THE SEALORD DEAL: A FAILED ATTEMPT AT MODERNISATION

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ABSTRACT

This theses commences with a review of the salient features of Modernisation Theory , and the way in which this theory can be shaped to apply to the situation of Maori in New Zealand in the 1990s.

The next two chapters look at the history leading up to the Sealord Deal and consider this period of development in conjunction with issues of Maori sovereignty. The focus is on the problematic issues surrounding the definitions of sovereignty, and issues of rights and ownership which flow from these definitions.

Following on from this is a consideration of the Treaty of Waitangi as a reference point for establishing Maori rights to the fisheries, and how the provisions and principles of the Treaty have been applied through the mechanism of the Waitangi Tribunal.

Chapters five and six cover the evolution of the New Zealand fishing industry from the early 1980s up until 1992. Attention is paid in particular to the effect of the substantial restructuring of the fishing industry during this period on Maori participation in commercial fisheries.

The subsequent chapters analyse the content and nature of the Sealord Deal itself, the various responses from Maori and from politicians to the Deal, and consequences which flowed from the settlement. At this juncture, consideration is given to the divisions the Deal fostered among Maori, including the growing distinction between those Maori who identify as iwi Maori - basing their identity on ancestry, and those who perceive themselves as urban Maori - based on their present location.

Finally, this thesis concludes that the Sealord Deal did not only fail to meet the expectations of Maori, but also that it can be seen as a ineffectual

attempt on behalf of the Crown at achieving modernisation. By the end of 1992, most Maori were opposed to the Deal, and five years after the Sealord Deal was passed into law, issues relating to the allocation of benefits form the company have yet to be resolved.

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Several people have provided assistance, in different ways, to enable the completion of this thesis. In particular, I am extremely appreciative for support and patience of my supervisor, Barbara Nowak, who provided careful and constructive criticism throughout the time I was working on this thesis.

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For the sake of discretion, some of those who offered information relating to the content of this thesis and who assisted in verifying certain facts will remain nameless, but their willingness to share material and ideas that may otherwise have been unavailable has made a valuable contribution to the content of this work

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INTRODUCTION

One of the long-standing issues which have continued to nag successive New Zealand Governments is the settlement of claims made by Maori under the provisions and principles Treaty of Waitangi. Throughout the 1980s in particular, the increasing pressure from various sectors of the Maori community, the Waitangi Tribunal, universities, together with undercurrents of support from other groups in the country led to the Governments of the time resolving that something should be done, which by 1990 had evolved to something should be done once and for all.

With little precedent for large-scale solutions in this area, innovative responses were required. However, the opportunity for innovation in this context contained within it the prospect of private sector involvement where cultural imperatives could easily be sunk by profit motives. Thus, the Government's opportunity for innovation soon turned into the need for an escape route in the face of heightened expectations from those seeking restitution for past injustices perpetrated or sanctioned by the Crown. Allied to this theme of reparation was the broader issue of 150 years of increasing alienation of Maori resources which precluded Maori from the opportunity of participating in the development of these resources and the readjustment in attitudes towards these resources (from a traditional view to a modern capitalist one).

Just when it appeared as though an opportunity had opened up for Maori to have some of the fisheries resource returned to them, through an arrangement which became commonly known as the Sealord Deal, the predominantly Pakeha legislature apparently discovered that Maori are just as pluralistic as any other people. Consequently, the Government found

itself alternatively winning praise and receiving condemnation from various sectors of the Maori community.

Although the initial impetus for the Sealord Deal came from a recognition of the guarantees contained in the Treaty of Waitangi, by the time the Deal was concluded, it was clear that other interests had taken over - based on imperatives far less noble. The Maori community as a whole was split into two broad groups: those who thought that the Deal was 'better than nothing' and would go some way towards improving the socio-economic predicament of the Maori, and the other group, initially a small minority, who believed that the whole Deal was a violation of the Treaty of Waitangi and the traditional Maori world view (te Ao Maori), and was 'selling the Maori short' of what was rightfully one of their largest, and potentially most lucrative possessions as well as violating the spiritual elements of the resources in question.

Central to this analysis is the application of Modernisation theory to the Sealord Deal. The concepts of a traditional society, or a traditional group within society, undergoing an economic transition which has cultural and social as well as just economic implications, fit closely with the developments in the Deal.

In its broader context, the Sealord Deal was an initiative which necessarily involved a process of modernisation among iwi, the consequences effects of which would require not only economic reorganisation, but also, a redefinition of the attitudes towards traditional resources and their management. The tacit application of modernisation theory (along with some of its false premises) by the Crown seems to have been an underlying necessity for the full implementation of the fisheries settlement within what

amounts to the Maori nation (that is, the collection of iwi involved in the deal, in whatever capacity, representing the approximately 70 per cent of Maori who identify themselves with a particular iwi). The Sealord Deal became the device which, as part of a modernisation process, both developed and supplanted the traditional Maori approach to the fisheries resource.

There are also other strands of readjustment and modernisation running through the transitional requirement of the fisheries settlement. There is the enforced trend (enforced particularly by patterns of Maori urbanisation) for Maori to move from a regional based people, founded on hapu and iwi systems of social organisation, to a national unit, administered (in the case of the fisheries resource) by a centralised, Crown-appointed body which bypasses tribal delineations.

The confusion, divergence of opinions, and eventual stalemate over the Sealord Deal reflects these internal structural and moral struggles that Maori and the Government experienced. The Deal brought Maori in face-to-face contact with issues of development which up until that time they had, in a general sense, not encountered.

Viewed in this light, the Sealord Deal was not an isolated policy initiative of the 1990 National Government, but part of a larger and much longer process of modernisation affecting Maori. Indeed, the Sealord Deal was consistent with the 'Fiscal Envelope' policy of the 1990 National Government - a policy that persisted despite a majority of Maori eventually opposing it.

Many aspects of Modernisation theory, including different patterns of growth among the indigenous and the dominant (colonial) sectors of the community, the unevenness of these patterns of growth, the transformation of indigenous social institutions, and problems of social and economic dislocation, among many other features, were mirrored in the formation and workings of the Sealord Deal, and make it a useful case study in a failed attempt at Modernisation.

1. THEORETICAL FRAMEWORK

Part of the task of examining the theoretical issues stemming from the Sealord Deal involves applying more general theories and paradigms relating to development to a focused series of events in New Zealand over the period of around 150 years from 1840. To date, no theoretical framework has been constructed which enables development issues specific to New Zealand to be analysed. These specific theoretical concepts must therefore be derived from the existing international body of literature on development theories, coupled with a review of historic, cultural, economic, and political research relating to the topic.

If the Sealord Deal is to be regarded as an attempt at modernisation, then the net must be cast wide to incorporate the range of perspectives on modernisation. A number of the arguments and themes contained in this thesis are informed by the ideas which originate from the work of modernisation theorists such as Rostow and Smelser. Establishing how these theories can be integrated into an analysis of the processes that led to the formation of the Sealord Deal necessitates a concise review of the views of these writers. For the most part, this survey does not touch directly on the Sealord Deal itself, unless there is some immediate relevance to the analysis in the subsequent chapters.

A. Smelser, Rostow, and Hoselitz on Traditional Societies

For Smelser, the starting point of the Modernisation process is the traditional society,[1] which is based on a set of generalised assumptions. Smelser characterises traditional societies by the predominance of subsistence farming, the use of human or animal power, and the prevalence of farms or villages:

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[1] N. J. Smelser, 'The Modernisation of Social Relations', in W. Myron (ed.), *Modernisation: The Dynamics of Growth*, Washington, 1966, pp. 119-120.

> In preindustrial societies, production is typically located in kinship units. Subsistence farming predominates....economic activities are relatively undifferentiated from the traditional family-community setting....community and associational life is closely knit with the ascribed bases of social existence: kinship and clanship, and tribal and caste affiliations. Formal organisations such as trade-unions, social clubs, voluntary organisations, and special interest groups seldom develop. Most of social life and its problems are worked through in the multifunctional ascribed groupings themselves.[2]

Rostow offers a more detailed and less stagnant view of the shape and functions of traditional societies:

> A traditional society is one whose structure is developed within limited production functions, based on pre-Newtonian science and technology, and on pre-Newtonian attitudes towards the physical world.....
>
> The conception of the traditional society is, however, in no sense static; and it would not exclude increases in output...and some ad hoc technical innovations....But the central fact about a traditional society is that a ceiling existed on the level of attainable output per head. The ceiling resulted from the fact that the potentialities which flow from modern science and technology were either not available or not regularly and systematically applied.[3]

Hoselitz provides his description of traditional societies as a juxtaposition to modern societies, emphasising the differences between the two. Traditional societies, according to Hoselitz, have:

> ...a low level of economic development...in which productivity is low because division of labour is little developed, in which the objectives of economic activity are more commonly the maintenance or strengthening of status relations...and in which the hard cake of custom determines the manner, and often the effects, of economic performance.[4]

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2 N. J. Smelser, pp. 121 & 127.

3 W. W. Rostow, 'The Stages of Economic Growth', in P. Worsley (ed.), *Modern Sociology*, London, 1988, p. 141.

4 B. F. Hoselitz, *Sociological Aspects of Economic Growth*, Chicago, 1962, p. 60

Hoselitz then goes on to outline the features of an economically developed society, which is:

> ...characterised by a complex division of social labour, a relatively open social structure in which caste barriers are absent and class barriers not insurmountable, in which social roles and gains from economic activity are distributed essentially on the basis of achievement, and in which therefore, innovation, the search for and exploitation of profitable market situations, and the ruthless pursuit of self-interest without regard to the welfare of others is fully sanctioned.[5]

However, Rostow, Hoselitz, and Smelser rely on Western constructions of the non-Western world - a standpoint known as 'Orientalism'. This notion was analysed by Edward Said, who observed that '...the Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience'.[6] The assumption implicit in the description of traditional societies, as given by these theorists, is that those societies are necessarily inferior, and in need of 'catching up' with the industrialised (Western) societies. These theorists have been victims of the prevailing Western construction of the non-Western world:

> The combined difficulties of squaring comparative evidence with "Western" history, of accounting for cultural differences in purely adaptive terms, and of finding a sure index of position on an evolutionary scale led to a rather radical "relativism" in social description....history itself tended to be minimised, partly for want of facts concerning events that had occurred in the past in societies that were without written records.[7]

Said's analysis of the impact of Orientalist thinking suggest how widespread its implications are for theorists in a wide range of disciplines:

> Orientalism as a discourse...was able to manage - and even produce - the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively...no-one writing, thinking, or acting on the Orient could do so without taking

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5 B. F. Hoselitz, p. 60.
6 E. Said, *Orientalism*, London, 1978, pp. 1-2.
7 W. E. Moore, *Social Change*, New Jersey, 1965, p. 114.

> into account the limitations on thought and action imposed by Orientalism.[8]

The counter to the Orientalist interpretation of traditional societies appears in the form of 'Occidentalism',[9] which is, in effect, a doctrine of cultural relativism, relying on a framework of cross-cultural generalisations:

> This is important because although Orientalism has been thoroughly scrutinised from the Western perspective, less thought has been given to the ways in which non-Westerners define themselves and others, and the political implications which may follow from this.[10]

According to Andre Gunder Frank, however, both the Oriental and Occidental perspectives are irrelevant in the context of Rostow's thesis because Frank argues that Rostow's stylised construction of traditional societies is largely mythical:

> Rostow's stages and thesis are incorrect primarily because they do not correspond at all to the past or present reality....It is explicit in Rostow...that underdevelopment is the original stage of what are supposedly traditional societies....This entire approach to economic development and cultural change attributes a history to developed countries but denies all history to the underdeveloped ones.[11]

However, this blunt criticism is misdirected in as far as Rostow's stated focus is on economic progress, or development, whereas Frank languishes in the Marxist rhetoric of historical development.

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8 E. Said, *Orientalism*, London, 1978, p. 155.

9 S. Lawson, 'Politics and Culture in International Studies', in R. Wilkinson (ed.), *Culture, Ethnicity and Human Rights in International Relations*, Auckland, 1997, p. 33.

10 S. Lawson, 'Politics and Culture in International Studies', in R. Wilkinson (ed.), *Culture, Ethnicity and Human Rights in International Relations*, Auckland, 1997, p. 33.

11 A. G. Frank, 'Development and Underdevelopment', in P. Worsley (ed.), *Modern Sociology*, London, 1988, p. 146.

B. The Nature of Transition to a Modern Industrial State

How traditional societies metamophosise into advanced industrial states forms the foundation of modernisation theories. Moore defines the transition as:

> ...a "total" transformation of a traditional or pre-modern society into the types of technology and associated social organisation that characterised the "advanced", economically prosperous, and relatively politically stable nations of the Western World.[12]

The explanations for this type of transition taking place are varied:

> Usually, rapid economic growth has been explained in terms of "external" factors - favourable opportunities for trade, unusual natural resources, or conquests that have opened up new markets or produced international political stability. But [there are]...*internal* factors - in the values and motives men [sic] have that lead them to exploit opportunities, to take advantage of favourable trade conditions; in short, to shape their own destiny.[13]

The areas of society in which this transition occur are broad, although, as Smelser points out, the process is not a unitary one:

> ...structural change is, above all, uneven during periods of modernisation....In colonial societies, for instance, the European powers frequently revolutionised the economic and political framework by exploiting economic resources and establishing colonial administrations, but at the same time encouraged or imposed a conservatism in traditional religious, class, and family systems....rapid industrialisation bites unevenly into established social and economic structures. Social institutions also display a pattern of growth that produces leads and lags, and bottlenecks.[14]

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[12] W. E. Moore, p. 89.

[13] D. C. McClelland, 'The Achievement Motive in Economic Growth', in G. D. Ness (ed.), *The Sociology of Economic Development: A Reader*, New York, 1970, p. 178.

[14] N. J. Smelser, p. 128.

The scope of this transformation is seemingly all-embracing. Scientific knowledge is applied to existing technology, there is a move towards the specialised, large-scale, and commercial production of agricultural and other goods, production itself tends to become more mechanised, and national populations are more likely to concentrate themselves into urban conglomerations.[15] For Maori, the economic and social cohesion within was broken as the economy of the colonisers imposed new and differing demands on the workforce, and the introduction of improved agricultural technology quickly undermined traditional agricultural practices.

These features of the modernisation process have been identified by Hoselitz, who noted some of the (arguably necessary) changes that colonisers impose on traditional economies:

> ...the problem of finding employment opportunities for the growing labour force is especially pressing, because fragmentation of land-holdings, and the exploitation of marginal lands sets limits to a further extension of employment in agriculture. The principal solution proposed to find productive employment for the labour force is planned industrialisation and the past experiences of economically advanced countries have been cited as proof that this development is not merely desirable, but virtually inevitable if living standards are to rise.[16]

While there may be leads and lags in this process, Rostow argues that the actual period of transformation is comparatively brief, and relies on the presence of certain preconditions:

> ...the sequence of economic development is taken to consist of three periods: a long period (up to a century or, conceivably, more) when the preconditions of take-off are established; the take-off itself, defined within two or three decades; and a long period when growth becomes normal and relative automatic.[17]

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[15] N. J. Smelser, pp. 119-120.
[16] B. F. Hoselitz, p. 115.
[17] W. W. Rostow, 'The Take-Off into Self-Sustained Growth', in *Economic Journal*, New York, March 1956, p. 27.

According to Rostow, the preconditions for an economic take-off must include major changes in political and social structures, and even cultural values.[18] However, Rostow's language seems deliberately imprecise: his use of the word change bypasses any implication of sacrifice or the imposition of an external set of values on the society about to be modernised.

Hoselitz raises the notion of deviance as a fundamental component in the machinery of modernisation. Deviance is seen as a trigger which sets off the economic transition:

> ...if the concept of deviance is to have any meaning, it cannot be interpreted as signifying simply behaviour which is new, but it must imply that this set of innovating acts is opposed in some way to existing social norms....In other words, a deviant always engages in behaviour which constitutes in a certain sense a breach of the existing order and is either contrary to, or at least not positively weighted in, the hierarchy of existing social values.[19]

The nature of the transition into a modern industrial state can be divided into three broad categories (with some overlap between each). These categories are political evolution, developments in the educational sphere, and changes in the family and community.

(a) Political Evolution

The modernisation process requires a political structure which is truly centralised, as opposed to a composite of regional political institutions. Political power becomes more centralised, the territorial scope of the centralised institution is extended, and there is an intensification of the power of the central, legal, administrative, and political agencies of the society.[20] This political evolution can extend to the introduction of forms of mass democracy, and the accompanying universal suffrage, and

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[18] W. W. Rostow, 'The Take-Off into Self-Sustained Growth', p. 27.
[19] B. F. Hoselitz, p. 62.
[20] S. N. Eisenstadt, *Modernisation: Protest and Change*, New Jersey, 1966, p. 4.

permeates most areas of society (although it can also lead to new forms of stratification, and authoritarianism):

> Perhaps the most important aspect of this process is that within any modern political system new problems and forms of political organisation tend to develop continually and new groups are continually drawn into the central political orbit; and that their problems, interests, and demands tend more and more to impinge on the central political institutions, on the selection of rulers, on the creation and crystallisation of central political symbols, and on the choice and implementation of different major policies.[21]

According to Eisenstadt's very idealistic perspective, allied to this process of the centralisation and increased power of political institutions is the ascendancy of the notion of social equality, which manifests itself in the growing demand by the population for participation in the political system. In practice though, the process of centralisation does not necessarily correspond with these anticipated changes.

(b)Developments in the Educational Sphere

As the processes of modernisation get under way, one of the most profound areas of change occurs in the field of education. As various sectors in society undergo transformations, so too do the demands on the education system. New skills are required for the workforce,[22] and the possibility emerges of the educational system becoming a tool of political or social control. In addition, a centralised education system has the capacity to mainstream minority groups and force them to adopt the culture of the dominant group.

Moreover, a standardised, modern education system can act as a common thread that interconnects what might otherwise be disparate groups in society. However, the modernised education system does not fully impose social uniformity:

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[21] S. N. Eisenstadt, p. 15.
[22] W. W. Rostow, 'The Take-Off into Self-Sustained Growth', p. 27.

> ...bringing together the various types of educational activities within one common institutional framework did not necessarily assure any harmony or identity between the various aspects of the process of supply and demand for educational activities and products. On the contrary, the possibility of some discrepancy between these different aspects was inherent in the very nature of their interaction. But these discrepancies continually brought together various groups of the population into common frameworks, increasing their interdependence on the one hand, and their pressures on the central institutional sphere of the society on the other.[23]

The development of a standardised and universal education in a modernising country also fulfills other functions:

> Education may be viewed as essential for an informed electorate in a democratic regime, or as an agency for political indoctrination in order to subvert the conservative influence of the family in revolutionary regimes, or as a form of cultural "consumer good" for states dedicated to the culture of the "good life".[24]

(c) Changes in Family and Community

One of the recurrent themes in much of the modernisation literature is that economic modernisation imposes on traditional communities severe social dislocations and adjustments. Smelser described some of these changes that occur during modernisation - changes which impact initially on the family, and through that institution the community:

> ...the family itself loses some of its previous functions and becomes a more specialised agency. As the family ceases to be an economic unit of production, one or more members leave the household to seek employment in the labour market....
>
> The social implications of these simply described structural changes in the family are enormous....
>
> The development of new kinds of social and economic activities creates conflict with traditional ways of life.[25]

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[23] S. N. Eisenstadt, p. 18.
[24] W. E. Moore, p. 91.
[25] N. J. Smelser, pp. 124 & 129.

Eisenstadt also notes the tendency towards breakdowns or deviations of social behaviour:

> Processes of modernisation also generate problems with respect to community organisation and organisation of work and leisure time activities. Just as in the cases of youth, age, and sexual and family relationships, these areas may escape full institutionalisation and may provide points of recurrent eruptions and new social problems even after relatively successful attempts to solve the problems at one level of their development.[26]

Rostow's theses, by contrast, makes only token reference to these dislocations, observing that an economic take-off requires '...political, social and institutional changes...'[27] without offering much in the way of further elaboration. Rostow subsequently couches changes in economic structure, education, power structures, agriculture, public health, communications, and a range of other areas, in the language of economic benefit[28] - paying scant attention to the accompanying social upheavals.

Significantly, Hoselitz, who gave some consideration to Maori society during the period of modernisation in the nineteenth century, argued that many of the Maori social institutions remained largely in tact, despite the mountainous forces of change around them:

> ...during the period of rapid economic growth, beginning roughly in 1840, Maori social organisation had not changed from what it had been in the old days. As before the introduction of new tools and new work processes, the society was organised in hapu and tribes with the chiefs occupying a position of leadership within their groups; fixed capital was owned by the group communally, and each person's rights and duties were derived from his position within the hapu or tribe....Economic development among the Maori in the period 1840-60 took place not through the appearance of marginal individuals, nor through the development of socially deviant

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[26] S. N. Eisenstadt, p. 23.
[27] W. W. Rostow, 'The Take-Off into Self-Sustained Growth', p. 25.
[28] ibid. pp. 27-8.

behaviour, but through the elite's reinterpretation of objectives which the society wished to attain....

Here then, we encounter an instance of economic development which is associated with no significant change in social structure. The persons who held elite positions before continue to hold them. Although they envisage the attainment of new goals, they are at the same time able to maintain their traditional position of leadership, and therefore, also to discourage or even make impossible the development of deviance. They continue to allocate labour and to organise the common efforts of the members of the community in the creation of capital. This centralised organisation, based on traditional leadership and kinship patterns makes the attainment of economic success in Maori society virtually impossible, except as a member of a hapu.[29]

C. The Product of Modernisation

Even if traditional societies, as described by Modernisation theorists, did not exist in the format as these theorists believed them to, and even if the take-off or transitions to modern industrial societies involved an infinitely more tortuous process than these theorists would admit, Modernisation Theory still allows policy planners to apply the theory to their own hindsight of historical and economic events. This framework can then be used with the corresponding application of foresight to assist with the formulation of policies for modernising not only underdeveloped countries, but also, economically under-developed sectors within a country.

The urgent need to demonstrate success in political decisions, as evidenced by the extreme haste in which some aspects of the Sealord Deal were conducted, can be perilous to the outcome, as Smelser forewarned:

...developing nations face a danger if they conceive...economic development simply in terms of developing as fast as possible. To focus unduly on this criterion is likely to create social costs...that may in the end defeat the very effort to develop....if too much speed is fostered in any one sphere...the society is

[29] B. F. Hoselitz, pp. 77-8.

> unlikely to create an unbalanced pattern of growth, which is also a source of social unrest.[30]

However, this haste can, in part, be attributed to the inherent nature of modernised societies themselves, in which change appears at a steadily accelerating rate.[31]

(a) Responding to the Dislocation of Modernisation

Government policy tends to be one of the main vehicles through which responses to some of the dislocations of the modernisation process are made, even though the policies do not always match or coincide with the movements of the modernisation process.

Government intervention becomes critical in reducing, or at least managing, public hostility to the process of modernisation or their consequences:

> The problems of unemployment and of conditions of work become objects of regulation...and by various schemes of social security of legislation and of regularised, mutual bargaining between employees and labour. Similarly, education problems also become focuses of political bargaining on the one hand, and on the other hand objects of public policy dealing with the establishment of compulsory education....[32]

Other responses to these dislocations include the establishment of a modern police force, a near-universal welfare system, and the emergence of a range of large-scale, professional organisations geared to managing the consequences of social disorganisation.

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30 N. J. Smelser, pp. 129-130.
31 W. E. Moore, p. 105.
32 S. N. Eisenstadt, pp. 25-6.

(b)The Transformation of Systems

The magnitude of the modernisation process is revealed in its effects on social systems, and the need it imposes on these systems to either transform or to cease to exist:

> ...the revolution of modernisation involves transformation - the transformation of all systems by which man organises his society....
>
> Modernisation demands of all systems of society...the ability to persist continuously in the enterprise of responding to the challenge of new questions, new facts, and inadequate solutions....such...revolutions, even under the best of circumstances, tend to be discontinuous, conflict-ridden, and marked by considerable intervals of concentration on refining and enlarging existing systems....[33]

The notion of constant change and development in social systems, which is a feature of the modernisation process, eventually becomes not only a characteristic of modernised societies, but also a cultural expectation. This is significant because it means that change can be driven by society as a whole, and not just its political elites. The process of modernisation thus has the capacity to become a popular movement.

D. Modernisation in Colonial Societies

Colonial societies form a special category when analysing the modernisation process. This is primarily because of the rapidity at which the modernisation process takes place in many colonised countries, and because of the extreme influence of an external force - the colonising power:

> These powers developed specific orientation to change. They were, of course, interested in the promotion of change in the colonial societies, but at the same time saw it as part of their task to effect these changes only within very specific limits.[34]

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[33] M. Halpern, 'The Rate and Costs of Political Development', in *Annals of the American Academy of Political and Social Science*, 358, March 1965, pp. 21-3, cited in S. N. Eisenstadt, p. 41.

[34] S. N. Eisenstadt, p. 109.

For the often poorly-resourced colonial administrations, the emphasis on change was directed more in the areas of the colony's administration, government, economic growth, and technological developments, as opposed to deliberately attempting to implement change in the cultural and social arenas.

Eisenstadt's description of the changes brought about by colonial regimes seems to apply almost exactly to New Zealand's experience in the nineteenth century:

> Most changes introduced...by the colonial powers have been focused on the central institutions of the society. In the political field, the introduction of unitary systems of administration, the unification or regularisation of taxation, the establishment of modern court procedures, and at later stages the introduction of limited types of representation....[35]

However, while these changes may be in accordance with the instructions given to colonial administrators by their political masters,[36] parallel social and cultural changes tend to be neglected by these same colonial administrators. Indeed, if anything, the colonial administrators in New Zealand attempted to contain changes in the cultural and social sphere, and above all, the indigenous peoples tended to be '...denied full participation in a common political system and full integration in a system of solidarity'.[37]

(a) Colonial Economies

One of the main characteristics of colonial economies tends to be their dependence on the colonising country, usually as a source of capital for investment and as a main market for the colony's output. Also, social

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35 S. N. Eisenstadt, p. 110.

36 In the case of New Zealand, these include: Letter from Viscount Palmerston, Foreign Secretary in Lord Melbourne's Cabinet, to Captain William Hobson, 13 August 1839, cited in T. Buick, *The Treaty of Waitangi, or, How New Zealand Became a British Colony*, Wellington, 1936, p. 1; Instructions from Normanby to Hobson, 14, 15 August 1839, cited in W. D. McIntyre and W. J. Gardner, *Speeches and Documents on New Zealand History*, Oxford, 1971, pp. 10-17.

37 S. N. Eisenstadt, p. 110.

dislocation, manifesting itself mainly in the weakening of traditional kinship ties,[38] results in sometimes severe social disruption.[39] Labour is removed from its traditional (and in the case of most Maori in New Zealand) communal setting, and is converted into a wage labour force. This simultaneously strengthens the colonial economy and weakens the traditional economy. Such economic change is both uneven and unbalanced, and forces other, non-economic changes in the colony.

The issue of economic dependence is important because it subsequently distinguishes between two different patterns of economic growth. Hoselitz suggests that there exists:

> ...a dichotomy between countries with a "dominant" and those with a "satellitic" pattern of economic growth. The ideal case of a dominant pattern would be exhibited by a country with a fully autarchic economy, with no need to resort to foreign borrowing for capital accumulation, and without exports. At the other extreme we would have a society which draws all its capital for development from abroad and which develops only those branches of production whose output is entirely exported. If we further stipulate that all or the bulk of the capital imports come from one source and that all or the bulk of exports go to one destination, we have the ideal-typical case of a country with a satellitic pattern of growth.[40]

(b) Changes in the Indigenous Society

As this uneven and unbalanced process of modenisation continues, certain responses are produced as the colonial society tries to grapple with these changes. These can include the embracing of the introduced educational system by the indigenous society, attempts by the indigenous people at participating (usually at lower levels) in the colony's administrative or political institutions, and the adaptation to the new technological and commercial developments that have been imposed on the colony.

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38 N. J. Smelser, p. 128.
39 N. J. Smelser, pp. 128-9.
40 B. F. Hoselitz, p. 93.

Eventually, sectors from the indigenous group might form nationalist organisations as a response to a lack of political representation or influence in the existing colonial regime. Such groups '...have adapted themselves to some aspects of Western life, without entirely losing a foothold in their own traditions'.[41]

At a family level, extensive family disorganisation is likely to accompany the breakdown of traditional patterns of family structure while the new institutions which will displace these structures remain incomplete. Furthermore, this '..."transitional" disorganisation is not the same as the disorganisation arising from marital separations and divorces in industrial societies....Such instability cannot be taken as a sign of family decay as a "loss of function."'[42]

(c) Requirements for Sustained Economic Growth

Eisenstadt identifies four broad areas which are important for colonies to maintain sustained economic growth.[43] The first of these is the capacity of the colony to move away from economic dependence on the colonising power. The second is what he defines as 'recrystallisation'. That is, the reorganisation of traditional frameworks that allow them to operate within a modern environment. The third process is that of political transformation itself, within the colony, and finally, the reconstitution of the education system in a way that makes it more flexible and dynamic, and less bound by the rigid forms it may have assumed during the early periods of colonisation.

Another requirement for sustained economic growth is the presence of large urban and industrial centres. These centres have high concentrations of population and become the core of a country's economic growth:

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41 S. N. Eisenstadt, p. 112.
42 W. E. Moore, p. 102.
43 S. N. Eisenstadt, p. 121.

> The growth of population in urban or industrial centres appears to be inevitable if there is economic development, whether by industrialisation...or by the commercialisation and improvement of agriculture. If governments desire economic development, they must be prepared to face the consequences and to attempt to mitigate the effects of the concentration of people....[44]

Cities make possible the mobilisation of a large quantity of workers to be used in the new enterprises that are a characteristic of the modernisation process. This ready supply of labour also helps to overcome some of the '...bottlenecks and shortages that existed...due to the...lack of industrial discipline in a population still little used to factory work'.[45]

Large concentrations of workers may also mean that a greater variety of skills and occupational specialties can be found, thus reducing the problems of insufficient skilled labour for enterprises to succeed. However, one of the adverse consequences of growing urbanisation can be a growing disparity in economic development between newly populated industrial/urban centres, and the depopulated rural areas. While cities have become important components in the process of economic growth '...a fertile soil has been found in cities for social disorganisation, criminality, and other presumably undesirable forms of social behaviour'.[46]

A requirement for sustained economic growth arising from the trend to urbanisation is a long-term upgrading of minimum and average skill levels.[47] This, in turn, shapes to a considerable extent the type of education system that evolves.

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[44] R. W. Steel, 'Economic Aspect: General Report', Brussels, 1952, p. 120, cited in B. F. Hoselitz, p. 159.
[45] B. F. Hoselitz, pp. 160-1.
[46] B. F. Hoselitz, p. 187.
[47] W. E. Moore, p. 99.

E. Conclusion

The purpose of this review of the major theoretical components of Modernisation theory has been not only to identify its constituent parts, but also, to offer a framework which can explain or account for the processes involved in the Sealord Deal. Although the issues surrounding the Sealord Deal are peculiar to New Zealand, the elements of Modernisation theory which have been outlined here can be integrated into this specific topic in a way which demonstrates how the deal was a failed attempt at modernisation.

One of the chief failures of modernisation theory - and a failure which translates into the Sealord Deal - is that it tends to perceive economic development in terms of a strictly Western definition of the concept, and therefore allows virtually no room for cross-cultural views even to be considered, let alone acted on. In the case of the Sealord Deal, for example, the stated aim of the Government was to return part of the country's fishing resource to Maori as a means of partially fulfilling the conditions of the Treaty of Waitangi. However, the Government neglected to acknowledge Maori tribal structures when it initially came to considering options for allocation of the fisheries resource, and this resulted in inter-tribal conflict as many tribes competed with each other for a share of the resource.

2. MAORI SOVEREIGNTY AND CONCEPTS OF THE STATE

A. Introduction

Any use of the term 'Maori Sovereignty' seems to be immediately problematic. On the one hand, many of the concepts associated with sovereignty are European, and so the debate over Maori assertions of sovereignty must, at least on a general level, take place (ironically) in a European intellectual environment. The question emerges of whether a European concept such as sovereignty can be employed to describe Maori (and therefore essentially non-European) aspirations.

Moreover, the label 'Maori' is itself a definition which was partly forced on iwi and hapu as a means of identifying themselves collectively in the face of European colonisation. In one sense at least, the term Maori is a product of this colonisation in as far as it conceals or overrides the importance of iwi or hapu identity.

However, having stated these problematic areas, it must also be observed that around two centuries of shared (though uneven) development between Maori and Europeans in New Zealand has meant that terminology and the accompanying concepts are in no way the exclusive preserve of just one group, and that in the case of sovereignty, some of the fundamental concepts transcend cultural divides. A 'post-modernist' view might hold, however, that it is always wrong to look for foundational statements, or 'meta-narratives' which might provide rationally objective grounds with which different interpretations would have to come to terms.[1] The range of definitions and applications of sovereignty generally and Maori sovereignty in particular show that this seems to be the case.

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1 T. B. Strong, 'Nietzsche's political misappropriation', in B. Magnus and K. M. Higgins (eds.), *The Cambridge Companion to Nietzsche*, Cambridge, 1996, p. 132.

The current plethora of references to the term 'sovereignty' by some Maori activists, their detractors, and a largely populist media[2] has misrepresented the meaning, history, and application of sovereignty in its social as well as political and ideological contexts. This misrepresentation has reached the point where the entire concept of sovereignty has evolved into a generic and largely meaningless abstraction - conveniently grouped with a confused concoction of nationalism, separatism, patriotism, and autonomy.

This uncertainty over the meaning of sovereignty is not surprising in New Zealand's case, where one of the founding documents, the Treaty of Waitangi (1840) refers to sovereignty in the first article of the English version, although the term kawanatanga, or governance, appears in the Maori version of the text.

Rarely has an effort been made to uncover the development of the concept of sovereignty, and particularly, the metamorphosis the concept underwent in the nineteenth century. Instead, discussions on sovereignty and its application to New Zealand's ethnic politics usually appear as an almost incidental part of analyses of the Treaty of Waitangi,[3] Maori nationalism,[4] or New Zealand's institutions of government.[5]

The concept of Maori sovereignty is also tied in historically with the process of the British colonisation of New Zealand. In the outcome of the conflict between the two cultures, one of which was dominant, neither group either won or died. Instead, in the language of Nietzsche, the

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2 Letter to Chas Poynter, Mayor of Wanganui, from Niko Tangaroa, Kaumatua of Pakaitore Marae, 20 March 1995; Letter to Niko Tangaroa from C.J. Whitlock, Chief Executive Officer, Wanganui District Council, 22 March 1995; 'Mayor steps into Maori park protest', in *New Zealand Herald*, 1 March 1995; C. Brett, 'Wanganui: Beyond the Comfort Zone', in *North and South*, June 1995; et. al.

3 L. Cox, *Kotahitanga: The Search for Maori Political Unity*, Auckland, 1993; R. Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland, 1990.

4 I. H. Kawharu, (Ed.) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland, 1989; W. H. Oliver, *Claims to the Waitangi Tribunal*, Wellington, 1991; C. Orange, *The Treaty of Waitangi*, Wellington, 1987;

5 K. J. Scott, *The New Zealand Constitution*, Oxford, 1962; A. Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Toronto, 1974.

weaker group became subdued. They could no longer act according to their own cultural and social imperatives, but had to act in accordance with the will of the colonisers. Thus, if Maori were to survive in the colony, they would have to repress any immediate expression of those aspects of their cultural imperatives which would be in conflict with those of the colonisers. However, these cultural imperatives did not vanish. Rather, Maori had to learn to change them and alter their direction. Nietzsche described a process parallel to this in his hypothetical reconstruction of the emergence of human society, where the inability to express inherent drives resulted in those drives and impulses not being extripated, but only redirected.[6] The emergence of contemporary Maori sovereignty can therefore be considered as part of a reassertion of Maori cultural drives which is, in turn, a consequence of the process of cultural decolonisation.

B. Towards a Definition of Sovereignty

The idea of sovereignty is comparatively new in the history of social and political thinking. There is practically nothing, for example, in Greek or mediaeval texts on the subject. The reason for this is partly because it was the particular set of political and social conditions which arose in the sixteenth and seventeenth centuries in Europe that gave rise to the need for a definition of concepts of sovereignty. These conditions included the transition from a feudal system to a nation-state which included a metamorphosis in political organisation, the emergence of an industrial capitalist economy, and growth in countries' military capacity (mainly through improvements in technology) which made it possible for entire nations to be defended. Bodin was one of the first theorists to attempt to offer a definition of sovereignty in the 1570s, (still in the pre-industrial era):

> A state is a lawful government of many families and what is common to them, together with a supreme sovereignty....Sovereignty is the absolute and perpetual power

6 J. Salaquarda, 'Nietzsche and the Judaeo-Christian Tradition', in B. Magnus and K. M. Higgins (eds.), pp. 105-6.

> of commanding in a state. It is necessary to define this term since no political philosopher or jurist has yet defined it, though the presence of sovereignty is the chief property which distinguishes a state from other organisations or societies of men....To begin with...[sovereignty] is *perpetual* power. For, if the power be held only for a certain time (it does not matter how long a time), it is not sovereign power.[7]

Bodin then goes on to argue that sovereign power includes a law-making facility, and involves supreme and absolute power being possessed by the institution of the sovereign. Hobbes, too, concurs with this view of the absolute nature of the sovereign's power.[8] However, in Rousseau's state, it was the general will that was sovereign:

> Every act of sovereignty, that is, every authentic act of the general will, restricts or works to the advantage of all citizens equally....What, then, is an act of sovereignty, exactly? It is not a convention made by a superior with an inferior; it is a convention made by the whole Body with each of its members - a convention which is just because it rests on the social contract.[9]

While Rousseau gives his sovereign just as much power as Hobbes, in Rousseau's model, this power is not based on historical justification, but on consent. Rousseau then goes on to assert that sovereignty is inalienable and indivisible because it is the exercise of individual will.

C. The Foundations of Sovereignty in New Zealand

(a) Concepts of Statehood and British Expansionism

From a more global perspective, there are certain poles to which various types of sovereignty tilt. The constraints of space prohibit an analysis of all of these variations, and so attention is focused on those concepts of

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7 J. Bodin, cited in E. M. Sait (ed.), *Masters of Political Thought*, Vol. 2, London, 1949, pp. 55,57, & 58.
8 ibid. p. 123.
9 ibid. p. 280.

sovereignty which may have more relevance to the contemporary Maori experience. One of the crucial areas of consideration is that of statehood.

Franz Kafka's unfinished novel 'The Trial' (1919-20)[10] offers a useful insight into some of the broader issues of law and the state, and their power over people. It is not difficult to extend these themes to the notion of British law, and the effects it had on the legal mechanisms and understandings of indigenous peoples during the eighteenth and nineteenth centuries.

In *The Trial*, many crucial questions remain unanswered. No-one ever asks the obvious question as to what the main character is supposed to have been guilty of; and similarly, the jurisdiction, composition, legitimacy, and 'legality' of the court that is to try him remains indeterminate. Josef K., the central character in the book, protests his innocence and asks '...how can a man be guilty? Surely we're all human beings here, one like the other'. The only response he receives from the court is 'That is right, but that's the way the guilty are wont to talk'. The implication emerges that Josef K. is guilty of what he is rather than anything he has done. In this sense, Kafka is promoting a view that the law is focusing not on the *offence* of the person, but the total *existence of* the person. Thus, verdicts are not true or right, but are assessed in terms of their necessity. Kafka then takes this theme further. He asserts that to be involved with the law is the same as to lose to it.

Yet even this is not the end of the parallel. For Josef K., the law, and the impact of his direct encounter with it, is seen as providing some morbid validation to his existence. The law has become something which, however uncomfortable, still implies a sense of meaning and legitimacy. Yet paradoxically, at its most abstract, Kafka offers the suggestion that the law itself is criminal, which throws into a questionable light all that has

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10 F. Kafka, *The Trial*, New York, 1946.

previously been assumed about the functional nature of the law in *The Trial.*

Kafka's accusations against the whole notion of the law can, not inappropriately, be extrapolated into the broader theme of statehood. A consideration of the state has particular relevance in this context. The Treaty of Waitangi, which apart from being a fundamental development in the state of New Zealand, was equally a small token of the culmination of the conception of the British state at the time.

Tied up with any interpretation of the state is the decisive role of the economy. As Britain's economy flourished with the onset of greater levels of industrialisation in the early nineteenth century, the need for more markets, capital, and the organisation of labour within the state led to the requirement to expand into other regions of the world, which signaled the genesis of Britain's colonial efforts. Thus, colonial expansion, and specifically the increased colonial expansion taking place by the late eighteenth century, served to justify and eventually maintain the particular sort of state Britain had become. Central to the ability to operate as an imperial state was the perception that the colonies would necessarily be 'inferior' by some criteria (no matter how vague or incorrect) to the 'mother country'.

In Marxist analyses, there is no single institution more important than the state. The commencing point of Marxist thinking is the categorical rejection of the traditional view of the state as the representative agent of society. Marx firmly linked the actions of the state with the goals of the bourgeoisie.[11] Certainly, an empirical survey of the ruling classes in Britain in the first half of the nineteenth century betrays similar social backgrounds and origins, education, kinship, expectations, connections, and political and ideological aspirations. Thus, the state, which theoretically was meant to

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11 K. Marx, 'The Revolution of 1848', in K. Marx, *Political Writings*, Vol. 1, London, 1973, p. 69.

be a manifestation of the 'whole of society', had become almost a 'private sector' institution, run by a social and economic elite.

Marx and Engels were of the opinion that any state, whether autocratic, democratic, or of another form, was a tool of coercion, internally, and potentially externally as well.[12] Engels acknowledged and stressed the central role of the economy and capital in the formation and survival of the state, and that the expansion of any state into other areas of economic interest (for example, through the acquisition of colonies) was a possibility with the dynamics of a capitalist economy in operation.[13]

It has been argued that the very concept of the state has an almost metaphysical basis which transcends its tangible components.[14] In order to appreciate the sentiments of this analysis of the state, it is necessary to distinguish between *state power* and *class power*. Class power is the method by which a dominant social grouping maintains and exercises its prevalence in society. This dominant group uses the state's institutionalised mechanisms and instruments of power to reinforce and strengthen itself. The state's power in this context is necessarily subservient. It lies in its capacity to formalise, legitimise and sanction class power, which in turn is able to be projected, as in the case of Britain's Empire, onto a global scale (provided that the economic prerequisites are met). The class institutions of nineteenth century England, such as schools, families, peerage, churches, and even, to some extent, political parties, were where most of the ideological struggles of society initially took place - institutions which were not uniquely part of the state system per se.[15]

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12 F. Engels, 'The Civil War in France', in F. Engels and K. Marx, *Selected Works*, Vol. 1, London, 1955, p. 485.

13 F. Engels and K. Marx, 'Selected Correspondence', p. 320, in T. Sowell, *Marxism; Philosophy and Economics*, London, 1985, p. 148.

14 K. Marx, 'Critique of Hegel's Doctrine of the State', in K. Marx, *Early Writings*, London, 1975, p. 89,

15 R. Miliband, *Marxism and Politics*, Oxford, 1986, pp. 53-7.

A part of the expansion of the capitalist economy of Britain was the need to protect it using military force, which could also serve the purpose of extending the economy's reach in the world. War, conquest, imperialism, colonisation, and sovereignty, are '...simply variations of power. The variety of nationalism, the will to spread an ideology,...the desire for more territory...all these represent power in different wrappings. The conflicting aims of rival nations are always conflicts of power'.[16] Yet the conflict of power in the nineteenth century world stage had led to a multipolar power structure to which the apparent stability that existed in parts of the world at the time could be tentatively attributed.

War and conquest through direct military intervention were still considered valid and acceptable tools of British foreign policy, although the British view of war was not clear. British statesmen and scholars, well into the twentieth century, maintained that '...war was some kind of *accident*, for which nobody in particular was responsible; caused by deterrents...which somehow just happened to 'go off'....it was precisely this cultural ethnocentrism, this besetting liberal belief that everyone fundamentally shares one's own value-system'.[17] Again, the strength of the class-entrenched British political and state system was the facilitator to this mentality of superiority and the notion that the 'British' world view was the only practical and sensible one.

