Maori Fishing Rights – Coping with the Aboriginal Challenge

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New Zealand's fisheries management is world famous for introducing a fully fledged individual quota management system (the QMS) from 1986 onwards. Less well known is the crucial role played by Maori tribes in this process. The guaranteed Maori claims, dating back to 1840, had to be sorted out and the ITQs provided to be the "currency", making a peaceful transition possible. After a negotiated deal was done in 1992, the Ministry of Fisheries has in co-operation with Maori interests also built a customary fisheries regime, securing Maori also the cultural connection to the fisheries. The following article gives a broad review of these processes, claiming that there is more to be learnt from New Zealand than just ITQs.

In 1984 Tom Te Weehi, a member of the Ngati Porou tribe *(iwi)* was gathering shellfish on Montunau Beach along the Canterbury coast. Being detected by a fisheries officer he was charged with breaching the rules for Amateur Fishing Regulations (recreational) by being in possession of 46 undersized abalone *(paua)*. He resisted the charge, claiming (rightfully so) that he had obtained a permission from the local guardian *(kaumatua)* in advance. He was collecting the shellfish within the area *(rohe)* traditionally controlled by his tribe and the catch was to be used for immediate consumption. In short he was, in his own view, only exercising his traditional right guaranteed by the Treaty of Waitangi of 1840 between Maori chiefs and the English Queen. Surprisingly, the Court accepted his claim, finding that Te Weehi was exercising his right according to the Fisheries Act of 1983, where it is explicitly stated that "Nothing in this Act shall affect any Maori fishing right". Consequently, he had not committed an offence and the case was quashed (Kerins & McClurg, 1996:7).

In hindsight this was a lucky outcome, not only for Maori, but for the whole New Zealand fishing industry and not least the fledgling set-up of the new quota management system (QMS), being in its final stage of preparation. This was the first time that a general Maori fishery right was recognised in law, supporting the view that customary fishing rights continued to exist until they were expressly taken away with the consent of the right holder.

While New Zealand no doubt has been most famous in fishing circles for its quota management system (the QMS), its handling of the Maori challenge deserves no less attention. In many ways it can be claimed that the solution to the "Maori problem" was an absolute precondition for the successful establishment of the ITQ-system. On the other hand, the QMS provided the "currency", making it possible to sort out the Maori commercial claims. Finally it can be argued that the addition of a separate sphere of *Maori customary fishing* is an innovative attempt of establishing the best of the two worlds, keeping Maori in touch with the cultural roots of fishing while also participating in the modern commercial sector. Although we are still in the middle of a rapidly unfolding drama, we can draw some lessons from the New Zealand experience, regarding what is usually considered the complete incompatibility of aboriginal rights and the use of individual transferable quotas (ITQs) (Hooper & Lynch, 1999). But first we have to give a short account of New Zealand's fishing industry, in order to provide a setting for the development of modern Maori fisheries.

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New Zealand's fishing industry - small, exclusive and export oriented

New Zealand's exclusive Economic Zone (EEZ) is the fifth largest in the world, covering an area of 4,6 mill km^2 or more than 15 times the land area of the country. In spite of the large zone, productivity is limited with 2/3 of the area deeper than 1.000 metres and only 5% shallower than 200 metres. Of approximately 1.000 marine fish species in New Zealand waters 130 are fished commercially (only 43 species are considered commercially important). Species include shallow water finfishes and shellfish, pelagic as well as deep-water species. Only a small fraction of the commercially important species is based on shared stocks. The rest is exclusively within New Zealand's EEZ, making national management considerably easier than for most other fishing nations.

Within its quota management system (QMS) New Zealand has more than 180 separate fish stocks present in ten quota management areas, covering 43 species. This represents 85% of the total catch within the zone, with more stocks in line to be brought under the QMS. Some 117 species are still managed outside the QMS by a system of permits and input regulations. The industry is heavily concentrated, with approximately 80% of the total allocated quotas being controlled by ten companies. The remaining quotas are owned by approximately 2.500 persons/companies, each commanding just a small fraction of the total quota for the particular species.[2)] The three largest companies on the processing side (Sealords, Talleys and Sanfords) are also strongly vertically integrated, controlling quotas and owning vessels as well as retail outlets. Together they control about 55% of the industry. The most important species, in terms of volume and value are given in table 1.

While the number of fishing boats have been steadily reduced over the last 15 years, there are still some 2.000 domestic vessels licensed, mainly connected to the inshore coastal fisheries. Only 71 are larger than 28 meters[3)]. The number of foreign licensed vessels have been brought down to 11, while 80 are still foreign chartered.

Table 1 Total Exports by Major Species 1998

	Exports (FOB) $NZ	%
Hoki	294,6	21,0
Greenshell	117,7	8,4
Rock lobster	101,7	7,3
Orange roughy	78,7	5,6
Squid	63,8	4,6
Ling	61,6	4,4
Paua	55,9	4.0
Snapper	39,4	2,8
Salmon	31,9	2,3
Deep Sea Dory	22,1	1,6
Other species	532,6	38,0
Total	1400,0	100,0

Source: SeaFIC 2000

The total number of fishermen is estimated to be 4.650, while the number of processing workers (including the aquaculture industry) is 5.870 (SeaFIC, 2000).[4)] The total direct, indirect and induced economic impact of the seafood industry is just over 1,7 billion $ of value added or about 1,8% of New Zealand's GDP. In spite of these moderate numbers, the importance of the fishing industry should not easily be discounted. First of all, with 90% of the total catch (including aquaculture) going to export markets, fish and fish products account for 5% of New Zealand's total export earnings, next only to dairy, meat and forestry products. Secondly, in certain areas employment from fishing, processing and aquaculture is the most important source of income, giving work to a large number of unskilled or semiskilled workers. Thirdly, fishing plays a central role also in terms of recreation and subsistence. This is acknowledged by the statutory recognition of customary Maori fishing, and by the large number of New Zealanders participating in the recreational fisheries (anticipated to comprise 20% of the population), together with foreign tourists in the increasingly important game-fishing market. Finally, it is worth mentioning that the marine

environment is considered to be an important part of New Zealand's "green image". This is supported by the fact that the size of New Zealand's EEZ grants the country a status of a marine "superpower", attracting considerable international interest in its management.

