DAVE WHITE

TO SETTLE OR NOT TO SETTLE? AN ANALYSIS OF MAORI CLAIMS TO PETROLEUM

LLM RESEARCH PAPER

LEGAL WRITING (LAWS 582)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2000

Table of Contents

Abstract

This paper examines the merits of Maori claims to petroleum in the general context of the Treaty settlements policy that is currently being pursued by the Crown.

The status and effect of the Treaty of Waitangi are examined in detail to determine whether the Crown has breached its obligations to Maori under the Treaty by nationalising petroleum without paying any compensation. A breach may have occurred because Article II of the Treaty guarantees to Maori their Lands and taonga (treasures). Whether petroleum falls within this latter category may well depend upon the existence of a right for Maori to develop their resources in ways that were not contemplated when the Treaty was signed in 1840.

The doctrine of aboriginal title is also examined, with a particular focus on the development of that doctrine in Canada. The adoption of the Canadian position in New Zealand could open the way for Maori to successfully claim ownership of petroleum in the continental shelf within New Zealand's jurisdiction, as such petroleum is only managed, but not owned, by the Crown.

Finally, the Treaty settlement process is examined to determine whether it is advisable for claimants to settle directly with the Crown. Despite some significant defects in the process, notably the $1 billion cap and the concept of 'relativity', this paper concludes that it may be advantageous to do so.

The text of this paper (excluding contents page, abstract and footnotes) comprises approximately 12,300 words.

To Settle or not to Settle? An Analysis of Maori Claims to Petroleum

Dave White[§]

I Introduction

In July 1999, Thomas Tohepakanga Ngatai submitted a statement of claim to the Waitangi Tribunal (the "Tribunal") on behalf of "all the descendants and rightful successors of the rangatira and people of Nga Hapu o Nga Ruahine" (the "Nga Ruahine Claim"), in accordance with s6(1) of the Treaty of Waitangi Act 1975 (the "Treaty of Waitangi Act").

The Nga Ruahine Claim states that the Crown has breached the Treaty by, among other things:

- failing to recognise that all petroleum resources, natural gas and other minerals located in their rohe (traditional tribal area)[1] are protected as Nga Ruahine's taonga under the Treaty;
- failing to recognise Nga Ruahine's customary rights or aboriginal or native title to those resources;
- vesting ownership of Nga Ruahine's petroleum and gas resources in the Crown pursuant to the Petroleum Act 1937 and continuing to vest ownership of the resources in the Crown under the Crown Minerals Act 1991;
- failing to ensure that Nga Ruahine controls, owns and manages the resources in accordance with the rights guaranteed under the Treaty of Waitangi, the doctrine of aboriginal or native title and their customary laws; and

---

[§] LLB, BA. The writer was a solicitor at Bell Gully Buddle Weir, Barristers and Solicitors, Wellington, where he advised Ngati Ruanui, Ngati Tama and Ngati Mutunga in negotiating their respective Heads of Agreements with the Crown. The writer would like to acknowledge the support and tutelage of David Tapsell, who led the legal team during those negotiations.

[1] Nga Ruahine's rohe is in the petroleum-rich area of South Taranaki. As Nga Ruahine is a coastal iwi, it also claims part of the seabed and continental shelf located within the Taranaki bight.

- failing to compensate Nga Ruahine after assuming control of the resources through legislation.

Nga Ruahine are seeking orders from the Tribunal recognising the rights described above, that those rights are analogous to rights of ownership and that ownership of the resources be vested in the iwi. They are also seeking compensation from the Crown for the loss of benefits from the resources suffered by Nga Ruahine.

The Nga Ruahine Claim is set against the background of a number of recent Treaty negotiations between the Crown[2] and iwi in the Taranaki region.[3] During the negotiations, the Crown made it clear that natural resources were not available for general use in settlements in the way that cash or surplus lands are. Claimants therefore had no option but to accept the Crown's position if they wished to progress their Treaty negotiations with the Crown.

Faced with this choice, several of those iwi have signed agreements with the Crown in contemplation of a final settlement of their Treaty claims, settlements which will necessarily involve them surrendering any claims that they may have had in relation to petroleum. But was this the right decision? Should Nga Ruahine follow their lead and opt to settle their claim through direct negotiation or should they pursue their claim for ownership of those resources that they regard as rightfully theirs?

This paper examines the merits of Maori claims to petroleum in order to answer that question and to determine what is the best option for claimants such as Nga Ruahine. It begins by setting out, in Part II, the current legislative framework pertaining to petroleum, examining both the domestic legislation and the international influences upon it. The likely claims to petroleum by Maori are examined in Part III, focusing on Article II of the Treaty and the doctrine of aboriginal title. Part IV then provides an overview of the concept of the "development right", as the application of that concept is potentially significant for some of the claims analysed in Part III. Two key Treaty settlements are then analysed in Part V to determine what the probable effect of a future Treaty settlement would be on a Maori claim to petroleum. Part VI then assesses the

---

[2] As the term is used in this paper, the "Crown" refers to the executive branch of the New Zealand government, representing the historical authority of the sovereign as head of state.
[3] These negotiations are discussed in more detail in Part V B (2) above.

advantages and disadvantages of the direct negotiations process, highlighting in particular potential issues with the finality of such process.

The paper concludes that, despite the drawbacks of the direct negotiations process, this process presents the best opportunity for a claimant to seek redress for past Crown breaches of the Treaty in relation to petroleum. The paper does, however, leave open the possibility of a separate claim to ownership of petroleum on the continental shelf.

II Legal Framework

A Background

Before considering Maori claims to petroleum, it is necessary to determine the legal position with regard to the ownership of this resource. An analysis must therefore be made of the ownership of petroleum within New Zealand and the surrounding waters over which New Zealand claims jurisdiction.

B New Zealand's Legislative Framework

(1) Petroleum Act

In 1937, petroleum was nationalised by means of s3(1) of the Petroleum Act 1937 (the "Petroleum Act"). Prior to 1937, the common law position was that petroleum belonged to whoever abstracted it.[4] Ownership of petroleum was, therefore, a natural incidence of land ownership.

Section 3(1) of the Petroleum Act vested the ownership of all petroleum in the Crown. Specifically, that Act provided:

> Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum existing in its natural condition on or below the surface of any land, whether the land has been alienated from the Crown or not, is hereby declared to be the property of the Crown.

Section 3(2) went on to provide that any alienations of Crown land after the commencement of the Act were made subject to the reservation of title to petroleum, while s3(3) specified that, for the purposes of s3, "petroleum":

> shall not include petroleum which has been mined or otherwise recovered from its natural condition on or below the surface of any land, whether or not such petroleum has subsequently been returned to a natural reservoir for storage purposes in the same or an adjacent area.

---

[4] D E Fisher "The legal context of petroleum development in New Zealand" in *Petroleum development and New Zealand law* (Victoria University Press, Wellington, 1984) p20.

This exclusion was necessary because the definition of petroleum in s2(1) of the Petroleum Act also included petroleum which had been mined or otherwise recovered but which had been returned to a natural reservoir for storage purposes in the same or an adjacent area.

"Land" was defined in s2(1) of the Petroleum Act as "all land within the territorial limits of New Zealand, and includes land below the sea and any other water". Therefore, all petroleum existing in its natural condition, on or below the surface of the land, covered or not covered by water within the territorial limits of New Zealand, was declared to be the property of the Crown.

(2) Crown Minerals Act

The Petroleum Act was repealed by the Crown Minerals Act 1991 (the "Crown Minerals Act"). Section 10 of the Crown Minerals Act provides that petroleum continues to be the property of the Crown.

The phrase "within the territorial limits of New Zealand" has now been updated by reference to the term "Territorial Sea", defined in s3 of the Territorial Sea and Exclusive Economic Zone Act 1977 as:

> The territorial sea of New Zealand comprises those areas of the sea having, as their inner limits, the baseline described in sections 5 and 6 of this Act and, as their outer limits, a line measured seaward from that baseline, every point of which line is distant 12 nautical miles from the nearest point of the baseline.

Although a relatively complex definition in its own right, the baseline can effectively be regarded as being equivalent to the coastline for the purposes of this paper. Accordingly, any petroleum on land or off the coast of New Zealand for a distance of up to 12 nautical miles is covered by s10 of the Crown Minerals Act.

(3) Continental Shelf Act

Although s10 of the Crown Minerals Act vests the ownership of all petroleum, on or below the surface of the land, in the Crown, the position in relation to petroleum in the continental shelf is different.

Section 4 of the Continental Shelf Act 1964 (the "Continental Shelf Act") applies all the provisions of the Crown Minerals Act, with the exception of s10, to petroleum in the continental shelf. Although "land" in the Crown Minerals Act becomes a reference to the seabed and subsoil of the continental shelf,[5] the effect of the exclusion of s10 is to deprive the Crown of any rights of property in petroleum existing in its natural condition in the continental shelf and no other person is invested with a right of property in such petroleum.[6]

Control of the development of the resource is vested in the Crown on behalf of New Zealand.[7] That does not go so far as vesting ownership of such petroleum in the Crown.

(4) Conclusion

While ownership of petroleum on land or within the Territorial Sea of New Zealand is clearly vested in the Crown, this is not the case for petroleum situated beyond the Territorial Sea. Although s4 of the Continental Shelf Act provides that the minerals regime established by the Crown Minerals Act applies to such petroleum, ownership is not vested.

