

## *The Treaty of Waitangi and the Sealord deal*

Justine Munro\*

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*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 article asks whether the "Sealord deal", as it has come to be called, is in accordance with the principles of the Treaty of Waitangi, as these have been developed by the courts and the Waitangi Tribunal; and concludes that the deal represents only a pragmatic response to Maori needs and the opportunities at hand. The Sealord deal failed to confront the issues that must be addressed if legitimate and lasting Treaty claims settlements are to be made in New Zealand. This paper incorporates events up to 1 September 1993. Key developments since that time and up to June 1994 are briefly summarised in the appendix.*

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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. The deed, commonly called the "Sealord deal", was enacted on 10 December as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.<sup>1</sup>

The Sealord deal was immediately hailed as "an historic settlement."<sup>2</sup> The Crown had at last recognised Maori fishing rights under the Treaty of Waitangi. The Sealord deal, with a total value estimated at approximately \$500 million,<sup>3</sup> gives Maori a major stake in the New Zealand fishing industry. In this way, the Crown claimed to have fulfilled its Treaty obligations to Maori, and to have begun a new era in Crown-Maori relations.

Problems with the deal were, however, immediately apparent. Within a week of the deed's signing, representatives of some tribes had filed challenges to it in the High Court and the Waitangi Tribunal, and later, before the United Nations Human Rights Committee. They claimed that the Sealord deal was in breach of the Treaty of Waitangi; that it had sacrificed fundamental principles for short-term gains; and that it portended ill for future Treaty claims settlements.

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\* Justine Munro is reading for a DPhil in Law at Balliol College, Oxford. This article is an edited version of a paper written as part of the LLB(Hons) requirement at Victoria University of Wellington.

1 Hereafter the "Settlement Act."

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

3 D Graham, New Zealand Parliamentary Debates Vol 532, 1992: 12817.

The Crown and the deal's Maori negotiators acknowledged the difficulties with the Sealord deal. They saw it, however, as "a tide that had to be taken at the flood."<sup>4</sup> As Mr Tipene O'Regan, one of the Maori negotiators, explained:<sup>5</sup>

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.

The Sealord deal, it was felt, represented the best available means for Maori to achieve change and for the Crown to settle a deeply felt injustice.

This article asks whether the Sealord deal is in accordance with the principles of the Treaty of Waitangi, as these have been developed by the courts and the Waitangi Tribunal. Two points should first be made. First, the article must, for reasons of space, assume a basic knowledge of the Treaty principles developed in the courts and the Waitangi Tribunal. Secondly, the article does not provide a critique of these Treaty principles. This is not to imply that they constitute the best possible basis for claims settlements, but merely to recognise that they have played a key role in developing current policy. They are, therefore, an important starting point for any discussion of the Sealord deal.

The article proceeds in four parts. Part II provides an overview of the Treaty principles, looking first to those principles governing substance, and secondly to those which guide the process of claims settlements. Part III gives the factual background: the Crown's breaches of Treaty fishing rights; the situation leading to the Sealord deal; and an overview of the deal's provisions. Part IV evaluates the Sealord deal in the light of the Treaty principles; and Part V draws out its significance for the process of Treaty claims settlement.

## II THE PRINCIPLES OF THE TREATY

### A *The Treaty Obligations*

The Treaty of Waitangi is the "foundation for a developing social contract" in New Zealand.<sup>6</sup> This section focuses on those principles relevant for New Zealand now.

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

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

6 Waitangi Tribunal *Motunui-Waitara Report* (Government Printer, Wellington, 1983), 52 ("*Motunui*").

## 1 Partnership

Partnership has become the overarching principle representing the Treaty obligations of the Crown and Maori.<sup>7</sup> Three ideas are of central importance. First, partnership embodies a commitment to biculturalism, to a state whose institutions uphold both Maori and Pakeha perspectives.<sup>8</sup> Secondly, partnership recognises not only separateness but also a common enterprise.<sup>9</sup> There will need to be compromise and co-operation as we move from past breaches to honour the Treaty in the future.<sup>10</sup> Thirdly, partnership imposes a responsibility on both partners to act towards each other reasonably, honourably, and with the utmost good faith.<sup>11</sup>

## 2 Kawanatanga

Article I of the Treaty of Waitangi gave to the Crown kawanatanga, or sovereignty:<sup>12</sup> 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.<sup>13</sup> The Crown's right to govern in the public interest is, however, limited by its Treaty obligations.<sup>14</sup>

The Crown has, for example, the right to make laws of general application for conservation control and resource protection.<sup>15</sup> 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.<sup>16</sup> Maori have Treaty rights to certain resources; others have only privileges.<sup>17</sup> The Crown must also establish that its laws embody a

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- 7 Partnership was given prominence by the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (Cooke P), 682 (Richardson J) ("NZMC (1987)"); and developed in *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 I"). The concept has also been affirmed 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").
- 8 NZMC (1987), 674 (Richardson J). See also the Waitangi Tribunal's *Mangonui Report* (Government Printer, Wellington, 1988) 60 ("Mangonui").
- 9 *Muriwhenua*, 195.
- 10 *Tainui*, 530 (Cooke P).
- 11 NZMC (1987), 664, 667 (Cooke P); 673, 681-681, 682 (Richardson J).
- 12 The Waitangi Tribunal and the Court of Appeal have accepted, contrary to some Maori opinion, that Maori did cede legal sovereignty: *Muriwhenua*, 186-187; NZMC (1987).
- 13 *Ngai Tahu*, 236.
- 14 *Waitangi Tribunal Orakei Report* (Government Printer, Wellington, 1988) 149 ("Orakei"); *Ngai Tahu*, 236-237.
- 15 *Muriwhenua*, 232.
- 16 See, with regard to fisheries, *Muriwhenua*, 232; *Waitangi Tribunal Ngai Tahu Sea Fisheries Report* (Government Printer, Wellington, 1992), 242.
- 17 *Muriwhenua*, 164.

commitment to biculturalism. The cession of sovereignty did not authorise the conduct of government based on the "primacy of Anglo-Saxon values and institutions."<sup>18</sup>

Balancing the Crown's Article I rights with its obligations under Articles II and III is difficult. 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."<sup>19</sup> The danger would seem, however, more likely to be the other way.

### 3 *Rangatiratanga*

Article II of the Treaty of Waitangi guaranteed to Maori both a property right in resources, and a right to tribal autonomy. These aspects of rangatiratanga are examined in turn.

#### *i Property rights*

The Treaty of Waitangi affirmed Maori tribes in the property rights they held at 1840. The Crown was also, however, obliged to actively protect Maori property interests<sup>20</sup> by ensuring that tribes retained sufficient property for their needs<sup>21</sup> and developed their interests to take account of new technologies and understandings.<sup>22</sup> The Crown had also to respect Maori autonomy and control over their taonga to the extent that this was compatible with kawanatanga.<sup>23</sup>

The fisheries resource provides an example of these concepts. Fish were an important taonga:<sup>24</sup> Maori used fish both for subsistence and as an integral part of the tribal economy; and tribes exercised control over their fisheries in the inshore sea extending out from their territories. 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."<sup>25</sup> Maori also 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]."<sup>26</sup> Maori maintained the resource by requiring

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

19 NZMC(1987), 665 (Cooke P).

20 Waitangi Tribunal *Manukau Report* (Government Printer, Wellington, 1985) 70 ("Manukau"); *Te Reo Report* (Government Printer, Wellington, 1986) 1 ("Te Reo"), and every subsequent Waitangi Tribunal report. See also NZMC (1987), 664 (Cooke P).

21 *Muriwhenua*, 217.

22 *Muriwhenua*, 217; *Ngai Tahu Sea Fisheries*, 253-256.

23 *Muriwhenua*, 231-232; *Mangonui*, 47, 60; *Ngai Tahu*, 242.

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

25 *Ngai Tahu Sea Fisheries*, 264.

26 *Ngai Tahu Sea Fisheries*, 306.

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 Crown had, as far as possible, to respect that control.

ii *Tribal autonomy*

The Treaty of Waitangi recognised the tribe as the centrepiece of Maori social organisation.<sup>27</sup> Traditional structures and mechanisms for tribal control were to be maintained,<sup>28</sup> as was an adequate endowment of resources for each tribe.<sup>29</sup>

These guarantees were not, however, honoured, and the consequence was the near destruction of the tribe. Tribal restoration is a direct obligation, therefore, on the Crown. Restoring the tribe has also assumed centrality as an appropriate means of making redress for other Treaty breaches, such as the breach of property rights.<sup>30</sup> As Chief Judge Durie put it: "To compensate a tort is only one way of dealing with a current problem. Another is to move beyond guilt and ask what can be done now and in the future to rebuild the tribes ...".<sup>31</sup>

Tribal restoration has a number of components. Economic self-determination is central. The tribe must have a resource base that enables it to provide for its present and future needs. What resources make up each tribe's base will depend on a number of factors: the tribe's existing resources; its geography and demography; its interest in particular resources over which rangatiratanga was traditionally exercised; and the desire to be re-established in the economy of its traditional territory. One resource can clearly not be considered in isolation.<sup>32</sup> The Crown must also assist in the development of this restored resource base. Many Maori 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."<sup>33</sup>

The Crown must, further, 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.