By the early twentieth century, Lenin observed that Britain, in its empire-building exploits, had '...sunk into the all-European, filthy, bloody morass of bureaucratic military institutions which subordinate everything to themselves, and suppress everything.[18] Even the majority of state leaders in Europe chose to dress in military uniform to give more than tacit

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16 G. Blainey, *The Causes of War*, London, 1973, p. 149.
17 M. Howard, 'Weapons and Peace', Lecture delivered in January 1983, in M. Howard, *The Causes of War*, London, 1983, p. 158.
18 V.I. Lenin, 'The State and Revolution', in V.I. Lenin, *Selected Works*, London, 1969, p. 264.

endorsement to the prowess and necessity of the military machines of their respective nations.

The British acknowledged that even the most benign form of colonial intervention of which they were capable may involve military force and consequent suffering to the colonised country. The Colonial Office's instructions to Hobson in 1839 reveal precisely this unquestioned inevitability of intervention (implicitly excused by the constraining influence of the 'facts' of possible French annexation of New Zealand), albeit in almost apologetic tones:

> The Ministers of the Crown have deferred to the advice of the Committee appointed...to inquire into the state of the Aborigines in the vicinity of our colonial settlements; and have concurred with that Committee in thinking that the increase in national wealth and power, promised by the acquisition of New Zealand, would be a most inadequate compensation for the injury which must be inflicted upon this kingdom itself, by embarking on a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government. We retain these opinions in unimpaired force, and though circumstances entirely beyond our control have at length compelled us to alter our course, I do not scruple to avow that we depart from it with extreme reluctance.[19]

Inherent in this attitude towards colonisation were often assumptions of national or ethnic superiority. A report of a House of Commons committee on New Zealand in 1844 included a report from a group of settlers in New Zealand which stated, in reference to the Treaty of Waitangi, that that agreement could only be treated as '...a praiseworthy device for amusing and pacifying savages for the moment',[20] and that it had

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19 Great Britain Parliamentary Papers, 1840, Vol. xxxiii. Correspondence Relative to New Zealand, p. 37.

20 Letter from the Governor of the New Zealand Company to the Colonial Office, January 1843, in Great Britain Parliamentary Papers, 1844, Vol. xiii (Committee on New Zealand), Appendix, p. 30.

no practical application because it had been signed by '...naked savages...'.[21] This rhetoric (although it frequently proved to be more than just rhetoric) is an indication of the paternalistic spirit of some of those involved in carrying out the process of British colonisation.

The contrast between the British perceptions of their statehood, and the Maori view of their own social organisation was vivid. One of the central international legal issues relating to the Treaty of Waitangi is the question of whether it was made between two sovereign states.

New Zealand was manifestly not a nation prior to the arrival of the Europeans. While this is a true statement legally, it is based on the flawed premise that the British definition of what constitutes sovereignty has universal application. If this was the case, it could be argued that the Maori state of Aotearoa, with its inherent legal and ethical status, properly commenced during January 1840 when the Treaty of Waitangi was being drawn up - an act which gave implicit sovereignty status to New Zealand through British recognition.

Even the tools of analysis used in reviewing the Maori 'state' can be inclined to be shaped by the particular terminology employed. This is not to say that the current vocabulary of social and political enquiry is necessarily wrong, but rather, that there is a risk in making the subject of analysis conform to the labels applied to it. It is clear, for example, that the British acceptance of Maori sovereignty hinged on a belief that Maori 'possessed' their land, and were not nomadic. However, possession, in the Maori context reflected mainly the custodial attitude with which the Maori viewed their land, and did not have the same implications of ownership that the British legal system relied on. The Maori connection with the land was fully dependent on kinship ties (whanaungatanga),[22] and hence the

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21 op. cit.

22 M. Henare, 'Nga Tikanga Me Nga Ritena O Te Ao Maori: Standards and Foundations of Maori Society', in *The April Report of the Royal Commission on Social Policy*, Volume 3, April 1988, p 15.

continual reference by Maori to ancestral land. Land was a communal resource.[23] Sir John Salmond described Maori land as being:

> ...held tribally; there was no general right of private or individual ownership except the right of a Maori to occupy use or cultivate certain portions of the tribal lands, subject to the paramount right of the tribe.[24]

Another possible pitfall in considering any socio-political structure, such as a state, is that it eventually becomes portrayed as a rigid, compartmentalised regime in which status and power allocation, functional roles, and political activity are pre-determined by fixed rules.

(b) Maori 'Statehood'

Maori political institutions were much less 'institutionalised' and distanced from day-to-day life than was the case in the English system. Communities could often be completely politically self-contained in a regime in which all members shared the basic conditions of a common life.[25] Such communities were clearly identifiable by their level of social coherence, their locality, and some form of community sentiment.[26] The first two of these are more tangible, and would suggest that the Maori state did not exist as a single entity in pre-European times, and that instead, New Zealand was made up of a loose collection of independent tribal groupings, frequently geographically isolated from each other, and united only by their common background and language.

However, the notion of 'community sentiment' challenges such assumptions. Several dynamics existed within the Maori conception of their communities that are fundamental to achieving an understanding of

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23 op. cit.
24 J. Salmond, 'Introduction to the Native Land Act', in *The Public Acts of New Zealand, Volume 6, 1908 - 1931*, p. 87.
25 R.M. McIver and C.H. Page, *Society: An Introductory Analysis*, London, 1961, p. 8.
26 ibid. p. 9.

the status of the Maori state, and go a long way towards proving that a form of sovereign state did exist prior to European intervention.

For a state to exist, it is not necessary for a supreme legislative, judicial, or executive authority to be present. Moreover, in New Zealand's case, its comparative isolation from even its nearest neighbours meant that it was unnecessary to define itself as a single state at such formal levels, because there was, for all practical purposes, nothing outside the Maori world.

For Bentham, the sovereignty of the state lay in its law (which need not be written) as devised by its wisest citizens in accordance with rational principles, and that any government should be of the minimum scale necessary to secure the *artificial* identification of the interests of the people who make up the state.[27]

The implication of Bentham's argument was that a national spirit, supported by all the members of the state, was of utmost importance, whereas the formal instruments and institutions of the state were just one manifestation of this spirit (and potentially a hindrance as well). When this principle is transported into Maori society, an entirely new perspective is made available. As has already been mentioned, Maori shared the same language, and geographical and cultural origins. But in addition to this, there was a large body of shared customs. There was the wero: a detailed procedure for ensuring an approaching party from another tribal grouping was not a threat. Once this was established, the visitors were received onto the marae, and a kaumatua, or elder, from the visiting group would recite a chant, known as a waerea. The ensuing mihi, or welcome, and whaikorero (the response from the visitors) concluded this introductory process.[28] This ritual and protocol indicates that there was a unity of purpose and practice which extended beyond the confines of tribal identity. Despite geographical and communication difficulties, inter-tribal hui, or

27 C.J. Friedrich, *Inevitable Peace*, London, 1948, pp. 205-6.
28 R. Walker, *Ka Whawhai Tonu Matou, Struggle Without End*, Auckland, 1990, p. 73.

meetings, did take place, and it is only the absence of an 'outside' threat, coupled with internal struggles and conflict, which prevented the evolution of a national governing body. Early writers on New Zealand almost universally referred to the Maori as a single ethnic and cultural unit, and this strengthens the notion of Maori New Zealand existing as a sovereign state. If it is accepted that the formal institutions are of secondary, or even no importance to the essential notion of sovereignty, then the Maori state of the early nineteenth century has full legitimacy.

The 'volksgeist' which existed in Maori society, and which contributed to this loosely defined sovereignty, was based on several factors. Among these were the identification with a strong historical process, the links of many tribes with a common ancestry, and the same social structures and values which were present. However, despite this level of prima facie evidence for the Maori state, it is insufficient in itself because of the fact that the Treaty of Waitangi was signed between the Maori and an outside sovereign entity. Yet, in this context, the sovereignty of the Maori state is also affirmed. Article One of the Treaty acknowledges that the chiefs in New Zealand had a collective sovereignty over New Zealand, and when the Treaty was signed, it was effectively concluded between two sovereign states. According to one historian, Maori '...had a claim to territorial sovereignty or land ownership superior to most other indigenous peoples [who were colonised by the British]'.[29] However, despite these appearances of sovereignty, it has been suggested that due to an absence of indigenous national structures, even after the European arrival, and tribal divisions which had not abated by 1840, Maori were left '...in an anomalous position'.[30] It can be argued, though, that the signing of the Treaty of Waitangi by Maori replaced tribal sovereignty with a national Maori sovereignty, and so tribal divisions, even though they persisted, were thereafter a cultural rather than constitutional issue.

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29 C. Orange, p. 23.
30 op. cit.

The issue of Maori sovereignty has been an ongoing point of debate since the signing of the Treaty. Even at the time, the question of Maori sovereignty prompted the Colonial Office to adopt a specific stance so as to be able to fend off any potential criticism of its attempts to annex New Zealand. It was realised that no Treaty could be concluded unless New Zealand was regarded, in the eyes of the international community, as a sovereign state. To this end, Normanby proclaimed that New Zealand was officially acknowledged by the British Government as a '...sovereign and independent state'.[31] But for the benefit of British engagement in this newly declared state, the definition was qualified by the expression that Maori sovereignty could be recognised '...so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate in concert'.[32] Again, it is implied that the European form of political relations could be the only legitimate sort. Yet, near the end of the document, Normanby discloses perhaps what is his personal insight into the issue of Maori sovereignty. He describes the Maori as an '...inoffensive people, whose title to the soil and to the sovereignty [possibly meaning possession] of New Zealand is indisputable'.[33] Similarly, Normanby disclosed his perception of the inevitability of the British colonisation of New Zealand, and believed that the national independence of the Maori would no longer be able to be maintained.[34] It must be remembered, though, that Normanby was involved in policy-making from a great distance, both geographically and in terms of communication, and as a consequence, could not possibly have an accurate appreciation of New Zealand at the time. His judgements were influenced more by projections and anticipations. The British presence in New Zealand at the time was extremely small - probably around one per cent of the country's total population. It seems evident from this that

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31 Normanby to Hobson, explanation of various points of policy relevant to New Zealand, 14 and 15 August 1839. Colonial Office Record 209/4, 251-82, 157-63.
32 op. cit.
33 op. cit.
34 op. cit.

Normanby's statements and decisions '...had been based as much upon the expectation of a rapid growth in British settlement and its effects on the Maoris upon the current situation'.[35]

The Motonui Report of the Waitangi Tribunal in 1983 added its weight to the view that the Treaty of Waitangi gave explicit rights of sovereignty to the Maori: 'The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected'.[36]

It has been argued that by 1840, the concept of sovereignty in England had moved from its previous status as a personal relationship between the sovereign and the subject to a territorial relationship between sovereign and country, or in New Zealand's case, colony.[37] However, the Treaty of Waitangi gave no consent to the establishment of a legislature whose functioning and decision-making could not be questioned by the Maori.[38] Furthermore, the Maori understood that all they had ceded to the Crown was government [Kawanatanga],[39] according to the terminology used in the Maori version of the Treaty - which most Maori signed, and that they retained the '...unqualified exercise of their chieftainship [rangatiratanga] over their lands, villages, and all their treasures'[40] - chieftainship having a meaning closer to the English concept of sovereignty.

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35 C. Orange, p. 31.

36 Waitangi Tribunal, *Motonui Report*, Wai-6, March 1983.

37 P.G. McHugh, 'The Lawyer's Concept of Sovereignty, The Treaty of Waitangi, and a Legal History for New Zealand', in W. Renwick (ed.) *Sovereignty and Indigenous Rights - The Treaty of Waitangi in its International Contexts*, Wellington, 1991, pp. 170-189.

38 Indeed, Article the Third of the Treaty guaranteed the '...Natives of New Zealand...all the rights and privileges of British subjects'. The 'all' is not qualified by any restriction in participating in the democratic system of Government in New Zealand, yet the British perception of property ownership as a prerequisite to vote clearly prejudiced Maori interests where the 'ownership' of land, if it can even be called ownership, was entirely communal.

39 Professor Sir Hugh Kawharu - translation of the Maori text of the Treaty of Waitangi given to the Court of Appeal in 1987, in *New Zealand Maori Council v Attorney-General* [1987] I, New Zealand Law Report 641.

40 op. cit.

It has also been suggested that the Treaty effectively produced a distinctive definition of sovereignty - distinctive in that it recognised that Maori never ceded sovereignty to Britain, and that the legitimacy of the Treaty in this context:

> ...rests to an essential extent on reconciling the authority of the New Zealand Crown and Parliament developed from the kawanatanga ceded in the first Article of the Treaty of Waitangi with the rangatiratanga, the mana of the Maori which should have been preserved under the second Article.[41]

D. The Existence of a Maori Legal System

The use of separate terms for a similar concept can have the effect of elevating the importance of the meaning of one word over another. Such an example can occur in the distinction between 'law' and 'lore'. Essentially, the argument is that the European system of social regulation was one of law (and thus bore that title), whereas other societies, in this case pre-European Maori society, had to be satisfied with the implicitly inadequate lore. Despite the absence of a clear delineation between these two terms in a practical environment, there is also an evident inference in the system of law - as though lore is a primitive alternative which is incapable of meeting the requirements of a 'civilised' community.

Yet this premise is untenable because it relies on a concept of law as being basically unbending, and not immediately subject to the arbitrary mood of the community, whereas lore can be irrational, harsh, and can be altered based on something as insignificant as the whim of a chief, or the overwhelming desire for revenge and the mob mentality which accompanies it. This is obviously an incorrect interpretation. The history of the law in Britain over the last four centuries has revealed itself to be a regime subject to abuse by monarchs, and sometimes a device to uphold

41 F.M. Brookfield, 'The Constitution in 1985: The Search for Legitimacy', Inaugural Lecture to the University of Auckland, 1985.

the values and aspirations of a select group of society. Moreover, British law, in responding to growing complexities in the society it serves, has altered substantially more than the so-called Maori lore because of the more substantial forces of change occurring in Europe at the time. It seems that the core of the distinction between lore and law is founded on the fact that one is a literate-based system of governing and control and the other is not. It appears to be chiefly on this basis that assumptions about the superiority of law over lore predicated.

Maori societies (it is a generalisation to talk of a single concept of Maoridom until the European arrival) had few formal institutions of justice of the type which had evolved in Europe. There was no court system to resolve issues of justice, no parliaments or estates, and no body which was specifically charged with enforcing what the community set as its guidelines for living. Yet the sense of social control and social order was none-the-less present in Maori communities. But despite this, the question remains as to whether this sense of individual behaviour in these communities being controlled equated with the presence of a legal system:

> The general underlying scheme regulating the application of sanctions to "wrong-doers" is not law, in the Austinian sense [of commands from a central sovereign source of power] but collective retaliation. Punishments, by necessity, vary....[42]

Such an assessment appears to seal the inadequacy of Maori lore, but notwithstanding the qualification of central sovereignty, surely this argument could just as easily apply to British law? For most of its history, and even largely in the present time, British law has concentrated not so much on rehabilitation, but on the process of exacting retribution to satisfy the community's desire for justice (which in this context appears remarkably similar to revenge). In addition, because of the more stratified nature of British society compared, the law frequently disadvantaged

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42 D.M. Sahlins, *Social Stratification in Polynesia*, Seattle, 1958, p. 150.

minority groups, whereas Maori lore had the advantage of operating in a comparatively unitary community environment.

Maori lore was a practical expression of accepted social norms. In a society which looked to its past for knowledge, strength, and precedent, the law evolved very slowly, and was not generally subject to fickle aberrations. Coupled with this was the importance of kinship ties within the community. Precisely defined roles, and relationships between those roles, contributed to the maintenance of order, and a continuity of economic and social facets strengthened the community. The strength of kinship ties was also significant in that it provided a link with the religious and sacred elements of Maori communities. Most tribes and ariki traced their descent back to a deity. The effective recognition of this supernatural origin made social norms and accepted modes of behaviour divinely sanctioned by virtue of the fact that they appear to have been present and enforced since the mythical supernatural past. This also meant that chiefly authority was linked with religious institutions, hence possessed a supernatural aspect.

Therefore, a distinct system of social control was present in pre-European Maori society. In addition, this system was based on a clear understanding between right and wrong - a regime of community as well as individual morality to which transgressions could meet with an appropriate and relatively standardised punishment. It was necessary for these punishments to be standardised because this would contribute to the sense of consistency in a chief's rule. Any sizable disparity in the type of punishment for a particular sort of offence would not endear the community to the chief.

As for the moral code, it has been suggested that '...there was...considerable correspondence between Maori concepts of wrong, and those recognised in English law. Negligence leading to damage of person

or property was punishable; so were nuisance, trespass, defamation, liability for animal trespass, seduction and other offences categorised as torts in England'.[43] There was a distinction between civil and criminal law in traditional Maori society and a system of apportioning punishment which hinged not only on the offence, but also the need to achieve utu - a term which embodies revenge, justice, satisfaction, and the establishment of a sense of balance.

The traditional Maori legal system, whilst not sharing the consistency of a written regime, was still a effective tool in the regulation of Maori communities, and evolved to meet the needs of a complex social and political structure which was a cornerstone of the 'Classical' Maori era. In a practical sense, it was in every way a 'law', and functioned largely in a fashion not dissimilar to that of the English law.

E. Hierarchies of Sovereignty

In addition to the definitions of sovereignty being varied, they can also be ranked according to their degree of universality. At the fundamental levels are those sorts of sovereignty which can be viewed cross-culturally, while at the 'higher' levels are those elements which tend to be more culture-bound, and which rely for their validation more heavily on the surrounding political and social edifices.

(a) Level One

This level could be termed the primary level of sovereignty. It is sovereignty at its most universal and metaphysical state. The sentiments of volksgeist (community spirit) or in the case of Maori societies, wairua, and the notion of a community bound by a common experience form the basis of this level. Institutions, formalised laws, and bureaucracies either do not exist, or are virtually irrelevant to the identity this sort of sovereignty brings. It is experiential and organic in basis, and is difficult to adopt as a

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[43] A. Ward, *A Show of Justice, Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, p. 8.

purely ideological stance - it is lived rather than practiced. That is, it is mainly more subconscious and automatic rather than conscious and deliberate. Inherent in this conception of sovereignty is a strong emphasis on the natural world. This type of sovereignty relies on the superiority of the natural over all rational and institutional criteria. Legend, history, and mythology form an important ideological foundation for such societies, although there is also room for integration with contemporary ideals. Thus, in the current environment, Maori sovereignty can exist at this level through having '...political and moral, rather than legal, force'.[44] This is demonstrated though the reluctance or even objection by some Maori who wish to assert their sovereign rights to the sort of automatic submission to the governing body that is normally associated with citizens living in a sovereign state.

In one sense though, this level of sovereignty exists by default. Political (if not also legal) autonomy can only be considered when there is another system present from which there can be autonomy. In a society which is isolated from all contact with other political and legal regimes, it is impossible to claim that there is a form of sovereignty, despite the fact that elements within that society's make-up could later form part of the justification for claims of sovereignty if there was the involvement of another sovereign power.

(b) Level Two

This is a stage of transitional sovereignty. It is when the elements of unity in a community - its history, language, culture, and its closely integrated balance of power are unable to withstand the stresses that lead to conflict - stresses usually brought about by external forces. Rousseau analysed this situation and recognised that there '...must be some power with sanctions to regulate and organise the movement of its members in order to give

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44 P. G. McHugh, 'Constitutional Theory and Maori Claims', in I. H. Kawharu (ed.), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland, 1989, p. 25.

common interests and mutual engagements the degree of solidarity which they could not assume by themselves'.[45] This is based on the belief that eventually, the primary state of sovereignty will be overtaken by developments within the society (technological, social, shifts in power structures, and so forth). Although Rousseau was referring to the states of Europe as a collective, each individual state is a microcosm which experiences its own stresses as it evolves towards more formal, institutionalised forms of social organisation.

This transitional stage is also characterised by a growing idealism and romanticism over the past. Much of the popular literature of eighteenth and nineteenth century England, for example, evokes a stylised rural utopia, which was in stark contrast to the industrial revolution which was fast becoming the dominant force of social and economic change at the time.

Another feature of the transitional stage is that the structural transitions which occur are uneven. One analyst has attributed social unrest in some colonies to this transition:

> In colonial societies...European powers frequently revolutionised the economic and political framework by exploiting economic resources and establishing colonial administrations, but at the same time encouraged or imposed a conservatism in traditional religious, class and family systems. In a society undergoing post-colonial modernisation, similar discontinuities appear.[46]

Eventually, the uneven elements in the transitional phase are 'levelled out' through a shifting and sorting mechanism, leaving, at least in theory, a single sovereign state. The degree of real unity in such a state rests ultimately not so much on the strength of the institutions, but on the level

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45 F. H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States*, Cambridge, 1967, p. 47.

46 N. J. Smelser, 'The Modernisation of Social Relations', in M. Weiner (ed.), *Modernisation: The Dynamics of Growth*, Washington, 1966, p. 128.

of cultural integration or assimilation. The presence of two discernibly distinct cultures in the same society is incongruous with the creation of a national cultural consciousness.[47] Cultural separatism, and the ideologies that accompany it, therefore needs to be overcome to allow the transition to a modern sovereign state.

(c) Level Three

This level is characterised by the primacy of the nation-state. Institutions of government, law-making and law-enforcement take on the power of personalities. For example, the Prime Minister is both an individual, but also the title of an office. And while individuals may change, the office of Prime Minister remains. At the same time, the sense of community unity diminishes as people are directed to put their faith in a system which is necessarily impersonal and alienating. Ironically, this level, although institutionally stronger, is also reliant in a successively weakening base of popular support as inefficiencies seep into the institutions, and as the distance from the elements which constitute the primary level of sovereignty increases. The popular identification with the sovereign state diminishes, although the extent of influence of the state's institutions over individuals is greater than in previous levels.

(d) Level Four

This final stage is a post-sovereign age. Sovereignty, as an ideology, matured in the nineteenth century and therefore coincided with the height of nationalist sentiment in Europe (notwithstanding the regimes of Mussolini and Hitler this century). However, as time progresses, huge developments in technology, coupled with changes in international commerce and social expectations, have radically redefined the understanding of what constitutes a nation - a process that will no doubt accelerate as do advances in that technology which contribute to this redefinition. The question is, therefore, is there any role for sovereignty

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47 M. Lamb, *Nationalism*, Auckland, 1972, p. 2.

when the edifice upon which it has been built is transforming into something virtually unrecognisable to those familiar with its previous form? The whole purpose of a country's institutions begins to narrow. In the post-sovereign age, governments no longer reflect any aspect of genuine sovereignty. The authentic experience has disappeared, and apart from possibly occasional token gestures, governments fulfill purely administrative roles, and the individual is left with the shell of a state, powerful in appearance, but with practically nothing of substance as far as the elements of sovereignty which traditionally and naturally constitute a state.

(e) Further Variations

It is possible that when the core components of sovereignty - those outlined in level one - are not met for a particular group of citizens within a sovereign state, then potential exists for that group to reassert its own sovereignty based on the core components. Certainly, voluntary submission to a set of ideals based on a collective consciousness is easier than to a highly institutionalised regime such as a modern state. Whilst legal sovereignty, and the institutions which give it shape, does not generally allow for itself to be dismantled in any substantive way, the aspirations of political sovereignty, that is, the relationship between the governing system and the citizens (which incorporates the belief that '...the consent of the community is the ultimate source of all political authority or right of government'),[48] are relatively free to question assumptions about the legitimacy of those institutions and/or individuals who assert sovereign rights. The employment of an electoral process to allow for tacit public endorsement for a particular sovereign regime does not necessarily cater for those numerically smaller groups whose claims (irrespective of their merits) for sovereign rights are unlikely to reach fruition.

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48 P. G. McHugh, 'Constitutional Theory and Maori Claims', p. 34.

A resolution to this dilemma has been proposed through a particular delineation of political and legal sovereignty in which '...the Treaty of Waitangi is a compact ceding the legal sovereignty of the tribes over New Zealand but leaving them with their own political sovereignty'.[49] Therefore, rangatiratanga becomes '...a form of political sovereignty reorganised by the Crown as remaining with the tribes subsequent to British annexation'.[50]

However, this solution fails to acknowledge the requirement for sovereignty to be considered holistically, and not as a collection of separate components. Neither does it recognise that in modern states, there is no room for competing claims for sovereign power. An arbitrary division of sovereign authority does little to overcome the dilemma of competing claims to what, in practice, can only be a single sovereign authority.

F. Conclusion

There is a need for the term Maori sovereignty to be fairly precisely defined, and to avoid merely becoming a cliched catch-phrase for sentiments which may not necessarily have anything to do with sovereignty.

Having established that there is a valid basis for claims for Maori sovereignty, and the possibility that it could exist, a final clarification of its position within an existing sovereign state is necessary.

Essentially, the failure to recognise the various cultural heritages and allegiances (which are experienced at different intensities and in different ways by different peoples) as a possible obstacle to all subsequent development towards a state of full sovereignty is critical. This is because it results in the inability to create a true sovereign state without relying to some extent on suppressing those groups within it which have different

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49 ibid. p. 42.
50 ibid. pp. 42-3.

cultural foundations to that expressed by the institutions of the state, and which therefore have no motivation or reason to lend their support to the state, and could ultimately act against it.

It would be inappropriate at this juncture to speculate on the likely consequences for any state which relies on only a limited form of sovereignty through containing diverse cultural aspirations, as opposed to the recently-acquired sovereignty of states such as Croatia and Serbia, for example (which are evidently much more culturally cohesive). There are also issues of the fairness, equity, and even legitimacy of limited-sovereignty states and their political and legal relationships with the cultural minority groups which live within them.

3. THE HISTORICAL BACKDROP

A. Te Tiriti O Te Moana - The Gift of the Sea

The sea has played a dominant role in Polynesian cultures. For approximately 3,500 years, there have been civilisations inhabiting the myriad of islands which make up Polynesia in the southern part of the Pacific Ocean. Ceramics from what has become known as the Lapita culture have been found in Tonga dating from 920 BC. In Fiji, even older pieces of Lapita pottery have been unearthed and dated to around 1385 BC. In Samoa, the earliest traces of such pottery range from 1120 to 1250 BC.[1]

From about 0 to 300 AD, the Samoans, from whom the origins of much of eastern Polynesia can be traced, migrated to the Marquesas Islands, and by 400 AD, Polynesian populations had been established in Hawaii, Easter Island, and the Society Islands. By around 800 AD, it is estimated that the first Polynesian explorers reached Aotearoa.[2]

The pre-European Maori existed in structured, well-organised communities which made effective use of most of the resources available to them. The two predominant factors of production were labour and natural resources, chiefly in the form of the land and the sea. Technological development existed, but its impact on Maori was, for the most part, slight, and only took place gradually. Indigenous expectations of change in technology was virtually non-existent as the rate of change was slow that it would not be noticeable during a lifetime.

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1 J. Poulsen, *Early Tongan Pre-History, The Lapita Period on Tongatapu and its Relationships*, Vol. 1, Canberra, 1987, pp. 152-3.

2 I.C. Campbell, *A History of the Pacific Islands*, Christchurch, 1989, p. 33; R.G. Green, 'Adaptation and Change in Maori Culture', in G. Kuschel (ed.), *Biogeography and Ecology in New Zealand*, the Hague, 1975, pp. 621 and 624.

A problem with some of the earlier analyses of Maori economies is that the regions in which Maori lived tended to be seen as either impoverished or bountiful.[3] Neither of these polarised descriptions are of much use because they oversimplify the principle of relative economic scarcity. That is, the relative availability of resources compared with the demands on those resources. In essence, the structure of Maori communities developed within limited production functions.[4] Therefore, changes in population sizes as a result of droughts, storms, or disease causing starvation, or a succession of good harvests and an abundance of seafood pushing up the population growth rate, would have a proportionately dramatic effect on production requirements. Central to the economic functioning of Maori communities was that '...a ceiling existed on the level of attainable output per head'.[5] Modern technology and science, and the state of mind that accompanies it, was inaccessible to the Maori, and so in many aspects, life was prone to be much more erratic. If the population of a community reached its maximum sustainable level, then an increase in that population would impose a heavier burden on that community's natural resources and would result in diminishing returns for the labour input component. The sea proved to be the most consistent long-term food resource, and therefore an inherent reliance on, and bond with the sea grew during the 900 years of pre-European Maori society in Aotearoa.

Maori society, before the arrival of the European was intricate without being complex, and simple without being simplistic. There was an inherent flexibility in Maori communities which allowed progress to take place

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3 Bay of Plenty and Poverty Bay are perhaps the earliest examples of this.

4 W.W. Rostow, *Stages of Economic Growth: A Non-Communist Manifesto*, Cambridge, 1960, p. 4.

5 ibid. p. 5.

where needs dictated without the hindrance of a bureaucracy, over-centralised planning, and the rigidity of a written law.

During the earliest stages of human habitation in Aotearoa, a poor combination of foods in the diet, and the consequent malnutrition, reduced the life-expectancy, and in a few areas, life-expectancy fell to below 30 years.[6] Fertility among women at this time was also lower, resulting in only slow population growth up to the thirteenth century. The infant mortality rate was around 15 to 25 percent, based on information collected at Palliser Bay.[7] Although this is high by current standards, it was about average for most parts of the world during this time.[8]

This period has become known as the Archaic,[9] or more precisely, the Archaic Phase of New Zealand Eastern Polynesian Culture.[10] Its common label of the Moa-Hunter period, whilst convenient, is inaccurate: Most Maori living during this period would never have seen a Moa.

Much of what is known about this culture has come from the research of Roger Duff, who was in involved in the excavation of a twelfth century Maori settlement at Wairau Bar.[11] This research revealed a considerable amount about the diets, health conditions, and probable lifestyle of the time. The reliance on agriculture, for example, was comparatively weak at this stage, and cultivation was restricted almost entirely to the kumara, which was the staple root crop. The sea was still the primary food source.

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6 P. Houghton, *The First New Zealanders*, Auckland, 1980, p. 95.
7 D.G. Sutton, 'The Prehistoric People of Eastern Palliser Bay', in B.F. Leach and H.M. Leach, (eds.), *Prehistoric Man in Palliser Bay*, Wellington, 1979, pp. 188 and 199.
8 K. Wrightson, English Society, 1580 - 1680, London, 1982, p. 105.
9 J. Golson, *Archaeology, Tradition, and Myth in New Zealand Prehistory*, p. 381.
10 J.M. Davidson, 'The Polynesian Foundation', in W.H. Oliver and B.R. Williams, (eds.), *The Oxford History of New Zealand*, Wellington, 1981, p. 6.
11 R. Duff, *The Moa-Hunter Period of Maori Culture*, Wellington, 1977, introduction.

An excavation of fourteenth century camp sites at Purakanui Inlet provides sufficient evidence to indicate people living there over periods of several years having caught as many as 230,000 fish.[12] This was achievable through the Maori applying minor innovations to the traditional fishing techniques they had inherited from their Polynesian predecessors. Nets and traps were used in addition to hooks and lines, and the materials employed in their construction such as bone, and especially flax, gave them strength and durability. Middens (refuse from occupations)[13] reveal the presence of a wide variety of fish species. In Northland, snapper, trevally, and kahawai were the most common fish caught. In Cook Strait, terakihi and red cod made up the bulk of the catch, and off parts of the South Island, groper was the predominant species eaten.[14]

An excavation site at Mt Camel in Northland revealed that the inhabitants there between 1100 and 1250 AD hunted seals and dolphins as well as smaller sea creatures, and that such operations were carried out at on a large scale.[15]

Dr Murray Bathgate presented evidence to the Waitangi Tribunal, on behalf of the Crown, on the value of archaeological evidence as a record of Ngai Tahu's fisheries in pre-European times, and stated in his introduction that:

> ...in using the archaeological record we are, with certain provisos, in a better position of actually *knowing* what was caught.[16]

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12 J.M. Davidson, p. 140.
13 J.R.S. Daniels, *New Zealand Archaeology: A Site Recording Handbook*, Auckland, 1979, p. 29.
14 J.M. Davidson, p. 141.
15 A. Salmond, *Two Worlds, First Meetings Between Maori and Europeans 1642 - 1772*, Auckland, 1993, p. 34.
16 M.A. Bathgate, Crown expert, archaeological and early documentary record concerning Maori fishing in the South Island. Doc S2, p. 9.

However, it is not possible to rely solely on archaeological records to provide accurate indications of the nature of Maori fisheries,[17] (even though this is precisely what the Crown did in its submissions to the Waitangi Tribunal).[18] As Dr George Habib noted in relation to the Ngai Tahu claim to mahinga kai:

> It is this concept of what the *fisheries* were, and the implications of these fisheries for the pre-European Maori society, that is being debated: not specific details of daily existence.[19]

The Maori economy, of which the sea was an integral part, differed significantly from contemporary Western capitalist models. In traditional Maori society, the means of production such as land and labour had no monetary value assigned to them. Furthermore, apart from occasional inter-tribal claims to small areas of coast, the sea was basically a common good in as far as it provided benefits to everyone in the community, and the long-term costs for providing for an additional population increase would have been negligible. The notion that any part of the sea could have been a commodity exclusively and permanently *owned* was never considered, although user rights to certain areas of the coastline did exist.

For Maori, the land and the sea were not only sources of food - they were integral parts of their social make-up. There was an abundance of legends and stories concerning the sea, and the tohunga, or wise men, of each village held exclusive and sacred knowledge relating to appropriate fishing times, canoe building, and the construction and religious sanctioning of

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17 G. Habib, 'Assessment of Crown Evidence on the Mahinga Kai Fisheries Aspects of the Ngaitahu Claim, Wai-27', p. 94.
18 op. cit.
19 op. cit.

other apparatus associated with fishing.[20] Not only were sea animals used for food, but the bones and teeth of some fish were used for religious and ornamental purposes.

As Maori populations grew in the thirteenth and fourteenth centuries, a greater dependence developed on resources which were primarily local, and settlement patterns began to reflect this localisation of productivity.[21] This localisation often extended to the coast of the land where the tribe was based. In essence, Maori considered themselves to be custodians or stewards of the areas of sea which they utilised. Each hapu or iwi could claim what amounted to virtual exclusivity of access to their tribal area of sea through discovery, continual use, or ancestral right, although access was frequently granted to members from other tribes, particularly those tribe whose tribal area was land-locked.

With the arrival of the European, issues of 'ownership', or perhaps more precisely, sovereignty, were brought into a sharper focus.

B. The Importance of the Maori Understanding of Land

In December 1980, the Legislative Review Committee of the New Zealand Maori Council issued a statement which identified the importance and relevance of land to Maori:

> Maori land has several cultural connotations for us. It provides us with a sense of identity, belonging, and continuity. It is proof of our continued existence not only as people, but as tangata whenua of this country. It is proof of our tribal and kin group ties....It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance

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20 E. Best, *The Maori School of Learning - Its Objects, Methods, and Ceremonial*, Dominion Museum Monograph No. 6, Wellington, 1986.

21 G.R. Lethwaite, 'Life and Landscape in Ancient New Zealand', in R.F. Watters (ed.), *Land and Society in New Zealand - Essays in Historical Geography*, Wellington, 1965, p. 20.

> that we shall forever exist as a people, for as long as the land shall last.[22]

In 1978, Wiremu Parker, writing for a collection of essays commemorating the Silver Jubilee of Elizabeth II, expressed similar sentiments:

> For ever so long, land has been central in Maori thought. The source of his physical sustenance, of his very blood from time immemorial, the object of deep emotional attachment in song, poetry and oratory, the prized heritage of tribe and family, and lay at the very core of a people's mana. Land was for ever. [23]

These statements embody the strength of the bond between the identification of being Maori and the inherent metaphysical relationship with the land. The two are inseparable.

On a functional level, the geographical features of an individual's tribal territory became points in their very recognition as people. Such features as rivers, mountains, lakes, and so on were encapsulated in the myths and legends which were one of the pillars of the preservation of the social order. In addition, the land was a source of life-force - mauri, and so rituals such as tapu (which made certain ground sacred or forbidden) were entwined with the attitude towards the land.

As has already been mentioned, land was not seen by pre-European Maori as a transferable commodity. In essence, Maori considered themselves custodians or stewards of the land where they lived, rather than exclusive owners. Different groups could acquire stewardship of a particular area of land through conquest or discovery, continual occupation, or through

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22 Legislative Review Committee of the New Zealand Maori Council, *A Discussion Paper on Future Maori Development and Legislation*, December 1980.

23 W. Parker, 'The Substance that Remains', in I. Wards (ed.), *Thirteen Facets; The Silver Jubilee Essays Surveying the New Elizabethan Age, A Period of Unprecedented Change*, Wellington, 1978, p. 170.

ancestral right. Of these, ancestral right was always the greatest basis for a claim to occupation. From burying the placenta of newborn children, through to the burial of the dead, the Maori were literally, and in every sense, tangata whenua - people of the land. Tribal land would be used by generations with the expectation that its status would be unaffected (with the exception of infringements caused by conquest). There was no conception of land as an entity that could be exchanged for goods. After all, there could be no physical value placed on spiritual and ancestral ties to a territory.

It was with this entrenched view of land that the Maori chiefs approached the Treaty of Waitangi. Admittedly, though, the New Zealand Company had been active in purchasing land from Maori for many years prior to 1840, and it could be concluded from this that at least some Maori had a degree of familiarity with the economic status of land. Yet in these dealings, there was often doubt, confusion, and misunderstanding. One contemporary observer, George Clarke, (the Protector of Aboriginies) claimed that '...in no single instance of the [New Zealand] Company's purchases have they been explained fully [to the Maori]. Had they been so, I think that no purchase would have ever taken place'.[24] Maori were certainly never told that the New Zealand Company intended to relocate them, and sell their villages, gardens, and burial grounds to prospective settlers. It was never understood by Maori that they would be compelled to leave their lands, but this understanding of the transactions and intentions of the New Zealand Company was '...verbal only, and not recorded in the written document'.[25]

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24 G. Clarke Jnr. *Letters to His Father*, 27 June 1844.
25 E. Dieffenbach, *Travels in New Zealand*, Volume 2, London, 1843, p. 143.

In a letter to the Crown in 1831, a group of Maori chiefs wrote of the fear of the French removing them from their land, and stated that their only possessions were flax, timber, pork, and potatoes.[26] No indication was given by the Maori that their land was an economic possession, or that it was owned (in the commercial sense) by the chiefs or their tribe. The only concept relating to land exchange which is evident in the petition was that it could be taken by superior force.

The subsequent political domination of Maori by the British through the various devices of colonialism, and the accompanying processes of modernisation, reflected the one-sided nature of Britain's involvement in New Zealand. It was only in the late twentieth century that substantial attempts (like the Sealord Deal) at reconciling traditional Maori rights to resources with modern Western concepts of resources was attempted, although such attempts arguably succeed best at drawing attention away from the exploitative nature of the modernisation process itself.[27]

C. Early European Observations

Early European accounts of Maori fisheries from the late eighteenth and early nineteenth centuries provide a great deal of useful evidence on the practices, symbolism, extent, and type of Maori fishing.

The Church Missionary Society missionary and printer, William Colenso, wrote about the off-shore fishing that Maori were undertaking at Kawakawa in 1841. He noted that Hapuka were '...common on the New Zealand coasts; the natives having their marked spots [assigned exclusive

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26 Letter signed by thirteen Maori chiefs, forwarded by William Yate to the Colonial Secretary of New South Wales, and from there to the British Government, 16 November 1831.

27 A. M. M. Hoogvelt, *The Sociology of Developing Societies*, Second edition, London, 1978, p. 110.

areas] for fishing, near...shoals lying off the land in deep water'.[28] A notion of ownership therefore existed. Colenso's observations are also of interest because of what they reveal about the concept of possessing fishing areas in this part of the country: 'These preserves are all 'rahui' i.e. private; and scrupulously descend from the chief to his nearest relatives. Any infringement on such a fishing preserve was invariably resented, and often ended in bloodshed'.[29]

This extract provides a useful insight into one of the concepts of possession as held by at least some traditional Maori communities who were engaged in fishing. That the sea was not easily subdivisible did not detract from this sense of 'ownership'. Other contemporary accounts lend support to this notion:

> The sea-side is often tapued by certain tribes who possess the sole right of fishing....[30]

Connected with what appears to be rights associated with possession are matters relating to access to fisheries by inland tribes - something that has great significance in the details relating to the resolution of the Sealord Deal:

> There were also rights of another kind; in former times, it was almost necessary for the support of life to pay a visit to the sea coast during the scarce months; thus each inland tribe claimed a right to visit the sea shore, though included in another tribe's district, and even to have a fishing station close to those of others.[31]

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28 W. Colenso, *Excursion in the Northern Isalnd of New Zealand in the Summer of 1841-42*, Launceston, 1844, p. 7.

29 op. cit.

30 J.S. Polack, *Manners and Customs of the New Zealanders*, 2 Vols, 1840, reprinted Christchurch, 1976, p. 275.

31 R. Taylor, *Te Ika a Maui or New Zealand and its Inhabitants*, 1855, p. 357, in Waitangi Tribunal, Department of Justice, *Report of the Waitangi Tribunal on theMuriwhenua Fishing Claim*, Wai-22, Wellington, 1988, p. 17.

Evidence from the journals of Captain Cook, and Joseph Banks, points to the extent and reliance the Maori had on the fisheries resource:

> At 8 being about 2 Miles from the shore some Canoes that were out fishing came to our Ship....[32]
> They catch fish with Saines, hooks and lines but more commonly with hooped netts very ingeniously made, in the middle of these they lie the bait such as sea ears, fish gutts & c than sink the nett to the bottom with a stone....[33]

Several additional references in the report are made to the availability of fish and the methods the Maori employed to catch them. Early European traders and explorers frequently mention fish as being part of the staple diet of most Maori, particularly those Maori living in coastal areas.

In an article on the status of the Maori economy around 1840, Robert Merrill observed that '...Maori technology was based on...fresh-water and ocean fishing using well-built wooden canoes, weirs, nets, and other devices'.[34] Ample additional evidence exists, much of which has been presented in various Waitangi Tribunal reports, to show that traditional Maori fishing practises had '...sustained our people [Maori] for centuries, it has been admired, envied, sung about, and fought over...'.[35]

By the time of European arrival, and certainly by the time that the Treaty of Waitangi was signed, Maori fishing was at an advanced stage - well beyond mere subsistence fishing to supply local communities. Captain

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32 *Cook's Journals*, 30 October 1769, Vol. 1, p. 187, quoted in, Department of Justice, Waitangi Tribunal, Dr George Habib, *Ngai Tahu Claim to Maihinga Kai. Part One - Report on Ngai Tahu Fisheries Evidence*, Auckland, June, 1989, p. i.

33 Cook's Journals, March 1770, Vol. 1, p. 283, quoted in, Department of Justice, Waitangi Tribunal, Dr George Habib, *Ngai Tahu Claim to Maihinga Kai. Part One - Report on Ngai Tahu Fisheries Evidence*, Auckland, June, 1989, p. ii.

34 R.S. Merrill, ' Some Social and Cultural Influences on Economic Growth: The Case of the Maori', in The *Journal of Economic History*, Vol. 16, No. 4, New Your, 1954, p.402.

35 Waitangi Tribunal, Department of Justice, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai-22, Wellington, 1988, p. 17

Cook noted that on many occasions, local Maori iwi and hapu were immediately able to supply his whole crew with more fish than they could eat and store.[36] For centuries, fishing had been an integral part of the Maori economy.[37]

The relationship between Maori and their fisheries was to change in the decades following the signing of the Treaty of Waitangi, and the very status of Maori fisheries under the Treaty, provided the backdrop to the emergence of the Sealord Deal. The interchange between the two cultures had led, by the 1860s, to the cultural, political and economic domination of one society over the other, and this in turn led to what has been described as 'problems of development', and 'symptoms of underdevelopment'.[38] In the terminology of Lenin, the centre had successfully managed to organise and virtually monopolise the resources of the periphery,[39] to consolidate their monopolistic power position. The fisheries are a case in point - by the mid twentieth century, the control of the resource had beentransferred from numerous hapu and iwi to a small cartel of European 'owners'.

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36 Department of Justice, Waitangi Tribunal, Dr George Habib, *Ngai Tahu Claim to Maihinga Kai. Part One - Report on Ngai Tahu Fisheries Evidence*, Auckland, June, 1989, Preface.

