HR/GENEVA/ /SEM/EXPERT/2012/BP.5

"Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements"

Geneva

16-17 July 2012

Organized by the Office of the United Nations High Commissioner for Human Rights

The Waitangi Tribunal

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The views expressed in this paper do not necessarily reflect those of the OHCHR.

The Treaty of Waitangi has been described as "simply the most important document in New Zealand's history".[1] At its heart it provides a framework for the relationship between the indigenous Māori peoples and the New Zealand government. The Waitangi Tribunal is the body that is effectively charged with monitoring that relationship. This paper begins by providing a brief description of the Treaty of Waitangi and the Waitangi Tribunal. This is followed by an outline of two Waitangi Tribunal reports: the *Te Reo Māori Report* on issues related to the Māori language, and the *Tāmaki Makaurau Settlement Process Report*, which illustrates the way that the Tribunal has more recently been asked to intervene in settlement negotiations. Arguably, by doing so, the Tribunal is also taking on an oversight role in relation to new agreements between Māori groups and the New Zealand government.

The Treaty of Waitangi was signed in 1840 between Māori chiefs and the British Crown.[2] While there has been much debate about the specific terms of the Treaty, this instrument essentially paved the way for the introduction of a colonial government in return for British guarantees that Māori interests would be protected. The source of much of the debate arises from the fact that the Treaty was drafted in both Māori and English. According to the English text, the Māori chiefs ceded their sovereignty to the British Crown in return for the protection of their existing property rights to lands and natural resources. In the Māori text, however, it seems clear that a form of governmental authority that was somewhat less than sovereignty was ceded to the Crown, while full chiefly authority over all that was precious to the chiefs was guaranteed to them. Much of the discussion of the Treaty of Waitangi in the last 30 years, and especially the discussion in judicial decisions, has therefore focused on 'the principles of the Treaty', developed by reference to both the Māori and English versions. Key Treaty principles that have been recognized include:

- Partnership - Māori and the state, as Treaty partners, have an obligation to act reasonably towards each other with utmost good faith;
- Active protection – the Treaty sets out guarantees that impose positive duties on the state;
- Redress – where Treaty obligations have been breached, redress ought to be provided.

For much of its history the New Zealand government largely ignored the Treaty. In 1975 the Waitangi Tribunal was established to hear claims by Māori that the Crown had breached the principles of the Treaty of Waitangi.[3] The long title indicates the purpose of this statute:

> *. . . to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty*

Aside from a small number of statutorily defined exceptions, the Waitangi Tribunal may not issue binding orders, but instead it reports its findings and recommends action to the Minister of Māori Affairs. The Tribunal's jurisdiction was

[1] Sir Robin Cooke, "Introduction" (1990) 14 New Zealand Universities L. Rev. 1.
[2] For historical background relating to the signing of the Treaty of Waitangi, *see* CLAUDIA ORANGE, THE TREATY OF WAITANGI (Allen and Unwin) (1987).
[3] *Treaty of Waitangi Act* (New Zealand) 1975. For a comprehensive discussion of the work of the Waitangi Tribunal, *see* THE WAITANGI TRIBUNAL – TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI, (Janine Hayward and Nicola R. Wheen eds.,) (2004).

originally limited to claims arising from Crown action which had taken place after 1975. In 1985 this jurisdiction was extended to encompass claims relating to historical breaches dating back to the signing of the Treaty in 1840.[4] This extension of jurisdiction saw an enormous increase in the number of claims filed with the Tribunal, because most long-held grievances relating to the dispossession of land and natural resources arose out of historical, rather than contemporary, acts of the Crown. However, since 2008, the Tribunal can no longer register historical claims and its jurisdiction has again reverted to one with a contemporary focus.[5]

The Waitangi Tribunal's membership is comprised of lawyers, judges, historians, business leaders, Māori elders and experts in Māori law and traditions, and people with experience in public policy development and implementation. The Tribunal aims to have a roughly equal number of Māori and non-Māori amongst its membership at any given time. Panels of three to five members usually hear claims. Waitangi Tribunal hearings are often held within the traditional territory of the claimant community, and significant aspects of Māori protocol are incorporated within the Tribunal's procedure. Since its establishment, the Tribunal has conducted inquiries, heard evidence, and issued reports and recommendations to government in relation to numerous diverse claims relating to such matters as land and natural resources,[6] fishing rights,[7] language protection[8] and broadcasting policy,[9] and delivery of social services[10], and last year issued a significant and wide-ranging report addressing law and policy affecting Māori traditional and cultural knowledge.[11] The remainder of this paper briefly considers two examples of the Waitangi Tribunal's work.

