Vanderbilt Journal of Transnational Law

Volume 25
Issue 4 *Issue 4 - November 1992*

Article 4

11-1992

New Zealand's Forgotten Promises: The Treaty of Waitangi

Jennifer S. McGinty

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ABSTRACT

This Note presents the problems the Maori, New Zealand's indigenous people, have encountered in seeking enforcement of the Treaty of Waitangi that they signed with Great Britain in 1840. It argues that the Treaty of Waitangi is a valid legal document that should be fully integrated into New Zealand domestic law and afforded protection under international law. The author argues that the Maori met the international law requirements of statehood in 1840 and, therefore, were capable of entering into a treaty with Great Britain. Even if there was no Maori state capable of entering into a treaty, there is analogous international authority which suggests that a non-state can be a party to a treaty. Further, because the document allegedly involved the cessation of land or sovereignty or both, an agreement less formal than a treaty would not have sufficed. The result is that New Zealand may incur state responsibility for its failure to give full effect to the terms of the Treaty.

This Note explores both the English and Maori texts of the Treaty and the doctrine of aboriginal rights to determine what rights to sovereignty the Maori retained. In doing so, the Note addresses the domestic paths taken by the United States and Canada concerning similar treaty interpretation and sovereignty issues that may be helpful to the Maori and New Zealand in fashioning an appropriate solution to settling the long standing Treaty dispute. This Note suggests international remedies that the parties may employ as well as other remedies that the Maori may explore in the face of continued New Zealand resistance to their Treaty claims.

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I. INTRODUCTION

New Zealanders regard the Treaty of Waitangi[1] as their founding document,[2] but for the Maori, the native people of New Zealand, the Treaty's benefits have been illusory.[3] Great Britain executed the Treaty of Waitangi in the 1840s to assure colonial dominion and a peaceful coexistence between the British settlers and the Maori.[4] During Great Britain's colonization efforts which followed,[5] the Maori lost considerable amounts of land and suffered severe social displacement.[6]

New Zealand has historically displayed a facade of racial harmony, but the societal divisions are quite apparent.[7] Even today in New Zealand society the Maori hold a lower class position.[8] Strained race relations are shouldering additional burdens due to activists' pressing for the return of Maori land and sovereignty.[9]

The Maori have consistently urged fulfillment of their rights under the Treaty, whereas Great Britain and New Zealand have consistently failed to honor those rights.[10] The Maori expected two things: first, that

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1. Treaty of Cession Between Great Britain and New Zealand, Signed at Waitangi, Feb. 6, 1840, 89 Consol. T.S. 473 (English text) [hereinafter Treaty of Waitangi or Treaty]. For the version of the text in Maori, see The Treaty of Waitangi (1840) *reprinted in* MANA TIRITI: THE ART OF PROTEST AND PARTNERSHIP, 84 app. II (Ramari Young ed., 1991) [hereinafter Maori Treaty of Waitangi].

2. *New Zealand Prime Minister on Resolving Maori Problems,* XINHUA GEN. OVERSEAS NEWS SERVICE, May 23, 1991, available in LEXIS, Nexis Library, Omni File [hereinafter *New Zealand Prime Minister*].

3. Jane Kelsey, *Decolonization in the "First World"—Indigenous Peoples' Struggles for Justice and Self-Determination (A Discussion of the Treaty of Waitangi and the Bill of Rights),* 5 WINDSOR Y.B. OF ACCESS TO JUST. 102, 103 (1985).

4. *Id.* at 105-06. The famous explorer Captain Cook first arrived at New Zealand in 1769. Tony Simpson, *One More Truth About the Treaty, in* MANA TIRITI: THE ART OF PROTEST AND PARTNERSHIP, *supra* note 1, at 24, 27. Missionaries began working in the area in 1814. *Id.* Settlements began to be more prominant beginning in the 1830s. *Id.* at 28.

5. Kelsey, *supra* note 3, at 104-05.

6. *Id.*

7. *Id.* at 103.

8. *Id.* at 105. For a discussion of the position the Maori currently hold in New Zealand society *see infra* notes 45, 46, 65 and accompanying text; *see also* David Barber, *New Zealand Faces Racial Tension,* CHRISTIAN SCI. MONITOR, Feb. 22, 1990, at 6; Kelsey, *supra* note 3, at 104. The Maori's plight is similar to that of indigenous peoples in other states, who were also victims of colonialism and imperialism. *See id.* at 105.

9. *Id.* at 102-03.

10. *Id.* at 107; *see also* Dai Hayward, *New Zealand 4; Maoris Get a Serious Hearing,* FIN. TIMES, July 23, 1990, at 12.

Great Britain would honor the treaty[11] and second, that the Maori would remain in control of their state and destiny.[12] Many Maori, as well as several scholars, argue for full implementation of the Treaty of Waitangi.[13] Even moderate Maoris advocate the return of some land or compensation for its loss.[14] Compliance with land and fishing rights under the Treaty, however, would cost New Zealand billions of dollars.[15]

The Treaty addresses an additional right, which has also been denied—the Maori's right to self-determination. The Maori demand an end to monoculturism and the policy of assimilation which threaten to eradicate Maori culture and rights.[16] Therefore, in addition to enforcement of the Treaty's land and fishing rights, the Maori desire cultural, economic, and political self-determination.[17] New Zealand judicial decisions, however, state that a sharing of power and sovereignty is unacceptable.[18] This traditional hostility of New Zealand courts toward Maori claims and rights make the courts an inadequate alternative for solving the plight of Maori.[19]

New Zealand courts historically have held the Treaty of Waitangi a nullity and therefore gave it little effect in decisions.[20] The 1975 Treaty of Waitangi Act allows claims under the Treaty to be heard by the five-member Waitangi Tribunal,[21] but the Tribunal's decisions are not legally binding, and they serve only as recommendations to the government of New Zealand.[22] This does not comfort the Maori who wish to assert

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11. Kelsey, *supra* note 3, at 107.

12. *Id.*

13. JEROME B. ELKIND & ANTONY SHAW, A STANDARD FOR JUSTICE: A CRITICAL COMMENTARY ON THE PROPOSED BILL OF RIGHTS FOR NEW ZEALAND 36-45, 167-68 (1986); *see also* Hilary Charlesworth, Book Note, 81 AM. J. INT'L L. 794, 797 (1987) (reviewing A STANDARD FOR JUSTICE: A CRITICAL COMMENTARY ON THE PROPOSED BILL OF RIGHTS FOR NEW ZEALAND).

14. Barber, *supra* note 8, at 6.

15. *Id.*

16. Kelsey, *supra* note 3, at 113.

17. *Id.* at 103.

18. Police v. Dalton (unreported) (Auckland Mag. Ct., June 1979, per Blackwood S.M.), *discussed in* Kelsey, *supra* note 3, at 111-12. "There cannot be one set of laws, for example, for one ethnic group and another set of laws for another. If the rule of law is not upheld, we have anarchy. If we have anarchy then civilised society will perish." *Id.*

19. Kelsey, *supra* note 3, at 112.

20. *See, e.g.*, Wi Parata v. Bishop of Wellington, 3 N.Z. Jur. Rep. (n.s.) 72, 78-79 (S.C. 1877).

21. *See infra* notes 50-67 and accompanying text.

22. *See infra* note 55 and accompanying text.

property rights and the right of self-determination under the Treaty.[23] The government must reach a compromise with the Maori which guarantees the Maori economic rights and self-determination found both in the Treaty of Waitangi and under the doctrine of aboriginal rights. This compromise, however, must preserve private property rights and avoid further inflammation of racial tensions.

This Note addresses the proper legal interpretation of the Treaty of Waitangi and suggests solutions available under New Zealand and international law. Part II of this Note discusses the historical roots underlying the current conflict between the Maori and New Zealand over territorial and non-territorial rights. Part II concludes with an analysis of the Waitangi Tribunal and the limited role its opinions may play in solving the conflict. Part III examines how the doctrine of aboriginal title and how the semantic differences between the English and Maori versions of the Treaty may affect Treaty analysis. Part IV sets forth a reasonable interpretation of the Treaty and establishes that the Treaty of Waitangi is a valid, enforceable treaty under international law. Part V summarizes Canadian and United States progress toward interpreting treaty rights and resolving conflicts with indigenous peoples that may be useful to the Maori and the government of New Zealand in establishing a workable domestic solution to the dispute. Part V also suggests that New Zealand may incur international state responsibility for its failure to honor its treaty obligations and reviews some international dispute resolution mechanisms that may be available. This Note concludes that the Treaty of Waitangi is a valid legal document, enforceable under international law. Thus, the Treaty affords the Maori some type of redress for past breaches that should be "settled by peaceful means and in conformity with the principles of justice and international law."[24]

II. THE MAORI PEOPLE

A. *Historical Background*

The Maori people[25] accounted for nearly all of New Zealand's population before the arrival of European settlers over 150 years ago.[26] In

23. For a discussion of rights under the Treaty, see *infra* Part III.

24. Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 680 [hereinafter Vienna Convention].

25. The Maori refer to themselves as "tangata whenua," meaning first indigenous people. David V. Williams, *The Queen v. Symonds Reconsidered,* 19 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW [V.U.W.L.R.] 385, 386 (1989).

26. *New Zealand; Waitangi's Wisdom,* THE ECONOMIST, Aug. 24, 1991, at 36.

1840 there were 200,000 Maoris and only 2000 European settlers.[27] Letters of Patent which Great Britain issued directed the Governor of New South Wales to enlarge British territory by including "any territory *which is or may be acquired* in sovereignty of Her Majesty . . . within that group of Islands in the Pacific Ocean, commonly called New Zealand."[28] A state may assert dominion over a new territory by three methods: conquest, discovery, or entering a treaty with the resident peoples.[29] Because New Zealand was already populated and the natives outnumbered the settlers 100 to 1, Great Britain chose to execute a treaty to gain colonial rule of New Zealand.[30] The Crown specifically directed Captain William Hobson to obtain the "free and intelligent consent of the natives."[31]

Captain Hobson, commissioned as Lieutenant-Governor of New Zealand,[32] arranged for meetings with numerous tribal leaders on February 5, 1840.[33] On February 6, 1840, approximately forty-five of the tribal leaders signed the Treaty of Waitangi,[34] which generally provided that the Queen would govern New Zealand and the Maori would be British subjects, enjoying Crown protection and retaining title to land pending potential sale to the Crown.[35] After the initial signing, various officials and military officers traveled throughout the New Zealand territory to obtain the signatures of additional tribal leaders.[36] More than 500 tribal leaders eventually affixed their signatures to the Treaty.[37] Many influen-

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27. Moana Jackson, *Maori Law, Pakeha Law and the Treaty of Waitangi, in* MANA TIRITI: THE ART OF PROTEST AND PARTNERSHIP, *supra* note 1, at 14, 18.

28. Letters Patent of June 15, 1839, *quoted in* David V. Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?*, 2 AUSTL. J.L. & SOC'Y 41, 41-42 (No. 2, 1985) (emphasis added).

29. Jackson, *supra* note 27, at 19.

30. Pita Rikys, *Trick or Treaty*, NEW ZEALAND LAW JOURNAL [N.Z.L.J.], Oct. 1991, at 370, 371. "They could not afford to conquer and from General Cameron's subsequent experiences had they done so, the likelihood was that they would have been thoroughly thrashed." *Id.*

31. Memorandum of Attorney-General William Swainson, Dec. 27, 1842, *quoted in* Williams, *supra* note 25, at 51. This argument for a treaty is especially compelling because Great Britain, even after signing the treaty, had only approximately 65 soldiers stationed in the New Zealand territory. *Id.* at 51.

