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REPORT ON THE PROCEEDINGS OF SOUTH COAST INTERNATIONAL INDIGENOUS FISHING SYMPOSIUM 24–26 MAY 2024 KIOLOA COASTAL CAMPUS

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Second Symposium after the Raporo AINU Nation initiative in Urahoro, May 2023
Hosted by the South Coast Aboriginal Fishing Rights Group on Walbunja Country
Sponsors: Australian National University and University of Wollongong

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Associate Professor William Fogarty
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Report on the Proceedings of the South Coast International Indigenous Fishing Symposium

24–26 May 2024, Kioloa Coastal
Campus

Hunt, J., Ridge, K., Voyer, M., and
Barclay, K.

Abstract

First Nations globally assert their fundamental human rights to self-determination, including access to, management and ownership of their natural resources.

Settler colonies deny, undermine and resist the recognition of permanent indigenous sovereignty in natural resources. In each nation state there is conflict which arises from the State prioritising the non-Indigenous users of fishery resources, be it commercial and recreational exploitation of fisheries, or tourism impacting cultural fishing.

This is a report on the second International Indigenous Fishing Symposium held at ANU's Kioloa Coastal Campus, in New South Wales, Australia, on the lands of the Walbunja clan of the South Coast Aboriginal people. It builds on the initiative of the Raporo Ainu Nation who hosted the inaugural International Indigenous Fishing Symposium 2023 in Urahoro.

The South Coast International Indigenous Fishing Symposium built on the inaugural Symposium, and the Raporo Declaration by inviting presenters to think of solutions and a new pathway to resolving the structural issues identified.

Key words:

Aboriginal, Indigenous, fishing rights, sea country, settler colonialism

Acknowledgement of Country

The research for this report took place primarily on the lands of the South Coast People and Dharawal People, and all on unceded Aboriginal lands. The authors acknowledge and pay respects to the Elders past and present and recognise how the continuity of knowledge nurtures community and Country – including this research. Always was and always will be Aboriginal land.

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Acronyms

AFN	Alaska Federation of Natives
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ANILCA	Alaska National Interest Lands Conservation Act
ANU	Australian National University
ATSIC	Aboriginal and Torres Strait Islander Commission (Australia)
CEO	Chief Executive Officer
CIPR	Centre for Indigenous Policy Research
DFO	Department of Fisheries and Oceans (Canada)
DOCIP	Indigenous Peoples' Centre for Documentation, Research and Information
DPI	Department of Primary Industry (NSW, Australia)
EBM	Ecosystem based management
EcoSoC	Economic and Social Council (UN)
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
FRDC	Fisheries Research and Development Corporation (Australia)
IBA	Indigenous Business Australia
ILSC	Indigenous Land & Sea Corporation
ICERD	International Commission on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
HRC	Human Rights Committee (UN)
KMT	Kuomintang
MMPA	Marine Mammals Protection Act (Alaska)
MOU	Memorandum of Understanding
NIAA	National Indigenous Australians Agency
NSW	New South Wales
NT	Northern Territory
OAS	Organisation of American States
PBC	Prescribed Body Corporate (under the Native Title Act, Australia)

PFI	Permanent Forum on Indigenous Issues
PNG	Papua New Guinea
PRC	People's Republic of China
PZJA	Protected Zone Joint Authority (Torres Strait)
ROC	Republic of China
TAC	Total allowable catch
TSRA	Torres Strait Regional Authority
TVH	Transferable Vessel Holder
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues

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Introduction

Fish and fishing hold profound significance within Indigenous cultures, serving beyond an important source of food and sustenance. They are deeply woven into the fabric of custom, ceremony, and social relationships, acting as a cornerstone of cultural identity and social cohesion. The importance of fish to Indigenous communities extends beyond nutrition; it encompasses health, tradition, and the strengthening of communal bonds. This common ground underscores the essential role of fish and fishing in maintaining the cultural heritage and wellbeing of Indigenous peoples. In May 2024, approximately 50 Indigenous people from Alaska, Canada, Japan, Nepal and Taiwan joined Torres Strait Islanders and Aboriginal people from the Northern Territory and the New South Wales (NSW) South Coast at Kioloa on Walbunja country for the second International Indigenous Fishing Symposium. The group shared stories and culture and gave an update on progress since the inaugural symposium held in Raporo Ainu territory, Japan, last year. Building on their shared challenges and histories, the group discussed strategy around lodging simultaneous complaints with the United Nations (UN) about the systemic criminalisation of cultural fishing.

The transcripts contained within this compilation reflect the presentations of key members of the different Indigenous groups who were present in Kioloa. They demonstrate remarkable consistency in their experiences despite their diverse geographical and language backgrounds.

Across the many Indigenous communities represented we heard how colonial systems of governance repeatedly prioritise the rights and interests of other users, such as commercial fishers, recreational fishers, and even tourism interests over cultural fishing practices, and Indigenous access to fisheries. All delegates' communities had experienced their traditional food and medicine being taken away from them and reallocated to commercial and or tourism interests, to the detriment of their physical and mental wellbeing.

These communities have separately and consistently challenged the lawful basis for this reallocation of their resources to other users with mixed success. Within colonised governance systems the colonisers have sought to define – through legal and policy frameworks – what constitutes cultural fishing and 'tradition' and in doing so seek to limit the scope and scale of customary catch and fishing practices. Walbunja man and traditional owner Wally Stewart neatly summarised their position. 'The government keeps prioritising our resources to commercial operators and not recognising our rights. It is damaging communities around the world.'

This process of cultural arbitration is fraught with contradictions, particularly in efforts to 'modernise' Indigenous peoples. For instance, cultural fishing might be deemed non-traditional if it makes use of modern equipment like motorised boats, while at the same time, efforts are made to encourage modernisation of other aspects of traditional customs, such as housing. These contradictory standards reveal the complex and often conflicting ways in which colonial authorities have attempted to reshape Indigenous identities and practices, further eroding Indigenous fishing rights.

In response to these challenges, Indigenous communities have developed a range of strategies aimed at securing recognition and protection of their fishing rights. Education plays a vital role in this effort, both within Indigenous communities and in the broader society. By raising awareness and fostering understanding, these educational initiatives, often supported by media and allies, seek to build support for Indigenous rights. Protest has also been another key strategy, serving as a visible and powerful means of asserting rights and demanding change. Additionally, legal pathways, including treaties, agreements, and civil action, provide a formal mechanism for pursuing justice and recognition. These strategies are often employed in tandem, creating a multifaceted approach to rights advocacy.

Amidst the challenges, there are also stories of success and positive outcomes. As the stories of the conference participants demonstrate, engaging with Indigenous communities in the management of fisheries has led to numerous benefits, and assisted to showcase the value of Indigenous stewardship and custodianship. These activities have included environmental restoration activities, demonstrating the potential for sustainable and culturally respectful management of natural resources. Furthermore, in a number of communities we heard about how constructively engaging with fishing rights and responsibilities has contributed to employment opportunities, economic development, and other positive social outcomes within Indigenous communities.

Throughout these discussions, a central theme emerges: the persistence and perseverance of Indigenous communities in the face of ongoing challenges. Despite the numerous obstacles they encounter,

Indigenous peoples continue to fight for their rights, uphold their cultural practices, and contribute positively to society. This resilience is not only a testament to their strength but also a powerful reminder of the importance of respecting and supporting Indigenous rights.

At the conclusion of the conference, four delegates – Mr Stan Lui, Torres Strait, Professor Awi Mona of the Seediq nation in Taiwan, Mori Ichikawa who is head counsel for the Raporo Ainu nation of Japan and Wiri man Tony McAvoy SC – formed a UN Action Committee. The secretariat will be Danny Chapman, Wally Stewart, Kathryn Ridge and Janet Hunt. This group of international delegates will work together to advance a commitment to lodge simultaneous complaints with the UN about the systemic criminalisation of cultural fishing.

Pre-conference Activities

Australian Museum First Nations Fishing Tour

The international Indigenous fishers and their support teams were fortunate to be hosted by the Australian Museum First Nations team with a tour of the First Nations fishing exhibitions, (see Figure 1 below). Thank you to Amanda Farrar from the Australian Museum, and Hayley Rivers, the Museum tour guide. Wayne Carberry, Walbunja man, met the international guests on their first day and thanked them for their support to South Coast Aboriginal fishing rights.



Figure 1. International Indigenous Fishing Symposium guests hosted at Australian Museum by Amanda Farrar

Photo credit: Hayley Rivers, Australian Museum

Dharawal Cultural Fishing Gamay Rangers

As a cultural introduction to Australia, the Dharawal Gamay Rangers and their Elders hosted the International Indigenous Fishing Symposium guests at La Perouse, landing place of both Lt Cook and Governor Arthur, inviting them to join them in shooting a mullet net, and to hear about their self-determined journey to maintain cultural fishing practices for their community of La Perouse.

Michael and Robert Cooley explained the licence process, and Rodney Ella, Barry Cooley and a number of Gamay Rangers helped explain the maintenance of Dharawal fishing practices, in their context of what is now Australia's largest port and airport, and their fight to maintain the health of their coast and continue cultural fishing practices.

The net was rowed out, shot from the rowboat, and all participants helped haul the net to shore and were very impressed with the size of the very large whiting that were caught.



Figure 2. International Indigenous Fishing Symposium guests assist in Dharawal net haul at Gamay, Botany, NSW

Photo Credit: Michael Power

The Dharawal men expressed their respect and gratitude for the Aboriginal Fishing Rights Group's extensive advocacy of cultural fishing to Robert Chewing and Wayne Carberry.



Figure 3. Koki making sashimi from the freshly caught whiting to share, Mori anticipates it will be very tasty

Photo Credit: Michael Power

After the beach haul, mullet and whiting were cooked expertly and everyone enjoyed their second breakfast and sharing more cultural fishing experiences. It soon became apparent that they had a lot in common, in terms of the reallocation of their fish resources to the commercial sector, and an environment where water quality and fish habitat, and the cultural relationships which have existed since time immemorial, are valued less than housing and industrial developments.



Figure 4. Dharawal community fishers, Gamay Rangers boat and International Indigenous Fishing Symposium Guests

Photo credit: Michael Power

The Ainu, Seediq, Iraraley Tao, and Haida fishers shared their thanks and stories about their cultural fishing journeys. Koki gifted a copy of the Report of the inaugural Raporo Ainu Nation's International Indigenous Fishing Symposium 2024, and in return the Gamay Rangers gifted a local Indigenous Rugby League jersey.

Cultural Welcome

The International Indigenous guests and colleagues travelled to Kioloa Coastal Campus by bus and were welcomed by the Walbunja clan of the South Coast Aboriginal People. A young Walbunja dance troupe gave a traditional welcome, and the Ainu, Seediq and Tao guests thanked them.



Figure 5. Walbunja clan of the South Coast Aboriginal people welcome guests to the International Indigenous Fishing Symposium

Photo credit: Michael Power

Murramarang Special Aboriginal Area

Owen Carriage, Walbunja Elder, invited the International Indigenous Fishing Symposium guests to Murramarang Special Aboriginal Area. He explained that this is the oldest recorded site on the South Coast detailing a continuity of law and custom for over 26,000 years.

Owen walked everyone around the headland, explaining the cultural sites in the landscape, the size and significance of the middens, and the species found within the middens. He described the burials, and the size of the middens before they were disturbed for development.

Syan Jayayod caught an octopus in the rockpool, which was returned to the safety of the rockpool.



Figure 6. Owen Carriage explains the cultural landscape of Murramarang Special Aboriginal Area

Photo credit: Michael Power

Symposium Welcome by Walbunja Elders, 25 May 2024

Danny Chapman

Can I welcome you all here today on the South Coast of New South Wales for the South Coast International Indigenous Fishing Symposium at Kialoa. It's on Walbunja country here in New South Wales. Walbunja is our tribal name for the local Aboriginal people here. Our boundary extends from just here, to slightly down the coast where you will travel on Monday. And I'm sure the driver will point out the different tribal boundaries as we go along.

Thank you very much for coming and attending this Symposium. We think it's really important that we carry on the really good work that was conducted in Japan last year by Ainu people – and just on that, we had some sad news about the passing of Masaki Sashima. He was a leader of Raporo Ainu people, and he passed, about six months ago, which was extremely sad for us. And we pass on our sincere condolences to you for that.

