

**INDIGENOUS PEOPLES, THEIR LIVELIHOODS AND
FISHERY RIGHTS IN CANADA AND THE
PHILIPPINES: PARADOXES, PERSPECTIVES AND
LESSONS LEARNED**

Robert Charles G. Capistrano

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Abstract

The involvement of indigenous peoples in natural resource management varies widely around the world, and invariably involves complex interactions. This paper examines the experiences of indigenous peoples in Canada and the Philippines with respect to their participation in fisheries management and policy, and how the mismatch between formal frameworks and local practice affects this participation. Combining approaches based on sustainable livelihoods and those relating to rights over natural resource access and management proves a useful vehicle for positive change in collaboratively improving the situation of indigenous peoples. Thus rights to fisheries are fundamental not only as a key tool in fisheries management and conservation, but also as an integral ingredient in the pursuit of secure livelihoods on the part of indigenous peoples.

This paper also discusses the impact of local and national policies on the participation of indigenous peoples in the Philippines in relation to fisheries management. Specifically, this research focuses on the Tagbanua, an indigenous group in Coron Island, Palawan. In minimizing conflict between the Tagbanua and other stakeholders in the area, the situation of indigenous peoples looks at institutions and property rights in order to sustain the fishery resources. The struggle of the Tagbanua in reclaiming their ancestral title is recognition of their self-determination, which is critical not only to their ancestral lands and waters, but also to their survival. Indigenous rights are essential in addressing social justice and in giving a greater voice that encourages indigenous peoples towards self-governing institutions and common management of resources. Significantly, the fundamental development of indigenous peoples lies in the recognition of their rights in their ancestral domain and the preservation of their culture, tradition, system, practices and their natural resources.

SUPERVISORS:

Dr. Anthony Charles

Dr. François Bailet

Acronyms

ADMP	Ancestral Domain Management Plan
ADSDP	Ancestral Domain Sustainable Development and Protection Plan
ANGOC	Asian NGO Coalition for Agrarian Reform and Rural Development
CADC	Certificate of Ancestral Domain Claims
CADT	Certificate of Ancestral Domain Title
CBD	Convention on Biodiversity
CBS	Canadian Biodiversity Strategy
CFSA	Community Forestry Stewardship Agreement
Coastal CURA	Community University Research Alliance
COP	Conference of Parties
COS	Canada's Oceans Strategy
DAO	Department Administrative Order
DFID-UK	Department for International Development – United Kingdom
DFO	Fisheries and Oceans Canada
DOALOS	Division of Ocean Affairs and Law of the Sea
DENR	Department of Environment and Natural Resources
ELAC	Environmental Legal Assistance Center
FPIC	Free, Prior Informed Consent
FTAA	Financial Technical Assistance Agreement
GIS	Geographic Information System
ICC	Indigenous Cultural Communities
ILO Convention 169	International Labour Organization Convention Number 169

IMPs	Integrated Management Plans
INAC	Indian and Northern Affairs Canada
IPRA	Indigenous Peoples Rights Act
LGC	Local Government Code
LGU	Local Government Unit
LOMAs	Large Ocean Management Areas
MCPEI	Mi'kmaq Confederacy of Prince Edward Island
MDG	Millennium Development Goals
MEQ	Marine Environmental Quality
MPSA	Mineral Production Sharing Agreement
NBSAP	National Biodiversity Strategy and Action Plan
NCIP	National Commission on Indigenous Peoples
NIPAS	National Integrated Protected Area System
NGOs	Non-government organizations
OMS	Oceans Management Strategy
PAFID	Philippine Association for Intercultural Development
PAMB	Protected Area Management Board
PAWB	Protected Areas and Wildlife Bureau
PEI	Prince Edward Island
SEP	Strategic Environmental Plan
SSHRC	Social Sciences and Humanities Research Council of Canada
SONA	State of the Nation Address
TFCI	Tagbanua Foundation of Coron Island
UN	United Nations
UNCED	United Nations Conference on Environment and Development

UNCBD	United Nations Convention on Biodiversity
UNDRIP	United Nations Declaration of the Rights of Indigenous Peoples
UNEP	United Nations Environmental Programme

Dedication

To the Indigenous Peoples of the Philippines and Canada.

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1 Introduction

The interaction of fisheries management and indigenous peoples is undoubtedly complex. The legal recognition of indigenous rights and/or treaty rights in fisheries management is directly related to improving the well-being of indigenous peoples who were deprived of their land, fisheries, and other resources through processes of colonization and oppression. The recognition of these rights to traditional lands, and coastal and marine resources, is crucial in achieving equal opportunity and appropriate development¹ since without the necessary resource base, indigenous peoples will become further alienated in society. In spite of that, accommodating indigenous rights within existing legal frameworks of fisheries remains a challenge for various Governments.²

Aboriginal peoples is a collective name for the original peoples of North America and their descendants. The Canadian Constitution recognizes three groups of Aboriginal people: Indians (commonly referred to as First Nations), Métis and Inuit. These are three distinct peoples with unique histories, languages, cultural practices and spiritual beliefs.

¹ Randall Bess, "New Zealand's indigenous people and their claims to fisheries resources," *Marine Policy* 25 (2001): 23-32.; see also: Svein Jentoft, Henry Minde and Ragnar Nilsen eds. *Indigenous peoples: resource management and global rights*. Delft, Netherlands: Eburon Academic Publishers; Ciaran O'Faircheallaigh, "Resource development and inequality in indigenous societies," *World Development* 26, (1998): 381-394.

² Anthony Charles, "Community Fishery Rights: Issues, Approaches and Atlantic Canadian Case Studies. Paper presented at the Rebuilding Fisheries in an Uncertain Environment," (paper presented at the Thirteenth Biennial Conference of the International Institute of Fisheries Economics and Trade, Portsmouth, United Kingdom, 2006): 5-6; see also: Elizabeth Ganter, "Indigenous participation in coastal management in the Northern territory, Australia: issues and options," *Ocean and Coastal Management* 33,(1996): 193-212.; Cathy Robinson and David Mercer, "Reconciliation in troubled waters? Australian oceans policy and offshore native title rights," *Marine Policy* 24, (2000): 349-360; Melanie Wiber and Julia Kennedy, "Impossible dreams: reforming fisheries management in the Canadian Maritimes in the wake of the Marshall decision," *Law and Anthropology* 11, (2001): 282-297; Melanie Wiber and Chris Milley, "Seeking clarity, legitimacy and respect: the struggle to implement special rights," *Journal of Legal Pluralism and Unofficial Law* 55, (2007a):1-10. Melanie Wiber and Chris Milley, "After Marshall: implementation of aboriginal fishing rights in Atlantic Canada," *Journal of Legal Pluralism and Unofficial Law* 55, (2007b): 163-186.

More than one million people in Canada identify themselves as an Aboriginal person, according to the 2006 Census.³

On the other hand, under the Philippine Indigenous Peoples Rights Act of 1997, indigenous peoples are also called “*indigenous cultural communities*” which is defined as a group of people or homogenous societies who have continuously lived as organized community on communally-bounded and defined territory since time immemorial. Under claims of ownership, indigenous peoples in the Philippines occupied, possessed customs and tradition and other distinctive cultural traits by resisting the political, social and cultural inroads of colonization and non-indigenous religions and culture, and became historically differentiated from the majority of Filipinos. The indigenous peoples have retained their own social, economic, cultural and political institutions but may have been displaced from their traditional or ancestral domains at the time of conquest or colonization and the establishment of present State boundaries.⁴ In the context of the Philippine definition of indigenous cultural communities, however, the use of the word “*cultural*” may suggest the commodification and exploitation of indigenous peoples culture for tourist promotion, a reductionist view of the situation of indigenous peoples in the Philippines.⁵

For consistency, this paper will use the term *indigenous peoples* throughout. The term “indigenous peoples” has been adopted by a large number of Governments, international agencies and, most significantly, a broad movement of self-identified

³ Indian and Northern Affairs Canada, “Aboriginal Peoples and Communities”; available from <http://www.ainc-inac.gc.ca/ap/index-eng.asp>; Internet; accessed 3 January 2010.

⁴ Indigenous Peoples Rights Act of 1997. Chapter 2, Section 3.h.

⁵ Steven Rood, “NGOs and Indigenous Peoples,” in G.. Sidney Silliman and Lela Gardner eds. *Organizing for Democracy: NGOs, Civil Society, and the Philippine State* (Honolulu: University of Hawai'i Press, 1998), 139.

peoples as the best catch-all term available to incorporate consideration for their rights into international law.⁶

This thesis provides an opportunity to explore the problems facing indigenous people that are managing their fisheries in Canada and the Philippines. While the governance, socio-economic and cultural context may be different from each other, my basic assumption is that there are similarities between these countries in terms of the experience of indigenous peoples who are making an effort to be heard in the decision making process related to fisheries management. This research consists of conducting background research on indigenous peoples by collecting various articles on-line, and policy analysis. The objectives of the research are:

1. To provide background information on the interaction and involvement of indigenous peoples fisheries management;
2. To assess relevant policies and strategies affecting indigenous peoples participation in natural resource management; and
3. To provide recommendations for sustaining the involvement of indigenous peoples.

Chapter two reviews the international agreements and national policies related to the rights of indigenous peoples and natural resource management and the current issues confronting its implementation. At the international level, the shaping of indigenous rights can be considered as both radical and progressive. It is characterized by increasing emphasis on democratization of natural resources and the participation of indigenous peoples in resource management focused towards poverty alleviation and the sustainable management of fisheries. At the national level, crucial issues and concerns need to be

⁶ Marcus Colchester, Tom Griiffiths, Fergus MacKay and John Nelson, "Indigenous land tenure: challenges and possibilities," in Paolo Groppo ed. *Land Reform, Land Settlement and Cooperatives* (Rome: Rural Development Division, Food and Agriculture Organization. 2004), 9.

addressed to close the gap between indigenous peoples and non-indigenous peoples in Canada and the Philippines in order to improve current practices and outcomes in fisheries management, sustain policy initiatives and responding to changing contexts and needs.

The third chapter examines the experiences of indigenous peoples in Canada and the Philippines who are seeking to participate in fisheries management and policy, examining in particular the mismatch between formal frameworks and local practice. This chapter outlines the political, social, cultural, and economic context for these two countries, and notes that despite various differences, there are many common pitfalls such as the gap between the non-natives and the indigenous peoples who are articulating their indigenous rights and fishing rights – which may be avoided to some extent by increasing the involvement of indigenous peoples through participatory planning and public mediation. Although the adoption of such processes will not eliminate conflict or guarantee that all stakeholders recognize the legitimacy of fisheries rights arrangements, these approaches can give fishery-dependent people, whether indigenous peoples and non-natives the information and experience they need to defend their interests and negotiate workable solutions.

Chapter four discusses the impact of local and national policies on the participation of indigenous peoples in the Philippines in relation to fisheries management. Specifically, this section focuses on the Tagbanua, an indigenous group in Coron Island, Palawan. Using property rights as a framework, the struggle of the Tagbanua in their ability to exercise their indigenous rights becomes an entitlement in managing their resources. While the experience of Tagbanua is also provided in the second chapter, the succeeding chapter uses property rights as a framework which becomes an entitlement for the indigenous peoples that has an impact on their ability to exercise their ancestral rights and manage their resources.

2 Global and national frameworks on indigenous peoples rights: a policy review

2.1 International agreements related to indigenous peoples rights to natural resource management

As a global reality, efforts of indigenous peoples to have their rights recognized or further developed are relevant in both developing countries and industrialized nations.⁷ Indigenous peoples suffered from historic injustices due to colonization and dispossession of their lands, territories and resources, preventing them from exercising their right to development that meets their own needs and interests. In general, indigenous peoples are disproportionately represented among the poorest of the poor in both industrialized and developing countries.⁸ While the rights of indigenous peoples are significantly recognized through various international declarations or conventions such as the 1989 International Labor Organization Convention No. 169⁹ concerning the indigenous and tribal peoples in independent countries, the 1992 United Nations Convention on Biological Diversity, and the 2007 United Nations (UN) Declaration on the Rights of Indigenous Peoples – such progress has not been matched in practice by effective recognition of indigenous rights by Governments and society in many countries of the world. For instance, many indigenous peoples in Canada have had little access to commercial fisheries, and most have had limited involvement in fisheries management.¹⁰ Similarly, in the Philippines, conflicting laws and policies on corporate mining and

⁷ See review by Jentoft *et al.*, n. 1 above for a compilation of the challenges of indigenous peoples in industrialized countries in governing their land and the sea that looks at the experiences in Canada, New Zealand, and Norway.

⁸ Victoria Tauli-Corpuz, “Indigenous Peoples and the Millennium Development Goals,” *Indigenous Perspectives* 7, (2001), 9.

⁹ International Labor Organization Convention No. 169 (hereafter ILO Convention No. 169), available from: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>.

¹⁰ Anthony Davis and Svein Jentoft, “The challenge and the promise of indigenous peoples' fishing rights - from dependency to agency,” *Marine Policy* 25, (2001): 223-237; see also: Richard McGaw,

logging, and the illegal fishing practices by migrants and non-natives within their ancestral domain, are still a major threat to indigenous peoples.¹¹

2.1.1 ILO Convention 169 of 1989

Recalling the terms of the Universal Declaration of Human Rights in 1948, the International Labor Organization Convention on Indigenous and Tribal Peoples (ILO Convention 169) is one of the key instruments in the body of international law relating to indigenous peoples. Adopted in 1989, the Convention has been ratified by only 18 countries (as of January 2007) of which 13 are in Latin America (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Honduras, Guatemala, Mexico, Paraguay, Peru, and Venezuela). The other countries that have ratified the Convention to date are Denmark, Fiji, Norway, the Netherlands, and Spain. ILO Convention 169 is the only legally binding instrument that distinctly concerns itself with indigenous peoples rights. The Convention aims at protecting indigenous peoples and their cultures and languages from vanishing with special actions by the Governmental authority.

ILO Convention 169 recognized ‘the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy’ and their right to continue to use resources on lands which they may not occupy, but traditionally use “for their subsistence and traditional activities.”¹² Other rights include “management and conservation,” and the maintenance of traditional land tenure systems.¹³ “Traditional activities [...] such as hunting, fishing, trapping and gathering, shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance

“Aboriginal fisheries policy in Atlantic Canada,” *Marine Policy* 27, (2003): 417-424; Wiber and Milley, n. 2 above.

¹¹ Robert Charles Capistrano, “Reclaiming the ancestral waters of indigenous peoples in the Philippines: the Tagbanua experience with fishing rights and indigenous rights,” *Marine Policy*, (2009) [*in press*]: 6.

¹² ILO Convention No. 169, Article 14.

¹³ *Ibid.*, Article 15 and 17.

and development,”¹⁴ an implied priority for indigenous peoples over competing users of living resources.

International standards on indigenous peoples right to participate and to free, prior, and informed consent is stipulated in Article 7(1) of ILO Convention 169:

The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social, and cultural development.

2.1.2 1992 United Nations Conference on Environment and Development

The UN Conference on Environment and Development (UNCED)¹⁵ held in Rio in 1992 provided several multilateral environmental agreements which now shape the strategies and approaches of Governments in relation to the environment and development, including natural resource management. The assessment of the Rio Agreements highlight the recognition of indigenous peoples as a major group for the implementation of Agenda 21 as one major accomplishment. As discussed in Section III of Agenda 21, Chapter 26 entitled, “Recognizing and strengthening the role of indigenous people and their communities.” The first paragraph acknowledges that indigenous peoples have “developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous peoples and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.” Section III, Chapter 26 of Agenda 21, also recognizes the indigenous rights to lands, intellectual and cultural property and the need to preserve customary and administrative practice, advocates empowerment, promotes participation and proposes involvement in resource management and conservation.

¹⁴ Ibid., Article 23.

The promotion of participation is a key for this report as the first paragraph of Agenda 21 expresses this as follows:

[T]heir ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

However, the Agenda 21 also contains several features which give indigenous peoples cause for concern as these were drawn up with little indigenous participation and indigenous peoples have been marginal to subsequent decisions. The documents weaken indigenous rights by overemphasizing State sovereignty, by refusing to recognize indigenous peoples as peoples with collective and distinct identities, by not acknowledging territorial rights, by considering indigenous peoples as objects of study and development not as self-determining subjects of their lives; and by limiting them to passive and reactive roles in participation and partnership. The issue of clear mechanisms for participation, within intergovernmental processes is an important issue that requires urgent attention.¹⁶

2.1.3 1992 United Nations Convention on Biodiversity (UNCBD)

The UN Convention on Biological Diversity¹⁷, known informally as the Biodiversity Convention, is an international legally binding treaty that was adopted in Rio de Janeiro in June 1992. This Convention aims to conserve the earth's biological diversity, promote the sustainable use of these resources, and promote equitable sharing of benefits derived from these resources. The UNCBD focuses on various thematic issues and also covers other issues that cut across such thematic areas. The Convention of

¹⁵ United Nations Conference on Environment and Development (hereafter: UNCED).

¹⁶ Joji Cariño. "Indigenous peoples, forest dwellers, women and local communities," XI World Forestry Congress (Rome :Food and Agriculture Organization, 1997), 148-149.

Parties of the CBD had specifically adopted decisions related to other cross-cutting issues and concerns such as the protected areas, ecosystem approach, education and public awareness, finance mechanisms, among others. Specific to the CBD, however, it uses the term *indigenous and local communities* rather than *indigenous peoples* which in effect restricts the rights of indigenous peoples. With the 2007 adoption of the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) which is discussed in the next section, the CBD has integrated in specific Conference of Parties (COP) IX decisions, noting the UNDRIP as the international standard in the recognition of the human rights of indigenous peoples in specific issues and concerns in the CBD implementation.¹⁸

Specific to the particular recognition and respect of traditional knowledge, innovations and practices of the indigenous and local communities relevant to the in-situ conservation and sustainable use of biodiversity, it is significant to note the CBD statement on Article 8(j) as follows:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

As a natural resource management strategy, the decisions of the recent Conference of Parties of the CBD in relation to protected areas also adopted the following obligations of Governments towards indigenous and local communities, as stated in the following decisions:

¹⁷ United Nations Convention on Biodiversity (hereafter: UNCBD).

¹⁸ UNCBD, Decision IX/12 of COP IX: 2008, available from <<http://www.cbd.int/decision/cop/?id=11655>>.

Recalls the obligations of the Parties towards indigenous and local communities in accordance with Article 8 (j) and related provisions and *notes* that the establishment, management and planning of protected areas should take place with full and effective participation of, and full respect for the rights of indigenous and local communities consistent with national law and applicable international obligations;¹⁹

Recognizing the need to promote full and effective participation of indigenous and local communities in the implementation of the programme of work on protected areas at all levels; also *noting* the United Nations Declaration on the Rights of Indigenous Peoples [...].

Encourages Parties to ensure that conservation and development activities in the context of protected areas contribute to the eradication of poverty and sustainable development and ensure that benefits arising from the establishment and management of protected areas are fairly and equitably shared in accordance with national legislations and circumstances, and do so with the full and effective participation of indigenous and local communities and where applicable taking into account indigenous and local communities' own management systems and customary use.²⁰

These CBD decisions are significant with the statement on the obligation of Parties towards indigenous and local communities. It also takes note that the establishment, management, and planning of protected areas should take place with the full and effective participation and full respect of the rights of indigenous and local communities. Further, the CBD-COP9 also takes note of the UN Declaration of the Rights of Indigenous Peoples as adopted in 2007 by the United Nations General Assembly, as a minimum universal standard on indigenous peoples rights in the implementation of the programme of work on protected areas; and with the recognition of the indigenous and local communities' own management and customary use of the protected areas.²¹

¹⁹ Ibid., Decision VII/28 of COP VII: 2007, available from <http://www.cbd.int/decision/cop/?id=7765>.

²⁰ Ibid., Decision IX/18 of COP IX: 2008, available from <http://www.cbd.int/decision/cop/?id=11661>.

²¹ Ibid., COP IX: 2008, available from <http://www.cbd.int/decisions/cop/?m=cop-09>.

2.1.4 United Nations Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007, by a majority of 144 States in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Since its adoption, Australia has reversed its position and now endorses the Declaration. Colombia and Samoa have also reversed their positions and indicated their support for the Declaration.²² In relation to Australia's endorsement of the Declaration, Prime Minister Kevin Rudd read his 361-word speech to the Parliament in 2008, a public apology that was watched by hundreds of parliamentarians, former prime ministers and representatives of the indigenous community, expressing:

The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future. We apologize for the laws and policies of successive Parliaments and Governments that have inflicted profound grief, suffering and loss on these our fellow Australians. We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. For the pain, suffering and hurt of these stolen generations, their descendants and for their families left behind, we say sorry. To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry. And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.²³

A year later, this humble expression by the Australian Government was followed by a statement made by Indigenous Affairs Minister Jenny Macklin on Australia's change

²² United Nations Permanent Forum on Indigenous Issues, United Nations Declaration on the Rights of Indigenous Peoples [on-line] (New York: Secretariat of the Permanent Forum on Indigenous Issues, 2007, accessed 02 January 2010); available from <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>>; Internet.

²³ The Sydney Morning Herald, Prime Minister Kevin Rudd's speech to the Parliament [on-line] (Sydney: Sydney Morning Herald, 2008, accessed 02 January 2010); available from <<http://www.smh.com.au/articles/2008/02/13/1202760379056.html?page=fullpage#contentSwap2.>>; Internet.

in position at the Parliament House by supporting the declaration and as part of the Rudd Government's election promises and reversing the Howard Government's vote in 2007. Macklin showed their support to the declaration as an important step towards closing the gap between indigenous and non-indigenous Australians and as an expression of their respect for indigenous peoples, expressing:

We want Indigenous Australians to be partners in efforts to close the gap. For this to happen, we must recognize the unique place of Indigenous people in Australia.²⁴

On the contrary, in speaking to the General Assembly on 13 September 2007, Canada's Ambassador to the UN, John McNee expressed his disappointed to have to vote against the Declaration. He explained that Canada had significant concerns about the language in the document, specific are: the provisions on "lands, territories and resources;" the provisions on "free, prior, and informed consent when used as a veto;" and dissatisfaction with the process which was seen as not having been "open, inclusive or transparent."²⁵

Similarly, the Declaration is said to be inconsistent with the Canadian legal tradition, and signing on to it would have given native groups an unfair advantage, the minister said in an interview in advance of the UN General Assembly vote. As expressed by Indian Affairs Minister Chuck Strahl in 2007:²⁶

In Canada, you are balancing individual rights versus collective rights, and (this) document...has none of that," he said. "By signing on, you default to this document by saying that the only rights in play here are the rights

²⁴ Australian Broadcasting Corporation, Australia to support UN Indigenous rights declaration [on-line] (Sydney: Australian Broadcasting Corporation News, 2009, accessed 08 January 2010); available from <<http://www.abc.net.au/news/stories/2009/03/26/2527177.htm>>; Internet.

²⁵ Christopher J. Fromherz, "Indigenous peoples' courts: egalitarian juridical pluralism, self-determination, and the United Nations Declaration on the Rights of Indigenous Peoples," *University of Pennsylvania Law Review* 156 (2008): 1345.

²⁶ CanWest News Service, Native rights declaration inconsistent with legal tradition: Strahl [on-line] (Ontario: The Canada.com Network, 2007, accessed 01 January 2010); available from <<http://www.canada.com/nationalpost/news/story.html?id=23df9769-3423-4f43-b828-a755725c2719&k=23677>>; Internet.

of the First Nations. And, of course, in Canada, that's inconsistent with our Constitution.

Contrastingly, on the eve of the vote, Assembly of First Nations Chief Phil Fontaine expressed his disappointment in Canada's decision and appealed for reconsideration expressing, "This is an aspirational (*sic*) document [...], it's neither a convention, nor a treaty. When it comes to the standards that are set, if there is a legal (conflict), domestic laws will prevail," arguing the Minister was reading too much into its legal implications. On balancing rights, Fontaine said the record of Canadian native groups is one of responsible partner.²⁷

Although the Declaration has raised a lot of controversy since its drafting stages, with some States arguing that it makes the indigenous peoples 'citizens plus' enjoying special rights which other members of their populations do not enjoy, S. James Anaya, a UN Special on the Situation of Human Rights and Fundamental Freedoms on Indigenous People, views this in a different light:²⁸

Accordingly, the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.²⁹

²⁷ Ibid.

²⁸ Ronald Kakungulu, "The United Nations Declaration on the Rights of Indigenous Peoples: a new dawn for indigenous peoples rights?" Cornell Law School Inter-University Graduate Student Conference Papers (Cornell Law Library, 2009), 7. Available from <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1046&context=lps_clap>.