37 W.B. Sutch, *The Maori Economy - A Survey to the Time of the Coming of the European*, a paper prepared for the opening address to the New Zealand Federation of Maori Students at Victoria University, Wellington, 15 May 1964.

38 A. M. M. Hoogvelt, p. 65.

39 V. I. Lenin, *Imperialism: The Highest Stage of Capitalism*, London, Lawrence and Wishart, 1916, p. 131.

4. THE TREATY OF WAITANGI

A. The Text and Legality of the Treaty

It could be argued that the Treaty was not intended at the time to be a constitutional document, and that it only acquired this status at a later stage. By definition, a constitution means that there is a body of rules determining or providing the necessary procedures for determining the organisation, personnel, powers, and duties of the organs of government.[1] Thus, the question revolves around what probable philosophies were being expressed through the text of the Treaty.

This task is made fairly awkward by two facts. Firstly (from a British legal perspective), the length of the Treaty is insufficient to derive any great substance from it, and secondly, there was an overriding purpose for the Treaty, which related to the cession of sovereignty to the British Crown.

The Treaty's separation from what could generally be described as 'legality' is explainable by the fact that laws per se can only exist within societies. The idea that a legal agreement could be concluded between two quite distinct nations assumes that those nations constitute a single society, with all that that entails. The rise of the modern state system from the sixteenth century undermined the tradition of the unity of Christendom which had, at least for a time, constituted a real sense of society among the nations involved. Even in the example of the British colonisation of New Zealand, it is evident that economic motives are an insufficient base for interdependence or a sense of inter-nation solidarity. The focus on material acquisitions is '...not enough without a common social

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1 K. J. Scott, *The New Zealand Constitution*, Oxford, 1962, p. 1.

consciousness; without that they are as likely to lead to friction as to friendship'.[2]

A fundamental element in any society is an element of shared responsibility for the conduct of a common life. The Treaty of Waitangi was accepted in good faith by the Maori because they believed that it would be in their interests to sign it. As there was (and is) no effective means of enforcing this sort of international agreement, goodwill and mutual benefit rather than legal compulsion were the motivating factors.

Another dimension to the text of the Treaty was its connection, for Maori at the time of signing, with the mixture of literacy and Christianity that was beginning to permeate traditional Maori society. It has been suggested that the existence of a written form of the Maori language was central to Maori literacy development, particularly in the 1830s: 'Once writing had been introduced to them [Maori], and their own language, through missionary effort, reduced to written form, the Maoris acquired a passion for this art. They wrote everywhere, on all occasions and on all substances'.[3] As early as the 1820s, well before New Zealand had any political structure, and when the entire European population in the country numbered in the hundreds, moves were being made to develop a Maori dictionary and to translate portions of the Bible into Maori. Some early European arrivals, particularly missionaries and some traders, actually learnt Maori, and in the case of one missionary, Thomas Kendall, made an effort to record the details about the Maori language and its grammar.[4] The translation of the Bible into Maori made literacy an imperative and introduced the ideal of a community '...which was nomothetically both possible and desirable for certain Maori groups'.[5] Furthermore, allusions to the Bible, political

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2 Brierly, 'The Law of Nations: International Law as *Law*' sixth edition, 1963, in D. J. Harris, *Cases and Materials on International Law*, second edition, London, 1979, p. 1.

3 A. Ngata and I. L. G. Sutherland, *The Maori Today*, Wellington, 1940, p. 343.

4 K. Sinclair, *A History of New Zealand*, Auckland, 1988, p. 38.

5 P. Cleave, 'Language and Authority in the Ethnic Politics of New Zealand (Aotearoa): A Case Study of the Treaty of Waitangi', in *Ethnic and Racial Studies*, Vol. 9, No. 3, London, July 1986, pp. 85-6.

agendas, and literacy became entwined.[6] This is evidenced in the translation of the Treaty of Waitangi into Maori.[7] The Maori version of this segment of the Treaty reads:

> Ko reira te mutunga ina oti te rangatiratanga, te hoatu e ia ki te Atua te Matua, ina oti te whakangaro te Kawanatanga Katoa, te mana Katoa me te Kaha.
>
> Then cometh the end...and when he shall have put down all rule and all authority and power.

The word 'Kawanatanga' - a missionary neologism - was critical to this political/ religious/ linguistic mix. According to Cleave, 'In introducing *Kawanatanga* the missionaries seem to have preferred not to give a transliteration for 'rule' but to substitute 'government' for 'rule' and to arrive *from this* at the transliteration of 'government', *Kawanatanga*.[8] The difficulties relating to the Maori and English versions of the Treaty are not based solely on varying translations, but are founded on two distinct modes of political and cultural understanding being brought into contact.[9] This is based on the idea that societies develop language and concepts with which they can discuss and articulate political issues.[10] This is usually allied to some degree of isolated political development, and explains differences in the Maori and European understandings of the role and purpose of the Treaty. Many Maori saw the Treaty primarily as a verbal agreement[11] (which traditionally held as much if not more strength for Maori than written documents did for Europeans). In addition, the other party to the Treaty - the Crown - was perceived by some Maori to be a fusion of British law and Christianity.[12] The spiritual and temporal laws of Britain

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6 ibid. pp. 84-5.
7 R. M. Moss, 'Te Tiriti o Waitangi: Texts and Translations', in *New Zealand Journal of History*, Vol. 6, 1972, pp. 129 - 157.
8 P. Cleave, p. 385.
9 ibid. p. 392.
10 J. G. A. Pocock, 'The History of Political Thought: A Methodological Enquiry', in W. G. Runciman and R. Laslett (eds.), Oxford, 1967, cited in P. Cleave, 1986, pp. 392-3.
11 C. Orange, *The Treaty of Waitangi*, Wellington, 1987, p. 45.
12 M. Henare, 'Nga Tikanga Me Nga Ritenga o Te Ao Maori: Standards and Foundations of Maori Society', in *The April Report of the Royal Commission on Social Policy*, Vol. 3, Wellington, 1988. p. 33.

were understood to be embodied in the person of Queen Victoria, and it followed from this therefore, that the Treaty was as much a spiritual agreement as it was a 'legal' one. Sir Apirana Ngata later described the Maori understanding '.. of religion and civil law as [being] one. The functions of his [Maori] religion took the place of what Pakeha calls civil law as the restraining and controlling force in the Maori commune. Western civilisation, when it reached New Zealand, presented a combination of Christianity and British law....He [Maori] assumed the law and the Gospel to be one'.[13] In this context, the language of the Treaty would have had significance for Maori beyond the mere provisions of the document, and the document itself would have, and did acquire a symbolism that was almost esoteric, and was out of all proportion to the role the Crown envisaged the Treaty playing in the development of the country. This collision of two political mind-sets remained unresolved at the time the Treaty was signed.

An absence of a strong legal dimension to the Treaty of Waitangi is consistent with this understanding of international law. Ultimately, the great majority of rules governing international engagement are '...generally unaffected by the weakness of its system of enforcement, for voluntary compliance prevents the problem of enforcement from arising altogether'.[14]

Bearing this in mind, the singularly legal aspect of the Treaty would have been minimised, as was the case. The purposes of the Colonial Office in concluding a treaty with the Maori have already been covered. The Colonial Office realised that there was a need to take some sort of stance on New Zealand. This required the cession of sovereignty, absolute control of all matters relating to land, and authority to impose law and order on both Maori and non-Maori.[15] But despite these requirements, significantly, the Colonial Office had no draft or even outline for a treaty

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13 A. Ngata and I. L. G. Sutherland, 'Religious Influences', in I. L. G. Sutherland, (ed.), *The Maori People Today*, Wellington, 1940, pp. 334-5.
14 Morgenthau, 'Politics Among Nations', fourth edition, 1967, in D. J. Harris, p. 7.
15 C. Orange, p. 36.

with the Maori. And when the Treaty of Waitangi was finally complete, the text revealed that its authors had intentions above those demanded by the Colonial Office. Busby's draft,[16] based on notes he received from Hobson and Freeman, gave guarantees to the Maori which the Colonial Office would certainly have seen as unnecessary. This was evidently no accident. The fact that the final version of the Treaty was agreed on by more than one British official tends to negate the possibility that it was the product of an overzealous humanitarian who was an anomaly in an otherwise stable system. Lord Glenelg, the Secretary of State for the Colonies, was also '...reluctant to admit that colonisation in any form was desirable for New Zealand'.[17] Glenelg had previously been involved in the Church Missionary Society which had publicly and energetically opposed the de facto sovereignty that the New Zealand Company, under Wakefield, was implementing.[18] It was partly his opposition to the intrusions into New Zealand that the New Zealand Company was making that he instructed that a Treaty between the Crown and Maori be concluded.

The most probable conclusion that can be drawn from the 'humanitarian' elements of the Treaty's text is that the concerns of its authors were broader than those of the Colonial Office. There is clear evidence of the '...interest of the community',[19] being considered, and the lack of a complex and precise legal document points to a utilitarian motive. The utilitarian dichotomies of pain and pleasure, and right and wrong, and the overwhelming importance placed on achieving the greatest degree of good for the greatest number of people, suggests that at the least, this was a subconscious force in the minds of the Treaty's authors.

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16 Busby Letters and Papers, submitted to Hobson on 3 February 1840, MS 46, f.6, Auckland Institute and Museum Library.

17 C. Orange, p. 25.

18 P. Adams, *The Fatal Necessity: British Intervention in New Zealand, 1830 - 1847*, Auckland, 1977, pp. 94-102.

19 J. Bentham, 'Of the Principle of Utility', in *An Introduction to the Principles of Morals and Legislation*, London, 1822.

B. Maori Perception of the Treaty

At the time of the signing of the Treaty of Waitangi in 1840, European cultural penetration into Maori was still comparatively slight. Maori was still the first language of practically all Maori, and most Maori cultural values and practices prevailed in Maori communities - even in those communities where European settlement was beginning to flourish. However, the diffusion of Western cultural and structural forms, for which the Treaty of Waitangi is an important marker, brought in its wake '..a trail of problems arising out of the conflict of modern and traditional social and cultural patterns'.[20] Indeed, it could be argued that the Treaty itself was a prime tool in the process of alienation of Maori from their traditional resources - not through the provisions of the Treaty per se - but through its highly selective application, interpretation, and eventual dismissal by the European-dominated governments.

Even applying a conventional historical analysis to the origins of the Treaty of Waitangi involves the considerable risk of making the themes associated with the Treaty being moulded to fit the terminology used to describe them. While this may work in a European context, it results in barriers to achieving an understanding of the Treaty from a Maori perspective.

The essence of the Treaty of Waitangi from this Maori standpoint was summed up by the late Sir James Henare:

> My own thoughts regarding the Treaty of Waitangi is that it is a sacred treasure. It was made so when the rangatira signed it with a representation of their personal moko. These rangatira, our ancestors, were tapu, possessed of infinite knowledge. They were tohunga because they were ariki.[21]

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20 A. M. M. Hoogvelt, p. 110.

21 J. Henare, quoted in A. Blank, M. Henare, and H. Williams (eds.), 'He Korero Mo Waitangi 1984', Te Runanga O Waitangi, 1985, p. 113.

The Maori attitude towards the Treaty, as revealed above, adds considerable strength to the relevance of the document to the Maori at the time when it was signed. From the Maori view, the Treaty was a covenant in which the various promises and conditions acquired an almost sacred complexion.[22] This was enhanced by the chiefs placing the mark of their moko on the Treaty. It was a visual representation, identified among Maori as being more powerful than a signature, and was symbolic of their mana which they derived from their hapu and iwi, and was never taken lightly. By contrast, some European legal points of view, though less prevalent now, asserted that only the acts and attitudes of 'civilised' nations mattered in relation to agreements such as the Treaty of Waitangi[23] - a belief predicated on the notion that non-Europeans were non-civilised.

C. The Relevance of a Written Document to the Maori

The question of the relevance of the Treaty to Maori at the time it was signed, and even its validity, hinges on whether the Maori signatories actually comprehended the concept that making a mark on a document could have the effect of equating with a transfer of their kawanatanga, let alone their sovereignty (mana) which was the term used in the English text.

On the surface, it would appear that the concept of literacy among Maori was only weakly developed, and the difficulties of measuring Maori literacy as it was in 1840[24] add to the uncertainty about the validity of the Maori signatures and marks on the Treaty.

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22 I. H. Kawharu, 'Sovereignty and Rangatiratanga, the Treaty of Waitangi 1840 and the New Zealand Maori Council's Kaupapa 1983', Paper delivered to the Waitangi Tribunal in connection with the Kaituna Claim, 1984, p. 11.

23 E. T. J. Durie, 'The Treaty in Maori History', in W. Renwick (ed.), 1991, p. 158.

24 The measurement of literacy has always been problematic. Some people were taught to read, without ever having learnt to write, and so evidence of their literacy levels usually leave no trace. Furthermore, measurements such as the ability of a person to sign their name is inadequate because research has revealed than many people were taught to write their name, yet could neither read nor write anything else.

Pre-European Maori only heard words - they had no conception of seeing them, and this impacted on the particular perception of life that Maori held, and even to the way in which social structures and hierarchies emerged. Professor Walker has argued that 'The Maori readily learned the symbolling system of the written word since it was seen as an extension of their own symbolling system in the art of carving'.[25] However, this analysis is not only too simplistic in its assumptions about writing being an extension of carving (there is a developmental gap between carved symbols, or ideograms, and the 'phoneticization' of symbols, that is, their direct association with a particular sound or sounds),[26] and is based on the unsubstantiated belief that all those Maori who acquired literacy skills prior to 1840 (predominantly children) would be not only familiar, but also competently able to interpret carvings.

Professor Walker's claim also bypasses consideration of the very concept of a written language. The process of literacy acquisition extends beyond merely the ability to decode and recreate the written word. Notions of documents as objects having the power to affect huge areas of people's lives took time to be absorbed by Maori. Even as late as 1840, it is probable than many Maori had yet to fully seize the importance of the written word.

However, the Treaty was not just a written document. It was, as far as the overwhelming majority of Maori who attended at Waitangi in February 1840, also a spoken agreement. Hobson explained the purpose of the meeting to the assembled chiefs (and explanation which was translated into Maori), and the Maori text was read out to the gathering clause by clause,

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25 R. Walker, *Ka Whawhai Tonu Matou - Struggle Without End*, Auckland, 1991, p. 85.
26 C. L. Barber, *The Story of Language*, London, 1972, pp. 43-4.

interpolated by explanations in Maori.[27] Therefore, even if the concept of the written document was not completely comprehended by some Maori, it is still the case that all the Maori present would have *heard* the Treaty (the Maori translation as well as the English version),[28] and this, coupled with the explanations provided in Maori, removes any doubt about whether the Maori signatories knew what they were agreeing to.

D. The Maori Belief in the Treaty as a 'Legal' Document

It has been suggested by Manuka Henare that the Treaty of Waitangi was seen by the chiefs who signed it as a constitutional and legal document,[29] and that this consequently led to a heightened awareness among Maori of their own sovereignty. As far as the latter is concerned, the issue of sovereignty has already been covered in this work, suffice to say at this juncture that the sentiment of Maori sovereignty among Maori was prevalent well before 1840.

The implication that because some Maori perceived the Treaty as a legal document, a basis is therefore provided for the Treaty having some legal status, is of course wrong. The Treaty's only claim to legality is its tenuous recognition in international law as an agreement signed between two sovereign states. The Treaty of Waitangi is clearly not a contract, it contains no provisions for remedies and nor was it concluded in a system which already provided remedies, it was not an act of a parliament or other legislative institution, and due to its distinctly non-legal wording, subsequent attempts to enact it as some sort of enshrined document within

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27 C. Orange, p. 45.
28 op. cit.
29 M. Henare and M. Douglas, 'Te Reo o Te Tiriti Mai Rano: The Treaty Always Speaks', in *The April Report of the Royal Commission on Social Policy*, Volume 3, Part 1, 'Future Directions Associated Papers', Wellington, 1988, p. 88.

New Zealand's constitutional framework have never progressed far.[30] As the head of the Waitangi Tribunal put it, the Treaty '...is founded not on legislation but on a philosophy of good faith'.[31]

New Zealand did not have its own legal or administrative system at the time the Treaty was signed, and so the Treaty does not fall into the context of this country's legislative framework. Furthermore, legislation passed in New Zealand after 1853 (shortly after New Zealand acquired the capacity to produce its own legislation as a result of the passing of the New Zealand Constitution Act 1852 in the British Parliament) gave virtually no practical recognition to the provisions of the Treaty, and until the relatively recent attempts at giving partially legal recognition to the Treaty through institutions such as the Waitangi Tribunal, (whose brief is to advise and recommend to the Government. It has no power to make decisions that are legally enforceable) the courts have had no jurisdiction to preside over cases which are based solely on the provisions of the Treaty of Waitangi.[32]

Since the time of the signing of the Treaty, judges cannot be criticised for failing to give recognition to the Treaty as part of the country's constitution because there was no basis on which they could do so.[33] Justice Somers concluded in 1987 that 'Neither the provisions of the Treaty of Waitangi nor its principles are as a matter of law, a restraint on the legislative supremacy of Parliament'.[34] Over one and a half centuries after the Treaty was concluded, the judiciary has perhaps come closest to implying the

30 Prime Minister Palmer attempted to get the Treaty of Waitangi included and enshrined in his later version of the proposed Bill of Rights in the late 1980's, but was unsuccessful partly because the Treaty lacked the precision of an act or bill.

31 E. T. J. Durie, 'The Treaty in Maori History', in W. Renwick, (ed.), 1991, p. 156.

32 M. Lawrence, *Legal Studies, A First Book on New Zealand Law*, Second Edition, Palmerston North, 1990, p. 110.

33 F.M. Brookfield.

34 Justice B. J. Somers, 'Court of Appeal Judgements in the New Zealand Maori Council v Attorney General et. al.', in P. Haig (ed.), *New Zealand Administrative Reports*, Volume 6, Part 12, 1987, p. 399.

Crown's direct obligation under the Treaty by referring to '...the honour of the Crown....[which] captures the crucial point that the Treaty is a positive force in the life of the nation and so in the Government of the country'.[35]

To get some appreciation of how the Maori came to recognise the Treaty as having some sort of legality, other factors need to be evaluated.

The first area which requires examination is that of the provisions of the Treaty coinciding with common law obligations with respect to customary and traditional Maori tribal rights to land and fisheries.[36] The fact that the Government and the Judiciary did not fulfill their obligations to Maori under common law does nothing to detract from the significance of this obligation which has existed since the Treaty's inception. There were examples of precedent emanating from the experience of the colonialists in the United States where recognition was given (albeit all too infrequently) to the rights of the native Americans.[37]

Secondly, throughout the latter part of the nineteenth century in particular, Maori still clung to the Treaty of Waitangi as a clear basis for their grievances against the Crown, even though legal opinion in particular '...stymied the exposure of a Maori view'.[38] The Kotahitanga movement urged the Government of the day to protect Maori rights, not as part of some humanitarian obligation to indigenous peoples, but specifically under the provisions of the Treaty of Waitangi.[39] It was the Treaty which also provided the justification for the Member of Parliament for Tai Tokerau in

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35 Justice Richardson, in P. Haig (ed.), p. 390.
36 See Article the Second of the Treaty of Waitangi.
37 D. N. Brown, 'Native Americans and the Right of Self-Government in the United States', in W. Renwick, (ed.), 1991, pp. 36 - 44.
38 E. T .J. Durie, 'The Treaty in Maori History', in W. Renwick, (ed.), 1991, p. 158.
39 J. Williams, *Politics of New Zealand Maori*, London, 1969, pp. 51-2.

1894, Hone Heke (the grand-nephew of his namesake) to introduce a Bill which provided for a separate Maori system of government - partly because of his expressed view that the provisions of the Treaty had been violated.[40]

As part of its submission to the Royal Commission on Social Policy, the Department of Maori Affairs emphasised this Maori perspective:

> Maoridom has always seen the Treaty as a fundamental constitutional fact that provides the basis for economic, cultural, and social rights....Virtually all Maori political movements since at least the 1850's have looked to Government to uphold the principles of the Treaty....Maori opinion is emphatic that the Treaty of Waitangi must influence all legislation, policy, and administrative decisions.[41]

This distinctive Maori view of the Treaty was symptomatic of a legacy that extended back for decades before the Treaty of Waitangi came into being, during the period when Maori were in the process of becoming familiar with the British colonisers. The missionaries in particular, who played vital roles in the drafting, translating, and promoting of the Treaty,[42] were fundamental to the Maori perception of the Treaty as a legal document. For Maori at the time, Christianity and British law were identified as virtually the same thing.[43] This notion was enforced among Maori by the still strongly lingering traditional view, described early this century by Sir Apirana Ngata as an understanding:

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40 H. Heke, quoted in M. Henare and M. Douglas, p. 97.

41 T. M. Reedy, 'Submissions to the Royal Commission on Social Policy', for the Secretary, Department of Maori Affairs, Wellington, 1987, pp. 1-5.

42 C. Orange, p. 39, and R.M. Moss, 'Te Tiriti O Waitangi, Texts and Translations', in *New Zealand Journal of History*, Volume 6, 1972, pp. 129-157.

43 M. Henare, 'Nga Tikanga Me Nga Ritenga O Te Ao Maori: Standards and Foundations of Maori Society', in *The April Report of the Royal Commission on Social Policy*, Volume 3, 1988, p. 33.

> ...of religion and civil law as [being] one. The functions of his [Maori] religion took the place of what the Pakeha calls civil law as the restraining and controlling force in the Maori commune. Western civilisation, when it reached New Zealand, presented a combination of Christianity and British law....He [Maori] assumed the law and the gospel to be one.[44]

If there was any uncertainty on behalf of the chiefs about the impact or possible outcomes of a commitment such as the Treaty of Waitangi, then the chiefs would rely on the guidance of the missionaries in good faith.[45] This symbolic bond between spiritual and temporal leadership as represented by the Crown was a concept that was a natural part of pre-European Maori society in which the temporal was the spiritual, or vice versa. Was not the British Queen also the head of the English Church?

Thus, the missionary involvement in guiding Maori towards signing the Treaty of Waitangi had the effect of clouding the non-legal nature of the Treaty for the Maori signatories.

E. Maori Understanding of the Treaty's Provisions in 1840

Separate consideration needs to be given to the Maori understanding and expectations of the Treaty of Waitangi. It must be separate because it involves assessing the Maori understanding of a device of foreign policy which was uniquely European, and for which there was no Maori equivalent. The distinction is therefore between the perception of the Treaty from a Maori dimension and the specific interpretation the Maori applied to the Treaty.

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44 A. Ngata and I. L. G. Sutherland, 'Religious Influences', in I. L. G. Sutherland (ed.), *The Maori People Today*, Wellington, 1940, pp. 334-335.

45 M. Henare, 'Nga Tikanga Me Nga Ritenga O Te Ao Maori: Standards and Foundations of Maori Society', p. 33.

A useful starting point for the examination in this area is an analysis of the significant words in the Treaty, and how they were understood by Maori. This can also help to minimise the speculative nature of reviewing the attitudes of people of another time.

The European concepts of 'sovereignty' have already been discussed, but their translation into Maori in the Treaty relied on the use of the then neologism 'kawanatanga'. According to Claudia Orange, the decision to use this translation was not a happy one.[46] Kawanatanga implies governance,[47] or more specifically, Crown governance.[48] From a Maori standpoint, this amounted to virtually an administrative, custodial role, and was almost certainly not interpreted as a cession of sovereignty. The distinction would have been clear to many Maori because five years prior to the Treaty of Waitangi being signed, the word 'sovereignty' had been used in the Declaration of Independence, which at that time had more appropriately been translated into Maori as 'mana'.[49] This would then appear to give an added endorsement to the view that the Maori understanding of their sovereignty was not at all being affected by the signing of the Treaty of Waitangi. This raises the question of what precisely did the Maori cede to the Crown?[50] A question which is made even more difficult to fathom when other passages of the Treaty are scrutinised.

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46 C. Orange, p. 40.

47 H. Kawharu, translation of the Treaty of Waitangi given to the Court of Appeal in 1987, in *New Zealand Maori Council v Attorney-General* [1987] I, New Zealand Law Report 641.

48 E. T. J. Durie, 'The Treaty in Maori History', in W. Renwick, (ed.), 1991, p. 166.

49 *He Whakaputanga o te Rangatiratanga o Nu Tireni - A Declaration of the Independence of New Zealand*, 1835.

50 M. Szaszy, 'Appendix I: The Treaty of Waitangi' in, *The April Report of the Royal Commission on Social Policy*, p. 270

The phrase 'tino rangatiratanga', which appears in the Maori translation of Article the Second of the Treaty, appears in the English version as a reference to full, exclusive, and undisturbed possession by the chiefs and their families of their lands, estates, forests, and fisheries. However, Maori understood this chieftainship to mean considerably more than mere physical possession.[51] 'Full authority'[52] may be a more appropriate phrase, but even this does not adequately capture the essence of tino rangatiratanga. The definition is also political in that it extends to Maori self-determination: '...to link in with their goal of Maori [self]-development'.[53] This too must prompt the question of what, if anything, did the Maori believe they were ceding to the British Crown in 1840. A possible answer rests in a Maori view which received a deserved airing in the Rigby-Koning Report to the Waitangi Tribunal in 1990 in which it was suggested that Maori may have expected that they would govern not only themselves, but also any Europeans resident in their tribal areas.[54] Thus, Maori apparently believed that they would continue to govern themselves as they had for a thousand years, while the British Crown would be responsible '...for the maintenance of peace and the control of unruly settlers'.[55] Therefore, Maori may have believed that, in fact, they were ceding nothing.

McHugh argued that rangatiratanga was '...not a form of legal sovereignty apart from that of the Crown'[56] because the Crown would not have been able to confirm and guarantee[57] to Maori the possession of their lands,

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51 C. Orange, p. 41.
52 E. T. J. Durie, 'The Treaty in Maori History', in W. Renwick, (ed.), 1991, p. 157.
53 M. Szaszy, p. 270.
54 Rigby-Koning Report to the Waitangi Tribunal', in 'The Muriwhenua Land Claim', 1990, quoted in E. T. J. Durie, 'The Treaty in Maori History', in W. Renwick, (ed.), 1991, p. 158.
55 E. T. J. Durie, 'The Treaty in Maori History', in W. Renwick, (ed.), 1991, p. 157.
56 P. McHugh, quoted in W. H. Oliver, *Claims to the Waitangi Tribunal*, Wellington, 1991, p. 80.
57 See Article the Second of the Treaty of Waitangi.

forests, and fisheries, as the Treaty promised, had the Crown not assumed full legal sovereignty. Accordingly, the Maori expectation in 1840 was:

> ...that they would be subjects, but subjects 'with substantial rights reserved to them under the Treaty', and the efforts of the chiefs to retain 'a form of autonomy' showed a desire for a kind of local self-government.[58]

Yet this does not fit comfortably with the Maori translation of the Treaty in which the sort of full legal sovereignty which is discussed above was not only not included, but the substitute - kawanatanga - specifically implied something other than this complete European conception of sovereignty. Kawanatanga referred to the power exercised by the Governor (William Hobson) which at the time was very slight, and importantly, confined mainly to the *Europeans* in New Zealand.

This evidence of the conflict between the translations remains unresolved. The Waitangi Tribunal concluded that kawanatanga meant something less than sovereignty, although sovereignty was somehow meant to be 'implicit from surrounding circumstances'[59] - a claim that is incommensurate with the promise of full authority by Maori over their lands, homes, and prized possessions, and the exercising of rangatiratanga.

F. Maori Non-Signatories of the Treaty

The Treaty of Waitangi did not meet with uniform approval among Maori. As copies of the Treaty were circulated around the country, with missionaries in some cases given the authority to act as official negotiators, it is perhaps not surprising that the euphoria and sense of occasion that accompanied the hui at Waitangi (which was the prelude to the first Maori

58 W. H. Oliver, *Claims to the Waitangi Tribunal*, p. 80.
59 *Orakei Report to the Waitangi Tribunal*, Wai-9, 4 November 1987.

signatures being placed on the Treaty) was not matched elsewhere. Governor Hobson, did not attend most of the Treaty signings (due to illness) and was forced to give instructions to the missionaries to ensure that Maori clearly understood the principles and purpose of the Treaty before they signed it.[60]

The expectation among some Maori at the time of the signing that the Treaty would, '...not allow us to become slaves...[but] preserve our customs and never permit our lands to be wrested from us',[61] was not immediately fulfilled. No definitive word had reached those who were yet to sign the Treaty that it had achieved anything for Maori. Yet most chiefs and tribal representatives, relying and trusting in the goodwill of the missionaries, signed the Treaty during the months subsequent to February 1840. However, what of those chiefs who did not sign the Treaty? How does their status (or lack thereof) under the Treaty affect issues of Maori sovereignty, and therefore the validity of the Treaty itself?

One of the most significant non-signatories of the Treaty of Waitangi was Te Wherowhero, who was later to give his followers a renewed sense of direction through his leadership of the King Movement, which aimed at the establishment of a Maori state that was autonomous from European intervention and influence. Te Wherowhero's determination to abstain from signing the Treaty was not motivated by a personal contempt for the British, but a desire to protect and maintain all that was Maori. It has also been suggested that his refusal to sign came, in part, from an absence of pomp afforded him by the missionaries when the Treaty was being

60 Brown Journal, 1 April 1840, Auckland University Library, cited in C. Orange, p. 69.
61 Tamati Waka Nene, a senior Ngapuhi chief speaking at the hui at Waitangi on 5 February 1840, cited in K. Sinclair, p. 71.

discussed with him,[62] although in the light of later events, such an explanation appears patronising, superficial, and possibly even derogatory.

The Arawa and Ngati Tuwharetoa confederations also failed to be persuaded by the missionaries' arguments when discussing the Treaty, and so were also technically excluded from the Treaty commitment.

An answer to how this affected the overall Maori consent to the Treaty, and the burden it places on establishing a collective Maori sovereignty, can possibly be found in very recent events which have many similarities with the quest for a Maori mandate for the Treaty of Waitangi in 1840. When a mandate from Maori was required for the so-called 'Sealord Deal' in 1992, various hui were held around the country to gauge Maori opinion, even though the Deal was virtually a foregone conclusion. However, even though there were at least 13 dissenting tribes who made clear their opposition to the Deal, the negotiators claimed overall Maori support.[63] Despite the presence of Maori opposition to the Deal, the settlement went ahead on the basis of majority Maori support. The Waitangi Tribunal, in its report of the Sealord Deal, observed that there was no single structure to determine who are iwi and who represent them on a national basis. Because of this, the assessment of Maori opinion was deemed to be acceptable through the process of holding general hui.[64] Indeed, the comments made by former Prime Minister, David Lange, about the Sealord Deal could equally apply to the Treaty: 'No lawyer would dream of

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62 Letter from Symonds to Colonial Secretary, 12 May 1840, in Great Britain Parliamentary Papers (311), p. 102, cited in C. Orange, p. 70.

63 Te Puni Kokiri, Ministry of Maori Development, *National Hui on the Appointment of the Treaty of Waitangi Fisheries Commissioners*, Wellington, 16 February 1993, p. 8.

64 Waitangi Tribunal, *The Fisheries Settlement Report 1992*, Wai-307, Wellington, 1992, pp. 23-24.

negotiating a settlement on a mandate as unstructured as is currently relied on to represent the aspirations of the Maori'.[65]

The tacit consensus on the Treaty of Waitangi appears to have been that the majority of Maori chiefs who signed the document did so in a capacity that was satisfactory *as far as the British were concerned* to constitute *sufficient* evidence of Maori sovereignty, and so universal Maori endorsement of the Treaty was not the principal objective[66] or an expected outcome. This seems to have been adequate for the Colonial Office. In October 1840, British sovereignty over New Zealand was officially confirmed, which was the closest the Treaty ever came to being ratified.

The overriding problem for the British in acquiring unanimous Maori support for the Treaty was that Maori society at the time (and arguably still) was not organised or structured as a single national entity. Yet this is an imperialist view because it deliberately attempts to merge structure with unanimity of ideas, and implies that Maori did not have the capacity or the choice to be pluralistic in their political viewpoints. Therefore, the general endorsement which the Treaty received from Maori was considered sufficient by the British, or perhaps more precisely, adequate because it suited the needs of the British at that particular point in time.

The entire issue of the status of the Maori non-signatories of the Treaty has been made almost impossible to disentangle due to the particular economic, political and social developments that have taken place since 1840. However, at the time of the Treaty's signing, the issue of the status of the non-signatories is significantly clearer. The chiefs of Waikato,

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65 Rt. Hon David Lange, *Treaty of Waitangi (Fisheries Claims) Settlement Bill - Second Reading*, Parliament, Wellington, 8 December 1992.

66 C. Orange, p. 86.

Arawa, Ngatihaua, and Ngatimaniapoto refused to sign the Treaty, and this indicates a particular series of sentiments towards the British. Firstly, there was no sense among these tribes that they had been conquered, and therefore were under no obligation or coercion to surrender their sovereignty, in any sense or translation of the word. And secondly, the British impact on Maori life at this relatively early stage of colonial settlement was clearly not sufficient to make such an agreement a necessity on the eyes of these tribal leaders.[67]

G. The Treaty, its Interpretation and Relevance to Maori Fishing Rights

The Treaty of Waitangi is straightforward and unambiguous on the issue of Maori fishing rights. Article the Second of the English version of the Treaty promises the Maori '...the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries....' However, in the Maori text of the Treaty, the same passage merely guarantees the chiefs '...the unqualified exercise of their chieftanship over the lands, villages, and all their treasures'.[68]

This language of the Treaty was common to similar agreements made by the British with other nations, and was in '...fairly widespread use...'[69] at the time. The only substantial difference in this respect is the difficulty in there being effectively two versions of the same treaty - something that was to prove problematic later on.

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67 At the time of the signing of the Treaty in 1840, the European population in New Zealand was around 2,000, which represented around one per cent of the country's total population of around 200,000 - the other 99 per cent being Maori.

68 Translation of the Maori version of the Treaty of Waitangi given by Professor Sir Hugh Kawharu to the Court of Appeal in 1987 in *New Zealand Maori Council v Attorney-General* [1987], New Zealand Law Report, 641.

69 M. P. K. Sorrenson, 'Treaties in British Colonial Policy: Precedents for Waitangi', in W. Renwick (ed.), 1991, pp. 15 - 29.

Stress has been placed on the '...principles of the Treaty of Waitangi',[70] as opposed to merely its literal meaning. Furthermore, the Waitangi Tribunal has reached a number of important conclusions regarding the Treaty's text. These include:

> Treaties with native groups should be construed in the sense in which they would naturally be understood by the native people; where there is doubt as to the meaning, the Treaty will be construed against the drafter, in this case, against the English view; the customs and practices of the native people, their history and oral traditions are also relevant in determining the native treaty view.[71]

Part of the reason for the inclusion of the concept of the 'principles of the Treaty of Waitangi' in the Treaty of Waitangi Act 1975, was because of the problems associated with the fact that the English and Maori versions of the Treaty are not precise translations of each other and that the implied as well as literal meanings are different. Inherent in the provisions of the Treaty was also the notion of equality which no longer had the same application. The general concept of the principles of the Treaty of Waitangi was espoused by Justice Heron in the Lands case:

> ...it is an unspoken premise when one speaks of principles of the Treaty of Waitangi that land and estates, forests and fisheries and other properties transferred or taken at some earlier time often shrouded in history were transferred or taken allegedly contrary to the principles of the Treaty. So, when one speaks of the principles, one is not just referring to the letter of the Treaty but to the events that have occurred since it was signed.[72]

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70 Justice Bisson, *Robert Mahuta and the Tainui Trust Board v Attorney-General, Coal Corporation et. al.*, Court of Appeal Judgement CA 126/89, 3 October 1989.

71 E. T. J. Durie, 'The Treaty in Maori History', in W. 1991, (ed.), p. 163. These conclusions are also summarised in some of the reports of the Waitangi Tribunal, specifically: *Te Ati Awa Report*, 1983; *Manukau Report*, 1985; *Orakei Report*, 1987; *Muriwhenua Fishing Report*, 1988.

72 Justice Heron, 'The Lands Case', High Court, p. 646, Quoted in D. Crengle, *Taking Into Account The Principles of the Treaty of Waitangi - Ideas for the Implementation of Section 8 Resource Management Act 1991*, Ministry for the Environment, Wellington, 1993, p. 8.

With all this taken into consideration, it is clear that both the principles and the provisions of the Treaty point to the fact that the Maori have an unqualified and indisputable right to the fisheries of New Zealand under the Treaty of Waitangi. Historically too, the Maori claim to 'fishing rights' has found support from various areas. The Kohimarama Conference of 1860, which was comprised principally of Ngapuhi chiefs, affirmed the mana of the guarantees contained in the Treaty. At the Conference, Governor Gore Browne's opening speech (which was translated into Maori) attempted to define more clearly the guarantees in the second article of the Treaty. Specific reference was made in this speech to fishing places (wai mahinga ika) - something that had been omitted from the Maori version of the Treaty.[73] In 1861, Browne re-affirmed the primacy of the Treaty of Waitangi, including specifically the fisheries, and challenged anyone who would throw doubt on the pledge.[74] Fishing legislation passed in the late-1870's specified that nothing in its content '...shall be deemed to repeal, alter, or affect in any way the provisions of the Treaty of Waitangi'.[75] Yet, legislation over the past century relating to Maori fisheries has been founded on the assumptions that the Crown has an unrestricted right to dispose of the fisheries, and that Maori aspirations in this sector could be satisfied with the provision of subsistence reserves - the commercial aspect being either forgotten or ignored in the statutes.[76] While the Treaty's provisions specified fisheries, subsequent rulings by the Waitangi Tribunal went further by articulating the implanted spiritual and cultural importance of the resources mentioned: 'All resources were taonga [treasures], or something of value, derived from gods'.[77] This argument was extended in

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73 C. Orange, p. 149.
74 *Maori Messenger*, 15 March 1861.
75 *Fisheries Act 1877.*
76 W. H. Oliver, *Claims to the Waitangi Tribunal*, Wellington, 1991, p. 33.
77 Justice Department, Waitangi Tribunal, *Muriwhenua Fishing Report*, Wai-22, 1988, p. 179.

the report, and gave a clear indication of the weight which the Tribunal gave to the importance of the fisheries resource to Maori:

> The Maori taonga in terms of fisheries has a depth and breadth that goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours [Maori] thinking, attitude and behaviour about their fisheries.[78]

It has been argued recently that the fact that there is an absence of any mention of fisheries in the Maori version of the Treaty is not singularly important to the way in which the fisheries were perceived by Maori:

> ....Maori would have seen the seas as being theirs, having regard to their parochial way of thinking (kupu whakarite). The Treaty protected their traditional authority. Their authority extended to the seas. It matters not if the Treaty said land but not seas. That is mere trivia. Authority (or rangatiratanga) was the key and that was clearly understood.[79]

Even when land was sold by the Maori, it was frequently understood that exclusive fishing rights to the land's coasts, lakes, or waterways would remain with the original 'owner'. A pristine example of this approach can be found in the evidence given to the Smith-Nairn Commission in 1880. A senior rangatira, Mataiha Tiramorehu of Moeraki, in reference to the Kemp land purchase of 1840, stated that while he had given consent to the land being sold, equally, he understood that he would retain the right to its waters.[80] This reflected the broader Maori principle that different types and rights of usages could exist within the same area of land. As one

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78 ibid. p. 180.

79 E. T. J. Durie, 'The Treaty in Maori History', in W. Renwick, (ed.), 1991, p. 165.

80 Evidence to Smith-Nairn Commission, 1880, cited in A. Ward, *Report on the Historical Evidence; the Ngai Tahu Claim*, document T1, Series Wai-27, The Waitangi Tribunal, May 1989, pp. 174-5.

historian has put it: 'Once the total concept of land ownership is removed, all kinds of arrangements are possible'.[81]

Entwined with this Maori idea of ownership are concepts of kaitiakitanga and rangatiratanga:

> Both are concerned with actions which are the right and responsibility of tangata whenua, but there are differences. Rangatiratanga denotes the authority which tangata whenua have to control all aspects of use of a resource. To a significant extent, rangairatanga is exercised as between people. It includes, for example, the right to control other people's access to the resource. Since it is exercised collectively, it also denotes the right to control the terms of access and use by members of the hapu.
>
> In comparison, kaitiakitanga connotes a relationship between people and the environment. This relationship encompasses and determines the position occupied by people in relation to the natural world in both its physical and metaphysical senses. As do many Pakeha, Maori value the natural world for both its tangible and its intrinsic worth.[82]

However, the strength of such guarantees and good intentions as first articulated in the Treaty lay in their practical and culturally valid implementation and not the promises which were uttered in their shadow. The sea, with the difficulty of subdivision and the application of title, could (and was) very easily alienated from Maori possession, and in violation of the Treaty of Waitangi.[83]

It was not until the inception of the Waitangi Tribunal that the tide began to turn in favour of Maori fishing rights. The Motonui-Waitara claim,

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81 A. Ward, 'Land and Law in the Making of National Community', in W. Renwick, (ed.), 1991, p. 121.

82 D. Crengle, *Taking Into Account The Principles of the Treaty of Waitangi - Ideas for the Implementation of Section 8 Resource Management Act 1991,* Ministry for the Environment, Wellington, 1993, p. 23.

83 Appendices to the Journals of the House of Representatives, 1879, session 2, G-8, p. 13.

which was reported on in March 1983, resulted in abandoning the planned ocean outfall at Motonui by Syngas[84] which had threatened traditional Maori fisheries. Customary Maori fishing rights were upheld through various decisions made by the Tribunal, including an acknowledgement in one instance that traditional Maori fisheries extended up to 32 kilometres out to sea,[85] demonstrating it was not just a matter of coastal based fishing that was in question.

Later cases to the Tribunal shifted in emphasis from the effects of sewerage and such on traditional, mainly coastal fisheries, to issues embracing the whole area of Maori fishing rights in contemporary New Zealand.[86]

The Ngai Tahu Sea fisheries Report, released in 1992, further defined the nature of Maori fisheries under the Treaty of Waitangi. It observed that there had been '...considerable debate...'[87] over the course of the enquiry as to what exactly the drafters of the Treaty had in mind when they wrote the segment 'their fisheries' in the English text of the Treaty. The Ngai Tahu report echoed the findings of the Muriwhenua report by defining 'their fisheries' as:

> ...their activity and business of fishing, and that must necessarily include the fish that they caught, the places where they caught them, and the right to fish.[88]

Furthermore, both reports concluded that Maori fisheries could not be limited to site specific grounds, or simply the mere right of access to the sea. The dispute over the meaning of certain words was fundamental to

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84 *Motonui-Waitara Report*, 17 March 1983, Wai-6.
85 *Muriwhenua Fisheries Report*, 31 May 1988, Wai-22.
86 op. cit.
87 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 102.
88 op. cit.

the precise extent of Ngai Tahu's claim to the sea fisheries. The counsel for the fishing industry, Tim Castle, called evidence from Professor Ian Gordon, a retired English professor from Victoria University in Wellington, which attempted to expand on the historical definition of 'fisheries'. The conclusion of this evidence was that fisheries was defined at the time of the signing of the Treaty as '...the business, occupation, or industry or catching fish or of taking other products of the sea'.[89] On the basis of the interpretation of these words as offered by Professor Gordon, the counsel for the fishing industry rejected '...the proposition that the drafters of the Treaty intended the protection of Maori fisheries to include Maori fishing grounds'.[90] However, while this evidence did carry some weight, it was effectively overridden by other findings in the report. Stress was put on the broader historical environment surrounding the formation and signing of the Treaty, and not just an analysis of the text. The point was made that Busby, who was chiefly responsible for the drafting of the Treaty, was familiar with iwi, at least in the Bay of Islands area, and therefore was aware of:

> ...the extent to which Maori had developed these fisheries to their own needs for self-sufficiency and internal trade and how clearly they were regarded by Maori as tribal property.[91]

The definition of the phrase '...their fisheries...' which is contained in the Treaty of Waitangi is clarified in the report as that: '...which most appropriately takes into account the use of Maori fisheries in New Zealand at 1840....'[92] The Fisheries Act 1989 actually included this definition by referring to the Act's purpose as being:

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89 op. cit.
90 ibid. p. 103.
91 op. cit.
92 ibid. p. 104.

