*, above n 24, 63,4.

¹⁸¹*Muriwhenua Fishing Report* above n 8, 185

¹⁸²*Muriwhenua Fishing Report* above n 8, 185.

rangatiratanga to petroleum under the continental shelf). Otherwise the success of a claim to offshore petroleum depends on the Tribunal finding a right to develop per se.¹⁸³

XI SEVERANCE OF SUBSURFACE RIGHTS

One further issue should be mentioned. In the *Ngawha Report*, the Tribunal considered whether the sub-surface components of the geothermal resource were capable of ownership.¹⁸⁴ The Tribunal noted that in 1840, and prior to sale of any parts of the surface geothermal field, various hapu held rangatiratanga over the whole of the resource by virtue of their management and control of the land surface. However, given alienation of the land block, the claimants had no right to exercise management or control over the surface components for they no longer had rangatiratanga over them.

The Tribunal noted that the claimants believed that ownership of the surface pools of the resource could not be separated from the underground resource. The Tribunal considered that once ownership of the surface components had been severed, there was no basis for allocating the right of ownership of, or rangatiratanga over, the whole of the sub-surface geothermal fluid to the owner of only one set of hot springs or pools on the land. No one such owner or group of owners could validly claim the exclusive right to manage and control the underground fluid or to exercise a veto over its extraction and use.¹⁸⁵

This decision, though by no means definitive, could cause problems in a Maori claim to petroleum. A claim to petroleum may be substantively different to the claim in the *Ngawha Report*. The claim to the geothermal resource was entirely taonga-based, and essentially the hapu in that claim were claiming rangatiratanga over the whole of the resource. The severance issue should be unimportant if Maori claim only that part of the petroleum resource on their lands or the lands confiscated from them before nationalisation. Due to the common law view of ownership of petroleum, this may mean that Maori can extract oil from under neighbouring non-Maori land, but it is not claimed that their rangatiratanga would extend to this oil until extraction.¹⁸⁶

A Ownership Issues

This issue highlights the problems of ownership of a fungible resource like geothermal springs and petroleum. At common law the owner of the land generally owns everything down to the core of the earth and up to the heaven within the owner's landed boundaries.¹⁸⁷ However with respect to a resource like

¹⁸³See Part VI above.

¹⁸⁴*Ngawha*, above n 35, 97-98.

¹⁸⁵*Ngawha*, above n 35, 97-98.

¹⁸⁶Of course, due to practicalities and the lengthy time petroleum has been exploited, the compensation recommended by the Tribunal will not be a return of the petroleum under current Maori lands, whereas in the *Ngawha* claim the surface pools could be returned and conservation of the resource could be administered in accordance with tikanga Maori. See *Ngawha*, above n 35, 149-158.

¹⁸⁷Pursuant to the maxim "cujus est solum ejus est usque ad coelum et ad infernos". See generally

petroleum, the groundwater doctrine is said to apply.¹⁸⁸ Thus the owner of land containing petroleum reserves did not own the petroleum until she or he extracted it. Consequently, that same owner could, from a mine on her or his own land, extract petroleum from beneath the neighbouring property and acquire valid ownership.

Crown could argue, then, that the nationalisation of petroleum did not divest Maori of petroleum ownership, because the petroleum remained unextracted. This argument is without force. At common law Maori landowners (nor non-Maori landowners) may not have technically owned the petroleum, but the exclusive opportunity to extract it from their land before their neighbours and the exclusive control over third party access to the resource gives Maori (and non-Maori) landowners property rights in the petroleum. It could be deemed an inchoate ownership. It is this control, or *rangatiratanga*, which the Treaty guarantees to Maori landowners and the Crown allegedly took away.

XII EXTINGUISHMENT

It is highly likely that the Tribunal will find that any rights, Treaty or aboriginal, to onshore petroleum have been extinguished. An interest in offshore petroleum, however, may still exist.

A General Principles of Extinguishment

The radical title which Crown acquires as a concomitant of sovereignty¹⁸⁹ gives the Crown the power to extinguish native title.¹⁹⁰ Only the Crown possesses this right of extinguishment, and the Crown can exercise it impliedly or expressly through legislation or executive action.

The intention to extinguish must be clear and plain.¹⁹¹ Any ambiguities should be decided in favour of the native title holder. A statute which expressly states that any aboriginal or Treaty interests in a particular resource or area are extinguished will satisfy the test of clear and plain intent.¹⁹²

However some statutes or Executive actions are not so explicit. In *Wik Peoples*, Justice Toohey affirmed the view of the court in *Delgamuukw* that the native title or right and the interest authorised by the Crown which purports to extinguish the

Paul Grinlinton "Petroleum Law" (1995) 8(3) Otago Law Review 386, 388-9 [Grinlinton].

