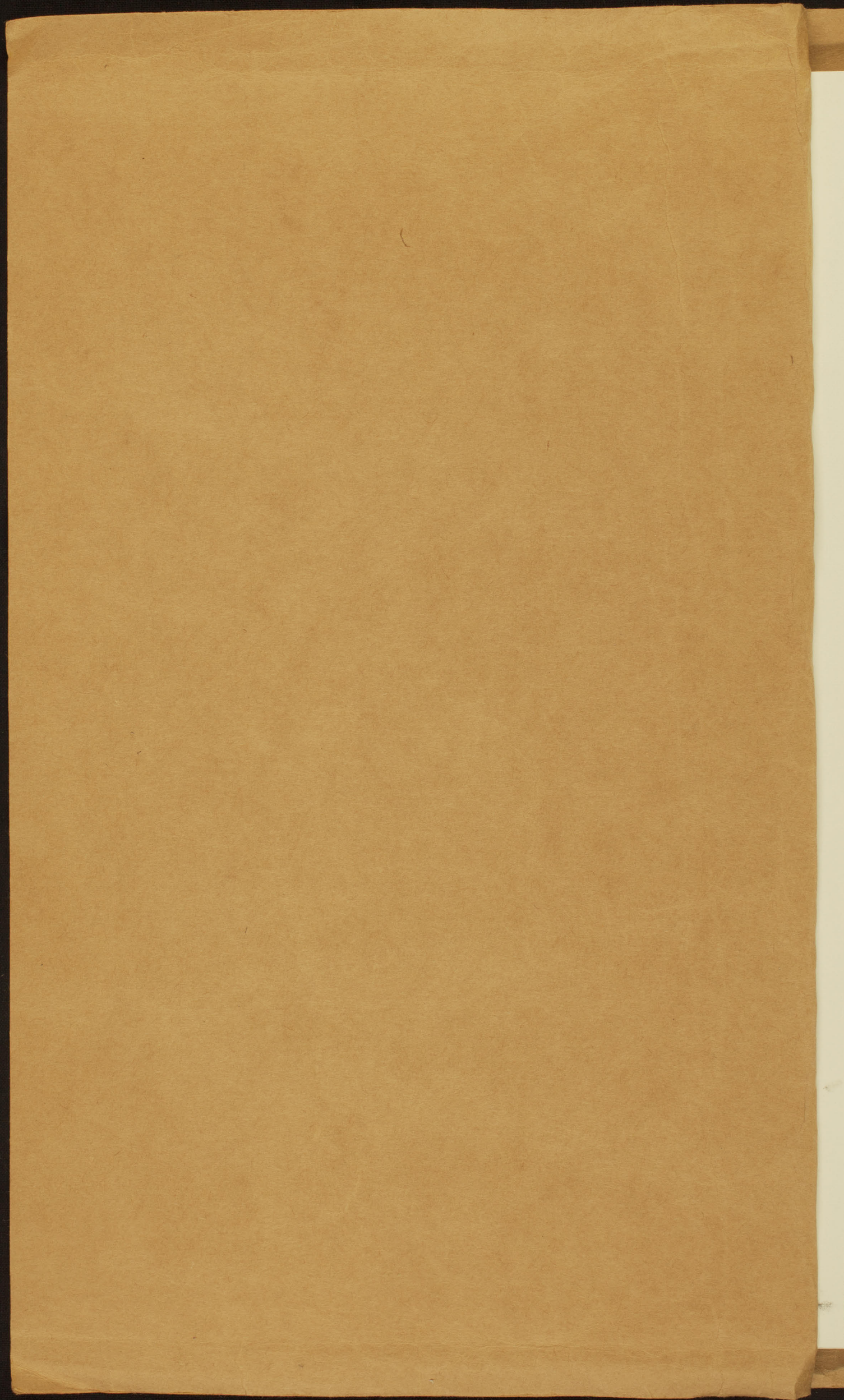


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JUSTINE MARY MUNRO

**THE TREATY OF WAITANGI
AND THE SEALORD DEAL**

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INTRODUCTION

On 23 September 1992 the Crown and Maori representatives signed a deed in full and final settlement of Maori claims to fishing rights under the Treaty of Waitangi. This paper asks whether the "Sealord deal", as it has come to be called, is in accord with the Treaty of Waitangi. The paper develops a framework of Treaty principles with which to guide the substance and process of Treaty claims settlements in 1993. It concludes that the Sealord deal was an understandable attempt by the Crown and Maori to seize an opportunity to settle Treaty fishing claims. The principles of the Treaty of Waitangi were, however, sacrificed in order to achieve this result. The paper argues that this is unacceptable. The Treaty of Waitangi is the basis on which New Zealand must move beyond colonialism towards bicultural nationhood. The Sealord deal must be rejected as the basis for future Treaty claims settlements.

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I INTRODUCTION*

On 23 September 1992 the Crown and Maori representatives signed a deed in full and final settlement of Maori claims to fishing rights under the Treaty of Waitangi.¹ The deed was enacted on 10 December as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.²

The Sealord deal was immediately hailed as "an historic settlement."³ The Crown had at last recognised Maori fishing rights under the Treaty of Waitangi and reached what the Crown and the Maori negotiators claim is a fair and honourable resolution.⁴ The Sealord deal gives Maori a major stake in the New Zealand fishing industry and a significant opportunity to get back into the business of fishing.⁵ The Crown thus claims to have fulfilled its Treaty obligations to Maori,⁶ and in a way that takes Maori beyond "grievance mode" to "development mode."⁷ This, it is said, is the beginning of "a new era in Crown-Maori relations."⁸

The Sealord deal, however, has its drawbacks. Major issues have been raised, for example, concerning the adequacy of Maori consent and the effective abrogation of Treaty rights; and some Maori opposed the deal before the Waitangi Tribunal, the High Court and

* This paper incorporates events up to 1 September 1993.

¹This is commonly called the "Sealord deal" or the "fisheries settlement." These terms will be used interchangeably in the paper.

²Hereafter the "Settlement Act."

³The Minister of Justice, Hon D Graham, MP quoted by the Speaker: New Zealand Parliamentary Debates, Vol 529, 1992: 11214.

⁴The Minister of Justice stated: "From the Crown's point of view it discharges an obligation, and we can say that we can now lift our heads up because we have acted honourably at last." (New Zealand Parliamentary Debates Vol 529, 1992: 11217.)

⁵The Sealord deal is worth approximately \$0.5 billion: D Graham, New Zealand Parliamentary Debates Vol 532, 1992: 12817. The Maori share of national quota will be close to 45 per cent: A Leavesley "Sharing out the fish" *The Evening Post*, Wellington, 12 August 1993, 6.

⁶The Prime Minister, Rt Hon J Bolger, stated: "We said that we saw the Treaty of Waitangi as the founding document of New Zealand, and, consistent with that, an honourable agreement has been reached." (New Zealand Parliamentary Debates Vol 532, 1992: 12827.) The Settlement Act states in its preamble that:

The Crown and Maori wish to resolve their disputes in relation to the fishing rights and interests and the quota management system and seek a just and honourable solution in conformity with the principles of the Treaty of Waitangi.

⁷The Sealord deal "will get Maori ... out of the courts, and ... back into the business of managing their fisheries and achieving the economic development potential that it offers": Mr Graham, New Zealand Parliamentary Debates Vol 532, 1992: 12817, 12820, 12843. Mr Tipene O'Regan, one of the Sealord deal's Maori negotiators, adds: "There is a time to lay down your guns and pick up your tools and trade out into the piece ... it's time for us to switch into growth mode." (P Tumahai "Tipene talks on hooking the big one" *Te Maori News*, February 1993, 6.)

⁸The Sealord deal has "captured the spirit of New Zealand in 1992. It is a spirit that says: 'We want New Zealand to go forward.'" (Mr Bolger, New Zealand Parliamentary Debates Vol 532, 1992: 12827.)

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the Court of Appeal, the Human Rights Committee of the United Nations, and in Parliament.

The Crown and the Maori negotiators have acknowledged the difficulties. This, however, was "a tide that had to be taken at the flood."⁹ As Mr Tipene O'Regan, one of the Maori negotiators, explained:¹⁰

There is a narrow window of opportunity and we don't have time for haggling and puhaehae if it is to be seized. We either do it or we sit on a rock crying about what might have been for the next generation or so.

Ultimately, there was a balance to be struck between principle and practice, theory and results: the Crown and the Maori negotiators struck the balance here. The Sealord deal was, they argued, in the circumstances of 1993, an appropriate fulfilment of the Treaty of Waitangi. Others, however, have dissented. The Sealord deal, they say, reveals a limited understanding of the Treaty of Waitangi and an inadequate vision of New Zealand's future. Fundamental principles have been sacrificed for short-term gains. This deal, it is argued, must not become the model for future Treaty settlements.

This paper considers whether the Sealord deal fulfils the Treaty of Waitangi in the circumstances of 1993. It develops an account of the principles of the Treaty, based on the work of the Waitangi Tribunal and the courts. The paper proceeds in three parts, as follows:

- i. Part II develops a framework of principles for Treaty claims settlement which will provide the basis for our consideration of the Sealord deal;
- ii. Part III gives the background to the Sealord deal and an overview of the settlement; and
- iii. Part IV considers the settlement against the Treaty framework, drawing out its wider significance for the evolution of the Crown-Maori relationship in New Zealand.

⁹*Te Runanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 307 ("Te Runanga O Wharekauri").

¹⁰Maori Fisheries Commission *The Sealord Deal - What it means for Maori* Special Issue, September 1992.

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II THE PRINCIPLES OF THE TREATY

A *The Treaty of Waitangi*

The Treaty of Waitangi is New Zealand's founding document and its constitutional foundation.¹¹ It is the basis on which two peoples, Maori and Pakeha, agreed to live in one country, New Zealand.¹² When we turn to the Treaty now, however, we are calling on it to respond to a situation where its promises have been broken, and the intentions and expectations of at least its Maori signatories frustrated. Given the legacy of the past and the reality of the present, how do we honour the Treaty now? It is this question that the Crown and Maori grappled with in the Sealord deal and which concerns us in this paper.

We consider in this part the principles of the Treaty of Waitangi which guide Treaty claims resolution.¹³ We look, first, to the principles governing content; and, secondly, to those which guide procedure. These provide the framework by which we shall consider the legitimacy of the Sealord deal in Part IV.

¹¹The Treaty of Waitangi is now recognised by the Crown as having this status. The Labour Government required all legislation to be assessed against the principles of the Treaty of Waitangi: Cabinet Office Circular CO (86) 10 of 23 June 1986. The National Government acknowledges the Treaty as New Zealand's founding document: New Zealand National Party *Facing the Future Together* National Maori Affairs Policy, released 22 July 1990. Both governments have recognised the Treaty directly in legislation: see, for example, the State-Owned Enterprises Act 1986 ("SOE Act"); the Resource Management Act 1991; and see further those acts detailed in Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (Report No 6, rev ed 1991) appendix D.

¹²The Waitangi Tribunal has stressed that:

[T]he Treaty was an acknowledgment of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country but acknowledged that we were two people. [This is] an important and basic proposition. It is fundamental to an understanding of the Treaty of Waitangi. ... It established the regime not for uni-culturalism but for bi-culturalism. (Waitangi Tribunal *Orakei Report* (Government Printer, Wellington, 1987) 130 ("*Orakei*"); Waitangi Tribunal *Motunui-Waitara Report* (Government Printer, Wellington, 1983) 52 ("*Motunui*").)

¹³The basis of this analysis is the "principles" of the Treaty, rather than the Treaty text. As Sir Robin Cooke explained extra-judicially:

[T]he Treaty is a brief document - a preamble, three articles, a testimonium - standing for a set of embryonic and partly conflicting ideas, which by any normal process of verbal interpretation could not possibly be made to supply answers to the specific problems of the vastly different society existing 150 years later. The courts and the Tribunal alike, and Parliament itself in deciding to refer to principles, have placed in the forefront the need to get at the spirit and underlying ideas of the Treaty, to apply them as realistically and reasonably as possible in current circumstances. (Sir Robin Cooke "Introduction to Special Waitangi Edition" (1990) 14 NZULR 3.)

B The Treaty Obligations

1 Introduction

The Treaty of Waitangi is the "foundation for a developing social contract" in New Zealand.¹⁴ The Treaty, however, evolves "to take account of the nation we have become and of the gains as well as the disadvantages that have accrued to us over the last 147 years."¹⁵ In this section, we consider how the promises of 1840 translate into the principles which guide the resolution of Maori claims in 1993. We look, first, at the basic principle of partnership, and, secondly, at the roles which the partners play, as defined by the principles of kawanatanga and rangatiratanga.

2 Partnership

The Treaty of Waitangi establishes a partnership between the Crown and Maori:¹⁶

It was the basic object of the Treaty that the two people would live in one country The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.

Partnership has become the overarching principle representing the parties' Treaty obligations.¹⁷ Three ideas are of central importance.

First, partnership embodies a commitment to biculturalism, to a state whose institutions uphold both Maori and Pakeha perspectives.¹⁸ Partnership recognises the separate identity of the Treaty partners and predicates a sharing of power.

¹⁴Motunui, 52.

¹⁵*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 680 (Richardson J) ("NZMC (1987)).

¹⁶*Muriwhenua*, 192.

¹⁷Partnership was given prominence by the Court of Appeal in *NZMC* (1987), above n15, 664 (Cooke P), 682 (Richardson J). The concept has been affirmed and developed by the Waitangi Tribunal (*Waitangi Tribunal Muriwhenua Report* (Government Printer, Wellington, 1988) 190-191, 193 ("Muriwhenua"); *Waitangi Tribunal Ngai Tahu Report* (Government Printer, Wellington, 1991) 243 ("Ngai Tahu")) and the Court of Appeal (*Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 527-530 (Cooke P) ("Tainui"); *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152-153 ("Forest Assets"); *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129, 135 (Cooke P) ("Airwaves 1")).

¹⁸This arises from both Articles II and III. Under Article II, the Maori right to autonomy and control over their people and resources is affirmed (below Part II B 2 b). Under Article III, Maori are guaranteed rights and privileges in common with British subjects. Article III recognises that Maori interests

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Secondly, partnership recognises not only separateness but also a common enterprise.¹⁹ We must recognise that there will need to be compromise and co-operation as we move from past breaches to honour the Treaty in the future:²⁰

[B]oth the history and the economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today's world.

This is not to advocate the sacrifice of Treaty principles on the basis of convenience, but rather to recognise that in defining the Treaty's requirements now, we must work with the reality of the present.

Thirdly, partnership imposes a responsibility on both partners to act towards each other reasonably, honourably, and with the utmost good faith.²¹

2 The Exchange

The Treaty of Waitangi has, at its base, an exchange.²² By Article I, Maori ceded to the Crown sovereignty, or *kawanatanga*, over New Zealand; by Article II, the Crown guaranteed to Maori *te tino rangatiratanga* and the full, exclusive and undisturbed possession of their lands, estates, forests and fisheries and *taonga*. Article III established the equality of Maori and Pakeha citizens. What do these guarantees mean in 1993?

must be accorded equal status with those of Pakeha: *NZMC* (1987), above n15, 674 (Richardson J). As the Waitangi Tribunal stated:

It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an object of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end, the needs of both cultures must be provided for, and where necessary, reconciled. (Waitangi Tribunal *Mangonui Report* (Government Printer, Wellington, 1988) 60 ("*Mangonui*").)

¹⁹The Waitangi Tribunal stated:

Both parties expected to gain from the Treaty, the Maori from new technologies and markets, non-Maori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory state power. For Maori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Maori, a sharing in resources requires that Maori development be not constrained but perhaps even assisted where it can be. But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides. (*Muriwhenua*, 195.)

²⁰*Tainui*, 530 (Cooke P).

²¹*NZMC* (1987), above n15, 664, 667 (Cooke P); 673, 681-681, 682 (Richardson J).

²²Waitangi Tribunal *Ngai Tahu Sea Fisheries Report* (Government Printer, Wellington, 1992) 269-273 ("*Ngai Tahu Sea Fisheries*"). This is recognised in the preamble to *Te Ture Whenua Maori Act* 1993:

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of *kawanatanga* for *rangatiratanga* be reaffirmed . . .

a *Kawanatanga*

The Treaty of Waitangi gave to the Crown *kawanatanga*:²³ the right to govern, to make and administer laws, to keep the peace, to create courts for the resolution of grievances and to enforce the law.²⁴ The Crown's sovereignty, however, is fundamentally limited by the terms of the Treaty exchange.²⁵

First, *kawanatanga* is limited by the Crown's obligation to uphold Maori *rangatiratanga*. The Crown may override *rangatiratanga* in the public interest, but the need for and the extent of any claimed public interest powers must be established. To give an example, the Crown has the right to make laws of general application for conservation control and resource protection.²⁶ The need to regulate a resource, however, does not in itself establish a need to regulate Maori, or to regulate Maori in the same way as other resource users.²⁷ The difference is that Maori have Treaty rights to certain resources; others have only privileges.²⁸

Secondly, the Crown's right to govern in the public interest is limited by its partnership obligations and its duty to respect Maori as equal citizens. The Treaty envisaged that the Crown would protect both Pakeha and Maori interests. The cession of sovereignty to the Crown did not authorise the conduct of government based on the "primacy of Anglo-

²³There has been much debate about whether the Maori ceded sovereignty to the Crown in the Treaty. One perspective is that Maori, retaining *rangatiratanga* under Article II, kept sovereignty over themselves and their resources: see, for example, M Jackson *The Maori and the Criminal Justice System* (Department of Justice, Wellington, 1988) 71. The difficulty with this is that it leaves little place for Article I. It has thus been accepted by the Waitangi Tribunal and the Court of Appeal that the Treaty ceded legal sovereignty to the Crown:

The concept of a national controlling authority with *kawanatanga* (lit. governorship), or the power to govern or make laws, was new to Maori But the supremacy of this new form of control was clear. The Queen as guarantor and protector of the Maori interest ... had perforce an overriding power. ... From the Treaty as a whole it is obvious that it does not purport to describe a continuing relationship between sovereign states. (*Muriwhenua*, 186-187.)

²⁴*Ngai Tahu*, 236. Maori are obliged to observe the corresponding duties of "loyalty to the Queen, full acceptance of her Government through here responsible ministers, and reasonable co-operation": NZMC(1987), above n15, 664 (Cooke P); 682 (Richardson J).

²⁵*Orakei*, 149; *Ngai Tahu*, 236-237.

²⁶*Muriwhenua*, 232.

²⁷With regard to the fisheries, for example, the Waitangi Tribunal stated that
Unless absolutely necessary the Crown should not restrict the Treaty right fishing of the tribes to counteract over-fishing not caused by them even if it is necessary to restrict the general public fishing, commercial or otherwise (*Muriwhenua*, 232; *Ngai Tahu Sea Fisheries*, 242).
The Waitangi Tribunal drew here on the principles developed in the influential United States decision *United States v Washington* 384 F Supp 312 (1974), 520 F 2d 676 (1979), 506 F Supp 187 (1980) ("Boldt").

²⁸*Muriwhenua*, 164.

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Saxon values and institutions.”²⁹ Government must embody a commitment to biculturalism.

Balancing the Crown’s Article I rights with its obligations under Articles II and III is difficult. There will need to be compromise on both sides as we move from a situation of past breach to a new recognition of the Treaty. This has led the Court of Appeal to emphasise that “the principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy.”³⁰ The danger, however, is more likely to be the other way. Our history has seen not so much the unreasonable shackling of the Crown by Maori, as the Crown’s refusal to recognise Maori rangatiratanga. The key task, it will be argued below, is to develop the full meaning of rangatiratanga for New Zealand now.

b Rangatiratanga

The Treaty of Waitangi guaranteed to Maori te tino rangatiratanga, in the Maori text, and the full, exclusive and undisturbed possession, in the English text, of their lands, forests, and fisheries, their taonga.

We look, first, to the meaning of the rangatiratanga guarantee, secondly, to its breach by the Crown, and, thirdly, to how we may begin to honour the Treaty promise in 1993.

i The Treaty guarantee

At 1840, the tribe was the basic unit of Maori society, exercising rangatiratanga over its people and resources. Article II of the Treaty of Waitangi affirmed tribes in this authority, subject only to the overriding sovereignty of the Crown. Four key aspects of this Treaty guarantee should be emphasised.

First, the Treaty recognised the tribe as the centrepiece of Maori social organisation: it “envisaged a place of respect for the tribe.”³¹ The Treaty thus guaranteed that traditional structures and mechanisms for tribal control would be maintained.³²

²⁹A Fleras and JL Elliott *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto, Oxford University Press, 1992) 181.

³⁰NZMC(1987), above n15, 665 (Cooke P).

³¹*Mangonui*, 47, 60.

³²*Mangonui*, 47, 60.

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Secondly, the Treaty guaranteed to Maori possessory rights to their taonga. The Crown had, therefore, to acknowledge those rights held by tribes in their resources at 1840. The fisheries resource, for example, was an important taonga.³³ Maori used the resource both for subsistence³⁴ and as an integral part of the tribal economy;³⁵ and tribes exercised control over their fisheries in the inshore sea extending out from their territories.³⁶ The Waitangi Tribunal found, therefore, that the tribe had "an exclusive Treaty right to the sea fisheries surrounding the whole of their coastal rohe to a distance of 12 miles or so there being no waiver or agreement by them to surrender such rights."³⁷

Thirdly, the Crown had an obligation to actively protect Maori interests in their taonga:³⁸

It was a principle of the Treaty that the Crown would ensure that Maori retained sufficient for their needs; that despite settlement Maori would survive and because of it they would also progress.³⁹

The Crown thus had to ensure that tribes retained an adequate tribal endowment of resources.⁴⁰ The Crown had also to help tribes to develop these resources in line with

³³As the Waitangi Tribunal stated: "Maori involvement with fish and fishing is as ancient as the creation and Maori fishing embraces not only the physical but also the spiritual, social, and cultural dimensions." (*Muriwhenua*, xi, 202.)

See generally Law Commission *The Treaty of Waitangi and Maori Fisheries - Preliminary Paper No 9* (Wellington, 1989).

³⁴Maori used marine resources - fish, seaweed, kina, marine mammals - for food, and also for ornamentation, clothing, weaponry, and fertiliser: *Treaty of Waitangi (Fisheries Claims) Settlement Bill: Submissions on behalf of Te Runanga O Wharekauri Rekohu*, undated paper, on file with the writer.