27 *Mangonui*, 47, 60.

28 *Mangonui*, 47, 60.

29 Waitangi Tribunal *Waiheke Report* (Government Printer, Wellington, 1987) 36-42 (Chief Judge Durie) ("*Waiheke*"); *Muriwhenua* (194); *Ngai Tahu* (237-240); *Orakei* (137-147).

30 *Waiheke*, 41 (Chief Judge Durie); *Orakei*, 186. In *Muriwhenua* and *Ngai Tahu*, both of which involved large resource claims, the Tribunal gave tribal restoration as its primary recommendation: *Muriwhenua* (228, 239-240); *Ngai Tahu* (1051-1059). 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.

31 *Waiheke*, 41.

32 See the Waitangi Tribunal's analyses in *Muriwhenua* (3, 295) and *Ngai Tahu* (1056).

33 IH Kawharu "Introduction" in IH Kawharu (ed) *Waitangi - Maori and Pakeha Perspectives* (Oxford University Press, Auckland, 1989) xiv.

services that can be performed by the tribe consistently with kawanatanga, and arrange for their devolution.

Reconstruction of the tribe also requires a structure appropriate for the needs of Maori now.<sup>34</sup> Major issues, however, arise here.<sup>35</sup> First, what entity represents Maori - the hapu or the iwi?<sup>36</sup> Different answers seem appropriate 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";<sup>37</sup> and there may be issues which have to be determined at a pan-iwi level.<sup>38</sup> The Crown and Maori must reach an understanding as to which issues require what level of representation.

Secondly, who has the authority to represent the hapu or iwi?<sup>39</sup> There is, at present, no certainty as to the structure which represents the iwi or hapu in a particular area, with a number of bodies possibly important.<sup>40</sup> This poses a major difficulty for the Crown in undertaking consultation or achieving consent in accordance with its Treaty obligations.<sup>41</sup>

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34 The 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).

35 An attempt was made 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 authority in an area, and for iwi accountability structures. There was, however, significant Maori concern that the Runanga were Pakeha defined constructs without Maori legitimacy: J Kelsey *Rolling Back the State* (Bridget Williams Books, Wellington, 1993) 272-273.

36 This 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" (1992) 26 *New Zealand Journal of History* 5, 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.

37 *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.

38 Dissident iwi may, as with hapu, 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.

39 Representation has been emphasised by the Waitangi Tribunal: *Mangonui*, 48; *Fisheries Settlement*, 17.

40 The Waitangi Tribunal mentions 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: *Fisheries Settlement*, 14.

41 Te Ture Whenua Maori Act 1993 will, however, 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,

Thirdly, there is a need for appropriate tribal administrative and legal structures. Tribes are now operating within frameworks which are incapable of meeting today's objectives.<sup>42</sup> 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.<sup>43</sup>

Fourthly, the majority of Maori now live in urban centres outside their traditional tribal boundaries. Tribal restoration claims urgency on the basis of their needs. The Crown must ensure, therefore, that tribal structures include provision for identifying and passing real benefits to urban tribal members. 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 Otago and Porirua, and not just a windfall for the few.

### C *The Process of Settlement*

Negotiation between the Treaty partners has come to be recognised as the most appropriate means by which to determine justice for Maori: the Crown and Maori entered into the Treaty; only they have the mana to define its requirements.<sup>44</sup> This is, however, a new realisation, and much thought must be given to the process of negotiation, and to fundamental issues which arise concerning the imbalance of bargaining power between the parties, Maori representation, and the public acceptability of the process.

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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.

42 The Maori Trust Boards were set up in the 1940s 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. Neither 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 n 33, 234, 259-260.

43 Ngai Tahu has recognised structure as fundamental, and Te Runanga O Ngai Tahu Bill, introduced to Parliament on 27 July 1993, is intended to deal with these issues. This model may not, however, be appropriate for all tribes, and there must be a Crown commitment to deal with the structural needs of all.

44 This is recognised by the Waitangi Tribunal: *Muriwhenua*, 241; and see also Chief Judge Durie "The Waitangi Tribunal: Its relationship with the judicial system" [1986] NZLJ 235, 236. The Waitangi Tribunal does not, in any case, have the legal ability to impose its vision of the Treaty's requirements other than under the State-Owned Enterprises (Treaty of Waitangi) Act 1988 and the Crown Forest Assets Act 1989. It is also recognised by the courts: *Tainui*, 529. In practice, the Court has left the Crown and Maori to together negotiate a settlement and has not made a substantive determination of the Treaty's requirements (but see the obiter dicta discussed at n 48 below).

### 1 *The negotiation process*

Negotiation may now be seen as the means by which the Crown and Maori should determine the practical application of Treaty principles. The institutions of the courts and the Waitangi Tribunal are of continuing importance, however, in complementing and safeguarding the negotiation process. This must be recognised by the Crown.

The Waitangi Tribunal has a central role as an independent body in establishing the factual matrix of the claim;<sup>45</sup> developing our understandings of the Treaty principles;<sup>46</sup> and providing an ongoing check on the continuing validity of Treaty settlements.<sup>47</sup> Its input may well be a necessary part of the progression towards legitimate settlements, and a component of their long-term durability. The Waitangi Tribunal must be affirmed as a fundamental part of the Treaty claims settlement process, not subject to political interference, and funded appropriately.

The courts also have an important procedural role.<sup>48</sup> They are the only institution which can be appealed to by claimants to force the Crown to recognise rights, take or

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45 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 n 33, 158.

46 The 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*.

47 The Tribunal now seldom makes substantive recommendations, respecting the common request from claimants for findings of fact and Treaty interpretation only as a basis for Crown negotiations: *Muriwhenua*, xxi; *Ngai Tahu*, 1061; *Ngai Tahu Sea Fisheries*, 309.

48 The Court of Appeal appeared initially to see itself in a more substantive role, with Cooke P stating in *Tainui* that "[i]n the end only the Courts can finally rule on whether or not a particular solution accords with the Treaty principles" (529). The Deputy Prime Minister, Rt Hon G Palmer (as he then was) was, it is submitted, correct in his reply:

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 Awamarahi Marae, Tuakau, 24 November 1989, quoted in Kelsey *Rolling Back the State*, above n 35, 215; (1989) 12 TCL 45/1.)

The Court of Appeal has since backed away from the *Tainui* statement. In *Airwaves 1*, 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*, the Court found that the issues "are political questions for political judgment" (309).

abstain from action. The courts are thus able to help redress the imbalance of bargaining power between Crown and Maori, discussed further below. They are, however, constrained by a number of factors: the need for statutory incorporation of the Treaty;<sup>49</sup> notions of justiciability and parliamentary sovereignty;<sup>50</sup> and the limitations of the aboriginal title analysis, if that is resorted to.<sup>51</sup>

## 2 *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.

Mechanisms must be developed to redress this power imbalance. Adequate funding of Maori, in the Waitangi Tribunal and during negotiations, would be an important start.<sup>52</sup> More far-reaching would be the boosting of the courts' ability to safeguard the negotiation process by the statutory incorporation of the Treaty<sup>53</sup> or of substantive Treaty rights. The appointment of an independent body to monitor Treaty negotiations is another possibility.<sup>54</sup>

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49 *NZMC*(1987); *Love v Attorney-General* Unreported, 17 November 1988, High Court Wellington Registry CP 135/88.

50 *Te Runanga O Wharekauri*.

51 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

52 Chief Judge Durie has commented extra-judicially that "[i]t 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.

53 As 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 Legal Research Foundation *A Bill of Rights for New Zealand* (Auckland, 1985) 207. It may be, however, that the Maori experience of the courts after 1987 has changed attitudes.

