2. OVERSEAS EXPERIENCE WITH INDIGENOUS SEA RIGHTS

In New Zealand, US, Canada, and the South Pacific indigenous groups have taken their battle for indigenous sea rights to the courts and won. Judicial decisions have been followed by legislative and executive changes which have given traditional owners a primary role in the management of the marine resources of their traditional domains.[14]

2.1 New Zealand

The last decade has witnessed a dramatic advance in both statute law and case decisions concerning the recognition of Maori rights, originally provided in the Treaty of Waitangi of 6 February 1840 (see McHugh 1991). The Waitangi tribunal was set up in 1976 to inquire into any claims by the Maori people that some action of the Crown violated the principles of the Treaty of Waitangi, principles which the tribunal was also obliged to interpret. The tribunal's findings are not binding as it is more a commission of inquiry than a court. It passes recommendations to government, which has no specifically established procedure for dealing with them.

In 1983 the New Zealand parliament amended the fisheries act so that 'nothing in this Act shall affect any Maori fishing rights'. Subsequently the courts, which prior to 1986 had consistently rejected Maori fishing claims, have held that validity and primacy of traditional fishing rights are exempt from the ordinary regulations and limitations under the act on fishing grounds and quotas. The rights are limited to the particular tribe and its authorised relatives for food supply. Some commentators suggest that in New Zealand sea rights are incidents of native title, recognised by treaty, rather than deriving from treaty (see Boast 1990). The Waitangi Tribunal's view is that treaty rights do include the right to commercial development of the fishery. In Muriwhenua, the Tribunal found that the laws of general applicability made for the purpose of conservation are a valid exercise of the governorship granted to the crown, provided that the priority of treaty fishing interests over recreational fishing is taken into account (Muriwhenua 1988; 227; Mylonas-Widdall 1988; Austin 1989; Levine 1989).

Just as importantly was a High Court judgement obtained by Maori interests in 1987 restraining the government from implementing a quota system for sea fisheries (see McHugh 1991,142). The Maoris argued that the quotas were creating new property rights without reference to them and was contrary to the principles of the Treaty of Waitangi. The upshot was a *Maori Fisheries Act 1989*, which recognises Maori fishing rights secured under the Treaty of Waitangi and reserved 10% of the total fishery quota for Maori interests. According to the NZ fishing industry this equates in value to approximately 50% of the total inshore quota. This quota forms an important source of earnings for tribal trusts. The South Island's Ngai Tahu tribe has earned more than $1 million in 1992 by leasing its quota.

This amount may well be boosted by the Waitangi Tribunal's 400 page report on the Ngai Tahu Sea Fisheries handed down on the 11 August 1992 (Waitangi Tribunal 1992a). The Tribunal's recommendations proposed a negotiated settlement of the Ngai Tahu sea fishery grievance. It recommended that a settlement should include an additional percentage of quota to Ngai Tahu under the quota management system and the delivery mechanism should be the *Maori Fisheries Act 1989*. The Tribunal also recommended return of exclusive eel fishing rights in Lake Ellesmere and cancellation of existing eel fishing licenses with compensation to existing licence holders. The Waitangi Tribunal rejected the Ngai Tahu claim to all sea fisheries off their boundaries. The Tribunal found that Ngai Tahu has an exclusive treaty right to the sea

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Hansard, 24 November 1992, pp.3340-3341. The first Aboriginal and Torres Strait Islander Social Justice Commission is Mr. Michael Dodson, the Director of the Northern Land Council. See 'Social Justice Commissioner named', *The Australian*, 23-24 January 1993.

[14]This chapter focuses on fisheries issues although it is recognised issues relating to cultural tourism may also be relevant in the GBRMP.

fisheries surrounding the whole of their coastline to a distance of 12 miles or so. Ngai Tahu also has a treaty development right, exclusive to the tribe, to a reasonable share of the sea fisheries off their coastline extending beyond the continental shelf and into deep water fisheries within the exclusive economic zone.

The Tribunal found that it was not in a position to evaluate accurately the value of sea fisheries to which Ngai Tahu is entitled. However, it was noted that appropriate allowance should be made for the inshore fishery off the Ngai Tahu coastline when assessing the reasonable share of the Ngai entitlement. There is a need for the crown and Ngai Tahu to negotiate and reach a settlement by way of compromise. According to the report, circumstances such as public conscience, the nation's ability to meet the cost and the need for a permanent solution should be considered.