³⁵Tribes traded amongst themselves and with other iwi in a system of gift exchange: "although conducted along distinctive lines, it was trade and commerce nonetheless." (*Muriwhenua*, 45.) Gift exchange adapted after European settlement to barter and sale, and tribes traded with visiting ships, and later supplied settlements. Ngai Tahu, for example, may have been exporting as far as Australia by the late 1830's (*Ngai Tahu Sea Fisheries*, 291); Muriwhenua tribes in the 1850's were supplying Auckland with thousands of kits of oysters each year (*Muriwhenua*, 82).

³⁶The Waitangi Tribunal found that "each tribe had complete dominion over the land and foreshore - mana whenua - and over such part of the sea as they exercised mana moana": *Ngai Tahu Sea Fisheries*, 100. Tribes exercised effective control over the inner sea only, although they occasionally fished further out.

³⁷*Ngai Tahu Sea Fisheries*, 264. The Treaty right was not an exclusive right to fish, but rather to maintain the tribe's business and activity of fishing without interference from other users or from pollution. The Crown had, therefore, to negotiate for any major public user. Neither the sale of land nor the sharing of the fisheries with Pakeha constituted a diminution or modification of rangatiratanga. (*Muriwhenua*, 216-220.)

³⁸The principle of active protection was established by the Waitangi Tribunal in *Manukau* (70) and Waitangi Tribunal *Te Reo Report* (Government Printer, Wellington, 1986) 1 ("Te Reo"), and it is affirmed in every subsequent report. The principle was accepted by the Court of Appeal in *NZMC* (1987): "[T]he duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable." (Above n16, 664 (Cooke P).)

³⁹*Muriwhenua*, 217.

⁴⁰The retention right was developed by Chief Judge Durie in *Waiheke* in relation to land: Waitangi Tribunal *Waiheke Report* (Government Printer, Wellington, 1987) 36-42 ("Waiheke"). It was

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new technologies and understandings.⁴¹ With regard to the fisheries resource, therefore, the tribe had "a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond 12 miles out to and beyond the continental shelf into the deep water fisheries within the 200 mile economic zone such right being exclusive to [that tribe]."⁴²

Fourthly, rangatiratanga extended beyond possession to the management and control of taonga and those who use taonga. With regard to the fisheries resource, for example, Maori followed established fishing practices "based principally on respect for life, the seabed, the water, and the gods associated with the fish and the seas."⁴³ They maintained the resource by requiring the seasonal capture of many species and the seasonal use of some fishing grounds, providing for the imposition of tapu and rahui to protect breeding areas and threatened species, and laying down regulations concerning fishing practice. The Treaty guaranteed to Maori the right to continue in the management of themselves and their resources to the extent that that was compatible with kawanatanga.⁴⁴

The Treaty thus looked forward to a shared future of prosperity in New Zealand where Maori tribes and Pakeha settlers would develop within their own structures and the Crown would protect the interests of both.

ii Breach of the Treaty

The Crown did not honour its obligations under Article II of the Treaty of Waitangi. The Treaty's spirit of accommodation and reciprocity soon disappeared in the face of settler greed. The Pakeha wanted land, resources and control, not competition with strong, successful and developing Maori tribes; Maori wanted the Treaty promise of rangatiratanga honoured.⁴⁵ That clash of expectations led to the New Zealand Wars in the

affirmed generally by the Tribunal in *Muriwhenua* (194), *Ngai Tahu* (237-240), and *Orakei* (137-147). This right was sourced in the Treaty text and in the parties' understandings.

⁴¹The development right was evolved by the Waitangi Tribunal in *Muriwhenua* and *Ngai Tahu Sea Fisheries*. The Tribunal emphasised Lord Normanby's instructions which "clearly envisaged that Maori would profit from the development of those properties they retained", the concurring understandings of the Maori signatories, and principles of international law: *Muriwhenua*, 217; *Ngai Tahu Sea Fisheries*, 253-256.

⁴²*Ngai Tahu Sea Fisheries*, 306.

⁴³*Muriwhenua*, 200.

⁴⁴The Waitangi Tribunal has established this as representing the understandings of both Treaty partners: The explanations at Treaty signings support the conclusion that though Maori expected the Treaty to initiate a new relationship, it would be one in which Maori and Pakeha would share authority Maori were encouraged to believe that their rangatiratanga would be enhanced ... and that Maori control over tribal matters would remain. (*Muriwhenua*, 190 (citing Claudia Orange *The Treaty of Waitangi*) 231-2; *Mangonui*, 47, 60; *Ngai Tahu*, 242.)

⁴⁵See MPK Sorrenson "Maori and Pakeha" in GW Rice (ed) *The Oxford History of New Zealand* (2ed, Oxford University Press, Auckland, 1992) 141.

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1860's. After the wars, the Crown was determined to destroy Maori rangatiratanga. The aim was the assimilation of Maori,⁴⁶ detribalisation,⁴⁷ and the acquisition of the tribal resources, in particular land. The Treaty became, in practice as well as (supposedly) in law, "a simple nullity."⁴⁸

The result of this fundamental breach of the Treaty of Waitangi was the near destruction of the tribe. Iwi lost their lands and resources, and thus their economic viability. Later, they lost their people: "[d]uring the second half of the [twentieth] century more than seventy per cent of the Maori population shifted to the cities, often breaking the link with their turangawaewae, dispersing the whanau and Hapu, and threatening the tribal identity which was at the heart of being Maori."⁴⁹ Rangatiratanga was unutterably diminished.

We are faced now with the legacy of the Treaty's breach. Comparisons between Maori and non-Maori today reveal alarming disparities in health, education, housing, employment, crime, mortality, and incarceration.⁵⁰ We have now, in seeking to honour the Treaty, the opportunity to reverse this and to re-establish Maori mana.

iii *Rangatiratanga in 1993*

We are faced in 1993 with the question: given the legacy of the past and the reality of the present, how do we affirm Maori rangatiratanga? We look, in this section, first, to the basis for Treaty claims resolution and, secondly, to a method of approach.

⁴⁶The House of Representatives passed the following resolution in 1862:

Resolved: That in the adoption of any policy, or the passing of any laws affecting the Native race, This House will keep before it, as its highest object, the entire amalgamation of all Her Majesty's subjects in New Zealand. (New Zealand Parliamentary Debates 1862: 483-4.)

The official policy changed in the late 1950's from assimilation to integration: see the *Hunn Report* 1962. Many doubted, however, whether there was much difference: "tribe" was still "an anachronism" and "Maori authority was better defined by Pakeha structures": IH Kawharu "Introduction" in I H Kawharu (ed) *Waitangi - Maori and Pakeha Perspectives* (Oxford University Press, Auckland, 1989) xii.

⁴⁷The Minister of Justice stated in 1870 that:

The other great object was the detribalisation of the Maoris - to destroy if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. (New Zealand Parliamentary Debates Vol IX, 1870: 361.)

⁴⁸*Wi Parata v The Bishop of Wellington and the Attorney-General* (1877) 3 NZ Jur (NS) SC 72.

⁴⁹J Kelsey *Rolling Back the State* (Bridget Williams Books, Wellington, 1993) 247. By 1981, 80.3 per cent of Maori were living in cities: Ministerial Planning Group, 1991.

⁵⁰MH Durie "The Treaty of Waitangi: perspectives on social policy" in Kawharu, *Waitangi*, above n46, 280, 285-287. We may question also whether this does not represent a breach of the Article III guarantee.

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1 Basis

The basic Treaty obligation in 1993 is the restoration of the tribe. This is not only the means of honouring the Treaty for the future, but also of making redress for the past. As Chief Judge Durie stated in *Waiheke*:⁵¹

To compensate a tort is only one way of feeling with a current problem. Another is to move beyond guilt and ask what can be done now and in the future to re-build the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes. That approach seems more in keeping with the spirit of the Treaty and with those founding tenets that did not see the loss of tribal identity as a necessary consequence of European settlement. It releases the Treaty to a modern world, where it begs to be re-affirmed, and unshackles it from the ghosts of an uncertain past.⁵²

Tribal restoration is, in fact, at the heart of Maori claims.⁵³ Maori want to re-establish their communities, to regain their lands and other taonga, to develop their economic bases, to rescue their people from social and economic dislocation, and to reclaim autonomy within the state,⁵⁴ though the traditional vehicle of the tribe.⁵⁵ Maori thus require redress that focuses on this goal and which ensures its achievement.⁵⁶

⁵¹*Waiheke*, 41 (Chief Judge Durie). The Waitangi Tribunal stated in *Orakei* that it is the restoration of iwi that must be the focus of redress now, not reparation (186).

⁵²In this way, we "uphold the Treaty not just as a reminder of 'colonial bad faith' but as a symbol of 'bicultural good faith'" (R Mulgan "Can the Treaty Provide a Constitutional Basis for New Zealand's Political Future" [1989] 41 *Political Science* 65.)

⁵³*Muriwhenua*, xxi, 3. Maori Treaty claims "are a response to current feelings of cultural, economic and political powerlessness. They are not purely backward looking." (J Williams, quoted in Kelsey, *Rolling Back The State*, above n49, 270.)

⁵⁴Ngai Tahu provides a prominent example. The tribe released on 13 May 1992 its "vision for the future" - "a multi-million dollar programme aimed at eliminating Maori dependence on the state and securing the economic future of [Ngai Tahu]." Ngai Tahu aims to achieve social development through financial independence, and intends to operate education, employment, training, superannuation, health, and housing schemes. The plan relies heavily on a beneficial settlement of the Ngai Tahu land and fisheries claims: "Tribe unveils its 'vision'" *The Dominion*, Wellington, 14 May 1992, 12.

⁵⁵CHECK The place of the tribe has been affirmed by Maori on a national level. The National Maori Congress was formed in June 1990 as the "national expression of tino rangatiratanga of the tribes" in contrast to the regionally based New Zealand Maori Council: Kelsey, *Rolling Back the State*, above n49, 245. The Crown has also affirmed the tribe: the Labour Government proposed the devolution of government programmes to iwi (*He Tirohanga Rangapu (Partnership Perspectives)* 1988).

⁵⁶The Waitangi Tribunal gave tribal restoration as its primary recommendation in *Muriwhenua* (228, 239-240) and *Ngai Tahu* (1051-1059), both of which were large resource claims. The Tribunal has also recognised that, behind claims seemingly more narrowly focused, there is often the basic grievance of tribal destruction: *Mangonui*, 61-67; *Waiheke*, 42.

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It must be emphasised, however, that tribal restoration is not "social welfare",⁵⁷ nor does it point towards some global compensation scheme.⁵⁸ It is an appropriate means of respecting rangatiratanga in 1993. It also formally acknowledges each tribe's grievances as the basis for restoring the mana of the tribe and the honour of the Crown.⁵⁹ As Chief Judge Durie emphasised:⁶⁰

I doubt many Maori will be able to seek the road ahead until the road behind has been cleared for we are as a people locked into history. There is a Maori opinion that your future lies behind you for what in fact confronts you is your past and we are still largely constrained by that opinion.

There is, on the concept of tribal restoration, the opportunity to fulfil the spirit of the Treaty of Waitangi in 1993. The Treaty may then emerge as "a central unifying force, providing a cultural frame of reference for renewal of Maori-state relations along lines of partnership and power-sharing."⁶¹ Restoration of the tribe has become the Crown's overarching Treaty obligation in the late twentieth century.

2 Method

There are three main components of tribal restoration: the reconstruction of the tribal resource base; the return of tribal autonomy; and the restructuring of the tribe. These are considered in turn below.

⁵⁷As has been claimed by some. Mr O'Regan writes:

In recent decisions ... the Tribunal has chosen to assess remedy on the basis of 'need' rather than on a basis of the value of lost property rights ... Whilst such a basis might possibly be relevant to the settlement of an issue under Article 3 (general citizenship and equal rights) ... the 'needs principle' rests uneasily with the expression in Article 2 of guarantee for 'full, exclusive and undisturbed possession' of Maori properties which they wish to retain. (T O'Regan "Old Myths and New Politics" [1992] 26 *New Zealand Journal of History* 5, 10-11.

This is based, however, on a misunderstanding of the tribal restoration analysis.

⁵⁸As is proposed by some: see JE Gould "'Big bang' move on Waitangi" *The Dominion*, Wellington, 27 July 1993.

⁵⁹As the Minister of Justice recognised:

[Y]ou have to say the Crown is wrong and we're sorry. We haven't done that before, unbelievable though it is. It's not hard to do and once it's done you are halfway there. (C Brett "Who Are Ngai Tahu and What Do They Really Want?" *North and South*, New Zealand, November 1992, 56, 60.)

⁶⁰Chief Judge Durie "The Waitangi Tribunal - its relationship with the judicial system" [1986] NZLJ 235, 236.

⁶¹Fleras and Elliott, above n29, 218.

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a *Tribal base*

Reconstruction of the tribe involves restoring economic self-determination. The tribe must have a resource base that enables it to provide for its present and future needs. The Crown must help both to provide the necessary resources and to ensure that the tribe is able to develop from this basis.

The particular resources needed will depend on each tribe's particular circumstances. As the Waitangi Tribunal commented with regard to Muriwhenua:⁶²

A programme of tribal restoration requires, in our opinion, a review of the total tribal resources and the interrelationships between the tribes. Muriwhenua has a small land mass and poor soils but an extensive coastline. There the resources of the sea have special significance, and land and sea have traditionally been worked together.

The economic base will thus involve the interplay of a number of resources, including capital.⁶³ One resource cannot be considered in isolation. This point was made by the Waitangi Tribunal with regard to both Ngai Tahu⁶⁴ and Muriwhenua:⁶⁵

The Tribunal has also considered that a comprehensive analysis of the Muriwhenua tribe's situation should be made - that is, of their land and fishing claims together, so that relief might be seen in terms of a total package proposal for the restoration of the Muriwhenua tribes through their land and sea resources. The adequacy of those resources needs to be reviewed and the capability of those resources to service those needs. ... We have therefore been reluctant to proceed with the Fisheries matter by itself.

⁶²*Muriwhenua*, 3. The Waitangi Tribunal commented in *Ngai Tahu*:

Ngai Tahu is plainly entitled to very substantial compensation ... It would need to be sufficiently substantial to enable Ngai Tahu, now a numerous tribe, to be able significantly to enhance the social, educational and economic well being of its people. Whether the tribe opts for the purchase on the open market of viable farm properties in suitable locations, or for the establishment or purchase of commercial ventures offering employment for its people, or for other forms of investment or economic activity, or for a combination of some or all of these, is of course for Ngai Tahu to decide. (1056).

⁶³Land will be in many cases the primary resource required. The reduction of tribal estates from 27 million hectares to 1.3 million hectares has left some tribes landless, and most with a small amount of poor quality land held under fragmented titles: G Asher and D Naulls *Maori Land* (New Zealand Planning Council, Planning Paper No 29, 1987).

⁶⁴*Ngai Tahu*, 1054-1057.

⁶⁵Memorandum of Tribunal's preliminary opinions as conveyed to Hon Minister of Fisheries, 30 September 1987 (reproduced in *Muriwhenua*, 295). The Tribunal was, however, forced by events to give priority to fisheries: *Muriwhenua*, xi.

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The Treaty right being upheld here is the right to a resource base, and not specifically the right to the return of resources wrongly taken. The tribal restoration approach is not a property rights compensation analysis.⁶⁶

A return to the 1840's is ruled out. There can be no attempt to restore to Maori either all the holdings and resources that were theirs then or their full equivalent value. Instead the emphasis is on the present position of disadvantage suffered by the Maori people.

Treaty claims settlement must work through the past in order to grapple with a perspective for the future.⁶⁷

A number of factors will need to be balanced in finding an appropriate tribal base: the tribe's interest in particular resources over which rangatiratanga was traditionally exercised and the desire to be re-established in the economy of its traditional territory; the tribe's need for sound investments now; and the fiscal realities of the Crown. A tribal base could include, for example, a settlement of traditional lands, a share in commercial fishing quota, shares in Coalcorp, and an amount of investment capital.

It is the development of this restored resource base, however, which will determine the long-term success of tribal restoration. The Crown's assistance will be critical. Maori may lack managerial and entrepreneurial skills, and "tribal kin-based systems are poorly placed at this stage to meet the expectations either of Government or of their beneficiaries."⁶⁸ The return of resources alone is no guarantee of tribal restoration.⁶⁹

It will also be important to ensure that development is "driven by Maori sensitivities and priorities rather than that of the dominant sector."⁷⁰ "True" Maori development, as Cooper writes, "has as its goals the restoration and reconciliation of we Maori people with our lands and the promotion of our self-determined advancement in life, according to our own Maori human values and ideals."⁷¹ The Crown must be sensitive to these needs.⁷²

⁶⁶Mulgan, above n52, 60.

⁶⁷Chief Judge Durie "The Waitangi Tribunal: Its relationship with the judicial system", above n60, 237.

⁶⁸Kawharu "Introduction", above n46, xiv. Kawharu further warns:

[T]o recognise the existence of a few professionally qualified tribal individuals in secure employment elsewhere, to recognise a rise in awareness of tribal identity, and even to acknowledge that a few *ad hoc* explorations into the world of commerce have survived is not to see a cadre of tribal authorities ready for a partnership today.

⁶⁹Tribes will need varying levels of assistance. Some, such as Ngai Tahu, may only need the resources from which to build. Most tribes, however, have far less expertise, experience and organisation, and will need considerable Crown development assistance.

⁷⁰Fleras and Elliott, above n29, 180.

⁷¹R Cooper for the Maori Council of Churches, quoted in Kelsey, *Rolling Back the State*, above n49, 251.

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b Tribal autonomy

Rangatiratanga includes a right to tribal autonomy. The Crown must restore to the tribes control over their resources and those who use them. The Crown and Maori must work together to establish the functions and services that can be performed by the tribe consistently with kawanatanga, and arrange for their devolution: resource control is likely to be important as is tribal provision of parallel services such as health and education.

There must, however, be a real commitment to power-sharing. Devolution is not delegation or decentralisation⁷³ or "a private-sector delivery mechanism for social services."⁷⁴ This has not been adequately appreciated thus far in New Zealand.⁷⁵

c Tribal structure

Reconstruction of the tribe requires a structure appropriate for the needs of Maori now.⁷⁶ There are major unresolved questions here. The Crown and Maori must work through these as a matter of priority.⁷⁷

⁷²Te Ture Whenua Maori Act 1993 is an example of the Crown's attempt to grapple with this issue. The Act is intended to balance the kaupapa of retention of Maori lands with the need to facilitate their development: preamble, Te Ture Whenua Maori Act 1993.

⁷³"Devolution" is defined by Fleras and Elliott as:

[A] mutually agreed upon transfer of jurisdiction ... from a higher level of government ... to a lower Ideally, the "periphery" is not necessarily subordinate to the centre; nor are the powers so transferred subject to unilateral recall by the centre. ... [D]evolution is about power-sharing and restructuring (Above n30, 204 (references omitted).)

Local government, for example, has devolved powers which it is free to exercise inside the broad constraints of the statutory regimes. Rangatiratanga has been analogised to local government: *Muriwhenua*, 187. "Delegation" and "decentralisation", however, are where duties and responsibilities are transferred out, but power remains in the centre: Fleras and Elliott, above n29, 204.

⁷⁴Kelsey, *Rolling Back the State*, above n49, 273. See also Mr O'Regan, quoted in "Ngai Tahu: Into the 21st Century" *Race Gender Class*, New Zealand, December 1989, 97, 99-100.

⁷⁵The Labour Government was nominally committed to iwi devolution and passed the Runanga Iwi Act 1990 as the structural framework for devolution. It had, however, no intention of providing independent iwi control over policy and resources at a level of equality with the Crown. As Fleras and Elliott comment:

While the *tangata whenua* talk about parallel development and separate institutions, the central authorities talk about tinkering with the existing system by way of Maori add-ons. The clash of these paradigms is likely to aggravate the difficulty of restructuring Maori-government relations in a rapidly decolonising Aotearoa. (Above n29, 207-208).

The National Government has since backed away from "devolution", has repealed the Runanga Iwi Act, and is focusing on the mainstreaming of Maori affairs: Kelsey, *Rolling Back the State*, above n49, 276.

⁷⁶The Waitangi Tribunal stated in *Mangonui* that the Crown "must provide a legally recognisable form of tribal rangatiratanga or management, a rangatiratanga that the Treaty promised to uphold." (5)

⁷⁷There was an attempt to grapple with these issues in the Runanga Iwi Act 1990. The Act recognised iwi for the purposes of devolution of government services and provided, amongst other things, for a process of identifying the iwi with authority in an area, and for iwi accountability structures. There

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First, there is a difficulty concerning the entity which represents Maori.⁷⁸ Who is the Crown's Treaty partner, the hapu or the iwi? There would seem to be no one answer here: the hapu will have primary importance at the level of traditional use and guardianship; the iwi becomes significant in the case of commercial operations and "matters of common policy affecting the people generally."⁷⁹ There may also be issues which have to be determined at a pan-iwi level.⁸⁰ There is a need for an understanding between Crown and Maori of which issues require which level of representation.

Secondly, who has the authority to represent the hapu or iwi? Representation has been emphasised by the Waitangi Tribunal:⁸¹

Modern circumstances compel the need for legally cognisable forms of tribal institutions with authority to represent the tribe on local [and national]⁸² issues and adequate resources to assist the formulation of tribal opinion.

At present, there is no certainty as to the structure which represents the iwi or hapu in a particular area. There are a number of bodies which may be important: the trust board, the Maori council, the local branch of the Federation of Maori Authorities, the runanga, and the kahui ariki, the council of elders.⁸³ There is thus a major difficulty for the Crown in undertaking consultation or achieving consent in accordance with its Treaty obligations.⁸⁴

was, however, significant Maori concern that the Runanga were Pakeha defined constructs without Maori legitimacy: Kelsey, *Rolling Back the State*, above n49, 272-273.

