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Resisting settler-colonial property relations? The WAI 262 claim and report in Aotearoa New Zealand

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This paper gives a brief survey of the WAI 262 claim, and the Tribunal Report, in Aotearoa New Zealand. Colloquially known as the Native or Indigenous Flora and Fauna Claim, WAI 262 was the first whole of government claim to the Waitangi Tribunal, requiring a commission of enquiry to investigate how New Zealand constitutes intellectual and cultural property regimes in relation to Māori peoples across the spectrum of governance, from arts and cultural production to medical research, language, and broadcasting. I give a brief summary of the claim and report, but focus primarily on the ways in which languages of cultural difference and incommensurability are mediated within this quasi-legal framework. I argue that rather than presenting ontologically incompatible frames of 'culture', which is ultimately disempowering for indigenous people in the context of the settler-colony, indigenous alterity is a strategy to assert and reorganize the foundations of sovereignty. The strategic relationship between governance, sovereignty, and property regimes has become a zone of contestation and indigenous cultural production.

Introduction

Anthropology has a number of enduring questions, many of which revolve around questions of difference. What is the nature of (cultural) difference? Where do the boundaries of difference lie? How does cultural difference inform the possibility of understanding, translating, and exporting values, ideas, and ways of being across time and space? These questions have underscored the anthropology of property relations, and they underscore the anthropology of settler-colonies – both founded on the question of how singular forms (of property, political authority, and governance) develop in society, and how they have historically been mapped onto others.

The anthropology of property has long engaged with the idea of radical cultural difference. The distinction between gift and commodity has often equated models of property with contrasting models of exchange and by extension social organization. In Mauss' influential essay on *The Gift*,[1] he was less invested in mapping differences between gift and commodity onto different cultural locales, but rather used the nascent anthropology of exchange in places such as the North West Coast and New Zealand (NZ) to argue for an expanded genealogy of property in Europe, pointing out the forms of social contract that underpinned the emergence of capitalism, which in the twentieth century were increasingly obscured by models of the free market.[2] *The Gift* is in fact an extended argument for how we might rethink our own political and economic systems and rediscover, using the lens of cultural difference in the present, alternative genealogies

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of ownership and exchange within our own societies. Here, I want to follow this logic of cultural difference as a heuristic into a shared, yet comparative, framework, into the case of the WAI 262 claim and report in Aotearoa New Zealand.

Similar to the anthropology of property, the anthropology of settler-colonies is fundamentally concerned with the question of difference: underlying many ethnographies is the question of whether the logic of radical cultural difference ultimately curtail or liberate indigenous peoples from their ongoing condition of colonialism?[3] I want to argue here, that like the dichotomy of gift/commodity, the notion of radical difference in the condition of settler-colonialism can also be understood as an analytic straw man, and might rather be used, like the notion of the gift, to imagine an alternative blueprint for national governance of property. It is clear that asking questions about the nature of difference is itself a political act. Whilst it seems impossible to talk about indigenous difference and colonial culture in the same breath except in terms of their opposition, in my own work, rather than focusing on the ways in which indigenous culture was radically different pre-contact, and might remain so into the present, I prefer to look at the ways in which discourses of difference themselves have become powerful tools in anti-colonial struggle *and* also in the perpetuation of (settler-) colonial logics.

In this article, I explore the modeling of difference in the settler-colony by examining how an indigenous property claim in Aotearoa New Zealand presents a reimagining of entitlement and property and is also confined by the logic of settler-colonial property relations. Colloquially known as the 'Native Flora and Fauna Claim', WAI 262 (the two hundred and sixty-second claim to the Waitangi Tribunal) instantiated a critique and a delineation of indigenous intellectual property rights under a condition of supposedly shared sovereignty. The claim and the subsequent findings of the Tribunal are an excellent case study with which to think about how models of cultural difference are laid onto property rights and relations, how property rights and relations are used to justify sovereignty regimes and resistances, and how prevailing state property regimes are intrinsically settler-colonial in nature, coopting resources on behalf of the nation but in fact expropriating resources for the state. The discussions in NZ about law, the policing by government of rights, and the recognition of indigenous entitlement, also expose the interdependence of discourses of cultural difference and the constitution of sovereignty in the settler-colony. The perspective I present here is one of an outsider who has long been tracking the ways in which intellectual and cultural property are in the process of being indigenized, especially in the South Pacific.[4] Here, I draw my analysis less from my ethnographic research, and more from publicly accessible documents and formal and popular discourses about the WAI 262 claim and about indigenous intellectual property rights in Aotearoa New Zealand and beyond.

Beyond the settler-colony?

NZ is a (formerly British) settler-colony, now vibrantly multicultural, with significant populations of more recent immigrants from Asia and the Pacific Islands living alongside indigenous Māori and Pākehā (people of European/British descent). The emergence of 'biculturalism' in the 1970s as a guiding ethos for governance, and a representational frame for the nation, honored the 1840 Treaty of Waitangi that formally created the nation through a partnership between Māori and the British government, promising Māori certain kinds of sovereignty in exchange for ceding certain kinds of governance.[5] There were two official versions of the Treaty (English and Māori) and several circulating copies that differed on crucial points of translation and interpretation. The version of the Treaty most consistently recognized consists of a preamble and three articles. Article I of the English version signs the rights of 'sovereignty' in NZ over to the British crown. In the Māori version, something quite different (*kāwanatanga*, usually translated as governorship) was granted to the Crown. Article II promises in English to protect Māori in the

exclusive and undisturbed possession of their properties. In Māori, they were guaranteed *tino rangatiratanga* (usually translated today as sovereignty) – Māori authority and control – over their lands, forests, fisheries 'me o rātau taonga katoa' (everything they valued, their estate, their treasured things). Article III states, in English, that everyone in NZ would have the rights and privileges of British subjects.[6]