The Tribunal found that Ngai Tahu were prejudicially affected by various acts and omissions, policies and statutes of the Crown relating to their sea fisheries. These breaches were inconsistent with the principles of the Treaty of Waitangi. The failure of the Crown to provide adequate land resources directly affected the tribe, preventing the continuation of their thriving and expanding sea fishing activity. A further serious breach was the assumed right of the Crown to dispose of Maori fisheries without the consent or consultation with the tribe as if the fisheries were crown property under the quota management system. Further breaches were a failure to protect and conserve sea fisheries; the Crown's assumption that non-Maori had equal rights with Maori in the whole of their fishery; the Crown's wrongful assumption that it owned the oysters offered for sale for public tender; and the Crown's failure to give statutory recognition of the Treaty in fisheries legislation. The report also recorded that despite repeated requests from Ngai Tahu the Crown refused to give effect to legislative provisions which provided for the reservation of exclusive Maori fishing grounds.

Since the release of the report Maori and Crown negotiators have announced a proposal that they hope will take care of the Maori share in commercial fishing once and for all. The deal involves the Crown buying for the Maori half of New Zealand's biggest fishing company, Sealords. All fishing claims under the Treaty of Waitangi would then be dropped. On the 27 August 1992 the New Zealand government announced that it would fund Maori interests in a joint venture bid to buy 100% of Sealord products, New Zealand's largest seafood company, mainly involved in deepwater fishing. It holds about a quarter of all New Zealand fishing quotas. Carter Holt Harvey's income from the company in the year to March this year was nearly $NZ35 million. The company will sell Sealords for $NZ325-375 million. The government is seeing it, if the bid is successful, as a full and final settlement of commercial fishing claims. The Prime Minister has stated that the funding arrangement 'will be a bold, fair and final resolution of Maori commercial fishing claims'.[15]

Not all Maori are happy with the deal. Some argue that it is not clear how ordinary Maori will benefit, there are concerns about the proposed repeal of statutes relating to Maori fishing rights, the amount of quota transferred under the deal and the effect on traditional fishing rights.[16] During September 1992 discussions were held by different tribes throughout New Zealand on the agreement. The Chairman of the Maori Fisheries committee pointed out that it spares Maori the necessity and costs of negotiating for many years in a situation where there are limited options.[17] The Chairman of the Maori fisheries negotiators stated in mid September that the deal was not under any threat.[18] The agreement was signed on 23 September 1992. Some

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[15] 'Maori fishing rights go commercial' *Australian Financial Review* 28 August 1992.
[16] 'Ngai Tahu rejects deal for Maori fisheries' *Evening Post* (NZ) 12 September 1992: 'Maori spotlight on Sealord deal' *New Zealand Herald* 12 September 1992.
[17] 'An honourable offer on fishing' *Evening Post* (NZ) 31 August 1992; 'Fishing deal Welcome' *The Dominion* September 1992.
[18] 'Rata perceives no threat to Sealord deal' *New Zealand Herald* 14 September 1992.

tribes have not signed, however, fearing that it purports to extinguish a tribal right that it does not want to sign away.[19]

The *Treaty of Waitangi (Fisheries Claims) Settlement Bill* was passed by the New Zealand Parliament on 10 December 1992.[20] The Bill gives effect to the legislative proposals embodied in the Deed of Settlement of 23 September 1992 between the Crown and Maori whereby in return for the Crown providing for the purchase of Sealords by Maori BIL (Brierly Investments Ltd) Joint Venture, the payment of $150 million to Maori and the granting of indemnity to Waitangi Fisheries Commission against certain liability for goods and services tax, all claims both current and future by Maori in respect of commercial fishing would be recognised as finally settled (ss. 5,6,7 and 8). The Bill also made provision for non-commercial Maori fishing rights and interests (s 9).