⁷⁸This issue has been raised recently by groups such as Ngai Tuhuru and Waitaha from Ngai Tahu; Rangitane from Ngati Kahungunu; Te Runanga o Paiea from Ngati Porou; and Pakakohi from Taranaki who seek independent status: T O'Regan "Old Myths and New Politics", above n58, 16; Waitangi Tribunal *The Fisheries Settlement Report* (Government Printer, Wellington, 1992) 12 ("*Fisheries Settlement*"); "Maori split widens on eve of Sealord deal hui" *The Dominion*, Wellington, 16 February 1993, 1.

⁷⁹*Fisheries Settlement*, 13. Dissident hapu may, therefore, be bound by an iwi decision. There must, however, be a means of determining whether a particular hapu has come to have iwi status.

⁸⁰Dissident iwi may, therefore, be bound by a majority decision. The Waitangi Tribunal has emphasised, however, that where rights are to be extinguished, only consenting groups should be bound: *Fisheries Settlement*, 17.

⁸¹*Mangonui*, 48.

⁸²*Fisheries Settlement*, 15.

⁸³In Te Arawa, for example, there appear to be three separate bodies with standing - a trust board, a runanga and the local branch of FOMA: *Fisheries Settlement*, 14.

⁸⁴Te Ture Whenua Maori Act 1993 will be important here. Section 30 of the Act gives the Maori Land Court the power, at the request of various people, to determine who "are the most appropriate representatives of any class or group of Maori" affected by any proceedings, negotiations, consultation, or allocation. It should not be taken from this, however, that the problem can simply be left to the Maori Land Court. The court does not have the resources to deal promptly with every representation issue as it arises. The Crown and Maori must make an effort to set a basic framework for resolving these issues outside the judicial process.

Thirdly, there is a need for appropriate tribal administrative and legal structures. Tribes are now operating within structures which are incapable of meeting today's objectives.⁸⁵ It is important to find structures which give the tribe the ability to function effectively commercially, to exercise autonomous functions, to participate in decision-making and consultation, to be accountable to its people, and to contribute to an effective partnership with the Crown.⁸⁶ What is required with respect to these functions will have to be determined between the Crown and Maori.

Finally, we must consider the majority of Maori, who now live in urban centres outside their traditional tribal boundaries. Tribal restoration claims urgency on the basis of their needs. We must ensure, therefore, that tribal structures include provision for passing real benefits to urban tribal members, and have means of identifying them. There are difficult and charged issues here and we have not yet grappled adequately with them. We must do so if tribal restoration is really to provide the "window of opportunity" for the dispossessed children of Otara and Porirua, and not just a windfall for the few.

iv Conclusion

The Treaty of Waitangi guaranteed Maori rangatiratanga. We now seek to honour that promise in the circumstances of 1993. This is a considerable challenge and we should not under-estimate its difficulty.⁸⁷ We have in it, however, the opportunity to build the basis for a stable bicultural future.

⁸⁵The Maori Trust Boards were set up in the 1940's to administer tribal compensation funds. More recently, tribal runanga were set up under the now repealed Runanga Iwi Act 1990 to receive devolved government services (above n75). None of these structures have provided Maori with administrative and legal structures appropriate for Maori needs as perceived by Maori now: T O'Regan "The Ngai Tahu Claim" in Kawharu (ed) *Waitangi*, above n46, 234, 259-260.

⁸⁶Ngai Tahu has recognised structure as fundamental: O'Regan "The Ngai Tahu Claim", above n86, 254-261. Te Runanga O Ngai Tahu Bill, introduced to Parliament on 27 July 1993, is intended to deal with these issues. The Ngai Tahu Maori Trust Board is to be dissolved and the Runanga recognised as the representative of Ngai Tahu with its own legal personality. The Minister of Maori Affairs, Hon D Kidd MP, stated in introducing the Bill that the Runanga is "a uniquely Maori organisation" designed by Ngai Tahu for its own social, cultural and commercial needs: "Treaty claims spurs Ngai Tahu change" *The Evening Post*, Wellington, 28 July 1993, 23. The Ngai Tahu model may not, however, be appropriate for all tribes, and there must be a Crown commitment to deal with the structural needs of those besides Ngai Tahu.

⁸⁷In *Tainui*, above n18, Cooke P stated that "[i]t is as well to stress that [the principles of the Treaty] are of limited scope and do not require a social revolution." (527) This may have been politically expedient, but it may have given a false impression.

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4 Overview

We have developed in this section the key Treaty principles of partnership, *kawanatanga*, and *rangatiratanga*. This is the substantive basis on which this paper will assess the content of the Sealord deal.

C The Process of Settlement

The Treaty of Waitangi provides the basic framework on which to base Crown-Maori interaction in general and the resolution of Treaty claims in particular. The Treaty does not, however, define the practical application of its principles in the circumstances of 1993.⁸⁸ There is a need, therefore, to think carefully about the institutions which will be important in claims resolution, and the way in which they operate. The process of Treaty claims settlement must be given as much attention as the content of settlements.

In this section, we look, first, to the choice of procedure and, secondly, to the specific features of the negotiation process.

1 The Treaty claims process

There are three main institutions involved in the process of Treaty claims settlement: direct negotiation between the Crown and Maori, the Waitangi Tribunal, and the courts. We consider here the respective roles of these institutions.

Negotiation has come to be seen as the most appropriate means by which to determine the practical application of Treaty principles. The understanding is that as the Crown and Maori entered into the Treaty, only they have the *mana* to define its requirements.⁸⁹ Treaty issues are ultimately political matters which can only be legitimately resolved in the political realm by the parties themselves. This is recognised in practice by the Waitangi Tribunal⁹⁰ and the courts.⁹¹

⁸⁸The Treaty "lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines": Chief Judge Durie "Part II and Clause 26 of the Draft New Zealand Bill of Rights" in Legal Research Foundation *A Bill of Rights for New Zealand* (Auckland, 1985) 175, 190.

⁸⁹The Waitangi Tribunal stated in *Muriwhenua* that we do not "seek to take from the tribes the *mana* to effect their own arrangements, in accordance with the Treaty's guarantee." (241)

⁹⁰The Waitangi Tribunal recognises the legitimacy of the now common request from claimants for findings of fact and Treaty interpretation only, not substantive recommendations, as the basis for Crown negotiations: *Muriwhenua*, xxi; *Ngai Tahu*, 1061; *Ngai Tahu Sea Fisheries*, 309.

⁹¹Cooke P stated in *Tainui*, that "[p]referably - and I am confident that the Waitangi Tribunal would agree with this - the Treaty partners should work out their own agreement." (Above n17, 529). In

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The Waitangi Tribunal has a key role in providing the theoretical basis for negotiation. The Tribunal does not have the practical ability to determine the Treaty's requirements in other than a few cases.⁹² Its importance is in its contribution to an effective negotiation process; to establishing the factual matrix of the claim;⁹³ and to developing our understandings of the Treaty and its requirements now.⁹⁴ The Tribunal also provides an ongoing check on the continuing validity of Treaty claims settlements.

The courts protect the Treaty claims settlement process. They act as a safeguard on Crown-Maori interaction and ensure procedural legitimacy.⁹⁵ As McHugh writes:⁹⁶

[There is a danger of the Treaty being] assigned to a legal vacuum, or, more accurately, ghetto, where it is viewed solely and simply as a policy document. It is depicted as a "pact" requiring a Parliamentary response, yet one otherwise bereft of legal consequence. There is in that approach a hidden and ultimately condescending patriarchy. Whatever Maori may have agreed to when they signed the Treaty, they certainly did not agree to an absolute Hobbesian sovereignty being vested in the Crown.

The courts do not, however, have a substantive role in Treaty settlements. First, they do not have the constitutional legitimacy to perform this function.⁹⁷ They must operate within

practice, the Court has always left the Crown and Maori to together negotiate a settlement. It has not made a substantive determination of the Treaty's requirements. Compare below n97.

⁹²The Waitangi Tribunal has binding jurisdiction only under the State-Owned Enterprises (Treaty of Waitangi) Act 1988 and the Crown Forest Assets Act 1989. This, according to its Chairman, is as it should be: "Given the political nature of most of [the claims], I do not think it should [be so empowered]." ("The Waitangi Tribunal: Its relationship with the judicial system", above n60, 236.)

⁹³This is important; as the Waitangi Tribunal stated in *Manukau*, those "who [do] not know the past will never understand the present." (46-47) See MPK Sorrenson "Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal" in *Kawharu Waitangi*, above n46, 158.

⁹⁴The Tribunal is also able to recognise the Treaty as "a political statement of policy", and thereby to develop Treaty principles in a way not open to the courts. This was highlighted by the different conclusions in *Fisheries Settlement* and *Te Runanga a Wharekauri*, above n9, discussed in Part III B 2 a below.

⁹⁵The Legislation Advisory Committee has emphasised that "the history of freedom is largely the history of procedural safeguards": *Legislative Change*, above n11.

⁹⁶PG McHugh "Constitutional Myths and the Treaty of Waitangi" [1991] NZLJ 316; see also PG McHugh "The role of law in Maori claims" [1990] NZLJ 16.

⁹⁷The Court of Appeal appeared initially to challenge this, with Cooke P in *Tainui* stating that "[i]n the end only the Courts can finally rule on whether or not a particular solution accords with the Treaty principles" (above n17, 529). The Crown's response was immediate. The Deputy Prime Minister, Rt Hon G Palmer (as he then was), made the constitutional position clear:

The Courts are an essential part of New Zealand's constitutional arrangements. They have provided in recent years justice for Maori claims against the Government. Some imaginative and constructive resolutions have been achieved. These should not be forgotten, nor should they be rejected. The Courts are important. They will continue to be important. But the Courts interpret the law. They do not legislate. They do not govern. The Executive governs. On matters resulting to the Treaty of Waitangi the Courts cannot govern. (G Palmer, speech at Te

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the existing frameworks of the state.⁹⁸ Secondly, the courts are able to deal with Treaty claims in terms of legal rights only.⁹⁹ The Treaty, however, is not "just a potential source of particular legal rights for indigenous peoples, but a political statement of policy."¹⁰⁰ A legal approach alone misses the essence of the Treaty. Thirdly, the courts are constrained by legal remedy structures which focus on past wrongs, rather than future benefits. Fourthly, in terms of approach, the courts are locked in to an adversarial, winner-take-all process which is inappropriate for a developing social contract. The Court of Appeal could not, for example, have achieved the Sealord deal.

2 The negotiation process

The Treaty's basic procedural principle is that the partners must act towards each other reasonably, honourably, and with the utmost good faith. What does this require of the parties in the negotiation of Treaty claims settlements? We focus here on three problem areas: the imbalance of bargaining power; aspects of Maori representation; and the public acceptability of the negotiation process. There must be a commitment by the Crown and Maori to working together through these issues.¹⁰¹

Awamarahi Marae, Tuakau, 24 November 1989, quoted in Kelsey, *Rolling Back the State*, above n49, 215; (1989) 12 TCL 45/1.)

The Court of Appeal has since backed away from the *Tainui* statement. In *Airwaves 1*, above n18, all the judges, except Cooke P, made it clear that they were applying orthodox administrative law. In *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 ("Airwaves 2"), the majority emphasised that the court "does not have either the power or the responsibility ... to direct the Crown on matters of policy." (598) In *Te Runanga O Wharekauri*, above n9, the Court found that the issues "are political questions for political judgment." (309)

⁹⁸As Kelsey states: "The Pakeha legal system could never deliver te tino rangatiratanga for to do so would be to deny the legitimacy of the state of which it was an integral part." (J Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Wellington, Allen and Unwin, 1990) 210.)

⁹⁹The court is thus constrained by the need for statutory incorporation of the Treaty (NZMC(1987), above n15; *Love v Attorney-General* Unreported, 17 November 1988, High Court Wellington Registry CP 135/88), notions of justiciability and parliamentary sovereignty (*Te Runanga O Wharekauri*, above n9), and the limitations of the aboriginal title analysis, if that is resorted to (*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680).

¹⁰⁰Chief Judge Durie, "The Waitangi Tribunal- its relationship with the judicial system", above n60, 236. Chief Judge Durie illustrates the point as follows:

Particular claims for the recognition of customary hunting and fishing rights are the sort of claims that could be readily transmuted to defined rights by statutory enactment ... Such rights, if given, would be justiciable. ... But many Maori people are really saying much more, that their particular view of environmental management should be adopted as a matter of national policy. The wider issue is not strictly within the ambit of legal rights but of broad policy. (235-6)

¹⁰¹Gifford emphasises the importance of this task:

The challenge for the government is to find ways to return in an orderly fashion assets which it held in trust for generations, so its treaty partners can implement the development envisaged by rangatira at Waitangi in 1840. It can't do that behind closed doors. Some process of open and equitable debate with nga iwi Maori is needed to develop a process which will last. To continue to assume supreme powers in our treaty-driven constitution is to encourage charges of a new wave of land grabbing and theft. (A Gifford "Own Goal" (1992) 18 *Terra Nova* 52.)

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i Bargaining power

There is a basic inequality of bargaining power between the Crown and Maori. The Crown wields control over the negotiation process; it has skilled and experienced advisors and negotiators; and it can, for the most part, pick when and on what terms it wants to negotiate, and whether or not to settle. Maori are in a comparatively weak position. They have few human and financial resources; they cannot enter into negotiations without a measure of political largesse or as a result of judicial favour; and are often unable to walk away from a settlement, either because their needs are pressing, or for fear that, without settlement, the Crown will act or omit to act so as to prejudice Maori interests. This power imbalance can have a significant effect on outcome. There can be no guarantee in such circumstances that Maori will regard any settlement reached as legitimate.

There must, therefore, be mechanisms developed to redress the power imbalance. Adequate funding of Maori, in the Waitangi Tribunal and during negotiations, would be an important start.¹⁰² More far-reaching possibilities would be the boosting of the courts' ability to safeguard the negotiation process and ensure that an imbalance of bargaining power was not determinative of outcome. This could be achieved by the statutory incorporation of the Treaty¹⁰³ or of substantive Treaty rights.¹⁰⁴ The appointment of an independent body to monitor Treaty negotiations is another possibility.¹⁰⁵

¹⁰²Chief Judge Durie commented extra-judicially:

The key to handling Maori claims, in my view, is how effectively we can structure the negotiation arrangements. Negotiations require that both sides should be evenly armed. It is incumbent on the Crown, if it wants a lasting resolution of Maori claims, to ensure that the Maori negotiating costs are paid for, and that the claimants are not lacking for professional aid. (Chief Judge Durie, speech given at Oxford, 29 November 1989, quoted in (1989) 12 TCL 46/558; see also "1990 - The Treaty and the Lawyer" *Law Talk*, Wellington, New Zealand, April 1990, vol 324, 28, 33.)

¹⁰³As was proposed in the 1985 draft Bill of Rights: *A Bill of Rights for New Zealand: A White Paper* New Zealand. Parliament. House of Representatives. Appendix to the journals, vol I, A6. This was, however, opposed by Maori: S Jones "The Bill of Rights and Te Tiriti o Waitangi" in *A Bill of Rights for New Zealand*, above n88, 207. It may be, however, that the Maori experience of the courts after 1987 has changed attitudes.

¹⁰⁴The present trend is to incorporate the Treaty as a mandatory relevant consideration for decision-makers (s 8 Resource Management Act 1991), rather than as a substantive limitation on Crown action (s 9 SOE Act). This does little to redress the imbalance of bargaining power.

¹⁰⁵The Royal Commission on Social Policy recommended the establishment of an independent Treaty of Waitangi Commission: Royal Commission on Social Policy *The April Report* (Wellington, 1988) Vol II, 78. This was also recommended for Canada: Task Force to Review Comprehensive Claims Policy *Living Treaties: Lasting Agreements. Report of the Task Force to Review Comprehensive Claims Policy* (Department of Indian Affairs and Northern Development, Ottawa, 1985) 79-82.

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ii *Representation and ratification*

Negotiation takes place between the Crown and representatives of Maori. Issues arise, therefore, with respect to both representation and ratification of Treaty settlements. How should the negotiation process respect these concerns?

First, Maori representatives must be validly appointed by and held accountable to those they represent - the hapu, iwi, or, perhaps, all Maori. We have considered the difficulties of Maori representation earlier in this paper.¹⁰⁶ The Treaty claims process merely reinforces the need for the restoration of appropriate tribal structures.

Secondly, settlements must be ratified by those whose rights or interests they affect. This consent must be genuine and based on an informed understanding of the settlement. The ratification process must also respect the group's internal decision-making structures. For Maori:¹⁰⁷

The consensus process requires a high level of community involvement and debate. New ideas must be allowed to lie for a long time, and there are inhibitions on all tribal leaders in expressing a view that has not been tribally approved. Under the consultative processes of Maori, nothing can be hurried along.

iii *Public acceptability*

The Treaty of Waitangi is the basis for a bicultural society, and establishes a place for both Maori and Pakeha. Treaty claims settlements must, therefore, be recognised by the public as a legitimate attempt by the Crown to honour the Treaty, for the benefit of all. Building public acceptance is an important part of the settlement process.¹⁰⁸

First, on a practical level, there should be public education campaigns concerning each claim, its background, and the principles involved.¹⁰⁹ There should be forums for public

¹⁰⁶Above Part II B 2 b.

¹⁰⁷*Muriwhenua*, 157.

¹⁰⁸See *Living Treaties: Lasting Agreements*, above n105, 93.

¹⁰⁹This is recognised in theory by the Crown:

There is an acknowledgment that these outstanding [Treaty] grievances need to be settled in a manner which not only respects the Crown's obligations, but which is seen to be fair to all New Zealanders. (Treaty of Waitangi Policy Unit for the Crown Task Force on Treaty of Waitangi Issues *The Direct Negotiation of Maori Claims* (Treaty of Waitangi Policy Unit, Wellington, 1990).)

This policy was issued by the Labour Government and continues to be used by the National Government.

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debate and opportunities for public input. All must understand the issues and feel that their positions have been taken into account.

Secondly, and on a broader level, we must take the time to work through the issues involved in Treaty claims resolution. As Chief Judge Durie has emphasised with regard to the Waitangi Tribunal:¹¹⁰

There would seem to be sense in moving slowly in dangerous waters if the ship is not to be sunk. There has been quite a lot of support for the workings of the Tribunal to date, but it is as well to bear in mind that the Maori claims dealt with so far have happily harmonised with the politics of other special interest groups - the environmental groups in particular, and those opposed to certain industrial developments on economic grounds. What happens when the Maori claims are diametrically opposed to the balance of public convenience?

There must be time for the broader society to work through the structural and attitudinal changes which the Treaty requires in 1993.

3 Overview

Honouring the Treaty in 1993 requires not only adherence to its substantive principles, but also to the requirements of procedural legitimacy. No matter how generous the settlement, if it is not also achieved legitimately, then it is not in accordance with the Treaty of Waitangi. There must be a commitment by the Crown and Maori to address these outstanding procedural issues as a matter of priority.

D Conclusion

The Treaty of Waitangi is the basis for government in New Zealand. It provides core principles, substantive and procedural, with which we may redress the breaches of the past and honour the Treaty now. Any settlement which contravenes these principles may win temporary approval but, in the long run, it may only add to the grievances it sought to resolve. We now have the framework with which to consider the legitimacy of the Sealord deal.

¹¹⁰"The Waitangi Tribunal - its relationship with the judicial system", above n61, 238. We have seen something of this in the aftermath of the Waitangi Tribunal's *Te Roroa* Report: Waitangi Tribunal *Te Roroa Report* (Government Printer, Wellington, 1992) ("*Te Roroa*"). The Treaty of Waitangi Amendment Act 1993, which prevents the Tribunal from making recommendations with respect to private land, as it did in *Te Roroa*, was assented to on 20 August 1993.

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III TREATY FISHING RIGHTS

Article II of the Treaty of Waitangi guaranteed to Maori rangatiratanga over their fisheries. Maori were thus affirmed in the possession and control of their traditional fisheries, subsistence and commercial, and offered something more, a development right in the resource. The Crown did not, however, honour its Treaty obligations. We are faced now, therefore, with a claim to the fisheries resource and the challenge of upholding the Treaty in these new circumstances.

We consider in this part, first, the Crown's breach of its Treaty obligations and, secondly, the recent attempts by the Crown and Maori to settle Treaty claims.

A *Breach of Treaty Fishing Rights*

Treaty fishing rights have been consistently breached by New Zealand's fishing legislation and accompanying Crown practice. We look first at legislation before 1986, and secondly, at the Quota Management System, introduced in 1986.

1 *Legislation pre-1986*

The Crown has regulated fishing in New Zealand since 1866, and there have been a number of different management regimes.¹¹¹ All have failed to respect Maori fishing rights.

First, general fishing laws did not recognise the Maori right to participate in the control and management of the fisheries. Maori perspectives were never incorporated, and no effort was ever made to consult with Maori before legislating.¹¹²

Secondly, general fishing laws did not adequately protect Maori rights to take fish. Maori fishing rights were "saved" from the operation of general fisheries legislation, but no substantive effect was given to this until 1986.¹¹³ The only special provisions that were

¹¹¹See Appendix.

¹¹²*Ngai Tahu Sea Fisheries*, 295.

¹¹³The Maori fishing rights savings provision (s8 Fish Protection Act 1877; s 14 Sea Fisheries Amendment Act 1903; s77(2) Fisheries Act 1908; s88(2) Fisheries Act 1983) was given no content by the courts for most of its history: the only fishing rights were those given by Parliament and the court could not enforce customary rights claimed under aboriginal title or the Treaty of Waitangi (*Waipapakura v Hempton* (1914) 33 NZLR 1065; *Inspector of Fisheries v Weepu* [1956] NZLR 920; *Keepa v Inspector of Fisheries* [1965] NZLR 322). This approach was finally rejected in 1986 in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 where the High Court allowed Maori exercising traditional subsistence rights a defence against general fisheries laws. The full scope and extent of s88(2), however, was not decided in that case, and there

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made for Maori fisheries did not fully recognise Maori fishing rights.¹¹⁴ They were fundamentally limited by the following assumptions:¹¹⁵

- (i) that Maori interests should be accommodated by reserving particular fishing grounds for Maori
- (ii) that Maori fishing has no commercial component and grounds reserved must be for personal needs
- (iii) that Maori participation in the commercial fishing industry should be on no other terms than those provided for all citizens
- (iv) that no allowances should be made for Maori fishing methods, gear or rules for resource management
- (v) that the recognition of fishing should be an act of state; only parliament should authorise the reservation of fishing grounds; there should be no provision for the courts to recognise rights on proof of customary entitlement ...