(a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and

(b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing.[93]

Thus, there was at least partial statutory recognition of the extent of Maori fisheries in 1840 which concurred with the findings of the Waitangi Tribunal as expressed in the Muriwhenua and Ngai Tahu Sea Fisheries reports.

Claims by the fishing industry that the fisheries referred to in the Treaty of Waitangi were simply 'Maori fishing grounds' was dismissed because it failed to take into account the Maori view of fisheries as a taonga [treasure], the Crown's guarantee of tino rangatiratanga to Maori in relation to fisheries (as well as other resources), and that Hobson's intention to put the word 'usages' in the Treaty was changed by Busby's recommended modifications which were '...based on his wide experience of local Maori usage...'[94]

Yet, despite greater statutory recognition of Maori fishing rights in 1989, the preceding 150 years of colonial and later domestic control and exploitation of the resource remained. The cartel that controlled the fishing industry by the end of the 1980s demonstrated the point that political de-colonisation could get under way while the process of economic de-colonisation trailed well behind.[95]

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93 *Fisheries Act 1989*, Long title.
94 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 105.
95 A. M. M. Hoogvelt, p. 72.

H. The Waitangi Tribunal

> The Treaty only becomes enforceable as part of the municipal law if and when it is made so by legislative authority, and that has not been done in the case of the Treaty of Waitangi.[96]

The Waitangi Tribunal was initiated under the provisions of the Treaty of Waitangi Act which was passed in late 1975 under the guidance of then Labour Member of Parliament, Matiu Rata. Since that time, it has become the foremost institution in the country for dealing with matters relating to the Treaty of Waitangi - arguably of more practical as well as symbolic importance than Parliament, and certainly more appropriate and relevant than the conventional court system in terms of accommodating the culturally specific needs of the tangata whenua.

The Tribunal was given the authority to enquire, and to recommend to the Government of the day, which would, in turn, decide whether to implement the recommendations based on political and other considerations. Thus, a definite political element was injected (and has remained) into what are ostensibly issues of justice. The intention for the Waitangi Tribunal was to investigate any claims from Maori that they had been unfairly or prejudicially dealt with by the Crown. However, despite this laudable purpose, the Tribunal was only empowered to investigate cases of injustice or negligence by the Crown from the date of the passage of the Act. That is, 1975.

This was, at least, a starting point, and perhaps a tacit acknowledgement by the Government of the growing sense of frustration over Treaty issues

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96 Judge C. Myers, quoted in R. Walker, *Nga Tau Tohetohe - Years of Anger*, Auckland, 1987, p. 90.

which found its vents at successive Waitangi Day protests, the Land March, and in other arenas.

Three statutes in particular became focal points for Maori resentment over their ongoing economic and cultural alienation. These were the Maori Affairs Amendment Act 1967, which contained provisions for the alienation of 'uneconomic' Maori land; the 1967 Rating Act, which allowed for the sale of land in order to recover unpaid rates; and the Town and Country Planning Act 1953, which through zoning laws, restricted particular usages for some Maori Land.[97]

Yet despite the Tribunal's best intentions, there was a common awareness that in order for it to be more effective, its jurisdiction should be extended back to 1840, so that all the long-standing grievances (which showed absolutely no sign of 'going away') could be aired in an appropriate forum, and hopefully find a successful resolution. But even with the restriction of investigation only as far back as 1975, the Tribunal was still able to *consider* events which took place prior to that time.[98] This at least allowed for the expectation of the Tribunal one day assuming retrospective rights back to 1840.

By the time the Treaty of Waitangi Act was finally amended in 1985 to allow the Tribunal to investigate and report on grievances going back to 1840, this had already been anticipated by the Tribunal,[99] and so many of the existing claims at the time had already covered this new ground.[100]

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97 R., Walker, 'Maori People Since 1950', in G. W. Rice (ed.), *The Oxford History of New Zealand*, Second Edition, Auckland, 1992, p. 512.

98 W. H. Oliver, Claims to the Waitangi Tribunal, Wellington, 1991, p. 11. Also see *Manukau Report*, 19 July 1985, Wai-8.

99 op. cit.

100 *Orakei Hearings*, 16 July 1984 - 23 November 1984, Wai-8.

As a result of the amendment, the trickle of claims that the Tribunal had initially encountered soon turned into a deluge. The staff of the Tribunal was increased to handle the extra workload, but the sheer volume and size of the claims resulted in a major backlog developing.[101] By June 1987, of the 88 claims received by the Tribunal, only 13 had been reported on, and by mid-1991, of a total of 216 lodged claims, the Tribunal had reported on just 27.[102]

Another reason for the increase in claims to the Tribunal was a growing appreciation that matters not specifically mentioned in the Treaty of Waitangi could still form the basis of a claim. Fisheries, airwaves, language, and underground resources fell into this category, and most of the claims dealing with these issues met with at least some success.[103] The stress put on the principles of the Treaty extended the outlook of claimants who may have previously felt that an injustice had taken place, but that recourse was restricted by the provisions of the Treaty - which were locked into another time.

Several of the recommendations made by the Tribunal have formed the basis for new legislation or parts of new legislation. The State-Owned Enterprises Act 1986 is one such example. Some of its provisions were chiefly a response to the recommendations of the Tribunal regarding the uncertain status of land owned by state-owned enterprises, and the need for an acknowledgement of the principles of the Treaty of Waitangi, and of the safeguarding of iwi interests in relation to the land which was, or would

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101 The problem of this backlog has yet to be adequately addressed by Government.
102 W. H. Oliver, p. 12.
103 *Fisheries Regulations Report (Hawke)*, 22 March 1978, Wai-1; *Te Reo Maori Report*, 29 April 1986, Wai-11; *Fisheries Regulations Report (Tai Tokerau)*, 20 February 1990, Wai-13; *Broadcasting Frequencies Report*, 27 November 1990, Wai-150, et.al.

be, transferred to the state-owned enterprises.[104] The Maori Fisheries Act 1989 and the Resource Management Act 1991, both of which recognised and re-enforced traditional Maori rights to certain categories of fisheries, were influenced by the findings of the Tribunal.[105] Other legislation, such as the Fisheries Act 1983, also gave assurances of the need to protect Maori fishing rights,[106] but it was primarily the work of the Tribunal which brought these rights into a closer political focus.

While the Tribunal was able to recommend, it was still the Government who had the last say when it came to the implementation of these recommendations. This political element remained an impediment to the principles of justice which the Tribunal endeavoured to uphold. In the case of small traditional fisheries, the decisions were rarely difficult because the financial cost to the Government was usually negligible, and in many instances, all that was required was official recognition - statutory or otherwise - of a practice (such as harvesting kina) which was already occurring. The difficulties arose when resources, such as commercial fisheries, involving millions and even billions of dollars, were to be decided on. It was at this sort of juncture that the Government was forced to come up with innovative solutions and remedies that would placate, if not satisfy, all the concerned parties.

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104 R., Walker, 'Maori People Since 1950', p. 516.
105 W. H. Oliver, p. 95.
106 'Nothing in this Act shall affect any Maori Fishing Rights', Section 88(2), *Fisheries Act 1983*.

5. THE EVOLUTION OF THE NEW ZEALAND FISHING INDUSTRY

A. The Fishing Industry Prior to 1980

Every historical period (if such an arbitrary and artificial distinction can be made) harbours features which are unique to it. In New Zealand, the 1980's became identified as the decade of 'restructuring' - the ubiquitous term used to describe the mainly legislative changes which transformed the nation's economy from one of stifling protectionism to one under the harsh (albeit invisible) hand of the Free Market. In defence of this transition, the tired clichés of 'tightening the belt', 'no gain without pain', and 'the world does not owe us a living' were trotted out to make the difficulties that were being inflicted on the populace seem like some noble sacrifice for a better tomorrow.

One of many subplots to this theme of restructuring was a series of radical changes made to the fishing industry. During the 1970's, New Zealand fish exports increased in value from $18 million per annum to almost $60 million per annum,[1] mainly as a response to growing international demand for fish which coincided with increased scarcity of the resource. In terms of quantity, New Zealand was exporting around 100 million tonnes by 1980.[2]

On 1 April 1978, legislation came into effect in New Zealand which established a 200 nautical-mile exclusive economic zone.[3] It was partly a response to the need to protect the country's growing fish export industry

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1 'The value of fisheries products', in *New Zealand Official Yearbook, 1980*, Wellington, 1980, p. 415.
2 op. cit.
3 *The Territorial Sea and Exclusive Economic Zone Act 1977.*

from foreign exploitation. In the previous year, the principle of the 200 nautical-mile limit had been established internationally,[4] and the rights in such exclusive economic zones had been articulated a few decades earlier in the Geneva Convention on Territorial Sea.[5] Included in these rights were that the sovereignty of a coastal state extends beyond its land territory and its internal waters to a belt of sea adjacent to its coast, described as the territorial sea, and that the sovereignty of a coastal state also extends to the airspace over the territorial sea as well as to its bed and subsoil.[6]

New Zealand's Exclusive Economic Zone covers an area of 3.1 million square kilometres, and currently contains a commercial fishery of approximately 80 species. The resources range from those to a tropical to sub-tropical preference in the north, to cool temperate and sub-Antarctic fish in the south.[7]

The fishing industry in the 1980's inspired philosophical as well as economic motives. The country's Exclusive Economic Zone was being fished, frequently illegally, by foreign boats, and this raised the issue of New Zealand's sovereignty over its waters (a legacy perhaps of Britain's centuries-old desire to protect its waters and trade routes). The National Government in the early 1980's envisaged that eventually there would be an elimination of foreign fishing, but that this would be '...a difficult and lengthy process'.[8] The issue of foreign intervention in the fishing sector

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4 *Informal Composite Negotiating Text 1977*, Article 57, International Legal Materials 1108 (1977); United Nations Document C/CONF. 62/WP 10 and Corr. 1 and 2.

5 *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958*, United Kingdom Treaty Series 3 (1965); 516 United Nations Treaty Series 205; 52 American Journal of International Law 834 (1958).

6 op. cit.

7 Department of Justice, Waitangi Tribunal, *Ngai Tahu Claim to Mahinga Kai, Part One: Report on Ngai Tahu Fisheries Evidence*, Wai-27, Auckland, June 1989, p. 212.

8 R. D. Muldoon, *The New Zealand Economy - A Personal View*, Auckland, 1985, p.157.

was to emerge again during the opening stages of the Sealord's negotiations, and added another cultural and economic dimension to the Deal.

This protection, extending out for 200 nautical miles, was a further stage in the development and protection of New Zealand's fishing industry. The Fishing Industry Board,[9] established in 1964, had helped the industry achieve improvements in the quality of fish products, and the promotion of less popular fish species, especially in overseas markets.

From the mid-1970's there was also an increase in the levels of finance made available to the fishing industry. Loans from the Fishing Industry Finance Committee of the Rural Bank and Finance Corporation for development of the industry averaged around $10 million per annum in the three years leading up to 1980.[10] However, the benefits derived from this sort of capital input did not extend to Maori fishing concerns. Similarly, there was no corresponding increase in Maori involvement in various levels of the fishing industry to match the expansion that the sector was experiencing.

By 1986, New Zealand seafoods were exported to 56 countries, but the three main export markets were the United States, Japan, and Australia, between which around 80 per cent of the value of the export trade was accounted for.[11]

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9 The Fishing Industry Board was established under the *Fishing Industry Board Act 1964*.
10 *New Zealand Official Yearbook, 1980*, p. 413.
11 Department of Justice, Waitangi Tribunal, *Ngai Tahu Claim to Mahinga Kai, Part One: Report on Ngai Tahu Fisheries Evidence*, Wai-27, Auckland, June 1989, p. 217.

The following table shows the growth in New Zealand's fishing sector between 1975, and 1986 in terms of both tonnage extracted from the country's Exclusive Economic Zone, and the value of the catch.

Table 1. Growth in New Zealand's Fishing Industry 1975 - 1986.

Year	Tonnes exported	Value ($ millions)
1975	14,000	26
1979	65,000	98
1984	145,000	441
1985	131,000	544
1986	158,000	657

Source: Waitangi Tribunal, Department of Justice, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai-22, Wellington, 1988, p. 343.

B. Maori Involvement in the Fishing Industry

Between 1839 and 1861, 37 million acres of Ngai Tahu land was purchased by the Crown for a total of £27,000. Significantly, fishing rights associated with the land were specifically retained by Maori as a provision of the sale.[12] Ngai Tahu involvement in fishing has been substantially researched and documented for their claim to Mahinga Kai,[13] and demonstrates that there was a heavy reliance on off-shore fishing as well as in-shore fishing and coastal harvesting.[14]

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12 Tirikatene, Member of Parliament, in *Hansard*, 1933, p. 883.

13 Department of Justice, Waitangi Tribunal, *Ngai Tahu Claim to Mahinga Kai, Part One: Report on Ngai Tahu Fisheries Evidence*, Wai-27, Auckland, June 1989, pp. 61-2.

14 Modern marine fisheries are generally categorised into off-shore and in-shore components. Inshore fisheries lie on the continental shelf, or that part of the seabed that extends from the foreshore to a depth of about 200 metres.

The Maori Councils Act 1900 authorised Maori district councils to make bylaws for the conservation and control of fishing grounds and shellfish beds as long as these did not conflict with fisheries and harbours legislation. In 1920, a Royal Commission recommended a £354,000 payment to Ngai Tahu as a full settlement of their claim,[15] but only £150,000 was offered by the Government.[16]

From a position of control of the fisheries prior to the arrival of the European, the Maori have been gradually excluded from this sector during the previous two centuries, to the point where by 1980, the Maori presence in the fishing industry was negligible, and limited in many cases to labouring positions on the boats and wharves. In the Auckland fisheries management area, only twelve out of 378 vessels fishing permits were held by Maori. In Whangarei, it was just one out of 83.[17]

This is in contrast to 1849 when there were 43 Maori owned vessels averaging up to twenty tons operating in the Bay of Plenty,[18] and shipping operations (including fishing) encompassing Wanganui, Manawatu, Taranaki, Hawkes Bay, Poverty Bay, Waikato, Bay of Plenty, and Northland.[19]

When Cook's *Endeavour* encountered members of Ngati Porou in 1769, records taken by the ships officers revealed that the iwi was well prepared

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15 A. Field and A. Edge, *Historic Maori Fisheries Settlement. Adjournment Debate Notes*, 24 September 1992, p. 6.
16 *Hansard* 246, 1936, p. 642.
17 J. Kelsey, *A Question of Honour? Labour and the Treaty 1984 - 1989*, Wellington, 1990, p. 108.
18 R. Firth, *Economics of the New Zealand Maori*, Wellington, 1959, p. 448.
19 W. Swainson, *Auckland, the Capital of New Zealand and the Country Adjacent*, London, 1853, p. 143.

to demonstrate its 'ownership' of the sea, as well as to engage in trade where possible.[20]

Subsequent legislation such as the Oyster Fisheries Act 1866 had the effect of eventually ruling out Maori from commercial competition with Pakeha fishermen through the inclusion of closed seasons and the introduction of licenses which were granted solely to European fishermen.[21]

The 1867 Salmon and Trout Act gave the Governor extensive powers to protect any species of fish.[22] This provision was included in the Act because there had been the introduction of new, non-indigenous species which had growing commercial value.[23]

The Larceny Act of 1869 further violated Maori fishing rights by establishing and largely entrenching common law rights to fishery areas, and defined private property as extending to a private right to fisheries.

The Fisheries Protection Act 1877 contained a section which stated that:

> Nothing in this Act...shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives secured to them there under.[24]

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20 Letter to the Registrar of the Waitangi Tribunal from Te Whanau A Kaiaio, 5 October 1992.

21 R. Walker, *The Treaty of Waitangi and the Fishing Industry*, Paper for casebook on Business, Government and Society.

22 Waitangi Tribunal, Department of Justice, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai-22, Wellington, 1988, p. 83.

23 'Our waters are replete with golden sovereigns, and we have only to take them out and they will fill the Treasury', New Zealand Parliamentary Debates, 1885, Volume 52, p. 586.

24 Fisheries Protection Act 1877, section 8.

However, subsequent amendments and regulations progressively excluded Maori from commercial fishing, culminating in the 1885 regulations which stated that:

> Nothing in these regulations shall be deemed to prevent any Maori from taking oysters or indigenous fish...for consumption by himself and family, and not for sale.[25]

One of the more substantial pieces of legislation affecting Maori fishing rights in the nineteenth century and beyond was the Sea Fisheries Act 1894. This consolidated and slightly amended earlier legislation on fisheries. It firmed up the requirements of fishermen to comply with licensing obligations, and provided for closed seasons, closed fishing areas, and restrictions on the size and quantity of fish caught. It also imposed penalties against Maori who attempted to sell certain species of fish without approval. Indeed, Maori fishing could only be carried out at a commercial level with a licence.

By the end of the nineteenth century, Maori fishing had experienced a substantial decline. The decline was mainly in the area of traditional tribal fishing practices, that is, the right to fish for subsistence purposes, which had previously made up the bulk of Maori involvement in fishing.[26] By the end of the nineteenth century, commercial Maori fishing activity was negligible.

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25 1885 Regulations on the Fisheries Protection Act 1877.

26 G. Mair, *Reminiscences and Maori Stories*, Auckland, 1923, pp. 19-22.

The fishing industry in New Zealand experienced only small growth up until the 1960's. The variety of species fished was limited and the contribution of this sector to the New Zealand economy was minimal.[27]

Maori involvement in fishing generally declined further as a result of greater urbanisation of the Maori population during the twentieth century, especially following the Second World War, and because of the economic preference of Maori (and non-Maori) earning income from farming, manual labour, and employment in secondary sectors, rather than fishing.[28]

In discussing the reduction of Maori participation in the fishing sector, the Muriwhenua report noted that:

> In more recent years, fishing policies have been directed to the removal of small and part-time fishermen. Most of the remaining Maori fisherman are in that category.[29]

The absence of current active economic participation by Maori had the effect of denying the industry the particular skills of resource management and conservation which the Maori had possessed and practiced for centuries.[30] Moreover, it was evidence of a breach of the Treaty of Waitangi's promise that Maori would retain exclusive and undisturbed possession of their fisheries.

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27 Waitangi Tribunal, Department of Justice, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai-22, Wellington, 1988, p. 109.

28 P. Buck, *The Coming of the Maori*, Wellington, 1949, p. 237.

29 Waitangi Tribunal, Department of Justice, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai-22, Wellington, 1988, p. 113.

30 Details on Maori fishing practices and abilities can be found in A. Salmond, *Two Worlds - First Meetings Between Maori and European 1642 - 1772*, Auckland 1993, p. 33 ff.; pp. 124-5; 321; 349. Also see Muriwhenua Report, Wai-22, 31 May 1988; and W. H. Oliver, pp. 31-32.

The exclusion of Maori from the fishing industry was a symptom of over a century of European colonial penetration and the consequent development of a dual structure of economy and society, where the demarcation between big business and small traditional-based industries could almost not be bridged.[31]

However, this modernising experience was not unique to Maori, and conforms to a prescribed pattern. Smelser has concisely articulated the discontinuities inherent in the modernisation process:

> ...structural change is, above all, uneven during periods of modernisation....In colonial societies, for instance, the European powers frequently revolutionised the economic and political framework by exploiting economic resources and establishing colonial administrations....In a society undergoing post-colonial modernisation, similar discontinuities appear....economic structures...display patterns of growth that produce leads, lags, and bottlenecks....
>
> The development of new kinds of social and economic activities creates conflicts with traditional ways of life.[32]

C. The Restructuring of the Industry

Despite the significant cultural heritage of Maori in the fishing arena, and their claim to exclusive possession of the fisheries, the major restructuring developments during the 1980's did little to acknowledge Maori rights to fisheries under the Treaty of Waitangi.

The first significant piece of legislation affecting fisheries in this decade was the Fisheries Act 1983. It was, in part, a response to the need to have a co-ordinated approach to this developing industry. The stress was on

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31 A. M. M. Hoogvelt, p. 97.

32 N. J. Smelser, 'The Modernisation of Social Relations', in W. Myron (ed.), *Modernisation: The Dynamics of Growth*, Washington, 1966, pp. 128-9.

improved management of the resource. A whole administrative structure was put in place, but effectively, no consideration or even recognition was given to a specific Maori role in the industry. Admittedly, section 88(2) of the Act did give an assurance Maori fishing rights would not be affected by the Act, but this proved to be an empty promise as Maori participation in the fishing sector showed no serious signs of increasing. The stress of the Act instead was to conserve the diminishing fisheries resource, and establish the country's fisheries on a more commercial basis. The Fisheries Act had the following main provisions:

- to provide for the development of a comprehensive and integrated approach to managing fisheries by way of Fishery Management Plans for areas designated as fishery management areas. The Director-General of Agriculture and Fisheries (MAF) was obliged to consult and have regard to the views and responsibilities of various organisations, including Maori, when preparing fishery management plans.

- part 3 of the Act enabled the Ministry of Agriculture and Fisheries to make any New Zealand fisheries controlled for the purpose of conservation, effective management of the resource, or to protect the economic stability of the country's fishing industry. To this end, a system of licences were granted by the minister. However, such licences could only be granted to commercial fishing operators.

- the definition of a commercial fisherman was, in the case of an individual, a person who was engaged or intending to engage in fishing for sale throughout the year, and who could satisfy the director-general that he relies wholly or substantially on fishing as the source of his

income. This definition was to result in a number of part-time commercial fishermen being excluded from commercial fishing.

- commercial fishing vessels were required to be registered, and a fishing permit was mandatory for any sort of commercial fishing to be undertaken. Permits could be restricted to specific areas, species, quantities, methods, types of fishing gear, and periods of time.

- section 89(1) enabled the making of regulations covering a wide range of specific matters including the prescribing of quota or total allowable catch for any fish, or in respect of any fishery or method of fishing, and authorising the Minister to allocate any such quota or total allowable catch to such commercial fishermen as he may specify.[33]

The individual transferable quotas were allocated on the basis of fishing company investment, and catch history. Initially, they were allocated for a period of ten years, and covered only seven species. In the first allocation of quota, only nine companies were involved.[34]

The Fisheries Act began to prove itself ineffective as a device to protect New Zealand's fishing resource, and with the election of a Labour Government in 1984, alternatives were searched for which would attempt to serve the conflicting demands of resource conservation and the commercial needs of the fishing industry.

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33 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 218.

34 Evidence of Gregory C. Billington, New Zealand Fishing Industry Board, to Waitangi Tribunal hearing of the Ngai Tahu Sea Fisheries Claim on the history of the New Zealand fishing industry 1963-1989, p. 10, Doc Z18.

During 1986, there were 215 foreign fishing vessels operating in New Zealand's Exclusive Economic Zone. This represented approximately ten per cent of the total of 2,266 full-time domestic fishing vessels in operation during that year in New Zealand waters.[35]

The quest for a more efficient way of managing the fisheries resource came in the form of the Quota Management System (QMS) which was introduced in 1986 under the Fisheries Amendment Act. This established a much more comprehensive level of Government control over the nation's fisheries, and has been described as the '...final straw for Maori'.[36] Under the QMS, the Minister of Fisheries was able to declare Quota Management Areas, and set those species which were to be subject to the QMS. Based on ongoing research conducted by the Ministry of Agriculture and Fisheries, the Total Allowable Commercial Catch for each Quota Management Area was fixed. In the spirit of privatisation and Government retraction from the economy, the Total Allowable Commercial Catch of a designated Quota Management Area was divided into Individual Transferable Quotas (ITQ's). A possessor of an ITQ had the sole right to ownership of their quantity of fish. Because of this right, the ITQ's themselves became an asset which could be sold or leased. The result was that fishing rights became a transferable commodity.

One of the motives behind this restructuring of the industry, and particularly the introduction of ITQ's, was to reduce the number of fisherman for the sake of rationalisation and industry efficiency. The apparent target for the reduction of active fishermen participating in the fishing sector was 50 per cent. Under the new system, around 1,800

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35 Department of Justice, Waitangi Tribunal, *Ngai Tahu Claim to Mahinga Kai, Part One: Report on Ngai Tahu Fisheries Evidence*, Wai-27, Auckland, June 1989, p. 216.

36 J. Kelsey, p. 108.

fishermen were not allocated quota.[37] Inevitably, it was the small-scale fishing operators who were most affected by this policy of reducing the number of players in the industry. This would also contribute to the increased presence of big business in the fishing industry. 75 per cent of ITQ's were now held by just 18 companies.[38]

Initially, the ITQ's were allocated to existing fishing operators, based on them verifying their catch history and the possession of a fishing permit over the previous twelve months. A minimum quota share level was also established, so that those who fell below this level would simply lose their quotas altogether.

The Ministry of Agriculture and Fisheries had refused to postpone the allocation of ITQ's even though the Waitangi Tribunal had advised against the scheme until further investigations had been carried out.[39] However, when High Court action against the ITQ system was taken by various tribes and other Maori organisations, (which resulted in a ruling that ITQ's were a breach of the principles of the Treaty of Waitangi), an interim halt to the regime was imposed. The High Court also recommended that the Government work towards the bigger and longer-term issue of restoring Maori fishing rights.

Labour responded to the High Court's recommendations by commencing negotiations with Maori representatives. In some ways this was to be a crude precursor to the manufacture of the Sealord Deal four years later.

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37 Law Commission Report, *The Treaty of Waitangi and Maori Fisheries*, Wellington, 1989, p. 17.

38 R. Walker, *The Treaty of Waitangi and the Fishing Industry*, Paper for casebook on Business, Government and Society.

39 The Waitangi Tribunal, *Muriwhenua Claim*, Wai-22, received 11 June 1985 and heard up to April 1988. It was in December 1986 that the Ministry of Agriculture and Fisheries announced its intention to issue ITQ's under the QMS.

The culmination of the negotiations between the Maori representatives and the Labour Government was the Maori Fisheries Bill.[40] The Bill provided for 50 per cent of the fisheries to be given to Maori over a 20-year period. (This would translate in practice as 2.5 per cent of the quota per annum). Labour's offer to Maoridom seemed that it could go far in redressing Maori alienation from the fishing industry. However, such a potentially enormous upheaval posed a serious threat to other participants in New Zealand's fishing sector, that is, the predominately Pakeha commercial companies. The various methods and levels of pressure applied on the Government by these fishing interests amounted to '...industrial blackmail'.[41]

The Maori Fisheries Bill was ultimately withdrawn by the Government as a consequence of this pressure. Labour conjured up an alternative which promised to allocate to Maori only ten per cent of the existing quota in the QMS with a meagre grant of $10 million to be administered by the Maori Fisheries Commission.

In July 1989, the Labour Government issued a five-point policy statement which related to the Treaty of Waitangi. In the statement were the principles which Labour believed to be inherent in the Treaty of Waitangi, and which set a precedent for additional formal Government recognition of the principles of the Treaty. The five principles in the policy statement were:

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40 The Maori Fisheries Bill was introduced in the House in September 1988.

41 R. Walker, *The Treaty of Waitangi and the Fishing Industry*, Paper for casebook on Business, Government and Society.

Principle 1

The principle of Government - The Kawanatanga Principle. This principle asserted the Government's established right to govern and make the laws.

Principle 2

The Principle of Self-Management - The Rangatiratanga Principle. This principle stated that iwi have the right to organise as iwi, and, under the law, to control their resources as their own.

Principle 3

The Principle of Equality. Put simply, this principle confirmed the equality of all New Zealanders before the law.

Principle 4

The Principle of Reasonable Co-operation. This principle stated that both the Government and the iwi are obliged to accord each other reasonable co-operation on major issues of common concern.

Principle 5

The Principle of Redress. This principle affirms that the Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.[42]

The explanation and commentary on these five principles offered by Frank Light touches on the relevance of the fisheries issue to the discussion of the Treaty of Waitangi's principles:

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[42] F. Light, *Introduction to Business Law, Massey University*, Palmerston North, 1990, p. 28.

> It was expected that a great deal of land would be readily sold to the Crown....Following the signing of the Treaty land was sold [and the]...pattern of negotiation and consent to the sale of land became well established. But it was not repeated in so far as the fisheries were concerned. The Crown relied on the British law of Sovereignty, which meant that all land below the high water mark, and all beds of rivers belong to the Crown.
>
> The Crown and the Maori people have never discussed or negotiated this question until now [1989]....
>
> The Maori Fisheries Act 1989 is perhaps an attempt by the executive to make such a decision on the issue of Maori fishing rights. The Act is based on a 1988 Government proposal to fill the gap left by the deadlock between the sides of the 'Joint Working Group on Maori Fisheries'. The proposal provided for the delivery of ten per cent of the fisheries quota of each species to be delivered to Maori over four years, plus $10,000,000 to assist Maori into the industry....
>
> The Act is based firmly on the fourth Labour Government's 'Principles of Crown Action'. For example, the 'kawanatanga principle' seems to be in action in the Crown's 'sovereign' act of intervening when Maori interests and the fisheries industry had failed to reach agreement. The imperative of fisheries conservation is another example of the exercise of kawanatanga. The Rangatiratanga principle is demonstrated in the creation of the Maori Fisheries Commission and the terms of reference, under which, in granting fish quota assistance to Maori, it has regard to Maori custom and economic and social conditions.[43]

One of the biggest effects of the restructuring to date had been the impact of the Quota Management System on removing some of the potential opportunity that had informally existed for Maori to re-enter the industry prior to imposing a property interest on fisheries. The Quota Management System left most Maori fishing interests stranded in the non-commercial category. Even the Ministry of Agriculture and Fisheries admitted that when this relevant section of the Bill was drafted, Maori traditional

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[43] ibid., pp. 28-9.

interests were thought to have no commercial component.[44] Yet, this sentiment was consistent with the legislative trend for at least the preceding century, and was therefore not too surprising.

While Government officials were acknowledging their own lack of depth regarding Maori fishing interests, pressure from the private sector was mounting to get the Government to loosen its policy on aggregation, that is, the condensing of quota in the hands of fewer, and larger, owners.[45] On the surface, this would have been beneficial to small Maori commercial fishery operators, but in reality, the consequence of this on prospective Maori entrants to the fishing sector would have been even harsher than the existing restrictions because of the way in which it would open up competition. Some commentators were pushing for even further 'liberalisation' of the entire industry, to the point of suggesting that foreign licensed nations being permitted to compete for domestic quota.[46]

D. The 1984 Treaty of Waitangi National Hui

The spirit of a new order which accompanied the victory of the Labour Party in the 1984 General Election spread through much of the country, and manifested itself in one way in the series of forums held to discuss issues of perceived national importance under the somewhat nebulous yet attractive umbrella of consensus.

A submission by the Taranaki iwi Katoa Tribal Authority to the Hui dealt with the importance of water to Maori, and the way in which that

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44 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 372.
45 *National Business Review*, 15 July 1987, p. 24.
46 *National Business Review*, 25 January 1988, p. 1.

perception interacted with the European system of resource organisation, and expressed what appeared as the broadly shared Maori view on water:

> The significance of water to the tribes of Taranaki is equal to that of land. This significance showed to some degree when the Waitangi Tribunal sat at Manukorihi Paa, Waitara. Water was also a strong point of concern during a series of meetings held in South Taranaki in the latter part of last century, and continues to be a point of concern at meetings in Taranaki.
>
> We regard water as a taonga and draw your attention to the expression Taonga Katoa found in the authoritative Maori text of the Treaty of Waitangi....
>
> The present state of the Fisheries Act has no provision for the Maori people in keeping with the principles of the Treaty. Given that we are one nation, Maori and Pakeha, with one Treaty, then it's got to be based on that reality.
>
> The Health Act in having failed to exercise its authority in preventing or limiting pollution and sanitary conditions and having no legal bind concerning the Treaty is an anomaly which requires appropriate steps to be rectified.
>
> Under the Water and Soil Conservation Act 1967, all natural water is administered by the Crown. The Act is not linked or bound in any way to the Treaty. If a Maori representative is appointed to the National Water and Soil Conservation Authority or to the Water Resources Council, tribal custodianship and the principles of the Treaty will still not necessarily be applied....
>
> We further recommend that legislation be formulated to ensure tribal control of water, reefs, rivers, adjacent to and associated with the tribe of any given region.
>
> This would necessarily entail the setting up of bodies with legislative and judicial functions and constituted in accordance with Maori tradition and custom....
>
> The Crown does not own the water, it administers the water. It sells water that it does not own. It issues licence to use water...

> We respectfully submit to this Hui that water is a Taonga which should be administered by tribal authorities in keeping with the principles of the Treaty.[47]

The sentiments expressed in this submission encapsulated much of what Maori believed was wrong with the situation that existed at the time in regard to the whole issue of fisheries - both commercial and non-commercial: the lack of Maori input at virtually all levels of decision-making, the inadequacy of legislation to protect and serve Maori interests as defined in the Treaty, and the absence of a strategy which would resolve some of these grievances. However, it was the work of the Waitangi Tribunal and certain claimants to that body that began to given impression of the future direction of developments relating to Maori fisheries.

E. The Fisheries Amendment Act 1986

The Fisheries Amendment Act 1986 emerged partly in response to the problem of allocating quota to individual fishermen as part of the Government's desire to manage inshore fisheries under individual transferable quotas. The Act only gave Maori extremely limited rights to any fisheries at all - the Minister of Agriculture and Fisheries could specify the total allowable catch for all species and management areas, with the only concession to Maori that their traditional, recreational, and other non-commercial interests in the fishery would be given consideration.

The Act also gave the Minister the power to reduce the total allowable catch in respect of any species where the quantity of fish had fallen below the level which would be sustainable under the total allowable catch. However, the inadequacy of research and the consequent limited extent of

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47 Taranaki Iwi Katoa Tribal Authority Trust, 'Submission to the Treaty of Waitangi National Hui, Turangawaewae Marae, Ngaruawahia, 1984, in A. Blank, M. Henare, and H. Williams, (eds.), *He Korero Mo Waitangi*, 1985, pp. 65-6.

knowledge possessed by the Ministry of Agriculture and Fisheries meant that the probability of a comprehensive strategy for preserving the nation's fishery resource through this provision was extremely slight.

Overall the Government's continued stated concern was to avoid depletion of the fishery resource, while at the same time trying to foster a healthy export sector. This aim was summed up by a spokesperson for the Ministry of Agriculture and Fisheries, Robert Cooper:

> For some of the more important fisheries, commercial catches had to be reduced by more than 50% to ensure conservation and rebuilding of depleted stocks. The Government was concerned to minimise economic hardship to those who would inevitably have to reduce their commercial fishing activity, and also to prevent social disruption in the many fishing-dependent communities.
>
> Consultation with the fishing industry suggested that financial aid for the catching sector would assist where enterprises reduced their dependence on fishing, or chose to leave the industry altogether. A social impact study was also commissioned to examine the implications of the proposed ITQ scheme to assess options for the amelioration of adverse consequences on small communities. For both individual fishermen and for fishing enterprises, government restructuring assistance was made available through a voluntary tendering scheme to purchase back quota rights, allowing each individual to determine their own level of catch reduction, or to leave the fishing industry. Both larger fishing enterprises and many individual fishermen chose to accept this assistance. A total of NZ $45 million was paid out, and two-thirds of the catch reductions required for all species were achieved through this voluntary scheme. The commitment of the Government to reducing catches to sustainable levels necessitated some additional arbitrary reduction in fishermen's quotas in order to ensure the continuation of the resource.[48]

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[48] Evidence of Robert D. Cooper, Ministry of Agriculture and Fisheries, on records of Maori fisheries in Government archives since 1840, Doc P12, in Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 225.

F. Motonui-Waitara and Muriwhenua

These two claims to the Waitangi Tribunal both established a firm foundation for Maori rights to fisheries, and the right for these resources to be free from violation by pollution.

The Motonui-Waitara claim was brought to the Tribunal by the Taranaki tribe Te Ati Awa in June 1981 and was finally reported on by the Tribunal in March 1983.

The claim was in essence a protest at the destruction of the tribe's traditional fishing grounds and shellfish gathering areas as a result of the sewerage outfall at Waitara. There had been a proposal for an increase in the amount of sewerage discharged at the Waitara outlet, which had been one of the factors prompting the claim. In addition, a new source of potential sewerage was being proposed at the site of the Motonui Syngas plant.

The tribe's claim was that its traditional food-gathering rights were under threat, and that associated with these food resources were cultural and spiritual values which by implication would also be threatened. The Tribunal supported the claim and '...put great weight upon the spiritual and cultural values associated with both the harvest of the sea and the water itself'.[49]

The Muriwhenua claim was, in some respects, focused on much more substantial issues. The imminent introduction of the Quota Management System, which would potentially 'lock out' Maori from involvement in the fishing industry and open up the sector to permanent, albeit partial, foreign

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[49] W. H. Oliver, *Claims to the Waitangi Tribunal*, Wellington, 1991, p. 19.

involvement, was cause for concern. Furthermore, and Auckland Regional Marine Reserve Plan had suggested a complete prohibition of fishing along much of the north eastern coast.

The claim was received by the Tribunal in June 1985, and was not reported on until May 1988. The Tribunal found that the Quota Management System was in conflict with the Treaty. But of importance also was the fact that the Muriwhenua claim prompted reaction from the Crown, which questioned the interpretation of words such as rangatiratanga, while the Ministry of Agriculture and Fisheries persisted in putting into place the Quota Management System, despite a plea from the Tribunal that its implementation be postponed while the Muriwhenua claim was under consideration.

There was definitely a sense by the end of the 1980's that Maori were on the verge of recovering at least some of what was promised under the Treaty. However, exactly what would be reclaimed was uncertain, and the forces of commercial fishing interests were always in the background. It was into this uncertain yet faintly positive environment that a new decade dawned, and with it, a new Government and a new approach to the entire issue of Treaty claims.

G. The Maori Fisheries Act 1989

The Waitangi Tribunal, in its assessment of this piece of legislation, described it as being by any standards, '...a breakthrough towards Crown recognition of Maori Treaty fishing rights....'[50] The Act established the Maori Fisheries Commission, which was to be the precursor to the Treaty

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50 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 237.

of Waitangi Fisheries Commission, and which was responsible for representing the Maori interests in any negotiations with the Crown over fisheries.

The Maori Fisheries Commission established under the provisions of Section 1 of the Act comprised of seven members, and was appointed on the advice of the Minister of Maori Affairs. Its primary function was to facilitate the entry of Maori into the commercial fishing arena, and to establish a company (Aotearoa Fisheries) to be the recipient of at least fifty per cent of all quota transferred to the commission by the Crown under the Act.[51]

The commission's kaupapa rested on its understanding and application of tikanga Maori and the Treaty of Waitangi, and that the commission's assets belonged to iwi, and not to the commission in its own right. An aspect of this kaupapa which was stressed at the time was the importance of an effective consultative process with iwi, although specifics on the nature and mechanisms associated with this consultative process were left to the commission to formulate. However, the commission did state that:

> The ultimate roles of the Maori Fisheries Commission and Aotearoa Fisheries Limited will be shaped by the collective and individual wishes of the iwi - this lies in the future.[52]

The lack of a framework or stated process for this anticipated consultation did not seem to cause any concern among most of the interest groups affected by the legislation. This is perhaps because of the position the Maori Fisheries Commission saw itself in relation to iwi on the matter of

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51 *Maori Fisheries Act 1989*, sections 40 - 42.

52 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, pp. 239 - 240.

fisheries. The following extract on the kaupapa of taiapure, that is, the philosophy of local fisheries, as defined by the Commission, implies that the Commission would have a permanent role in any dealings with the Crown, and that it would be able to accurately reflect the interests of iwi (which revealed the mistaken belief that all Maori had identical ambitions and interests with regards to fisheries, or perhaps that there was no firm Maori opinion with which to grapple):

> In recent years the Maori fish negotiators have concentrated considerable effort on traditional Maori and Iwi rights in non commercial fishing. The discussion has revolved around the establishment of non commercial fishing zones, over which Iwi would have substantial control. Whilst the Maori fish [sic] negotiators have argued for absolute Iwi control of such zones Parliament has not conceded the Crown sovereignty as the ultimate controller of the non commercial fish resource. The compromise affected by the Maori Fisheries Act offers Iwi a substantial level of control over the non commercial zones named as Taiapure by the Act. That control applies to all citizens Maori or Pakeha. The development of Taiapure management will place heavy demands on Iwi organisation and commitment [sic]. It also demands the evolution of an effective management partnership between Iwi and the Crown represented by MAF.[53]

The election of a National Government in 1990 tilted the playing field that was emerging under Labour's stewardship, and necessarily redefined some of the arguments, issues, and contexts in which Maori fisheries were viewed by the Crown, and indeed by Maori themselves.

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53 *Te Kupenga: A Guide to the Maori Fisheries Act*, Manatu Maori and the Maori Fisheries Commission. Counsel for the New Zealand Fishing Industry Board and the New Zealand Fishing Industry Association, p. 10, in Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 242.

6. THE BUILD-UP TO THE DEAL: 1990-1992

A. Customary Fishing Rights

There were three main threads of development which led to the formation of the Sealord Deal. The first of these was the issue of traditional Maori fishing rights. For a long time, concerns had been voiced by some Maori over their rights to the use of traditional and customary fishing areas.[1] In particular, Maori were worried about the repeal of Section 88(2) of the Fisheries Act 1983, which removed the right of Maori to seek justice through the Courts for the violation of customary Maori fishing rights. (In this context, customary fishing rights are those that are considered traditional and non-commercial).[2] Legislation passed in 1989 aimed to '...make better provision for the recognition of these Maori fishing rights [rights which were left undefined in the Act] secured by the Treaty of Waitangi',[3] but the Act's stress was largely on commercial fisheries.

The Treaty of Waitangi Fisheries Commission resolved in 1992 to participate in a Government working party to develop regulations which would give recognition to '...customary food gathering interests',[4] as provided for in the Treaty of Waitangi (Fisheries Claims) Settlement Act.[5] The Fisheries Commission also aimed at providing assistance to various iwi groups in the development of parochial by-laws which would acknowledge these traditional rights.[6]

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1 Treaty of Waitangi Fisheries Commission - Te Ohu Kai Moana, 'Customary and Traditional Fishing Rights - What the New Act Means for Maori', Special Issue, April 1993, p. 1.

2 op. cit. Also see *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, (this Act put the Sealord Deal into legislation).

3 *Maori Fisheries Act 1989.*

4 Te Puni Kokiri, Ministry of Maori Development, *National Hui on Appointment on Treaty of Waitangi Fisheries Commissioners*, Wellington, 16 February 1993, p. 40.

5 See Section 10 of *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.*

6 This was provided by Section 34 (2) of the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.* and Section 89 (1c), (d) of *Fisheries Act 1983.*

The direction in which the legislation on traditional and customary fishing rights was heading was indicated in an incident which took place in 1991. In August of that year, fisheries officers from the Ministry of Agriculture and Fisheries seized a four-wheel drive truck and more than 600 paua and kina, some of which were undersized, from a person in Masterton who had allegedly been illegally harvesting shellfish. However, the officials later returned all that had been seized back to the person involved after he had made it clear that he had been given permission to collect the seafood from a local kaumatua. The Ministry discussed the matter with the kaumatua concerned, but '...ruled out any prosecution'[7] because of the Ministry's position that Maori fishing rights guaranteed under the Treaty of Waitangi overrode the Fisheries Act. In September 1992, the Prime Minister, Jim Bolger, acknowledged, when speaking on the Sealord Deal, that customary and traditional fishing rights were quite distinct from commercial rights, to the point (Mr. Bolger explained) where customary rights were '...left...to one side'[8] when the commercial fisheries were being negotiated.