Reflecting the disquiet felt by some Maori at the terms of the Settlement, all six Maori MPs expressed dissatisfaction with, and strong opposition to, the Bill warning that 'it was doomed to fail'. They expressed reservations on the extent of Maori support for the terms of the Settlement and at the provisions for traditional fishing, arguing that many Maoris would not benefit from the Sealord deal. They also felt that the Bill abrogated the terms of the Treaty of Waitangi.[21]

All these concerns had been considered by the Waitangi Tribunal in its Report on the Fisheries Settlement. With regard to the question of ratification of the Deed of Settlement, the Tribunal found that given the difficulty in determining who might be seen as possessing the necessary authority to negotiate on behalf of Maori, the Crown was correct in assuming that it had received 'a mandate for the settlement, provided however that the Treaty itself was not compromised'.(Waitangi Tribunal Report 1992,15). This difficulty in determining Maori representation was acknowledged by the Justice Minister when he referred to 'the main problem in negotiations (as being) the lack of a structure within Maoridom to speak in a united way'.[22] With the allocation of the benefits resulting from the agreement, the Tribunal found that the present provisions could not give adequate assurance that all interests would be dealt with fairly in the apportionment of fishing benefits and recommended that the 'Crown should appoint a special court or body to hear any objections'.(Waitangi Tribunal Report 1992,20). The Tribunal, while commending the Crown for 'seeking to provide for Maori interests in commercial fisheries', expressed strong reservations with 'the effective extinguishment of the Treaty interest' as embodied in the Deed of Settlement (Waitangi Tribunal Report 1992,21). In the opinion of the Tribunal the obligation to 'actively protect the Maori fishing interest' (Waitangi Tribunal Report 1992,22) embodied in the Treaty cannot be extinguished, an opinion with which the Justice Minister when addressing opposition to the Bill chose to disagree.[23]

The provisions for establishing traditional fishing reserves (whereby local marae committees could apply to the Fisheries Minister for permission to set up seafood-gathering reserves), were attacked because access to such areas would be prohibited to both Pakeha and to Maori who did not belong to the area. Maori negotiator, Maitu Rata, believed that the Bill 'formalised rather than created fishing rights for Maori' and offered reassurances that the marae committees 'would not be able to rule against pakeha or Maori fishing because of their race or tribe' but could decide whether 'a species could only be fished for marae ceremonial use' in which case the prohibition 'would apply equally to pakeha and Maori'.[24]

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[19] 'Maoris pin their hopes on a slippery deal' *The Australian* 1 October 1992.
[20] 'Graham angry at Maori MPs' stance'. *The Dominion* 12 December 1992.
[21] 'Fisheries bill doomed, say Maori MPs'. *The Dominion* 10 December 1992; 'Graham angry at Maori MPs' stance'. *The Dominion* 12 December 1992.
[22] 'Graham angry at Maori MPs' stance'. *The Dominion* 12 December 1992.
[23] 'Fisheries bill seen as fair to everyone'. *The Dominion* 10 December 1992.
[24] 'Pakeha not shut out by fishing Bill - Rata'. *The Evening Post* 11 December 1992.

Concern was expressed also by the President of the Fishing Industry Association at the provisions for the distribution of new species quotas and the effect this could have on fishing companies. He believed that the Government's guarantee of 20% of the quota with the remainder subject to tender amounted to the fishing industry contributing to the Government's $150 million payment to Maoris.[25]

In the New Zealand context the fishing rights issues are best understood as a 'medium for achieving a workable ideology, in an official forum, which could further the aims of Maori ethnic revival on a wider front' (Levine 1989,26). While the courts will decide what fishing rights actually exist the Tribunal has, by creating a framework for insinuating the principles of the Treaty of Waitangi into the legal system, significantly increased the chances that real gains will be made. Certainly in any expansion of the fishing industry Maori interests will be major players. Through the Maori Fisheries Act they now have 10 per cent of quotas. They will have acquired another 11 per cent, and a half share of Sealords quota will give them 12 per cent more. Through such programs Maori dependency on government programs and welfare diminish and wealth and job opportunities flow back to the tribes.

2.2 Canada

In Canada the Supreme Court in 1990 handed down a landmark judgement statement on the nature of aboriginal fishing rights and on the constitutional protection afforded them (Sparrow 1990). In 1984, Ronald Edward Sparrow a member of the Musqueam Indian band, was charged under the Fisheries Act with using a driftnet longer than that permitted under the band's Indian food fishing license. Sparrow did not deny the fact, but defended himself against the charge on the grounds that he was exercising an aboriginal right to fish, as guaranteed by the constitution, and that the driftnet restriction was therefore invalid. The court accepted this defence. The aboriginal right to fish cannot be extinguished by the Fisheries Act, only restricted by it. As well these rights must be interpreted in a generous way and the government has the responsibility to act in a trust relationship with respect to aboriginal peoples and is held to a high standard of honourable dealing with them.