Maori were thus not included within the development of the national fishing industry.¹¹⁶

In this way, the Crown breached the Treaty of Waitangi. The Crown had assumed sovereignty over the resource with scant regard for Maori rangatiratanga with its rights of possession, management and control. This had a fundamental effect on Maori fishing.¹¹⁷ Tribes were unable to maintain their extensive subsistence use and control of the fisheries; loss of land prevented access to traditional fishing grounds, and those which could be reached were often depleted by pollution or through over-fishing. Maori commercial fishing went into rapid decline. Tribal resource bases were lost; there was no money to develop; and no way to maintain the tribal role in the burgeoning fishing industry. Maori

were a number of different interpretations in the District Court cases which followed: *Ministry of Agriculture and Fisheries v Love* [1988] DCR 370; *Ministry of Agriculture and Fisheries v George Campbell and others* Unreported, 30 November 1988, District Court, Gisborne CRN 8016004552-4556; *Ministry of Agriculture and Fisheries v Pono Hakaria and Tony Scott* Unreported, 19 May 1989, District Court, Levin CRN 8031003482-3. The extent to which s88(2) could provide for substantive Maori fishing rights was at issue in the *Muriwhenua* proceedings: below Part III B 1 a and 2 a.

¹¹⁴Special provisions reserved exclusive fishing grounds for Maori subsistence use (Oyster Fisheries Act 1892; Maori Councils Act 1900; Maori Social and Economic Advancement Act 1945). Few were ever reserved (*Muriwhenua*, 223). There remain, however, some in Northland - 6 oyster reefs in Kaipara Harbour, for example - by virtue of the 1986 Fisheries Regulations. Other special provisions provide for Maori subsistence needs by permitting the taking of shellfish in excess of normal limits for tangi or hui, with the approval of a Maori community officer: reg 27 of the Fisheries (Amateur Fishing) Regulations 1986.

¹¹⁵*Muriwhenua*, 222.

¹¹⁶The State's support did not extend to iwi. New fishing settlements were funded, but not existing Maori coastal villages (Fisheries Encouragement Act 1885); the loans and incentives that were provided for the industry as a whole did not go to tribes: *Muriwhenua*, 222.

¹¹⁷See *Muriwhenua*, 220-224; *Ngai Tahu Sea Fisheries*, 275-282.

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commercial fishing continued, but only on an individual basis, small-scale, often part-time, and thus vulnerable to industry changes which excluded small fishers.¹¹⁸

2 *The Quota Management System*

The Quota Management System ("QMS"), established under the Fisheries Amendment Act 1986, was a revolution in the ownership, management and control of the fisheries resource. The Crown's response to the fisheries sustainability crisis¹¹⁹ was to privatise the fishery and create a tradeable property interest in an exclusive right of commercial fishing.

The QMS deals with resource ownership in the following way. The Minister of Fisheries can declare an area to be a quota management area ("QMA") and particular species of fish in that area to be subject to the QMS.¹²⁰ The Minister then sets a total allowable catch ("TAC") for species in the QMA and from that subtracts an allowance for "Maori, traditional, recreational, and other non-commercial interests in the fishery" to leave the total allowable commercial catch ("TACC").¹²¹ The TACC is then divided into individual transferable quotas ("ITQ's") which give a permanent property right to catch and sell a certain tonnage of fish.¹²² ITQ's were allocated to existing commercial fishers on the basis of previous catch records.¹²³ Quota holders can trade their property rights or lease them to others, and only quota holders can take fish commercially.¹²⁴ Quota-holders pay an annual resource rental to the Crown.¹²⁵

Management under the QMS focuses on MAFFish, the fisheries business group within the Ministry of Agriculture and Fisheries ("MAF"), and the Fishing Industry Board ("FIB"), a statutory body with Government and private sector representation.¹²⁶ MAFFish handles research, administration, management, and advice.¹²⁷ The FIB has a broad role in industry activity and must be consulted on major fisheries management decisions.¹²⁸

¹¹⁸See Appendix. Between 1984 and 1985, nearly 300 fishers lost their licenses in Northland alone. The Ministry of Agriculture and Fisheries does not keep separate Maori records, but the Fairgray Report estimated that most of these fishers were Maori: Ministry of Agriculture and Fisheries Fisheries Management Planning *ITQ Implications Study - Second Report (Community Issues)* FMP Series No 20, 48 ("Fairgray Report").

¹¹⁹See Appendix.

¹²⁰Section 28B Fisheries Act 1983.

¹²¹Section 28C and 28D Fisheries Act 1983.

¹²²Section 28O Fisheries Act 1983.

¹²³Section 28E Fisheries Act 1983.

¹²⁴Section 28Q and 28ZA Fisheries Act 1983.

¹²⁵Section 28ZC Fisheries Act 1983.

¹²⁶Fishing Industry Board Act 1963.

¹²⁷MAFFish is advised by five Fishery Management Advisory Committees (FMAC's) who maintain relations with fishers at a regional level. Local liaison committees are appointed by MAFFish to

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The QMS has been held to represent a fundamental breach of the Treaty of Waitangi.¹²⁹ The Crown had asserted its sovereignty and re-defined the foundations of ownership and management of the fisheries resource. It had done so, however, without regard for Maori Treaty rights.

First, the QMS has, at its base, the assumption that no fisheries belong to Maori but all to the Crown, and that they are, therefore, the Crown's to give away.¹³⁰ This is clearly in "fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive, and undisturbed possession of the property in fishing that to Maori was guaranteed."¹³¹ Further, the Crown's disposal of rights in the fisheries created a major obstacle for Maori in obtaining redress for previous Treaty breaches.

Secondly, the allocation of the Crown-derived rights was prejudicial to Maori: many Maori fishers had been driven out of the industry, were part-time only and often did not keep accurate catch-records.¹³²

Thirdly, Maori were given a minimal place only in the management of the commercial fishing industry. The only Maori input provided for under the QMS was a discretion to include Maori on local advisory committees advising MAFFish, and the reservation of a place for Maori on the Fisheries Authority which has functions in relation to fisheries management plans.¹³³

Fourthly, Maori fishing interests are classified by the QMS as traditional and non-commercial only.¹³⁴

provide an input to the FMAC's and comprise representatives from various commercial and recreational fishing groups, environmental groups and Maori organisations: s 7 Fisheries Act 1983.

¹²⁸Sections 28B, 28D, 28W, 28ZE, 30, 47, 86 and 107G Fisheries Act 1983.

¹²⁹*Muriwhenua*, 228; *Ngai Tahu Sea Fisheries*, 284-285.

¹³⁰*Ngai Tahu Sea Fisheries*, 133.

¹³¹*Muriwhenua*, xx. Many Maori feel that there is a "fundamental incongruity" between Maori values and the QMS:

They draw uncomfortable parallels with the history of Maori tribal lands where ... conferment of individual ownership was a major part of a process of alienation. ITQ's run contrary to the concept of communal guardianship (not ownership) of and access to the fish resource ... (Fairgray Report, above n118, 44.)

¹³²The Fairgray Report commented:

The conferral of ownership at a time where there are very few Maoris fishing commercially is seen as effective alienation of the fishery in one move. Many believe this to be contrary to the inalienable rights of the Maori to the fisheries guaranteed under Article 2 of the Treaty of Waitangi. (Above n1198 147.)

¹³³Section 13 Fisheries Act 1983.

¹³⁴Section 28D Fisheries Act 1983.

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The Treaty of Waitangi had thus again been breached by the fishing legislation. This time, however, the Crown had been warned. The Waitangi Tribunal and the Crown's own reports had repeatedly alerted the Crown to its Treaty fishing obligations and their possible breach by the new QMS.¹³⁵ The Crown had, however, continued as before, failing to recognise the Treaty as a constitutional limitation on its action, or as giving Maori a place in the modern New Zealand economy.

3 Conclusion

The Treaty of Waitangi's guarantee of fishing rights was thus consistently breached by fishing legislation and Crown action. The outcome for Maori was the loss of ownership and control of both their subsistence and commercial fisheries. The QMS posed also the danger that the Crown's alienation of the fisheries would prevent from ever regaining their Treaty fishing rights. Maori thus took action against the QMS in the Waitangi Tribunal and the courts. We examine this action and its outcome in the next section.

B Towards Settlement

The Crown and Maori grappled, from 1987 to 1993, with the question of how to affirm the Treaty fishing right in the circumstances of the late twentieth century. There were two main stages in these deliberations: the interim settlement of the Maori Fisheries Act 1989, and the full and final settlement of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. We consider these in turn.

¹³⁵The Waitangi Tribunal had, by 1986, considered Treaty fishing rights in *Motonui*, *Manukau*, and *Kaituna* (Waitangi Tribunal *Kaituna Report* (Government Printer, Wellington, 1984) ("Kaituna"). It had also twice warned the Crown in specific memoranda that the QMS should not be put in place while Maori fishing rights were still under investigation: below Part III B 2 a. The Fairgray Report had also warned of the grave economic and social consequences of Government fisheries policy for Northland communities: above n118. The Crown's failure to heed these warnings prompted the Tribunal to comment that:

The Ministry was and had been intent on pursuing its own plans ... legally if they can, otherwise by any means It ought to have been obvious, even on a brief reading of the Treaty, that the Ministry's proposals stood to be diametrically opposed to the provisions of the Treaty. (*Muriwhenua*, 149.)

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1 *Interim settlement*¹³⁶

The Maori Fisheries Act 1989 was an interim settlement of Treaty fishing claims imposed by the Crown after the Crown and Maori failed to agree. We look, first, to the process which led to the interim settlement and, secondly, to its content.

a *Process*

Treaty fishing rights were claimed by Maori in the Waitangi Tribunal and in the courts.

The Waitangi Tribunal claim was made by the Muriwhenua tribes in 1986.¹³⁷ The claimants alleged that the Crown had breached their Treaty fishing rights in legislation and Crown practice, particularly under the new QMS. The Waitangi Tribunal released its report on the claim on 15 June 1988. The Tribunal found that Maori Treaty rights extended to development rights in the commercial fishery, and that the QMS was, as it stood, in breach of the Treaty.

As the *Muriwhenua* claim was being heard, however, the Crown was continuing with the introduction of the QMS. The Crown was warned twice by the Waitangi Tribunal that this action was in breach of the Treaty.¹³⁸ The Crown ignored the first warning. On the second occasion, however, Maori had gone also to court.

Maori commenced court proceedings on 30 September 1987. They sought judicial review of the Minister of Fisheries' decision to allocate quota under the QMS. The action was based on s 88(2) of the Fisheries Act 1983, which stated that "Nothing in this Act shall affect any Maori fishing rights." The Maori claimants argued that s88(2) incorporated Treaty fishing rights and/or aboriginal title rights and that these rights were affected by the QMS in contravention of the section.¹³⁹ The High Court, on this basis, granted an interim

¹³⁶See generally Kelsey *A Question of Honour*, above n99; G Palmer *New Zealand's Constitution in Crisis* (Wellington, John McIndoe, 1992); A Frame "A State Servant Looks At the Treaty" (1990) 14 NZULR 82.

¹³⁷The Muriwhenua claim was the first general fisheries claim. The earlier *Motonui*, *Manukau*, and *Kaituna* reports involved particular Crown practices which had impacted on Maori fisheries. It should be noted that the Muriwhenua claim was with respect to both land and fisheries, but fisheries were reported on separately and the land claim is still being heard. The second general fisheries claim heard was made by Ngai Tahu, and was reported in 1992 as *Ngai Tahu Sea Fisheries*, after the lands claim, *Ngai Tahu*, in 1991.

¹³⁸The first Waitangi Tribunal memorandum, concerning the initial allocation of quota under the QMS, was issued on 8 December 1986. The second memorandum concerned the Government's proposal to bring more species under the QMS, and was issued on 30 September 1987. These memoranda are reproduced in *Muriwhenua*, 289-297.

¹³⁹This substantive use of s88(2) was, therefore, an extension from *Te Weehi*, above n, which had affirmed s88(2) as a defence to proceedings brought under the Fisheries Act 1983. The extension

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declaration that the Crown ought not to proceed with allocations of those species in Muriwhenua,¹⁴⁰ and later, in all of New Zealand.¹⁴¹

The Crown was thus forced, therefore, to negotiate with Maori.¹⁴² On 25 November 1987, a Joint Working Group, comprising four Crown and four Maori representatives, was established to determine how to honour the Maori fishing claims.¹⁴³ It was to reach a negotiated settlement before 30 June 1988 when the claims were to be heard.¹⁴⁴ By 30 June, however, there had been no agreement. The Crown and Maori had very different perceptions of the Treaty's requirements.¹⁴⁵

The Maori negotiators claimed that Maori were entitled under the Treaty of Waitangi to 100 per cent of the fisheries.¹⁴⁶ Maori were prepared, however, to accept the QMS and share ownership and management under it equally with the Crown. The Crown negotiators proposed another model altogether. They recognised that the Treaty of Waitangi entitled Maori to ownership and control rights in the commercial fishing resource, but proposed that all ITQ's revert to a corporation which would control and manage the fishery. The corporation would lease out its quota by tender, with annual

was accepted by the High Court and the Court of Appeal for the purpose of granting interim declarations. There remained issues, however, as to the scope of s88(2), the source of the rights referred to, their content, and whether, after the passing of the Maori Fisheries Act discussed in this part, they had been satisfied.

¹⁴⁰*New Zealand Maori Council and Te Runanga o Muriwhenua v Attorney-General and Minister of Fisheries* Unreported, 30 September 1987, High Court Wellington Registry CP 553/87. Greig J found that: "What has been done and what will be done in the continuation of the quota management system is, in my view, contrary to the Act in that it will affect the Maori fishing right."

¹⁴¹The Crown's response to the Muriwhenua declaration was to gazette all remaining areas. The Ngai Tahu Maori Trust Board and others representing most of the coastal tribes of New Zealand then brought another judicial review action and asked for the existing declaration to be extended: *Ngai Tahu Maori Trust Board and ors v Attorney-General and Minister of Agriculture and Fisheries and ors* Unreported, 12 November 1987, High Court Wellington Registry CP 559/87, 610/87, 614/87. These two review applications comprise the "first bracket proceedings".

¹⁴²The interim declarations remained in force but the parties negotiated the continuance of QMS on a temporary basis.

¹⁴³The Maori negotiators were those who had represented Maori in the first bracket proceedings: Matiu Rata from Muriwhenua; Tipene O'Regan from Ngai Tahu; Sir Graham Latimer for the New Zealand Maori Council; and Denese Henare on behalf of Tainui. These negotiators were mandated at a national hui in 1988 to seek a settlement of not less than 50 per cent of the fisheries. Maori were given \$1.5 million ex gratia by the Crown by way of payments to reimburse claims for costs incurred in the negotiations. This did not cover all costs and additional funding was eventually provided by the Maori Fisheries Commission: *Report of the Maori Fisheries Commission for the eighteen month period ended 30 September, 1992* New Zealand. House of Representatives. Appendix to the journals, 1993 C19: 23.

¹⁴⁴The interim declarations remained in force but the continuance of the QMS on a temporary basis was negotiated.

¹⁴⁵The Crown and Maori Working Group's Reports are reproduced as an appendix to the Law Commission's Report: *The Treaty of Waitangi and Maori Fisheries*, above n34.

¹⁴⁶This view is not in accordance with the Waitangi Tribunal's findings in *Muriwhenua* and, later, *Ngai Tahu Sea Fisheries*. This was emphasised in *Fisheries Settlement*, 10.

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resource rentals raised to the market maximum in five years. Maori would have a major share in management, with Maori and the Crown each having three directors and with the Crown appointing an additional chairperson. Maori would also share significantly in the benefits from the resource, with shares in the corporation allocated 25 per cent to Maori and 75 per cent to the Crown.¹⁴⁷ Maori would not, however, be allocated quota under the settlement.¹⁴⁸

Negotiations continued thereafter on a Cabinet level, but without success. The Government decided as a result to legislate for settlement, without Maori consent. The Maori Fisheries Bill, providing for the effective extinguishment of Maori fishing rights, was introduced in September 1988.¹⁴⁹ Maori went straight back to court. Actions were brought on behalf of virtually all fishing tribes alleging trespass, breach of fiduciary duty and negligence,¹⁵⁰ and the Crown was forced back into negotiations.¹⁵¹ No agreement was reached, but there was a measure of general approval to an interim settlement.¹⁵² A Crown submission was, therefore, given to the Select Committee considering the original Maori Fisheries Bill and it was incorporated, with some changes. The Maori Fisheries Act was passed on 20 December 1989 as an interim solution to Maori Treaty fishing claims.¹⁵³

The High Court declarations and the interim arrangements with respect to the QMS remained in force, however, and the substantive proceedings to determine the extent of

¹⁴⁷The 25 per cent figure was calculated on the basis that Maori had Treaty rights to 100 per cent of the inshore fishery and 12.5 per cent of the deep sea fishery (based on population). Four per cent of this total was subtracted, 2 per cent in order to provide quota for Maori fishers excluded in the early 1980's, and 2 per cent for training Maori in the fishing industry.

¹⁴⁸Apart from the 4 per cent of quota mentioned above n148. This was intended to deflect the conflict of interest which would be raised if Maori were to be both managers and users of the fishing resource. Maori could, of course, buy quota for themselves.

¹⁴⁹The Bill provided for Maori to be given up to 50 per cent quota over the next 20 years, but was dependent on the quota being "substantially fished" by Maori. In return, s88(2) would be repealed, the jurisdiction of the courts would be ousted, and Maori would be unable to go to the Waitangi Tribunal for 20 years.

¹⁵⁰These are the second bracket proceedings, filed as *Te Runanga o Muriwhenua Inc v Attorney-General* Wellington, CP 743/88.

¹⁵¹The compulsion, this time, was political. The Crown could have passed the Maori Fisheries Bill and ousted the jurisdiction of the courts. The Deputy Prime Minister, Mr Palmer, saw this, however, as "unconstitutional": Palmer, above n136, 95.

¹⁵²The press statement of the Deputy Prime Minister, Mr Palmer, of 28 October 1988 recorded a measure of support from both the Maori representatives and from the fishing industry: Frame, above n136, n27.

¹⁵³"The Act does not use the word "interim", but in leaving s88(2) and the High Court proceedings in existence, and imposing no bar on Waitangi Tribunal proceedings, Parliament has clearly left it to the courts and the Tribunal to determine how far the Act goes in discharge of any obligations falling on the Crown: *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 649 ("*Te Runanga o Muriwhenua (CA)*").

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Maori Treaty and aboriginal fishing rights were set down for hearing in early 1990.¹⁵⁴ On 27 February 1990, the Crown and Maori reached an agreement that all substantive proceedings should stand adjourned sine die, and Maori agreed not to return to court before October 1992.¹⁵⁵ The Crown promised that no further species would be brought within the QMS without agreement or court resolution. Fishing continued, under these arrangements, largely unrestricted.

b Content

The Maori Fisheries Act 1989 recognises the Treaty of Waitangi as entitling Maori to a full set of rights in the modern fishing resource. The Act states its purpose as being:

- (a) To make better provision for the recognition of Maori fishing rights guaranteed under the Treaty of Waitangi; and
- (b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing

The Act provides for both commercial and traditional subsistence fishing rights. These are considered in turn below.

i Commercial fishing rights

The Maori Fisheries Act recognises Treaty commercial fishing rights within the framework of the QMS. The Act gives Maori 10 per cent of existing quota¹⁵⁶ and a \$10 million grant towards the establishment of Maori commercial fisheries.¹⁵⁷ It also sets up an institutional structure to deal with these Maori assets, the Maori Fisheries Commission¹⁵⁸ and Aotearoa Fisheries Limited.¹⁵⁹

¹⁵⁴There were a number of procedural cases in the High Court and the Court of Appeal in early 1990 relating to hearing dates, adjournments, the continuance of the interim declarations, and evidential matters. In one case, the Court of Appeal indicated that the issue under s88(2) may be "whether the provisions of the Maori Fisheries Act 1989 are a sufficient translation or expression of traditional Maori fishing rights in present-day circumstances." As an interim measure, the court opined that the Act was probably sufficient: *Te Runanga o Muriwhenua Inc v Attorney-General* (CA), above n153, 656.

¹⁵⁵Proceedings were, however, to resume at the end of that month if a settlement could not be made: *Te Reo o Te Tini a Tangaroa*, newsletter of the Maori Fisheries Commission, Special Report from the 1992 AGM of the Maori Fisheries Commission, July 1992, 2 ("*Tangaroa*").

¹⁵⁶Section 40 Maori Fisheries Act 1989.

¹⁵⁷Section 45 Maori Fisheries Act 1989.

¹⁵⁸Section 4 Maori Fisheries Act 1989.

¹⁵⁹Section 12 Maori Fisheries Act 1989.

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The Maori Fisheries Commission holds 50 per cent of the settlement assets. Its purpose is to facilitate Maori entry into the business and activity of fishing.¹⁶⁰ The Crown envisaged the Commission as a continuing institution which would provide Maori fishers with technical and financial assistance on the basis not only of custom but also on broader social and economic considerations.¹⁶¹ The Commission, however, defined its own role more tightly. It saw itself as a temporary body whose primary responsibility was to allocate the settlement assets to iwi.¹⁶² That was not possible under the Act until 1992. In the meantime, the Commission would seek to optimise the benefits of the quota for iwi,¹⁶³ and to prepare iwi through development and training programmes to receive the resource.¹⁶⁴ The Commission would also consult with iwi to establish the principles of allocation. The Commission favoured the "mana moana mana whenua" model, under which each tribe is deemed to possess the whole of the fishery from their coastlines to the end of the EEZ, with allocations to be based on the relative catch values in the consequentially defined sea territories.¹⁶⁵ This it saw as in accordance with tikanga Maori¹⁶⁶ and the Waitangi Tribunal's findings,¹⁶⁷ and it leased quota to tribes on this basis.¹⁶⁸ The principles of allocation were, however, never finally determined.¹⁶⁹

¹⁶⁰Section 5 Maori Fisheries Act 1989.

¹⁶¹Section 8 Maori Fisheries Act 1989.