¹⁸⁸Crommelin "The United States Rule of Capture: its Place in Australia" [1986] AMPLA Yearbook 265; see also R P Boast *The Legal Framework for Geothermal Resources: A Historical Study: A Report to the Waitangi Tribunal* (Wellington, 1991) 35-41, 42.

¹⁸⁹Per Brennan J in *Mabo*, above n 78, 33.

¹⁹⁰See *Mabo*, above n 78, 46-50 per Brennan J, 84-85 per Dean and Gaudron JJ.

¹⁹¹*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 691 per Williamson J.

¹⁹²Section 155 of the Maori Affairs Act 1953 is an oft-cited example of an unambiguous statutory extinguishment of native rights:

Except so far as may be otherwise expressly provided in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against her Majesty the Queen or against any Minister of the Crown or any person employed in any department of State acting in the execution of his office.

native interest must not be able to co-exist to any degree.¹⁹³ In other words, if Crown grants rights are necessarily inconsistent with the continuation of all or part of the native title, that native title, to the degree that it is inconsistent, may be extinguished.¹⁹⁴ In *Wik Peoples*, Brennan J held up a Crown grant of freehold estate to a third party,¹⁹⁵ in the same land claimed under aboriginal title, as an example of inconsistency.¹⁹⁶ Both jurisdictions have therefore upheld this doctrine of extinguishment by necessary implication.

The New Zealand government has never tried to extinguish native rights by granting inconsistent rights in the land to a third party, and if such a grant was given, there would have to be statutory authority for the grant.¹⁹⁷ But it appears that the New Zealand courts have recognised the doctrine of extinguishment by necessary implication.

The courts in New Zealand clearly support a stringent test of extinguishment.¹⁹⁸ Only an unambiguous deliberate act of the Crown will extinguish a right under aboriginal title. "Customary law does not disappear by a side wind."¹⁹⁹ The Crown has the burden of proving any alleged extinguishment.²⁰⁰

B *Has the Right to Onshore Petroleum been Extinguished?*

The test of extinguishment must now be applied to the legislative regime governing petroleum. Initially relevant is the Petroleum Act 1937. The Petroleum Act 1937 has now been repealed. Section 3 of that Act declared all petroleum existing in its natural condition to be the property of the Crown.²⁰¹ The provision applied to all petroleum on or below the surface of any land, even if that land was not Crown-owned.

Section 2 of the Act defines land as all land, including that covered by water, within the territorial limits of New Zealand. The territorial limits of New Zealand extend to 12 nautical miles from the low water mark of the sea.²⁰² To summarise, under the Petroleum Act 1937, Crown owned all oil and gas resources existing within the 12 mile territorial limit of New Zealand.

¹⁹³*Wik Peoples v Commonwealth* (1996) 187 CLR 1.

¹⁹⁴*Wik Peoples v Commonwealth* (1996) 187 CLR 1.

¹⁹⁵*Wik Peoples v Commonwealth* (1996) 187 CLR 1, per Brennan J 69.

¹⁹⁶However it should be noted that not all such grants will extinguish aboriginal title; it is a matter of fact for each individual court. It depends on the exact scope and content of the particular grant and its supervising legislation, compared with the exact scope and content of any native rights to the land in question. See Paul Smith "Pastoral Leases and native title - what did the High Court say?" (1998) 3(1) Native Title News 6, 7.

¹⁹⁷*Brookers RMA*, above n 17, TW1.05.

¹⁹⁸*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC); see also *Faulkner v Tauranga District Council* [1996] 1 NZLR 337, 363 (HC) [*Faulkner*].

¹⁹⁹Per Blanchard J. in *Faulkner*, above n 198, 363.

²⁰⁰*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

²⁰¹Section 2 of the Petroleum Act defines petroleum as inclusive of "any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata, but does not include coal, helium, or bituminous shales, or other stratified deposits from which oil can be extracted by positive distillation".

²⁰²Pursuant to the definition of "territorial sea" in the Territorial Sea and Exclusive Economic Zone Act 1977, s 2.

The Petroleum Act 1937 was repealed on 1 April 1993. The Crown Minerals Act 1991 (the CMA) now governs the rights in and management of petroleum. The CMA contains a replacement provision which deems all naturally occurring petroleum to be Crown property.²⁰³ Section 11 reserves petroleum and other minerals in land which has been alienated from the Crown. Again, the definition of land in section 2 of the CMA includes land covered by water, the foreshore and the seabed to the outer limits of the territorial sea. The CMA therefore maintains the position taken in the Petroleum Act 1937 - the Crown owns petroleum on New Zealand land and under New Zealand's territorial sea.