B. Commercial Fishing Rights

The second factor which was of great importance in the reaching of the Sealord Deal was the negotiations on Maori commercial fisheries. In December 1989, the Maori Fisheries Act was passed, and provided an interim settlement of Maori fisheries claims. One of the purposes of the Act was to establish the Maori Fisheries Commission (which was replaced in 1992 by the Treaty of Waitangi Fisheries Commission).[9] The Maori Fisheries Commission was charged with managing a quota totalling 10 per cent of the total allowable commercial catch (TACC) for all species in the

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7 *New Zealand Herald*, 10 April 1992.
8 Rt. Hon Jim Bolger, Prime Minister, in *New Zealand Herald*, 8 September 1992.
9 The name change was done under Part II, Section 14 (1) and (2) of the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.*

Quota Management System for a four year period. Half of this amount was to be made available for lease to Maori fishers, and half to be transferred to Aotearoa Fisheries Limited for the transition period - a company that was completely owned by the Maori Fisheries Commission.[10]

In February 1990, the Crown and the Maori negotiators got together to discuss the development of the Quota Management System so that the eventual outcome would be consistent with the conservation requirements of the resource, and the principles of the Treaty of Waitangi. It was also agreed by both parties to the negotiations that no additional species would be introduced into the Quota management system until '...a satisfactory resolution of matters is reached....'[11]

The Maori-owned Aotearoa Fisheries Limited became actively involved with other commercial fishing operations in May 1992 in an attempt to prevent foreign interests purchasing large stakes in New Zealand's fishing industry. The chairman of Aotearoa Fisheries, Sir Graham Latimer, promised to do all he could, both politically and legally, to prevent the foreign control of New Zealand's fisheries. This pronouncement was prompted by the Government's decision to grant 40 per cent of Sealord Products - the country's largest fishing company at the time - to be sold to foreign interests. Such a sale would effectively bypass the Fisheries Act in which foreign ownership in any one seafood company was limited to 24.9 per cent. Sir Graham's view was that 'As far as Maoridom is concerned we will oppose vigorously any increase in the amount that is allowed to be sold overseas'.[12] However, Sir Graham's protestations were countered by

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10 Te Puni Kokiri, Ministry of Maori Development, *National Hui on Appointment on Treaty of Waitangi Fisheries Commissioners*, Wellington, 16 February 1993, p. 8.

11 op. cit.

12 Sir Graham Latimer, in *New Zealand Herald*, 19 May 1992.

the chief executive of Sealord Products, Dr. Brian Rhoades, who argued that for the purposes of capital input, and of parity with other New Zealand companies who were permitted to have large elements of foreign ownership, an exemption to the Act was crucial.[13]

Sir Graham's position in this dispute was significant not only because his stance heralded a strong determination to acquire a stake in Sealord Products, but also because of his ties with the national Government and his heavy and lengthy involvement in Maori politics. At this time, he was vice-president of the National Party (which he had joined in the late 1940's), president of the New Zealand Maori Council, chairman of the Tai Tokerau Maori Council, a member of the Waitangi Tribunal, and a long-time adviser to National on Maori affairs.[14] Because of the obvious political weight Sir Graham carried, his influence on the National Government's Maori policies was considerable, and he was later to play a vital role in the Sealord Deal.

From the National Government's perspective, on the one hand, it was strongly associated with free-market policies, and therefore had an ideological commitment to facilitating business growth, even if this meant that foreign capital was required. However, on the other hand, the influence and mana of Sir Graham Latimer within the National Party, coupled with other Maori groups applying pressure to the Government for some form of satisfactory agreement on commercial fisheries, placed National in a dilemma.

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13 Dr. Brian Rhoades, Chief Executive of Sealord Products Limited, in *New Zealand Herald*, 19 May 1992.

14 B. Gustafson, *The First 50 Years: A History of the New Zealand National Party*, Auckland, 1986, p. 372.

While Aotearoa Fisheries and the Maori Fisheries Commission were obviously keen for an opportunity to expand Maori involvement in commercial fisheries, cautionary noises were coming from other Maori groups. Dr. Bruce Gregory, the chairman of the Labour Party's Maori policy council, expressed the sentiment of the 25 Maori delegates to the Labour Party conference in Christchurch in September 1992, when he said that '...the treaty and aboriginal rights are not for sale and...we need to be addressing mechanisms that protect our traditional fishing rights'.[15] Other pockets of dissatisfaction existed among various Maori organisations and groups, but these were generally concealed within their internal workings, and only revealed themselves at a later date.

The anticipation of some sort of 'deal' which was emerging during 1992 led to worries over how a large-scale commercial fisheries operation would affect small-time Maori fishermen. The chairman of Te Rununga O Whaingaroa, and former Race Relations Conciliator, Hiwi Tauroa, observed that small scale fishing interests wanted '...to be able to go out and catch fish, but they are not included in the group who want to be big-time commercial fishers. They really are not being taken into account'.[16]

This apparent dilemma which the Government faced as 1992 progressed, was an indication (and possibly a warning) that Maoridom was not about to 'de-polarise' its views on Treaty settlements - despite the potential for a substantially greater Maori role in the fishing industry, and the potential flow-on effects of this.

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15 Dr. Bruce Gregory, in *New Zealand Herald*, 5 September 1992.

16 Hiwi Tauroa, chairman of Te Rununga O Whaingaroa, in *New Zealand Herald*, 29 September 1992.

C. National's Policy Stance

1990 was a landmark year for New Zealand. It marked the 150th anniversary of the signing of the Treaty of Waitangi, and towards the end of the year, a National Government was elected with Jim Bolger as its leader. The anniversary of the signing of the Treaty helped to raise the profile of Treaty issues in the public's consciousness, and prompted greater demands for the resolution of claims made by Maori, and for the Crown to fulfill its Treaty obligations. For its part, the National Party campaigned on a policy of aiming to settle all Maori claims under the Treaty of Waitangi by the year 2000. It appears that this policy was aimed more at placating an increasingly nervous Pakeha electorate who were worried about the scale and possible effect of large land claims (for example, Ngai Tahu were finalising a claim for most of the South Island). Certainly, this seemed to be a stronger motivating force behind the policy than any genuine and deeply-rooted desire on National's behalf to fulfill the Government's obligations under the Treaty. National's statements on the Treaty were far from reassuring, speaking of the need to 'Resolve misunderstandings relating to the Treaty...[and to] quickly resolve outstanding Maori grievances that are genuine and proven'.[17] In some cases, Jim Bolger's comments on this issue assumed the form of veiled threats about the process of settling claims taking too long, and the only limited patience and funds of the Government.

Statements by National Members of Parliament along these lines suggest that alternatives to fully honouring the Treaty of Waitangi would be an inviting option. The benefits to the Government would be considerably less expense in the short-term, a superficial but politically beneficial

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[17] New Zealand National Party, 'Facing the Future Together', in *National Party Policies for the 1990's, Creating a Decent Society*, Wellington, 1990, p. 18.

assumption of the moral high ground, and the temporary appeasement of influential Maori leaders. Nowhere in National's policy statements between 1990 and 1992 is any room provided for the so-called 'radical' component of Maoridom who were (notwithstanding this misleading and imposed title) requesting that the Crown honour a pledge it made to Maori in 1840.

This change in the philosophical approach to the Treaty, which rested in offering an alternative rather than a fulfillment to the promises, became morally acceptable to the community, including many Maori. Without such acceptance, the Sealord Deal would never have eventuated.

It is evident that the promise of settling all claims under the Treaty by the year 2000 was extravagant and unrealistic. By 1990, there was a growing backlog of claims to the Waitangi Tribunal, and by the beginning of 1994, the Tribunal had around 400 claims before it.[18]

The Government was also facing additional court action over Maori fishing rights unless it was able to satisfy Maori claims by October 1992 when 10 per cent of the fisheries quota would be distributed by the Maori Fisheries Commission to different tribes.

D. The Ngai Tahu Fisheries Case

One of the aspects of the Sealord Settlement which has received only minimal attention is the impact of particular Waitangi Tribunal reports on Government policies prior to 1992, especially the Ngai Tahu Sea Fisheries Claim.[19] Assessing this impact first requires an appreciation of the

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18 D. Graham, Minister of Justice, 'Digging Deep Into Land and History', *New Zealand Herald*, 13 January 1994.

19 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992.

triangular relationship between the Waitangi Tribunal, the Government, and the Maori claimants.

The Waitangi Tribunal's position in part of the wider justice system of New Zealand is unique in that there is definite and unconcealed political involvement in the Tribunal's operation: the Government defines (and has redefined) the scope of the Tribunal's jurisdiction, but more importantly, the effectiveness of the Tribunal as an organ of the justice system rests with the Government's political will, which may or may not be aligned at any given time with the sentiments expressed in the reports of the Tribunal. Thus, the Waitangi Tribunal has a tacit obligation to balance the merits of any particular claim with the likelihood of the Government implementing the recommendations, as well as considering the broader political climate in the country, which the Government has referred to as a justification of its policy stances on claims made under the Treaty.[20] The Treaty included no provision for the redress of grievances arising both from its interpretation and implementation. In order to resolve these shortcomings, the Waitangi Tribunal was created in 1975 as a division of the Justice Department, and was charged with inquiring into claims, reporting on these claims, and making recommendations to Government regarding redress.[21]

At the same time, though, there is a need for the Tribunal to satisfy the requirements of justice, in the fulfillment of Treaty obligations, which are laid on the Tribunal by the Maori claimants. The Tribunal's obligation therefore, at least in one respect, is to mediate and ultimately reconcile the

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20 Hon. Doug Graham, Minister of Justice, 'Fisheries Deal is Final', Speech in the second reading of the Treaty of Waitangi (Fisheries Claims) Settlement Bill, in *NZ Herald*, 21 December 1992.

21 W. H. Oliver, *Claims to the Waitangi Tribunal*, Wellington, 1991, pp. 10-12.

requirements of the parties to which it is responsible. Issues of justice are unavoidably bound by such constraints.

By the beginning of 1992, the National Government had developed a 'flexible response' approach to the reports and recommendations of the Waitangi Tribunal. This was adopted in part because of the need to avoid disrupting the delicate relationship between the Crown, the Tribunal, and the Maori claimants. Yet this relationship was apparently becoming harder to maintain. While the Muriwhenua report had certainly provided a basis for fisheries claims by iwi, many of the report's findings were either inconclusive, or, as in the case of its statements on the principles of the Treaty, almost contradictory.

Much of the effectiveness of the Muriwhenua report was lost too in the haste to get a final judgement on the main issues about which the claim was concerned in the face of accelerating violations of Treaty principles by the Crown, especially in its fisheries legislation and the constant threat of increased foreign ownership of New Zealand's fisheries resources lurking in the background.

Moreover, the ambiguity and uncertainty which characterised certain aspects of the Muriwhenua report, in the area of what precisely constituted Maori commercial fishing rights, sent a message to the Government that the status of Maori commercial fishing rights under the Treaty of Waitangi was less than clear. In this instance, the Waitangi Tribunal was providing insufficient direction to Government, with the consequence that Government policy on Maori fisheries could afford to be shaped with an air of contemptuous indifference.

In the Muriwhenua Report, the Tribunal determined:

> ...that it had insufficient evidence of the nature and extent of any Maori treaty fishing rights, of the considerations given to Maori fishing interests before the quota allocations were assessed, to enable it to give any determinative report.[22]

The Waitangi Tribunal's findings on the Muriwhenua also took the view that Maori fishing rights could be sold and were therefore alienable under the provisions and principles of the Treaty.[23] Yet this view failed to take into account the particular Maori concept of sea usage and access to fisheries, which differed in fundamental aspects from the European perception.

In one section of the Muriwhenua Report, the Tribunal acknowledged that a literal interpretation of the Treaty's provisions would '...create an awkward result today...'[24] and therefore, the possibility for an alternative arrangement was possible - in the Tribunal's own words: 'Nothing [in the Treaty of Waitangi] restricted the negotiation of alternative fishing arrangements'.[25] This capitulation to the apparent practicalities of the present, along with its suggestion of 'alternative fishing arrangements' is one of the earliest indications that some sort of deal could be reached, presumably between the Crown and Maori, which would resolve the possibility of the Tribunal having to recommend what it saw as an 'awkward result'.

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22 Waitangi Tribunal, Department of Justice, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai-22, Wellington, 1988, p. 6.
23 ibid. p. 205.
24 ibid. p. 211.
25 op. cit.

However, the publication of the Ngai Tahu fisheries report in 1992 prompted the Government to revise its posture on the whole issue of Maori fisheries, and put an obligation on the Government to develop some sort of seemingly sober response, both to maintain the credibility of the Waitangi Tribunal as an authoritative and effective institution and to uphold Maori faith in its ability to meet Maori aspirations under the Treaty. The Government would almost certainly have also been aware of the likely political costs of ignoring outright the recommendations of the Ngai Tahu Fisheries Report. Yet, the alternative - to accept and implement those implications, would also carry a very high political cost.

Ngai Tahu had already indicated in late 1986 that their claims to traditional fisheries '...were contiguous with the land which they occupied as tangata whenua, i.e., most of the South Island'.[26] In this report on Ngai Tahu's fisheries evidence, it was made clear that the fisheries in question were exclusive to the Ngai Tahu people, and that these fisheries had traditionally sustained the people in their daily lives.[27]

The evidence presented to the Tribunal was substantial and virtually conclusive. But perhaps more importantly, and certainly of more relevance to contemporary Government policy, was the comment the report made on the fact that the allocation of Individual Transferable Quota by the Government had failed to take into consideration the evident interest Ngai Tahu had in its own traditional fisheries areas,[28] (that is, the waters off the coast of tribal land) and that Ngai Tahu's right to fish these areas should be

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26 Waitangi Tribunal, Department of Justice, Dr. George Habib, 'Ngai Tahu Claim to Mahinga Kai - Part One - Report on Ngai Tahu Fisheries Evidence', Auckland, June 1989, p. 7.
27 ibid. p. 8.
28 ibid. p. 9.

'...without interference or restriction and that the right should be protected by the Crown'.[29]

The extent of the traditional Ngai Tahu fisheries was detailed in the report, and signalled to both the Government and the Waitangi Tribunal that there was a heavy burden on the Government to honour its obligations to Ngai Tahu under the Treaty of Waitangi. To attempt to avoid an obligation that was so clear-cut would be tantamount to the Government challenging the promises made in the Treaty.

Of particular relevance was the evidence submitted on the status of Ngai Tahu's mahinga kai (food-gathering locations) in 1880.[30] This detailed purchases made by Edward Gibbon Wakefield, and offered a comprehensive list of food production sites over much of the South Island. The report observed that early European administrators such as Kemp and Mantell failed:

> ...to acknowledge the complex nature of Ngai Tahu interactions with their environment and resources, and the long-standing significance of those interactions, is a continuing injustice....The modern Ngai Tahu position on mahinga kai and fisheries...is a reiteration on their original position as it applied in pre-European times.[31]

While the force of the initial Ngai Tahu claim was diminished to an extent by some of the less than satisfactory findings on the Muriwhenua claim, the resurfacing of Ngai Tahu's grievances in the 1992 Fisheries Report seemed

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29 ibid. p. 10.

30 Waitangi Tribunal, Department of Justice, Dr. George Habib, 'Ngai Tahu claim to Mahinga Kai - Part Two - Report on Ngai Tahu 1880 Mahinga Kai and Settlements, Auckland, June 1989.

31 ibid. p. 14.

to be timed perfectly (perhaps too perfectly) for the formation of the Sealord Deal.

The Crown's position on the evidence being presented by Ngai Tahu was unmistakable from early on. The Crown attempted to redirect the flow of issues by placing stress on the importance of careful resource management in relation to the fisheries resource and the development of effective management regimes[32], even though the Department of Agriculture and Fisheries had itself failed in this goal. But in a stubbornly defiant mood, the Crown attempted to swim against the tide of evidence, and even against the provisions and promises contained in the Treaty of Waitangi by asserting '...that the economics of the commercial fishery bring benefit to all New Zealanders and to Ngai Tahu who have chosen not to walk in the tribal world but under the protection of Article the Third of the Treaty'.[33] As Dr. Habib commented, such statements underpinned:

'...the Crown's approach to this claim. Rather than first examining the actions taken by the Crown in respect of its guarantees under the Treaty, the Crown seemed intent on persuading the Tribunal that it is doing a good job in managing the modern fishery, and that the benefits flow to Ngai Tahu from that'.[34] The Crown's stand was in clear contempt of the clearly defined principles of the Treaty. Ignoring the volumes of evidence that had previously been rigorously researched and submitted to the Tribunal, as well as all the existing published information, the Crown counsel articulated the Government's position in relation to the claim:

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32 G. Habib, 'Assessment of Crown Evidence on the Mahinga Kai Fisheries Aspect of the Ngai Tahu claim Wai-27', T4(c), p. 26.

33 S. E. Kenderdine, Crown Counsel, Opening submissions on Ngai Tahu sea fisheries, Doc R9, pp. 2 and 3.

34 G. Habib, 'Assessment of Crown Evidence on the Mahinga Kai Fisheries Aspect of the Ngai Tahu claim Wai-27', T4(c), p. 26.

> ...acting very properly under the Sovereignty ceded to it by the Tribe under Article the First of the Treaty, the Crown controls the commercial fishery as a national resource which because of its intrinsic nature can only be managed and conserved under national guidelines.[35]

The Crown's case was predictably devoid of mention of the kawanatanga principle, or of the principles of international law which would favour the Maori interpretation of the Treaty in which sovereignty was not ceded.[36] Neither did the Crown admit to its own failure to adequately conserve and manage the country's fisheries, even though it did have the alleged benefit of 'national guidelines'.

The findings of the 1992 Ngai Tahu Sea Fisheries Report restricted the number of options available to the Government for side-stepping its Treaty obligations. In its conclusion to the report, the Tribunal observed that Government legislation, while ostensibly pointed at the preservation of the fishing resource, rarely gave even recognition of fishing rights guaranteed to Maori under the Treaty of Waitangi:[37]

> ...from a relatively early stage, the Crown adopted the widely held settler view that fisheries belonged to the Crown and no rights, whether under Maori customary law or treaty, could be held by any person, Maori or non-Maori, without a specific land grant from the Crown or by legislative provision....the Crown refused to give any effect to the legislative provisions in force between 1900 and 1962 providing for the reservation of exclusive Maori fishing grounds....[38]

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35 S. E. Kenderdine, Crown Counsel, Opening submissions on Ngai Tahu sea fisheries, Doc R9, p. 3.

36 These principles include *Contra Proferentem*, and those relevant principles contained in the Vienna Convention 1969. See D. L. Harris, Cases and Materials on International Law, Second Edition, London, 1979, pp. 584 - 661.

37 Department of Justice, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai-27, Wellington, 1992, p. 295.

38 ibid. p. 298.

The report's language was firm in its conclusion on the attitudes of the Crown to Maori fisheries, stating that the Crown had a '...negative attitude...'[39] to Maori sea fishing rights under the Treaty of Waitangi. It was at this juncture, the report observed that Maori fishing rights were not frozen at their 1840 levels because there was an inherent right in the Treaty to development. That is, the right to development associated with changes in technology, population, and so on. Therefore, the fisheries arguments needed to be considered in current as well as historical contexts.

The Tribunal flatly rejected the Crown's suggestion that by 1840, the claims to areas of territorial sea had consolidated to a three-mile zone which was generally accepted by Maori. It was made clear in the report that this so-called agreed limit had been a point of continual controversy, and that the Crown had violated both the Treaty of Waitangi and international law in its subsequent legislation relating to this fishing zone.[40]

The summary of the Crown's breaches of the Treaty, which was contained in the Report of the Tribunal, is worth re-printing here as it is one of the clearest and most concise statements on the status of Maori fisheries in general, and Ngai Tahu fisheries in particular:

> We have found that Ngai Tahu has been prejudicially affected by various acts, omissions, policies and Acts relating to their sea fisheries which were or are inconsistent with the principles of the Treaty in that:
>
> - Grievous and irreparable harm resulted from the Crown's breaches of its Treaty obligations when acquiring the vast Ngai Tahu land holdings between 1844 and 1864. Not only did the tribe lose virtually the whole of their land and their economic base, they were as a direct consequence

39 ibid. p. 298.
40 ibid. pp. 301 - 302.

unable to continue their thriving and expanding business and activity of sea fishing.

- In legislating to protect and conserve the sea fishery resource the Crown failed to recognise Ngai Tahu rangatiratanga over their sea fisheries and in particular their tribal rights of self-regulation or self-management of their resource, this being an inherent element in rangatiratanga. Their rights were usurped by the Crown without any consultation with Maori and without any recognition of their Treaty rights in their sea fisheries. This denial of Ngai Tahu rangatiratanga over their sea fisheries was in breach of article 2 of the Treaty.

- Over time the various statutory regimes intended to protect and conserve the sea fisheries failed to prevent serious depletion of the resource to the detriment not only of Ngai Tahu but Maori generally. The resulting material and cultural depravation undermined Ngai Tahu mana moana and was the consequence of the Crown's breach of its Treaty duty to protect and sustain Ngai Tahu tino rangatiratanga.

- Subject to some limited or partial exceptions, the sea fishery statutes reflected the Crown's assumption that non-Maori had equal rights with Maori in the whole area of sea fisheries, notwithstanding that article two of the Treaty guaranteed Maori rangatiratanga over their fisheries. This assumption was in breach of the Treaty principle requiring the Crown actively to protect Maori rangatiratanga.

- In providing the Sea Fisheries Act 1894 for the sale by public tender of the exclusive right to the absolute property in oysters the Crown acted on the basis that it, not Ngai Tahu, owned the oysters within Ngai Tahu sea fisheries, contrary to Treaty duty to protect Ngai Tahu rights to their fisheries.

- From 1894 on until recently the Crown failed to provide any statutory recognition of Ngai Tahu Treaty rights to their fisheries. This was in breach of the Crown's Treaty obligation to actively protect Ngai Tahu rangatiratanga in their sea fisheries and contrary to its obligation as a Treaty partner to act reasonably and in good faith. Instead, it continued to exercise legislative control over the sea fisheries from 1894 to 1989 without regard to its Treaty obligations to Ngai Tahu and other Maori and in breach of Treaty principles.

- The refusal of the Crown to give any effect to legislative provisions in force between 1900 and 1962 providing for the reservation of exclusive Maori fishing grounds notwithstanding applications by Maori including Ngai Tahu was in breach of the Crown's duty as a Treaty partner to act reasonably and in good faith.

- The quota management system first put in place in a limited way by regulation in 1983 and in statutory form in 1986 is in fundamental conflict with the terms of the Treaty and Treaty Principles. It is based on an assumed right of the Crown to dispose of Maori fisheries without Maori consent as if they were the property of the Crown. No effort was made by the Crown to ascertain the nature and extent of Maori sea fisheries guaranteed by the Treaty prior to the passage of this legislation. Nor were the tribes consulted. The legislation constitutes a virtual denial of any significant rangatiratanga of Maori in their sea fisheries; far from protecting it, the Act gives the Crown authority to dispose of the Maori right to their sea fisheries. This the Crown has proceeded to do without the consent of Maori. The as it stands, constitutes a serious breach of the Treaty.[41]

This summary preceded possibly the most significant part of the report, in terms of it being a precursor to the Sealord Deal, which was that which dealt with recommendations to the Crown. Having stated unequivocally the positions of the Crown and Maori, and having detailed a history of injustices and violations of the Treaty, the Waitangi Tribunal issued recommendations which were bold, far-reaching, and reflected the effectiveness and resolution of the Tribunal at the height of its political autonomy.

In the introductory comments to the recommendations of the Waitangi Tribunal on the Ngai Tahu Sea Fisheries Report, Ngai Tahu were seen as having *exclusive* rights to the sea fisheries surrounding the whole of their tribal area to a distance of twelve miles from the shore, and that under the concept of the development right of the Treaty, that Ngai Tahu also have a

41 ibid. pp. 305 - 306.

right to a *reasonable* share of the sea fisheries beyond the twelve-mile limit up to the 200-mile exclusive economic zone.

In order to achieve the fulfillment of these recommendations, the Tribunal proposed that:

> ...that there is a need for Ngai Tahu and the Crown to negotiate and settle by compromise if possible, what constitutes a reasonable share of the fisheries beyond 12 miles including the deep sea fisheries.[42]

However, this recommendation still gave the Crown a loop-hole from which it could escape from its Treaty obligations and responsibilities. But at the same time, it was the clearest indication yet that the Crown would have to dramatically alter its policy stance towards Maori fishing. The Tribunal stressed that although its findings were specific to Ngai Tahu,

> ...the tribunal cannot ignore the legislative procedures now in place for what the Maori Fisheries Act 1989 describes (inter alia) as a process to make better provision for the recognition of Maori fishing rights secured by the Treaty.[43]

From the Crown's perspective, some action would have to be taken which, at least avoid the problems of ongoing claims of a similar nature being made, which would in turn require some sort of additional set of ad-hoc measures being implemented Therefore, the most sensible and expedient course to take would be one which would apply to the whole Maori sea fisheries question.

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42 ibid. p. 307.
43 ibid. p. 307.

As the Tribunal's greatest power was only to recommend, and not to decide, the outcomes it intended the Crown and Maori to achieve would necessarily involve some negotiation by both parties. The following recommendations made must be seen in this light:

> We *recommend* that the Crown and Ngai Tahu enter into negotiations for the settlement of the Ngai Tahu sea fisheries claim.
>
> In so doing the tribunal *recommends* that the parties take into account the findings of this tribunal that Ngai Tahu have:
>
> - an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe [region] to a distance of 12 miles or so there being no waver or agreement by them to surrender such right.
>
> - a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu.
>
> - that appropriate allowance should be made for the serious depletion of the inshore fishery of the Ngai Tahu rohe when assessing the reasonable share of the sea fisheries to which Ngai Tahu is entitled beyond the first 12 miles or so from the shoreline....
>
> We *further recommend* that the negotiation and settlement should include determination of an appropriate additional percentage of quota under the Quota Management System....[44]

It was these recommendations which were to be married with political and commercial imperatives later in 1992 to lead directly to the formation of the Sealord Deal.

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[44] ibid. p. 308.

7. THE SEALORD DEAL

A. Sealord Products Limited

In the late 1970's the shareholding of Sealord Products Limited was restructured with 76 per cent held by Carter Holt Harvey, and the remaining 24 per cent held by Hohsui Corporation of Japan.[1] Sealord Products was one of the first fisheries companies to get involved in the catching and marketing of Orange Roughy in the early 1980s, and the revenue this initiative generated facilitated the growth and development of the company's deep-water fleet and on-shore processing facilities. In March 1990, Carter Holt Harvey purchased Hohsui's 24 per cent holding in Sealord Products, and in the same year, acquired Fletcher Fishing's deep-water fishing operations.[2]

At the beginning of 1992, the Nelson-based Sealord Products was a wholly-owned subsidiary of Carter Holt Harvey Limited - one of New Zealand's biggest companies. Sealord Products had also proven to be one of Carter Holt Harvey's strongest New Zealand performers, earning $246 million in the year ending March 1992. Around 94 per cent of Sealord's earnings were from exports - a sector that was experiencing a period of sustained growth. Sealord employed 1200 staff and its assets were valued at $244.2 million.[3]

Sealord's Nelson-based processing plant, and another smaller one in Dunedin, focused on value-added production, which was a contributing factor to its comparatively high staff requirement. At the time, the

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1 Brierley Investments Limited, Brierley Investments Limited 1993 Annual Report, 1993, p. 28.
2 op. cit.
3 *New Zealand Herald*, 28 August 1992.

company operated its own fleet of seven fishing vessels and employed additional boats on a charter basis to harvest its annual quota entitlements. The total quantity of fish processed by Sealord Products in 1991 was 40,000 tonnes, making it the largest processing plant in Australasia.[4] Strangely, though, Carter Holt Harvey was silent on the political manoeuvring between the Maori Fisheries Commission and the Government relating to one of the Company's most important subsidiaries, and were content to pretend that the Deal, as far as they were concerned, was nothing more than a business transaction.

Sealord Products' markets, and the percentage exported to those markets for the 1991-1992 fishing year are displayed in the following chart. It reveals the company's heavy emphasis on exporting:

Table 2. Sealord's Markets for 1991-2 Fishing Year

Market	*Percentage of the Company's total output going to a particular market*
United States	33.3%
Japan	27.9%
Europe	12.4%
Other Asia	9.7%
Australia	8.4%
New Zealand	8.3%

Source: J. P. Morgan Limited, *Appraisal Report to the Independent Directors of Carter Holt Harvey Limited Re: Sealord Group*, November, 1992, p. 18.

4 Press statement by Carter Holt Harvey Limited, 'Carter Holt Harvey Limited Announces Sale of Sealord', 17 November 1992.

Sealord Products' quota holdings for the 1992-1993 fishing year are displayed on the following chart:

Table 3. Sealord's Quota Holdings for 1992-3 Fishing Year

Species	*Total ITQ allocated by the NZ Government. GWT*	*Total ITQ owned by Sealords. GWT*	*% of total quota owned by Sealords.*
Hoki	201,907	69,299	34.3%
Orange Roughy	35,510	10,283	29.0%
Squid	118,571	33,780	28.5%
Oreo Dories	26,156	8,238	31.5%
Ling	19,711	6,355	32.2%
Hake	13,780	4,304	31.2%
Silver Warehou	9,508	1,986	20.9%
Gemfish	7,349	1,466	20.0%
Barracuda	33,190	5,773	17.4%
Jack Mackerel	40,249	6,211	15.4%
Red Cod	15,840	1,450	9.6%
Blue Warehou	4,499	671	14.9%
Others	52,747	916	1.7%
Total	**579,017**	**150,732**	**26.0%**

Source: Brierley Investments Limited, Brierley Investments Limited 1993 Annual Report, 1993, p. 30.

New Zealand has the seventh largest Exclusive Economic Fishing Zone in the world, and so Sealord, with its twenty-six per cent share of the Total Allowable Commercial Catch is a significantly sized fishing company by

international standards. Furthermore, between 1990 and 1993, Sealord Products Limited experienced a considerable growth in the value of its sales, reflecting in increase in both quantity and variety of catch, a strong emphasis on marketing, and improvements in value-added processing. However, there was, and is, the constant possibility of readjustments in the size of quota as the Department of Agriculture and Fisheries attempts to reconcile the commercial demands of the various fisheries companies, and the need to conserve the resource.

The changing financial situation of the company is shown on the following schedule:

Table 4. The Financial Position of Sealord Products Limited

YEAR ENDED 31 MARCH

$ millions	**1993**	1992	1991	1990
Sales	**406.6**	247.2	189.6	135.8
Earnings before Interest and Tax	**61.5**	42.5	23.6	15.5
Net Profit	**38.6**	29.0	15.2	12.7
Shareholders' Funds	**114.6**	-	-	-
Total Assets	**288.4**	-	-	-

Source: Brierley Investments Limited, Brierley Investments Limited 1993 Annual Report, 1993, p. 31.

These figures demonstrate the rapid growth of the company between 1990 and 1993, and its steadily increasing profitability during this period.

B. The Metamorphosis of the Maori Initiative

> ...it does not appear to be at all difficult for Strangers to form a settlement in this Country; they [the Maori] seem to be too much divided among themselves to unite in opposing, by which means and kind and gentle usage the Colonists would be able to form strong parties among them.[5]

The first indication that Maori fishing leaders were serious about purchasing all or some of Sealord Products came in April 1992. The chairman of the Maori Fisheries Commission, Mr. Tipene O'Regan, described the possible purchase of the company by the Government on behalf of the Maori as a '...brilliant opportunity...'[6] to settle grievances with the least possible disruption to the fishing industry. Sir Graham Latimer also spoke in favour of the potential deal, saying that it was an excellent chance to settle outstanding claims fairly and quickly.[7] Carter Holt Harvey planned to publicly float the company in August of 1992 and anticipated raising $350 million from the sale of shares. These events collided with the release of the Ngai Tahu Fisheries Report which recommended the return of practically all fisheries to Maori. It was obvious that this would present a chance to Maori to use the additional pressure of the Waitangi Tribunal report to further the cause of some sort of settlement, but negotiations were still at a very early stage, and Mr. O'Regan's suggestion was little more than an exercise in opportunism at that juncture.

The possible upheaval this might cause to the country's fishing sector as a whole seemed to cause some panic within the industry. Fishing Industry Association President, Peter Talley, said that the interim settlement

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5 Captain James Cook, 31 March 1770, in J. C. Beaglehole (ed.), *The Journals of Captain Cook*, Volume 1, Cambridge, 1955, p. 278.

6 Dr. Tipene O'Regan, in *New Zealand Herald*, 15 April 1992.

7 Sir Graham Latimer, in *New Zealand Herald*, 15 April 1992.

arranged by the Labour Government in 1989 should have been the final settlement of the Maori commercial fisheries issue. Mr. Talley's frustration appeared to show when he stated that 'They [the Maori] seem to be able to conveniently interpret the Treaty to claim almost anything they want'.[8]

Maori were already eligible for 10 per cent of all quota - which was worth around $120 million - and was due to receive this in October 1992 under the provisions of the interim fisheries settlement made with the Labour Government in 1989.

The Minister of Fisheries at the time (and also incidentally the Minister of Maori Affairs) was Doug Kidd. In a speech to a Lower Hutt lawyers' luncheon on 26 March 1993, Mr. Kidd spoke deliberately on the issue of Maori fisheries, and stressed his perceived need that some sort of final resolution of the matter was required: 'They either leave the fishery in question woefully underdeveloped or...encourage a short-sighted, goldrush winner-take-all approach'.[9] In April 1992, although not specifically ruling out the possibility of such a deal, did insist that there '...was nothing in the works,'[10] as far as the Government acquisition of Sealord Products was concerned, even though he had also indicated that preliminary discussions had been held with Maori negotiators.[11] On the surface, this appeared to be a rejection of the potential deal, which seemed to be even more doomed to failure when the Government, a few weeks later, acknowledge that up to 40 per cent of Sealord Products could be sold to an overseas interest - in contravention of the Fisheries Act. This prompted outrage in the fishing industry because the 'rules were being broken' for seemingly political

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8 Peter Talley, president of the Fishing Industry Association, in *The Dominion*, 27 March 1992.
9 Hon. Doug Kidd, Minister of Fisheries, and Minister of Maori Affairs, in *The Dominion*, 27 March 1993.
10 Hon Doug Kidd, in *New Zealand Herald*, 15 April 1992.
11 *The Dominion*, 14 April 1992.

purposes. However, the threat of large-scale foreign ownership of Sealord Products, after the Maori fishing negotiators had expressed their interest in the company, appears to have been part of a tough negotiating ploy which the Government was utilising to indicate its likely position during any subsequent negotiations. The advantages of hindsight lend support to the belief that the Government was 'guiding' the Maori fisheries negotiators towards a partial purchase of Sealord Products. The statements that senior Government Members of Parliament were making on this matter not only seemed out of place, but were also, if taken at face value, a redirection of National's policy focus - which hinted that 'something was in the air'. If the Government had been serious about allowing 40 per cent of Sealord Products to be sold to overseas investors, the potential political costs would almost certainly have outweighed the possible benefits the Government may have derived from such a sale. There was the threat of probable legal challenges from the Fishing Industry Association, and the possibility of a judicial review if such a sale looked like going ahead. Other parties concerned, like the Auckland fish broker and exporter Taspac, announced that they were '...staggered...'[12] by the possibility of such a sale, and within a matter of days, Sir Graham Latimer, the chairman of Aotearoa Fisheries, described this special Government dispensation to allow 40 per cent of Sealord Products to be sold to foreign interests as '...crazy...', and that it would be the '...beginning of the end for the industry'.[13]

These sorts of reactions were quite possibly what the Government had anticipated. Any Maori organisation, and particularly the Maori Fisheries Commission, were immediately forced to scramble to present something to

12 *New Zealand Herald*, 15 May 1992.
13 Sir Graham Latimer, cited in *New Zealand Herald*, 19 May 1992.

the Government to regain the initiative which, at least on the surface, appeared to be under threat.

In May 1992, the formal consideration by the Maori Fisheries Commission of the acquisition of Sealord Products began. In order to facilitate the process, a special purpose company, Te Waka Unua Limited, was established, (Te Waka Unua Limited was wholly owned by the Maori Fisheries Commission). In May, Te Waka Unua commenced the undertaking of due diligence investigations. That is, as a serious potential purchaser, it was able to examine the records of Sealord Products as a possible prelude to acquisition.

At this stage, the momentum of the Sealord Deal was being directed largely by the Maori Fisheries Commission. At the Maori Fisheries Commission's Annual General Meeting in July 1992, it was resolved to allocate its existing holding of quota and assets to iwi as soon as possible to clear the way for the management and allocation of the quota it expected to receive once the Sealord Deal went through.[14]

The initial negotiations yielded the Memorandum of Understanding, known as the MOU. It was six pages in length, compared with over 35 pages in the final Deed of Settlement.

After a period of negotiations between the Maori Fisheries Commission and the Government in which details on the agreement were worked out in almost total secrecy,[15] the Sealord Deal was announced on the evening of

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14 Te Puni Kokiri, The Ministry of Maori Development, *National Hui on the Appointment of the Treaty of Waitangi Fisheries Commissioners*, Wellington, 16 February 1993, p. 8.

15 Letter to Paul Moon from the office of Hon Koro Wetere, MP for Western Maori, 1 February 1994.

27 August 1992. What was still required was some form of mandate from the Maori people which would give the Deal a sense of mana and legitimacy which it clearly lacked at the time, and because the Deal was going to have an impact on future claims under the Treaty of Waitangi.

One of the barriers to constructive dialogue in Maoridom on the potential deal was the absence of information available from the main players involved. The Government imposed legal constraints on the negotiation process, claiming that the commercially sensitive nature of the information prevented the negotiations being made open to public scrutiny.[16]

The Maori Fisheries Negotiators, for their part, rampaged across the preserves of iwi rights under the Treaty of Waitangi without hesitation. Their tactics were oblivious of precedent of individual iwi decision-making by imposing a pan-iwi agreement, and were driven by an end to which the use of almost any means could be justified.

The differences between the Deed of Settlement and the Memorandum of Understanding were later to be of crucial importance to the interpretation of the deal, and the claim by the Maori fisheries negotiators that they had a mandate for the deal from Maori. Honore Chelsey, the fisheries officer representing Te Runanga O Ngati Porou, encapsulated this problem two years later in a way that reflected the experiences and sentiments of other iwi:

> The Maori Fishery Negotiators held a hui here in Ruatoria on September 9, 1992, at which there was a large attendance,...to explain...the whole Sealords deal.
>
> Although the Memorandum of understanding had previously been explained to representatives of Maoridom at the Pipitea

[16] Kia Mohio Kia Marama Trust, *Background to the Sealords Deal*, Auckland, 1992, p. 1.

> Marae hui (August 28, 1992), more opportunity should have been allowed to scrutinise this document closely, and subsequently, the Deed of Settlement, especially with the impact this would have on Maoridom. However, on the 23 September, 1992, when the chairman of Te Runanga o Ngati Porou went to Parliament to sign the deal, based on the information of that time, the Deed of Settlement was distributed and all those present were given one to one and a half hours to study the document before the actual signing. This was clearly a ploy instrumented by the Crown to have this deal done on their terms as there was a suggestion that if Maoridom didn't sign the Crown would proceed and produce legislation anyway. It was on the basis that the Deed of Settlement would extinguish all our rights under the Treaty of Waitangi that Mr. Mahuika expressed his concern that he would be signing away the rights of future generations of Ngati Porou and indeed Maoridom once it became enshrined in legislation. It was at this juncture that Mr. Mahuika refused to sign on behalf of Te Runanga O Ngati Porou and all its beneficiaries and walked away.
>
> On Sunday 11 October, 1992, another meeting was convened by Te Runanga O Ngati Porou at Uepohatu Marae, Ruatoria, again at which there was a large gathering, to clarify Ngati Porou's position as far as the Sealords deal was concerned. After lengthy discussions, a resolution was adopted, with only one dissenting voice recorded, to support Te Runanga O Ngati Porou in its opposition to the Sealords Deal and to lend support to the court litigation against the Crown.[17]

By this stage, however, such opposition was virtually too late to effect any change in the contents of the deal.

C. The Ngai Tahu Sea Fisheries Report Released

The release of the Ngai Tahu Sea Fisheries Report in August 1992 served only to vindicate the actions and general direction of the Maori Fisheries Negotiators. The Ngai Tahu Report recommended that the iwi should have exclusive Treaty rights to the sea fisheries surrounding their tribal area to a distance of 12 miles from the shore, and that based on the newly

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[17] Letter from Honore Chelsey, Fisheries Officer, Te Runanga O Ngati Porou, to Paul Moon, Ref, 3/3/23, 22 September 1994.

espoused Treaty principle of development, Ngai Tahu should be granted a '...reasonable share...'[18] of fisheries beyond that point, up to the 200-mile Exclusive Economic Zone.

The Tribunal then went on to recommend a course of action which neatly coincided with the negotiations that were taking place at the time between the Maori Fisheries Negotiators and the Crown:

> In arriving at a "reasonable" share of the extended fishery it is also necessary to have regard to their expectation of Ngai Tahu arising from its Treaty right to development (10.6, 12.5.4, 13.15). It is therefore clear to the Tribunal that there is a need for Ngai Tahu and the Crown to negotiate and settle by compromise if possible what constitutes a reasonable share of the fisheries beyond 12 miles including the deep sea fisheries. Note will need to be taken of the provisions of the Maori Fisheries Act 1989 which have introduced onto the scene a new party in the Form of the Maori Fisheries Commission to which body government has transferred quota to hold and deal with on behalf of all Maori.
>
> The findings of this tribunal are specifically in respect of the Ngai Tahu claim but the tribunal cannot ignore the legislative procedures now in place for what the Maori Fisheries Act 1989 describes (inter alia) as a process to make better provision for the recognition of Maori fishing rights secured by the Treaty. Obviously, therefore, there will be a need for the Crown and Ngai Tahu to negotiate and settle within the overarching provisions of the 1989 Act and any amendments made to that Act which provide for additional quota allocation.[19]

This expressed desire for some sort of settlement skated around the obligation created by the Treaty for the Crown to return all Maori fisheries back to iwi. The thrust of these recommendations was for a sort of compromise which, in reality, would more than likely fail to full satisfy either side.

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18 *Ngai Tahu Sea Fisheries Report 1992*, p. 306.
19 ibid. p. 307.

D. The Deed of Settlement[20]

> The Settlement is an active endorsement of Maori rights and a fulfillment of the Governments [*sic*] obligation to the indigenous people of New Zealand.[21]

The final version of the Deed of Settlement for the Sealord Deal was a result of an intense period of negotiations, with the additional pressure of knowing that other parties were ready to purchase Sealord Products if the deal between the Government and the Maori Fisheries Commission fell through. The Preamble to the Deed of Settlement acknowledged that by the Treaty of Waitangi, the Crown guaranteed to Maori their fisheries, but that 'There has been uncertainty and dispute between the Crown and Maori as to the nature and extent of Maori fishing rights in the modern context as to whether they derive from the Treaty and/or common law...and as to the import of their long-standing statutory recognition'.[22]

Attached to the Deed were several preconditions which were required to be satisfactorily fulfilled prior to the settlement date. These included Maori conducting a due diligence investigation of Sealord Products. This meant that the Maori Fisheries Commission would have access to all the records (including confidential ones) relating to the operation of the company. Other preconditions involved the Maori-Brierley's [Brierley Investments Limited] joint venture entering into a binding sale and purchase agreement with the owners of Sealord Products, the Maori share of 50 per cent of Sealord Products could not be transferred or sold during the payment period unless consent was given by the Crown, and if any of these

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20 See Appendix 3
21 Letter from Doug Kidd, Minister of Fisheries, to Paul Moon, 16 February 1994, p. 3.
22 Preamble to the Deed of Settlement, August 1992.

conditions were not performed or fulfilled to the Crown's satisfaction, then the Deal would cease.[23]

Although the Deed of Settlement ran to over forty pages of closely typed script, the salient points were:

- The Crown would provide finance for Maori to the amount of $150 million for a joint venture acquisition of Sealord Products Limited.

- The Maori Fisheries Commission would be reconstituted into the Treaty of Waitangi Fisheries Commission - the functions of which would be changed, and which would be accountable to Maori and the Crown.

- Legislation would be enacted which would provide for the allocation of 20 per cent of all quota for species thereafter brought into the Quota Management System.[24]

- The repeal of legislation which recognised Maori fishing rights, and the restriction of the scope of the Waitangi Tribunal so that it could not enquire into commercial fisheries claims.

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23 op. cit.

24 This was mistakenly reported at the time in the New Zealand Herald as being 50 per cent instead of 20 per cent of all quota for new species brought into the Quota Management System. *New Zealand Herald*, 28 August 1992.

- The cessation of all fisheries related litigation against the Crown, and the acceptance by the Maori of the Quota Management System.

- Legislation would be enacted which would allow for the introduction of regulations recognising customary food-gathering interests.