32. *Id.* at 42. Captain Hobson was commissioned as both an envoy to the Maori peoples and as Lieutenant-Governor of the New Zealand territory. *Id.* at 51.

33. *Id.*

34. *Id.*

35. Geoffrey Palmer, *The Treaty of Waitangi - Principles for Crown Action*, 19 V.U.W.L.R. 335, 337 (1989).

36. Williams, *supra* note 25, at 42.

37. *Id.* at 42-43.

tial Maori chiefs, however, adamantly refused to sign the Treaty.[38]

B. *The Maori Today and the Role of the Waitangi Tribunal*

New Zealand regards the Treaty of Waitangi as its founding document[39] and celebrates the Treaty as part of a holiday known as Waitangi Day.[40] The Maori oppose celebration of the holiday and view the memorial with remorse because of Great Britain's failure to honor its obligations to the Maori.[41] Even Queen Victoria admitted, in a gross understatement, that the Treaty of Waitangi "has been imperfectly observed."[42] A more accurate characterization is that the European settlers ignored their treaty obligations[43] despite the Maori's consistent attempts to enforce the provisions.[44]

The British failure to adhere to the Treaty has altered the face of New Zealand. The Maori, who were once New Zealand's main residents and claimed all of its territory, now comprise only ten percent of the population and own less than five percent of the land.[45] In the political arena, New Zealand voters have squeezed the Maori out of Parliament, resulting in the Maori having little effect on election outcomes.[46]

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38. *Id.* at 43.

39. *New Zealand Prime Minister, supra* note 2.

40. *Ask the Globe,* BOSTON GLOBE, Feb. 25, 1991, at 20. The annual celebration, created by the New Zealand Day Act of 1973, entails significant pomp and ceremonial pageants. Williams, *supra* note 25, at 41.

41. *See* Williams, *supra* note 25, at 41.

42. Barber, *supra* note 8, at 6. The Queen made this statement while addressing New Zealanders during a celebration of New Zealand's 150th birthday in 1990. *Id.*

43. *New Zealand; Waitangi's Wisdom, supra* note 26, at 36. After the settlers gained power and possession of some lands the British wholly disregarded the Treaty of Waitangi. *Id.*

44. *See* Kelsey, *supra* note 3, at 102-03, 107.

45. *New Zealand; Waitangi's Wisdom, supra* note 26, at 36; Judge Edward J. Durie, *Protection of Minorities,* N.Z.L.J., Aug. 1987, at 260. Much of the land which Maori people hold is of poor quality and cannot be developed. *Id.* Additionally, land to the Maori holds a spiritual, as well as a material value. *Queen Victoria Said It Was Ours,* THE ECONOMIST, June 3, 1978, at 84. The Maori plight further manifests itself in the fact that although they represent approximately 10% of New Zealand's population, yet they comprise almost 50% of those in prison. Durie, *supra* note 45, at 260. The Maori people have also been plagued by poor education and job training which has resulted in a significantly higher unemployment rate among the Maori as compared to other New Zealanders. *New Zealand Prime Minister, supra* note 2.

46. William Allen, *New Zealand: Referendum Focuses on Minority Maori Rights,* INTER PRESS SERVICE, Sept. 17, 1992. New Zealand currently employs a racially based system called "First-Past-the-Post," which allows candidates with the most votes to go to Parliament. *Id.* The result has been that the National and Labor Parties have dominated

Because of the extreme diminution of tribal land holdings, many younger Maoris are angry at the "Pakehas" who stole their land and at their own ancestors for not successfully resisting the settlers.[47]

Like dispossessed indigenous peoples of other states, the Maori claim the Europeans took their land wrongfully.[48] To right this wrong, the Maori have continuously sought to enforce the Treaty of Waitangi, and they expect to regain some of their rights under it.[49] Their expectations derive in part from the Treaty of Waitangi Act of 1975,[50] which grants the Maori the right to petition the Waitangi Tribunal for resolution of claims arising from the 1840 Treaty of Waitangi.[51]

The Waitangi Tribunal has jurisdiction over claims dating back to 1840.[52] The Maori may initiate a claim simply by submitting a letter to the tribunal.[53] Resolving a claim, however, is a very lengthy and complicated process. The five-member tribunal merely makes recommendations to the Crown regarding compensation due the claimants;[54] the government ultimately decides the validity and value of each claim.[55] Claimants are fortunate if they reach a settlement in ten years, and many compromise the value of their claims to facilitate settlement.[56]

The Waitangi Tribunal is overwhelmed with claims involving approx-

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the legislature for over 40 years. *Id.* The Maori have 4 reserved seats on the 97 member Parliament, which does little to safeguard their interests. *Id.* New Zealand voters are currently considering a referendum to change this system to a proportional one. *Id.; see also Maoris Worried New Zealand Voting Changes Will Exclude Them*, AGENCE FRANCE PRESSE, Aug. 21, 1992.

47. *Queen Victoria Said it Was Ours, supra* note 45, at 84. "Pakeha" is the Maori word for the white European settlers. *Id.*

48. Kelsey, *supra* note 3, at 113-17.

49. *New Zealand; Waitangi's Wisdom,* supra note 26, at 36.

50. Treaty of Waitangi Act of 1975 (N.Z.), First Schedule.

51. Shonagh E. Kenderdine, *Statutory Separateness (2): The Treaty of Waitangi Act 1975 and the Planning Process,* N.Z.L.J., Sept. 1985, at 300.

52. Edward T. Durie, *A Peaceful Solution, in* MANA TIRITI: THE ART OF PROTEST AND PARTNERSHIP, *supra* note 1, at 64. Charles P. Wallace, *Maoris Get Property and Fishing Rights, Sparking White Backlash: Land Dispute Highlights Racial Issue in New Zealand,* L.A. TIMES, Aug. 18, 1989, at 12, 13.

53. Durie, *supra* note 52, at 65.

54. David Stamp, *New Zealand Faces Growing Race Problems on 150th Birthday,* REUTERS LIBR. REP., Feb. 6, 1990. Both Maoris and Pakehas have sat on the tribunal in the past. *Id.*

55. Kenderdine, *supra* note 51, at 300.

56. Durie, *supra* note 52, at 64-65. *See infra* note 64 and accompanying text for a discussion of a claim by the Ngai Tahu tribe that will have to be compromised to reach a settlement.

imately seventy percent of New Zealand's territory.[57] This has aroused concern about the substantial amount of compensation that may be due the Maori.[58] Moreover, severe economic difficulties may make New Zealand incapable of satisfying many large claims.[59] Returning land to the Maori—fulfilling the Tribunal's mission—may exacerbate the problems by widening the racial division in New Zealand.[60] Finally, some New Zealanders fear that the Tribunal will award the Maori privately held properties[61] because private purchasers now possess much of the land that the British illegally confiscated.[62]

The Waitangi Tribunal's first decision awarded one Maori tribe, the Ngati Whaatua, approximately eighty acres of land around Bastion Point and three million dollars in compensation.[63] Another recent claim for commercial fishing rights resulted in a recommendation to award the Ngai Tahu tribe the "exclusive right to fish virtually all of the South Island coastline as well as a reasonable share of the 200-mile deep water fisheries."[64]

Although the Waitangi Tribunal is attempting to assume a significant role in shaping the future of New Zealand and in resolving native claims, changes in government policy may undermine the limited success of the Tribunal.[65] Some factions, in fact, would revoke entirely the rec-

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57. Barber, *supra* note 8, at 6.

58. *New Zealand; Waitangi's Wisdom, supra* note 26.

59. Li Yao, *Year-Ender: Race Relations—Sensitive Issue in New Zealand Politics,* XINHUA GEN. OVERSEAS NEWS SERVICE, Dec. 27, 1989.

60. *New Zealand; Waitangi's Wisdom, supra* note 26; *see also infra* notes 63-66.

61. Wallace, *supra* note 52, at 13.

62. R.P. Boast, *New Zealand Maori Council v. Attorney-General: The Case of the Century?,* N.Z.L.J., Aug. 1987, at 240, 242.

63. Wallace, *supra* note 52, at 12.

64. Terry Hall, *Tribunal Backs Maori Claim on Fisheries,* FIN. TIMES (London), Aug. 12, 1992, at 26. The Ngai Tahu is one of New Zealand's smallest tribes with approximately 28,000 members. *Id.* Prime Minister Jim Bolger has already stated that the recommendation will not be accepted in full. *Id.*

65. *New Zealand; Waitangi Wisdom, supra* note 26, at 36. Maori rights are subject to the ever changing policies of New Zealand's government. Allen, *supra* note 46. An example of this is Prime Minister Jim Bolger's dismissal of Maori Affairs Minister Winston Peters for "disloyalty." *Id.* Peter's had openly challenged the government's economic policies because of rising Maori unemployment rates in excess of three times the national average. *Id.* Peters was replaced by a non-Maori. *Id.*

When the Tribunal suggested that the state purchase Maunganui Bluff, a piece of land owned by a white farmer, and return it to the Te Roroa tribe, Bolger threatened to change the law so the Tribunal could not make recommendations about private land any longer. *Maori Tribunal Ruling Threatens White New Zealanders,* AGENCE FRANCE PRESSE, June 2, 1992.

ognition of the validity of the Treaty of Waitangi.[66] The Maori have responded with increased pressure on the government and are demanding that the parties undertake full recognition and enforcement of the Treaty of Waitangi, asserting that "no matter how much time passes the treaty must be honored."[67]

III. THE TREATY'S TERMS

The Treaty of Waitangi is a relatively simple document consisting of a preamble and three articles. Those wishing to avoid its enforcement nevertheless label it as vague and meaningless.[68] One scholar notes, however, that "a contentious matter such as the treaty will yield to those who study it whatever they seek. If they look for difficulties and obstacles, they will find them. If they are prepared to regard it as an obligation of honour, they will find that the Treaty is well capable of implementation."[69] The Treaty is based on a partnership between the settlers and the Maori, and, despite obstacles, it allows interpretation which is faithful to the spirit of the Treaty and a sense of fairness to both parties.[70]

Perhaps the most problematic obstacle is the fact that Great Britain prepared The Treaty of Waitangi in both English and the native Maori language,[71] and the English version is not an exact translation of the Maori text.[72] Over 500 of the Maori leaders signed only the Maori text,[73] while approximately thirty tribal chiefs signed both the English and the Maori texts.[74] Captain Hobson, on behalf of the British govern-

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66. *New Zealand National Party's Drastic Racial Policy Proposal Evokes Outcry*, XINHUA GEN. OVERSEAS NEWS SERVICE, May 5, 1990. For instance, Peter Talley of Talley's Fisheries, in response to the recommendation for an award of fishing rights to the Nagai Tahu tribe stated that the Treaty of Waitangi should be "consigned to the cupboard" and called the Waitangi Tribunal a "kangaroo court." *Minister Urges Calm Following Maori Ruling*, AGENCE FRANCE PRESSE, Aug. 11, 1992.

67. Hayward, *supra* note 10, at 12.

68. *See infra* note 120 and accompanying text.

69. New Zealand Maori Council v. Attorney-General, [1987] 1 N.Z.L.R. 641, 673 (Richardson, J. quoting comments of Henare Ngata in his evidence in the case).

70. Robin Cooke, *Fairness*, 19 V.U.W.L.R. 421 (1989); *see also* Nick Gerritsen, *The Treaty of Waitangi: "Do I Dare, Disturb the Universe?"*, N.Z.L.J., Apr. 1987, at 138, 138 (Gerritsen argues that the Treaty "concerns values and morality, more than mere legal interpretation").