²⁹ United Nations Human Rights Council. Ninth session, Agenda item 3. A/HRC/9/9 11 August 2008. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Special Rapporteur on the situation of the human rights and fundamental

Nonetheless, not all of the battles fought by minorities have been only on behalf of their own groups. Sometimes, the rights that have been won have been won for everyone. For example, women were never fighting just for themselves; they were fighting for their children, and even for the men in their lives.³⁰ In Canada, the Charter of Rights and Freedoms is not just a collection of entrenched rights for various linguistic, sexual, and aboriginal minorities. It standardized rights for all citizens to the degree that rights struggles for particular groups enhance or clarify the rights of all citizens, they strengthen, rather than weaken the country.³¹

While as a General Assembly Declaration it is not a legally binding instrument under international law, according to a UN press release, it does represent the dynamic development of international legal norms and it reflects the commitment of the UN's member States to move in certain directions. The UN describes it as setting an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet's 370 million indigenous people and assisting them in combating discrimination and marginalization."³²

As a positive development that the UN General Assembly adopted, the Declaration not only inspires indigenous peoples, but also small-scale fishing people regardless of their ethnic background even if the language pertaining to the "rights to marine resources and sea space" was considerably watered down from what was previously stated in the draft that had been circulated in the years prior to its final

freedoms of indigenous peoples, S. James Anaya. Available on-line <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/149/40/PDF/G0814940.pdf?OpenElement>>

³⁰ Michael Ignatieff, "The Rights Revolution," (Toronto, Canada: CBC Massey Lecture Series, House of Anansi Press Ltd., 2000), 117.

³¹ Ibid.

³² United Nations Permanent Forum on Indigenous Issues, "Historic milestone for Indigenous Peoples worldwide as UN adopts Rights Declaration," 13 September 2007. Available from <http://www.un.org/esa/socdev/unpfii/documents/Declaration_ip_pressrelease.pdf>.

inauguration.³³ In the draft text of the United Nations Declaration on the Rights of Indigenous Peoples, Article 26 reads:

Indigenous peoples have the right to own, develop, control, and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea ice, flora, fauna and other resources, which they have owned traditionally owned, otherwise occupied or used.

Then, in the wording that was finally approved, the direct reference to the seas was removed. The same paragraph now reads:

Indigenous peoples have the right to own, use, develop, and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Nonetheless, the Declaration does contain important principles regarding indigenous peoples' rights to livelihood, culture, natural resources and self-determination. In the negotiations, the letter 's' in 'peoples' proved as a challenge because it determines whether we are talking about individual or collective rights. In the final text, however, the 's' stayed, to the relief of indigenous peoples around the world. Since the Declaration is drawn from human rights legislation and principles that are universal, these rights have broader relevance than the Declaration might suggest.³⁴

2.2 A review of Canadian policies related to indigenous peoples rights

The emergence of indigenous peoples as a direct participant in global affairs and their inherent rights as a priority for the international community was welcomed by the Canadian Government. However, Canada's long-standing support for the UNDRIP only

³³ Svein Jentoft, "The human rights of small-scale fishing people," SAMUDRA Report, (November 2008): 14.

³⁴ Ibid., 14.

waned after the rise of a new government in 2006, as reflected when the Conservative Party of Canada won a plurality of the seats in the Parliament creating the proportionally smallest minority government since Confederation in 1867.³⁵ Similarly, the positive image of Canadian leadership in the empowerment of indigenous peoples is not reflected however in Canada's response to its own legal obligations under the Convention on Biological Diversity (CBD)³⁶ and the UNDRIP outlined above in 2.1.4. In this regard, Canada does not yet have domestic legislation or policies protecting traditional knowledge or heritage, and it is unclear whether the Canadian courts would regard knowledge as an "aboriginal right."³⁷

A step in the direction of implementing the CBD was taken in 1994, with the publication of the Canadian Biodiversity Strategy (CBS).³⁸ Government officials characterized the CBS as a "blueprint for action," but thus far, it has only led to consultations and studies.³⁹ Most references to indigenous peoples in the CBS are contained in the chapter "Indigenous Community Implementation."⁴⁰ It describes what indigenous peoples can do to implement the CBD, but makes no commitments for Federal financial support, legal recognition, or legislative protection for these initiatives. The rest of the CBS speaks as if indigenous peoples have no distinct rights in relation to the implementation of the CBD by Canada.⁴¹

³⁵ Fromherz, "Indigenous peoples' courts: egalitarian juridical pluralism," 1345.

³⁶ Russel Lawrence Barsh and James (Sakej) Youngblood Henderson, "Biodiversity and Canada's Aboriginal Peoples," in Svein Jentoft, Henry Minde and Ragnar Nilsen eds. *Indigenous peoples: resource management and global rights* (Delft, Netherlands: Eburon Academic Publishers): 45.

³⁷ *Ibid.*, 55.

³⁸ Canadian Biodiversity Strategy (hereafter: CBS), available from: <http://www.eman-rese.ca/eman/reports/publications/rt_biostrat/cbs27.htm>.

³⁹ Barsh and Henderson, "Biodiversity and Canada's Aboriginal Peoples," 60.

⁴⁰ See also <<http://www.cbin.ec.gc.ca/strategie-strategy/27.cfm?lang=eng>>.

⁴¹ Barsh and Henderson, "Biodiversity and Canada's Aboriginal Peoples," 60.

2.2.1 18th Century Treaties of Peace and Friendship

In Canada, aboriginal entitlements to fisheries largely arise from Supreme Court of Canada adjudications that affirm the existence of treaty rights or other forms of aboriginal rights as recognized in the Canadian constitution. The affirmation of treaty-based rights and aboriginal rights in Canada and other States assures indigenous peoples access to and participation in commercial fisheries, thereby providing social readjustment and some justice.⁴² This is subject to the international law, particularly the Vienna Convention on the Law of Treaties adopted on 22 May 1969 which applies to treaties between States. The “treaty” being defined for the purposes of the Vienna Convention as:

An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.⁴³

Without prejudice to any relevant rules of the organization concerned, the Convention expressly provides that it applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization. Moreover, treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.⁴⁴

The root of the problem rested on fundamentally different assumptions about the meaning of treaties. Within the British/European tradition, such treaties were about sovereignty, with the agreements transferring effective control of the land and its inhabitants to the British. The British (and, in contemporary court proceedings, the Government of Canada) argued that, by signing the treaties, the indigenous peoples

⁴² Anthony Davis and John Wagner, “A right to fish for a living? The case for coastal fishing people’s determination of access and participation,” *Ocean and Coastal Management* 49, (2006): 495.

⁴³ Vienna Convention on the Law of Treaties, Article 5. Available from <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

⁴⁴ *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, p. 30.

became subject to British law. By implication, this agreement left the British free to deal with Aboriginal land and resources as they saw fit. On the other hand, the Mi'kmaq and other First Nations took the agreements as it fits with their tradition by symbolically sharing their resources and to represent peace accords by promising not to wage war. These treaties were not, like later western Canadian agreements, clearly devoted to the indigenous peoples surrender of land and resources, even though explicit land surrenders were actually required before indigenous lands could be alienated for other purposes.⁴⁵

The Treaties of Peace and Friendship of 1760-1761 (see *Annex A*) is an example of a tactical innovation developed by the 18th century Imperial British as an efficient and effective means for militarily neutralizing Eastern North American Native peoples in the context of their on-going imperial struggles with the French for possession of the continent and control of trade. Treaties were also considered by the English as an effective means for opening-up land for colonization and settlement.⁴⁶ Similarly, the Royal Proclamation of 1763 is generally held to be the foundation for historical and contemporary treaty rights and a pivotal first illustration of the British Government's commitment to signing land surrender treaties with First Nations before traditional lands were occupied.⁴⁷ While many Aboriginal commentators assert that the Royal Proclamation recognized indigenous sovereignty, the document makes it clear that the British Government considered these "Indian Territories" to be fully British. As the proclamation states:

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments [Quebec, East Florida and West Florida], or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and

⁴⁵ Ken Coates, *The Marshall Decision and Native Rights* (Quebec: McGill-Queen's University Press, 2000), 41.

⁴⁶ Davis and Jentoft, "The challenge and the promise of indigenous peoples' fishing rights," 226.

⁴⁷ Coates, "The Marshall Decision and Native Rights," 81.

Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.⁴⁸

Nonetheless, the Royal Proclamation set a high standard for the Government to follow, for it clearly stated that Aboriginal lands in areas not previously settled by Europeans were to be used for and by First Nations people until a proper treaty had been negotiated.⁴⁹

Contrastingly, the indigenous peoples base such agreements as political compacts between two independent and sovereign nations which form the legal foundation of their self-determination and self-Government.⁵⁰ In addition, it needs to be noted that for many Canadian First Nations peoples, treaties are the foundation and the embodiment of their nationhood as well as the formal basis for their unique political and social position within the Canadian confederation.⁵¹ For them, the treaties, concretely represent and acknowledge the 'fact' of their nationhood and of their identity as distinct peoples.⁵² In defining and concretising their indigenous rights, the treaties for indigenous peoples should not be critically treated as a minority from a culturally-diverse country such as Canada.

2.2.2 Canadian Constitution of 1982

Section 35 of the Canadian Constitution Act of 1982 recognizes and affirms existing Aboriginal and treaty rights. It provides that:

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. For greater certainty, in subsection (1) "treaty rights" includes

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Harald Prins, "The Mi'kmaq: Resistance, accommodation, and cultural survival," (Forth Worth: Harcourt Brace College, 1996): 13-14.

⁵¹ Davis and Jentoft, "The challenge and the promise of indigenous peoples' fishing rights," 225.

⁵² Ibid., 225; see also: M. Asch, *Home and native land: aboriginal rights and the Canadian constitution*. (Toronto: Methuen Press, 1984); Indian and Eskimo Association of Canada. *Native rights in Canada*. (Ottawa: Indian and Eskimo Association of Canada, 1972); Wiber and Kennedy, n. 2. above.

rights that now exist by way of land claims agreements or may be so acquired. Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”⁵³

The Supreme Court has reaffirmed the *sui generis* nature of Aboriginal title, and the historic powers of the Crown constitute the source of the fiduciary obligation, which guides the interpretation of section 35. In defining an existing Aboriginal right, the Court found the Government has the responsibility to act in a fiduciary capacity with respect to indigenous peoples.⁵⁴ In addition, the Canadian Charter of Rights and Freedoms (also known as the Charter of Rights and Freedoms) is a bill of rights entrenched in the Constitution of Canada. It forms the first part of the Constitution Act, 1982. The Charter guarantees certain political rights to Canadian citizens and civil rights of everyone in Canada from the policies and actions of all levels of Government. It is designed to unify Canadians around a set of principles that embody those rights. The Charter was signed into law by Queen Elizabeth II of Canada on April 17 1982 (along with the rest of the Act). Section 25 of the Canadian Charter of Rights and Freedoms under the heading "General" in the Charter reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

While section 25 is also the Charter section that deals most directly with Canadian Aboriginals, it does not create or constitutionalize rights for them. However, the Charter is a part of the larger Constitution Act, 1982. Aboriginal rights, including treaty rights,

⁵³ Canadian Constitution Act of 1982. Section 35.

⁵⁴ Patricia Doyle-Bedwell and Fay Cohen, “Aboriginal peoples in Canada: their role in shaping environmental trends in the twenty-first century,” in Edward Parson ed. *Governing the environment: persistent challenges, uncertain innovation* (Toronto: University of Toronto Press, 2001),171.

receive more direct constitutional protection under section 35 of the Constitution Act, 1982.

2.2.3 Amendments to the Indian Act of 1876

The Indian Act⁵⁵ is a Canadian statute that concerns registered Indians (that is, First Nations peoples of Canada), their bands, and the system of Indian reserves. The Indian Act was enacted in 1876 by the Parliament of Canada under the provisions of Section 91(24) of the Constitution Act, 1867, which provides Canada's Federal Government exclusive authority to legislate in relation to Indians and Lands Reserved for Indians. The Indian Act is administered by the Minister of Indian Affairs and Northern Development.

The Act defines who is an "Indian" and contains certain legal rights and legal disabilities for registered Indians. The rights exclusive to Indians in the Indian Act are beyond legal challenge under the Canadian Charter of Rights and Freedoms. Section 25 of the Canadian Charter of Rights and Freedoms in particular, provides that the charter shall not be interpreted as negating specific aboriginal treaties and their corresponding rights and freedoms.

In 1985 the Canadian Parliament passed Bill C-31, "An Act to Amend the Indian Act" but because of a presumed Constitutional requirement, the Bill took effect as of 17 April 1985. The Bill has amended the Indian Act in a number of important ways:⁵⁶

- It ends discriminatory provisions of the Indian Act, especially those which discriminated against women. A woman who marries a member of another band

⁵⁵ Indian Act, An Act respecting Indians, R.S., 1985, c. I-5 (hereafter: Indian Act).

⁵⁶ Department of Justice Canada, "Update notice to the Justice Laws site, Indian Act (R.S., 1985, c. I-5)," available from <http://laws.justice.gc.ca/en/showdoc/cs/I-5//20090923/en?page=1>; Internet; accessed 31 December 2009; see also http://www.johnco.com/native/bill_c31.html.

no longer automatically becomes a member of her husband's band. Transfers between bands are still possible if the receiving band agrees;

- It changes the meaning of "status" and for the first time allows for limited reinstatement of Indians who were denied or lost status and/or Band membership in the past;
- Before Bill C-31 was passed in 1985, the Act generally defined status Indians in two ways: First, an Aboriginal was any person who was a member of a "Band" recognised for the purposes of the Act (whether or not the Band had reserve lands); and
- It allows bands to define their own membership rules.

The Indian and Northern Affairs Canada (INAC) is mandated to support the indigenous people (First Nations, Inuit and Métis) and Northerners in their efforts to:

- improve social well-being and economic prosperity;
- develop healthier, more sustainable communities; and
- participate more fully in Canada's political, social and economic development - to the benefit of all Canadians.

INAC is one of the Federal Government departments responsible for meeting the Government of Canada's obligations and commitments to First Nations, Inuit and Métis, and for fulfilling the Federal Government's constitutional responsibilities in the North. INAC's responsibilities are largely determined by numerous statutes, negotiated agreements and relevant legal decisions. Most of the Department's programs, representing a majority of its spending - are delivered through partnerships with Aboriginal communities and federal-provincial or federal-territorial agreements.⁵⁷

Unfortunately, the Department of Indian Affairs, formally established in 1880, was not a key federal agency, particularly in eastern Canada, and attracted scant attention

⁵⁷ Indian and Northern Affairs Canada, Mandate [on-line] (Ottawa: Indian and Northern Affairs Canada, 2009, accessed 3 January 2010) available from <http://www.ainc-inac.gc.ca/ai/index-eng.asp>; Internet.

and few resources.⁵⁸ While exercising little national authority, the department quickly asserted considerable control over the lives of the indigenous people, both by legislative restructuring and administrative action.⁵⁹ Over the years, through a series of specific Government policies, such as centralization, and passive exclusion from mainstream economic activity, Canada's indigenous people became almost completely dependent on Government social support systems. The indigenous peoples had very limited access to the fishery for food and derived no direct economic benefit from the Maritime region's fishery and forest resources.⁶⁰ Being subject to the Indian Act poses a significant problem confronting Maritime First Nations as they have very few workable templates for the transfer of governance powers over natural resources.⁶¹

2.2.4 Ocean's Act of 1996

Four years after the Agenda 21, Canada's Oceans Act⁶² was passed which establishes a framework for cross-sectoral integrated management through the development of an Oceans Management Strategy (OMS). The Oceans Act of 1996 also establishes an integrated oceans management regime through the development of Integrated Management Plans (IMPs), which are to incorporate large ocean management areas (LOMAs) and marine environmental quality (MEQ) guidelines for outcomes based and adaptive management. Canada's Oceans Strategy (COS)⁶³ was released in July 2002 with three main policy objectives: the understanding and protection of the marine environment; to support sustainable economic opportunities; and to show international leadership in oceans management.⁶⁴ The Preamble of Ocean's Act reads:

⁵⁸ Coates, "The Marshall Decision and Native Rights," 40.

⁵⁹ *Ibid.*, 45.

⁶⁰ Wiber and Milley, "After Marshall," 168.

⁶¹ Wiber and Kennedy, "Impossible dreams," 288.

⁶² Department of Justice. Oceans Act (1996, c. 31), available from <<http://laws.justice.gc.ca/en/O-2.4/>>.

⁶³ Fisheries and Oceans Canada, "Ocean Strategy." 2002, available from <http://www.dfo-mpo.gc.ca/oceans-habitat/oceans/ri-rs/cos-soc/pdf/cos-soc_e.pdf>.

WHEREAS Canada recognizes that the oceans and their resources offer significant opportunities for economic diversification and the generation of wealth for the benefit of all Canadians, and in particular for coastal communities [...] AND WHEREAS the Minister of Fisheries and Oceans, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, is encouraging the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems.

Part 2, Section 9 and Section 31 of the Oceans Act shows the Ocean Management Strategy provides an enabling framework towards a genuine partnership among various stakeholders including the Government and indigenous peoples as indicated:

Section 9.

The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems in waters that form part of Canada or in which Canada has sovereign rights under international law.

Section. 31.

The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law.

⁶⁴Elizabeth Foster, Marcus Haward, Scott Coffen-Smout, “Implementing integrated oceans management: Australia’s south east regional marine plan (SERMP) and Canada’s eastern Scotian shelf integrated management (ESSIM) initiative,” *Marine Policy* 29, (2005): 392.

Canada again explicitly confirmed its commitment to Agenda 21 in 2002 when it declared that its *Oceans Strategy* was a concerted effort to implement the principles of Agenda 21 and to meet its international commitments for sustainable development. The Government noted that an important principle of integrated management is inclusive and collaborative ocean governance structures and processes. A key section on governance in *Oceans Strategy* states:

The governance model proposed for Integrated Management is one of collaboration. It involves ocean management decisions based on shared information, on consultation with stakeholders, and on their advisory or management participation in the planning process. It is also based on institutional arrangements that bring together all stakeholders. Participants taking an active part in designing, implementing and monitoring the effectiveness of coastal and ocean management plans, and partners that enter into agreements on ocean management plans with specific responsibilities, powers and obligations. It is also recognized that in specific cases, Integrated Management and planning may be achieved through co-management.⁶⁵

However, while the *Oceans Act* does provide for the Minister of Fisheries and Oceans to involve “coastal communities” in the development and implementation of both a national oceans strategy and integrated management plans, this is very generally stated and does not appear to be directly applicable to fisheries.⁶⁶ The devolution of management authority to the local level would require a major or even drastic revision of fisheries laws and possibly other related legislation given particular political and socio-economic conditions where legal changes may be difficult to accomplish.

⁶⁵ Fisheries and Oceans Canada, “Canada’s Ocean Strategy”; available from <http://www.dfo-mpo.gc.ca/oceans-habitat/oceans/ri-rs/cos-soc/page06_e.asp#governance>; Internet. accessed 3 January 2010.>.

⁶⁶ Marian Binkley, Alison Gill, Phillip Saunders and Geoff Wescott, “Community involvement in marine and coastal management in Australia and Canada,” in D.R. Rothwell and D.L. VanderZwaag eds. *Towards principled oceans governance: Australian and Canadian approaches and challenges* (London: Routledge Press, 2006): 254.

2.2.5 Fisheries Act of 1846

The Fisheries Act of 1846 was established to manage and protect Canada's fisheries resources. It applies to all fishing zones, territorial seas and inland waters of Canada and is binding to federal, provincial and territorial Governments. As federal legislation, the Fisheries Act supersedes provincial legislation when the two conflict. Consequently, approval under provincial legislation may not necessarily mean approval under the Fisheries Act. The Government of Canada's authority over fish and fish habitat arose from the Constitution Act (1982) that established the respective roles and authority of the Government of Canada and Provincial Governments. This Constitution Act deemed the Government of Canada responsible for sea, coastal and inland fisheries, navigation and migratory birds and fiduciary responsibility to indigenous people. Provincial Governments were given the right to make laws governing property, public lands and property rights. While the Government of Canada has the authority to manage fish habitats, it has essentially no control over the use of inland waters, beds of watercourses or shorelines which fall under provincial jurisdiction. Alternatively, the provinces cannot make regulatory decisions concerning fish habitat.⁶⁷ Since 1846, the *Fisheries Act* has remained in place without major revisions. However, the interpretation of this mandate has resulted in a strong commitment by the Fisheries and Oceans Canada (DFO) in understanding the biological system with heightened development of fish science and biological research.⁶⁸

2.2.6 Regina v. Sparrow, 1990

Ronald Sparrow from the Musquem reserve in British Columbia was charged with violating federal fishing regulations when he was caught on the lower Fraser river using a driftnet that exceeded acceptable limits. Sparrow appealed, arguing that the Constitution

⁶⁷ Fisheries Act, see also: <http://www.dfo-mpo.gc.ca/oceans-habitat/habitat/policies-politique/act-acte_e.asp>.

⁶⁸ Daniel Lane and Robert Stephenson, "Institutional arrangements for fisheries: alternate structures and impediments to change," *Marine Policy* 24,(2000):386.

Act of 1982 had, in section 35, recognized “existing Aboriginal and treaty rights” and that his right to fish for salmon for food was an Aboriginal right. Given the sensitivities, on both coasts, about fishing rights and First Nations demand for access to their traditional sources of food, the *Sparrow decision*⁶⁹ was watched very closely. Moreover, it was the first substantial test of the authority granted to First Nations under section 35 of the Constitution Act.⁷⁰

The Supreme Court, ruling in 1990, came down decisively on the side of the First Nations, continuing a string of important Aboriginal victories in the highest court.⁷¹ The Court ruled that Aboriginal and treaty rights could evolve over time and should be interpreted in a “generous and liberal manner,” as indicated:

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following, at p. 322:

This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future. . . . To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29. . . .⁷²

⁶⁹ Regina v. Sparrow (hereafter: Sparrow decision); available from <http://csc.lexum.umontreal.ca/en/1990/1990scr1-1075/1990scr1-1075.html>.

⁷⁰ Coates, “The Marshall Decision and Native Rights,” 88-89.

⁷¹ Ibid., 89.

⁷² R. v. Sparrow, [1990] 1 S.C.R. 1075, p. 34.

In other words, the nature of the federal Government's commitment was such that the courts should not interpret the rights narrowly. Governments could regulate the Aboriginal use of such resources, but they were instructed to do carefully, and only with a "compelling and substantive objective." Federal authorities could intervene in First Nations fisheries for reasons of conservation and resource management, but they had first to demonstrate that they were justified in doing so. Further, Aboriginal access to resources was granted a high priority by the Court, coming immediately after conservation and before commercial and sport fishing.⁷³ This is interpreted in the *Sparrow decision* as follows:

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. Section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority and guarantees that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.⁷⁴

The *Sparrow decision* did not offer much guidance for determining the contents of the box of "aboriginal rights," although the Supreme Court reasoned that section 35 "must interpret flexibly" so as to permit a certain degree of "evolution" of its coverage – for example, fishing with new kinds of fishing gear. The Supreme Court reminded the Federal Government that "the honour of the Crown is at stake in dealings with aboriginal peoples," so that in conflicts involving Aboriginal and non-Aboriginal people, the "special trust relationship and the responsibility of the Government vis-à-vis, aboriginals must be the first consideration."⁷⁵

⁷³ Coates, "The Marshall Decision and Native Rights," 89.

⁷⁴ R. v. Sparrow, [1990] 1 S.C.R. 1075, p. 6-7.

⁷⁵ Barsh and Henderson, "Biodiversity and Canada's Aboriginal Peoples," 52.

2.2.7 Regina v. Marshall, 1999

Supreme Court decisions have affirmed that indigenous people have a treaty right to access marine resources for ceremonial, subsistence, and with the *Regina v. Marshall*⁷⁶ decision in September 1999, ‘modest’ commercial livelihood purposes. These rights, akin to the Law of the Sea arguments, are rooted in the idea that unless formally extinguished, indigenous people establish explicit property rights as a consequence of historically continuous occupation of specific localities and use of resources within those localities.⁷⁷

While the *Marshall decision* recognized a commercial level right of access for First Nations in the Maritime Provinces of Canada who were signatories to the 18th Century Peace and Friendship treaties, the subsequent clarification of this decision limited the benefit to a “moderate livelihood” and required that a community level of benefit must result from any aboriginal commercial fishery. One problem is that the Supreme Court of Canada did not specify how the food and commercial fisheries were to be reconciled.⁷⁸ Moreover, while the *Marshall decision* provides an opportunity to advance the role of indigenous peoples in management of fishery resources, in accordance with their self-governance, aspirations and building on their long tradition of community management, this has been inhibited in part by a lack of clear understanding of treaty relationship by the established commercial fishing industry, and in part by a lack of attention by Governments to the potential for community management systems as effective means to promote conservation and sustainable fisheries.⁷⁹

Two months after the release of the *Marshall decision*, the Supreme Court of Canada took the rare step of issuing a clarification of the *Marshall decision*

⁷⁶ Regina v. Marshall (hereafter: Marshall decision), Available from <<http://mqp.mcgill.ca/books/marshall/g09-99.htm>>.

