Te Tiriti/Treaty, Power and the Fish:

The Dynamics of Dispossession

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This paper gives one interpretation of the politico-economic evolution of the fisheries in Aotearoa/New Zealand.[2] The focus in on the Crown's failure to give effect to its guarantee to Iwi (tribes) of "te tino rangatiratanga [...] o ratau toanga katoa" (the highest chieftainship of prized possessions) and "full exclusive and undisturbed possession" of their fisheries promised in Te Tiriti/Treaty.[3] Section 1 outlines the way in which the Maori and Pakeha parties to the contests are perceived and identified. Section 2 states how the contests may be framed, albeit with some difficulty, in Euro-centric politico-economic terms of rights and property. Section 3 gives a broad outline of the significance of fish in traditional Iwi life. Section 4 presents a sequence of events preceding Te Tiriti/Treaty so as to illuminate the circumstances and various possible reasons, motivations, and intentions, which led to Te Tiriti/Treaty. Section 5 examines aspects of the two texts of Te Tiriti/Treaty and the process whereby signatures were sought. Section 6 provides an account of various post-Te Tiriti/Treaty power contests up until the mid-to-late 1860's. Finally, Section 7 looks at the evolving status of Te Tiriti/Treaty fishing rights.

1. Preliminary Remarks and Terminology.

Prior to the arrival of Europeans to Aotearoa/New Zealand, the inhabitants identified themselves not as Maori but primarily in terms of their Iwi. Different Iwi shared many common cultural characteristics, including language; however, there was considerable heterogeneity (in traditions, customs, myths, etcetera). Early European settlers were, in

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Thanks to Martin O'Connor for many helpful suggestions. And I am indebted to Warren Samuels whose work in political economy has heavily influenced by understanding of the evolution of the fisheries in Aotearoa/New Zealand.

[2] Many, if not most, Maori (and some Pakeha), prefer their country of residence to be called 'Aotearoa' rather than 'New Zealand'. Others tend to consider this undesirable. Throughout this paper I have elected to use 'Aotearoa/New Zealand'.

[3] The device of the slash is also used here with reference to Te Tiriti o Waitangi and The Treaty of Waitangi. This document was written in two languages (Maori and English) which, as discussed later, have been given radically different meanings.

various respects, also heterogeneous (they included whalers, missionaries, land-speculators, and convicts). Notwithstanding this 'dual' heterogeneity, there was a cultural abyss between the Europeans and Iwi.[4] The latter perceived a common identity amongst themselves vis-à-vis Europeans. The word Pakeha was used to designate strangers. It originates from 'pakehakeha' -- defined in Williams' [1971] *Dictionary* as "Imaginary beings resembling men, with fair skins." The word 'maori' means, according to Williams, "Normal, usual, ordinary". The passage of time has seen it become a label for the indigenous people as a collectivity. This new identity did not replace the other identities, but became *complementary*. This is captured in a remark by Tipene O'Regan [1988, 25; Ngai Tahu]:

> *"I do not speak to you as Maori [...]. I am Ngai Tahu. I only have to be Maori because of the presence of the Pakeha culture. [...]."*[5]

For many Maori, especially with regard to matters political, acknowledgment of their Iwi is important, not the least because it was Iwi who participated (or did not participate) in Te Tiriti/Treaty with the Crown. Prior to the signing of Te Tiriti/Treaty, Iwi perceived themselves to be what many Pakeha loosely understand to be a sovereign nation. And, as discussed later, many Iwi consider Te Tiriti/Treaty to re-affirm this status. However, in recent attempts to resolve grievances, the Crown has talked in terms of 'Maori rights', and thus framed the resolution issues in terms of race; that is *Maori v. Pakeha*. This, in the view of some Iwi, is misleading and unhelpful -- as well as depreciating the status and identity of Iwi. The fundamental issue is, for them: *their property rights vis-à-vis other Iwi and Pakeha.* These points are made clear in another remark from Tipene O'Regan [1988, 25; Ngai Tahu]:

> *"I speak to you as Ngai Tahu and that is not some race classification but the name of a group that entered into a binding contract with the Crown. The easiest way to avoid the duty of contract is to deny the legal personality of the other party [...]. Ngai Tahu had a relationship with the Crown which amongst other things dealt with our property rights under Article two of the Treaty. That Treaty was not with 'Maori', it was with a tribe."*

These aforementioned points partially underpin my (i) preference for the term 'Iwi' rather than loosely using 'Maori' and (ii) decision to acknowledge the Iwi affiliation(s) of Maori writers quoted (as done above with Tipene O'Regan).

2. Framing the Contests.

Te Tiriti/Treaty-related conflicts can be, and indeed have been, given a multiplicity of interpretations. Different 'realities' can be portrayed using different discourses. Discussion

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[4] This abyss has often been discussed in terms of their respective relationships with death -- see, for example, Ranginui Walker's [1979, Whakatohea] 'On Being a Maori'.

[5] O'Regan is in fact also 'part Pakeha'. The issue of 'mixed blood' with regard to issues of identity, justice and politics is discussed in my forthcoming PhD thesis entitled 'Power and Justice: the fisheries in Aotearoa/New Zealand

of Te Tiriti/Treaty obligations in terms of, for example, the Maori notion(s) of utu, does not sit easily with Pakeha politico-economic concepts such as efficiency and 'takings' of, and injury to, property.[6] The following discussion selectively centres on the 'taking' of Iwi fisheries.

The concept of an 'eroding status quo' will be used in this paper on several occasions. It refers to the situation where injury is inflicted on an individual/group/Iwi through the (re)construction of legal rights. For example, consider a situation prior to the arrival of Pakeha to Aotearoa/New Zealand. Assume that Ngai Tahu has certain property rights, including full and exclusive use of a particular river -- in which koaro reside. Also assume that on 'discovery' of Aotearoa/New Zealand by Pakeha, Ngai Tahu welcome them as guests. After several years, a group of Pakeha, identifying themselves as the Acclimatisation Society, wish to, and indeed do, introduce trout into the river. Unfortunately for Ngai Tahu, it happens that the trout are predators to baby koaro. Furthermore, Acclimatisation Society assert their right to exclude Ngai Tahu from catching *their trout.* In the face of conflict, Acclimatisation Society appeal to government to have their rights protected. Ngai Tahu, however, assert that it is they (Ngai Tahu) that make the rules -- not a group of Pakeha males residing in Wellington elected almost exclusively by Pakeha males. However, following the threat of force by the self-legitimating Pakeha government, Ngai Tahu retire and lick their wounds (the loss of both fish and mana). Thus relative to the situation prior to the arrival of Pakeha, Ngai Tahu are worse off -- their 'legal base' has been eroded.

This injury may be exacerbated with the import of Pakeha 'free-market' ideology. The government may insist that if Ngai Tahu want to protect the kaoro, they must meet the reservation demand of Acclimatisation Societies. Ngai Tahu consider this problematical because they cannot conceptualise translating their wish to protect 'their' fisheries taonga in terms of their *willingness to pay.* For them, the taonga has a depth and breadth which 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 their thinking, attitude and behaviour towards their fisheries. It includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit.[7] This meaning precludes Ngai Tahu from expressing their protective desire as a 'taste' for a commodity in the market-place. Their desire constitutes an ethical sensibility, an expression of what they believe in; that is, what is right and wrong to them. This desire represents, at a social level, what Ngai Tahu want to *make* themselves. Placing a monetary valuation on them thus constitutes a category mistake.[8] However, if Ngai Tahu find themselves forced to speak

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[6] For a juxtaposition of these two frameworks, see Rosemary Arnoux, Richard Dawson, and Martin O'Connor 1993

[7] See the Waitangi Tribunal's *Muriwhenua Fishing Report* [Wai 22, 1988, 272].

[8] This is the kind of mistake you make when you predicate of one concept another that makes no sense in relation to it.

in the discourse of Western Paretian welfare economics whilst in a situation of an eroding status quo, a further loss may be experienced. As Laurence Tribe [1974, 73] wrote:

> *"when we feel a sense of obligation for wilderness and species protection, but have to transform this into a monetary figure in order to express a 'demand', we may be helping to legitimate a system of discourse that so structures human thought and feeling as to erode, over the long run, the very sense of obligation that provided the initial impetus for our own protective efforts."*

Tribe [1974, 73] remarked further that "we generate a grand distortion when a inchoate sense of obligation toward natural object is flattened into an aspect of self-interest." The distortion results from [1974, 73] "the ideological bias of the system in which such analysis is imbeded, a system that has come to treat the individual human will and its wants as the center around which reason as calculation must revolved."

One further layer of injury has not gone unnoticed by Martin O'Connor [1988, 35] who remarked self-reflectively on his analysis of Te Tiriti/Treaty violations using concepts from politico-economic theory:

> *"Too add insult to injury, I am now anaysing the situation using tools of Western intellectual tradition. Even in the act of auto-critique one preserves the hegemony and vitality of Western political philosophy."*

3. Iwi life and the progeny of Tangaroa.

From time immemorial fish have had an important part in various inter-woven dimensions of Iwi life and death, including cultural, economic, mythical, religious, and spiritual. Tradition has it that the fish are the progeny of the god Tangaroa who is the brother of Tanemahuta (the father of the first human beings). Thus the fish are cousins of humans and are, accordingly, to be treated with respect. Such an attitude is also proper since the fish constitute a gift from Tangaroa. Respect can be outwardly demonstrated by carrying out certain rituals and ceremonies. These included an offering to Tangaroa. This offering is described by Makereti (Maggie Papakura) [1938, 226; Te Arawa]:

> *When the catch is collected and taken out of the net, the Tohunga takes two of the fish from the catch, and takes them to a sacred place. He first places two sticks in the ground, one on the western and the other on the eastern side of the wahi tapu. He hangs a fish on each of these sticks, offering them to Tangaroa [...]."*

The offering, which is carried out by many today, constitutes the maintenance of a gift relationship. Being a gift from the gods, it was considered only proper to give some back. This is the principle (or cosmological principle) of utu which once pervaded Iwi life: every action has a proper return (life is returned by death; revenge will be exacted for insult or theft; every gift will, and must, be met by a counter-gift; and so on).[9] Refusal to make a return

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[9] See, for example, Elsdon Best [1929, 17-21], Raymond Firth [1959, 412-7], Ranginui Walker [1984, 1; Whakatohea], Maori Marsden [1991, Ngai Takoto] and Martin O'Connor [1993].

would anger Tangaroa who would give utu by, for example, taking back the mauri (life-force) of his bounty. Not to give back was considered sacrilege.

