Adopting a Maori Property Rights Approach to Fisheries

Valmaine Toki*

For Maori,[1] tikanga Maori or custom law not only underpinned the recognition of property rights to their fishery but also their environmental ethics and the sustainable management of that fishery. In comparison, the property right of non-indigenous peoples was sourced from a rights system determined by the State. The nature of these property rights, for Maori, has been acknowledged by legislation.[2] The challenge for Maori is to effectively maintain, develop and manage this allocated resource in a way that will not only sustain the resource but also ensure its longevity both socially and economically for future generations. Among the issues Maori will face are how to balance effective governance and efficient management, together with the requirement to address global issues of over-fishing and property rights, all the while preserving and respecting tradition. Irrespective of these challenges, it is the tikanga, or philosophy, intrinsic to the traditional Maori worldview which will guide Maori through these challenges, and provide a way forward for global issues such as climate change.

1. INTRODUCTION

The lens through which property rights and the rights to fisheries have been viewed has significantly changed over time. Indigenous property rights to

*BA LLB (Hons), MBA (Tas), LLM. Barrister and Solicitor of the High Court of New Zealand, Lecturer in Law, University of Auckland. The article was first presented as a paper at the NZCEL Conference on "Property Rights and Sustainability" held on 16–18 April 2009 at the University of Auckland.

1 The indigenous people of New Zealand.

2 Refer to Maori Fisheries Act 2004 ("MFA"); Maori Commercial Aquaculture Claims Settlement Act 2004.

fisheries are sourced from custom law. Upon colonisation and western intervention, the lens through which these property rights were viewed changed from one of indigenous property rights to one of common property rights. Colonisation not only subsumed indigenous property rights into western property rights but also, indigenous management and sustainability ethics were overcome by the western philosophy of individualisation.

For Maori (indigenous peoples of New Zealand), prior to colonisation, the property right to fisheries was sourced from Maori custom (tikanga Maori), Te Ao Maori (Maori worldview) and Maori cosmology.[3] Post colonisation, for Maori, the right to fisheries was sourced from concepts such as aboriginal title[4] and the Treaty of Waitangi ("the Treaty").[5] For Maori, as other indigenous peoples, the management of fisheries was based on their custom (tikanga Maori) that required the fish stocks to be held as communal property and managed to ensure enduring benefit to user groups and their successors.[6]

For non-indigenous peoples, the perception of fisheries is historically one of common property and open access (or equal access).[7] This common property perception and common use rights system inevitably led to exploitation and has been viewed as a hurdle to effective or sustainable management.[8] The ensuing debate concerning the ability or inability of common pool resources to be managed effectively (the "tragedy of the commons"[9] notion) has resulted in the State playing a commanding role in determining the pattern or allocation of these rights.[10]

This article emphasises the changing lens through which property rights and management of fisheries are viewed. The second part examines the grounds, pre and post colonisation, upon which Maori claimed their rights to the fishery. This

3 See section 2.2 of this article for further discussion of Te Ao Maori and tikanga Maori.

4 See section 2.2.2 of this article for further discussion of aboriginal title.

5 The Treaty of Waitangi was an agreement signed in 1840 between the Crown and Maori which guaranteed certain rights to Maori. See section 2.2.1 of this article for further discussion.

6 Symes, R, "Towards a Property Rights Framework", in R Symes (ed), *Property Rights and Regulatory Systems in Fishing* (Blackwell Science, Australia, 1998) 257. However, Arawa (iwi situated in the Rotorua area) lakes whanau often guarded individual fishery grounds against other small whanau groups.

7 However, the English/Scottish experience is quite different with commoners having limited rights to fish on landlords' estates; for discussion on the Black Acts, see E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon, New York, 1975).

8 Symes, supra note 6.

9 Hardin, G, "The Tragedy of the Commons" (1968) 162 Science 1243.

10 See also, Ostrom, Elinor, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, Cambridge University Press, 1990). Ostrom proposes that there are many ways of achieving just and sustainable governance of common-pool resources beyond the traditional "sterile dichotomy" proposed by Hardin between the "Leviathan" of state control and neoliberal "Market" solutions.

culminates in a New Zealand case study that traces the introduction of the Quota Management System to highlight how these different threads that underpin the source of property rights for Maori fisheries have ultimately been recognised in legislation. From this legislative recognition unique considerations, derived from custom, to sustainably manage this asset will be traversed.

Irrespective of the open access principle and subsequent private property rights imposed by the State, Maori property rights to their fishery, based on custom, have been recognised through legislation. Despite the western legislative recognition for these rights, it is evident from the provisions within the legislation and management of the asset by Maori, that tikanga (custom) still underlines the property right for Maori.

In comparison, the third part will briefly trace the non-indigenous property rights to fisheries and problematic global issues that have resulted from common property rights, asset management and privatisation of resources previously regulated by States. From these problems associated with non-indigenous property rights to fisheries, it is suggested that the answers may lie within an indigenous paradigm.

In conclusion, the article will offer a suggestion of managing marine resources and associated property rights collectively to ensure longevity of the industry and a way forward based on tikanga Maori, a return to viewing property rights and the rights to fisheries through an indigenous lens.

2. INDIGENOUS PROPERTY RIGHT — MAORI FISHERY

2.1 Background

Various threads underpin Maori rights to fisheries. Prior to colonisation, Maori cosmology, Te Ao Maori (Maori worldview) and tikanga Maori (Maori custom) inextricably linked Maori to their fishery. In 1840, the Treaty of Waitangi recognised these rights in Article 2.

Post colonisation the doctrine of aboriginal title recognises the continuity of tribal rights, such as the existing Maori rights to fisheries, unless these rights are extinguished by statute, purchase or voluntary cession.[11] Further, s 88(2) of the Fisheries Act 1983 (now repealed) explicitly stated: "nothing in this Act shall affect any Maori fishing rights". Article 2 and the notion of aboriginal title will be examined in more detail below.

11 McDowell, M and Webb, D, *The New Zealand Legal System: Structures and Processes* (4th ed, LexisNexis, Wellington, 2006) at 195.

