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TREATY OF WAITANGI (FISHERIES CLAIMS) SETTLEMENT ACT 1992: A FULL AND FINAL SETTLEMENT?

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ABSTRACT

The purpose of this paper is to consider the 1992 Maori fisheries settlement, namely the Treaty of Waitangi (Fisheries Claims) Settlement Deed and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; in general terms the credibility of its contention to be a "full and final" settlement, what could undermine it and to what extent it achieves "Treaty Justice". The prospect for success is gauged by contrast to overseas experience in North America. The paper considers the status of both commercial and traditional non-commercial Maori Fishing rights and interests under the settlement. An underlying theme of the paper is to question to what extent the settlement conveys to Maori, management and control over their sea fisheries. Whether Maori have to adapt to a Pakeha structure and the degree to which this could undermine the agreement.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,250 words.

1. INTRODUCTION 1

> If there are shortcomings in the drafting of the Deed and it might possibly turn out in the long term not to satisfy all understandable Maori aspirations, it is nevertheless an historic step. The Sealord opportunity was a tide which had to be taken at the flood. A failure to take it might well have been inconsistent with the constructive performance of the duty of a party in a position akin to a partnership.

On 23 September 1992 Ministers of the Crown and Maori representatives signed a Deed in settlement of claims relating to Maori Fishing rights under the Treaty of Waitangi.2 Crown and Maori sought a "just settlement" and "the resolution of a historical grievance." The Deed purports to be a complete settlement, affecting both commercial and customary fishing rights. The Deed was enacted on 10 December 1992 as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.3 Enactment of the Deed purports to constitute a "Full and final" settlement of all Maori fishing claims.4

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1 *Te Runanga O Wharekauri Re Kohu Incorporated v Attorney-General and others,* Unreported, 3 November 1992, Court of Appeal, C.A. 297/92, 13.

2 The Maori signatories represented only 17 iwi although the rights of all iwi are affected by the Settlement Act. Iwi and hapu that did not sign lose rights to enforce the Fisheries guarantee in the Treaty.

3 Hereafter the "Settlement Act."

4 Section 9 (c) of the Settlement Act.

For over a century successive fisheries policies progressively excluded Maori from the fishing industry. The New Zealand Law Commission concluded in 1989 that the Crown's failure to give full effect to the obligations assumed in the Treaty of Waitangi has been at two levels.5 Failure to protect tribal fisheries as a property right and failure to preserve tribal mana over Maori fisheries in the sense of participation in their control and management.

First and foremost the fisheries settlement gives recognition to the Treaty of Waitangi as New Zealand's fundamental constitutional document. The settlement purports to honour the Treaty, repair some mistakes of the past and lay a basis for the development of the Crown-Maori partnership. "It will change the focus of Maori in relation to commercial fisheries, from grievance mode to development mode"6 The settlement purports to restore Maori property rights in the commercial fishing industry and ensure Maori tino rangatiratanga over sea fisheries.

The Waitangi Tribunal, while recognising the 1992 fisheries settlement as "appropriate and reasonable,...., for at least so long as the conditions pertain,"7 further qualified expectations of a "full and final" settlement, stating:8

> Who can predict the future however? Circumstances change. The protection needed for today may be different for tomorrow. The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome.

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5 New Zealand Law Commission *The Treaty of Waitangi and Maori Fisheries - Preliminary Paper No 9* (New Zealand Law Commission, Wellington, 1989)92.

6 NZPD, no 65, 12817, 3 December 1992

7 Waitangi Tribunal *Fisheries Settlement Report - Wai 307* (Brooker and Friend Ltd, Wellington, 1992), 11, 6 WTR.

8 Above n 7.

As far as the fisheries settlement does purport to be "full and final" what are its chances of survival? Will history with its "shifting sense of justice" overtake the agreement? Objections to the settlement have never been far from the surface. For some Maori the settlement represents the breach, not the honouring of the Treaty of Waitangi. Complainants claim treaty fishing rights "are either extinguished or made unenforceable"9 Concerns have extended beyond the contents of the deed to how the deed was executed; in particular, problems of representation and ratification. Another important concern is the prospective allocation of settlement benefits to the Maori tribes. Thus there is "a division in the Maori community that reflects in part a desire on the one hand to seize the opportunity, and on the other, to maintain the integrity of the Treaty."10

The Waitangi Tribunal suggests the above mentioned concerns do "not demonstrate a major division."11

Two primary objectives identified during the "ratification" hui provide a useful yard stick by which to measure prospects for the success of the fisheries settlement.

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9 Above n 7,4.

10 Above n 7,3.

11 Above n 10.

The objectives are: to restore their mana and tino rangatiratanga over fisheries, and to help re-establish an economic base. The extent to which the settlement can achieve these two objectives will provide the general focus of this paper.

The fisheries settlement and more specifically the Sealords deal raise some fundamental questions:

- is there inherent potential in the settlement to inflict new grievance and injustice?
- how realistic is it to separate subsistence, hospitality and commercial fishing as given effect by the deed.
- can a commercial enterprise of Sealord's nature be adapted to meet fundamentally non-commercial needs?
- is success of the settlement contingent upon the sustainability of the fish resource?

This paper aims to provide:

(a) an outline of the background of Maori fishing claims (Part II);

(b) an analysis of the fisheries settlement (Part III);

(c) a comparison with similar failed agreements in North America (Part IV);

(d) a discussion of the commercial fisheries component of the settlement, in particular issues relating to the allocation of benefits and the sustainability of the fish resource (Part V);

(e) an analysis of the non-commercial fisheries component of the settlement, including a discussion of proposed regulations which will regulate traditional Maori fishing (Part VI);

(f) consideration of the extent to which Maori have acquired management and control over their fisheries (Part VII).

II BACKGROUND[12]

A *The Treaty Fishing Right*

Under article 2 of the Treaty of Waitangi the Crown guarantees to Maori tino rangatiratanga and the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties.

B *Fishing Legislation to 1982*

The Waitangi Tribunal in its Muriwhenua Report[13] stated:[14]

> Few New Zealanders, we suspect, appreciate the extent of early Maori fishing activities, that by state action their development of those fisheries were discouraged, or that Maori have never abandoned their claims to their original fishing entitlements.

The extent of a Maori economy in fishing is well documented by the Waitangi Tribunal. Maori around the Hauraki Gulf, for example, supplied thousands of kits of oysters annually at the ports of Onehunga and Auckland.[15] Up until the mid 1860's fishing was not an issue:[16]

> Maori were unrestricted in their fishing and fish trade and they in turn had no reason to seek limits on the settler's fishing, for the settlers fished mainly for their subsistence and personal needs. Then, somewhere in the historical process, the roles became reversed.

The Waitangi Tribunal identified the 1860's as "marking the turn of the tide." The Oyster Fisheries Act 1866 began a process of legislative dislocation between Maori and their fisheries.

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12 See generally above n 5; Waitangi Tribunal *Muriwhenua Fishing Report-Wai 22* (Department of Justice, Wellington, 1988); Waitangi Tribunal *Ngai Tahu Sea Fisheries Report-Wai 27* (Brooker and Friend Ltd, Wellington, 1992).

13 Waitangi Tribunal *Muriwhenua Fishing Report-Wai 22* (Department of Justice, Wellington, 1988).

14 Above n 13, xiii.

15 Above n 13, 82.

16 Above n 13, xv.

The premise of this enactment, as with various statutory regimes which followed, was the prevention of serious depletion of the fish resource. The Oyster Fisheries Act was targeted at the commercial supply of oysters to Auckland. It regulated the commercial development of oyster fisheries by enabling closures, ostensibly to protect oyster beds from depletion by Maori, and granting leases of Maori oyster beds to non-Maori for commercial purposes. Subsequent provision was made for Maori oyster reserves but these beds were designated for personal needs only.17 Maori were prohibited from selling oysters from beds reserved for them.

The assumptions underlying the Oyster Fisheries Act are important. They permeated fishing laws for the following 120 years and gave effect to the statutory abrogation of Maori tino rangatiratanga over their sea fisheries as guaranteed by article 2 of the Treaty. Significantly the Oyster Fisheries Act established, in statute at least, the perception that Maori interests in fisheries were non-commercial.18

> The assumptions were basically that Maori fisheries were restricted, both as to the area of sea used and the species caught, that Maori fishing should be limited to satisfying personal needs, and that fisheries could be managed by the state as though Maori had no systems of their own.

"The oyster laws assumed the unrestricted right of the Crown to dispose of inshore and foreshore fisheries".19

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17 Section 14 Oyster Fisheries Act 1892; none was reserved before 1913 and "only after the local beds had been severely depleted by non-Maori pickings".

18 Above n 13, xvi.

19 Above n 13, 81.

The Crown assumed ownership of the oyster resource, or at the least, the right to regulate access and control. Even the control of Maori reserves was assumed to vest with the Crown.

With the introduction of salmon and trout by the acclimatization societies, the government also assumed control over fresh water fisheries. The Salmon and Trout Act 1867 was designed to protect the fledging salmon and trout fisheries. Significantly this enactment also gave the Governor wide powers to protect "any other fish"20 "The protection was illusory but the control absolute".21

The dependence of Maori fisheries upon Parliamentary enactment was illustrated by the Larceny Act 1869. This Act made it an offence to fish from "any water which shall be private property or in which there shall be any private right of fishery" or to take oysters from any bed "being the property of any other person and sufficiently marked out or known as such." Maori fisheries were not included except to the extent that they had been specifically reserved or granted. "The Larceny Act affirmed the assumption that customary fisheries had no status unless provided for by statute or in some deed or grant."22

Notwithstanding the above mentioned enactments, New Zealand's first general sea fisheries legislation did recognise Maori Treaty rights in their fisheries, albeit as a token gesture.

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20 Section 4.

21 R. Walker "The Treaty of Waitangi And The Fishing Industry" *Controlling Interests: Business, the State, and Society in New Zealand* (Auckland University Press, 1992) 98, 104.

22 Above n 13, 83.

Section 8 of the Fish Protection Act 1877 stated:

> Nothing in this Act shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

The effect of section 8 was to provide that nothing in the Fish Protection Act 1877 was to adversely affect any Maori Treaty fishing rights. The Waitangi Tribunal in its Muriwhenua Report, in reference to section 8, stated:23

> It recognised the Treaty of Waitangi but the manner in which it did so illustrates a recurring theme, apparent also in Maori land laws (the Native Land Act 1862 for example) that Maori concerns for the recognition of Treaty interests could be met by mentioning the Treaty in the Act, in a general way, and although nearly everything else in the Act might be contrary to Treaty principles.

This statement is supported by a finding in the Tribunal's Ngai Tahu Sea Fisheries Report that amended regulation's made under the Fish Protection Act "purported to limit Maori exemption to taking oysters or indigenous fish for their personal consumption only and nor for sale."24 The Waitangi Tribunal in its Muriwhenua Report concluded:25

> The more likely event is that section 8 was really window dressing, inserted in the face of claims by Maori members that the Treaty should be recognised and fishing rights upheld, while no one really knew or very much cared what section 8 entailed.

The Fish Protection Act was re-enacted in the Sea Fisheries Act 1894 without a new provision to replace the former section 8.

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23 Above n 13, 85.

24 Waitangi Tribunal *Ngai Tahu Sea Fisheries Report-Wai 27* (Brooker and Friend Ltd, Wellington, 1992) 280.

25 Above n 23.

The 1894 Act repealed the earlier regulation permitting Maori to take oysters and indigenous fish for personal consumption. "There was no longer any statutory recognition of Maori Treaty rights to their fisheries."26 Maori could engage in commercial fishing, but subject to their obtaining a licence. The Waitangi Tribunal in its Ngai Tahu Sea Fisheries Report concluded that the 1894 enactment amounted to a "clear breach of the Crown's treaty obligation actively to protect the rangatiratanga of Maori, including Ngai Tahu, in their sea fisheries."27

The Sea Fisheries Amendment Act 1903 reinstated "in substantially modified form" the former section 8 of the 1877 Act. Section 14 of the 1903 Amendment provided that:

> Nothing in this Act shall affect any existing Maori fishing rights.