- Provision would be made for the new Treaty of Waitangi Fisheries Commission to be Directly involved with the Crown in making major decisions on the future management of the country's fisheries sector.[25]

The Deed of Settlement was finally ratified on 23 September 1992 between the Crown and Sir Graham Latimer, Matiu Rata, Richard Dargaville, Tipene O'Regan, Cletus Maanu Paul, Whatarangi Winiata, and others who negotiated with the Crown on behalf of iwi, the New Zealand Maori Council, the National Maori Congress, and other representatives of iwi. However, the actual signing of the Deed remains confused. Contrary to the Crown Law Office typed sheet, there was no record of signatures by Claude Edwards, Jules Ferris, Hunara Tangaere, or Henare Ngata. Yet Henare Ngata was convinced that he did sign, even though his signature was not contained in the copies of the signed Deed sent to Te Puni Kokiri.[26] It is possible that there was confusion between the signing of the Deed of Settlement and the earlier Memorandum of Understanding. The significance of this confusion is that it highlights Government mismanagement of the process, and possibly the deliberate attempt by

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25 *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, (1).

26 Department of Justice, 'Analysis of Signatories to the Sealords Fisheries Agreement (Subsequent to the First Hearing)', Wellington, 1992.

Government officials to mislead some of the signatories and thereby obscure the significance of the extinguishment provisions of the Dead of Settlement.

Undoubtedly, this was probably the single most significant settlement under the Treaty of Waitangi in New Zealand's history. There was the possibility of as many as 130 new species of fish being introduced into the Quota Management System,[27] and the required withdrawal of Maori fisheries-based litigation against the Crown would have the effect of accelerating commercial fisheries expansion in New Zealand.

Even though the Deal was spoken of in terms of a settlement of fisheries clauses under the Treaty of Waitangi, in one sense at least, this was not a precise assessment. The Deed of Settlement was a substitute for the fulfillment of the promises contained in the Treaty, and the extinguishing of the right of Maori to make further fisheries claims, which was fundamental to the Settlement Deed, indicates that a trade-off of rights for financial gain, and a smothering of the essence of the Treaty's promise relating to fisheries was a planned byproduct of the settlement.

From a 'bird's eye view', Maori were seemingly compelled to accept this Settlement in virtually whatever form the Government constructed it, because of clause 4.6 of the Deed of Settlement[28] which had '...momentous consequences...'[29] for all outstanding Maori claims. The clause gave the impression that it was necessary to conclude an agreement because of the unlikelihood of such an opportunity arising again. However, the Minister

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27 Hon. Doug Kidd, Minister of Fisheries, Media Statement, 'Maori Fisheries Settlement Good News for Industry', 27 August 1992.

28 See Appendix 3.

29 P.G. McHugh, 'Sealords and Sharks: The Maori Fisheries Agreement, 1992', October 1993, p. 6.

of Fisheries, Doug Kidd, later redefined the extinguishment clause to soften the blow and make the severely limited settlement the Government was offering seem more palatable:

> It does not "extinguish Maori rights", rather the Government believes the Settlement redefines those rights in a modern context with a progressive and sustainable fishery management system.[30]

Such semantic manipulation did nothing to cloud the issue of the total removal of certain rights and promises contained in the Treaty.

The Maori negotiators were confident that Maori would support the Deal,[31] and the Prime Minister confirmed his desire that the Deal would signal the end of commercial Maori fishing claims, adding a comment about the '...endless [*sic*]...'[32] litigation that had preceded the Deal, thus tacitly indicating that continued pressure had probably been effective as a device for bringing about the agreement. Matiu Rata acknowledged that the Settlement Deed was not perfect, but that it presented '...an opportunity to build, and build we will'.[33]

The scope of the Settlement, which extended to traditional and non-commercial fisheries, went beyond the general requirements that would have been expected of what was fundamentally a commercial agreement. Sealord Products had no involvement in traditional Maori fisheries. The non-commercial component in the agreement was arguable an unnecessary diversion, and as one historian put it: 'If any feature of the Deed of Settlement is to sink the agreement and incur the wrath of future

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30 Letter from Doug Kidd, Minister of Fisheries, to Paul Moon, 16 February 1994, p. 3.
31 *New Zealand Herald*, 28 August 1992.
32 Rt. Hon Jim Bolger, in *New Zealand Herald*, 28 August 1992.
33 M. Rata, on Radio New Zealand *Morning Report*, 24 September 1992.

generations, it will be that [the inclusion of the non-commercial element].[34] The Government seems to have been keen to incorporate as many potential Treaty issues relating to Maori fishing rights (both commercial and traditional) in the Sealord Deal as possible.

E. The Grasp for a Mandate

> One cannot claim to have a mandate for a full and final settlement. It is absurd to claim that mandate. It is proper to claim a move of some significance along the way. I plead with the Government not to make that a matter of full and final settlement because it would be mocked before the ink is dry on the statute.[35]

It would have been arrogance on behalf of the Maori Fisheries Commission to have acted as representatives of all Maori without any endorsement from Maoridom to do so. Indeed, the six Maori fisheries negotiators signed the Settlement Deed in their capacity as negotiators, and gave no indication of their iwi affiliation. From this standpoint, it could be argued that their signatures would not necessarily bind their respective iwi.[36] Therefore, the Maori negotiators held hastily convened hui around the country for a three week period in September 1992 - at the point when the Sealord Deal had been practically concluded, apart from the signing. The purpose of these hui was to get a mandate for the up-coming Deal, but by this stage, the negotiations were effectively complete, and thus the Maori fisheries negotiator's 'tour' around the country was reduced to a charade to present what was a fait accompli. Pressure was applied to iwi by the Fisheries Negotiators who cloaked their message in the language of

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34 P.G. McHugh, 'Sealords and Sharks: The Maori Fisheries Agreement, 1992', October 1993, p. 7.

35 Rt. Hon David Lange, Speech to Parliament in Second Reading of the Treaty of Waitangi (Fisheries Claims) Settlement Bill, 8 December 1992.

36 Department of Justice, 'Analysis of Signatories to the Sealords Fisheries Agreement (Subsequent to the First Hearing), Wellington, 1992.

urgency and of ultimatum, which concealed the fact that most of the preparations for the Deal were already complete.

In a document issued by Te Puni Kokiri, the Ministry of Maori Development, this '...national round of consultations...'[37] is described as having taken place in August 1992, a month before the signing of the Deed of Settlement, and concludes that '...a mandate for the proposal...[was] received'.[38] However, newspaper reports indicate that these so-called 'consultations' did not actually commence until September 1992.[39] Furthermore, before any discussions between the Maori negotiators and Maori organisations around the country had taken place, Brierley Investments Limited had announced an 'indicative bid' to enter into a joint venture with the Maori Fisheries Commission to purchase Sealord Products from Carter Holt Harvey.[40] Such a public bid would have been unlikely had there not been some degree of certainty about the final shape of the Deal. It would not have been realistic for Brierley to even consider making a bid if there was any real potential for these nation-wide 'consultations' between the fisheries negotiators and Maori organisations and interest groups to result in a fundamentally altered form of the Deal, or even its abandonment. Brierley Investments' chief executive, Paul Collins, said that his company was '...ready to move immediately...'[41] to undertake due diligence - suggesting a great deal of faith in the final outcome of the settlement. Only three weeks after Brierley's announcement, the Sealord Deal settlement was signed, and the Government pledged $150 million to

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37 Te Puni Kokiri, The Ministry of Maori Development, *National Hui on the Appointment of the Treaty of Waitangi Fisheries Commissioners*, Wellington, 16 February 1993, p. 8.

38 op. cit.

39 *New Zealand Herald*, 31 August 1992.

40 *New Zealand Herald*, 29 August 1992.

41 Paul Collins, chief executive of Brierley Investments Limited, in *New Zealand Herald*, 29 August 1992.

fund a Maori-Brierley Investment joint venture bid to buy Sealord Products.

Matiu Rata, the chairman of the Maori fisheries negotiators, acknowledged at the end of August 1992 that the negotiators should not take agreement for the Deal from Maori for granted.[42] Yet when opposition and concern were expressed by some Maori, these were almost universally ignored by members of the Government and the Maori Fisheries Commission. No forum or mechanism existed for opposition to be considered or acted on, and this added to the feelings of confusion and frustration over the Deal. For example, within a few days of the commencement of the nation-wide tour by the Maori negotiators, the Labour Party's Maori policy council raised the objection that rights under the Treaty of Waitangi were apparently being bargained, and expressed concern that Maori Labour Party delegates at Labour's annual conference in Christchurch had not been informed about the series of hui which had been organised by the Maori fishing negotiators.[43] However, there is little that the conference members could have done to rectify the situation, and they were forced to rely on a meeting that was unconnected with the hui being held for the Sealord Deal to air their feelings.

The Minister of Justice, Doug Graham, was also naturally keen to see the Deal, which his Government had helped manipulate, gain acceptance and approval from Maori in the eyes of the electorate at large, if not from the majority of Maori themselves. On the eve of a hui at Waitangi on 12 September 1992 to discuss the Sealord Deal, the Minister stated that he would be:

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42 *New Zealand Herald*, 31 August 1992.
43 *New Zealand Herald*, 5 September 1992.

> ...very concerned if Maoridom failed to take this opportunity because they can't quite agree on things all the time....It would really demonstrate, I think, an inability of Maoridom to speak in a unified way....If they can't do it on this one, then I wonder if they ever will.[44]

Notwithstanding the heavily paternalistic overtones of this announcement, it put pressure on Maori at that particular hui to accept the Deal. On 13 September, a broad resolution was adopted by the northern tribes to accept the Sealord Deal, but this was not done without criticism. Mr. Dover Samuels, of Matauri Bay, who was one of the leaders in the opposition to the Deal at the hui, described the resolution supporting the Deal as '...the first bite at the Treaty',[45] and poignantly predicted that 'The day will come when our mokopuna will say 'why did you sell us down the drain?".[46]

One of the strongest issues of contention about the way the Deal was being 'sold' at various hui was the dearth of information made available. Hiwi Tauroa, a former Race Relations Conciliator, said that there had been a lack of information which had been responsible for the difficulties the Deal was now encountering among Maori - particularly over the threat it posed to the Treaty of Waitangi'.[47] Even one of the fisheries negotiators - Maanu Paul - said that he was concerned at the antagonism that had developed, and the apparent misinformation that was about.[48] A Ngati-toa spokesman, Matiu Rei, said during the promotion of the Deal by the Maori Fisheries Commission, that 'Ngati-toa does not know what it will be getting for what it will be giving up. We have therefore rejected the Deal'.[49] The information that the fisheries negotiators were prepared to

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44 Rt. Hon Doug Graham, in *New Zealand Herald*, 12 September 1992.
45 Dover Samuels, in *New Zealand Herald*, 14 September 1992.
46 op. cit.
47 Hiwi Tauroa, in *New Zealand Herald*, 14 September 1992.
48 Maanu Paul, in *New Zealand Herald*, 14 September 1992.
49 Matiu Rei, in *New Zealand Herald*, 14 September 1992.

share was, understandably, more in the nature of propaganda, where the basic nature of the issue was obscured by the speed at which the mandate was allegedly required.

However, such concerns were of evidently no great significance to the outcome of the Sealord Deal. The Minister of Justice had already stressed that it was up to Maori people to all agree to the Deal, and after two weeks of promoting it throughout the country, Matiu Rata said that it was under no threat, and that any tribal concerns would be taken back to the Government for consideration.[50] Yet, no evidence has so far surfaced to show that any consideration was given either by the Government or the Fisheries Commission to the concerns raised at the various hui.

The overall response to the Maori fisheries negotiators' quest for a mandate for the Sealord Deal was mixed. While some tribes backed the Deal, many cautiously qualified their support by suggesting that safeguards be implemented to secure rights under the Treaty of Waitangi and to avoid the unfair allocation of the potential benefits which the Deal would generate. Other Maori groups openly opposed the Deal and threatened to take legal action to halt it. The Minister of Justice responded to these protestations by attempting to dismiss the seriousness of their opposition, or in some cases, questioning their motives: 'One or two of them are obviously trying to manoeuvre themselves into a stronger position when it comes to divvying up. That's fair enough'.[51] At another occasion, Mr. Graham attributed some Maori opposition to the Deal to ignorance

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50 *New Zealand Herald*, 14 September 1992.

51 L. Jones, 'Marae Talks on Fish Deal Draw Mixed Replies', in *New Zealand Herald*, 21 September 1992.

'...[some Maori] did not really seem to understand the contract'.[52] Yet, a challenge to the Deal by the Tahuru people of the West Coast through the Waitangi Tribunal led the Minister to publicly speculate '...if they ought to be able to frustrate Maori'.[53] Again, the Minister was attempting to marginalise Maori opposition to the Deal, and create the impression that, by and large, the Deal had the support of Maoridom. The National Government, and some of the Maori fisheries negotiators, were still under the belief that all Maori would eventually come to the same opinion on the Deal (at least, this was the hope). There was no room in the negotiations road show for overt and sustained opposition, and in almost all cases, there simply was not enough time to arrange opposition, or even to firm opinions on what little substance was being conveyed by the negotiators. Only 22 hui over a period of 15 days were initially scheduled as being sufficient to inform over a quarter of a million Maori of the details of the Deal.[54] Maori people were not being asked so much what they thought of the Deal as they were being told of the benefits they would reap from it when [and not if] it went ahead. On 22 September, claimants in proceedings against the Crown were contacted by the Maori Council, and a meeting was arranged in Wellington for the next day. To give a taste of the speed and pressure which surrounded the Deal at the time, those claimants who attended the meeting were given less that three hours, without access to legal advice, to read, consider, discuss, and sign a 26-page document which had been drawn up by the Crown Law Office.[55]

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52 Hon. Doug Graham, Minister of Justice, in P. Bensemann, New Zealand Press Association, 'Acting Prime Minister Says 'Lucky to be New Zealander' as he signs Sealord Deal', 23 September 1992.

53 L. Jones, 'Marae Talks on Fish Deal Draw Mixed Replies', in *New Zealand Herald*, 21 September 1992.

54 Department of Justice, 'Treaty of Waitangi Maori Fishery Negotiators: Notice of Meetings', Auckland, 15 September 1992.

55 Kia Mohio Kia Marama Trust, *Background to the Sealord Deal*, Auckland, 1992, p. 3.

The issue of who could sign on behalf of iwi was one that the Crown and the fisheries negotiators disregarded, even though it should have been a matter of the utmost importance. Certainly, some iwi were quick to voice their concern over the issue of who had the authority and mana to provide a mandate for the settlement on behalf of the iwi as a whole:

> Whilst it was accepted that the chairman of the Runanga [O Ngati Porou] refused to sign on our behalf there was still the knowledge that some Ngati Porou people did indeed sign the Sealords deal but the question is why did they sign on behalf of Ngati Porou, which the courts may decide they did, or as individuals? They certainly did not have the mandate of the people of Ngati Porou and I believe this situation applies to other tribes as well.[56]

It seems remarkable that the Maori fisheries negotiators could have hoped to have adequately gauged the sentiments of Maori people throughout the country on such a critical issue in a few weeks. There was no time for in-depth discussion or debate, and the contemplation and additional analysis necessary for such a decision was not catered for at all. Politically, the Maori fisheries negotiators got their broad mandate, in which dissent was either marginalised, or postponed to be reviewed at some unspecified later date - after the Deal was signed. Even the possible processes of review, and the weight any submissions might have carried, was left uncertain. The Government - for its part - was now absolved from any immediate responsibility for Maori opposition to the Deal because it had successfully guided the negotiating group to secure Maori support for the Sealord Deal.

One of the overriding difficulties with the substance of the Sealord Deal, and the subsequent search for support, was that only one party to the

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[56] Letter from Honore Chelsey, Fisheries Officer, Te Runanga O Ngati Porou, to Paul Moon, Ref 3/3/23, 22 September 1994.

agreement, the Crown, could be unambiguously defined. In a vacuum of structure, delegation, and precedent, the Maori negotiators were forced to '...rely on their strength of character and standing in the community to carry the agreement. No lawyer would dream of negotiating a settlement on a mandate as unstructured as is currently relied on to represent the aspirations of the Maori'.[57]

Perhaps not surprisingly, the lack of a truly valid Maori mandate did little to reduce the momentum of the Sealord Deal during September 1992. After all, for many Maori groups, the various hui at which the Deal was presented was their first opportunity to digest some of the information and consider the implications of the agreement. In no way could these hui be realistically construed as being the appropriate forum for the delivery of a final mandate on an agreement of such proportions - except perhaps in the minds of the fisheries negotiators and the will of the Government. Significantly, however, the opponents of the Deal were unable to identify any other forum which would be more appropriate.

F. The Proposed Transaction

There were several principle terms in the proposed transaction relating to the sale of Sealord Products Limited to Maori interests, and in the opinion of the Appraisal Report, the '...terms and conditions of the Proposed Transaction are...fair and reasonable'.[58]

The offer by the Joint Venture comprising the Maori Fisheries Negotiators and Brierley Investments Limited was not the only option available to Carter Holt Harvey. An offer had been made by Ashlar Limited, and there

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57 Rt. Hon David Lange, *Dominion* column, 7 September 1992.

58 J. P. Morgan Limited, *Appraisal Report to the Independent Directors of Carter Holt Harvey Limited Re: Sealord Group*, November, 1992, p. 2

was also the possibility of selling Sealord Products through a public float, or if these options turned out not to be viable, Carter Holt Harvey could still possibly retain ownership of Sealord Products, although this was highly unlikely. The J. P. Morgan report on the proposed sale offered the following conclusions about the viability, risk, and likely return of the various options:

Table 5. Comparison of Sale Alternatives

Criteria	***Proposed Sale to Joint Venture***	***Sale to Ashlar***	***Sell via Float***	***Retain the Company***
Consideration ($ million)	$361	$330	$316-$340	$266-$381
Price Risk	Low	High	Medium to High	Not Applicable
Deliverability	High	Low to Medium	Medium	Not Applicable
Timing	December 1992	Uncertain	February or March 1993	Not Applicable

Source: J. P. Morgan Limited, *Appraisal Report to the Independent Directors of Carter Holt Harvey Limited Re: Sealord Group*, November, 1992, p. 4.

Despite the apparent success of Sealord Products, and the likelihood of further growth, diversification and profitability in the foreseeable, other issues relating to the operations of Carter Holt Harvey necessitated its sale, and financial advice pointed to the Joint Venture bid as being in the best interests of Carter Holt Harvey shareholders.

8. AFTERSHOCKS

A. The Escalation of Concern

> Our mana on our waters is not for sale, and we have given no-one any authority to sign papers which say that it is....the clear threat to our taonga has occasioned considerable anger.[1]

From mid-September 1992, some groups within Maoridom were almost thrown into a state of consternation as they tried to grapple with the enormity of the implications the Sealord Deal held for them. At first, there was no sudden rush of heated opposition. Instead, venues such as the Waitangi Tribunal became focal points for resistance to the Deal. As details of the settlement and its likely consequences began to sift through Maoridom, the vague consensus of opinion which the Government had hoped for quickly evaporated.

Once iwi got a chance to analyse the Deed of Settlement, its implications began to provoke responses. Comments added to a copy of the Deed by iwi members of Te Whanau a Apanui showed how the Government was mistaken if it believed it could direct Maori public opinion. The comments note that the term 'the Crown' was used by National politicians as a 'smoke-screen', that is, that the concept of the Crown's impartiality was used to conceal the very partial political motives of the National Government, Also noted was that the Maori fisheries negotiators who signed the Deed on behalf of all Maori had not yet sent to Te Whanau a Apanui parts of the Deed to consider.[2]

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1 Draft of letter from kaumatuas of Maungaora Marae Committee in Opotiki to the Waitangi Tribunal, 5 October 1992.

2 Copy of the Deed of Settlement for the Sealord Deal with comments written on it by members of Te Whanau a Apanui, 1992.

The Chatham Island Maori lodged a claim at the Waitangi Tribunal which was attended by observers from other tribal groups who were skeptical about the Deal. These observers included representatives from Ngati-toa, Ngati-kahungunu, Rangitane, and others.[3] Almost simultaneously, similar dissenting views emerged from a Ngati-porou kaumatua, Mr. Api Mahuika, who admitted that the Sealord Deal was commercially viable, but stressed that the cultural price was high, and that the Deal redefined Article Two of the Treaty of Waitangi.[4] One of the potential problems with the Deal which was now becoming apparent was that traditional tribal fishing rights could become 'corporatised', and that no provision had been made for those tribes who wished to remain outside the structure. The Government was committed to this policy to the extent that it was willing to legislate to terminate proceedings against the Crown on fisheries matters.[5] Thus, a sense of legal and to a lesser extent political disempowerment festered among some tribes as the political will behind the Deal was made manifest.

At the end of September 1992, Hiwi Tauroa emphasised how the Sealord Deal was going to be tough on the small-time Maori fishermen of Whangaroa. This problem arose from the imposition of a large-scale fisheries company on those (admittedly small) Maori fishing ventures which were already returning benefits to those Maori communities involved. This was associated with one of the other principal sources of dissatisfaction with the Deal: the dispossession of traditional fishing grounds. Under the provisions of settlement of the Sealord Deal, the actual possession of the Maori fisheries quota would be in the hands of one

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3 *New Zealand Herald*, 25 September 1992.

4 op. cit. See Chapter One on Maori Fishing Rights Under the Treaty of Waitangi.

5 The Government was prepared to terminate legal proceedings against the Crown even if the plaintiffs concerned refused to withdraw their legal action - such was the depth of the Government's commitment to the success, or survival, of the Sealord Deal.

company which would be responsible for the allocation of profits, employment opportunities, and so on, to the Maori community. The precise mechanism for this allocation looked likely to be based at the time on current geographical concentrations of the Maori population, rather than on a traditional tribal basis. For the majority of tribes, this could potentially deny them their right to a centuries-old claim to the exclusive use of local fishing areas. Levin-based Mua-upoko added its criticism of the Sealord Deal at the end of September 1992 - claiming its ownership of commercial sea fisheries on the coastline from the Manawatu River to the Whanganui River was under threat.[6] One of the issues which was increasingly becoming apparent to many of those concerned was that the future of Maori fishing rights - which were guaranteed in the Treaty of Waitangi, was being left in the lap of market forces. This point of the market influencing race relations led to the description of Treaty issues as being '...corporatised'.[7]

One by one, the props defending the Sealord Deal were being knocked away. By October 1992, a disgruntled minority of Maori tribal groups and organisations had swollen to a sufficient size that '...about a majority...'[8] of the New Zealand sea fishing areas under Maori claim were challenging the Sealord Deal through court action. Even the temptation of financial gain failed to blunt Maori opposition to the Deal. As one organisation expressed it: 'Regardless of our opinions on the viability of the Sealords proposal as a business venture, we have seen nothing to prove that it is sound. Our hapu considers it extremely unethical to use this Deal as a smoke-screen to overturn court judgements in favour of Maori tribal

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6 *New Zealand Herald*, 29 September 1992.
7 P.C. McHugh, 'Sealords and Sharks: The Maori Fisheries Agreement 1992', October 1993, p. 4.
8 Dr. Rodney Harrison in *New Zealand Herald*, 8 October 1992.

fishing rights'.[9] Yet in the immediate political reality, it was not as though Maori had been given any choice. The tortuous arguments deployed by the fisheries negotiators and the Government related mainly to achieving a successful resolution to the Deal.

The scene was set for a series of challenges to the Sealord Deal, and for a shifting and sorting of political stances as increased pressure began to bear down on the settlement.

B. Political Posturing

If rhetoric is the harlot of oratory, then this notion could certainly be applied to the exchange of speech that took place in Parliament when the Treaty of Waitangi (Fisheries Claims) Settlement Act was in its final stages. The Minister of Justice, Doug Graham spoke in an emotional yet confident tongue that managed to affirm his colleagues' moral high-ground on the issue. Labour and National Members of Parliament stood to applaud a tearful Doug Graham, and shake his hand as he concluded his speech on the fisheries settlement. He later described the agreement going through Parliament as '...probably one of the most emotional moments of my life...we can now lift our heads up. We have acted honourably - at last'.[10] But even before the melodramatic euphoria had subsided, it was evident that Maori opposition to the Deal was not diminishing, and that all National had succeeded in doing was to take a terrible plunge into the unknown.

These pressures made themselves apparent in the changing attitudes of some of those in Parliament. At first though, the response was tepid as

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9 Letter to Registrar of the Waitangi Tribunal from Te Whanau A Kaiaio, 5 October 1992.
10 Hon Doug Graham, Minister of Justice, in *The Dominion*, 29 September 1992.

Members of Parliament 'tested the water' in order to assess the depth of feeling among the various Maori factions affected by the Sealord Deal. The Labour Party's annual conference in September 1992 passed a paper which resolved that a Labour Government would reinstate Maori rights to make commercial fisheries claims to the Waitangi Tribunal. The leader of the Labour Party at this time, Mike Moore, endorsed this paper at the conference, but retracted his support within a matter of days, saying that 'Things have moved since...and they are moving as we talk'.[11] However, Mike Moore gave no indication as to what specific 'things' he was referring to. He then fell into the parlance that was to surface again in the 1993 election, saying that the Sealord Deal would have '...no moral authority...'[12] if its signatories were not treated properly. Again the vagueness of what constituted being treated properly and by whom was avoided by Mr. Moore. He then went on to confusingly stress his support for the agreement, in spite of conflicting statements he had made earlier. Mr. Moore even offered praise to Doug Kidd and Doug Graham for handling the Maori fisheries issue: '...with far more sensitivity and skill than [I]...first imagined they could'.[13] The Labour fisheries spokesperson, Graham Kelly, conceded a month later that a future Labour Government was unlikely to hold Maori to the Sealord Deal because it did not consider Treaty rights '...a tradable commodity',[14] but the luxury of being in opposition prevented Labour from developing a firm policy on Maori fishing rights.

Meanwhile, the Prime Minister, Mr. Bolger, was still using the technique of casually shrugging off opposition to the Deal - long after it was evident that such an approach would do nothing to diminish the feelings of wrong

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11 Rt. Hon Mike Moore, in *New Zealand Herald*, 26 September 1992.
12 *New Zealand Herald*, 26 September 1992.
13 Hon Mike Moore, Leader of the Opposition, Media Statement, 28 August 1992.
14 Graham Kelly, Labour fisheries spokesperson, in *Evening Post*, 9 September 1992.

that the Sealord Deal had engendered among Maori and non-Maori. Bolger's defence of the agreement simply was that it would '...stand the test of time',[15] and his opinion on the merits of the arguments put forward by the opponents of the Deal were equally revealing of the Prime Minister's attitude towards the agreement: '...there would always be some Maori or some iwi that would complain'.[16] Bolger then concluded his assessment by describing the settlement as '...bold and very honourable'.[17] National's lack of sincerity about the need to fulfill its Treaty obligations was continually emphasised. The Minister of Fisheries openly admitted that the Settlement was not entirely adequate, but because it was a better deal than indigenous peoples elsewhere in the world had been offered, it was therefore a good deal.[18]

As court action loomed over the settlement, the Minister of Justice, Doug Graham, described those opponents of the Deal as '...a minority holding the rest of New Zealand to ransom'.[19]

Even following a Waitangi Tribunal recommendation that suggested a 25-year moratorium on fishing claims along with a termination of present legal actions, the Minister of Fisheries, Mr. Kidd, indicated that there would be no re-drafting of the Sealord Deal.[20]

There were to be further political stances assumed during late 1992 and 1993 as some Members of Parliament perceived that personal gain could be made through expressing opinions on the Deal. Two National Members

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15 Rt. Hon Jim Bolger, in *New Zealand Herald*, 6 October 1992.
16 *New Zealand Herald*, 6 October 1992.
17 op. cit.
18 Letter from Hon Doug Kidd, Minister of Fisheries, to Paul Moon, 16 February 1994, p. 3.
19 *New Zealand Herald*, 4 November 1992.
20 *New Zealand Herald*, 6 November 1992.

of Parliament, John Carter (Bay of Islands) and Ross Meurant (Hobson) described parts of the Deal as racist[21] and Koru Wetere, the shadow Maori Affairs spokesman, promised to amend the Deal if Labour was elected, although precise details on the shape of these amendments were not mentioned.[22] However, these pronouncements were of little consequence except to those who conceived them, and had no measurable effect on the development of the agreement.

One of the puzzling elements of Labour's opposition to the Deal was the way in which some of the Maori Members of Parliament in Labour reacted to the proposed settlement. The situation was tricky politically because Maori opinion, and indeed, European opinion, had yet to be fully assessed. In addition, on the surface at least, the proposed deal had acquired a degree of support from Maori, and so to oppose it outright would be to alienate support from some quarters. These considerations had to be balanced against the fact that the deal would violate a specific provision of the Treaty, and therefore, could possibly be counter-productive to the interests of Maori in the long term. This dilemma was complicated by the speed at which the Government was seeking to get the relevant legislation passed in the House. As Peter Tapsell, later the Speaker of the House, described the situation:

> Although we Maori members kept a close watch on negotiations leading up to the Sealord deal, we decided against taking an active role and none of us were signatories. It was felt that the arrangement should be sanctioned by ex... governmental representatives of the people. Looking back on it now, I am not certain that we did the right thing....
> The incentive for the Sealord deal was to remove the difficulties experienced by the courts when Maoris charged with breaking the fishing regulations claimed immunity under

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21 *New Zealand Herald*, 7 December 1992.
22 *New Zealand Herald*, 24 December 1992.

> the Treaty. It was a one-off and quite separate deal where every single Maori had their commercial rights bestowed by the Treaty (whatever those might have been and they were never determined for anyone) removed and in return Maori people were granted a shareholding in Sealord. It is for that reason my own contention has been that every Maori should share equally in the ownership of Sealord.[23]

C. The Deal Challenged

> The opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible.[24]

Urgent High Court action was undertaken by at least twelve Maori groups in early October 1992 - on the basis that the settlement Deed was invalid and would severely prejudice legitimate claims under the Treaty of Waitangi. Ironically, the withdrawal of most of the court action against the Crown on the night of the signing of the Deed of Settlement had been understood by the Minister of Fisheries as a confirmation of Maori retraction of opposition to the Government and their acceptance of the Settlement.[25] The High Court challenge to the Deed was unsuccessful, and so the matter was taken to the Court of Appeal, which agreed to an urgent hearing of the case against the Maori-Brierley bid for Sealord Products on 13 October. Because of the threat of impending legislation which would enact the provisions of the Deed, time was proving to be a major constraint to those Maori opposed to the agreement.

A few days before the Court of Appeal's decision was made, the Ngai Tahu fisheries negotiator, Tipene O'Regan, said that dissenting tribal groups

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23 Letter from Hon Peter Tapsell, Speaker, to Paul Moon, 28 September 1994.

24 J. S. Mill, 'Of the Liberty of Thought and Discussion', in 'On Liberty' in M. Warnock (ed.), *Utilitarianism; On Liberty; Essay on Bentham*, Glasgow 1986, p. 143.

25 Letter from Hon Doug Kidd, Minister of Fisheries, to Paul Moon, 16 February 1994, p. 2.

would have to abide by the changes the Deal introduced.[26] Dr. O'Regan spoke of the agreement in terms of the fulfillment of Treaty rights, as opposed to their removal, and described the Sealord sale by Carter Holt Harvey as '...an opportunity to have a breakthrough which is otherwise impossible'.[27] Four days later, the Court of Appeal dismissed the Maori appeals against the Sealord fishing deal. The basis for its decisions indicated almost a reluctance to become involved in what it perceived to be essentially a political issue. In its judgement, the principle of separation of Parliament and the court system was reaffirmed, and that Parliament had the responsibility and right to enact legislation along the lines it felt to be acceptable.[28] The Minister of Fisheries described the Court of Appeal decision as '...wonderful news for Maori, for the fishing industry, and for New Zealand as a whole',[29] (as well as for the National Government). Throughout November 1992, the Minister persisted in emphasising the value of the Settlement to the whole country as well as Maori, but was mute on the specifics of opposition to the Deal, except to say several months later that concerns would be dealt with by the new fisheries commission when it was appointed, and that the new regime would be validated through a system of '...numerous checks and balances which will ensure that the views and desires of Maori are reflected in the eventual allocation process'.[30]

One of the particular concerns the challengers of the Deal brought to the Court's attention was the issue of who, precisely, was bound by the Deed of Settlement - especially since the Government had failed to secure a

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26 *New Zealand Herald*, 31 October 1992.
27 Dr. Tipene O'Regan, in *New Zealand Herald*, 31 October 1992.
28 *New Zealand Herald*, 4 November 1992.
29 Hon Doug Kidd, Minister of Fisheries, Media Statement, 'Court of Appeal Decision 'Wonderful News' ', 3 November 1992
30 Hon Doug Kidd, Minister of Fisheries, Media Statement, 'Response to Kotahitanga Letter', 15 April 1993.

unanimous mandate from Maori for the agreement. Again, the Court left the onus of responsibility for this matter in the lap of the Government, observing that there was insufficient evidence to gauge either the support or opposition to the Deal from Maori, and therefore, the Crown was not under any obligation to delineate between those who were and those who were not bound by the Deal.[31] The judgement focused primarily on the constitutional separation between the court system and the Government, and did not address the political (but also justice-related) issues that were at the heart of the Maori challenge. The Government's response to this was that because the majority of Maori supported the Deal (although no evidence existed for this supposition) and because it would lift the Maori out of a position of economic alienation, then the Deal must therefore necessarily be good (as well as being politically and economically expedient).

One iwi organisation perceptively described the usual acknowledgement of the principles of the Treaty of Waitangi, which were being paraded by various interested parties, in the following analogy: 'It's as if they acknowledge the seagull's cry, but refuse to acknowledge the bird itself. By playing this game, the Crown sidesteps the crunch issue of the legality of the Treaty'.[32]

The next development in the challenge was the report of the Waitangi Tribunal on the fisheries settlement, which was anticipated by many as being the last realistic short-term resort for the opponents of the Deal. The uncomfortable realisation was slowly dawning that no matter what form

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31 *New Zealand Herald,* 4 November 1992.

32 Copy of the Deed of Settlement for the Sealord Deal with comments written on it by members of Te Whanau a Apanui, 1992.

the opposition to the Settlement assumed, in the short-term at least, the struggle against the Deal would be strenuous and probable achieve little.

D. The Waitangi Tribunal's Assessment of the Deal

Having acknowledged that several tribes had made submissions to the Tribunal regarding the fisheries settlement, the Tribunal's report commenced with the following statement:

> The complaint is that the Deed of Settlement, or the Crown policy that it proposes, is contrary to the Treaty and prejudicial to claimants in that it would diminish their rangatiratanga and fishing rights and impose new arrangements that have not been adequately agreed.[33]

The Tribunal's report also took account of the '...inevitable haste...'[34] with which the agreement was constructed, and concluded that legislation could rectify some of the conflicts in principles that existed between the Deal and the Treaty of Waitangi. The Tribunal also observed that no single unitary Maori structure existed which had a capacity to deliver a mandate on behalf of Maoridom, as has already been stressed, Maori forming a single opinion on what was a highly contentious issue. The Tribunal's scope was limited due to the fact that High Court and Court of Appeal rulings on cases that had been heard by those bodies from opponents of the Sealord Deal had already dealt with much of the content associated with opposition to the agreement. If the Waitangi Tribunal issued a report on an issue which the Court of Appeal was currently hearing, then this could potentially prejudice the Court's findings. Thus, the Tribunal's report was released after the challenge to the Deal in the Court of Appeal was over.

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33 Waitangi Tribunal, *The Fisheries Settlement Report 1992*, Wai-307, Wellington, 1992, p. 1.
34 ibid. p. 3.

The Waitangi Tribunal Report was released in November 1992, after the legislation which would put the Sealord Deal into effect had already been drafted. The Tribunal could not be seen to be too critical of the Bill because it had already specifically endorsed some sort of negotiated settlement between Maori and the Crown.

There were eight main findings and recommendations in the report by the Waitangi Tribunal. These were:

- The hapu generally have the main interest in the fisheries. However, it is not inconsistent that a national settlement on fisheries should be ratified at no less than an iwi level.

- Currently, there is no single structure to determine who are iwi and who represent them on a national basis. Because of this, the assessment of Maori opinion was deemed to be acceptable through the process of holding general hui and receiving individual submissions.

- The report of the Maori fisheries negotiators indicates a reasonable mandate, but with the qualification that the Treaty itself should not be compromised.[35]

- Provided that the extinguishment right of further fisheries claims under the Treaty of Waitangi is deleted from the provisions of the settlement, it is reasonable and not inconsistent with the Treaty that the Deal, if generally agreed, should bind all, including dissidents.

- The allocation scheme for hapu should not be based on Treaty principles alone, but must also take into consideration what is fair, and also that objections to the allocation plan or its delivery mechanisms must not be referred to the Waitangi Tribunal, but to another body which could suitably deal with such

[35] This finding accepts the Maori mandate without acknowledging that it was obtained in just three weeks, with minimal consultation, and no processes for considering suggestions or dealing with opposition relating to the Deal's content.

objections. In addition, it is proposed that legislation should state the settlement's goals, and that legislation also provide for a Crown-Maori body to review, every five years, the progress in achieving these goals.

- The Crown should clarify how the Deed of Settlement will impact on other claims.

- It is not inconsistent with the Treaty of Waitangi that the settlement was arranged prior to the resolution of the issue of allocation. It is premature to think that a fair process of allocation will not be found. However, it is likely that such a scheme will provide for legal determinations on beneficial entitlements and occasional reviews of the scheme for the hearing of particular complaints.

- It is inconsistent with the Treaty of Waitangi and prejudicial to Maori to legislate for the removal of Treaty fishing rights. Therefore, the Tribunal recommends:
  - That the legislation makes no provision for the extinguishment of Treaty fishing interests, and that it actually provides for those interests.
  - That fisheries regulations and policies be reviewable in the courts.
  - That courts be empowered to have regard to the Settlement in the event of future claims affecting fisheries management laws.
  - It would be reasonable for the Crown to place a moratorium on such claims for 25 years.
  - It is appropriate, in light of the Settlement, that the Crown should legislate to terminate current actions.[36]

Yet, despite these recommendations urging access to the instruments of justice and appeal, section 8 of the Treaty of Waitangi (Fisheries Claims) Settlement Act deliberately excluded these options for Maori, and its extent was breath-taking:

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36 Waitangi Tribunal, *The Fisheries Settlement Report 1992*, Wai-307, Wellington, 1992, pp. 23-24. Also see *New Zealand Herald*, 13 November 1992.

8. Effect of Settlement on commercial Maori fishing rights and interests - it is hereby declared that -

(a) All claims (current and future) by Maori as Maori in respect of commercial fishing -

(i) whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and

(ii) Whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and

(iii) Whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal, - having been acknowledged, and having been satisfied by the benefits provided to Maori by the Crown under the Maori Fisheries Act 1989, this Act, and the Deed of Settlement referred to in the Preamble to this Act, are hereby finally settled; and accordingly

(b) The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to enquire into the validity of such claims, the existence of rights and interests of Maori as Maori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Maori referred to in paragraph (a) of this section; and

(c) All claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Maori as Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.[37]

Maori would now be legally prohibited from making any future claims for any commercial fishing resource promised in the Treaty. The reference to fisheries in the Treaty would now effectively extinguished.

This displayed a blatant disregard for the recommendations of the Waitangi Tribunal, simply because those recommendations clashed with the

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[37] *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, Section 8.

Government's agenda on Maori fisheries. The far-reaching coverage of Section 8 of the Act precluded any effective means of response to the Sealord Deal, and cut off the traditional and legitimate avenues for appeal or even review.

The report of the Waitangi Tribunal concluded:

> We are of the opinion that the settlement is not contrary to the Treaty, except for some aspects which can be rectified in the anticipated legislation....The Court [of Appeal] went on to note that the deed could not bind Parliament as to the legislation that could be passed.
>
> Accordingly, if the settlement proceeds, we urge that the effecting legislation has the modifications recommended above.[38]

The Minister of Maori Affairs and of Fisheries, Doug Kidd, stated shortly after the release of the report that it needed some clarification, partly because of '...misleading reports in the media'.[39]

Despite the strong currents of compromise running through the Tribunal's report, the Government apparently overlooked the possibility of implementing these recommendations, and instead, chose to see the report almost as an endorsement of the Sealord Deal - a view that was not completely incorrect. The Tribunal's findings and recommendations were endeavouring to place realistic checks on the Government's support for the Sealord Deal as it stood, but in this realism, much of the sense of injustice which the various complainants had brought to the Tribunal went unresolved. The political balancing act the Tribunal was forced to play

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38 Waitangi Tribunal, *The Fisheries Settlement Report 1992*, Wai-307, Wellington, 1992, p. 24.
39 Hon Doug Kidd, Minister of Fisheries, Media Statement, 'Minister Clarifies Waitangi Tribunal Recommendations', 13 August 1992.

prevented any strong decision from being reached. The anger felt by many Maori at the settlement increased in the face of the Waitangi Tribunal's report and consequently, it was to later be vented elsewhere.

E. The Sealord Deal in Parliament

The Government's interpretation of the Waitangi Tribunal's report was to see it largely as an endorsement of the settlement. The Fisheries Minister, Doug Kidd, announced that the Tribunal's report was '...no impediment...' to the Sealord Deal, and that the joint venture partners were free to pursue a commercial deal with Carter Holt Harvey.[40] However, when it came to the Tribunal's expressed concern over the extinguishment of Maori fishing rights under the Treaty of Waitangi, Mr. Kidd responded by making the claim that this was an '...aspect of the Deal which the Tribunal has not understood'.[41] Mr. Kidd said that the Government did not agree with the Tribunal's assessment that traditional Maori fishing rights would be 'abrogated'. On the contrary, the Minister stated that these rights would be '...developed and enhanced from their present ill-defined state'.[42]

One of the principal concerns among a number of Members of Parliament, from both sides of the House, regarding the legislation implementing the Sealord Deal, was the speed at which it was pushed through. Both the Minister of Fisheries, Mr. Kidd, and the Minister of Justice, Mr. Graham, were criticised by Government back-benchers who claimed that the Treaty of Waitangi (Fisheries Claims) Settlement Bill was introduced without any discussion or consultation involving them, and that the urgency under which the Bill was being debated only exacerbated this problem.

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40 Hon Doug Kidd, Media Statement, 6 October 1992, Ref. LI-IRDITA.
41 op. cit.
42 op. cit.

Rebel National MPs took the occasion of the campaign for Wellington by-election in December 1992 to publicly raise concerns about fishing rights under the Bill. This prompted a special caucus meeting in Parliament on the evening of 8 December at which amendments to the Bill were discussed. Among the amendments was one that gave the Minister of Fisheries the authority to declare certain areas as mataitai (traditional fishing reserves). This right would become law and therefore could be reviewed through the courts. Moreover, consultation would have to take place with affected parties before any mataitai could be declared. Any subsequent prohibition on fishing would apply to all people living in the affected area - a principle based on the Bay of Islands' MP John Carter's belief that no New Zealander should have rights or advantages over others.[43]

Much of the anger by National back-benchers was directed not so much at the Deal *per se*, but more towards the relevant Ministers who were guiding it through Parliament, and whom, it was felt, had denied other MPs time to assess the Bill.

In a Parliamentary debate lasting five hours on 9 December 1992, the MPs representing the four Maori seats, and Winston and Ian Peters from the National Party, spoke out strongly against the proposed legislation which would enact the Sealord Deal. Fears were raised that the handling of the Deal by the Maori fisheries negotiators would result in '...nepotism' and '...mismanagement...',[44] and urged the Government to debate the Bill clause by clause rather than part by part. But National's agenda revolved around

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43 *New Zealand Herald*, 9 December 1992.
44 Hon. Dr. Peter Tapsell, in *New Zealand Herald*, 10 October 1992

the quick passage of the Bill through its Parliamentary stages, and to this end, the debate was conducted under urgency.

Regrettably, the dignity which such an issue of importance and significance deserved was diminished by the behaviour of certain MPs during the committee stages of the Bill. During the debate on clause eight of the Bill, which extinguished all present and future Maori fisheries claims, two National MPs, Tony Ryall and John Carter, started giving imitations of the way in which some senior MPs walked. This caused other Government MPs to burst out in laughter. The whole incident was described by Labour MP Whetu Tirikatene-Sullivan as '...offensive...',[45] and revealed an absence of sincerity and respect by those MPs involved in the misbehaviour.

John Carter's criticisms of the Sealord Deal reached the point in late December 1992 where they potentially threatened not only the final shape of the legislation which would empower the Sealord Deal, but also his own political future. Having previously criticised the Government's lack of consultation with caucus on the Deal, Mr. Carter was now in a position of having to back down and indicate some sort of loyalty to the Government (if not the Sealord Deal) as publicity of his statements and antics began to cause the Government some public discomfort.