Accordingly, it is necessary to determine whether anyone else can establish better title than the Crown to petroleum beyond the Territorial Sea.

C The Continental Shelf under International Law

(1) Background

As discussed above[8], s4 of the Continental Shelf Act applies the Crown Minerals Act to the continental shelf. But upon what basis is New Zealand able to exercise jurisdiction over the continental shelf?

The rules governing the continental shelf are drawn from both custom and treaty. The most important treaty is the United Nations Convention on the Law of the Sea 1982 (the

---

[5] Continental Shelf Act 1964, s4(1)(a).
[6] See above n4, p20.
[7] Continental Shelf Act 1964, s3.
[8] See Part II B (3) above.

"1982 Convention"), although the Geneva Convention on the Continental Shelf 1958 (the "1958 Convention") continues to be relevant.[9]

(2) 1982 Convention

Article 76 of the 1982 Convention defines the continental shelf as:

> the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin,[10] or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

This definition means that the continental shelf extends to a minimum of 200 nautical miles for all states, but further for the geographically favoured. However, Article 76(6) provides that the continental shelf shall not exceed 350 nautical miles from territorial baselines.

Regarding a coastal state's rights over the continental shelf, the 1982 Convention essentially reproduces the provisions of the 1958 Convention.[11]

> A coastal state's rights are not territorial sovereign rights but are, rather, functional rights for the purpose of exploring and exploiting the natural resources[12] of the continental shelf. The coastal state's rights are exclusive, and exploration and exploitation activities may not be undertaken without the consent of the coastal state.

The 1982 Convention provides that the coastal state has the exclusive right to authorise and regulate drilling on the continental shelf for all purposes. However, the coastal state's rights in the continental shelf do not affect the status of the superjacent waters as high seas, or that of the airspace above those waters.[13]

---

[9] I Brownlie (ed) *Basic Documents in International Law* (Clarendon Press, London, 1983) p213.
[10] See above n9, where Brownlie states that the continental margin consists of the continental shelf, slope and rise that separate the land mass from the deep ocean floor (abyssal plain).
[11] Article 2, 1958 Convention; Article 77, 1982 Convention.
[12] Natural resources are defined as "the mineral and other non-living resources of the sea bed and subsoil, together with living organisms belonging to sedentary species".
[13] Article 3, 1958 Convention; Article 78, 1982 Convention.

(3) Conclusion

It is clear from Article 76 of the 1982 Convention that New Zealand does not have sovereignty over the continental shelf adjacent to its coastline. Section 4 of the Continental Shelf Act therefore appears to be an acknowledgement that the Crown does not have title to the natural resources in the continental shelf: it only has the ability to regulate the exploration and exploitation of those resources.

Accordingly, although no other state can assert any rights to the continental shelf within New Zealand's jurisdiction, there is no restriction in international law on a claimant asserting its rights against the Crown within New Zealand's jurisdiction, pursuant to the laws of New Zealand. The possibility therefore exists that a claimant could establish better title than the Crown to the resources in the continental shelf within the jurisdiction of New Zealand.

III Potential Claims to Petroleum

A Introduction

There are two well-established grounds upon which Maori claimants could base a claim for the ownership of petroleum: the Treaty and the doctrine of aboriginal title. However, little discussion of the issue of Maori claims to petroleum has occurred in the courts.

In *Love* v *Attorney-General*[14], a representative of a number of Taranaki Maori sought an injunction preventing the disposal of the Crown's shares in Petrocorp, arguing that such a disposal would prejudice the forthcoming Treaty claim by Taranaki Maori. However, as it was an application for an injunction, the Court did not consider the claimant's substantive claims to petroleum in detail. Instead, the injunction was refused on procedural grounds, namely that there was no provision in the relevant legislation that gave effect to the Treaty.

It should also be noted that it may be possible to base an action against the Crown directly upon an alleged breach of the fiduciary relationship between the Crown and Maori.[15] However, there has been little exploration of such an action in New Zealand courts. In any event, it may well be the case that an action based on a breach of this fiduciary relationship would be better received by the judiciary if it was argued under the aegis of the Treaty and its well-developed jurisprudence.

B Treaty of Waitangi

(1) Legal basis of the Treaty

The Treaty was signed in Waitangi on 6 February 1840 in both English and Maori. It was originally drafted in English and then translated into Maori so that the chiefs could understand what they were signing. However, because of the way that key concepts such as "sovereignty" and "exclusive possession" were translated in the Maori text,

---

[14] Unreported, 17 March 1988, High Court, Wellington Registry, CP 135/88.
[15] R P Boast and D A Edmunds "The Treaty of Waitangi and Maori Resource Management Issues" in *Resource Management* (Brooker's, Wellington, 1991), TW11.

there has been extensive debate since that date over the authority that the chiefs intended to relinquish when they signed.[16]

The general nature of the language of the Treaty, combined with the confusion generated by the differences between the two versions of the Treaty, has meant that the courts and the Tribunal have looked to promote the "principles" of the Treaty rather than its exact terms. Chief Judge Durie of the Tribunal has accepted that the Treaty "can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines."[17]

The orthodox view was set out in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*[18], where the Privy Council held that the Treaty is not directly enforceable in the courts unless it has been expressly incorporated into a statute. This view was clearly reasserted by the Court of Appeal in *New Zealand Maori Council v Attorney-General*[19], where McKay J stated that "Treaty rights cannot be enforced in the courts except in so far as they have been given recognition by statute." However, many significant statutes specifically refer to the Treaty and have therefore enabled the courts to apply the principles of the Treaty when considering those statutes.

It has been suggested, however, that the Treaty may be developing a kind of independent status in administrative law, and that a failure to take the Treaty into account in an appropriate context may impact on the legality of an administrative decision.[20] In *Huakina Development Trust v Waikato Valley Authority*[21], Chilwell J held the context of the statute capable of importing the Treaty as an extrinsic aid to statutory interpretation.

---

[16] A Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget William Books, Wellington, 1999) pp14-15.
[17] Part II and Clause 26 of the Draft New Zealand Bill of Rights, noted in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 671 per Richardson J (often referred to as the "Lands Case").
[18] [1941] AC 308.
[19] [1992] 2 NZLR 567.
[20] See above n15, TW11.
[21] [1987] 2 NZLR 188.

(2) The Waitangi Tribunal

The preamble to the Treaty of Waitangi Act notes that the text in English differs from the text in Maori and grants the Tribunal exclusive authority to determine the meaning and effect of the Treaty "as embodied in the 2 texts" and to decide issues raised by the differences between them.[22]

In addition, the courts have often turned to the Tribunal for guidance in interpreting the principles of the Treaty. In the Lands Case, Cooke P stated that the Court of Appeal "should give much weight to the opinions of the Waitangi Tribunal expressed in reports under the Treaty of Waitangi Act", although noting that the Tribunal's interpretation of the principles could not bind that Court.[23]

The Tribunal also has the power to inquire into situations where the Crown has acted inconsistently with the principles of the Treaty, leading to prejudice against Maori.[24] Having considered a claim which has been filed, the Tribunal may then recommend to the Crown possible means of redressing grievances.

However, these recommendations are only binding in limited circumstances. In 1988, the Tribunal was given a binding power to order the resumption of land transferred to a state-owned enterprise in certain defined circumstances,[25] even where it had been on-sold to a third party.[26] Further binding powers were conferred in 1989 by the Crown Forest Assets Act 1989.[27]

Despite their generally non-binding nature, the recommendations of the Tribunal are still of enormous value to claimants as they can provide the stimulus for the Crown to begin direct negotiations with claimant groups; the moral and political force of these recommendations should not be underestimated.

---

[22] Treaty of Waitangi Act 1975, s5(2).
[23] See above n17, p661.
[24] Treaty of Waitangi Act 1975, s6.
[25] Treaty of Waitangi Act 1975, s8A.
[26] Treaty of Waitangi Act 1975, s8B; State Owned Enterprises Act 1986, ss 27-27D.
[27] Treaty of Waitangi Act 1975, s8H.

(3) Possible claims based on the Treaty

At the time of the passing of the Petroleum Act in 1937, Sir Apirana Ngata, along with a number of other MPs, objected to the Labour Government's plans to nationalise petroleum.[28] He saw petroleum as an incident of land ownership that Maori were now going to be deprived of and argued that knowledge of the existence of the resource was irrelevant.[29]

> Did the Maori know that there was oil under their lands when they signed the Treaty of Waitangi in 1840? No. Nor did they know there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses and so on. Is the argument now, that, because the poor savage was ignorant or the things that have been made possible by the pakeha, he is to have no benefit or advantage from them today? If so, it will not hold water.

The matter was referred to the Solicitor General for consideration as to whether the Petroleum Act was contrary to the Treaty. The Solicitor-General felt that it was not, stating that "the legislation is comprehensive and treats [everyone] equally"[30]; the matter did not progress further.

Subsequent Maori claims to petroleum in Taranaki have primarily been based upon Sir Apirana Ngata's argument or upon the proposition that petroleum is a taonga guaranteed under Article II of the Treaty. Implicit in both arguments is the proposition that the nationalisation of petroleum in 1937 was a breach of the Treaty. These arguments, and the responses to them, are discussed in detail below.