The court elaborated a two part test for determining whether a regulation under the fisheries act infringes on an existing aboriginal right, and where that infringement is justified. The first test is whether the legislation in question has the effect of interfering with an existing aboriginal right. Few aboriginal rights have been precisely defined in law, but the court then asks if the limitation is unreasonable, whether it imposes undue hardship, and whether it denies the holders of the right their preferred means of exercising it. The court stated that a *prima facie* infringement would consist not just in reducing the catch below reasonable food and ceremonial needs, but even the imposition of undue cost or hardship in obtaining that catch. The burden of proof with respect to the first test is on the Aboriginal person or group challenging the legislation. The tests for justifying the limitation and the fact that the burden of proof falls on the Crown are novel features of *Sparrow*. These tests are:

- Is there a valid legislative objective?
- Is the legislation consistent with the special relationship and the responsibilities of the government vis-a-vis aboriginals? Here the court said in effect that whatever surplus exists beyond the requirements of conservation shall be allocated to meet Indian food requirements in their entirety.
- Has there been as little infringement as possible in order to effect the desired result?
- In a situation of expropriation is fair compensation payable?
- Has the aboriginal group in question been consulted with respect to the conservation measures being implemented?

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[25] 'Fishing chief fears industry value cuts'. *The Dominion* 10 December 1992.

Sparrow opens the way for challenging the system of state management through the first three tests, particularly the third tested noted above. If the infringement encompasses not just harvesting activity but also tenure and management arrangements the Crown will have to show that the regulation has the objective of conservation but also is the most efficacious and acceptable from the aboriginal viewpoint. The *Sparrow* case indicates that aboriginal fishing rights consist not just in a claim to a share of the harvest but also a stake in the management of the resource. The onus will be on Canadian governments to justify regulations affecting native harvesting in accordance with the Sparrow tests. Notably the court did not foreclose the possibility of constitutional protected rights to fish commercially. The case was cited in the recent Australian case of *Mabo* as demonstrating the requirement for clear and plain intention before aboriginal rights are taken to have been extinguished.

In the Canadian context of marine resource management it is also worth noting the eight year old Inuvialuit Final agreement and the recent Nunavut arrangements.[26] The Inuvialuit agreement was proclaimed in force in July 1984. The Inuvialuit number over 2,500 and live in six coastal settlements in the western Arctic, in what is both the Yukon (one settlement) and the northwest territories (five settlements). Under the final agreement, the Inuvialuit gained title to approximately 35,000mi^2 of land, of which 5,000mi^2 included the sub-surface. In exchange for extinguishing their Aboriginal title to the land and waters they traditionally used, the Inuvialuit were given $45 million (in 1977 dollars) payable over a thirteen year period. The settlement recognised Inuvialuit priority in the harvesting of marine mammals, including first access to all harvestable quotas. This recognises that the Inuvialuit have the right to harvest a subsistence quota of marine mammals, according to a quota set by them and the government. They are also entitled to harvest any portion of any commercial or other quotas that they can expect to take within any given quota year, once such quotas have been set jointly according to sound conservation principles.

The Inuvialut have a preferential right to harvest fish for subsistence within the settlement region: this includes trade, barter, and sale to other Inuvialuit. Subject only to restrictions imposed by quotas each year, Inuvialuit are issued non-transferable commercial licences to harvest a total weight of fish equal to the largest annual commercial harvest of that species taken by Inuvialuit from those waters over the preceding three years. Access to commercial harvests above that level is granted on the same basis to Inuvialuit as to other applicants. A Fisheries Joint Management Committee became operational in 1987 and assists the Ministry of Fisheries and Oceans in the management of marine resources and provides advice on all matters relevant to harvests in the settlement. Its activities overlap with other institutions such as a Game Council, and Hunter and Trappers Committees. It currently monitors Aboriginal subsistence harvests of both fish and marine mammals, as well as sports fishing on Inuvialuit lands. It monitors the beluga whale hunt and managed a quota involving a total annual intake of 130. Inuvialuit hunters are hired as whale monitors and they record the number of animals struck and the sex and size of the landed whales. They also take biological samples and make a report to the Fisheries Joint Management committee after the whaling season. In sum the Final Agreement contains all the required ingredients for a co-management regime. As Doubleday points out: 'It recognises preferential or exclusive harvesting rights, control of access to the resource, participation in management, relevance of traditional knowledge, and modern scientific approaches to conservation—all of which represent elements of special status and self-government necessary for the survival of indigenous peoples' (Doubleday 1989,221).