71. Jackson, *supra* note 27, at 17-19. The Crown prepared the English text, and British missionaries to New Zealand translated it into Maori. *Id.* at 19.

72. Boast, *supra* note 62, at 243; *see infra* notes 86-97 and accompanying text.

73. Jackson, *supra* note 27, at 17-19.

74. *Id.*

ment, signed both versions.[75] Initial problems arose precisely because the English version is not an exact translation of the Maori text.[76]

New Zealanders claim that analyzing the English version of the Treaty of Waitangi is a difficult task because it is a "short, sparse document, full of ambiguities. . . . Problems of construction and interpretation can easily arise."[77] The choice of words in the Maori text, however, suggests that there was in fact deliberateness because certain terms convey to the Maori not ambiguity, but rather particular messages.[78]

A. *The English Text*

One New Zealand Court of Appeal summed up the Treaty as follows: "[T]he basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated."[79] Specifically, article I in the English text purports to cede to Great Britain the tribal chiefs' sovereignty over their individual territories.[80] Article II states that the tribes should have the "full, exclusive, and undisturbed possession" of their lands and fisheries but allows Great Britain the pre-emptive right to purchase land that the natives wish to sell.[81] Some read the articles I and II as qualifying, and

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75. *Id.*

76. *See* Boast, *supra* note 62, at 243.

77. *Id.* at 243.

78. R.P. Boast, *The Treaty of Waitangi: A Framework for Resource Management Law,* 19 V.U.W.L.R. Monograph 1, 4 (1989); *see also infra* notes 86-107 and accompanying text.

79. New Zealand Maori Council v. Attorney General, [1987] 1 N.Z.L.R. 641, 663.

80. *See* Treaty of Waitangi, *supra* note 1, at 475. The English text of article I provides as follows:

> The chiefs of the confederation of the united tribes of New Zealand . . . cede to Her Majesty, the Queen of England, absolutely, and without reservation, all the rights and powers of sovereignty which the said confederation of individual chiefs respectively exercise or possess, or may be supposed to exercise or to posses, over their respective territories, as the sole Sovereigns thereof.

Id.

81. Treaty of Waitangi, *supra* note 1, at 475. Article II in the English text provides as follows:

> Her Majesty the Queen of England confirms and guarantees . . . the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession. But the chiefs . . . yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to

being somewhat dependent on, one another.[82] Article III extends to the Maori royal protection and affords them the rights and privileges of British subjects.[83] The concluding portion of the text of the English version provides that the Maori understood the provisions of the Treaty.[84]

The Wellington Law Commission describes the Treaty of Waitangi as one that "gave the Crown what it sought: sovereignty and governance over New Zealand. This is a continuing authority and power. What the Maori received in return is likewise ongoing, the continued protection of the rights that the Treaty acknowledged as theirs."[85]

B. *The Maori Text*

The text of the Treaty of Waitangi in the Maori language contains significant linguistic differences.[86] The Waitangi Tribunal asserts that the Maori text "[c]onveyed an intention that the Maori would retain full authority over their lands, homes, and things important to them. . . ."[87]

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treat with them in that behalf.

Id.

Article II was essentially the price paid by Great Britain to obtain sovereignty granted in article I. Palmer, *supra* note 35, at 340.

82. Palmer, *supra* note 35, at 340.

83. Treaty of Waitangi, *supra* note 1, at 475. The text of article III in the English version provides as follows:

> In consideration thereof, Her Majesty, the Queen of England, extends to the natives of New Zealand Her Royal protection, and imparts to them all the rights and privileges of British subjects.

Id.

84. *Id.* The provision provides:

> Now, therefore, we the chiefs of the confederation of the united tribes of New Zealand, being assembled in congress at Victoria in Waitangi, and we, the separate and independent chiefs of New Zealand, claiming authority over the tribes and territories which are specified after our respective names, having been made fully to understand the provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof.
>
> In witness of which, we have attached our signatures or marks at the places and dates respectively specified.

Id.

85. *The Treaty of Waitangi and Maori Fisheries Mataitai: Nga Tikanga Maori Me Te Tititi o Waitangi* A Background Paper, Preliminary Paper No. 9 (Law Commission, Wellington, 1989) para. 755, at 52, *quoted in* Palmer, *supra* note 35, at 341.

86. Translation problems are limited to articles I and II, so this section will not discuss article III. *See supra* note 83 and accompanying text for a discussion of this article.

87. *Orakei Report: Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9), The Waitangi Tribunal, Department of Justice, Wellington, New Zealand (1987), *quoted in* Palmer, *supra* note 35, at 340.

This is in sharp contrast to the English text, which conveys a Maori intention to cede sovereignty to the Crown.[88]

Article I in the Maori text uses the Maori word "kawanatanga" instead of sovereignty.[89] It is unlikely that "kawanatanga" conveys to the Maori the English meaning of sovereignty.[90] Kawanatanga means the "authority to make laws for the good order and security of the country, but subject to an understanding to protect particular Maori interests."[91] Another interpretation of article I as a whole suggests that the Treaty gave the Crown the right to govern its colonists but that authority over the Maori would continue to reside with the "iwi."[92]

Article II in the Maori text uses the word "rangatiratanga," which conveys a much clearer sense of sovereignty than does "kawanatanga,"[93] to designate the rights that would remain with the Maori people.[94] Some activists argue that the language of article II confers "full and exclusive"[95] authority to the Maori. Activists justify this interpretation with the precolonial condition: in 1840 the Maori exercised authority over all of New Zealand and its resources.[96] The Maori text recognizes the rangatiratanga that the Maori had exercised over their people and resources for centuries.[97]

Article II has been the subject of controversy in light of the Crown Principles for Action on the Treaty of Waitangi issued by New Zealand

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88. *See supra* note 80 and accompanying text.

89. Maori Treaty of Waitangi, *supra* note 1, at 84.

90. CLAUDIA ORANGE, THE TREATY OF WAITANGI 40-41 (1987), *quoted in* Boast, *supra* note 78, at 4. The concept of sovereignty in English encompasses much more than the Maori word the translators chose. Unlike "kawanatanga," the English concept of sovereignty includes the right to exercise jurisdiction nationally and internationally. Kawanatanga "tended to imply authority in an abstract rather than a concrete sense." *Id.*

91. *Motunui Report,* Aila Taylor (Te Atiawa, re Motunui), Wai-6, Mar. 1983, *quoted in* Boast, *supra* note 78, at 4.

92. Jackson, *supra* note 27, at 19. "Iwi" means individual tribes. *Id.* Pakeha experts have defined the term kawanatanga. The roots of kawanatanga can be traced to the Bible where it simply means governance. *Id.*

93. Boast, *supra* note 78, at 7; *see also* ORANGE, *supra* note 90, at 41.

94. Boast, *supra* note 78, at 7. "Te tino rangatiratanga" can be said to convey a meaning of "the full authority, or full chieftainship, or maybe complete sovereignty." *Id.* The word rangatiratanga "implies something rather more than a mere right of possession until alienation, and this different terminology in the two texts is of real importance in view of the possibility that" the Maori text may prevail. *Id.*

95. Jackson, *supra* note 27, at 19-20.

96. *Id.* at 20.

97. *Id.*

in 1989.[98] The New Zealand government named five principles: The Principle of Government, or Kawanatanga; The Principle of Self-Management, or Rangatiratanga; The Principle of Equality; The Principle of Reasonable Co-operation; and The Principle of Redress.[99] The first principle states that because the Maori ceded sovereignty, the government has the right to govern and make laws which prioritize Maori rights.[100] The second principle states that New Zealand will protect rangatiratanga, but that protection is subject to the government's right to govern.[101] The third princple recognizes that the Maori and other New Zealanders are equal before the law[102] and that common law shall serve as the basis for this equality.[103] The fourth principle recognizes a partnership between the Maori and the Crown.[104] The fifth principle acknowledges the right to redress grievances under the Treaty through the courts, the Waitangi Tribunal, or direct negotiation with the government.[105]

Some Maori believe that New Zealand has attempted to modify the Treaty, particularly article I and its five principles. There is also particular concern with the government's selection of the common law as an interpretative tool because neither version of the Treaty makes reference to the common law.[106] The Maori believe that their version of the Treaty upholds the status quo of 1840, ensuring that they would share the land with the European settlers, and that the Maori would continue to exercise rangatiratanga over their lands and properties.[107]

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98. *Id.*

99. Palmer, *supra* note 35, at 338.

100. *Id.* at 338-39. The sovereignty recognized in the first principle is qualified by a promise to "accord an appropriate priority" to Maori rights specified in article II of the Treaty of Waitangi. *Id.* at 338.

101. *Id.* at 340-41.

102. *Id.* at 341.

103. *Id.*

104. *Id.* at 342.

105. *Id.*

106. Jackson, *supra* note 27, at 20-21. It is also suggested that there is a fourth article to the Treaty of Waitangi that was not recorded but to which all parties clearly agreed prior to signing. This fourth article was to protect the important laws and customs of Maori society. *Id.* at 21.

107. *Id.*

C. *Effect of the Doctrine of Aboriginal Title*

Some scholars argue that the spirit of the Treaty of Waitangi is merely declaratory of the common law doctrine of aboriginal title[108] and that the doctrine aids in the interpretation of the two texts. The doctrine of aboriginal title provides that regardless of the method of acquisition of a territory, a state takes it subject to the pre-existing property rights enjoyed by the native peoples.[109] Under this theory, the Crown, in essence, acquired New Zealand subject to the pre-existing aboriginal rights.[110] These rights include those related to hunting, fishing, flora collection, occupation and cultivation.[111] The Waitangi Tribunal recognizes the existence of rights other than those specified in the Treaty of Waitangi, specifically, those concerning aboriginal fishing rights.[112] Because the doctrine of aboriginal rights has a common law basis,[113] the voluntary sale, cessation by the aboriginal owners, or statutory elimination of the common law right can extinguish aborignial title.[114]

Aboriginal rights are property rights the Maori could claim without benefit of any treaty.[115] The doctrine creates burdens on the legal title to parcels of New Zealand land.[116] As an inherent right, the aboriginal right to property is not dependent upon statutory recognition.[117] This undermines arguments that the Treaty of Waitangi is only applicable where the state has adopted it by passing a statute.[118] In fact, the doctrine of aboriginal title clarifies the extent of Maori rights outlined in the

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108. P.G. McHugh, *Aboriginal Servitudes and the Land Transfer Act 1952*, 16 V.U.W.L.R. 313, 316-17 (1986) [hereinafter McHugh, *Aboriginal Servitudes*].

109. *Id.* at 316.

110. *Id.* at 317. One scholar argues that the reach of the doctrine of aboriginal title has been extinguished for territorial claims because the common law has been overridden by specific New Zealand statutes, such as the Maori Affairs Act 1953, 8 R.S.N.Z. 705 (1960), which superseded the Native Land Act 1909. *See* P.G. McHugh, *The Constitutional Role of the Waitangi Tribunal,* 224 N.Z.L.J., July 1985, 224-25. However, even this position recognized that the right may still remain for non-territorial claims. *Id.* The doctrine is still helpful in analyzing the intent of the written treaty.

111. *Id.*

112. *See* Te Weehi v. Regional Fisheries Officer, 1 N.Z.L.R. 680 (1986); *see also* Kenderdine, *supra* note 51, at 303.

113. McHugh, *Aboriginal Servitudes, supra* note 108, at 317.

114. *Id.*; *see, e.g.*, The Queen v. Symonds, 1847 N.Z.P.C.C. 387, 388.

115. *See* McHugh, *Aboriginal Servitudes, supra* note 108, at 317.