54 The 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*.

### 3 *Representation and ratification*

Maori representatives in a negotiated settlement must be validly appointed by and held accountable to those they represent - the hapu, iwi, or, perhaps, all Maori. We have emphasised above the difficulties here; the settlement process reinforces the need for the restoration of appropriate tribal structures. Negotiated settlements must also be ratified by those whose rights or interests they affect. This consent must be genuine, based on an informed understanding of the settlement, and gained in a way which respects the group's internal decision-making structures.<sup>55</sup>

### 4 *Public acceptability*

Building public acceptance is an important part of the settlement process: "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."<sup>56</sup> In practice, this means that all must understand the issues and feel that their positions have been taken into account. There should be public education campaigns concerning each claim, its background, and the principles involved; and forums for public debate and input. Time must be taken for the broader society to work through the structural and attitudinal changes which the Treaty requires.<sup>57</sup>

## III TREATY FISHING RIGHTS

### A *Breach of Treaty Fishing Rights*

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

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*Report of the Task Force to Review Comprehensive Claims Policy* (Department of Indian Affairs and Northern Development, Ottawa, 1985) 79-82.

55 The Waitangi Tribunal stated in *Muriwhenua*:

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 (157).

56 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 continues to be used by the National Government.

57 See Chief Judge Durie with regard to the Waitangi Tribunal: "The Waitangi Tribunal - its relationship with the judicial system", above n 44, 238. Something of this is visible 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 further recommendations with respect to private land, was assented to on 20 August 1993.

## 1 Legislation pre-1986

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

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.<sup>58</sup> General legislation also 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.<sup>59</sup> The only special provisions that were made for Maori fisheries were fundamentally limited by the following assumptions:<sup>60</sup>

- (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 ....

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<sup>58</sup> *Ngai Tahu Sea Fisheries*, 295.

<sup>59</sup> The Maori fishing rights savings provision (s 8 Fish Protection Act 1877; s 14 Sea Fisheries Amendment Act 1903; s 77(2) Fisheries Act 1908; s 88(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 ("*Te Weehi*") where the High Court allowed Maori exercising traditional subsistence rights a defence against general fisheries laws. The full scope and extent of s 88(2), however, was not decided in that case, and there 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 s 88(2) could provide for substantive Maori fishing rights was at issue in the *Muriwhenua* proceedings: below n 83.

<sup>60</sup> *Muriwhenua*, 222.

Maori were also not included within the development of the national fishing industry. The loans and incentives that were provided for the industry as a whole did not go to tribes.<sup>61</sup>

This Crown breach of rangatiratanga had a fundamental impact on Maori fishing.<sup>62</sup> 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. Once highly profitable Maori commercial fishing went into rapid decline: tribal resource bases had been lost; there was no money for development; and no way to maintain the tribal role in the burgeoning fishing industry. Commercial fishing continued, but only on an individual basis, small-scale, and often part-time, and thus vulnerable to the industry changes which excluded small fishers.<sup>63</sup>

## 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. It was also in breach of the Treaty of Waitangi.

The QMS represents the Crown's response to the overfishing crisis which had emerged in the 1980's: the privatisation of the fisheries resource and the creation of a tradeable property interest in an exclusive right of commercial fishing. The QMS operates in the following way. The Minister of Fisheries can declare an area to be a quota management area and particular species of fish in that area to be subject to the QMS.<sup>64</sup> The Minister then sets a total allowable catch for species in the quota management area 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.<sup>65</sup> The total allowable commercial catch is then divided into individual transferable quotas ("ITQs") which give a permanent property right to catch and sell a certain tonnage of fish.<sup>66</sup> (ITQs were allocated to existing commercial fishers on the basis of previous catch records.)<sup>67</sup> Quota holders can trade their property rights or lease them to others, and only quota holders can take fish commercially.<sup>68</sup> Quota-holders pay an annual resource rental to the Crown.<sup>69</sup> Management under the QMS focuses on MAFFish, the fisheries business group within the Ministry of

61 *Muriwhenua*, 222.

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

63 Between 1984 and 1985, for example, nearly 300 fishers, most of them believed to be Maori, lost their licenses in Northland alone: Ministry of Agriculture and Fisheries Fisheries Management Planning *ITQ Implications Study - Second Report (Community Issues)* FMP Series No 20, 48 ("Fairgray Report").

64 Section 28B Fisheries Act 1983.

65 Section 28C and 28D Fisheries Act 1983.

66 Section 28O Fisheries Act 1983.

67 Section 28E Fisheries Act 1983.

68 Section 28Q and 28ZA Fisheries Act 1983.

69 Section 28ZC Fisheries Act 1983.

Agriculture and Fisheries, which handles research, administration, management, and advice;<sup>70</sup> and the Fishing Industry Board, a statutory body with Government and private sector representation<sup>71</sup> which must be consulted on major fisheries management decisions.<sup>72</sup>

The QMS is thus based on the assumption of the QMS is that no fisheries belong to Maori but all to the Crown, and that they are, therefore, the Crown's to give away.<sup>73</sup> 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."<sup>74</sup> Further, the Crown's alienation of the fisheries created a major obstacle for Maori in obtaining redress for previous Treaty breaches, and posed the danger that Maori would never regain their Treaty fishing rights. The QMS also operated in a way prejudicial to Maori: the allocation of ITQs on the basis of catch histories worked against many Maori fishers who had been driven out of the industry, were part-time only, and often did not keep accurate catch-records.<sup>75</sup> The QMS also classified Maori fishing interests as traditional and non-commercial only.<sup>76</sup> Further, Maori were given only a minimal place in the management of the commercial fishing industry. The only Maori input provided for 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.<sup>77</sup>

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.<sup>78</sup> The Crown had, however, continued as

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70 MAFFish is advised by regional Fishery Management Advisory Committees who are in turn advised by local liaison committees comprising representatives from various commercial and recreational fishing groups, environmental groups and Maori organisations: s 7 Fisheries Act 1983.

71 Fishing Industry Board Act 1963.

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

73 *Ngai Tahu Sea Fisheries*, 133.

74 *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 n 63, 44).

75 Fairgray Report, above n 63, 147.

76 Section 28D Fisheries Act 1983.

77 Section 13 Fisheries Act 1983.

78 The 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 warned of the grave economic and social consequences of Government fisheries policy for Northland communities: above n 63.

before. Maori were thus forced to take action in both the Waitangi Tribunal and the courts to force the Crown to negotiate.

### *B Towards Settlement*

From 1987 to 1993, the Crown and Maori grappled with the question of how to affirm Treaty fishing rights 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 each in turn, looking first to the process which led to settlement, and secondly, to its content.

#### *1 Interim settlement*<sup>79</sup>

##### *a Process*

The first general Maori fisheries claim was initiated before the Waitangi Tribunal by the Muriwhenua tribes in 1986<sup>80</sup> and was reported on 15 June 1988. The claimants' allegation, that the Crown had breached their Treaty fishing rights in general and in particular under the new QMS, was upheld.<sup>81</sup> 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 constituted a breach of the Treaty.<sup>82</sup> The Crown ignored the first warning. The second time, Maori had also gone to court.

Maori commenced court proceedings on 30 September 1987 seeking judicial review of the Minister of Fisheries' decision to allocate quota under the QMS. They based their action on section 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 section 88(2) incorporated Treaty fishing rights and/or aboriginal title rights and that

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79 See generally J Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Wellington, Allen and Unwin, 1990); 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.

80 The earlier *Motonui*, *Manukau*, and *Kaituna* claims were not general claims, but involved particular Crown practices which had impacted on Maori fisheries. The Muriwhenua claim concerned 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.

81 *Muriwhenua*, 228.

82 The first Waitangi Tribunal memorandum, concerning the initial allocation of quota under the QMS, was issued on 8 December 1986. The second 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.

these rights were affected by the QMS in contravention of the section.<sup>83</sup> The High Court, on this basis, granted an interim declaration that the Crown ought not to proceed with allocations of those species in Muriwhenua<sup>84</sup> and, later, in all of New Zealand.<sup>85</sup>

The Crown was thus forced to negotiate with Maori.<sup>86</sup> On 25 November 1987, a Joint Working Group, comprising four Crown and four Maori representatives,<sup>87</sup> was established to determine how to honour the Maori fishing claims.<sup>88</sup> By 30 June 1988, the deadline for agreement, there had been no agreement.<sup>89</sup> The Crown and Maori had very different perceptions of the Treaty's requirements.

The Maori negotiators claimed that Maori were entitled under the Treaty of Waitangi to 100 per cent of the fisheries.<sup>90</sup> Maori were prepared, however, to accept the QMS as long as ownership and management were shared equally with the Crown. The Crown negotiators offered another model altogether. They proposed that all ITQs revert to a corporation which would control and manage the fishery. The corporation

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83 This substantive use of s 88(2) was, therefore, an extension from *Te Weehi*, which had affirmed s 88(2) as a defence to proceedings brought under the Fisheries Act 1983. The extension 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 s 88(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.

84 *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.

85 The Crown responded to the Muriwhenua declaration by gazetting 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 asking 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".