In 1985 the Waitangi Tribunal received a claim alleging that the state had breached its obligations because it had failed to protect the Māori language, *te reo Māori*. The Waitangi Tribunal held hearings over four weeks in 1985 and issued the *Te Reo Māori Report* the following year. Though this claim was distinct from claims relating to lands or fisheries in the sense that the subject matter was something intangible, the Tribunal had little difficulty in determining that the language was indeed something that was highly valued to Māori and fell within the protection of the Treaty guarantees. The Tribunal made a number of important recommendations in this report, a number of which were implemented by the New Zealand government. The Tribunal recommended that *te reo Māori* be recognized as an official language, enabling anyone who wished to do so to speak Māori in Courts of law. These recommendations were given effect by the Māori Language Act 1987. The Tribunal also recommended that a supervisory body be established to foster and support the Māori language. This recommendation led to the creation of the Te Taura Whiri i Te Reo Māori – the Māori Language Commission. Not all of the Tribunal's

[4] *See Treaty of Waitangi Amendment Act* (New Zealand) 1985.
[5] *Treaty of Waitangi Amendment Act* (New Zealand) 2006.
[6] *See, e.g.*, WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE ORAKEI CLAIM, (1987).
[7] *See, e.g.*, WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM, (1988).
[8] *See, e.g.*, WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE TE REO MĀORI CLAIM, (1986).
[9] *See, e.g.*, WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON CLAIMS CONCERNING THE ALLOCATION OF RADIO FREQUENCIES, (1990).
[10] *See, e.g.*, WAITANGI TRIBUNAL, THE NAPIER HOSPITAL AND HEALTH SERVICES REPORT, (2001).
[11] WAITANGI TRIBUNAL, KO AOTEAROA TĒNEI - A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLICY AFFECTING MĀORI CULTURE AND IDENTITY, (2011).

recommendations in this report were fully implemented, and a more recent Tribunal report suggests that there is still much work to be done in this area. Nevertheless, the *Te Reo Report*, illustrates the way in which the Waitangi Tribunal can be effective in recommending practical measures that the New Zealand government can take in order to fulfill its obligations under the Treaty of Waitangi.

The Tāmaki Makaurau Settlement Process Report[12] is an example of the Waitangi Tribunal providing some independent oversight of the historical Treaty of Waitangi claims settlement process. Since the early 1990s, the state has developed a comprehensive programme to settle claims that relate to historical breaches of the Treaty of Waitangi. This is a staged process based around negotiations between Māori groups and government officials. The negotiations are conducted by the Office of Treaty Settlements, which is a branch of the Ministry of Justice. The Waitangi Tribunal does not have any direct involvement in these negotiations. However, on a number of occasions, claimants have requested that the Tribunal intervene in circumstances where the settlement process itself was alleged to have been carried out in a way that was in breach of Treaty principles. This was the allegation dealt with by the Tribunal in the *Tāmaki Makaurau Settlement Process Report*. The claim was brought on behalf of a number of Māori communities in Tāmaki Makaurau (Auckland) in 2006. At that time, these communities were not in settlement negotiations with the New Zealand government but they were concerned that their interests would be prejudicially affected by the settlement agreement about to be signed between the state and another of Tāmaki Makaurau's communities, Ngāti Whātua ki Orakei. The Tribunal found that the state had failed to fulfil its obligation to act reasonably, honourably, and in good faith in the way that it had dealt with the various Māori communities in Tāmaki Makaurau. The state had also failed to fulfil its obligations of active protection of the interests of those communities. The Tribunal strongly recommended that the proposed settlement with Ngāti Whātua ki Orakei be put on hold and that the policy and practice for managing 'overlapping claims' be both amended and elaborated. Although this was not the first time that the Tribunal had raised concerns about these issues, this report appears to have led to significant changes in official practice in this area, including specifically in the case of Tāmaki Makaurau.

Not all recommendations that are made by the Tribunal are subsequently accepted by the New Zealand government. However, the two examples above show that the Waitangi Tribunal can provoke significant changes in law and policy by recommending action that will give effect to the rights and obligations agreed to in the Treaty of Waitangi.

[12] WAITANGI TRIBUNAL, THE TĀMAKI MAKAURAU SETTLEMENT PROCESS REPORT, (2007).