Mr. Carter was (ironically perhaps) in charge of discipline in National's caucus, and in an attempt to control the injury his criticisms were beginning to cause the Government, he telephoned some of the Maori fisheries negotiators, MPs, and some Ministers. The Prime Minister also got involved and successfully managed to placate the caucus disquiet

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45 Whetu Tirikatene-Sullivan, Member of Parliament, in *New Zealand Herald*, 11 December 1992.

which was still simmering. However, the political credibility of the deal seemed irreversibly damaged. The unity of National's will on the settlement had been exposed as a facade, and therefore, the last significant bastion of support for the Sealord Deal (notwithstanding the Maori fisheries negotiators) was no longer seen as sufficiently strong, especially by its opponents, to sustain the agreement in its existing format.

A constant source of Parliamentary criticism of the Treaty of Waitangi (Fisheries Claims) Settlement Bill came from one-time National Minister of Maori Affairs, Winston Peters. Mr. Peters alleged that the South Island's Ngai Tahu would be the major benefactor of the Deal, even though no allocation formula had yet been established. His assessment of Ngai Tahu's representative, Tipene O'Regan, was described by the Justice Minister, Mr. Graham, as '...a disgraceful and scurrilous assertion and the slur on the character of a fine New Zealander who...does more in one day for Maoris and this country as a whole then that member [Mr. Peters] has done in his lifetime'.[46]

Winston Peters' brother and National Member of Parliament, Ian Peters also brought to the House's attention some of the inadequacies of the Bill - particularly over the issue of the lack of consideration given to the traditional fishing rights of Maori: 'For Ngai Tahu, this is a good settlement. Whilst Ngai Tahu have every reason to be proud of their negotiator, Maori from other areas do not have the same reason to be proud of theirs - Maori people from Ngati Wai, Ngati Kahungunu, and Ngati Porou in the Chatham Islands, to mention some. What about these people? What about their fishing rights? What about their commercial

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[46] Rt. Hon. Douglas Graham, Minister of Justice, Speech to Parliament on Second Reading of the Treaty of Waitangi (Fisheries Claims) Settlement Bill, December 1992.

abilities in the future?'[47] Winston Peters pointed out that National had broken its 1990 election promise to negotiate Treaty issues with Maori tribe by tribe, and described the Sealord Settlement as being '...designed for a Maori mafia....Tribe after Tribe is against it'.[48]

Parliamentary opposition to the Bill was tenacious in the face of National's chaotic moves to uphold the fast-fading impression of unqualified support for the settlement. The former Labour Minister of Maori Affairs, Koro Wetere, promised that a future Labour Government would restore Maori fishing rights as expressed in the Treaty of Waitangi.[49] Mr. Wetere was concerned that the Bill had not gone before a select committee, and questioned the Bill's proposed permanence:

> Let me also say, from listening to the Minister, that this is not the end of the matter. Other legislation will come, containing other measures, which will be referred to the new commission which the Minister talks about - then he talks about a full and final settlement of the Bill! How can the Minister bring a Bill to the House, then have the gumption in the same speech to tell us that there are other pieces of legislation to come that will receive the attention of the House?[50]

But probably the most cogent criticism of the Deal came from the former Labour Prime Minister, David Lange. In a speech he gave during the Second Reading of the Bill, Mr. Lange observed that there were political precedents for claiming full and final settlements on matters relating to the Treaty of Waitangi, and that none of these settlements had endured.[51] He

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47 Ian Peters, Speech to Parliament on Second Reading of Treaty of Waitangi (Fisheries Claims) Settlement Bill, 3 December 1992.

48 Winston Peters, in *The Dominion*, 10 December 1992.

49 *New Zealand Herald*, 12 December 1992.

50 Hon Koro Wetere, Speech to Parliament on Second Reading of Treaty of Waitangi (Fisheries Claims) Settlement Bill, December 1992.

51 Rt. Hon. David Lange, *Treaty of Waitangi (Fisheries Claims)Settlement Bill - Second Reading*, 8 December 1992.

then went on to encapsulate the essential drawback of the entire settlement:

> ...one cannot deem a people who have been given an inalienable right to have forfeited those rights in the interest of a common cause or hope....Distinguished Maori were given...[the] task [of reaching a settlement] and over a period of years, they proceeded to purport to represent the interests of Maori people. But, of course, they did not. They could not. There was no mandate. There was no structure of delegation in those people...[52]

Significantly, though, Mr. Wetere's objection focused on the passage of the Bill through Parliament, and not the long-term threat it presented to the principles and provisions of the Treaty of Waitangi.

National was forced to retaliate in the face of a concord of Maori opposition in Parliament to the settlement. Mr. Graham again resorted to scarcely-concealed threats as a means of defence. He said that the opponents of the Deal in Parliament were endangering the settlement of all Treaty of Waitangi claims.[53] He added that 'This Government has done its best to resolve the commercial fishing claims fairly, honourably, and with finality because New Zealanders want to see an end to litigation...but the public's patience will soon be exhausted if what is seen as a fair deal is rejected'.[54] Mr. Graham evidently perceived the New Zealand public to be equivalent to the European public in New Zealand, and gave no recognition to the validity of the specific complaints raised by opponents to the Deal in or out of Parliament.

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52 op. cit.
53 *New Zealand Herald*, 12 December 1992.
54 Hon Doug Graham, in *New Zealand Herald*, 12 December 1992.

F. International Escalation

Two prominent Maori, lawyer Moana Jackson, and Maori Congress member and former Maori Affairs secretary Dr. Tamati Reedy, were responsible for elevating the debate on the Sealord Deal to an international forum: the United Nations. In early December 1992, both men, representing the Maori Congress, put their case forward at the United Nations for an international investigation into the '...utter violations...'[55] of Maori fishing rights by the instigation of the Sealord settlement. The speech was made at a special United Nations General Assembly session launching the International Year for the World's Indigenous People.[56] Dr. Reedy spoke strongly against the Government's timing of the Deal, saying that it was '...remarkable for its callous disregard and insensitivity of indigenous rights'.[57] Dr. Reedy stated that he believed the best course of action to resolve the problem would be for the United Nations Committee on Human Rights to investigate the settlement.

The National Government, who had ironically (and perhaps sensing an opportunity to ferment division) paid for Dr. Reedy's visit to the United Nations, had apparently anticipated that his comments would be adverse to its policy regarding Maori fishing rights, and particularly the Sealord Deal. Thus, in a statement to the session by the New Zealand permanent United Nations representative, Mr. Terence O'Brien, the United Nations was told that the settlement was '...seen almost universally as being fair to all parties and the resolution of a long-standing and contentious issue'.[58]

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55 Dr. Tamati Reedy, Speech to the United Nations General Assembly, Special Session launching the International Year for the World's Indigenous People, in *New Zealand Herald*, 12 December 1992.

56 see appendices for transcript of the speech.

57 op. cit.

58 Terence O'Brien, New Zealand permanent United Nations representative, Speech to the United Nations General Assembly, Special Session launching the International Year for the World's Indigenous People, in *New Zealand Herald*, 12 December 1992.

Back in New Zealand, Mr. O'Brien's statement was endorsed by the Minister of External Relations and Trade, Don McKinnon, who said that 'Its rather sad that a Maori leader of his [Dr. Reedy's] status should use this forum [the United Nations] to attack something which really has a significant amount of consent within New Zealand'.[59] The Minister of Fisheries, Mr. Kidd, obliquely referred to the speech at the United Nations when he spoke of the Government giving financial assistance to people, some of whom '...rant and rave'.[60] However, the speech itself referred to the salient points of the Deal up until that point in a way that was difficult to challenge as far as content was concerned (the desired effect of the speech was a different issue). At the conclusion of the speech, Dr. Reedy implored the United Nations Commission on Human Rights to investigate matters relating to the Deal. Larger political imperatives, coupled with the fact that the Sealord Deal was a political and quasi-constitutional matter rather than one of human rights, clearly ruled out any chance of such an investigation ever taking place, but Dr. Reedy's comment did serve the purpose of accentuating the feeling that Maori had been denied their rights as a result of the impending settlement.

Reaction to the speech from the pro-Sealord Maori lobby was swift and harsh. Matiu Rata, one of the fisheries negotiators, described Dr. Reedy's speech as '...tantamount to treason...' and that Dr. Reedy was locked into '...grievance mode'.[61] Tipene O'Regan, identified by some opponents of the Deal as one of its most ardent supporters, asserted that Dr. Reedy had '...behaved reprehensibly...' and that to '...run the same argument which the

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59 Don McKinnon, Minister of External Relations and Trade, in *New Zealand Herald*, 12 December 1992.

60 Doug Kidd, Minister of Fisheries, in *New Zealand Herald*, 17 December 1992.

61 Matiu Rata, in *New Zealand Herald*, 14 December 1992.

courts have found against on facts in an international court seems to be defying gravity'.[62] The chairman of the Maori Council, Sir Graham Latimer, questioned Dr. Reedy's mandate to make such statements, and accused him of trying to destabilise the country.[63] Ironically, Dr. Reedy had also raided the issue of who possessed mandates to represent Maori, stating that:

> Maoridom is appalled that the Crown has chosen to move this legislation on the advice of four Maori negotiators - four negotiators appointed by the Crown. The Crown further claims that the 75 signatures it has collected is sufficient to wipe away the rights of 500,000 individual Maori, including the rights of tribes who opposed or did not sign the Crown's Deed of Settlement.[64]

In early 1993, Ngai Tahu announced that it would split from the Maori Congress. Even though the Congress had maintained a neutral stance over the allocation debate, the role of its convenor, Mr. Api Mahuika, and Congress administrator Dr. Tamati Reedy, in opposing the Sealord Deal was instrumental in Ngai Tahu's withdrawal. As Mr. Charlie Crofts, the chairman of the governing body of Ngai Tahu described the decision, 'Ngai Tahu and other iwi recently had to endure the spectacle of Dr. Tamati Reedy and his group standing before the United Nations indigenous people's forum and speaking on behalf of the National Maori Congress, lambasting the Maori fisheries settlement and the Maori fisheries negotiators in front of the World's news media'.[65]

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62 Dr. Tipene O'Regan, in *New Zealand Herald*, 14 December 1992.

63 Sir Graham Latimer, in *New Zealand Herald*, 14 December 1992. It is perhaps a shame that Sir Graham left it to this late stage to start questioning the mandate people had to represent Maoridom.

64 T. Reedy, Address delivered at the United Nations, New York, 10 December 1992, for the National Maori Congress, at the Launch of the 1993 International Year for the World's Indigenous People.

65 Charlie Crofts, in *New Zealand Herald*, 18 February 1993.

Ngai Tahu's withdrawal from the Congress preceded a hui at which the allocation of the benefits of the settlement were to be discussed,[66] and so it is possible that the walk-out was part of a broader bargaining scheme, in which Ngai Tahu's 'return to the fold' would have a price attached to it, although this is not to diminish the sense of indignation many felt over the comments made by Dr. Reedy to the United Nations. This particular episode was not to be concluded until February 1994 when Matiu Rata made a formal apology to Dr. Reedy in the face of defamation proceedings in the High Court. Mr. Rata described his statement that Dr. Reedy's speech was '...tantamount to treason...' as a rhetorical one, and that he wished to '...dispel any suggestion that the statement was intended literally, I wish to apologise for the language used, and express my regret for any harm that has been caused to Dr. Reedy's character, reputation, and mana'.[67]

While the vitriolic attacks between senior Maori leaders were being aired in front of the New Zealand public, there was a benefactor from these outbursts. The National Government's strongest critics on the Sealord Deal were tilting their energies slightly away from the Government and towards the Maori fisheries negotiators and those Maori who were to be placed in charge of the operation of the settlement. Although one historian has argued that the agreement has '...an in-built divisiveness...'[68] which was apparent before it was signed. It would be speculation to claim that the Government deliberately manipulated the chain of events to achieve this divide in Maoridom. It is evident, though, that the consequences of the

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66 see 'The Operational Aspects of the Settlement' in Chapter 6.
67 Hon. Matiu Rata, *New Zealand Herald*, 18 February 1994.
68 P.C. McHugh, 'Sealords and Sharks: the Maori Fisheries Agreement, 1992, October 1993, p. 6.

split were advantageous to the Government's purpose of strengthening the political validity of the Deal.

9. THE IMPLEMENTATION OF THE SETTLEMENT

A. The Final Word from the Government

> ...I believe that...on reflection and close study of the Bill, many who opposed it may find their concerns have been heeded and their fears, I hope, allayed....I invite Maoris who opposed the settlement...now to indicate their approval so that they can accept the benefits which it will provide....At the end of the day the durability of settlements of any kind will ultimately depend on whether the agreement reached is fair to both sides as it clearly is in this case.[1]

These extracts from a speech made by the Minister of Justice at the end of 1992 exposed a sense of satisfaction in the Government's handling of the Sealord Deal. The desire for reconciliation and consensus which is one of the themes of the speech indicates that the Government was confident that it had rode the storm, survived the torrents of opposition, and was now emerging as the victor, despite ongoing dissent from many of those affected by the settlement. The Government was to make many more statements on the settlement, but these tended increasingly to focus more on specifics relating to its operation and the deflection of on-going (though diminishing in the media) criticism of the Deal, rather than a justification of its existence which frequently characterised earlier statements. On a trip to Canada in late September 1992, Mr. Bolger stated that National would explore the possibility of extending the precedent which the Sealord Deal established to settling Maori land claims, such was the confidence with which the Prime Minister viewed the success of the Sealord Deal at the time.[2]

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1 Rt. Hon. Douglas Graham, Minister of Justice, Speech to Parliament on the Second Reading of the Treaty of Waitangi (Fisheries Claims) Settlement Bill, December 1992.

2 New Zealand Press Association, 'Sealord Deal Sets Precedent, Bolger Says', 24 September 1992.

Now that the Deal had been initiated, it was up to the Sealord Board of Directors to negotiate its immediate future direction; 'As far as the Crown is concerned...They [the Maori] and they alone have to sort it out'.[3]

B. The Operational Aspects of the Settlement

> It has been shown that the happiness of individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator ought to have in view.[4]

On 6 January 1993, Dr. Tipene O'Regan was named the chairman of the board that would guide Sealord Products. The joint venture agreement between the Treaty of Waitangi Fisheries Commission, who had established the special-purpose company Te Ika Paewai for the venture, and partner Brierley Investments Limited, provided for the chairmanship of the company to alternate every three years between these two partners. The other Maori directors were Sir Graham Latimer, Whaimutu Dewes, and Phillip Pryke. Under the arrangement constructed by the Government, the Crown paid the first third of the $150 million to the Commission in January 1993, with the other two-thirds to be paid out during the subsequent two years.

One of the sticking points relating to the Maori acquisition of Sealord Products was the formula for the division and allocation of benefits which the settlement would generate. While the Government had shown a strong commitment to the principles of the Deal, and had ensured that it was implemented, regardless of the merits or intensity of criticism it faced,

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3 Rt. Hon. Douglas Graham, Minister of Justice, in *New Zealand Herald*, 18 February 1993.

4 J. Bentham, 'An Introduction to the Principles and Morals of Legislation', in M. Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty, Essay on Bentham*, Glasgow, 1986, p. 59.

when it came to the organisation of a distribution and allocation system, the Government was able to absolve itself of any responsibility by claiming that this was a matter for Maori to decide, and that it would be culturally inappropriate for the Government to intervene and dictate the specific outcome Maori should adopt. Yet this sudden rush of cultural sensitivity failed to conceal National's reluctance to get involved in what would be politically an extremely risky process of decision-making. The insincerity of such a justification also emerges when the brazen methods the Government used to achieve the settlement are considered.

The essence of the looming debate was whether the mainly financial benefits from the settlement should be divided according to tribal numbers, or the traditional length of a tribe's coastal boundaries. This represented a potential barrier to the future success of the Deal, partly because of the exaggerated proportions these options could produce. For example, 70 per cent of the value of New Zealand's total fish catch is taken off the Ngai Tahu coast, yet numerically, the Ngai Tahu tribe is comparatively small with about 22,000 Maori claiming affiliation to it. This compares with almost 100,000 for the Northland-based Ngapuhi.[5] This traditional versus utilitarian debate was complicated by two further factors. Firstly, tribes such as Tuwharetoa in the central North Island, numbering around 24,000, and Tuhoe of the Urewera region, with about 25,000 affiliates,[6] traditionally had little or no coastal areas, and so if historical principles were to be applied, tribes such as these could be denied any significant returns from the Sealord Deal. Thus, parity became a point of disagreement. The second issue was that of current Maori population centres. Following the migration to urban areas which began to rapidly

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5 Department of Statistics, quoted in *New Zealand Herald*, 18 February 1993.

6 op. cit.

accelerate after the Second World War, the concentrations of Maori in the cities, especially Auckland, bear no relation to their traditional tribal areas, and so the possibility also existed for the greatest number of Maori being excluded from the benefits of the settlement because they lived in the wrong location or were descendants of the wrong tribe or sub-tribe.

Fears about the allocation formula were raised because the chairman of Sealord Products was Dr. Tipene O'Regan - a senior Ngai Tahu Trust Board member. Ngai Tahu leaders suggested that they would never even contemplate making a claim on, say, the forestry resources of Tuwharetoa, or the geothermal areas in Te Arawa's region. Based on this strand of logic, it would be equally inappropriate for other tribes to derive any direct benefits from Ngai Tahu's coastal resources. Thus, Ngai Tahu was determined to support the plan for the allocation of fishing quotas according to the length of a tribe's coastline. However, Ngapuhi's Dick Dargaville completely rejected Dr. O'Regan's argument, observing that 'The attention paid to coastline, to the total exclusion of the modern circumstances of Maori people has heightened fears that the fisheries settlement will lead to a concentration of wealth to the detriment of those areas where there is a huge Maori population....At no time was the settlement developed to create phenomenal winners and abject losers'.[7]

This fundamental difference was foreseen in an assessment of the Sealord Deal and its probable implications by the Waitangi Tribunal:

> The Sealord's purchase would provide a major stake in the industry and an income to promote Maori fishing....The concern was that the [Treaty of Waitangi Fisheries] Commission should allocate benefits fairly and impartially among the iwi, and that the interests of particular sub-groups

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7 Dick Dargaville in *New Zealand Herald*, 18 February 1993.

> and individual operators should also be protected. These things might not happen, some thought, without special safeguards.
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> The Crown has a Treaty duty to all the tribes...and therefore has some delicate balancing to achieve....To that end, the deed [of settlement] envisages that an allocation system will be promoted through three stages. The new commission will propose an allocation scheme after full consultation with Maori. Then, the Crown must be satisfied that it is fair, and finally, the legislation to effectuate this scheme may be referred to this tribunal. The scheme is to include proposals for an independent dispute resolution process.[8]

Although room for additional negotiation still existed in early 1993, Ngai Tahu had unequivocally asserted their claim to the 'lion's share' of the settlement, thus practically eliminating the possibility of an allocation scheme based on other criteria or considerations.

In February 1993, Ngai Tahu quit the Maori Congress as a form of protest by some of the Congress' prominent members, including Dr. Reedy, but indicated a few days later that it could consider rejoining provided that the Congress returned to the principles which Ngai Tahu believed had been abandoned. This aspect of the controversy over the Sealord Deal simmered on while new difficulties came to the boil.

C. The Decision on Allocation

On 16 February 1993, an all-day hui took place which resulted in the Minister of Maori Affairs, Doug Kidd, extending the previous deadline of 26 February for the appointment of the body that would allocate the benefits of the Sealord Deal. However, the Minister announced that he had yet to decide on whether a hui should be held to decide membership of

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8 Waitangi Tribunal, *The Fisheries Settlement Report 1992*, Wai-307, Wellington 1992, pp. 17-18.

the formatted Treaty of Waitangi Fisheries Commission which was to replace the MFC.

The convenor of the National Maori Congress, Mr. Api Mahuika, stressed that it was essential that greater recognition be given to Maori submissions on membership of the commission, and the Maori Congress itself insisted that Maori tribes, rather than the Government, should be responsible for making appointments to the Commission. To this end, the Maori Congress proposed that appointments to the Commission be postponed until March or April - after a national hui on the matter had been held. Mr. Kidd's response was that the Government was keen to get the Fisheries Commission under way as soon as possible - probably in a matter of weeks rather than months. This desire for haste could not be explained as being the result of external pressures, as the purchase of Sealord Products had been. The Government's concern apparently lay with the continuation of the Deal, which could be achieved if as many Maori as possible received benefits from it as soon as practicable, thus locking those beneficiaries into a moral obligation to uphold the settlement.

The Maori response parroted the debate over the allocation scheme itself. A North Auckland kaumatua, the Rev Maori Marsden, objected to the swift pace at which the Government was pushing the Deal forward, and said that the '...durability of the settlement...' was in question.[9] He also put what was becoming a fairly focused debate into a global perspective: 'I cannot recall ever seeing a more fragile situation in Maori society. This is not about whether the north wins or the south loses. It is about maintaining quality dialogue rather than sloganeering'.[10] Tipene O'Regan

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9 Rev Maori Marsden, in *New Zealand Herald*, 17 February 1993.

10 op. cit.

was quick to respond, stating that there was a need for haste in the settling of the allocation issue. He pointed out that tribes were losing millions of dollars in potential growth and benefits due to the delays.[11] The Minister of Fisheries' contribution was to suggest that a possible compromise be worked out between the interested parties which would combine the elements of population and coastline length as determinants of the outcome.

On 27 May 1993, the Minister of Maori Affairs announced the 13 members of the Treaty of Waitangi Fisheries Commission after what Mr. Kidd incorrectly described as '...the most extensive and intensive consultative process in the history of the relationship between the Crown and Maori'.[12]

D. A Temporary Truce but no Solution

In early August 1993, a temporary 'cease-fire' was agreed on by Maori tribes over who would be allocated what from the Maori fishing quota. However, the cease-fire did practically nothing to resolve the split between the South Island tribes who favoured an allocation regime based on tribal coastlines, and the North Island tribes who were adamant that resources be apportioned on a population basis. The tribes decided that this longer-term division should not jeopardise the future of the Maori fishing industry. It was acknowledged that the allocation issue would require intense and lengthy negotiations, and that this should not prevent the tribes allowing the short-term leasing of quota for the next fishing season. The Treaty of Waitangi Fisheries Commission chairman, Dr. O'Regan was partly responsible for arranging this truce, and summed up the rationale behind it: 'At the moment we have got two very distinct positions which are probably

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11 Dr. Tipene O'Regan, in *New Zealand Herald*, 17 February 1993.

12 Hon Doug Kidd, Minister of Maori Affairs, Media Statement, 'Treaty of Waitangi Fisheries Commissioners Announced', 27 May 1993, p. 1.

in themselves not reconcilable. But that which slows down the allocation, slows down the betterment of our people, and justice delayed is justice denied'.[13] The fact that this sort of agreement could be achieved indicated not only a desire among Maori to 'get on with the job', but also that in the long term, neither side in the argument was willing to give any 'ground' on the issue of allocation. As the Ngai Tahu spokesman Charlie Crofts put it, 'This is a particularly confrontation issue....We have a problem seeing how a compromise could be reached, but until iwi sit down and discuss it, we won't know'.[14] Yet there had already been numerous discussions among tribes - all leading to an impasse.

Legal action by some Maori groups had been temporarily put on hold as a result of the hui - with an acknowledgement that in the broader perspective, litigation stalled any Maori economic recovery and only benefited the lawyers involved.[15]

By late August 1993, the loss of the year's $100 million Maori fishing season looked likely as a consequence of continued disagreement on what allocation scheme should be adopted. Dr. O'Regan highlighted the possibility that there would be no fishing season for the up-coming year for Maori:

> It will be a huge cost to Maoridom. I would suggest the tribes deprived of fish would pursue charges against the [Treaty of Waitangi Fisheries] Commission who would join the people who prevented it from moving.[16]

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13 Dr. Tipene O'Regan, in *New Zealand Herald*, 2 August 1993.

14 Charlie Crofts, in *New Zealand Herald*, 2 August 1993.

15 Maanu Paul, speaking to the hui on behalf of some central northern tribes, in *New Zealand Herald*, 2 August 1993.

16 Dr. Tipene O'Regan, in *New Zealand Herald*, 24 August 1993.

Mr. Dargaville, representing some of the northern tribal interests, spoke frankly about the immediate prospects:

> There won't be a fishing season. It's just not going to happen this year....The losses will be substantial. The New Zealand public spent a lot of money on this deal, and there's an expectation of fair treatment of one Maori to another.[17]

Although the issue was returned to the Fisheries Commission to reconsider, challenges were now being made to the mandate which the Commission implicitly claimed it possessed, with Mr. Dargaville stating that court injunctions were inevitable.[18]

A few days later, Dr. John Mitchell, a member of the Treaty of Waitangi Fisheries Commission, announced that the Maori's $100 million quota catch would go ahead, even if no agreement on the allocation of the harvest had been made.[19] However, the Commission was caught between the necessity of a quick decision before the opening of the season, and the certainty of legal action from several tribes once such a decision had been made.

The awarding of tenders to Maori to harvest the 57,200 tonnes of fishing quota was dealt with by the Commission at the beginning of September 1993. Prior to this time, the Commission received written submissions on how this aspect of the settlement should be handled. By 1 September, the interim compromised had been reached. But the whole matter was taken before the High Court within a few weeks of the compromise being announced. The Fisheries Commissioners' deal proposed that tribes within

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17 Rihari Dargaville, in *New Zealand Herald* 24 August 1993.

18 op. cit.

19 *New Zealand Herald*, 29 August 1993.

the country's nine fisheries management areas would fish their own coastlines for a combined national total of 15,000 tonnes of inshore quota. Half of the 42,000 tonnes of deep-water species quota would be shared out under the 'mana moana' basis, that is, that the fish off any particular tribe's coast is exclusively theirs. Challenges to this regime, which would award the bulk of the catch to Ngai Tahu, came from Northland, Waikato, and Bay of Plenty tribal groups, represented by the Area One Fishing Consortium and the Muriwhenua confederation. Their challenge was based on the premise that the Treaty of Waitangi Fisheries Commission's plan was unfair and unlawful.[20] They suggested an interim order halting the allocation until a fairer system was devised by the Commission. Further challenges came from Te Arawa and Ngati-Ranginui who described the Commission's proposals as an abuse of statutory power and failed to abide by the principles of the Treaty of Waitangi.[21]

The Commission answered these challenges by making it clear that it had gone to great lengths to consult and then consider the options for quota distribution.[22] The counsel for Ngai Tahu claimed that the tribe had no involvement in the proposed allocation scheme,[23] and that population figures were not a relevant factor: 'Essentially, the use of population figures is an expression of the concept of majority rule. It is, of course, majority rule which took away from the Maori in the first place the rights they now seek to retrieve'.[24] Mr. Upton also stressed that it was not up to the courts to intervene in an area where the Treaty of Waitangi Fisheries Commission was legally empowered to make decisions.[25]

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20 *New Zealand Herald*, 22 August 1993.
21 op. cit.
22 op. cit.
23 *New Zealand Herald*, 23 September 1993.
24 John Upton, Q. C., counsel for Ngai Tahu, in *New Zealand Herald*, 23 September 1993.
25 op. cit.

On 30 September, the day before the opening of the Maori commercial fishing season, the Court of Appeal turned down a request to stop some quota being issued to tribes. A High Court order made a few days previously had prevented the Fisheries Commission from distributing 21,000 tonnes of quota for deep-sea species. (An earlier Court of Appeal ruling had acknowledged, though, that the Deed of Settlement of the Sealord Deal was '...a most unusual document and, perhaps even designedly, obscure in some major respects').'[26] The Commission chairman, Dr. O'Regan, described the Court of Appeal's finding which allowed the fishing to go ahead as '...a huge relief', and added, 'It means that the Commission can go ahead with its proposals and get the iwi out fishing'.[27] The Appeal Court's judgement was based on the absence of any evidence that the Commission had ignored its legal obligations when deciding how the quota would be allocated. Yet, even though on a population basis Ngai Tahu would clearly benefit disproportionately from the decision, the tribe's spokesman, Charlie Crofts, described the Court of Appeal's verdict (which upheld the Commission's allocation formula) as '...only marginally digestible'.[28] Tai Tokerau chairman, Matiu Rata, demanded that Mr. O'Regan resign from the Fisheries Commission so as to prevent further action being taken against the allocation formula. This was undoubtedly a bluff, because Dr. O'Regan's position on the Commission was crucial for Ngai Tahu's lucrative fishing resource to be protected from other tribes, and was also politically secure because it was in the Government's interests to be able to manipulate the balance of divisions among Maori tribes and organisations who had an interest in fisheries, and the excessively loud voice Ngai Tahu had in the fisheries arena ensured that

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26 Court of Appeal judgement, quoted in *Te Reo O Te Tiri A Tangaroa*, Newsletter of the Maori Fisheries Commission, Issue number 12, December 1992, p. 3.

27 Dr. Tipene O'Regan, in *New Zealand Herald*, 30 September 1993.

28 Charlie Crofts, in *New Zealand Herald*, 5 October 1993.

the imbalances and divisions would continue to fester. The Government peppered these divisions with threats over the future of claims under the Treaty in general. Echoing comments made by the Prime Minister in September 1992, a National caucus meeting on 23 February 1994 considered a cut-off date of 1996 or 1997 for Maori claims to the Waitangi Tribunal, and came close to agreeing on an overall settlement fund which would be made available to resolve all remaining claims.[29]

Former Prime Minister David Lange speculated on how the political posturing which had taken place within the Fisheries Commission would be interpreted in the future:

> I have no doubt that Tipene O'Regan will be denounced by the next generation. You don't have to be much of a radical to think that any agreement that leaves Jim Bolger looking smug can't have much going for it. If the Deal doesn't give a boost to the economic aspirations of a fair cross-section of the Maori people, the negotiators will be open to accusations that they did no more than create a perpetually funded aristocracy. The negotiators will doubtless live long enough to find themselves beset.[30]

Yet despite the warnings of Mr. Lange and others, immediate interests and concerns continued to take precedence over the longer term good the Deal could potentially generate, and the philosophical issues which it had stirred.

Matiu Rata, a seasoned player in the Maori fisheries game, had proposed that Far North tribes be given $10 million by the Fisheries Commission to develop marine farming as an interim alternative to the vexed option of quota distribution, but this did not eventuate, and the stalemate persisted.. Mr. Rata was also opposed generally to the actions of the Commission in

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29 *New Zealand Herald*, 24 February 1994.

30 Rt. Hon David Lange, *Dominion* column, 7 September 1992.

part because he had not been chosen as a member of that body, despite his previous experience as a fisheries negotiator,[31] something which contributed to Mr. Rata's additional distrust of the Commission and its leader.

The ongoing difficulties over the allocation scheme was foreseen in a speech given to Parliament by David Lange in December 1992, when he predicted that 'They [the Maori people] are not going to go fishing; they are going to go to hui at which they will argue the distribution of the proceeds of Mr. Brierley's half share in their fishing. That is not exactly what I would call a triumph and fulfillment of the aspiration of Maori under the Treaty of Waitangi'.[32]

E. The Development of an Allocation Policy

> It is a matter of some satisfaction...that the manifestations of that debate [regarding the allocation issue] in the operation of the Commission to date have, on the whole, taken place in a productive spirit. The good faith with which both sides of the debate conduct themselves within the Commission has resulted in a unified public position even though particular decisions may have been taken on fiercely fought and quite narrow majorities.[33]

The ongoing point of contention since the inception of the settlement has been the apportioning of the benefits from the Deal. At the same time, there was an acknowledegment that if a conclusion was not reached, then

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31 A decision apparently based on the fact that Mr. Rata was a member of the Alliance Party, whereas he person who was given what was anticipated to be Mr. Rata's position, was Sir Graham Latimer, a National Party stalwart. The obvious political overtones of the appointment were so clear that even a National Member of Parliament, Ross Meurant, said of the decision to overlook Mr. Rata, 'I fear this is a case where objectivity has gone out the window and given way to party cronyism'. *New Zealand Herald*, 28 May 1993.

32 Rt. Hon David Lange, *Speech to Parliament in Second Reading of Treaty of Waitangi Fisheries Claims) Settlement Bill*, 8 December 1992.

33 Sir Stephen O'Regan, 'Chairman's Report', in *Treaty of Waitangi Fisheries Commission, Te Ohu Kai Moana, Hui-A-Tau*, 30 July 1994, p. 6.

there could be significant costs borne by the Fisheries Commission as a result of the season's catch not going ahead.

However, the attitude of the Fisheries Commission by mid-1994 seems to have been that dissent to the Settlement by iwi was no longer a matter of active consideration, and that issues of allocation were on the verge of a final resolution. Yet despite this apparent confidence in the future resolution of the dilemma, hints of warnings about the need to avoid further litigation continued to surface:

> The costs of litigation are not confined to simply paying lawyers...there are huge costs in delayed access to the resource. There are huge costs in the diversion of our best talents to economically non-productive struggle and, above all, there is the cost of diversion from the urgent imperatives of the development of our people.[34]

While the principles expressed in this statement would possibly have played on those who were fatigued with the ongoing legal battles over the allocation issue, the views of the Fisheries Commission clearly precluded the option of reviewing the actual settlement itself, and therefore further publicly entrenched the Commission's absolute commitment to the settlement. This message was sweetened by the announcement that around $13 million had been distributed to Iwi organisations:

> The benefits have been utilised in different ways by Iwi, and these initiatives have been possible through profitable activities by Iwi in the business and activity of fishing.[35]

The fact that various iwi had received benefits from the settlement meant that they implicitly had given their consent to the settlement, and had

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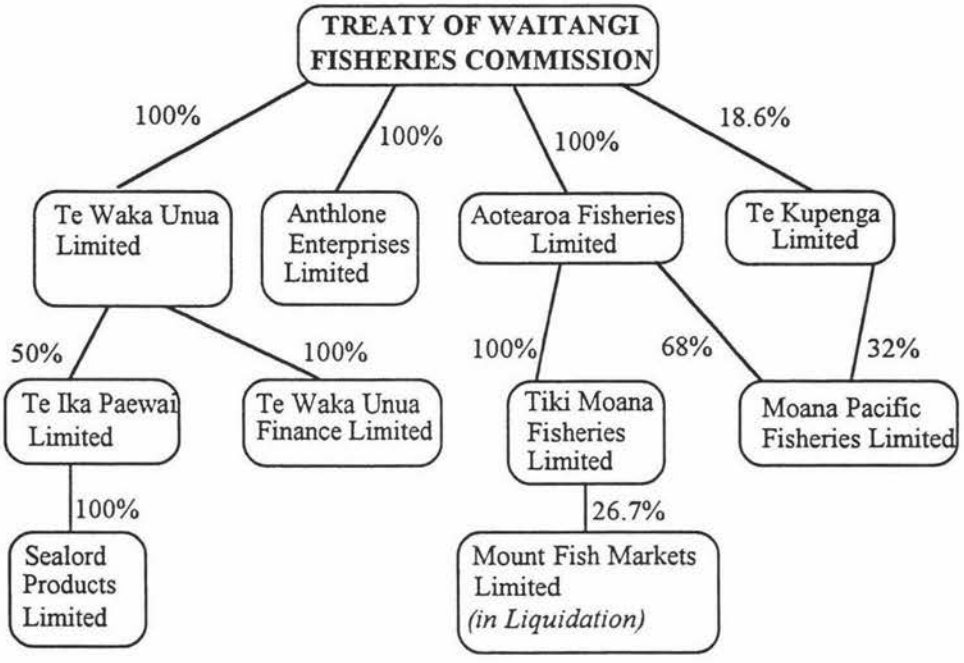
34 ibid., p. 7.
35 ibid. p. 12.

accepted the authority of the Fisheries Commission to decide issues on their behalf relating to allocation and all other matters affecting the Maori fisheries resource.

The following diagram outlines the Commission's interests and its subsidiary and associated companies:

Figure 1. The Fisheries Commission's Interests



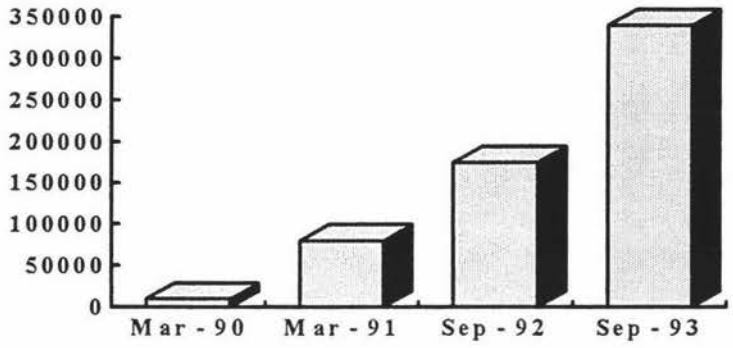
Source: Sir Stephen O'Regan, 'Chairman's Report', in *Treaty of Waitangi Fisheries Commission, Te Ohu Kai Moana, Hui-A-Tau*, 30 July 1994, p. 21.

The percentages listed on this diagram are the percentages of financial interest which the Treaty of Waitangi Fisheries Commission's special purpose company -Te Ohu Kai Moana Limited, holds in various subsidiary companies.

Te Ohu Kai Moana Limited, the umbrella company which represents the Fisheries Commission and its interests reported that its growth had been

substantial between 1990 and 1993. This growth is shown in the following graph:

Figure 2. Total Assets of Te Ohu Kai Moana ($000's)



Source: Sir Stephen O'Regan, 'Chairman's Report', in *Treaty of Waitangi Fisheries Commission, Te Ohu Kai Moana, Hui-A-Tau*, 30 July 1994, p. 21.

This growth corresponded with increased profits which put pressure on the Commission to resolve the allocation issue so that iwi could benefit from this profitability.

F. The 1994 Hui at Orakei Marae

On 30 July 1994, a hui was held at Orakei Marae in Auckland by the Treaty of Waitangi Fisheries Commission. However, even before the hui commenced, it was apparent that there would be no resolution to the ongoing debate over the allocation issue. The mood of the Fisheries Commission towards the hui seemed to be that it was fulfilling its obligations, and going through the lip-service process of consultation which was a requirement under the provisions of the settlement.

The hui was held on a Saturday morning and it was evident well before the start time of 10:00 am that the number of people attending was perhaps greater than had been anticipated. If nothing else, this reflected the ground-swell of interest that the fisheries issue had generated.

The agenda for the day included the Chairman's report, three periods of around fifteen to twenty minutes for iwi comment, with reports from the subsidiary companies occupying the remainder of the allocated time.[36]

Around 30 protesters were outside the marae arguing that the commission was denying Maori their rights under the Treaty of Waitangi. Inside the meeting, there was some confusion as a group representing 25 iwi, who had formed together in early July 1994 to constitute the Treaty Tribes (an organisation opposed to the Sealord Deal), walked out of the meeting over concerns that the time allocated to iwi to discuss some of the issues on the agenda was insufficient. The Treaty Tribes also expressed their worry that the venue was to small and therefore inappropriate for the demands of the meeting.

The chairman of the Treaty Tribes, Mr. Tutekawa Wyllie, commented about his groups walkout during the hui:

> I think it looks bad for the commission in the sense that there's a high interest in this hui and a venue should be made available for everybody to participate...the commission needs to get its act together.[37]

When the Treaty Tribes announced their formation, they were dismissed by some northern iwi as being merely a small South Island coalition existing to promote the interests of a small minority of tribes in the South Island and the Chathams. But as the Treaty Tribes Chairperson expressed just prior to the Orakei hui:

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36 Treaty of Waitangi Fisheries Commission, 'Hui-a-Tau Agenda', 30 July 1994.

37 Tutekawa Wyllie, in *NZ Herald*, 1 August 1994.

> They apparently overlooked the membership of Ngati Kahungunu on the East Coast, Ngai Tamanuhuri in Gisborne and Ngati Wai from Whangarei but with 12 iwi from Hauraki joining must now look for another excuse to deny tikanga and treaty principles.[38]

Sir Tipene O'Regan's response to these apparently legitimate concerns was to fall back onto the commission's view that it was doing what was required of it, and was under no compulsion to do anything else: 'Our statutory requirement is to report to the people, which is what we have done'.[39]

Criticism was levelled at Doug Kidd by Matiu Rata about the handling of the Settlement while it was still in its infancy. Mr. Rata said that the provisions of the Deed of Settlement had not been complied with and should have been put into place within ten days of the relevant legislation coming into effect.[40] Mr. Rata's main objection to the process which had emerged on the handling of Maori fisheries was that the Treaty of Waitangi Fisheries Commission had appeared to become preoccupied with the administration of commercial considerations, particularly relating to the size of quota, to the detriment of the transfer of these assets to Maori, as was originally the intention.

Supporting Mr. Rata's view of the Commission's purpose, the Treaty of Waitangi Fisheries Commission had been set up under the provisions of the Act as a transitional body which would no longer exist in its present form once it had succeeded in its goal of devolving the fishing interests from the Crown to the Maori people within the four-year time-frame given.

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38 *Te Maori News*, July 1994, p. 3.

39 Tutekawa Wyllie, in *NZ Herald*, 1 August 1994.

40 *Te Maori News*, July 1994, p. 3.

It was also acknowledged by Matiu Rata that no structure was yet in place to facilitate this transfer, and that this could potentially de-rail the processes put in place in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act.

Sir Stephen's report on the allocation of the Commission's assets attempted to give the impression that the Commission had already reached a compromise settlement with which the majority of iwi were at least satisfied, if not pleased:

> Since the 1993 Hui-A-Tau, the Commission has continued to make progress with the development of its allocation process. Iwi are fully aware that the development of this policy is inherently complex, and the Commission is aware that any firm allocation programme must be seen as eminently fair, while being robust enough to withstand the exacting scrutiny of Iwi and the High Court.
>
> In reporting on progress with allocation of its fishing assets to Maori at the 1993 Hui-A-Tau, the Commission outlined the framework within which the allocation policy is being developed. It was noted that the Commission's work on allocation was built around the relevant resolutions endorsed at the previous year's Hui-A-Tau as well as relevant provisions contained in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992....
>
> The Commission believes that the maximum progress has been made in the allocation area, bearing in mind the enormous political, legal, cultural and economic issues.[41]

In this report, the Commission also outlined a process for the proposed allocation of the pre-settlement assets of the Commission, and more importantly, discussed briefly the need for the development of proposals relating to the allocation of post-settlement assets. This was far from

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41 Te Ohu Kai Moana, The Treaty of Waitangi Fisheries Commission, *Hui-A-Tau - Orakei Marae, July 30, 1994*, Auckland, 1994, p. 8.

conclusive, and although it would be premature to expect any full and final formula for the allocation of assets to be articulated when the bigger issues relating to the allocation process remained unresolved, the conclusion in the Commission's 1994 report was simply inadequate:

> ...the development of a procedure for identification of the beneficiaries and their interests under the Deed of Settlement will require a thorough review of the work already undertaken by the Commission on distribution, recourse to other specialist opinion, consultation with Maori and consideration by the Crown.
>
> It should be noted that the Commission has presented its report both to Iwi and to the Minister in respect of its accountability to Maori and the Minister has written to the Commission advising that it has satisfied the statutory requirements for this particular matter.[42]

Only the most general comment - that of 'consultation with Maori' - seemed to suffice for the Commission's purposes. No details were provided on the extent of this consultation process and whether or not the Commission had felt that it had achieved a mandate to represent Maori in the arena of commercial fisheries. The emphasis quickly tilted towards the Commission's attempt to deflect its responsibilities in this area by implying that it was bound by statutory restrictions, and that it was merely 'following orders'. The burden of responsibility was correctly placed on the relevant Crown Minister, but this ignored the complicity of the Commission in the workings and schemes of the Minister's department, and of the wider issue if the Crown's stance in connection with Maori fisheries. From this report, it would appear that the Commission was simultaneously asserting its authority and its independence, and yet also acknowledging its

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[42] ibid. p. 9.

subservient role in relation to Government policy, with which it happened to concur at the time.