86 The interim declarations remained in force but the parties agreed that the QMS continue on a temporary basis.

87 The 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.

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89 The Crown and Maori Working Group's separate reports are reproduced as an appendix in Law Commission *The Treaty of Waitangi and Maori Fisheries - Preliminary Paper No 9* (Wellington, 1989).

90 This 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.

would lease out its quota by tender, with annual resource rentals raised to the market maximum in five years. Maori would be allocated 25 percent of the shares in the corporation,<sup>91</sup> the Crown holding the rest; and would have a major share in management.<sup>92</sup>

Negotiations continued thereafter on a Cabinet level, but without success, and the Government decided 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.<sup>93</sup> Maori went straight back to court. Actions were brought on behalf of virtually all fishing tribes alleging trespass, breach of fiduciary duty and negligence,<sup>94</sup> and the Crown was forced back into negotiations.<sup>95</sup> No agreement was reached, but there was a measure of general approval to an interim settlement.<sup>96</sup> 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.<sup>97</sup>

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- 91 The 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. Maori were not, it should be noted, to receive quota, although individual Maori could, of course, buy quota for themselves.
- 92 The Maori and the Crown were each to appoint three directors to the corporation, with the Crown appointing an additional chairperson.
- 93 The 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, s 88(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.
- 94 These are the second bracket proceedings, filed as *Te Runanga o Muriwhenua Inc v Attorney-General* Wellington, CP 743/88.
- 95 The 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 n 79, 95.
- 96 Frame, above n 79.
- 97 "The Act does not use the word "interim", but by leaving s 88(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. The Court of Appeal indicated in that case that the issue under s 88(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 (656). Substantive proceedings to determine the extent of Maori Treaty and aboriginal fishing rights were set down for hearing in early 1990. On 27 February 1990, however, 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. The Crown also promised that no further species would be brought within the QMS without agreement or court resolution. There were a number of procedural cases in the High Court and the Court of Appeal in early 1990 relating to

b        *Content*

i        *Commercial fishing rights*

The Maori Fisheries Act recognises Treaty commercial fishing rights within the framework of the QMS, giving Maori 10 per cent of existing quota<sup>98</sup> and a \$10 million grant towards the establishment of Maori commercial fisheries.<sup>99</sup> It also set up an institutional structure to deal with these assets: the Maori Fisheries Commission<sup>100</sup> and Aotearoa Fisheries Limited.<sup>101</sup>

The Maori Fisheries Commission held 50 per cent of the settlement assets. The Crown envisaged the Commission as a continuing institution responsible for facilitating Maori entry into the business of fishing.<sup>102</sup> The Commission, however, saw itself as a temporary body with the primary responsibility of allocating settlement assets to iwi.<sup>103</sup> The Commission undertook a process of consultation with tribes to determine the principles for allocation, but itself 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.<sup>104</sup> The Commission never, however, finally determined the principles of allocation.<sup>105</sup>

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hearing dates, adjournments, the continuance of the interim declarations, and evidential matters.

98        Section 40 Maori Fisheries Act 1989.

99        Section 45 Maori Fisheries Act 1989.

100       Section 4 Maori Fisheries Act 1989.

101       Section 12 Maori Fisheries Act 1989.

102       The Hon R Prebble, MP, Minister of State-Owned Enterprises and a chief fisheries negotiator under the Labour Government, emphasised the conflict between the Commission’s 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.

103       The Act did not, however, allow allocation of assets until 1992. The Commission, therefore, sought to optimise the benefits of the quota for iwi by leasing it out. Quota was allocated by tender with preference given to Maori, and in practice almost all was leased to iwi organisations and individual Maori: *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: 6. Allocation was for the most part on the mana whenue mana moana model: H Barlow “More talks likely on Maori fish quotas” *The Dominion*, Wellington, 28 August 1992, 2.

104       *Fisheries Settlement*, 18.

105       The Commission’s 1992 Hui-a-Tau 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

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 the other 50 per cent of the Commission's assets.<sup>106</sup> 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."<sup>107</sup>

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.<sup>108</sup> The purpose of the taiapure is to give local Maori a greater say in the management and conservation of the area, not to establish a special fishing regime for iwi, and the taiapure regulations may thus not discriminate against people on the grounds of "colour, race, ethnic or national origins."<sup>109</sup> The Minister of Fisheries approves the establishment of a taiapure after an extensive application and objection process,<sup>110</sup> and appoints the taiapure's committee of management on the recommendation of the local Maori community.<sup>111</sup> 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, section 88(2) and the Amateur Fishing Regulations, continue.

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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.

106 Sections 12 and 43 Maori Fisheries Act 1989. In practice, the Commission transferred all the deep sea quota to Aotearoa Fisheries: *Te Reo o Te Tini a Tangaroa*, newsletter of the Maori Fisheries Commission, Issue 7, November 1991, 12 ("*Tangaroa*").

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

108 Section 54A Fisheries Act 1983.

109 Section 54K(6) Fisheries Act 1983.

110 The 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; and the Minister's decision and its publication in the *Gazette*: ss 54B - 54I Fisheries Act 1983.

111 Section 54J Fisheries Act 1983.

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 in principle as the preferred settlement process. The settlement represented, however, only the Crown's perspective on how to respect the Treaty fishing right. It could not, therefore, be a solution in itself, but it paved the way for the final settlement of Treaty fishing claims in the Sealord deal.

2 The Sealord Deal<sup>112</sup>

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 they saw the Maori Fisheries Act as the end of the matter<sup>113</sup> 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.<sup>114</sup> Further, the interim declarations were still in force<sup>115</sup> and the possibility of returning to court was open.<sup>116</sup> There was, however, no new agreement in sight.

The opportunity came in mid-1992. Sealord Fisheries Limited, one of New Zealand's largest fishing companies and holding 26 per cent of existing quota, was put up for tender.<sup>117</sup> Maori saw a real chance to re-enter the New Zealand fishing industry as a major player, and recognised that Sealord was critical to the settlement of their Treaty fishing claims.<sup>118</sup> There was also a need to settle the claim: the financial and

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112 See generally Kelsey *Rolling Back the State*, above n 35, 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.

113 Kelsey *Rolling Back the State*, above n 35, 261.

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

115 The Crown had attempted, unsuccessfully, to have them lifted in 1990: *Te Runanga o Muriwhenua v Attorney-General* Unreported, 28 June 1990, Court of Appeal CA 110/90.

116 Under the 1990 agreement, Maori could resume proceedings at the end of October 1992 if no settlement had been reached: above n 97.

117 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.

118 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

personal resources of the negotiators were sorely taxed; and there was pressure, after six years of on-and-off litigation and negotiation, to do something practical about Maori needs. 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. Maori were also running out of alternatives: litigation was not an easy option, with the legal issues wide open and difficulties with both proving the case<sup>119</sup> and achieving an appropriate remedy.<sup>120</sup> 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.<sup>121</sup> 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, but there had been no discussion of any imminent settlement.<sup>122</sup> The Memorandum of Understanding was as much a surprise to Maori as it was to the general public.

Ratification of the Memorandum of Understanding was also problematic. 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 twenty-three marae throughout the country for ratification. These hui became surrounded by considerable controversy. Maori, it was 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

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limited by the increasing expense and the opposition of the fishing industry to purchases from existing companies.

119 The amount of factual material needed to establish, and refute, the existence of Maori fishing rights was immense, especially as the Waitangi Tribunal's reports had been ruled not conclusive evidence of the existence of rights: *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 654.

120 These factors in the negotiators' decision to settle are given by Mr O'Regan: *Treaty of Waitangi Fisheries Commission Hui-a-Tau*, above n 105, 4.

121 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: s 2 Settlement Act.

122 The Hui-a-Tau seemed 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.)

sensitivity; iwi were not assisted by lawyers or financial advisors; and no negative aspects of the deal were presented.<sup>123</sup> Further, it was alleged, there was much confusion as to the deal's effect on traditional fishing rights and no support for any abrogation of Treaty rights.<sup>124</sup> The Crown considered, however, in a decision later affirmed by the Waitangi Tribunal,<sup>125</sup> that the report of these hui evidenced a sufficient mandate from Maori for the Maori negotiators.