2.2 Te Ao Maori — Tikanga Maori

Maori, like other indigenous peoples, have a spiritual connection to the environment.[12] Maori perceptions of the environment and natural resources, such as fisheries and climate, are sourced in Maori cosmology. This cosmology governs the Maori attitude towards the environment. The separation of Ranginui (sky father) and Papatuanuku (earth mother) in the creation stories resulted in the birthing and developing of different ecosystems, such as rains, mists and dews symbolising the tears of separation of the spouses; and the blood from the tearing of the sinews joining them became the sunrises and sunsets. This separation and the ongoing conflict between the children of Rangi and Papa symbolises the ongoing struggle between different aspects of the environment.[13]

This was all part of the huge whakapapa (genealogy or lineage) relating the gods, the natural world and human beings. The whakapapa of each atua, each god, includes the genealogy of all of those elements within their sphere of influence. Each element had an assigned role as a result of the separation of Rangi and Papa. The fulfilment of that role provided the state of balance that is essential to the Maori worldview.[14]

So, as whakapapa relates us as Maori to the environment, in that these elements are our relations, that concept of whanaungatanga extends to an obligation to our non-human relations also. We are all related and should treat each other with respect. This is the concept of utu (process to restore balance).

Over time, Maori developed customs to look after the mauri (life force) of all natural resources and ensure their sustainable management. There is no concept of ownership of resources, such as the fishery, just control over access and use. The resource is recognised as taonga (treasure) protected by guardians (kaitiaki) who mediate the relationships between that resource and people to maintain the mauri (life force) of that resource.[15] It is from Te Ao Maori (Maori worldview) and tikanga Maori (Maori custom) that Maori property rights to fisheries are established.

These customary tenets are not confined to Maori but are intrinsic to other

12 For general discussion, see also Klein, Ulrich, "Belief-Views on Nature — Western Environmental Ethics and Maori World Views" (2000) 4 NZJEL 81.

13 For general discussion of these concepts, see Paterson, J, *Exploring Maori Values* (Thomson Dunmore Press, Victoria, 2005) at 143–154.

14 See Marsden, M, "The Natural World and Natural Resources", in C Royal (ed), *The Woven Universe: Selected Writings of Rev Maori Marsden* (Estate of Rev Maori Marsden, Masterton, 2003) 24–54.

15 Marsden, ibid, at 54–73.

indigenous peoples, such as the Saami[16] and First Nations.[17] Nonetheless, custom law in New Zealand requires incorporation into statute for enforceability.

2.2.1 Treaty of Waitangi

In 1840, when the Treaty of Waitangi was signed, Maori owned all the fisheries.[18] Article 2 of the English text[19] of the Treaty stated:

> Her majesty *the Queen of England confirms and guarantees to the Chiefs* and Tribes of New Zealand and to the respective families and individuals thereof *the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries* and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ... (emphasis added)

Thus, through Article 2 the Crown guaranteed to Maori the full, exclusive and undisturbed possession of their fisheries for so long as they desired — a guarantee of full possession of their fishing resource.

Despite this assurance, the Treaty was initially viewed as a "simple nullity"[20] and the orthodox view, on the legal effect of the Treaty of Waitangi, is that unless it has been adopted or implemented by statute, it is not part of our domestic law and creates no rights enforceable in court.[21] Matthew Palmer suggests that "the Treaty is valid and binding on the Crown at international law and as a matter of honour";[22] however, it is the "principles of the Treaty" that are referred to in legislation[23] and policy documents[24] rather than the text of the Treaty itself.

16 The indigenous inhabitants of Sápmi, an area that ranges across what is now Sweden, Norway, Finland and parts of the Kola Peninsula in Russia. Limited autonomy has been recognised with the establishment of Saami Parliaments in Finland (1973), Norway (1989) and Sweden (1993).

17 Referring to the indigenous peoples of the USA and Canada.

18 Walker, R, "The Treaty of Waitangi in the Postcolonial Era", in M Belgrave, M Kawharu and D Williams (eds), *Waitangi Revisited* (Oxford University Press, Australia, 2005) 68.

19 There were two versions of the Treaty, one an English text and one a Maori text. It is the English text/version which is the one most commonly referred to.

20 *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72, at 78 per Prendergast CJ.

21 See Judge Prendergast's discussion in *Wi Parata* above; see also *Hoani Te Heu Heu Tukino v Aotea District Land Board* [1941] NZLR 590 (PC) which supported Prendergast's claim that the Treaty could have no legal effect unless incorporated in statute.

22 Palmer, M, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 231.

23 For example, Conservation Act 1987, s 4; State-Owned Enterprises Act 1986, s 9.

24 See, for example, the policy of the Office for Disability Issues where the Treaty underpins the development of their Strategy and is consistent with the relevant principles of the

The concept of the "principles of the Treaty" was actively constructed through the interaction and mutual legitimation of the courts,[25] the Waitangi Tribunal,[26] State agencies and the government. This provides a legal yardstick by which an issue can be resolved.

2.2.2 Aboriginal title

Common law aboriginal title is concerned with the effect of Crown sovereignty upon pre-existing property rights of tribal inhabitants.[27] When the colonising power declares itself sovereign over a territory it establishes institutions of governance including courts that apply English law; that being common law and statute law.

The source of the common law aboriginal title doctrine is found in European notions of international law dating back to the sixteenth century.[28] Aboriginal rights are based largely on the presumption of continuity.[29] The presumption applies regardless of whether the new territory was acquired by conquest, cession or settlement.[30] Crown ownership of title does not extinguish aboriginal rights. The doctrine of aboriginal title recognises the legal continuity of tribal property rights upon the Crown's acquisition of sovereignty over their territory. Should the Crown wish to extinguish aboriginal title it can do so through legislation, Crown purchase of title, or voluntary cession by Maori of their rights.

Cooke P defined aboriginal title in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* as:[31]

> *On the acquisition of the territory*, whether by settlement, cession or annexation, *the colonising power acquires a radical title or underlying title*

Treaty; available at <http://www.odi.govt.nz/publications/nzds/discussion-document/tow.html>.

25 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, at 655, 656 per Cooke P.

26 An important function of the Waitangi Tribunal was to determine what the "Principles of the Treaty" were.

27 McHugh, Paul, *The Foreshore and Seabed, New Zealand Law Society Seminar*, July 2004, 26.

28 Williams, D, "Unique Treaty-Based Relationships Remain Elusive", in Belgrave, Kawharu & Williams, supra note 18, at 381.

29 Law Commission, *Maori Custom and Values in New Zealand Study Paper 9* (Law Commission, Wellington, March 2001) 11.

30 McNeil, Kent, "Aboriginal Title and Aboriginal Rights: What's the connection?" (1997) 36 Alberta Law Review 193.

31 [1994] 2 NZLR 20, at 23–24.