The complex ambiguities around national and indigenous rights, and a discursive environment that polarized indigenous and other stakeholders in the nation have been textually and discursively, enshrined since 1840 and much political reform in NZ over the past three decades has been undertaken with the Treaty in mind. However, NZ has been constitutionally separated from the British Crown since 1947; it no longer makes sense to conceptually divorce Māori and Crown. There are Māori members of Parliament and Māori political parties, there is currently a Māori Governor General, and there are fully established Māori departments of government such as Te Puni Kōkiri, responsible for Māori public policy and policy effecting Māori.[7] Documents such as the UN Declaration of the Rights of Indigenous Peoples (passed in 2007 and ratified by NZ in 2010) and the Convention for Biological Diversity (1992) have also become instrumental documents in consolidating indigenous rights in the nation-state. In the present, the language of self-determination and sovereignty is increasingly superseding the language of biculturalism in the many indigenous rights movements.[8] In turn, the structural reforms of NZ's economy, following global patterns of neoliberal development have led the Government to limit retroactive claims and cap the time period for Treaty and Tribunal hearings, moving away from the restrictive obligations of the Treaty toward a more expansive, 'free market' orientation.[9] As prominent Māori scholar and activist, Graham Hingangaroa Smith noted in 1997:

> One of the more interesting things that has happened here in New Zealand is of course the deliberate attack on the Treaty, because the Treaty has been the one instrument that has held up the progress of successive governments of going wholly into alliances with other countries overseas and I am left in no doubt as to the fact that is the very reason why the government is very keen on seeking a full and final settlement on Treaty grievances. I guess they feel that they can get rid of the Treaty by the year 2010 in order to make New Zealand a completely open marketplace.[10]

Whilst the Treaty has not disappeared as Smith suggested it might, I suggest we might use the WAI 262 report (released in 2011) to ask how treaty principles and commitments are currently shaping up.

Despite this shift toward a global indigenous rights environment, coupled with a global dominance of neoliberal model for state economies, since 1840 vernacular debates over the instrumental differences between governance and sovereignty, the definition of *what* is to be treasured (called *taonga* in the Treaty), and the status of Māori as 'citizens' have been vigorously discussed in Aotearoa New Zealand. These debates occur on *marae* (ritual and community centers), in people's homes, and in the media – they are a part of the everyday experience of living in NZ and many people have strong opinions about and are able to discuss the politics of a public versus indigenous commons, the idea of a national commons, and the pragmatics of indigenous exceptionalism.[11]

The limits of sovereignty are also prominently discussed within the Waitangi Tribunal, a commission of enquiry established in 1975 to evaluate the ways in which the Treaty has been upheld and to provide redress for the history of, and ongoing, Treaty violations that continue to undergird national policies. We might perceive the tribunal to be a manifestation of the state's conscience, a kind of Jiminy Cricket. Since 1975, the Tribunal has heard claims from nearly every *iwi* (tribe). Broader claims, contesting governance over the foreshore and seabed, the radio spectrum, and fisheries (amongst others) have often proved to be lightening rods for popular discourses

around indigenous entitlement and its legitimacy. The Tribunal's reports are measured and comprehensive, and are now also important artifacts of oral history and testimony. Their proposed rulings, although they carry significant moral and discursive weight, are extra-legal and generally non-binding. For many, they represent the failings as well as the success of the shared enterprise of sovereignty in the settler-colony.

WAI 262

The WAI 262 claim was lodged in October 1991 on behalf of six Māori individuals and asserted indigenous ownership over the natural and cultural world of Aoteaora. It is often referred to as the Native or Indigenous Flora and Fauna Intellectual and Cultural Property claim.[12] The claim explicitly appropriated the discourse and framework of intellectual and cultural property rights and claimed that the NZ government had failed in its treaty obligations when developing its intellectual property (IP) regime especially when they acceded to various international conventions and agreements, such World intellectual property organization (WIPO)'s trade-related aspects of intellectual property rights (TRIPs) agreement, which is disinterested in the internal obligations within nations to other sovereign constituents. The WAI 262 claim was wide-ranging and was the first 'whole of government' Tribunal hearing, in which different agencies across the full spectrum of governance were consulted and evaluated. In spring 2011, after nearly 20 years of hearings and deliberations during which time almost all of the original claimants and one of the Tribunal judges passed away, the Tribunal published a 1000-page report that summarized the claim, and drew conclusions as to the responsibilities and obligations of the NZ state to uphold Māori property rights. The claim provides an excellent opportunity to analyze how intellectual property rights have become a filter for thinking about sovereignty; the ways in which Māori and the NZ state imagine what indigenous intellectual property might be and how it might work; and how much this discussion continues to be informed by the logic of settler-colonialism.