Besides for hoki, New Zealand's fisheries are based on a large number of small stocks. Total TAC for all species is estimated to be in the area of 5-600.000 tons annually, offering few possibilities of increasing domestic catches (Annala, 1997). Further development will have to be obtained by fishing in international waters, by entering into joint ventures with other international fishing companies (presently Namibia, South Africa and Argentina) or by enhancing the value added element through further processing in New Zealand. In addition comes aquaculture, providing some 50.000 tons (1998), mainly of farmed mussels, oysters and a small salmon growing sector. The aquaculture sector has increased rapidly over the last ten years and is generally considered to have the largest growth potential, provided that the conflicts over space can be solved. The most important export market is Japan (29% of total), followed by United States (20%) and Australia (11%).

Administratively the fisheries, including aquaculture, sort under the Ministry of Fisheries, established in 1995, after being split off from the ministry of Agriculture and Forestry (MAF). Altogether 274 staff are employed by the Ministry, the majority in Wellington, with regional offices in Nelson, Dunedin and Auckland in addition to nine local offices. More than half of the employed staff is occupied with fisheries compliance. Another 70 persons are engaged in the running of the QMS data system, working under contract with the Ministry. In addition comes personnel connected to other functions which have been out-sourced, like scientific investigations, mainly operated through the Crown owned National Institute of Water and Atmospheric Research (NIWA). The Ministry's 1999/2000 budget was in the order of NZ$ 64 mill, of which 25 mill (40%) is represented by registry and research services. Of the total Ministry spending NZ$ 34 mill is paid by the industry, recovered by cost recovery levies and transaction charges.

From having fisheries as a complete marginal industry prior to the 1978 extension to 200 miles EEZ (total export of NZ$ 25 mill in 1976), New Zealand has within 20 years managed to build a competitive export industry generating export income in the order of NZ$ 1,4 bill. In addition, the home market generate approximately NZ$ 150 mill in fish sales annually. The key to this success story has generally been considered to be the introduction of the QMS in 1986, where ITQs figure prominently.

The Treaty of Waitangi (1840) – establishing the fishing rights

Unlike many other former colonies New Zealand's aboriginal peoples were never conquered and thereafter forced under the jurisdiction of the coloniser. When Captain Hobson arrived at Bay of Islands in January 1840 as representative of the English Crown, the idea was to make a voluntary agreement, whereby the original inhabitants were to operate under the protection of the English Crown, but without giving up their existing (collective) property rights. Article (1) of the Treaty of Waitangi, signed in 1840 by fifty chiefs (later 500) and representatives of the British Crown, read:*"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…"(Orange, 1987).*[5)]

The Article (2) then went on to grant the Crown an exclusive right of pre-emption in respect of lands. In practice that meant that subsequent take-overs by the English, starting with Wakefield's famous New Zealand Company, was made by negotiated deals, although buying practices and prices paid may be objectionable[6)]. However, the English never bought any fishing rights, nor did

Maori voluntarily cede any such rights. At that time English common law held that fish were nobody's property until caught, and furthermore, that only territorial waters ranging three nautical miles from the shore could be controlled by national governments, or in this case by the English Crown. Outside the territorial border was "mare librum" or in principle "open access" with regard to fisheries.

Maori tradition was completely different, being based on an intricate system of nested rights. Here extended families (*whanau*) controlled small streams, fishing grounds and shell beds in the immediate vicinity of their villages, sub-tribes (*hapu*) larger rivers, shellfish beds and certain fishing grounds, while the tribe (*iwi*) incorporated the rights of its hapu and whanau. Major fishing expeditions and activities were undertaken at the iwi level (Kerins & McClurg, 1999:3). Boundary marks were commonly used to demarcate both land and water areas, with fishing grounds being located through major landmarks. Knowledge of *who controlled what* was known in minute detail and this knowledge together with knowledge of fish behaviour and catching techniques was handed down through generations.

Management was in many instances similar to modern day practices, with a local guardian regulating *when* fish could be harvested, *who* could harvest and with *what type* of gear. By using special area zoning *(tapu and makutu)* fishing could be further restrained, or to prevent fish from being taken out of season, the use of complete closure *(rahui).* By the time British settlers came into contact with various Maori tribes they had a well developed social system, with rules and structures guiding their fisheries. The point should not be driven too far, however. Over and above iwi level there were few possibilities of solving conflicts (except struggle and internal warfare), and aggregated effects of resource use could not always be dealt with. On the other hand, the number of inhabitants was small and the catch technology relatively simple, although much more sophisticated than among their European competitors. Hence, pressure on the marine resources was moderate, tempered also by limited markets within reasonable distance.

This was soon to change, when English settlers started to utilise local shellfish resources extensively, giving rise to the first Governmental Fisheries Regulations in 1877. Although it was explicitly stated that: "Nothing is this Act…. shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder", Maori fishing rights were systematically undermined in subsequent laws and regulations. Through the Oyster Fisheries Act of 1892 Maori property rights were unilaterally constrained. Furthermore, all subsequent legislation (15 laws all together) was based on the assumption that whatever type and level of European commercial and later, recreational use, it would not interfere with Maori customary fishing. This attitude of formally keeping with the Treaty of Waitangi, while paying little attention to the practicalities was maintained right up to the Fisheries Act 1983, where again it is stated that: "Nothing in this Act shall affect any Maori fishing rights".