⁷⁷ Davis and Wagner, “A right to fish for a living,” 477.

⁷⁸ Melanie Wiber, Anthony Charles, John Kearney and Fikret Berkes, “Enhancing community empowerment through participatory fisheries research,” *Marine Policy* 33, (2009): 177; see also: Wiber and Kennedy n. 2 above; Wiber and Milley n. 2 above.

⁷⁹ Wiber and Milley, “After Marshall,” 167.

(17 November 1999), in response to an unprecedented appeal of the Court's decision by a coalition of non-native fishing concerns. This clarification is often referred to as *Marshall II*, and it clearly stated that the Federal Minister of Fisheries has overall management authority and that the right to a livelihood fishery had limitations (namely conservation and good governance). The clarification did not state how this authority should be exercised.⁸⁰ The Court opened the possibility for the federal Government to unilaterally impose regulations or restrictions on constitutionally protected Mi'kmaq treaty rights, which may not have to meet any standard or justification at all.⁸¹

Marshall II revives and legitimizes the process by which the Mi'kmaq originally lost the enjoyment of their treaty rights. It is even worse than a return to the parliamentary supremacy principle, which has been limited (at least in principle) by section 52 of the *Constitution Act, 1982*. *Marshall II* vindicates a kind of administrative supremacy over Aboriginal peoples, in which ministerial discretion can unilaterally override fundamental constitutional rights without the need for justification or compensation. As such, it is a cynical colonial wink to the Crown's attorneys and to the mandarins in Ottawa.⁸²

2.3 A review of Philippine policies related to indigenous peoples rights related to fisheries management

The CBD was signed by the Philippines in June 1992 during the Earth Summit in Rio de Janeiro and ratified by the Philippine Senate on 8 October 1993. Under the CBD, the obligations of the Philippines include the development of a national strategy and action plan to provide the framework for national implementation of the CBD objectives through action plans for the conservation and sustainable use of biodiversity, and the equitable sharing of benefits arising from the utilization of these natural

⁸⁰ Ibid.,” 169.

⁸¹ Kiera L.Ladner, “Up the creek: fishing for a new Constitutional order,” *Canadian Journal of Political Science* 38, no. 4 (December 2005): 19.

⁸² Russel Lawrence Barsh and James (Sa'kej') Youngblood Henderson, “Marshalling the Rule of Law in Canada: of eels and honour,” *Constitutional Forum* 11, no. 1 (1999): 17.

resources. This, in turn, should be part of the national sustainable development strategy, plan and action; which includes the identification and monitoring the important components of biological diversity that need to be conserved and used sustainably.⁸³

2.3.1 The Philippine Constitution of 1987

The 1987 Constitution⁸⁴ contains provisions dealing with the State's absolute control over natural resources, including fisheries and other coastal resources, while also giving attention to local communities and indigenous peoples. The Philippine Constitution states that all natural resources are owned by the State and that the "State may directly undertake such activities, or it may enter in co-production, joint-venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least 60 percentum of whose capital is owned by such citizens."⁸⁵ However, the Philippine Constitution also allows the small-scale utilization of natural resources. Furthermore, the constitution provides that the "State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens."⁸⁶

Specific in Article 12, Section 5 of the 1987 Philippine Constitution indicates that: "The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being. The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain."⁸⁷

Also, Article 2, Section 22 (on Declaration of Principles and State Policies), Article 12, Section 5, (on National Economy and Patrimony), Article 13, Section 6 (on

⁸³ UNCBD, Article 6, available from <<http://www.cbd.int/nbsap/>>.

⁸⁴ 1987 Philippine Constitution (hereafter: Philippine Constitution).

⁸⁵ Philippine Constitution, Article 12, Section 2.

⁸⁶ Ibid.

⁸⁷ Ibid., Article 12, Section 5.

Social Justice and Human Rights), and Article 14, Section 17 (on Education, Science and Technology, Arts, Culture, and Sports of the 1987 Constitution also provides the legal framework to protect the rights of indigenous peoples in the Philippines. These constitutional and legal safeguards protecting the rights of, and giving preferential treatment to indigenous people, exist as a necessary measure of social justice and equity.⁸⁸

Relevant to social justice and human rights of every Filipino citizen, Article 13, Section 1 indicates that, “The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good. To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.” Section 2 of the same article indicates that the promotion of social justice shall include the commitment to create economic opportunities based on freedom of initiative and self-reliance. In the context of resource management and environmental protection, the Philippine Constitution provides the democratization of access to resources,⁸⁹ social justice in terms of preferential use of subsistence fisherfolk,⁹⁰ and the right of the people to a balance and healthful ecology.⁹¹

Additionally, Article 12, Section 5 of the Constitution guarantees that, “The State subject to the provisions of this Constitution and national development policies and programs shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.”

⁸⁸ Grizelda Mayo-Anda, and others, “Is the concept of ‘Free and Prior Informed Consent’ effective as a legal and governance tool to ensure equity among indigenous peoples? A Case Study on the experience of the Tagbanua on Free Prior Informed Consent, Coron Island, Palawan, Philippines,” (paper presented at the Survival of the Commons: Mounting Challenges and New Realities the Eleventh Conference of the International Association for the Study of Common Property Bali, Indonesia, 9-23 June 2006): 3.

⁸⁹ Philippine Constitution, Article 13, Sections 4, 6 and 7.

⁹⁰ *Ibid.*, Article XII, Section 3.

⁹¹ *Ibid.*, Article II, Section 16.

2.3.2 Local Government Code of 1991

The Local Government Code (LGC) of 1991 devolves certain responsibilities for fishery resources and powers for their management to Local Governments. The Code gives Local Governments the mandate to manage municipal waters within a distance from the coast of 15-kilometer seaward, and to enact and enforce appropriate fishery ordinances. Joint undertakings with non-governmental organizations (NGOs), people's organizations, indigenous peoples, and other stakeholders for the promotion of ecological balance are also encouraged and promoted by the law.

2.3.3 The National Integrated Protected Areas (NIPAS) Act of 1992

As part of its international obligations to the UNCBD, the Philippine Government has also enacted the NIPAS Act in 1992, as the legal framework in the establishment of protected areas to conserve biological diversity while promoting environmentally-sound development around these areas.⁹² As stipulated in the NIPAS Act, it clarifies that 'this is the Republic Act No. 7586, [An Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining Its Scope and Coverage, And For Other Purposes]. This Act is known and referred to as the 'National Integrated Protected Areas System Act of 1992.'

NIPAS Act introduced the protected areas framework in biodiversity conservation in the Philippine while enshrining people's participation and indigenous peoples' traditional rights as principal management objectives. NIPAS is the first piece of national legislation to accord recognition for ancestral land and customary rights of indigenous peoples.⁹³ Section 13 of the Act further proscribes the Department of Environment and Natural Resources (DENR) from forcibly relocating indigenous communities, to wit:

⁹² National Integrated Protected Areas (hereafter: NIPAS Act).

⁹³ Kail Zingapan, "Field experiences in implementing protected areas in ancestral domains: Indigenous peoples' rights and the management of biodiversity conservation programs," in *Building on lessons from the field: Conference on protected area management in the Philippines*. Haribon Foundation, Department of Environment and Natural Resources, Foundation for the

Ancestral lands and customary rights and interest arising shall be accorded due recognition. The DENR shall prescribe rules and regulations to govern ancestral lands within protected areas. Provided, that the DENR shall have no power to neither (*sic*) evict indigenous communities from their present occupancy nor resettle them to another area without their consent. Provided, however, that all rules and regulations, whether adversely affecting said communities or not, shall be subjected to notice and hearing to be participated in by members of concerned indigenous community.

Section 44 of the DENR Department Administrative Order (DENR DAO 25 s. 1992), the Implementing Rules and Regulations for the NIPAS Act, prescribes that ancestral domains falling within protected areas shall be preserved and duly recognized. The customary rights of indigenous communities within such ancestral domains are likewise to be preserved:

Ancestral domain and other customary rights and interests of indigenous communities shall be accorded due recognition in protected areas. Moreover, the preservation of ancestral domain and customary rights within protected areas shall be a management objective.

Also, the NIPAS Act provides for the protection of habitats of rare and endangered species of plants and animals. To implement the Act, there were eighty three (83) protected areas proclaimed by the President under NIPAS, of which 53 are initial components and 30 are additional sites. Out of the 83 protected areas proclaimed by the President, there are five (5) protected area bills approved by Congress. The NIPAS Act specifies the instruments required for the establishment and operationalization of the System by the DENR. Establishments include the compilation of maps and technical descriptions of protected areas through public participation processes and production of an initial protected area plan up to a Presidential Proclamation, Congressional Action and Demarcation.⁹⁴

Philippine Environment and Birdlife International. Quezon City Haribon Foundation for the Conservation of Natural Resources, 2003: 153.

⁹⁴ Tebtebba Foundation, Philippine Indigenous Peoples and Protected Areas: Review of Policy and Implementation (Moreton-in-Marsh, England: Forest Peoples Programme, 2008), 5.

Under Section 4 on Definition of Terms, the NIPAS Act had given due recognition of the indigenous peoples as the:

Indigenous cultural community (ICC) which refers to a group of people sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, since time immemorial, occupied, possessed and utilized a territory.’⁹⁵

It also mentions in Section 9 under Management Plans that ‘the management planning strategy shall also provide guidelines for the protection of indigenous cultural communities, other tenured migrant communities and sites and for close coordination between and among local agencies of the Government as well as private sector’.

Further, under Section 11 of NIPAS Act:

The Protected Area Management Board (PAMB) for each of the established protected area shall be created and shall be composed of the following: the Regional Executive Director under whose jurisdiction the protected area is located; one (1) representative from the autonomous regional government, if applicable; the Provincial Development Officer; one (1) representative from the Municipal Government; one (1) representative from each *barangay*⁹⁶ covering the protected area; one (1) representative from each tribal community, if applicable; and, at least three (3) representatives from non-government organizations/local community organizations, and if necessary, one (1) representative from other departments or National Government agencies involved in protected area management’.⁹⁷

2.3.4 The National Biodiversity Strategy and Action Plan of 1997

The Philippine National Biodiversity Strategy and Action Plan⁹⁸ was formulated in 1997 to meet the obligations of the Philippine government as a State Party to the CBD in recognition of the need to confront the problems and issues relating to the conservation

⁹⁵ NIPAS Act, Section 4.

⁹⁶ A *barangay* is the basic political unit in the Philippines

⁹⁷ NIPAS Act, Section 11.

⁹⁸ National Biodiversity Strategy and Action Plan (hereafter: NBSAP).

of biodiversity. This was formulated by multidisciplinary groups of experts as well as multi sectoral consultative for a following United Nations Environmental Programme's (UNEP) guiding principles for biodiversity planning. The NBSAP provided the blue print for the country's biodiversity agenda and identified strategies including action plans to conserve and develop biodiversity in a sustainable manner.⁹⁹

This NBSAP recognizes that for some indigenous communities, some biological resources or sites are sacred and a source of cultural identity. This type of value attached to a resource contributes to its preservation or sustainable use. It further stipulates that, more fundamentally, local communities and especially indigenous peoples have a rich repository of knowledge and practices about the natural environment that contribute to biodiversity conservation.¹⁰⁰ Many of these communities occupy territories, particularly forest areas that harbor a variety of species. The cultural and spiritual values attached to biological resources by indigenous peoples constitute a part of the worth of these resources.

To institutionalize the NBSAP, Presidential Memorandum Order No. 289 of July 1995 was issued to integrate Philippines' strategy for biological diversity conservation in the sectoral plans, programs and projects of national Government agencies. The Government thru its focal point agency on CBD, which is the Protected Areas and Wildlife Bureau (PAWB) under the Department of Environment and Natural Resources (DENR), is obliged to ensure the implementation of the NBSAP and to make the country reports on how the Philippines is meeting its biodiversity goals. The Philippines was able to submit three country reports from 1993 to 2005 to the CBD, with the fourth country report due on 2010.¹⁰¹

⁹⁹ NBSAP, available from <<http://www.cbd.int/countries/?country=ph>>.

¹⁰⁰ Ibid.

¹⁰¹ The 4th National Report to the Convention on Biological Diversity, 2009. Available from <<http://www.cbd.int/doc/world/ph/ph-nr-04-en.pdf>>.

2.3.5 Indigenous Peoples Rights Act of 1997

The Philippine Constitution is the fundamental basis for the Indigenous Peoples' Rights Act.¹⁰² The law protect the rights of the indigenous in the utilization of natural resources within their ancestral domain.¹⁰³ Before any person is allowed access to these resources, a Free Prior Informed Consent (FPIC) of the community should be obtained in accordance with customary laws.¹⁰⁴ While the recognition of the rights of the indigenous peoples in their ancestral domain and cultural integrity is explicitly provided under the Constitution, the lobby for an enabling statue to implement the Constitutional mandate was a very long and difficult process. It took a decade to pass the IPRA. IPRA was first filed in the Congress sometime in 1987 during the 8th Philippine Congress and was finally enacted in October 1997 during the 10th Philippine Congress.¹⁰⁵

During the 8th Philippine Congress, Senate Bill No. 909 was filed as a response to the Constitutional mandate to Congress to enact a law that will protect the rights of the indigenous peoples. The bill was subjected to deliberation in the Senate floor but was not enacted into law. Subsequently, during the 9th Philippine Congress, Senate Bill Nos. 1029, 1849 and 2056 were successively introduced. These bills, however, were never sponsored and deliberated upon.¹⁰⁶

Finally, the 10th Philippine Congress, through the sponsorship of Senator Juan Flavier introduced Senate Bill No. 1728. After exhaustive deliberation, both Houses passed the bill into law. Republic Act No. 8371 or IPRA was signed into law by President Fidel Ramos on 20 October 1997. It became effective on 22 November 1997. Its Implementing Rules and Regulations were approved on 9 June 1998.¹⁰⁷

¹⁰² Indigenous Peoples Rights Act (hereafter: IPRA).

¹⁰³ IPRA, Chapter 3, Section 7b.

¹⁰⁴ IPRA, Chapter 3, Section 7c.

¹⁰⁵ Mayo-Anda, *et al*, "Is the concept of Free and Prior Informed Consent," 4.

¹⁰⁶ *Ibid*.

The Indigenous Peoples Rights Act of 1997 recognizes the property rights of indigenous peoples over their ancestral domains and ancestral lands. A traditional tribal council (composed of the tribal chief, council members and spiritual advisers) is recognized by the law to draft policies on natural resource use and development plans in the ancestral domain. The tribal council can exercise their rights by invoking the use of traditional tribal justice systems as a sign of their cultural identity and autonomy from the national laws.¹⁰⁸

A salient feature of the law is the acknowledgement of the rights of indigenous peoples to give consent over development interventions in their community through the process of Certification Precondition or Free and Prior Informed Consent. The Free and Prior Informed Consent provision is one of the most essential features of IPRA Law. This legal concept gave the indigenous peoples the right to deny or allow entry of development projects into their ancestral domain. By virtue of such right, the indigenous peoples now have the prerogative of determining their development priorities and assert their right to self-determination and recognition of their cultural integrity.¹⁰⁹ The Free and Prior Informed Consent is codified under Part 3, Section 3 of National Commission on Indigenous Peoples Administrative Order No. 1 or the Implementing Rules and Regulations of IPRA as follows:

The indigenous cultural communities/indigenous peoples shall, within their communities, determine for themselves policies, development programs, projects and plans to meet their identified priority needs and concerns. The indigenous cultural communities/indigenous peoples shall have the right to accept or reject a certain development intervention in their particular communities.

¹⁰⁷ National Commission on Indigenous Peoples, Administrative Order No. 1, series of 1998. Available from <http://www.tebtebba.org/index.php?option=com_docman&task=doc_details&gid=30&Itemid=27>.

¹⁰⁸ IPRA, Chapter 2, Section 3.i.

¹⁰⁹ Mayo-Anda, *et al*, "Is the concept of Free and Prior Informed Consent," 5.

IPRA defines the indigenous concept of ownership as basically one that is private but communal and cannot be disposed of or sold.¹¹⁰ This concept of ownership covers ancestral domains and sustainable traditional resource rights. From these definitions, the claim of ownership that any indigenous peoples may make on a particular area extends to the total physical and spiritual environment, including portions thereof that have been used by them for their subsistence like fishing or hunting grounds. Such claim of ownership is in the form of a Certificate of Ancestral Domain Title (CADT). The CADT recognizes the title of the concerned indigenous peoples over their territories identified and delineated. The Department of Environment and Natural resources issued several CADCSs

The law also paved the way for the creation of the National Commission on Indigenous Peoples (NCIP), the primary Government agency for the formulation and implementation, policies, plans and programs to promote and protect the rights and well being of indigenous peoples and their ancestral domain.¹¹¹ Previously, the Department of Environment and Natural Resources (DENR) issued several CADCs based on various Department Administrative Orders: A.O. No. 61 series of 1991; A.O. No. 2 series of 1993 and Special Order No. 31, series of 1990, even prior to the enactment of IPRA. It is these CADCs that are supposed to be prioritized by the NCIP in the processing of CADTs. The DENR has ceased awarding CADCs since the establishment of the NCIP in 1997. The NCIP is mandated to identify, delineate, and issue CADTs upon compliance with specific procedures (e.g., petition for delineation, submission of proof of ancestral domain claims, and other documents, preparation of maps, report of investigation, notice of publication, and endorsement to the NCIP).¹¹²

However, the issuance of CADT was slow and full of controversy. The autonomy of the tribal councils is undermined by national Government priorities. For example, the

¹¹⁰ IPRA, Chapter 3, Section 5.

¹¹¹ Ibid, Chapter 2, Section 3.k.

National Commission on Indigenous People is faulted by some sectors of the society for not providing enough services for the indigenous communities and for misrepresenting them on the mining issues.¹¹³ Although the IPRA has gone through many controversies regarding its constitutionality and its adherence to the culture of the indigenous peoples, it provides opportunities for indigenous people to establish community-based property rights over ancestral waters, including marine waters. Consequently, the traditional beliefs and practices of indigenous peoples were enhanced when the national law recognizes their rights over their ancestral domain and strengthened their participation in decision making, thus protecting their rights and reducing the conflicts between and among different stakeholders.

In addition, there are other enacted laws on natural resource management that are conflicting with the laws on protected areas and the IPRA. While there are attempts on harmonizing IPRA and natural resource management laws/policies, the overlaps and conflicts among some of national laws with IPRA are widely experienced by the IPs in the protected areas. These conflicting laws include the aggressive implementation of 1995 Philippine Mining Law, the 1975 Revised Forestry Code or Presidential Decree 705, and other DENR administrative orders related to the management and utilization of natural resources in the protected areas in relation to the indigenous peoples within the protected areas as part of their ancestral domains. Presently, the corporate mining applications and operations, poor forestry management and illegal logging, militarization, among others are now conflicting with the IPRA and NIPAS law in areas within the declared protected areas and ancestral domains of the indigenous peoples.

¹¹² Ibid, Chapter 7.

¹¹³ Cesar Allan Vera, Rande Cabaces and Leonard Reyes, *Asserting rights, defining responsibilities: perspectives from small-scale fishing communities on coastal and fisheries management in the Philippines* (Chennai: International Collective in Support of Fisherworkers, 2007), 6-7.

2.4 Summary

The international and national political and legal frameworks that have been described provide an understanding on indigenous peoples and their needs and interest (see *Figure 1*). Because of the international agreements and national policies, there is an inherent value in recognizing indigenous people's rights and their traditional management systems for these two countries. Also, the abovementioned national plans and laws/policies represent some of the Canadian and Philippine Government's commitments to establish the legal framework of relevance to natural resource management recognizing the rights of indigenous peoples who rely upon these resources as part of their livelihoods. Chapter 3 describes the conflict between the State and indigenous peoples which could be interpreted as a mismatch of values and means, underpinned by power struggles between two parties.

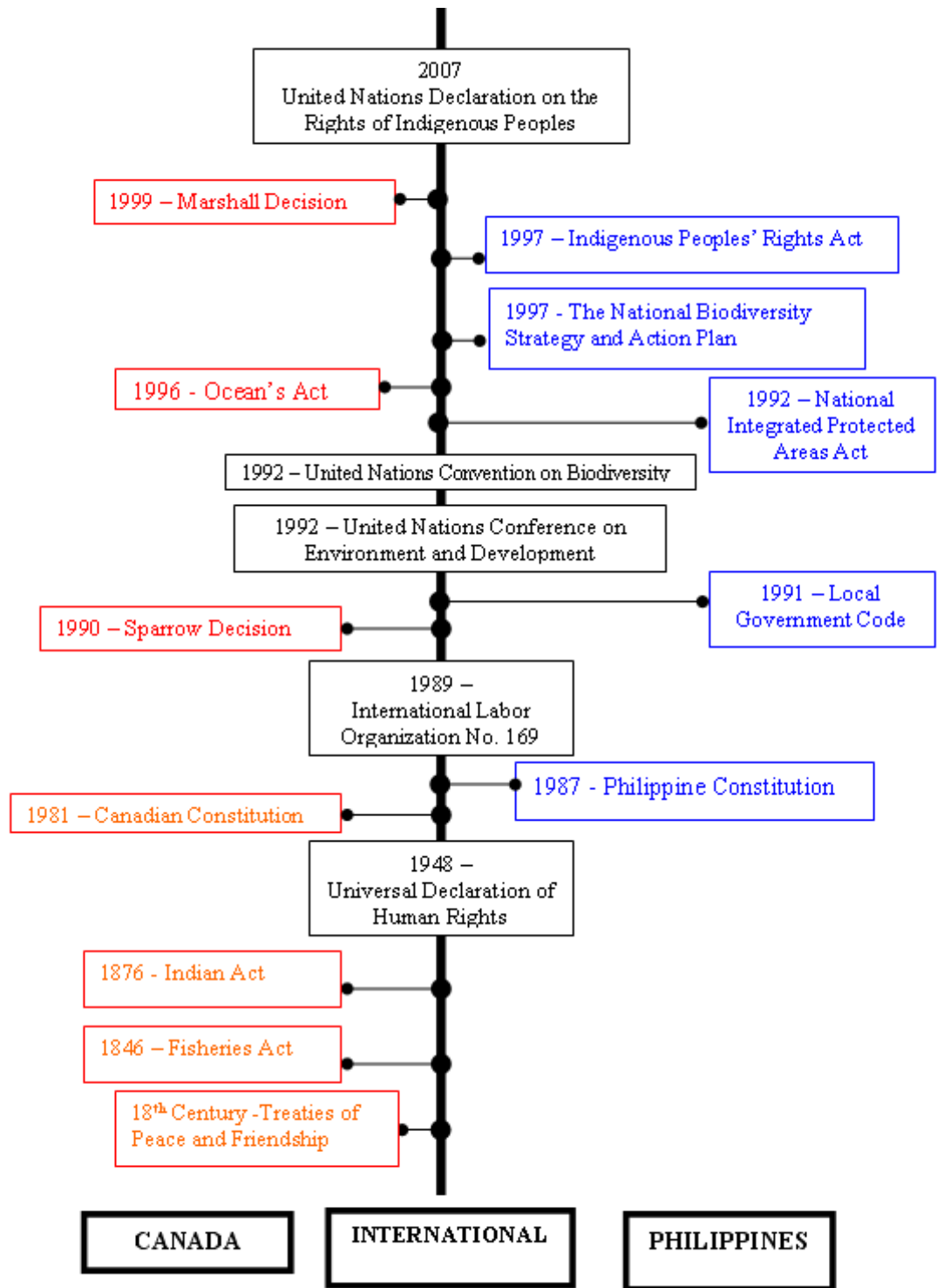


Figure 1. Historical Timeline of International Agreements and National Policies relevant to Indigenous Peoples. (Source: compiled by author).

3 Indigenous peoples perspective on sustainable livelihood as it relates to various forms of rights in Canada and the Philippines

Despite the diverse histories and culture, the experiences of indigenous peoples in Canada and the Philippines are more similar than might be expected. This chapter begins by looking at the linkage between sustainable livelihood and indigenous rights, thereby providing a broad national-scale situation of indigenous peoples for both countries. Given the complexity of the topic, the discussion will focus on the First Nations in the Maritimes region of Canada, particularly the Mi'kmaq Confederacy of Prince Edward Island and the Tagbanua in Coron Island, Palawan, Philippines. These indigenous peoples were chosen because they illustrate a diversity of approaches, outcomes, challenges, and lessons learned in their effort towards self determination in the management of their fisheries and in promoting their sustainable livelihoods in their own terms.