My name is Danny Chapman. I will be giving you a presentation pretty soon or an update about what I said in Japan last year. The Chair, who will arrive shortly, is Owen Carriage. He'll be here, and he will take over. The other person who's been involved with this is Wally Stewart. Wally will give a presentation pretty soon. So, I will just give an update about the agenda today.

The agenda is running a little bit late because it was supposed to open at 8.30am. At 9.00 to 9.30, Raporo Ainu national update. So that'll be pushed back a wee bit. And that will be a joint presentation. And after that, Seediq national update.

And we're going to have morning tea. Then after that we've got Haida national update. That will be Russ, Russ is on his way. We're told that he's only a couple of minutes away, and Dolly will be here with him as well. Then we'll have lunch, then we'll have Aboriginal Sea Company presentation. Larrakia for our international guests is a tribal name for people that live in the north end of Australia around Darwin. And a presentation after that by Stan Lui on Torres Strait Fishery issues; he is up the back there. And he is from the Torres Strait, which is a group of islands between Australia and Papua New Guinea.

Then in the afternoon, we're going to have Tony McAvoy and, he's a senior counsel, and helps our people out here on the South Coast in our legal endeavours to try and get our fishing rights recognised. So he's pretty much entrenched in all of that. Then we're going to have dinner. Someone's got the wok fired up outside there, so they'll be cooking out there. I don't know what's going on there.

Then on Sunday we'll have a workshop and a Walbunja summary. And, then on Monday people will have breakfast here and then we'll get on the bus and ride to Narooma, which is around about an hour and a half south of here. And, we're going on to Joonga, where Wally Stewart is going to take us on a boat ride up Wagonga inlet and talk to you about the cultural connections and all that stuff for his country.

There's Russ and Dolly now. Then after that, we're taking a bus ride to Parliament House and we're going to talk to a couple of parliamentarians who've been pretty much involved in fighting for Aboriginal fishing rights and Aboriginal rights in general, really. And that's about it.

Our Chair's just arrived and has been welcomed.

Presentations

South Coast Country Update: Wally Stewart

My name's Wally Stewart, I'm a Walbunja man from the far south coast, this country here, this is our northern part of our boundary. And I live on the southern part of the boundary.

I'm an applicant for the South Coast Native Title claim that Danny talked about, and I'm an activist for the Aboriginal fishing rights group. First of all, I'd like to welcome you all here to my country. We will make sure that we look after you and we stole some of them whitefellas' abalone out of the water and some fish and brought them here to have a good feed of our seafood. But, with my presentation, I'm going to tell you a story because I have to tell the story so you know where we are.

Ten years ago, we'd been fighting for fishing rights basically 40–50 years down here. And no one seemed to be listening. And we're all talking in our circles down on the south coast in our mob. And one day we got together and we said, 'come on, let's go and have a protest'. And, so we decided to have a protest, and that's the first protest. And it's ten years this year.

So, 180 people turned up. We're going. 'Shit! You know, 180 people turned up!' We didn't realize that was this much of a problem. We knew people were getting prosecuted and Fisheries were harrassing us, but then we realized how bad the problem was. So that's basically where the New South Wales Aboriginal Fishing Rights Group started from.

So we started getting good at protesting and then we realised that, you know, we need to keep this going and then we learned how to use the media to our advantage because the story out in the wider community was that we're just a bunch of criminals taking the resources, our fishing resources, out of the water.

And so our community kept on discussing about it and when we use the media we were able to tell the other side of the story to the whitefellas. So we kept that discussion going, and we knew that, you know, the protest and the media, we got real good at using the medium, and we played it all the time. Every time we had a protest or we done something, we made sure the media was there and then the tables started to turn, and we were able to tell the truth that we have these rights under our native title rights. But

Fisheries were ignoring them and choosing to police us under their state regulations, which, you know, doesn't benefit us.

So the Fisheries Management Act they were policing us under done a lot of damage. And then when our people were getting prosecuted, they were going to court and we had our Aboriginal Legal Services supposed to represent us, telling us to just plead guilty I'll get you six months or, you know, good behaviour bond. And we're going, 'No, you know, we need to stand up and use that section of the Act, Native Title Act, section 211, that gives us the right to fish as a defence.' So that's why it was important for us to keep having the meetings with our community, because they didn't know their rights. They were just going to court and pleading guilty because the lawyers were telling them to. So we had to basically educate our own community about their rights as well.

We kept on, you know, discussing and as these conversations kept on taking place, we realized that our culture fishing was dying. And where we live, we live on the coast, you know, 85, 95% of our food source came from the oceans and the estuaries, so we had to do something about saving our way of life otherwise if we would have kept Fisheries just prosecuting us and not doing nothing about it, our culture would have died. And it would have been gone forever.

When our culture started dying, we realise that, you know, our community, we needed to arm our community with culture practices again. This slide here (Figure 7) is one of the practices where we went back into a men's group in one of our Aboriginal villages, down at Wallaga Lake. And we taught them how to hang a net, to make a net. And then we took them out and we actually built a boat. We taught them how to build their own boat, build their own net. And where they live near water, it's one of the first official reserves in New South Wales that was set up, when in the early days of colonisation they were put there in this community, around the water and they used to, you know, access the fishing but it was taken away from them.

And that was why it was important to teach them to make a net, make a boat, then they'd go out and net that Lake for the community and share the fish around into the community. It actually did not just teach cultural practice, but it actually brought the community back together and healthy food and so that when you went to La Perouse the other day that's where some of them started from down here and we moved along the coast. And, you know, we're telling communities 'go and fish your community like you used to'. And they were the head butts we still have with Fisheries.

While this was gone along we went and seen AIATSIS (Australian Institute of Aboriginal and Torres Strait Islander Studies), and we had a chat to them and said, 'look, you know, you need to do a case study down here about what's happening down here'. And we spent, you know, I think it was 18 months to 2 years doing this case study. At the end of the day, you know, the results came back from the case study.

And the impact from the case study highlighted the damage done to our communities right along the south coast. So, the impacts on culture, the loss of culture and of course, difficulty in passing on cultural knowledge because Fisheries were hindering our way of life. They were intimidating our people. Our people weren't going fishing and handing that culture down to our communities or the younger generation. So kids weren't going fishing or taught fishing any more, and they nearly severed two generations of cultural fishing. And it was really important for us to keep fighting, to say, 'no we need to we need to start educating our mob about, you know, keeping this culture fishing alive'.

And then there were the social impacts of the case study. And, you know, showing that people who can't fish like elders. And so they was going without that healthy seafood that the younger ones gathered. And this led to poor health, which was identified in the case study that a lot of our community was low in protein and iodine that you get from seafood.

And then there was the health issues because the fishing practices that we do takes a fair amount of exercise. You know, rowing a boat and diving and stuff like that. And so our people, because they were intimidated to go fishing, every time they went fishing the Fisheries, they're turning up with the police and harrassing us or, you know, finding some way to take our catch off us. And people were scared out of the water. And that's another way that our people didn't get that culture handed down to them.



Figure 7. Phantom (Kevin Mason) and South Coast Fishing Rights Group boat, net and haul

Photo credit: Wally Stewart

It highlighted that our mob are high cholesterol, iodine and overweight, heart disease and diabetes. And then there was when they were sending them to jail, they were coming out with mental health issues, and when they were in jail our family structure was breaking down. It had a massive impact. And they had a low self-esteem. You know they were unable to provide for their families. It really done a lot of damage. The case study actually highlighted a lot of damage that had been done to our community down here. And our mob still go fishing, and it's therapeutic for our mob to go fishing. It's part of who they are. We had to just keep on fighting. If we didn't fight for our fishing rights, our culture would have been gone forever because, you know, we're sea people, Katungal – Katungal means sea people.

It wasn't easy, actually, keeping our mob informed because you've got such a massive, big area like where you were the other day up in Sydney. That's basically where our boundary starts around native title and finishes off right down near the Victorian border.

And it was important for us to keep these dialogues going with our community. Every chance we got we try to pull our community together and educate them about their rights that they had, that they didn't know about. That was a massive challenge in itself. It was hard enough for us to understand the laws that we had there, but then we had to go and interpret it to our community. So basically, this slide here (Figure 8) every chance we got to bring our community together. And we talked [...] till they were sick of me, you know, 'go away Wally leave me alone'. You know. And we kept on protesting. We just kept on protesting. And then we realised that we can keep protesting and fighting but how well are we moving forward?

That's when we set up an organisation called Joonga Land and Water Aboriginal Corporation. 'Joonga' in our language is the octopus. And the name Joonga actually came from, when the police came down or colonisation came down, and we didn't have a name for government or police or anything. And now they're always chasing our mob around them, locking them up. And mob called the police 'Joongas', because we could never get away from them, they had all these eight arms, (see Figure 8).



Figure 8. Joonga, the octopus

Source: Wally Stewart powerpoint slide

So anyway, that organisation, we started looking at funding from government to train our community. And then we talked to our community, and they wanted to work around and on water, around where they live, where they're comfortable. And we set up a training course where we did deck hand, tour guiding and coxswain, and skipper courses.

And while we're doing that, we put in a submission to get a charter boat. I didn't think it was that much work, but anyway, we done that. We ended up getting a charter boat, and we said to the government, what's the use of throwing all these dollars at us for training and there's no jobs at the end of it? You've got to be real, you know. Follow it through, otherwise it's just a waste of money. This is the boat we are going on, on Monday (Figure 9).

We were successful in getting that tour boat, with a grant from DPI (NSW Department of Primary Industries). They still play good cop/bad cop with us. And that created five or six jobs for our community. At the end of the day, they've done that training and now they're working on that boat.

The tour guiding, you know, we made government accountable: if you are going to train us give us something, jobs at the end of it. We got the grant over the line. We built the boat, that was built locally in Narooma and it's called Nar-oo-ma Aboriginal culture tours. Nar-oo-ma means Narooma where I live but, that's the Aboriginal name, Nar-oo-ma. And it means 'beautiful water'.



Figure 9. Photo of Symposium Delegates on Nar-oo-ma Tour boat

Photo credit: Michael Power

As this was going on our conversations, we kept that conversation going with our mob, the mob kept on telling us, coming back to us and saying, every time we go fishing now our water's not there? Our culture fishing grounds are damaged. And we're saying, 'what do you mean?'

You know those places, where our grandfathers handed down to us, you know, it was full of kelp and lobsters and abalone and, there's nothing there no more. And the conversation went on for a year or two and we're going, 'well, what do you think this is caused from?' We decided to do a survey amongst our mob along the south coast. They identified that there was no kelp there. And our fishing grounds were taken over by sea urchin barrens. And then we asked what do you think it's caused from? And they identified: 'Well, we know it's climate change and global warming, but we see these commercial operators, abalone industry, coming right in close and taking four or five big bags of abalone out.' And we believe our science is their science, to say that, the sea urchins have got no competition from the abalone anymore due to overfishing and so the urchins, they're taking over the reefs and eating all the kelp. So Joonga lobbied again, lobbied government and said, 'Look, you're destroying our waters with this overfishing. You know, you're still taking out 100 ton of abalone a year, we need to stop that. Our mob are saying that 50% of our reefs along the south coast are overtaken by sea urchin barrens.'

That's when we lobbied for money to train an Aboriginal commercial dive team. And now we do two programs, one with the University of New South Wales and one with DPI. And we do research on them sea urchins. So what we've identified in them fishing grounds, when we identified problems with our water, we identified some of these fishing grounds and we went in and targeted them fishing grounds.

And now we're doing research on them fishing grounds. Our guys go in and measure an area the size of this room. And then they look at all the species there. And then they'll go round and count it all and then they start removing sea urchins. The sea urchins in areas where there's no kelp or nothing, they've got nothing, no roe or nothing inside them. They're not worth anything except for fertiliser. They remove them and then we go back at another fishing site that our mob have identified. And then we will go along and do another site. Then in three months we come back to see if we have had any changes. And they're starting to see the changes where the kelp's starting to grow back because they've removed them sea urchins.

That was a program that we lobbied, and saying that, Fisheries, they had an Inquiry into invasive species. And our mob on the South Coast put in a submission and identified all these problems with our water.

And then last year, government released \$65 million to spend over five years on the south coast to look at this problem. But we haven't seen any of that money. They haven't come near us. You know, we created employment for our community anyway. And, we're still lobbying government for more funds to keep them programs going.