Having generally been complacent with their deteriorating marine rights for 140 years, the early 1980s saw an upsurge of Maori grievances. Different tribes tried to protect their rivers, estuaries and inshore fishing grounds towards outside interference in the form of sewage disposal schemes, power plants, as well as industrial processing plants discharging "degraded" water. According to Kerins and McClurg (1996:7): "The claims were last ditch attempts by Maori to protect fisheries habitats from poor or inadequate planning processes which denied the recognition of Maori Treaty rights to traditional resources." By that time the Maori claims had got an avenue for redress, namely the Treaty of Waitangi Tribunal.

The Treaty of Waitangi Tribunal – rediscovering the fishing rights

By the early 1970s New Zealand experienced a political swing to the left, giving a political opportunity of addressing Maori

grievances and more generally, figuring out how New Zealand should deal with two peoples within the framework of one nation. The establishment of the Waitangi Tribunal in 1975 under the Treaty of Waitangi Act was primarily to make recommendations to the Government on claims relating to the practical application of the Treaty and to determine whether certain (political) matters were inconsistent with the Treaty principles. Originally the Tribunal only had the powers to address issues from 1975 onwards, but in 1985 its mandate was widened to examine claims all the way back to 1840. Although most of the initial claims were land claims, fisheries claims multiplied over the years, giving opportunity for large hearings and much publicity. In a country with a relatively strong environmental movement, protecting marine resources offered Maori tribes the moral "high ground". At last it was demonstrated that Maori rights referred to more than subsistence fisheries and the subsequent claim to certain fishing sites. Through extensive research the Tribunal claimed:

- The (Treaty) guarantee includes both the preservation of a right to fish and a protection of the place of fishing.
- The guarantee cannot be diminished if Maori fishing rights have in fact been subsumed into the current fishing regime without willing consent.
- The duty to protect is an active duty. It requires more than the recognition of a right.
- (Furthermore), the Crown must take all the necessary steps to assist Maori in their fishing to enable them to exercise that right (Waitangi Tribunal, 1988:218-220).

The Tribunal concluded that the Treaty guaranteed to Maori: "The full, exclusive and undisturbed possession of their fisheries for as long as they wished to keep them" (Waitangi Tribunal, 1988:220). "Fisheries" was here interpreted to mean both the activity and business of fishing, the fish caught, the places where they fished and the property rights in fishing (Kerins & McClurg, 1996:8).

The claims and later the recommendations of the Tribunal came at the worst possible time, seen from the point of view of QMS proponents. After two years of struggle the QMS was to be launched in 1986, only to be dragged into a new debacle over who possessed the original fishing rights. For how could the state (Crown) allocate permanent fishing rights (in terms of individual transferable quotas) when Maori all along, through the "constitutional" Treaty of Waitangi, were guaranteed "the full, exclusive and undisturbed possession"?

Treaty of Waitangi Fisheries Commission – bridge over troubled waters

With the expanded mandate for the Treaty of Waitangi Tribunal from 1985 the course was set for collision with the introduction of the new QMS, where individual transferable quotas were going to be allocated to existing private operators in perpetuity. Some tribes, in particular the Muriwhenua tribes of the north claimed pre-existing and inextinguished property rights in the fisheries off their coast. Against this background the Waitangi Tribunal recommended the Minister of Fisheries to stop the ITQ scheme until negotiations could be carried out with the affected tribes. At that time ITQ had been issued for 29 species, covering more than 80% of the commercial fisheries. Numerous tribes and Maori organisations had applied for an injunction, which was finally granted by the High Court in November 1987.

Fearing an endless litigation process, the Government of the day agreed with Maori parties to establish a joint working group to sort out how Maori fishing rights could be exercised in a modern context. In the end not much common ground could be found and each side produced its own report. While Maori started out claiming 100% of the fishing resources ending up proposing 50% as a compromise, the Crown offered 100% of the inshore fisheries quotas and only 12.5% of the deep sea fisheries (equivalent to the Maori proportion of the population). In order to proceed with the negotiations and not compromise the integrity of the fledgling QMS, Parliament passed the Maori Fisheries

Act in 1989 as an interim arrangement, pending the settlement of the fisheries claims. The Act provided for the establishment of the Maori Fisheries Commission (MFC), which was to receive 10% of all Total Allowable Commercial Catch (TACC) within the QMS. Since quotas for 29 species already had been allocated, that meant that Government would have to buy back quota, based on the principle of willing buyer-willing seller. The plan was to buy 2,5% per year over four years, having the deal finalised by October 1992.[7)]

In addition MFC was granted NZ$10 mill in order to run the Commission and to set up a commercial arm, the Aotearoa Fisheries Limited. The Commission used its profits from leasing out quotas to acquire further fisheries assets, companies as well as quotas. Equally important to this commercial arrangement was the guarantee that the Act provided in terms of securing areas of specific significance to Maori as "a source of food or for spiritual and cultural reasons". These areas, called *taiapure* in Maori, could be claimed and after due consideration be acknowledged in official fisheries regulations.[8)]

From a Maori perspective, both the commercial and non-commercial (customary) components of the interim settlement were unsatisfactory, and an increasing number of tribes continued to press their claims. Government agreed that no further species should be brought into the QMS until an agreement was made or a resolution made by the court. Fearing endless litigation Government again proposed discussion between the parties, and a Fisheries Task Force was established in 1991 to advise the Minister of Fisheries on "appropriate legislative change and reform". The Fisheries Task Force produced two central documents, a public discussion paper (MAF, 1991) and a report to the Ministry of Agriculture and Fisheries (MAF, 1992). At that time New Zealand had already five years of experience with the QMS, giving the Fisheries Task Force the opportunity to assess its benefits and problems. Not only did the Fisheries Task Force find that the QMS "is a suitable foundation for the development of a consistent and comprehensive fisheries management regime" but they also concluded that: "The principles of the QMS do not appear fundamentally at odds with the Treaty of Waitangi. Indeed there appears to be scope to adapt the QMS as a means of providing effective recognition of Maori fishing rights secured by the Treaty" (MAF, 1992).