From the outline above, it is apparent that the statutory regime does not expressly extinguish Maori rights to oil or gas. However the Crown will have a strong case that vesting ownership of petroleum resources in the Crown extinguishes native rights with clear and plain intention, or at least by necessary implication.

Section 4 of the CMA states that all persons exercising functions and powers under the Act are to have regard to the principles of the Treaty. Maori claimants may wish to argue that to extinguish oil and gas resources would be a breach of the principles of the Treaty as required under section 4. Therefore it could be presumed that Crown did not intend to extinguish any aboriginal or Treaty rights with the Act.²⁰⁴

However this argument runs into a hurdle in the Petroleum Act 1937. This Act was the original source of extinguishment of petroleum resources, and the Act did not require any consideration of the Treaty. Although the Petroleum Act 1937 no longer is in force, aboriginal or Treaty rights would probably not be revived on its repeal. Whether native rights survive or hibernate during the reign of extinguishing provisions remains to be seen.²⁰⁵

C Has The Right to Offshore Petroleum Been Extinguished?

The legislation relevant to petroleum under the continental shelf was examined in Part IX above. The investigation established that Crown has sovereign rights over the continental shelf and its subsoil for the purpose of exploration and exploitation of its resources. It was also found that all but one the regulatory provisions of the CMA applied to the mining of petroleum on the continental shelf seabed. Only section 10 of the CMA does not apply, the section that vests ownership of petroleum in the Crown. In summary, the Crown has sovereign rights to exploit petroleum, but the Crown does not own the petroleum in its natural state. The Crown may issue permits to third parties to explore and exploit the offshore petroleum.

²⁰³Crown Minerals Act 1991, s 10. This section also vests property in gold, silver and uranium in the Crown.

²⁰⁴This argument should not be confused with the argument that extinguishment of any rights to petroleum is in breach of the Treaty. There is a subtle difference in the tack of the argument; the argument above is not that extinguishment was a breach, but rather that the Crown did not intend to extinguish any native interests in oil because extinguishment would constitute a breach of the Treaty pursuant to section 4 of the Crown Minerals Act 1991.

²⁰⁵For discussion on this point and an examination of extinguishment in general see Richard Ogden "Wik Peoples v State of Queensland" (1998) 28 VUWLR 341 [Ogden].

The status of the Crown's relationship to petroleum under the continental shelf raises a reasonably difficult issue with respect to extinguishment. The advanced argument goes beyond the scope of this paper. The present author proposes to introduce the basic considerations, and will refer the reader to articles which contain a more comprehensive treatment of the issues.

The claimants have a very strong case that the mere fact that the Crown has sovereignty over petroleum on the continental shelf is not sufficiently clear extinguishment of aboriginal or Treaty rights to petroleum. After all, surely Crown sovereignty over land on the territorial lands of New Zealand did not and does not extinguish aboriginal or Treaty rights there. *In Re Marlborough Sounds*,²⁰⁶ Hingston J found that when the Crown assumed sovereignty in 1840, any Maori interest in the seabed was in no way disturbed, diminished or extinguished. Hingston J found that confiscatory legislation must clearly and unequivocally deal with extinguishment. The decision is currently under appeal to the Maori Appellate Court.

The claimants may, however, face a bigger issue. The Crown could argue that by granting leases to third parties for the exploitation of petroleum, the Crown has extinguished aboriginal and/or Treaty rights, either by clear intention or necessary implication.

In *Mabo*, Brennan J stated that "a Crown grant which vests in the grantee an interest inland which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title."²⁰⁷ Brennan J found that a Crown grant of a freehold estate to a third party would necessarily extinguish native title. A grant of a lesser interest may not extinguish aboriginal or Treaty title. Here Brennan J speculated that a lease to prospect for minerals may not be sufficiently inconsistent with a native interest so as to extinguish it.²⁰⁸

It is arguable that the Tribunal, and the courts, would not allow an inconsistent Crown grant to extinguish aboriginal or Treaty title to land. As mentioned above, the law of New Zealand does not allow native rights to be taken away by a 'side wind'.

However the issue here is not about extinguishment of native title to the whole seabed, but extinguishment of a right within that native title - the right to the petroleum. Moreover, in this situation the grant of exploration or exploitation rights has statutory authority. In addition, a grant effectively allows the third party, say Generic Mining Ltd (GM), full rights to the petroleum. GM has no proprietary rights in the petroleum in situ, but does have exclusive access to the resource.²⁰⁹ Section 31 of the CMA states that the permit holder who lawfully obtains minerals becomes the owner of those minerals. This arguably gives GM an inchoate right of ownership of the oil which becomes a concrete proprietary

²⁰⁶*In Re Marlborough Sounds* (1997) unreported, MLC, 22A Nelson MB 1, Hingston J.