> which goes with sovereignty ... *the radical title is subject to the existing native rights*. (emphasis added)

In *Re Lundon & Whitaker Claims Act 1871* the Court of Appeal said:[32]

> *the Crown is bound, both by the common law* of England and its own solemn engagements, *to a full recognition of the Native proprietary right*. (emphasis added)

In Canada, the Courts have stated:[33]

> ... *aboriginal title to land exists in relation to those lands indigenous nations held exclusively (either de facto or de jure according to their own legal traditions) at the time when the Crown asserted sovereignty*, and where it continues to exist today it represents a sui generis communal property right that, although inalienable except to the Crown, permits title holders to use the land for any purpose that does not destroy their cultural attachment to it ... (emphasis added)

In terms of substantive content, in Canada, the courts identify aboriginal title to land, non-title aboriginal rights and treaty rights as three principal strands of rights that are woven together to provide a constitutional doctrine of aboriginal rights.[34]

Aboriginal title can be divided into two categories, territorial and non-territorial. Territorial title represents what was deemed a tribal claim to "full ownership of the land".[35] The concept of "full ownership" was not a Maori concept but one introduced by legislation, in New Zealand, during the 1860s to convert territorial title to land, or Maori customary land, to freehold titles and today only small pockets of customary land remain. This represented the imposition of a "freehold" tenure system by the Crown upon land held by Maori.[36] To this end the doctrine of aboriginal title, or native title, is somewhat

32 (1871) 2 NZCA 41, at 49.

33 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

34 Walters, M, "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada", in B Richardson, S Imai and K McNeil, *Indigenous Peoples and the Law* (Oregon, Hart Publishing, 2009) 37–38.

35 See McHugh, P, "The Legal Basis for Maori Claims against the Crown" (1988) 18 VUWLR 1, at 3.

36 The relevant legislation imposed by the Native Land Court during this period was so detrimental to Maori custom that it has been coined "the Engine of Destruction" — for further discussion, see Williams, D, *Te Kooti Tango Whenua* (Huia Publishing, Wellington, 1999).

underdeveloped in New Zealand compared to jurisdictions such as Canada and Australia.

Non-territorial title refers to those rights that may continue to exist in land, even where the customary title (or territorial title) to land has been extinguished. These rights are less than absolute ownership, such as the right to cross land, to fish and to collect flora and fauna. Non-territorial aboriginal rights do not run with the land and are parasitic to any rights in the territory. Nonetheless, in both instances, territorial and non-territorial, to establish the existence of that territorial or non-territorial title or right requires a claim based on custom law.

In the case of *Te Weehi v Regional Fisheries Officer*,[37] the claimant, Te Weehi, had been harvesting shellfish in an area (shoreline) owned by the Crown. He appealed conviction by citing s 88(2) of the Fisheries Act which stated that "nothing in this Act shall affect Maori fishing rights".

The High Court held that although Maori customary title, or territorial title, to that area (shoreline) had been extinguished it was still burdened by a non-territorial right, Maori customary fishing. The continuing existence of the right to gather kaimoana (shellfish) was noted by Williamson J in *Te Weehi*:

> a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore

The non-territorial right was separate to the territorial right.

The doctrine of aboriginal title acknowledges that the Crown is the sole source of title to land at common law and the Crown's territorial title is subject to the rights of use and occupancy by the indigenous peoples. These rights have legal force on the Crown and as a rule of common law can be enforced irrespective of incorporation within a specific statute.[38] These rights claimed by *Te Weehi* would thus exist at common law regardless of specific incorporation in a statute.[39]

Meyers and Cowan[40] view the *Te Weehi* case as instrumental in empowering the Maori negotiations with the government on the Maori fisheries claim. This pressed the New Zealand government towards a serious consideration of Maori sea fishery rights.[41]

37 [1986] 1 NZLR 690.

38 McDowell & Webb, supra note 11, at 195.

39 Bourassa, S C and Strong, A L, "Restitution of fishing rights to Maori: representation, social justice and community development" (2000) Asia Pacific Viewpoint 41(2), 155–175, at 161.

40 Meyers, G D and Cowan, C M, *Environmental and natural resources management by the Maori in New Zealand* (Murdoch University, Perth, 1998) 31.

41 McHugh, P, "New Dawn to Cold Light: Courts and Common Law Aboriginal Rights", in R Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 47.

2.3 Legislative Recognition of Indigenous Property Rights

2.3.1 Fisheries Act

Custom law or tikanga Maori is a source of rights that are increasingly recognised in New Zealand.[42] These rights were taken into account when passing early fisheries legislation, with s 88(2) of the Fisheries Act 1983 explicitly stating that "nothing in this Act shall affect any Maori fishing rights".

In *Te Weehi* the claimant appealed against the conviction of collecting shellfish by citing this legislation. This allowed the court to acknowledge that the claimant's right to fish was based in the doctrine of aboriginal title. The protection of these fishing rights for Maori within this legislation was of concern during the Treaty of Waitangi Fisheries Settlement.[43]

2.3.2 Fisheries Amendment Act

In the years before 1986 and the introduction of property rights-based legislation, the New Zealand open access wild capture fishery was managed with input controls. These input controls or regulations resulted in an overcapitalised industry with too many fishing boats and unsustainable exploitation.[44] As a result, fishers earned low profits and government faced significant cost in transfer payments and surveillance.

Consequently, management was reformed during the 1980s and 1990s. The Fisheries Amendment Act 1986 introduced the Quota Management System[45] ("QMS"). This created private property rights to catch fish for commercial use establishing property rights in New Zealand's major commercial fish species. The introduction of the QMS not only breached the guaranteed property rights, for Maori, contained in Article 2 of the Treaty and the protections afforded to Maori in s 88(2) of the Fisheries Act[46] but also custom law.

Custom law (tikanga Maori) is sourced from tenets such as collectivity, guardianship, protecting the life force (mauri) of the resource and ensuring the resource is available within the collective for future generations. The granting of a private property right in commercial fisheries, through the introduction of the QMS, vests this right within an individual entity whose interest is primarily to derive and maintain the greatest economic benefit.

42 McDowell & Webb, supra note 11, at 78.

43 See section 2.3.4 of this article for further discussion.

44 Symes, supra note 6.

45 Refer s 2 and Part IV of the Fisheries Act 1996 for full definition.

46 Durie, M, *Nga Tai Matau: Tides of Maori Endurance* (Oxford University Press, Australia, 2005) 114.

2.3.3 Quota Management System

The QMS is based on the individual transferable quota ("ITQ"), a private property right to catch a quantity of fish in a specific location during a specific period of time.[47] This property right can be traded (bought and sold) on the open market. ITQs are defined as a share of the total allowable commercial catch ("TACC") and the New Zealand government adjusts this TACC to restrict the amount of fish landed to sustainable levels. Fishers can contribute to stock utilisation and sustainability decisions through the various government bodies.