The same language was reenacted as section 77(2) of the Fisheries Act 1908 but was restricted to the part of the Act relating to sea fisheries. Section 77(2) was construed in *Waipapakura v Hempton*28 to contain no legislative recognition of Maori fisheries. The full Supreme Court considered section 77(2) in respect of a Maori who was fishing in contravention of fisheries regulations and who brought an action for wrongful conversion of her nets. Stout CJ held that while the Treaty of Waitangi may have provided for a Maori fishing right, this had never been enacted and therefore the Court could not give effect to or take cognisance of it.

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26 Above n 24.

27 Above n 24.

28 (1914) 33 NZLR 1065.

The Treaty "was merely a bargain binding on the conscience of the Crown and was not a source of legal rights."29 Section 77(2) was held to be merely a saving clause which did not create rights. Only legislation confirming the treaty rights would suffice.30

The approach in *Waipapakura* was upheld by the Privy Council in *Hoani te Heuheu Tukino* v *Aotea District Maori Land Board* where it was stated that rights conferred by a treaty of cession could not be enforced by courts in the absence of specific legislative direction.31 The courts continued to render section 77(2) as having no real effect until the case of *TeWeehi* v *Regional Fisheries Officer*32 in 1986.

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29 Above n 24, 281

30 Compare an earlier decision in *Baldick v Jackson* (1911) 30 NZLR 343 where Stout CJ held inapplicable to the circumstances of New Zealand a statute that would have conflicted with Maori whaling guaranteed by the Treaty. Also note the decision of Chief Judge Fenton in the Native Land Court in the 1870 *Kauwaeranga* judgement, reprinted at (1984) VUWLR 227,240 where exclusive Maori rights to fish on tide lands on the Waihau River were affirmed.

31 see also [1941] AC 308; *Inspector of Fisheries v Weepu* (1956) NZLR 920; *Keepa v Inspector of Fisheries* (1965) NZLR 322.

32 [1986] 1 NZLR 680; discussed below.

The Waitangi Tribunal has concluded Crown sea fisheries legislation during the period 1866 to 1982 had three main characteristics:33

- a principal concern was to conserve the sea fishery resources;
- an underlying assumption was the right of the Crown to provide for the general public exploitation of the sea fisheries subject only to the conservation measures enacted from time to time, notwithstanding the fishing rights guaranteed to Maori under the Treaty; and
- the failure by the Crown throughout almost the whole period to afford adequate legislative protection or recognition of Maori sea fishing rights guaranteed by the Treaty.

Thus Maori fishing rights "were declared non existent by the courts; although not expressly confiscated, they simply vanished by operation of law."34

C *The Fisheries Act 1983*

In more recent years fishing policies have been directed to the removal of small and part-time fishermen. A new Fisheries management regime implemented under the Fisheries Act 1983 further limited Maori participation in the fishing industry. This enactment was a response to the serious depletion of the inshore fisheries. It placed emphasis on the need to conserve and re-generate depleted resources "and to bring a greater measure of economic security to the industry."35

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33 Above n 24, 278.

34 M C Blumm "Native Fishing Rights And Environmental Protection in North America And New Zealand: A Comparative Analysis of Profits A Prendre And Habitat Servitudes" (1990) 4 Canterbury Law Review 211, 234.

35 Above n 24, 217.

Section 88(2) of the Fisheries Act 1983 re-enacted section 77(2) of the Fisheries Act 1908, with the word "existing" deleted. Again recognition of the Treaty of Waitangi was compromised by other important provisions in the 1983 Act. Section 89(1) provided the genesis of the Quota Management System ("QMS"), empowering the making of regulations generally regulating fishing in New Zealand. Paragraph (g) provided the origin of the QMS in limited form: "Prescribing a quota or total allowable catch for any fish, or in respect of any fishery or method of fishing, in any part of New Zealand fisheries waters; and authorising the Minister to allocate any such quota or total allowable catch to such commercial fisherman or fishermen as he may specify ...".

The definition of "commercial fishermen" in section 2 was particularly relevant to the demise of part-time fishers. In the case of an individual, a commercial fisherman was defined as meaning a person engaged in fishing for sale throughout the year, or a specified part of the season of each year, and who could satisfy the director-general that during such time as [he/she] engages in fishing for sale [he/she] relies wholly or substantially on [his/her] fishing activities for [his/her] income.

"The restricted definition of commercial fishermen caused much heartburn among Maori and non-Maori fishers who overnight were excluded from any further commercial fishing."36 Between 1500 and 1800 part-time fishers are estimated to have been excluded from the fishing industry.37

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36 Above n 24, 218

37 Above n, 24, 219

Most of the remaining Maori fishermen operated in the small and part-time way and were affected by this scheme.

Section 28C of the Fisheries Act 1983 provided that an allowance must be made for recreational and other non-commercial users. Significantly Maori interests were grouped with non-commercial interests, perpetuating the statutory arrangement that assumed Maori traditional interests had no commercial component.

D *The Fisheries Amendment Act 1986*

The Fisheries Amendment Act 1986 established the Quota Management System. The QMS has become the "cornerstone of the modern fishing industry."38 Again the scheme's development was projected at conserving fish and ensuring sustainable levels of fishing. The most radical feature of the QMS was the creation of a property interest in an exclusive right to commercial fishing. This property interest took the form of an individual transferable quota ("ITQ"). Individual quota can be readily transferred by sale, lease or licence. The ambit of the scheme extended to apply to both inshore and deep water species.39

1 *How the QMS works*

The Minister of Fisheries can declare an area to be a quota management area ("QMA"). The Minister then sets a total allowable catch ("TAC") for species of fish in that area. The allowance mentioned above for "Maori, traditional, recreational, and other non-commercial interests in the fishery" is subtracted from the TAC to give the total allowable commercial catch ("TACC"). The TACC is then divided into individual transferable quota.

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38 Above n 13, 140.

39 The QMS originally applied to only eight species under the Fisheries Act 1983.

Quota was allocated to existing commercial fishers on the basis of previous catch sizes.

"This restructuring of the industry resulted in reducing the total allowable catch by only 5 per cent and concentrating 75 per cent of ITQ's in eighteen companies."40 Maori fishers were further marginalised, those who had supplemented their income by part-time fishing were not given quota.

E *The Maori Fishing Right*

"Despite a century of struggle, with no success, against the derogation of their fishery rights, the Maori did not give up."41 In a series of Reports, the Waitangi Tribunal introduced the concept of Treaty fishing rights. In its *Motunui Report,*42 pollution from the Waitara sewage outfall which was damaging valuable fishing sites, as well as proposed new discharges and a new outfall to accommodate petrochemical industries, was found to violate the Treaty of Waitangi. The Tribunal ruled that the Crown was obliged to protect the Maori interest in fisheries from the consequences of settlement and development on the land.43 The *Kaituna Report*44 found that the then proposed Kaituna River sewage pipeline which would have degraded Maori fishing grounds also violated Treaty principles.

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40 Above n 21, 107; see also above n 5, 17.

41 Above n 21, 107

42 Waitangi Tribunal *Motonui Report* (Government Printer, Wellington, 1983).

43 Above n 42, 5.

44 Waitangi Tribunal *Kaituna Report* (Government Printer, Wellington, 1984).

In the Manukau45 claim the Tribunal found that the Manukau Harbour plan neither gave sufficient weight to Maori culture and fishing interests nor was detailed enough to ensure improvements in harbour water quality.

The next step in the vindication of Maori fishing rights was the decision in *Te Weehi*. Tom Te Weehi had appealed to the High Court in Christchurch against a conviction for taking undersized shellfish. Te Weehi claimed he was exercising customary fishing rights to take shellfish for domestic consumption. Williamson J ruled in Te Weehi's favour. The Judge held that Maori customary fishing title was legislatively recognised by section 88(2) of the Fisheries Act 1983 and thus Te Weehi was exempt from certain requirements of the fishing laws. Williamson J further held that customary fishing rights could exist independent from land ownership and they are preserved until expressly extinguished by "clear and plain" legislation.46.

The interpretation of section 88(2) in *Te Weehi* left open the question as to what is the source of a legal basis to the Maori fishing right. Does "Maori fishing rights" as espoused in section 88(2) refer to Treaty rights or does it refer to rights protected by the doctrine of aboriginal title?47 Whatever the source of this legal right *Te Weehi* represented the turning of the tide for the recognition of Maori fishing rights.

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45 Waitangi Tribunal *Manukau Report* (Government Printer, Wellington, 1985).

46 Above n 32; citing *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d); Guerin v The Queen (1984) 13 DLR (4th) 321.

47 See R Boast "Treaty rights or aboriginal rights?" [1990] NZLJ 32.

The impetus continued with the Waitangi Tribunal's *Muriwhenua Report.*48 The tribes of Muriwhenua in the Far North filed a claim against the QMS. The Muriwhenua claim had its first hearing before the Tribunal on 8 December 1986. On the 10 December 1986 the Muriwhenua claimants conveyed their concern that the Government was about to allocate fish quota under the new Fisheries Amendment Act. The Tribunal responded by immediately expressing their concern to the Director-General of Fisheries, that quota should not be allocated until the claim had been investigated. The Tribunal was advised that the procedures for allocating quota had already gone too far.49

Having accepted that this particular quota allocation could not be stopped the Tribunal learnt from the Muriwhenua claimants in September 1987 that further quota for squid and jack mackerel were in the process of being issued. Again the Tribunal conveyed its concern to the government without effect. The Muriwhenua claimants and the Maori Council filed an injunction in the High Court against the issue of quota in Muriwhenua waters. Greig J granted an interim injunction to stop the issue of quota until Muriwhenua rights and the obligations of the Crown were resolved.50

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48 Above n 13; initially the Muriwhenua claims to their lands and waters were heard together but events led to the fishing claim being heard separately.

49 Above n 13, 148.

50 *New Zealand Maori Council and Runanga o Muriwhenua* v *Attorney-General and Minister of Fisheries,* Unreported, 30 September 1987, High Court, Wellington Registry, CP 553/87; among Greig J reasons was that the QMS was operating without taking into account Maori rights in fisheries which were protected by s 88(2) of the Fisheries Act 1983.

In October 1987 the Maori Council, Ngai Tahu Trust Board and other tribal groups filed an injunction in the High Court to suspend the ITQ regime over all tribal waters. These orders were granted, 51 Greig J advising the government and Maori to negotiate. As a result a joint working party comprising four government members and four Maori members was established to settle the Maori fisheries claims. Maori claimed 100 per cent ownership of the fisheries but were prepared to settle for not less than 50 per cent. The Crown would only concede 29 per cent to the tribes.52 Unable to agree, the working party dissolved itself, issuing two separate reports, in June 1988.

Also in June 1988, the Waitangi Tribunal published its *Muriwhenua Fishing Report.* The "central issue" for the Tribunal was that "fishing has been corporatised."53 The QMS was found to be in fundamental conflict with Maori fishing rights as guaranteed by the Treaty of Waitangi. The root of this conflict was not so much the QMS itself, but the guaranteeing to non-Maori, the full, exclusive and undisturbed possession of the property right in fishing that the Crown had already guaranteed Maori.54 Importantly, the Tribunal pointed out that it does not follow that because the Treaty is breached the whole scheme must be jeopardised.55

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51 *Ngai Tahu Maori Trust Board* v *Attorney-General*, Unreported, 2 November 1987, High Court, Wellington Registry, CP 559/87.

52 This 29 percent total would allocate to Maori all the inshore (within 12 miles) fisheries and 12.5 percent of the deep water fishery (based on the Maori percentage of population in 1986).