¹⁶²The Hon R Prebble, MP, Minister of State-Owned Enterprises and a chief fisheries negotiator under the Labour Government, emphasised the conflict between this conception and the Crown's intentions:

[T]he Maori Fisheries Commission, which was set up by a Labour Government, was not set up to distribute Maori fisheries rights; the commission was set up to help Maori to go fishing, but it has been subverted. ... That body was not set up to be a judicial body deciding who is to get what property rights. (New Zealand Parliamentary Debates, Vol 532, 1992: 12833.)

Given that the settlement was imposed on Maori, its "subversion" in practice is unsurprising.

¹⁶³The Commission's quota was, therefore, leased by tender but with a preference for lease to Maori. Almost all of the quota was leased to Iwi organisations and individual Maori: *Report of the Maori Fisheries Commission*, above n 143, 6.

¹⁶⁴*Report of the Maori Fisheries Commission*, above n 143.

¹⁶⁵*Fisheries Settlement*, 18.

¹⁶⁶"The Commission thinks that tikanga Maori, the customs and rules that govern Maori, should be the basis of sharing quota to the tribes. ... Thus as mana whenua applies to land, mana moana applies to the sea. The Commission is of the view that the fish in the sea off an iwi's coast is that iwi's fish": *Tangaroa*, Special Issue for 1992 AGM of the Maori Fisheries Commission, July 1992, 2.

¹⁶⁷*Ngai Tahu Sea Fisheries* "is clearly supportive of the kaupapa adopted by the Commission tying quota allocation to 'mana whenua mana moana'": *Tangaroa*, Special Report from the 1992 AGM of the Maori Fisheries Commission, August 1992, 3.

¹⁶⁸H Barlow "More talks likely on Maori fish quotas" *The Dominion*, Wellington, 28 August 1992, 2.

¹⁶⁹The 1992 Hui-a-Tau of the Commission resolved "that MFC examine the alternative methods to allocate, consult with iwi, and have prepared discussion material to enable agreement to be reached on the optimum method for allocation": Schedule 1A, Maori Fisheries Act 1989, as amended by s 18 Settlement Act. The question of the allocation of these assets is still current as the Settlement Act is careful to distinguish between these, the "pre-settlement assets", and the "post-settlement assets" of the Sealord deal: s 6(e)(1) and s 9(2)(1) Maori Fisheries Act 1989, as amended by the Settlement Act. The new Commission, the Treaty of Waitangi Fisheries Commission (below Part III B 2 b), is focussing first on the allocation of pre-settlement assets. It is expected that the principles of allocation will be similar for both: *Treaty of Waitangi Fisheries Commission Hui-a-Tau*, Pipitea Marae, 31 July 1993, materials presented, 18-20.

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Aotearoa Fisheries Limited, a wholly owned public company, was required by the Act to be formed as the commercial arm of the Commission and to hold 50 per cent of the Commission's assets.¹⁷⁰ AFL was required to seek a commercially driven return in order to provide a capital base for Maori.

ii *Traditional fishing rights*

The Maori Fisheries Act established the taiapure-local fisheries model in order "to make better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi."¹⁷¹

The Act defines the taiapure as a coastal fishing area limited to littoral or estuarine waters which is of special significance to the local iwi either for fishing or for cultural or spiritual reasons.¹⁷² The purpose of the taiapure is to give local Maori a greater say in the management and conservation of the area. It is not to establish a special fishing regime for iwi, and the taiapure regulations may not discriminate against people on the grounds of "colour, race, ethnic or national origins."¹⁷³

The Minister of Fisheries approves the establishment of a taiapure after an extensive application and objection process,¹⁷⁴ and appoints the taiapure's committee of management on the recommendation of the local Maori community.¹⁷⁵ The committee advises the Minister on the making of regulations for the conservation and management of the area, but has no substantive powers itself.

The provisions of the Fisheries Act affecting traditional subsistence fishing rights, s88(2) and the Amateur Fishing Regulations, continue.

¹⁷⁰Sections 12 and 43 Maori Fisheries Act 1989. In practice, the Commission transferred all the deep sea quota to Aotearoa Fisheries: *Tangaroa*, Issue 7, November 1991, 12.

¹⁷¹Section 54A Fisheries Act 1983, as inserted by s 74 Maori Fisheries Act 1989.

¹⁷²Section 54A Fisheries Act 1983.

¹⁷³Section 54K(6) Fisheries Act 1983.

¹⁷⁴The process involves the submission of a detailed proposal for the taiapure; its initial approval by the Minister; the publication of the notice in the *Gazette* and metropolitan newspapers; the lodging of copies of the proposal in a number of specified locations; the hearing of objections and submissions by a Tribunal consisting of a Judge of the Maori Land Court, assisted, if necessary, by assessors appointed by the Chief Judge; a report to the Minister; the Minister's decision and its publication in the *gazette*: ss 54B - 54I Fisheries Act 1983.

¹⁷⁵Section 54J Fisheries Act 1983.

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c *Conclusion*

The Maori Fisheries Act marked a significant first step in Treaty claims resolution. It recognised, for the first time, the Treaty of Waitangi as entitling Maori to a full set of rights in the modern fishing resource; and affirmed direct negotiation as the preferred settlement process, although not successful at this point. The settlement represented, however, only the Crown's perspective on how to respect the Treaty fishing right. The settlement could thus not have legitimacy as a solution in itself. It paved the way, however, for the final settlement of Treaty fishing claims in the Sealord deal.

2 *Full and final settlement*¹⁷⁶

The Sealord deal is a full and final settlement of all Maori Treaty fishing claims. It claims to honour the Treaty in 1993 and to take Maori beyond "grievance mode" to "development mode". We consider in this section first, the process towards the Sealord deal, and, secondly, its content.

a *Process*

The Maori Fisheries Act was a temporary solution only. The Crown may have hoped that Treaty fishing claims were over - both Labour and National had made it clear at the 1990 election that the Maori Fisheries Act was seen by the Crown as the end of the matter¹⁷⁷ - but Maori were intent on reaching a full settlement.

The *Ngai Tahu Sea Fisheries* Report, released on 11 August 1992, gave support to the Maori position. The Waitangi Tribunal affirmed Ngai Tahu's exclusive inshore fishing and deep sea development rights, and saw the Maori Fisheries Act as a partial solution only.¹⁷⁸ Further, the interim declarations were still in force¹⁷⁹ and the possibility of returning to court was open.¹⁸⁰ There was, however, no new agreement in sight.

¹⁷⁶See generally Kelsey, *Rolling Back the State*, above n48, 260-269; PG McHugh "Sealords and Sharks: The Maori Fisheries Agreement (1992)" [1992] NZLJ 354; *Fisheries Settlement*. The preamble to the Settlement Act also provides a useful summary of events.

¹⁷⁷Kelsey, *Rolling Back the State*, above n49, 261.

¹⁷⁸*Ngai Tahu Sea Fisheries*, 287-288.

¹⁷⁹Despite the Crown's attempt in 1990 to have them lifted. In *Te Runanga o Muriwhenua v Attorney-General* Unreported, 28 June 1990, Court of Appeal CA 110/90, the Court of Appeal allowed an appeal from a High Court decision to rescind the interim orders.

¹⁸⁰The Crown-Maori agreement in 1990 was that proceedings could be resumed at the end of October 1992 if no settlement had been reached; above n155. Neither the Crown nor Maori, however, wanted to resolve the Treaty fishing claims through litigation. The legal issues, despite obiter comment from the Court of Appeal, were still wide open, and the amount of factual material needed to establish, and refute, the existence of Maori fishing rights was immense, especially as the

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The opportunity to settle the Treaty fishing claim came in mid-1992. Sealord Fisheries Limited, one of New Zealand's largest fishing companies with 26 per cent of existing quota, was put up for tender.¹⁸¹ Maori saw a real chance to re-enter the New Zealand fishing industry as a major player. Maori also recognised that Sealord was critical to the settlement of their Treaty fishing claims. If the company's quota had gone elsewhere, the Crown may never have been able to fulfil its Treaty obligations. The Crown's ability to buy back quota on the open market was limited by the increasing expense and the opposition of the fishing industry to purchases from existing companies. Further, there was a limit to the financial and personal resources of the negotiators, and pressure, after six years of on-and-off litigation and negotiation, to start doing something practical about Maori needs now. There were also limited options open to Maori for resolving the claim. Maori may have been in court, but they were conscious of the difficulties of both proving their case and achieving an appropriate remedy. Further, Maori felt that if they did not take up the Sealord opportunity on the terms offered, the Crown would lose all interest in settling Treaty claims.¹⁸² The Crown, on its part, saw the opportunity to finally end claims, quantify its liability, and achieve a politically acceptable settlement.

The Maori negotiators asked the Crown to help them to buy into Sealord in late August 1992. There followed several days of intense negotiations, in secret, under considerations of strict confidentiality, and driven by a tight commercial deadline. On 27 August 1992, the Crown and the Maori negotiators signed a Memorandum of Understanding, an agreement in principle subject to ratification by 24 September 1992.

Maori interests had thus far been represented by the Maori negotiators.¹⁸³ These people had been given a mandate by the Maori Fisheries Commission's Hui-a-Tau in July 1992 to represent iwi in negotiations with the Crown. There had been, however, no discussion

Waitangi Tribunal's reports had been ruled not conclusive evidence of their existence: *Te Runanga o Muriwhenua* (CA), above n153, 654.

¹⁸¹ Sealord Fisheries Limited was owned by Carter Holt Harvey. Carter Holt had, however, run into difficulties when an increase in its overseas shareholding had put it in breach of the Fisheries Act limits for foreign ownership of quota. The Minister of Fisheries undertook not to enforce forfeiture provisions against Carter Holt, provided Sealord was floated immediately. The Minister's decision was upheld in the Court of Appeal: *Southern Ocean Trawlers Ltd v Director-General of Fisheries* [1993] 2 NZLR 53.

¹⁸² These factors in the negotiators' decision to settle are given by Mr O'Regan: *Treaty of Waitangi Fisheries Commission Hui-a-Tau*, above n169, 4.

¹⁸³ The Maori negotiators were those who had represented Maori in the interim settlement. They were Matiu Rata, Sir Graham Latimer, Robert Te Kotahi Mahuta, Tipene O'Regan, Whatarangi Winiata, Richard Dargaville, Cletus Manu Paul, and David Higgins: s2 Settlement Act.

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of any imminent settlement, nor of one along the Sealord line.¹⁸⁴ The Memorandum of Understanding was as much a surprise to Maori as it was to the general public.

Ratification of the Memorandum of Understanding raised additional problems. There was no pan-Maori body capable of giving its consent to the deal, and no clear means of identifying iwi or hapu authorities with the authority to approve the settlement. The Crown and the Maori negotiators decided, therefore, to take the deal to national hui and some 23 marae throughout the country for ratification.

Many allegations have been made concerning these hui.¹⁸⁵ Their overriding theme is that there was no informed or sufficient consent for the Sealord deal. Maori, it is claimed, did not understand the full content and implications of the memorandum; there was no time for proper consideration; full and frank disclosures were not always made - some negotiators would not reveal the contents of the Memorandum on the grounds of commercial sensitivity; iwi were not assisted by lawyers or financial advisors; and no negative aspects of the deal were ever presented. Further, it is alleged, there was much confusion as to the deal's effect on traditional fishing rights and no support for any abrogation of Treaty rights.¹⁸⁶

There was, however, sufficient support on the face of the record of the hui submitted by the Maori negotiators for the Crown to conclude that Maori had given a sufficient mandate.¹⁸⁷ The Crown decided to proceed to the conclusion of a formal deed.

The Deed of Settlement was entered into between the Crown and representatives of many, but not all, iwi¹⁸⁸ and Maori organisations with fishing interests at Parliament on 23 September 1992. The Deed received tri-partisan commendation in Parliament the following day.¹⁸⁹ The Crown and the Maori signatories agreed that the settlement was not

¹⁸⁴The Hui-A-Tau would seem rather to have envisaged the continuation of negotiations directed towards achieving the return of 50 per cent of the fishing resource. The Hui had resolved: "That MFC ensure that no allocation of the 10 per cent be made before the position of the pursuit of the legal rights of iwi to secure the complete 50 per cent is secure." (Schedule 1A Maori Fisheries Act 1989, as inserted by s 18 Settlement Act.)

¹⁸⁵See generally *Fisheries Settlement*, 15-17; Kelsey *Rolling Back the State*, above n49, 264-267; John Kaiwai "Maoridom 'sat in ignorance' over Sealord" *Dominion*, Wellington, 14 October 1992, 10.

¹⁸⁶*Fisheries Settlement*, 15.

¹⁸⁷The Waitangi Tribunal found that "in the lights of the report emanating from the hui it was reasonable for the Crown to believe it was justified in proceeding": *Fisheries Settlement*, 16.

¹⁸⁸Dissenting iwi included Ngati Porou, Ngati Awa, Tuhuru, Whanau-a-Apanui, Ngati Kahungunu, Tai Tokerau, Te Runanga O Wharekauri Rekohu, Nga Puhi, and Ngati Toa.

¹⁸⁹New Zealand Parliamentary Debates Vol 529, 1992: 11214 - 11235.

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binding on those who did not sign;¹⁹⁰ but all were to be drawn in under the deed's enacting legislation.

The Sealord deal was, at this point, challenged by the dissenting iwi before the courts and the Waitangi Tribunal. In the courts, the application for interim relief by way of injunction or declaration was declined.¹⁹¹ The Court of Appeal found that it could not interfere in Parliamentary proceedings;¹⁹² the wisdom of the settlement and the sufficiency of its mandate were "political questions for political judgment."¹⁹³ The Court of Appeal commented, however, that the Sealord deal was "a responsible and major step forward":¹⁹⁴

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 that had to be taken at the flood. A failure to do so might well have been inconsistent with the constructive performance of the duty of a party in a position akin to partnership.

The Waitangi Tribunal also upheld the Sealord deal. It did so, however, subject to a number of substantive amendments, particularly with regard to the extinguishing of rights and the ability to judicially review traditional fisheries regulations.¹⁹⁵ None of these were made.¹⁹⁶

The Sealord deal was challenged also on the international level. Dr Tamati Reedy condemned it before the United Nations General Assembly at the launch of the UN International Year for the World's Indigenous Peoples, and a complaint on behalf of 12 iwi was filed with the United Nations Human Rights Committee.¹⁹⁷

¹⁹⁰*Te Runanga O Wharekauri*, above n9, 307.

¹⁹¹*Te Runanga O Wharekauri Rekohu Incorporated v Attorney-General* [1993] 2 NZLR 301.

¹⁹²Cooke P's judgment had, however, a "twist in its tail." Whilst declining this application, he added that the proper time for challenge, if there were any relevant limitations on legislation, was after the deed's enactment. (308) As Kelsey comments, "[w]hat Cooke [P] left unsaid was how expansive such a challenge could be, based on what grounds, and how far a court might go to strike it down." (Kelsey, *Rolling Back the State*, above n49, 219.) An opening has thus been left.

¹⁹³*Te Runanga O Wharekauri*, above n191, 309.

¹⁹⁴*Te Runanga O Wharekauri*, above n191, 306-307.

¹⁹⁵*Fisheries Settlement*, 23-4.

¹⁹⁶At a meeting called by the National Maori Congress shortly after the Waitangi Tribunal's decision, the Tribunal's findings seemed to be the basis for consensus amongst Maori after months of division. The Crown was, however, not interested: A Robb "Who are the Sea Lords now?" *Mana*, Issue 2, March-April 1993, 27.

¹⁹⁷"Historic' Sealord bill finally becomes law" *Dominion* 11 December 1992, 1, 2; "UN told of Maori opposition to Sealord deal" *Dominion*, 12 December 1992, 1.

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The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, enacting the deal, was passed under urgency on 10 December 1992.¹⁹⁸ It was opposed by all Maori MP's, Labour and National, and the Labour Opposition, but supported by the Alliance and the National Government.

b Content

The Sealord deal provides for Maori involvement in commercial fishing and fisheries management, and establishes a new traditional fisheries regime. We consider these aspects of the deal in turn.

i Commercial fishing rights

The Sealord deal gives Maori a half share in Sealord Fisheries Limited¹⁹⁹ and 20 percent of any new fishing quota,²⁰⁰ in addition to the 10 percent of existing quota and \$10 million transferred under the Maori Fisheries Act. The Sealord deal restores Maori to a position as major players in the New Zealand fishing industry and transfers a total benefit estimated at \$0.5 billion.²⁰¹

The settlement assets are held by the Treaty of Waitangi Fisheries Commission, the newly constituted Maori Fisheries Commission.²⁰² The Commission is responsible for the allocation of the assets to iwi. This is to be done in two stages. First, the Maori Fisheries Act assets are to be allocated in accordance with the resolutions of the 1992 Hui-a-Tau, and, secondly, the Sealord assets are to be allocated in accordance with the principles of

¹⁹⁸The Minister of Justice justified the urgency as follows:

This bill will not go to a select committee for the very real reason that it would be hard to suggest that this matter has not been the subject of consultation - endlessly - with Maori and with everybody else. (New Zealand Parliamentary Debates Vol 532, 1992: 12823.)

¹⁹⁹Sealord Fisheries Limited was bid for successfully by a Maori/ Brierley Investment Limited ("BIL") Joint Venture. The Deed of Settlement required that the Joint Venture agreement give Maori a first option on BIL's share: cl 2.1.3.6. The Crown contributed \$150 million towards the Maori share: s7 Settlement Act.

²⁰⁰Clause 3.2, Deed of Settlement. The Sealord deal's discontinuance of the Maori court proceedings (s 11 Settlement Act) allows the Minister of Fisheries to bring new species under the QMS. The value of new fishing quota is expected to rise rapidly as the species are developed: Minister of Fisheries, New Zealand Parliamentary Debates Vol 532, 1992: 12817. Legislation amending the Fisheries Act to provide for the 20 per cent allocation to Maori has yet to be passed.

²⁰¹Above n5.

²⁰²Section 4(1) Maori Fisheries Act 1989, as amended by s 14 Settlement Act. There are 13 commissioners, appointed by the Crown after consultation with Maori: s 29 Maori Fisheries Act, as amended by s 16 Settlement Act. Appointment took place in June 1993 and was a highly politicised process about which there was much discontent. Proceedings seeking judicial review of the Minister's decision were lodged but withdrawn: "Tribes decide against legal challenge" *The Evening Post*, Wellington, 2 June 1993, 21. Aotearoa Fisheries Limited is to be wound up and its assets transferred to the Commission for distribution to iwi: *Treaty of Waitangi Fisheries Commission Hui-a-Tau*, above n169, 13-14.

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the Treaty of Waitangi and according to a procedure determined by the Commission after full consultation with iwi.²⁰³ In practice, however, the Commission faces the same issues with respect to both allocations. The 1992 Hui-A-Tau resolved only that the Commission examine alternative methods of allocation, seemingly leaving the issue wide open.

There is, however, considerable disagreement amongst iwi as to these allocation principles. Two main issues arise: when should assets be allocated to tribes, and on what basis? The mostly Southern tribes²⁰⁴ emphasise property rights and favour the immediate allocation of assets to iwi on the mana moana model.²⁰⁵ On this basis, Ngai Tahu would receive 75 per cent of the resource for its 20 000 people; Nga Puhi, with a few kilometres of coastline and 75 000 people, would receive virtually nothing.²⁰⁶ The Northern tribes favour a base principle of "equitable development."²⁰⁷ They seek to delay the allocation of quota in order to develop the Maori holding as a whole, rather than in uneconomic fragments, and to allow iwi more time to develop their commercial bases. The Northern tribes want eventual allocation to be on the basis of tribal population.

There is an immediate need to resolve these allocation principles in order to enable the leasing of quota for the new fishing season.²⁰⁸ The tribes had not, however, been able to reach a compromise and the decision was left to the Treaty of Waitangi Fisheries Commission. The Commission has reached a compromise solution for the purposes of this quota round, but has stressed that it should not be seen as a precedent for allocation of the resource.²⁰⁹

The Sealord deal represents a full and final settlement of all Maori commercial fishing claims, whether based on the Treaty of Waitangi or aboriginal title. In return for the benefits of the deal, Maori accept that all Treaty and aboriginal title claims against the

²⁰³The first allocation may proceed after a report by the Commission to the Minister (s 9(2) Maori Fisheries Act, as amended by s 17 Settlement Act), the second only after the incorporation of the procedure in a new Maori Fisheries Act (s6(e) Maori Fisheries Act, as amended by s 15 Settlement Act). The Deed of Settlement provides that an iwi may request that the Crown recommend to Parliament that this Maori Fisheries Bill be referred to the Waitangi Tribunal under s 8 of the Treaty of Waitangi Act 1975 and that the Crown shall so recommend: cl 4.5.3.

²⁰⁴Ngai Tahu and Te Runanga O Wharekauri Rekohu, from the South Island, and also Ngati Kahungunu and Ngati Porou from the North.

²⁰⁵"Sharing out the fish", above n5.

²⁰⁶R Laugesen "Party's over for Bolger as tempers get frayed" *The Dominion*, Wellington, 15 February 1993, 2.

²⁰⁷The Northern consortium comprises Tai Tokerau, Tainui, Te Arawa, and Mataatua and claim to represent more than 60 per cent of Maoridom: "Sharing out the fish", above n5.

²⁰⁸The season opens on 1 October 1993: E O'Leary "Maori keen to settle fish dispute" *The Evening Post*, Wellington, 2 August 1992, 3. The quota to be leased involves, for the first time, deep sea fishing quota, previously held by AFL: "More talks likely on Maori fishing quota" above n168.

²⁰⁹S Raea "Compromise reached in Maori fishing quota row" *The Dominion*, Wellington, 1 September 1993, 3. As at 1 September 1993, the Commission has not released details of the compromise.

Crown "(current and future) in respect of, or directly or indirectly based on, rights and interests of Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged."²¹⁰ The Courts and the Waitangi Tribunal have no further jurisdiction to hear commercial fishing claims;²¹¹ s 88(2) of the Fisheries Act 1983 is repealed;²¹² and the Maori court proceedings are statutorily discontinued.²¹³ Treaty commercial fishing rights are thus effectively abrogated.²¹⁴ Maori have also recognised that the fisheries settlement will limit the Crown's ability to settle other Treaty claims.²¹⁵

ii Fisheries management

The Sealord deal provides a new role for Maori in fisheries management. Maori are to have two places on the Fishing Industry Board, and all advisory committees appointed by the Board are to have a Maori representative.²¹⁶

The Treaty of Waitangi Fisheries Commission must also be consulted by the Crown at the same time as the Fisheries Act requires it to consult with the Fishing Industry Board.²¹⁷ Consultation is required, for example, on the introduction of species to the QMS, the determination of the TACC, the declaration of a controlled fishery or a closed season, and

²¹⁰Section 9 Settlement Act.