3.1 Conceptual Framework: Fisheries management and its link to sustainable livelihoods and indigenous rights

An important component of the recent literature on fisheries management describes how a sustainable livelihoods approach can help create positive change in supporting suitable conservation-compatible community development.¹¹⁴ Whether one

¹¹⁴ Edward Allison and Benoit Horemans, "Putting the principles of the Sustainable Livelihoods Approach into fisheries development policy and practice," *Marine Policy* 30(2006): 757-766; Orlando Arciaga, Fernando Gervacio, Robert Charles Capistrano and Catherine Demesa, "Envisioning Life: Community-created Sustainable Livelihood Analysis and Development," (Quezon City: Haribon Foundation, 2002); CBCRM Resource Center, *Sentro para sa Ikaunlad ng Katutubong Agham at Teknolohiya*, and Oxfam-Great Britain, "Sustainable Livelihoods in Community-based Coastal Resource Management," (Quezon City: CBCRM Resource Center, *Sentro para sa Ikaunlad ng Katutubong Agham at Teknolohiya*, Inc., and Oxfam-Great Britain, 2003; Elmer Ferrer and Cristi Marie Nozawa, *Community-based coastal resources management in the Philippines: key concepts, methods and lessons learned* [online] (Ottawa: International Development Research Centre, 1997, accessed 10 September 2009); available from <<https://idl-bnc.idrc.ca/dspace/bitstream/123456789/33448/1/Key-concepts.pdf>>; Internet.; Jennifer Graham with Anthony Charles and Arthur Bull, "Community fisheries management handbook," (Halifax: Gorsebrook Research Institute and Saint Mary's University, 2006), 133 pp.; John Kearney, Fikret Berkes,

refers to community-based fisheries management, community-based management, community-based coastal resource management, or co-management of natural resources, these approaches involves the people who are directly affected in the decision-making process in fisheries management. In defining sustainable livelihoods, the importance of human capabilities, not only in their ability of doing, but also in their ability to recognize and recover from potential shocks and stresses relates to sustainability.¹¹⁵ Further, there is a need to critically look further at the different assets, including physical capital (sometimes also called produced capital or economic capital) , financial capital (savings, credit), natural capital (land, trees, fish stocks, etc.), human capital (people, education and health), and social capital (kinship, networks, associations), that are usually mediated by institutions and social relations – focusing on the community, and indigenous peoples. For indigenous peoples that are at the periphery of most development projects, securing rights to common property resources provides a basis for sustainable management by communities. Secure rights of access, use and management are fundamental to the sustainability of livelihoods which rely on natural resources.¹¹⁶

A livelihood comprises the capabilities, assets (including material and social resources) and activities required for a means of living. Livelihood development focuses on increasing the capital to effectively set up and sustain viable and sustainable livelihoods. These include human capital (skills, knowledge) social capital (social resources such as networks, and relationships), natural capital (natural resources), physical capital (basic infrastructure and producer goods), and financial capital (financial resources). Livelihood strategies in fisheries should focus on the whole household and all its members. Any livelihood, whether income generating or enterprise should recognize

Anthony Charles, Evelyn Pinkerton and Melanie Wiber, “The role of participatory governance and community-based management in integrated coastal and ocean management in Canada,” *Coastal Management* 35(2007), 79-104.; Rebecca Rivera and Gary Newkirk, “Power from the people: a documentation of non-governmental organizations' experience in community-based coastal resource management in the Philippines,” *Ocean and Coastal Management* 36(1997), 73-95.

¹¹⁵ Robert Chambers and Gordon Conway, “Sustainable rural livelihoods: practical concepts for the 21st century,” *IDS Discussion Paper 296* (Brighton, U.K.: University of Sussex, 1992), 4.

¹¹⁶ *Ibid.*

cultural diversity, provide equal opportunity, be economically viable with proper management, and environmentally friendly.¹¹⁷

The sustainable livelihoods framework presented in schematic form (see *Figure 2*) was developed by the Department for International Development – United Kingdom (DFID-UK) to help understand and analyze the livelihoods of the poor. It is also useful in assessing the effectiveness of existing efforts to reduce poverty. Like all frameworks, it is only understood qualitatively through participatory analysis at a local level. The framework does not attempt to provide an exact representation of reality. It does, however, endeavour to provide a way of thinking about the livelihoods of poor people that will stimulate debate and reflection, thereby improving performance in poverty reduction. In its simplest form, the framework views people as operating in a context of vulnerability. Within this context, they have access to certain assets or poverty reducing factors. These gain their meaning and value through the prevailing social, institutional and organizational environment. This environment also influences the livelihood strategies – ways of combining and using assets – that are open to people in pursuit of beneficial livelihood outcomes that meet their own livelihood objectives.¹¹⁸

¹¹⁷ Robert Pomeroy and Rebecca Rivera-Guieb, *Fishery co-management: a practical handbook*. (Ottawa: International Development Research Centre, 2006), 224.

¹¹⁸ Department for International Development, “Sustainable Livelihoods Guidance Sheets,” (London: Department for International Development, 1999), 1.

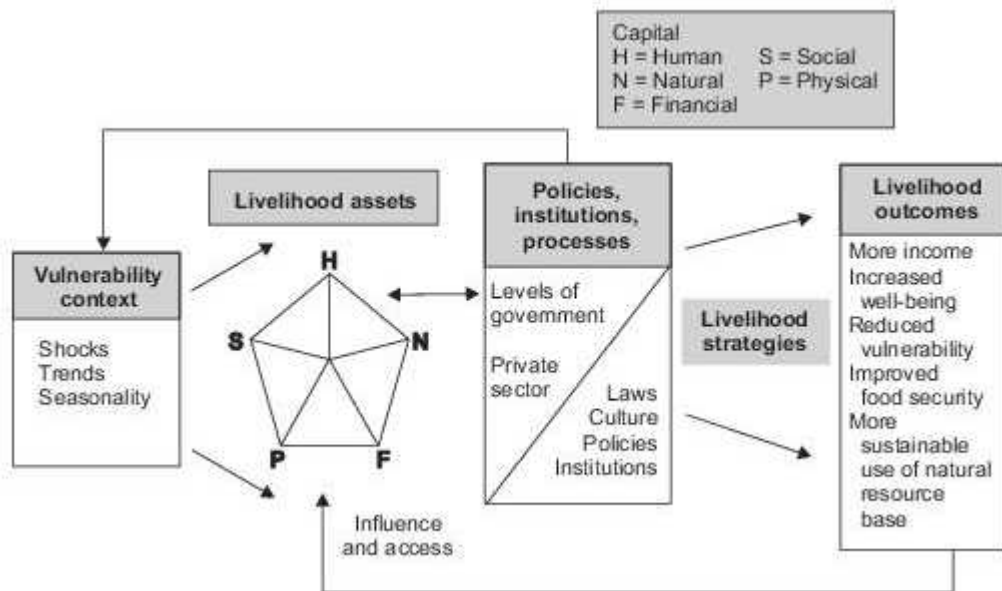


Figure 2. Sustainable Livelihoods Framework.

(Source: Department for International Development, 1999, p. 1.)

The sustainable livelihoods framework presents the main factors that affect people's livelihoods, and typical relationships between these. It can be used in both planning new development activities and assessing the contribution to livelihood sustainability made by existing activities. It draws attention to core influences and processes and emphasizes the multiple interactions between the various factors which affect livelihoods. The framework is centered on people. It does not work in a linear manner and does not try to present a model of reality. Its aim is to help stakeholders with different perspectives to engage in structured and coherent debate about the many factors that affect livelihoods, their relative importance and the way in which they interact. This, in turn, should help in the identification of appropriate entry points for support of livelihoods. The framework points to *livelihood outcomes*. A livelihood is sustainable if people are able to maintain or improve their standard of living related to well-being and income or other human development goals, reduce their vulnerability to external shocks and trends, and ensure their activities are compatible with maintaining the natural resource base in this case, the fisheries.¹¹⁹

Significantly, the struggles of indigenous peoples in securing ownership, control and access to their lands, territories, and natural resources are only one part of their quest for self-determination.¹²⁰ This can be related to community-based fisheries management (or related approaches of community-based coastal resource management, or co-management of natural resources) – which involve the people who are directly affected in the decision-making process in fisheries management. The idea of “equity” as a desired outcome of community-based management is rooted in the ideals of social justice.¹²¹

¹¹⁹ Allison and Horemans, “Putting the principles of the Sustainable Livelihoods,” 758.

¹²⁰ Colchester, *et al.*, “Indigenous land tenure,” 10.

¹²¹ Robert Pomeroy and Rebecca Rivera-Guieb, *Fishery Co-management: A Practical Handbook* (Ottawa: International Development Research Centre, 2006), 12.

Equity qualifies all initiatives in development including human rights, intergenerational and gender equity considered in all contexts.¹²²

Equity and social justice is brought about through empowerment and active participation in the planning and implementation of fisheries management. However, a disparity exists between policy rhetoric and its actual practice where the poor and powerless usually find it difficult to deal with the law. More often than not, laws and institutions are unable to comprehend and address the realities faced by the poor – their culture, intricate problems, interests, and aspirations.¹²³ It is policies and institutions that determine access and determine people’s livelihood options, reactions and strategies, and ultimately, the outcome of those strategies in terms of their ability to make a living and willingness to invest in helping to conserve the natural resource base. Addressing governance therefore remains the key challenge for both poverty reduction and responsible fisheries.¹²⁴

Poverty reduction demands not only an improved and sustained economic growth, but ensuring that indigenous peoples communities participate in and benefit from that growth. Oftentimes, however, resources are viewed from a narrow economic perspective – where goals are measured in terms of income, minimum basic needs, gross domestic product, etc. The initiatives of indigenous peoples moves beyond the basic need approach to a rights-based approach where solutions to poverty are measured in terms of giving the appropriate responses needed by the marginalized group.

¹²² Robert Chambers, “Editorial: Responsible well-being - a personal agenda for development,” *World Development*, 25(1997),1748.

¹²³ Grizelda Mayo-Anda, “Engaging and Empowering Communities,” In *Comprehensive legal and judicial development: toward an agenda for a just and equitable society in the 21st century*, ed. Rudolf V. Van Puymbroeck (Washington, D.C.: The World Bank, 2001), 71.

¹²⁴ Allison and Horemans, “Putting the principles of the Sustainable Livelihoods,” 764-65.

Community-based management is considered as a mechanism to address issues of social injustice that are associated with unequal resource access and wide gaps in benefits-sharing from resource use.¹²⁵ Significantly, responsibility means that communities, including indigenous peoples, have a share in the decision-making process and bear the cost and benefits of those decisions.¹²⁶ The concept of equity also correlates to empowerment which is the ability (or power) to exercise management control of resources and institutions to enhance one's own livelihoods and secure sustainable use of resources upon which communities depend.¹²⁷ More than simply opening up to decision making, this should also include processes that lead people to perceive themselves as able and entitled to occupy decision making space; and so overlaps with the other categories of 'power to' and 'power from within.' Simply put, these interpretations of empowerment involve giving full scope to the full range of human abilities and potential.¹²⁸

Policies that shape fisheries rights can play a major role in promoting and improving the equity of resource distribution which is an implicit theme in analyzing indigenous rights. In the language of fishery rights, co-management requires allocation of management rights, the right to be involved in managing the fishery. Use rights aid management by specifying and clarifying who the stakeholders are in a certain fishery, while also aiding these stakeholders whether fishers, fishers' organizations, fishing companies or fishing communities – by providing some security over access to fishing areas, use of an allowable set of inputs, or harvest of a quantity of fish. With clear-cut use rights, conservation measures to protect the resources become more compatible with the

¹²⁵ Rebecca Rivera-Guieb, Jennifer Graham, Melissa Marschke, and Gary Newkirk, "Different Gardens, Different Blossoms: An Analysis of the Experience with Community Based Coastal Resource Management in the Philippines, Viet Nam And Cambodia," (paper presented at The Commons in an Age of Global Transition: Challenges, Risks and Opportunities, the Tenth Conference of the International Association for the Study of Common Property, Oaxaca, Mexico, 9-13 Aug., 2004), 8.

¹²⁶ Pomeroy and Rivera-Guieb, "Fishery Co-management," 12.

¹²⁷ International Institute of Rural Reconstruction, "Participatory methods in community-based coastal resource management," (Silang, Cavite: International Institute of Rural Reconstruction), vol. 1.

¹²⁸ Jo Rowlands, "Empowerment examined," *Development in Practice* 5, no. 2: 102.

communities' long-term interests, which may allow the adoption of a conservation ethic and responsible fishing practices, and greater compliance with regulations.¹²⁹

Subsequently, involvement of the community in fisheries management will lead to a stronger commitment to comply with the management strategy and regulations.¹³⁰ Since community-based management is people-centered, community-oriented and resource-based, the people have the innate capacity to understand and act on their own problems and build on existing knowledge and develop further their knowledge to create a new consciousness.¹³¹

3.2 The Mi'kmaq of Atlantic Canada

We, as the First Nations Government, had to beg for access to the natural resources in order to provide employment for our people so they can provide for their families and to bring back their pride and self-esteem. We, as First Nations people, realize the Europeans are here to stay. Not once have we tried to change you. We have learned to understand your ways and accepted your way of life. The day you learn to understand our way of life and try not to change us and accept that we are here to stay is probably also the day the three Governments can work together and make Canada a proud and beautiful country.¹³²

¹²⁹ Anthony Charles, "Use Rights and Responsible Fisheries: Limiting Access and Harvesting through Rights-based Management," In *A Fishery Manager's Guidebook. Management Measures and their Application: FAO Fisheries Technical Paper, No. 424*, ed. K. Cochrane (Rome, Italy: Food and Agriculture Organization of the United Nations, 2002), 134.

¹³⁰ Pomeroy and Rivera-Guieb, "Fishery Co-management," 12.

¹³¹ Ferrer and Nozawa, see n. 115 above.

¹³² Coates, "The Marshall Decision and Native Rights," 166.

At the time of their first contact with the Europeans, the Mi'kmaq occupied the whole of Nova Scotia, a portion of New Brunswick, the Gaspé region of Quebec, and all of Prince Edward Island (see *Figure 3*).¹³³ The Mi'kmaq, together with other neighbouring indigenous peoples including the Maliseet and Passamaquoddy, have inhabited the coastal Maritimes since time immemorial. Fishing is an essential seasonal activity for both the east and west coast of Canada, and in particular the indigenous peoples of the Atlantic coast, including the Mi'kmaq that integrate hunting with fishing as an essential part of their land-based economy.¹³⁴ There are 25,070 Mi'kmaq in the Atlantic Region, of which nearly 15,643 live on-reserve.¹³⁵

¹³³ The Mi'kmaq came from seven main districts: Epelwik (Prince Edward Island); Kespek (northern New Brunswick and Gaspé); Siknikt (eastern New Brunswick and western Nova Scotia); Wunama'kik (Cape Breton Island); Sipekne'katik (Shubenacadie); Kespukwitk (southern Nova Scotia); and Eskikewa'kik (east coast of Nova Scotia). Each district is represented by local chiefs within smaller regions.

¹³⁴ Claudia Notzke, "Aboriginal peoples and natural resources in Canada," (Ontario: Captus University Publications, 1994), 34.

¹³⁵ Indian and Northern Affairs Canada, *Aboriginal peoples in the Atlantic Region* [on-line] (Ottawa: Indian and Northern Affairs Canada, 2009, accessed 8 October 2009; available from <http://www.ainc-inac.gc.ca/ai/scr/at/abor-eng.asp>; Internet.

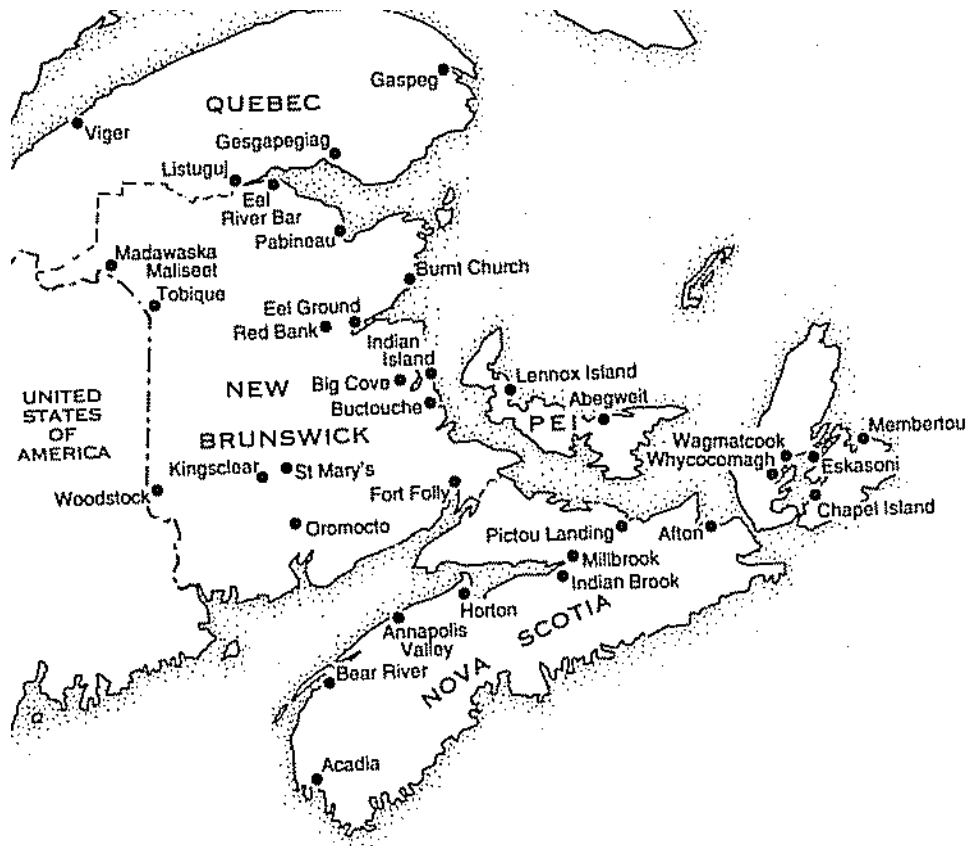


Figure 3. First Nations Communities of the Maritime Canada.

(Source: Coates, p. 209).

The Mi'kmaq define their relationship with the environment through the concept of *Netukulimk*, a Mi'kmaq term for resource management and harvesting which does not jeopardize the integrity, diversity, or productivity of the environment.¹³⁶ Inevitably, this reflects that one should not take any more than necessary for survival in order to ensure that there are some resources left for future use. The etymology of the word which originates from the root *ntuk-* which means “provisions” in the broadest sense of food, fuel, clothing, shelter; *Netukulit* is “to get provisions,” *ntuksuwinu* is “hunter or provider” and *netukulowómi* is “a hunting territory” (literally “gathering provisions place”); *Netukulimk* is the process of supplying oneself or making a livelihood from the land, and

the *netukulimkewél* refers to applicable rules or standards.¹³⁷ Indeed, the natural resources are a cornerstone of the livelihoods of indigenous peoples in Canada.

Fishing plays a unique role in many First Nation communities as the catch is divided between food, ceremonial, and commercial purposes.¹³⁸ Also, regulations placed on harvesting practices, including frequency and season of harvest, areas of harvesting and who would harvest are all tied to annual migrations between fishing and hunting grounds. Decision making was not vested in the hands of a hierarchical leadership, but rather made through a consensus of all members of the community within each of the seven territorial districts or *sakamowowiti*.¹³⁹

Unfortunately, there is no doubt that even in industrialized countries like Canada, Governments fell short of providing a comprehensive framework for human development. Notably, the emphasis on material and monetary gain, used as a measure of aggregate economic well-being, must be considered in parallel with the distribution of benefits among the members of the society. In Canada, the First Nations are the most glaring example of people who have been alienated as an institution as they are deprived of their rights and interest and needs to their resources upon which they have traditionally depended for their livelihoods.¹⁴⁰ Typically, the various social services and programs provided to them (including housing, education, health) are all well below

¹³⁶ Suzanne Berneshawi, "Resource management and the Mi'kmaq Nation," *Canadian Journal of Native Studies* 17, (1997): 118.

¹³⁷ Russel Lawrence Barsh, "Netukulimk Past and Present: Mikmaw ethics and the Atlantic fishery," *Journal of Canadian Studies* 37, (2002): 16.

¹³⁸ Martha Stiegman, "Fisheries privatization versus community-based management in Nova Scotia: emerging alliances between First Nations and Non-native Fishers," In *Environmental conflict and democracy in Canada*, ed. Laurie E. Adkin (Vancouver: UBC Press, 2006), ____.

¹³⁹ Chris Milley and Anthony Charles, "Mi'kmaq fisheries in Atlantic Canada: Traditions, legal decisions, and community management," (paper presented at the People and the Sea: Maritime research in the social sciences: an agenda for the 21st century Amsterdam, Netherlands 2001)..

¹⁴⁰ Patrick Kerans and John Kearney, "Turning the world right side up: science, community and democracy," (Halifax: Fernwood Publishing, 2006), 95.

Canada's accepted national standards. In addition, the majority of the Mi'kmaq people earn much less than the regional and national averages.¹⁴¹

At the policy level, while the Indian Act excused the indigenous peoples from certain obligations of citizenships such as paying taxes, the process denies them the right to represent themselves, to organize as a free people, and to control the lands and resources they depend on for their livelihood.¹⁴² Also, the passive exclusion of the indigenous peoples from mainstream economic activity have limited their access to the fishery for food and in deriving direct economic benefits not only in the fisheries, but also with forestry resources.¹⁴³

Since colonial days, indigenous peoples had never been front and centre in the Atlantic commercial fishery, but had taken some part in such fisheries as lobster and salmon. In spite of this, licensing restrictions, and the salmon-fishing ban during the late 1960s and the 1970s, had squeezed some of them out leaving an undercurrent of resentment among indigenous peoples.¹⁴⁴ In 1992, the Supreme Court of Canada confirmed their treaty rights to fish for food, social and ceremonial purposes as stipulated in the Sparrow decision. This 1990 Supreme Court ruling came down decisively on the side of the First Nations, continuing a string of important Aboriginal victories in the highest court. The Court ruled that Aboriginal and treaty rights could evolve over time and should be interpreted in a "generous and liberal manner." In other words, the nature of the Federal government's commitment was such that the courts should not interpret the rights narrowly.¹⁴⁵

¹⁴¹ Coates, "The Marshall Decision and Native Rights," 65.

¹⁴² Ignatieff, "The Rights Revolution," 59.

¹⁴³ Wiber and Milley, "After Marshall," 168.

¹⁴⁴ Joseph Gough, "Managing Canada's Fisheries: from early days to the year 2000," (Quebec: Les éditions du Septentrion in co-operation with Fisheries and Oceans Canada, and Public Works and Government Services Canada, 2007), 400.

¹⁴⁵ Coates, "The Marshall Decision and Native Rights," 89.

With the Sparrow decision, the Canadian Government through the DFO instituted Aboriginal Fisheries Strategy (AFS) in 1992, thus providing financial support for employment and economic development available to Mi'kmaq Bands. In 1994, the Federal Government reported that AFS agreements had been reached with 42 indigenous peoples groups in British Columbia and Yukon and 37 groups in Atlantic and Arctic regions.¹⁴⁶ Various cases are before Canadian courts relating to Aboriginal rights to commercial fisheries.¹⁴⁷ While this has generated employment in the community, the agreement between the Government and the Mi'kmaq Bands diminished the Mi'kmaq authority over their harvesting activities and further moving away from their community-based management system.

While the First Nations food fishery is guaranteed in law by the Sparrow decision and as a key element of federal fisheries policy, the First Nations food fishery is so narrowly defined that it provides only a small to negligible contribution to the livelihood of First Nations in the Maritimes.¹⁴⁸ Moreover, there is dissatisfaction with both the funds and the fishing access that Department of Fisheries and Oceans (DFO) put on the negotiating table through the Aboriginal Fisheries Strategy – and this has alienated Mi'kmaq communities.¹⁴⁹

In 1993, Donald Marshall, a Mi'kmaq fisher from Membertou First Nation in Cape Breton Island was arrested by the DFO for commercially fishing eels without license. The case made its way to the Supreme Court leading to what is known as the

¹⁴⁶ House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Oceans*, Issue No. 17 (27 September 1994), 5.; see also Marcus Haward and David VanderZwaag, "Implementation of UNCED Agenda 21 Chapter 17 in Australia and Canada: a comparative analysis," *Ocean and Coastal Management* 29, (1995): 290.

¹⁴⁷ House of Commons, "Minutes of Proceedings," 6-7; see also Haward and VanderZwaag n. 108 above.