53 Above n 13, 147.

54 Above n 13, 149.

55 Above n13, 150.

The Tribunal acknowledged that the QMS has "many meritorious features,"56 that many Maori are supportive of the system57 and that Maori could work within it.

F *The Maori Fisheries Act 1989*

The Maori Fisheries Act was characterised as a "breakthrough towards Crown recognition of Maori Treaty Fishing rights," the first step "to repair the grave infringement of Maori rangatiratanga in their sea Fisheries".58 The Maori Fisheries Act 1989 was not an agreed settlement. It was an interim settlement, planned for review in 1993.

The Act dealt with both "commercial" and "traditional" fishing rights. The commercial component provided Maori with 10 per cent of existing quota and a grant of $10 million to be administered by the Maori Fisheries Commission. The Commission was established by Part I of the Act. Its principal functions include the duty to facilitate the entry of Maori into, and the development by Maori of the business of fishing. The Act required the Commission to incorporate Aotearoa Fisheries Limited, a wholly owned public company, to whom the Commission must transfer 50 per cent of all quota. The balance of the quota retained by the Commission is leased by public tender.

Part II of the Maori Fisheries Act amended the Fisheries Act 1983 by declaring rock lobsters subject to quota fishing and also enacting a new part IIIA of the 1983 Act authorising the establishment of taiapure-local fisheries.

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56 Above n 55.

57 Above n 13, 144.

58 Above n 24, 285.

The taiapure model provides iwi or hapu with the right to manage and conserve the resources within their coastal rohe. Section 54C states that any person may submit a proposal to the Director-General for the establishment of a taiapure. The Minister of Fisheries can approve the establishment of the taiapure, appoint the committee of management on the recommendation of iwi and makes regulations on the recommendation of the committee.

III THE SEALORD DEAL

Further progress was given impetus when the Waitangi Tribunal released its report on the fisheries aspect of the Ngai Tahu claim. The Tribunal concluded that Ngai Tahu had an exclusive Treaty right over all their inshore fisheries and a Treaty development right to a reasonable share of the sea fisheries off their rohe, extending beyond 12 miles out to the 200 mile exclusive economic zone ("EEZ").59 The Tribunal reiterated its Muriwhenua finding that the QMS, as enacted, was in fundamental conflict with, and in clear breach of the Treaty of Waitangi. Ngai Tahu claimants however submitted that Ngai Tahu did not necessarily oppose the QMS per se as a management system. The claimants accepted that a durable Ngai Tahu fisheries right in the form of ITQ could reasonably represent rangatiratanga in sea fisheries.60

The Waitangi Tribunal recommended that the Crown and Ngai Tahu enter into negotiations for the settlement of the Ngai Tahu sea fisheries claim.

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59 Above n 24, 306

60 Above n 24.

The Tribunal recognised that negotiation would require compromises if Maori and the Crown were to reach a satisfactory settlement of fishing claims. The Tribunal stated this compromise would need to take into account a number of external circumstances such as the "public conscience," "the nations ability to meet the costs" and the "desirability of a permanent solution."61

Shortly after the release of the Ngai Tahu Sea Fisheries Report a "totally fortuitous solution then materialised"62 Carter Holt Harvey ("CHH"), holder of the largest single share of fisheries quota,63 was required to forfeit its quota.64 Initially Maori commercial fishing interests, including the Maori Fisheries Commission, approached the government for financial assistance to buy Sealord Products Ltd65 as a purely commercial venture.66 The Maori Fisheries Negotiators then saw an opportunity to link the Sealords proposal with the settlement of fishing claims. The Maori Fisheries Negotiators in September 1992 stated "the Sealord proposal, though not perfect, offers the best means for Maori to settle commercial fishing claims and to get Maori back into the business of fishing."67

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61 Above n 24, 307.

62 J Kelsy *Rolling Back the State* (Bridget Williams Books Ltd, Wellington, 1993) 261.

63 CHH held 26 percent of fisheries quota.

64 An increase in CHH's foreign ownership had put the company in breach of the statutory limit for foreign ownership of fishing quota.

65 Sealord Products Ltd was the company holding the quota CHH intended to sell.

66 A special purpose company, Te Waka Unua Ltd, wholly owned by the Maori Fisheries Commission was formed to undertake due diligence investigations.

67 See "The Sealord Deal - What it means for Maori "*Maori Fisheries Commission Bulletin, Special Issue,* Wellington, New Zealand, September 1992.

In late August 1992 the Maori Fisheries Commission, without a mandate from "Maori", obtained tentative government agreement to help it buy Sealord. Crown and the Maori negotiators signed a Memorandum of Understanding on 27 August 1992, an agreement on a proposal for settlement subject to Maori ratification.

Ratification involved negotiators undertaking a national round of hui, consultations with iwi and other Maori groups in the three weeks before the 24 September 1992 deadline. Satisfied that a mandate for settlement had been received, the Crown, Maori Fisheries Negotiators and iwi representatives signed a Deed of Settlement on 23 September 1992. The Deed being enacted as the Treaty of Waitangi (Fisheries Claims) Settlement Act on 10 December 1992.

A *Terms of the Settlement*

The Sealord's deal affects both commercial and traditional Maori fishing rights and Maori participation in fisheries management issues. In concise terms the commercial arm of the deal involves a "lump sum commercial settlement, lodged with a pan-tribal authority appointed by the Crown."68 Maori receive $150 million from the Crown to finance a joint acquisition of Sealord Products Ltd with Brierley Investments Ltd; provision is made for the allocation of 20 per cent of all quota for new species brought into the QMS to Maori (in addition to the 10 per cent of previous quota transferred under the Maori Fisheries Act) and the Maori Fisheries Commission is reconstituted into the Treaty of Waitangi Fisheries Commission. The Commission's functions include devising a procedure for the prospective allocation of settlement benefits, input into fisheries management and the reorganisation of its own membership in consultation with Maori.

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68 Above n 62, 268.

The Commission will appoint two members to the Fishing Industry Board ("FIB").69 The Minister of Fisheries is required to consult with the Commission on various fishing management issues, for example TACC setting, appropriate deemed value of fish and species or class of fish subject to the QMS.

In return Maori agree that the settlement "shall discharge and extinguish all commercial fishing rights and interests of Maori;"70 the discontinuance of all fisheries litigation by all Maori against the Crown (Iwi and Hapu that did not sign also lose rights to enforce the fisheries guarantee in the Treaty):71 unconditional acceptance and endorsement by Maori of the QMS, thus "conceding the Foundations on which the entire Fisheries litigation had been fought:"72 and the removal of the Waitangi Tribunal's jurisdiction to inquire or further inquire, or to make any finding or recommendation in respect of:

(a) Commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983); or

(b) The Deed of Settlement; or

(c) Any enactment, to the extent that it relates to such commercial fishing or commercial fisheries.

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69 The Fishing Industry Board is a statutory body comprising government and fishing representatives which plays a key role in fisheries management.

70 The Settlement Act settles all Maori commercial fishing claims founded on rights arising by or in common law (including customary and aboriginal title), the Treaty of Waitangi, statute or otherwise, and claims which have been the subject of adjudication by the courts or any recommendations from the Waitangi Tribunal.

71 Treaty of Waitangi Fisheries Commission *Hui-A-Tau* (Treaty of Waitangi Fisheries Commission, Wellington, 31 July 1993) 16.

72 Above n 62, 267

The Crown's continuing obligations include the appointment of Treaty of Waitangi Fisheries Commissioners after consultation with Maori and the approval of allocation principles. The appointment of thirteen Commissioners took place in June 1993 amid some controversy. Proceeding's seeking judicial review of the appointments were lodged but later withdrawn.73

Traditional fisheries took a back seat in the Sealord deal. The Settlement Act repealed section 88(2) of the Fisheries Act 1983.74 Judicially recognised customary fishing rights were extinguished with obligations resting on the Crown to make provision for the introduction of regulations recognising and providing for customary food gathering interests, "to the extent that such food gathering is neither commercial in anyway nor for pecuniary gain or trade."

Notwithstanding the New Zealand Law Commission's warning in 1989 of the "unreality of trying to separate subsistence, hospitality and commercial fishing...",75 the Settlement Act separated commercial from traditional fishing rights. Contrary to Maori custom traditional fishing can no longer have a commercial component. Maori fishing in the customary sense extends beyond the use of fish resources for personal and family consumption and the provision of food at hui, to include trading in the form of gift exchange.76 Thus, how appropriate is it to draw a distinction between commercial and traditional Maori fishing?

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73 The proceeding's were led by Matiu Rata but later withdrawn on the advice of the Northern tribes.

74 Section 34.

75 Above n 5, 35.

76 Above n 5, 32.

Traditional fishing rights under the Act will continue to give rise to Treaty obligations on the Crown. The Waitangi Tribunal will continue to have jurisdiction to hear claims from Maori in respect of non-commercial and traditional Treaty rights. Beyond this traditional fishing rights will no longer have legal effect, either as a defence to prosecution or in civil proceedings.

B *Parallels between the Settlement and the Treaty of Waitangi*

Ranginui Walker has observed that the Deed of Settlement has "remarkable parallels with the Treaty of Waitangi."77

> 78The parameters of the document were drawn up and defined by the Crown ..... All the Maori negotiators .....were in the weak position of being cosseted in the Beehive with the Crown partner, and therefore isolated from the collective wisdom and strength of their people.

The potential for further injustice and grievance was fuelled by the commercially driven negotiation process. "Several days of intense negotiations took place in secret, under conditions of strict confidentiality, and driven by a tight commercial deadline."79 Time for extended reflection and informed consensus gave way to commercial expediency. The Maori negotiators emphasised that it would take at least ten years for Maori to acquire, through any other means, half the quantity of quota which was to be handed over as part of the Sealord deal. The negotiators further warned there was no guarantee that other means, such as going back to court, would result in any extra quota at all.80

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77 R. Walker "Changes to the Traditional Model of Maori Leadership" Unpublished, November 1992.

78 Above n 77.

79 Above n 62, 264.

80 Above n 67.

It is against this background that the negotiators spent three weeks in September 1992 promoting the Memorandum of Understanding in a series of hui to gain a mandate to close the deal. The quality of this consultation has been questioned.81 Deference to commercial confidentiality meant some details of the deal could not be disclosed - "totally contrary to Maori decision making processes - leaving many unanswered questions about the benefits to Maori."82

Ranginui Walker described the process as "like a mini-government [which] went around the tribes belatedly seeking a mandate for what was in effect a fait accompli"83 Tribal endorsement was far from complete but sufficient, it was evidently felt, for the agreement to proceed to signature."84 Concession to commercial expediency extended to the signing of the Deed of Settlement on 23 September 1992. Kelsey states:85

> Representatives of many, but not all,Iwi and Maori organisations with fishing interests had been gathered at the Beehive. They were given three hours to scrutinise and approve the complex and technical deed. Few had much grasp of the details, which had been negotiated in secret right up to the last minute.

McHugh has suggested that major parts of the settlement return Maori to the "non-legal vacuum" associated with the *WiParata*86 case.

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81 See generally above n 7; above n 62, 266.

82 Above n 62, 266.

83 Above n 79.

84 P.G. McHugh "Sealords and sharks: The Maori Fisheries Agreement (1992)" [1992] NZLJ 354.

85 Above n 62, 264-65.

86 *WiParata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

In *WiParata* it was held deeds of cession by which Maori relinquished their Crown recognised customary property rights in exchange for a Crown derived title were unenforceable in the courts.87 The courts also ruled, as already mentioned in this paper, that the Treaty was not self-executing. In order for its promises to be judicially enforceable they had to be enacted by Parliament.88 Interrelated to this was the courts view of the Treaty as a legal nullity on the basis that Maori lacked political organization and therefore could not act as a sovereign body under international law.