²⁰⁷Per Brennan J in *Mabo No 2*, above n 78, 68.

²⁰⁸Per Brennan J in *Mabo No 2*, above n 78, 69.

²⁰⁹For the proprietary nature of mining leases, see Michael Crommelin "The Legal Character of Resource Titles" (1998) 17 AMPLJ 57.

interest upon the oil's extraction.²¹⁰ The claimants must argue that this is not extinguishment of their rights to offshore petroleum by necessary implication.

Maori could argue that the Crown did not intend that the Petroleum Act 1937 or Crown Minerals Act 1991 should extinguish aboriginal and treaty rights to the bed of the continental shelf. In 1937 Crown would not have contemplated a claim by Maori to the seabed, let alone have legislated for the purpose of extinguishing such a claim. However, Brennan J did comment that the actual intention of the grantor in granting rights inconsistent with native rights is irrelevant. If the effect of the grant is irreconcilably inconsistent with the native right or title, then whether the grantor intended to extinguish the native right does not matter.²¹¹

The present author is reluctant to accept this reasoning. Brennan J's comments do pertain to a pluralist situation and related to grants not according to a specific statutory power. Further Australian decisions have addressed the extinguishment of aboriginal title by Crown grant.²¹² In *Wik Peoples* the judges expressed differing views about whether it is the intention or the effect of the grant which is relevant.²¹³ There are further issues to consider, like whether native title revives after the grant expires.²¹⁴ The recent Native Title Act 1993 in Australia affects the issue.²¹⁵ The question is indeed complex.

XIII COMPENSATION

It has fallen, it has collapsed,
The Treaty of Waitangi!
It is perhaps the work of the Labour Government
Which has altered the Laws
Which has absorbed all our money,
Which is confiscating our lands!
And so I weep. Au! Alas!²¹⁶

Whether the Crown has an obligation to obtain the consent of the relevant Maori

²¹⁰See generally Deborah Fischer "Energy Development in New Zealand - Public ownership and public enterprise" (1984) NZLJ 49, 50.

²¹¹Per Brennan J in *Mabo No 2*, above n 78, 68.

²¹²See *Wik Peoples v Commonwealth* (1996) 187 CLR 1; also *Mineralogy Pty Ltd v NNTT and others* (10 December 1997) unreported, Federal Court of Australia, per Carr J.

²¹³See P Hunter "Wik Decision: Unnecessary Extinguishment" (1997) 3(1) Native Title News 1; also Stephen Lloyd "Extinguishment, Revival and Minerealogy" (1998) 3(7) Native Title News 88.

²¹⁴The reader is again referred to Ogden, above n 205, for a comprehensive review of these issues.

²¹⁵It is interesting to note that under the Native Title Act 1993, compensation is payable for interference with native title due to the grant of a mining lease. Category C stipulates that native title is not extinguished by the lease and reverts if the lease expires. See R T M Whipple "Assessing Compensation under the Provisions of the Native Title Act 1993" (1997) Native Title News 30, 31.

²¹⁶Translation of a haka to be performed by Ngati Porou upon the visit of the Minister of Mines in 1937, Webb, to discuss the issue of Petroleum royalties. The haka expresses Ngati Porou's feelings about the government and the developments regarding petroleum. The visit never took place. Cited in Dr Robyn Anderson "Goldmining: Policy, Legislation, and Administration" Rangahaua Whanui Series Theme N at 90-91.

in order to validly extinguish aboriginal or Treaty rights is unclear. Nor have the courts decided whether the Crown must compensate for the extinguishment of aboriginal or Treaty rights. However the task of the Tribunal is to recommend whether compensation should be provided.²¹⁷ The present author reiterates that the Crown is not bound by the Tribunal's recommendations.²¹⁸

Generally the Tribunal will recommend compensation if the Crown has extinguished Maori rangatiratanga over a property guaranteed to Maori by the Treaty, where Maori did not willingly or knowingly agree or relinquish that right.²¹⁹ The Tribunal will look at the Maori assumptions of control and mana over the resource over time. A willingness to share does not show relinquishment of this mana.²²⁰ This may be relevant to a claim to petroleum if it is proven that Maori entered into private agreements with Pakeha for the extraction of oil on Maori land.²²¹ It follows then that a statutory bar to compensation may also be inconsistent with the principles of the Treaty.

The Tribunal has stated that the Crown should only extinguish Treaty rights without consent in exceptional circumstances as a last resort in the national interest.²²² As an aside, the present author speculates whether the nationalisation of petroleum in the face of impending world war qualifies as a last resort. While the nationalisation of oil was in part motivated by thoughts of regional security, history shows that nationalisation was more influenced by qualms about the collapse of New Zealand's local industry.²²³ The present author merely queries whether these circumstances qualify as "exceptional" and whether nationalisation qualifies as the only resort.