While this is going on, we've been saying over the years that, you know, we're sick of Fisheries coming along and telling us what to do, and, you know, and how it should be done. We've been talking probably seven or eight years now about 'let's design our own sea country plan'. I think FRDC (Fisheries Research and Development Corporation) funded that one.

We applied to FRDC for some funding to set up a Sea Country Plan and the Sea Country plan is basically about our aspirations and how we see country, because we don't fit into their fishing industry. We need to design a sea country plan right along our south coast within our boundary of our native title and lobby that document to government, to say this is what we want to see. We want to have a say in management. This is what our people are saying. This is how it can be done. That's another program that we got running now. We started this year and we've got a draft of that, and we've still got a whole lot more work to do because we want to stitch all our communities up to have input into this, into the Sea Country plan. And we've got like I said, a big area. So we kept tormenting Fisheries, as we do down here.

And then they decided to put out an expression of interest to set up an Aboriginal fishing cooperative. Because we kept on saying 'how come every whitefella can come down into our country and make money off our country and our resources and our water? And how come we weren't part of that fishing industry that you think you own?'

They had a bit of a backflip and put out an expression [of interest]. One for south coast, one for the north coast and one for out west. And so we put in an expression of interest for one down here. And we won that. And we're starting work on that this year, so we got 18 months to 2 years I think, to design a business plan, feasibility studies. So it's basically the same thing, going out and talking to our community, what their aspirations are as a fishing cooperative. And, let's see if we can put this together.

In saying that, we've already had seven Aboriginal commercial fishermen down here fishing and they chase salmon and mullet. We've got tonnes and thousands of tonnes of salmon down here that are actually a pest. But there's not a lot of money in it. But we've got seven Aboriginal commercial fishermen.

When we put that expression of interest in we went and spoke to these guys and put that expression of interest in to set up this fishing co-op. We've been working with Wollongong University to design this Aboriginal fishing cooperative. And our communities, they're real good at fishing but they never get the opportunity to expand. And so some of the aspirations that's come out of fishing industries is looking at setting up a cannery, for the salmon, getting some international chefs out and looking at experimenting with them, you know, cooking them in oils and sauces and promoting it, because the way our community fish there... it's still one of the environmental friendly fishing practices left in the world.

They use a net, they shoot the net off the sand, no reef, they target their species and get little bycatch. And they also still row the boats. The only thing that's changed over 100 years is they use four wheel drives to get their boat, net and fish off the beach.

Danny just said to remind you that our salmon here are not the same as your salmon over there. But our mob love them. We made some salmon fish cakes for you today, you can have a taste.

Along the east coast of New South Wales, DPI Fisheries got a program where they tag sharks and they put out an expression of interest. And we put one in just for fun, because we didn't think we were going to win it. And we put this stupid dollar figure on it, and, and we filled in the expression of interest. Anyway, cut a long story short, we won that. We won that tender. And, it works because we had our guys trained as the deckhand and the skippers, and so when they came back and said Joonga you've won this tender, we go, 'And we haven't even got a boat!'

We had to go and lease a boat and it cost us \$880 a day. And I went to government departments. You know, all ILSC (Indigenous Land & Sea Corporation) NSWALC (NSW Aboriginal Land Council), IBA (Indigenous Business Australia), all these Aboriginal organisations or government organisations that are supposed to support us. We couldn't get any money. It was like, they set the bar that high for this, just to get a grant over the line to buy a \$180,000 boat.

It was just rubbish, you know? So anyway, we had to lease one. It took us six months before we could actually get one. And we ended up going back to the New South Wales State Land Council, which, Danny was a chair at the time, but he had no interest in us, you know, no problem. But, anyway, it took us six months before we end up getting a loan, but we did.

It turned out we are the only Aboriginal crew in New South Wales, and we turned out one of the best crews in the state. So Fisheries play good cop/bad cop. Well, this is one of the programs that they hold their hat on, to say 'oh those black fellas down the South coast, they're deadly'. But we are.

Just to sum it all up, today with that smart drumline contract the shark tagging, so you have to have two boats. One boat breaks down, the other boat's ready to go. The program's 365 days a year, and when the sea's too rough and we can't go to work we still get paid, and we do all our maintenance and stuff on our boats. It's part of the contract. And that's the other boat we built for the charter boat. And, so if one boat breaks down and we need something to tow it, these boats are about 8.5 metres. One of them's got two V8 motors, 250 horsepower, 500 hp. They've got to do 25 knots, it's all part of the contract. And, because they're so big we've got a truck to tow it. That's just some of the things that we've done with Joonga when we got incorporated. In two years we ended up with about \$800,000–\$900,000 worth of assets, and created stuff that we needed for the community. Plus \$30,000 worth of diving gear for our guys, because of the work that we're doing. And part of that, if we go back a few steps where we talked about the Sea Country plan and the fishing co-op, our mob's identified that we want to set up a nursery and hatchery on the coast and breed these abalone in the tanks and then re-seed our reefs to fix our reefs up, it's called ranching of abalone. Then divers will play a big part in the future if our fishing cooperative comes together and our sea country plan comes together. They'll play a major part in it.

When you see the blue, that's our native title boundary, we've got a native title claim that we lodged in 2017, but we put it three nautical miles out to sea and made sure that we covered our water. And in that is 450 kilometres of coastline. But like our mob said, 50% of our reefs are damaged by overfishing, commercial fishing, and sea urchins have actually taken over our reefs.

These are some of the things we're looking forward to. Educating our community about their rights. We still do that. And we had to educate the wider community about our rights because they just thought we were thieves and criminals, and we had to explain to them that we've got rights and we've been discriminated against. The South Coast Native Title claim was lodged in 2017 and it's starting to shape up pretty well now. It's looking strong. All our evidence is coming out as very strong, we're likely to get that over the line. And the class action lawsuit is going on side by side with the native title claim, so it's pretty unique as well. And all of the members of the South Coast Native Title claim are members of the class action on the south coast.

This is just some photos up there and gives you some highlights. This is our guys out here on the smart drumline doing the shark mitigation. They were very proud when they caught their first white pointer. You get kudos and it ripples right through all the smart drum-line crew, and while they're waiting for these lines to go off, because, soon as a shark line goes off, it goes straight to a satellite and comes straight back to our phones. Then they go out and do the work on the shark. And while they're waiting for that, they're catching fish, that's a 100 kilogram marlin they pulled in while they were sitting around waiting for these lines to go off, so that's the benefits of this job as well (not all images are reproduced in Report).

This is us here, netting the lakes with the boat and the net that we made. And what we do is to share fish out with the community which you can see up there in the corner, where we take fish out to the communities and hand out fish. And when it was Covid, we were feeding up to 1600 people a week in our communities just with this net program.

That's my presentation and this says a lot, because we didn't come this far to turn our back on our ancestors, because it's like I said, if we would have just copped it up the backside with Fisheries and stopped fishing, our culture would have been gone forever, full stop. And that photo up there on the right-hand side is a T-shirt we done in 1986, when Fisheries really started hammering us, coming turning up with the police and harassing us. And that's one of the old fellas there telling them, it says 'my abalone licence was 40,000 years old'. So go and have a big coony, you can work coony out for yourself. And that's one of our mob, Burnum Burnum. He's a Walbunja man. And he went over to England. And you've probably seen that, in 1988 he put a flag in the ground and told them he's claiming England.

Basically what I'm saying our mob never gave up and they never will. We'll be fighting Fisheries or government until we die, until we start working together. And we've offered to work together, but they just don't come back and talk to us.



Figure 10. AINU Nation presenters with Jeff Gayman (middle) and Robert Chewing, Walbunja man

Photo credit: Michael Power

Ainu Nation Update: Mashi Kadowaki and Koki Nagane.

This talk was in Japanese followed by English translation by Jeff Gayman

Mashi

Hello, everyone. I am from Hokkaido, in the northern part of Japan. I am Kadowaki Mashi, a member of the Raporo Ainu nation. Please call me Mashi. I'm grateful to be here today and receive this traditional Aboriginal greeting, on the lands of the Walbunja clan.

Koki

Hello everyone. My name is Nagane Koki of the Raporo Ainu Nation. Please call me Koki. I would like to pay my respects to the traditional owners of this land upon which we stand.

Thank you very much for your warm welcome with marvellous song, dance and a walk along the beach. I felt I could get to know this land, its history and culture as a result.

At the international symposium hosted by the Raporo Ainu Nation in 2023, Danny Chapman made a powerful call for us to tell and spread the stories of our Indigenous peoples. And true to his words, we are truly grateful that this second international symposium is now being held in this way.

I'd like to tell you a little bit about myself. My parents are Ainu and my grandparents on my father's side are Ainu from Kotan villages in the Tokachi river basin. I knew I was Ainu, but it wasn't until the repatriation of our ancestors' remains that I became very aware of my Ainu identity.

When I learned that the remains of my ancestors had been exhumed and taken away by university professors and others, I felt a strong sense of outrage. As a result of the trial the remains of my ancestors were returned, and as I prepared for the reburial and its rituals, I began to think about Ainu culture and history. I became keenly aware that, living as I would like to, living as an Ainu is an amazing thing. And I am an Ainu. I'm a fisherman who catches salmon by using set nets at sea. But like my ancestors, I now want to catch salmon in the river and live proudly as an Ainu by catching salmon in the river.

I was unfortunately unable to attend last year's symposium because I contracted Covid-19 exactly one day prior to the event. But I do think that I understand the content. Masaki Sashima, the former President of the Raporo Ainu Nation, after listening to the lectures by the overseas Indigenous peoples gathered at the symposium, said that he was very surprised by the fact that Indigenous peoples around the world are still fighting for their rights, even though the world's Indigenous policies are undoubtedly far more advanced than those in Japan. The 2023 International Symposium and the Raporo Declaration have given us Ainu great courage.

I will talk about the right to catch salmon that we are trying to regain, as well as the court case we are fighting for that aim. The Ainu built Kotans – villages – in the watersheds of rivers, such as the Tokachi River and Ishikari River, where salmon run upriver. And they lived on this salmon as their staple food. After 1868 the Meiji government unilaterally deprived the Ainu of their land and natural resources. All salmon fishing in the rivers was banned, and our ancestors suffered hunger and economic hardship.

In 2020, we the Raporo Ainu Nation filed a lawsuit against the governments of Japan and Hokkaido to restore our right to catch salmon. However, in April of this year (2024), the court ruled that we, the plaintiffs, lost the case. This is a very unfair ruling that does not recognise any Ainu Indigenous rights. It is also far out of line with the common sense of Indigenous peoples around the world. So we immediately appealed. Both the law and the court only allow for the harvest of about 100 salmon, the amount they consider needed for traditional ceremonies. I think it's a contradiction in terms to say that we can't harvest salmon and only allow us to perform the ceremony.

The reason for the ban is said to be resource protection. However, the Salmon and Trout Propagation Business Association currently catches 200,000–300,000 salmon per year in the Tokachi River. They are over-catching more salmon than they need for fish hatcheries' reproduction purposes. Also, in my experience, natural salmon fry have a higher survival rate than released salmon fry, although they are smaller in size. Our ancestors never depleted salmon stocks. Conservation of the environment and resources should be based on the wisdom of Indigenous people.

Masaki Sashima fell ill and passed away two months before the verdict. We are still inexperienced as Ainu, but we are determined to carry on his legacy and continue our fight at the High Court. The issues of the ruling and our future strategy will now be reported in detail by the head of the lawyers supporting our case, Morihiro Ichikawa.

Progress in Ainu Fishing Case: Morihiro Ichikawa

On April 18, 2024, the Sapporo District Court ruled against the Raporo Ainu Nation (an Ainu group at the mouth of the Urahoro Tokachi River), denying the right to fish for chum salmon in the mouth of the river.

The decision states as follows.

1. The Ainu group's right to fish for salmon is guaranteed by Article 13 of the Constitution as a right of cultural enjoyment.

Article 13 All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Twenty years ago, in the Nibutani decision, it was held that the Ainu have the right to enjoy culture as individuals under Article 13 of the Constitution. Subsequently, the UN Committee on the ICCPR

(*International Covenant on Civil and Political Rights*) issued General Comment 23 in 1994, stating that in the case of indigenous peoples, the right to cultural enjoyment guaranteed by Article 27 of the Covenant includes collective rights. However, many constitutional scholars in Japan argued that Article 13 of the Constitution guarantees the rights of individuals because it is a right derived from the dignity of the individual, and that Article 13 of the Constitution does not allow for the recognition of Ainu group rights.