It is in these respects that the 1992 Deed and its subsequent enactment possess striking parallels with the Treaty of Waitangi. Again Maori are giving up their claim to a traditional property right in exchange for a property interest under the QMS, derived from statute. McHugh observes, "much of the Deed of Settlement rests upon an agreement by the Crown to introduce and secure Parliament's passage of legislation."89 Many of the conditions attached to the Sealord transaction are unenforceable. The enactment of legislation to meet these condition's are within the "undisputed and undisputable province of Parliament and completely beyond any form of judicial review."90

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87 See McHugh, above n 84, 356.

88 *Hoani Te Heuheu Tukino* v *Aotea District Maori Land Board* [1914] NZLR 590, [1941] AC 308.

89 Above n 84, 356

90 Above n 89.

The Court of Appeal recognised that their is "an established principle of non-interference by the Courts in Parliamentary proceedings."91 "Accordingly the clause purporting to be an agreement by the Crown to introduce legislation to a described effect cannot have any legal effect."92

Similarly it is not clear who the agreement is with "since 'Maori' are not a separate, legal or corporate unit."93 Indeed the term "Maori", used repeatedly in the Deed of Settlement, is not defined. These factors underlie the Court of Appeal's ruling that:94

> Nothing in .....the Deed as a whole should be allowed to obscure the truth that the Deed is a compact of a political kind, its subject-matter so linked with contemplated Parliamentary activity as to be inappropriate for contractual rights.

The Deed of Settlement and the Sealord deal per se place recognition of Maori fishing rights back in the area of faith. Recognition of traditional Maori fishing rights for example is wholly contingent upon the Crown introducing regulations. Maori must, not for the first time, rely on the good faith of the Crown. McHugh aptly states: "It is almost as though history were being agreed to repeat itself."95

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91 Above n 1, 15.

92 Above n 1, 16.

93 Above n 84.

94 Above n 1, 17.

95 Above n 89.

C *Dissidence in the Settlement Process*

Dissenting tribes, including the Chatham Island's te iwi Moriori, Ngati Kahungunu and Ngati Toa, responded swiftly to the Deed of Settlement. This response included the bringing of proceedings challenging the Deed in the High Court. The Crown responded with an application to strike out the statement of claim. Heron J declined both applications. On Appeal, the main criticisms directed at the Deed by the Maori claimant's were that the Sealord's deal provides for an investment interest rather than for Maori to be engaged in fishing;96 that it purports to provide for legislation extinguishing Treaty rights and to be a permanent settlement.97

The Court of Appeal acknowledged that the Deed is a "most unusual document and, perhaps even designedly, obscure in some major respects."98 The Court recognised that it could not "determine with any accuracy the degrees of support and opposition that the proposal in the Deed has from *iwi* generally, still less from *hapu* or individual Maori generally."99 The Court of Appeal concluded: All that can safely be said is that the Deed was negotiated by some responsible Maori leaders and has significant Maori support but also significant Maori opposition."100

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96 This point is discussed more fully below.

97 Above n 1, 11.

98 Above n 97.

99 Above n 1, 14.

100 Above n 99.

The Court indicated its general support for the Sealord deal, suggesting that the proposal of the Crown and the Maori negotiators "to endeavour to obtain a substantial Maori interest in Sealord is thoroughly consistent with the approach of this Court in previous cases."101 "All that can be said now is that a responsible and major step forward has been taken."102 With regard to the longevity of the settlement and the exclusion of redress to the courts, Cooke P stated:103

> Should any legislation be enacted in this field, there could be little point in bringing the matter before the courts until at least some years of experience have been gained, and perhaps not even then.

Kelsey aptly states the Court of Appeal "left the door ajar to future generations but only by an inch."104

Issues of representation and complaints of insufficient consent at the ratification stage were among the main concerns in an urgent claim to the Waitangi Tribunal. It was claimed the Memorandum of Understanding was not presented or properly explained at some meetings and that proper agreement could not be attained if people were not well informed. It was contended there were significant uncertainties, such as the regulations to be made and the method of allocation of benefits, which brought into question the consent to the Deed.

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101 Above n 1, 12-13

102 Above n 1, 18.

103 Above n 102.

104 Above n 72.

The Waitangi Tribunal acknowledged the issue of consent raised many difficulties. Some complainant's argued each hapu had to agree, not some large iwi group purporting to act on their behalf. The Tribunal however concluded that there was sufficient Maori support and acknowledged that while it is hapu who generally have the main interest in fishing "it is appropriate and not inconsistent with the Treaty, that a national settlement in fisheries should be ratified at no less than iwi level."105

Concern was expressed that the Deed extinguished rather than fulfilled the Treaty obligations and that the Deed does not see the Treaty as a living and on-going covenant but as something to be ended. The Waitangi Tribunal attributed some of this concern to the "inevitable haste" in drafting the Deed. It was found that the Deed was "not packaged well for Maori" and that "a poverty of spirit in the operative parts" was evident. Dissenting tribes were concerned they would remain bound by a deal which terminated their rights and to which they had not agreed.

The Tribunal agreed that legislating to extinguish Treaty fishing interests would be inconsistent with the Treaty and prejudicial to Maori and recommended that the impending legislation make no provision for extinguishment. The Tribunal also recommended fish regulations and policies be reviewable in the courts and that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws. Alternatively the Tribunal considered it reasonable that the Crown place a moratorium on such claims for a term not exceeding 25 years.

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105 Above n 7, 23.

Provided it was limited to one generation the Tribunal considered it reasonable that the settlement should bind all tribes, whether they signed or not. This practical compromise recommended by the Tribunal, as with most of the Tribunal's recommendations in the Settlement Report, were not heeded by the government. "The dissenting tribes would remain bound by a deal which terminated their rights and to which they had not agreed."106 The Crown maintained its stance that the deal should be seen as a permanent solution.

Dissent spread into the international arena. Former Secretary for Maori Affairs Tamati Reedy, presenting the National Maori Congress's address to the United Nation's special session marking the international year of indigenous peoples, "described the deal as an 'an act of violation' by the New Zealand government on a par with the land confiscations and denial of Maori rights during colonial rule."107 Similar sentiments were expressed by Moana Jackson to a United Nations indigenous peoples' conference in Geneva.

IV HISTORICAL PARALLELS

Former Prime Minister David Lange has predicted that history, with its shifting sense of justice, will probably overtake the fisheries agreement.108 Two recent multi-million dollar settlements in North America, the Alaska and James Bag Agreements, illustrate "that full and final settlements only work when they provide adequate redress on terms which current and future generations will view as just."109

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106 Above n 72.

107 Above n 68.

108 See McHugh, above n 84.

109 Above n 68.

Neither the Alaska Native Claims Settlement Act 1971 110 nor the James Bay Agreement 1975 are today regarded as having achieved the lasting settlements contemplated at their respective moments of settlement under twenty years ago. As far as the fisheries settlement does purport to be "full and final" it is appropriate to consider the extent to which it duplicates the failed North American models.

A *The Alaska Native Claims Settlement Act 1971 ("ANCSA")*

Twenty years ago, Alaskan Natives had staked claims to almost all of Alaska's 375 million acres. Pressure to settle escalated in 1970 after the discovery of oil deposits. ANCSA devised a plan of property settlement for the Native peoples of Alaska, providing both land and cash settlement to satisfy claims. The Natives received title to 44 million acres of land, about ten percent of Alaska's territory and $962.5 million, about 3 dollars per acre.

The distribution of the settlement was complicated by the requirement that the Natives establish corporations under statute law. It is these formed corporations that collected the proceeds from the cash settlement and from the revenues generated by the corporations profits.111 ANCSA established 12 regional corporations and more than 200 village corporations. The typical village shareholder would own one hundred shares in the village corporation and one hundred shares in the regional corporation. No one born after December 18, 1971, the date ANCSA was passed, would receive shares.

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110 Hereafter "ANCSA".

111 J.A. Bowen "The Option of Preserving A Heritage: The 1987 Amendments To The Alaska Native Claims Settlement Act" (1989) 15 American Indian Law Review 391.

Originally shares could not be traded on the open market for a twenty year period. Restrictions on alienating shares were extended, after fears were expressed that Native ownership could be overtaken by outside entities. The alienation restrictions were to end in early 1992.

ANCSA, like Sealord's, was hailed as a new departure for the resolution of aboriginal claims. ANCSA purported to give Natives control over their land and assets. Aboriginal title of Alaskan Natives to their land throughout Alaska was extinguished, along with their aboriginal right to hunt and fish. The New Zealand fisheries settlement is similar, the restoration of Maori property rights to their commercial fisheries in exchange for the extinguishment of customary fishing rights and the full and final settlement of commercial claims.

The similarity extends to the form of settlement, both involving the use of corporate entities and the market place as a means of settlement. There are, however, key differences. ANCSA provided Native Alaskans with capital but left them to their own devices to find or create economic opportunity. They had to formulate their business purposes after the fact.112 The fisheries settlement however has restored Maori property rights with an established and profitable commercial entity. With regard to the economic viability of village corporations established under ANCSA, the Alaska Native Review Commission has stated:113

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112 T.R. Berger *Village Journey - The Report of the Alaska Native Review Commission* (Hill and Wang, New York, 1985).

113 Above n 112, 36.

> For a variety of good reasons, few village corporations have been successful -but not because they are Native corporations. In most villages, no commercial business could have succeeded, and the bankruptcy of many village corporations seems to be inevitable.

By 1987 only nine million of the 44 million acres reached the Native corporations. ANCSA's problems were compounded by a lack of commercial expertise. Few Native Alaskan's in 1971 had any training or experience in the management of business enterprises.114 In contrast the ability of Maori to successfully engage in commercial fishing is well documented.115

The promise of ANCSA to Native Alaskan's has not been fulfilled. The Alaska Native Review Commission states:116

> Having relinquished aboriginal title to and aboriginal rights in the whole state, Alaska Natives confidently expected that their ownership of the forty-four million acres that ANCSA had conveyed to them would be secure and their way of life protected. This expectation is precisely what ANCSA has not achieved.

ANCSA's failure can be attributed to a number of factors. The settlement sum of nearly one billion dollars, turned out to be modest once it was distributed among all the corporations. Much of this money was actually swallowed up in litigation and incorporation costs.117

> Because of the conflicts inherent in ANCSA, the early years of implementing it were characterized by misunderstanding and strife. Officers of the corporations had to devote inordinate amounts of time, energy, and money to negotiation, litigation, administrative appeals, and lobbying. Delays in the conveyance of land to the corporations severely handicapped their planning and development.

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114 Above n 112, 30.

115 Above n 12; see P.B. Temm *The Treaty of Waitangi and Maori Rights in New Zealand* (Republished by Trade Union Education Authority, Wellington, 1988).

116 Above n 112, 26.

117 Above n 114.

Ultimately ANCSA failed because of its inability to strengthen subsistence economies. Its emphasis was on establishing artificial economic activities for Natives in rural villages. These activities were governed by corporate entities as opposed to tribal governments.

The imposition of a settlement of land claims based on corporate structures was also considered inappropriate. The capitalist model imposed upon Native Alaskan's did not fit well with Native Alaskan life. ANCSA adversely affected traditional patterns of leadership and decision making, customs of sharing, and subsistence activities.118

> Nor were the Native shareholders investors in the sense that Wall Street understands the word. They were not a random group of shareholders, but a people bound together by land, culture, and kinship ties.

Sealord's presents a similar scenario. Fishing to Maori is about kinship. How difficult will it be to reconcile the demands of corporate enterprise with culture? Kelsey aptly states:119

> The traditional Maori economy was based on collectivity, integrated goals and reciprocity with nature. Capitalism was dependent on individualism, self-interest and the capture and exploitation of resources for profit. The two could not peacefully co-exist on any large scale.