116. *Id.* A grant of land title by the Crown is taken subject to the aboriginal right. *Id.*

117. P.G. McHugh, *Aboriginal Rights and Sovereignty: Commonwealth Developments,* N.Z.L.J., Feb. 1986, at 57 [hereinafter McHugh, *Aboriginal Rights*].

118. *Id.*

Treaty of Waitangi. Where the intent of the Treaty is unambiguous, this doctrine provides interpretative guidance.

Although the New Zealand Court of Appeals has not resolved definitively the question of aboriginal rights, it is likely that courts will eventually recognize the doctrine.[119] In the 1877 case of *Wi Parita v. Bishop of Wellington,*[120] the court found that rights based upon aboriginal title were nonexistent. The 1986 decision of *Te Weehi v. Regional Fisheries Officer,*[121] however, held that the Maori could exercise "customary rights."[122] The defendant asserted that he was not bound by the Act's regulations because he was exercising his traditional Maori rights.[123] The court held that because the statute at issue, the Fisheries Act, did not expressly extinguish the Maori customary fishing right, that right continued to exist.[124] Given the court's willingness to recognize customary rights, this case suggests that, in a proper case, the courts may be willing to recognize the analogous doctrine of aboriginal rights.[125]

IV. ANALYSIS OF THE TREATY

Although New Zealand courts originally held the Treaty of Waitangi a nullity,[126] they officially recognized it by passing the Treaty of

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119. F.M. Brookfield, *Maori Rights and Two Radical Writers: Review and Response,* N.Z.L.J., Nov. 1990, at 406.

120. 3 N.Z. Jur. Rep. (n.s.) 72 (S.C. 1877).

121. 1 N.Z.L.R. 680 (1986). *Te Weehi* involved a member of the Ngai Tahu tribe who was convicted of violating the Fisheries Act. *Id.* at 682. The Fisheries Act of 1983 prohibits the possession of fish that are smaller than regulations allows. *Id.* Section 88(2) of the act specifies that the provisions of the act do not affect Maori fishing rights. *Id.* at 683. The defendant was convicted of having undersized paua and acting in a threatening manner toward a fisheries officer. *Id.* The defendant had collected the fish for immediate consumption. *Id.*

122. *Id.* The defendant claimed as a defense that he had a Maori fishing right to collect shellfish off the Motunau Coast for "personal and family consumption." *Id.* at 682. Customary rights are generally those arising "by the traditional possession and use enjoyed by Maori tribes prior to 1890." *Id.* at 686.

123. *Id.* at 683.

124. *Id.* at 681; *see also* Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, 107 D.L.R.3d 513, 552 (1979) (Can.) (test is whether legislation "expressed a clear and plain intention to extinguish that right"), *cited with approval in* Te Weehi v. Regional Fisheries, 1 N.L.Z.R. 680, 691 (1986).

125. *See* Huakina Development Trust v. Waikato Valley Authority, 2 N.Z.L.R. 188, 206 (1987) (holding that the Waikato Valley Authority's Planning Tribunal should consider evidence pertaining to traditional relationships of the Maori with natural water bodies in granting water rights).

126. *See supra* note 20 and accompanying text; *see also* Wallace, *supra* note 52, at 13 (By the turn of the century a British governor had labeled the Treaty of Waitangi a

Waitangi Act of 1975.[127] The Act directs the Waitangi Tribunal to identify claims that are inconsistent with the Treaty.[128] While the Tribunal has recognized the validity of some claims, it has avoided the precarious position of full enforcement of the Treaty. The Waitangi Tribunal has not undertaken the task, for instance, of determining which of the two different texts is applicable because the government directed it to accept both.[129]

A. *Legal Validity of the Treaty*

1. The Treaty of Waitangi is a Treaty Subject to the Rules of International Law

Some scholars contend that the Treaty of Waitangi is not a treaty at all because: 1) the Maori did not belong to a state capable of making a treaty; 2) Great Britain actually took New Zealand by conquest; 3) the Treaty is not incorporated into domestic law; and 4) the Treaty of Waitangi, despite its name, is simply not a treaty.[130] Other scholars believe that New Zealand's Chief Justice Martin and Justice Richmond resolved the issue of the Treaty's validity when they declared it valid and binding in the case of *The Queen v. Symonds*.[131] Besides the *Symonds* case, however, there has been little judicial recognition of the Treaty.[132]

"nullity.")

127. Kenderdine, *supra* note 51, at 303. Section 6(1) of the Treaty of Waitangi Act of 1975 provides:

> Jurisdiction of the Tribunal to consider claims—where any Maaori claims that he or any group of Maaoris of which he is a member is or is likely to be prejudicially affected—
>
> (a) by any Act, regulations or Order in Council, for the time being in force, or
>
> (b) by any [sic] policy or practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted or on behalf of the Crown: or
>
> —and that the Act, regulations or Order in Council or the policy, practice or Act is inconsistent with the principles of the Treaty he may submit that claim to the Tribunal under this section . . . .

Id.

128. *See id.*

129. *See id.*

130. *See generally* Betty Carter, *The Incorporation of the Treaty of Waitangi into Municipal Law*, 4 AUCKLAND U.L. REV. 1 (1980).

131. 1847 N.Z.P.C.C. 387. *Symonds* concerned a suit between two officials of the colonial government brought to determine whether the previous governor had the authority to waive the court's rights to preemption. *Id.* Various scholarly articles have supported the court's position as to the Treaty's validity. Williams, *supra* note 25, at 387.

132. Carter, *supra* note 130, at 1.

The inclusion of the word "treaty" in the title of the document may be substantial evidence that the parties intended the Treaty of Waitangi to be legally binding. As United States Supreme Court Justice Marshall stated in *Worcester v. Georgia*:[133] "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each *a definite and well understood meaning*."[134] Because the language of the United States and Great Britain is the same, for the most part, this principle arguably would apply to the use of the word "treaty" in the present case as well.

A treaty is an agreement between two or more subjects of international law which produces legal effects or creates rights and obligations.[135] Treaties are a source of "special" or "particular" law, applicable to the parties to the agreement, which supplant general law.[136] Treaties, in contrast to conventions, pacts, acts, declarations, or protocols, are the most formal type of international agreement.[137] Generally, a treaty requires the same elements that binding private contracts require: 1) a legal objective; 2) consent; and 3) capacity.[138] In addition, Article 3 of the Vienna Convention requires treaties to be in writing to be enforceable under the Convention.[139]

The Treaty of Waitangi meets the criteria of a valid, enforceable treaty. First, the Treaty of Waitangi clearly creates rights and obligations for both parties. Great Britain obtained the right for its citizens to settle in the territory, sovereignty over at least its own people and lands, and the right of pre-emptive purchase of property.[140] There is no suggestion that cessation of land or sovereignty would not be a legal objective. Great Britain undertook an obligation to "confirm and guarantee" the exclusive and undisturbed possession of the land possessed by the Maori.[141] The Maori would retain rights to their lands, fisheries, and peo-

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133. 31 U.S. (6 Pet.) 515 (1832).

134. *Id.* at 559 (emphasis added).

135. Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 Rec. des Cours 35-37 (1978), *reprinted* in LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 389, 390-91 (2d ed. 1987) [hereinafter International Law: Cases and Materials].

136. *See* J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 57 (6th ed. 1963).

137. *Id.* at 317.

138. *Id.* at 317-18.

139. Vienna Convention, *supra* note 24, art. 3, 8 I.L.M. at 681-82.

140. *See infra* notes 194-209 and accompanying text; *supra* notes 79-80 and accompanying text.

141. *See infra* notes 194-209 and accompanying text; *see supra* note 81 and accompanying text.

ples, and would have the rights and privileges of British citizenship.[142] Second, the Treaty is a written instrument entered into with the consent of both parties.[143] Third, the parties had legal capacity to enter into the agreement.[144] Finally, because the document allegedly involved the cessation of land or sovereignty or both, a less formal international agreement would not have sufficed.[145]

2. The Maori Belonged to a State Capable of Entering into a Treaty

Article I of the Vienna Convention states that its rules apply to treaties between states.[146] Article VI establishes that every state has the capacity to enter into treaties.[147] A state is "a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on."[148] The Third Restatement on the Foreign Relations Law of the United States establishes four criteria for statehood: 1) a defined territory; 2) a permanent population; 3) that the territory be under the control of its own government; and 4) that it engages, or has the capacity to engage, in relations with other states.[149]

One of two different theories usually determines the existence of statehood. The first is the constitutive theory, which looks to other states' acts of recognition to ascertain whether an entity is a state.[150] Under this theory, existing states essentially create new states. Applying this theory

142. *See infra* notes 194-209 and accompanying text.

143. *See supra* notes 80-84.

144. *See infra* notes 155-69 and accompanying text.

145. De Aréchaga, *supra* note 135, at 391. De Aréchaga refers to a situation concerning the cessation of a small piece of land by France to Switzerland to enlarge the Geneva Airport. *Id.* Despite the triviality of the agreement, a treaty had to be concluded because there was a cessation of sovereignty of state territory. *Id.*

146. Vienna Convention, *supra* note 24, art. 1, 8 I.L.M. at 680. Although article 4 of the Vienna Convention states that the Convention is not retrotactive, the principles embodied in it are still highly persuasive as statements of the general and customary rules of international law. *See id.* arts. 3-4, at 681-82.

147. *Id.* art. 6, at 682.

148. BRIERLY, *supra* note 136, at 126.

149. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 201 (1986); *see also* Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19; BRIERLY, *supra* note 136, at 137.

150. INTERNATIONAL LAW: CASES MATERIALS, *supra* note 135, at 231. The flaw with this theory becomes apparent when one state recognizes statehood while others refuse to do so. *See* BRIERLY, *supra* note 136, at 138. Lack of official recognition does not mean, however, that a state has no rights or duties under international law. *Id.* at 138-39.

to the instant circumstances, Great Britain's act of negotiating a treaty with the Maori tribal leaders evidences Great Britain's recognition of the Maori's statehood. Although some authorities question the capacity of the Maori tribal leaders to enter into treaties, Great Britain's willingness to execute the Treaty of Waitangi can be considered evidence that Great Britain believed that the Maori belonged to a sovereign nation and that it recognized Maori statehood.

The second, more widely supported theory, is the declaratory theory.[151] The declaratory theory evaluates the facts to determine whether the criteria of statehood are evident.[152] Under this theory, a state may exist even if other states do not formally recognize it.[153] Moreover, a state meeting the conditions of statehood cannot be denied its rights, or escape its obligations, under international law merely because of non-recognition by other states.[154]

In 1840, the Maori were a people with a defined territory and therefore met the first qualification for statehood under international law.[155] The territory of a state need not have precisely identified boundaries.[156] The Maori claimed all of New Zealand and inhabited considerable territory.[157] The New Zealand courts have recognized this. In the case of *Tamihana Korokai v. Solicitor General,*[158] for example, the court stated that for every part of New Zealand, there was a native owner.[159]

The more than 200,000 Maori residing in New Zealand in 1840 fulfilled the criteria of a permanent population under international law.[160] Today the international community regards states with small populations, such as Nauru with a population of 8,000, and Liechtenstein, with a population of 28,000, as meeting the population requirements for statehood.[161]

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151. *Id.* at 139.
152. *Id.*
153. *Id.*
154. *Id.*
155. *See supra* note 149 and accompanying text.
156. U.N. SCOR 3, Sess., 383d mtg., No. 128, at 9-12 (1948) (statements of Philip C. Jessup), *reprinted in* INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 233. These statements were made advocating the admission of Israel to the United Nations. *Id.* at 232. Many states, including the United States, began existence while their frontiers were unsettled. *Id.* at 233. Yet, the existence of the United states was never questioned before its final boundaries were determined. *Id.* at 234.
157. *See infra* note 205 and accompanying text.
158. 32 N.Z.L.R. 321 (1913).
159. *See* Carter, *supra* note 130, at 3.
160. *See supra* note 27 and accompanying text.
161. INTERNATIONAL LAW: CASES AND MATERIAL, *supra* note 135, at 234.