This process inevitably feeds information to the overall sustainability issue and assists government to set quota and TACC levels. From this information the annual catch entitlement ("ACE") of a certain tonnage of fish that can be landed is also set, representing the output from the fishery. The private property right inherent in the QMS gives the fishers an incentive to care about and participate in the processes to sustain the resource.

The adoption of the ITQ has been viewed as a step towards securing sustainable fisheries supported by legislation and administrative machinery.[48] The respective fisheries legislation appears to be directed towards creating a property right.[49] It is arguable that the inefficient management practices and perhaps the desire to obtain a tradeable and economically based "property right" within the fishery resource prompted the introduction of the Quota Management System.

2.3.4 Settlement process

Unlike the Treaty of Waitangi for Maori, in Canada, a treaty enjoys the constitutional protection of s 35 of the Constitution Act 1982. If introducing a private property right in a resource eliminates these constitutionally protected rights, there is no recourse to a judicial challenge in order to realise the abrogation of these rights on the grounds that this is contrary to the Constitution as

47 For general discussion on the QMS, see also Wallace, Cath, "Environmental Justice and New Zealand's Fisheries Quota Management System" (1999) 3 NZJEL 33.

48 See Scott, A, "Development of Property in the Fishery" (1988) Marine Resource Economics 5, 289–331. See also Connor, R, "Are ITQs Property Rights? Definition, Discipline and Discourse", in Ross Shotton (ed), *Use of Property Rights in Fisheries Management: Proceedings of the FishRights 99 Conference Fremantle, Western Australia*, 11–19 November 1999 Workshop presentations, FAO Fisheries Technical Paper 404/2, available at <http://www.fao.org/docrep/003/X8985E/x8985e04.htm#WHAT%20ARE%20PTOPERTY%20RIGHTS%20Chairman%20Peter%20Millington,%20Fisheries%20Western%20Australia,%20Perth> (last accessed 4 August 2010).

49 Refer *New Zealand Federation of Commercial Fishermen (Inc) v Minister of Fisheries* CP 294/96 and on appeal as CA 82/97, CA 83/97, CA 96/97 where both the High Court and Court of Appeal declared quota as property only subject to the overriding powers of the legislature.

these rights enjoy constitutional protection afforded by the Constitution Act 1982. Section 35 also offers constitutional protection to aboriginal rights and impending legislation cannot interfere with them. Treaty rights together with aboriginal title and non-title aboriginal rights provide a constitutional doctrine of aboriginal rights; and as constitutional rights, in Canada, they are protected from governmental and legislative interference.[50]

In New Zealand, however, the same level of protection and recognition is not afforded. Neither the text of the Treaty (of Waitangi) nor tikanga Maori (custom law) has been incorporated into domestic legislation. Domestic legislation is binding on the State. Irrespectively, Maori appealed to the Waitangi Tribunal[51] and courts for recourse on the breach of these rights. In 1988 and again in 1992 the Waitangi Tribunal produced two major fisheries reports: the *Muriwhenua* and *Ngai Tahu* reports. These reports recognised that customary Maori fishing rights had a commercial component and that such rights were capable of evolving as recognised commercial rights in fishing.[52]

This right to development was recognised not only by the Waitangi Tribunal but again by the High Court and Court of Appeal.[53] It was accepted that as a result of the Quota Management System, Maori had either lost their rights or were stopped from developing them as they were entitled.

The Waitangi Tribunal and courts also established that Maori fishing rights were held and exercised as a consequence of tikanga Maori, whakapapa (genealogy) relationships, and that whanau (family and extended family group) and individuals benefited from fishing rights and those whakapapa relationships.[54]

The Waitangi Tribunal, High Court and Court of Appeal recognised that the introduction of the QMS impinged upon the right of Maori to develop this resource. The Waitangi Tribunal, High Court and Court of Appeal also recognised that the basis for this claim, to the fishery, was one sourced in tikanga Maori (custom law). The threads that underpin this right are based on custom, and the management of this right is also one based on custom.[55]

50 Walters, M, "The Emergence of Indigenous Rights Law in Canada", in Richardson, Imai & McNeil, supra note 34, at 38.

51 The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975 as a forum to hear disputes between Maori and the Crown and make recommendations.

52 McDowell & Webb, supra note 11, at 204.

53 *Ngai Tahu Maori Trust Board & Ors v Director General of Conservation & Ors* CA 18/95, 22 September 1995, Cooke P, Richardson, Casey, Hardie Boys, Gault JJ. See also Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) 234–235.

54 Findings on the nature and extent of fisheries rights have been made by the Waitangi Tribunal (*Muriwhenua Fishing*, *Ngai Tahu Sea Fisheries* and *Fisheries Settlement* reports) and the Courts (*Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285, at 307–312 per High Court and 375–376 per Court of Appeal).

55 Ibid.

Irrespectively, the resultant settlement from this appeal, to the Waitangi Tribunal and courts, was ultimately a private property right for Maori in the form of quota and shares.

In legal proceedings Maori obtained from the High Court and the Court of Appeal,[56] by way of interim relief, a declaration that the Crown ought not to take further steps to bring fisheries within the Quota Management System. This prompted the Crown to negotiate with Maori on Treaty fishing rights. These negotiations led to a two-stage settlement of claims over Maori commercial and customary fisheries.

The first step was an interim arrangement effected by the Maori Fisheries Act 1989 which was enacted to allow better provision for the recognition of Maori commercial fishing rights secured by the Treaty. This Act provided to the Maori Fisheries Commission, established pursuant to the Maori Fisheries Act 1989, a proportion of quota holdings or the equivalent value in cash as compensation for commercial fishing claims. The Maori Fisheries Commission was to also promote Maori involvement in the business and activity of fishing.

A Deed of Settlement, dated 23 September 1992, was entered into between the Crown and Maori, effectively settling the commercial fishing claims by Maori. Subsequently the Treaty of Waitangi (Fisheries Claims) Settlement Act was enacted to give effect to the settlement of claims relating to Maori fishing rights provided for in the Deed of Settlement. This included:

(a) the reconstitution of the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commission ("the Commission");
(b) payment of cash to the Commission (which was to be used to purchase a 50 per cent shareholding of Sealord Products Limited);
(c) provision for the allocation of 20 per cent of quota for any new species brought into the Quota Management System;
(d) provision for the making of regulations to recognise and provide for customary food gathering by Maori; and
(e) empowerment of the Commission to hold the assets and develop a model to allocate the assets to Maori.