After the offering, tradition has it, the Tohunga removed the tapu.[10] Almost everything connected to fishing (like everything connected to everything else of significance!)was to freater or lesser degree tapu [Makereti 1938, 220, Te Arawa]:

> *"the people who went being tapu, and their canoes, and the making of their nets. The men who went on fishing expeditions had no food before they went, and none until after their return, when the tapu was taken off by a Tohunga. Tapu entered into all that they did, as atua were watching over them [...]. Even when fish were caught, and pulled into the waka, it must not touch the top of the gunwale. If it did, it was considered to be an evil omen [...]."*

Tradition has it that if the fish are not plentiful, it is because, among other things, their mauri may weak. It may be weak because it has simply 'gone to sleep'. A Tohunga could usually rectify this by concentrating the mauri of the fish in a material symbol such as a stone. The object would serve as a kind of shrine for the protecting spirit. The Tohunga would hold the stone and recite over it a charm (termed a whakara) and thereby foster fertility and abundance. Elsdon Best [1954, 37] informs us:

> *"A rock at Motu [...] is the mauri of the sea-fish called kahawai. The mauri of the sea fish was sometimes a small stone, which, together with the gills of the kahawai, or whatever the principal fish of such place, would be concealed. The talisman would preserve the productiveness of the ocean, cause the fish to be plentiful, and bring luck to the fishermen. When the Atiawa Tribe of Taranaki occupied Wellington district last century there were but few kahawai in these waters, hence they sent back to Waitara for the mauri, and on its arrival and location here those fish became plentiful."*

The belief in the mauri remains among some. For example, following the establishment of a toheroa canning factory near Kaitaia in the 1960's, the elders predicted that the mauri of the toheroa would be extinguished due to the 'inappropriate' attitude to their harvesting [Revd. Maori Marsden 1991, 8; Ngai Takoto]:

> *"I remember at a special meeting of Ngaitakoto where the elders expressed misgivings about the mauri of the toheroa being made noa and being depleted in the near future because they were being commercialised, a grave hara or sin against the Atua for a freely bestowed gift. They predicted that in twenty years the toheroa would disappear because the mauri would remove itself [...] and this would spell doom for the toheroa. For them, it was not so much the use or even over-use of the resource but rather the abuse and misuse of the mauri and its tapu. [...] Their predictions about the departure and the length of time for it to occur proved to be exactly right."*

Tradition has it that humans, like the fish, have a mauri, and that there were evil spirits waiting to attack a person's mauri, but they were kept at bay by the protection of the gods. If

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[10] There are many meanings and conditions associated with tapu. However, first and foremost, tapu is the power and influence of the gods. As an adjective Herbert Williams' [1971] *Dictionary of the Maori Language* defines it as 'Under religious or superstitious restriction.'

one offended the gods by committing some hara, the gods withdrew their protection. The person would then become sick. If the offence was serious, kouka (the abyss of death) yawned before them. Less serious offences were dealt with by muru (exacting compensation by confiscation of property).[11] Iwi histories contain numerous instances where a whanau or hapu has had to accept utu for a member's wrong-doing. Utu was mediated through ritualised korero (address). This was widely acknowledged as an appropriate means of settling grievances.

The laws of tapu had a very powerful influence on individual behaviour and a major source of order. A frequently used application of tapu to control behaviour was as a sanction to the institution of a rahui. This was a prohibition upon the taking of the fruits of a particular area of forest or fishing ground. Instituting a rahui was the privilege of someone with mana such as a Tohunga or Rangatira so as to, among other things, permit recovery from over-use, thereby fulfilling their duty (to both Tangaroa and their mokopuna) as kaitiaki (guardians).

At the time Europeans arrived, there existed a complex and evolving configuration of rights throughout Aotearoa/New Zealand with respect to numerous aspects of fishing. The Iwi who had territory along side the sea would also have exclusive access-rights out to sea (in many cases extending further than ten miles). The boundaries of lands were minutely known, with natural features such as, rocks, hills, or prominent trees, typically used to identify borders.[12] Whilst the highest level of authority with respect to usage of the fisheries resides with the Rangatira, the fish were Tangaroa's. The Rangatira and Iwi members, whilst being able to exclude non-members from their fishery, did not consider themselves as 'owners' in the sense that they could alienate the fish. As the Waitangi Tribunal wrote [Wai 22, 180-1]:

> *"There is no doubt that particular sub-groups had special use rights of various places and resource areas [...]. But they did not own them; they stayed in the bloodline; they were not transferable. [...] Taonga were either gifted or wrested, never sold. [...] There was absolutely no way a sale or purchase could have been negotiated under Maori law."*

The strict control on access to the fish, together with, among other things, an intricate knowledge of the fisheries (that had been acquired over a millennium), made for sustained plentiful catches with little effort. Numerous graphic descriptions have been provided by both Maori and Pakeha on the nature and competence of Iwi fishing last century. One account, by Richard Matthews, an early settler who received an invitation from one of the principal Rangatira of Pukewhau to join in the annual shark-fishing in Rangaunu Harbour, is reproduced below:[13]

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11 Discussions of muru have been given by, inter alia, Raymond Firth [1959, 400-1], Moana Jackson [1988, Part 2, 40-1; Ngati Kahungunu, Ngati Porou], and John Patterson [1992, 224-30].

12 Discussions of fishing property-rights include Raymond Firth [1959, 350-3, and 390], Ranginui Walker [1984, 2; Whakatohea], Waerete Norman [1989, 206; Ngati Kuri, Ngati Rehia, Te Aupouri]

13 Matthews' account was entitled 'Reminiscences of Maori Life Fifty Years Ago', published in *Transactions and Proceedings of the New Zealand Institute* [1910, 598-605]. Similar accounts of shark fishing in these waters have been passed down by Maori and told in submissions to the Waitangi Tribunal -- see, for example, the Tribunal's *Muriwhenua*

"The traditional customs and regulations were most strictly observed and rigidly enforced. The season [...] was restricted to two days only in each year. Any one who killed a shark after this would be liable to the custom of muru, and would be stripped of his property.

At the time I am speaking of, the mana, or authority, over the kopua (the deep) was solely exercised by Popata te Waha, who had inherited it from his ancestors. It is he who issued the panui, or notice, of the date of the maunga (or catching) [...]. Popata te Waha's mana over the kopua was acknowledged by all the surrounding tribes within a line extending from Taemaro to [...] Parengaerenga, and Rangiwahia [...].

There would probably be a muster of not less than fifty canoes, each with an average crew of about twenty [...]. [W]e waited for high water [...]. The Maoris believed that the strong spring tides swept immense numbers of sharks into the harbour and far up the rivers and creeks, and that when the tide ebbed the returning sharks were intercepted by the fleet. As the time of high water approached, the talking ceased, and there was a dead silence through the fleet. Presently our chief whispered, "Kua whati mata o te tai" (The tide has turned). Almost immediately after Popata stood up in his canoe and shouted out in a stentorian voice, "Huakina" (Charge). The followed a most exciting race for the fishing ground and the mataika (first fish). [...] It was a brilliant moonlight night, and the whole fleet could be plainly seen paddling furiously for the channel. [...] Within five minutes from the time of anchoring, and for the space of at least three hours, the sound of timo could be heard incessantly all around us, accentuated by shouting and loud splashings. The scene was simply indescribable. All this time the fleet was gradually working towards the mouth of the harbour, and sunrise found us anchored near the Heads. [...]. The catch in our canoe totalled 180. [...] The total number of sharks caught by the fleet [...] was about seven thousand."

Fish were frequently gifted. Those on the coast gave fish to inland Iwi who responded with various kinds of forest and mountain products. Motivation to participate in such exchanges came from more than the desire to participate in (economic) welfare-enhancing exchanges. As mentioned earlier, under the principle of utu, it was considered only proper to give back. To pass on a gift which carried an obligation helped maintain and enhance harmonious relations. Fish were (and still are) also used as manaaki (to bestow a blessing) for manuhiri (visitors). The presence of visitors is likened to the bestowal of a blessing upon the hosts. This is returned by giving the best of their provisions in the hakari (feast) provided. It is a matter of Iwi prestige and honour that guests should never leave hungry. The hakari is associated with the numerous tangi and hui and thus is an important part of the culture.

4. Pre-1840 change and conflict.

The relationships between Iwi and early Pakeha visitors and settlers to Aotearoa/New Zealand Iwi varied. Some were harmonious, others were acrimonious. Tension and fighting occasionally followed the infringement of Iwi customs. One example was the violation of a

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Fishing Report [Wai 22, 1988, 17-18]. See also Waerete Norman's 'The Muriwhenua Claim' [1989, Ngati Kuri, Ngati Rehia, Te Aupouri].

rahui was felt first-hand by one of the early French fleets to visit Aotearoa/New Zealand. A comprehensive account of the events leading up to the death of Marc-Joseph Marion du Fresne is provided in Anne Salmond's [1991] *Two Worlds: first meetings between Maori and Europeans 1642-1772*, reproduced in part below [p.386-8]:

> *"The most virulently offensive of all the French actions [...], and one that was persistently talked of in tribal records, was almost certainly committed without the French ever realising what they had done. Marion had developed a habit of going on fishing and hunting expeditions in [...] Manawaora Bay, where the fish and oysters were plentiful [...]. According to the tribal accounts, however, one of the coves in the bay was intensely tapu at this time, for some members of Te Kauri's Ngaapuhi descent-group Te Hikutuu had recently drowned and been washed up there on the beach. [...] The fish of the bay had been touched by the tapu of death, and had themselves perhaps nibbled on the bodies of the drowned men. To catch these fish was bad enough, but to eat them was tantamount to cannibalism, an attack on the tapu of the corpses and that of their tribe, and on the mana of the tribal gods. [...] The next morning, 8 June, two chiefs came on board the Mascarin looking for Marion. They took him and several officers, escorted by some soldiers, to a high hill near Te Kauri's village. [...] [T]here were many people and they made him sit down along with the officers who were with him. He received many caresses from them, then they put a sort of crown of feathers on his head [...]. They [...] made him a present of fish and of a stone on which a image of their deity was carved. [...] Whatever else these ceremonies may have meant, they sealed his death warrant."*

Despite this and other violent incidents, many friendships developed, often through trade relations. In some instances, missionaries became dependant on Iwi for food and protection. In return, goods such as iron tools and muskets were provided.[14]

The introduction of the musket changed the balance of power amongst Iwi. And in the 1820's Iwi warfare escalated to unprecedented levels.[15] In some cases, Pakeha became more directly involved in fighting. For example, in 1830, Te Rauparaha of Ngati Toa conspired with Captain John Stuart of the British brig *Elizabeth* to take him from Kapati to Akaroa with a taua (war party) of nearly 200 men, armed with muskets in return for a cargo of flax. This would form the basis for a surprise attack on Ngai Tahu. Te Maiharanui, the most senior southern Rangatira, was killed, along with other members of his whanau (family). (The *Elizabeth* was also used as a vehicle for the growing Sydney trade in preserved Maori heads.) Stuart avoided punishment partly because of the legal uncertainties over the status of British subjects in Aotearoa/New Zealand.[16]

Following the incident involving Stuart and the *Elizabeth*, as well as perceived threats from the French, under missionary guidance, thirteen northern Rangatira petitioned the King of England to provide both control over British subjects and protection from foreign

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14 Claudia Orange [1987, 6-7], Ranginui Walker [1990, 81; Whakatohea].