Imagining an alternative, making the claim

The origins of the WAI 262 claim lie in the intense activism of the 1970s in which numerous Māori organized to resist and challenge the status quo of national government. It was drafted by lawyer Moana Jackson in collaboration with Haana Murray (Ngāti Kurī), Hema Nui a Tawhaki Witana (Te Rarawa), Te Witi McMath (Ngāti Wai), Tama Poata (Ngāti Porou), Kataraina Rimene (Ngāti Kahungunu), and John Hippolite (Ngāti Koata) on behalf of themselves and their six iwi.[13] As cultural practitioners and leaders, the claimants already had long-standing concerns about Māori access to land, and the state appropriation and management of other natural resources, and became concerned that Māori were cut out of NZ's participation in a wide variety of international treaties and agreements regarding the commercial exploitation of plants and animals. For instance, they were concerned about the ways in which the NZ government was commodifying the *kūmara* (sweet potato) both nationally and internationally;[14] and they were worried about the exploitation and conservation of other indigenous flora such as *harikeke* (flax) and the knowledge associated with them for cultural production and sustenance.[15] Their concerns kick-started a series of public discussions about the relationships between intellectual property legislation, Treaty obligations, and Māori understandings of the ways in which the environment, and culture, might be 'owned'. The WAI 262 claim was made on behalf of six Māori all from different *iwi*, but was holistic in its claims to define and frame indigenous rights for all Māori.

In the delicate balance of the settler-colonial legal regime, the WAI 262 claim was radical in a number of ways: it articulated *tino rangatiratanga* (sovereignty) and *kaitiakitanga* (guardianship)

as explicit forms of resource management, alternative to the language of the prevailing State intellectual property regime. It challenged the State to really incorporate Māori concepts into its economy as well as its government, arguing that the Crown had failed to uphold its obligations to protect the *tino rangatiratanga* and *kaitiakitanga* over indigenous flora and fauna, stating that the Crown failed to protect these *taonga* by agreeing to 'international agreements and obligations that affect indigenous flora and fauna and intellectual property rights and rights to other taonga'.[16] It explicitly addressed the definition of sovereignty over resources allocated to Māori in article two of the Treaty, articulating a holistic account of indigenous property rights *as* a form of sovereignty. It did this by expansively linking nature and culture, connecting native plants and animals to traditional Māori knowledge (including carving, weaving, symbols and designs) and using this to redefine the State intellectual property regime by declaring that article two of the Treaty, which gave Māori self-determination over all their treasures, also referred to the environment that Māori inhabited and their natural resources. The entire contents of this holistic domain were defined as *taonga* rather than property: 'all elements of a tribal group's estate, material and non-material, tangible and intangible'.[17]

The claim made specific reference to the ways in which the NZ government had managed decision-making authority over conservation and proprietorial interests in indigenous plants and animals. It argued that the Crown had a duty to 'place mechanisms to ensure it can meet its obligations to Māori under the Treaty prior to entering into any international agreements' (Claim 1.1(a), para 14.10). The claim asserted that there had been inadequate consultation with Māori around these issues and that 'the Crown continues to develop practices, policies, and legislation which will have an adverse impact upon Māori rights to indigenous flora and fauna' (Claim 1.1(a), para 17.1(k).[18] In turn, it also contained *iwi*-specific claims against specific aspects of state appropriation, asserting intellectual property rights to particular cultural images, designs and symbols, expressions of culture (including photographs, audio-visual material, archives, and museum collections), and knowledge and skills including those concerning indigenous flora and fauna.

The WAI 262 claim did more than instantiate a dichotomous imaginary that perceived indigenous and state ideas about intellectual property to be incompatible. The claim also observed that such incompatibility was produced by the systematic overturning of Treaty rights and an intentional denial of indigenous sovereignty and claims to self-determination. The claim suggested an alternative: to re-center Māori ontology and epistemology as the foundations of a national intellectual property regime that by definition was first and foremost a cultural domain.

Property rights and sovereignty

The tension between cultural identity and economic entitlement, between 'indigenous rights' and 'public good' plays out in the curious kind of sovereignty that indigenous peoples hold in settler societies. As commentators such as Cattelino,[19] Comaroff and Comaroff,[20] and Biolsi[21] note, indigenous sovereignty is limited by the extent to which the (other) nation-state imagines the propriety of layering property relations and cultural rights onto one another.[22] Commentator's investments in one position or another expose that this is fundamentally a political issue: that the boundaries of property rights mark the boundaries of the nation, of 'civil' society and constitute what is 'public' in public culture and the cultural commons.[23]

Similar to the Seminole Indian take-over of the Hard Rock brand[24] or the Royal Bafokeng's control of platinum mining in Southern Africa,[25] Māori iwi are increasingly recognized by the state as corporations. They may receive compensation and restitution from Treaty injustices in the form of cash payments and economic rights have become a primary idiom through which cultural specificity and colonial history are recognized and repaired. By staking a claim to define and

hold intellectual property rights, indigenous groups such as Māori effect a reverse appropriation of the colonial categories of intellectual and cultural property at the same time as they draw their moral value and accountability into question. Within this innovative and critical legal environment, popular debates emerge about whether or not there is space within intellectual property regimes to incorporate indigenous values or whether they are essentially different to one another. This is the same discussion anthropologists have about the nature of cultural difference, with much higher stakes.

Consistent to all of the individual assertions within the WAI 262 claim is the position that cultural and natural worlds are united in Māori knowledge systems and narratives. For instance, as Roberts et al. argue, the concept of *whakapapa* (genealogy) is both a cosmological frame and a classificatory system through which to track relationships between humans, their ancestors and their environment.[26] Whakapapa, as a map of relatedness, also insists on a sometimes messy, communal, and interconnected blueprint for modeling ownership. Māori knowledge systems emphasize epistemological interconnections between knowledge of nature and culture – the same word for relatedness, *whakapapa*, is used to track relationships within both domains. The WAI 262 claimants insisted that *te tino rangatiratanga* (Māori sovereignty) be recognized as the ultimate frame for allocating state-defined property rights and that intellectual property needs to be understood within the expansive political framework of indigenous rights.