The Deed of Settlement was entered into between the Crown and representatives of many, but not all, iwi<sup>126</sup> and Maori organisations with fishing interests at Parliament on 23 September 1992. The Deed received tri-partisan commendation in Parliament the following day.<sup>127</sup> The Crown and the Maori signatories agreed that the deed was not binding on those who did not sign;<sup>128</sup> 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.<sup>129</sup> The Court of Appeal found that it could not interfere in Parliamentary proceedings,<sup>130</sup> the wisdom of the settlement and the sufficiency of its mandate were "political questions for political judgment";<sup>131</sup> but commented that the Sealord deal was "a responsible and major step forward".<sup>132</sup> The Waitangi Tribunal also upheld the Sealord deal, but did so subject to a number of substantive amendments, particularly concerning the extinguishing of rights and the judicial review of traditional fisheries regulations.<sup>133</sup> None of these were made.<sup>134</sup> The

123 See generally *Fisheries Settlement*, 15-17; Kelsey *Rolling Back the State*, above n 33, 264-267; John Kaiwai "Maoridom 'sat in ignorance' over Sealord" *Dominion*, Wellington, 14 October 1992, 10.

124 *Fisheries Settlement*, 15.

125 *Fisheries Settlement*, 16.

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

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

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

129 *Te Runanga O Wharekauri*, 307.

130 Cooke P did, however, leave a somewhat unorthodox opening, stating that the proper time to challenge legislation is after its enactment: *Te Runanga O Wharekauri*, 308.

131 *Te Runanga O Wharekauri*, 309.

132 *Te Runanga O Wharekauri*, 306-307. Cooke P further commented:

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.

133 *Fisheries Settlement*, 23-4.

134 At 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.

Sealord deal was also challenged 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.<sup>135</sup>

The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, enacting the deal, was then passed under urgency on 10 December 1992.<sup>136</sup> It was opposed by all Maori MPs, Labour and National, and the Labour Opposition, but supported by the Alliance and the National Government.

*b*        *Content*

*i*        *Commercial fishing rights*

The Sealord deal gives Maori a half share in Sealord Fisheries Limited<sup>137</sup> and 20 percent of any new fishing quota,<sup>138</sup> in addition to the 10 percent of existing quota and \$10 million transferred under the Maori Fisheries Act. The Treaty of Waitangi Fisheries Commission, the newly constituted Maori Fisheries Commission, holds these assets and is responsible for their allocation to iwi.<sup>139</sup>

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135        "'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.

136        The 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.)

137        Sealord 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: s 7 Settlement Act.

138        Clause 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.

139        Section 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 n 105, 13-14.

Allocation is to take place in two stages: first, the Maori Fisheries Act assets are to be allocated in accordance with the resolutions of the 1992 Hui-a-Tau,<sup>140</sup> and, secondly, the Sealord assets are to be allocated in accordance with the principles of the Treaty of Waitangi and according to a procedure determined by the Commission after full consultation with iwi. The 1992 Hui-a-Tau had, however, resolved only that the Commission examine alternative methods of allocation; and the Commission thus faces the same issues with both allocations. Allocation principles are, however, the subject of intense disagreement amongst Maori. The mostly Southern tribes<sup>141</sup> emphasise property rights and favour the immediate allocation of assets to iwi on the mana moana model.<sup>142</sup> Ngai Tahu would, for example, receive 75 per cent of the resource for its 20 000 people; Nga Puhī, with a few kilometres of coastline and 75 000 people, would receive virtually nothing.<sup>143</sup> The Northern tribes, however, want eventual allocation to be on the basis of tribal population. In the meantime, they favour a base principle of "equitable development"<sup>144</sup> whereby allocation is delayed 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. These allocation principles had to be resolved in order to enable the leasing of quota for the new fishing season.<sup>145</sup> Maori have not, thus far, been able to reach a compromise and the decision has been left to the Treaty of Waitangi Fisheries Commission.<sup>146</sup>

The Sealord deal is a full and final settlement of all Maori commercial fishing claims. Maori have accepted, therefore, that all Treaty and aboriginal title claims against the 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."<sup>147</sup> The Courts and the Waitangi Tribunal have no further

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- 140 The 1992 Hui-a-Tau resolved only that the Commission examine alternative methods of allocation, which seems to leave the issue wide open.
- 141 Ngai Tahu and Te Runanga O Wharekauri Rekohu, from the South Island, but also Ngati Kahungunu and Ngati Porou from the North Island.
- 142 A Leavesley "Sharing out the fish" *The Evening Post*, Wellington, 12 August 1993, 6.
- 143 R Laugesen "Party's over for Bolger as tempers get frayed" *The Dominion*, Wellington, 15 February 1993, 2.
- 144 The 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", below n 202.
- 145 The 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" below n 165.
- 146 The Commission reached a compromise solution for the purposes of leasing quota (not released as at 1 September 1993), but has stressed that it should not be seen as a precedent for allocation of the resource: S Rea "Compromise reached in Maori fishing quota row" *The Dominion*, Wellington, 1 September 1993, 3.
- 147 Section 9 Settlement Act. Does this count, therefore, as an extinguishment of Treaty rights? The Memorandum of Understanding and the Deed of Settlement had required "extinguishment", but this reference was 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

jurisdiction to hear commercial fishing claims;<sup>148</sup> section 88(2) of the Fisheries Act 1983 is repealed;<sup>149</sup> and the Maori court proceedings are statutorily discontinued.<sup>150</sup> Maori have also recognised that the fisheries settlement will limit the Crown's ability to settle other Treaty claims.<sup>151</sup>

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.<sup>152</sup> The Treaty of Waitangi Fisheries Commission must be consulted by the Crown whenever it is statutorily required to consult with the Fishing Industry Board.<sup>153</sup>

iii *Traditional fishing rights*

The Sealord deal establishes a new Maori traditional fishing regime.<sup>154</sup> The central idea is that Maori traditional fishing rights no longer derive their status from the Treaty

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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 n 5); "The end result is that Treaty rights remain unaffected" (Mr Graham, *New Zealand Parliamentary Debates* Vol 532, 1992: 12929-12930)). The test for extinguishment of aboriginal title rights is "a clear and plain intention" to extinguish: *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513. This would seem to be satisfied here.

148 Section 9(b) Settlement Act; s 6(7) Treaty of Waitangi Act 1975, as amended by s 40 Settlement Act.

149 Section 33 Settlement Act.

150 Section 11 Settlement Act.

151 Clause 4.6 of the Deed of Settlement

152 Sections 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.

153 Consultation is required, for example, on the introduction of species to the QMS, the determination of the total allowable commercial catch, the declaration of a controlled fishery or a closed season, and on the variation of resource rentals: ss 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.

154 Traditional 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": cl 5(k). There was a strong reaction against this by iwi and the Crown and Maori were forced to negotiate further, resulting in the provisions of the Settlement Act:

or from aboriginal title, but instead from regulations made by the Crown.<sup>155</sup> Treaty rights and obligations continue to exist, but they cannot be legally enforced.<sup>156</sup>

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.”<sup>157</sup> The Minister also has a specific obligation to recommend the making of regulations “to 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 ..., to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.”<sup>158</sup>

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.<sup>159</sup> 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

S Jones, Treaty of Waitangi Fisheries Commissioner and former Crown fisheries negotiator, interview with the writer, 1 July 1993.

155 These 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 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.

156 Sections 10(a) and (d) Settlement Act. The Waitangi Tribunal will thus 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.

157 Section 10(b) Settlement Act.

158 Section 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. These 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.

159 This is intended to give the effective regulatory control insufficiently provided by s 88(2) and the Amateur Fishing Regulations. Although some saw the s 88(2) jurisprudence as an important opportunity for a developing bicultural jurisprudence (McHugh “Sealords and Sharks”, above n 112, 357), others have emphasised the practical problems of s 88(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. See *Muriwhenua* (230); *Fisheries Settlement* (8-9).

fisheries use.<sup>160</sup> 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.<sup>161</sup> 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.

Secondly, regulations are to provide for the special relationship between tribes and places of particular importance for customary food gathering - mahinga mataitai.<sup>162</sup> 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.<sup>163</sup> The kaitiaki may, however, have the power to waive the application of those bylaws "for purposes which sustain the functions of the marae concerned."<sup>164</sup>

These traditional fishing regulations have not yet been made and a process of discussion and consultation as to their content is now taking place.<sup>165</sup>

#### IV THE TREATY OF WAITANGI AND THE SEALORD DEAL

The Sealord deal represents the first major attempt by the Crown to resolve Maori grievances under the Treaty of Waitangi since the 1940s.<sup>166</sup> It marks the transition

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160 The 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.

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

162 Section 89(1C) Fisheries Act 1983, inserted by s 34(2) Settlement Act.

163 Section 89(3B) Fisheries Act 1983, inserted by s 34(4) Settlement Act.

164 Section 89(1C)(e) Fisheries Act 1983, inserted by s 34(2) Settlement Act.

165 See Treaty of Waitangi Fisheries Commission *Mahinga Kaimoana Tuturu - Customary and Traditional Fishing Regulations - A Discussion Document for Iwi* (April 1993); *Kaitiaki o Kaimoana*, above n 161. 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 n 161, 4-5.