However, the court ruling recognised that Article 13 of the Constitution ‘applies equally to the relationship between a large number of groups and a small number of groups that have their own culture’, and that ‘the enjoyment of the Ainu’s unique culture is an important personal value for the Ainu people. In this case, the term ‘group’ means a historically and customarily established group called *kotan*.’ This is a commendable holding.

2. Economic activities are not included in the right to cultural enjoyment

The Rapporo Ainu Nation sought gillnet fishing in the mouth of the Urahoro Tokachi River (within a four kilometer radius) with boats equipped with outboard motors, and claimed the right to process and sell the salmon they caught.

The court ruled that the right sought by this plaintiff was an exercise of property rights because it exceeded ‘the scope of traditional ceremonies, the transmission of fishing methods, and the dissemination of knowledge regarding preservation’ and therefore ‘has a strong property right aspect’. In other words, ‘the right to fish in this case cannot be recognised as part of the right to enjoy culture or as an inherent right’, but only as an economic activity in exercise of a property right. The court also held that the exercise of property rights is subject to regulation based on public welfare, and since rivers are public property, the management of rivers and riverine organisms is subject to the discretion and legislative policy of the national government, and that the current law, the Fishery Resources Protection Law, uniformly prohibits the catching of salmon in rivers is reasonable because it is regulated from the perspective of public welfare.

Therefore the court denied Rapporo Ainu Nations’ claim.

Below are Morihiro’s comments on the ruling.

1. Problems with the Decision

(1) What is culture?

The United Nations Declaration on the Rights of Indigenous Peoples (2007) and the aforementioned General Comment 23 recognise that culture is a way of life, and that economic activity as a way of life is also culture. In Finland, the Sami reindeer herding and salmon fishing as a way of life are guaranteed as cultural rights, and in Canada, the right to fish for products that were once traded is recognised as an economic activity if it is proven (Gladstone Decision, 1994).

The Sapporo District Court clarified that culture is recognised only to the extent of ‘traditional rituals, the transmission of fishing methods, and the dissemination of knowledge concerning conservation’. Recall, however, the Japanese government’s argument regarding the resumption of whaling. The government withdrew from the International Whaling Commission and resumed the whaling of minke whales in the South Pacific, claiming that whale eating and fishing are part of Japan’s traditional culture and to ‘protect’ this Japanese culture. The government claims that culture includes ‘whaling’ activities (and that is pelagic whaling, not historical coastal fishing!). It is not at all clear why only the Ainu should be restricted to ‘the transmission and preservation of traditional rituals and fishing methods’ as cultural activities. For the Ainu, salmon is a staple food and a symbol of their spiritual culture. Where salmon cannot be freely harvested, there is no Ainu culture. The Ainu can become economically independent, escape poverty, and build an Ainu society on an equal footing with the Japanese by freely harvesting salmon.

The ruling that the right to enjoy culture does not include economic activities lacks an understanding of culture.

(2) The folly of assuming that rivers are public property

The idea that oceans and rivers are public property is a post-Meiji national view. After the restoration of the monarchy with the Meiji Restoration, the government designated the lands, seas, and rivers throughout Japan as ‘belongings’ of the Emperor, Tenno. After World War II, these were simply transferred from the Emperor’s authority to the national authority.

Today, all fishing rights are considered 'by permission', and historical customary fishing rights (the right of fishermen to fish) and other rights are not recognised.

In the case of the Ainu, the Kotan groups in various regions had sovereign control over the land, seas, and rivers until the Meiji era, when they were simply deprived of these rights unilaterally through invasion. The Ainu groups in the various regions still have authority over the illegal invasions.

The lawsuit attempted to historically clarify the pre-state control rights of these Ainu Kotans, but the defendant state refused to make any admissions and the court ignored this argument, stating that it would be a 'watershed' argument.

In Hokkaido, the understanding that rivers are public property is not accepted. This view can only justify Japan's acts of aggression since the Meiji era.

2. Fighting in the Appeals Court ... A Nationwide Issue

The Raporo Ainu Nation has naturally decided to appeal the case. In the appeal, we hope to clarify Japan's acts of aggression since the Meiji era, and in contesting the existence of pre-constitutional and pre-state authority of each Ainu group, we hope to have the court recognise that the right to cultural enjoyment includes economic activities.

Traditionally, the Ainu issue has tended to be viewed as a Hokkaido problem. This is probably because the Ainu issue cannot be grasped close at hand. However, the Ainu issue is the same issue as Japan's aggression against Taiwan, Korea, China, and Southeast Asia. Without resolving the Ainu issue, a correct summary of the history of Japanese aggression will not be possible.

This issue is a problem for Japan as a whole.

Seediq Nation Update: Professor Awi Mona

I'm Awi Mona from Taiwan, thank you for the introduction.

I'd like to begin by acknowledging the traditional owners of this Country, the custodians of the lands on which we meet today and pay my respects to the elders, past, present and the continuing emerging leaders.

So as an indigenous person from Taiwan, I'm representing one of the 16 governmental recognised indigenous nations. And my people are from the Seediq Nation. I was honoured and privileged to be able to participate at a first international symposium last year in Hokkaido with our friends.

I speak about my nation because today, the next speaker, Syan Jayayod, will be the main person to explain to you the fishing issues the Tao people face.

I will give you a very brief update on what has happened for the past year in general terms, on indigenous peoples' rights in Taiwan.

The situation of Taiwan as a government, as a political entity is very unique. The reason I say that is that, maybe you all know about democracy relations, but that's another issue about indigenous peoples because we are not a member today of a number of different international organisations, including the UN.

We are not allowed or we are not able to ratify any international documents, including international human rights conventions but instead of officially participating at the UN, the government of Taiwan has integrated domestically a number of different international human rights conventions, including two international human rights covenants – the ICCPR (International Covenant on Civil and Political Rights) and the ICESR (International Covenant on Economic, Social and Cultural Rights) – and other seven core international human rights instruments.

These are the nine conventions adopted as human rights in Taiwan. Since 2010 we've invited a number of different international experts to Asia, different treaty bodies, communities. We invited those

international experts to come to Taiwan to do a national report review under different international human rights agreements.

Since the Serge report, since 2010, Taiwan has received the recommendations, including the preservation of these international aspects, these human rights. The research reveals that despite some major progress achieved in some areas, such as the legalisation on same sex marriage and about ending a policy of the crime of adultery and the establishment of a national human rights commission, they observed that there are very important issues which remain to be achieved to accord with international human rights benchmarks.

Further, the Government has failed to materialise a number of key human rights, including the protection of the rights of indigenous peoples. Despite all our government has achieved, the international report still concluded that indigenous people still face access and rights recognition issues and the next one is a very important issue, which has been Free Prior and Informed Consent, and also stalled is Nuclear Waste Dump on their lands.

I mean, where Syan Jayayod's Tao people live is a very small island a long way off the main island of Taiwan. So, the concluding recommendation was urging the government to provide remedies for indigenous peoples affected by the use or disposal of nuclear waste and other hazardous materials on indigenous peoples' land or territories. We have a number of different fronts that we have to make it comply with, especially the UN Declaration on the Rights of Indigenous Peoples.

That's the summary. All from the international human rights community. And last month, back in April, we just finished the first initial report on the ICERD, the International Commission on the Elimination of All Forms of Racial Discrimination. This is another major human rights convention regarding indigenous peoples in Taiwan. There are a number of major recommendations regarding indigenous peoples.

We still need to make a concrete legal framework for implementation of the rights of indigenous people, including to ensure that national and local laws are consistent with UN declarations. And regarding the hunting and fishing in the international community space, the goal is to promote indigenous people's self-governance in hunting and fishing in indigenous peoples' exclusive areas, as well as hunting and fishing co-management models in shared areas.

Based on these two international government reviews, and the national report to implement international human rights, I myself for the past five, almost five years, I've been working with the people from Iraraley from the tribal communities. We are doing a research project, about how the indigenous reserves are managed locally.

This system is the national based land management system. And we tried to find a way to discover its impact on Indigenous Peoples. We took an approach from the traditional justice system of the Iraraley. This research provides some insights into legality, and how their self-governance is in line with these recommendations from the reviews.

The issue here I think is inter-legality between the indigenous law and the traditional laws. The debate over indigenous governance and traditional government started in the 1980s and has been ongoing in Taiwan. When I say debate, it is not the external debate, it will be more like internal debate within the tribal community about these debates – because these debates have tended to frame issues of indigenous self-governance and space authority in terms of binary oppositions like custom and law, like tradition and materialism, culture and nature, practice and protection, and peoples and nations. Different states will take different ideas about how we manage our lands and this ideological opposition to many conflicts over indigenous land cases in Taiwan fails to reflect the capacity of indigenous knowledge and maintenance of their lands. The main thing I want to say is that if we fail to recognise these capacities, it will result in a significant gap between the national ecosystems and existing indigenous languages and practices, which has many meanings.

What we have been doing in the past five years, we are trying to codify the traditional or the indigenous traditional laws, and of course we have received a number of different complaints, because some people will say that conflict creation will simplify the reach capacity of customary laws, as once written – it will render it more rigid and unwieldy. It may change the meaning. And another thing is, modifying indigenous law may also create a crisis. On the other hand, some parts of communities have a concern that if we make local indigenous law legible within the national legal system, the national legal system may use such laws as generally applicable statements. It definitely cannot be a new process which overrides local laws and customs, and it may have the unintended effect of simplifying the reach and capacity of indigenous customs, distorting how they operate.

Those are three oppositions, all complaints about why we want to do this. But there are also some people who want to do this, despite the qualifications. Then we are all expressing ourselves as a nation. Discussing these issues in multiple and overlapping ways is very important. Acknowledging all those vying for attention, including indigenous perspectives, is unusual in a media situation where people engage with these Indigenous knowledge holders in different ways.

I think other community members, like the younger generation making up the nation in the future, are crucial. We have been undertaking many activities. This is to bridge the generation gap or generational acquisition of knowledge. This is what we've been dealing with at tribal communities.

Thank you for listening.

Iraraley Tao Nation Update: Syan Jayayod

Professor Awi Mona translated for Syan Jayayod

By way of introduction to Syan Jayayod, I want to give you a rough idea of where that island is [refers to a map]. This is Taiwan and this is Orchid Island, Lanyu. If you took the boat from Taiwan to Lanyu, it can take to you about almost three hours by boat. But if you take the flight, it is 20 minutes.

This is kind of research model. What we try to develop is a bridge between more traditional and academic visions of the management. And we are trying to adapt the international models to the traditional, despite a lack of funds. It will be more like customary indigenous Tao relations and values. They will develop this model for their people. This will conclude my presentation.

The Tao people fish, they have law for the specific seasons and now they have a designated area where they have exclusive fishing priorities. Others cannot use it, and there will be other spatial terms like a season, location and time, but not a quantity. Yeah, not a quantity.

Hello everyone, my name is Syan Jayayod and I'm honoured to be invited to participate in this forum. I am from Taiwan, Orchid Island, Iraraley tribal community.

The meaning of Iraraley means to be a polite person. And everything about our life is surrounded by the ocean, by the fishing. The tribal order and organisation is surrounded by fishing, starting from building of their own canoe, and they have to walk together and they form very organised tribal communities.

For the traditional part, because Lanyu used to live in a house that is underground because of the wind, they had to dig underground. But after the KMT (Kuomintang), the Republic of China came to Taiwan. They built up a new house like right now, the modern houses are actually in a new area. So they replace it today with that legacy. They think that will be more modernised.

So he's saying he wants to emphasise originally the government wants to build up the new house on the traditional site but they protest. They force the government to build a new house in a new area. Not the original site.

You can tell that's the new houses that were built up by the government. And on the right-hand side it will be lot more traditional houses. If you go to Lanyu, Iraraley is on the north side of Lanyu. On Lanyu there are six tribal communities and they are all situated in each different part of the Lanyu. It's very, very clear. There is like an area between each other. You cannot cross or invade to use other people's land. Within their tribal area, they have those exclusive rights. If you cross the line, or you come into other tribal communities, there will be concrete rules.