The devastation of subsistence economies in Alaska under ANCSA has been matched in New Zealand before the advent of Sealord's. The fisheries settlement hopefully provides the link between the economy of fishing and the sustenance of communities and ultimately Maori culture.

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118 Above n, 112, 28.

119 Above n 62, 249.

Perhaps the greatest challenge of the fisheries settlement in New Zealand is whether it can revitalise the small scale economies which once formed the backbone of Maori communities. The New Zealand model avoids the artificial economic activities which characterised ANCSA. The challenge for Maori is to channel the restored property rights in their commercial fisheries to replace or encourage subsistence and commercial activities at hapu level.

ANCSA was described as a form of social engineering, designed to bring Alaskan Natives into the mainstream of American life. The possibility that Tribal governments be used to implement the settlement was rejected. In contrast, Tribal control of Maori commercial fisheries receives some recognition in the fisheries settlement. The Treaty of Waitangi Fisheries Commission, at the helm of "self-management", is an expression of tribal governance over Maori commercial fisheries. The extent of the Commission's control is however qualified. The Commission is equally accountable to the Government, as it is to Maori. Further, the Crown retains control over important areas such as the setting of resource rentals.120 Kelsey submits, under the deal "the government retained control over the nature, extent and direction of Maori economic development."121.

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119 Above n 62, 249.

120 Annual resource rentals are payable by quota holders to the government for the privilege of exclusive commercial rights to utilise property rights in quota. The rental is based upon the amount of fish quota each fisher holds, the rate varying according to species.

121 Above n 68.

It is submitted that the success of the Treaty of Waitangi Fisheries Commission could well determine the success of the fisheries settlement. The Commission faces a dilemma. On the one hand it must avoid concerns already expressed to the Waitangi Tribunal, of operating as a Maori bureaucracy,122

> .....holding the power and the assets at the centre, that Maori would get shares in a business but not a chance to be in the business themselves, or that the scheme would advantage groups and prejudice individual initiatives,.....

On the other hand the Commission must address the need to maintain the central business asset that generates the necessary revenue. This also raises the concern as to how the Commission will effect allocation of settlement assets and revenue from the commercial property rights. The validity of claims to a "full and final" settlement could well rest on how Sealord's is carved up.

Under ANCSA villagers were forced to place all of their ancestral lands in the corporation. The restrictions on the alienability of shares until December 1991 were extended by amendments in 1987. The extension however provided for an opt out procedure which allowed for alienation.123

> Although the amendments appear to address the Native's concerns about preserving their land, ...they contain provisions which serve to potentially diminish the Natives ability to control their land.

For the Native people's of Alaska, like Maori, ancestral land is held in trust for future generations. In this respect ANCSA was fundamentally flawed by cultural conflict. The focus of this conflict is the land:124

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122 Above n 9.

123 Above n 111, 405.

124 Above n 112, 73.

> To one culture, the land is inalienable. Alaska Natives believe that land is held in common by the tribe, a political community that is perpetual. Every member of the community in succeeding generations acquires an interest in the land as a birthright. But to western society, land is a commodity to be bought and sold.

The fisheries settlement, it is hoped, provides the means by which future Maori generations can enjoy property rights in commercial fisheries of which their predecessors were denied. Statutory distinction between Maori commercial and non-commercial fisheries and Maori endorsement of the QMS represents inherent cultural conflict. Maori commercial fishing rights take the form of individual transferable quota, a transferable private property right. A key difference between ANCSA and the fisheries settlement is that under ANCSA shares are held by individuals whereas ITQ's will be held by tribes.

Alaskan Natives now realise that ANCSA has failed them and that its goals are at cross purposes with their own. Today they are trying to strengthen their subsistence economy and to restore their tribal governments.125

B *The James Bay Agreement 1975 (Canada)*

The Fort George area, as with much of Canada's north, was being opened up for resource exploitation and development. The James Bay project, begun in 1971, involved the building of a large-scale hydro electric power station. In 1971, the Cree of James Bay and the Inuit of Northern Quebec were heavily dependent upon hunting, fishing, trapping, and the harvesting of natural resources of the land.126

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125 Above n 112, 19.

126 B. Diamond "Aboriginal Rights: The James Bay Experience" *Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) 266.

The government of Quebec was firm in its view that the Cree and Inuit contested in Court the original development plans. Billy Diamond states:127

> To assess properly the strength of our claim based on aboriginal rights, it must be recalled that in 1971 the official position of the federal government was that aboriginal rights would not be recognized; the Supreme Court of Canada would not hear the Calder case until 1973.....At the time that we initiated our court proceedings, the British Columbia Court of Appeal had ruled against the Nishga's claim to aboriginal title.

At the time the Cree and Inuit initiated proceedings, no court in Canada had ever granted an injunction based on a violation of aboriginal rights.128 After a long and complex court case, Mr Justice Malouf held that the Cree and the Inuit had some apparent rights in the territory. The practical effect of the judgment was to shut down all development in the traditional area of the Cree and Inuit.

A short time after, three justices of the Quebec Court of Appeal, suspended the effect of Mr. Justice Malouf's injunction.129

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127 Above n 126, 268.

128 Above n 126, 269.

129 *Kanatewat* v *James Bay Development Corp.* (1974) R P 38 (C5); rev'd (1975) C A 166 (QCA).

The Quebec Government made an offer of settlement to the Cree and Inuit. Although they did not regard the offer as a good one, the Cree and Inuit reluctantly decided to negotiate.130 They felt their chances of winning the case in the Quebec Court of Appeal and probably in the Supreme Court of Canada were minimal. The Cree and the Inuit also feared, even if they did win in the courts, the Federal Parliament would respond to political pressures from the Quebec Government and eventually pass a law extinguishing aboriginal rights.

The negotiations led to an agreement which the Cree and the Inuit felt was an acceptable settlement, bearing in mind their tenuous situation. The Agreement effected a cession and surrender of all the native claims, rights, titles, and interests of the Cree and the Inuit in and to land in Quebec. In return they received land in fee simple (the Inuit received two million acres, the Cree about one million acres) and the exclusive right to hunt, fish, and trap on an additional thirty-eight million acres.

The James Bay Agreement is a good example of how a shifting sense of justice can overtake an agreement. At the time the agreement was signed claims to aboriginal title were not recognised in Canada and the Cree and the Inuit had to negotiate on that basis. The development of the doctrine of aboriginal title and its subsequent recognition131 has meant the ground rules have significantly changed.

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130 See generally B. Diamond, above n 126.

131 The existence of aboriginal title is now recognised by the law of Canada: see *Calder* v *Attorney-General of British Columbia* [1973] SCR 313, (1973) 34 DLR (3rd) 145: *Guerin* v *The Queen* [1984] 2 SCR 335, (1984) 13 DLR 321 (4th); *R* v *Sparrow* [1987] 2 WWR 577, 246.

The nature of the Native claim to the land has changed. Added to this has been controversy over exactly what was surrendered. Billy Diamond suggests the extinguishment of Cree and Inuit claims did not effect extinguishment of aboriginal title.132

Whether the ground rules change with respect to Sealord's in ten or twenty years from now is a moot point. The question may arise as to whether the Sealord's deal was assessed as a remedy based on "need" or a remedy based on the value of lost property rights. Need, like justice, is not a concept which stands still. If the settlement is deemed in years to come to be based on need its adequacy may well be tested.

Whether the bargaining position of Maori in relation to the Sealord negotiations can be equated with that of the Cree and the Inuit is debatable. It seems Maori generally did regard the terms of the deal as acceptable. Equally it could be argued Maori, like the Cree and Inuit, felt goaded by the opportunity of available quota to accept the settlement. Tipene O'Regan, Chairperson of the Treaty of Waitangi Fisheries Commission has stated that the "fragility of the legal position" was an important factor in the decision of the Maori fisheries negotiators to pursue the settlement. 133

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132 Above n 126, 283.

133 Treaty of Waitangi Fisheries Commission *Hui-A-Tau* (Treaty of Waitangi Fisheries Commission, Wellington, 1993) 4.

C *Conclusion with regard to Historical Parallels*

There are significant parallels between the fisheries settlement and the two North American settlements outlined above. Maori commercial fishing rights under the Treaty of Waitangi are extinguished, as are judicially recognised customary fishing rights. The structure of the Sealord deal is similar to ANCSA, utilising corporate entities and the market place as a means of settlement. The "Campaign Against Foreign Control of Aotearoa" is critical of the form of the fisheries settlement:134

> Maori fishing claims have been successfully channelled into the extractive capitalist model, working in active partnership with local and international Big Business. They are the primary beneficiaries of this, along with a rapidly emerging Maori capitalist elite. Ordinary Maori stand to gain very little, and indeed have lost all future fishing claims.

Whether endorsement by Maori of the QMS is consistent with an objective to revitalise small scale Maori fishing economies is open to conjecture. Market forces and the need "to maintain the central business asset that generates the necessary revenue" may count against getting Maori back into the business of fishing. ANCSA's failure is attributed, in part, to its inability to strengthen subsistence economies. While Maori have been endowed with a profitable corporate, it is conceivable that their ability to revitalise subsistence economies will be just as unsuccessful as ANCSA.

The fisheries settlement avoids the artificial economic activities which characterised ANCSA. However the separation of commercial and non-commercial Maori fishing is an artificial imposition which abrogates Maori custom.

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134 M. Horton *In Deep Water? Fishing in New Zealand* (Campaign Against Foreign Control of Aotearoa, Christchurch, 1993) 2.

There is also potential for the Sealord's deal to be undermined by conflict, especially with regard to the allocation of benefits under the settlement.

Whether the settlement will be viewed in a decade or two as providing sufficient redress to Maori of their commercial fishing interests is a moot point. Significantly the Waitangi Tribunal indicated in its Settlement Report that the property interests in commercial fisheries restored to Maori were sufficient. The Tribunal states, "We are not convinced there is a compromise in the quota aspects of this settlement, at least on the Maori side."135 The Tribunal did not accept the view that Maori were giving away too much of their commercial fishing interests:136

> Most especially we do not accept the view that Maori are entitled to 100 percent of the fishery and should compromise at nothing less than 50 percent. That view does not derive from the tribunal's findings, despite assertions to the contrary. The Maori interest has not been quantified, may not be quantifiable and the tribunal has said simply that there should be such fair shares as might be negotiated, or failing negotiation, as might eventually be recommended.

In line with the Tribunal's comments, a significant number of Maori view the settlement as just. Only time will tell as to whether future generations also view the agreement as just.

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135 Above n 7, 10.

136 Above n 135.

V COMMERCIAL FISHERIES

The Settlement Act fulfils all claims (current and future) by Maori in respect of commercial fishing. It applies in respect of sea, coastal or inland fisheries including any commercial aspect of traditional fishing. The Act states that the obligations of the Crown to Maori in respect of commercial fishing are fulfilled, satisfied and discharged.137

The Treaty of Waitangi Fisheries Commission holds two packages of fishing assets on behalf of iwi - pre-settlement and post-settlement assets. The Settlement Act requires the separation of pre-settlement and post settlement assets.138 Pre-settlement assets are those acquired before the settlement of Maori commercial fisheries claims - that is 10 percent of quota species transferred by the Crown, plus cash and shares, under the Maori Fisheries Act 1989. Post-settlement assets are those acquired as a result of the Sealord settlement.

The Settlement Act in distinguishing between pre-settlement and post-settlement assets empowers the Treaty of Waitangi Fisheries Commission to allocate pre-settlement assets, however requires legislation to be developed in respect of post-settlement assets. Section 15 of the Settlement Act places a duty upon the Commission to develop, after full consultation with Maori, proposals for a new Maori Fisheries Act. The new Act will make provision for the appointment, composition and powers of future Treaty of Waitangi Fisheries Commission's and a procedure for allocating, in accordance with the principles of the Treaty of Waitangi, benefits to beneficiaries under the Deed of Settlement.

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137 Section 9.