(a) Petroleum as a taonga

The English version of Article II guarantees to Maori "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 their wish and desire to retain the same in their possession…".[31]

---

[28] (1937) 249 NZPD 1044
[29] R P Boast and D A Edmunds "Indigenous Claims to Petroleum Resources" (1991) p7.
[30] See above n28, p1236.
[31] H Kawharu *Maori and Pakeha Perspectives to the Treaty of Waitangi* (Auckland, Oxford University Press, 1989), pp329-320.

In the Maori version of the Treaty, the word "taonga" is used to express the concept of "other properties". In his English translation of the Maori text, Professor Sir Hugh Kawharu translates "taonga" as "treasures".[32]

In their claim, Nga Ruahine state that the petroleum resources, natural gas and other minerals located in their rohe are protected as Nga Ruahine's taonga under Article II of the Treaty. But what is it that characterises something as a "treasure"? Can anything be claimed as a taonga under Article II? And furthermore, did the particular taonga need to be regarded as such when the Treaty was signed in 1840?

(i) What is a taonga?

The Tribunal reports offer the greatest assistance in determining whether petroleum is a taonga. In the Kaituna River Report[33], the Tribunal stated that the phrase "ratou taonga katoa" meant "all things highly prized".

This finding was re-iterated in the Waitara-Motunui Report[34] where the Tribunal translated the phrase "me o ratou taonga katoa" as "and all their treasured things" and accepted that for the claimants, Te Atiawa, the "general word 'taonga' embraces all things treasured by their ancestors, and includes specifically the treasures of the forests and fisheries."

And in the Manukau Report[35], the Tribunal found that 'taonga' means more than objects of tangible value.

> A river may be a taonga as a valuable resource. Its 'mauri' or 'life-force' is another taonga. We accept the contention of Counsel for the claimants that the mauri of the Waikato River is a taonga of the Waikato tribes. The mauri of the Manukau Harbour is another taonga.

It seems reasonably clear from the statements above and various tribunal findings that things such as fisheries, [36] rivers[37] and language[38] fall within the concept of taonga.

---

[32] See above n31, pp329-320.
[33] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Waitangi Tribunal, Wellington, 1984), para 4.7.
[34] Waitangi Tribunal *Report of the Waitangi Tribunal on the Waitara-Motunui Claim* (Waitangi Tribunal, Wellington, 1984) (the "Waitara-Motunui Report"), para 10.2.
[35] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Waitangi Tribunal, Wellington, 1985) (the "Manukau Report") para 8.3.
[36] Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim 1988* (GP Publications, Wellington, 1988) (the "Muriwhenua Fishing Report").

They were all well-known to Maori and it is thus relatively easy to demonstrate that they were highly valued and prized in Maori life prior to the Treaty.

The concept of taonga is not, however, limited to only those things that were valued and highly prized prior to 1840. The Tribunal strongly supports the view that the Treaty "did not simply preserve the status quo as at 1840 but that it must be adapted to meet changing needs and circumstances – in other words, it must allow a right of development."[39] This flows directly from the recognition of the Treaty as a living instrument and that the obligations thereunder are ongoing and evolving as conditions change.

The Court of Appeal has also held that coal can be classified as a form of taonga, despite acknowledging that the demand for coal and the establishment of the New Zealand coal industry have come largely from European or Western civilisation.[40]

The concept of a right to develop therefore suggests that a resource that was not highly valued and prized prior to 1840 may nevertheless become a taonga, as the uses of that thing or resource evolve and are regarded as valuable by Maori post-Treaty.

What then of a thing that was not used at all pre-Treaty? There are indications from the Tribunal that the mere knowledge of a thing may suffice, even where it was not possible to use that thing at the time. In the Radio Spectrum Report[41], the Tribunal stated:[42]

> We also accept the claimant's argument that the electromagnetic spectrum, in its natural state, was known to Maori and was a taonga. And we accept that they have a right under Treaty principles to the technological exploitations of that spectrum after 1840, just as the Wai 26 and Wai 150 claimants had a right, in the view of the Tribunal, to a fair and equitable allocation of the radio frequencies then being offered by the Crown.

The issue for a claimant such as Nga Ruahine is therefore to establish that petroleum is a taonga in one of the following ways:

---

[37] Waitangi Tribunal *Mohaka River Report 1992* (Brooker and Friend, Wellington, 1992).
[38] Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Waitangi Tribunal, Wellington, 1986) (the "Te Reo Report").
[39] Waitangi Tribunal *Te Ika Whenua Rivers Report 1998* (GP Publications, Wellington, 1998) (the "Te Ika Whenua Rivers Report") para 10.2.4.
[40] *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 529 (CA).
[41] Waitangi Tribunal, *Radio Spectrum Report 1992* (GP Publications, Wellington, 1992).
[42] See above n41, para 5.1.

1. by proving that petroleum was highly valued and prized pre-Treaty;

2. by proving that the resource was used pre-Treaty; or

3. by arguing that a pre-Treaty use was not necessary.

As noted above, the second and third scenarios are also contingent on the proposition that the development right enables petroleum to be recognised as a taonga because of its modern value to Maori. Because this right is so important for a claim that petroleum is a taonga, the development is analysed in more detail in Part IV.

(ii) The relationship between Article I and Article II

For the reasons discussed above, it is not immediately obvious that Nga Ruahine will be able to establish that petroleum is a taonga under Article II of the Treaty. Even if one assumes this to be the case, Nga Ruahine must also establish that the nationalisation of petroleum was in fact a breach of the Treaty. This necessitates examining the relationship between Article I of the Treaty, which cedes to the Crown the right to govern, and Article II, which seeks to protect Maori interests.

In *Ngai Tahu Maori Trust Board* v *Director-General of Conservation,*[43] Cooke P described the effect of Article I vis-à-vis the New Zealand Parliament's ability to enact legislation, stating that irrespective of the different terms used in the different texts: [44]

> [T]he first article must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to that overriding authority.

Clearly, Cooke P regarded parliament's ability to enact legislation as being implicit in the grant of power by Article I. However, this ability is not completely unfettered; Cooke P contemplated that there may be reasonable restrictions on the Crown's powers. This follows his earlier pronouncement in the Lands Case where he stated:[45]

---

[43] [1995] 3 NZLR 553 (CA).
[44] See above n43, p558.
[45] See above n17, p665.

> The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles.

This is consistent with the idea that the Treaty is a partnership and that each party is required to act reasonably and in good faith towards each other.[46]

Turning to Article II of the Treaty, it is now well-established that Article II gives rise to a duty of "active protection" in relation to taonga. As the Tribunal stated in the Manukau Report: "The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests but actively to protect them."[47] This was re-iterated in the Te Reo Report, where the Tribunal endorsed the submissions of the claimant about the nature of the Crown's obligations to Maori concerning the Maori language.[48]

> [T]he word (guarantee) means more than merely leaving the Maori people unhindered in their enjoyment of their language and culture. It requires active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture…The word guarantee imposes an obligation to take active steps within the power of the guarantor, if it appears that the Maori people do not have or are losing, the full, exclusive and undisturbed possession of the Taonga…

It is clear that there is a need to reconcile these two potentially conflicting obligations of the Crown - the need to govern and legislate in the national interest while also being mindful of its obligations to protect Maori interests. In *New Zealand Maori Council v Attorney-General*,[49] the Privy Council referred to the obligations of the Crown as being dependent upon the situation that exists at the time:[50]

> The Treaty refers to [the obligations which the Crown undertook of protecting and preserving Maori property] as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the

---

[46] See above n17, p667.
[47] See above n35, para 8.3.1.
[48] See above n38, para 4.3.9.
[49] [1994] 1 NZLR 513.

> obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

The Privy Council goes on to use Te Reo as an example of a taonga that is in a vulnerable state, providing that, if the present vulnerability has been contributed to by past breaches by the Crown of its obligations, the Crown's responsibility to protect that taonga will increase.

(iii) Establishing a breach of the Treaty

The Crown position on the nationalisation of petroleum is that it is in the national interest for the Crown to own and manage natural resources such as petroleum, uranium, gold and silver.[51] Although the merits of this policy decision may be debatable, it can be seen from the judicial pronouncements above that it is possible that the nationalisation of petroleum under the Petroleum Act was a legitimate exercise of the Crown's power of governance under Article I of the Treaty.

However, such an exercise under Article I is also subject to the Treaty principles that the Treaty partners act reasonably and in good faith towards one another. Whereas the nationalisation of petroleum may be reasonable in itself for particular policy reasons, nationalisation without compensation is arguably not. It is suggested that the removal by one Treaty partner of the other Treaty partner's rights without compensation is not the action of a reasonable partner.

These principles of reasonableness and faith have arguably been breached by failing to provide compensation for either vesting ownership of a petroleum in the Crown under the Petroleum Act or imposing a legislative regime that regulates the use of petroleum and the royalties derived from it in the Continental Shelf Act.

(b) Petroleum an incident of land ownership

As noted in (a) above, the English version of Article II guarantees "the full exclusive and undisturbed possession of their Lands and Estates" to Maori. As discussed above,[52]

---

[50] See above n49, p517.
[51] Office of Treaty Settlements *Healing The Past, Building A Future* (Office of Treaty Settlements, Wellington 1999).
[52] See text following above n4.

the common law position was that the ownership of petroleum is a natural incidence of the ownership of the land. The nationalisation of petroleum in 1937 therefore denied Maori the ownership of any petroleum which was guaranteed to them under Article II of the Treaty.