Their houses are very close together, it's not spread out. That's the way traditionally they have to form in a very close relationship. Their community has 210 households and roughly a population of 900, and more than 90% are Tao people. Because they made up the major part of the community, they maintain the culture very well. These are the overall traditions about what is Iraraley and what is legendary.

The next one is the migration history.

That's the comparative location with Taiwan. Because they are kind of isolated from Taiwan, there are less impacts from Taiwan cultures so they can maintain more complete culture characteristics.

The Republic of China came to power in Taiwan, and they enacted a number of different laws, even though Lanyu is outside Taiwan, they still implement the national laws on the island. So after World War II, they started to assimilate Lanyu into the national cultures.

Okay, of course, Taiwan is independent. We are not related to PRC (People's Republic of China).

Syan will use a number of different pictures to show the cultural characteristics. The first one here is how they made 10-men canoe, 10-men boat (Figure 11). For the Tao people when they sail out they have two major canoes or boats, one with carving. One is a blank one without carving. If you want to use the one with carving and you have to finish all of the boat by before September. That's their law, their traditions because that boat has to go through a number of different ceremonies before they can go out to the ocean. They have to finish the boat with carvings before September. But without carvings – anytime you can do that.

This picture (Figure 11) – the reason he wants to show this – is this is his elders and those elders are the traditional knowledge keepers, they pass on all the knowledge, traditional knowledge, about how they live as a fisherman. But those elders are already passed away.

All those elders, they build houses, they make a boat just with one axe. They cut a tree, carve the wood and make a boat and do the houses with that one axe. There is no iron stuff to build up the boat. It's all with the wood. He just wants to emphasise this. There are no iron nails, it's all made up with wood.

Every family, every clan, has to build out their own boat. You have to work together so that can show your connections. The relationship. If you don't have those connections, then you will not have a boat and then you will not have the resources to go out in the ocean. That's the key to the tribal community members.



Figure 11. Syan Jayayod presentation: Lanyu boat

So these are the some of the slides I translate in English for him. So you can see this. [Not reproduced here].

You know, and this one is the very important ceremony. Whenever, the Tao people, they have the year-long ceremony to do the fish. The first one is fish calling ceremony approximately about February. Before we go out to the oceans, they have to do the ceremony on the coast, on the beach. And every family member, the male members, have to attend, and bring their boat out on the beach and do this fish calling ceremony – call the fish, come. Every male has to attend this one.

And it is a very important part of the ceremony, if we have a very young kid, a boy, when he can walk he has to join this ceremony. So the young boy, when he can walk, he has to join the ceremony and he can join the team.

The year-long ceremony will have four phases. The first is the fishing calling ceremony in February. And then they can start to go out to fish until June. So that's the end of the season you can go out to fish and then September, that's the time you can eat flying fish. And then the next one will be wait until the next year, you know, February, you call the fish to come and you start to fish. And the end of June, you cannot go out to fish and after June, before September, you have to finish all the flying fish you catch. Otherwise, after September you cannot eat flying fish. But you can give as a present to non-Tao people. So like myself, when I go, they can give it to me if they cannot eat the fish, so it is very interesting. I remember when I visit him like October or November and they will cook flying fish for me, but they cannot eat it. That's the tradition for them.

It's a taboo – they wouldn't break that. Because they believe there will be some kind of taboos. He's trying to say it is very important for them to abide by those traditions. They believe if you want to break the law you will affect the fate of your whole family. Not just yourself. Every community member.

(Question: has anyone ever broken the law?) So, two parts. First part is, because Lanyu is now a very popular sightseeing place, so they have a restaurant to cook flying fish for the tourist. And another issue is the young generations. But that's very few cases, but especially the younger generation.

And another issue is when I say the season to catch flying fish is between February till June. We see this period they only catch flying fish not any other kind of fish. After June they can start to fish other fishes. They can still eat fish, just not flying fish.

This is another ceremony he wants to show you. When they do the fish calling ceremony each family, they use the chicken blood to do that ceremony. And each family has their specific schedule. You cannot go to other families. When they finish that, they feel they will be blessed, there will be peace when they go out to the fish.

They go out to catch flying fish, that's the canoe they are using, (Figure 11). That's the one with the carving. These are the ten men boat. So that's right now they are doing the net fishing but in the past they would catch by their bare hands. Once they catch the flying fish, mostly they will air dry the fish because they can stay longer and there are specific ways they deal with the flying fish. As you can see, there's certain cuts. Yeah, there's always some custom way to deal with this air drying.

The first part is in order to, like, respond to this ongoing conflict. The tribal community, they start to form tribal meetings. They try to make up their own customs to regulate activities on their own tribal lands. This is the first action they took.

(question – inaudible)

This is an issue that you are asking about. These are a Lanyu and a Taiwan one – these are the oceans here. If you want to fish, you have to get the permit from the government. Some of the fishermen from Taiwan, they sail out a big commercial ship, they come to Lanyu and they do the fishing, they catch all almost all the big fish. And that's their traditional ocean territory. And the commercial, they always say they are under the national laws. So they got a permit. That way they can do whatever they want.

Because of this conflict of Taiwan law regarding indigenous people, especially for Tao people, area motorised boats cannot go within this area. Within this 11km area. Now, commercial boat can come close to this area to fish. After this conflict we enacted a law to protect the Tao peoples. Yeah, but like I say, within 11 kilometres is not commercial boat, but you can still use the non-motorised boat within this area. We have a small restricted area. Half of this is exclusive area, exclusive zone for Tao people. Non-Tao people cannot go into this area. So that's the protected, exclusive zone for Tao people. Yeah. That's what we do right now. So that's the existing situation.

Question: Has there been any change from global warming to the island?

For now it's not that significant.

Question: Do the continental Chinese come here to fish?

So you mean PRC? They will then come here. Only the military. ...?

Question: Do tensions between PRC and Taiwan impact on Lanyu?

Is it still under that big picture of the Taiwan tensions? But [it] is not that significant on the fish issue.

Question: Who polices the exclusion zones?

The Taiwan patrol. The Taiwan police patrol. Like always, whenever there's conflict and you have to call and then they will come to you.

But, right now we call this view, an upside-down perspective of how Lanyu should be. It's a lack of an Indigenous perspective.

This slide [not included] shows the history of Lanyu has been impacted from the Mandarin Chinese in Peoples' Republic of China since 1948 until now. So this shows different phases that people have been encountered with the Government impact. There's a very important government policy promulgated in 1966 the then ruling party is KMT, the government passed the Mountain Reserved Land Management Regulations. The aim of the Mountain Reserved Land Management Regulations is to improve the life of mountain tribes in Lanyu. So, as you can see from the title, this already has a racist idea of the Lanyu people, that they needed their lives improved. And after that, 1967 and especially in 1971, the government opened Lanyu as a tourist destination and lifted restrictions on mountain areas, because before 1970, non-Tao people, except if you are Government official, you are not allowed to go to Lanyu. After 1970s, they designated it as a tourist spot and people started to come to Lanyu.

Question: [What is the] difference between KMT & PRC?

The KMT is an opposition to PRC, but you can imagine if they have a nuclear waste facility there and they also made out beforehand that the highlands would be the national park.

In around 1990s in Taiwan we have indigenous rights movement. It was not just the specific indigenous people, it's the whole island, it is the whole of Taiwan. One of the claims is to expel the nuclear waste facility, and they use the idea to expel the facility, to expel those. They made the facility go away. So they made these rights come. Those are the traditional houses, how they used to live. They stay in those kind of houses until 12 years old, sixth grade.

If you ever visit Lanyu, there's only two communities [where] you can still see those traditional houses. One is his community; another is another tribal community. But they are the tourism spots. The reason they can keep their homes was that they protested to the government. The government, after their protest, they think it may be worthwhile to maintain to let the tourists come and see what the traditional way looks like. That's for another purpose. If you go to Lanyu there's only two locations, you can still see that.

So this picture shows here the traditional fishing performance, ceremony of fishing, or ceremonial dancing whenever they have a big boat. The people go to the ocean after fishing ceremony. And this, the traditional outfit for their people. You can see their very good bodies.

Question: Do the women have a specific role?

The male goes to the ocean. The female does the farming. That's the how they distribute the work. And one thing is that the men, they divided fish into different categories. They have elder's fish, women's fish and kid's fish. Each generation and genders eat different kind of fish.

And the male [does] not eat the delicate kind of fish. The more delicate fish goes to women and elders. And the male eats the most rough type. And the females also go to the ocean to walk the shoreline, that's the main work. Thank you.

He [Syan] thanks you for your patience we hope we can all work together to make indigenous culture shine for everyone. Thank you.

Haida Nation Update: Nang Jingwas Russ Jones

Strategies to Assert Title and Fishing Rights in Haida Gwaii

Sii.ngaay 'laa. Good day everyone. Today I'll be giving an update on the presentation that I made in Hokkaido. I'll repeat some of the background because not everyone was at the event in Hokkaido.

Then I'll give an update on five topics:

- First is an agreement that the Haida Nation just signed with the province of British Columbia, where the province recognised Haida title, which is ownership of lands in Haida Gwaii.
- Then I'll talk to you about our ongoing work to gain access to commercial fisheries in our waters.
- And similar to the presentation that Wally Stewart made, I'll talk about some of the stewardship work that we're doing, or 'boots in the water'. I know you have variety of programs here. We have similar programs.
- And then I'll talk about some work which was recently completed, which is a Haida Gwaii herring rebuilding plan. This was a co-management initiative that was completed in this last month, after about three or four years of work.
- As well I'll talk about our ongoing work on marine protected areas and ocean planning. I did talk about this in Hokkaido, but there's been some progress.

In closing, as requested by the organisers, I'll talk about the strategies we've used that have been successful. And these include legal, political, and direct action and how that's opened up opportunities for our Nation in self-determination, as well as economic development.

Background

Canada borders three oceans. Haida Gwaii is located on the Pacific coast in the northern part of British Columbia. There's also an Atlantic coast, as well as an Arctic coast. Indigenous people make up about 4.9% of Canada's population. On the Atlantic coast there are historic treaties, but there's still outstanding issues around fishing rights. And in the Arctic there are modern land claim agreements which deal mainly with land. But there's also some fishing issues which are yet to be fully resolved.

On the West coast, where we live, a few historic treaties were signed and there's a few modern treaties. But most of the area is not subject to treaties, and that includes Haida Gwaii and the Haida Nation.

The map (Figure 12) shows Haida Gwaii which translates to 'Islands of the People' in our language. In 2009 the Province of British Columbia agreed to restore the original name of Haida Gwaii to the islands. The colonisers had called them the Queen Charlotte Islands. So now it's recognised by our Indigenous name.

We have two main villages in Skidegate and Masset. We lived in villages throughout the islands, and it was mainly due to population loss from smallpox and other diseases that we consolidated into these two.

Our culture is well known for the use of red cedar for canoes, for totem poles, and also for long houses, as shown in the picture. And we're very connected to the ocean and to the land, and this slide (Figure 12) shows some of the Haida values have been used in the planning work that we've done. One of our values is *yahguudang* which means respect. We believe that all living creatures have a spirit. *Yahguudang* guides our relationship with each other as well as with all living things.

We have our own government, the Council of Haida Nation. We adopted a Constitution in the 1980s. Our governing structure has been in place for about 50 years. We have an elected council and their mandate is to implement Haida title and our rights, working with Canada towards a treaty or reconciliation agreements. All persons of Haida ancestry are citizens of the Haida Nation. There are also other governing structures. There are two village councils that represent the two villages, as well as a hereditary chiefs' council. I'm one of the members of the hereditary chiefs' council. There are 18 hereditary chiefs in Haida Gwaii.

Haida society and culture



Figure 12. Haida society and culture

Source: Russ Jones powerpoint slide

Haida Gwaii is rich in fishery resources. You can see some of the species on the map on the right [not included] including salmon, herring, halibut, black cod, Dungeness crab and many other shellfish species. It's quite a rich area for fishing and not long ago accounted for about 20% of the commercial landings of fish in British Columbia. The value of the fishery was more than \$80 million a year. Historically we would move seasonally to different fishing camps around the islands, to catch different fish.