15 Claudia Orange [1987, 12-13], Ranginui Walker [1990, 82-4; Whakatohea]

16 Harry Evison [1993, 54-6], Claudia Orange [1987, 12].

aggression. In 1832, a decision was taken to appoint James Busby as Resident. However, without a naval, military, and civil backing, he found himself ill-equipped to deal with problems including assault, brawling, cattle trespass, theft, and murder.

Busby considered that only the establishment of a supra-Iwi Maori polity could put a stop to inter-Iwi warfare. He perceived an opportunity to create such a polity in the need for a national flag. Ships built in Aotearoa/New Zealand did not qualify to fly the British ensign, nor carry a British register. In the absence of an acknowledged national flag the ships became liable to seizure. In March 1834, at Busby's invitation, some twenty-five northern Rangatira assembled with their followers at Waitangi. The Rangatira voted for a national flag. It was gazetted in Sydney, and the Admiralty directed its naval vessels to acknowledge the flag and respect the Maori registers. Busby's hopes of a supra-Iwi polity, however, came to nothing. Though the following year, when it became known that a Frenchman, Baron de Theirry, was planning to establish a 'sovereign and independent state' in Hokianga, Busby called a meeting of 34 northern Rangatira in which he persuaded then to sign He Whakaputanga o te Rangatiratanga o Nu Tirene/Declaration of the Independence of New Zealand. Part of the English text read (and some of the corresponding Maori terminology):

> *We the hereditary chiefs and heads of the tribes [tino Rangatira] of the Northern parts of New Zealand [...] declare the Independence [Rangatiratanga] of our country, which is hereby constituted and declared to be an independent state, under the designation of the United Tribes of New Zealand.*
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> *All sovereign power [Ko te Kingitanga] and authority [ko te mana] within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity [...].*

Provision was made for an annual congress "for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade". An invitation was made to the "Southern tribes to lay aside their private animosities" and to "consult the safety and welfare of our common country, by joining the Confederation of the United Tribes." He Whakaputanga/Declaration was acknowledged by the Colonial Office.[17]

Busby collected a further eighteen signatures over the following four years. During these four years, the number of unruly settlers increased (causing tensions between Pakeha and Iwi), and so too did inter-Iwi warfare.[18] Busby concluded that the strength of individuality amongst Iwi made it near impossible to create a supra-Iwi polity. Several hundred British subjects (including missionaries) petitioned the Crown for intervention, whilst Busby requested a warship so that British subjects could receive protection. In response H.M.S. *Rattelsnake* was despatched under the command of William Hobson. Hobson soon recommended to the Colonial Office that British sovereignty be established. On the 14th August 1839, Lord Normanby instructed Hobson to obtain surrender of sovereignty to the

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[17] Claudia Orange [1987, 21].

[18] Claudia Orange [1987, 27-29], Ranginui Walker [1990, 89; Whakatohea].

British Crown by "the free and intelligent consent of the natives".[19] Normanby, however, did express both reluctance and regret about intervening insofar as it constituted a depreciation of status of sovereignty which Britain had previously acknowledged Iwi as having. Though the intervention, in Normanby's view, would now constitute a benefit for Iwi given the extant disorder created by unruly settlers:[20]

> *"The Ministers of the Crown [...] [considered] in 1836 that the increase of national wealth and power, promised by the acquisition of New Zealand, would be a most inadequate compensation [to Iwi] for the injury which must be inflicted on this kingdom itself, [...] whose title to the soil and to the sovereignty of New Zealand is indisputable [...]. We retain these opinions [...], though circumstances entirely beyond our control have at length compelled us to alter our course [...]. The reports which have reached this office within the last few months establish the facts that [...] a body of not less than 2,000 British subjects had become permanent inhabitants of New Zealand; that among them were persons of a bad or doubtful character -- convicts who had fled from our penal settlements, or seamen who had deserted from ships; and that these people, unrestrained by any law, and amenable to no tribunals, were alternately the authors and the victims of every species of crime and outrage. [...] [U]nless protected and restrained by necessary laws and institutions they will repeat [...] the [...] process of war and spoliation [...]. To mitigate, and, if possible, to avert these disasters, [...] it has been resolved to adopt the most effective measures for establishing amongst then a settled form of civil government. To accomplish this design is the principal object of your mission."*

It can be inferred from the above passage, that Normanby would undoubtedly question the existence of a net gain for Iwi relative to the situation prior to the arrival of the settlers; that is, there would seem to be an 'eroding status quo' for Iwi.

5. Te Tiriti/Treaty.

On 30th January 1840, Hobson sent out invitations to Rangatira to attend a meeting at Waitangi on 5th of February. On 4th of February 1840 a draft of the English text, constructed largely by Busby, was given to missionary Revd. Henry Williams to translate into Maori.

Article 1 of the English text captured the 'cessation of sovereignty' instruction that was given by Lord Normanby:

> *"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."*

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19 The instructions have been quoted at length by Chief Judge Fenton in the 'Kauwaeranga judgement' [1870] which is reproduced in *Victoria University of Wellington Law Reports* [1984, 227].

20 See previous footnote.

However, in Article 2 of the Maori text the Queen guaranteed Iwi 'tino rangatiratanga'. This, judging from 'He Whakaputanga o te Rangitiratanga o Nu Tirene' (of which Revd. Williams was an official witness at its signing) is closely approximate to 'sovereignty'.[21] Also, in te Paipera Tapu (the Bible), rangatiratanga is the most significant and the most frequently used concept of power and authority. It is used to translate 'Kingdom of God', Kingdom of Heaven', and 'Kingdoms of the World'.[22] That supreme authority was being maintained by Iwi was perhaps reinforced by the substance of Article 1 of the Maori text wherein the Rangatira ceded "Kawanatanga". In terms of power, is widely accepted as meaning something significantly less than sovereignty.[23] The word kawanatanga is a transliteration of the biblical term 'governance'. It is found in many places in te Paipera Tapu, most clearly in the gospels telling the story of the crucifixion of Christ. When Christ was taken by the people of the Governor, Pontius Pilate, to ask if he would crucify Christ, Pilate at first refused. His refusal is translated:

> *"As governor of this place I have only limited authority of governance [kawanatanga]. The supreme authority [the mana] to impose the death penalty, resides elsewhere."*[24]

The antinomy in the two texts with respect to supreme authority/mana, as will become clear in this paper, has been a continual source of antagonism.

Article 2 of the English text is clear on the structure of rights with regard to, inter alia, the land and fish:

> *"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 [...]."*

In the translation forests and fisheries are not specifically mentioned. However, it is widely accepted that these constitute a taonga (see Section 2), and are thereby covered in the guarantee to Iwi of: "te tino rangatiratanga [...] o ratou taonga katoa". Thus the two texts are consistent with respect to the organisation and control of the fisheries.

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21 Numerous writers hold this view including Rt. Rev. Manuhuia Bennett [1989; Te Arawa], Lindsay Cox [1993, 28; Ngati Kahungunu, Ngati Porou], Moana Jackson [1991, 20; 1993, 73-4; Ngati Kahungunu, Ngati Porou], Jane Kelsey [1990, 7], H. Levine [1987, 425], Claudia Orange [1987, Ch. 3], Ruth Ross [1972, 142], Keith Sorrenson [1989, 159; Ngati Pukenga], Ranginui Walker [1987, 93; Whakatohea], David Williams [1985, 165], and Joe Williams [1991; Ngati Pukenga].

22 I am indebted to David Williams [1985] for these and other points relating language in Te Tiriti with Biblical terms Williams [1985, 163] points out that between 1814 and 1840 the Lord's Prayer would have been recited on countless numbers of occasions and it would have been familiar to (even if not accepted by) almost all Maori people. Each time it was recited the second phrase was: 'Kai tae mai tou rangatiratanga' (Thy Kingdom come).