Conventionally in so-called Western IP regimes, nature must be culturally modified before it can be patented (although this is by no means stable and there are infamous exceptions). In this way, the very concept of intellectual property is a good fit for Māori activists who insist on recognizing cultural knowledge and the natural world *as* intellectual property, i.e. inextricably entangled with human creativity and society. The WAI 262 claimants argued that cultural identity is the a-priori condition for ownership, and that Māori knowledge (*Matauranga Māori*) should be recognized as a template for indigenous intellectual property rights because it allocated specific permissions and entitlements and legitimated indigenous forms of ownership. The idea of ownership itself was modified to reflect the values of the concept of *kaitiakitanga* (a term glossed as 'guardianship' understood more specifically by the Tribunal in its report as meaning to 'protect, preserve, control, regulate, use, develop, and/or transmit' authoritative relationships with *taonga*, 2006: 5). The claim therefore challenged the NZ government's rights to claim the natural resources of NZ by redefining the basic categories of intellectual property and ownership, arguing for the recognition of Māori authority, epistemology, and governance. It does not deny the existence or applicability of intellectual property concepts, but locates them within a Māori framework. This is not a cultural manifesto, written from the outside, but a highly sophisticated argument for rethinking the alignments of indigenous rights, culture, and national governance.

A comment by the eminent Māori scholar Arohoa Mead exemplifies this. She is discussing the registration of the second tier domain name, *.Māori*, in NZ:

> As at Tuesday 1 October [2002] 398 names had been registered with Māori.nz domain demonstrating a clear wish for Māori individuals and organizations to 'brand' themselves as Māori. In so doing they are joining the global world voluntarily and enthusiastically and becoming active participants in the developing national and global policies on e/commerce and the use of indigenous cultural and intellectual property. I include this example … not only to illustrate the developments in Māori branding, but to also highlight the values that underpin Māori initiatives. We do things differently.[27]

What is 'different' here? Is it the usage and cultural framing of the brand rather than the form of the brand itself? Does this transform, and decolonize, the process of branding? Or does it further co-opt indigenous peoples into the sweeping process of commodification? What is different is the

reorganization of power that might be effected if it were acknowledged that there were cultural criteria for belonging to the domain .Māori.[28]

In many ways, WAI 262 has been one of the most important, and most contentious, claims to the Tribunal, not only because it attempted to redefine cultural and intellectual property, but also because it explicitly acknowledges that these property forms in fact articulate the boundaries of indigenous sovereignty. As one online commentator noted:

> It is based on the rights of tangata whenua [people of the land], not on the principles of the Treaty, or on rights to Aboriginal title in British law. Rather than focus on specific acts of the Crown in breach of the Treaty of Waitangi, it questions the right of the Crown to rule at all. Additionally, it questions the Crown's presumption of rights over everything not known at the time of the signing of the Treaty/Te Tiriti … I believe it is no overstatement to say this is revolutionary.[29]

For some in NZ, this vision is empowering, for others a great threat. Not surprisingly, the claim fed the fears of commentators who presume that the blanket assertion of indigenous rights might undermine 'the commons' and cut out the rational, natural rights of the state-controlled market, as one right-wing pundit commented:

> When will this race-based lust for power and control stop, you might well ask? It won't – at least not unless there are major changes. As long as there are special Māoriseats in Parliament with governing parties willing to offer those MPs powerful coalition partnerships, it won't stop. Not only will it not stop, but the demands are gaining momentum to the point where non-Māori New Zealanders are beginning to realise they are being increasingly marginalised by the cunning strategies of a greedy tribal elite, that now has its hands on the levers of power and its fingers in the public purse.[30]

Others assert that Māori culture is part of the cultural commons of the nation, and should be accessible to all:

> A dynamic and evolving Māori culture is an inextinguishable driver in my own Pakeha culture. Is my Pakeha expression of that to be circumscribed as exploitation? Will I be denied the power of waiata, haka and all the other cultural symbols that inevitably define the culture that enriches and nourishes us all?[31]

The WAI 262 claim instantiates a position on intellectual and cultural property that contests the authority of the nation-state to divorce culture and identity from entitlement and challenges the insistence that property, even cultural property, in effect has no culture. It presents a revised imaginary of a State intellectual property regime, using intellectual property as a frame to reimagine and reframe the recognition of indigenous rights. As I shall describe in a moment, the Tribunal's report, and response to the claim, in turn reflects the ways in which these debates are perpetually inflected with the power structures of the settler-colony, highlighting both alternative imaginaries and limitations to practical alternatives.

The WAI 262 report

> This report is a new lens through which our identity can be crystallised. It is the vehicle through which our relationship with the Government can evolve. And it is the means by which our kaitiakitanga can be entrenched for our future generations.[32]

Hearings from expert witnesses, claimants and the Government began in 1997 and ended in 2007. Sections of the final report, on Te Reo – Māori language, were released in April 2011 and the full report presented to the Government in July of that year.[33] The report presents a summary of

hearings from a number of interested parties, from artists, business developers, graphic designers, educators, and language specialists and representatives of government in all areas. Unlike the claim, the report, as a product of the Tribunal, takes the imaginary of cultural difference and incommensurability and renders it cogent within the broader language of state law, fusing the language of Māori knowledge systems and intellectual property. However, rather than drawing only on the language of existing legal regimes, the report also takes as its starting point the language of the claim itself to create working definitions of its key terms. Following the claim, the authors devise a template for defining *taonga*: dividing *taonga* into works (cultural) and species (natural), linked to Māoriby *korero* (stories, oral histories), *whakapapa* (genealogy), and known *kaitiaki* (guardians). The term '*kaitiaki* relationship' is used to specify the forms of guardianship that arbitrate the authenticity of taonga and the entitlement to them. Within this framework, the report then evaluates the ways in which existing frameworks of intellectual and cultural property do or do not protect the *kaitiaki* relationship and Māorirights in *taonga,* using the Treaty as a framework referencing best practice. They also evaluate the extent to which the kaitiaki relationship can be applied, as a substitute, to the existing IP regime. Only once this cultural framework has been established, do the report writers evaluate the current IP regime (focusing especially on copyright, trademarks, and patent), current environmental legislation, and the ways in which the state manages custodianship of these resources (from museums to fisheries). Chapters evaluate intellectual property in relation to taonga works (culture), genetic and biological resources in relation to taonga species (nature), the environment, the conservation estate, language (*Te Reo*), traditional healing practices (*rongoā*), the role of Crown control, and the making of international instruments.