¹⁴⁸ Coastal Learning Communities Network, "Fishing for justice," *The Nova Scotia Policy Review* 2, (2009): 16.

¹⁴⁹ Stiegman, "Fisheries privatization," 75.

R.V. *Marshall* S.C.R. 1999 (Marshall Decision) which recognizes the indigenous peoples' historic right and involvement in commercial fishing in the Canadian Maritimes fisheries. The treaties signed by the First Nations with the (British) Crown in 1760 and 1761 specify that these eighteenth-century agreements guaranteed Mi'kmaq the right to fish for commercial purposes and to benefit substantially from their resource activities. While the First Nations celebrated this validation of their rights, non-native commercial fishers expressed concern – that their own livelihoods, the value of their licenses, and the fishery management system itself would be destroyed by a flood of new entrants from the First Nations communities.

However, the Supreme Court soon after issued a revised decision affirming not only the treaty rights, but also the authority of the DFO to regulate Mi'kmaq fishing (the so-called Marshall II decision). In *Esgenoôpetitj*, also known as Burnt Church First Nation, in Miramichi Bay, New Brunswick, the Marshall decision was met with violence, conflict and confrontation among various indigenous peoples, non-Natives, and the Government. Burnt Church and other First Nations that asserted their treaty rights found themselves in a riot after their lobster traps were destroyed by some non-Natives. This arose in the context of the aspirations, and challenges, facing First Nations in Canada's Maritimes at that time:

However, the First Nations communities remain reluctant with the existing institutional framework of the Federal Government in privatizing fishing rights through individual transferable quotas.¹⁵⁰ In particular, the promotion of market-oriented individual transferable quotas can greatly affect the indigenous peoples as well as non-native fishers in inshore fisheries, as the concentration of access rights shifts into the hands of large operators, creating inequity in communities, between those who own quota and those who do not. Also of concern to indigenous peoples is the reality that while many First Nations have gained experience in fisheries management, this has been under

¹⁵⁰ Wiber, *et al.*, "Enhancing community empowerment," 176.

ground rules established by the DFO. Many signatory communities have experience sharp debt as a result of the ‘right’ to fish commercially.¹⁵¹ The actions of the Federal Government in allocating fishing rights are a cause for concern among many First Nations communities.

3.2.1 The Mi’kmaq Confederacy of Prince Edward Island

In light of the Marshall decision, two Mi’kmaq First Nations – Lennox Island and Abegweit – located in the province of PEI in the Gulf of St. Lawrence – began a process of planning their participation in the commercial fishery. These two bands later formed the Mi’kmaq Confederacy of PEI (MCPEI) which, among other roles, supports their efforts in natural resource management.¹⁵² In spite of the variety of perspectives among First Nations about how their communities should participate in commercial fisheries, a commonly-used fisheries management model is that of communal fishing licenses whereby communities sign fisheries agreements with the Federal Government.¹⁵³ Communal licenses, whether issued for the ‘food fishery’ or the commercial fishery, are not provided to individual fishers, but rather to the Band. This form of management considers not only the interests of those who are fishing, but also how the benefits are distributed to the members of the community.

MCPEI is a non-governmental organization that represents the two Mi’kmaq bands of Abegweit and Lennox Island, and the collective interests of the PEI Mi’kmaq, to foster a society that respects and sustains their existing aboriginal and treaty rights.¹⁵⁴ The long-term goals of the MCPEI for their fisheries include: (1) protection of Mi’kmaq

¹⁵¹ Wiber and Milley, “After Marshall,” 184.

¹⁵² Anthony Charles, Arthur Bull, John Kearney and Chris Milley, “Community-based Fisheries in the Canadian Maritimes,” In *Fisheries management: progress towards sustainability*, eds. T. R. McClanahan and J. C. Castilla (Oxford: Blackwell Publishing, 2007), 288.

¹⁵³ Graham *et al.*, “Community fisheries management handbook,” 19.

¹⁵⁴ Mi’kmaq Confederacy of Prince Edward Island, available from <<http://www.mcpei.ca/node/1>>.

treaty and aboriginal rights to access natural resources for the benefit of their communities and their members; (2) establishment of secure systems for food production to meet the needs of local band members; (3) development of commercial fishing ventures that will provide band members with stable and effective employment; (4) establishment of local governmental and administrative structures and mechanisms regarding fishery decision-making; and (5) development and maintenance of harmonious relations with adjacent fishing communities.¹⁵⁵

An essential goal of the MCPEI is that they have built their fisheries management plan towards employment and not profit generation, in order to allow band members to become productive as harvesters, fish handlers, and marketers. This later on improved the economic well-being of the community making them less dependent on social programs. Nonetheless, the MCPEI fishery is not viewed as an economic burden but as a way to generate enough revenue to meet the cost of fishing, provide enough revenue to meet the personal needs of the fishers, and provide sufficient surplus revenue to cover the management costs incurred by the community. An organizational structure was also established in each community to ensure their control over the fishery so individual band members, or non-native interests outside the community, could not compromise agreed-upon management objectives. In each of the PEI First Nation communities, the band council, through its fisheries sub-committee, appoints community committee members, reviews policy documents and fishery plans, and approves operational procedures and work plans. However, the DFO has been slow to recognize and adopt the First Nation's plans and to assist in enforcing band-level rules and regulations.¹⁵⁶

On the positive side, a significant development in building local fishery management capacity has been a community justice program (Customary Justice Group) that was established to ensure infractions to band and DFO management plans and

¹⁵⁵ Charles, *et al.*, "Community-based Fisheries in the Canadian Maritimes," 288.

¹⁵⁶ *Ibid.*, 289.

regulations are dealt with in a manner that will promote compliance, be respectful to the communities as a whole, and ensure effective penalties are imposed where required. PEI First Nation bands have also initiated business relationships in fishery marketing and marine supply activities. This is an important component of the community management system designed to promote conservation, treaty rights, employment, and social well-being of the communities. In addition, band participation in marine research is promoted to strengthen their involvement in resource management.¹⁵⁷

Thus there has been some progress for these PEI First Nations in ensuring their use rights in the commercial fishery following the Marshall decision, but despite great efforts to develop their own fishery management plans, there has been less progress in having the Federal Government recognize First Nation management rights in the fishery. Overall, then, movement toward a framework of sustainable livelihoods is underway but by no means complete.

3.3 The Indigenous Peoples of the Philippines

*May aabutan bang protected area ang proyekto ninyo kung hindi iyan inalagaan ng katutubo? [Will there be any protected area that your project will manage if this was not traditionally maintained by the indigenous peoples?]*¹⁵⁸

The archipelagic nature of the Philippines is the basis for its diverse cultural systems, with more than 100 ethno-linguistic groups that have retained their traditional or customary systems to various degrees¹⁵⁹ which is reflected on the activities of local

¹⁵⁷ Ibid., 290.

¹⁵⁸ Kail Zingapan, "Field experiences in implementing protected areas in ancestral domains: Indigenous peoples' rights and the management of biodiversity conservation programs," In Building on lessons from the field: Conference on protected area management in the Philippines, eds. Haribon Foundation, Department of Environment and Natural Resources, Foundation for the Philippine Environment and Birdlife International (Quezon City: Haribon Foundation for the Conservation of Natural Resources, 2002), 153.

¹⁵⁹ Department of Environment and Natural Resources-Protected Areas and Wildlife Bureau, Conservation International Philippines, Biodiversity Conservation Program - University of the Philippines

fishers or indigenous peoples during the pre-colonial history as exhibited through their intricate knowledge on local and traditional fishing practices such as determining sacred areas where fishing is not allowed and seasonal harvesting practices.¹⁶⁰ Indigenous peoples comprise about twenty-per cent of the Philippine population, or 12 to 15 million inhabitants.¹⁶¹ The local pre-colonial economics as geared for social use and for fulfilling certain kinship obligations, while production was decentralized and not predicated on exchange.¹⁶² The family as a unit had to take charge of their own needs, meeting only the requirements of family members' patterns of consumption. Thus, there was no need to create relations of either dependence or exploitation. Prior to the coming of Spain, the Philippines was involved in a maritime trade economy where communities are dispersed along estuaries of rivers and coastal shores, and each settlement was scattered to protect inhabitants from the possibility of off-shore marauders. Its history was made up of a complex of local histories wherein leaders were legitimized by their followers.¹⁶³

However, the introduction of the Regalian Doctrine into the Philippine legal system by the Spanish colonizers had virtually converted most, if not all, of the indigenous peoples to squatters in lands that they traditionally owned and possessed, by virtue of native title already vested in them. It provides an exceptionally convenient

Center for Integrative and Development Studies, & Foundation for the Philippine Environment, "Philippine Biodiversity Conservation Priorities: A Second Iteration of the National Biodiversity Strategy and Action Plan," (Quezon City, Philippines: Department of Environment and Natural Resources-Protected Areas and Wildlife Bureau, Conservation International Philippines, Biodiversity Conservation Program - University of the Philippines Center for Integrative and Development Studies, and Foundation for the Philippine Environment, 2002).

¹⁶⁰ Cristi Marie Nozawa and Margarita Lavidés, "Community-based Marine Protected Areas in the Context of Community-based Coastal Resource Management," In *Atlas of community-based marine protected areas in the Philippines*, eds. M. N. Lavidés, M. G. Pajaro and C. M. C. Nozawa (Quezon City, Philippines: Haribon Foundation for the Conservation of Natural Resources, Inc. and Pamana ka sa Pilipinas, 2005), 17.

¹⁶¹ Asian Development Bank, "Indigenous Peoples/Ethnic Minorities and Poverty Reduction," (Manila: Asian Development Bank, 2002): 7.

¹⁶² Aida Santos, "Do women really hold up half the sky?: Notes on the Women's Movement in the Philippines," In *Gender, culture and society: selected readings in Women's Studies in the Philippines*, ed. C. Sobritchea (Seoul: Ewha Womans University Press, 2005): 24-25.

¹⁶³ Kathy Nadeau, "Peasant resistance and religious protests in early Philippine society: turning friars against the grain," *Journal for the Scientific Study of Religion* 41, (2002): 76.

pretext for the State to ignore property rights based on original long-term occupancy and possession.¹⁶⁴ Eventually, the Spanish and American colonization left widespread socio-economic problems, with wealth in the hands of a small ruling class, while claiming and exploiting the untouched lands often belonging to indigenous peoples.

3.3.1 The Tagbanuas' in Coron Island, Palawan

The experience of the Tagbanua in reclaiming their territory which they had lost from migrants and the powerful elites in Palawan is historically the first formal legal claim in the Philippines for their ancestral waters. The island of Coron in the northern part of Palawan is home to the Tagbanuas. While involved in rice farming, most Tagbanua families are also engaged in subsistence fishing using hook-and-line, spears, and nets. Traditional fishing practices within their ancestral waters are practiced within the context of sacred marine areas or *panya'an* which is similar to fish sanctuaries. Such taboo also governs with their *amlaran* (sacred areas on land) and the *awuyuk* (sacred lakes) which is believed to be inhabited by the *panlalabyut* or giant human-like octopuses and following customary laws as ordered by their elders or *mama'epet*.¹⁶⁵ Coron Island is also rich in fine quality edible birds' nests (*Callocalia troglodytes*)¹⁶⁶ that are harvested within their sacred caves located on the cliffs of the island. Historical records show that the Tagbanuas have been trading the bird nests with Chinese merchants since the 13th

¹⁶⁴ Owen Lynch, "Concepts and Strategies for Promoting Legal Recognition of Community-based Property Rights: Insights from the Philippines and Other Nations," In *Communities and Conservation: Histories and Politics on Community-based Natural Resource Management*, eds. J. P. Brosius, A. L. Tsing and C. Zerner (Plymouth, United Kingdom: Altamira Press:2005): 396-97; see also Mayo-Anda, *et al.*, "Is the concept of Free and Prior Informed Consent," 17.

¹⁶⁵ Dante Dalabajan, "The Healing of a Tagbanua Ancestral Homeland," In *Hope Takes Root: Community-based Coastal Resources Management Stories from Southeast Asia*, eds. E. M. Ferrer, L. Polotan-de la Cruz and G. F. Newkirk. (Quezon City, Philippines: CBCRM Resource Center, U.P. Social Action and Research Development Foundation, Inc., U.P. College of Social Work and Community Development, and Coastal Resources Research Network-Dalhousie University, 2001): 172-73.

¹⁶⁶ A species of swift that produces the nest composed of gelatinous secretion from the salivary glands of birds.

century AD.¹⁶⁷ The wealth of resources has deeply shaped the semi-nomadic way of life of the Tagbanua, who are dependent on fishing, hunting and foraging.

Until the mid-20th century, little has changed in the lives of the Tagbanua who have a relatively low population and a subsistence economy based on kinship and mutual sharing on the means of production that is defined through communal rather than individual ownership of resources in terms of exploiting and managing their natural resources. During the 1970s, the Municipal Government seized all the clan caves to raise taxes for the municipal treasury and classified these as Government property, which was auctioned off to tourist resort developers and resort owners. Likewise, the historical decline of fisheries in the mid-1980s in the Visayas region and some parts of Luzon led to encroachment on fisheries of the Tagbanua, forcing them to leave the adjacent island of Delian and eventually moving upland in Coron Island.

In response to the continuous illegal fishing practices by the migrants, the Tagbanuas in Banuang Daan and Cabugao established the Tagbanua Foundation of Coron Island (TFCI) in 1985 and later applied for a Community Forest Stewardship Agreement (CFSA) with the Department of Environment and Natural Resources (DENR) covering the islands of Coron and Delian Island. Under this agreement, qualified individuals and communities were allowed to continue occupying and cultivating the upland areas. Through Individual or Community Stewardship Agreements, people were given tenure over the land for a period of 25 years, renewable for an additional 25 years.¹⁶⁸ In exchange, the program participants were required to undertake protection and reforestation activities.¹⁶⁹ The Community Forest Stewardship Agreement was in line with the Philippine Forestry Code of 1975 and Letter of Instruction No. 1260 or the law that established the Integrated Social Forestry Program of the Philippines.

¹⁶⁷ Kail Zingapan and Dave De Vera, Mapping the ancestral lands and waters of the Calamian Tagbanwa of Coron, Northern Palawan [on-line] (Quezon City: Philippine Association for Intercultural Development, 1999, accessed 15 May 2009) available from <http://www.iapad.org/pafid/docs/Coron%20Best%20Practice%20Paper.pdf>; Internet.

¹⁶⁸ Department of Environment and Natural Resource, Administrative Order No. 96-29.

¹⁶⁹ Ibid.

In 1990, the contract was awarded to the Tagbanuas on a communal basis to extract logs in a limited manner over 7,748 hectares, on the condition that they protect the forest from illegal activities. As the TFCI was successful in regaining control of their ancestral domain by recovering their clan caves, other Tagbanuas in Calamianes began building community organizations to secure their tenurial rights. Nevertheless, the tribe argues, “*Walang saysay ang lupa kung wala ang dagat*” (The land is meaningless without the sea).¹⁷⁰ Realizing that the CFSA is limited only to land ownership, the TFCI identified another opportunity to reclaim their traditional fishing grounds through the Strategic Environmental Plan (SEP) for Palawan, or the Republic Act 7611. Chapter II, Section IV of the environmental plan indicates the comprehensive framework for the sustainable development of Palawan compatible with protecting and enhancing the natural resources and endangered environment of the province. This serves as a guide for the Local Government of Palawan and the Government agencies concerned in the formulation and implementation of plans, programs and projects affecting said province. This law expands the definition of ancestral domains to include coastal zones and other submerged areas.

That same year, the National Integrated Protected Areas System Act (NIPAS Act) or Republic Act 7586 was enacted and Coron Island was included as one of the priority protected areas. Based from Section XI of the NIPAS Act, the Protected Area Management Board for each of the established protected area shall be composed of the following: the Regional Executive Director under whose jurisdiction the protected area is located; one (1) representative from the Autonomous Regional Government, if applicable; the Provincial Development Officer; one (1) representative from the Municipal Government; one (1) representative from each barangay covering the protected area; one (1) representative from each tribal community, if applicable; and, at least three (3) representatives from non-government organizations/local community organizations,

and if necessary, one (1) representative from other departments or National Government agencies involved in protected area management. The Tagbanuas were reluctant to participate in government programs, including protected area management. This stems not from their lack of belief in the intent of these programs, but rather from the manner by which they are implemented on the ground.¹⁷¹ Such reluctance is reflected in the results of a similar study revealing that of the approximately twenty-eight protected area management boards (PAMBs), only six involve indigenous peoples.¹⁷² Hence, the Tagbanua's refusal to participate originates in a usurpation of protected area management roles and authority, which they believe should be rightly accorded to their community elders.

In 1993, DENR issued the rules and regulations for recognizing and awarding a Certificate of Ancestral Domain Claims (CADC). Through the Department Administrative Order No. 02, the Department of Environment and Natural Resources (DENR) provides the recognition and awarding of the CADC, a land tenure instrument issued by the DENR recognizing the claims of indigenous peoples on land, resources, and rights within a defined territory. Three years later, DENR Administrative Order 34 was passed providing guidelines for the management of CADC claims and formulating their Ancestral Domain Management Plan (ADMP). While preparing another plan may be exhaustive and time consuming, the Tagbanuas view this as an enabling policy to codify their customary laws, belief, and practices.¹⁷³ The Tagbanuas sought the assistance of the various non-government organizations to assist them in mapping their ancestral

¹⁷⁰ Luz Rimban, Tagbanua win first ever ancestral waters claim [on-line] (Manila: Philippine Center for Investigative Journalism, 1998, accessed 15 May 2009); available from <<http://www.pcij.org/stories/1998/coron.html>>; Internet.

¹⁷¹ Edward Lorenzo and Dante Dalabajan, "Analysis of overlapping jurisdictions over Coron Island under R.A. 7586 (NIPAS Act), RA 7611 (SEP Law), RA 8371 (IPRA Law) and RA 7160) (Local Government Code): The dilemma of having the concurrent status of an ancestral domain, a protected area, and an environmentally critical area," In Building on lessons from the field: Conference on protected area management in the Philippines, eds. Haribon Foundation, Department of Environment and Natural Resources, Foundation for the Philippine Environment and Birdlife International (Quezon City: Haribon Foundation for the Conservation of Natural Resources, 2002), 152.

¹⁷² Tebtebba Foundation, "Philippine Indigenous Peoples and Protected Areas," 9.

territory, conducting biological resource assessment and livelihood development as they develop their Ancestral Domain Management Plan.

The passage of the Indigenous Peoples Rights Act (IPRA), or Republic Act 8371, in 1997 is one of the milestones in establishing a comprehensive framework of protecting the rights of indigenous peoples. Through the Department Administrative Order No. 02, the Department of Environment and Natural Resources (DENR) provides the recognition and awarding of the CADC, a land tenure instrument issued by the DENR recognizing the claims of indigenous peoples on land, resources, and rights within a defined territory. It seeks to alleviate the plight of the country's "poorest of the poor" by correcting, by legislative fiat, the historical errors that led to systematic dispossession of and discrimination against indigenous peoples.¹⁷⁴ In 1998, DENR approved the CADC of the Tagbanuas covering 22,284 hectares that include the entire island and a portion of the seas surrounding it. The success of this claim gives substance to the definition of "ancestral waters" embodied in the IPRA.¹⁷⁵ This is also a landmark case in the Philippines that recognizes the rights of indigenous peoples to their ancestral lands and waters and their rights to self-governance that reflects their social, economic, and cultural rights including indigenous culture, traditions and institutions. The constitutionality of IPRA is believed to mark the first time in Asia that a National Government has legally recognized indigenous peoples' territorial rights.¹⁷⁶

The experience of the Tagbanuas' reflects their continuing struggle based on their collective aspiration for survival to preserve their social, economic, cultural, and ecological bonds. Like the rest of indigenous peoples in the Philippines who are continuously preserving their ancestral territories and their ethnic identity, the Tagbanuas'

¹⁷³ Dalabajan, "The Healing of a Tagbanua Ancestral Homeland," 181.

¹⁷⁴ Asian Development Bank, "Indigenous Peoples/Ethnic Minorities and Poverty Reduction," 13.

¹⁷⁵ Mayo-Anda, *et al.*, "Is the concept of Free and Prior Informed Consent," 18.

reflect their the aspirations: “*para mapanatili ang aming pamumuhay*” (for us to sustain our life), where “*pamumuhay*” is rooted in the Filipino word “*buhay*” or life. Such articulation refer to both [maintaining] a “source of livelihood” and a “way of life.” These two distinct, yet linked, constructions of their struggle, illustrates how individual and collective, livelihood, and way of life, identity and territory act as a fluid continuum in the Tagbanua social reality of indigenous space.¹⁷⁷

3.4 Lessons Learned: Linking Livelihoods and Rights

In community fisheries, everyone is the manager. Everyone has responsibilities.¹⁷⁸

Fisheries management requires a wide range of expertise, experience, and skills, so there is a need to build the capacity of indigenous peoples to manage their resources. Through fisheries co-management, communities are empowered for this, when they are allowed to do something from which they were previously barred (or deprived), for instance when institutions are established that facilitate participation and secure rights.¹⁷⁹ However, there is a danger of overusing the term ‘co-management’ that simply becomes a routine consultation with no sharing of decision-making power which leads to suspicion and cynicism on the part of communities.¹⁸⁰ What should be emphasized in a co-management arrangement is that indigenous peoples as an institution have the local ecological knowledge and values which the State should recognize being the repositories of generations of observations that could contribute towards their cultural survival and sustainability of resources. This should be a process where all those involve gain and become better able to accomplish what they are capable of and realizing what is in their

¹⁷⁶ Lynch, “Concepts and Strategies for Promoting Legal Recognition of Community-based Property Rights,” 404.

¹⁷⁷ Aya Fabros, “Saragpunta: A Consellation of Resistance,” (Quezon City, Philippines: Institute for Popular Democracy, 2005), 9.

¹⁷⁸ Graham, *et al.*, “Community fisheries management handbook,” 20.

¹⁷⁹ Svein Jentoft, “Fisheries co-management as empowerment,” *Marine Policy* 29, (2005): 4.

¹⁸⁰ Binkley *et al.*, “Community involvement in marine and coastal management in Australia and Canada,” 272.

common interest such as securing the resource in a way that is profitable, equitable and just.¹⁸¹

As indigenous peoples in the Maritime Region try to build their relationship by working with non-natives, they have learned that ways of doing community-based management are very diverse. Each community has its own unique situation, and practitioners of community-based management have to adapt their strategies to each of those unique situations. But, despite this diversity, there are common themes and principles that they share. One is that they should take responsibility for the future as stewards of our resources. Also, for community-based management to be successful, they have to develop the capacity to do science locally, and to change public policy in the public interest.¹⁸²

Sustainable livelihood analysis looks further in making fishery policies and management more supportive of indigenous coastal communities particularly among the poorest sector of the society that are attempting, through their livelihood activities, to find a route out of poverty.¹⁸³ Non-native communities should concede that treaty rights are not the real enemy and as different fishing nations joined by treaty; these stakeholders should recognize each other's interests and rights and agree on a coordinated management regime capable of sharing fish and risk transparently.¹⁸⁴ Indigenous peoples' vision of self-determination should not be perceived as a threat to conservation values, but as a symbolic representation of sovereignty. Likewise, the agreement provided by the State with indigenous peoples should not be treated as a simple token of participation.

¹⁸¹ Jentoft, "Fisheries co-management as empowerment," 4.

¹⁸² John Kearney, "Community-based fisheries management in the Bay of Fundy: sustaining communities through resistance and hope," (paper presented at the Third Annual Community-based Conservation Network Seminar, "Turning Natural Resources into Assets" Savannah, Georgia, 15-17 Oct. 2003), 7.

¹⁸³ Edward Allison and Frank Ellis, "The livelihoods approach and management of small-scale fisheries," *Marine Policy* 25 (2001): 386.

¹⁸⁴ Barsh, "Netukulimk Past and Present: Mikmaw ethics and the Atlantic fishery," 35.

Instead, the State should treat this as a negotiation that would forge partnerships while assisting them to link their fisheries and other natural wealth with their sustainable livelihoods. Indigenous peoples should not be treated as clients or stakeholders in the process, but should be invited to participate in all levels of decision-making and management bodies.¹⁸⁵ Further, there is a need to look at the legal recognition of indigenous rights in Canada in respecting and recognizing access to and participation in commercial fisheries as a critical step towards dismantling dependency and in achieving agency.¹⁸⁶

The analysis of indigenous rights in marine areas in Canada strongly shows that federally recognized indigenous rights to marine areas is significantly weaker than rights to land as the Government remains unwilling to do two things: it will not recognize indigenous property rights to sea that are as strong as those it recognizes for portions of traditionally-owned lands (though it will consider sharing royalties from offshore development); and, despite a willingness in practice to share decision-making in resource and environmental management, the Federal Government holds to the position that its own jurisdiction is paramount.¹⁸⁷ With this situation, there is a need to critically examine and analyze fisheries management where community needs and values are considered. There can be no effective and long-term resolution if there is no respect between the parties involved in the management of natural resources. Such a relationship would further call for an open and respectful dialogue between the Government and the community.¹⁸⁸ Looking at ways to resolve issues related to indigenous peoples in Canada:

¹⁸⁵ Francesco Mauro and Preston Hardison, "Traditional knowledge of indigenous and local communities: international debate and policy initiatives," *Ecological Applications* 10, (2000): 1267. 1263-1269.