23 Most of the writers named in Footnote 20 make this point.

24 Christ was then sent to King Herod [Moana Jackson 1991, 19; Ngati Kahungunu, Ngati Porou]

In Article 3 the Queen extended to Maori "all the Rights and Privileges of British Subjects". The Maori translation of this article would appear to be congruent with the English version.[25]

At the meeting at Waitangi on 5th of February, Hobson began by explaining the purpose of the meeting -- to seek consent from Rangatira to Te Tiriti/Treaty. Williams spoke to the Rangatira in Maori, which he recounted:[26]

> *"I told them [...] that we, the missionaries, fully approved of the treaty, that it was an act of love toward them on the part of the Queen, who desired to secure them their property, rights and privileges. That this treaty was as a fortress for them against any foreign power which might desire to take possession of their country, as the French had taken possession of Otiaiti [Tahiti]."*

Following Williams' reading of the Maori text, Busby assured the Rangatira that the Governor had not come to take away their land, but to secure them in the possession of what they had not sold; and that land not duly acquired from them would not be confirmed to the purchaser, but returned.[27] A number of Rangatira, including Tamati Pukututu [Te Uri o Te Hawato], Matiu [Te Uri o Ngongo], Wai [Ngati Awake], Hone Heke [Nga Puhi], and Tamati Waka Nene [Nga Puhi] rose in support of the Governor, largely seeking to protect themselves and remedy extant injury. Their remarks reinforce those of Lord Normanby (see Section 3) inferring an eroding 'status quo' for Iwi. For example, Wai [Ngati Awake] stated:[28]

> *"To thee, O Governor! this. Will you remedy the selling, the exchanging, the cheating, the lying, the stealing of the whites? O Governor! yesterday I was cursed by a white man. [...]."*

Tamati Waka Nene [Nga Puhi] later recalled the rationale behind his decision to support Hobson for Governor (one which infers an attempt to put an end to an eroding status quo:[29]

> *"My reason for accepting Governor Hobson was to have a protector for this Island. I thought of other nations -- of the French. Now if we consent to the Maori King, our Island will be take from us. If the Governor had not been drawn ashore the Queen's protection solicited ten our lands would have become the Pakehas by purchase. Each man would have said, 'Here is my land'. He would have had a knife as payment, and the land would have been the Pakehas. [...] Look, for instance at the conduct of the French towards Pomare (the Queen of Tahiti). The French have taken all her land."*

Some Rangatira were concerned that their legitimation of Hobson would lead to a depreciation of their own status. This concern was put to rest, with Rangatira guaranteed the continuation and protection of 'te ritenga Maori' -- the basic laws and customs of Maori

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25 Ranginui Walker [1989, 265; Whakatohea].

26 Quoted by Claudia Orange [1987, 45-6]

27 See William Colenso's *The Signing of the Treaty of Waitangi* [1890, 17].

28 Quoted in Colenso's *The Signing of the Treaty of Waitangi* [1890, 22].

29 Printed in *Te Karere* [1860, Vol. 15, 17].

society.[30] The following day, Hobson invited the Ranagtira to sign Te Tiriti/Treaty. Forty-three Rangatira signed that day, including those who had voiced opposition.[31]

Signatures were then sought throughout Aotearoa/New Zealand. In several places, it seems, the dynamics of the assemblies were similar to those at Waitangi, with suspicion and opposition voiced by Rangatira, which were put to rest by reassurance from the British contingent. At Kaitaia, for example, Nopera Panakareao [Te Rarawa], following suspicion conveyed by Rangatira that Te Tiriti/Treaty threatened their mana whenua, questioned the missionaries on the meaning of a passage in the Paipera Tapu -- at Rewitikuha (Leviticus) 25:23 -- which reads:[32]

> *"Do not trade, barter or exchange the land in perpetuity; for the land belongs to me; you are simply sojourners [on it] just living here with me."*

Panakareao wanted assurance that these instructions given by God to Moses were affirmed in British law, and that he would continue to hold the mana whenua for his Iwi as God's agent on earth, and could not barter or exchange it. Following assurance from the missionaries, Panakareao made a speech containing a statement which encapsulates the belief that supreme authority remained with the Rangatira:[33]

> *"The shadow of the land goes to Queen Victoria of England, but the substance remains with us."*

Not all Rangatira, however, perceived the Te Tiriti/Treaty to be doing what Panakareao envisaged. There were a number of refusals including three Rangatira of high rank, namely Te Wherowhero [Waikato], Te Heuheu [Tuwharetoa], and Te Kani a Tikirau [Ngati Porou]. These Rangatira refused to surrender their mana to the British Crown. Te Heuheu asserted:[34]

> *"I will never consent to the mana of a woman resting upon these islands. [...] Do not consent or we will become the slaves of this woman, Queen Victoria."*

And, in respect of the mana of Te Heuheu, other Rangatira refused to sign, including Tupaea of Ngai Te Rangi and Te Pukuatua of Te Arawa.

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[30] Moana Jackson [1991, 21; Ngati Kahungunu, Ngati Porou]

[31] Te Kemara, for example, volunteered the statement that he had been influenced in his opposition by the French Bishop, who had told him "not to write on the paper, for if he did he would be made a slave" [quoted by Colenso 1890, 34]. Rewa also admitted being dissuaded by Pompallier.

[32] Margaret Mutu [1992, 15, Ngati Kahu, Te Rarawa] in a draft version of 'Tuku Whenua or Land Sale'.

[33] Margaret Mutu [1992, 16-17, Ngati Kahu, Te Rarawa].

[34] Quoted by Lindsay Buick [1914, 179].

6. Post Te Tiriti/Treaty power contests.

Notwithstanding the refusal by several Rangatira to sign Te Tiriti/Treaty, on 21 May 1840 Hobson proclaimed sovereignty over the entirety of Aotearoa/New Zealand.[35] This is interpreted by Ranginui Walker [1987, 97; Wakatohea] as the first act of power-play:

> *"the coloniser initiated the process of undermining the authority structures of Maori society by the application of his own principle of majority rule."*

From early 1840 to 3 May 1841, Aotearoa/ New Zealand was 'officially' under the jurisdiction of New South Wales. Governor Gipps evidently either failed to read carefully Te Tiriti/Treaty or had little respect for it. In his view, sovereignty had been acquired by Cook's 'discovery', Te Tiriti/Treaty merely confirming this.[36] On 9 July 1840 Gipps introduced legislation to examine pre-1840 land purchases. After stating that the Bill was founded on three general principles, Gipps defined the first of these as:[37]

> *"that the uncivilised inhabitants of any country have but a qualified dominion over it, or right of occupancy only; and that, until they [...] subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they have not themselves any individual property in it."*

One part of the Bill stated that with claims exceeding 2,560 acres, land in excess of this amount would become property of the Crown. Several Rangatira have been recorded as being perturbed by this new stance. Nopera Panakareao [Te Rarawa], who less than one year previously had considered that Te Tiriti/Treaty confirmed that the substance of the land remained with Iwi, now judged:[38]

> *"The Queen has taken the substance of the land and left us, the Maori, only the shadow."*

Panakareao repeated this shortly before his death, and added the words:[39]

> *"What truly is a shadow? It is like death that the hand cannot hold."*

There was tension in the early 1840's with some Rangatira, including Hone Heke [Nga Puhi], dis-satisfied that the government monopolised the process of adjudicating land claims. And Hone Heke was particularly concerned with the Government's position on taxation. He had been receiving sums of money from levies on whalers who anchored in harbours. This, evidently to Heke's surprise, was now appropriated by the government. A further slight to his mana occurred when the pole on Maiki Hill, which he had gifted to fly the flag of the United

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35 At that time Hobson had not been to Te Waiponaumu (the South Island) Sovereignty was proclaimed on the basis that it was terra nullis.

36 Claudia Orange [1987, 96].

37 Quoted in the Waitangi Tribunal's, *Ngai Tahu Report* [Wai 27 1991, 253].

38 Margaret Mutu [1992, 17, Ngati Kahu, Te Rarawa]

39 See previous footnote.

Tribes, was now being used to fly the Union Jack. This was considered an insult not only because the gift was being used for a different purpose than for which was intended, but because the Union Jack constituted a symbol of British supremity. He believed the mana of the land should not be vested solely in the Government.[40] Heke cut down the flagstaff. This incident developed into war. Heke and his allies were eventually subdued (with the government using the services of Iwi who did not support Heke).

In 1852 the New Zealand Constitution Act gave men [sic] who owned property the right to vote in the newly constituted Parliament. Iwi (collectively-held) property, however, did not qualify as property, and almost all Maori men were thereby denied a vote. Requests by several Maori, including Te Waharoa [Ngai Haua], to be admitted to the House of Representatives were declined. Te Waharoa, largely in order to restrain land-sales, then worked for the unification of Iwi and his effort culminated in the election of Te Wherowhero as the first Maori King. Initially the movement desired to position itself as a complementary power to the British Queen. The Queen's law, upheld by the government's mana, would stand alongside the King's law and mana. The Crown became antagonistic to Kingitanga when it became effective in resisting land sales. In a dispatch in 1859 Governor Browne referred to the vast lands held by Iwi in the North Island and declared:[41]

> *"The Europeans covet these lands and are determined to enter in and possess them -- recte si possint, si non, quocunque modo [legally if possible, if not, then by any means at all]."*

At a meeting in Taranaki on 8 March 1859, at which the Crown sought to buy land, Te Teira [Te Ati Awa], offered to sell Governor Browne a 600 acres at the mouth of the Waitara River. However, Wiremu Kingi, a senior Rangatira, refused to permit the sale. The government ignored the latter's claim of a right to veto. It was argued at the time that Te Tiera, as a *British subject*, had a right to sell his land individually, whatever the view of the Iwi. Thus the status of the Iwi was denigrated. On 18 March, a letter was written to Wiremu Kingi from the Native Minister:

> *"This is a word to you to request you to make clear (point out) your pieces of land which lie in the portion given up by Te Teira to the Governor. [...] You are aware that with each individual lies the arrangement as regards his own piece; in like manner Te Teira has the arrangement of his piece. Another cannot interfere with his portions to obstruct his arrangements, for the has the thought of what belongs to himself. [..] Do not [...] interfere with Te Teira's [...] part, for [he has] consented to the sale of their part, in the presence of the tribe [...]"*

The Iwi may have been present, but Kingi did not consent. And there was no traditional Maori notion of individual land ownership. As such, there were no customary "arrangements"

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[40] Claudia Orange [1987, 119].

[41] Quoted by Keith Sinclair [1969, 123].

with which to work out apportionments.[42] In forcing the division of land, the Minister was violating the terms of Te Tiriti/Treaty. Fighting broke out between the Iwi and British troops. Kingi aligned with Kingitanga, and in return was supported with a number of volunteer fighters, many of whom had links with the land at Te Ati Awa. The British troops suffered several defeats.