The report represents a very real struggle to conceptualize intellectual and cultural property in the context of partnership, power sharing, and mutual obligation, underwritten by the Treaty, balancing the governorship promised by the Treaty to the Crown with Māori self-determination also promised. The writers commence from what they term 'a post-grievance climate for claim-making' aiming to overcome the dichotomies of biculturalism and imagine the state as a system of governance taking into account the special relationship with Māori as treaty partners. They follow the claimants in criticizing existing law for a failure to recognize collective and enduring rights, to extend moral rights beyond their limited purview, and to support *kaitiaki* and their role in protecting and conserving *taonga* works.[34] The report lists many instances of failed or inadequate consultation. For example, in the section on intellectual property in *taonga* works, the writers noted:

> All the parties before us acknowledged that the IP system in relation to copyright, trade marks, and related rights is designed primarily to encourage commercial exploitation of a creator's work, and not to accommodate the interests of kaitiaki in their taonga works or matauranga Māori[35]

By addressing this neglect, the report writers go on to make proposals through which Māori could be more readily acknowledged and institutionalized as stakeholders (although the report perpetuates a divide between nature and culture, affording indigenous rights to culture but not acknowledging proprietary rights to nature, *taonga* species). The report suggests potential alterations to the current IP regime most of which focus on the acknowledgment that indigenous intellectual property rights need to be translated into a recognizable and implementable bureaucratic regime. The report struggles to conceptualize a regime that could marry the state law and property regimes taking into Māori values in terms not of their proprietary interests, but by definition the spirit of partnership. They conclude that the current legal infrastructure is fundamentally unable to recognize the idea of guardianship, and the complex, communal non-commoditized rights that this concept embodies and suggest a number of ways in which this process of recognition could be institutionalized in law.

The report delineates a possible program for the national integration of an indigenous framework for intellectual property (for some forms of property) that hinges on the concept of guardianship (*kaitiaki* relationships). At times, the *kaitiaki* relationship, as a right of inalienable connection is recognized as a form of stakeholdership akin to ownership (e.g. with the right to exclude others from producing and profiting from certain cultural images). At other times, the kaitiaki relationship is interpreted as a stakeholder role more in the vein of a consultant or community of interest (with the right to be consulted on the use of national parks, scientific research, but without an exclusive right of ownership).

The report acknowledges that the existing IP system was not designed with the protection of Māori knowledge systems in mind, but believes that existing structures (including international agreements such as TRIPs) are not incompatible or intrinsically unsuited to such protection. They propose the establishment of an intellectual property commission 'composed of experts in mātauranga Māori, IP law, commerce, science, and stewardship of taonga works and documents, assisted by a secretariat drawn from the same areas of expertise' (702) that would ascertain and register the *kaitiaki* and would ensure that consultation and collaboration would be in place around their economic exploitation (*kaitiaki*, unlike intellectual property rights holders are not term limited relationships). They also propose that alongside *kaitaiki*, Māori knowledge systems (Mātauranga Māori) be allowed to define new relations of responsibility and entitlement:

> This approach is not intended to create a new category of proprietary right, but is rather a way of recognising the relationship of kaitiaki with taonga works and some aspects of Mātauranga Māori where it is proposed to exploit those things commercially. The kaitiaki right is inherently inalienable and is therefore not a proprietary right in the orthodox Western sense. Rather it would be a statutory participatory right in respect of decisions around proposals to exploit taonga works or Mātauranga Māori commercially. It may in appropriate cases amount to a right of veto, and it must be perpetual.[36]

This is an important new form of indigenous entitlement for taonga works (cultural production). With regards to Taonga species, the report proposes that consultation and partnership be better institutionalized through government bodies such as Te Puni Kōkiri. Overall, the proposals of the report focus on a greater level of bureaucratic framing to enforce and institutionalize the principles of partnership.

The rights of kaitiaki are framed by the existing legal regime, not only because the report writers overall believe that most legal instruments, even the TRIPs agreement are not incompatible with a framework that focuses on indigenous rights and tino rangatiratanga, but also because the very principles of partnership enshrined by the Treaty emerge from this legal framework. This passage, in the conclusion of the section on genetic and biological resources of taonga species, summarizes the tensions and encompassments of law and indigenous sovereignties:

> The larger, central question is whether Māori interest and values should affect the way in which research into the genetic and biological resources of taonga species is carried out and its out comes exploited.
>
> We have looked to the Treaty of Waitangi for guidance. We have concluded that the issue is best resolved by reference to the concept of tino rangatiratanga as expressed in the Treaty's Māori text, rather than to the concept of exclusive ownership as expressed in article 2 of the Treaty's English text.
>
> Accordingly, we conclude that kaitiaki do not have rights in the genetic and biological resources of taonga species that are akin to the Western conception of ownership. Only in the most rare and exceptional cases, like the tuatara, would we say kaitiaki are justified in claiming an interest in each living specimen of a taonga species. Instead, we conclude that where there is a risk that bioprospecting, GM, or IP rights will affect kaitiaki relationships with taonga species, those relationships are entitled to a reasonable degree of protection. Just what is reasonable is a matter for case-by-case analysis.