The response from the Crown to this argument has always been that the whole of the resource was nationalised and therefore affected everyone equally. However, it is arguable that Maori were more prejudiced by the Petroleum Act than pakeha because of the prevalence of petroleum in Taranaki, most of which could well have been in Maori ownership but for the confiscation of Maori land. This confiscation has now been acknowledged by all parties, including the Court of Appeal, to have been a breach of the Treaty.[53]

> All too clearly there have been breaches in the past. For example it has been recognised for many years that the confiscation of lands in Taranaki after the wars of the 1860s was unjust...

The key point, however, is that even if Maori were more prejudiced than pakeha by the nationalisation of petroleum, the analysis in the preceding section suggests that the nationalisation may have been a legitimate exercise of the Crown's power of governance under Article I.

This, however, is subject to the same "reasonableness" argument discussed above in relation to compensation, namely that nationalisation without compensation is not a reasonable exercise of the Crown's powers and is therefore a breach of the Treaty.

C Aboriginal Title

(1) Description of doctrine

The doctrine of aboriginal title is a common law doctrine. It holds that the rights of indigenous peoples to their lands survive a proclamation of sovereignty by colonising powers but that these rights can be validly extinguished in certain circumstances.

---

[53] See above n17, p653.

The exact nature of aboriginal title is dependent upon the existing law and/or lore of the indigenous people. The rights in question can best be thought of as a spectrum of rights that may range from the exclusive use and occupation of land at one end, to a non-territorial, non-exclusive right to engage in a site-specific activity that is not sufficient to support claim of title to the land, at the other end.[54]

Aboriginal title cannot be explained by "normal" fee simple principles: it is an inalienable title that cannot be transferred, sold or surrendered to anyone other than the Crown.[55] It is also unique in that aboriginal title is held communally and cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.[56]

(2) Extinguishment

Aboriginal title may be extinguished either voluntarily or by legislation that evinces a "clear and plain" intention to do so.[57] Therefore, the mere regulation of an aboriginal activity does not amount to its extinguishment.[58] The Supreme Court of Canada has held that legislation inconsistent with the continued enjoyment of aboriginal rights was not sufficient to meet the extinguishment threshold. The "clear and plain" test for extinguishment, as a result, requires quite a high standard and the onus of proving extinguishment is on the party alleging it.[59]

Where aboriginal title is extinguished other than by free consent, there have been suggestions that compensation may be required.[60] However, this requirement has been rejected in the United States[61] and by the majority judgments in *Mabo No.2*[62], in Australia. The Supreme Court of Canada has indicated support for the idea of

---

[54] *R v Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289 (*"Van der Peet"*).
[55] *R v Delgamuukw* [1997] 3 SCR 1010, 1088; 153 DLR (4th) 193, 246 (*"Delgamuukw"*).
[56] See above n55, 1088; 246.
[57] See above n55, 1120, 271.
[58] See above n55, 1120; 271.
[59] See above n55, 1120; 271.
[60] *Te Runanganui o Te Ika Whenua Inc Soc* v *A-G* [1994] 2 NZLR 20, 24 ("Te Runanganui"); see also above n55, 1113; 265.
[61] Te-Hit-Ton Indians v US 348 US 272 (1955).
[62] Mabo v Queensland (No.2) (1992) 175 CLR 1.

compensation in two significant cases[63] but it is uncertain whether these comments will be adopted as a general rule.

(3) Status in New Zealand

The concept of aboriginal title is now firmly established in the law of New Zealand. Although early formulations of the doctrine stretch as far back as Chapman J's judgment in *R v Symonds,*[64] the approach to the doctrine had been somewhat fragmented and confusing. The status of the law in New Zealand was clarified by the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc Soc v A-G*[65] and in the judgment of Blanchard J in *Faulkner v Tauranga District Council.*[66]

As aboriginal title is a common law doctrine, it can be invoked in the courts without the need for express statutory recognition unless, of course, it has been expressly extinguished by an Act of Parliament. Native title to land has been expressly extinguished in this way in New Zealand by section 84 of the Native Land Act 1909 and customary fishing rights were extinguished pursuant to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

It should, however, be noted that the New Zealand Court of Appeal's analysis of the doctrine is somewhat at variance with more orthodox analyses in other commonwealth jurisdictions.[67] In particular, Cooke P's comments that compensation may be required where aboriginal title is extinguished other than by free consent. As noted above, this requirement has not been adopted in the United States, or Australia and the position is still unclear in Canada.

(4) Test for aboriginal title

Having briefly described the nature of aboriginal title, and noted its status in New Zealand, it is necessary to examine some of the aspects of the doctrine in more detail before an assessment can be made as to the validity or merit of an aboriginal title claim to petroleum.

---

[63] *Calder* v *A-G of British Columbia* [1973] SCR 323; see also above n55.
[64] (1847) NZPCC (SC) 387.
[65] See above n60, 23-24.
[66] [1996] 1 NZLR 357 (HC) ("Faulkner").
[67] See above n15, TW16(b).

Although various analyses of aboriginal title have been conducted in recent years, the pronouncements by the Supreme Court of Canada in *Delgamuukw* are highly significant and warrant particular attention given their possible impact on claims for petroleum.

(a) The Delgamuukw decision

The appellants (representatives of two Indian bands or tribes) claimed separate portions of 58,000 square kilometres in British Columbia. The appellants' claim was based on their historical use and "ownership" of one or more of the territories. The State Government of British Columbia counter-claimed for a declaration that the appellants had no right to, or interest in, the territory. Alternatively, they claimed that the appellants' cause of action ought to be for compensation from the federal government.

For the purposes of this paper, the key substantive issues in the appeal were:

1. the content of aboriginal title; and

2. what is required to prove aboriginal title.

(b) Content of aboriginal title

The court stated that aboriginal title encompasses the right to the "exclusive use and occupation" of the land held pursuant to the title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions which are integral to distinctive aboriginal culture.[68]

By concluding that aboriginal title amounts to the right to occupy and possess lands, it follows that, once that occupation or title is established, the rights that go with it are not limited to those derived from custom and included rights to minerals.[69] As Teehan states:[70]

> The right to exclusive occupation must be related to aboriginal custom, but once the occupation is established, the only limitation on use is the second leg of [the test in *Delgamuukw*]: the uses cannot be irreconcilable with custom or the nature of the attachment to the land.

---

[68] See above n55, 1083; 243.
[69] See above n55, 1084; 244.
[70] M Teehan "Delgamuukw v British Columbia" (1998) 22(3) MULR 763, 773.

This limitation on aboriginal title was justified by the court because of the unique nature of that title. According to the court, the common law seeks to protect 'in the present day and in to the future', the special connection with land enjoyed prior to sovereignty. It is for this reason that the title is inalienable and its inalienability gives it a non-economic element. Actions that would threaten that special connection would be inconsistent with the protection afforded by the common law.[71]

It is this formulation of aboriginal title that is at the heart of the distinction between the legal consequences of aboriginal title as opposed to an aboriginal right. Previously, the test for establishing that a particular activity was an aboriginal right was the test laid down in *Van der Peet*,[72] namely that the activity must be 'integral to the distinctive culture of the aboriginal group claiming the right'.[73] In differentiating between aboriginal title and aboriginal rights, the court in *Delgamuukw* described aboriginal title as a species of aboriginal rights and set out three different types of aboriginal rights:[74]

1. aboriginal title, as defined above;

2. aboriginal rights which might be connected with, or derived from, a particular piece of land but which do not amount to title because of the lack of exclusivity; and

3. aboriginal rights which are unconnected with land.

As noted above, the crucial distinction is the legal consequences that follow a determination that a particular usage amounts to aboriginal title; the rights that go with that title are not limited to those derived from custom and include rights to minerals.

(c) Proof of aboriginal title

Three major criteria were identified for proof of title:[75]

1. The land must have been occupied prior to sovereignty.

---

[71] See above n55, 1088-90; 246-8.
[72] See above n54, 507; 289.
[73] See above n54, 554; 341.
[74] See above n70, 773.
[75] See above n55, 1097; 253.

2. If present occupation is relied upon as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation.

3. At sovereignty, that occupation must have been exclusive.

The Court stated that occupation should be proved by evidence of actual physical occupation and by reference to the traditions and culture of the group itself that demonstrate the group's connection with the land. These references should show that the land was 'of central significance to their distinctive culture'.[76]

In relation to the second component, the Court stated that an "unbroken chain of continuity" is not required as it is likely that the nature of the occupation may have changed but 'as long as a substantial connection between the people and land is maintained', the claim to title could succeed.[77]

The third element for proof of title is that occupation must have been exclusive at sovereignty: there must have been the ability to exclude others from the land.[78] The Supreme Court suggested that actual proof of this should give equal weight to the common law and aboriginal aspect: there must be factual evidence of the actual occupation but this must 'also take into account the context of aboriginal society at the time of sovereignty'.[79]

It follows that there might be evidence of other groups occupying the land, but this may be examined in accordance with aboriginal custom. For example, was the secondary group occupying the land by permission or agreement? The key issue is 'the intention and capacity to retain control'.[80]

The Court also suggested that a joint exclusive title might be possible. That is, the shared right to exclude others except the joint titleholder might amount to exclusive possession.[81] This issue was not considered in detail as it was not relevant to the case. However, the possibility of joint title means that the mere fact that more than one group

---

[76] See above n55, 1099-1101; 255-6.
[77] See above n55, 1098; 253.
[78] See above n70, 775.
[79] See above n55, 1104; 259.
[80] See above n55, 1104; 259.
[81] See above n70, 775.

occupied land will not be determinative of a claim for aboriginal title; practice and custom will still need to be explored in order to determine the issue of exclusivity.[82]

(d) Relevance to New Zealand

Although the doctrine of aboriginal title has been established in New Zealand through decisions such as *Te Runanganui* and *Faulkner*, the extent to which New Zealand courts might adopt the pronouncements from the Supreme Court of Canada in *Van der Peet* and *Delgamuukw* is far from clear.