166 Previous 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

point from an era where many claims were made, to an era where there seems to be a will to settle them.<sup>167</sup> The Deputy Prime Minister made this clear in his speech commending the signing of the Deed of Settlement:<sup>168</sup>

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 acceptance, an understanding that we will not go over the issue again, and the feeling that honour has been restored.

We must, therefore, at this point, take the opportunity to consider carefully the lessons of the Sealord deal for future Treaty claims settlements.

## A Process

### 1 The negotiation process

The Sealord deal demonstrates the Crown's commitment to direct negotiation as a means of resolving Treaty claims; but reveals also its failure to affirm the institutions which complement and safeguard that process.

The Waitangi Tribunal played a key role in the Sealord deal, establishing the importance of the fisheries taonga, the history of its extensive use, and existence of the Treaty development right. Beyond Sealord, however, the Crown has made little commitment to the perpetuation of this role for the Waitangi Tribunal 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.<sup>169</sup> It is currently negotiating the Tainui claim without a prior Tribunal report.<sup>170</sup> 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;<sup>171</sup> and the Treaty of Waitangi Amendment Act 1993 responded to political pressure to cut back the Tribunal's recommendatory power over private land.

The courts were also central to the Sealord deal: fishing rights were only negotiated because Maori were able to get judicial protection through section 88(2) of the

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Durie "Politics and the Treaty", paper presented to the New Zealand Law Conference, March 1993.

167 The National Government has declared its intention to resolve all historical Treaty claims by the year 2000. This commitment was first made in the National Party 1990 election manifesto: New Zealand National Party *Facing the Future Together* National Maori Affairs Policy, released 22 July 1990. It has been affirmed on a number of occasions since, including the Prime Minister's speech on the introduction of the Settlement Act: New Zealand Parliamentary Debates Vol 532, 1992: 12827.

168 Rt Hon Mr D McKinnon, New Zealand Parliamentary Debates Vol 529, 1992: 11220.

169 Chief Judge Durie "Politics and the Treaty", above n 166.

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

171 Section 6 Treaty of Waitangi Act 1975, as amended by s 40 Settlement Act.

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 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.<sup>172</sup>

The Crown has thus reasserted its control of the Treaty claims settlement process. The Crown will negotiate when and if it likes,<sup>173</sup> and on terms it chooses.<sup>174</sup> Maori are tied back into their former status as political and moral claimants only; supplicants not litigants.<sup>175</sup>

## 2 Bargaining power

The Sealord deal was negotiated around the sale of Sealord Fisheries Ltd. Seizing that opportunity was seen as critical to the settlement of Treaty fishing claims. 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."<sup>176</sup> As Whetu Tirikatene-Sullivan emphasised in Parliament:<sup>177</sup>

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172 Compare s 8 of the Resource Management Act 1991 with s 9 of the State Owned Enterprises Act 1986.

173 Despite 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 n 35, 259. The Ngai Tahu and Tainui claims have been under negotiation since 1991 and Te Roroa since 1992 ("Seeking common ground", above n 170), but there has been no indication of progress.

174 The 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 n 143. 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 the Treaty", above n 166), 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 (cf Frame, above n 79, 88), if they represent the only basis on which the Crown will negotiate, then that is their substantive effect.

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

176 *The Sealord deal - What it means for Maori*, above n 5. A similar situation occurred in the "full and final" land claims settlements of the 1940s, in Taranaki, Waikato, and Ngai Tahu. In response to the question "why did the tribes accept full and final payments?", Hill has suggested that part of the answer is that

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.

The Crown should have acted to remove this imbalance of bargaining power. 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 without continued negotiation. The Crown could, for example, have purchased Sealord on its own behalf, thereby giving both parties the time to work through the key issues which were arising here and would arise again. The Crown's failure to accept any responsibility for the imbalance of bargaining power is of considerable concern.

### 3 *Representation and ratification*

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. The Maori negotiators may have been authorised by the 1992 Hui-a-Tau to seek a settlement with the Crown, but the powers exercised would seem to have gone far beyond their mandated extent. The Maori negotiators negotiated 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. There are thus considerable difficulties in saying that the Maori negotiators represented the will of Maoridom. The Crown, however, again ignored these difficulties;<sup>178</sup> to wit the Prime Minister's confident statement:<sup>179</sup>

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[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-à-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).

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

178 The 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

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.

Ratification was also highly problematic. It seems doubtful whether the "consent" given at the regional hui was genuine, based on an informed understanding of the settlement, and achieved in accordance with the group's internal decision-making structures. The Waitangi Tribunal may have affirmed the Crown's acceptance of ratification, but, with respect, the tribunal ignored the broader responsibility of the Crown to ensure appropriate iwi structures and to avert the need for haste. The Crown should not enter into Treaty claims settlements without addressing these basic issues.

The Crown has made no commitment to deal with these issues of representation and ratification. The Minister of Justice made this clear:<sup>180</sup>

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.

#### 4 Public acceptability

The Sealord deal demonstrates no Crown recognition of the importance of achieving a general understanding of the requirements of the Treaty in 1993. The deal 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.<sup>181</sup> Further, there was no attempt to explain the findings

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principal plaintiffs will shine forth as some of the great lights of their people (New Zealand Parliamentary Debates Vol 532, 1992: 12842).

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

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

181 Government MPs, 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 on top of the issues and has not turned up for Treaty briefings: F O'Sullivan "Simple solution to Sealord problem was always highly improbable", *The National Business Review*, 11 December 1992, 11. The taking of urgency is also of concern. As Sonja Davies said in Parliament, much consultation may have 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 unresolved constitutional issues relating to parliamentary ratification of Treaty settlements, as Kelsey explains:

of the Waitangi Tribunal,<sup>182</sup> and the need for a Treaty claims settlement, and after the settlement, no effort to clarify its implications.<sup>183</sup>

Treaty claims settlement, in general, is shrouded by misconception and misunderstanding.<sup>184</sup> The Crown has sought to bypass the issues with a minimum of fuss.<sup>185</sup> 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 facilitative of instant, chequebook answers, not real solutions which shift power and resources. "Political acceptability" is only a function of understanding; it should not be used to fob Maori claimants off 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 just about the substance of a settlement, but also the means

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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 n 35, 254).

182 The *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": M Belgrave "Maori fisheries claims need clarifying" *The Dominion*, Wellington, 18 August 1992, 6.

183 The traditional fishing regulations are particularly misunderstood. They raised the fears of commercial fishers form 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.

184 There is "an almost paranoid secrecy about [the Crown's Treaty] policy and approach to settlement of claims": Kelsey *Rolling Back the State*, above n 35, 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 n 143.

185 The Minister of Justice has made this clear:

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" (New Zealand Parliamentary Debates Vol 532, 1992: 12951-12952).

by which it is achieved. We cannot continue to negotiate Treaty claims settlements without first giving real and concerted attention to the outstanding issues of process.

## *B Content*

### *I Partnership*

The Sealord deal demonstrates a Crown attitude towards Treaty claims settlements which threatens partnership. The Treaty is viewed as a "problem" to be "solved", a temporary aberration to be smoothed away.<sup>186</sup> It is not recognised as a fundamental constitutional document establishing an ongoing relationship between Maori and the Crown.<sup>187</sup>

First, it may be doubted whether it is possible to amend a fundamental constitutional document.<sup>188</sup> The Treaty is the basis for the evolving partnership between the Crown and Maori; and that relationship does not conclude with regard to a particular resource with the settlement of a grievance.<sup>189</sup> The Sealord deal reveals, however, that the

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186 In 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 1980s. (Quoted in Kelsey, *Rolling Back the State*, above n 35, 237).

187 National's 1990 election manifesto 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 given because of that help and not on account of race": *Facing the Future Together*, above n 167. 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).

188 As Cooke P stated:

[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 (*Te Runanga o Wharekauri a Rekohu*, 308-309).

189 Chief Judge Durie made this clear:

[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 Waitangi Tribunal: Its relationship with the judicial system", above n 44, 236).

Crown sees the Treaty not as a constitution but as a contract, discharged on the settlement of a claim.<sup>190</sup>

Secondly, rights sourced in an ongoing partnership have a special character. They develop for different times and needs, but the underlying obligation remains as a constant.<sup>191</sup> The Treaty fishing right may transmute, therefore, into quota rights or shares in a fishing company, but there will always be an obligation to respect Maori rangatiratanga.<sup>192</sup> Treaty settlements should, therefore, affirm Treaty rights, though acknowledging that the Crown's current obligations with respect to those rights are now satisfied.<sup>193</sup> That acknowledgment should not, however, exceed 25 years, or one generation.<sup>194</sup> Under the Sealord deal, however, Maori are required to accept that the Crown's responsibilities with respect to them are over.