> It requires a full understanding of the level of protection required to keep the relationship safe and healthy, as well as a careful balancing of all competing interests.[37]

The writers identify the need to balance the obligations of the Crown to the treaty with other interests that 'include the wider community interests in free access to information and ideas and the flourishing of creativity, and the interests of IP right holders in that creativity'[38] – basically to negotiate and balance with the existing IP regime. In the case of *taonga* species, what must be protected is the kaitiaki relationship, but this is not recognized as intrinsic to the species itself. The report therefore acknowledges indigenous entitlement to culture, but not to nature.

Conclusions

The report presents a vision of partnership, but ends with a vision of encompassment:

> It would create, for the first time in New Zealand's history, a legal environment conducive to the long-term survival of matauranga Māori and the kaitiaki relationship … a fair balance between the Treaty rights of kaitiaki, the private rights of IP owners, and the interests of the public in the use of publicly available works and access to the public domain.[39]

These seemingly contradictory statements encapsulate many of the tensions that are enshrined in the settler-state, in which difference itself must be recognized and therefore made in some way commensurable with the structures that provide recognition.[40]

WAI 262 was by no means the only attempt of indigenous groups to develop a recognizable legal language that presents an alternative structuring of property rights, trying to work within and subvert national legal regimes. Debates about the suitability of projects to redefine intellectual property rights are often smokescreens to the ongoing dispossession and failure to recognize indigenous sovereignties, even those initially established (via treaties) in state law. In February 2012, the Indigenous Forum at WIPO unanimously decided to withdraw from negotiations around forthcoming WIPO Treaties on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. This pragmatic and political action was made, not because of any ontological incompatibility between indigenous peoples and national intellectual and cultural property regimes but because the Indigenous Forum perceived that 'The IGC, in its overall procedures, has systematically ignored our rights, as Indigenous Peoples and as Nations with internationally recognized collective rights, to self-determination and full and equitable participation at all levels'.[41] The Forum explicitly recognized that participation, consultation, recognition, self-determination were what constituted property rights. These practices, rather than the words, of law were the mechanisms of both sovereignty and of economic entitlement.

In my very brief summary of thousands of pages of legal claim and response, and many years of public debate, I have tried to draw out the ways in which the language of intellectual (and cultural) property in fact interiorizes another language about difference and entitlement. This interior dialog, within the framework of law and governance, is by no means unique to the settler-colony but is also a decisive, ongoing debate in the negotiation of settler-colonial power relations. The Tribunal report on the WAI 262 claim explicitly addresses both the bifurcation and entanglement of indigenous and state ideas about ownership and tries to express ideas of difference using a much more generic, global language of property rights. For the tribunal, this is divisive: They ultimately note '*kaitiakitanga* focuses on obligations and relationships arising from kinship; property focuses on the rights of owners'.[42] This assertion naturalizes a rhetoric of a public, state commons and by extension of individual ownership, by 'recognizing' it as a form of justified guardianship, using the category of *kaitiakitanga* not even as a legal category, but as an expressive or discursive gesture of good faith in the interventions it makes into policy. Similar to other Māori concepts

(e.g. *tino rangatiratanga*), these terms are appropriated into state vocabulary,[43] but as esthetic frames, not necessarily categories for state reform. In this way, the report makes it very clear that a non-indigenous nation-state still controls the ways in which indigenous intellectual property is recognized and allowed to become emergent, even as it also suggests ways in which the state might reimagine itself. In this way, the WAI 262 report exposes both the hopes and the complexities of indigenous sovereignty claims in the settler-colony.

The WAI 262 claim parses a different language of difference to that usually associated with the radical alterity suggested by settler-colonial logics (in which the settler and the colonized are discursively separated even as the former controls and contains the latter). This other language of difference uses Māori categories to encircle those of the state, and opens a space for us to imagine a nation-state that is more than simply inflected with indigenous words, but which increasingly internalizes indigenous categories, transforming its own property regimes. Following on from my comments regarding difference at the very start, what is different is not so much the definition of property, entitlement or ownership (although they become nuanced in very different ways) but rather who the custodians of the categories are; who is allowed to have the power recognize and name resources, and allocate entitlements. In the claim, these are traditional guardians (*Kaitiaki*) rather than state officials, although the suggestion is that they become one and the same.

By talking through the ways in which indigenous intellectual property is constituted within the frame of the settler-colony, I have come to a couple of tentative conclusions. One is that the dynamic of settler-colonialism is defined by an imbalance of power that sit at the core of not only governance, but which constitutes a politics of recognition and representation. To my eye, the WAI 262 claim is a genuine rethinking of property from within an indigenous world-view – a world-view that is within but solely defined by the settler-colony. The report replaces this world-view back within the frame of the settler-colonial state. The possibility of constituting and implementing indigenous intellectual property categories and regimes lies more in the potential realignment of the structures of sovereignty, and the parceling out of rights and political authority than it does in the maintenance of radical models of difference between Western and Indigenous categories and property regimes.

As an anthropology of cultural difference, the descriptive account I present here refuses to layer conceptual models of difference onto divergent models of culture and ethnic-based identity. It is clear that this connection is provocative and ideology-laden – be it within accounts that critique a disembedded free market and neoliberal model of governance (that advocate strong state intervention and support), or within those that believe firmly in the paramount rights of individual citizens above any other collective. Indigenous rights movements have long provided a provincializing commentary to the descriptions of modernist property relations that in fact constitute the settler-colony, presenting alternative genealogies of how political authority, exchange, and entitlement may be zoned, regulated, and experienced.