The characterisation of aboriginal title vis-à-vis aboriginal rights was undoubtedly influenced by the provisions of the Constitution Act 1982. However, the Canadian approach can be generally characterised by its reliance on common law concepts rather than the statutory framework that exists in Canada. Therefore, that approach could be readily adopted by a New Zealand court seeking to apply the doctrine of aboriginal title to a New Zealand situation. In addition, *Delgamuukw* only decided substantive issues, not evidential ones, so there is still scope for a New Zealand court discern its own direction in terms of evidential principles and tests.

(5) The basis of a claim

So what kind of circumstances might give rise to a successful aboriginal title claim to petroleum in New Zealand? Due to the legislative framework outlined above, this question is best answered in two parts.

---

[82] See above n70, 775.

(a) Within the 12 nautical mile limit

The Petroleum Act vested the ownership of petroleum in the Crown and stipulated, pursuant to s39(5), that no compensation would be payable. At common law, petroleum belongs to whoever abstracts it. However, by s3 of the Petroleum Act, the entire resource was expropriated and vested in the Crown. Boast writes that there is no doubt that s3 amounted to a valid extinguishment of aboriginal title to petroleum.[83]

Although s10 of the Crown Minerals Act provides that petroleum continues to be the property of the Crown, there is no equivalent in the Crown Minerals Act to s39(5).

As there is no longer a statutory bar to compensation, the issue becomes whether compensation is payable on the extinguishment of any aboriginal title to petroleum. As discussed above, there have been indicia from the New Zealand Court of Appeal that an extinguishment by "less than fair conduct or on less than fair terms" could give rise to an obligation to compensate Maori land owners.[84] Although the judicial trend in the United States and Australia has been against an obligation to pay compensation there have been developments in Canada in this respect so it is not inconceivable that a New Zealand court could find sufficient support for the establishment of such an obligation.

(b) Petroleum on the continental shelf

Title to petroleum resources on the continental shelf beyond the 12 nautical mile limit has not been vested in the Crown. Because of the exclusion in s4 of the Continental Shelf Act, all of the provisions of the Crown Minerals Act except s10, the vesting provision, apply in relation to petroleum on the Continental Shelf.

However, the Canadian authorities are clear that this is not sufficient to extinguish aboriginal title: the mere regulation of an aboriginal activity does not amount to its extinguishment.[85]

---

[83] See above n29, p7.
[84] See above n60, p24.
[85] See above n55, 1120; 271; see also text above n58, p22.

Having established that there is no statutory bar to an aboriginal title claim to such petroleum, how could such a claim be made? Depending on the circumstances, there appear to be two main avenues to which such a claim could proceed.

1. An aboriginal title claim based on an iwi's traditional use and occupation of fishing reefs beyond the 12 nautical mile limit

   If the test in *Delgamuukw* was adopted by New Zealand Courts, it is quite foreseeable that claimants could then adduce sufficient evidence to prove each element of the test. For example, the Waitara-Motunui Report, prepared by the Tribunal in 1983, documented the traditional use of the Kaawa (reefs) in North Taranaki, which extend for some 30 to 35 miles along the coast of the north Taranaki bight.[86]

   If such use and "occupation" was exclusive and occurred prior to the Crown's declaration of sovereignty over New Zealand, and a substantial connection between the people and the land had been maintained, then the elements of the *Delgamuukw* test would be satisfied. It would then be up to a New Zealand court to determine the tests and principles for such evidential issues.

2. An aboriginal rights claim based on an iwi's traditional fishing practices in a particular area

   The position becomes less clear where a claim is based on the exercise of a customary right to fish in a particular area of the sea, as opposed to the use of identifiable reefs. As the aboriginal right claimed would be based on an activity in a certain area, rather than the use of the land per se, the principles in *Van der Peet,* rather than *Delgamuukw*, would apply.

   The legal consequences of this distinction are significant. The *Delgamuukw* test for aboriginal title provides that, once a connection with the land is established and aboriginal title is proven, it is of no consequence that the rights and/or customs that the aboriginal peoples are seeking to establish did not occur at the time of sovereignty. The rights are a natural incidence of the title to the land.

---

[86] See above n34, para 4.1

However, in the case of an aboriginal rights claim, as per the principle in *Van der Peet,* this is not the case. Accordingly, it will almost certainly be necessary to argue that, once a connection with the land has been proven, an aboriginal people's right to development is the basis from which they are able to claim rights over resources which were not customarily used or exercised at the time of sovereignty.

D Conclusion

It can be seen from the discussion above that it is possible but potentially difficult for Maori to establish a successful claim to petroleum.

(i) The nationalisation of petroleum under the Petroleum Act and the imposition of a legislative regime regulating the resource in the national interest are arguably legitimate exercises of the Crown's authority under Article I. It is, however, equally arguable that the failure to pay compensation is a breach of Article II because petroleum was guaranteed to Maori under that Article either as a taonga or as an incident of the lands which were owned by them. It is therefore arguable that a reasonable Treaty partner would have paid compensation for the extinguishment of those rights.

(ii) An aboriginal title claim to petroleum has two distinct bases.

First, the nationalisation of petroleum by the Petroleum Act is a valid extinguishment of any aboriginal title rights to petroleum within the 12 nautical mile limit. A claim for the extinguishment of those rights is however possible, especially with the repeal of s39(5) of the Petroleum Act. However, it is probably unlikely that a New Zealand court would find in favour of such a claim at present, given the lack of international jurisprudence supporting such an approach.

Secondly, it is still possible to claim title to the resource itself on the continental shelf. A claim would primarily depend on the recognition of an iwi's aboriginal title over a particular area. Alternatively, a customary association with a particular area could be sufficient if a right to development is established. The evidential requirements for either of these claims could, however, be onerous.

IV The Status of the Development Right in New Zealand

A Background

As noted above,[87] the right of Maori to develop their resources under the Treaty has been recognised by both the courts and the Tribunal. There has, however, been a divergence of opinion between the Court of Appeal and the Tribunal about the nature of this right.

The existence and nature of a development right may be crucial to establishing a successful claim to petroleum based on the following grounds:

(i) whether petroleum can be recognised as a taonga because of its modern value to Maori, a taonga which is therefore guaranteed to Maori under Article II of the Treaty; and

(ii) whether an aboriginal rights claim based on an iwi's traditional fishing practices in a particular area enables that iwi to claim rights over resources which were not customarily used or exercised at the time.

Although a comprehensive analysis of the right to development is beyond the scope of this paper, the concept is outlined below for the sake of completeness.

B Waitangi Tribunal

The Tribunal has clearly expressed that a right to development of property or taonga guaranteed under the Treaty is indeed a Treaty right.[88] This right was expounded upon by the Tribunal in one of the first reports, the Waitara-Motunui Report, where the Tribunal stated:[89]

> The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for the future growth and development…

---

[87] See text following n40.
[88] See above n39, para 10.2.4.
[89] See above n34, para 10.2.4.

The inherent inconsistency in any attempt to limit the development of Maori was noted in the Muriwhenua Fishing Report[90], where the Tribunal dealt with the argument that Maori fishing rights must be limited to the use of canoes and fibres then in use in 1840.

> It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840. Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new technologies developed in other countries and to learn from each other.

The existence of the right to development has subsequently been confirmed in the Ngai Tahu Sea Fisheries Report[91] and the Te Ika Whenua Rivers Report, discussed at Part IV B below.

C Courts

As the Tribunal in Te Ika Whenua Rivers Report noted,[92] the courts have not been called upon to consider a right to development on the same basis as has the Tribunal. The Tribunal is specifically required to take into account Treaty principles while the courts' consideration is limited to proceedings where those principles are incorporated into statute or are otherwise relevant.

However, the courts have made a number of statements in relation to a right to develop under the Treaty where they have been called upon to examine the Treaty. As noted above,[93] the Court of Appeal in *Tainui Maori Trust Board v Attorney-General* did not tie Tainui's interest in coal to its use by them in 1840.

In *Te Runanga o Muriwhenua Incorporated v Attorney-General*[94], the Court of Appeal referred to the Treaty "as a living instrument and has to be applied in the light of developing national circumstances… The position resulting from 150 years of history

---

[90] See above n36, para 11.6.5
[91] Waitangi Tribunal *Ngai Tahu Sea Fisheries Report 1992* (Brooker and Friend, Wellington, 1992) (the "Ngai Tahu Fisheries Report")
[92] See above n39, para 10.2.3.
[93] See text below n40.
[94] [1990] 2 NZLR 641.

cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change."[95]

The Court of Appeal took a more restrictive approach in *Te Runanganui* arguing that the Treaty must have been intended to preserve Maori customary rights as existed in 1840.[96]

> But, however liberally Maori customary and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840.