Thirdly, Treaty rights must be viewed in a holistic sense. The Crown has an obligation to respect Maori property rights in the fisheries, but it lies within the broader context of its responsibility to reconstruct a tribal resource base and to facilitate the tribe's management of all its resources. Treaty rights are not separable entities; they cannot be "settled" piecemeal.

Finally, the Sealord "full and final" settlement has a more basic difficulty. It is practically impossible.<sup>195</sup>

[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.

This has been seen already in New Zealand in the full and final settlements of the 1940s, in Taranaki, Waikato and Ngai Tahu<sup>196</sup> - good faith attempts to settle Maori land grievances but "[proving] in time to be unjust, founded as they were on an inflation-free world."<sup>197</sup> More recently, we have seen the experiences of Ngati Whatua at Orakei,

190 Cf Robb "Who are the Sea Lords now?", above n 134, 26.

191 As the Waitangi Tribunal stated:

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 (*Fisheries Settlement*, 11).

192 *Fisheries Settlement*, 22.

193 *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.

194 *Fisheries Settlement*, 24. See also *Living Treaties: Lasting Agreements*, above n 54, 41-43.

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

196 Taranaki Maori Land Claims Settlement Act 1944; Ngai Tahu Claim Settlement Act 1944; Waikato-Maniopototo Maori Claims Settlement Act 1946: Hill, above n 176, 11-12.

197 Hill, above n 176, 11-12. Hill writes:

where the initial settlement made in 1978 was, within a few years, seen as ineffective,<sup>198</sup> and another settlement forced to be made in 1991.<sup>199</sup> The overseas experience of full and final settlements also spells caution.<sup>200</sup>

To promise a final settlement is, therefore, harmful. For Maori, the basis is 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."<sup>201</sup>

## 2 *Kawanatanga*

The Crown maintains in the Sealord deal its absolute authority to legislate for, define and manage the fishing resource, despite making certain concessions to Maori interests.

With regard, first, to the QMS, the Crown has the right to make laws of general application for resource protection. The QMS may be accepted, in this light, as a conservation and management tool<sup>202</sup> which must regulate Maori as well as Pakeha fishing interests; the system could not operate effectively were Maori fishing rights to be excluded altogether.<sup>203</sup>

What need not be accepted, however, is the QMS's regulation of Maori fishing rights in the same way as those of other users. It was surely 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. Further, the Crown has not adequately explained why the QMS could not provide for Maori traditional commercial fishing interests, small-scale part-timers 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 is, further, solely the Crown's vision of an appropriate solution to management and conservation needs; there was no commitment to finding a bicultural

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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).

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

199 Orakei Act 1991.

200 With regard to Canada, see *Living Treaties: Lasting Agreements*, above n 54, 35-43. For Alaska, see TR Berger *Village Journey - The Report of the Alaska Native Review Commissioner* (Hill & Wang, New York, 1985).

201 Lange "Full and final", above n 175.

202 *Muriwhenua*, 150.

203 *Fisheries Settlement*, 17.

approach. Under the Sealord deal, Maori have bought into the Crown's vision, exchanging their Treaty fishing right for a Crown-derived, Crown-defined title.<sup>204</sup> The Sealord deal demonstrates, therefore, an inability to accept pluralism, or treating one section of the community differently from another. The Crown has perpetuated the simplistic notion of "one nation under one law".<sup>205</sup> This is an illegitimate extension of *kawanatanga*.

Secondly, the Crown's right to manage the fisheries in the public interest must involve a respect for *rangatiratanga* and the principle of partnership. In the Sealord deal, however, the Crown asserted absolute control and rejected a special status for Maori. Although Maori have a larger role in management than ever before, it is equivalent to that of the Fishing Industry Board, or, within the Fishing Industry Board, of 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.<sup>206</sup>

Thirdly, and more positively, the Sealord deal's traditional fisheries regime is 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. Some problems do, however, arise. The traditional fishing regulations should be judicially reviewable: "active protection requires ... access to the courts in appropriate cases."<sup>207</sup> Also, *mahinga mataitai* bylaws should not require the approval of the Minister of Fisheries.<sup>208</sup> If the Wellington City Council, for example, is not required to follow such a procedure, why must *iwi*?<sup>209</sup> Further, the *mahinga mataitai* bylaws should not have to apply generally to all individuals. This is inconsistent with Maori *rangatiratanga*, which gives Maori greater rights than others in the fisheries. Finally, the limitation of the traditional fisheries regime to non-commercial fishing seems unjustified. 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.<sup>210</sup>

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204 See McHugh "Sealords and Sharks", above n 112, 358.

205 This was the title of a 1989 speech by the present Prime Minister: above n 186.

206 The Crown Working Group Report in 1988 offered an interesting model along these lines, but it was not further developed: see above at text surrounding n 93.

207 *Fisheries Settlement*, 9.

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

209 Part XLIII Local Government Act 1974.

210 Mr 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).

### 3 *Rangatiratanga*

The Treaty of Waitangi requires the restoration of the tribe, its structure and its resource base. All that the Crown has done in the Sealord deal, however, is to provide an amount of assets, present it to Maoridom as a whole, and offer its confident expectation that the tribe will thence be restored. We look, first, to problems with this general approach, and, secondly, to specific issues relating to the tribe's economic base and structure.

#### *a Approach*

The Sealord deal is a global settlement, for all iwi, of a single resource which 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 which attempt to discharge liability on a compensatory property rights basis.

The Treaty of Waitangi Fisheries Commission's difficulty in settling the principles for allocation of the settlement assets amongst the tribes clearly illustrate this. The basis for allocation is to be the "principles of the Treaty of Waitangi", and, on the interpretation of the principles here discussed, should be tribal restoration. Thus the Sealord settlement asks Maori to divide the settlement assets so as to ensure that each tribe has a sufficient economic base relative to each other tribe, taking into account the needs of each tribe, the assets already held by it, and the assets which it is likely to receive from the Crown as a result of other settlements. This is almost impossible. Without knowledge of the Crown's intentions with regard to future Treaty claims settlements, and without the resources on which to make these investigations, Maori are not able to determine the "right" allocation.

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.<sup>211</sup> The Sealord deal is an attempt by the Crown to discharge its Treaty obligations without ever coming to terms with their substance.

#### *b Tribal base*

The Sealord deal will give most tribes some proportion of quota, cash, and shares in Sealord Fisheries Ltd. The Crown has not, however, accepted its ongoing obligation to ensure the successful development of these resources, or to help each tribe establish a

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211 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" (Chief Judge Durie "Politics and Treaty Law", above n 166).

broader economic base. Indications have rather been that the Crown is intent on limiting its liabilities: the Deed of Settlement warned that it may impact on the settlement of other grievances; and the Crown is believed to be developing a strategy whereby it will set aside a maximum amount for Treaty claims settlements.<sup>212</sup>

Issues also surround the appropriateness of quota, cash, and Sealord shares as providing a significant part of the restored tribal base. Sealord Fisheries Ltd is, at present, a profitable fishing company with considerable development potential.<sup>213</sup> There is, however, room for doubt as to its long-term viability, as there is for the whole fishing industry.<sup>214</sup> To attempt to mould a full and final settlement on the basis of the continued profitability of this company seems risky.

The Sealord investment involves Maori in a joint venture with Brierley Investment Limited. Will Maori be able then to develop Sealord in accordance with Maori priorities? BIL has no Treaty obligations, and its only duty is to make a profit for its shareholders. 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. An issue has been left unexplored here: can "a commercial enterprise of this nature ... be adapted to meet fundamentally non-commercial needs"?<sup>215</sup>

The ongoing value of fishing quota is also doubtful. This factor does 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.<sup>216</sup> In fact, the value of quota is not a constant, but is determined by the state of the resource, and the market demand for that resource. These factors remain in doubt. Maori would seem also to have assumed that resource rentals paid for the use of fishing quota will remain the same. There is, however, no guarantee that the Crown will not raise the rentals to market levels, thus cutting the value of the settlement for Maori. Nothing in the Fisheries Act 1983, the Deed of Settlement, or the Settlement Act prevents this. In fact, Treasury has been attempting to raise the rentals to a maximum market value since the mid-1980s, and almost simultaneously with the conclusion of the Sealord deal, the Crown announced

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212 "Party's over for Bolger", above n 143; B Edwards "Early claims deadline tipped" *The Evening Post*, Wellington, 2 August 1993, 2.

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

214 Kelsey *Rolling Back the State*, above n 35, 266; Mr Prebble, New Zealand Parliamentary Debates Vol 532, 1992: 12959.