Relating to traditional (customary) fisheries, the Fisheries Task Force saw a need to identify and clarify Maori rights, which extended beyond a mere share of the total allowable quota (TAC) but would have to include real involvement in management as well. In its final report the Fisheries Task Force envisaged two components to the traditional fishing right; a harvesting right, which could be exercised in general fishing areas not excluding others, and a more exclusive right *(mahinga kaimoana)*, which would be a small area (estuary, reef or coastline) where local tribes would be able to exclude all others from harvesting (Maori as well as non-Maori) (Kerins & McClurg, 1996:13).

"Now or never" – the 1992 Sealord deal and Deed of Settlement

By early 1992 the prospect of an agreement appeared rather remote. New claims poured into the Treaty of Waitangi Tribunal while litigation and threats of litigation flourished – good times for lawyers but not for the fishing industry, and particularly not for the QMS. In September 1992 it became clear that one of New Zealand's leading corporate companies wanted to sell its major fisheries subsidiary, Sealords Limited, the largest seafood company in the country. It appeared to Maori and Crown negotiators that this was a "now or never" opportunity – "acting on the rising tide". Within two weeks of active negotiations it was agreed that the Crown should pay NZ$150 mill in three annual tranches to fund a Maori take-over (50%), with Brierley Investments Limited taking over the other 50%. The Maori/Brierley bid was successful and Maori interests now controlled 36% of all ITQs within the QMS (Sealords commanding 26% of TACCs at the time).

In addition the Deed of Settlement Act passed in September 1992, promised Maori 20% of quota for all new species brought into the QMS. The Act also promised regulations recognising customary fishing to be developed. Finally Maori representatives were granted seats in fisheries statutory bodies, to reflect the special situation between Maori and the Crown. In return Maori would have to accept the Deed of Settlement (Fisheries Claims) as a full and final settlement of all their grievances related to fisheries (not aquaculture!) and quit all their court proceedings. As could be expected, not all tribes agreed to the compromise. Iwi representing approximately 20% of all Maori did not accept the Deed of Settlement Act, claiming this was not a fulfilment of the original Treaty of Waitangi.

With the Deed of Settlement Act, the MFC was reconstituted as the Treaty of Waitangi Fisheries Commission (*Te Ohu Kai Moana*). The number of commissioners was increased from seven to thirteen and the staff increased to cope with the increased workload and the more complex role of the new Commission. The Commission was charged with a formidable challenge. According to the very detailed prescription of the legislation the Commission should facilitate two different allocation processes: one applicable to the assets granted to Maori before the settlement (the 10% of TACCs within the QMS+cash) called pre-settlement assets (PRESA), and another dealing with the assets granted through the Sealord deal (shares+cash) and the 20% of new species, commonly referred to as the post-settlement assets (POSA).

While PRESA assets should be allocated to the tribes *(iwi)* after due consultation process, POSA would require a new Maori Fisheries Act, substituting the preliminary 1989 Act. Without going into the many details of the Act, it is important not least in order to understand the ensuing difficulties, to stress that PRESA from the beginning was meant to be exclusively for the tribes (*iwi*) involved in marine fisheries, while POSA was a pan-Maori settlement, meant to benefit all Maori. While some tribes were bitterly disappointed and others had grudgingly accepted, it is not difficult to see that in an international perspective this was a favourable deal, probably the most favourable deal made by any aboriginal people in terms of fisheries.

Everybody therefore expected a relatively short interim period while the allocation model was worked out and then the final distribution of assets (PRESA) to the tribes. Eight years later the Commission is more alive than ever, having recently been reappointed with a mandate running for at least two additional years. What happened? Before describing the difficulties of distribution, we shall take a brief look at the Treaty of Waitangi Fisheries Commission, which has established itself as a major player in New Zealand's fishing industry.

The Treaty of Waitangi Fisheries Commission – between commerce and policy

When the Governor General approved the Maori Fisheries Act in 1989, it was designed to be an interim arrangement pending the settlement of the fisheries claims. To cater for the provisional assets a management structure was put in place, the Maori Fisheries Commission (MFC). At the same time, the MFC was obliged by the Act to establish a company, Aotearoa Fisheries to act as the commercial arm of MFC, to which 50% of the quota received from the Crown would be transferred. The remaining 50% should be leased annually, where preference was to be given to Maori lessees.[9]

Over the next few years MFC manoeuvred skilfully, acquiring further fisheries assets, most notably Moana Pacific Limited, a relatively large fishing company involved with processing inshore species. In 1992, when the Deed of Settlement Act was enacted, the MFC was renamed the Treaty of Waitangi Fisheries Commission or Te Ohu Kai Moana (TOKM), the number of commissioners increased from seven to thirteen and the staff extended. The first major task of the TOKM was to develop a scheme for distribution of the pre-settlement assets. After years of meetings, consultation and

research, the allocation model was presented in mid 1997 (TOKM, 1997). After further consultation it was slightly edited and finally put out for approval in late 1998. Complementary work by the TOKM has provided guidelines for settling of conflicts between tribes as well as developing specifications for appropriate governance structures (tribal organisation).