¹⁸⁶ Davis and Jentoft, "The challenge and the promise of indigenous peoples' fishing rights," 236.

¹⁸⁷ Monica Mulrennan and Colin Scott, "Mare Nullius: Indigenous rights in saltwater environments," *Development and Change* 31, (2000):699.

Aboriginal groups have consistently argued that their treaty claims to land and resources are based on an ideal of sharing use rights with others, rather than a European model of exclusive ownership. When sharing is the intention, resolution is possible. The problem is how to create the good faith to share between peoples who have such a long history of hurt and injury between them, and in particular, how to adjudicate disputes when sharing fails [...] The purpose of negotiations is not just to define title to land and resources, and not just to turn over powers of local administration to legitimate aboriginal authorities, but also to find a way to share the sovereignty of the national territory.¹⁸⁹

As repositories of generations of observations and insights essential for their survival, the pursuit of indigenous peoples' ideals and goals is predicated not only in protecting their territories and resource base, but also on maintaining their cultural knowledge, preserving their traditional institutions, improving their health and social welfare, and nurturing their own language. The struggle of indigenous peoples may be understood through the constructs of both identity and territory:

Both identity and territory imply demarcation lines, the former determines social borders and the latter establishes geographic boundaries. Identity denotes affiliation and inclusion, a sense of belonging. It distinguishes members ('us') from non-members ('them'), and defines a group held together by shared beliefs, aspirations, experiences and/or practices. Territory, on the other hand, delineates spaces, separating the internal from the external, the inside ('ours') from the outside ('theirs') [...] the interconnection between identity and territory comes to fore, as the movement consciously activates indigenous identity as a framework for communicating their struggles and aspirations.¹⁹⁰

The challenge remains whether securing the fishery access rights and management rights fishing rights of indigenous peoples can strengthen the assets available to indigenous peoples so that they are able to withstand shocks, become less vulnerable and are better able to influence policies in their favour. However, legal and

¹⁸⁸ Wiber and Milley, "Seeking clarity, legitimacy and respect," 7.

¹⁸⁹ Ignatieff, "The Rights Revolution," 80.

institutional frameworks alone cannot determine the capacity of the community to manage its resources as threats to management rights may affect the sustainability of community-based management initiatives. Access and control of resources are not in themselves enough to ensure sustainable livelihoods as the community should get adequate support in terms of developing their capacities to manage their resources.¹⁹¹ Considerably, user rights may enhance the opportunity for indigenous peoples provided that they have the social capital to secure access to resources and eventually enhance them. Yet, other stakeholders including the State should be committed in providing an environment that allows indigenous peoples to access assets and assess what resources available and eventually become equal partners in participatory planning and management. Greater respect for indigenous management, customary traditions and institutions within natural resource management is required, to fully realize the sustainable livelihood aspirations of indigenous peoples. A lack of support from the State for community management institutions can be a major limitation on the conservation measures of indigenous peoples.

There is an urgent need to rethink and restructure First Nations affairs in the Canadian Maritimes. While the current structure of indigenous peoples affairs holds little promise to significantly improve the eighteenth-century treaties, the current Indian Act arrangements, nor the overall economic and social difficulties, moves for reconciliation between indigenous and non-Natives is the key to any lasting solution.¹⁹² Social capital should be mobilized to expand the potential for local governance, and indeed, valuing indigenous and community norms can be valuable to enhance the social capital, thereby providing better ways of working together between the State and communities. Policies that protect or strengthen indigenous peoples claims on resources can provide a vehicle to move in these directions.

¹⁹⁰ Fabros, "Saragpunta: A Consellation of Resistance," 3.

¹⁹¹ Vera, *et al.*, "Asserting rights, defining responsibilities," 30.

On the other hand, in the Philippines, implementation of the IPRA does not necessarily reflect the interests of the indigenous peoples. For instance, the appointment of officials and employees of the National Commission on Indigenous Peoples (NCIP) may be tainted by political interest. For instance, it is ironical that the budget for the NCIP is limited compared with the resources provided for the Mining and Geosciences Bureau for the exploitation of mineral resources.¹⁹³ In effect, indigenous peoples in the Philippines face major financial obstacles in securing their lands under IPRA, as even the cost of carrying out land surveys have to borne by the communities. Some communities are even reclaiming their territories piecemeal, to bring the survey costs down to levels that they can afford.¹⁹⁴ Consequently, there is a need for a conscious effort for the State to recognize that they are part of the problem. Hence, the knowledge and skills of the Local Government and the NCIP in the implementation of laws related to indigenous people should be enhanced particularly in enhancing their role in conflict resolution.

A case in point is the 2008 European Commission report during the celebration of the International Indigenous Peoples Day, wherein it mentioned that ‘the European Union acknowledges the potential importance of the mining sector in contributing to economic growth, but underlines the essential importance of ensuring that mining is conducted in an environmentally and socially responsible manner. Mining in protected areas and other priority conservation sites (such as for example the Palawan and Sierra Madre forests) remains a matter of grave concern.’ Environmental and Social Impact Assessments, undertaken systematically prior to approving any mining concession are the main tools for an effective monitoring of the impact of mining. All legal requirements should be effectively enforced to ensure the protection of rights and claims of indigenous peoples

¹⁹² Coates, “The Marshall Decision and Native Rights,” 203.

¹⁹³ Michael Teodoro Ting, Augencio Bagsic, Mylene Eguilos, Ryan Jaen, Maria Lourdes Respicio and Christopher Ryan Tan, “Modernity vs. Culture: Protecting the Indigenous Peoples of the Philippines,” *European Journal of Economic and Political Studies* 1, (2008): 105.

¹⁹⁴ Colchester, *et al.*, “Indigenous land tenure,” 11.

and other vulnerable communities including their fair share of the economic benefits, and to prevent the depletion of natural resources.¹⁹⁵

Nonetheless, the diversity of legal options available to the Tagbanua allowed them to shape the terms of encounter thereby enhancing their ability to manage their ancestral domain coupled by the support of various NGOs creating an enabling environment that bridges shift in managing resources such as developing their Ancestral Domain Management Plan (ADMP) that incorporates their indigenous knowledge systems and practices, and customary laws.

Currently, the Tagbanua is in the process of enhancing their ADMP into an Ancestral Domain Sustainable Development and Protection Plan (ADS DP) that will harmonize the objectives of both the ancestral domain title and protected areas. This will engage not only the Tagbanuas and the NGOs, but will remain as a platform for other stakeholders such as migrant fishers, Municipal Government, and the National Government. In time, with mutual confidence (and respect) in place, these parties can evolve an alternative dispute settlement process, not limited to a strictly legal framework, which would build upon the uniqueness of Coron Island and the strengths of their respective legal mandates.¹⁹⁶

Like any other coastal communities, indigenous peoples, being the most dependent on their natural resources, particularly fisheries and marine resources, should have an essential role in deciding how these resources should be managed. Indigenous peoples will be more willing to protect their fisheries if their rights are accorded. There is greater motivation if their rights are respected and if they are treated as equal partners of

¹⁹⁵ European Union, 2008 Philippine Development Forum: Statement of the European Union [on-line]. (Manila: European Union, 2008, accessed 29 December 2009); available from http://www.delphi.ec.europa.eu/docs/PDF_EU_Statement_2008.pdf; Internet.

¹⁹⁶ Lorenzo and Dalabajan, "Analysis of overlapping jurisdictions over Coron Island," 151.

the State. Beyond securing their fishing rights, due recognition should be given for building the capacity of indigenous peoples.

Policies that shape fisheries rights can play a major role in promoting and improving the equity of resource distribution which is an implicit theme in analyzing indigenous rights. Indigenous rights related to land and water plays a fundamental role governing not only the patterns of natural resource management, but also to indigenous peoples who view such as a cornerstone and integral to their livelihoods. Within the interactive relationship between poverty and resource degradation, poverty should not be seen as a cause in itself, but rather as the outcome of inequitable structures, uneven development patterns and constraints imposed by ruling elites.¹⁹⁷ Manifestations of poverty are deeply rooted in the unequal access to or control over productive resources as well as in the distribution of wealth created in production. Furthermore, development cannot be detached from the issues of poverty and inequality.¹⁹⁸

In linking sustainable livelihoods and rights, the indigenous peoples are given the capacity and space to participate in decision making processes. Such approach emphasizes the need to ensure local participation, legally secure entitlements to assets especially land and water, and build social capital so that the indigenous peoples are empowered to improve their own lives. This integration necessarily involves a new emphasis on empowering indigenous peoples as well as establishing linkages with institutions that mediate the access of the indigenous peoples to assets, technologies, markets and rules.

¹⁹⁷ Naresh Singh and Richard Strickland, "Sustainability, poverty, and policy adjustment," (Winnipeg: International Institute for Development Studies, 1994), 4.

¹⁹⁸ Saturnino M. Borras, Jr., "Free market', export-led development strategy and its impact on rural livelihoods, poverty and inequality: The Philippine experience seen from a Southeast Asian perspective," *Review of International Political Economy* 14, (2008): 146.

The underpinning approach to development is the realization that the root cause of poverty goes deeper than the absence of economic assets and involves discrimination, exploitation, and exclusion of the indigenous peoples from the development processes. Indeed, poverty persists not merely because of lack of access to assets and resources but because indigenous peoples inherent human rights and freedom to live the lives they value are not recognized, respected, and fulfilled by the non-natives. By linking sustainable livelihoods and rights, development becomes both a right and an obligation in itself. In light of these trends, a better way to protect both human and its resources is to consolidate the rights of peoples to their resources.

A rights-based approach to development take as their foundation to promote and protect human rights (those rights that have been recognized by the global community and are protected by international legal instruments). These include economic, social and cultural as well as civil and political rights, all of which are interdependent. Running through the rights-based approach are concerns with empowerment and participation, and with the elimination of discrimination on any grounds (race, language, gender, religion, etc.).¹⁹⁹ The social, cultural, economic, and political capital that binds indigenous peoples together is inextricably linked to their territories and fishery resources that they have occupied and utilized since time immemorial. In essence, upholding the rights of indigenous peoples means protecting and preserving their territories for the survival of their own culture, history, and race.

Rights-based and sustainable livelihoods approaches are complementary perspectives that seek to achieve many of the same goals (for example, empowerment of the most vulnerable and a strengthened capacity of the poor to achieve secure livelihoods) (see *Figure 4*). The primary focus of the rights perspective is on linkages between public institutions and civil society and, particularly, on how to increase the accountability of public institutions to all citizens. The livelihoods approach recognizes

¹⁹⁹ Department for International Development, “Sustainable Livelihoods Guidance Sheets,” 4.

the importance of these links and of enhancing accountability, though it takes as its starting point a need to understand the livelihoods of poor people in context. From this starting point it then tries to identify the specific constraints which prevent the realization of people's rights and consequently the improvement of their livelihoods on a sustainable basis.²⁰⁰

The linkage between livelihoods and rights is a deep one. Looking at the legal recognition of indigenous rights in Canada, notably in respecting and recognizing access to and participation in commercial fisheries is as a critical step towards dismantling dependency and in achieving agency.²⁰¹ To this end, the State could support the processes by which indigenous peoples link their fisheries and other natural wealth with their sustainable livelihoods. An avenue toward this would involve ensuring effective management rights, with indigenous peoples treated not as mere stakeholders in the process, but as full participants in all levels of decision-making and management.²⁰²

In the context of sustainable development for industrialized countries, Governments may find it too easy to place economic and social issues at the top of their agenda, leaving the problem of subsequent environmental externalities as a second-rank issue to be dealt with at a later stage. Governments following this course of action can invoke citizen interests other than conservation and environmental protection, or they can define 'sustainability' in line with particular national interest, so as to justify a more piecemeal approach. The first approach would be democratically based since authorities must accommodate people's wishes; while the second would draw upon the undeniable fact that there are many different ways to promote sustainable development.²⁰³

²⁰⁰ Ibid.

²⁰¹ Davis and Jentoft, "The challenge and the promise of indigenous peoples' fishing rights," 224.

²⁰² Mauro and Hardison, "Traditional knowledge," 1267.

²⁰³ Susan Aguilar Fernandez, "Sustainability is cool': rhetorical participatory discourse in the Spanish strategy for sustainable development," In *Governance for Sustainable Development: The challenge of adapting form to function*, ed. W.M. Lafferty (Cheltenham, UK: Edward Elgar Publishing Ltd: 2004): 133.

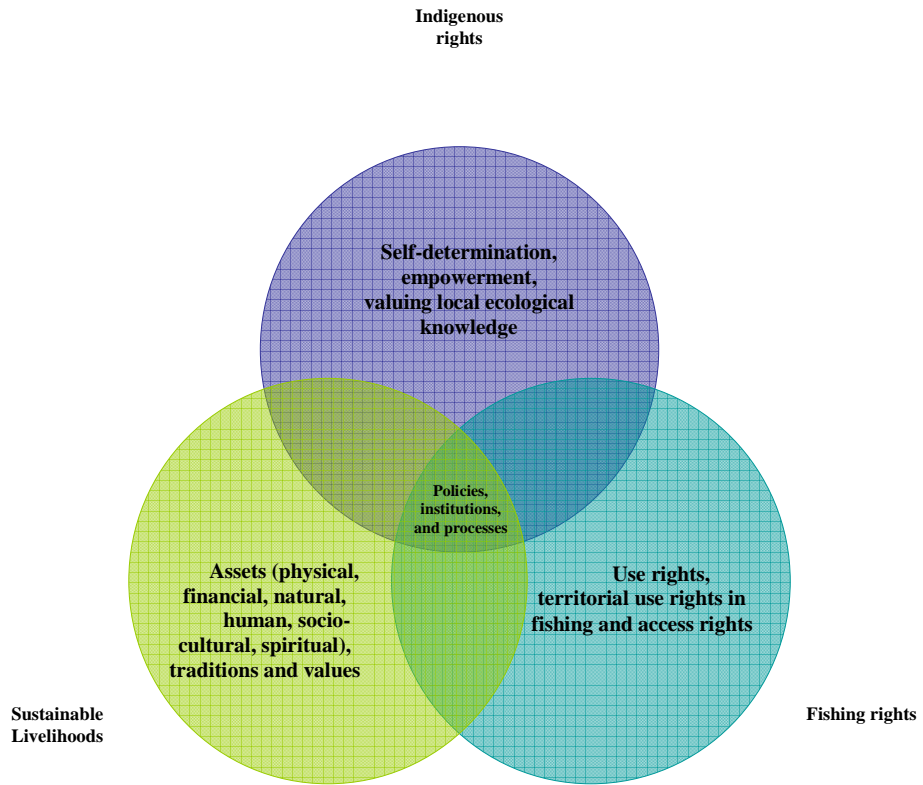


Figure 4. Linkages between sustainable livelihoods and various forms of rights of indigenous peoples.

3.5 Conclusion

Combining the ideas of sustainable livelihoods and of rights over natural resource access and management can be a useful vehicle for positive change in collaboratively improving the situation of indigenous peoples. This chapter has indicated how this applies in the case of fisheries, particularly in Canada and the Philippines. Both the livelihoods and rights approaches recognize the potential of local peoples to act as stewards of the resources on which they depend, and may assist in ‘bridging the gap’ in terms of policy, catalyzing change towards better opportunities at a grassroots level. This is crucial so that indigenous peoples may have the capacity to manage their fisheries and sustainable livelihoods in their own terms. Simply put, community-based management and sustainable livelihoods gives life and blood in putting the indigenous peoples at the center of development.

In the cases examined here, and in related literature, it is clear that in the pursuit of self-determination by indigenous peoples, securing control, access and management decision making capabilities over their territories and natural resources (such as fishery resources), is a key element. While the path towards sustainable livelihoods and full recognition of indigenous and fishing rights proved very challenging (and yet to be fully resolved) for the indigenous peoples in our case studies, the evidence indicates that, suitably empowered, indigenous peoples can develop their own vision of sustainable livelihoods, based on their own priorities and values, local conditions, resources and knowledge base. In this way, a sustainable livelihoods strategy, manifested in the experience of the indigenous peoples, and emerging from local experience, insights and reflection, reflects a robust approach to be supported by the State.

Ensuring appropriate rights to fisheries is a fundamental component within any blueprint for fisheries management and conservation, and certainly this is the case for indigenous peoples, who recognize such rights as integral to their livelihoods. Indigenous peoples dependent on fishing for their livelihood can be vulnerable to outside usurpation of their access rights, and the impacts of such losses can be great, given their social, cultural, and spiritual dependence on traditional terrestrial- and marine-based resources. Accordingly, secure rights and a focus on sustainable livelihoods are crucial in building resilience within indigenous communities. These directions are complemented by efforts to strengthen relationships between indigenous peoples and non-natives in the context of fisheries management, a mutually helpful vehicle in reducing or removing dependency relationships. In the end, equitable fishery rights and sustainable livelihoods can be sought, for indigenous peoples and non-natives, as we build bridges over troubled waters. In the end, indigenous peoples can now look after themselves and establish relationships with the rest of the society and contribute in building the bridge over troubled waters with the rest of the non-natives on the basis of genuine equality.

4 Advancing Property Rights of Indigenous Peoples in the Philippines

The term ‘indigenous peoples’ refers to us, the more than twelve million descendants of the original inhabitants of this archipelago who have somehow managed to resist centuries of colonization and in the process have retained their (*sic*) own customs, traditions and life ways. Our ancestors were once upon a time the only inhabitants on these islands, and as such even during those early times, already exhibited the attributes of independent states, namely: people, territory, government (through their customs and traditions and indigenous socio-political institutions), and sovereignty (for they were free and independent communities).²⁰⁴

This chapter discusses the impact of local and national policies on the participation of the indigenous peoples in the Philippines in relation to fisheries management. As was reviewed in Chapter 3, indigenous peoples in the Philippines and elsewhere face multiple issues in securing their rights to fish in their coastal area, including lack of tenure and legal recognition of their traditional rights in national constitutions and laws, discrimination and culturally-insensitive policies and development projects. This chapter critically examines the case of the Tagbanua because they represent the historic struggles of other indigenous peoples in the Philippines in providing policy options towards their recognition, self-determination, and governance in managing natural resources.

While the basic premise assumes that the right to access and control of ancestral domain is critical to the indigenous peoples in the Philippines, this chapter addresses the following questions: (1) What does property rights mean to indigenous peoples who have been historically dependent on their natural resources?; (2) What level of organization or institutional mechanism is viable in the management of fisheries for indigenous peoples?;

²⁰⁴ Evelyn S. Dunuan, Indigenous peoples of the Philippines [on-line] (Quezon City: National Commission on Indigenous Peoples, 2001, accessed 18 May 2009); available from <<http://www.ncip.gov.ph/resourcesdetail.php?id=1>>; Internet.

and (3) In the context of fisheries management, how should we integrate property rights with indigenous rights?

Section 3.a. of the Indigenous People's Rights Act of 1997 defines ancestral domain as to include all areas generally belonging to indigenous peoples comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by themselves or through their ancestors whether communally or individually since time immemorial except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of Government projects or any other voluntary dealings entered into by Government and private individuals, corporations, and which are necessary to ensure their economic, social and cultural welfare.²⁰⁵

The participation of indigenous peoples requires building their capacity in various management and decision making aspects – assessment, planning, implementation, monitoring and evaluation, from biological, social, cultural and economic perspectives. Information and education are also vital in strengthening the capacity of communities. In order to succeed in natural resource management, indigenous peoples together with other resource users should have an interest in the long-term well-being of their resources. In relation to community participation, there is a need for the Government to provide assistance through legal, financial and technical support. However, the participation of indigenous peoples in the Philippines in various dialogues on policy development relevant to them is more ornamental than substantive such that their representatives are only invited to join the meetings and sign attendance sheets but are not encouraged to speak during forums. For instance, only people who are educated and know how to speak English, who dress up well and have had the right connections are were invited to attend

²⁰⁵ Indigenous Peoples Rights Act of 1997. Chapter 2, Section 3-a.

policy dialogues.²⁰⁶ There are also instances where they are not able to attend meetings because of lengthy distances that their representatives have to travel. Related constraints to being able to meaningfully participate in management dialogue also include not being informed of their roles and responsibility in the board nor have they been given orientation or training; there were also scarce or limited resources for travel expenses. The language used in the conduct of meetings may often be too technical and difficult to be understood by indigenous peoples representatives.²⁰⁷

4.1 Examining Property Rights of Indigenous Peoples in Fisheries Management

Common property rights in fisheries management are often mistakenly understood and equated with Hardin's "tragedy of the commons"²⁰⁸ – i.e. perceived as being open access.²⁰⁹ Within this simplistic framework, common property regimes in fisheries management then seem problematic, resulting in a lack of management authority and leading to overfishing that eventually results in the collapse of fisheries. In contrast, the "tragedy of the commons" should be critically examined and should be referred to as the tragedy of open access, as the commons refers to a resource being managed by and belonging to a definite group.²¹⁰

²⁰⁶ Dave De Vera, "The Coalition of Indigenous Peoples and their campaign for IP rights in the Philippines," In *Civil Society Organizations experiences in strengthening rural poor organizations in Asia*, eds. International Fund for Agricultural Development, Asian NGO Coalition for Agrarian Reform and Rural Development & Center on Integrated Rural Development for Asia and the Pacific (Quezon City, Philippines: International Fund for Agricultural Development, Asian NGO Coalition for Agrarian Reform and Rural Development, and Centre on Integrated Rural Development for Asia and the Pacific, 2006), 113.

²⁰⁷ Tebtebba Foundation, "Philippine Indigenous Peoples and Protected Areas," 9.

²⁰⁸ The tragedy of the commons refers to a dilemma in which multiple individuals, acting independently, and solely and rationally consulting their own self-interest, will ultimately deplete a shared limited resource even when it is clear that it is not in anyone's long-term interest for this to happen; see Garrett Hardin, "The Tragedy of the Commons," *Science* 162(1968): 1243-1248.

²⁰⁹ Fikret Berkes, "Property rights and coastal fisheries," In *Community management and common property of coastal fisheries in Asia and the Pacific: concepts, methods and experience*, ed. R.S. Pomeroy (Manila: International Center for Living Aquatic Resources Management, 1994), 54.; see also Ken Ruddle, "Changing the focus of coastal fisheries management," In *Community management and common property of coastal fisheries in Asia and the Pacific: concepts, methods and experiences*, ed. R.S. Pomeroy ed. (Manila: International Center for Living Aquatic Resources Management, 1994), 64.

²¹⁰ Owen J. Lynch, "From Land to Coasts and Shining Seas?: Reflections on Community-based Property Rights Concepts and Marine and Coastal Tenure," In *Marine and Coastal Resources and*

Beyond reducing conflict between indigenous peoples and other stakeholders in fisheries management is the question of the sustainability of the resources that critically requires looking at institutions and property rights. Also, there is a need to look further at the social, economic, and human rights dimension of fisheries management affecting individual and community access rights and management rights.²¹¹ At the heart of fisheries management, access to both assets and activities is enabled or hindered by policies, institutions and processes including social relation, markets and organizations. Consequently, poverty reduction and livelihood improvement are envisaged to take place largely through the development of social and human capital in fisheries-dependent communities, by maintaining or enhancing the natural assets used by those communities, and by supporting the development of appropriate policy and institutional environments.²¹² However, the term ‘development’ has acquired a negative connotation for indigenous peoples even if this is called ‘sustainable’, because their histories are replete with traumatic experiences with development projects, policies and programmes. In fact, mainstream development is regarded as one of the root causes of their problems.²¹³ This argument is a critique of the Millennium Development Goals (MDG) by Tauli-Corpuz, an indigenous leader and a member of the Permanent Forum on Indigenous Issues expressing: *“The key weakness of the MDG is that they do not question the mainstream development paradigm, nor do they address the economic, political, social and cultural structural causes of poverty ... The path of incurring more debts, engaging in more aggressive extraction of mineral resources, oil or gas in indigenous peoples’ territories, or further liberalizing imports to the detriment of traditional livelihoods, in all probability, would not alleviate poverty among indigenous*

Community-based Property Rights: A Philippine Workshop, eds. Teresita Gimenez-Maceda, Rosario M. Espino and Shivani Chaudry (Quezon City: Tanggol Kalikasan, 2001): 8.