215 Kelsey *Rolling Back the State*, above n 35, 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, Treaty of Waitangi Fisheries Commissioner and former Crown fisheries negotiator, interview with the writer, 1 July 1993.

216 Mr O'Regan has stated that he believes new quota to be in total a larger asset than Sealord itself: P Tumahai "Tipene talks on hooking the big one" *Te Maori News*, February 1993, 6.

plans to adjust the rentals to cover administrative costs of the fisheries regime, in line with "user pays."<sup>217</sup>

Further, 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; and they may not have the capital or expertise to develop it themselves.<sup>218</sup> Iwi will be forced to enter into joint ventures, or to lease out their quota to others, thereby losing control over it and, often, the opportunity to reinstruct their own people in the business and activity of fishing. As the Rt Hon M Moore, then Leader of the Labour Opposition, put it:<sup>219</sup>

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.

*c Tribal structure*

Tribal structure has also been left unaddressed by the Sealord deal. This has a significant impact not only for the process of settlement, but also on content. The fisheries settlement assets are, for example, to be allocated amongst "Maori". Should assets then be allocated to iwi or hapu? The Maori Fisheries Commission had earlier opted for iwi,<sup>220</sup> but some groups have raised objections. 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.<sup>221</sup> The

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217 Kelsey *Rolling Back the State*, above n 35, 267. See "Fishing rental plan intolerable, says Sealord chief" *The Dominion*, Wellington, 19 August 1993, 10.

218 Mr Graham demonstrated an understanding of this when explaining why individual iwi settlements were inappropriate. He said: "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, however, how the global Sealord settlement would in practice be any different.

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

220 The 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).

221 The 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 a legal entity which tribe members have agreed should hold quota, cash, and shares for them, which acts for them, and which has a way

scope of the problem was emphasised, however, by the Commission when it reported in July 1992 that "the iwi register now stands at 60 and grows by the week."<sup>222</sup>

The Sealord deal highlights 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 involving iwi in providing enforcement officers and fulfilling reporting obligations. None of these issues have been addressed.

Questions of tribal responsibility and tribal structures which identify members and their needs have also been left untouched. The Sealord deal was intended by the Crown and Maori to improve the lot of all: 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. Little attention has been paid, however, to how this will happen.

### C Overview

The Sealord deal thus breaches the Treaty principles developed by the Waitangi Tribunal and the courts. In its substance, it fails to respect the status of 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*; and key issues surrounding the restoration of *rangatiratanga* have gone unaddressed. Further, there has been no commitment to a legitimate Treaty claims process; to developing appropriate mechanisms for representation and ratification, to redressing the imbalance of bargaining power in negotiations, and to building public understanding of Treaty claims settlements. Underlying the Sealord deal is a failure by the Crown and Maori to grapple with the "hard questions" surrounding the requirements of the Treaty now.

## V THE SEALORD DIRECTION

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

This article has analysed the Sealord deal from the perspective of the framework of Treaty principles developed by the Waitangi Tribunal and the courts. It has found that there are important respects in which the Sealord deal deviates from these principles. What, it may now be asked, is the significance of this conclusion?

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of accounting to the tribe. (Maori Fisheries Commission letter, above n 220; *Tangaroa*, Special Issue for 1992 AGM of the Maori Fisheries Commission, July 1992, 2).

It is important to first recognise that a failure to comply with those Treaty principles developed judicially does not necessitate a conclusion that the Sealord deal is in breach of the Treaty of Waitangi. The judicial principles, as was acknowledged at the outset, may not, despite their prominence, represent the best possible basis for Treaty claims settlements. Other interpretations may be better able to capture the needs of Maori now. It is thus open to the defenders of the Sealord deal to argue for alternative principles which will allow the Sealord deal to be affirmed as in accordance with the Treaty of Waitangi.

That debate did not, however, happen. The Sealord deal was defended, not on the basis of principle, but as a pragmatic response to Maori needs. The tension in the deal was not between competing conceptions of the Treaty, but "[reflected] in part a desire on the one hand to seize the opportunity, and, on the other, to maintain the integrity of the Treaty."<sup>223</sup> The Maori negotiators chose opportunity, and gambled on the Sealord settlement being the first step achieving real economic change. As Tipene O'Regan acknowledged: "I think it was not what Maori were due in terms of their Treaty rights ...",<sup>224</sup> but it was worth doing for its benefit to Maori.

A Treaty claims settlement, however, which is not acknowledged by most people, including its negotiators, as in accordance with the Treaty of Waitangi cannot be the lasting settlement that the Crown, Maori and all New Zealanders desire. The Sealord direction, in trusting in what remain uncertain economic outcomes, and in failing to ask the hard questions that are the building blocks of legitimacy, marks a wrong turn.

What, then, is the way forward for the Treaty claims settlement process? This article would submit, in closing, that there must be a public debate in New Zealand over principles appropriate for the country now. We must approve the basis on which Treaty settlements are reached, and we must grapple with the substantive issues which are a prerequisite to settlement. There are no short cuts in the path towards a just, legitimate, and stable future in Aotearoa - New Zealand.

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#### APPENDIX\*

Developments in Maori fishing since September 1993 have been considerable.<sup>225</sup> They may be summarised briefly under the heads of commercial fishing, customary fishing, and fisheries management.

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223 *Fisheries Settlement*, 3.

224 "Tipene Talks on Hooking the Big One", above n 216.

\* This appendix updates key developments in Maori fishing between 1 September 1993 and 30 July 1994.

225 The information presented here is taken from *Te Reo o Te Tini a Tangaroa*, newsletter of the Treaty of Waitangi Fisheries Commission, Issues No 18 and 19, April and June 1994; *Report of Te Ohu Kai Moana/ Treaty of Waitangi Fisheries Commission for the year ended 30 September, 1993* New Zealand. House of Representatives. Appendix to the

### *Commercial fishing*

The Treaty of Waitangi Fisheries Commission/ Te Ohu Kai Moana (TOKM) has agreed that the allocation of pre-settlement assets is to proceed, and the consultation process based on proposals determined by the commission is to commence in August 1994. There seems to be no progress on the allocation of post-settlement assets.

In the meantime, TOKM is leasing the quota to iwi on a one-season basis without prejudice to future asset allocations. TOKM attempted to develop principles for leasing priorities (the Maori Fisheries Commission had distributed its quota on a competitive basis only) but iwi were divided as to the significance of population and Treaty "property rights". TOKM's compromise solution, whereby all the inshore quota and 50 percent of the deep sea quota would be allocated on the basis of property rights and the remainder on the basis of population, was rejected by both sides and challenged in the courts. The Court of Appeal, however, rejected requests for a stay on the issue of quota, adding that it did not want to "usurp the Commission's role of deciding issues of fairness and equity for Maoridom".<sup>226</sup>

TOKM is also involved with initiatives in training, aquaculture development, and the the facilitation of private-sector assistance to developing Maori fishing ventures

### *Customary fishing*

Consultation on the content of customary fishing regulations commenced in August 1993. TOKM produced a set of draft regulations to assist iwi to make submissions, and a series of regional and national hui were held. Maori have been concerned to ensure appropriate representation and there is continuing discussion with the Crown concerning the make-up of the Crown-Maori working party drafting the regulations. Maori have also agreed to limit the working party's term of reference to marine fisheries only. TOKM is to facilitate the development of a collective strategy with regard to freshwater fisheries.

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journals, 1994 C19. Treaty of Waitangi Fisheries Commission *Briefing on the Activities of the Treaty of Waitangi Fisheries Commission* (Wellington, 21 January 1994); Treaty of Waitangi Fisheries Commission *Report to the Hui-A-Tau, 30 July 1994* (Wellington, 1994). See also H Barlow "Maoris 'ill-prepared' for \$200m fishing assets" *The Dominion*, Wellington, 26 October 1993; and generally, A Leavesley "Nature's bounty - can the Waitangi Tribunal divvy it out?" *The Evening Post*, 18 November 1994, and D Graham "Maori grievances should be understood" and "Crown develops strategy" *The Evening Post*, Wellington, 12 January 1994, 7.

226 H Barlow "Appeal Court clears way for Maori fishing start" *The Dominion*, Wellington, 30 September 1993.

*Fisheries management*

The Crown has demonstrated its willingness to listen to Maori on matters of fisheries management and, in particular, the drafting of the new Fisheries Bill. The Crown's resource rental proposal was dropped following opposition by TOKM and the fishing industry. Maori and Commission representatives have been appointed to the Fishing Industry Board and its sub-committees, and the Iwi Legislative Review Working Party, an independent group of tribal fishing representatives, now meets regularly with the Minister of Fisheries.