A *No Free Consent by Maori*

There is extensive evidence that Maori objected to the passing of the Petroleum Act 1937.²²⁴ In that same year, Ngati Porou petitioned the proposed legislation. The iwi complained that the Act took away their rights, and they demanded that in return for allowing prospectors on to tribal land, they receive a percentage of the royalties on any oil discovered there. The government passed the Act despite Maori objections, and promised to address the royalty issue later. The issue was later discussed, but no change to the Act was made. Some see these events as a case where government promised to provide a royalty to Maori and failed to do so. Thus the events and legislation could be viewed as a breach of the Treaty.

Sir Apirana Ngata was vociferous in his condemnation of the taking of petroleum by the Crown. He referred to the common law recognition that Maori have full ownership of their lands, and that this included the rights to oil and gas. Ngata

²¹⁷The Treaty of Waitangi Act 1975, s 6(3).

²¹⁸The Treaty of Waitangi Act 1975, s 6(3).

²¹⁹*Whanganui River Report*, above n 36, 266-268.

²²⁰*Whanganui River Report*, above n 36, 266-268.

²²¹Dr Robyn Anderson "Goldmining: Policy, Legislation, and Administration" Rangahaua Whanui Series Theme N, 90-91.

²²²Waitangi Tribunal *The Turangi Township Report* (Brooker and Friend Ltd, Wellington, 1995) sec 1.5.2(3).

²²³For a history on the New Zealand petroleum regime, see Grinlinton, above n 187.

²²⁴See generally Grinlinton, above n 187, 390-92.

stressed that these rights were guaranteed and protected by the Treaty, and should not be removed without compensation.²²⁵

B No Consultation Apparent

The conclusions of the Solicitor-General on whether the Petroleum Bill breached the Treaty are noteworthy. He concluded that the Bill treated "equally all subjects of His Majesty" and therefore did not breach the Treaty.²²⁶ But it is submitted that the Solicitor-General focused on article 3 of the Treaty, ignoring the special rights Maori hold under article 2. Either way, his actions could hardly discharge the obligation of the Crown to consult with Maori pursuant to the principles of the Treaty.

C Statutory Bars to Compensation

1 Onshore petroleum

The Petroleum Act 1937 specifically barred any compensation payable to anyone in respect of any oil or gas taken by the Crown pursuant to that Act.²²⁷ The Crown Minerals Act 1991, which repealed the Petroleum Act 1937,²²⁸ does not contain an equivalent provision. Thus, a statutory bar to compensation for extinguishment of territorial petroleum rights no longer exists.

2 Offshore petroleum

Section 4 of the Continental Shelf Act 1964 applies the provisions of the Crown Minerals Act 1991 to petroleum under the continental shelf seabed (with the exception of section 10 regarding Crown ownership of petroleum). Therefore, in the event that petroleum rights under the aforementioned 188 mile zone are extinguished, compensation is also no longer barred either.

The claimants must then prove that the bar contained in the now-repealed Petroleum Act 1937 did not survive that Act, and has no effect on a claim to compensation today.²²⁹

D Compensation despite Statutory Bar

In recent Crown settlements, the Crown has included payment of compensation even though relevant statutes had historically barred the right to compensation. The Waikato Raupatu Deed of Settlement awarded compensation to Tainui regarding the unjust confiscation of Tainui land under the New Zealand Settlements Act 1863 (the Settlements Act). Section VI of the Settlements Act barred the predecessors of Tainui claimants from claiming any compensation for confiscated land. Nonetheless, compensation was paid, and paid to the

²²⁵See Grinlinton, above n 187, 391.

²²⁶Letter dated 16 November 1937 from the Solicitor-General to Hon Minister of Mines cited in Grinlinton, above n 187, 390.

²²⁷Petroleum Act 1937, s 39(5).

²²⁸See Part IX above.

²²⁹Of course, in a court claim the claimants must also prove that a right to compensation for extinguishment of aboriginal or Treaty rights exists at all.

descendants of those Maori who historically had been statutorily denied any compensation. Although such behaviour is likely the result of political obligation than legal obligation, it must be remembered that Treaty issues are as much political as legal.

E Recent Developments Regarding Compensation

In a claim to the Tribunal, it is not necessary to investigate whether the Crown must either obtain free consent from Maori or award compensation to validly extinguish aboriginal or Treaty rights.²³⁰ Yet it is worth acknowledging some of the significant comments from both the courts and the Tribunal on compensation for extinguishment or breach of aboriginal and Treaty rights. Not only do these developments show a greater willingness of the courts to compensate for extinguishment of native rights, they also strengthen the argument that the Tribunal will recommend redress in a claim to petroleum.