The most frequent question is whether a government controlled the Maori in 1840.[162] The Maori were not a people without law; they were governed by Maori law which the various tribes executed.[163] One example of the existing governmental structure was a well defined system of land ownership.[164] Another example was the Maori system of land conservation, which was advanced for its time.[165] There were also two religions present among the Maori people.[166] The Maori of 1840 were a people with a structured society under a legal system that had been in place for a substantial period of time.[167] That the Maori legal procedures differed from the adversarial system in other states is insufficient cause to deny existence of the Maori government. Indeed, the contemporary proceedings of the Waitangi Tribunal take into account the legal system, language, and history of the Maori.[168]

Arguably, capacity to enter into relations with other states is evidenced by the Treaty's existence and the fact that more than five hundred tribal chiefs signed the document. The fact that the tribal leaders signed the Treaty only because article I, which designates Great Britain's rights, used the word "kawanatanga" instead of "rangatiratanga," also evidences a capacity to engage in foreign relations.[169]

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162. Carter, *supra* note 130, at 3.

163. Jackson, *supra* note 27, at 15-16. When the settlers arrived, they did not find a system of police, courts, judges, and lawyers and assumed, therefore, that the Maori had no law. *Id.* at 15. Yet, there were mechanisms well practiced by the Maori to make agreements and insure that enforcement would be available. *Id.* at 15-16; *see also* Joe Williams, *Chapman is Wrong*, N.Z.L.J., Oct. 1991, at 370, 373 ("Nor would anyone have suggested that the tribes were not *in fact* self-governing. Any attempt at the time of the Treaty's signing to take land without purchase or supplant tribal government without consent would have led to war with little doubt as to the victors.").

164. Carter, *supra* note 130, at 2-5.

165. *Id.* at 4-5; Jackson, *supra* note 27, at 15-16.

166. Carter, *supra* note 130, at 6-7.

167. *Id.* at 4-5; Jackson, *supra* note 27, at 15-16.

168. Kenderdine, *supra* note 51, at 300; *see also* Durie, *supra* note 52, at 64-66 (explaining the process when a claim is heard by the Waitangi Tribunal).

169. Carter, *supra* note 130, at 2; *see also* Jackson, *supra* note 27, at 18-19. Additional support for the proposition that the 1840 Maori were a nation capable of entering into a treaty may be found by analogy to the United States treatment of Native American tribes as independent nations. The United States government continues to regard American Indian tribes as independent nations, and has established exclusive relations with the Indians. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832). *See generally* Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991). Many early United States treaties with American Indian tribes were similar to the Treaty of Waitangi and often recognized the national character of a tribe, the right of self-government, guarantees of land, and the duty of protection

3. Validity of Treaties with Non-States

Even if the Maori did not meet the criteria for statehood under Article 1 of the Vienna Convention, the treaty is nevertheless enforceable. Support for this proposition arises by analogy to other situations in which non-states were recognized as parties to enforceable treaties. The International Court of Justice has held that a state and an international organization may conclude treaties.[170] In the jurisdictional phase of the *South West Africa Cases*, for example, the court held that the League of Nations could be a party to a treaty.[171] The United Nations Convention on Treaties Concluded Between States and International Organizations also recognizes the ability of organizations to enter into valid, enforceable treaties with states.[172] Thus, meeting the Vienna Convention's criteria for statehood is not a requisite for recognizing a treaty. Even if the Maori were not a "state" in 1840, the agreement with Great Britain is a treaty enforceable under international law.

4. Incorporation into Domestic Law

Generally there are two steps in making a treaty: signature by the parties and ratification by the heads of states.[173] Ratification, however, is not always a prerequisite to establishing a treaty's validity internationally or domestically.[174] "There is no legal nor even a moral duty on a state to ratify a treaty. . .; it can only be said that refusal is a serious step which ought not be taken lightly."[175] Any arguments that Great Britain's lack of ratification invalidated the Treaty are unpersuasive because Great Britain enjoyed the Treaty's benefits.[176]

In *Te Heuheu Tukino v. Aotea District Maori Land Board*, the New Zealand Privy Council held that even if the Treaty of Waitangi is valid, it does not become part of domestic law unless statutes give it effect.[177]

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pledged by the United States. *See Worcester*, 31 U.S. at 556.

170. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. Pleadings 4; *see also* Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1 (1978).

171. South West Africa Cases, 1966 I.C.J. at 4.

172. *See* United Nations Convention on Treaties Concluded between States and International Organizations, art. 6, U.N. Doc. A/Conf.129/15 (Mar. 20, 1986).

173. BRIERLY, *supra* note 136, at 319.

174. *Id.* at 320-21; MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 130 (5th ed. 1984).

175. BRIERLY, *supra* note 136, at 320.

176. Carter, *supra* note 130, at 8-10.

177. 1941 N.Z.L.R. 590, 596-97.

New Zealand Maori Council v. Attorney-General undermines this position, however, by holding that section 9 of the State-Owned Enterprises Act precludes land transfers that are "inconsistent with the principles of the Treaty of Waitangi."[178] Furthermore, in *Huakina Development Trust v. Waikato Valley Authority*, the court relied on the Treaty of Waitangi as authoritative "extrinsic material," even in the absence of reference in a statutory scheme.[179] Additionally, under international law, New Zealand cannot assert lack of incorporation into domestic law as a defense to fulfilling its treaty obligations.[180]

B. *The Rule of Pacta Sunt Servanda*

The international law principle of *pacta sunt servanda* states the basic premise that parties are expected to perform the international obligations to which they are bound.[181] This rule of customary international law is also stated in article 26 of the Vienna Convention.[182] Great Britain's stated policy was to abide by its treaties with indigenous peoples and to expect the natives to fulfill their obligations as well.[183] The Crown, however, has historically ignored the good faith requirement of *pacta sunt servanda* and, until recently, has made little attempt to honor its treaty obligations with the Maori.

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178. [1987] 1 N.Z.L.R. 641, 642.

179. [1987] 2 N.Z.L.R. 188, 210. The court stated:

> There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

Id.

180. Vienna Convention, supra note 24, art. 46, 8 I.L.M. at 697. The text of article 46(1) provides:

> A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

181. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 433.

182. Vienna Convention, *supra* note 24, art. 26, 8 I.L.M. at 690. The text of article 26 provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." *Id.*

183. *Worcester*, 31 U.S. at 547-48. Justice Marshall referred to the general views of Great Britain as expressed by Superintendent Stuart, of Indian Affairs, at a speech given in Mobile, Alabama. *Id.* at 547.

C. *The Rule of Contra Proferentum*

International law principles also resolve the question of which version of the text of the Treaty of Waitangi should prevail. Under the rule of *contra proferentum,* the Maori text should prevail because the Maori text played the "predominant role" in securing the signatures of the various chiefs.[184] This rule conflicts with the Treaty of Waitangi Act of 1975, which gives equal weight to both versions of the text.[185] The Waitangi Tribunal, however, gives some effect to the Maori text and recognizes the principles set out in the analogous United States Supreme Court case of *Jones v. Meehan.*[186] The rule in *Jones* was that treaties with native peoples should be interpreted "in the sense in which they would naturally be understood by the Indians."[187] This rule expresses a preference to the text of a treaty that is in the language of the indigenous people.

Despite the fact that the Treaty of Waitangi Act of 1975 requires that the Waitangi Tribunal take into account both versions of the Treaty, it is apparent that under the rule of *contra proferentum,* the Maori text should take precedence. One scholar has stated that "[f]or too long all academic discussion of the Treaty has proceeded on the incorrect assumption either that the English text is the Treaty or that it is an accurate translation of the Treaty."[188]

Article 31 of the Vienna Convention, which states the international law principle that the text of a treaty is assumed to be the intention of the parties, underscores the importance of the text.[189] Article 33 of the Vienna Convention, moreover, provides that when parties authenticate a treaty in two or more languages, each text is equally authoritative unless the treaty provides otherwise.[190] The majority of the Maori did not au-

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184. Boast, *supra* note 78, at 7 n.24. This rule clarifies any possible uncertainty of which text prevails, even as to tribes which signed both texts.

185. *Id.*

186. Jones v. Meehan, 175 U.S. 1 (1899). Scholars and judicial authority alike find United States cases persuasive because of the similarity of experiences with indigenous peoples.

187. *Id.* at 5.

188. Williams, *supra* note 25, at 47.

189. Vienna Convention, *supra* note 24, art . 31, 8 I.L.M. at 692-92. New Zealand is a party to the Vienna Convention. Article 31(1) states the general rule of treaty interpretation to be that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* Article 31(3)(c) also gives effect to "any relevant rules of international law applicable in the relations between the parties." *Id.*

190. *Id.* art. 33, at 692-93.

thenticate both texts of the Treaty. Great Britain signed both texts, but only thirty Maori tribes signed both the English and Maori texts.[191] Over 500 of the tribes signed only the Maori version of the Treaty of Waitangi.[192] Under article 33, the Maori text would prevail because that was the only version of the text of the treaty which both parties authenticated.[193]

D. *Rights Under the Treaty*

1. The Right of Sovereignty

The issue of sovereignty is the heart of the textual differences. Prior to colonization New Zealand was populated by a distinct people with their own institutions and government. The general rule concerning discovery of new territories during the era of European colonization was that the discovering government obtained title against all other European nations, but discovery did not affect the rights of those already in possession of the territory.[194] Contrary to this general rule, the English version of the Treaty claims a cessation of all Maori sovereignty. The Maori text, in contrast, uses the word rangatiratanga[195] to identify the sovereignty remaining with the Maori.

2. The Preemptive Right To Purchase Maori Land

Article II of the Treaty of Waitangi provides that the Maori yielded to Great Britain the "exclusive right of preemption" to lands that the Maori were willing to alienate.[196] The general rule with respect to colonization was that the Crown would possess the exclusive right to purchase those lands that the native peoples were willing to sell, and no more.[197] This right of preemption was central to the 1847 case of *The Queen v. Symonds,*[198] a decision New Zealand ignored for many years.

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191. Boast, *supra* note 78, at 7.

192. *Id.*

193. There is no reason to believe that the 30 tribes that signed the English text could bind the 500 who did not sign that version. Furthermore, the rule of *contra proferentum* suggests that the native language is controlling regardless of how many signed both versions. *See supra* note 184 and accompanying text.

194. *Worcester,* 31 U.S. at 543-44.

195. *See supra* notes 93-95 and accompanying text.

196. Treaty of Waitangi, *supra* note 1.

197. *Worcester,* 31 U.S. at 544-45.

198. 1847 N.Z.P.C.C. 387. This case was brought by two colonial government officials to settle the dispute among the settlers as to the validity of land titles that had not been obtained from the Crown. It is important to note that the case involved two Europe-

That decision has since emerged as the central authority for the determination of the rights under the Treaty of Waitangi.[199] *Symonds* examined whether a governor could waive Great Britain's right of preemption under the Treaty of Waitangi.[200] The purpose of the right to preemption was to provide that all lands the Maori were willing to sell would become the absolute property of the Crown.[201] Individuals who purchased land from the Maori lost title to Great Britain *R. v. Symonds* held that "[p]urchases of land by subjects from Natives are good against the Native seller . . ., subject to legislative provisions—but not against the Crown."[202] Most important about the *Symonds* decision is that the Maori title to land was never in question and that all parties explicitly recognized this fact.[203] The only question remaining in *Symonds* was who would benefit from the sale of land by the Maori.