The following year saw the arrival of 7,000 troops from Australia. Browne had good reason to be confident that he could put an end to Kingitanga. Following an uneasy truce with Te Ati Awa in April 1861, the focus shifted to Waikato where Te Wherowero's son, Tukarotu, had become King. In May 1861, the Governor sent a proclamation to Waikato accusing them of violating Te Tiriti/Treaty and requiring from all "submission without reserve, to the Queen's sovereignty and the authority of the law."[43]

> *"An authority has been set up inconsistent with allegiance to the Queen, and in violation of the Treaty of Waitangi. [...] A large number of the adherents of the Native King have interfered between the Governor and other Native tribes in matters which they had no concern [...]. The Governor cannot permit the present state of things to continue. [...] Submission to her Majesty's Sovereignty requires [...] that every man yield [...] obedience to what the Law (which is the same for all) prescribes for the public welfare [...]. Whenever the Maories forfeit [the protection of Te Tiriti/Treaty], by setting aside the authority of the Queen and the Law, the land will remain their own so long as they are strong enough to keep it:-- might and no right will become their sole title to possession."*

This Proclamation was indeed, as stated in the last paragraph, all about "might and not right". Insofar as Kingitanga sought to resist land alienation from the Crown's tactics of individualisation, there was no inconsistency with Te Tiriti/Treaty. And to the extent that Kingitanga was seeking to assure te tino rangatiratanga was given effect, it was not contrary to Te Tiriti/Treaty. Furthermore, the Proclamation, in implying Kingitanga had no business in Taranaki, was incorrect. Te Wherowhero (who was now dead), under Maori customary law, indeed had legitimate claims to land which the Crown sought.[44] Thus the notion that "the Law (which is the same for all)" is highly problematical; the fact that "the [Pakeha] Law" was sacrificing the interests of Wiremu Kingi was precisely the reason for the war at Taranaki. The fundamental question, then, which Kingi undoubtedly would have considered: *Whose law?*

Te Waharoa wrote a lengthy reply to the Governor clarifying the non-revolutionary intentions of Kingitanga (making numerous references to Te Paipera Tapu with respect to

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42 This point was emphaised by Sir William Martin in his pamphlet 'The Taranaki Question' [*Appendix to the Journal of the House of Representatives*, 1861 E.--No.2].

43 *Appendix to the Journal of the House of Representatives* 1861, No. 1B, 11.

44 See Sir William Martin's pamphlet 'The Taranaki Question' reprinted in *Appendix to the Journal of the House of Representatives* 1861 E --No.2. And also see Te Waharoa's reply to Grey's Proclamation [*Appendix to the Journal of the House of Representatives* 1861 No.1B, 16]

both co-existence and non-violence).[45] However, the Governor proposed to move into the Waikato and set up military posts. The King insisted that road-making was to stop at the Mangatawhiri Stream and no armed steamers were to be allowed up the Waikato River. Governor Grey issued the following Proclamation in July 1863:

> *"Some of you know that the officers and soldiers were murdered in Taranaki and some of you approve of these murders. Some of you are involved in wrongdoing in other parts of the country [...].*
>
> *I am therefore compelled, for the protection of all, to establish posts at several points on the Waikato River [...]. I now call on all well-disposed Natives to aid the Lieutenant-General to establish and maintain these posts, and to preserve peace and order.*
>
> *Those who [...] remain in arms [...] must take the consequences of their acts, and they must understand that they will forfeit the right to the possession of their lands guaranteed to them by the Treaty of Waitangi."*

But it was precisely the land guaranteed under Te Tiriti/Treaty that Kingitanga was defending. Before Grey's message had even reached the Waikato, British troops had crossed the Mangatawhiri Stream. War began, and there was considerable blood-shed. As with the battle with (inter alia) Heke, the Crown sought support from other Iwi who had old scores to settle with the 'deviant' Iwi. Te Arawa, for example, obliged. Ngati Awa and Waikato, despite support from Tuhoe, Te Hura, and Tuwharetoa, were outnumbered, and suffered sever losses. Many of the 'rebelling' Rangatira were sentenced to death. And there was considerable confiscation of land. Some of this land was awarded to 'friendly' Iwi for their services. For example, 87,000 acres was taken from Ngati Awa and given to the Te Arawa .[46]

7. Te Tiriti/Treaty fishing rights.

In the first twenty years following the signing of Te Tiriti/Treaty, there were few issues raised explicitly about fishing rights (except, as mentioned in Section 3, the issue of levies which troubled Hone Heke). Though throughout the 1850's, Iwi experienced the diminution of authority (mana) over land and thus coastal areas and water-ways. By the mid 1860's, the Crown, through the use of force, had asserted itself, in both legal and coercive terms, as rule-maker.

The Oyster Fisheries Act 1866 was the first of a number of Acts to attenuate Iwi Te Tiriti/Treaty fishing rights as such. Whilst this Act was a largely a conservation measure, no consultation took place with Iwi. The Salmon and Trout Act 1867 was instituted to protect these two species introduced by Acclimatisation Societies. These imported fish are predators to a number of fish prized by Iwi. In some instances Iwi were debarred from eeling in certain rivers stocked with imported fish. The reasons for introducing these fish included, (i) the

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[45] See *Appendix to the Journal of the House of Representatives* 1861 No.1B, 16].

[46] Henri Mead and Onehou Phillips [1993, 33; Ngati Awa].

provision of 'back home' recreational interests and (ii) the maintenance of dietary pattern (the taste and texture of various indigenous fresh-water fish were not congenial). The introduction of the trout (including the Brown, Brook, and Rainbow) and salmon (including the Quinatt) was very 'successful'.[47] However, these imported species had a considerable adverse impact on indigenous fish such as koaro, pipiki, tikihemi and inangi. Also, there were numerous eel drives (which included koaro) designed to protect young trout. Tonnes of eels were slashed with iron and allowed to decay on the banks.[48] For Iwi, apart from being deprived of an important and intensely desired food source, this destruction was culturally and spiritually offensive (the eel had a place in tribal mythology, where it takes the place of the snake in some other lands). Iwi were precluded from catching the imported fish unless they purchased a licence. These events were the source of antagonism. Two decades later, Alexander Mackay, Native Commissioner, reported on the situation in Ngai Tahu. His description of events illuminates clearly a process whereby Iwi have been injured from various factors and forces creating a physical and financial environment which was keeping the Iwi "in a state of privation":[49]

> *A matter that has inflicted serious injury on the Natives of late years [...] is the action of the Acclimatization Societies in stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the Natives are debarred from using the nets for catching the whitebait in season, [n]or can they catch eels or other native fish in these streams for fear of transgressing the law. [...] In olden times the Natives had control of these matters, but the advent of the Europeans [...] changed this state of affairs and destroyed the protection that formerly existed, consequently their mahinga kai (food-producing places) are rendered more worthless every year, and in addition to this [...] they are frequently ordered off by the settlers if they happen to have no reserve in the locality. This state of affairs, combined with the injury done to the fisheries by the drainage of the country, inflicts a heavy loss on them annually and plunges then further into debt, and keeps them in a state of privation. All this is very harassing to a people who not long since owned the whole of the territory now occupied by another race, and it is not surprising that discontent prevails, or that [...] prosperity is impossible."*

Mackay's description helps pinpoint several dimensions of power and coercion. The Acclimatisation Societies were able to use the government to protect their interests. Indeed, at the time of the legislation, insofar as Maori could not vote, they were excluded (all women, Maori and Pakeha, were excluded) from any participation in the law-making process which gave rise to the injurious policy. The Acclimatisation Societies were in a position of power. Iwi had to meet their reservation price in order to have access to the fish. Thus they were in a coercively disadvantageous position insofar as the flow of payment to withhold injury (of

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47 See the evidence of Crown witness Ronald Little provided for the Ngai Tahu Tribunal -- see the Waitangi Tribunal's *Ngai Tahu Report* [Wai 27 1991, 892).

48 See the claim made by Hoani Korehe Kahu to the Mackay Commission [*Appendix to the Journal of the House of Representatives*, 1891, G 7, 49].

49 *Appendix to the Journal of the House of Representatives* 1887 G.-8, 16].

stocking the streams and rivers with trout and salmon) ran to the Acclimatisation Societies. But, for Iwi, the issue was (and still is) the pattern of coercion/freedom.[50] Henere Tau expresses a sentiment that would be echoed by all speak for Iwi:[51]

> *"With the Pakeha Trout came his laws. They were placed in our waterways, our garden, Te Marae o Tangaroa. For me to catch a Trout, I have to pay a licence for this privilege even though it is destroying my garden. [...] Should not the person who put the Trout in our garden pay rental for this privilege? Should not those who take from our garden obtain permission?"*

For Iwi, the control (in terms of access to, possibilities for passing on to yet-to-be-born) over fish had become contingent upon willingness (and, of course, ability) to pay.

The Goldfields Amendment Act 1868 opened Maori land for goldmining and provided that the foreshore adjoining Maori land was deemed to be Maori land too. This Act gave rise to the first of hundreds of fishing-related petitions by Iwi that would be placed before Parliament.[52] The first petition, sent on 5th August 1869, is reproduced below:

> *O friends the Assembly of Chiefs, salutations to you all. [...] The word has come to us that you are taking our places from high water-mark outwards. [...] O fathers, great is the grief, great is the sorrow, great is the objection, great is the searching, great is the considering of the heart on the subject of that work of yours.*
>
> *O friends, it is wrong, it is evil. Our voice, the voice of Hauraki has agreed that we shall retain parts of the sea from the high water-mark outwards. These places were in our possession from time immemorial; these are the places from which food was obtained from the time of our ancestors [...] down to us their descendants. Why do you desire to seize heedlessly upon these places? What fault of ours has been discovered by you? [...]*
>
> *O friends, our hands, our feet, our bodies, are always on our places of the sea; the fish, the mussels, the shell-fish are there. Our hands are holding on to those [...]. The men, the women, the children, are united in this, that they alone are to have the control of all the places of the sea, and that the Europeans are to have nothing to do with them.*
>
> *O friends, give effect to our request. Leave to us our own, the places of the sea. Act justly towards the good tribe, because the searching for justice is with you [...].*
>
> *The word to you ends. From all Ngatimaru, Ngatitamatera, and Ngatiwhanaunga.*

This petition, like almost all of the petitions sent by Iwi requesting that their Te Tiriti/Treaty fishing rights be honoured, was not given any recognition.

Following complaints about the gold-mining by Iwi, Walter Mantell, Member of the Legislative Council, asked that for a literal copy of the original Treaty of Waitangi in Maori.

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50 Trout and salmon have hallowed status in the Resource Management Act 1991 (see Martin O'Connor 1993).