In the Court of Appeal case of *Te Runanganui o Te Ika Whenua*, President Cooke concurred with the view originally set down by the Privy Council that aboriginal title cannot be "extinguished otherwise (at least in times of peace) than by the free consent of the native occupiers".²³¹ Cooke went onto say:²³²

An extinguishment of native title by less than fair conduct or on less than fair terms will be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power...it may be that *the requirement of free consent* has at times to yield to the necessity of the compulsory acquisition of land or other property for specific public purposes which is recognised in many societies; *but there is an assumption that, on any extinguishment of the aboriginal title, proper compensation will be paid.*

Cooke's statements were obiter. Nonetheless, Cooke's description of free consent as a requirement is strongly significant. While the majority in *Mabo* denied any requirement of consent, two judges, Deane and Gaudron JJ, affirmed the comments cited from *R v Symonds*.²³³

It has been the practice of the US government to negotiate and obtain consent from native bands before extinguishing the band's rights. In addition, the government has shown a willingness to provide compensation, including in the valuation any minerals found on or under the land. Of course, such behaviour is a result not of law, but of political policy.

The case law in America uses the fiduciary relationship of the Federal Government and native peoples to establish an obligation to compensate if rights

²³⁰It appears that at present, the Crown is under no obligation to do either.

²³¹*Te Runanganui o Te Ika Whenua Inc Soc v A-G* [1994] 2 NZLR 20, 23-24, referring to the case of *Nireaha Tamaki v Baker* (1901) NZPCC 371,384, citing *R v Symonds* (1847) NZPCC 387, 390. The author again notes that when the Crown first took ownership of petroleum, the world was facing war. Would this constitute a state of non-peace sufficient to vitiate the need for free consent, if such is required at all? The present author doubts that this principle would apply to New Zealand two years before war began.

²³²*Te Runanganui o Te Ika Whenua Inc Soc v A-G* [1994] 2 NZLR 20, 23-24, emphasis added.

²³³See *Mabo (No 2)*, above n 78, 92, approving *R v Symonds* (1847) NZPCC 387, 390.

are extinguished. The present author reiterates that there are differences between the two jurisdictions,²³⁴ the reasoning appeals. President Cooke seems to agree, emphasising the need for fairness in Crown actions, this need stemming from the fiduciary relationship between the two Treaty partners. This principle has been discussed at length in Part IV above. The same comments apply here.

The very fact that the government expressly barred compensation for the taking of petroleum in the Petroleum Act 1937 implies that the government believed such a claim could be successfully made. The absence of that same bar in the Crown Minerals Act 1991 further implies that compensation may now be claimed. The words of Tribunal itself provide further support for such a view. In 1990 the Tribunal presided over the interim hearing concerning the disposal of Crown interests in the petroleum resource. In a memorandum the Tribunal stated:²³⁵

We are of the opinion however that the claimants have a case to be argued, either to the share of the resource or to compensation from that resource as a local asset within the de facto control of the Crown.

XIV CONCLUSION

Neither the Waitangi Tribunal nor the New Zealand courts have addressed a claim of aboriginal or Treaty rights to petroleum. It is difficult to accurately predict how successful such claims will be.

It is the present author's view that there is enough gas in the tank to sustain a Maori claim to petroleum. The claimants have a strong argument that they had Treaty rights to petroleum within their lands. Applying the established principles of partnership and protection, and the duties and rights of both Crown and Maori encompassed by these principles, the vesting of petroleum in the Crown by virtue of the Petroleum Act 1937 was and is inconsistent with the Treaty and its principles. The recent decision on the spectrum claim supports a finding that petroleum is a taonga. The success of this submission will depend on the evidence adduced and how the Tribunal define the scope of taonga and development.

It is the present author's view that a claim to offshore petroleum is full of complexities and sub-issues which fudge the claim's focus. If a claim to offshore petroleum is taken before the Tribunal, it will indeed be interesting, even if the result does not favour the claimants. It is the timid view of the present author that such a claim, either based on taonga or as an incident of the seabed, is not strong.

However it must again be mentioned that the success of a claim to petroleum depends on factors which are not known at this stage. Extensive research may turn up useful evidence that Maori used petroleum extensively. A factor more uncontrollable, however, is the Tribunal itself. A claim to petroleum may be the

²³⁴Particularly, the US government owes a strict fiduciary duty to the native peoples akin to a trust, moreso than in Canada or New Zealand. The constitutional affirmation of native rights in Canada and the US, the US constitutional takings provision and ability to review legislation are also notably absent in New Zealand.