The preemption right does not apply to lands that did not belong to the Maori in 1840; those lands automatically became the property of Great Britain.[204] The critical question is what constitutes unappropriated, or surplus lands. The Maori claim that all of New Zealand was Maori land: "The realities of Maori land ownership and land values are thus: 'It may fairly be stated that, in pre-European days, there was no area of land that was not claimed by some tribe.' "[205] Great Britain used the pre-emptive right, however, to dispossess the Maori of these claimed land holdings.[206] This use violated Great Britain's good faith obligation with respect to the right of pre-emption, as it classified all lands as surplus unless the Maori were using the land as a home, for crops, or for herds.[207] As a result, Great Britain confiscated huge tracts of Maori land during the nineteenth century by classifying them as unused.[208] The tracts of land that the British unjustly took must be considered when considering Maori claims under the Treaty of Waitangi.

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ans, rather than a Maori asserting rights under the treaty. Williams, *supra* note 25, at 388-89.

199. Williams, *supra* note 25, at 385.

200. *Id.* at 389.

201. *Id.* at 390-91 (citing a memorandum by the Chairman of the 1948 Royal Commission on Surplus Lands, 1948 A.J.H.R).

202. *Id.* at 390.

203. *Id.* at 391.

204. *Id.*

205. Williams, *supra* note 25, at 394 (quoting PETER ADAMS, FATAL NECESSITY, BRITISH INTERVENTION IN NEW ZEALAND 1830-1847, at 176-77 (1977)).

206. *See id.* at 395-96.

207. *Id.* at 396.

208. *Id.* at 396-97.

3. Rights and Privileges of British Citizenship

Article III grants the Maori the rights and privileges of British citizens. Great Britain commonly used this language in treaties with indigenous people to preclude competition from other European nations for the newly discovered territory.[209] It was well known that the natives did not fully comprehend, or even consider it material, that they were subjects of Great Britain, so long as all parties understood that their independence was undisturbed and that their right to self-government remained intact.[210] Because there is no reason to believe that Great Britain conducted its relations any differently in its New Zealand colonization efforts than it had with the North American Indians, the article III rights and privileges of British citizenship were probably intended to have limited apolization to the Maori.

V. SOLUTIONS

A. *Domestic Solutions Employed by Other States*

Indigenous peoples of various states have initiated substantial litigation to enforce their rights to land[211] and to establish governmental recognition of their rights to self-government. The Màori, in a position similar to that of indigenous peoples of other states, have a constitutional relationship with the government of New Zealand[212] and may find Canadian and United States resolutions of their problems with indigneous peoples to be instructive. Some authorities, however, have suggested that the Maori could never achieve to the type of relationship the American Indians have with the United States government[213] because the inherent characteristics of the New Zealand government make such a relationship impossible.[214]

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209. *See Worcester,* 31 U.S. at 546-47.

210. *Id.* at 547. Justice Marshall stated that the Indians were:

> [n]ot well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects . . . so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country: and this was probably the sense in which the term was understood by them.

Id. at 546-47.

211. *See* McHugh, *Aboriginal Rights, supra* note 117, at 58.

212. *See id.*

213. *See, e.g., id.* at 61-63.

214. *See id.* McHugh argues that the inherent distinction between political and legal

The United States and Canada share similar histories, policies, and legal treatment of the Native North Americans.[215] Both states have engaged in similar legal challenges to determine the rights of their indigenous peoples displaced from tribal lands. For example, litigation in the United States in *Worcester v. Georgia*[216] addressed certain treaty obligations. In Canada, a court recently considered the doctrine of aboriginal title in the case *Guerin v. The Queen.*[217] The future of Native American rights in the United States may appear uncertain considering the Supreme Court's reluctance to review federal actions concerning tribes, but Congress' apparent support of tribal rights may mitigate this reluctance.[218] In contrast, the Canadian Parliament made progress when it codified aboriginal rights in the 1982 Constitution Act.[219] Furthermore,

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sovereignty makes the Crown's sovereignty exclusive and exhaustive, whereas in the United States, those concepts are blended into one which makes a sharing of sovereignty possible. *Id.*

According to the Vienna Convention, which is a codification of many of the rules of customary international law, New Zealand is unable to claim its domestic law as a valid reason for avoiding treaty obligations. Vienna Convention, *supra* note 24, art. 46, 8 I.L.M. at 697. A state's claim at a later date that it is possible under their system of government to allow to a treaty does not justify circumventing the rule of *pacta sunta servanda. Id.* Article 61 of the Vienna Convention discusses impossibility as a reason for avoidance but does not encompass the position that New Zealand argued for denying the Maori their rights pursuant to the Treaty of Waitangi. *Id.* art. 61, at 702. *See id.* art. 61(1), at 702. Article 61(1) provides:

> A Party may invoke the impossibility of performing a treaty as a ground for terminality or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for supending the operation of the treaty.

Id.

215. Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians,* 66 WASH. L. REV. 643, 643 (1991).

216. 31 U.S. (6 Pet.) 515 (1832). Worcester was indicted for residing in the Cherokee nation without a license or permit. *Id.* at 515. Worcester was preaching the gospel with the permission of the Cherokee. *Id.* He claimed that by virtue of treaties entered into between the United States and the Cherokee, the Cherokee were an independent nation and Georgia had no jurisdiction over their territory. *Id.* The Court agreed and reversed the conviction. *Id.* at 562-63.

217. [1984] 2 S.C.R. 335 (holding that aboriginal title was a preexisting legal right that was not created by Great Britain).

218. Johnson, *supra* note 215, at 643. *See generally* Matthew D. Wells, Sparrow *and* Lone Wolf: *Honoring Tribal Rights in Canada and the United States,* 66 WASH. L. REV. 1119 (1991).

219. R.S.C. app. II, No. 44 (1985) (Can.); *see also* Errol P. Mendes, *Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights,* 20 ALBERTA L. REV.

the Canadian Supreme Court has chosen to carefully scrutinize state actions that impact those rights.[220] Because the United States and Canada have already addressed many crucial aspects of treaty interpretation and sovereignty, they should serve as models for a domestic resolution of the Maori-New Zealand dispute.[221]

1. The Right to Self-Determination: The United States and Canadian Models

Since 1970 every United States President and administration has embraced a policy of self-determination[222] and allowed American Indians to retain the right to govern member Indians on Indian owned lands.[223] Tribes posses all powers of self-government except those clearly altered by Congress.[224] Thus, the governmental powers retained by the tribes are still quite substantial, as set forth in the case of *Montana v. United States*:[225]

> [I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . .
>
> . . . Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations . . . [and] . . . may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members . . . .[226]

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383 (1982).

220. Johnson, *supra* note 215, at 643.

221. One advocate, stressing the importance of Maori sovereignty stated: "For the Maori, without sovereignty we are dead as a nation. It is not sovereignty or no sovereignty. It is sovereignty or nothing. We have no choice." DONNA AWATERE, MAORI SOVEREIGNTY 32 (1984), *quoted in* Kelsey, *supra* note 3, at 102.

222. Johnson, *supra* note 215. at 663.

223. *Id.* at 666. *See* Duro v. Reina, 459 U.S. 676 (1990) (holding that tribal courts lack jurisdiction over non-member Indians). *But see* Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1991) (legislatively reversing Duro for one year). *See generally* Peter Fabish, *The Decline of Tribal Sovereignty: The Journey From Dicta to Dogma in* Duro v. Reina, 110 S.Ct. 2053 (1990), 66 WASH. L. REV. 567 (1991); Elizabeth A. Pearce, *Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law*, 22 COLUM. HUM. RTS. L. REV. 361 (1991).

224. Johnson, *supra* note 215, at 700.

225. 450 U.S. 544, 564-66 (1981).

226. *Id.* at 564-65.

Canadian relations with the North American Indians developed in a different manner from those of the United States. Self-determination became an alternative only recently.[227] Canadian politicians historically have argued that Canada could not compromise territorial sovereignty in any respect.[228] The Indian Act of Canada[229] creates a band council system which results in minimal rights of self-governance among the Native Indians.[230] More recent developments suggest that the government will eventually adopt a system that recognizes the rights of Indian peoples to self-government.[231] Efforts at initiating more expansive authority have not yet proved successful, and there Canada has yet to establish tribal courts or to address environmental concerns, unlike the United States.[232]

Some speculate, however, that Canada could recognize a form of native self-government on a basis other than that of traditional territorial sovereignty.[233] Canada already employs nonterritorial sovereignty in the areas of criminal law, income taxation on the basis of citizenship, diplomatic immunity, sovereign immunity, admiralty law, and military law.[234] What is critical is not Canada's present failure to establish a more expansive right to self-government, but rather its trend toward recognizing self-determination.

2. Prior Treaty Interpretation

The Canadian rules for interpretation of treaties with Indians are similar to those developed in the United States. Generally, the plain meaning should control, but, where the meaning is not plain, the terms should be resolved in favor of the Indian.[235] This construction compels Canadian courts to hold that Indian treaties do not expire for lack of

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227. Johnson, *supra* note 215, at 710-11. *See generally* Michael Hartney, *Some Confusions Concerning Collective Rights*, 4 CAN. J.L. & JURIS. 293 (1991).

228. Geoff R. Hall, *The Quest for Native Self-Government: The Challenge of Territorial Sovereignty*, 50 U. TORONTO FAC. L. REV. 39, 40 (1992).

229. Civilization of Indian Tribes Act of 1857, Ch. 26, 1857 S.C. 84 (Can.); *see also* Richard H. Bartlett, *The Indian Act of Canada*, 27 BUFF. L. REV. 581 (1978).

230. *See* Johnson, *supra* note 215, at 709-10.

231. *Id.* at 710-11.

232. *Id.* at 712.

233. Hall, *supra* note 228, at 39.

234. *Id.* at 39, 41-60.

235. *See* Johnson, *supra* note 215, at 670-71; Nowegijick v. The Queen, [1983] 1 S.C.R. 29 (Can.); The Queen v. Simon, [1983] 2 S.C.R. 387 (Can.); Attorney General of Quebec v. Regent Sioux, [1990] 1 S.C.R. 1025 (Can.). For a discussion of United States treaty interpretation policies, see Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

use,[236] and in light of recent decisions, there is some doubt as to whether treaty obligations can be modified or terminated.[237]

The United States resolved nearly all issues of aboriginal title through the use of treaties and the 1946 Indian Claims Commission Act.[238] United States courts also recognized the doctrine of aboriginal title in cases such as *Johnson v. M'Intosh.*[239] In Canada, however, many claims based on aboriginal title still exist in Canada because Canada has not established a body equivalent to the United States Indian Claims Commission.[240] Canadian courts have upheld aboriginal rights, however, at least since the passage of the 1982 Constitution Act which recognizes and affirms the rights of Indians.[241]

In *Guerin v. The Queen,*[242] for example, the court found the doctrine of aboriginal servitudes to be a pre-existing legal right which relied on no affirmative action by the Crown.[243] The full effect of the plurality decision in *Guerin* is uncertain,[244] perhaps because Judge Dickson's concurring opinion attracts the most attention:

> The Crown's fiduciary obligation to the Indians is therefore not a trust.

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236. Attorney General of Quebec v. Regent Sioux, [1990] 1 S.C.R. 1025 (Can.).

237. Johnson, *supra* note 215, at 673. This position is in contrast to the United States Supreme Court position that Congress has the plenary power to terminate Indian treaties for any reason. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The Canadian approach may help the Maori in establishing the validity of their land claims.