In return Maori agreed:

(a) that the Settlement settled all Maori commercial fishing rights and interests;
(b) to accept regulations for customary fishing, and to stop litigation relating to Maori commercial fisheries;

56 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.

(c) to support legislation to give effect to the Settlement; and
(d) to endorse the Quota Management System.

Despite the legal recognition that Maori owned all the fisheries, in a magnanimous gesture Maori gifted half the fishery back to the Crown.[57]

Subsequent to the development of a model to allocate these fishery assets to Maori, the Maori Fisheries Act 2004 ("MFA") was passed to codify the allocation model and enable Te Ohu Kaimoana (the statutory organisation dedicated to future advancement of Maori interests in the marine environment which was established under the Act) to transfer fisheries assets to Maori. The settlement asset resultant from this process included for each iwi quota shares (both inshore and deepwater) in Aotearoa Fisheries Limited ("AFL"),[58] a Maori-owned company, and cash. AFL, pursuant to the MFA, has a 50 per cent shareholding in Sealord (Nelson) and Prepared Foods Ltd (Palmerston North); and 100 per cent ownership of Moana Pacific Fisheries (Auckland), Chatham Processing (Chatham Islands), Pacific Marine Farms (Coromandel) and Prepared Foods Processing (Palmerston North).

The right to development recognised by the Waitangi Tribunal and again by the courts[59] provided a process to establish private property rights for Maori both in terms of quota shares and shares in Aotearoa Fisheries Limited. Although this right to development has ultimately been manifested in a private property right for Maori, the thread that underpins this right is one based on custom and the management of this right is one based on custom.

2.4 Sustainable Management of the Fishery

Bearing in mind that tikanga (custom) was the basis upon which the property right to the fishery was established,[60] there are unique considerations that iwi (tribes) are required to address in the sustainable management of this asset, including future and cultural considerations.

57 Walker, supra note 18.

58 Aotearoa Fisheries Limited was established pursuant to s 60 of the MFA and is required to manage its assets in a commercial manner (s 61). See Subpart 3 of the MFA for full provisions pertaining to AFL.

59 *Ngai Tahu Maori Trust Board & Ors v Director General of Conservation & Ors* CA 18/95, 22 September 1995, Cooke P, Richardson, Casey, Hardie Boys, Gault JJ. See also Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (1988) 234–235.

60 Ibid.

2.4.1 Future considerations

Due to the cultural dynamic, Maori organisations are often established to provide a resource for future generations (taonga tuku iho), so the long-term vision for that organisation and strategies to ensure its continuing success are critical. The tikanga principle of taonga tuku iho is similar to the social equity principle of intergenerational justice or justice for future generations. These two terms reflect the broad acceptance that justice spans past, present and the future.[61]

For Maori organisations this principle has implications for many aspects of governance such as selecting board members with a view to handing the business on, and in strategic planning where a 25-year view, or longer, may be taken. This may seem similar to organisations in industries such as farming or aquaculture, which also undertake long-term planning, but for many Maori organisations the time span is intergenerational.

Conversely, some stakeholders, such as financiers, may adopt a short-term view — for example, focusing on immediate and short-term returns or limiting to a five-year planning cycle. Good communication with stakeholders and potential financiers concerning the strategic plan is therefore vital to ensure that any long-term view to sustain and develop the settlement asset is fully appreciated.

It is acknowledged that adopting a strategic long-term view can not only lock organisations into unproductive deals but can also prevent acceptance of opportunities that may arise in the interim. Effective strategic management plans are essential and the inclusion of exit strategies assist to compensate any effects of adverse deals or alternatively permit the organisation to engage new opportunities as they occur.

2.4.2 Cultural considerations

Many Maori organisations are explicitly driven by tikanga (culture), kawa (protocol) and values (for example in employment, tangihanga or funeral rites, and cultural leave policies) that take into account the aspirations of whanau (extended family), hapu (subtribe) and iwi (tribe).[62] Cultural considerations will sometimes take precedence over purely economic factors. For instance, many coastal iwi will adopt a provision to enable iwi Maori to fish quota. In many

61 Bosselman, K and Grinlinton, D (eds), *Environmental Law for a Sustainable Society* (New Zealand Centre for Environmental Law, Auckland, 2002).

62 See Effective Governance, available at <http://www.tpk.govt.nz/en/services/effective/> (last accessed 5 August 2010). See also Law Commission Report, *Waka Umanga: A proposed law for Maori Governance Entities*, May 2006, Report 92, Wellington, New Zealand.

instances this quota package could be leased for a greater commercial value; however, the cultural or tikanga value will override the commercial gain.

Maori organisations may also have a Maori dimension in procedure such as the use of Te Reo (Maori language), mihi (greeting), karakia (prayer), koha (donation), hospitality for manuhiri (visitors), manaakitanga (care for), whanaungatanga (relationship), kotahitanga (unity, consensus decision-making) and regular consultation hui (meetings or gatherings). These elements should support the general principles of good governance. Subsequently, it is important to have people with expertise in tikanga and kawa on the board.

In recognising the need for Maori to form their own structure based on their specific kawa and protocol, the Waka Umanga (Maori Incorporations) Bill[63] was introduced. The primary objective of this Bill is to provide a balance between good corporate governance standards to ensure governors act in accordance with the interests of current and future members, and the need to maintain scope for tribes to develop structures appropriate to their size, structure and cultural traditions. Although not introduced specifically for the Fisheries Settlement, but to address the inadequacies of existing legislation, it belatedly provides an appropriate vehicle for Maori in terms of maintaining their cultural structures.

It is acknowledged that non-indigenous business practices may also conform to these unique considerations. However, each iwi (tribe) upon receipt of their assets is different, and it is imperative that the appropriate governance structure, with an accompanying strategic management plan, is adopted to safeguard the assets and provide a clear path for Maori. Upon establishment of this structure the strategic plans can then realise the respective kawa (protocol), kaupapa (way of doing things) and agenda for each iwi.

The inclusion of these unique cultural considerations complicates the issue of governance for Maori entities, particularly when the inclusion of these principles is implemented alongside general governance principles.