²¹¹ Anthony Charles, “The Right Form of Rights,” SAMUDRA Report 51, (2008): 5.

²¹² Allison and Horemans, “Putting the principles of the Sustainable Livelihoods,” 758.

²¹³ Inter-Agency Support Group on Indigenous Issues. Permanent Forum on Indigenous Issues, Item 3 of the Provisional Agenda. (paper presented at the Fourth Session, Special Theme: Millennium Development Goals and Indigenous Peoples New York: USA, 16-27 May 2005).

peoples.” As such, there is a need to reexamine fisheries management that takes place in the context of rights – all the various forms of rights.²¹⁴

In the context of fisheries management, both property rights and indigenous rights are two important principles that recognize the potential of indigenous peoples in managing resources and influencing institutions towards policy advocacy and reform. Property rights is an entitlement that has a great impact on the ability of indigenous communities to exercise their ancestral rights and manage resources. Similarly, the legal recognition of community-based property rights should be understood as a goal that reflects an ideal outcome for many local communities that are or will be negotiating management agreements with the Government.²¹⁵ Consequently, any management mechanism for fisheries resources needs to acknowledge the importance of incentives for cooperation and individual self-interest, as well as balancing the claims of multiple uses and users.²¹⁶ Such participation takes many forms and should not be limited to a community’s contribution of time and labour alone, but includes to some extent the notion of influencing, sharing or redistributing power and control of resources, benefits, knowledge, and skills to be gained through community involvement in decision-making processes.

For the indigenous peoples who are often at the periphery of most development initiatives, securing rights to common property resources provides a basis for sustainable management by communities. The value of common property resources to the poor is heightened because they often provide safety nets in the form of remunerative activity or foot, at times when other opportunities are lacking. Secure rights of ownership, access and use are fundamental to the sustainability of livelihoods which rely on natural

²¹⁴ Charles, “The Right Form of Rights,” 4.

²¹⁵ Lynch, “Concepts and Strategies for Promoting Legal Recognition of Community-based Property Rights,” 411.

²¹⁶ Robert Pomeroy, “Community management and common property of coastal fisheries in Asia and the Pacific: concepts, methods and experiences,” (Manila: International Center for Living Aquatic Resources, 1994), 10.

resources.²¹⁷ Furthermore, community fishery rights have the potential in improving the use of local ecological knowledge, improving acceptance of management rules, helping resolve conflicts through which there is a locally-determined balance achieved among the multiple ecological, economic, and community well-being goals, and producing positive effects on fishery conservation and sustainability.²¹⁸

While the terms “common property rights,” “community-based property rights,” and “community fisheries rights” discussed earlier are not synonyms, the concepts represented by them have much in common as they play a fundamental role in governing the patterns in fisheries management as well as the welfare of indigenous peoples associated with the unequal resource access and wide gaps in benefits-sharing from resource use. Consequently, indigenous rights look at the potential benefit or desired outcome for the indigenous peoples that are based on the ideals of social justice. A property rights-based system can provide a robust mechanism for ensuring the sustainable utilization of fisheries, while providing for indigenous rights holders to realize their often divergent social and economic aspirations.²¹⁹

The next section describes the pre-colonial social structure in the Philippines since it is imperative to understand the previously prevailing property rights in the country. Relevant policies are then discussed having a direct impact on the indigenous peoples in the Philippines and the challenges confronting them in the implementation of indigenous rights at the policy level.

²¹⁷ Robert Chambers, “Poverty and livelihoods: whose reality counts?” *Environment and Urbanization* 7(1995): 202.

²¹⁸ Charles, “Community Fishery Rights: Issues, Approaches and Atlantic Canadian Case Studies,” 3.

²¹⁹ Matthew Hooper, “Maori Power,” In *Sizing Up: Property Rights and Fisheries Management: a collection of articles from SAMUDRA Report*, ed. K.G. Kumar (Chennai: International Collective in Support of Fishworkers, 2000), 18.

4.2 Relevant Policies affecting Indigenous Peoples in the Philippines: a historical perspective

In addressing the rights of indigenous communities, several international agreements and conventions have recognized the rights and interests of indigenous peoples to manage their natural resources – including the UN Conference on Environment and Development (1992), the World Summit on Sustainable Development (2002) and recently, the UN Declaration on the Rights of Indigenous Peoples (2007). In addition to building a sense of ownership among indigenous peoples, their tenurial security, and the legal and institutional recognition that provides them, leads to a more equitable role in decision-making and the policy-making process. However, policies generally reflect the dominant perspectives of the elite and powerful in the society.²²⁰ For instance, as of 1995, national laws concerning the use and management of forest resources in at least six Asian countries (Indonesia, Thailand, the Philippines, India, Nepal, and Sri Lanka) were noted to be more hostile towards local communities than was the case during the colonial area.²²¹

The pre-colonial communities in the Philippines were subsistence economies and therefore had no classes in the economic senses. Local communities lived in small scattered communities and ownership of resources was based on kinship ties. There was reliance for sustenance mainly on subsistence agriculture. Compared with some nations prior to their colonization, the Philippines had no significant monuments or erect structures made of hard materials for self-glorification (i.e., temples, palaces, etc.), which is considered to reflect that the labour organization of the natives such that no surplus was being produced that could enable any ruling class to appropriate labour or dominate in the economic sense.²²² Despite the numerous competing centres of power, the Philippine

²²⁰ Mayo-Anda, “Engaging and Empowering Communities,” 71.

²²¹ Lynch, “Concepts and Strategies for Promoting Legal Recognition of Community-based Property Rights,” 409.

²²² Renato Constantino, “Identity and Consciousness: The Philippine Experience,” *Journal of Contemporary Asia*, no. 6 (1976): 6.

social hierarchy is characterized by tribal rulers who strove not to colonize their neighbours but to include them in their network of kith and kin. Hence, social relations, rather than private property, were one's greatest resource.²²³

However, in the Philippine legal system during the Spanish colonization, the introduction of the Regalian Doctrine or *Jura Regalia* became a major impediment towards property rights. Officially signed in 1493 by Spanish Borgia Pope Alexander VI, this doctrine refers to the feudal principle that private title to land should directly or indirectly emanate from the Spanish crown with the latter retaining the underlying title. This doctrine made a significant impact on Philippine laws by becoming a legal mechanism in converting the native lands of indigenous peoples so they became squatters in their own traditionally-owned and possessed lands.²²⁴ Later, this was reinforced by the Royal Decree of 13 February 1894, known also as Maura Law²²⁵, the last land regulation enacted by Spain in the Philippines which required all landowners to register their property within a period of a year following its publication date. In cases of non-compliance, ownership of the land reverted to the Government. However, rather than solve problems, the Maura Law only contributed to the increasing complexity of land registration issues during the colonial regime. The policy has only served the interests of the elite by claiming native lands that are not legally registered, as the natives are unable to pay for costs required to register – transportation fares and legal prerequisites (i.e., filing fees, attorney fees, and survey costs) and all other taxes created by the colonial officials. Another burden that the communities confronted is the inaccessibility of newspapers in remote areas, making them unaware of the legal situation.

The enactment of the Maura Law demonstrated Spain's long-standing insensitivity to the plight and potentials of the vast majority of people in the Philippine

²²³ Nadeau, "Peasant resistance and religious protests in early Philippine society," 77.

²²⁴ Lynch, "Concepts and Strategies for Promoting Legal Recognition of Community-based Property Rights," 396-397; see also Mayo-Anda, et al., "Is the concept of Free and Prior Informed Consent," 2.

²²⁵ **Full** reference to Maura Law.

colony. There was nothing new in this, as colonial regimes were inherently exploitative and unjust. The decree's novelty laid in the fact the Government in Madrid, during the twilight of Spain's Pacific empire, reneged on its centuries-old commitment to respect indigenous property rights. The Maura Law theoretically empowered the colonial regime to deny, for the first time ever, legal recognition of customary property rights. The immediate symbolic effect was to disenfranchise several million rural farmers. This has also provided the legal basis by which the U.S. colonial regime denied any effective recognition of ancestral property rights.²²⁶ Hence, the Maura Law became another instrument for 'land grabbing' against the native population.

On the other hand, a significant Supreme Court decision during the U.S. occupation recognized the rights of indigenous communities as described in the *Cariño vs. Insular Government* case in 1909:

It is true that Spain, in its earlier decrees, embodied the universal feudal theory that all lands were held from the Crown, and perhaps the general attitude of conquering nations toward people not recognized as entitled to the treatment accorded to those in the same zone of civilization with themselves. It is true, also, that in legal theory, sovereignty is absolute, and that, as against foreign nations, the United States may assert, as Spain asserted, absolute power. But it does not follow that, as against the inhabitants of the Philippines, the United States asserts that Spain had such power. When theory is left on one side, sovereignty is a question of strength, and may vary in degree. How far a new sovereign shall insist upon the theoretical relation of the subjects to the head in the past, and how far it shall recognize actual facts, are matters for it to decide.²²⁷

Although the rules on ownership of all untitled land and resources found in the Regalian Doctrine continued under the U.S. colonial administration, the 1987 Philippine Constitution guarantees the rights of indigenous cultural communities. Furthermore, in 1992, the National Integrated Protected Area System (NIPAS) established the legal and

²²⁶ Lynch, "Concepts and Strategies for Promoting Legal Recognition of Community-based Property Rights," 398.

²²⁷ Joaquin G. Bernas, SJ. Ancestral domain vs. Regalian Doctrine [on-line] (Manila: Philippine Daily Inquirer, 2008, accessed 3 June 2009); available from <http://archive.inquirer.net/view.php?db=1&story_id=162061>; Internet.

policy framework for protected areas that ensures the participation of indigenous peoples in protected area management and decision making. Section 13 provides that: “Ancestral lands and customary rights and interest arising shall be accorded due recognition. The Department of Environment and Natural Resources (DENR) shall prescribe rules and regulations to govern ancestral lands within protected areas: Provided (sic), that the DENR shall have no power to neither evict indigenous communities from their present occupancy nor resettle them to another area without their consent.”

In Palawan, a comprehensive framework for the sustainable development specific to the province was passed called the Strategic Environmental Plan (SEP).²²⁸ The SEP established a graded system of protection and development control over the whole province, including its tribal lands, forest, mines, agricultural areas, settlement areas, small islands mangroves, coral reefs, seagrass beds and the surrounding sea. This strategy has developed the Environmental Critical Areas Network (ECAN) that identifies and recognizes the tribal ancestral zones covering both land and sea and protecting the tribal people and the preservation of their culture. In addition, Section 7.3 and 7.4 of SEP ensures the preservation of biological diversity and the protection of tribal people and the preservation of their culture.

4.3 Coron Island, Palawan: The Tagbanua’s homeland

Coron Island is part of the Calamianes Island Group located in northern Palawan province (see *Figure 5*). Palawan, considered as the last ecological frontier of the Philippines is situated in the south-western side of the Philippines. Coron Island is about five kilometres from the town center of Coron on Busuanga Island and has a total land area of approximately 7,700 hectares. With the multiple ecosystems existing in Coron Island – such as mangroves, tropical forests, coral reefs, lakes and lagoons – the area has diverse marine and wildlife resources, including the Philippine macaque (*Macacca*

fascicularis), wild pigs, porcupines, anteaters, lizards, skunks, the Palawan hornbill and various parrot species.²²⁹

The Tagbanua's status as an indigenous people may be attributed to their resistance to the prevailing colonial structures of the Spanish and Americans and lowland migrant Filipino culture. The Tagbanuas are semi-nomadic and seafaring searing whose lives revolves around their natural environment.²³⁰ The seafaring aspect is the domain of men while women provide the continuity of life on the land and in clan caves, since they traditionally inherit these areas as their husbands settle with the families of their in-laws upon marriage.

The Tagbanua believe in *panyain* or spirits that dwell in nature, including the lakes, trees and the seas. They hold to various sacred and/or conservation-related practices relating to resource use. For example, certain areas are protected as fish sanctuaries or sacred sites where the *panlalabyut* (a giant, human-like octopus) are believed to dwell, and which may bring harm on anyone who trespasses in the area. In Coron Island alone, there are over ten inland lakes that are considered *panyaan* (sacred waters).²³¹ Also, the Tagbanuas have a cultural belief that some fish species should be avoided for consumption since they may pose a health risk, especially for women after birth.²³² This belief is passed down through the generations by oral tradition. Cutting trees near streams or springs is prohibited as the Tagbanuas recognize the value of watersheds for irrigation of their crops and preventing soil erosion.

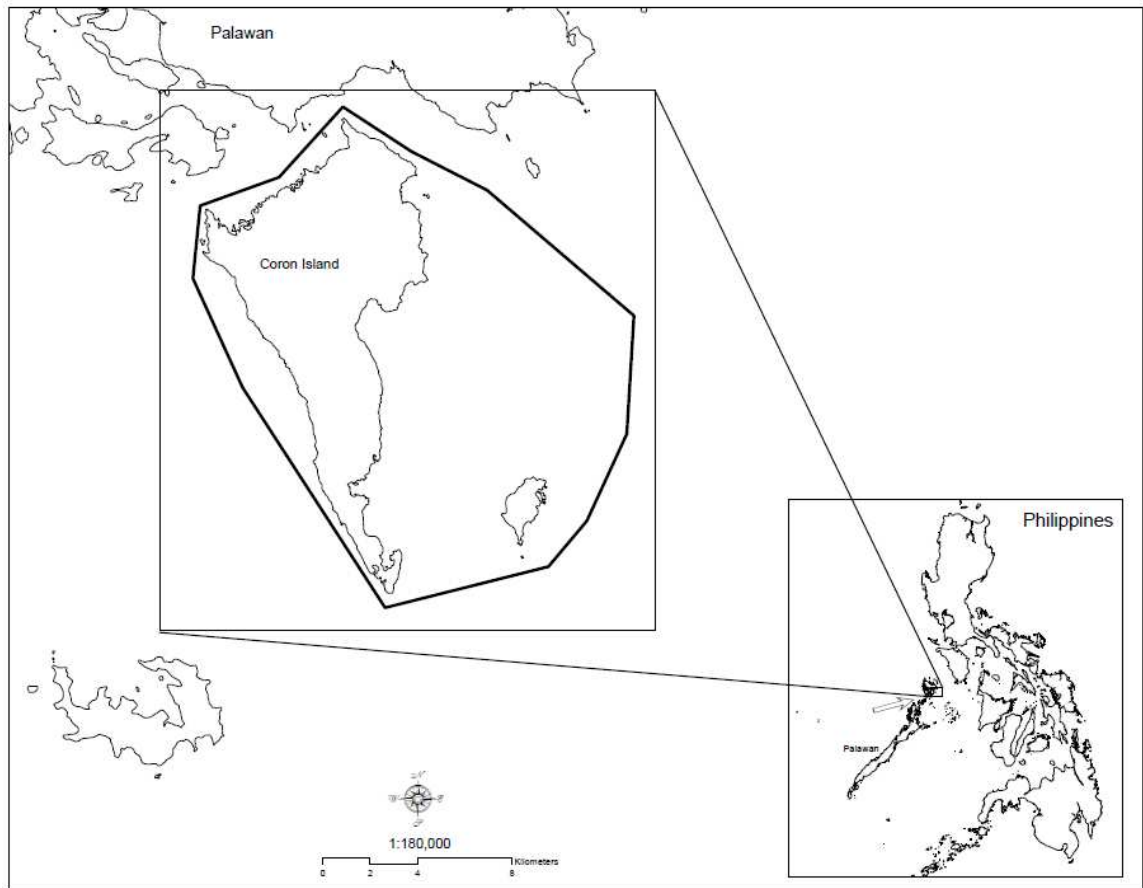
²²⁸ Republic Act 7611. An Act Adopting the Strategic Environment Plan for Palawan, creating the Administrative Machinery to its implementation, converting the Palawan Integrated Area Development Project Office to its support staff, providing funds therefore, and for other purposes.

²²⁹ Conservation International-Philippines, "Estimation of the Opportunity Cost of Tourism in the Kayangan Lake, Coron Island, Northern Palawan (draft report)," (Quezon City, Philippines: Conservation International-Philippines, 2003): 4.

²³⁰ Fabros, "Saragpunta: A Consellation of Resistance," 5.

²³¹ Ibid.

²³² Arlene Sampang, "The Calamian Tagbanwa Ancestral Domain (Coron Island, Palawan, Philippines): Evaluation of traditional fishing practices towards biodiversity conservation and sustainability," (Los Banos, Laguna: World Fish Center, 2007), 59.



**Figure 5. Ancestral Domain of the Tagbanua in Coron Island, Palawan, Philippines.
(Source: Philippine Association for Intercultural Development, 2009).**

Fishing, hunting, and foraging define the way of life of a Tagbanua. The majority of the Tagbanua employ hook-and-line fishing either for subsistence or trade. The fishing season runs from June to mid-November. A few families are engaged in small-scale commercial trading of groupers, fresh fish, and octopus; the harvest is determined by what can be sold or consumed immediately, due to the absence of electricity in the island.²³³ Interestingly, the Tagbanuas are unselfish and share their fish catch with other community members when their catch exceeds what a family needs.²³⁴ Coron Island is well-known for the fine quality of its edible swiftlets' nest (*Collocalia troglodytes*) found on the caves where the people have gathered these bird nests to trade with the Chinese since the 11th century A.D. Such a hunting method is governed by an open and closed season for an improved harvest of the population of swiftlets. The nests are also sold to local dealers in Coron Market for PhP 6,000 to 18,000 per kilo (approximately US\$ 125 to 380).²³⁵

4.4 The evolution of resource access and rights in the Philippines

There are three factors that explain the ecological balance in Coron Island until the mid-20th century: a low population vis-à-vis the resource base, a subsistence economy, and cultural norms that made it taboo for the Tagbanua to indiscriminately exploit their forest and coastal resources. During the early 1970s, however, the Municipal Government sequestered many clan-caves when the Tagbanua failed to pay the taxes imposed on them. Tax payments were used by the Municipal Government as a proof of ownership to the land, and since most of the Tagbanuas could not afford the annual payment, the lands were auctioned off to tourist resort developers and real estate agents. In the mid-1980s, Tagbanuas were again threatened by migrants from neighbouring provinces of the Philippines (notably Visayas) encroaching in their area, particularly in

²³³ Sampang, "The Calamian Tagbanwa Ancestral Domain," 56.; Zingapan and De Vera, see n. 168 above.

²³⁴ Mayo-Anda, et al., "Is the concept of Free and Prior Informed Consent," 10.

²³⁵ Conservation International-Philippines, "Estimation of the Opportunity Cost of Tourism," 6.

Delian Island forcing them to move upland in Coron Island.²³⁶ The struggle of the Tagbanuas in accessing their resources was aggravated by the onset of declining fish catches due to illegal fishing activities of these migrants. A Tagbanua fisherfolk laments: “*Kung kami-kami lang, di namin kayang ubusin ang isda sa dagat*” (If we were left alone, we cannot consume all the fish in the sea).²³⁷

In 1985, the indigenous communities established the Tagbanua Foundation to address the resource-use issues in the area and applied for a Community Forest Stewardship Agreement (CFSA) with the Department of Environment and Natural Resources (DENR). This agreement entitles communities to use and develop the forestland and resources for a twenty-five year period on the condition that they protect these resources. Five years later, the DENR returned all the clan-caves to the Tagbanua while rescinding all the tax declarations issued for the islands of Coron and Delian. Through ‘stewardship contract’, as recalled by the tribe’s chief leader, “*Para kaming binibigyan ng permiso na pumasok sa sarili naming bahay*” (It was like asking permission to enter in our own home).²³⁸

In 1993, DENR issued a Department Administrative Order 02 (DAO 02-93) that provides the rules and regulations for recognizing and awarding a Certificate of Ancestral Domain Claims (CADC) by which the nation recognizes the inherited and preferential rights of indigenous communities to extract, exploit, manage and protect their delineated ancestral territory. The law is anchored in the 1909 US Supreme Court decision on *Cariño vs. Insular Government* stating, “[...] *as far back as memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been a*

²³⁶ Fabros, “Saragpunta: A Consellation of Resistance,” 7.; Dalabajan, “The Healing of a Tagbanua Ancestral Homeland,” 176.

²³⁷ Rimban, see n. 171 above.

²³⁸ Mayo-Anda, et al., “Is the concept of Free and Prior Informed Consent,” 18.16; Fabros, “Saragpunta: A Consellation of Resistance,” 2.; Dalabajan, “The Healing of a Tagbanua Ancestral Homeland,” 177.

public land.” The CADC is a tenurial instrument that grants indigenous communities conditional rights over land and resources.

In order to apply for the CADC, the Tagbanuas sought the assistance of the Philippine Association for Intercultural Development, a non-governmental organization advocating for the rights of indigenous communities, in using a participatory geographic information system (GIS) to gain control over their domain through various participatory methods such as community mapping and three-dimensional (3-D) modelling.²³⁹ Drawing on the Tagbanua’s indigenous knowledge, this mapping exercise documented their ethnic genealogy through oral tradition, identifying ‘indigenous names of sacred places and burial grounds that serves to correct the injustice and violence that colonial and modern-day maps and borders have drawn’.²⁴⁰

Indigenous rights are essential in addressing social justice and in giving a greater voice that encourages indigenous peoples towards self-governing institutions and common management of resources. Despite the limited options accorded by the National Government, the Tagbanuas tried to resist oppression and assert their own management plans for the island, drawing from a range of policy tools and options.²⁴¹ Notably, the Tagbanuas felt that they would be unable to survive on their ancestral lands alone if their fishing grounds are progressively being destroyed. The “indigenous seas” cannot be separated from the ancestral land claim as each sustains the other, and neither is viable as a separate entity.²⁴²

²³⁹ Zingapan and De Vera, “Mapping the ancestral lands and waters,” 4.

²⁴⁰ Sampang, “The Calamian Tagbanwa Ancestral Domain,” 12.

²⁴¹ Reed L. Wadley, Ole Mertz and Andreas Egelund Christensen, “Local Land Use Strategies in a Globalizing World: Shaping Sustainable Social and Natural Environments,” IAS Newsletter 32, (2003): 45-46.

²⁴² International Fund for Agricultural Development, Asian NGO Coalition for Agrarian Reform and Rural Development & Center on Integrated Rural Development for Asia and the Pacific (Quezon City, Philippines: International Fund for Agricultural Development, Asian NGO Coalition for Agrarian Reform and Rural Development, and Centre on Integrated Rural Development for Asia and the Pacific, 2006).

Three years later, DENR passed Administrative Order 34, series of 1996, requiring indigenous communities applying for claims to formulate their Ancestral Domain Management Plan (ADMP) governing all claimed territories. While planning may be exhaustive and time consuming, the Tagbanuas view this as an enabling policy to codify their customary laws, belief, and practices since time immemorial. The Ancestral Domain Management Plan focused on the following: (1) resource utilization; (2) identification of sacred places including caves, lakes, corals, forests and spirit dwellings; (3) manner of inheritance/transfer of properties and possessions; (4) initiating and planning for development projects; (5) utilization and access to water resources; (6) full recognition of the general assembly as the most powerful decision-making body, and the *mama'epet* or tribal elders as the governing body; and (7) traditional sanctions and penalties for law offenders.²⁴³

The Tagbanuas made progress in asserting its CADC with support from non-governmental organizations such as Conservation International and the Environmental Legal Assistance Center (ELAC), to assist them in biological resource assessment and trainings on environmental and human rights, respectively. In 1998, DENR approved the CADC of the Tagbanuas covering 22,284 hectares that include the entire island and a portion of the seas surrounding it (see *Figure 6*).

²⁴³ Dalabajan, "The Healing of a Tagbanua Ancestral Homeland," 181.