²¹¹Section 9(b) Settlement Act; s6(7) Treaty of Waitangi Act 1975, as amended by s40 Settlement Act.

²¹²Section 33 Settlement Act.

²¹³Section 11 Settlement Act.

²¹⁴The Memorandum of Understanding and the Deed of Settlement required Maori agreement to the "extinguishment" of Treaty and aboriginal rights. Reference to extinguishment was, however, omitted from the Settlement Act after Maori pressure. This would appear, however, to have no real effect. If a right imposes no obligations and cannot be enforced, then, for all practical purposes, it is abrogated: "the just rights of peoples are ... meaningless without access to the courts to enforce them." (*Fisheries Settlement*, 22.) The Crown and the Maori negotiators have, however, skirted this conclusion: "We are not giving up our Treaty rights. We are accepting that, in respect of commercial sea fisheries, they will have been honoured" (*The Sealord Deal - What it means for Maori*, above n10); "The end result is that Treaty rights remain unaffected" (Mr Graham, New Zealand Parliamentary Debates Vol 532, 1992: 12929-12930).

²¹⁵Clause 4.6 of the Deed of Settlement provides:

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.

²¹⁶Sections 3(3) and 9 Fishing Industry Board Act 1963, as amended by ss 42 and 43 Settlement Act. The Fishing Industry Board now has ten members: the Director-General of Fisheries; the Chairperson; one NZ Federation of Commercial Fishermen Incorporated representative; one NZ Sharefishermen's Association Inc representative; two NZ Seafood Processors' Association Inc representatives; one representative of fish retailers; one other member; and two members nominated by the Treaty of Waitangi Fisheries Commission.

²¹⁷Sections 23, 24, 26, 28-32, 35 and 36 Settlement Act with regard to ss 28B, 28D, 28W, 28ZE, 30, 47, 86 and 107G Fisheries Act 1983.

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on the variation of resource rentals. The Commission thus has a continuing role as an advocate for Maori interests.²¹⁸

iii Traditional fishing rights

The Sealord deal establishes a new Maori traditional fishing regime.²¹⁹ The basic idea is that Maori traditional fishing rights no longer derive their status from the Treaty or from aboriginal title, but instead from regulations made by the Crown.²²⁰ Treaty rights and obligations continue to exist, but they cannot be legally enforced.²²¹

Under the new regime, the Minister has a continuing general obligation, acting in accordance with Treaty principles, 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."²²² The Minister also has a specific obligation to recommend the making of regulations:²²³

[T]o recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance ...

²¹⁸The continuing role of the Treaty of Waitangi Fisheries Commission is emphasised by the Chairman of the Commission, Mr O'Regan:

When I first came to the Commission, I believed that once we had wrapped up the allocation of our assets to Iwi, then I and my colleague Commissioners could retreat back to our respective Iwi and offer what ever assistance we could to them as they fashioned out their fishing futures. ... That view of the Commission's future is no longer supportable. With the new legislation, the Commission is now faced with a demanding future and a variety of new functions to perform. (Report of the Chairman of the Treaty of Waitangi Fisheries Commission to Iwi for the twelve months ended 30 June 1993, presented to the Hui-a-Tau: *Treaty of Waitangi Fisheries Commission Hui-a-Tau*, above n169, 6.)

²¹⁹Traditional fisheries were not adequately provided for in the Memorandum of Understanding. The Memorandum provided only for "requests by Maori to the Government that it develop policies to help recognise traditional use and management practices": clause 5(k). There was a strong reaction against this by iwi and the Crown and Maori were forced to negotiate further: S Jones, Treaty of Waitangi Fisheries Commissioner and former Crown negotiator, interview with the writer, 1 July 1993. The Settlement Act makes considerably more detailed provision for traditional fishing rights.

²²⁰These provisions apply only to non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983. They do not affect non-commercial interests in indigenous fish such as eels, smelt, whitebait, and other freshwater fisheries, or in acclimatised sports fish such as trout or salmon: these are managed under the Conservation Act 1987. Treaty and aboriginal title rights to non-commercial interests in these fish thus continue as before. This was not clear in the Deed of Settlement: *Fisheries Settlement*, 4, 8-9.

²²¹Sections 10(a) and (d) Settlement Act. The Waitangi Tribunal will still be able to hear claims with respect to traditional non-commercial fisheries based on the Crown's continuing Treaty obligations. The Settlement Act's effect on aboriginal title rights is less clear. The issue is whether provision that an aboriginal title right has no legal effect, except to the extent that it is provided for in regulations, exhibits a sufficient "clear and plain" intention to extinguish that right: *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513.

²²²Section 10(b) Settlement Act.

²²³Section 10(c) Settlement Act. The Minister is empowered to do so by s 89(1)(mb) Fisheries Act 1983, as amended by s 34(1) Settlement Act.

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, to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.²²⁴

The Settlement Act contemplates two types of traditional fishing regulations.

First, general regulations are to be promulgated which provide for tribes to regulate tribe members and tauwi who seek to take fish under customary authority in any part of their rohe.²²⁵ The regulations will provide for tribes to control the taking of fish under their authority for defined customary uses within the overall goal of sustainable fisheries use.²²⁶

There are, however, a number of questions, practical and theoretical, yet to be resolved. On a practical level, issues arise concerning the procedures for identifying fishers with customary approval; the means of recording the quantity of fish taken from an area in order to be able to assess traditional take within the TAC; the penalties for non-compliance; and the authority of iwi fisheries officers.²²⁷ On a theoretical level, there are questions surrounding the identification of the group which holds rangatiratanga over the area; if and when the Crown should be able to override the tribe on sustainability issues; who defines the customary uses allowed; and how acceptable traditional gift exchange, koha and utu, is distinguished from non-acceptable commercial purposes, such as trade and barter.²²⁸

²²⁴These regulations will not provide, therefore, for the protection of areas important for spiritual or cultural reasons, or for the gathering of marine species not used for food. These are covered only by the taiapure provisions of the Maori Fisheries Act 1989, which remain in force. Taiapure reserves may not, however, be able to fill these needs, as they apply only to littoral or estuarine waters, and do not allow discrimination on the grounds of race.

²²⁵This is intended to give the effective regulatory control insufficiently provided by s88(2) and the Amateur Fishing Regulations. Although some saw the s88(2) jurisprudence as an important opportunity for a developing bicultural jurisprudence (McHugh "Sealords and Sharks", above n176, 357), others have emphasised the practical problems of s88(2). There was continuing confusion in the District Court surrounding the extent of rights and the evidential requirements, and, in practice, the reliance on unstructured traditional controls did not allow tribes adequately to control their fisheries. As the Waitangi Tribunal commented in *Muriwhenua*:

[T]he right of regulation has become a duty in our time, to protect the resource and to bring certainty to the law. It is also contrary to the public interest when Maori purporting to exercise customary fishing rights cannot be made bound to their own tribal rules. (230; *Fisheries Settlement*, 8-9.)

²²⁶The Amateur Fishing Regulations continue as a temporary measure, amended to extend the range of traditional uses covered and to allow power to be delegated to kaitiaki: r 27 Amateur Fishing Regulations 1986, as amended by s 37 Settlement Act.

²²⁷Ministry of Agriculture and Fisheries *Kaitiaki o Kaimoana - Treaty of Waitangi (Fisheries Claims) Settlement Regulations - A Discussion Paper* (Wellington, July 1993), 11-14.

²²⁸Above n227.

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Secondly, regulations are to provide for the special relationship between tribes and places of particular importance for customary food gathering - mahinga mataitai.²²⁹ These mahinga mataitai regulations will be site specific and will enable kaitiaki to make bylaws regulating the use of the resource within the overall sustainability requirements of the regulations. The by-laws could, for example, prohibit fishing, commercial or non-commercial, at any or all times, establish seasons, or place limitations on the number or size of fish able to be taken. Bylaws must apply to all individuals equally, and be approved by the Minister of Fisheries.²³⁰ The kaitiaki may, however, have the power to waive the application of those bylaws "for purposes which sustain the functions of the marae concerned."²³¹

These traditional fishing regulations have not yet been made and a process of discussion and consultation as to their content is now taking place.²³²

c Conclusion

The Sealord deal is an acknowledgement that Treaty fishing rights have been breached by Crown legislation and practices in the past and an attempt to uphold them now in the context of the modern fishing resource.

IV THE TREATY OF WAITANGI AND THE SEALORD DEAL

The Sealord deal recognises the Treaty of Waitangi as a fundamental constitutional document which must now be honoured. The deal represents the first major attempt by the Crown to resolve Treaty grievances since the 1940's.²³³ It is presented as the model for a new wave of Treaty claims settlements,²³⁴ with the National government committed to the resolution of all historical Treaty claims by the year 2000.²³⁵

²²⁹Section 89(1C) Fisheries Act 1983, inserted by s34(2) Settlement Act.

²³⁰Section 89(3B) Fisheries Act 1983, inserted by s34(4) Settlement Act.

²³¹Section 89(1C)(e) Fisheries Act 1983, inserted by s34(2) Settlement Act.

²³²See Treaty of Waitangi Fisheries Commission *Mahinga Kaimoana Tuturu - Customary and Traditional Fishing Regulations - A Discussion Document for Iwi* (April 1993); *Kaitiaki o Kaimoana*, above n227. There are to be regional hui convened to discuss these papers; a revised paper issued by the Treaty of Waitangi Fisheries Commission and MAF together; and a working group comprising MAF and Commission representatives to draft the regulations: *Kaitiaki o Kaimoana*, above n227, 4-5.

²³³Previous settlements had been either interim, such as the Maori Fisheries Act 1989, or merely procedural, such as the SOE Act settlements relating to Landcorp lands, broadcasting assets, forest assets, and surplus railway lands (see discussion in Chief Judge Durie "Politics and the Treaty", paper presented to the New Zealand Law Conference, March 1993)

²³⁴The Deputy Prime Minister, Rt Hon Mr D McKinnon, stated:

I want to say to all the land claimants whom the government is dealing with that the Government's commitment is to achieve similar types of objectives. We want to achieve

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Does the Sealord deal, however, fulfil the Treaty of Waitangi in the circumstances of 1993 and is it an appropriate basis on which to proceed with Treaty claims settlements? In this part, we assess the Sealord deal, as discussed in Part III, against the Treaty framework developed in Part II. We look, first, to issues of process, and, secondly, to those of content.

A Process

Treaty claims settlements must have procedural legitimacy. There are considerable difficulties here for the Sealord deal. We look, first, to the Treaty claims process, and, secondly, to particular aspects of the negotiation process.

1 The Treaty claims process

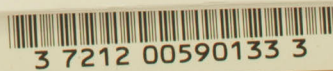
The Treaty claims process must involve a commitment to negotiation as the means of determining the practical requirements of the Treaty; to the Waitangi Tribunal to explicate the factual basis of a claim and the relevant Treaty principles; and to the courts, as a procedural safeguard on the negotiation process.

The Sealord fisheries settlement did adhere to this process and, to this extent, it has procedural legitimacy. What is of concern, however, is the clear Crown intention to depart from this process in the future. The Crown may be committed to direct negotiation as a means of resolving Treaty claims, but there is no affirmation of those other institutions which complement and safeguard the Treaty claims process.

acceptance, an understanding that we will not go over the issue again, and the feeling that honour has been restored. (New Zealand Parliamentary Debates Vol 529, 1992: 11220.)

The New Zealand Maori Council and the National Maori Congress are said to be attempting to extrapolate the Sealord formula as a "generic" solution to outstanding Treaty land claims in order to acquire the government-owned Landcorp: F O'Sullivan "Simple solution to Sealord problem was always highly improbable" *The National Business Review*, 11 December 1992, 11. This is of concern for some: "Before any serious consideration is given to this kaupapa, we do not want the errors of the construction of the Sealord deal repeating itself." (A Tumahai "Landcorp As Settlement for Maori Land Claims?" *Te Maori News* January 1993, 5.)

²³⁵This commitment was first made in the National Party 1990 election manifesto: *Facing the Future Together*, above n11. It has been affirmed on a number of occasions, including the Prime Minister's speech on the introduction of the Settlement Act: New Zealand Parliamentary Debates Vol 532, 1992: 12827.



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a The Waitangi Tribunal

The significance of the Waitangi Tribunal was clearly demonstrated in the Sealord deal. The Tribunal played a key "missionary" role, establishing the importance of the fisheries taonga, the history of its extensive use, and the Treaty development right. It had a major impact on the settlement negotiated between the Crown and Maori.

Beyond Sealord, however, the Crown has made little commitment to the Waitangi Tribunal playing this role in future Treaty settlements. The Crown has made a larger budgetary allocation to the Treaty of Waitangi Policy Unit of the Department of Justice ("TOWPU"), which arranges negotiations, than that to the Tribunal.²³⁶ It is currently negotiating the Tainui claim without a prior Tribunal report.²³⁷ The Crown has also limited the jurisdiction of the Waitangi Tribunal: the Settlement Act prevents Maori from taking claims with respect to commercial fishing rights or the Sealord deal itself to the Tribunal;²³⁸ and the Treaty of Waitangi Amendment Act 1993 responds to political pressure to cut back the Tribunal's recommendatory power over private land.

This is of major concern. The Waitangi Tribunal must be recognised as a fundamental part of the Treaty claims settlement process, not subject to political interference, and funded appropriately. It is vital that we have an independent body to establish the factual basis of Treaty claims, extend our conception of Treaty principles, and provide an ongoing check on the continuing validity of Treaty settlements. The Waitangi Tribunal process may well be a necessary part of the progression towards legitimate settlements, and a component of their long-term durability.

b The courts

The importance of the courts was also highlighted in the Sealord deal. Fishing rights were only negotiated because Maori were able to get judicial protection through s88(2) of the Fisheries Act 1983.

The Crown has, however, demonstrated its antipathy to the courts in this protective role. With regard to fishing rights, the Settlement Act has removed the court's ability to monitor the implementation of the settlement or to ensure its continued validity. With regard to Treaty claims in general, the limited ability of the courts to safeguard negotiation has been

²³⁶Chief Judge Durie "Politics and Treaty Law", above n233.

²³⁷S Evans "Seeking common ground" *The Dominion*, Wellington, 10 July 1992, 7.

²³⁸Section 6 Treaty of Waitangi Act 1975, as amended by s40 Settlement Act.

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maintained. There has been no general statutory incorporation of the Treaty, and the legislative trend is to incorporate the Treaty, if at all, as a relevant consideration, rather than a substantive limit on decision-making.²³⁹

The Crown has thus reasserted its control of the Treaty claims settlement process. The Crown will negotiate when and if it likes,²⁴⁰ and on terms it chooses.²⁴¹ Maori are tied back into their former status as political and moral claimants only; supplicants not litigants.²⁴²

c Conclusion

The Treaty settlement process may have worked well in the Sealord deal, but there is no commitment by the Crown to that process. This threatens the procedural legitimacy of future Treaty claims settlements.

2 The negotiation process

The Treaty of Waitangi requires that negotiations towards Treaty claims settlements are conducted reasonably, honourably, and with the utmost good faith. We saw below that unresolved difficulties surround the negotiation process, in particular with regard to bargaining power, representation and ratification, and public acceptability. The Sealord deal, however, demonstrates no commitment to resolving these issues. Rather, it highlights the danger of proceeding with Treaty claims settlements without so doing.

²³⁹See *Legislation Advisory Committee*, above n11.

²⁴⁰Despite the year 2000 commitment, the Crown seems in no hurry. There were 271 known claims pending in March 1992, but only a few small settlements and the Sealord deal have been concluded: Kelsey, *Rolling Back the State*, above n49, 259. The Ngai Tahu and Tainui claims have been under negotiation since 1991 and Te Roroa since 1992 ("Seeking common ground", above n237), but there has been no indication of progress.

²⁴¹The Crown is to make clear what types of natural resource claims, for example, it considers valid in the Treaty claims policy which it is to release: "Party's over for Bolger", above n207. The Crown's disestablishment of the Crown-Congress Joint Working Party on Railway Lands also demonstrates effective Crown control. Initially hailed as an important new process for Treaty claims settlement (Chief Judge Durie "Politics and Treaty Law", above n233), the Working Party was put aside when it began to make settlements the Crown regarded as inappropriate. The Labour Government's *Principles for Crown Action on the Treaty of Waitangi* (CAB (89) M16/19, 22 May 1989) demonstrate also the Crown's power position. Although the Crown may have protested that the principles were not an attempt to rewrite the Treaty (Frame, above n136, 88), if they represent the only basis on which the Crown will negotiate, then that is their substantive effect.

²⁴²D Lange "Full and final' and very unsettling" *The Dominion*, Wellington, 7 September 1992, 6.

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a *Bargaining power*

The Sealord deal was negotiated around the sale of Sealord Fisheries Ltd. Seizing that opportunity was seen by Maori as critical to the settlement of Treaty fishing claims. Maori recognised that Sealord's quota was needed for settlement, that settlement was needed soon, and that litigation posed considerable risks. Maori recognised also that the deal had to be done within the short time-frame forced by the Sealord tender.

In these circumstances, the Maori negotiators, and those iwi who ratified the deal, felt no option but to take the deal, whatever their reservations about its content or the procedure by which it had been reached. In response to the question "Is this a good deal for Maori", the Maori negotiators were able to reply only "[This is] the best deal that Maori will get."²⁴³ As Whetu Tirikatene-Sullivan emphasised in Parliament:²⁴⁴

I believe that, given the opportunity, even the negotiators would not have given up [Treaty rights]. In fact, I have heard one of them say that he did not agree with giving up Treaty rights. Nevertheless he is a signatory ... Those commercial fishing rights ... are being extinguished ... in a manner that no Maori can really accept.

There was a clear imbalance of bargaining power in the Sealord deal which threatened its legitimacy.²⁴⁵

The Crown, as a reasonable Treaty partner, should have acted to remove this imbalance. That Sealord was the last opportunity for the Crown to settle Maori claims should have been the Crown's concern, not that of Maori. That Maori had fundamental reservations about the deal should have indicated the impossibility of a lasting settlement. The Crown could, for example, have purchased Sealord on its own behalf. In that way, it would have

²⁴³ *The Sealord Deal - What it means for Maori*, above n10.

²⁴⁴ New Zealand Parliamentary Debates Vol 532, 1992: 12839.

²⁴⁵ A similar situation occurred in the "full and final" land claims settlements of the 1940's, in Taranaki, Waikato, and Ngai Tahu (below n). In response to the question "why did the tribes accept full and final payments?", Hill has suggested that part of the answer is that

[T]hey saw that they had no choice if they were to receive any compensation at all. Mrs E Tombleson MP put it this way in 1972 vis a vis the renewed Ngai Tahu claim before the Maori Affairs Committee: "It was found that each petitioner was of the opinion that the decision in 1944 was not completely binding and that they thought, to quote the petitioners of that time, that half a loaf was better than no bread." This does not imply duplicity on the part of the claimants: acceptance of "half a loaf" does not preclude hope that in the future the donor might become more generous, particularly if the donor's role in the impoverishment of the recipient in the first place is more fully appreciated. The negotiators of the 1940's will have noted keenly, by virtue of the fact that settlement was pending after so long, that political standards and public mores alter over time. (R Hill *Settlements of Major Maori Claims in the 1940's: A Preliminary Historical Investigation* (Wellington, Department of Justice, 1989), 12.)

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demonstrated its commitment to settlement, and would have given both parties the time to work through the key issues of procedure, and also substance, which were arising here and would arise again in future Treaty settlements.

The Crown's failure in the Sealord deal to accept any responsibility for the imbalance of bargaining power is of considerable concern.²⁴⁶ It is a clear breach of the Treaty of Waitangi.

b Representation and ratification

The Sealord deal, as a Treaty claims settlement which affects the rights of all Maori, raises significant procedural issues. How are we to ensure that those who negotiate on behalf of all have the authority to do so and can be held accountable for their actions? How are we to determine that those whose rights are affected have given their genuine consent? The Sealord deal failed to look for, or to find, answers to these questions.

i Representation

Maori interests were represented in the negotiation of the Sealord deal by the Maori negotiators. Were these people, however, given their authority by Maori and were they able to be held accountable to Maori?

There must be significant doubt. Although the Maori negotiators were authorised by the 1992 Hui-a-Tau to seek a settlement with the Crown, few are likely to have envisaged the effect of this. The Maori negotiators, however, took their mandate as an authority to negotiate the Sealord deal in secret and without consultation with iwi. They concluded a deal which was in many respects contrary to the basic expectations of their principals: the lack of consideration for traditional fisheries, freshwater fisheries and pre-existing settlements was revealing. They reached a settlement, whilst those they purported to represent remained largely ill-informed, suspicious and confused.

There are thus considerable difficulties in saying that the Maori negotiators represented the will of Maoridom. The Maori negotiators, in fact, would seem to have advanced their own perceptions of what is good for Maori. The Treaty settlement was, in effect, determined by a few, for the end benefit of all.

²⁴⁶The Minister of Maori Affairs stated:

It was not our desire to do it quickly or in haste, but an opportunity came, which if let pass would virtually have guaranteed that it would be impossible to progress the matter in a reasonable time-frame or ever. (New Zealand Parliamentary Debates Vol 532, 1992: 12843.)

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The Crown, however, again ignored these difficulties.²⁴⁷ As the Prime Minister stated confidently:²⁴⁸

This is the agreed way; this is not an imposed way. This is the way that was agreed in negotiations and discussions with the Maori negotiators. We did not appoint them. The Crown did not say that they had to be the negotiators. Maori appointed the negotiators. The negotiators came to us. We sat down and negotiated honourably with them.

ii Ratification

Ratification of the Sealord deal was, as a result of the lack of iwi structures, conducted in a series of regional hui. We have seen that there is much room for doubt whether the "consent" thus given was genuine, based on an informed understanding of the settlement, and achieved in accordance with the group's internal decision-making structures.