The second major task of the Commission has been to look after the assets, that is, to develop quotas, shares and cash hold in trust for the tribes. This policy has involved buying up additional processing companies and diverting into aquaculture.[10)] Commission members participate in the boards of the acquired companies, and in the largest (Sealords Ltd.) the chairman has been the chairman of the Commission up to mid 2000. TOKM has also bought additional quotas when available for a reasonable price, partly in order to secure the efficient running of its ”own” companies. The system is based on annual leases, where the lessees get a rebate compared to the ordinary leasing price of that particular quota. The total value of the rebate is according to TOKM managers roughly calculated to NZ$20 mill per year, which is indirectly a contribution to the participating tribes. This has been instrumental in helping a number of tribes to set up their own fishing operations, and at present TOKM is assisting some 63 small-scale Maori companies.[11)] The third major area covered by TOKM has been the field of education, specifically geared towards the fishing industry, where more than 1200 scholarships have been granted since 1995. Students may obtain scholarships for a range of different types of education, from vocational training to research at PhD level. TOKM has also entered into a contractual relationship with SeaFIC’s training division, supplying training courses for personnel already employed in the fishing industry. As a consequence of the long delayed process of allocating the assets, TOKM has increased the value of the assets considerably, from an estimated value of NZ$ 350 mill in 1992 to more than $800 mill in 2000.

An unintended consequence of the delay has been the building of a very powerful player in the New Zealand fishing industry, having competence in a number of fields, ranging from business management to customary fisheries. TOKM participates in all major events relating to the industry and present opinions and feedback on all major issues of government legislation. With a possible settlement of the PRESA in the relatively near future, TOKM will not be idle. The Commission will still be responsible for the development of an allocation model for the post settlement assets (the POSA) and for overseeing the phasing in of the remaining stocks into the QMS, where Maori is granted 20% according to the Act. Even with these tasks solved, there will probably be need for an umbrella organisation, overseeing Maori interests. This might be an organisation based on voluntary membership or a quasi non-governmental organisation (a ”quango”) backed by law.

Distribution more difficult than production?

Through the Settlement Act of 1992 the Commission was left with a hot potato, the division of assets. No precedence existed for a similar exercise and the Government had not made the task easier by insisting on near unanimity among Maori over a final solution. For six years the Commission consulted extensively, asking for submissions, evaluating different options, participating in numerous meetings with tribes and subtribes as well as individuals. Finally it came up with a solution to the distribution of PRESA (commercial quotas, shares and cash), aptly called the *Optimum Method for Allocation*.

Through the hearings within the Treaty of Waitangi Tribunal two of the most active and influential tribal groupings (Muriwhenua and Ngai Tahu) presented extensive historic evidence about fishing activities on the continental shelf. The Tribunal found that iwi and hapu had exclusive rights to inshore fisheries and a smaller ”development interest” in deep-water fisheries (TOKM, 2000:9). Consequently, fishing quotas have been divided into deep water and inshore. The defining criterion has been the 300-metre depth contour, giving a fairly clear

demarcation of inshore and offshore species. The inshore quotas held by TWFC should then be distributed to the tribes according to the length of coastline pertaining to their tribal area. If, for the sake of argument, a tribe has 30% of the coastline in a management area for species x, this tribe is entitled to 30% of the inshore quota (held by TOKM) for that fish stock in that quota management area (QMA). If an iwi's coastline straddles two quota management areas, that iwi will receive inshore quota from the two QMAs.

Deep-water quotas are split in two parcels, half the deep-water quotas will be allocated according to coastline (as with inshore quota) while the other half will be allocated on a population basis. If an iwi makes up 10% of the affiliated Maori population of New Zealand, it will receive 10% of half the deep-water quota[12]. According to the Fisheries Commission: "This deep-water allocation method takes into account the Waitangi Tribunal finding that modern rights to the deep-water fisheries are to an extent developmental and that all Maori are entitled to share in that development" (TOKM, 2000:10).

A special case is made for Chatham Islands, where the tribes' quota shares are actually based on what has been caught within a separate 200-mile zone over a specified number of years.[13] The Commission has also been aware of the organisational requirements on the receiving side. Each of the 78 iwi having an interest in the marine fisheries have been asked to establish one (and only one!) organisation, able to show that it holds sufficient mandate from iwi members. Furthermore, this organisation has to be structured according to certain standard requirements, referring to the existence of a formal constitution, free and open elections and the provision of relevant information. Another basic requirement is the division between economic and political responsibilities.

The largest stake is evidently the 60.000 tons of quota held in trust, to be allocated as described above. The additional shares, of which Moana Pacific Fisheries Ltd is the most important, are going to be distributed according to quota volume to each iwi. The remaining cash, approximately NZ$50 mill, is to be split with $40 mill distributed according to population size and $10 mill set aside for a development fund, targeting Maori living outside their tribal rohe, not having (or not wishing to have) close tribal links. The distribution of the POSA is to be decided at a later stage, after having distributed the PRESA.

With this elaborate model the Commission could present the optimal solution to its "owners", the tribes - take it or leave it! Of the 78 tribes (iwi) acknowledged by the Commission, 37 representing 50,6% of affiliated Maori, accepted the model without conditions. 17 rejected the model (representing 42,7% of affiliated Maori), while the rest are either undecided or will have to sort out organisational issues before they can decide on the distribution process.