However, in *Ngai Tahu Maori Trust Board v Director-General of Conservation*[97], the court was called upon to adjudicate in relation to a claimed right that almost certainly could not have been contemplated by either party in 1840. Although the facts required the court to deal with the "exclusivity" of any right, the court was first called upon to consider the existence of the right to develop.

> It is obvious that commercial whale-watching is a very recent enterprise, founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the treaty. We were referred to no case in any jurisdiction dealing with a claim to exclusive commercial whale-watching rights. A right to development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests.

The Court may have been influenced by the United Nations Declaration on the Right to Development adopted by the General Assembly on 4 December 1986 (resolution 41/128), which was supported by New Zealand. Article 1(1) provides:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

---

[95] See above n94, p655.
[96] See above n60, p24.
[97] See above n43, 559.

D Conclusion

Despite the conservative position adopted by the Court of Appeal in *Te Runanganui*, there are statements by that Court that imply a right to development. A Treaty right to an interest in coal has been recognised despite limited use of this resource prior to the signing of the Treaty. And the right to development was recognised in relation to "whale-watching", notwithstanding that whale-watching was a very recent enterprise and could not be considered a 'taonga' protected by the Treaty.

The Tribunal has also clarify its position in Te Ika Whenua Rivers Report vis-à-vis that of the Court of Appeal in *Te Runanganui*.[98]

> We do not disagree with the comment of the Court of Appeal that Maori, as distinct from other members of the community have not had preserved or assured through customary title, any right to generate electricity by the use of water power. What we do say is that under the Treaty Maori were entitled to the full, exclusive and undisturbed possession of the properties, which would include their river. As part of that exclusive possession, they were entitled to the full use of those assets and to develop them to their full extent. This right of development would surely included a right to generate electricity.

The Tribunal acknowledged that this right was dependent on present circumstances, not on the position as at 1840. Te Ika Whenua's shared use of the rivers, along with other circumstances, had therefore reduced their interest in the rivers and must accordingly have an impact on their development right, including their right to generate electricity.[99]

Given the various statements of the Court of Appeal, *Te Runanganui* apart, and the growing support in the United Nations for the recognition of the rights (including a right to development) of indigenous people, the Tribunal has stated that it believes that such a right may become part of customary international law, and hence part of the common law, in the foreseeable future.[100]

---

[98] See above n39, para 10.3.5.
[99] See above n39, para 10.3.5.
[100] See above n91, para 10.2.4.

V Impact of Existing Treaty Settlements

A Introduction

Since the commercial fisheries settlement ($170,000,000) in 1992 pursuant to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the process of settling Treaty claims has begun in earnest. The Crown has now successfully negotiated settlements with Ngati Whakaue ($5,210,000) in 1994; Waikato/Tainui ($170,000,000) in 1995; Ngai Tahu ($170,000,000) in 1997; and Ngati Turangitukua ($5,000,000) in 1998. There have also been a number of smaller settlements.[101]

The primary focus of these settlements is to compensate iwi for past breaches of the Treaty and enable both Maori and pakeha to put some of the more acrimonious aspects of New Zealand's colonial past to rest. Accordingly, many of the bases upon which those iwi had been able to base a claim have understandably been extinguished as part of the settlement of their claim. It is therefore necessary to examine the impact of the Treaty settlement process upon the grounds for a claim analysed in Part III D above to determine the extent to which those grounds have been extinguished.

B Effect Upon Treaty Claims

(1) Ngai Tahu

(a) Ngai Tahu Claims Settlement Act 1998

The Ngai Tahu Deed of Settlement was signed on 29 November 1998 and given effect by the Ngai Tahu Claims Settlement Act 1998 (the "Ngai Tahu Act"). The settlement of Ngai Tahu's Treaty claim represented a watershed in New Zealand's political history as it signalled the end of one of New Zealand's longest-running and mostly combative Treaty claims, which numerous court cases and three previous settlements had failed to resolve.[102]

---

[101] Ngāti Rangiteaorere ($760,000) and Hauai ($715,682) in 1993; Waimakuku ($375,000) in 1995; and Rotomā ($43,932) and Te Maunga ($129,032) in 1996.

[102] Previous settlements with Ngai Tahu occurred in 1872, 1944 and 1973.

(b) Definition of the Ngai Tahu Claim

Section 10(1) of the Ngai Tahu Act provides that Ngai Tahu claims[103] means:

> all claims made at any time by any Ngai Tahu claimant and:
>
> (i) founded on rights arising in or by the Treaty of Waitangi, the principles of the Treaty of Waitangi, statute, common law (including customary law and aboriginal title), fiduciary duty, or otherwise; and
>
> (ii) arising out of or relating to any loss of interests in land, water, rivers, harbours, coastal marine areas, minerals, forests, or any natural and physical resources in the Ngai Tahu claim area, caused by acts or omissions by or on behalf of the Crown or by or under legislation, being a loss that occurred before 21 September 1992,
>
> whether or not the claims have been researched, registered, or notified.

Section 10 goes on to exclude several specific claims from the definition. They are generally claims that have already been lodged with the Waitangi Tribunal and are excluded to the extent to which they overlap with the Ngai Tahu claim area.

The key feature of the Ngai Tahu Claims definition is limb (ii), which limits the claims to those that arise out of or relate to loss of interests in the following specific areas: land, water, rivers, harbours, coastal marine areas[104], minerals, forests or any natural and physical resources[105] in the Ngai Tahu claim area. Section 8 of the Ngai Tahu Act provides:

> "Ngai Tahu claim area" means the area shown on allocation plan Ngai Tahu 504 (S.O. 19900), being:
>
> (a) the takiwa of Ngai Tahu Whanui;[106] and

---

[103] Although not expressed to be a definition of "Historical" claims, the express inclusion of all Ngai Tahu claims prior to 21 September 1992 means that it is equivalent to the term "historical claims" used in later settlements.
[104] "Coastal marine areas" has the same meaning as in s2 of the Resource Management Act 1991 ("RMA"), namely "that area of the foreshore and seabed… of which the seaward boundary is the outer limits of the territorial sea…"
[105] "Natural and physical resources" has the same meaning as in s2 of the RMA, namely "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures".
[106] As defined in s5 of Te Runanga o Ngai Tahu Act 1996. The 'takiwa' is the legislatively-defined traditional tribal area of Ngai Tahu, including their lands, islands and coasts. The definition does not refer to land within a Coastal Marine Area or the Exclusive Economic Zone.

(b) the coastal marine area adjacent to the coastal boundary of the takiwa of Ngai Tahu Whanui; and

(c) the New Zealand fisheries waters within the coastal marine area and exclusive economic zone adjacent to the seaward boundary of that coastal marine area,

...

The intent of these two definitions is presumably to encompass *all* claims that could be made by anyone of Ngai Tahu descent and relate to Ngai Tahu's traditional tribal area. However, while all natural and physical resources within the Territorial Sea are caught by limb (b) of the definition of the Ngai Tahu Claim area by reference to the coastal marine area, the seabed beyond the Territorial Sea is not. Limb (c) of this definition only refers to the *New Zealand fisheries waters* within the coastal marine area and exclusive economic zone, and while limiting claims to the natural and physical resources within those waters, does not exclude claims based upon the seabed.

Therefore, a claim for a breach of the Treaty in relation to the resources in the seabed beyond the 12 nautical mile limit based upon any of the grounds in limb (i) of the Ngai Tahu Claims definition is not prohibited by the Ngai Tahu Act. This is particularly significant because, as discussed in Part II B above, the petroleum situated outside the Territorial Sea is not vested in the Crown. However, it is of course dependent upon Ngai Tahu establishing that petroleum is a taonga under the Treaty and that the development right exists.

It should be noted, however, that although it appears that a claim to the seabed beyond the 12 nautical mile limit is not prevented by the Ngai Tahu Act, should such a claim ever be made it would be open to the Crown to argue in a court that the express intention of the Ngai Tahu Act was to settle all claims prior to 21 September 1992 and that it would be contrary to the spirit of the Ngai Tahu Act to allow such a claim.

(2) Taranaki

(a) The Taranaki settlements

In September 1999, another significant milestone in the settlement of Treaty claims occurred with the signing of the heads of agreement between the Crown and Ngati Ruanui. Ngati Tama, Ngati Mutunga and Te Atiawa followed soon afterwards in

October and November of that year. For ease of reference, these settlements are collectively referred to in this paper as the "Taranaki settlements", although it should be noted that the other four Taranaki iwi have not yet concluded, or in some cases even commenced, direct negotiations.[107]

The Taranaki settlements are particularly significant because they are the "second wave" of Treaty settlements and indicate a new approach by the Crown to settlement negotiations. The structural similarities between the Taranaki settlements are striking, indicating the Crown's moves towards stream-lining the process and achieving greater consistency among claimants.

(b) Definition of Historical Claims

Given the similarity between the claim definitions in the Taranaki settlements, this paper will only examine the first of those agreements to be concluded, the heads of agreement dated 7 September 1999 between the Crown and Ngati Ruanui (the "Ngati Ruanui Heads").