138 Section 20.

A *The Allocation Process*

The Settlement Act did not directly address the issue of the allocation of settlement benefits. The Waitangi Tribunal in its Settlement Report recognised that the "prospective allocation of settlement benefits to the tribes caused the greatest consternation."139 Dissenting Maori felt that with principles of allocation yet to be resolved no settlement should be agreed to. The allocation issue has the potential to divide Maori and to undermine the success of the fisheries settlement. Kelsey suggests division within Maori over allocation is "created by the settlement framework dictated by the government."140

The allocation issue, it is submitted, is complicated by the terms of the settlement. The Settlement Act expressly requires Treaty of Waitangi Fisheries Commissioners to develop a procedure for allocation to Maori which is in accordance with the principles of the Treaty of Waitangi.141 This has caused concern that the principles of allocation will be fixed on the basis of the only two Waitangi Tribunal inquiries which have dealt with fisheries claims.142 Only two tribes have been heard on those principles.143 The Ngai Tahu Sea Fisheries Tribunal, according to Maori Fisheries Commission Chairperson T. O'Regan, had confirmed the "off-shore equation" as a Treaty principle in holding that Ngai Tahu had the exclusive right to the deep-sea fishery off their shores as against other tribes.144

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139 Above n 7, 5.

140 Above n 62, 269.

141 Section 15 of the Settlement Act amending s6 of the principal Act; see also paras 4.5 and 5.2 of the Deed of Settlement.

142 Above n 7, 20.

143 Muriwhenua and Ngai Tahu.

144 Above n 142.

The "off-shore equation" provides that each tribe should be deemed to possess the whole of the fishery "from their shorelines to the deep blue yonder." The fishery is defined as a "continuation of lines projecting into the sea from the land boundaries."145 It is based on tikanga Maori, or Maori law, in that traditionally tribes had authority over the seas adjoining their land.146

The "off-shore equation" or "mana whenua, mana-moana" principle particularly favours Ngai Tahu in the South. On the basis of mana-moana Southern and Chatham Islands iwi, who comprise about 6 percent of Maori, would receive between 65-75 percent of quota.147

The Waitangi Tribunal acknowledged that:148

> Other tribes had no say on the relevant principles, they pointed out, and nor had they the chance to demonstrate their special circumstances or to have their treaty fishing rights defined according to their perspectives.

Thus, these tribes had not had an opportunity to be heard on the principles, and by virtue of the settlement are prejudiced by the repeal of the Waitangi Tribunal's jurisdiction to hear their claims. Tribes who had been able to prove their fishing claims before the Tribunal would be advantaged. The Tribunal concluded that it would be impractical to hear each and every fishing claim and that the better course will be to seek an allocation scheme based on "tika" or fairness.149

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145 Above n 67.

146 The extent of this "mana-moana" protocol is in dispute - a number of Northern tribes contend it applies only to the in shore fishery.

147 See "Sharing out the Fish" *The Evening Post, Wellington, New Zealand, 12 August 1993, 11.*

148 Above n 7, 6.

149 Above n 142.

Significantly the Tribunal stated "that allocation should not necessarily be based on treaty principles and that previous tribunal opinion should not be binding on the framers of the allocation scheme."150

Indeed, "the Sealord deal was a 'full and final'..... pan-Maori settlement and the benefits must pass to all Maori."151 Allocation on the basis of fairness is inferred by paragraph 4.5.5 of the Deed of Settlement. A scheme for the distribution of benefits must satisfy "the Crown that all persons who may have rights and interests extinguished by or in consequence of this Settlement Deed will be fairly treated." While the rights and interests of dissenting tribes are not affected by the deed,152 they are extinguished by the Settlement Act. Because the Act is a "consequence" of the deed it is submitted allocation must be effected so that all Maori are fairly treated.

Also relevant is that the Crown's payment of $150 million to Maori under the fisheries settlement "was clearly part of a larger plan for the settlement of Treaty claims".153 The Deed of Settlement referred to a Treaty of Waitangi Settlement Fund "with the $150 million effectively a first call on any such fund".154

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150 Above n 142.

151 Above n 147.

152 Above n 92.

153 Above n 140.

154 Above n 140.

The deed also required that:155

> Maori recognise that the Crown has fiscal constraints and that this settlement will necessarily restrict the Crown's ability to meet from any fund which the Crown establishes as part of the Crown's overall settlement framework, the settlement of other claims arising from the Treaty of Waitangi.

Kelsey suggests those with significant fishing interests would gain preference over tribes with major land claims.156 Thus the potential for division among Maori is intensified. However another interpretation is that the Crown is signalling that allocation of benefits under Sealord's should take account of the Crown's restricted ability to meet land claims.

1 *Methods of Allocation*

A more serious concern highlighted by the Waitangi Tribunal was that the various methods of allocation had not been adequately examined. This is attributable to the Treaty of Waitangi Fisheries Commission's predecessor, the Maori Fisheries Commission, which had assumed that the basis for allocation would be tikanga Maori.157 The Waitangi Tribunal found that the Commission's annual general meeting had not approved allocation based on tikanga Maori, contrary to assertions from the Commission chairperson, T O'Regan. Indeed at the 1992 Hui-A-Tua of the Commission, a number of resolutions concerning allocation of the pre-settlement assets were endorsed by Iwi. The key resolution asked: "that the [Commission] examine the alternative methods to allocate, consult with Iwi and have prepared discussion material to enable agreement to be reached on the optimum method of allocation".158.

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155 Paragraph 4.6 of the Deed of Settlement

156 Above n 140.

157 See above n 67.

158 See 1993 Hui-A-Tau above n 133, 18.

Methods of allocation examined by the Commission include:159

(i) the location and density of fish caught in the seaward territories of Iwi (Location-Density Method, the approach preferred by the Maori Fisheries Commission);

(ii) the length of Iwi coastal boundaries relative to the length of coastline traversed by the QMA in which they are contained (Coastline-Length method);

(iii) Iwi population (Population method);

(iv) allocation to regional groupings of Iwi based on either of the three methods above.

2 *The Pre-Settlement Assets*

In light of the Settlement Act's distinction between the allocation process of pre-settlement and post-settlement assets the Treaty of Waitangi Fisheries Commission established two project teams to progress allocation issues. One team deals with pre-settlement assets, the other dealing with post-settlement assets. While work has commenced on the allocation of post-settlement assets, the primary focus of the Commission's work has been the allocation of pre-settlement assets.160 The Commission has accorded the allocation of its pre-settlement assets significant priority.

The allocation of pre-settlement assets is relevant to the allocation of benefits under the Sealord deal. The Fisheries Commission has expressed

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159 See 1993 Hui-A-Tau above n 133, 19.

160 Above n 133, 11.

the view "that even though the processes are prescribed differently, the principles governing the allocation of both sets of assets could be expected to be similar".161 Thus progress in the allocation of pre-settlement assets will provide insight into the workability of the allocation procedure prescribed under the fisheries settlement.

During the transition period the Maori Fisheries Act 1989 required the Maori Fisheries Commission to retain ownership of quota on behalf of Maori.162 As an interim measure, designed to maximise the benefits of the acquired property for Iwi, the Commission resolved to lease the quota under its control through a tender process. "Leasing the quota provides a minimum of risk, coupled with an acceptable level of return, and provides access to the quota by Maori".163 Leasing provides "a more acceptable strategy" than the alternative of the Commission actually undertaking to fish the resource itself. The Commission incorporated a Maori development incentive (a level of preference) into the tender process which provided positive assistance to iwi to lease quota. According to the Commission's 1992 Annual Report to the Minister of Fisheries virtually all of the Commission's quota was leased to Iwi organisations and individual Maori.164

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161 Above n 158.

162 Section 7; the transition period was to end on the 31 October 1992, retention of ownership relates to quota that is not transferred to Aotearoa Fisheries.

163 *Report of the Maori Fisheries Commission - Te Ohu Kai Moana* (Government Printer, Wellington, 1992) 5.

164 Above n 163.

3 *Geography or population*

The major division over allocation generally appears to be between the South which proposes the mana-moana model and the North which supports a population based model. Eighteen tribes ranging from Ngati Wai (North Auckland) to Ngai Tahu (South Island) defend the division of the resource using the principle of mana-moana which they say is grounded in Maori protocol - tihanga Maori. The populous and mainly inland northern tribes, including Nga Puhi, inland Te Arawa (Rotorua) and Tainui of Waikato and South Auckland want quota shared on a population basis as opposed to the length of a tribe's coastline.

Northern tribal groupings, including Tai Tokerau, Tainui, Te Arawa and Mataatua have formed a consortium, "Area One Fishing Consortium", representing more than 60 percent of Maori. "The Consortium questions the authenticity of mana moana as a Maori protocol, saying the debate 'has become bogged down with concoctions and new definitions of Maori Custom'".165 While accepting mana moana applied to the inshore fisheries,it disputes its application offshore. "The consortium argues that the mana moana criteria for allocation is only partially developed and not appropriate for a 'full and final' settlement".166 At the first meeting of the reconstituted Treaty of Waitangi Fisheries Commission on 31 July 1993, Area One Fishing Consortium spokesperson Rihari Dargaville submitted that the principles and policies of the old Commission be rescinded and a fresh approach be adopted.167

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165 Above n 146.

166 Above n 146.

167 Above n 146.

"The consortium wants 60 percent of the Maori quota and warns that unless a satisfactory result is found the whole process will be in jeopardy".168

The Treaty of Waitangi Fisheries Commission was required by the terms of the Settlement Act to decide by 1 October 1993 how to allocate rights to 57,000 tonnes of inshore and deep water quota (representing the 10 percent pre-settlement quota). Following a series of hui at which tribal representatives failed to agree on an allocation formula, the Commission proposed a temporary compromise. The interim compromise relates to the distribution of the $100 million of fish quota for the 1993-94 season which commenced on 1 October 1993. The Commission decided to distribute the quota on the basis of population and nine fisheries management areas ("FMA"). Fifty percent of deep water fishing quota will be offered to iwi on the basis of FMA (i.e. their coastline), and fifty percent on the basis of population. All inshore quota (100 percent) will be distributed on the basis of FMA.169

Northern tribes challenged the Treaty of Waitangi Fisheries Commission's formula, seeking judical review of the way the Commission allocated quota. Northern tribes claimed in the High Court that the Commission's method of allocation would give southern tribes a disproportionate share of the quota.170

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168 Above n 146; a consortium paper dated 23 July 1993 details the Area One Fishing Consortium's position.

169 See "Court action possible" *The Evening Post,* Wellington, New Zealand, 11 September 1993, 11.

170 See "Court dismisses northern tribes' quota challenge" *The Evening Post,* Wellington, New Zealand, 27 September 1993, 2.

"The northern tribes challenged the legal authority of the commission to decide on the allocations and asked the court to order the commission to halt its proposed scheme and to take a more even-handed approach."171

In a judgment delivered on 27 September 1993 Anderson J dismissed the applications by northern iwi but prohibited the Commission from distributing quota until 5pm the following day, giving the applicants time to provide an undertaking to accept liability for damages if they were to appeal. Application was made to the Court of Appeal for a stay of the Commission's allocation with regard to the 50 percent of quota to be allocated on the basis of tribal coastline, until appeals lodged against the High Court's main judgment could be heard. Northern iwi acknowledged that they were not financially in a position to give security for any damages that might occur from delaying quota distribution. The Court of Appeal had to consider whether it would be right to order a stay without any such undertaking.

The Court refused to extend the order preventing the Commission from distributing all of its fishing quota.172 Cooke P stated: "We are unable, however, to hold that the applicants have a sufficiently strong case ... to justify a stay without a realistic undertaking as to damages".173

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171 Above n 170.

172 *Area 1 Consortium Limited v Treaty of Waitangi Fisheries Commission,* Unreported, 29 September, Court of Appeal, CA 224/93.