51 Quoted in the Waitangi Tribunal's *Ngai Tahu Report* [Wai 27 1991, 893-4).

52 The petitions can be found in the *Appendix to the Journal of the House of Representatives* [for example , 1869, F-7, 18; 1879, G-8, 18; 1880, I-2, 24; 1881, I-2, 24 and 26; 1885, I-2, 24, 31 and 33, 1891, I-3, 6, 17, and 22, 1895, I-3, 3, 6, 15, and 19; 1901, I-3, 6 and 9, 1916, I-3, 28 and 30, 1924, I-3, 39; 1929, I-3, 9 and 10]. A comprehensive list of the petitions is provided in the Waitangi Tribunal's *Muriwhenua Fishing Report* [Wai 22, 1988, 330-37].

He was insistent that the translation was from English to Maori, since the original was "in execrable Maori".[53] In the new translation the original 1840 rendering of 'the rights and powers of sovereignty' by 'kawanatanga' became "nga tikanga me nga mana katoa o te Rangatiratanga" (all the customary powers and mana of Chieftainship).[54] This was not the same Tiriti o Waitangi that was constructed by Revd. Williams.

The events at Thames filtered though to many Iwi. In Riverton several Iwi made claims to exclusive ownership of the foreshore. As a result, tensions arose with Pakeha. Alexander Mackay, Native Commissioner, investigated the problem. He reported that the key points made by the Iwi: (i) "by the 2nd article of the Treaty of Waitangi, the 'Chiefs and Tribes [...] were confirmed and guaranteed in the full, exclusive, and undisturbed possession of their land, &c. [...]" and (ii) "Mr. Mantell had distinctly promised them the foreshore in 1853, as a landing place for their boats."[55] In reply, Mackay argued:[56]

> *"The Natives, on the assumption of British sovereignty [sic] over the Islands of New Zealand, became British subjects [sic], and thereon all their dominion, if any existed, was extinguished; it was clear, therefore, that it was useless on their part to assert any rights antagonistic to the Crown's prerogative, which could only end in being upset before a proper tribunal."*

Mackay recorded the negative reaction from Iwi, the subsequent impasse and, finally, his ultimatum (one resembling that of Governor Grey's to Kingitanga prior to the Rangatiratanga/Sovereignty Wars):[57]

> *"My arguments, however, met with considerable opposition, and after two days' discussion, finding it would avail nothing to prolong the subject, I consented as a matter of policy, giving them to understand at the same time that they could not maintain an exclusive right to the foreshore, and that if they were unwise enough to take any action to interfere with the general use of the beach by the public, they would do it at their own risk, and must abide by the consequences. All they could claim was a right in common with other to the use of the beach as a landing place [...] but they must not attempt to fence it in.*

In 1877 the issue of Iwi fishing rights was raised in Parliament. Hori Tairoa [Ngai Tahu], member for Southern Maori, expressed concern that [27 N.Z.P.D. 1877, 67] "Europeans were [...] plundering all the oysters and fish from the [Mangahoe Inlet], and selling them in Dunedin." Tairoa asked two fundamental questions: (i) "By what authority Europeans exercise fishing rights over the Mangahoe inlet, while the Native title thereto has not been extinguished?" and (ii) "Would the Government "cause a stop to be put to such acts [...] ?" In response, the Hon. John Sheehan said [27 N.Z.P.D. 1877, 67]:

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53 Quoted by Claudia Orange [1987, 182].

54 The text written by Young is reproduced in Claudia Orange's *The Treaty of Waitangi* [1987, 265].

55 *Appendix to the Journal of the House of Representatives* [1874, G-5c, 1].

56 *Appendix to the Journal of the House of Representatives* [1874, G-5c, 2].

57 *Appendix to the Journal of the House of Representatives* [1874 G.-5c, 1-3].

"the Government had no power to stop them. If the honourable gentlemen proved his title to the property, he could bring an action against the people in the ordinary Courts, and restrain them from the trespass of which he complained."

The title, of course, at least in Tairoa's view, was Te Tiriti/Treaty. However, in 1877 this 'title', the Courts asserted, was null and void. In the oft-quoted legal case *Wi Parata v. Bishop of Wellington* [1877] Chief Justice Prendergast argued that on the arrival of the Europeans, the natives were found [p.77] "without any form of law or civil government." As such [p.78]: "No body politic existed capable of making cessation of sovereignty [sic] nor could the thing itself exist." Only a body politic, in the European sense could, it seemed, claim a legal root of title to territory. Aotearoa/New Zealand, therefore, was technically territorium nullis. Henceforth, Te Tiriti/Treaty was determined [p.78] "a simple nullity". The unreviewability of either executive or legislative action was laid down by Prendergast, thereby making the government accountable to the rules that it saw fit to make [p.79]:

"In the case of primitive barbarians, the supreme executive government must acquit itself as best as it may of its obligation to respect native propriety rights, and of necessity must be the sole arbiter of its own justice. Its acts cannot be examined or called into question by any tribunal because there exist no known principles upon which an adjudication can be made."

After *Wi Parata*, it was generally held that Maori [sic] property rights could not be legally recognised unless established by statute. Such rights could only exist if created by the Crown. Despite this assertion, Iwi have consistently maintained that Te Tiriti/Treaty reaffirmed their mana over the fisheries. In 1879 at a hui known as the 'Orakei Parliament', convened by Paora Tuhaere [Ngati Whatua], Tuhaere stated in one address:[58]

"The Treaty of Waitangi left the rights of the soil with the Maori chiefs. [The Queen] left the fisheries to the Maoris [...]. She also left us the places where the pipis, mussels, and oysters, and other shellfish are collected [...]. Let us see whether the stipulations made in the Treaty of Waitangi are still in force or not.".

There was only one view on this point. Tuhaere's words were reiterated by, inter alia, Eruene [Ngaoho], Hamiora [Te Arawa], Kawatupu [Nga Puhi], Makoare [Kaipara], Paikea [Urihau], and Tukere [Ngati Paoa]. Eruena remarked:[59]

"There is both life (ora) and death (mate) in that treaty [...]. The Queen stipulated in that treaty that we should retain the mana of our [...] fisheries, [...] but now these words have been over-looked."

At the conclusion of the Parliament, several firm and unambiguous resolutions were unanimously carried [A.J.H.R. 1879, G.-8, 30]:[60]

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58 *Appendix to the Journal of the House of Representatives* [1879, G.-8, 16].

59 *Appendix to the Journal of the House of Representatives* [1879, G.-8, 16].

60 The translation to English is by the Law Commission [1989, 150].

"Ma tenei runanga e whakamana ko nga mahinga ika me nga kopua mango [...], patiki, tuna, [...] tahuna pipi, toka tio, kutai, paua, kina, tipa kei nga iwi Maori ano te mana."

(That this assembly asserts the mana of the Maori people over their fishing grounds and deep water shark, [...] flounder and eel fisheries, [...] sandbanks of pipi, rock oysters, mussels, paua, kina and scallops.)

The Pakeha-dominated Parliament, however, ignored the Iwi Parliament. In 1885 the former discussed the Fisheries Encouragement Bill which proposed to give special bonuses for, among other things, exporting tinned fish. Commenting on the Bill, Robert MacAndrew [N.Z.P.D. 1885, 586] said:

"If we wish to fill the treasury there could be no better way than by means of this Bill. Our waters are replete with golden sovereigns, and we only have to take them out and they will fill the treasury."

Not one mention of Te Tiriti/Treaty was made. The fish were perceived, in contradiction with Iwi traditional values and beliefs, as merely a means to an end -- something to 'make use of', and there simply for the taking.

At the second 'Orakei Parliament' in 1889, the observing Native Minister wanted to know what specifically had been violated in regard to Te Tiriti/Treaty. One response came from Keepa Te Rangihiwinui [Muau Poko], who asked who has sold the foreshore of the country to the government. The Minister replied that Te Tiriti/Treaty gave the Queen sovereignty to high-water mark -- the land under the sea belonged to the Queen for the benefit of the community at large. Paora Tuhaere [Ngati Whatua] replied that the Te Tiriti/Treaty "did no such thing".[61] Evidently, Tuhaere was ignored.

In 1893 there was the first Court of Appeal case involving a Maori in a fishing-related dispute (*Piripi Te Maari and Ors. v. Matthews and Or.*). At stake was a thirty-five year effort by Te Maari [Muau Poko] to maintain Iwi fishing activities, especially eeling, in the Wairarapa Lakes area.[62] Muau Poko consumed, gifted (to neighbouring Iwi), and now traded (with nearby Pakeha villages) approximately twenty tonnes of eels each year.[63] The lake did not have a permanent outlet, being separated by a bar of sand and shingle. In certain seasons of the year, however, the water would break through, scouring a channel, but the southerly gales would silt up the channel with sand and shingle. When the channel was closed, the lake would rise and cover a greater part of the land. The Chairman of the South Wairarapa River Board sought to keep the channel permanently open so as to increase the area of pasture for farming (for settlers). With the channel permanently open, the catch of eels fell to about one tonne (due to habitat destruction and many eels being washed out to sea). Robert Matthews, the Board Chairperson considered that he could keep the channel permanently open under the authority of the Public Works Act [1882] which required public drains to be kept

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61 Quoted in Law Commission [1989, 148].

62 The first petiton from (inter alia) Piripi Te Maari was written on 22 September 1853 and is recorded in the *Appendix to the Journal of the House of Representatives* [1891, G -4, 38-9].