Clause 2.2.1 of the Ngati Ruanui Heads defines the Ngati Ruanui Historical Claims as:

> all claims made at any time by any Ngati Ruanui claimant and:
>
> (a) founded on rights arising in or by the Treaty of Waitangi, the principles of the Treaty of Waitangi, statute, common law (including customary law and aboriginal title), fiduciary duty, or otherwise; and
>
> (b) arising out of or relating to acts or omissions before 21 September 1992 by or on behalf of the Crown or by or under legislation,
>
> whether or not the claims have been researched, made, registered or notified;

Clause 2.2 specifically includes a number of claims that have been lodged with the Tribunal to the extent that they relate to Ngati Ruanui. However, Clause 2.3 clearly excludes Ngati Ruanui claims that relate to the land area outside Taranaki.

---

[107] Nga Rauru, Ngati Maru, Taranaki and Nga Ruahine. Together with Ngati Ruanui, Ngati Tama, Ngati Mutunga and Te Atiawa, these are the eight iwi referred to by the Waitangi Tribunal in "The Taranaki Report – Kaupapa Tuatahi" as the recognised iwi of Taranaki.

(3) Comparison of Ngai Tahu and Taranaki claim definitions

Although the first limb of both definitions is identical, the second limb of the Ngati Ruanui definition is significantly more restrictive. The words in this limb effectively act as a 'catch-all', covering all possible eventualities upon which historical claims could be based.

This non-prescriptive formulation probably eliminates the risk to the Crown that a claimant could base a claim upon a ground not specifically listed by the Ngai Tahu definition. Furthermore, the revised definition closes the loop-hole that exists in the Ngai Tahu definition in relation to the seabed beyond the Territorial Sea.

(4) Conclusion

In the Ngai Tahu Treaty settlement, the Crown intended to settle all historical claims. However, the gaps identified in Part V B (1) above suggest that it is still possible for Ngai Tahu to claim any resources located in the seabed beyond the 12 nautical mile limit. This kind of historical claim has been closed off by the non-prescriptive definition used in the Taranaki settlements.

This revised claim definition is particularly significant because the Taranaki settlements are the most recent and give the best indication of the direction of the Crown's settlement policy in this respect. It is likely that such a definition will be used in all subsequent settlements and therefore permanently close the loophole in the Ngai Tahu definition.

C Effect Upon Aboriginal Title Claims

(1) Rights not extinguished

As discussed in the preceding section,[108] the Ngai Tahu and Ngati Ruanui claim definitions include any claims founded on rights arising in the common law, including customary law and aboriginal title.

---

[108] See Part V B above.

The effect of these provisions is to extinguish historical claims for breaches of customary and aboriginal title rights. But, it should be emphasised that any final settlement will not extinguish the rights themselves nor exclude "contemporary" claims, namely those claims based on events after 21 September 1992.

This is expressly stated in Clause 9.2.1 of the Ngati Ruanui Heads, where the Crown acknowledges that Ngati Ruanui will not be prevented from pursuing claims against the Crown based upon aboriginal title or customary rights that do not come with the definition of historical claims. Clause 9.2.2 also expressly provides that the parties acknowledge that nothing in the Deed to be signed between the parties will extinguish any aboriginal title or customary rights that any Ngati Ruanui claimant may have.

(2) Comparison between Ngai Tahu and Ngati Ruanui

Based upon the definitions above, it follows that the effect on possible aboriginal title claims by Ngai Tahu and Ngati Ruanui is almost identical to the effect on possible Treaty claims. Accordingly, claims for compensation arising from the extinguishment of aboriginal title to petroleum are prohibited because such claims are based on the Crown's nationalisation of petroleum pursuant to the Petroleum Act, a pre-1992 event.

However, Ngai Tahu would not be prevented from bringing a claim based on the Crown's imposition of a regime that controls petroleum resources outside the 12 nautical mile limit and the royalties derived from those resources. This is of course dependent upon satisfying the evidential requirements necessary to establish such a claim.

As discussed above, Ngati Ruanui would be prevented from making such claims by virtue of the 'catch-all' provision used in the Ngati Ruanui settlement.

(3) Conclusion

Despite the prohibitions on bringing certain claims discussed above, the settlements have no effect on the existence of the aboriginal rights themselves. Claims based upon existing rights of ownership at common law are therefore unaffected whereas claims based on alleged *breaches* of those rights through Crown action or inaction are extinguished.

Therefore, while compensation claims based on the loss of ownership or control of petroleum pursuant to the Petroleum Act and other legislation are now excluded, the settlements have no effect on an aboriginal title claim to the ownership of petroleum in the sea-bed beyond the 12 nautical mile limit.

VI The Treaty Settlement Process

A Introduction

The focus of this paper so far has been on analysing the potential claims by Maori to petroleum. Those claims can effectively be grouped into two categories:

(i) a claim for compensation for the nationalisation of petroleum within the 12 nautical mile limit; and

(ii) a claim to the actual title of petroleum beyond the 12 nautical mile limit.

As discussed above,[109] the purpose of a Treaty settlement is to provide redress for all historical breaches of the Treaty by the Crown. Therefore, concluding a Treaty settlement would prevent a further claim for compensation based on the first limb above as compensation for that specific breach above is included within the overall settlement amount.

However, there are other considerations that must be taken into account by a claimant before deciding whether or not to settle with the Crown. The focus of this section of the paper is to assess whether or not a claimant such as Nga Ruahine should sign away its claims to petroleum (and any other potential Treaty claims) in order to achieve a final settlement with the Crown. In order to do this, it is necessary to set out a brief outline of the key aspects of the settlement process.

B Negotiated Settlements

(1) Entering negotiations

Before the Crown will agree to negotiate a Treaty settlement with an iwi, the iwi needs to show that the Crown has in some way breached the Treaty or any of its principles. Traditionally, a Treaty breach by the Crown in respect of a particular iwi has been prima facie "proved" if, following a potentially lengthy Tribunal hearing, the Tribunal issued a report in favour of the iwi.

---

[109] See Part IV above.

However, the Crown has now publicly accepted that certain events will, of themselves, amount to a breach of the Treaty. For instance, the Crown has acknowledged that the confiscation of land after the New Zealand wars breached the Treaty. More recently the Crown has also accepted that in many cases it breached the Treaty when it bought Maori land between 1840 and 1865, and also that in many cases the way the Native Land Court operated after 1865 amounted to a Treaty breach.[110]

It should be noted that it is the Crown's policy to only negotiate with iwi (as opposed to hapu or whanau)[111] and that any settlement must be comprehensive; all of the historical claims of the iwi must be negotiated and settled at the same time. This is a departure from the Waikato/Tainui settlement, where all of Tainui's historical claims were settled except their claims in respect of the Waikato river.

(2) The direct negotiations process

The Crown states that the overall aims of direct negotiations are to reach a settlement which:[112]

- removes the sense of grievance;
- is a fair, comprehensive, final and durable settlement of all the historical claims of the claimant group; and
- provides a foundation for a new and continuing relationship between the Crown and the claimant group, based on the principles of the Treaty.

---

[110] See above n51.
[111] A notable exception to this policy was the settlement with Ngati Turangitukua, a hapu of Ngati Tuwharetoa, in respect of the Turangi township. This settlement followed the Tribunal's "Turangi Township Report" in 1995 where the particular breach of the Treaty by of the Crown was determined to relate specifically to that hapu.
[112] See above n51.

(a) Advantages

The key advantage of a negotiated settlement is that it can encompass a broad range of remedies that cannot be achieved through the litigation, which traditionally provides some form of financial compensation.

Following the comprehensive settlement with Ngai Tahu in 1997, in which a number of new redress options were negotiated, the Crown policy is that settlement redress will typically include each of the following elements:[113]

- an apology;
- economic redress; and
- cultural redress.

(i) Apology

The Crown will provide a formal apology as part of the settlement to acknowledge that the iwi suffered injustices which (significantly) impaired its economic, social and cultural development. To many claimants, this acknowledgement of past injustices and the prejudice that they have endured is an integral part of the settlement, as it enables them to finally put the sense of grievance behind them.

(ii) Economic redress

Economic redress will typically consist of a number of different elements, typically including a one-off cash payment, the ability to purchase certain Crown properties and a right of first refusal over any Crown properties that it wishes to sell within the claimant's rohe. However, any purchases must be made from the claimant's own funds and the ability to purchase property is now usually limited to a finite period of time, for example, 50 years from the date of settlement.

---

[113] See above n51.

(iii) Cultural redress

The cultural redress elements of Crown settlement offers are aimed at restoring the iwi's ability to give practical effect to its responsibilities as kaitiaki (caretakers) of the environment, a role that has been dramatically eroded over the last 150 years.[114]

Much of the cultural redress aims to provide for greater iwi input into the management of the environment and other areas. The redress typically includes such elements as exclusive camping entitlements for iwi within their rohe, statutory advisor roles to provide advice to government ministers on conservation and other related issues and the establishment of protocols with government agencies to enhance the communication and consultation between the particular agency and the iwi.

(b) Disadvantages

There are also many disadvantages in concluding a Treaty settlement with the Crown, the most significant of which are outlined below.