238. Pub. L. No. 79-726, 60 Stat. 1049. The commission was terminated in 1978. Johnson, *supra* note 215, at 680 n.194.

239. 21 U.S. (8 Wheat.) 543, 574 (1823). Chief Justice Marshall stated that:

> They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

Id.

240. *See* Johnson, *supra* note 215, at 683.

241. *Id.* at 682-83.

242. [1984] 2 S.C.R. 335 (Can.). The facts of *Guerin* involved the Musqueam Indian Band which had surrendered reserve land to be leased as a golf course. The land was eventually leased on terms less favorable than those originally agreed to, without the band's consent. *Id.; see also* Richard H. Bartlett, *The Fiduciary Obligation of the Crown to the Indians,* 53 SASK. L. REV. 301 (1989); Darlene M. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples,* 18 OTTAWA L. REV. 307 (1986) [hereinafter Johnston, *A Theory*]; John Hurley, The *Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen,* 30 MCGILL L. REV. 559 (1985).

243. [1984] 2 S.C.R. 335, 336 (Can.).

244. *See* Johnston, *A Theory, supra* note 242, at 690.

> To say as much is not to deny that the obligation is trust-like in character. . . . The . . . relationship . . . bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands . . . . I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis.* Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.[245]

In the case affirming Indian rights, *Regina v. Sparrow,*[246] the court found that heavy governmental regulation in itself does not extinguish fishing rights.[247] These two cases, combined with the 1982 Constitution, represent major steps toward recognizing the rights of indigenous peoples in North America.

Another major step is the Canadian Charter of Rights and Freedoms,[248] which recognizes and affirms aboriginal and treaty rights, and actually serves as the model for New Zealand's draft bill of rights. Although the Charter is plagued with controversy,[249] Canadians appear to be on the verge of including some form of self-government within the meaning of aboriginal rights under section 35.[250] At the very least, there are indications that aboriginal rights will be interpreted as including some form of self-government—even if not as expansive as the system of self-government which has evolved in the United States.[251]

Neither the United States nor Canada deserve praise for their historical dealings with North American Indians, but the regimes that have evolved in these former British colonies should be of particular interest to New Zealand—if New Zealand abandons its resistence to established colonial policies toward native peoples. The concept of self-governance inherent in the United States and the developing Canadian relations is of particular import for the Maori.

B. *New Zealand's Responsibility Under International Law*

1. Incurring State Responsibility

If New Zealand fails to formulate adequate domestic remedies to the treaty dispute the Maori may pursue relief under international law. General principles of state responsibility provide that when a state

245. [1984] 2 S.C.R. at 387 (Dickson, J., concurring).
246. [1990] 1 S.C.R. 1075, 1103-04 (Can.).
247. *Id*; *see also* Johnson, *supra* note 215, at 675.
248. McHugh, *Aboriginal Rights, supra* note 117, at 59.
249. *Id.* at 59-60.
250. *Id.* at 60-62.
251. *Id.*

breaches its international obligations by its acts or omissions, it incurs international responsibility to make reparations.[252] New Zealand has incurred liability for its nonadherence to its treaty obligations:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and *there is no necessity for this to be stated in the convention itself.*[253]

International responsibility arises regardless of the origin of the breach of an international obligation.[254]

Most states comply with the good faith requirement of the rule of *pacta sunt servanda,* perhaps for no other reason than to avoid being labeled a derelict within the international community.[255] Thus, "[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[256] The Maori are party to a treaty that is outside this norm, and enforcement seems illusive. Inasmuch as the rule of *pacta sunt servanda* has not inspired adherence to the Treaty, and the decisions of the Waitangi Tribunal are nonbinding on the government of New Zealand, the Maori should pursue all other avenues of redress for violations of the Treaty of Waitangi to afford its full enforcement.

2. Reparations Available for Breach of State Responsibility

The Maori may pursue reparations for New Zealand's breach of its international obligations. The Permanent Court of International Justice found that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[257] The three forms of reparation available are restitution, indemnity, and satisfaction.[258] Restitution restores the circumstances which would have existed without the breach; it would require a return of property wrong-

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252. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 519.

253. Case Concerning the Factory at Chórzow (Ger. v. Pol.) 1927 P.C.I.J. (ser. A) No. 8, at 21 (July 27) (Jurisdiction) (emphasis added).

254. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 520.

255. LOUIS HENKIN, HOW NATIONS BEHAVE 97-98 (2d ed. 1979). *See supra* note 182-83 and accompanying text.

256. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 47.

257. Case Concerning the Factory at Chórzow (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (Merits).

258. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 552.

fully taken.[259] Indemnity, or the payment of money, is the most common form of reparation for breach of an international obligation. The goal of indemnity is to eradicate the consequences of the breach by paying the injured party the value of lost profits and confiscated property.[260] Profit includes that which the party would have earned in the ordinary course of events but for the breach, and excludes that which is speculative or indeterminate.[261] The third type of reparation is that of satisfaction, which provides reparation for nonmaterial damage or moral injury to the state and is generally a presentation of the offending state's apology.[262]

An arbitration agreement or compromise generally directs selection of the most adequate form of reparation.[263] Tribunals facing the practical difficulties of restitution often will select indemnity because of the administrative ease of that form of relief.[264] Under international law, however, restitution in kind is the normal sanction for a breach of international obligations.[265] For the Maori, it seems that the most feasible solution is partial restitution in kind for land and fishing rights, and indemnity for any remaining uncompensated breaches. Some form of satisfaction is also appropriate as solace for the damage Great Britian and New Zealand wreaked on the culture and social status of the Maori.

Although New Zealand must make reparations to the Maori for its violations of international law, each method without the complementary aid of the others would be ineffectual. New Zealand does not have expansive financial reserves to satisfy its obligations in this case, and much of the land involved is now in private hands.[266] The combination of restitution, indemnity and satisfaction presents an equitable solution for the Maori, but, given New Zealand's resources, any reparation will either fall short of what is due or cripple New Zealand's economy.

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259. *Id.* at 553.

260. *Id.* Punitive damages are generally incompatible with the concept of reparation because the goal is to restore the situation if the breach had not occurred, and not to punish the wrongdoer. *Id.* at 553-54.

261. *Id.* at 553.

262. *Id.* at 554.

263. *Id.* at 553.

264. *Id.*

265. *See, e.g.,* Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1, 36 (Int'l Arb. Trib. 1978). "[T]his Tribunal must hold that *restitutio in integrum* is, both under principles of Libyan law and under the principles of international law, the normal sanction . . . and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible." *Id.*

266. *See supra* notes 60-62 and accompanying text.

C. *Peaceful Dispute Settlement Measures Available Under International Law*

Article 2(3) of the U.N. Charter directs states to settle their international disputes by peaceful means.[267] Article 33 of the Charter further directs states to pursue solutions through "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[268] All of these procedures require the consent of both parties to resolve the dispute.[269] Generally, when a party withholds consent, disputes follow one of three courses: they dissipate, fester and possibly escalate, or become the subject and justification for coercive measures against the withholding state.[270] Considering the heightened racial tensions and the long-standing nature of the Maori struggle, there are indications that continuing strife would impact the international community and, therefore, New Zealand is obligated under article 33 to take proactive measures to pursue peaceful solutions to the problem.

1. Negotiation

The first stage of settlement is usually negotiations between the affected parties.[271] Parties to a dispute employ diplomatic channels initially in implementing reparation because they are less formal and more likely to lead to a speedy solution to the conflict without embarrassment in the international community.[272] Negotiations resolve most international dis-

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267. The text of article 2(3) states: "All Members shall settle their international disputes . . . in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, ¶ 3. New Zealand was an original signatory to the Charter on June 26, 1945. *Id.*

268. Article 33 of the U.N. Charter states that parties must employ this means whenever the dispute is likely to "endanger the international peace and security." *Id.* at para. 1. This does not seem to be a direction that states should only employ these means in those situations which would cause a general upheaval of the international community. The Maori situation would seem to qualify even under the plain language of article 33 because the characterization of New Zealand as a state which ignores its international obligations could cause repercussions in its relations with other states.

269. *See* Robert E. Lutz II, *Perspectives on the World Court, the United States, and International Dispute Resolution in a Changing World*, 25 INT'L LAW. 675, 676 (1991).

270. *Id.*

271. Manfred Lachs, *The Law and the Settlement of International Disputes, in* DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS, 287-89 (K. Venkata Raman ed., 1977).

272. *Id.*

putes.[273] The negotiation process has three steps: 1) diagnosis; 2) formulation of a principle to define the problem; and 3) applying the principle to construct an agreement between the parties.[274] The general requirement under international law concerning negotiation is that states are under an obligation to "pursue them as far as possible with a view to concluding agreements."[275]

Although the Maori have struggled for implementation of the Treaty of Waitangi since its signing, they are now in a position to effectuate the Treaty through negotiations. Many Maori leaders are active participants in the Treaty dispute and are capable of engaging in serious negotiations with the government of New Zealand to bring about a binding form of settlement. The obligation under international law to negotiate disputes is not, however, an obligation to actually settle, but merely to "try one's best."[276] A party who negotiates in good faith while the other party utilizes delay tactics to increase tension between the parties probably has fulfilled its obligation to engage in negotiations.[277] Therefore, the Maori should attempt to meet New Zealand's efforts at resolving treaty differences by entering into good faith negotiations with the government.

If direct negotiations fail, the parties might undertake an alternative dispute settlement procedure in the earlier stages of negotiation, which would involve a commission composed of representatives of both parties or of other states or individuals.[278] Although convenient, the Waitangi Tribunal could not assume this role because its decisions are non-binding and are subject to acceptance by the government of New Zealand. Despite this weakness, the Tribunal's efforts play a key part in the exhaustion of local remedies, which may be a prerequisite to establishing international obligations of reparation and persuading New Zealand to agree to other solutions.[279]

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273. AKEHURST, *supra* note 174, at 201. Negotiation assumes a strong role in the peaceful settlement of international disputes because it enables the states to exercise some control over the outcome of a dispute settlement, whereas other means such as arbitration and judicial proceedings allow less control. Lachs, *supra* note 271, at 287-89.

274. *See* William Zartman, *Negotiation: Theory and Reality, in* INTERNATIONAL NEGOTIATION 1, 2 (Diane B. Bendahmane & John W. McDonald, Jr. eds., 1984).

275. Lachs, *supra* note 271, at 287.

276. *Id.*

277. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 572.

278. *Id.* at 556.

279. *Id.* at 557-58. Generally, a state seeking remedies for injury to its nationals must exhaust remedies in national courts and agencies. *Id.* The purpose of this is to allow the state to settle claims within its own legal system. *Id.* It is uncertain whether there are exceptions to this rule. *Id.*

2. Arbitration

If negotiation is either implausible or unfruitful, the parties may employ arbitration to reach a binding settlement of the claims. As with negotiation, arbitration requires the consent of both parties to the dispute.[280] Unlike negotiation, arbitration leads to binding settlements through application of the law.[281] An arbitral body is usually composed of judges appointed by the parties but who are not subject to the parties' direct influence or instructions.[282] Arbitration is both effective in the settlement of disputes and equitable to the parties involved.[283] The flexibility of arbitration[284] may be of particular help to a tribunal established to resolve claims between New Zealand and the Maori.