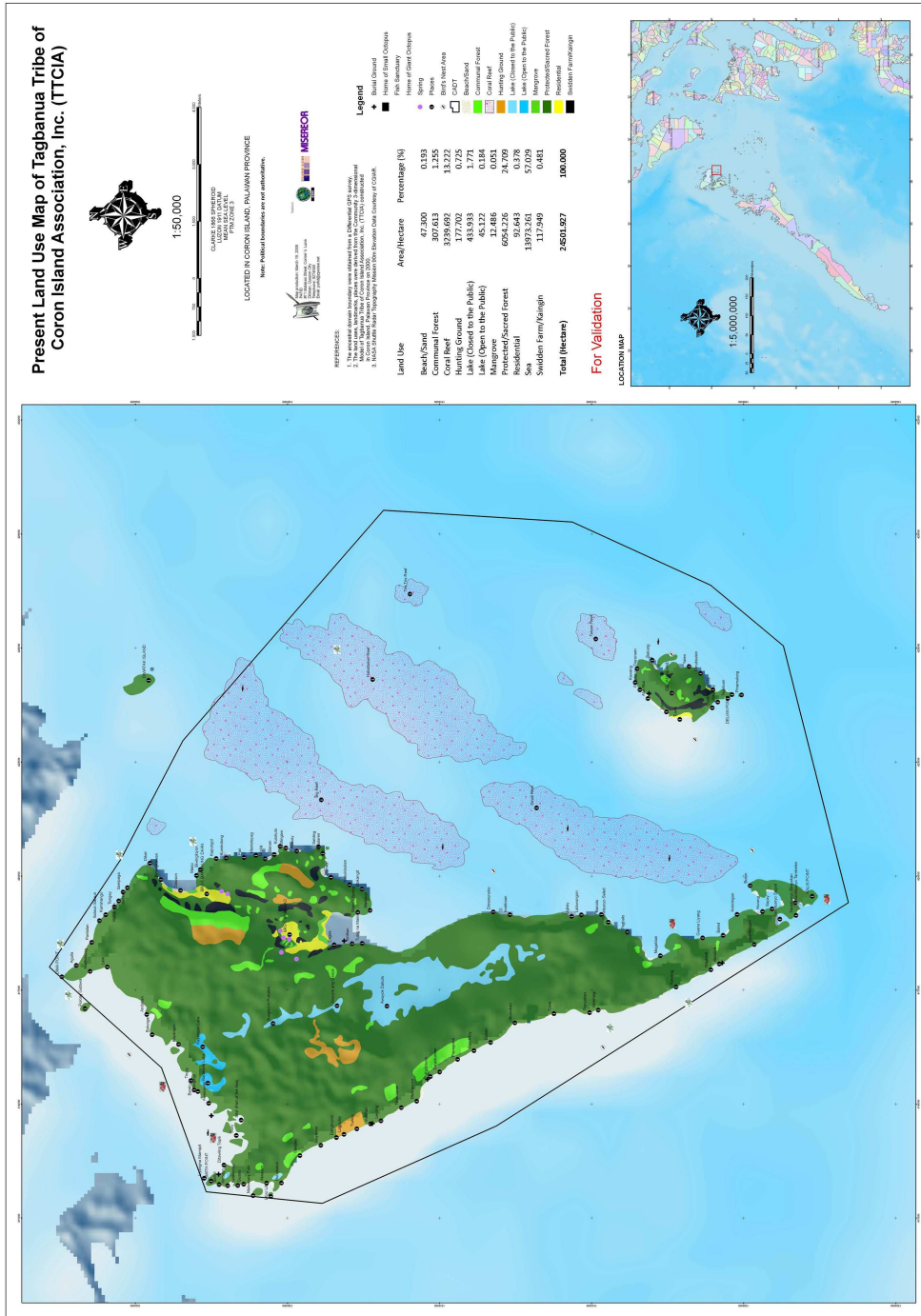


Figure 6. The extent of the ancestral land and waters title of the Tagbanuas' in Coron Island, Palawan.

(Source: Philippine Association for Intercultural Development, 2009).

The passage of the Indigenous People's Rights Act (IPRA) or Republic Act 8371 in 1997 became a milestone in establishing a comprehensive system for protecting the rights of the Indigenous peoples. This law recognizes three basic rights including the rights of ownership of indigenous communities over their ancestral lands and bodies of water, traditional resource management practices and the need to secure a free, prior informed consent (FPIC) from the community prior to the implementation of any project or initiative within areas identified as traditional territories. Such ownership of resources by indigenous peoples is basically private but communal and cannot be disposed of or sold. Before the law was passed and approved by the Congress, this was initially carried out in the Philippine Senate by former Senator Juan Flavio Velasco who filed the Senate Bill No. 1728 with neither voted against nor an abstention from the twenty-one senators. In his sponsorship speech, Sen. Velasco said, "This bill provides for special treatment for cultural communities owing to their condition of poverty, illiteracy, and underdevelopment brought about, in the main, by Government neglect, foreign colonization, and discrimination."

The IPRA also established the National Commission on Indigenous Peoples (NCIP) as a Government agency responsible for the formulation of policies, plans, and programs to recognize, protect, and promote the rights of indigenous cultural communities/indigenous peoples.²⁴⁴ The National Commission on Indigenous Peoples shall protect and promote the interest and well-being of the indigenous peoples with due regard to their beliefs, customs, traditions and institutions. As an independent agency under the Office of the President, it is composed of seven (7) Commissioners belonging to indigenous peoples, one (1) of whom shall be the Chairperson.²⁴⁵ The Commission have the following powers, jurisdiction and function: serves as the primary Government

²⁴⁴ Yasmin Arquiza, Conflicts with LGUs complicate tribe's right battle [on-line] (Manila: Philippine Center for Investigative Journalism, 2001, accessed 15 May 2009); available from <http://www.pcij.org/stories/print/cadt2.html>; Internet.

²⁴⁵ Indigenous Peoples Rights Act, Chapter 7, Section 39.

agency through which indigenous peoples can seek Government assistance and as the medium, through which such assistance may be extended; reviews and assess the conditions of indigenous peoples including existing laws and policies pertinent thereto and to propose relevant laws and policies to address their role in national development; formulate and implement policies, plans, programs and projects for the economic, social and cultural development of the indigenous peoples and to monitor the implementation thereof; request and engage the services and support of experts from other agencies of Government or employ private experts and consultants as may be required in the pursuit of its objectives; and issue certificate of ancestral land/domain title.²⁴⁶

Despite the triumph of the Tagbanuas in securing their ancestral waters, the DENR has identified Coron Island as one of the eight sites under NIPAS without consultation with the local communities and the prior consent of the Tagbanua. In principle, while the National Government has created an enabling environment towards the participation of indigenous peoples, the Tagbanuas resisted the Government's designation of the island, as the community is aware of the history of marginalizing indigenous peoples in protected area management. For instance, the protected area management board failed to provide documents in the local language or to provide the basic resources needed to hold meetings. Since the management board consists of a Government representative as a chairperson, communities are often concerned that management will be controlled by the Government, making the indigenous peoples uncomfortable in discussing problems and solutions in public forums. Likewise, most indigenous peoples are not recognized as legal Local Government Units thus denying them representation on the management board.²⁴⁷

Eventually, the NCIP converted the Tagbanua's CADC into a Certificate of Ancestral Domain Title (CADT) in 2002, a legal title formally recognizing the rights of

²⁴⁶ Indigenous Peoples Rights Act, Chapter 7, Section 44a to 44e.

possession of indigenous peoples over their ancestral domains, identified and delineated in accordance with IPRA. However, its conversion was another challenge confronted by the Tagbanuas. While the first set of commissioners made this move, the CADT was never released nor registered in the Register of Deeds.²⁴⁸ The NCIP created Administrative Order 1, series of 2002, to determine with finality the validity of the title. Upon review and revalidation, the ancestral title increased by 2,236.75 hectares from their previous ancestral domain claim as a result of an error in computation in the last survey. Thus, the total ancestral land area is 7,320.0516 hectares and 16,958 hectares for the ancestral waters. The whole ancestral domain covers 24,520.75674 hectares. The CADT was issued to the Tagbanuas on February 2004.

With the CADC and CADT accorded to the Tagbanua, these indigenous people came to a point where they are able to challenge existing government systems centered on formal political structures and decision making processes. For example, the Tagbanuas now control the collection of user fees and the number of tourists who enter the various lakes and beaches, so as to protect the fragile habitat of the swiftlets, marine sanctuaries, and other areas that the Tagbanua consider as sacred sites. The Municipal Government of Coron for its part found itself coping with an empowered community and ended up being unable to impose its own plan on how natural resources should be managed, particularly for tourism purposes. While the Municipal Government discontinued their allocations for the maintenance of natural resources, they have continued to provide funds for social services to the indigenous peoples of Coron Island.²⁴⁹

²⁴⁷ Maurizio Farhan Ferrari and Dave De Vera, "A Choice for Indigenous Communities in the Philippines," *Human Rights Dialogue* 2.11(2004): 2.

²⁴⁸ Mayo-Anda, et al., "Is the concept of Free and Prior Informed Consent," 18.

²⁴⁹ *Ibid.*

4.5 Challenges in the Implementation of the Indigenous Peoples Rights Act

Rights create and sustain culture and by culture, we mean habits of the heart. Rights create community. They do so because once we believe in equal rights, we are committed to the idea that rights are indivisible. Defending your own rights means being committed to defending the rights of others.²⁵⁰

The current struggle of indigenous peoples in the Philippines is not only an issue of equitable access to resources or rights to a territory. Other than the legal aspect, the recognition of indigenous peoples rights should also consider the cultural capital of the resources to indigenous peoples and that all members of a society, including Government institutions, have the responsibility to be involved in advancing relationships based on trust and confidence.²⁵¹

The historical success of the Tagbanua not only in reclaiming their ancestral domain but also towards their self-governance, self-determination, and self-regulation is an inspiration to the remaining indigenous groups in the Philippines, which account for more than fifteen per cent of the national population. However, there is still a need to reconcile other existing policies and Government priorities, as indigenous rights should not be extinguished without the consent of the people concerned. Despite having free prior informed consent at the heart of IPRA, the mining industry succeeded in convincing the NCIP to weaken the FPIC provisions on the Implementing Rules and Regulations; NCIP Administrative Order 98-3 stated that mining firms with concessions that were approved prior to the implementation of IPRA did not need to obtain the FPIC of an indigenous community.²⁵²

²⁵⁰ Ignatieff, "The Rights Revolution," 125.

²⁵¹ Bess, see n. 1 above; see also K.S. Coates, "International perspectives on relations with indigenous peoples," in K. S. Coates ed. *Living relationships: the treaty of waitangi in the new millennium* (Wellington: Victoria University Press:1998), pp. 19-103.

²⁵² Environmental Science for Social Change, "Mining Revisited," Quezon City: Environmental Science for Social Change.; see also William N. Holden, "Indigenous peoples and non-ferrous metals mining in the Philippines," *The Pacific Review* 18(2005): 424; see also M.M.V.F. Leonen, A.G.G. Ballesteros, 'Introduction,' in Marvic M. V. F. Leonen and Andre G. G. Ballesteros eds. *A Divided Court: Case*

The Mining Act of 1995 creates new types of production agreements that govern the mineral deposit ownership requirements under which a foreign mining corporation would operate in the Philippines. The two major types of production agreements under the Mining Act are: the Mineral Production Sharing Agreement (MPSA) and the Financial Technical Assistance Agreement (FTAA). The Mineral Production Sharing Agreement is a production agreement which can last for up to twenty five years if approved by the DENR and requires that no more than forty per cent of the mineral project be owned by a foreign corporation. The FTAA in contrast, as approved by the Philippine President, can last for up to twenty-five years and allows 100 per cent foreign ownership of the mining property. Such weakening of the IPRA law meant that the MPSA and FTAA acquired by mining companies between March 1995 and October 1997 would be exempt from obtaining the consent of indigenous peoples claiming the land where the mining project would be located. Such a policy leaves millions of hectares of land within ancestral domains vulnerable to mining and logging companies that have pending applications that directly affect the indigenous peoples in Northern Luzon and the islands of Palawan, Mindoro and Mindanao.²⁵³

In the competitive world of mining, one of the attractions of the Philippine Mining Act is the offer of one-stop access: agreements made between the company and Central Government bypass Local Government, not to mention indigenous peoples. These deals can secure exploitation rights over vast tract of lands and other resources, as well as offer the promise to companies that, should they wish, these exploration rights can be carried through to development and evening mining. The companies identified and lodged claims over areas long before informing the affected communities.²⁵⁴

Materials from the Constitutional Change to the Indigenous Peoples Rights Act of 1997 (Quezon City: Legal Rights and Natural Resource Center: 2001).

²⁵³ Alex P. Pabico, One year after, a landmark law on indigenous peoples hits a dead end [on-line] (Quezon City: Philippine Center for Investigative Journalism, 1998, accessed 15 May 2009); available from <http://www.pcij.org/stories/1998/ipra.html>; Internet.

Contrastingly, Section 59 of the Indigenous Peoples Rights Act strictly enjoins all departments and other Government agencies not to issue, renew, nor grant any concession, license, or lease, nor enter into any production-sharing agreement, without prior certification from the National Commission on Indigenous Peoples that the area affected does not overlap with any ancestral domain. Further, no certification shall be issued by the National Commission on Indigenous Peoples without the free prior and informed consent and written consent of the indigenous peoples concerned.

Accordingly, the sincerity of the State in recognizing indigenous tenure rights is put into question, as it views the issue on the basis of economic rights to resources in the Western liberal sense or from a progressive standpoint of redistributive (“land to the tiller”) reform, rather than as a determinant of the survival of a community and their culture, the basis of the identity of indigenous peoples.²⁵⁵ For instance, the State of the Nation Address of President Arroyo in 2001 suggests that land policies, particularly the issuance of CADTs, while perceived as a benevolent gift emanating from the State, fails to reflect the aspirations of the indigenous peoples as it falls under the category of land reform rather than the recognition of time-immemorial land ownership and natural resource utilization rights of indigenous peoples. This is reflected during the State of the Nation Address in 2001, President Gloria Macapagal-Arroyo expressed her policy relating to indigenous peoples, stating (as translated from Filipino to English): *“Each year, the Government will provide 200,000 hectares for land reform; 100,000 hectares for private land and 100,000 hectares of public land, including 100 ancestral domain titles for indigenous peoples.”*²⁵⁶

²⁵⁴ Joji Cariño, “Indigenous peoples’ right to free, prior, informed consent: reflections on concepts and practice,” *Arizona Journal of International and Comparative Law* 31(2005), p. 31.

²⁵⁵ Myrthena Fianza, “Contesting Land and Identity in the Periphery: The Moro Indigenous People of Southern Philippines,” (paper presented at the Commons in an Age of Global Transition: Challenges, Risks and Opportunities, the Tenth Conference of the International Association for the Study of Common Property, Oaxaca, Mexico, 9-13 Aug., 2004), 1.

²⁵⁶ T. M. Hamada, “Between the State and Indigenous Communities: Civil Society as Political Arbitrators,” Tan-awan (2001).

In terms of governance, the NCIP is beleaguered by lack of funding and personnel in order to administer their duties in delineating and surveying of ancestral domains in other areas. The appropriated budget for NCIP is limited compared with what the DENR Mining and Geosciences Bureau for the exploitation of mineral resources which does not only subject the natural resources to environmental risk but the well-being of the indigenous peoples.²⁵⁷ There are also instances where some of the NCIP personnel have even served as apologist of mining companies in Palawan.

4.6 Conclusion

The struggle of the Tagbanua in reclaiming their ancestral title is a recognition of their self-determination, which is critical not only to their ancestral lands and waters, but also to their survival. The indigenous practices of the Tagbanuas may be viewed as a precursor of the present concept of sustainable resource management.²⁵⁸ The emphasis on rights over ancestral waters reflects the reality that to remove one aspect of their livelihood means threatening their entire culture and existence as a community. Accordingly, the reclaiming of rights to their ancestral waters symbolizes the Tagbanua's ownership to their resources, a landmark case regarded as the first in the contemporary era in the Philippines, and one that later formed the basis for the inclusion of ancestral waters in the IPRA.

In conclusion, the fundamental development of indigenous communities lies in the recognition of their rights in their ancestral domain and the preservation of their culture, tradition, system, practices and their natural resources. Development can only be achieved if it addresses the fundamental reasons behind poverty in most indigenous peoples: the absence of legal recognition of their right to ownership and control of their ancestral domain. The recognition of their rights to ancestral domain is not only a demand for social justice, but also an imperative for the survival of the life support system that

²⁵⁷ Ting, *et al.*, "Modernity vs. Culture," 105.; see also Malanes, "The Saga of Happy Hallow," 8.

underlie national prosperity and development.²⁵⁹ From the Tagbanua's testimonies, it is clear that the illegal fishing practices of outside migrants and other resource-use groups led to the depletion of the fishery resources and destruction of marine and terrestrial ecosystems. With recognition of their rights, the indigenous people have been able to define an appropriate management system in their own terms.

This reflects upon the relationship of indigenous rights and fisheries management, and notably the role of the Tagbanua as resource users and as a significant resource owner in natural resource management, showing their productive and equal participation in Philippine society. Significantly, there is an accompanying need to continually harmonize Philippine laws and regulations related to indigenous and local knowledge and practices. At the municipal level, the Local Government Units should also be oriented or enlightened on indigenous rights and other relevant policies. In the Coron case, it is apparent that LGUs still view the indigenous peoples and their ancestral rights over their domain as threats to their authority and jurisdiction. In the future, capacity building which includes reorienting the perspectives of Local Government Units on fisheries resource-use management and indigenous rights would be essential.

4.7 Recommendations

4.7.1 Support for indigenous peoples to participate in multilateral processes on sustainable development should be strengthened

The participation of indigenous peoples in fisheries planning and management is a means of recognizing their rights and safeguarding their interest in the development process buy-in and implementation. As the Tagbanua is in the process of converting their Ancestral Domain Management Plan (ADMP) into Ancestral Domain Sustainable

²⁵⁸ Mayo-Anda, *et al.*, "Is the concept of Free and Prior Informed Consent," 15.

²⁵⁹ Ting, *et al.*, "Modernity vs. Culture," 99; see also National Secretariat of the Episcopal Commission on Indigenous Peoples, "A situationer on the indigenous peoples of the Philippines and the IPRA," In The Catholic Bishops' Conference of the Philippines Monitor, 1998.

Development and Protection Plan (ADSDPP), it is recommended that reassess the existing ADMP of the Calamian Tagbanua covers regulatory framework of laws pertinent to their legal rights in the ancestral domain, indigenous punishments and customary laws, among others. Baseline studies for a sustainable fisheries management plan utilizing the traditional ecological knowledge of the Tagbanua should be prioritized. The Tagbanua has been steadfast on restricting research and monitoring activities inside the island because of misrepresentation of motives, thus, it is imperative to undergo the free and prior informed consent process. Seeking help from external agencies can help in the documentation and facilitation in the development of the ADSDPP.²⁶⁰

Similarly, the lack of education, information and training of the Tagbanua makes them vulnerable to external threats. The lack of education is related to the livelihood opportunities of the Tagbanua. Elementary schools existing in the island should incorporate environmental awareness programs. Elders should have session with Calamian Tagbanua youth, so that there is a continuous transmission of knowledge and cultural practices. Cultural integrity and identity should not be compromised. Fishers should also be aware and educated on the environmental impacts of fishing activities in relation to biodiversity conservation and sustainability. Regular involvement in meetings of Tagbanua Tribe of Coron Island Association officials in the Local Government Units will help them be aware of the adaptive management they will implement. Training and equipping the Calamian Tagbanua youth to deal with external threats and manipulations will have an assurance that Coron Island and Calamian Tagbanua culture will be protected.²⁶¹

Recognition and support from Government Units and local partners. Despite of the CADT of the Calamian Tagbanua, lack of Government support is still manifested in Coron Island (i.e. monitoring/enforcement of law on illegal fishing activities, ordinance

²⁶⁰ Sampang, "The Calamian Tagbanwa Ancestral Domain," 56.

²⁶¹ Ibid.

from the municipality recognizing their legal right over the ancestral domain can be of help to the Calamian Tagbanua to gain respect from non-Calamian Tagbanua). Help provided by external agencies like NGOs, academe, among others, are sometimes intermittent. Such programs being offered by the external agencies should therefore be holistic in such a way that if funding is already limited, there is a continuum of activities learned during the process.

4.7.2 Building partnerships that recognizes and strengthens human rights and indigenous rights agenda in fisheries management

Recognition is a two-way street. National unity, therefore, depends on equality of rights and equality of recognition: minorities recognize majorities; majorities recognize minorities. Both seek shelter under the arch of a law they can trust, since both have had a hand in building it.²⁶² This also calls for a development agenda that aims to form cross-sectoral partnership with Government departments, international organizations, bilateral agencies, non-governmental organizations working on social development issues. It will improve the well-being and empower indigenous peoples within fishing communities, thereby supporting responsible fishing and potentially enhance the contribution of fisheries to poverty reduction and food security. Such an agenda is based on strengthening human rights, strengthening access/property rights and investing in markets (in that order). Adopting an over-arching human-rights based framework for these efforts would strengthen the ability of Government fishery department and other fishery organizations to support fishing communities and indigenous peoples in securing their development, including their role in sustaining the contribution of fisheries to the wider economy.²⁶³ Undoubtedly, resource rights vested in communities are among the most potent vehicles at hand in creating those community qualities that are crucial for

²⁶² Ignatieff, "The Rights Revolution," 124.

²⁶³ Food and Agriculture Organization of the United Nations, Report of the Global Conference on Small-scale Fisheries – Securing Sustainable Small-Scale Fisheries: Bringing together responsible fisheries and social development (Rome: Food and Agriculture Organization of the United Nations, 2008), 15.

sustaining the resource, and, hence, the viability of the community.²⁶⁴ Undoubtedly, resource rights vested in communities are among the most potent vehicles at hand in creating those community qualities that are crucial for sustaining the resource, and, hence, the viability of the community.²⁶⁵

4.7.3 Harmonizing laws, ordinances, and regulations related to indigenous and local knowledge, systems and practices

Institutional assessment of the situation of indigenous peoples only reflects the overlapping functions between and among Government units. For example, between the Department of Environment and Natural Resources and the National Commission on Indigenous Peoples; and that DENR personnel need to be culturally sensitive, including awareness of indigenous and local knowledge, systems, and practices. A multi-stakeholder approach is recommended that builds cooperation among and between the National Government, Local Government Units, non-government organizations, people's organizations, and indigenous people. There is also a need to undertake cultural sensitivity trainings and provide skills training on indigenous and local knowledge, systems, and practices on research, dissemination and utilization.²⁶⁶

4.7.4 Finding ways to alternative dispute mechanisms for conflict resolution

The articulation of demands governing the use of natural resources means exercising power and the resistance to it. Hence, new social relationships are borne out of these demands which lead to new relations of power that eventually lead to an increase in possibilities of conflict. It is imperative to search for a workable conflict or dispute mechanism among stakeholders. The legal system is often relied on in providing instruments for dispute resolution. Laws are also referred to for legitimization and acceptance of rights. Mechanisms for conflict resolution should critically examine the

²⁶⁴ Svein Jentoft, "The community: a missing link of fisheries management," *Marine Policy* 24(2000): 55.

²⁶⁵ *Ibid.*

²⁶⁶ Tebtebba Foundation, "Philippine Indigenous Peoples and Protected Areas," 7.

people, resources, and institutions in a more reflective analysis. Given the experiences and apprehensions of indigenous peoples with various Government agencies, it would take a long time for them to bestow trust upon the State and Government programs.

Annex A. Treaty of Peace and Friendship (1760)

Treaty of Peace and Friendship concluded by H.E.C.L. Esq. Govr and Comr. In Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Acadia.

I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.

And I do promise for myself and my tribe that I nor they shall not molest any of His Majesty's subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty in any thing whatever within the Province of His said Majesty or elsewhere and if any insult, robbery or outrage shall happen to be committed by any of my tribe satisfaction and restitution shall be made to the person or persons injured.

That neither I nor any of my tribe shall in any manner entice any of his said Majesty's troops or soldiers to desert, nor in any manner assist in conveying them away but on the contrary will du our utmost endeavours to bring them back to the Company, Regiment, Fort or Garrison to which they shall belong.

That if any Quarrel or Misunderstanding shall happen between myself and the English or between them, and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in His said Majesty's Dominions.

That all English prisoners made by myself or my tribe shall be sett at Liberty and that we will use our utmost endeavours to prevail on the other tribes to do the same, if any prisoners shall happen to be in their hands.

And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any all designs which may be formed or contrived against His Majesty's subjects. And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.

And for the more effectual security of the due performance of this Treaty and every part thereof I do promise and Engage that a certain number of persons of my tribe which shall not be less in number than two prisoners shall on or before September next reside as Hostages at Lunenburg or at such other place or places in this Province of Nova Scotia or Accadia as shall be appointed for that purpose by His Majesty's Governor of said Province which Hostages shall be exchanged for a like number of my tribe when requested.

And all these foregoing articles and every one of them made with His Excellency C.L., His Majesty's Governor I do promise for myself and on of sd part – behalf of my tribe that we will most strictly keep and observe in the most solemn naner.

In witness whereof I have hereunto putt my mark and seal at Halifax in Nova Scotia this _____ day of March one thousand

Paul Laurent

I do accept and agree to all the articles of the forgoing treaty in Faith and Testimony whereof I have signed these present I have caused my seal to be hereunto affixed this day of March in the 33 year of His Majesty's Reign and in the year of Our Lord – 1760

Chas Lawrence

By his Excellency's Command
Richard Bulkeley – Secty

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