²³⁵Memorandum from the Waitangi Tribunal Concerning the Disposal of Maui Gas Rights to the Hon. K T Wetere Minister of Maori Affairs and others, Wai 143, 29 June 1990, 4.

COPY

first time the Tribunal assesses a claim which extends the norms and shakes the status quo a little since the spectrum claim. Whether the Tribunal will continue down a more principles-based path of Treaty jurisprudence remains to be seen.

Finally, the author submits that in deciding the validity of a claim to petroleum, the implications and inconveniences which may follow from a favourable judgment should in no way affect the legal basis for the claim. The question as to what the Tribunal and the government in any settlement are trying to redress must be further developed when redress is being considered, but not when the legal claim is being considered.

The Tribunal has proven to be an authoritative and competent judicial body. If there is one certainty in a claim to petroleum, it is that the Tribunal will deal with it thoroughly and neutrally. In terms of a possible settlement with Crown, the issue will be decided by politics. In light of the apparent boldness of the Tribunal to tackle new issues, the author takes the optimist's view of a Maori claim to petroleum; the tank, it is submitted, is half full.

FIRST AMENDED STATEMENT OF CLAIM

Kahungunu oil and gas and other natural resources claim

Dated Monday, 31st December 1995

LEGAL REPRESENTATIVES
WELLINGTON
TELEPHONE 04-488 8888
FACSIMILE 04-488 8889
ATTENTION: General Counsel
DIXON BUILDING

APPENDIX I

COPY

IN THE WAITANGI TRIBUNAL

WAI 201

IN THE MATTER of Section 6 of the Treaty of Waitangi
Act 1975

AND

IN THE MATTER of a claim by WILLIAM HENRY
CHRISTIE, TUEHI RATAPU, WIKI
HAPETA (all now deceased),
JOSEPH CARROLL and CHARLES
COTTER on behalf of themselves, and
all of Ngati Kahungunu

FIRST AMENDED STATEMENT OF CLAIM

Kahungunu oil and gas and other mineral resources claim

Dated Monday, 21st December 1998

RUDD WATTS & STONE
SOLICITORS
WELLINGTON
PO BOX 2793

TELEPHONE 04 498-5000
FACSIMILE 04 498-5001
ATTENTION: Gina Rudland/Stacey Shortall
DOC REF: 132711GMR

FIRST AMENDED STATEMENT OF CLAIM
(Kahungunu Oil and Gas and other Mineral Resources Claim)

DATED THIS MONDAY, THE 21st DAY OF DECEMBER 1998

1. PREAMBLE

- 1.1 This First Amended Statement of Claim ("this Claim") amends the original Statement of Claim dated 14 May 1991 and registered with the Waitangi Tribunal as Wai 201 ("the original Claim").
- 1.2 This first amended statement of claim amends by addition only and does not replace any provision of the original Claim.
- 1.3 The traditional territory of the iwi of Ngati Kahungunu is that area on the east coast of the North Island stretching from the Mahia Peninsula in the north to Cape Palliser and Lakes Onoke and Wairarapa in the south and inland to the south-eastern shores of Lake Waikaremoana, and to the Kaweka, Kaimanawa, Ruahine, Tararua and Rimutaka Ranges to the west, and include all inland and coastal fisheries adjacent to the said area.

2. THE CLAIM

- 2.1 The claimants say their claim falls within one or more of the matters referred to in section 6(1) of the Treaty of Waitangi Act 1975, namely:
 - (a) each of the claimants are Maori; and
 - (b) each of the claimants claim they have been prejudicially affected, or are likely to continue to be affected by:

- (i) ordinances of the General Legislative Council of New Zealand, and/or the provincial Legislative Council of New Munster and/or provincial ordinances and/or acts passed on or after the 6th of February 1840; and/or
- (ii) by regulations, orders, proclamations, notices or other statutory instruments made, issued or given at times on or after the 6th of February 1840 under the ordinances or acts referred to in paragraph (i) above; and/or
- (iii) by policies, practices (some of which are no longer in force) adopted by or on behalf of the Crown, and by policies or practices proposed to be adopted by or on behalf of the Crown; and/or by acts, omissions on and after the 6th of February 1840 with regard to proposed acts and/or proposed omissions, by and on behalf of the Crown including but not limited to the following particulars:

3. PARTICULARS OF THIS FIRST AMENDED CLAIM

3.1 Petroleum, Natural Gas and Other Mineral Resources

Specifically the claimants claim that all petroleum, natural gas and other mineral resources howsoever constituted, in whatsoever form and located within the land based and sea based rohe including, without seaward boundary, the seabed adjacent to the land based rohe of Ngati Kahungunu ("the resources") are taonga tuku iho of Ngati Kahungunu, and are protected as such by the Treaty of Waitangi for the benefit of Ngati Kahungunu.