According to normal democratic procedure, the majority would have carried the solution, but not so in this case. Litigation now started from within, with a number of Maori organisations claiming that another model/other principles should have been applied. They challenged the whole concept of redistributing assets to tribes, but lost in the High Court. Nevertheless, the case was brought further to the Privy Council in London, one of the few remaining Commonwealth institutions, effectively blocking redistribution for at least another year. And the fight goes on. According to a prominent leader of one of the "rejecting" tribes: *"The Treaty tribes is a bunch of bully boys who have controlled the the Sealords settlement since its early beginning. The model that will finally be acceptable is the one having widespread support from Maori people (as opposed to the iwi leadership). The current manawhenua manamoana model has never been put to that test. The 35 Iwi that the Treaty Tribes claim are in support of their model are in fact those Maori leaders whom the Commission has managed to buy off and who have got fat at the expense of the majority of Maori people" (Northland Age, 31.10.2000).*

Ten years of squabbling over the allocation has also left the politicians in a delicate dilemma. Originally the distribution issue was left to Maori because it was too complicated and too sensitive to handle in Parliament. Now representatives of the proposed

model urge the Government to pass legislation that may facilitate the deal, having recognised that leaving the issue to court may require years before any allocation can be made. This position is also supported by SeaFIC, the generic industry organisation for all New Zealand seafood producers. But past and present Governments are still hesitating. The outgoing chairman of the Commission, Sir Tipene O'Regan has questioned the logic: *"To some extent, the Commission's detractors play to that curious Pakeha (white) mindset which demands unanimity of Maori whilst accepting huge differences within the power culture. This view has it that, for some reason, Maori should be the only cultural group in the history of mankind where every member must agree on key issues" (TOKM, 2000:7).*

At present the Government is buying time, having replaced some of the commissioners including the chairman, with members thought to be more favourable towards urban Maori. They have been given two years to sort out a solution. To add to the complexities it should also be mentioned that the new chairman is known for his resistance to any reallocation (earlier termed "spread of confetti"), preferring to keep the assets within a professional management organisation and at most, redistribute the proceeds (NZ Herald, 4 Sept. 2000).

In the meantime the funds accumulate, while public trust deteriorates – ultimately threatening not only the fisheries agreement but possibly also future settlements.[14)] In the present atmosphere of allegations and counter allegations, endless litigation and ten years deadlock, it is worthwhile to remember that the Commission was tasked with three distinct challenges: restoration of rights, compensation to rights holders and assistance to Maori wishing to enter the business and activity of fishing. Without any precedence and operating in a climate of very divisive politics, it had to be complicated. This is even more so because the seemingly technical distribution process has raised a number of more profound issues like:

- What *is* a tribe and sub-tribe (iwi and hapu)?
- What role can tribes possibly play in a modern capitalist society like New Zealand ?
- What is the link between the tribe and its members? (What about Maori who prefer new and other organisational forms?)
- What is the relationship between Maori politics and Maori economic development?

Before we turn to these complex issues, we shall present the outcome of the other half of the 1992 agreement, namely the customary fisheries. Such a split between commercial and subsistence fisheries never occurred to Maori before it was introduced in 1892, and it was never accepted.[15)] Maori argued that customary take was an integral part of their fisheries, along with more commercially orientated fisheries for barter or for sale. How come the two fisheries entered on a different course, with different procedures, different management and even different participants?

Customary fishing rights – old practices in a new setting

The concept of customary fishing rights is a modern one, although the activities involved are age old. While the early colony regulations sought to split the customary (subsistence) fishery from the emerging commercial, the customary rights were never specified, neither as a specific portion of the catch nor as a special management regime. That happened for the first time with the Fisheries Task Force giving advice to the Ministry of Agriculture and Fisheries in 1992. Here it was explicitly argued that Maori commercial fisheries could easily be integrated in the QMS, while the customary fishery could be established as a separate category, different also from the recreational fisheries. Section 10 of the Treaty of Waitangi (Fishery Claims) Settlement Act (1992) declared explicitly:*"It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life or seaweed that are subject to the Fisheries Act 1983:*

a) Shall in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto
b) The Minister….shall
(i) Consult with tangata whenua (Maori tribes) about; and
(ii) Develop policies to help recognise – Use and management practices of Maori in the exercise of non-commercial fishing rights"

The Minister was furthermore urged to develop regulations for customary food gathering by Maori, among other things by protecting important places, "to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade" (ToWDSA, 1992). As part of the process the then Ministry of Agriculture and Fisheries presented a background paper (MAF, 1993) outlining the development of customary fishing regulations. With the assistance of the Treaty of Waitangi Fisheries Commission these proposals were widely discussed and consulted upon. It was repeatedly stressed by Maori interests that the involvement in fisheries was not only to provide food but involved the transmission of traditional knowledge from one generation to another. Or as pointed out by Kerins and McClurg (1996:20): "This debate reinforced the fact that need is not a number."

The whole idea of traditional Maori management was exercising a right to decide *who should fish, where, when and how (gear type).* Hence the challenge was to develop a customary regime within the modern regime, trying to match old management techniques with modern requirements. As could be expected, resistance to the project was encountered both from commercial interests (mainly non-Maori) as well as among recreational fishers, fearing a further reduction of their already insecure rights. Nevertheless, the process of consultation, drafting regulations, receiving submissions and drawing up the final regulations, slowly moved ahead, with separate procedures for North and South Islands. In the case of the North Island regulations, the Ministry received more than 500 submissions, which were all considered and dealt with, before the final draft was accepted by the Minister in 1999.

New Zealand's Customary Fishing Regulations are premised on certain underlying principles (Hooper & Lynch, 1999:6). The first refers to mandate, that is, the need to have mandated representatives responsible for fisheries in each area. The Customary Fisheries Regulations therefore oblige the tribes to appoint guardians (*Kaitiaki*) who will be responsible for managing customary fisheries within their areas. Disputes over who should be Kaitiaki have to be solved by the tribes themselves, with no role for the government or the administration. As soon as the guardians are elected, their names are gazetted in the paper, and their activities actively underpinned by compliance officers, fulltime as well as honorary.