The Crown argued, however, that that in the circumstances, its acceptance of the ratification thus achieved was reasonable. The Waitangi Tribunal agreed:²⁴⁹

Given the task of explaining complex matters to diverse groups and the business and political imperatives, allegations of too much haste and too little information were inevitable. Having viewed the matter as a whole however, we are of opinion that the complaints are not justified in all cases. ... [I]n the light of the report emanating from the hui it was reasonable for the Crown to believe it was justified in proceeding.

With respect, however, the Waitangi Tribunal has ignored the broader responsibility of the Crown to ensure appropriate iwi structures and to avert the need for haste. The Crown must not enter into Treaty claims settlements without addressing these basic issues. A failure to do so threatens the legitimacy of the settlement. Once again, however,

²⁴⁷The Crown's perceptions were obscured somewhat by its faith in the Maori negotiators. As the Minister of Maori Affairs stated:

I say that this nation owes a huge debt to this principal plaintiffs ... I, for one, believe that in the future annals of Maoridom, as the stories are told, those principal plaintiffs will shine forth as some of the great lights of their people (New Zealand Parliamentary Debates Vol 532, 1992: 12842.)

²⁴⁸New Zealand Parliamentary Debates Vol 532, 1992: 12951.

²⁴⁹Fisheries Settlement, 16.

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the Crown ignored the difficulties. As the Prime Minister stated:²⁵⁰

No piece of legislation has been exposed more to the Maori people. Maori negotiators have traversed the country and talked to iwi after iwi.

The Waitangi Tribunal did, however, emphasise that this regional ratification would not be a sufficient basis on which to extinguish Treaty rights. Only those who consent should be bound.²⁵¹ In the Sealord deal, however, the commercial fishing rights of all were abrogated, whilst only some consented.

iii Conclusion

The Sealord deal thus raises major issues with respect to representation and ratification. The Crown has made no commitment to deal with these. The Minister of Justice made this quite clear:²⁵²

The Government accepts that [there are structural problems] but we are not going to wait another 100 years for Maori to sort out their own structure, having failed to do so for 1000 years. We intend to get on with the job and to do as best we can in an imperfect world.

We cannot "get on with the job" of honouring the Treaty, however, until we have built a proper base by which to do so.

c Public acceptability

Treaty claims settlements require public acceptance in order to achieve procedural legitimacy. The Sealord deal demonstrates, however, no Crown recognition of the importance of achieving a general understanding of the requirements of the Treaty in 1993.

The Sealord deal itself was concluded in haste and secrecy. There was no public discussion, no public education campaign, no opportunity for public input, and little understanding by parliamentarians of the Act they were passing.²⁵³ The taking of urgency

²⁵⁰New Zealand Parliamentary Debates Vol 532, 1992: 12826. See also the comments of the Minister of Justice with respect to urgency, above n .

²⁵¹*Fisheries Settlement*, 17.

²⁵²New Zealand Parliamentary Debates Vol 532, 1992: 12951.

²⁵³Government MP's, in particular, demonstrated a woeful ignorance of the Treaty and the Sealord deal in the debate on the passage of the Settlement Act. The Caucus generally has made little effort to get

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is also of concern.²⁵⁴ There was no attempt earlier to explain the findings of the Waitangi Tribunal,²⁵⁵ and the need for a Treaty claims settlement, and after the settlement, no effort to clarify its implications.²⁵⁶ There can be little public acceptance of the Sealord deal in these circumstances.

Treaty claims settlement, in general, is shrouded by misconception and misunderstanding.²⁵⁷ The Crown has sought to bypass the issues with a minimum of fuss. The Minister of Justice has made this clear:²⁵⁸

The people of New Zealand say to me all the time: "There are grievances there; there were wrongs done; I don't know the detail; I don't particularly want to know the detail, but I accept that they were done. Where the Government finds that that is true, do something about it. Don't get carried away; don't write out the large cheques; don't go overboard, but be fair and restore the honour of the Crown.

on top of the issues and has not turned up for Treaty briefings: "Simple solution", above n234. The consequences for electorate understandings are obvious.

²⁵⁴As Sonja Davies said in Parliament:

The Minister said tonight that much consultation has already taken place, but, because of the widespread confusion, anger, and misconceptions that are abroad, if all the various interest groups do not have the chance to make submissions and to be heard, justice will not be done. (New Zealand Parliamentary Debates Vol 532, 1992: 12937.)

There are also constitutional issues here which have gone unexplored. Kelsey explains:

The extra-parliamentary status of the agreements which were reached raised difficult constitutional issues. The negotiations were undertaken on behalf of the Crown by the executive, but their implementation usually required legislation. Normally, a Bill would be subjected to parliamentary debate and submissions before a select committee to allow MP's and outsiders to participate in the law-making process. [It is] unclear how far a select committee could alter the terms which Maori and the Crown had agreed to, whether Maori could withdraw their consent if the agreements were amended, and what the constitutional implications were if they were deemed non-negotiable. (Kelsey, *Rolling Back the State*, above n49, 254.)

²⁵⁵The *Dominion* coverage of the *Ngai Tahu* Report announced "Maoris get SI Fishery" and stated that the Waitangi Tribunal had recommended that "most of the South Island's fisheries be handed over to the Ngai Tahu." Belgrave comments "[c]overage of the report must have caused considerable and unnecessary concern among thousands of recreational and commercial fishermen": M Belgrave "Maori fishery claims need clarifying" *The Dominion*, Wellington, 18 August 1992, 6. Mr Lange comments with regard to the Waitangi Tribunal generally:

[T]he tribunal must be given the resources and the expertise to explain its role and findings of the general public. As it is, it seems to be a trigger of sporadic political and popular meltdown. It is unnecessary for the source of much enlightenment to be simultaneously the well of such alarm. ("Full and final", above n242.)

²⁵⁶The traditional fishing regulations are particularly misunderstood by the fishing industry and the public generally. They raised the fears of commercial fishers from the outset: "Fishing rights for all - PM" *The Dominion*, Wellington, 8 December 1992, 1. They continue now, resurfacing on the release of the Crown's discussion document for traditional fisheries: H Barlow "Fishing to be non-exclusive, say officials" *The Dominion*, Wellington, 6 August 1993, 5.

²⁵⁷There is "an almost paranoid secrecy about [the Crown's Treaty] policy and approach to settlement of claims": Kelsey, *Rolling Back the State*, above n49, 257. The National Government has not yet released a Treaty claims policy, although it has been "labouring over [one] since it took office": "Party's over for Bolger", above n206.

²⁵⁸New Zealand Parliamentary Debates Vol 532, 1992: 12953.



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This is no basis for the people of New Zealand to work carefully through the structural and attitudinal changes which the Treaty requires in 1993. It is rather facilitative of instant, chequebook answers, rather than real solutions which shift power and resources. "Political acceptability" is only a function of understanding; it should not be used to fob off Maori claimants with less than the Treaty requires. There must be a Crown commitment to build public acceptance of the Treaty of Waitangi.

3 Conclusion

In the Sealord deal, the Crown and the Maori negotiators seized the chance to finally settle Treaty fishing claims. Both recognised the procedural difficulties, but both saw the Sealord deal as an opportunity which "had to be taken at its flood."

This is, however, to view the Sealord deal solely in terms of outcomes. Treaty claims resolution, however, is not only about the substance of a settlement, but also the means by which it is achieved. It is in this way that we ensure that a settlement accords with the principles of the Treaty and the needs of all, and carries with it the mana of both Treaty partners. We cannot continue to negotiate Treaty claims settlements without first giving real and concerted attention to the outstanding issues of process.

B Content

The Treaty of Waitangi provides the basic framework for government in New Zealand. There are three main Treaty principles: partnership, kawanatanga, and rangatiratanga. We look in this section to their recognition in the Sealord deal.

1 Partnership

The Sealord deal is a full and final settlement of Maori Treaty fishing rights. Treaty commercial fishing rights are effectively abrogated and non-commercial rights are prevented from judicial enforcement. The Crown has, in this way, purported to fulfil its Treaty obligations, quantify its liability, and assure the people of New Zealand that there will be no more Maori fishing claims.

We may question whether this is in accordance with the Treaty of Waitangi and the principle of partnership. We consider the Sealord deal with regard, first, to the status of the Treaty; secondly, to the nature of Treaty rights; and, thirdly, to the practicality of final settlements.

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a The status of the Treaty

The Treaty of Waitangi is New Zealand's fundamental constitutional document. The Sealord deal purports to amend the Treaty. It may be doubted whether that is possible:²⁵⁹

[A] nation cannot cast itself adrift from its own foundations. The Treaty stands. ... Whatever constitutional or fiduciary significance the Treaty may have of its own force, or as a result of past or present statutory recognition, could only remain.

The Treaty is the basis for the evolving partnership between the Crown and Maori. That relationship does not conclude with regard to a particular resource with the settlement of a grievance:²⁶⁰

[A] political or social contract between two people is by its very nature something to be developed over time. It is not capable of finite settlement at any particular stage in history:

The Sealord deal is, however, perceived by many Maori, not merely to change the institutional nature of the Maori proprietary interest in the fisheries resource, but to attempt to extinguish the status of Maori.²⁶¹

The Sealord deal thus fails to appreciate the nature of the Treaty of Waitangi.²⁶² The Treaty is perceived by the Crown not as a constitution but, rather, as a contract, which guarantees certain property rights, and which is discharged on the settlement of a claim.²⁶³

b The Treaty right

Treaty rights, sourced as they are in an ongoing partnership, have a special character. They develop for different times and needs, but the underlying obligation remains as a constant:²⁶⁴

²⁵⁹*Te Wharekauri a Rekohu*, above n191, 308-309

²⁶⁰Chief Judge Durie, "The Waitangi Tribunal: Its relationship with the judicial system", above n60, 236.

²⁶¹S Jones, interview with the writer, 1 July 1993. Mr Jones added: "we don't want to just see pieces of silver handed over and have anyone think that that reflects a cessation of the relationship between our grandchildren and the Queen."

²⁶²Perhaps this is because of our relative lack of constitutional experience.

²⁶³Robb, "Who are the Sea Lords now?", above n196, 26.

²⁶⁴*Fisheries Settlement*, 11.

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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. It is about the maintenance of principle over ever-changing circumstances.

The Treaty fishing right may transmute, therefore, into quota rights, or shares in a fishing company, but there will be a continuing obligation to respect Maori rangatiratanga.²⁶⁵ Treaty settlements should, therefore, affirm Treaty rights, although acknowledging that the Crown's current obligations with respect to those rights are now satisfied.²⁶⁶ That acknowledgment should not, however, exceed 25 years, or one generation.²⁶⁷

The Sealord deal fails to appreciate the nature of Treaty rights. Maori receive benefits under the deal, but accept in return, that the Crown has no ongoing responsibilities.²⁶⁸

Further, Treaty rights must also be viewed in a holistic sense. The Treaty guarantees rights to a resource base, to tribal self-management, to biculturalism in government. The Crown cannot satisfy Treaty rights piecemeal.

To this extent also, the Sealord deal is misconceived. The Crown's attempt to abrogate Treaty fishing rights still leaves it with the broader obligation to return adequate resources to Maori.

c *Practical impossibility*

The Sealord "full and final settlement" has, also, a more basic difficulty. It is practically impossible:²⁶⁹

[N]o Act of Parliament is ever final. ... This is a political settlement for the present time, under today's circumstances; it cannot be more than that; and it should not be pretended that it is more than that. Any real and unfair discrimination or failure to resolve legitimate grievances will ultimately have to be dealt with by a subsequent Parliament.

²⁶⁵ *Fisheries Settlement*, 22.

²⁶⁶ *Fisheries Settlement*, 10. The acknowledgment could reasonably include a moratorium on court action and a statutory discontinuance of existing court proceedings. There seems no reason, however, for the Waitangi Tribunal to lose jurisdiction.

²⁶⁷ *Fisheries Settlement*, 24. See also *Living Treaties: Lasting Agreements*, above n105, 41-43.

²⁶⁸ As Robb commented:

To some observers it's like selling a product only on the condition that the buyer gives up all rights as a consumer. Even if the goods are not what they seem, the buyer can do nothing. (A Robb "Who are the Sea Lords now?", above n196, 26.)

²⁶⁹ Mr J Anderton MP, Leader of the Alliance, New Zealand Parliamentary Debates Vol 532, 1992: 12955.



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We have seen this in the full and final settlements of the 1940's - in Taranaki, Waikato and Ngai Tahu²⁷⁰ - which were good faith attempts to settle Maori land grievances but which "proved in time to be unjust, founded as they were on an inflation-free world."²⁷¹ More recently, we have seen the experiences of Ngati Whatua at Orakei where an initial settlement in 1978 was, within a few years, seen as ineffective,²⁷² and another settlement made in 1991.²⁷³ The overseas experience of full and final settlements also spells caution.²⁷⁴

To promise a final settlement is, therefore, harmful. For Maori, the basis is thus laid for a continuing grievance. For the general public, finality is offered "to lull [their] suspicions ... , suspicions which will be redoubled when one day the settlement is revisited."²⁷⁵

d Conclusion

The Sealord deal demonstrates a Crown attitude towards Treaty claims settlements which threatens partnership in New Zealand. The Treaties viewed as a "problem" to be "solved", a temporary aberration to be smoothed away.²⁷⁶ The Treaty of Waitangi is not recognised as a fundamental constitutional document affirming Maori in a status as ongoing Treaty partners, and necessitating ongoing structural and attitudinal change in the exercise of government.²⁷⁷ The Sealord deal is no basis for future Treaty claims settlements.

²⁷⁰Taranaki Maori Land Claims Settlement Act 1944; Ngai Tahu Claim Settlement Act 1944; Waikato-Maniopototo Maori Claims Settlement Act 1946: Hill, above n246, 11-12.

²⁷¹Hill, above n245, 11-12. Hill writes:

The extant documentation which has been uncovered so far on the historical settlements of the twentieth century does not reveal duplicity or bad faith on the part of either of the partners to the Treaty of Waitangi, Maori or the Crown. Rather it reveals a determination by both to resolve finally longstanding grievances in good faith, in accordance with the standards and realities of the time. (13)

²⁷²Orakei Block (Vesting and Use) Act 1978. See *Orakei*, 173-176.

²⁷³Orakei Act 1991.

²⁷⁴With regard to Canada, see *Living Treaties: Lasting Agreements*, above n105, 35-43. For Alaska, see TR Berger *Village Journey - The Report of the Alaska Native Review Commissioner* (Hill & Wang, New York, 1985).

²⁷⁵Lange, "Full and final", above n242.

²⁷⁶In 1989, the present Prime Minister gave a speech entitled "One Nation under One Law" in which he stated:

Extremists - Maori and non-Maori - are using the 150th anniversary of the signing of the Treaty of Waitangi to drive a racist wedge through our nation We are determined that the next generation of New Zealanders will not be burdened with the race relations problems that have characterised New Zealand in the late 1980's. (Quoted in Kelsey, *Rolling Back the State*, above n49, 237.)

National's 1990 election manifesto stated that "National will quickly resolve outstanding Maori grievances that are genuine and proven" and will "seek to settle all major outstanding Maori claims by the turn of the century": *Facing the Future Together*, above n11.

²⁷⁷National's 1990 election manifesto also stated that "National's aim is not to treat the Maori as a race apart needing special programmes and assistance, but rather, where there is a need for help it will be



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2 *Kawanatanga*

The Treaty of Waitangi gave the Crown *kawanatanga*, a limited right of government. How does the Sealord deal respect this Treaty principle? We consider in this section, first, the QMS regime; secondly, Maori participation in fisheries management; and thirdly, Maori traditional fishing rights.

a *The QMS*

The Crown has the right to make laws of general application for resource protection. The QMS has been accepted, therefore, as a conservation and management tool.²⁷⁸ It has also been accepted that the QMS must regulate Maori as well as Pakeha fishing interests; the system could not operate effectively were Maori fishing rights to be excluded altogether.²⁷⁹

What need not be accepted is that the QMS must regulate Maori fishing rights in the same way as those of other users. Was it not possible, within the QMS, to take special account of the Maori Treaty interest? For example, *iwi* resource rentals could have been charged on a different basis for Maori, thus protecting the value of the settlement.²⁸⁰ Further, the Crown has not adequately explained why the QMS could not provide for Maori traditional commercial fishing interests. The regime now makes no provision for small-scale part-time Maori fishers who want to fish, as they have long done, to supplement their incomes. The TAC could surely have included a limited Maori traditional commercial share, to be managed by *iwi* in addition to their non-commercial allocation.

The QMS, in addition, is solely the Crown's vision of an appropriate solution to management and conservation needs. Under the Sealord deal, Maori have merely bought into that vision, exchanging their Treaty fishing right for a Crown-derived, Crown-defined title.²⁸¹

given because of that help and not on account of race": *Facing the Future Together*, above n11. This attitude was demonstrated in the debate on the Settlement Act:

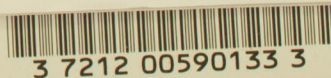
Maori have the opportunity to take charge of their own destiny - a destiny that will not include an escape clause that refers back to the Treaty of Waitangi and the rights that go with it. Maori have the opportunity to take the same chances that the rest of us have to live with; the risks that are associated with investment, and the risks that are associated with making a living without some sort of crutch or special set of rights to fall back on. (Mr M Bradford, MP, New Zealand Parliamentary Debates Vol 532, 1992: 12962.)

²⁷⁸*Muriwhenua*, 150.

²⁷⁹*Fisheries Settlement*, 17.

²⁸⁰Below Part IV C 3 b ii.

²⁸¹See McHugh "Sealords and Sharks", above n176, 358.



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The Crown's failure to probe these issues demonstrates an inability to accept pluralism, that the Treaty requires treating one section of the community differently from another. The Sealord deal perpetuates the notion of "one nation under one law".²⁸² It is an illegitimate extension of kawanatanga.

b Fisheries management

The Crown has the right to manage the fisheries in the public interest. The Crown must, however, offer Maori a substantive role in management in order to respect Maori rangatiratanga and the principle of partnership.

In the Sealord deal the Crown asserts absolute control over the fisheries and rejects a special status for Maori. Maori certainly have a larger role in fisheries management than ever before. It is, however, only a role equivalent to that of the FIB, or an industry interest group and is limited to consultation on major issues. There is no Crown commitment to a structure in which the Maori status as Treaty partner is affirmed, Maori perspectives are effectively incorporated, and Maori have a substantive role in all aspects of fisheries management.²⁸³

c Traditional fisheries

The Sealord deal's traditional fisheries regime must be acknowledged as a step forward. The Crown has acknowledged the Maori right to control and management over their traditional fisheries within its responsibility to protect the fisheries in the public interest.

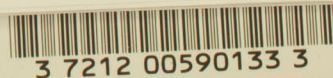
There are, however, some problematic aspects of the new regime. First, the traditional fishing regulations must be made subject to judicial review. As the Waitangi Tribunal emphasised:²⁸⁴

Active protection requires in our view, access to the courts in appropriate case. ... the danger is that Maori interests will become, as they have been before, overly susceptible to political convenience or administrative preference. ... We would expect judicial review to guard against that prospect. Certainly it would be contrary to the Treaty in our view, if there was no provision to review the regulations against the Treaty's principles.

²⁸²This was the title of a 1989 speech by the present Prime Minister: above n276.

²⁸³The Crown Working Group Report in 1988 offered an interesting model along these lines, but it was not further developed: above Part III B 1 a.

²⁸⁴*Fisheries Settlement*, 9.



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Judicial review is a necessary procedural safeguard to ensure the appropriateness of the new regime and the effective limitation of the Crown's powers.

Secondly, mahinga mataitai bylaws should not require the approval of the Minister of Fisheries.²⁸⁵ If the Wellington City Council is not required to follow such a procedure, why must iwi?²⁸⁶ Requiring approval is an illegitimate extension of kawatanga.

Thirdly, the mahinga mataitai bylaws, as they stand, must apply generally to all individuals. This is not consistent with Maori rangatiratanga, which gives Maori greater rights than others in the fisheries. It may be, however, that the non-discrimination provision will be marginalised in practice by an expansive interpretation of a "purpose which sustains the function of the marae."

Fourthly, the traditional fisheries regime is limited to non-commercial fishing. There may well, as we have seen, be no justification for this within kawatanga. Further, to draw a distinction between "acceptable" traditional gift exchange, koha and utu, and "non-acceptable" commercial purposes, such as trade, and barter, is to attempt to freeze Maori culture, contrary to the Treaty's development right.²⁸⁷

d Conclusion

The Crown thus maintains its assertion of absolute authority to legislate, define ownership and manage the fishing resource, although it does give limited recognition to Maori rangatiratanga over traditional fisheries. This is inconsistent with the Treaty of Waitangi and the limited nature of kawatanga. Absolute sovereignty must not form the basis for Treaty claims settlement.

3 Rangatiratanga

The Treaty of Waitangi's guarantee of rangatiratanga requires in 1993 the restoration of the tribe. This should be a focus of Treaty claims settlements. How far does the Sealord

²⁸⁵They remain, of course, subject to judicial review and scrutiny by the Regulations Review Committee.

²⁸⁶Part XLIII Local Government Act 1974.

²⁸⁷Mr Lange emphasised this point:

What on earth is a traditional purpose? Do we know that? Has it been specified? With no disrespect to some of my Maori friends, the traditional purpose in circles in which I move ... is also a sack of shellfish for a raffle in the pub. ... Culture is not a frozen phenomenon. ... That is the problem. There is no way that they can actually define what constitutes those traditional areas. (New Zealand Parliamentary Debates Vol 532, 1992: 12933.)

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deal advance this objective? We look, first, to the general approach, and, then, to specific issues relating to the economic base and tribal structure.²⁸⁸

a Approach

The Sealord deal is a global settlement, for all iwi, of a single resource. It aims to honour the Crown's obligations with respect to that resource. This, it is submitted, is the wrong approach to Treaty claims resolution. Restoration of the tribe requires settlements which focus directly on that objective, not on discharging liability on a compensatory property rights basis.