Recognition of Haida Title Lands in 2024

Next, I'll talk about the recognition of Haida title lands that occurred this year. The 1997 Delgamuukw decision laid out a test to prove Aboriginal Title requiring that the territory was occupied to the exclusion of others in 1846. We have no overlaps with other First Nations on the land and in 1846 there were only a handful of non-Indigenous people living on our island. We filed a title case in 2002, claiming both title to the land and also the marine area and marine resources. A trial date was recently set for 2026. Over the last 20 years a lot of work has been done to prepare for the trial including exchange of evidence between the Crown and the Haida, and commissioned evidence, such as interviews with elders. Both Canada and the Province (British Columbia) were well aware of the evidence that we could bring. As well, in 2002, we won a court case that stopped the Province of British Columbia from transferring a forest tenure from one entity to another because of Haida title. And the court determined that we had a good prima facie case for title for Haida Gwaii.

Canada's negotiating approach changed from requiring extinguishment of rights, through a treaty, to recognition of rights in the mid-2010s. The Haida Nation signed the 'Changing Tide' Framework Agreement with Canada in 2021, for how we would work together. It recognised the ongoing title case but the parties committed to make efforts to negotiate the issues. And in keeping with this, earlier this year, the Province and Haida concluded an Agreement where the Province recognised Haida title to Haida Gwaii. And it was ratified in a Haida assembly. We had 95% approve the Agreement by vote. This was followed by an Agreement signing, as shown in the photo [not included]. That's the Premier of British Columbia along with the President of the Council of the Haida Nation.

The map (see Figure 12) shows the area covered by the Agreement. The northern two-thirds of the island is the land area that the Province was responsible for. The lower one-third is Gwaii Haanas National Park reserve and the National Marine Conservation Area, and Haida Heritage Site. And that's considered

federal land. So the Agreement didn't address the federal lands. But it includes submerged lands, which were within the laws of the land. Those are areas where tenures might be issued for forestry such as log booming or docks or activities such as aquaculture. The Agreement recognises Haida title throughout Haida Gwaii and the Province passed legislation last week that acknowledges Haida title for Haida Gwaii, and the Agreement identifies a two-year transition period to Haida jurisdiction. So it's not an immediate change. Currently it's under the Provincial Crown Land legislation but in two years it will transfer over to complete Haida jurisdiction for the land. The Haida have recognised private property rights and that makes up 1.7% of the land. The other 98.3% will become Haida title land.

The province commits to maintaining existing government services and infrastructure on Haida Gwaii. Also, the parties have agreed that some of the priority areas to address are the management of protected areas. About 50% of the land area is protected area, and about 90% of the of the shoreline is also protected. So, how management would work under Haida title is an important issue. Other priority areas are fishing lodges in Haida Gwaii and also the remaining forest tenures. The Haida Nation already controls about half of the forest tenure area in Haida Gwaii, and so the other half would now be under Haida title.

Commercial Fisheries Access

I reported in Hokkaido some of the legal cases which have been quite important in terms of guaranteeing our rights for food, social, ceremonial purposes. This slide [not included] focuses on commercial access, which continues to be negotiated. The important thing is that the commercial fishing rights are proven on a case by case basis. Even though the Heiltsuk Nation and five Nuuchah-nulth Nations (including Ahousaht) have proven commercial fishing rights, Haida and many others haven't proven their commercial fishing rights in court. Some commercial fishing is recognised through modern treaties. The Nisga'a Nation through an agreement separate from their treaty has access to a percentage of salmon returning to the Nass River system, as well as other commercial fisheries in their territory.

Canada has pursued transfer of commercial fishing access through buy-back programs. These are programs to buy-back fishing licences and quota and transfer them to First Nations. For example, in 2004 I was involved in a First Nations Panel that looked at fishing in British Columbia. We wrote a report *Our Place at the Table* that recommended transfer of commercial fishing access to First Nations. A minimum of 50% of commercial access was what we recommended. The Pacific Integrated Commercial Fishery Initiative, which came about as part of that report, was expected to transfer about 15% of commercial fishery and quota to First Nations in the first five years. Transfers were done through agreements with individual First Nations, outside the treaty or reconciliation process. The Haida Nation was a party in a reconciliation agreement, which was signed in 2019, that provided funding to acquire fishing licences and quota for a new Indigenous-owned commercial fishing company. Some of that access is being provided to develop new community-based fisheries that can catch and sell of fish under more flexible rules than the existing commercial fishery.

Stewardship – 'Boots in the Water'

Next I'll talk about some of the stewardship programs that we have. I previously spoke about Gwaii Haanas which is a National Park Reserve, National Marine Conservation Area, and Haida Heritage Site. We established watchman sites in those areas to protect historic village sites. We've also established watchman camps at the north end of the island that focus on recreational fishing. There are village sites there, but we run a creel program that monitors recreational fishing catch and effort.

A Haida Nation Fisheries Program has been in place for over 30 years. This employs biologists, technicians and field staff and funds projects as part of Fisheries and Oceans Canada's (DFO) Aboriginal Fisheries Strategy, which provides capacity for fisheries management. We've also had a Marine Planning Program in place since about 2008. This group has been involved in Ecosystem Based Management (EBM) monitoring, protected area planning, and monitoring of shipping. Core funding is provided through several other Canadian government programs, including DFO's Aboriginal Aquatic Resource and Ocean Management Program and the Oceans Protection Plan. We have staff that are employed in protected areas. Parks Canada employs 20–30 full time staff in Gwaii Haanas and about three-quarters of those are Haida.

Haida Gwaii Herring Rebuilding Plan

Next, I'll talk about the Haida Gwaii Herring Rebuilding Plan. This is essentially a co-management plan. The Rebuilding Plan was developed collaboratively with Parks Canada and Gwaii Haanas as well as DFO. In terms of history, the herring spawn-on-kelp fishery is both an important Haida food and trade item. The herring fishery has experienced conservation issues in the past. Herring fisheries collapsed coastwide back in the late '60s. When the fisheries reopened, a new roe fishery along with a commercial herring

spawn-on-kelp fishery began, the latter with mainly Haida licence holders. Then in the mid-1990s we began to see declines in the stock and fishery closures. When DFO tried to reopen fisheries in the area, we had Haida blockades to try to stop the fishery. Again in 2014 and 2015 there were signs of rebuilding and again DFO tried to reopen the area for fishing. We reached an agreement in 2014 with industry not to fish in the area. In 2015, we were able to get an injunction that stopped the federal government from reopening the area.

This is all context for why a Rebuilding Plan was needed. But the federal government didn't agree to develop a Rebuilding Plan until 2018. We've worked on this Rebuilding Plan for about five years now and it was finally agreed to this month. A working group met every month or two, throughout Covid, to develop the Rebuilding Plan. We jointly engaged in a public process to engage with the herring industry as well as community members about the draft Plan.

Figure 13 shows some of the policy drivers for the Rebuilding Plan. Haida ethics and values were important aspects, but also the reconciliation policy of the federal government, to work with Nations. DFO has a sustainable fisheries framework and they recently put in place requirements under the federal Fisheries Act, to develop Rebuilding Plans if fish stocks fall below a certain level. As well there were commitments in the management plan for the Gwaii Haanas area to develop a Rebuilding Plan for herring. So, there were a number of drivers on the federal side to develop a plan.

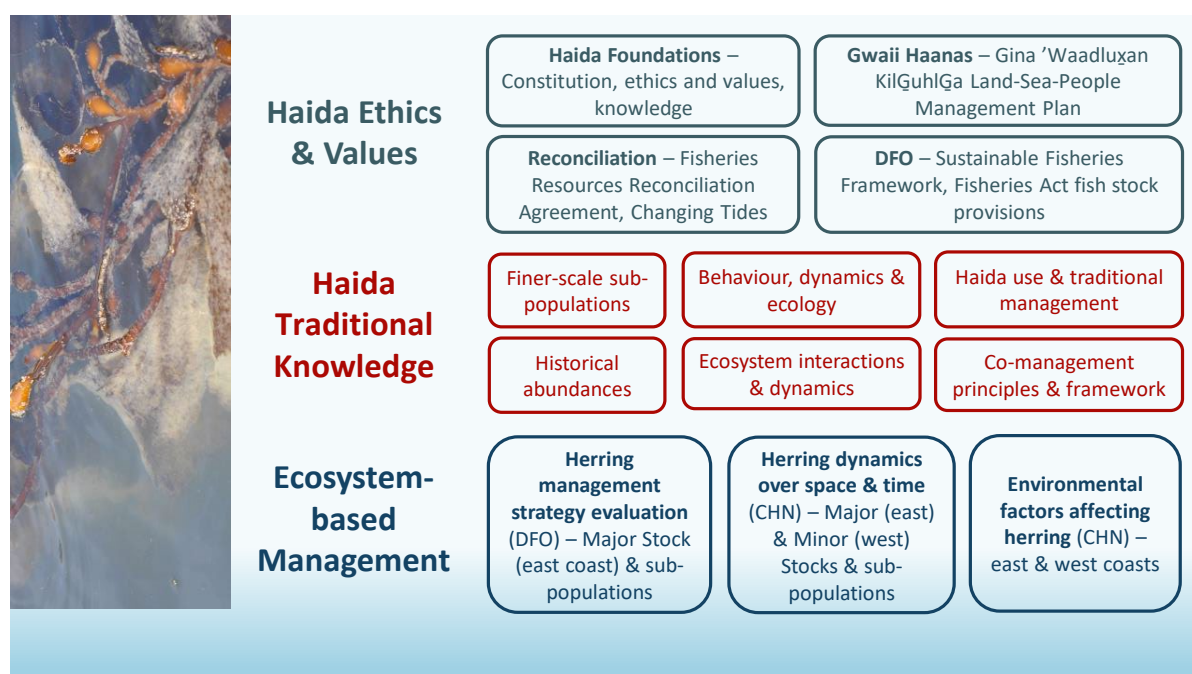


Figure 13. Haida ethics and knowledge

Source: Russ Jones powerpoint slide

I'll talk in a minute about the use of Haida traditional knowledge. The Rebuilding Plan made efforts to incorporate EBM, which was one of the Haida values. There were three studies done to support the Rebuilding Plan, one by DFO, and the others were led by the Haida Nation and were done externally to Canada.

Haida traditional knowledge was incorporated into the plan in several ways. The photo [not included] shows Haida harvesting herring spawn-on-kelp in Skidegate in 1897, over a century ago. In recent years DFO has managed herring in British Columbia as five Major Stocks including one in Haida Gwaii but we think of herring as being made up of many small populations. In the Rebuilding Plan we were able to reach agreement to look at herring as a grouping of smaller populations rather than a large aggregate stock.

Traditional knowledge also informed the reference points or historical baselines that were used as triggers for management action. The modelling didn't previously consider [the] herring spawn-on-kelp harvest as being different from a roe herring harvest. In the herring spawn-on-kelp fishery the fish spawn

on the kelp and many survive to come back to spawn again the next year. So it's more precautionary than a fishery that kills the fish to take the roe.

Traditional knowledge also documents information about ecosystem changes and informs decision making for co-management.

Figure 14 shows key changes in the Rebuilding Plan from past management. The Rebuilding Plan considers the finer scale spatial structure of herring populations. The Major Stock which is shown in purple, instead of being considered one aggregate stock [it] is now seen as three sub-stocks. And the Minor Stock, the blue area on the west coast, instead of being considered one area is now managed as five sub-stocks.