2.4.3 Legislative considerations

The purpose of the Maori Fisheries Act 2004[64] is to implement the agreements made in the Deed of Settlement, outlined above, and provide for the development of the collective and individual interests of Maori in fisheries by establishing a framework to allocate and manage the settlement assets.

It is acknowledged that part of the settlement was to implement regulations

63 See also general discussion on the provisions, Te Puni Kokiri, "Waka Umanga Bill — Key Provisions", available at <http://www.tpk.govt.nz/en/consultation/reform/wakaumanga> (last accessed 5 August 2010).

64 MFA, s 3.

to recognise and provide for customary fishing[65] and food gathering[66] for Maori. The recognition of custom (tikanga), within this framework, is clear. This was effected through fisheries regulations within the Fisheries Act 1986. The Maori Fisheries Act 2004, in essence, directs the allocation of financial assets. This analysis addresses the recognition of custom within a commercial property rights framework.

Tikanga (custom) principles are recognised in the Maori Fisheries Act 2004. Consistent with tikanga principle taonga tuku iho (held in trust for future generations) the MFA contains provisions that restrict the passing of the settlement asset outside iwi.[67] The management structure also provides for two entities: a traditional structure[68] and a commercial structure.[69] Schedule 7 of the MFA refers to "kaupapa" (way of doing things) that is required to establish the "traditional structure". The traditional structure accommodates tikanga practices whereas the commercial structure is an economically driven entity that has reporting responsibilities to the traditional structure. This arrangement enables Maori to maintain their traditional governance while at the same time having the agility to act as a business entity.

2.5 Conclusion: Indigenous Property Right — Fishery

An indigenous property right to fish is sourced, pre colonisation, from custom law. Post-colonisation western concepts such as aboriginal title, treaty rights and statute provided for recognition of these rights. Nonetheless, the underpinning issue or concept to be satisfied, pre or post colonisation, is one of customary law (tikanga Maori).

In comparison, a non-indigenous property right to fish, or the western notion of property rights and fisheries resources, is based on the presumption that the resource is an asset that can be owned, divided and transferred. Linked to this presupposition is the idea of the State being the owner of the asset on behalf of the public, a right determined and regulated by the State.

Maori have a different interpretation of the relationship between people and the fisheries resource. Maori do not, and cannot, own the fisheries resource. Rather, Maori are the guardian of that resource for future generations. This

65 See, for example, Fisheries (South Island Customary Fishing) Regulations 1999 — provisions for Maori to fish for non-commercial purposes.

66 See Part IX of the Fisheries Act 1996 for customary fishing management tools.

67 Section 161 of the MFA provides that settlement quota cannot be gifted and restricts the sale of settlement quota to other recognised iwi or an entity within Te Ohu Kaimoana.

68 Section 14 of the MFA and Schedule 7 contains criteria and kaupapa for a Mandated Iwi Organisation.

69 Section 16 of the MFA contains criteria for the Asset Holding Company including that they are wholly owned by, and provide dividends to, the Mandated Iwi Organisation.

authority is confirmed by genealogy, defined by physical boundaries, and determines seasons, methods and any other measure to sustainably manage the fishery. The access to the fishery that Maori had exercised over generations was one of responsibility to ensure longevity and sustainability of that resource.

For Maori, the right to the fishery has been recognised by legislation.[70] This underpinning right is one based on tikanga. Tikanga does not stop at the recognition of guardianship but extends to effective governance and sustainable management to ensure longevity of the resource for future generations. Despite the commercial recognition of private property rights for Maori, the tangible recognition of tikanga is reflected in the iwi governance structures underpinned by parallel recognition of tikanga in the provisions of the Maori Fisheries Act 2004.

3. NON-INDIGENOUS PROPERTY RIGHTS — FISHERY

3.1 Background

In comparison to the indigenous perspective, the lens through which non-indigenous peoples view fisheries is one of open access. At common law there are recognised public rights of navigation and fishery. According to Viscount Haldane in *Attorney-General (British Columbia) v Attorney-General (Canada)*:[71]

> The subjects of the Crown are entitled *as of right ... to fish* in the high seas. It is probably a right enjoyed so far as the High Seas are concerned by *common practice from time immemorial* ... (emphasis added)

Any grants made by the Crown to land adjoining the shoreline were subject to the public right to fish. This common law right could only be overturned by statute. Parliament or the State may regulate fishing and grant private property rights in any manner it sees fit.[72]

70 See, for example, MFA and Maori Commercial Aquaculture Claims Settlement Act 2004.
71 [1914] AC 153, at 169.
72 Boast, R, *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 42.

3.1.1 Property rights

Spiller defines "property" as a "thing owned, that over which title is exercised, whether tangible or intangible, real or personal"[73] and a "right" as "a lawful title or claim to anything".[74]

Bearing in mind these definitions, scholars in various disciplines such as economics and the social sciences have developed theories to determine the term "property rights". Economists[75] provide a quantified view of property, and the rights intrinsic to this view of property contain four characteristics: exclusivity, duration, security and transferability. It is acknowledged that these characteristics are far from absolute, but it is this economic view that often prevails in providing the more appropriate theory for property rights for fisheries and ultimately legislative rights to them.

3.1.2 Property rights in fisheries

The resolution of problems associated with property rights is fundamental for the effective management of marine resources. Predictably, there has been a considerable amount of literature and debate that has ensued as to the meaning and nature of fisheries property rights systems. So, it is not surprising that the issue of property rights occupies a position of central importance in the social science of fisheries management.

With respect to fisheries rights there are four basic property rights regimes: open access, state property, private property and common property.[76] These rights have been expanded to include a global regime and a communal regime. It is within these regimes that fishers exercise generic rights such as the right of harvest, use, conservation and management.

3.1.3 Property rights and use rights

Although the basic economic problem of commercial fisheries can be viewed as the absence of property rights to the fish stocks,[77] the preferable arrangement appears to be stock control by public agencies, combined with exclusive use rights granted, leased or sold to the fishing industry in order to achieve

73 Spiller, P, *Butterworths New Zealand Law Dictionary* (6th ed, LexisNexis, Wellington, 2005) at 242.

74 Ibid, at 270.

75 FAO Depository Office of Director General, *Legislating for Property Rights*, available at <http://www.fao.org/docrep/007/y5672e/y5672e04.htm> (last accessed 4 August 2010).

76 Ibid.

77 Hannesson, Rögnvaldur, "Rights Based Fishing: Use Rights versus Property Rights to Fish" (2005) Reviews in Fish Biology and Fisheries 15(3) 231–241.

economic efficiency. Incentives to establish such rights can be found both in government circles and in the industry.