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[26] In addition to these final agreements two recent final agreements have been reached on outstanding claims, the council for Yukon Indian claims and the Dene and Metis claim in the Northwest of Canada. One earlier ratified land claim agreement which has been widely criticised for problems of implementation is the James Bay and Northern Quebec Native Lands claim settlement of 1976-77 (see Berkes 1989). There are about 20 other claims submitted by aboriginal peoples and are waiting discussion.

In April 1992 the Canadian government signed an agreement with the Tungavik Federation of Nunavut for the establishment of the new Nunavut territory. The land settlement was ratified in November 1992.[27] The Inuit claim is the largest in Canada, involving 17,500 Inuit and covers a land area of 775,000 square miles of land and 800,000 square miles of ocean. The accord provides for a transition process leading to the creation of the Nunavut government no later than 1 April 1999. Like other lands claims the agreement provides for the effective extinguishment of Aboriginal title to lands and adjacent offshore areas in exchange for a variety of rights and benefits in the settlement area. Under the settlement Nunavut's inhabitants will be paid $1.44 billion over the next 14 years (Jull 1992).

From the mid 1980s traditionally used offshore areas were admitted into the negotiating arena for purposes of harvesting rights and for participation in environmental management and resource sharing. The Inuit are by and large a sea-based people. They are a coastal people who spend much of the year harvesting marine mammals and all but one of the communities in Nunavut, Baker Lake, is located on the coast. Under the agreement (see Fenge 1992) Inuit will be guaranteed, subject to principles of conservation, the right to harvest marine and terrestrial wildlife throughout Nunavut sufficient to meet their consumption needs, and will be given priority in establishing sport or commercial wildlife ventures. The government is to give 'special consideration' to Inuit when allocating commercial fishing licenses in Hudson Bay and Davis strait, adjacent to, but outside the Nunavut settlement area. The resource management provisions of the agreement operate on consensual principles as much as possible, and mesh the different experiences and expertise of Inuit and government (see Fenge 1992,28-32). They reflect a commitment to cooperative management of natural resources by both government and users. A Nunavut Wildlife Management Board (NWMB) is established. It will be composed of nine members, four appointed by Inuit organisations, three appointed by the governor-in-council upon the advice of ministers responsible for fish and marine mammals, the Canadian Wildlife Service and Indian Affairs and Northern Development and one appointed by the Commission-in-Executive council.

Where a total allowable harvest for a stock has not been established by the NWMB, Inuit have a right to harvest that stock up to the full level of their economic, social and cultural needs. Inuit must abide by a total allowable harvest established by the NWMB but they have first claim on any wildlife. The basic needs level shall constitute the first demand on the total allowable harvest. Where the total allowable harvest is equal to or less than the basic needs level, Inuit shall have the right to the entire allowable harvest. A five year harvest study to assist the NWMB set a basic needs level will commence shortly. The board is required to presume, however, that Inuit need the total allowable harvest of a number of listed species, including bowhead whales. The board is to periodically review the basic needs level to determine if an additional harvest allocation to Inuit is required in light of growth of the Inuit population, increased intersettlement trade or other factors. The resulting 'adjusted basic needs level' may over time reach the total allowable harvest, but may never be reduced below the basic needs level. The surplus (animals that remain to be harvested) are to be allocated first to other residents of the NWT for personal consumption, second to sport or commercial operations existing at the time of ratification of the agreement, and third for new sport and commercial operations. The board or federal or territorial minister may restrict Inuit harvesting only to effect a valid conservation purpose, to give effect to the allocative system detailed in the agreement, or to provide for public health and safely (Fenge 1992,30). The board is to have a major role in preserving wildlife habitat, but the agreement makes clear that the primary responsibility for the management of lands shall be exercised by appropriate government agencies and such related bodies as may be established by the agreement. This rider was insisted upon by government that feared an expansive board mandate might hinder the disposition of rights to use and develop sub-surface resources. Fenge states that the 'ability of

[27] 'Eskimos granted land rights' *Canberra Times* 1 November 1992.

the NWMB to exercise the various functions identified in the agreement will depend upon the budget that it receives, the number, quality and dedication of its staff, and foremost, the attitudes and skills of the board members' (Fenge 1992,32).