173 Above n 172, 4.

The Court found no evidence that the Commission had not complied with the statutory criteria prescribed by section 8 of the Maori Fisheries Act in deciding on a scheme of allocation. Cooke P emphasised that the Commission's quota distribution scheme was a temporary compromise for the 1993-94 season:174

> The Court received assurances that the Commission and Ngai Tahu and the third respondents regard the scheme now challenged as purely an interim one, not intended to influence subsequent allocations.

Cooke P stated that one point of view was that the allocation unduly favoured Ngai Tahu and "perhaps no one is wholly satisfied with it; but it is not more than an interim solution and when seen as such it does not appear to be open to a legal attach of any strength".175

Dissent with regard to the Commission's interim allocation scheme is not limited to northern tribes. Moriori of the Chatham Islands also threatened legal action over their quota allocation. They were allocated "only 193 tonnes of orange roughy quota available in their area".176 Dissent on both sides of the divide illustrates the near impossible task facing the Treaty of Waitangi Fisheries Commission when deciding on final allocations of both pre-settlement and post-settlement assets. Clearly challenges to the interim allocation of pre-settlement assets have been made with a view to the allocation of the benefits from the Sealord deal. It is submitted that the success of the fisheries settlement will be largely contingent upon how those benefits are allocated.

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174 Above n 172, 15.

175 Above n 174.

176 See "Moriori to take legal action on fish settlement" *The Evening Post*, Wellington, New Zealand, 11 September 1993, 3.

B *Sustainability177*

> It is the Maori ownership issue that is getting the attention, and rightly so, because it is presented as the means to put right historic injustice. But it will be a hollow victory if the industry collapses from overfishing, and that is a very real risk.

Kelsey aptly observes that important questions such as the long-term viability of the fishing industry were "left-begging" by the fisheries settlement.178 There is a large body of evidence that important species, principally orange roughy, are being fished beyond levels of sustainability.179 Orange roughy, New Zealand's biggest export fishery earning around $145 million annually, provides a graphic example.180 MAF have calculated that the maximum sustainable yield for Chatham Rise orange roughy is between 3400 tonnes and 5900 tonnes. They advised the Minister to set this seasons catch limit at 5900 tonnes, down from 14,000 tonnes last season.181 The advised reduction is based on an assessment that orange roughy stock is now between 14 and 29 percent of its original biomass. Orange roughy live up to 150 years, and do not mature until 20 and 30 years old. The fish has a very slow growth rate, which means it is particularly vulnerable to overfishing.

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177 Above n 134.

178 Above n 82.

179 See above n 134; see "Crunch time in debate over future of rich fish resource" *The Evening Post*, Wellington, New Zealand, 15 September 1993, 7; "Conserving Fisheries" *The Evening Post*, Wellington, New Zealand, 27 September 1993, 8.

180 See "Crunch time in debate over future of rich fish resource" *The Evening Post*, Wellington, New Zealand, 15 September 1993, 7.

181 Above n 180.

Notwithstanding his department's advice, Fisheries Minister, Hon D Kidd, MP, maintained the orange roughy catch at 14,000 tonnes for the current season.182 Helen Hughes, Parliamentary Commissioner for the Environment, concluded in a report *Sustainable Management of the Chatham Rise Orange Roughy Fishery* that the orange roughy fishery is in imminent danger of collapse. Hughes criticised successive Ministers for failing to respond to MAF data urging catch reductions.183

Nick Flanders, visiting Fullbright scholar at Waikato University, says the lack of biological information about most fisheries is strong cause for caution. The allocation of quota under the Sealord settlement may also have implications for ensuring sustainability of the fish resource. Flanders suggests Maori unity is important because Maori interests may be different to other quota holders.185 Since Maori "are establishing long term industries it is in their interest to unite to prevent this boom or bust cycle".186

Ultimately Maori property rights to a percentage of quota will be rendered useless without the provision of a sustainable resource.

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182 See "Conserving Fisheries" *The Evening Post*, Wellington, New Zealand, 27 September 1993, 8.

183 Above n 133, 32-33.

184 Nick Flanders specialises in indigenous people and natural resources; see above n 147.

185 Above n 147.

186 Above n 147.

VI NON COMMERCIAL FISHING RIGHTS

A major concern raised by Iwi during the negotiation of the fisheries settlement was that resulting law changes and the repeal of section 88(2) of the Fisheries Act 1983, would remove protection of customary and traditional fishing rights. The status of Maori non-commercial fishing rights no longer give rise to legal rights and obligations and no longer have legislative or judicial recognition.188 The deed and Settlement Act however state that Maori non-commercial fishing rights and interests are not extinguished. They continue to be subject to the principles of the Treaty of Waitangi and continue to give rise to Treaty obligations on the Crown.189

While Treaty rights and interests are not extinguished in a technical sense, it is submitted that effectively this is the case. The treaty interest in non-commercial fisheries is rendered legally unenforceable. The Waitangi Tribunal's interpretation of the deed is that the treaty interest in non-commercial fisheries is "effectively abrogated".190 The right of Maori to take matters related to their non-commercial customary fishing interests to the Waitangi Tribunal is continued.191

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187 Section 33 of the Settlement Act repeal s 88(2).

188 Section 10(d) of the Settlement Act, para 5.2 of the Deed of Settlement.

189 Section 10(a) of the Settlement Act, para 5.2 of the Deed of Settlement.

190 Above n 7, 8.

191 Above n 190, though the Tribunal expressed doubt whether the Tribunal can undertake that role.

The Settlement Act provides for regulations to be developed by the Crown for the protection of Maori non-commercial fishing rights and interests after consultation with Maori.192 Maori will not be able to lodge claims with the courts relating to non-commercial fishing rights, unless provisions for such rights have been included in the regulations developed under the Settlement Act. The regulations and policies for non-commercial fisheries may be reviewed by the Waitangi Tribunal.193

The Waitangi Tribunal found that "the provision of regulations to perfect, augment or develop the treaty right is entirely consistent with the Treaty".194 However the Tribunal stated that the effective abrogation of the general treaty right "is neither consistent with the Treaty nor necessary in our view".195 The Tribunal saw "no reason why the regulations should not be made to effect the principles of the Treaty, without abrogating anything".196

The Waitangi Tribunal expressed concern that Maori would be prejudiced by the lack of a suitable body to conclusively determine whether the regulations are consistent with the Treaty and provide adequately for Maori treaty interests. The Tribunal recognised doubt existed over whether it could undertake this role itself, and even if it could, "we are not convinced that tribunal recommendations substitute adequately for court determinations".197

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192 Section 34 amending s 89 of the principal Act.

193 Paragraphs 3.5.1.4 of the Deed of the Settlement.

194 Above n 190.

195 Above n 190.

196 Above n 190.

197 Above n 190.

The ability of the courts to assess regulations against broad principles in the Treaty will be excluded. The courts inquiry will be limited to judicial review and discussions of vires, unless provision is otherwise made in the regulations to extend their role.

A *Regulations*

Paul McHugh suggests the contention that Maori non-commercial rights are not affected by the Deed "is simply not true for the Deed contemplates a fundamental relocation of the lawmaking power over tribal fisheries".198 The source of the regulation of tribal fisheries is "taken from the tribe and given back to officialdom".199 McHugh submits that the inclusion of traditional non-commercial fisheries has the greatest potential to undermine the fisheries settlement. Thus "the Deed of Settlement might well have been acceptable throughout Maoridom were the agreement limited solely to commercial sea fisheries".200

"Maori have never taken to the regulation of their traditional fishing grounds by Pakeha law and its administration by fisheries officers".201 Maori must again adapt to a structure "whose lawfulness derives from permissive Pakeha law rather than from tribal society itself".202

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198 Above n 84, 355.

199 Above n 84, 357

200 Above n 199.

201 Above n 199.

202 Above n 199.

McHugh suggests the Deed of Settlement discloses a fundamental intention to return non-commercial traditional fisheries to pre-*Te Weehi* law.203 Indeed the power of Maori over traditional fisheries is "diminished to a right to be consulted as to the content of the new regulations".204

Notwithstanding provision for Maori to be consulted, a major concern expressed to the Waitangi Tribunal was that too much power was left in the hands of the Crown, or its department agents to determine the regulations. "There was a very real fear that some matters might not be properly provided for, and most especially, that the tribal control, or rangatiratanga, would once more be subverted".205 McHugh questions "the likelihood of regulations drafted by a central, governmental bureaucracy commanding the same responsiveness as that generated within the tribal community itself".206

An inter-related concern is the lack of a guarantee "that anything resembling the present system of regulation by customary law will be preserved".207 The Waitangi Tribunal found that it would be contrary to the Treaty if no provision to review the regulations against the Treaty's principles was provided in the settlement. No such provision was made in the Settlement Act. The protection of Maori traditional non-commercial fisheries rights are further threatened by the fact that the proposed regulations or any failure to make them are not subject to court review.

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203 Above n 84, 358

204 Above n 203.

205 Above n 7, 9.

206 Above n 199.

207 Above n 199.

"The danger is that Maori interests will become, as they have been before, overly susceptible to political convenience or administrative preference".208 McHugh aptly concludes:209

> The Deed does not guarantee that any new regime for the non-commercial tribal fisheries will not prejudice the present system of Maori customary law. If any feature of the Deed of Settlement is to sink the agreement and to incur the wrath of future generations, it will be that.

1 *The proposed regulations*

Tipene O'Regan has stated "the development of regulations to more effectively protect customary fishing rights secured and guaranteed in Article II of the Treaty is pivotal to the successful implementation of the Settlement Act".210 O'Regan's comment "that I have been less than impressed with the dilatory nature of the Crown's efforts on this matter to date"211 exemplify renewed Maori dependence upon the good faith of the Crown in relation to recognition of traditional non-commercial fishing rights and interests.

Section 10(c) of the Settlement Act requires the Minister to make regulations to recognise and provide for:

- customary food gathering by Maori (as long as that food is not sold for commercial gain or trade);
- protection of places which are of customary food gathering importance (including mahinga mataitai and tauranga ika).

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208 Above n 205.

209 Above n 203

210 Above n 71, 6.

211 Above n 210.

2 *Regulations relating to customary food gathering*

These regulations will recognise and provide for customary food gathering by tangata whenua, or persons authorised by tangata whenua, to take fish in accordance with their customary practices in any part of their rohe. Similar provision currently exists in the Fisheries (Amateur Fishing) Regulations 1986. Regulation 27, "commonly known as the hui and tangi regulation",212 is revitalised by the Settlement Act to allow fish to be taken for hui, tangi "or traditional non-commercial fishing use approved by the Director-General". McHugh is critical of regulation 27, describing it as "an indication of how Maori custom is being usurped by Pakeha institutions and decision makers".213

A "Discussion Paper" published by MAF acknowledges that "Tangata whenua need to have full control over the taking of fish under an Iwi customary right, subject to the sustainability of the fishery".214 Thus it is recognised regulations will need to provide sufficient authority to tangata whenua to allow them to fully manage fisheries in their areas. According to MAF, regulations could provide for:215

> A system to transfer the authority to approve the taking of kaimoana from the Crown to the tangata whenua and to identify the proper source of authority to exercise those controls.

Thus, the proposed regulations have the potential at least, to allow Maori to exercise a degree of autonomy over their customary food gathering.

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212 *Kaitiaki o Kaimoana: Treaty of Waitangi (Fisheries Claims) Settlement Regulations - A Discussion Paper* (Ministry of Agriculture and Fisheries, Wellington, 1993) 7.