63 See Commissioner Mackay [1891 A.J.H.R. G.4-27] 'Claims of Natives to Wairarapa Lakes and Adjacent Lands'

unobstructed. Te Maari objected, considering the temporary channel not to be a 'drain' because the forces of nature blocked the lake off (which, of course, made the Lake a 'lake'). Mr Justice Conolly [1893, 22], delivering the judgement of the majority, responding to the claim by Te Maari that the 'channel' was not a channel when it silted up:

> *"We cannot agree to this. The channel is still there [sic], although hidden by obstructions, which the waters of the lake will shortly remove [...] We are therefore clearly of opinion that is a natural [sic] watercourse, and therefore a public drain [...]. This being so, Section 189 of 'The Public Works Act' authorises the County Council to keep it clean and in good repair, and to remove all obstructions to the flow of water through it."*

Te Maari would undoubtedly have concurred with Mr Justice Ward, dissenting, who considered that insofar as the lake was blocked for five months of the year it "cannot be held to be a natural water course [...]." As for the decision of the majority, Te Maari perhaps would concur with the words of Lord Hailsham that "the only way known to English law of disregarding an unpleasant fact [viz. the bar of silt and shingle] is to create the legal fiction that it does not exist."[64] It was this kind of creativity which made Te Tiriti/Treaty null and void (by Chief Justice Prendergast in *Wi Parata*), thus forcing Te Maari to base his defence on his interpretation of a Pakeha statute (the Public Works Act) whose meaning was then to be decided by Pakeha judges. Whether or not the Public Works Act was contrary to Te Tiriti/Treaty, according to the earlier precedent by Chief Justice Prendergast, was irrelevant. And insofar as a Pakeha judge (appointed by Pakeha) was determining resource use, te tino ragatiratanga o Iwi was being demeaned.

The outcome of the Wairarapa Lakes dispute was later creatively used as a precedent in the construction of legislation pertaining to drainage. Following forty-seven years of efforts by Ngai Tahu to maintain fishing activities at Waihora (Lake Ellesmere), the Hon. John Bell, Minister of Internal Affairs, stated with regard to the Ellesmere Lands Drainage Bill 1912 [N.Z.P.D. 1912, 1117]:

> *"It was impossible to permit a Maori to hold up the drainage of a plain, to prevent the straightening of a river, to prevent the reclaiming of swamp land and turning into productive land. It was not alone the land immediately affected that must suffer for the public good; the whole of the land above and below it suffered if the drainage was to be held up by a lagoon or stream. [...] [I]n the case of the Wairarapa Lake the Maoris did for many years so hold the lake until they recognised the necessity of the settlers [...]. The Maori was not asked to submit to anything different from that which the European was forced to submit to. [...] The Maoris were as safe today in the possession of the rights reserved to them by the treaty."*

Contrary to Bell, however, it was not "impossible" to permit Iwi to "hold up" a drainage plan. It was simply a valuational decision with regard to whether or not, and in what terms, to give effect to the terms of Te Tiriti/Treaty. Also contrary to Bell, is difficult to see how Maori could be considered to be "safe" in the possession of their Te Tiriti/Treaty fishing rights when

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64 Quoted by Paul McHugh [1984, 263].

their fishing activities were being non-consensually extinguished. Bell simply implied that if Europeans had fishing 'rights', they would be extinguished too (if it was in the 'public good'), thus Maori had nothing to complain about insofar they were being treated as Pakeha would be treated. But, of course, Te Tiriti/Treaty was not about equal treatment, it was about (inter alia) property rights.

In 1914, Section 77(2) of the Fisheries Act, wherein "Nothing in this Act shall be deemed to [...] affect any of the provisions of the Treaty of Waitangi", was brought before the Supreme Court in *Waipapakura v. Hempton* [1914].[65] This was a case concerning a Maori woman who appealed her conviction of whitebait regulations. She claimed that she was using these nets in the Waitotara River as part of the exercise of a Maori fishing right. With regard to the significance to Te Tiriti/Treaty, Chief Justice Stout [1914, 1071-2], chose to follow the precedent set in *Wi Parata*:

> *"It may be [...] that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such [...]* Wi Parata v. The Bishop of Wellington *[...] [is] the authority for saying that until given by statute no such right can be enforced [...]."*

On assuming absolute sovereignty, the Crown held that the English common law was imported to Aotearoa/New Zealand. For Iwi, the implication of this was laid out by Chief Justice Stout [1914, 1071]:

> *"Now, in English law -- and the law of fishery is the same in New Zealand as in England, for we brought the common law of England with us [...] there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast."*

The Crown would have been well aware of the Court interpretation of section 77(2) -- and since no steps were taken to amend it, it can only be presumed that the Crown was satisfied with the result.[66] The *Waipapakura* position on the common law was followed in numerous subsequent fishing cases including *Cobeldick v Tamana Maika* [1924], *Police v Fluety* [1926], and *In re the Ninety-Mile Beach* [1963].[67] This position on the common law with regard to

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65 Section 77(2) originated from Section 8 of the Fish Protection Act 1877, which provided:
"Nothing in this Act contained shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder."
The Sea Fisheries Act 1894 dropped this provision, but this was partially reinstated by a 1903 Amendment which provided that nothing in the Act dealing with sea fisheries "shall affect any existing Maori fishing rights." The saving provision was carried through in that form as Section 77(2).

66 As put by the Waitangi Tribunal [Wai-22, 1988, 98].

67 There were, however, several decisions in the Courts which did not build on *Waipapakura*. For example, the judgements of *Inspector of Fisheries v Ihaia Weepu and Or.* [1956] and *Keepa v. Inspector of Fisheries* [1965] proceeded on the basis that customary fishing rights reserved under Te Tiriti/Treaty ned not be conferred by statute, but can be extinguished by statute Hence Iwi fishing rights included customary fishing rights which were preserved by Te Tiriti/Treaty which were still unextinguished However, these decisions judged that Te Tiriti/Treaty rights were extinguished when title was granted or a freehold order made in respect of the land bordering their sea. As nearly all land has had a title granted or freehold orders made in respect of it, this effectively meant that all Te Tiriti/Treaty fishing rights had been extinguished.

the fisheries is, however, contentious. Contained within the (fluid) common law are, inter alia, the contra proferentum rule[68] and the doctrine of aboriginal title,[69] which, if given effect to, would have respected Iwi control of the fisheries. Yet in Aotearoa/New Zealand contra proferentum has never been applied, and aboriginal title has been selectively neglected. In short, the Crown has chosen to ignore some of its own rules. For many Maori, however, such technicalities are secondary issues; the self-legitimating privileged status of the common law is the primary point at issue, as it inherently denigrates the standing of Te Tiriti/Treaty. Furthermore, as a product of Western thought, the common law contains concepts which lack resonance with traditional Iwi concepts.

There have been numerous other legislative and judicial constructions contributing to an eroding status quo of Iwi fishing rights. These include the establishment and interpretation of, inter alia:[70]

(i) *Land Drainage Act 1908.*
(ii) *Auckland & Suburban Drainage Act 1908:*
(iii) *River Boards Act 1908.*
(iv) *Harbours Act 1908.*
(v) *Public Works Act 1908.*
(vi) *Manukau Harbour Control Act 1911.*
(vii) *Petroleum Act 1937.*
(viii) *River Control Act 1941.*
(ix) *Iron & Steel Industry Act 1959.*
(x) *Water & Soil Conservation Act 1967.*
(xi) *Mining Act 1971.*
(xii) *Town & Country Planning Act 1977.*

Whilst Iwi were powerless to reverse the 'legal' transfer of the fisheries, they were also forced to witness the diminution of Tangaroa's bounty resulting from, inter alia:

(i) Widespread overfishing by Pakeha of traditional Iwi fishing grounds, including those at the Mangahoe, Pukaki and Whatapuka Inlets, Herekino and Kaipara Harbours, and the Waiuku Estuary.[71]

(ii) Industrial and agricultural pollution, including the, Lyttelton, Manakau, Otakou, and Otago Harbours; lakes Rotorua, Waihora (Ellesmere) and Wairewa (Forsyth), the Kaituna, Waikato, Taieri, Waihou, and Orari rivers, and Te Atiawa reefs.[72]

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68 This rule states that if there appears to be a conflict between different language texts of a Treaty, then it must be interpreted in a manner that is least favourable to the drafting nation.

69 This doctrine preserves customary rights of indigenous peoples until extinguished either by cessation to the Crown or by statute.

70 A comprehensive discussion of these Acts is provided in my forthcoming PhD thesis 'Power and Justice: the fisheries in Aotearoa/New Zealand.

71 See, inter alia, the Waitangi Tribunal's *Manukau Report* [Wai 8, 1985, 58-60] and *Ngai Tahu Sea Fisheries Report* [Wai 27, 1992, 137].

72 See the Waitangi Tribunal's *Te Atiawa Report* [Wai 6, 1983, 21 and 25], *Kaituna River Report* [Wai 4, 1984], *Manukau Report* Wai 8 [1986], *Ngai Tahu Report* [Wai 27, 1991, 897-99] and *Ngai Tahu Sea Fisheries Report* [Wai 27, 1992, 15-17, 29] See also *Minhinnick v. Waikato Valley Authority* [1981, and 1984] and *Huakina Development Trust v. Waikato Valley Authority* [1987].

(iii) Sewerage schemes, including those at Mangere, Mangonui, and Rotorua.[73]

(iv) River diversions, alterations, and usage for, inter alia, power generation, navigation, gravel for roads, and irrigation. Examples include the Mohaka, Rangataiki, and Waipoua Rivers.[74]

The cumulative effect of each of these actions left Iwi throughout Aotearoa/New Zealand with a substantially eroded bounty of Tangaroa. The erosion contributed to the dissolution of Iwi with members seeking work in order to subsist. In response to some protests Iwi were told that the benefits they were receiving from related progress outweighed the harm being done.

This ideology of progress imbued, for example, the *Report of Royal Commission Appointed to Inquire Into and Report on Claims Made by Certain Maoris in Respect of the Wanganui River* [1950].[75] Hundreds of eel-weirs and fish-traps along the river were, the Commission acknowledged [p.2]: "indiscriminately [...] destroyed or done away with to provide a passage for river steamers." However, the Commission went on to state that [p.15]:

> *"[...] the consequential excursus of the Maoris, are, I think, only consistent with the breaking in and progress of the district. Non-remunerative pursuits were inevitably and naturally abandoned for those sufficiently remunerative to support changing habits [...] and requirements. The Maori change to economic labour [...] was to the benefit and advantage of the race, and the economic advantage, in my opinion, far outweighed the loss. I see no cause for compensation [...].*

In 1963, despite objection by Iwi, the government embarked on a strategy to expand the fishing industry. There were investment incentives, capital grants and tax breaks. These resulted in expansion of catching capacity and processing facilities. This expansion, over a period of approximately fifteen years, led to a further erosion of Tangaroa's bounty.