Use rights that attract a user fee are often utilised as a tool for government agencies to achieve economic efficiency in the industry. Norway and Iceland are two countries that have put in place use rights, but they have done so in different ways. Iceland, like New Zealand, has an Individual Transfer Quota system while Norway has fishing concessions combined with individual vessel quotas. Some success appears to have been achieved in both countries with these systems.

In comparison to New Zealand's situation, the property rights concept implemented in Australian legislation ranges between an endorsed licence model and one approaching, but not actually attaining, a full property rights concept. Although some Australian states provide legislative penalties and cancellation of licences,[78] few have developed the concept of fisheries quotas to the stage of creating a property right.[79] It could be concluded that the Australian system is hindering or not supporting the need to secure a sustainable fishery.

However, fisheries are complex and interdependent ecological and social systems that require integrated management approaches.[80] The actions of one person or group of users affect the availability of the resource for others. Managing such common pool resources requires conscious efforts by a broad range of stakeholders to organise and craft rules enabling equitable and sustainable use of the resources for everyone's benefit. Collective action is often a prerequisite for the development of community-based institutions and the devolution of authority.

Elinor Ostrom's theory of common pool resource[81] existing in the interstices of the Market and the State, notes that:[82]

> Many alternative forms of property have repeatedly been found to work effectively when well matched to the attributes of the resource and the harvesters themselves, and when the resulting rules are enforced, considered legitimate, and generate long-term patterns of reciprocity ... in spite of Hardin's

78 See, for example, Victoria's Fisheries Act which provides for cancellation of entitlement to quota and suspension of licence. Also the Commonwealth's Fisheries Management Act 1991 which provides for the suspension or cancellation of fishing concessions.

79 The most developed is the NSW Fisheries Management Act 1994 which employs the approach of allocating "shares" in a "share management fishery". Whereas the least developed are Victoria and Queensland. Victoria establishes "individual quota units" within the total allowable catch.

80 Mahfuzuddin, Ahmed, Viswanathan, K Kuperan, Valmonte-Santos, R A, "Collective Action and Property Rights in Fisheries Management", available at <http://ideas.repec.org/p/fpr/2020br/1107.html> (last accessed 5 October 2010).

81 Ostrom, supra note 10.

82 Van Laerhoven, Frank, and Ostrom, Elinor, "Traditions and Trends in the Study of the Commons" (2007) 1 International Journal of the Commons 3, at 19.

> persistent metaphor, today many people, ranging from policy makers, donors, practitioners, and citizen activists, to scientists from different disciplines, have begun to appreciate that there is a world of nuances between the State and the Market.

3.1.4 Shared fisheries in New Zealand

Bearing in mind the aim that all New Zealanders have the basic right to catch fish and that shared fisheries should be managed in such a way that produces the best value for New Zealand, in 2007 the Ministry of Fisheries released a *Shared Fisheries* paper to provide opportunities for New Zealanders to obtain the best value from the use of fisheries resources.

This paper identified that effective management is currently undermined by poor information on amateur catch and uncertainty surrounding the process for allocating the available catch between commercial, customary and amateur fishers.[83] In addition, the paper also identifies the risks associated with management decisions based on poor information, the cost of ongoing contention and litigation, and the loss of value associated with inadequate incentives for all sectors to protect and improve shared fisheries.

Although this initiative has stalled, it indicated the willingness of the New Zealand government to maintain sustainability of the fishery economically, socially and culturally for all New Zealanders and consider their respective rights. It is acknowledged that there have been no property rights allocated to endorse this basic right to catch fish.[84]

3.1.5 Property rights for indigenous peoples in other jurisdictions

Most writers, managers, economists and policy makers agree that the granting of property rights in fisheries to the private sector will result in increased involvement in maintaining the resource.[85] However, social scientists dispute this assumption, seeing the argument for increased property rights in fisheries as an economic rationalisation working against disadvantaged groups such as indigenous peoples.

Unlike Maori, this position for the indigenous peoples of Australia is further compounded by the fact that the current Native Title Act 1993 (Cth) does not recognise the full extent of the property rights that they are due. Although the

83 Ministry of Fisheries, *Introduction to the Shared Fisheries Proposals*, available at <http://www.fish.govt.nz/en-nz/info/aboutus/Organisation/policy/Shared+Fisheries/intro.htm> (last accessed 8 May 2009).

84 Ibid.

85 Shotton, supra note 48.

Native Title Act refers to native title over land and waters (including seas) and specifically refers to "fishing rights" in s 223(1), the Commonwealth argues that only native title recognised by common law was protected by the Native Title Act.[86] Bearing in mind that the majority of Australian states have not yet developed the concept of property rights for fisheries, the stance taken by the Australian courts in granting (or not granting) property rights in fisheries for indigenous peoples is perhaps justified.

In Norway, the recently produced clarifications from the Saami Rights Commission and the Coastal Fishing Commission have clearly placed the question of Saami rights to marine resources on the agenda. One recommendation of the Saami Rights Commission is that special fjord-related rights be legalised.

This proposal for legislative recognition of fishing rights for Saami indigenous peoples is similar to the situation for Maori.[87] The right stems from local Saami custom and practice that in turn is based upon customary knowledge, ecological knowledge and customary sustainable management of this resource. Whilst the legislative recognition of fishery rights for the Saami peoples is still in the formative stages, arguably the decrease of local cod stocks and comprehensive ecological changes have contributed to the policy direction of government towards a favourable view of the ability of indigenous Saami peoples to sustainably manage their fishery.

3.1.6 Property rights — conclusion

Compared to conservation measures used in other countries, the introduction of the QMS in New Zealand has been relatively positive as it established tradeable property rights that allowed fishers to enter or exit the industry. Property rights determined who was able to participate in the fishery and this resulted in significant changes for boat owners, crew and related processing industries and on coastal communities. Attempts to introduce ITQs overseas have led to concerns over the concentration of quota into fewer fishing operations and the negative effect this can have on coastal communities.[88] It is apparent that property rights need to be clearly defined in order to avoid tension over access to the fishery.

86 *Commonwealth v Yarrmir* (2001) 208 CLR 1, 184 ALR 113 (HC Australia).

87 Although for the Saami peoples the Commission also refers to international law which grants these fisheries protection against measures that may endanger that right to continued cultural enjoyment and that this protection has not ceased even if the fishing currently takes place with more modern equipment. Also Art 27 ICCPR, Art 15 ILO Convention 169 where the State is obligated to implement consultation and Saami participation in any decision-making that may impact on possibilities to perform Coastal Saami fishing.