Late in August 1994, around a month after the hui at Orakei Marae, the Treaty of Waitangi Fisheries Commission announced its decision for the up-coming fishing season. Maori fishing quota would be distributed to nine management areas along the same lines as the previous year. It was the responsibility of the iwi within those management areas to decide among themselves the basis for allocation of the quota which they had collectively been given. Thus, the Commission was able to 'wash its hands' of its responsibilities to protect the interests of iwi it claimed to represent. Furthermore, this was not a resolution to the allocation dilemma. The quota were being leased without prejudice, and would only have application for the approaching season.[43]

The quota at the Commission's disposal was 56,970 tonnes, and significantly, under the plans that the Commission had developed, there was a distinction between inshore and deepwater species, even though such a division was contrary to the nature of traditional Maori fisheries as identified in various Waitangi Tribunal reports.

Another crucial aspect of the interim settlement proposed by the Treaty of Waitangi Fisheries Commission was that there was a partial attempt at overcoming the problem of allocating the quota on either a traditional or population basis. All of the inshore quota and half of the deep-water quota would be distributed through the fishing management areas. The remaining half of the deep-water quota would be distributed on the basis of iwi

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43 *New Zealand Herald*, 20 August 1994.

populations.[44] Iwi would be offered quota on a concessional rate, but this put the burden of trading and arranging quota distribution within the nine management areas on tribal organisations of varying structures, size, and with disparate resources. In this sense, the seemingly workable compromise the Commission was proposing had the potential to exaggerate the discrepancies over the allocation of quota. All quota that iwi did not lease would be disposed of by commercial tender.

That the heavily Ngai Tahu-influenced Treaty of Waitangi Fisheries Commission was apparently bowing to pressure and offering at least some degree of population-based distribution of the fisheries resource at its disposal may give the impression that a compromise on the allocation predicament could be possible. However, in the murky background where Government officials were in pursuit of their own agenda, this apparent concession to the demands of those iwi wanting a population-based allocation of the financial benefits derived from the Sealord Deal was a 'double-edged sword'. The evidence presented by the Crown to the Waitangi Tribunal on the mahinga kai fisheries aspects of the Ngai Tahu Sea Fisheries claim unfurled the Crown's ambition for pan-tribalism to replace the traditional tribal structure within Maoridom.

The Crown Counsel put the evidence as follows:

> You will see:
>
> - that to manage fisheries accurately, a great deal of knowledge on both biology of the fish and effects of fishing is needed
>
> - that there is therefore, a need for rational development and management of the resource.

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[44] op. cit.

- that without effective enforcement, fisheries management loses its integrity

- that conservation of the resource involves limits on access, careful allocation and rigid compliance with controls

- that the economics of the commercial fishery bring benefit to all New Zealanders and to Ngai Tahu who have chosen not to walk in the tribal world but under the protection of Article the Third of the Treaty.[45]

The Crown's stance on tribalism was made abundantly clear in this submission. The Crown's capacity to exert its authority and control over Maori claimants would be greatly enhanced if traditional tribal structures were removed and replaced with the pan-tribal approach, in which future mandates could easily be obtained. In this particular submission, the Crown unequivocally asserted its position in relation to the fisheries of the nation:

> ...acting very properly under the Sovereignty ceded to it by the Tribe under Article the First of the Treaty, the Crown controls the commercial fishery as a national resource which because of its intrinsic nature can only be managed and conserved under national guidelines.[46]

There is no recognition in this statement of the Maori version of the Treaty which is equally valid (if not more so) than the English version in which sovereignty is ceded. The Maori version ceded only the right of the British to govern. The Crown's basis for claiming control of the fisheries rested with a mixture of asserting its sovereignty and observing the need for a national strategy which it argued was necessary to preserve and manage the resource.

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45 S. E. Kenderdine, Crown Counsel, opening submissions on Ngai Tahu sea fisheries, Doc. R9, pp. 2-3.

46 ibid. p. 3.

But the Crown, partly on advice from its officials and partly because it suited the Government's own agenda with respect to claims made under the Treaty of Waitangi, preferred to follow a policy line that dealt as much as possible with Maori on a national rather than tribal level. This is one of the reasons that the Treaty of Waitangi Fisheries Commission was the body charged with the task of settling an allocation scheme. From the Government's perspective, it was content to deal with Maori fishing interests only on a bilateral level, and so carefully and successfully avoided negotiating with iwi on an individual level. This strengthened recent findings which revealed that:

> ...although we sometimes refer to the Maori nation as a collective term it as a mistake to think the population is cohesive, homogeneous and centrally organised...[though] waka, iwi, hapu and whanau (canoe, tribe, sub-tribe, extended family) still exist despite years of government efforts to undermine them.[47]

Following the Orakei Hui, the Fisheries Commission announced three models which it proposed as options to resolve the allocation problem. These were:

1. Manamoana Model - under this model, the fish off an iwi's traditional coastline would be the property of that iwi. This would be the option most consistent with the Treaty of Waitangi, and would be based on historical fishing practices at the time of the signing of the Treaty.

2. Population Model - this aims to divide up quota simply on the basis of population. Quota would be allocated to all individuals of Maori

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[47] *Nga Toka Tu Moana: Maori Leadership 1993*, Te Puni Kokiri Report, Wellington, 1993.

ancestry as represented by iwi organisations. The Commission was quick to point out that over a quarter of Maori did not know their tribal affiliation, and so there could be possible difficulties with this model.

3. Progressive Allocation Model - this model was the same as the manamoana model with the exception that quota would be allocated progressively, starting with species easily linked with a particular rohe or district. In the meanwhile, other quota would continue to be leased to provide funding for capital growth, and other areas of relevant development.[48]

The criteria which would be used as a basis for the Commission's decision on which allocation model would be chosen were that it must be:

- consistent with tikanga Maori.
- consistent with legislation.
- helpful for Maori in the areas of social and economic development, particularly in the employment related field.
- financially viable, so that the costs of implementation do not outweigh the benefits.
- technically feasible - which included implementation within what the Commission described as '...a reasonable time'.
- politically sustainable. If the model at all threatened the 1992 Settlement, then it would be deemed unacceptable.[49]

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48 Treaty of Waitangi Fisheries Commission, *Tangaroa*, Issue No. 20, August 1994, p. 6.

49 op. cit.

Despite the merits or otherwise of the options put forward by the Commission, the problem of securing a mandate for any final decision still dogged the possible resolution of the allocation question. The Commission was obliged to admit that there would be processes of consultation with iwi over a period of months including a hui of iwi representatives in Wellington, a round of regional hui, followed by a national hui at which an anticipated agreement on the preferred model would be reached.

While there is evidence of perhaps a genuine desire to gain a mandate from Maori for a preferred model, the difficulty of reconciling two vastly different philosophies of allocation were only slightly smudged in the rewording present in the models. The Commission acknowledged the possibility of no agreement being reached, and proposed that in the absence of a unanimous view, the Commission would assume the responsibility of developing a policy on what was the most appropriate model based on the outcome of its consultations, and this would form the basis of a recommendation to the Minister of Maori Affairs. The Minister would then have 30 days to consider the proposal and make any necessary changes, whereupon it would be the responsibility of the Commission to implement the allocation model.

CONCLUSION

A. A Failed Attempt at Modernisation

This thesis set out to examine the Sealord Deal from the premise that it was an attempt, albeit an unwitting one, at Modernisation. Many of the variants and elements of Modernisation theory apply closely to the formation and purpose of the Deal, as well as to broader areas of Maori development over the past two centuries. These elements include the description of traditional societies, and the nature of the transition these societies undergo to advance economically and adapt socially and culturally to new economic forces, based on an 'external' factor - in this case the Government.

The Sealord Deal, once fully operational, would unavoidably impose on many iwi the need to undergo a process of Modernisation. This necessitates not only economic reorganisation, but also the much more culturally threatening process of redefining the attitudes towards traditional resources and their management.

Other issues have arisen as a result at this attempt at modernisation. There has been a clearer division between Maori who identify themselves as regionally-based - along traditional hapu and iwi systems of social organisation, whereas comparatively new groups, identifying themselves as 'urban Maori' have argued that they are due a share of traditional resources. In one sense, the Sealord Deal brought these issues of definition and identity to a head. Maori were confronted with one of the products of Modernisation in a way which they had not previously encountered.

The Sealord Deal was manifestly a failed attempt at modernisation because the Government, which was the chief instigator of the Deal, did not take into account the cultural imperatives of Maori - especially tribal divisions and the absence of a centralised institution or body representing all Maori, and therefore based its efforts at modernisation purely from the standpoint of the dominant culture. From the Government's perspective, Maori were now able to be dealt with as a national unit, administered by a centralised, pan-tribal body (the Maori Fisheries Commission, and later the Treaty of Waitangi Fisheries Commission) in a way which no longer needed to take into account traditional tribal delineations.

Another reason why the Sealord Deal can be seen as a failed attempt at Modernisation is that the Government did not anticipate the various types of reorganisation that would be required to enable Maori to take full advantage of the fisheries settlement. The transition Maori society had undergone as a consequence of the colonisation process was uneven, and while there may have been rapid changes in the economic and political framework of the entire country, in the areas of fam,ily structures, traditional values, and other culture-based institutions, Maori society had not undergone a uniform transition in the way in which the Government believed it had. As Hoselitz observed, Maori economic development during the last 150 years has not been matched by a corresponding development in Maori social structures.[1]

This lack of recognition of the features of Maori society is a common feature in societies colonised by other powers. Most of the changes introduced by colonial powers in their colonies have been focused around

[1] B. F. Hoslitz, pp. 77-8.

the central institutions of the society.[2] The apparent disintegrated system of Maori tribal organisation defied that trend towards centralisation, and was still not acknowledged when the Government decided to reach a national fisheries setlement to resolve individual tribal claims made to the Waitangi Tribunal.

Moreover, Maori collectively were being treated almost as a colonial economy by the Government in the manner in which the Government chose to implement the Sealord Deal. The Government positioned itself as the sole body which would arrange for the capital to be provided for Maori,[3] and, possibly unwittingly, fostered what Hoselitz described as a 'satellitic'[4] pattern of growth for Maori. Maori involvement in the fishing industry under ths Sealord Deal would be fully dependent on the structure of the industry (as shaped by the 'dominant' body - the Government), and the external markets (external in the sense of non-Maori).[5]

B. An Uncertain Future

If anything is probable about the Sealord Deal, it is that it will not be a full and final settlement of fisheries claims under the Treaty of Waitangi as its authors intended it to be. Monetary settlements made to Maori in Taranaki, Waikato, and Tauranga by the first Labour Government in the 1930's were also announced at the time as permanent settlements. And despite legislation supporting those initiatives, it was not long before Maori land claims in those regions once again surfaced. The lack of durability of such settlements can be attributed to two main factors: firstly, they were predominantly politically expedient, rather than based on a philosophical

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2 S. N. Eisenstadt, p. 110.
3 N. J. Smelser, p. 128.
4 B. F. Hoselitz, p. 93.
5 op. cit.

desire to uphold the Treaty, and secondly, because these attempts at permanent settlements did not fulfill the Crown's obligations under the Treaty of Waitangi (and instead offered an alternative), they were necessarily destined to eventual failure.

As a sub-theme to this, the Sealord Deal has its own individual inadequacies which immediately threatens its capacity to endure: there was no Maori mandate for the Deal, and nor was there even a mechanism or structure in place to gauge Maori support or opposition to the settlement; the bulk of the negotiations from which the settlement emerged were conducted in secret, and thus many of the political components of the Deal have remained concealed and are now left to be the subject of speculation; and parochial tribal interests, both within the Fisheries Commission and in the ensuing litigation, overtook the wider consideration of Maori social and economic development.

The responsibility for the inadequacies of the Sealord Deal ultimately rests with the Government - particularly in its reluctance to become involved in establishing an allocation scheme for the benefits of the Deal. The consequence of this is that a wedge has been driven between Maoridom, at the base of which is the Sealord Deal. As long as the Deal remains, so does the cause for division. National's lethargy and abdication of accountability over the allocation scheme contrasts vividly with the haste and drive that characterised the negotiations and establishment of the settlement.

Proof that the Deal would not be an end to Maori grievances over the fisheries is self-evident. Once iwi and hapu groups had time to scrutinise the settlement (in the months after it was signed), their assessment of the

Deal began to crystallise. Any euphoria which may have accompanied the anticipation of the Deal during the early months of 1992 had, one year later, given way to feelings of resentment at being 'sold out' by the fisheries negotiators. Admittedly, there were Maori groups who felt that the advantages of the settlement outweighed the likely disadvantages, yet even for these groups, there were still the occasional mummers of dissatisfaction with the legal annulment of a portion of the Treaty of Waitangi.

It is probably the Sealord Deal's power to 'chip away' at parts of the Treaty which many of the parties affected by the settlement ultimately find so unpalatable. In terms of establishing precedent, it is a threatening and dangerous undertaking. Ethically, it is a flagrant breach of a long-standing agreement and violates the established principles as well as the provisions of the Treaty of Waitangi; and politically, it does not appear to be part of any package of policies - it is more an attempt to proverbially paper over the cracks.

It seems clear that as time progresses, the Government is becoming more strained in its attempts to contain the flourish of criticism arising as a consequence of the Sealord Deal. One option the Government has is to continue with further reforms in order to win support from Maori, but this must be weighed up against the potential political damage such reforms could trigger from sectors of the Pakeha community, as well as the minimal likelihood that this sort of initiative would bring any sort of substantial success. An alternative path, and one which is indicative of the Government's current stance, is for the Government to reject the option of a coercive solution based on Maori pressure and protestations, and rely on the fact that Maori have thus far been a comparatively small voice in the electorate - particularly as far as the National party is concerned - and so

are politically expendable. The variables of alternating views from the predominantly Pakeha community and better politically organised Maori groups add to this concoction of dilemmas, and herald an interesting and definitely uncertain future.

GLOSSARY

airiki	paramount chief
atua	God
hapu	sub-tribe
hui	meeting
iwi	tribe
kai	food
kaitiakitanga	guardianship
kaumatua	elder
kaupapa	philosophy; mission; purpose
kawanatanga	governorship
mahinga kai	traditional food sources
mana	respect; honour; dignity; sovereignty
mana moana	title/sovereignty over the sea
marae	meeting house; courtyard in front of meeting house
mauri	life-force
moana	sea
moko	facial tattoo
mokopuna	grandchildren
pakeha	European
rangatira	chief
rangatiratanga	chieftainship
rohe	region, district
taiapure	control but not exclusive use
tangata whenua	people of the land; the indigenous people; Maori
taonga	treasure
tapu	sacred
tika	correct; fair; right
tikanga	the correct way of doing things; culture
tiriti	treaty
utu	revenge; justice; compensation-
wairua	spirit; spirituality
wero	spear; challenge; pierce
whaikorero	speech; exchanges of speeches, usually at a marae
whanau	extended family
whenua	land; soil; country

APPENDICES

Appendix 1: The Treaty of Waitangi

(English text)[1]

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

Article the First

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

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the

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[1] C. Orange, Appendix 2.

individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat them in that behalf.

Article the Third

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

(Maori text)[2]

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu O Nu Tirani i tana hiahia hoki kia tohungia ki a ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o Nu Tirani - kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.
Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha o noho ture kore ana.
Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana I te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi
Ko nga Rangatira o te Wakaminenga, me nga Rangatira katoa, hoki, kihai i uru ki taua Wakaminenga, ka tuku rawa atu ki te Kuini o Ingarangi ake tonu atu te Kawanatanga katoa o o ratou wenua.

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

Ko te tuatoru
Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini. Ka tiakina e te Kuini o Ingarangi nga tangata maori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ke ana mea ki nga tangata o Ingarangi.

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[2] C. Orange, Appendix 2.

(Maori translation into English)[3]

Victoria, the Queen of England, in her gracious remembrance of the Chiefs and Tribes of New Zealand, and through her desire to preserve to them their chieftanship and their land, and to preserve peace and quietness to them, has thought it right to send them a gentleman to be her representative to the natives of New Zealand. Let the native chiefs in all parts of the land and in the islands consent to the Queen's Government. Now, because there are numbers of the people living in this land, and more will be coming, , the Queen wishes to appoint a Government, that there may be no cause of strife between the Natives and the Pakeha, who are now without law: It has therefore pleased the Queen to appoint me, WILLIAM HOBSON, a Captain in the Royal Navy, Governor of all parts of New Zealand which shall be ceded now and at a future period to the Queen. She offers to the Chiefs of the Assembly of the Tribes of New Zealand and to the other Chiefs, the following laws:-

The first

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

The second

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

The third

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

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[3] Articles one, two, and three of this translation are by Professor Sir Hugh Kawharu; a translation given to the Court of Appeal in 1987, in *New Zealand Maori Council v Attorney-General*, [1987] I, New Zealand Law report 641; The introductory clause is from J. N. Coleman, *A Memoir of the Rev. Richard Davis*, London, 1865, pp. 455-456.

Appendix 2: The Memorandum of Understanding[4]

1. At meetings held at Parliament on 26 and 27 August 1992 of the Crown and Maori ("the Parties") through their representatives and agents [a list of those in attendance is attached as annex 1] considered a proposal that the Crown provide Maori with capital to participate in a joint venture with Brierley Investments Limited ("BIL") to purchase Sealord Products Ltd ("Sealords"). In return, Maori will withdraw all existing litigation [specify: a list of all proceedings is attached as annex 2] and support the repeal of all legislative references to Maori fishing rights and interests including, but not limited to, repeal of S.88(2) of the Fisheries Act 1983 and an amendment to the Treaty of Waitangi Act 1975 ("the TOW Act") to exclude from the Tribunal's jurisdiction claims related to commercial fishing.

2. The parties wish to record their preliminary understandings on the matters agreed during the discussions which were conducted on a without prejudice basis without an intention to create legal relations. This Memorandum of Understanding ("MOU") does not create legal relations between the Parties, or in favour of third parties. Both acknowledged the need to seek endorsement of the matters contained in this MOU from their respective principals. Following which it is the Parties desire to enter into a binding Agreement.

3. The Parties note the proposal currently being considered is one of the utmost importance to the Crown and Maori in the pursuit of a just settlement of Maori fishing claims and express their mutual and solemn acknowledgement that the settlement if concluded will mark the resolution of an historical grievance. The Parties also express their intention that the discussions proceed in a spirit of co-operation and good faith.

4. Both Parties recognise that the mandate of the Maori principals is a key threshold issue to the further progress of the proposal.

5. The Crown's willingness to enter into a binding Agreement will be dependent on Maori:

    a. agents <u>confirming</u> their mandate from Maori for the proposal;

    b. <u>endorsing</u> the Quota Management System ["QMS"];

    c. <u>obtaining</u> from all Maori litigants currently involved or having interests represented in fishing litigation
        i. a notice of discontinuance of the proceedings;

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[4] Released under the Official Information Act on 22 September 1994

ii. undertakings that they will not be re-issued in any form in any respect of Maori fishing rights or interests of any nature.
Such undertakings are to be in a form satisfactory to the Crown;

d. supporting the legislative repeal of S.88(2) of the Fisheries Act 1983, and such other legislative provisions as may confer legal entitlements to fishing rights and interests of Maori.

e. agreeing that the effect of the proposal is to satisfy and extinguish (other than to the extent that they will be available to Maori as to all New Zealanders) all commercial fishing rights and interests, whether they arise from customary rights, the Treaty, or otherwise, and whether or not there has been any adjudication by the Waitangi Tribunal pursuant to the TOW Act;

f. agreeing that this settlement of fishing claims is a first call against any fund which the Government establishes as part of the Government's overall settlement framework for all Maori claims arising from the Treaty, which framework Maori acknowledge has fiscal restrictions.

g. agreeing that the settlement is ultimately for the benefit of Maori and that a scheme for the distribution of benefits is to be provided to the Crown for its perusal prior to the entering into the Agreement;

h. undertaking a due diligence investigation of Sealords;

i. agreeing that they will obtain the following in the joint-venture agreement with BIL:
   a Maori will acquire at least 50% interest in Sealords;
   b Maori will not, without Crown consent, dispose of their interest during the payment period and will not dispose of the quota from Sealords until the end of that payment period;
   c Maori obtain from BIL the first option of purchasing BIL's interest in Sealords or any quota held by it.

j. agreeing the payment price is to be used solely for the development and involvement of Maori in the fishing industry;

k. agreeing that in respect of fishing rights not related to commercial fishing, although no longer having legal effect or legislative recognition, may be the subject of requests by Maori to the Government that it develop policies to help recognise traditional use and management practices.

6. Maori willingness to enter into as binding Agreement is dependent on the Crown:

   a. agreeing to provide the sum of one hundred and fifty million ($150m) net of GST to be provided to [Maori, Maori Fisheries Commission, Te Waka Unua Limited] on the basis of an initial payment of $50m in 1992 and two subsequent payments of $50m in two successive financial years ("the payment period");

   b. agreeing that as new quota for species is issued as a result of the extension of the QMS, 20% of such new quota will be allocated to Maori Fisheries Commission for distribution to iwi;

   c. agreeing that Maori will participate in any relevant statutory fishing management and enhancement policy bodies.

7. The Parties agree that any binding agreement between the parties will provide that any payment by the Crown shall be conditional on agreement of Maori to all the conditions outlined in para 5, and to the Crown of all the conditions outlined in para 6.

8. The Parties agree to nominate appropriate persons to agree and report back on the details of the requirements listed in paras 6 and 7 with a proposal for a timetable for the entering into a binding Agreement.

9. The Parties agree that if they enter into a binding Heads of Agreement and the Sealords Joint Venture purchase by Maori and BIL does not proceed, no further steps are required of them, in terms of this MOU, which shall then have a without prejudice status in relation to litigation between the Crown and Maori.

Appendix 3: The Deed of Settlement[5]

THIS DEED made as of the day of 1992

BETWEEN

HER MAJESTY THE QUEEN in right of New Zealand acting by the Minister of Justice and the Minister of Fisheries ("the Crown")

AND

MAORI by the persons who have entered into and executed this Deed of Settlement on behalf of Maori and whose names, addresses, status and representative capacity are set out in the Fourth Schedule ("the Maori Principals")

PREAMBLE

A. By the Treaty of Waitangi the Crown guaranteed to Maori their fisheries.

B. Since 1877, legislation in New Zealand has almost continuously recognised Maori fishing rights. Currently s.88(2) of the Fisheries Act 1983 provides: "Nothing in this Act shall affect any Maori fishing rights."

C. There has been uncertainty and dispute between the Crown and Maori as to the nature and extent of Maori fishing rights in the modern context as to whether they derive from the Treaty and/or common law (such as by customary law or aboriginal title or otherwise) and as to the import of their longstanding statutory recognition.

D. Differences over the scope of Maori fishing rights arose during 1986 and 1987 between the Crown and Maori in the particular context of action by the Crown to introduce the Quota Management System.

E. On 30 September 1987 litigation was commenced by Maori against the Crown in relation to those differences and further related proceedings have since been issued in the Courts by Maori against the Crown.

F. On 20 December 1989 Parliament enacted and brought into force the Maori Fisheries Act 1989 one purpose of which is "to make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi". The Act provided that quota totalling 10% of the

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[5] Te Puni Kokiri - the Ministry of Maori Development.

total allowable commercial catches for all species then subject to the QMS should be transferred by the Crown to the Maori Fisheries Commission created under that Act in instalments over the period to 31 October 1992.

G. On 26 and 27 August 1992 representatives of the Crown and Maori met to discuss their differences with a view to settling outstanding claims and Treaty grievances of Maori in relation to fisheries, and, therefore, the outstanding litigation. On 27 August 1992 agreement was reached on a proposal for settlement.

H. The concept of the proposed settlement, which was expressed in a Memorandum of Understanding signed by the Maori negotiators on behalf of Maori and the Minister of Justice on behalf of the Crown on 27 August 1992, is that the Crown makes:

(i) A total payment to Maori of $X in three instalments to enable Maori in a joint venture with another party to bid for the entire capital of Sealord Products Limited, a company having a prominent place in New Zealand's fishing industry.

(ii) A commitment that in the future the Crown will allocate to Maori 20% of the quota in respect of new species brought under the Quota Management System.

(iii) A commitment in future to provide for representation of Maori on statutory bodies concerned with the fishing industry.

I. In return Maori agree that:

(i) To the extent that Maori claims are for commercial fishing rights or interests they are extinguished, all such unresolved claims existing and future being satisfied by the terms of the settlement.

(ii) To the extent that Maori claims are for other fishing rights or interests being rights or interests that are not commercial in nature, their legal character shall change so that they no longer shall be rights or interests that have legal effect (legislatively or at common law) but shall be matters that will continue to be subject to the principles of the Treaty of Waitangi and, where appropriate, will give rise to Treaty obligations on the Crown.

J. In the Memorandum of Understanding the Crown and Maori acknowledged that the Crown's willingness to enter a binding agreement in the nature of this Settlement Deed would be dependent on Maori confirming the mandate of their negotiators to make a solemn and binding commitment on behalf of the Maori people of New Zealand. The Crown and Maori, being satisfied that such a mandate

has been confirmed, now wish to sign this Settlement Deed as the binding agreement referred to in the Memorandum of Understanding.

K. In the Memorandum of Understanding Maori agreed that the settlement was ultimately for the benefit of Maori and that a scheme for the distribution of benefits should be provided to the Crown for perusal prior to making a commitment to a binding agreement in the nature of this Settlement Deed. However, the Crown and Maori have now agreed that the time for Maori to provide a scheme of distribution shall be extended until no later than the expiration of the Payment Period referred to in this Settlement Deed and that the scheme so provided is to satisfy the Crown that all persons who may have rights and interests extinguished by or in consequence of this Settlement Deed will be treated fairly.

L. What, therefore, Maori surrender by entering into this Settlement Deed is:

(a) All commercial fishing rights and interests (including any commercial aspects of traditional rights and interests) such rights and interests being fully satisfied by the terms of settlement and being extinguished accordingly.

(b) The legal character of all other Maori fishing rights and interests whether derived from statute, common law, a combination, or otherwise, and thus the capacity to enforce any such rights by legal process or to plead such rights or interests as defences in court proceedings of a criminal, regulatory or other kind.

M. What Maori does not surrender (in relation to fishing rights and interests other than commercial fishing rights and interests) is the benefit of the Crown's duties under the principles of the Treaty of Waitangi and specifically in relation to fisheries under Article the Second of the Treaty.

N. The Crown recognises the desire of Maori to enhance and restore the mahinga kai moana from its present state. The Crown recognises that traditional fisheries are of importance to Maori and that the Crown's Treaty duty is, in consultation with Maori, to develop policies to help recognise use and management practices in relation to those traditional fisheries.

O. The Crown and Maori wish, by entering into this Settlement Deed, to affirm that they consider the completion and performance of this Settlement Deed to be of the upmost importance in the pursuit of a just settlement of Maori fishing claims.

P. The Crown and Maori wish to express their mutual and solemn acknowledgement that the settlement evidenced by this Settlement Deed marks the resolution of an historical grievance.

ACCORDINGLY in the spirit of co-operation and good faith evidenced by the Memorandum of Understanding **AND** in consideration of the respective obligations and agreements contained in this Settlement Deed **THE CROWN AND MAORI AGREE** as follows:

SECTION 1: DEFINITIONS, CONSTRUCTION AND EXCLUDED TERMS

1.1 Definitions

In this Settlement Deed, including the schedule and any annexures, unless the context otherwise requires:

1.1.1 **"BIL"** means Brierley Investments Limited, a duly incorporated company having its registered office at Wellington and includes any wholly owned subsidiaries for the time being of that company;

1.1.2 **"Conditions"** means the conditions precedent specified in clause 2;

1.1.3 **"The Fisheries Act"** means the Fisheries Act 1983;

1.1.4 **"the Fisheries Legislation"** includes the statutes and/or regulations described in Part I of the First Schedule;

1.1.5 **"the Fisheries Statutory Bodies"** includes the statutory bodies described in the Second Schedule and any replacement or successor bodies;

1.1.6 **"the Fishing Litigation"** includes the claims, actions or proceedings described in the Third Schedule;

1.1.7 **"GST"** means the Goods and Services Tax;

1.1.8 **"Maori/BIL Joint Venture"** means the joint venture (including any company formed to act as the joint venture entity) to be established by and between Maori and BIL to purchase Sealords;

1.1.9 **"the Maori Fisheries Act"** means the Maori Fisheries Act 1989;

1.1.10 **"Maori Fisheries Commission"** means the Commission established under Part I of the Maori Fisheries Act and includes any wholly owned subsidiaries from time to time of that body;

1.1.11 **"the MOU"** or **"the Memorandum"** means the Memorandum of Understanding referred to in the preamble of this Settlement Deed;

1.1.12 **"Payment Period"** means the period commencing on the Settlement Date and terminating on the Third Installment Payment Date;

1.1.13 **"QMS"** means the quota management system established under Part IIA of the Fisheries Act;

1.1.14 **"Sealords"** means Sealord Products Limited, a duly incorporated company having its registered office at Manukau City and includes the entirity of the business and the undertaking of that company;

1.1.15 **"the Second Installment Payment Date"** means the first anniversary of the Settlemnt Date;

1.1.16 **"Settlement Amount"** means the sum of $150,000,000;

1.1.17 **"the Settlement Date"** means:

1.1.18 **"Settlement Deed"** means this deed together with the schedules and any annexures;

1.1.19 **"Subsidiary"** means any subsidiary as defined by section 158 of the Companies Act 1955;

1.1.20 **"the Third Installment Payment Date"** means the second anniversary of the Settlement Date;

1.1.21 **"the TOW Act"** means the Treaty of Waitangi Act 1975.

1.2 **Construction**

In the construction of this Settlement Deed unless the context otherwise requires:

1.2.1 Any reference to a business day means a day that registered banks in Wellington are open for business;

1.2.2 Words importing the singular number shall include the plural; persons shall include companies; and in each case vice versa;

1.2.3 Any headings and marginal notations in this Settlement Deed and shall not in any way limit or govern the construction of the terms of this Settlement Deed;

1.2.4 Any reference to legislation or statutory requirements includes reference to regulations or any other form of delegated legislation and such legislation amended and in force from time to time and included substituted provisions that substantially correspond to those referred to;

1.2.5 If any provision of this Settlement Deed shall be considered to be invalid under and applicable statute or rule of law it shall be deemed to be omitted only to the extent that the same shall be in violation of such statute or rule of law and shall be enforced to the maximum extent possible. In addition, the invalidity of any particular provision shall not in any way affect the validity of any other provision.

1.3 **Exclusion of Other Terms**

This Deed embodies the entire understanding and the whole agreement between the Crown and Maori relative to the subject matter hereof and all previous negotiations, representations, warranties, arrangements and statements (if any) whether expressed or implied (including any collateral agreement or warranty) with reference to the subject matter hereof or the intentions of any of the parties hereto are extinguished and otherwise are hereby excluded and cancelled.

SECTION 2: CONDITIONS PRECEDENT TO THIS DEED HAVING EFFECT

2.1 This Deed is conditional upon the following conditions having been performed or fulfilled to the reasonablesatisfaction of the Crown prior to the Settlement Date whether before or after the date of this Settlement Deed:

2.1.1 Maori shall have undertaken and completed a due diligence investigation of the business undertaking assets and liabilities of Sealords in accordance with currently accepted commercial practice in relation to business acquisitions;

2.1.2 The Maori/BIL Joint Venture has, following the due diligence investigation, entered into a binding sale and purchase agreement woth the owners of Sealords or with Sealords, as the case may be, for the acquisition by the Maori/BIL Joint Venture of Sealords.

2.1.3 Maori has entered into a joint venture agreement with BIL and such agreement includes binding and enforceable provisions to the effect that:

2.1.3.1 the Maori/BIL Joint Venture is being or has been established for the purpose of acquiring a 100% interest in Sealords;

2.1.3.2 The interest of Maori in Sealords through the Maori/BIL Joint Venture is not less than 50%;

2.1.3.3 Maori will not, during the Payment Period without prior written consent of the Crown sell transfer or otherwise dispose of the 50% interest or any part thereof in Sealords held by Maori through the Maori/BIL Joint Venture;

2.1.3.4 the Maori/BIL Joint Venture will not and will procure that Sealords will not, during the Payment Period without prior written consent of the Crown, voluntarily sell, transfer or otherwise dispose of any quota under the QMS held by Sealords and/or on behalf of the Maori/BIL Joint Venture including any of such quota that may be transferred to or vested in Maori under the Maori/BIL Joint Venture arrangements;

2.1.3.5 The provisions referred to in clauses 2.1.3.3 and 2.1.3.4 to be included in the Joint Venture agreement shall be expressed as being for the benefit of the Crown; and

2.1.3.6 BIL has granted to Maori a valid and enforceable first option (either expressed as an option to purchase or as a right of refusal or both) to purchase or otherwise acquire from BIL its interest under the Maori/BIL Joint Venture agreement in Sealords and/or on behalf of the Maori/BIL Joint Venture;

AND should any of these conditions not have been performed or fulfilled to the reasonable satisfaction of the Crown by the Settlement Date, or if for any reason the Maori/BIL Joint Venture does not complete the acquisition of Sealords, then this Settlement Deed and the MOU shall be at an end and neither party shall have any claim upon the other arising out of either the termination of this Settlement Deed and the MOU or the terms and conditions thereof to the intent that the parties shall for all purposes be returned on a without prejudice basis to the position that existed between them as at the time immediately prior to the execution of the MOU.

AND it is acknowledged by the Crown that as at the date of this Settlement Deed the conditions referred to in clauses [ ] have been performed or fulfilled to its reasonable satisfaction.

SECTION 3: OBLIGATIONS OF THE CROWN

3.1Settlement Amount

3.1.1 **Payable by Three Instalments**

The Crown shall pay to Maori the Settlement Amount in three instalments as follows:

3.1.1.1 one third on the Settlement Date;

3.1.1.2 one third on the Second Instalment Payment Date; and

3.1.1.3 the remaining one third on the Third Instalment Payment Date.

3.1.2 **Deferment of the Second and Third Instalments**

The Crown shall be entitled to defer either of the payments due on the Second or Third Instalment Payment Dates, as the case may be, if at either of such date Maori is in default in the performance or observance of any of the agreements on the part of Maori herein contained until such time as any such default has been remedied to the satisfaction of the Crown.

3.1.3 **Use of the Settlement Amount**

3.1.3.1 Maori agrees that the Settlement Amount is to be used solely for the development and involvement of Maori in the New Zealand fishing industry;

3.1.3.2 It is acknowledged by the Crown that the application of the Settlement Amount in or towards the acquisition by Maori through the Maori/BIL Joint Venture of a 50% interest in Sealords is a proper use of the Settlement Amount for the purposes of clause 3.1.3.1.

3.1.4 **Recipient of the Settlement Amount**

The Crown shall pay three instalments of the Settlement Amount to the Maori Fisheries Commission and the receipt of the secretary or other proper officer of the Commission shall be a sufficient receipt for such payments.

3.1.5 **Goods and Services Tax**

The Settlement Amount payable by the Crown to the Maori Fisheries Commission is intended by the parties to be received by the Maori Fisheries Commission without any obligation for the Maori Fisheries Commission to account to the Inland Revenue Department for any GST. If a GST liability exists or arises, it is intended by the parties that (apart from any input tax lawfully

available to the Maori Fisheries Commission) no net determinent or benefit should result to the Maori Fisheries Commission of the Crown. To this end, the parties agree the following.

3.1.5.1 If any installment of the Settlement Amount (or any indemnity payment made under this clause)paid to the Maori Fisheries Commission results in the Maori Fisheries Commission being required to account for output tax as provided by the Goods and Services Tax Act 1985, the Crown shall indemnify the Maori Fisheries Commission against that GST liability and, on the business day on which the Maori Fisheries Commission accounts to the Inland Revenue Department for such output tax, the Crown shall (subject to clause 3.1.5.2) pay to the Maori Fisheries Commission the amount of such GST liability.

3.1.5.2 If for whatever reason the Maori Fisheries Commission or any other person obtains a refund or credit in respect of any output tax for which an indemnity payment is made to the Crown by the Maori Fisheries Commission under clause 3.1.5.1, then, on the business day following the business day on which the refund or credit arises, the Maori Fisheries Commission shall pay to the Crown an amount equating to the refund or credit together with any interest payable by the Commissioner of Inland Revenue on that refund or credit.

3.2 New Quota for Additional Species

The Crown agrees that it will introduce legislation to amend the Fisheries Act to authorise the allocation of not less than 20% of any new quota, issued as a result of the extension of the QMS to fish species not included in the QMS as at the date of the Settlement Deed (including as yet any unknown species) to the Maori Fisheries Commission for distribution to iwi.

3.3 Maori Participation on Fisheries Statutory Bodies

3.3.1 The Crown agrees that within a reasonable time after the Settlement Date it will cause Maori to participate in the Fisheries Stautory Bodies.

3.3.2 In order to give effect to clause 3.3.1:

3.3.2.1 The Crown will request any Minister of the Crown or any other person who is entitled to appoint members of any of the Fisheries Statutory Bodies to so exercise such power at the appropriate time;

3.3.2.2 The Crown will introduce legislation to require Maori participation where the applicable legislation in respect of any

Fisheries Statutory Bodies does not presently require or permit such participation.

3.4 **Membership of the Maori Fisheries Commission**

3.4.1 The Crown agrees that as soon as practicable after the Settlement Date it will after consultation with Maori determine an appropriate increase in the number of members of the Maori Fisheries Commission having regard to the provisions of this Settlement Deed;

3.4.2 The Crown agrees that no appointments of members of the Maori Fisheries Commission shall be made by the Minister of Maori Affairs pursuant to section 29 of the Maori Fisheries Act except after consultation with Maori.

3.5 **Crown to Introduce Amending Legislation**

3.5.1 The Crown agrees that it will introduce legislation to give effect to the following:

3.5.1.1 The repeal of section 88(2) of the Fisheries Act and at the same time an amendment to section 89(1) of the Fisheries Act by adding paragraph (o) empowering the making of regulations recognising and providing for the special relationship between the tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai) to the extent that such food gathering is not for pecuniary gain, barter or trade;

3.5.1.2 Any further legislative provisions to give effect to clauses 5.1 and 5.2 of this Settlement Deed;

3.5.1.3 Without limiting the generality of the foregoing, the amendments to the Fisheries Legislation described in Part I of the First Schedule;

3.5.1.4 Without limiting the generality of the foregoing, amendments to the TOW Act as described in Part II of the First Schedule; and

3.5.1.5 This Deed.

3.6 **Crown to Promulgate Regulations**

The Crown agrees that, subject to the enactment of the amendment to section 89(1) of the Fisheries Act referred to in clause 3.5.1.1 it will, after consultation with Maori, promulgate as soon as practicable regulations pursuant to the new paragraph (o) of section 89(1).

SECTION 4: OBLIGATIONS OF MAORI

4.1 Acquisition of Sealords

4.1.1 Maori will as a 50% participant in the Maori/BIL Joint Venture perform its obligations in respect of the completion of the acquisition of Sealords by the Maori/BIL Joint Venture in accordance with the terms and conditions of the sale and purchase agreement referred to in clause 2.1.2

4.1.2 Maori will apply the first instalment of the Settlement Amount received from the Crown on the Settlement Date in or towards the acquisition by Maori through the MAori/BIL Joint Venture of a 50% interest in Sealords

4.1.3 Maori will not in accordance with the oligations contained in the Maori/BIL Joint Venture Agreement referred to in clause 2.1.3.3 of this Settlement Deed during the Payment Period without the prior written consent of the Crown sell transfer or otherwise dispose of the 50% interest or any part thereof in Sealords held by Maori/BIL Joint Venture.

4.1.4 In accordance with the obligations contained in the Maori/BIL Joint Venture Agreement referred to in clause 2.3.4 of this Settleent Deed, Maori will ensure that the Maori/BIL Joint Venture will not, and will procure that Sealords will not, during the Payment Period without prior written consent of the Crown, voluntarily sell, transfer or otherwise dispose of any quota under the QMS held by Sealords and/or on behalf of the Maori/BIL Joint Venture including any of such quota that may be transferred to or vested in Maori under the Maori/BIL Joint Venture arrangements.

4.2 Endorsement by Maori of QMS

Maori endorses the QMS and acknowledges that it is a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand.

4.3 Fishing Litigation

Maori will on or before the Settlement Date obtain ffrom all Maori involved or having interests represented in Fisheries Litigation and deliver to the Crown:

4.3.1 A notice of discontinuance of each of the proceedings in respect of all the Fisheries Litigation signed by the solicitors for all the plaintiffs to those proceedings;

4.3.2 Undertakings in writing in a form satisfactory to the Crown signed by the persons who are to execute this Settlement Deed for Maori and any other persons who are plaintiffs in the Fisheries Litigation that such proceedings will not be reissued or recommenced in any form in respect of Maori fishing rights and interests of any nature.

4.4 Maori to Support Amending Legislation

Maori will support the enactment of the legislation referred to in clause 3.5 of this Settlement Deed and will, in particular, if required by the Crown make appearances before or submissions to any select committee to which any proposed amending legislation has been referred, supporting such legislation.

4.5 Distribution of Benefits to Maori

4.5.1 Maori agrees that the settlement evidenced by this Settlement Deed of all the commercial fishing rights and interests of Maori is ultimately for the benefit of all Maori.

4.5.2 Maori agrees that it will before the expiration of the Payment Period provide to the Crown a scheme for the distribution of the benefits of this Settlement Deed to Maori which satisfies the Crown that all persons who may have rights and interests extinguished by or in consequence of this Settlement Deed will be fairly treated. An outline of matters to be covered in such a scheme is set out in Annexure A to this Settlement Deed.

4.5.3 The Crown agrees that, until such time as a scheme of distribution which satisfies the Crown has been provided by Maori in accordance with clause 4.5.2, the Crown will not introduce legislation conferring any power to distribute to Maori any assets or benefits of either this Settlement Deed or of the Maori Fisheries Act.

4.6 Treaty of Waitangi Settlement Fund

Maori agrees that payment by the Crown of the Settlement Amount is to be treated as a first payment made or to be made or deemed to have been made out of any fund that the Crown may establish, whether before or after the Settlement Date or the Second Instalment Payment Date or the Third Instalment Payment Date, as part of any overall settlement framework that the Crown may (after having due regard to any fiscal restrictions) establish for all Maori claims arising from the Treaty of Waitangi.

SECTION 5: SETTLEMENT AGREEMENTS

5.1 Permanent Settlement of Commercial Fishing Rights and Interests

Maori agree that this Settlement Deed, and the Settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall dischargeand distinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspects of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation of adjudication by the Courts or the Waitangi Tribunal.

5.2 Non-Commercial Fishing Rights and Interests

The Crown and Maori agree than in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in ciminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights.

SECTION 6: MISCELLANEOUS

6.1 No Assignment of Deed

Neither this Settlement Deed nor any of the rights or obligations hereunder may be assigned by the Crown or by Maori.

6.2 Notices, Requests, Demands

Any notice, request or demand required or permitted to be given pursuant to this Settlement Deed shall be in writing and shall be deemed sufficiently given if:

6.2.1 Delivered by hand to the intended recipient;

6.2.2 Deposited in New Zealand "Fastpost" (registered or certified with return receipt requested), postage prepaid, addressed to the intended recipient; or

6.2.3 Sent by facsimile addressed to the intended recipient;at the intended recipient's address below set forth or at such other address as the intended recipient may have specified in a written notice to the sender given in accordance with the requirements of this clause.

Any such notice, request or demand mailed as set out in clause 6.2.2 shall be deemed to have been received by the addresseeat the specified address 2 business days following the date of mailing and any such notice request or demand sent by facsimile shall be deemed to have been received by the addressee on the same business day as the day on which such facsimile is sent so long as the facsimile is sent prior to 3.00 p.m.

6.3 **Choice of Law**

This Deed shall be construed, interpreted and the rights of the Crown and Maori shall be determined in accordance with the laws of New Zealand.

6.4 **Jurisdiction**

The Crown and Maori each agree to submit to the jurisdiction of the courts of New Zealand and any court empowered to hear appeals therefrom.

6.5 **Counterparts**

This Deed may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

6.6 **Non-Merger**

The agreements and obligations of the parties in this Settlement Deed shall not merge upon payment of the Settlement Amount by the Crown but (to the extent that they have not been completed by performance on the Settlement Date) shall remain enforceable to the fullest extent notwithstanding any rule of law to the contrary.

AS WITNESS the hands of the parties

SIGNED for and on behalf of)
HER MAJESTY THE QUEEN)
in right of New Zealand by)
)
Minister/s for)
in the presence of:)

SIGNED for and on behalf of)
[list persons signing on]
behalf of Maori] in the)
presence of:)

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