(i) 'Fiscal envelope'

In December 1994, the government released its "Proposals for the Settlement of Treaty of Waitangi Claims". A key proposal was that the Crown would negotiate and settle all Treaty based claims for $1 billion. The proposal became commonly known as the 'fiscal envelope' and it was rejected at every hui (meeting) the Crown held with Maori. The concept of the Crown setting a cap on what it was prepared to pay as compensation for its own past wrong-doings was seen as offensive.[115]

The current Crown policy is that Treaty claims will be settled "on a fair and consistent basis, using existing settlements as benchmarks".[116] What this means in practice is that the financial loss an iwi suffered has little, if any, bearing whatsoever on the amount the Crown is prepared to offer. The amount offered is instead relative to what has been

---

[114] D Tapsell "The Iwi (Maori Community) Perspective of Treaty Settlements in New Zealand" an unpublished paper delivered at the *Aboriginal Law in Canada Conference*, 18-20 November 1999, Vancouver, Canada) p29.
[115] See above n16, pp52-54.
[116] See above n51.

offered in previous settlements.[117]

(ii) Natural resources

A proposal relating to natural resources was also put forward. The government argued that Article II of the Treaty did not guarantee Maori ownership rights to natural resources, but rather "use" and "value" rights where they could be shown to derive from use and values in 1840, allowing for development as contemplated in 1840 of those particular use and values.[118]

However, it is arguable that Maori customary rights over natural resources were much more than "use rights". A hapu or several hapu would control a certain territory and that control would extend over the *entire* territory – there was no sharp division between the surface soil and the sub-soil, between the foreshore and the sea, between the lake and river beds and the water.[119]

Furthermore, as noted above,[120] the Tribunal has consistently decided against the proposition put forward by the Crown, holding instead that the development right is not limited to what was contemplated by the parties in 1840.

(iii) Conservation estate

The government position from the beginning of the settlement process has always been that private land would not be available for use in Treaty settlements. And after bowing to pressure from conservation and other interest groups,[121] the government decided that conservation lands would not generally be available either; only in very special circumstances will conservation land be considered for vesting in claimants or for transferring management control back to iwi.

The policy is particularly detrimental to iwi in areas, such as Taranaki, where the Crown has very little land holdings other than the conservation estate. As many cultural redress options are only available over Crown-owned land, the practical consequence of

---

[117] See above n114, p25.
[118] See above n114, p13.
[119] See above n114, p13.
[120] See Part IV B above.
[121] See above n16, p172.

the Crown's policy on the conservation estate is that some iwi will be denied adequate redress.

This is, in effect, a double blow to claimants. Having suffered from the original confiscation of their lands by the Crown, they will now potentially be denied adequate redress for that confiscation because the Crown was so successful in disposing of that confiscated land and refuses to make adequate provision for iwi from the conservation estate.

(3) Natural resources policy

(a) Crown's position

The Crown's stated position, as at October 1999, is that natural resources are not available for general use in settlements in the way that cash or surplus lands are.[122] The Crown has given three official reasons for this:

- there are existing arrangements for allocating and managing natural resources on a national basis (for instance, geothermal energy is managed under the Resource Management Act 1991). It would not normally be appropriate to create different arrangements through Treaty settlements.

- the Crown owns and manages nationalised minerals (including petroleum, uranium, gold and silver) under the Crown minerals Act 1991, in the national interest. It considers that it should continue to do so. These resources are therefore not available in Treaty settlements.

- questions of valuation and risk are particularly difficult in relation to transferring ownership or income rights in natural resources. Cash and other types of Crown property enable both the Crown and claimants to make a better assessment of the overall value of the settlement.

The Crown notes instead that Maori, like any other individuals or companies, can use cash received in a settlement to invest in natural resource developments, through the usual market and resource management processes. However, if the Crown or a Crown

entity has surplus natural resource-based asset in a claim area – for example a small hydro or geothermal power station – these assets may be considered for use in a settlement. As with other commercial assets, transfer to the claimant group would be at market valuation.

In summary, the Crown position, unless altered by the new government, is that petroleum is not available as part of a Treaty settlement. In discussions to date, the Crown has refused to negotiate about this position or the policy reasons behind it.

(b) Response to Crown's position

As noted above,[123] Article I of the Treaty enables the government of New Zealand to make legislation and pursue its policies free from unreasonable restraints. However, the Crown is also under a duty to act reasonably and in good faith towards its Treaty partner.

With those principles in mind, although it may have been reasonable to nationalise petroleum in 1937 in the national interest in order to ensure that the resource was properly managed and conserved, it is suggested that it is no longer reasonable, if indeed it ever was, to completely exclude Maori from the management and control of such an important resource as petroleum.

At the very minimum, a co-management arrangement should be implemented where iwi can demonstrate a particular interest in the resource. For example, Te Arawa's relationship in Geothermal Energy or Ika Whenua's connection with their rivers.

(4) A case for a modern Treaty breach?

All of the settlements concluded so far have been to redress "historical" breaches of the Treaty by the Crown, namely where those breaches occurred before 21 September 1992. It is therefore expressly contemplated that any Crown breaches of its obligations after that date will also be actionable.

The Crown's actions in imposing the settlement process upon Maori with little or no

---

[122] See above n51.
[123] See text following n43 in Part III B (3) above.

effective consultation and their declared policy of settling all claims for a maximum of $1 billion do not accord with the principle of reasonableness expounded above. As noted above,[124] once the Taranaki claims are settled there is likely to be less than $300 million available to settle all other historical claims. Ward suggests that the fiscal cap should be removed.[125]

> This does not mean 'the sky is the limit'. It has already been established that remedy will not be on a full-restitution basis, and upper levels have been indicated in existing settlements. On the basis of the Rangahaua Whanui research, $2 billion spread over 20 years would not be unreasonable. It can be easily afforded, and the returns to the economy would be considerable.

Furthermore, the failure to offer a relativity clause to claimants other than Ngai Tahu and Waikato/Tainui may severely prejudice other iwi if, as it seems likely, the $1 billion settlement cap is exceeded. The Volcanic Interior Plateau Claim, which encompasses large parts of the central North Island, includes forestry assets estimated to be worth in excess of $2.1 billion. If the Tribunal were to issue a binding recommendation pursuant to Crown Forest Assets Act 1989 that part of those assets be returned, the accumulated rentals currently held by the Crown Forestry Rental Trust would almost certainly mean that the fiscal envelope is exceeded.

If this occurs, or indeed the envelope is exceeded through the settling of other historical claims, Ngai Tahu and Waikato/Tainui will each receive an extra cash payment to maintain their level of reparation at 17% of the total compensation paid through Treaty settlements. As Ward points out:[126]

> It is absurd that Treaty-based justice for the bulk of Maori should be constrained by fears that doubling the 'fiscal envelope' would mean paying Tainui and Ngai Tahu another $170 million each.

The Crown should therefore negotiate to replace these relativity clauses with an additional one-off payment.

---

[124] See text preceding n101.
[125] See above n16, p176-177.
[126] See above n16, p177.

C Conclusion

It can be seen from the comments above that there are numerous issues with the settlement process and the Crown's policy of making settlements relative. It is suggested that by offering such varied and unbalanced settlement packages to iwi, the Crown's stated objectives of a "a fair, comprehensive, final and durable settlement" are being undermined.

Unless the Crown resolves some of the serious defects in the settlement process identified above, it is likely that this latest attempt by the Crown to settle Treaty claims will be no more durable than their failed attempts of the past.

However, despite the defects in the process, a negotiated settlement represents an opportunity to obtain elements of redress that are not possible through litigation. It also avoids the uncertainty and expense of potentially protracted court action which may or may not be successful.

Finally, it should be remembered that Treaty settlements are political and therefore symbolic in nature.[127] The key issue for Nga Ruahine to consider will be whether they consider that the quantum amount, together with the other redress options, will give it the capacity and opportunity to rebuild its tribal asset base. Based on the quantum awards contained in the Heads of Agreements of the Taranaki settlements, a figure of approximately $25 million could be expected by Nga Ruahine.

---

[127] See above n114, p26.

VII Conclusion

Although it is possible to pursue claims to petroleum through the judicial system, this paper concludes that iwi may be better served by expending their time and resources in negotiating a Treaty settlement with the Crown.

Despite the many defects of the Treaty settlement process, such as the $1 billion cap and the concept of 'relativity', a negotiated settlement offers many forms of redress that will not be available through the courts. It also provides an opportunity for iwi to receive compensation through a settlement that, together with the other redress options, aims to give iwi the capacity and opportunity to rebuild their tribal asset base.

Once a settlement has been concluded, and the tribal asset base is beginning to be rebuilt, the option of pursuing an aboriginal title claim to petroleum may become more feasible (depending, of course, upon the claimant's geographical location and historical association with their tribal area). It is suggested that such a claim would best be undertaken once the process of rebuilding the asset base has begun via a negotiated settlement.

It is of course possible to seek redress from the Tribunal or the courts for past breaches of the Treaty by the Crown. However, the Tribunal does not have the power to make binding recommendations in relation to the ownership of petroleum, and the judiciary has shown a distinct reluctance to countenance Maori claims to strategically important natural resources. Although petroleum may well be a taonga guaranteed to Maori under the Treaty, as well as an incident of the ownership of their Lands, there are no guarantees that such claims would be successful.

Finally, it should be remembered that this is not the first attempt by the Crown to settle Treaty claims with Maori. The Crown's imposition of a settlement process on its Treaty partner that is manifestly unfair in some respects have led to suggestions that the current process is itself a breach of the Treaty, throwing into doubt the durability and finality of the entire process. It may yet take quite some time before the issue of Maori claims to petroleum is resolved once and for all.