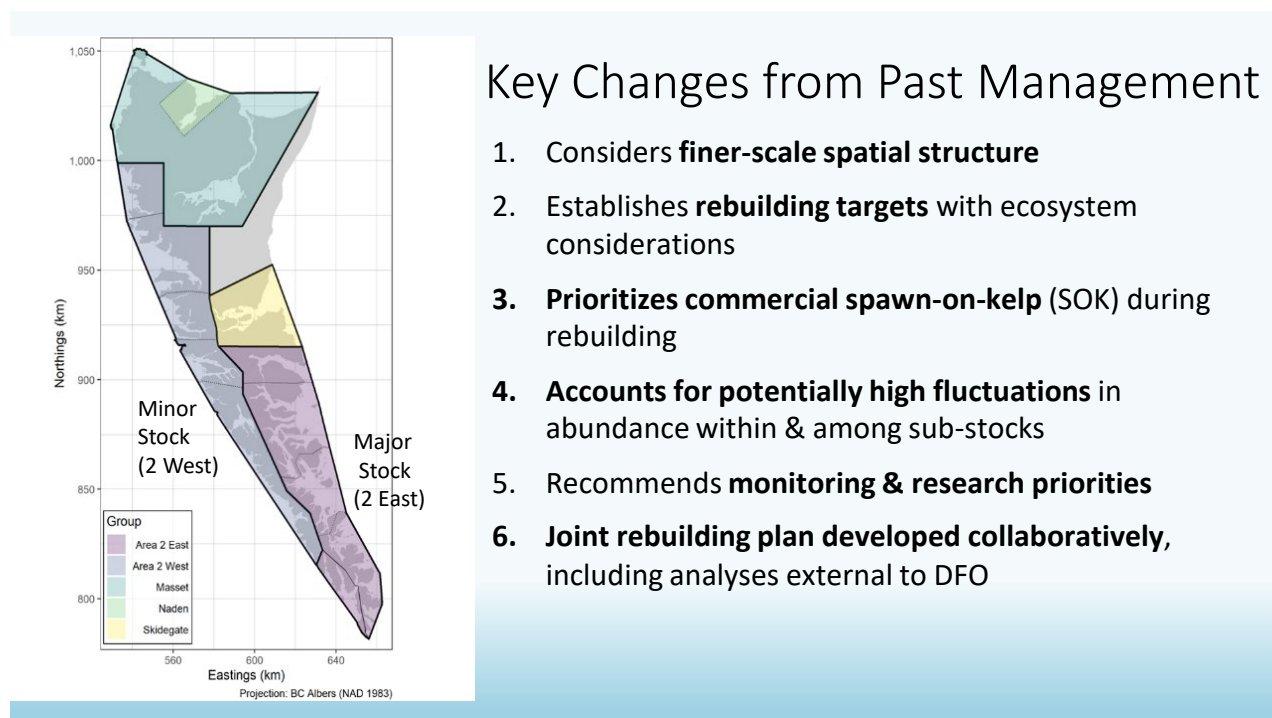


Figure 14. The Rebuilding Plan

Source: Russ Jones powerpoint slide

We've established targets and goals for rebuilding. We've also prioritised the commercial spawn-on-kelp fishery during rebuilding. We won't consider roe fisheries unless some new analysis shows that it could be sustainable. The management framework accounts for potentially high fluctuations in abundance across sub-stocks. This was informed by the analysis that was done for the Haida Nation by external scientists. The Rebuilding Plan recommends priorities for monitoring and research. In the past fishery management plans have not been done collaboratively (aside from razor clams as mentioned in Hokkaido). This is one of the first fishery management plans which will be signed off by the Haida Nation and Canada.

Marine Protected Areas and Ocean Planning

My last topic is about our work on ocean planning and management including marine protected areas. We've developed plans for the Haida Gwaii sub-region of the Northern Shelf Bioregion, that's the area shown in blue, as well as Gwaii Haanas in southern Haida Gwaii. These plans were signed in 2015 and 2018. There are two offshore areas, one is SGaan Kinghlas-Bowie Seamount protected area and is established. The other is Tang. gwan-hačx^wiqak-Tsigis marine protected area which extends southwest of Haida Gwaii, and is in progress. The Haida Nation along with other First Nations, Canada and the Province of British Columbia approved a Network Action Plan for the Northern Shelf Bioregion in 2023 that identifies a number of coastal sites for protection in Haida Gwaii. We're currently in the process of developing management measures, designating the sites through legislation, and putting management plans in place. The timelines to develop those plans are the first batch by 2025 and then the second batch by 2030.

Strategies for Haida Rights Recognition

As I reported in Hokkaido, we've used a mix of strategies for Haida rights recognition. This has included litigation such as the Haida Title case, or using legal precedents that other Nations have set. Negotiated agreements such as the 'Changing Tide' Reconciliation Agreement or management plans have been co-developed and signed off by Haida as well as Canada. And we have also used direct action. In some cases, we've had to go out to make our position known about herring fisheries or logging.

An essential aspect has been our internal governance system and self-determination. We have an internal process that we work through in order to bring a position forward to Canada and to negotiate issues. Canada's policies have been important in that they've changed from one of extinguishment of rights to recognition of rights; and also taking an incremental approach to reconciliation through interim agreements. We've been able to negotiate a series of government-to-government agreements, which will eventually contribute to a reconciliation agreement or a treaty. A driver for negotiations is that the Haida Title court case is now scheduled for 2026, that is expected to address outstanding issues. And these may include marine issues and commercial fishing rights.

It's been important for us to work collaboratively with other First Nations, whether it's on new protected areas or getting funding commitments from government or philanthropic programs.

In closing, our journey to assert Haida title and rights and to reconcile the injustice of colonisation with Canada, is ongoing. Those injustices include the loss of territory, political domination and cultural imposition. We're taking steps in all those areas to address those injustices. In that regard we're in the similar situation as many other First Nations around the Pacific. That was impressed on me by the conference organised by the Raporo Ainu Nation in Hokkaido. *Haawa*. I thank you for this opportunity to share our story.



Figure 15. Russ Jones and Dolly Garza sing traditional Haida songs as a very generous and valued cultural contribution to the Symposium

Photo: Michael Power

Alaskan Native Update: Dolly Garza

So, Russ and I did those two songs before his presentation (see Figure 15), and the first song was a peace song to let you know we're here in peace. The second song was part of our ritual, and I should have asked you not to record it, but it shouldn't go out on the internet or on any public venue, the spirit song that we did, because those are deeply, culturally embedded in our Haida culture. So I hope you take that into account.

Russ did a fabulous talk on the Haida rights and title. And it's an easy talk to give because they have done so much. The Haidas in Canada have led the charge in many areas for fisheries management and for being recognised as a person at the table. This is not so much for the Haidas on the Alaska side. Our territory extended from Haida Gwaii into the southern part of Alaska and that's where my family is from. And so my presentation is: How do you still have access to those fishery rights? How do you still have your culture carried forward when there is no treaty, when there are no guaranteed rights?

So just a quick summary. Alaska was purchased in 1867 for \$7.2 million from Russia to the United States – who knows why Russia thought they owned it? It became a territory in 1912 and then became a State in 1959. Russia sold Alaska, there is a photo of the Tlingits outside of Sitka on canoes where the transfer took place. They were showing their displeasure with the transfer of their property because it was not the Russians' right to give that property or to sell it to somebody else.

So when Alaska became a State, when any state becomes a State, the United States gives them X amount of land, and that's for a State purposes. Part of that agreement said that the State must not disclaim any rights entitled to the lands and other property not granted or confirmed to the State, including the right of title which may be held by Indians, Eskimos or Aleuts or by the United States for their benefit. And that is the closest thing we had to a treaty. And that was something that you will see that we appear to have given away.

After statehood in 1959, there were several actions by Native groups around Alaska to file claims and to protest the transfer of land to Alaska when the issue of Native title had not been resolved. This led to the creation of the Alaska Federation of Natives (AFN); it brought all of the Alaska Natives together at one table, (see Figure 16). It had never been done before, and it was very critical to all future actions. They started working with the Secretary of Interior, Stewart Udall, who will forever be a blessed man in our eyes, as they convinced him that he should put a moratorium on the transfer of any land to the State until the issue of native claims was settled.

At that same time, or simultaneously, one of the reasons Alaska pushed for statehood was the exploration for oil and the news coming back was that there was lots of oil on the North Slope and we had to get access to it. We beat America with this earlier moratorium. And so the pipeline was drafted out and the State of Alaska began claiming rights to the land, along the whole route of the pipeline so that they would incur the benefits from taxation for use of the land.

Two important things happened was that the Udall's moratorium on the Alaska State land transfer held. The State of Alaska filed suit against the Secretary of the Interior, but it held so they couldn't receive any of that land until Alaska Native claims were settled. It could have been a very long, drawn out process but the two major oil companies then, being very business minded, said, 'We're supporting the Natives. Let's go forward'.

It forced the State of Alaska to sit down and say, okay, we're going to resolve Native land claims. It's something that happened from the beginning: to when that agreement was made to the end in about 18 months. Alaska Native Claims Settlement Act. It was amazingly quick. There are numerous issues that still exist with it, but it was the decision through AFN (Alaskan Federation of Nations) that we have the oil companies on our side. As long as we have them on our side, we're going to be able to go forward. And so they did.

So, then it became public law in December 18, 1971. Keeping in mind that Alaska had no treaties, the natives of Alaska had no treaties with United States by the time Alaska came into statehood, the US had determined that treaties didn't work. It didn't work for them. It did work for some Native groups. So with the Alaska Native Claims Settlement Act (ANCSA), it was considered a new approach to resolving native claim issues. It has no Indian reservations. The land and money were transferred to newly created for-profit Native corporations. Okay. It did not transfer anything to any tribes. It did not create any new tribes, but it did not extinguish any.

And federal trust responsibility to Alaska natives continued. Those trust responsibilities were not removed. And then more importantly the rights to fish and wildlife, though not outright guaranteed, were referenced that they did exist.

So what we received in 1979 was 44 million acres and not quite \$1 billion. This was divided amongst the 12 regional corporations, and below that were village corporations. And if you were a Native in Alaska at that time and you could prove what village you were from, then you were enrolled into the village corporation as well as to the regional corporation.



Figure 16. Alaska

Source: Dolly Garza powerpoint slide

If you were born the day after that Bill was signed, you didn't count for anything. So, we had ANCSA in 1971. We had this reference to the right to fish and game that was unclear. But there was in 1980, a separate bill was passed: the Alaska National Interest Lands Conservation Act (ANILCA).

The purpose of that very broad, sweeping Act was to protect lands held by the federal government, for conservation purposes. And as you can see on this map two-thirds of Alaska is federally owned. So as part of that Act, and it didn't have to be there, but part of ANILCA was this section that said that we would address Native fishing and game access rights.

And what happened was it became not a Native right, but a rural right. And so residents in rural Alaska, whether or not you're Native or non-native, have the right to access resources as a priority over other users. And this is what we have. It depends on, well, there's lots of regulations and policies, etc., but it required that you have customary and direct dependence upon the resources, that you have local residency in the area, and whether or not you have the availability of other resources. And so instead of having these rights to fish and game, we had the opportunity to access fish and game if we lived in rural areas.

So, what does it look like then? The big picture is under 150,000 people in Alaska live in rural Alaska. It's not a huge population that has first priority to these resources. On the average, and these numbers are old,

those 150,000 people harvest about 44 million pounds of fish and game. It's about 375 pounds per person, and the replacement cost some time ago was about \$220 million. It's probably doubled now.

And this amount of harvest represents only 1% of all fish that is harvested. All the rest is harvested by commercial or by charter. And it represents 4% of game harvest, all the rest being harvested by just the general population and people that come in and hunt from outside of Alaska.

And so the take of fish and game resources by rural residents, most of whom are Native, is relatively small. But the taking of those resources can be very contentious nonetheless. And so this is what it looks like. 60% is for fish, 20% for land mammals, 14% marine mammals, then birds, shellfish, plants. And all of the resources are used by rural residents, to different degrees depending on where you live.

Getting back to our right to fish or to hunt based on being a rural resident falls under the federal government on federal lands that involves a large structure. It involves the Secretary of Agriculture and Interior. There's a five-member subsistence board. The important part is the regional advisory councils. And I'll get to that in one second. They're very important.

The Board is composed of the agency heads and one chair. That one chair, though not legally defined, has always been held by an Alaska Native. And the federal subsistence board is considering expanding their board size to allow several more rural or Alaska Natives on that board. The Board approves customary and traditional use determinations, they determine bag limits and seasons, the whole body of that. However, they have to rely on the recommendation of the regional advisory councils. They **must** defer to the subsistence regional advisory council's recommendations related to the taking of fish and game, which is very important, because it has worked to rural residents' and Native residents' benefits.

The regional advisory council is the key to the success of this whole program. I was on one of the regional advisory councils, and to be on that council, you have to live in that area. You have to have a very good knowledge of the resources. You have to either be a hunter or a fisher or a berry picker or a knowledge holder of that information.

And you meet twice a year, one time to look at proposals, one time to make recommendations on them. But the important thing there is that it is largely local people who are writing proposals, then locals who are reviewing the proposals and making recommendations on the proposals. The Federal Subsistence Board are required to follow those recommendations unless they see some legal or conservation reason not to follow them.