Notes

1. Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (London: Routledge, 1990).
2. David Graeber, 'Give It Away', http://www.inthesetimes.com/issue/24/19/graeber2419.html (accessed August 21, 2000).
3. Elizabeth Povinelli, 'Radical Worlds: The Anthropology of Incommensurability and Inconceivability', *Annual Review of Anthropology* 30, no. 1 (2001): 319–34; Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).
4. Haidy Geismar, *Treasured Possessions: Culture, Property and Indigenous Rights in the Pacific* (Durham: Duke University Press, 2013).

5. Paul Williams, 'A Breach on the Beach: Te Papa and the Fraying of Biculturalism', *Museum and Society* 3, no. 2 (2005): 81–97; Paul Williams, 'Reforming Nationhood: The Intersection of the Free Market and Biculturalism at the Museum of New Zealand Te Papa Tongarewa', in *South Pacific Museums: Experiments in Culture*, ed. Chris Healey and Andrea Witcombe (Sydney: Monash University ePress and The University of Sydney Press, 2006), 2–16. Māori currently comprise just under 15% of New Zealand's population.
6. This overview, and translation, is drawn from Williams, 'Breach on the Beach', 95.
7. Paul Callister and David Bromell, *A Changing Population, Changing Identities: The Crown-Māori Relationship in 50 Years Time?* Institute of Policy Studies Working Paper (Wellington, New Zealand: Institute of Policy Studies, 2011), 10, http://www.callister.co.nz/papers11.htm (accessed March 26, 2013).
8. The nine tribes of Mātaatua in the Bay of Plenty Region convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples from 12 to 18 June 1993 in Whakatane. Among the indigenous representatives in attendance were those from Japan, Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, the USA, and Aotearoa.
9. Maria Bargh, *Resistance: An Indigenous Response to Neoliberalism* (Wellington, New Zealand: Huia, 2007).
10. Graham Hingangaroa Smith, 'Controlling Knowledge: The Implications of Cultural and Intellectual Property Rights', in *Cultural and Intellectual Property Rights: Economics, Politics and Colonization. Volume 2*, ed. Leonie Pihama and Cherryl Waerea-i-te-rangi-Smith (Auckland, New Zealand: International Research Institute for Māori and Indigenous Education, 1997), 18.
11. Geismar, 'Treasured Possessions', Chapter 5.
12. Maui Solomon, 'The Wai 262 Claim: A Claim by Māori to Indigenous Flora and Fauna: Me o Ratou Taonga Katoa', in *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, ed. Michael Belgrave, Merata Kawharu and David Vernon Williams (Oxford: Oxford University Press, 2005), 213–33; Amiria Henare, 'Taonga Māori: Encompassing Rights and Property in New Zealand', in *Thinking Through Things: Theorising Artefacts in Ethnographic Perspective*, vol. 1, ed. Amiria Henare, Martin Holbraad and Sari Wastell (London: University College London, 2007), 57–83.
13. Report prepared by Oliver Sutherland and the late Murray Parsons in conjunction with Moana Jackson and the whanau of claimants, 'The Background to WAI 262', June 2011, http://wai262.weebly.com/uploads/7/4/6/3/7463762/history_wai_262.pdf (accessed March 26, 2013).
14. Mere Roberts et al., 'Whakapapa as a Māori Mental Construct: Some Implications for the Debate over Genetic Modification of Organisms', *The Contemporary Pacific* 16, no. 1 (2004): 1–28.
15. See http://wai262.weebly.com/uploads/7/4/6/3/7463762/history_wai_262.pdf (accessed August 10, 2012).
16. See http://www.med.govt.nz/templates/Page____1207.aspx (accessed August 2, 2011). In an interim document after the hearings, and before the publication of the report, the Tribunal distilled the elements of the claim into four main areas: *Mātauranga Māori* (traditional knowledge) – concerning the retention and protection of knowledge concerning ngā toi Māori (arts), whakairo (carving), history, oral tradition, Waiata, te reo Māori, and rongoā Māori (Māori medicine and healing). The claimants' concern is about the protection and retention of such knowledge. They note that traditional knowledge systems are being increasingly targeted internationally. *Māori cultural property* (tangible manifestation of mātauranga Māori) – as affected by the failure of legislation and policies to protect existing Māori collective ownership of cultural taonga and to protect against exploitation and misappropriation of cultural taonga, for example, traditional artifacts, carvings, mokomokai (preserved heads). *Māori intellectual and cultural property rights* – as affected by New Zealand's intellectual property legislation, international obligations, and proposed law reforms. Issues include the patenting of life form inventions, the inappropriate registration of trade marks based on Māori text and imagery, and the unsuitable nature of intellectual property rights for the protection of both Māori traditional knowledge and cultural property. *Environmental, resource and conservation management* – including concerns about bioprospecting and access to indigenous flora and fauna, biotechnological developments involving indigenous genetic material, ownership claims to resources and species, and iwi-Māori participation in decision-making on these matters, as such the 'flora and fauna claim' currently encompasses popular thinking on indigenous cultural and intellectual property in New Zealand – conceived as holistic claims to both the natural world and the cultural knowledge derived from it. Whilst the claim is couched more in terms of Treaty violations (that these taonga were not protected under the terms of article two), the more pressing concern for the Tribunal is that of the implications that the issues of ownership (or of indigenous entitlement) it evokes will have on the deployment of natural

resources in Aoteaora New Zealand – a massive part of the New Zealand economy – and the role that Māori will play in this as a interest group (source: http://www.med.govt.nz/templates/Page____1207.aspx (accessed November 10, 2009), macrons as on website).