Following confirmation of a significant depletion of fish stocks in the early 1980's, a new Fisheries Act was introduced in 1983. In an attempt to reduce fishing effort, M.A.F. eliminated the 'part timers'. All fishers earning less than 80 percent of their declared income or $10,000 per year from fishing were removed from the industry. This had a disproportionate impact on Maori operations which tended to be small and often 'informal'.[76]

In the 1983 Act the seeds were laid for the system of Individual Transferable Quotas (ITQs); that is, tradeable property rights to the progeny of Tangaroa based on simple textbook models of control of an 'open access' resource to ensure efficient allocation. The key

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[73] See, respectively, the Waitangi Tribunal's *Manukau Report* [Wai 8,1985, 74-5], *Mangonui Sewerage Report* [Wai 17, 1988], and *Kaituna River Report* [Wai 4, 1984]

[74] See, respectively, the Waitangi Tribunal's *Mohaka River Report* [Wai 119, 1992], *Te Ika Whenua -- Energy Assets Report* [Wai 212, 1993, 13-14], and *Te Roroa Report* [Wai 38, 1992, 193].

[75] Reproduced in the *Appendix to the Journal of the House of Representatives* [1950 G-2, 1-18].

[76] See Leith Duncan and Martin O'Connor [1995, forthcoming] 'Toward an Understanding of Subsistence and Informality in Northland Fishing Economy.'

objective of the ITQ system was, according to officials from the Ministry of Agriculture and Fisheries (MAF) [Clark et alia 1988, 331]:

> *"to achieve the optimal number and configuration of fishers, vessels, and fishing gear to minimize the aggregate real cost of taking any given catch."*

The authors emphasised that the achievement of this objective required the quota to be transferable [p.331]:

> *"a fisher will demand or offer to sell quota, in whole or part, depending on whether the net revenue he [sic] expects to earn from his last unit of catch is greater or less than the market price for quota. In this way, quota will gravitate to the most efficient operators, who will employ the least costly methods of fishing."*

The conceptualisation of this objective and the means thereto follows the tradition in neoclassical political economy established by, inter alia, James Crutchfield [1979]; that is, pursuing production efficiency without any consideration of the significance of alternative institutional/distributional arrangements/patterns, and the way these would influence the outcomes consequent to trading.[77] Insofar as Iwi (and others) have goals which differ from profit-maximising firms, the distribution of quota will significantly influence the number and configuration of fishers. Thus, there would not be a unique (Pareto) optimal outcome derived from a cost-minimising calculus; rather, an optimal outcome (if this can be defined) will be quota-distribution-specific.[78]

Quota was distributed in proportion to recent 'formally' documented catch history -- a practice of recording that priveleged Pakeha commercial fishers, who had contributed significantly to the resource depletion. The initial allocation of quota was seen by Iwi as a free gift of their property to those who had damaged their resource.[79] This position was made clear in an affidavit by Tipene O'Regan [Ngai Tahu] on the initial allocation of quota:

> *"the Crown first of all took away from the Maori Tribes the fishery resources which ... from time immemorial belonged to Maori, not to the Crown, and then the Crown went on to purport to give those resources, or the beneficial usage of them, together with tradeable property rights [...], to other persons."*

M.A.F. assumed that it had no obligation to either ask Iwi for permission to create tradeable rights or to distribute quota to them. This assumption stemmed partly from the presumption that 'traditional' Maori fishing interests were of a purely non-commercial nature.[80] M.A.F. officials [Clark et alia 1988, 348] inform us:

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[77] However, the MAF officials do imply in the above quote that a unique 'gravitation' (efficient) point does exist

[78] Put differently, policy-makers pursuing *production efficiency* (à la M.A.F) first have to deal with the problem of choosing which *allocatively efficient* point to head toward. Only thereafter (with rights thus determined, and a 'distribution of sacrifice' effected) do a set of cost and revenue curves exist from which to pursue production efficiency.

[79] See the Waitangi Tribunal's *Muriwhenua Fishing Report* [Wai 22, 1988, 144].

[80] However, the commercial/traditional dichotomy is highly problematical. As the Law Commission [1989, 34] concluded: *"There is little profit in entering into semantic arguments about the connotations of 'commercial': whether or not for instance commerce includes barter, or the notion of reciprocal gift that was integral to Maoritanga as to many societies The point is precisely that these matters are not susceptible of answer in purely Western terms. What is reasonably*

"it was assumed that the position of the Maori people of New Zealand [...] and their interaction with the fisheries would be unaffected by the new management system. In fact, it was the explicitly stated intention of the government that the quota system should not interfere with traditional fishing rights. Section 88(2) of the Fisheries Act states, "Nothing in this Act shall affect any Maori fishing rights."

But this simply begs the question of the attrition/erosion of Iwi opportunities in fishing over the whole preceeding time; and it ignores the coercive impact of the (selective) enforcement of the new system. A number of Iwi, including Muriwhenua and Ngai Tahu, filed proceedings in the High Court against the Crown issuing more ITQs. A decision by Mr Justice Greig was made in favour of the tribal plaintiffs who used as a defence a combination of the aboriginal title doctrine and Section 88(2) of the Fisheries Act.

As a result of Mr Justice Greig's decision, the Crown had little choice but to negotiate with Iwi. In November 1987 a Joint Working Group was set up. It was made up of four members from the New Zealand Maori Council and four from the Government, to report by 30 June 1988 on 'how Maori fisheries may be given effect'. The position taken by the Maori group was as follows:

"The settlement must be such as to give effect to the Treaty promise that te tino rangatiratanga in their fisheries was confirmed and guaranteed to the Maori people" [in Law Commission 1989, Appendix E].

An impasse emerged. However, during 1992, in circumstances not directly related to these events, a major public company, Sealord Products Ltd, which held a 26 per cent of the total fishing quota, was put on the market. The company was considered by both Crown and the four Maori negotiators as a unique prospect for part of a reparation package. In August they had reached agreement on a proposal for a final settlement of outstanding claims and Te Tiriti/Treaty grievances of Maori in relation to fisheries. These two groups signed a Memorandum of Understanding whereby the Crown would, inter alia:

(a) Provide Maori with the capital ($150 million) to participate in a joint venture with Brierley Investments Ltd to purchase Sealord Products Ltd.

(b) Agree to Maori participation in any relevant statutory fishing management and enhancement policy bodies (related to non-commercial fisheries).

In return Maori would, inter alia:

(a) Withdraw all existing litigation and support the repeal of all legislative references to Maori fishing rights and interests including Section 88(2) of the Fisheries Act 1983.

(b) Agree that the proposal would "satisfy and extinguish [...] all commercial fishing rights and interests, whether they arise from customary rights, the Treaty [...]."

The Maori negotiators carried out an extensive nationwide consultation with Iwi to 'sell' the deal. There was antagonism over, inter alia, the extinguishment of Te Tiriti/Treaty rights. Numerous Iwi were against the deal and did not want the Maori negotiators to enter the

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certain is that before and after the eighteenth century European contacts Maori communities often did not consume all the goods they produced but exchanged them for other goods, and that this process of exchange included fish."

perhaps one of their most significant symbols of Iwi identity. The Crown thus continues to assume the position of self-appointed sole arbiter of 'justice', a presumption that is, for many Iwi, the enduring source of injustice.

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agreement. For the former, the deal meant, inter alia, the "surrender [of] the moral high ground of [...] property rights at sea, guaranteed by treaty, [...] for 150 pieces of silver."[81] At that moment the 'Maori negotiators' became divorced from their Iwi bases. Thereafter they were identified as 'Maori negotiators' only because the Crown recognised them as such. In defence of this line of criticism, the Prime Minister, the Hon. James Bolger [532 N.Z.P.D. 12827, 3 Dec. 1992], insisted:

> *"We did not appoint them. The Crown did not say that they had to be the negotiators. Maori* [sic] *appointed the negotiators. The negotiators came to us."*

However, many Iwi did go to the Crown requesting that the 'Deal' not go ahead. And as far as these Iwi were concerned, there was no such thing as 'Maori' rights -- there were only Iwi rights guaranteed under Te Tiriti/Treaty.

Soon after the Memorandum had been signed, a Deed of Settlement was drawn up, which essentially put the Memorandum into contractual form. Dissenting Iwi filed proceedings in the Courts claiming that those signing had no authority to make contract binding other Maori, especially other Iwi. Furthermore, it was claimed that the Crown's actions pursuant to the Deed were inconsistent with Article II of Te Tiriti/Treaty. Interim relief was declined, however, because of "the general prohibition on Court interfering in the legislative process." It was also held that whilst "the Deed is couched in the form of a legal contract, [...] nothing [...] should be allowed to obscure the truth that the Deed is a compact of a political kind."[82] On Te Tiriti/Treaty matters: "the Treaty is not in itself a restraint on Parliamentary sovereignty." This, for many Iwi, is the precise issue in dispute. Yet there was nowhere else to dispute this in the existing legal architecture of Aotearoa/New Zealand. Tribes pursuing Te Tiriti/Treaty-based 'justice' were at a dead-end.

The ultimate authority of the Crown was explicitly re-asserted by the Minister of Maori Affairs (and Minister of Fisheries), the Hon. Doug Kidd, in introducing of the *Treaty of Waitangi (Fisheries Claims) Settlement Bill* into Parliament (to give effect to the Deed):

> *"We should confirm that the deed was not entered into by all Maori, nor does it bind all Maori, but this Bill will do that. It will do so because of the Crown's exercise of kawanatanga, or governance, and fulfilment of its treaty obligations to all Maori, must in the end act in the public interest as it sees that to be" [532 N.Z.P.D. 12817, 3 December 1992].*

The Minister thus considered it in the 'public interest' that the Crown's kawanatanga should prevail over tino rangatiratanga o Iwi. Whilst this would seem to be at odds with the terms of Te Tiriti/Treaty, for the Minister, it is the 'public interest' that matters and, as he admitted, it is the Crown who defines what this is. The government continued to refuse to acknowlege Iwi as a legal entity which participated in Te Tiriti/Treaty -- and took a taonga that was

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81 This remark was made in a booklet *Nga Toka Tu Moana: Maori Leadership and Decision Making* [1992], which was put together by Nga Tuara and Te Puni Kokiri (the Maori Development Ministry).

82 See *Te Runanga o Whare Kauri Rekohu v. Attorney General and Others*, CA 297/92 .

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