2.3 United States

As far back as 1905, the US Supreme Court recognised that the native American tribes of the North West coast were not 'much less dependent upon fishing than the air they breathed'.[28] The *Winans* case established the fishing right as a property right that burdened both the title of federal land grantees and state regulatory activities, even though the state was not a party to the treaty. This gave native American fishers the right to be treated separately from the rest of the fishing community and to participate meaningfully in the formulation of fishing regulations (Anderson 1987).

In 1974 the district Court of Washington, in US v Washington recognised the right of a North West tribe to 50% of fishery allocations under treaty. This right was confirmed by the Supreme Court in 1979.[29] Cohen has pointed out that the response to this ruling has been the development of innovative institutional initiatives, including tribal fisheries committees, a three tribe cooperative which jointly provides harvest management, biological research enforcement and other functions for member tribes and the inter-tribal Northwest Indian fisheries commission which serves as a coordinating agency which provides services such as technical assistance and public information (Cohen 1989).

Moreover the treaty right implied an environmental right which native Americans have successfully used to restrain development that threatens marine stocks. In 1985 treaty tribes were instrumental in negotiating the US—Canada Pacific Salmon Treaty which upholds the Indian right to take fish. The US legislation implementing the Pacific Salmon Treaty considers the tribes on an equal basis with the states, and gives them direct representation on the institutions established to implement the treaty (Yanagida 1987; Jensen 1986; Cohen 1989).

Professor Meyers' recent article reviews the legal literature on native fishing rights in the US and Canada and concludes that the states and provinces are permitted to regulate native access to natural resources but only to the degree necessary to conserve those resources (Meyers 1991).

With respect to treaty-guaranteed rights there is emerging case law in both the US and Canada suggesting that treaty language providing the 'sharing of resources in common with' means that indigenous people have some priority to those resources, after conservation measures are met. This 'priority' reflects the duty to interpret agreements made between the natives and their governments as the natives understood them. The 'priority' also owes a debt to the nature of aboriginal rights, as rights existing from time immemorial. Additionally, in both countries, there is also an emerging sense that native rights may impose a servitude on the federal and state/provincial governments to protect the 'property right' in the resource.

2.4 South Pacific

In the South Pacific there exist a large variety of marine tenure systems, although more often than not coastal villagers claim and exercise strong traditional rights over nearshore fishing grounds. Such institutions of customary marine tenure regulate fishing by limiting access to resource areas, restricting the use of various fishing methods and regulate the capture of certain species. Fishing grounds contained within customary marine tenure (CMT) systems of the

[28] United States vs. Winans 198 US.371 1905.
[29] Washington Passenger Fishing Vessel Assn 443 U.S. 658 1979.

South Pacific are generally communally-held property, inherited as ancestral title through generations, and cannot be sold or transferred to outsiders. CMT is much more than a resource management tool: it forms an important part of the framework for organising political and social relationships and for defining cultural identities in the Pacific. Sophisticated local knowledge also tells them where and how they ought to fish to get the best catches. There is now an expanding literature that describes customary marine tenure and traditional environmental knowledge in the South Pacific (Doulman 1992; Hviding 1991; Hviding and Ruddle 1991; Hviding 1992).

Kenneth Ruddle has identified six basic social principles of CMT in the Pacific: (1) that rights in sea and marine resources depend on social status: (2) that resource exploitation is governed by resource use rights: (3) that resource use territories are defined: (4) that marine resources are controlled by traditional authorities: (5) that conservation is widely practised: (6) that sanctions and punishments are meted out for breaking regulations (Ruddle 1988). While CMT in the Pacific may be referred to as systems of 'traditional resource management' this does not mean that 'tradition' is something static, rigid and unchanging. As Hviding and Ruddle point out: '"Tradition", as it exist in the rapidly changing world of indigenous peoples, is a system of knowledge and rules which has, on the one hand, strong roots in local history and experience, and which is on the other unwritten and uncodified, thereby allowing for flexibility in adapting to changing social, political, economic, or ecological circumstances. Thus, far from being overwhelmed by commercialisation and resource scarcity, many CMT systems in Oceania appear to have considerable capacity for handling and adapting to new circumstances, thereby becoming potentially important tools in the contemporary management of fisheries and of the coastal zone in general' (Hviding and Ruddle 1991,10). Most types of marine tenure systems are, as noted above, of traditional, unwritten kind, based on local customary law. However in Fiji, Vanuatu, Cook Islands, French Polynesia, Solomon Islands and Western Samoa the existence of viable CMT systems is given explicit legislative support (Hviding and Ruddle 1991,6).