17. Maui Solomon, 'Intellectual Property Rights and Indigenous People's Rights and Responsibilities', in *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions*, vol. 10, ed. Mary Riley (Walnut Creek, CA: Altamira Press, 2004), 235; see also Hal B. Lavine, 'Claiming Indigenous Rights to Culture, Flora, and Fauna: A Contemporary Case from New Zealand', *PoLAR: Political and Legal Anthropology Review* 33, no. s1 (2010): 36–56.
18. This summary has been excerpted from a statement of claim presented by the Waitangi Tribunal in 2006, http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/SOI/Wai262SOI(doc2.314)small.pdf (accessed March 26, 2013).
19. Jessica Cattelino, 'The Double-Bind of American Needs-Based Sovereignty', *Cultural Anthropology* 25, no. 2 (2010): 235–62; Jessica R. Cattelino, "One Hamburger at a Time': Revisiting the State-Society Divide with the Seminole Tribe of Florida and Hard Rock International: With CA Comments by Thabo Mokgatlha and Kgosi Leruo Molotlegi', *Current Anthropology* 52, no. S3 (2011): S137–49.
20. John L. Comaroff and Jean Comaroff, *Ethnicity, Inc.* (Chicago: The University of Chicago Press, 2009).
21. T. Biolsi, 'Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle', *American Ethnologist* 32, no. 2 (2005): 239–59.
22. See also Carole Blackburn, 'Differentiating Indigenous Citizenship: Seeking Multiplicity in Rights, Identity, and Sovereignty in Canada', *American Ethnologist* 36, no. 1 (2009): 66–78; Audra Simpson, 'Under the Sign of Sovereignty: Certainty, Ambivalence, and Law in Native North America and Indigenous Australia', *Wicazo Sa Review* 25, no. 2 (2010): 107–24.
23. Michael F. Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard University Press, 2003); Haidy Geismar, 'Reproduction, Creativity, Restriction: Material Culture and Copyright in Vanuatu', *Journal of Social Archaeology* 5, no. 1 (2005): 25–51.
24. Cattelino, 'One Hamburger at a Time'.
25. Comaroff and Comaroff, *Ethnicity, Inc.*
26. Roberts et al., 'Whakapapa as a Māori Mental Construct', 7–8.
27. See http://news.tangatawhenua.com/wp-content/uploads/2009/12PropertyRights.pdf (accessed August 13, 2012).
28. As of the time of writing, one does not have to prove Māori identity to register under this domain, but there is a suggested affiliation and rubric of cultural affiliation which is alternative to the undifferentiated citizenship suggested solely by the national domain names, .co.nz http://taiuru.Māori.nz/publicationslib/domainbook.pdf (accessed August 12, 2012).
29. Online article, 'The WAI 262 Flora and Fauna Claim, and the Mātaatua Declaration, Legal Statements of tino rangatiratanga', http://indymedia.org.nz/article/76680/WAI-262-flora-and-fauna-claim-and-mataat (accessed July 14, 2010).
30. See http://www.getfrank.co.nz/editorial/nz-politics/wai-262-empowers-Māori-elite (accessed September 15, 2011).
31. See http://www.listener.co.nz/commentary/cultural-curmudgeon/the-fish-hooks-of-wai-262/ (accessed July 7, 2012).
32. Te Ururoa Flavell, MP for Waiariki Monday, 10 October 2011; 11 am, speech entitled: Wai 262 insights and Perspectives, given at Te Puna Matauranga, Te Awamutu (Te Wananga o Aotearoa), http://www.scoop.co.nz/stories/PA1110/S00203/wai-262-insights-and-perspectives.htm (accessed July 6, 2012).
33. The Tribunal constituted to hear the Wai 262 claim comprised the late Judge Richard Kearney, Roger Maaka, Pamela Ringwood, and Keita Walker. Following Judge Kearney's death, Chief Judge Joe Williams became presiding officer. The late Bishop Manuhuia Bennett and the late John Tahuparae advised the panel as Tribunal kaumātua (Māori elders and authorities).
34. Waitangi Tribunal, *Ko Aotearoa Tanei. A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuarua* (Wai 262 Report) (Wellington, New Zealand: Waitangi Tribunal, 2011), 63, http://www.waitangitribunal.govt.nz/ (accessed March 26, 2013); Jessica Christine Lai, 'Māori Traditional Cultural Expressions and the Wai 262 Report: Looking at the Details', *SSRN eLibrary* (January 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996384 (accessed March 26, 2013).
35. Waitangi Tribunal, *Ko Aotearoa Tanei*, 77.
36. Ibid., 91.

37. Ibid., 208.
38. Ibid., 86.
39. See Note 36.
40. Povinelli, *The Cunning of Recognition*; Jane E. Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Cheltenham: Edward Elgar, 2009).
41. See http://www.materialworldblog.com/2012/02/statement-from-the-indigenous-forum-at-wipo/ for a copy of the International Indigenous Forum's Final Statement and see http://www.wipo.int/tk/en/igc/ (accessed March 26, 2013) for information about the WIPO Intergovernmental Committee.
42. Waitangi Tribunal, *Ko Aotearoa Tanei*, 46.
43. Joan Metge, 'Huarangatia: Māori Words in New Zealand English', in *Tuamaka: The Challenge of Difference in Aotearoa New Zealand* (Auckland, New Zealand: Auckland University Press, 2010), 55–107.