The Sealord deal gives Maori, through the Treaty of Waitangi Fisheries Commission, the responsibility of allocating the settlement assets amongst the tribes. The basis for allocation is to be the "principles of the Treaty of Waitangi", and thus should be the goal of tribal restoration. This does not, however, provide a clear basis for allocating the assets. The key difficulty is "relativities." Chief Judge Durie has emphasised the significance of this issue: "[t]he just resolution of Maori claims that are fair and reasonable, not only between the partners but amongst Maori themselves, presents the greatest challenge to the claims process."²⁸⁹ The Sealord settlement asks Maori to determine these "new issues of equity." Maori are given the responsibility of dividing the settlement assets so as to ensure that each tribe has a sufficient economic base relative to each other tribe and considering the needs of each tribe; the assets already held by the tribe; and the assets which the tribe is likely to receive from the Crown as a result of other settlements. Without knowledge, however, of the Crown's intentions with regard to future Treaty claims settlements, and without the resources on which to make these investigations, Maori cannot determine the "right" allocation. The impasse reached now reflects not so much tribal self-interest as "a division created by the settlement framework dictated by the government."²⁹⁰

The Sealord deal is, therefore, fundamentally flawed. The Crown cannot fulfil its responsibilities to Maori by offering a quantity of a single asset for tribes to divide amongst themselves. The Crown, not Maori, has the responsibility of ensuring that the tribe has a sufficient base, and the Crown, not Maori, must grapple with these issues of relativities. The Sealord deal represents an attempt by the Crown to discharge its Treaty

²⁸⁸Issues of tribal autonomy have been considered in the previous section: Part IV C 2 b and c.

²⁸⁹Chief Judge Durie, "Politics and Treaty Law", above n233

²⁹⁰Kelsey, *Rolling Back the State*, above n49, 269.



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obligations without ever coming to terms with their substance. There must be no more Treaty settlements on this basis.

b Tribal base

Tribal restoration requires the reconstruction of an economic base. Each tribe must have the resources with which to participate in the economy of its traditional territory, and to provide for the present and future needs of its people. The Crown has an ongoing obligation to provide such a base and to protect it.

The Sealord deal raises concerns about the Crown's commitment to the restoration of the tribal base. We look, first, to the provision of the base; secondly, to the nature of the fisheries assets; and, thirdly, to the Crown's ongoing role.

i The base

The Sealord fisheries settlement will give to most tribes some proportion of quota, cash, and shares in Sealord Fisheries Ltd. That does not, in itself, provide a sufficient economic base for the tribe. The Crown must make a commitment to provide for each tribe the additional resources, human and material, needed to develop and utilise the fisheries resource and to adequately cater for the tribe's needs.

The Crown's commitment to this is dubious. The Crown has emphasised that it has limited funds and limited assets with which to settle claims: the Deed of Settlement warned that it would affect the Crown's ability to settle other grievances. Further, the Crown's strategy on Treaty claims settlements is believed to centre around a "fiscal envelope" by which the Crown will set aside a maximum amount for Treaty claims settlements, and a certain amount for settlements each year.²⁹¹ Fiscal realities must certainly be appreciated. There is, however, a heavy obligation upon the Crown to manage its assets so as to account for relativities between tribes and the particular needs of all. The Crown would need to provide a significant justification for a failure to achieve the goal of tribal restoration.

²⁹¹"Party's over for Bolger", above n206; B Edwards "Early claims deadline tipped" *The Evening Post*, Wellington, 2 August 1993, 2.



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ii *The assets*

There are issues also surrounding the appropriateness of quota, cash, and Sealord shares as providing a significant part of the restored tribal base.

First, Sealord Fisheries Ltd is at present a profitable fishing company with considerable development potential.²⁹² There is, however, room for doubts as to its long-term viability, as there is for the whole fishing industry.²⁹³ The Crown can, of course, do little about this; it is an expected investment risk. What it does highlight, however, is that giving Maori a company cannot be the basis for a full and final settlement of Maori fishing rights. The Crown must accept its continuing obligations.

Secondly, the Sealord investment involves Maori in a joint venture with BIL. Will Maori be able to develop Sealord, therefore, in accordance with Maori sensitivities and priorities? BIL has no Treaty obligations, and its only duty is to make a profit for its shareholders.²⁹⁴ Difficulties could arise, for example, if Maori wished to concentrate operations less profitably in a particular locality because of high Maori unemployment there; or if Maori wished voluntarily to fish for less than the quota allotment through concern for the state of the resource. There is an issue here unexplored: can "a commercial enterprise of this nature ... be adapted to meet fundamentally non-commercial needs"?²⁹⁵

Thirdly, the ongoing value of fishing quota may be questioned. The value of quota is not a constant, but is determined by the state of the resource, the market demand for that resource, and the rentals which must be made to the government for its use. This factor would not, however, appear to have been taken into account by the Crown and Maori. Both have assumed that the value of new quota will rise dramatically.²⁹⁶ Maori have also assumed that resource rentals paid for the use of fishing quota will stay the same. There is, however, the potential for the Crown to raise the rentals to market levels, and thus to cut the value of the settlement for Maori. There is nothing to prevent this in either the Fisheries Act 1983, the Deed of Settlement, or the Settlement Act. Further, Treasury has been attempting to raise the rentals to a maximum market value since the mid-1980's, and almost simultaneously with the conclusion of the Sealord deal, the Crown announced

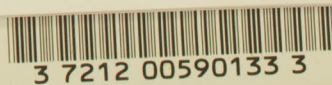
²⁹²p Tumahai "Maoridom Seeks Lord of the Sea" *Te Maori News*, October 1993, 13.

²⁹³Kelsey *Rolling Back the State*, above n49, 266; Mr Prebble, *New Zealand Parliamentary Debates* Vol 532, 1992: 12959.

²⁹⁴Kelsey, *Rolling Back the State*, above n49, 265.

²⁹⁵Kelsey, *Rolling Back the State*, above n49, 267. Similar questions had been raised concerning AFL, which was resented by many as the Crown's imposition of a development model on Maori: S Jones, interview with the writer, 1 July 1993.

²⁹⁶See Mr Kidd, above n200. Mr O'Regan has stated that he believes new quota to be in total a larger asset than Sealord itself: "Tipene talks on hooking the big one", above n7.



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plans to adjust the rentals to cover administrative costs of the fisheries regime, in line with "user pays."²⁹⁷

Fourthly, shares and quota do not, by themselves, restore a viable economic base. There must be doubt as to the ability of tribes to transform their allocations into an asset with a real and discernible effect on Maori society. Many tribes will not be able to use the quota they are allocated: the share they receive may be uneconomic; they may not have the capital or expertise to develop it themselves.²⁹⁸ Iwi will thus be forced to enter into joint ventures, or to lease out their quota to others, thereby losing control and, often, the opportunity to restore their own people in the business and activity of fishing. The danger was emphasised by the Rt Hon M Moore, Leader of the Labour Opposition:²⁹⁹

There is a danger that Sealord Products will become like a social welfare department that sends out cheques. There has to be more to it than that. I want in my lifetime to see as many Maori fishing and looking after their families as there have been lawyers carrying those people's briefs and supporting their families through their involvement in treaty legislation.

iii *Development of the base*

There is an ongoing obligation on the Crown to ensure the successful development of the tribal base. In the Sealord deal, however, the Crown purports to fully satisfy its Treaty obligations by passing the settlement assets to Maori. This is not in accord with its Treaty responsibilities. The Crown must continue to monitor and guide the process of tribal restoration.

c *Tribal structure*

Tribal restoration also requires the reconstruction of a structure appropriate for the needs of Maori in 1993. The Sealord deal has proceeded without grappling with this issue. We consider here the difficulties this poses for the efficacy of the Sealord deal.³⁰⁰

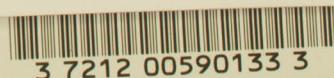
²⁹⁷Kelsey, *Rolling Back the State*, above n49, 267. See "Fishing rental plan intolerable, says Sealord chief" *The Dominion*, Wellington, 19 August 1993, 10.

²⁹⁸Mr Graham made this clear when explaining why individual iwi settlements were inappropriate: At the end of the day we would have ended up with fragmentation of quota among numbers of iwi or hapu, none of whom would have had the financial strength to foot it in a market that requires a lot of capital. (New Zealand Parliamentary Debates Vol 532, 1992: 12823.)

He did not explain how the global Sealord settlement would, in practice, be any different.

²⁹⁹New Zealand Parliamentary Debates Vol 529, 1992: 11219.

³⁰⁰We have seen some of these already in the context of representation and ratification: above Part IV A 2 b.



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First, the fisheries settlement assets are to be allocated amongst "Maori". This raises significant issues. Should assets be allocated to iwi or hapu? The Maori Fisheries Commission had earlier opted for iwi,³⁰¹ and this may be consistent with Treaty principles as discussed above. Further, if assets are to be allocated to iwi, which groups constitute iwi? The Maori Fisheries Commission was developing criteria by which to determine this, but they had not been debated.³⁰² The scope of the problem had been emphasised, however, by the Commission in July 1992 when it reported that "the iwi register now stands at 60 and grows by the week."³⁰³

Secondly, the Sealord deal has highlighted the need for appropriate administrative and legal structures. Tribes need a basis on which to manage and develop the settlement assets, and to be accountable to their members for their actions. Tribal structures will also be needed to enable iwi to exercise autonomous functions, such as these under the traditional fishing regulations which involve iwi providing enforcement officers and fulfilling reporting obligations.

Thirdly, the issue of distribution of benefits is left untouched. A major purpose of Treaty claims settlement is to improve the lot of all Maori. The Sealord deal must benefit not only those who run the companies, but also those who live in their traditional territories, those who live in the cities, those who live in marginal social and economic circumstances. Many have questioned, however, whether this will occur. Kelsey points to the experience of the Maori Development Corporation:³⁰⁴

Even where these large commercial investments were successful there was scepticism about how far they would benefit most Maori. They attempted to compensate for the grossly unlevel playing field by minimally increasing commercial opportunities for enterprising Maori and iwi

³⁰¹The Commission stated:

Though fishing rights might have belonged to a whanau or hapu, the Commission thinks it should transfer the quota to iwi because iwi is the group representing all its whanau and hapu. The allocation (and use) within the iwi is the business of particular iwi. (Maori Fisheries Commission, letter to all iwi, dated 29 July 1992.)

³⁰²The Commission had informed iwi that it would need to be satisfied that an iwi had the following characteristics: shared descent from Tipuna; Hapu, Marae; belonging historically to a Takiwa; an existence traditionally acknowledged by other Iwi; and the representation of the tribal group by legal entity which tribe members have agreed should hold quota, cash, and shares for them, which acts for them, and which has a way of accounting to the tribe. (Maori Fisheries Commission letter, above n301; *Tangaroa*, Special Issue for 1992 AGM of the Maori Fisheries Commission, July 1992, 2.)

³⁰³*Tangaroa*, Issue 10, July 1992, 1.

³⁰⁴Kelsey, *Rolling Back the State*, above n49, 251. See also Mr Peters who argues that Treaty claims settlements are doing little for ordinary Maori. The process, he says, has been captured by a small group of Maori men who tend to show by their actions that they alone know what is good for Maori, and who are practising a brown version of "trickle down" economics: S Kilroy "Treaty settlements slammed" *The Dominion*, Wellington, 9 August 1993, 2.



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to participate in the market economy. The mass of Maori would remain dependent on the "trickle down" of cash flows that resulted from these investments, with no guarantee of income, jobs or tribal control of resources and development. The entrepreneurial vision seemed a long way from the desperate situation facing the majority of rural and urban Maori.

There has been no attempt to grapple with questions of tribal responsibility and tribal structures which identify members and their needs.

Structure is of fundamental significance. The Sealord deal, however, proceeds without addressing the issue. This threatens the legitimacy of the deal for all Maori.

d Conclusion

The Treaty of Waitangi guaranteed Maori rangatiratanga. We established at the outset that restoration of the tribe must now be the Crown's overarching objective. The Sealord deal, however, fails to deal with the issues surrounding rangatiratanga. There is no Crown commitment to tribal restoration as the aim of Treaty claims settlement. All that the Sealord deal has done is to provide an amount of assets, to present it to Maori as a whole, and to hope that the tribe will thence be restored. There must be no further settlements in this mould.

D Overview

The Treaty of Waitangi is New Zealand's constitutional foundation and the basis for our bicultural nationhood. It provides the framework by which we may redress past grievances and honour the Treaty in the circumstances of 1993.

The Sealord deal is in breach of the Treaty of Waitangi. There are key respects in which it directly contravenes Treaty principles. It fails to uphold the Treaty as a fundamental constitutional document conferring ongoing rights and laying the basis for a developing partnership; it allows the Crown to exceed the legitimate bounds of kawanatanga. Further, the Crown has made no commitment to a legitimate Treaty claims process, to redress the imbalance of bargaining power in negotiations, or to build public understanding of Treaty claims settlements. Underlying the Sealord deal is a failure to grapple with the "hard questions" surrounding the requirements of the Treaty in 1993. There are major issues surrounding the restoration of rangatiratanga which have gone unaddressed. There are ongoing difficulties with the representation and ratification of settlements. Failure to attend to these questions threatens the legitimacy of all future claims resolution.



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We conclude, therefore, that the Sealord deal is not a appropriate fulfilment of the Treaty of Waitangi in 1993. It must not be a model for future Treaty claims settlements.

V THE SEALORD DIRECTION

The Sealord deal is a "historic settlement." It acknowledges Treaty fishing rights and satisfies them by giving Maori a major stake in the New Zealand fishing industry, and an opportunity for development. The Sealord deal is the first major settlement of Maori Treaty claims and is hailed as laying the way for more. It is, however, in breach of the Treaty of Waitangi.

What is involved in the Sealord deal is the balance between principle and practice, theory and results. There is a tension in the deal "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."³⁰⁵ The Crown and Maori chose opportunity. As Tipene O'Regan justified the decision:³⁰⁶

Concepts are lovely things, they're like grievances, they're like tears. You can massage them, you can nurse them, you can allow them to define you, but at the end of the day, if they are to have any meaning at all, they have to be translated into fact. ... If [the Treaty] is going to be relevant in terms of our people's future, the economic rights it enshrines must be translated into a set of assets capable of generating benefits for the tribe.

The Sealord deal was the best Maori were likely to do. They would take the chance to develop, and, in time, buy back Treaty principle:³⁰⁷

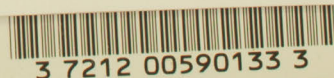
I think it was not what Maori were due in terms of their Treaty rights, but I take the view that we will get to the goal of 50 percent we set ourselves in 1988 far quicker by good commercial management, than what we will ever get there grinding away at high cost in long litigation.

This decision to accept the Sealord deal is understandable. The Crown should not, however, have put Maori in the position of having to make it. The Treaty of Waitangi is the basis on which New Zealand will move beyond colonialism towards bicultural nationhood. The hard questions must be grappled with in order to achieve a just,

³⁰⁵ *Fisheries Settlement*, 3.

³⁰⁶ Quoted in "Who Are Ngai Tahu?", above n59, 59.

³⁰⁷ "Tipene Talks on Hooking the Big One", above n7, .



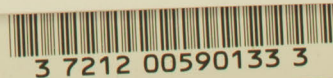
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legitimate, stable, future. The Treaty of Waitangi itself strikes the appropriate balance between principles and practice, theory and results.

The Sealord direction is thus the wrong direction. It only invites the recurrence of the demand to "honour the Treaty". The Crown has risked long-term justice for short-term results and the potential for future grievance, illegitimacy, and injustice; Maori have gambled on the Sealord settlement being the "window of opportunity" for dispossessed Maori and the first step towards Maori forcing change themselves. The Sealord deal has, however, failed to lay the foundations for real change. Indeed, it may well come to stand as an ineluctable barrier to self-determination and bicultural nationhood. The ultimate price of the Sealord deal may be the legitimization of continued Maori subordination. It is the purists who are indeed the realists.³⁰⁸

The Sealord direction is not an appropriate direction for New Zealand in 1993. We have not waited 150 years to dishonour the Treaty of Waitangi. The Sealord deal must be rejected as the basis for future Treaty claims settlements.

³⁰⁸Kelsey, *Honouring the Treaty*, above n98, 270.



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APPENDIX

New Zealand Fishing Legislation 1860 - 1986

The Crown has regulated the New Zealand fishing resource for a number of reasons: conservation, management, and promotion of the New Zealand fishing industry.

Early legislation focused on the commercial and subsistence oyster fishery,¹ on introduced species such as trout and salmon,² and on sea fisheries generally.³ This legislation was consolidated in the Fisheries Act 1908 which remained in force until 1983.⁴ The Fisheries Act 1908 contained basic management and control powers to regulate such matters as closed seasons, closed and restricted areas, minimum fish sizes, minimum mesh size of nets, prohibition of certain fishing gear, and the appointment of inspectors. These were the basic means by which the Crown managed the fishing resource.

The New Zealand fishing industry began its major development from the early 1900's. By the 1930's, however, problems with the industry infrastructure had begun to develop and there was concern about declining fish stocks resulting from trawling. Restricted licensing was therefore introduced as a means of management.⁵ Licensing was the major basis of fishery conservation in the 1940's and 1950's, along with the pre-existing Fisheries Act methods.

By 1960, the industry had changed: new technology was opening up fishing potential,⁶ there were new foreign operators to deal with,⁷ and there was doubt about the continued efficacy of the licensing system. The Government sought the best means both of accelerating the expansion of the fishing industry, and of continuing to conserve the resource. In 1963, it abolished restrictive licensing and the seas were opened to all who

¹The Oyster Fisheries Act 1866, amended in 1869 and 1874; the Oyster Fisheries Act 1892; the Sea-fisheries Act 1894.

²The Salmon and Trout Act 1867; the Fisheries Conservation Amendment Act 1903.

³The Fish Protection Act 1877; the Seal Fisheries Protection Act 1878; the Fisheries Conservation Act 1884; the Fisheries Encouragement Act 1885; the Sea-fisheries Act 1894, amended 1896, 1903, 1907.

⁴The Fisheries Act received some minor additions in 1912 and 1923, but, apart from those, remained almost unchanged until 1945.

⁵The previous practice had been that anyone who wished to fish could do so, subject to registering the vessel. Licensing was introduced by the Industrial Efficiency Act 1936, and its provisions were transferred into the Fisheries Act 1908 in 1945.

⁶The new technology, with developments such as on-board refrigeration and echo-sounding equipment, was enabling increasing number of boats to range further afield, and to explore new fisheries in deeper waters and further offshore.

⁷Japanese fishing operations had begun in New Zealand waters in 1959.

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wanted to go fishing and could afford to do so.⁸ The Government provided investment incentives, capital grants and tax breaks to the industry: "more and more people were encouraged to spend more money to catch more fish."⁹ The Territorial Sea and Fishing Zone Act 1965 was a further stimulus, with a nine mile fishing zone being established outside the three mile territorial sea for the exclusive use of domestic vessels.¹⁰ The Territorial Sea and Exclusive Economic Zone Act 1977 again addressed the problem of foreign fishers, giving New Zealand the power to control conservation and management of resources out to a limit of 200 miles and requiring foreign craft to be licensed. Conservation was achieved by the traditional Fisheries Act methods.

By the late 1970's, however, New Zealand fishing was in trouble. New fishers had found it difficult to succeed in the deep sea fishery and had returned inshore. The inshore fishery came under intolerable pressure and commercial catches fell dramatically from the late 1970's.¹¹ By 1982, it was clear that a new régime was needed. The result was a new Fisheries Act in 1983.

The Fisheries Act 1983 emphasised the need to conserve the depleted fisheries resource and to bring a greater measure of economic security to the industry. The Act provided for the designation of specific areas to be managed by Fishery Management Plans;¹² for controlled fisheries, defined by fish species, area, or those who could engage in the fishery to be set aside, and a maximum number of licenses granted in them;¹³ and for the compulsory registration of fishing vessels and compulsory fishing permits for commercial fishers.¹⁴ The Act also introduced a new definition of a commercial fisher: a person who had fished for sale throughout the year, or the fishing season, and who had relied substantially on fishing for his or her income.¹⁵ The effect of this was the exclusion of between 1500 and 1800 part-time fishers from the fishing industry.

⁸This was recommended by the Fishing Industry Committee, a parliamentary select committee set up in 1962.

⁹*Muriwhenua*, xviii.

¹⁰In the late 1960's and early 1970's, Russian, Japanese, Taiwanese and Korean fishers were here in large numbers and taking large catches from in and around New Zealand waters.

¹¹For example, catches of snapper, one of the most important of inshore species, fell from 18 000 tonnes in 1978 to 12 000 tonnes in 1981. *Ngai Tahu Sea Fisheries* quotes a Ministry of Agriculture and Fisheries official as saying:

The decline in the yields of the major species placed many fishermen and fishing companies under financial pressure. Coastal communities heavily dependent on fishing became at risk. Recreational and traditional Maori fisheries began to suffer as the fishery resource became further depleted. (217)

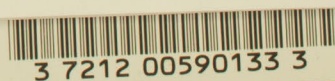
¹²Part I Fisheries Act 1983.

¹³Part III Fisheries Act 1983.

¹⁴Part IV Fisheries Act 1983. Fishing permits could be restricted to specific areas, species, quantities, methods, types of fishing gear and periods of time as fixed by the Director-General.

¹⁵Section 2 Fisheries Act 1983. The MAF criteria for those seeking commercial vessel registration and commercial fishing permits became:

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The Fisheries Act 1983 was not, however, considered to have dealt adequately with the problems of management, control or conservation of New Zealand's fisheries. The Government thus proposed soon after its enactment the revolutionary new solution of a quota management system. This became the Fisheries Amendment Act 1986.

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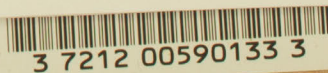
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- that during 1982 the fisher had caught the equivalent of \$10 000 of fish, or
 - the fisher held a controlled fishery license, or
 - approval had previously been granted in respect of the new moratorium provisions and had been used or only recently granted, or
 - the fisher earned at least 80% of non-investment income from fishing, or
 - the fisher held a permit for the period 1 January-30 September 1983 and fishing income was a vital part of the fisher's annual subsistence income. (*Ngai Tahu Sea Fisheries*, 219)

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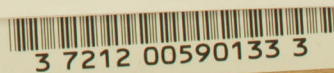
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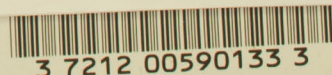
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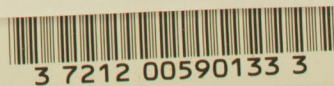
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