3.2 Extent of above rights:

Pursuant to the Treaty of Waitangi and/or the doctrine of aboriginal title, Ngati Kahungunu are guaranteed Tino Rangatiratanga over Ngati Kahungunu taonga located within the Ngati Kahungunu rohe so long as it is their wish to retain the same.

Ngati Kahungunu have never relinquished Tino Rangatiratanga over the resources.

3.3 Breach of rights:

Failure by the Crown, or its agents, through certain ordinances, Acts, regulations, orders, proclamations, notices, instruments, policies, practices, acts or omissions to actively protect Ngati Kahungunu Treaty and aboriginal rights to the resources by but not limited to:

- (a) the failure to recognise that the resources are protected as taonga of Ngati Kahungunu under the Treaty of Waitangi; and
- (b) the failure to recognise that Ngati Kahungunu had aboriginal title to the resources as at 1840; and
- (c) in respect of the oil and gas resources, the failure to consult with Ngati Kahungunu in regard to the introduction of the Petroleum Act 1937 and the Crown Minerals Act 1991 ("the legislation"); and
- (d) the failure to acknowledge that the legislation was/is contrary to the principles of the Treaty of Waitangi; and

- (e) the failure to compensate Ngati Kahungunu after purporting to assume ownership and control of the resources through the legislation; and
- (f) the consequent exploitation of the resources by third parties after the enactment of the legislation; and
- (g) the failure to ensure that Ngati Kahungunu continue to control and manage the resources in accordance with rights guaranteed under the Treaty of Waitangi and the doctrine of aboriginal title.

4. FINDINGS SOUGHT

4.1 The claimants seek the following findings:

- (a) that the Treaty of Waitangi guarantees to Ngati Kahungunu Tino Rangatiratanga, which includes rights analogous to ownership rights to Ngati Kahungunu in respect of the resources;
- (b) that Ngati Kahungunu retains ownership of the resources; and/or that Ngati Kahungunu had and retains aboriginal/customary title to the resources;
- (c) that the resources may not be exploited by third parties without the prior consent of Ngati Kahungunu;
- (d) that the right to manage the resources is, in terms of the principles of the Treaty of Waitangi, vested in Ngati Kahungunu;

- (e) that compensation be made by the Crown for loss of benefits suffered by Ngati Kahungunu from the resources; and,
- (f) such further findings as the Tribunal deems just.

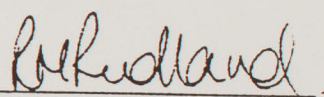
5. RECOMMENDATIONS

The claimants reserve the right to make submissions on recommendations as the claim progresses.

6. FURTHER AMENDMENTS TO THE CLAIM

The claimants ask that leave be given to amend this Amended Statement of Claim following the preparation of research reports and hearings which will both identify and refine claims and issues arising therein.

DATED at Wellington this Monday, the 21st day of December 1998


 RM Rudland
 Counsel for the Claimants

- TO: The Registrar, Waitangi Tribunal
- AND TO: The Crown Law Office (Solicitor-General)
- AND TO: Office of Treaty Settlements (The Director)
- Minister of Energy
- Minster in charge of Treaty of Waitangi Negotiations
- Simpson Grierson, Wellington for WestTech / Enerco Joint Venture
- Wairoa District Council (The Chief Executive)
- Napier Regional Council (The Chief Executive)

Appendices

TW APPENDIX II

TEXT OF THE TREATY OF WAITANGI

A. FIRST SCHEDULE TO THE TREATY OF WAITANGI ACT 1975

(THE TEXT IN ENGLISH)

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation of Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor.

Appendices

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]

(THE TEXT IN MAORI)

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

ARTICLE THE SECOND

Ko te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Treaty of Waitangi

Ko te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitahi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

B. ENGLISH TRANSLATION OF THE TEXT IN MAORI: (from the Royal Commission on Social Policy 1988, The April Report, Vol III part 1, pp 211, 212)

ARTICLE THE FIRST

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England forever the complete government over their land.

ARTICLE THE SECOND

The Queen of England agrees to protect the Chiefs, the sub-tribes and all people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand, the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being appointed by the Queen as her purchase agent).

ARTICLE THE THIRD

For this agreed arrangement therefore, concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

[The next page is TW Cases—1]

LAW LIBRARY

A Fine According to Library
Regulations is charged on
Overdue Books.

VICTORIA
UNIVERSITY
OF
WELLINGTON
LIBRARY

WWAI	90/00
PLEASE RETURN BY - 6 JUL 2000	
TO W.U. INTERLOANS	

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00562158 4

e

AS741

VUW

A66

S767

1999