The second principle refers to the actual management of the fishery. The local guardians are supposed to specify:
- The date that species will be taken.
- The person authorised to take the fish.
- The species that may be taken.
- Size limits of the species taken.
- The methods by which each species may be taken.
- The area(s) of the fishery.
- The purpose for which the fish may be taken.

The regulations also provide for the establishment of particular areas, known as *Mataitai Reserves* covering traditional fishing grounds. Within these areas no commercial activity may take place, while other users must comply with the special regulations laid down by the guardians. It is, however, a rather complicated process to get such Mataitai Reserves formally accepted, and in time of writing, only one has been approved.

The third principle refers to the generation of accurate information back to the Ministry on the actual removal from the fishery. Fishers must report their actual catches back to the Kaitiaki, who in turn must record the information and report back quarterly to the Ministry of Fisheries.

There is no provision in the Deed of Settlement Act 1992 to limit the customary take in any fishery. In practice an estimated separate allocation is set aside, based on traditional catch in previous years. Due to the political importance of the Settlement Deed Act, customary take has a priority, even before

commercial quotas are allocated. Some operators (commercial as well as recreational) claim the fisheries are unregulated (uncapped). According to Hooper and Lynch (1999:7) that is not the case. The fisheries are limited by the *kaitiaki*, not the state. That is not to say that over-fishing does not occur, but similar objections can be raised for most commercial and recreational fisheries as well. The hope is that Maori commercial interests will put pressure on excessive customary take – a notion that still has to be proved.

The fourth and probably most important principle refers to accountability. Individual customary fishers are responsible to the local guardian, who in turn is responsible both to the tribe and to the Ministry. The State is ultimately responsible for the overall sustainability of fisheries (as well as for delivery according to the Treaty of Waitangi and all international treaty obligations).

Closing the gap?[16)]

So far this account of Maori resurgence has dealt exclusively with fisheries policy. The Maori revival should, however, not be perceived as something special or exclusive to fisheries. Just like the QMS revolution was part of a larger economic/management revolution, whereby neo-liberal models were introduced over a whole range of sectors and institutions, the establishment of Maori commercial and customary rights must be seen in a larger perspective. By the early 1950s there were few signs that tribes and sub-tribes (*iwi and hapu*) should emerge as the central agents of a new fisheries policy, or for that matter, agents of a new economic development.

According to Kawhuru (1989:xiii), as recently as the late 1950s, early 1960s, it was held in official circles that ”tribe was an anachronism”. By that time more than 50% of Maori had moved to urban areas and started setting up new social structures and organisations, a clear indication that the existing tribal structures were not able to provide a decent living for the rapidly expanding Maori population. By the late 1960s the assimilation policy was challenged by a new process of *ethnification* and *indiginisation* among Maori, parallel to similar movements among other indigenous peoples. These processes were in New Zealand intimately connected to cultural expressions, that is, to Maori language, customs and not least to school education. In the economic sphere the tribe as an important actor started to emerge in the early 1980s, when protests against sewage and industrial waste were channelled through tribal organisations. This development must be seen in a larger political context, starting with the establishment of the Treaty of Waitangi Tribunal in 1975.The Tribunal was a first step in addressing Maori grievances with a mandate to advise Government, but only on grievances from 1975 onwards.

With the mandate extended in 1985 to encompass grievances dating all the way back to 1840, the political significance of the Treaty increased. From now on Maori grievances, relating to land policy, fisheries as well as educational policies had got a channel – far more efficient than the six Maori seats in Parliament. But this channel was of course not ”neutral” in political and organisational terms. By using *judges*, hearing *claims* and having cases prepared by *lawyers* (and consultants) the Tribunal played an important part in what may be called the ”juridification” process, that is the channelling of political grievances through the judicial apparatus. What had started out 15 years before as a cultural revival soon turned to a question of restoring rights – rights that originally were granted Maori through the Treaty of Waitangi 145 years earlier. According to Rata (1991): *”During the late 1980s and the early 1990s an explicit distinction emerged between Maori development and tribal (iwi) developments. The tribes saw themselves increasingly as the political, social and economic form of Maori organisation and strove to have this self-perception institutionalised in government policy.”*

Evidently, this process was driven from two sides: by the tribes themselves, setting up development organisations trying to influence government planning, policy and service delivery, and by the state, having the notion that revitalised tribes could take over

from heavy and expensive bureaucracies. Certain tribes had already set up development organisations to take care of the economic activities, while others had to constitute themselves as tribes in order to set up the economic structures. With the increasing expectations of delivery, every tribe wanted to be in a best possible position. This process of first organising the tribes and then setting up the economic organisations was largely assisted by the Treaty of Waitangi Fisheries Commission, insisting on a uniform set of requirements for tribes being eligible for the redistributed assets. In conclusion it is probably correct to say that this process of re-tribalisation partly drove and in turn partly was driven by the redistribution process.

The important outcome is that Maori fisheries development, both commercially and culturally, was seen as channelled through and connected to the tribal structures, or what Rata (1999) has named ”neo-tribal capitalism”. The central point is that this solution was by no means self-evident. Other countries with strong tribal presence have chosen completely different solutions, like Namibia and South Africa, where tribal affiliation is irrelevant regarding whom should be given access rights. What are then the prospects of this neo-tribal capitalism? With Maori interests now controlling approximately 50% of the fishing sector, there is considerable interest in which direction the tribes may move.