88 Symes, supra note 6.

Stakeholders with an interest in fisheries resources but who are not part of the QMS include Maori with customary fishing rights, landowners with coastal riparian rights and quota holders. Whilst property rights help provide for the commercial certainty required for the long-term investment in aquaculture and sustainable management of the wild catch fishery, a co-operative management plan to include a social dynamic is still required to ensure the longevity of the industry and maintain the value of the property right.

However, any system must be prepared to change and develop as the needs of the people evolve. For instance, as measures established to protect threatened species gradually prove successful, some stringent controls may be relaxed. Alternatively, more controls may be required to protect the rights of indigenous peoples. It is important to understand the nature of the right and the consequences involved in the protection of that right.

3.2 Global Problems

3.2.1 Over-fishing

Much of the rationale behind the open access principle[89] was predicated on a supposedly inexhaustible supply of marine resources. However, the problems of over-fishing in an open access regime were already becoming apparent. In a recent analysis of the state of the world's fish stocks, the Food Agricultural Organisation ("FAO") noted that:[90]

(a) 25 per cent are over-fished;
(b) 52 per cent are fully utilised, but not over-fished; and that
(c) Only 23 per cent of the stocks could produce more.

The FAO believe that there is limited room for expanding capture fisheries further and consider that gains will have to come from better management of the resources; projecting that aquaculture production might be up by some 50 per cent from current levels by 2015.

Nonetheless, the core problem facing fisheries is the social and economic inefficiencies of the management regime, not over-fishing.[91] Inevitably this requires co-operation between the fisher and the management to develop policies and regulations to ensure social, economic and cultural sustainability of the resource.

89 Open access principle and freedom of the seas were developed from the writings of Grotius in the 16th and 17th century.

90 Presentation by Grimur Valdimarrson, Director, FAO, "Aligning incentives for responsible fisheries: an FAO perspective", NZ Seafood Industry Conference, 24–25 May 2006.

91 Ibid.

3.2.2 Future challenges

It is perhaps imprudent to predict the future, but the changing nature of fisheries science cannot be ignored. Bio-economic analyses are increasingly important in the assessment and management of fisheries and there is more concern than ever before about the impacts of fishing on the marine environment.[92] This is reflected in the work now performed by laboratories that are concerned with the impacts of fishing on habitats and ecosystem processes,[93] and this may provide the basis for setting management strategies such as limits to the frequency and intensity of trawling.

The burden of proof for showing that fishing does not have adverse environmental effects is likely to shift toward the fisher and it is expected that there will be more research on precautionary approaches to dealing with uncertainty. So, in the short term it is not unreasonable to assume that there will be increasing pressure on the fisheries and the correlative effect on the ecosystem.

Sustainability is a key goal in fisheries. In a new FAO report it was stated that the fishing industry and national fisheries authorities must do more to understand and prepare for the impact climate change will have on world fisheries.[94]

The concern from conservation and pressure groups to alleviate the situation of over-fishing and now the effect of climate could lead to a structural change in fisheries.[95] Once again the ownership of fishing rights, property rights and fish stocks is likely to become the norm with fishers becoming more actively involved in management decisions. Participation in these management decisions for longevity of the industry appears to be a generic feature essential to all fisheries globally.

4. LOOKING AHEAD

4.1 Current Situation

Whilst countries like New Zealand and Australia have introduced fisheries legislation recognising property rights in their fisheries, the debate continues on the appropriate fisheries management regime. From the outset New Zealand

92 Jennings, Simon, Kaiser, Michel J and Reynolds, John D (eds), *Marine Fisheries Ecology* (Blackwell Science, Oxford, 2005).

93 Jennings et al, ibid.

94 FAO, *The State of World Fisheries and Aquaculture*, available at <http://www.fao.org/news/story/en/item/10270/icode/> (last accessed 5 August 2010).

95 Jennings et al, supra note 92.

has embraced the notion of sustainable fisheries and engaged with Maori to settle their Treaty claims to their fishery.

From a global fishery perspective, it is difficult not to applaud the success of the QMS that not only establishes a property right but also provides a vehicle to protect this right and enable effective participation by industry on issues affecting the fishery. Although property rights may be a step towards sustainability of the resource, this view is not without its problems.

With pressures on the global ecosystem including climate change and concerns from conservation groups it is no surprise that there is support for changing the existing management regime. Over-fishing is merely a symptom of the management problem.

Increased property rights as an economic rationalisation works against the interest of disadvantaged groups or new entrants who are unable to secure these rights, favouring instead the groups with deeper pockets. Nonetheless, these social obligations can be satisfied by group quota schemes. Inevitably this requires co-operation between all groups to develop policies and regulations to ensure social, economic and cultural sustainability of the resource.

Maori collectively now exert an influence on approximately 40 per cent by volume of all quota. Furthermore, it can be concluded that Maori collectively share in excess of 700 million NZD in fisheries assets (as valued at April 2003). Although it may be belated, the Waka Umanga (Maori Incorporations) Bill provides an effective vehicle for Maori to form their own tribal structures that best suit their own culture, traditions and particular requirements. These include the adoption of relevant core tikanga (cultural) principles such as taonga tuku iho (a treasure for future generations), manaakitanga (caring for each other) and kotahitanga (working as one).

Maori are undeniably a major player in New Zealand and global fisheries. To effectively address the issue of property rights requires co-operation between all groups. Furthermore, for any system to be effective it must be prepared to change and develop as the needs of the people evolve. As such it is important to understand the nature of the right and the consequences involved in the protection of that right.

4.2 A Way Forward?

The philosophy underpinning Maori tikanga includes concepts such as taonga tuku iho (future generations), kaitiakitanga (guardianship), manaakitanga (a duty to look after others) and kotahitanga (unity). The aim of tikanga Maori is balance. The interaction of these concepts to preserve intergenerational and intragenerational equity is consistent with the concept of "sustainable management". It is suggested that this underlying philosophy extends not

only to the management of the fishery but also to the respective governance structures.

With respect to the strong economic position Maori hold in fisheries together with the ability to utilise an appropriate governance structure and the underlying tikanga principles of taonga tuku iho, manaakitanga and kotahitanga, Maori need to take a lead in global fishery management. It is suggested that these principles can be applied to assist in the future management of the fishery with the realisation of longevity and economic, social and cultural sustainability of the industry.