213 Above n 203.

214 Above n 212, 11.

215 Above n 214.

3 *Mataitai reserves*

The Settlement Act provides for regulations empowering the Minister to declare mataitai reserves. Mataitai reserves can only be declared after consultation (by the Minister and the tangata whenua) with the local community and after having regard to the sustainable management of the fish, aquatic life and seaweed within the proposed reserve.216 Regulations providing for the establishment of mataitai reserves can:217

- provide for such things as are necessary or desirable for the sustainable management of the fishery resources within the reserve;
- empower a Maori Committee, marae committee or kaitiaki of the tangata whenua to make *bylaws.*

Provision for the making of bylaws will be subject to two provisions:218

- every restriction or prohibition imposed on fishing must apply equally to all individuals;219
- the bylaws must be approved by the Minister and be gazetted in the Gazette.

These provisions aim to enable the tangata whenua of the area "to exercise a greater degree of tino rangatiratanga over those places which are of special significance or importance to them as customary food gathering places".220

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216 Above n 212.

217 Above n 212

218 Above n 212, 8.

219 Notwithstanding that the Act provides that restrictions and prohibitions must be of general application, if the management committee of the reserve introduces a bylaw closing the area to harvest by individuals it may still be empowered to allow the taking of fish, aquatic life or seaweed to continue for purposes which sustain the functions of the marae.

220 Above n 218.

An important qualification on the exercise of this control is that it must be carried out in a manner consistent with the sustainability of the fishery in the area. While it will be possible for "mataitai" regulations (and their bylaws) to prevail over other legislation in the area of the reserve, the approval of a mataitai reserve will not confer rights or responsibilities to Maori under the Resource Management Act 1991".221 "Mataitai reserves only give exclusive management of the fishery. Exclusion of people for purposes other than fishing can only be made under the RMA".222

(a) *Relationship between mataitai reserves and taiapure*

Section 89 (1c)(a) of the Settlement Act states that regulations made to recognise and provide for mataitai reserves may overrule general fishing regulations and those relating to taiapure - local fisheries regulations. Mataitai reserves apply only to areas which are of importance for customary food gathering purposes. The Treaty of Waitangi Fisheries Commission has recognised that concern has been raised that the Settlement Act only makes provision for regulations dealing with "customary food gathering" and that "this may not be sufficiently broad enough to encompass, for example, the use of, say, Seaweed or Rimu Rapa for poha".223 Thus mataitai reserves do not apply to areas which tangata whenua want to protect for other purposes such as their spiritual associations with the people or to marine species not used for food. It is however conceivable that these types of areas can be provided for by taiapure.

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221 Above n 212, 21

222 Above n 221.

223 Above n 71, 22.

4 *Conclusion with regard to traditional non-commercial fisheries*

Tipene O'Regan's comment that the proposed regulations protecting customary fishing rights will be "pivotal" to the success of the Settlement Act is apt. Notwithstanding the reservations expressed by commentators such as McHugh, the proposed regulations have the potential to empower Maori in the management and to some extent control of their traditional non-commercial fishing areas. It is submitted the proposed regulations have the potential to provide statutory recognition of a "pluralistic legal culture" which McHugh submits was developing in the evolution of case law as a consequence of *Te Weehi*.224 Nevertheless, the unnecessary abrogation of the treaty interest in non-commercial fisheries and the inability of Maori to have regulations reviewed as against treaty principles in the courts, provides scope for future grievance and injustice.

VII MANAGEMENT AND CONTROL

Kelsey aptly suggests that under the Sealord deal "the government retained control over the nature, extent and direction of Maori economic development".225 The ability of Maori to manage and control commercial fisheries will be subject to overriding statutory and market forces. Maori economic development has been locked into "contemporary market capitalism". With regard to the commercial arm of the settlement, fish is viewed as a tradeable commodity with little room for non-commercial concerns such as employment, environment or tribal development.

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224 Above n 199.

225 Above n 62, 268-69.

The Treaty of Waitangi Fisheries Commission is at the head of Maori management over their sea fisheries. The Commission is as equally accountable to government as it is to Maori. The present Commission was appointed by the Crown, not Maori. The proposed new Fisheries Act is expected to provide the means by which future Commissions are appointed. While Maori will have some input into the Bill, it is government who will decide its final form.

Similarly under section 17 of the Settlement Act the Commission may report to the Minister of Fisheries its recommendations as to how benefits from Sealord's should be allocated. The Crown "can request the Commission to reconsider its proposed distribution". Ultimately it is the Crown who make the final decision as to allocation.

A *Consultation*

Maori management over their sea fisheries is perhaps more illusory than real. While the Settlement Act extends the role of the Commission into a range of general fisheries management issues, the Commission's involvement in key areas of management is limited to the right to be consulted. The Minister of Fisheries, for example, is required to consult with the Commission when setting the TACC for any fish managed within the QMS or when setting a TACC for any new fishery to be introduced into the QMS.226 Consultation will at least provide Maori with the opportunity, for example, to advocate recognition of the Maori traditional component in TACC setting procedures.227

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226 Section 24 of the Settlement Act amending s 28D of the principal Act.

227 In the past the Crown has not taken this portion of harvesting into account separately when setting the TACC for any fishery.

The Minister is also required to consult with the Commission on issues relating to the appropriate deemed value of fish and species or class of fish subject to the QMS.228 Notwithstanding the limited extent of Maori management over their sea fisheries, it is a positive aspect of the settlement and the evolution of the Crown-Maori partnership that the Crown are required to consult with Maori.

One respect in which the non-commercial fishing right under the Treaty of Waitangi is not "effectively abrogated" is evident under section 10 of the Settlement Act. Subsection (b) places a statutory duty on the Minister of Fisheries, acting "in accordance with the principles of the Treaty of Waitangi", to consult with tangata whenua about, and develop policies to help recognise use and management practices of Maori in the exercise of non-commercial fishing rights. Nevertheless McHugh is critical of the Deed of Settlement, which he states will severely compromise the tribal aspect of the regulation of tribal non-commercial fisheries. McHugh states: "The Deed quite clearly demonstrates an intention to revert to the centralised, bureaucratic and non-tribal control of fisheries which marked the pre-*Te Weehi* period".229 As already mentioned above, the extent of Maori control over traditional non-commercial fisheries is contingent upon proposed regulations. Contrary to McHugh's concerns, Maori will possess some input into management and control through their ability to make bylaws. Notwithstanding that these bylaws will be subject to Crown approval, it is submitted that Maori will have significantly more autonomy in the regulation of non-commercial fisheries than that which marked the pre-*Te Weehi* period.

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228 Sections 28 and 29 of the Settlement Act respectively.

229 Above n 199.

B *Dispute Resolution*

Conflict between Maori over the allocation of pre-settlement assets illustrates that no appropriate mechanism for dispute resolution between Maori currently exists. Area eight convener and spokesperson Kara Puketapu, representing tribes from Taranaki to Wellington, believes provision must be made for a disputes process.230 Puketapu suggests a disputes resolution body be used to avoid threatened legal action. "Independent overseas experts could judge if iwi had a valid complaint".231

The Waitangi Tribunal has also expressed concern in regard to the lack of an appropriate body to review and deal with disputes between Maori. The Tribunal's comments were made in reference to problems which may arise from disputes over allocation of settlement assets. The Tribunal stated:232

> An allocation scheme may also need to provide for an investigation of the comparable circumstances of each tribe, by some appropriate body. Occasional reviews of the allocation scheme and a hearing of individual complaints may also be necessary.

The Tribunal does not support a role for itself in deliberating over or resolving such disputes: "This tribunal however deals with treaty principles and with claims against the Crown and the issues here are essentially between Maori".233 The Tribunal suggested its jurisdiction is "too circumscribed" to deal adequately with disputes between Maori.

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230 See "Fish challenge decision to cost NZ millions" *The Evening Post,* Wellington, New Zealand, 28 September 1993, 1: "Local Maori urge regional split of $100m fish quota" *The Evening Post*, Wellington, New Zealand, 27 August 1993, 3.

231 See "Local Maori urge regional spit of $100m fish quota" *The Evening Post*, Wellington, New Zealand, 27 August 1993, 3.

232 Above n 7, 21.

233 Above n 232.

The Tribunal expressed confidence in the new Treaty of Waitangi Fisheries Commission "to work out a scheme to be legislated for that would accommodate these problems".234 A proposed framework for the resolution of disputes is being developed by the Commission.235

While the settlement framework can be criticised for not providing a suitable dispute resolution mechanism, it is appropriate that Maori have the opportunity to implement a mechanism themselves, rather than have one imposed upon them.

C *Resource Rentals*

An important variable over which Maori have no control is the setting of resource rentals. Government is currently looking at full cost recovery with effect from 1 October 1994.236 While the fishing industry favours phased introduction of cost recovery and the abolition of resource rentals, government is keen to continue resource rentals.237 The ability of government to raise rentals is a significant variable which needs to be taken into account when considering the value of property rights restored to Maori. A rise in resource rentals to maximum market value "would dramatically reduce the annual fisheries income, and severely undermine the market value of the quotas, in turn eroding the capital value of fishing companies and jeopardising those borrowings which used the quotas as security".238

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234 Above n 232.

235 Above n 71, 19.

236 Above n 71, 21.

237 Above n 236

238 Above n 72.

Kelsey suggests raising resource rentals is one of the ways the government will claw back its funding of the fisheries settlement. The setting of resource rentals provides another uncertain variable when assessing the likelihood of success for the fisheries settlement.

VIII CONCLUSION

It has not been the purpose of this paper to accentuate the negative aspects of the fisheries settlement and to predict its demise. McHugh, discussing the Deed of Settlement, aptly states: "There are, however, enough areas of uncertainty and non-justiciability to put at least a question mark around many aspects of the Deed".239 Those question marks were effectively codified by the Settlement Act. The purpose of this paper has been to identify those problem areas with a view to suggesting ways in which future settlements could avoid them.

As a framework for future settlements it is submitted there are important lessons to be learnt from the Sealord deal. Consultation and negotiation should not be compromised by haste and confidentiality; potential conflicts should be identified and resolved before, not after settlement; and an appropriate forum to resolve future disputes should be put in place.

With regard to the settlement purporting to be "full and final" there are a number of contingencies. These include the implementation of a fair scheme for allocation of settlement assets; the sustainability of the fish resource; the extent to which proposed regulations restore Maori tino rangatiratanga over their traditional non-commercial fisheries; and the setting of resource rentals by government with regard to commercial fishing interests.

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239 Above n 203.

It is difficult to assess whether future generations will view the settlement as just. While the Waitangi Tribunal has indicated it views the redress, in terms of quota at least, as sufficient, the Tribunal rightly warned Maori against quantifying adequate redress.

Comparison with failed North American models suggests significant parallels exist, however, there are also significant differences. Ultimately the success of the fisheries settlement, it is submitted, will rest upon whether it provides all Maori with the opportunity to develop an economic base and whether it restores Maori tino rangatiratanga over their fisheries. Whether the settlement provides the genesis to get Maori back into the business of fishing is questionable. Maori commercial fishing now takes the form of participation in a multi national fishing company. Channelling settlement benefits to small fishers will be difficult. Dividing and allocating quota into small holdings is unlikely to be economically viable. Even if this does occur, individual or small Maori holdings of quota will not have the necessary resource to allow them to invest in their own large fishing boats needed to fish for deep sea species. The likely scenario is that Maori in these situations would need to fish with joint venture partners from offshore. For Maori to keep leverage in the market much larger allocations of quota will be necessary. It is submitted that concerns the settlement will not get Maori back into the business of fishing but will provide Maori with an investment in fishing are likely to be well founded.

Whether the settlement restores Maori tino rangatiratanga over their sea fisheries is also questionable. Proposed regulations have the potential to provide Maori with some autonomy over traditional non-commercial fishing. Maori tino rangatiratanga over commercial fisheries is limited, by in large, to the right to be consulted by the Crown.

The partnership which evolves from the Treaty of Waitangi is ongoing, thus it may be inappropriate to talk in finite terms. Predicting the fisheries settlement's definite demise would itself be as foolhardy as labelling the settlement "full and final".

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