One scenario is that Maori interests will prefer some type of co-ordinating structure (a voluntary Treaty of Waitangi Fisheries Commission), use the considerable profits acquired to buy additional quotas and processing facilities and gradually dominate more and more of the New Zealand fishing industry. Over time they will also diversify their operations to other countries. Assets (in terms of shares and quotas) are kept within the Maori structure and only part of the proceeds is used for social development, directed through the tribal structures. The greatest direct benefits for the tribes involved will be the employment created in fishing, processing and eventually in aquaculture.

Another, equally possible scenario is a gradual dispersion of the whole fisheries portfolio. Both quotas and shares are transferable and many tribes may prefer to cash in what they have been allocated. Some will be under considerable pressure to hand out the compensation, while others may prefer to invest in other sectors, like tourism or domestic trade. If this is the case, it will be difficult to keep Maori assets together, even if certain limitations are placed on shares, stopping ”cannibalisation” of existing companies. Having accepted ITQs as the going ”currency” it is difficult to backtrack and impose severe limitations on transferability. Maori will still benefit, but more as passive investors than as active entrepreneurs and participants in the fishing industry.

Maori fishing – combining business and culture?

This account has been concentrating on Maori fishing rights, trying to show how the introduction of the QMS provoked a re-emergence of old fisheries claims, but also how the QMS provided the currency (the ITQs) to solve the Maori grievances in the commercial sector. On a global level this policy has been highly successful, even if the actual distribution of assets has met with unprecedented difficulties. With approximately 15% of the population, Maori interests now control more than 50% of the quota rights. Although the details of a future arrangement remain unclear, Maori will be a major player in the New Zealand fishing industry, especially if the quota rights and assets are professionally administered.

Even more challenging has been the question of creating a Maori customary fishing regime, a process that has taken nearly ten years. At present it is definitely too early to report on success or failure of this regime. Suffice to say that the arrangement is innovative and original, permitting all coastal Maori to maintain a traditional link to the fisheries, even in the case they do not have any commercial interests. Maori customary fishing has (for political reasons) been granted priority (allowances are made before the allocation of Total Allowable Commercial Catches (TACCs)), underlining the significance of cultural traditions. What is inte-

resting in the case of New Zealand's fisheries management regime is the blending of an extremely competitive commercial sector with traditional fishing practices and a large recreational sector. New Zealand has definitely not found *the solution* for how such diverse interests can co-exist without major problems. That is part of the unfinished business after the introduction of the QMS, now being implemented through various co-management arrangements. But New Zealand has tried a number of new and innovative approaches, from which there is a lot to be learnt, provided that the lessons are adapted and customised to local conditions. There is more to New Zealand's fisheries policy than ITQs!

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Notes

1) Bjørn Hersoug served as a Director on the board of the Norwegian Institute of Fisheries and Aquaculture Ltd. from September 1993 to May 1999. He held the vice-chancellery of The Norwegian College of Fishery Sciences, University of Tromsø, from 1993 to 1998, Since then Dr. Hersoug has been "in the field", doing research in New Zealand and South Africa.

2) Even with limitations on maximum quota ownership specified in the Fisheries Act 1996, it is hard to know the extent of effective concentration, as many of the larger operators also have controlling interests in smaller companies.
3) This figure contain all vessels required to be within the Vessel Monitoring System, that is all vessels larger than 28 meters and some vessels smaller than 28 meters fishing for orange roughy and scampi.
4) The numbers are calculated on basis of Full Time Equivalents (FTEs), which means that the actual number of participants is considerably higher.
5) For obvious reasons the English version is quite different from the Maori, giving rise for substantial disagreements regarding interpretations of the Treaty (see Orange 1987).
6) After the land wars (1860-1872) English trading practises became less noble, evicting Maori from large tracts of lands, especially in the Taranaki area. Nevertheless, most lands were taken over through sales and leases.
7) In practice it proved difficult and very expensive to acquire the 10% of total TACCs. In some cased MFC was therefore given cash to buy quotas for itself, but payment often fell short of actual market price, leaving MFC with a quota deficit by the end of 1992.
8) At present 13 Taiapure areas have been gazetted, although not all of them are operative, due to management difficulties.
9) These Maori companies or organisations could then forward lease quotas to other interests, often ending up with the awkward situation that MFC controlled quotas were used by competitors to MFC held companies.
10) The subsidiaries include Sealord Group, Moana Pacific Fisheries, Pacific Marine Farms, Prepared Foods Limited and Chathams Processing Group.
11) Some claim that these companies would not have survived if paying the full lease price. An alternative view is of course to say that these tribes should not have to pay a leasing price at all – being the rightful owners of the quotas from the start.
12) The affiliate population of each iwi is to be determined from 1996 census data.
13) A tricky question remaining is, however, that many tribes make claim to the same coastline, especially in the border zones between tribal areas (*rohe*). So far the Commission has urged the different tribes to seek voluntary agreement. If not successful, the Commission will facilitate dispute resolution. A publication setting out the Commission's dispute resolution procedures has been widely distributed (TOKM 1995).
14) Seen from the perspective of the Treaty tribes (the tribes having agreed on the allocation principles) the delay deprives them of important development possibilities, calculating the loss to a mill NZ$ per week! (see NZIER 2000).
15) This split was introduced through the Oyster Fisheries Act in 1892.
16) Closing the gap between Maori and the white (Pakeha) majority has been a consistent theme within New Zealand politics over the last 20 years. More recent research has questioned the systematic validity of such a gap, measured by income, employment and other indicators of socio-economic standing (see Chapple 2000). In commercial fisheries there is little doubt that Maori for many years were discriminated, and consequently had little participation and influence regarding the management of the resources.