To arbitrate the dispute, the parties would probably first execute an independent agreement, or compromise.[285] According to the International Law Commission's Model Rules on Arbitral Procedure,[286] a compromise should specify at least: the undertaking to arbitrate, the subject matter of the dispute, and the composition of the tribunal.[287] The agreement might also include applicable rules of law, power to make recommendations, power to make rules of procedure, applicable procedures, quorum for the hearings, voting requirements, time limit for awards, rights to submit individual or dissenting opinions, controlling languages, manner of ap-

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280. Vratislav Pechota, *Complementary Structures of Third-Party Settlement of International Disputes, in* DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS, *supra* note 271, at 149, 159-60.

281. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 587. For a discussion of many of the issues, benefits, and drawbacks of arbitration, see Michael Pryles, *Legal Issues Concerning International Arbitrations*, 64 AUSTL. L.J. 470 (Aug. 1990).

282. *Id.; see also* Jacques Werner, *Interstate Political Arbitration: What Lies Next?*, 9 J. INT'L ARB. 69, 69 (1992). According to the Convention for the Pacific Settlement of International Disputes, arbitration is a favored dispute settlement procedure because disputes are heard by judges of the parties' own choice, and on the basis of the law involved. 32 Stat. 1779, T.S. 392 (1899) [hereinafter Pacific Settlement]; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 904 (1986); Pacific Settlement, art. XV, 32 Stat. at 1788.

283. Pacific Settlement, *supra* note 282, art. XVI, 32 Stat. at 1788.

284. Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 197 (1989). Generally, arbitral tribunals may resolve a single claim, may operate as a continuing body, or may handle certain categories of disputes. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 587. A specified category in this case might be land or fishing claims under the Treaty of Waitangi.

285. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 589.

286. Art. 2, 2 Y.B. INT'L L. COMM'N 83 (1958).

287. *Id.*

portioning costs and disbursements, and whether the International Court of Justice may be allowed to provide services.[288] The tribunal would settle any procedural points the compromise does not address.[289] In most instances the decisions of an arbitral tribunal are final, but the tribunal may allow limited challenges.[290] The formation of an arbitral body would be an efficient and effective means of settling disputes between the Maori and New Zealand because, unlike the Waitangi Tribunal whose decisions are not binding on New Zealand, an arbitral body formed under international law would issue binding decisions.[291]

The process of arbitration would require both the Maori and the government of New Zealand to agree to submit the dispute to an arbitral tribunal. Both parties would participate equally in the selection of a tribunal's members. To expedite the process and increase the efficiency of the tribunal, it could consolidate smaller claims. One obstacle the parties must first overcome is the location of the tribunal, because locating a tribunal in New Zealand might be prejudicial to the claims of the Maori due to national public policies that have prevailed with respect to the

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288. *Id.*

289. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 591.

290. An award may be challenged if a tribunal exceeded its authority, was corrupted, failed to state the reasons for the award, seriously departed from procedures, or if there was never an undertaking to arbitrate. Model Rules on Arbitral Procedure, art. 35, 2 Y.B. INT'L L. COMM'N 83, 86 (1958).

291. This arbitral body could be patterned, for example, after the Iran-U.S. Claims Tribunal. One model arbitral body is Iran-United States Claims Tribunal which was formed pursuant to the Declaration of Algeria, 20 I.L.M. 223, 230 (1981). The tribunal consists of nine members, three chosen by Iran, three by the United States, and the other three appointed by the first six members. *Id.* at 231. Its decisions and awards are binding, and a fund was set up to compensate claimants. *Id.* at 232, 234. The tribunal is required to respect the law and utilize those choice of law rules and principles of law which are deemed to be applicable. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 599.

The Iran-United States Claims Tribunal has been relatively successful, settling over 95% of claims submitted to it by the two governments. Charles N. Brower, *Lessons to be Drawn from the Iran-U.S. Claims Tribunal*, 9 J. INT'L ARB. 51, 51 (1992). Many small claims (less than $250,000) were resolved in a lump-sum settlement, whereas others were considered individually. *Id.* at 52. Despite the continued political problems between the two states, all awards adjudicated by the tribunal in favor of United States claimants have been paid in full by Iran. *Id.* at 51. The success of the tribunal has been attributed to several factors, including that only two nationalities were involved in the arbitral process *Id.* at 52. One scholar has compared the Iran-U.S. Claims Tribunal with the United Nations Compensation Commission, involving over 28 nationalities, which was set up to hear claims arising from the Gulf War. *Id.*

Maori.[292]

3. Redress from the International Court of Justice

Through issuance of an advisory opinion, the International Court of Justice (I.C.J.) may assist the Maori in obtaining relief under either the Treaty of Waitangi or under the doctrine of aboriginal title.[293] Although an advisory opinion would not grant direct redress to the Maori, it could work to rebut arguments that the Maori had no capacity to enter into a valid, legally binding treaty and that the Maori did not have possession of the territory before the arrival of the European settlers. A favorable opinion would also put more pressure on New Zealand to finally resolve Maori claims.[294]

In *Western Sahara*, a case concerning circumstances analogous to the Maori's, the I.C.J. addressed whether the disputed territory, the Western Sahara, was *terra nullius*[295] at the time of colonization by Spain.[296] If the territory was *terra nullius*, a state could claim occupation.[297] If a territory was not *terra nullius*, a state could acquire sovereignty only through other means, such as agreements with local rulers.[298] The I.C.J. held that although the Western Sahara was inhabited by nomadic tribes lacking a European style of government, they exhibited a sufficient social and political organization to preclude a finding of *terra nullius*.[299] The

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292. *See generally* Nelson, *supra* note 284, at 195. Location was also a problem for the Iran-United States Claims Tribunal. Brower, *supra* note 291, at 53.

293. The court's advisory opinion in *Western Sahara,* addressed the status of disputed territory at the time of colonization. 1975 I.C.J. 12 (Oct. 16). The advisory opinion was requested by the General Assembly of the United Nations in response to competing claims for territorial sovereignty made by Morocco and Mauritania. *Id.*

294. Lutz, *supra* note 269, at 696. Although advisory opinions are not binding, pressure from the international community to respect advisory opinions may have the practical effect of making the decisions binding. *Id.*

295. Territory belonging to no one. 1975 I.C.J. at 37. "The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory." *Id.* at 39.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* The court observed:

> [T]he State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* . . . .

Id.

I.C.J. also concluded that the tribes possessed legal rights relating to the land through which they travelled.[300]

Article 36 of the Statute of the International Court of Justice sets forth the jurisdiction of the I.C.J.[301] The Maori would be unable to litigate the matter under the general jurisdiction of the court because only states can be parties to cases before the I.C.J.[302] The I.C.J. has authority, however, to give advisory opinions on legal questions presented by bodies authorized by, or in accordance with, the U.N. Charter.[303] The Maori may be able to persuade an authorized body of the United Nations, as did the injured party in *Western Sahara*, to request an advisory opinion as to what method the British used to acquire sovereignty over New Zealand.[304]

4. Collective Measures Against New Zealand

If New Zealand persists in blocking full enforcement of the Treaty provisions, the Maori have other avenues of redress. For example, the Maori could seek the aid of the interntional community's collective sanctions. These measures fall within the discretionary authority of the states.[305] Even states not directly injured can employ collective countermeasures when a common concern of the international community is violated.[306] Potentially effective collective actions include severance of diplomatic relations, trade boycotts, or cessation of air or sea traffic.[307]

The responsibility to take collective action may arise from membership in the United Nations. First, the acts of New Zealand toward the Maori may constitute human rights violations.[308] Second, the U.N. Security

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300. *Id.* at 64-65. "[T]he nomadic peoples of the Shinguitti country should, in the view of the Court, be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated." *Id.* at 64.

301. 59 Stat. 1055, T.S. 993. The I.C.J. has jurisdiction over cases referred by the parties, or cases provided for in the Charter for the United Nations, treaties, or conventions in force. *Id.* art. 36(1), at 1060.

302. *Id.* art. 34, at 1059.

303. *Id.* art. 65, at 1063.

304. *See generally* Douglas C. Hodgson, *Aboriginal Australians and the World Court I—Sovereignty by Conquest*, N.Z.L.J. Jan. 1985, 33, 35-36.

305. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 550.

306. *Id.*

307. *Id.* at 551.

308. U.N. CHARTER art. 55. Article 55 provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . c. universal respect for, and observance of, human rights and

Council has the authority to impose mandatory collective sanctions when chapter VII of the U.N. Charter is implicated.[309] The situation in New Zealand has already threatened widespread violence that could affect the international community. In light of the reaction of the international community to the apartheid regime in South Africa, there is some evidence of an international willingness to block efforts of states that disadvantage one class of people, particularly those native to the land.[310] The international community may be willing to exert pressure on New Zealand to make peace with the Maori and grant concessions under the Treaty, especially if the New Zealand government ignores the recommendations of the Waitangi Tribunal.

VI. CONCLUSION

The time for avoiding Treaty obligations and wrongfully subjecting the indigenous peoples to a lower class status has long ended. The traditional perception among New Zealanders that the Treaty of Waitangi is a nullity or incapable of implementation is simply incorrect. This Note has shown that the Treaty is a valid legal document under international law. The New Zealand government should assume its obligations pursuant to international law by implementing a more comprehensive domestic solution to the Treaty dispute. If New Zealand government does not give the Waitangi Tribunal's decisions appropriate weight or if the Tribunal cannot fully and expediently fulfill its mission to settle claims with the Maori, the government must implement a more effective domestic regime.

Despite the many failures of other states in dealing with the rights of indigenous peoples, these states should serve as models for New Zealand. Particularly helpful may be those developments in addressing the concerns of the North American Indians. The United States settled most property claims long ago with the establishment of the Indian Claims

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fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id.

Article 56 provides for "joint and separate action in cooperation with the U.N. to achieve this purpose. *Id.* art. 56. Although the actions of New Zealand may violate the human rights of the Maori on other grounds as well, that is beyond the scope of this Note.

309. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 135, at 551. These measures are taken by the Security Council under chapter VII of the U.N. Charter, including article 41. Collective measures were taken in 1968 against the minority regime in Southern Rhodesia (Zimbabwe). S.C. Res. 253 (XXIII) (1968), 7 I.L.M. 897 (1968).

310. *See* S.C. Res. 253, *supra* note 309, at 897.

Court. Canada is currently addressing many of the same property and self-determination issues. This progress should serve as persuasive precedent to New Zealand in addressing local conflicts because the historical beginnings are analogous in that Great Britain colonized the United States, Canada, and New Zealand.

Both parties should also pursue remedies that are available under international law to resolve the dispute. The government of New Zealand should participate in serious negotiations with the Maori leaders. Alternatively, the parties might establish an arbitral tribunal similar to the Iran-United States Claims Tribunal to effectuate a final resolution of at least the property rights the Treaty established. If New Zealand continues to diminish or avoid settlement of claims, the Maori should consider strengthening their position by seeking an advisory opinion from the I.C.J. They might also urge the international community to take up the struggle of a people who have wrongfully had their land and fishing rights appropriated and have been subjected to a lower class in society in a struggle that has spanned over 150 years.

"It must be noted that laws cannot alter the habits of men, they cannot eliminate fears, prejudice, pride and irrationality."[311] The prevailing attitude in New Zealand toward the Maori as being less than equal is fundamentally wrong, may constitute serious human rights violations, and must end. The right to self-determination is one which is specifically protected both in the Maori version of the Treaty of Waitangi and under the doctrine of aboriginal rights and, therefore, requires recognizing the Maori right to self-government and instituting a system which will genuinely protect their culture. Claims under the Treaty of Waitangi must find a resolution and New Zealand must establish a system that respects Maori rights and self-determination.

Jennifer S. McGinty

311. John Tamihere, *Te Take Maori: A Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law*, 5 AUCKLAND U. L. REV. 137, 143 (1985).