It remains a difficult question as to whether and how far traditional systems should be codified. At a workshop on 'People, Society, and Pacific Islands Fisheries Development and Management' held in Noumea 5-9 August 1991 there seemed clear agreement that it was not desirable to dilute the flexibility of CMT systems and several representatives noted that codification of CMT is very difficult and not desirable (Hviding and Ruddle 1991,80). At this workshop there seemed to emerge an approach of 'joint management' that has national government settling basic rules and principles while simultaneously recognising important aspects of customary resource rights, and local 'government' handling locally appropriate management within this legislative framework. It was argued by several speakers that local 'title to' resources should imply an obligation to manage that resource effectively. This stand is not unproblematic, however, since it involves political issues far beyond the restricted field of fisheries legislation, relating to local-level autonomy, rural influence on development policy, and recognition of hereditary claims and customary rights, all of high importance in the contemporary South Pacific (Hviding and Ruddle 1991,8). A recent consultant's report to the Forum Fisheries Agency recommended that the transfer of traditional knowledge and practices to guidelines for resource use legislation be a logical focus for future action (Hviding and Ruddle 1991).

At the sixth technical Subcommittee of the FFA workshop on decentralised Nearshore Fisheries management in Oceania held in Niue 27—30 April 1992 one subject kept coming up—to help people manage their resources more effectively they must be supported not only scientifically but also *legally* and *politically*. In the absence of strong legal protection local authority over marine resources is likely to break down if outsiders see a high enough value in obtaining access to them. This brings pressure on the courts to define precisely relevant local

oral traditions, such as those associated with CMT. This tends to freeze tradition, leaving villages less flexible in their response to population movements, changes in fishing methods, or other developments that require adjustments in local resource-use patterns and controls (Johannes 1992[a]). The Niue workshop recommended that FFA should conduct a review of regional constitutional and legislative provisions and international law relevant to customary marine tenure and management systems. The report should be available to member countries before the annual session of the Forum Fisheries committee in 1993 (Johannes 1992).[30] As a member of the Forum and participant in the Niue workshop Australia could be expected to respond to the recommendations flowing from the report.

2.5 Implications for GBRMPA

In the evolution towards greater self-determination, indigenous groups have sought greater legal and political protection of marine resources. Legal and political aspirations for self-government are in fact being incorporated in marine resources policies in the US, Canada, New Zealand and the South Pacific. Decisions in Canada and New Zealand, in particular establish a priority be given to aboriginal interests, an equitable allocation of the resource, and potentially, decision making in the co-management schemes. Although these decisions are often clouded by treaties, not relevant to the Australian situation, it should be noted that Aboriginal peoples are being invited to become genuine partners in management and government interferences are having to be justified by cogent reasons. The scope of protected aboriginal rights to marine resources in the US, NZ and Canada is evolving through judicial elaboration and political negotiation. In the main that evolution is towards widening the scope for co-management initiatives and joint conservation projects. In framing its policies the GBRMPA should be aware that while it may not have the power to act independently from the Commonwealth on some of these issues, the broad political and legal trends overseas exhibit a respect for the existence of genuine, and possibly extensive marine resource rights and a commitment by government to enable aboriginal communities to prepare for co-management negotiations. On the basis of overseas experience this seems the *sine qua non* for effective policy development in this area.

[30] In July 1992 the first issue of the *Traditional Marine Resource Management and Knowledge Information Bulletin* appeared. This provides a vehicle for communication among members of the Traditional Marine Resource Management and Knowledge Special Interest Group (SIG). This SIG was established as a result of recommendation No 12 of the 23rd Regional technical meeting on fisheries, held at SPF headquarters Noumea 5-9 August 1991, to provide a focus for collection, discussion and dissemination of information on traditional marine ecological knowledge.