In a nutshell, a lot of today's access to fish and game on federal lands are determined by localised, customary and traditional determinations. So, if you're a rural resident then probably you can access those resources as part of ANILCA. However these subsistence rights were an add-on to the Land Conservation Act. And it is something that could be removed by the federal government.

So, it's not a treaty right. It's not a guarantee. It's something that now is still advantageous to rural residents of Alaska. The State of Alaska, which owns one-third of Alaska, has some level of local priority. They have subsistence and personal use language which should benefit Alaska residents before charter operators or commercial fishermen are benefited. That doesn't always work. But it's what we have.

So continued access and participation requires continued involvement with the federal regional advisory councils and continued involvement with all levels of the State of Alaska Fish and Game Board process. So, it's a lot of administrative stuff. It's a lot of commitment to time. And there are no guarantees that you're going to walk away with what you want.

Separately, there are several Federal or international laws that limit resource access to Alaska Natives only. I listed two of them, the Marine Mammal Protection Act of 1981, and the International Whaling Commission. As international or national laws they restrict access to user groups. And in our case, it was to Alaska Natives. And again, these laws that I'll be talking about are not absolute. They could technically be changed. The likelihood is hard to say.

The Marine Mammal Protection Act (MMPA) of 1980 was this broad, sweeping Act that said there will be no further take of marine mammals in any US waters for any reason. This was in response to the tuna net harvest fishery off California that was killing porpoises; and because manatees that were being hit and killed by boats in Florida. It was a broad sweeping conservation effort. They made two exceptions to that rule. One was for scientific purpose, what the SeaWorlds use to bring marine mammals into captivity for display. The second was for Alaska Natives residing in rural Alaska. And it was amazing because that section 119 is relatively small. It was put in there by Alaska's Senator and, whether or not intentionally or

unintentionally, provided the hunting opportunity but did not give the federal agency the right to regulate. And that just opened the door to amazing opportunities.

Section 119 of MMPA assures Native hunting rights but does not give the federal agency the authority to regulate the Native hunters. Fish and Wildlife and National Marine Fisheries Services both said 'that can't be possible if we're managing a resource for conservation purposes. We have to be able to regulate take, we have to be able to set seasons and bag limits'. And the federal government said 'no'. That number of hunters is so small and spread out that there shouldn't be any conservation issues. And so we moved forward without regulation – it was amazing. Alaska Natives got together, and based on a few legal issues, started creating our own Native marine mammal commissions. I was on the Alaska Sea Otters Steller Sea Lion Commission since it was created and probably was on there for 20 years.

We have the Eskimo Walrus Commission, Polar Bear Commission, Harbor Seal Commission and others. These Native bodies fill the conservation void. The Commissions basically said, you can't regulate us, so we're going to create our own management plans. We're going to step forward, and we're going to do what you can't do, and we're going to do a better job.

As an example, at the Sea Otter Steller Sea Lion Commission, we worked on assisting tribes in Southeast Alaska or the Gulf of Alaska or the Aleutians, where there were sea otters, in developing their own management plan for sea otters. And this was important because it showed the Fish and Wildlife Service that, no we don't need you, we can do this ourselves. This did not sit well with the federal agencies. I was active at that time, and they just couldn't stand the thought that these management plans were being created and implemented without them, and that they have been successful.

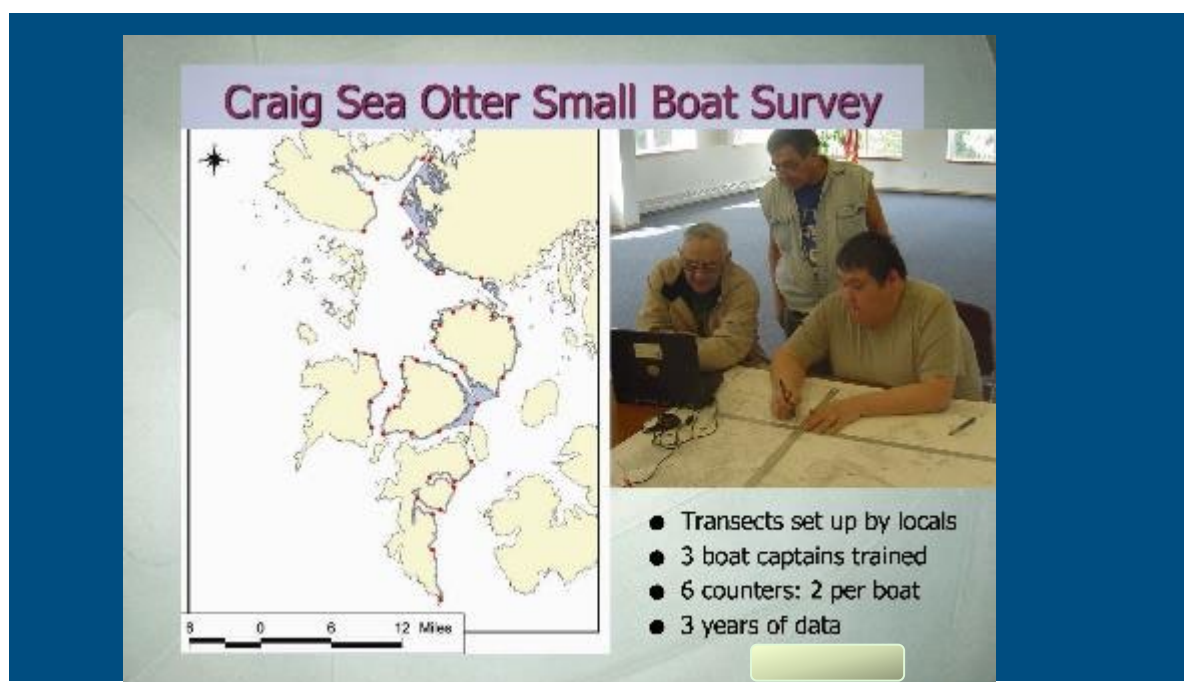


Figure 17. Craig Sea Otter small boat survey

Source: Garza powerpoint slide

Tribes became involved with mortality surveys, sampling surveys, small boat surveys, (see Figure 17). So as an example, the bio sampling program is a joint effort with the federal agencies and universities. It's a property of the Alaska Sea Otter Steller Sea Lion Commission. Every tissue that's taken from those sea otters, and they have become important, is housed at the University of Alaska. But access to it can only be gotten by going through and getting permission from the Sea Otter Sea Lion Commission.

And so, by doing these kinds of things, it put us at the table. It's like, if you want to talk about this topic, you're not going to talk to us. We're going to sit down at the same table and we're going to talk about what we can do in regards to issues.

There was an oil spill out of Dutch Harbor. Under our Commission our fishermen had been conducting sea otter distribution and abundance surveys using small boats. The Feds called and said, well, 'can you send us all our data?' And so the local tribe called us and said, what should we do? And we said, say no, say we will come to that meeting, sit at the table with you, and we will work it out together, because we have the data and we own the data.

Okay, so this is the kind of things that we do. We train tribes to do small boat surveys, helping them set up transects, making sure that the process that they used was the same State-wide, so that over time we could compare data between regions. We could compare data in one region over time and know that we had, as you would call it, good scientific data.

And that has been amazingly important to establishing yourself as someone who is co-managing a resource. So, what does Sea Otter co-management do? It gives tribes a place at the table. It allows them to decide what projects they want to work on, depending on what the needs of that area are. They are the owners of the data that they gather, so they have the right to sit down and talk with their federal or state government when issues arise.

They're the ones that are closest to the resources. So as things arise they can respond quickly. You don't have to get somebody from the university who you have to pay tons of money to come out. You can call up the tribe and say, hey, we need this kind of information. Can you get it for us? And so it's been very important for marine mammals to have this type of co-management going on.

So just using those two points – I tried to address who or what are the strategies, what worked. How are we making that work. And I think the first most important thing was that we had the Alaska Federation of Natives. We had one voice. We had all of the 11 major Native cultural groups sitting down at the table and saying, 'we're going to agree on this, and then we're going forward as one voice, and you're not going to stop us by trying to split us apart'.

We maintain open relationships with legislators, with universities, with non-profits. We want them to know that we're in it for conservation, that we're working with them as much as we can, that if they want to work with us, we're there. And while subsistence is not just for Natives, it includes non-Natives. The benefit of that is that when it comes to an issue, the non-Native is standing right next to me and saying, 'we don't want those commercial guys here'. So small towns aren't being divided. They're working together for the same access right.

And then again, like the sea otter management plan, it just trains people and it trains young people. Several other projects that we did inspired the young people that were involved to go on and say, 'maybe I should get into fisheries, maybe I should get into real science'. And they are next generation of Natives that are going to be fighting this fight.

And we have agreements, formal agreements and opportunities with universities and non-profits, mostly training of young people, for different types of activities, funding their education, and deciding our priorities on how we can go forward to properly manage these resources, not just for the benefit of Native people, but for the benefit of those resources and for our people in Alaska.

Thank you very much.

Broader Aboriginal Australian Fisheries Issues

Australian Sea Company – a new way?

Bo Carne

Gorna mayalgoorran. (Good afternoon.) I'm Bo Carne, and my Bardi name is Ejai. My English name is Robert. But you can call me Bo and I can tell you that story later because I already told some people last night. I'm the CEO (Chief Executive Officer) of the Aboriginal Sea Company. The Sea Company will turn two years old on the 6th of June this year. So, just a warning – I do have images and names of people deceased.

The vision of the Aboriginal Sea Company is to grow First Nations controlled seafood maritime industry related businesses. What I want to really point out in the statement is that it's not Northern Territory only, and it's not fishing only.

My heritage is Djabirr Djabirr and Bardi, both on the Dampier Peninsula of Western Australia, just north of Broome in the Kimberley. [refers to a photo] This is my grandmother's uncles, this is Ejai. I've got his name. I don't know the others' names but they're my grandmother's uncles. This photo is from 1901–1906. The men are wearing pearl shells. So we had a very strong connection to pearl shell. It's culturally very significant for us, but when the government was issuing pearling licences, Aboriginal people were excluded from that. You can't see very well, but my grandmother's country is right at the top and Djabirr Djabirr country is between Broome and Bardi country.

So just a quick history lesson. Trade still continues today among different mobs. We've [been] doing it for a long time, you know. I was recently in Alice Springs and I saw a pearl shell with a carving, and it had human hair on the pearl shell. I know through our stories that we did a lot of trade to Central Australia and a lot of ceremony, particularly our men's ceremony is shared through that region.

There's a lot of trade still goes on today. The Macassan trade – they say it started in the 1700s – was abolished by the South Australian government in 1907. They used to trade with Kimberley people and a lot of people through Arnhem Land, that is northeast Arnhem Land. They had a seafood company there at Galiwinku and it was set up in the 1950s and operated to 1976.

And what happened in 1976 was that the federal [Australian] government decided to burn all the small boats that the businesses were running because they were running it like a fishing co-op. The federal government said 'that's not viable'. So they burnt all the small boats and then basically donated a fishing trawler, an old trawl boat, and told them they could use that. And they quite proudly announced that in Parliament. That it was a big success. But no one wanted to get on the boat with another group and go on to someone else's country. So it all fell over.

So how did we begin? I think it was a case called Blue Mud Bay. Basically, Blue Mud Bay is an extension of the Aboriginal Land Rights Act for the Northern Territory [*Aboriginal Land Rights (Northern Territory) Act 1976*], where it was always recognised that Aboriginal land goes down to the mean low water mark.

But the Blue Mud Bay case actually pushed it further. And I think and I've probably not got the right terminology, but it made the courts aware that the interpretation of the Act was incorrect from the start, where it was then recognised that Aboriginal people could restrict access even when the tide came in. So, it overturned King Richard's Magna Carta, meaning that anybody going on a boat over Aboriginal land was trespassing if they didn't have permission. So you can imagine what that impact has on the inshore fisheries throughout the whole Northern Territory. Mud crab, commercial mud crab, barramundi, a massive fishery's up there. That's two of our main fisheries. So, if you don't have permission to enter those waters, you're not going to get much fish, right?

It was a better right of access, not a right to harvest without a licence. Aboriginal people can still catch all the crabs they want and however they want under customary fishing. But they couldn't sell it. So section 211 – that Wally was talking about of the Native Title Act – is enshrined in the Northern Territory Fisheries Act under section 53, basically word for word. And it's very clear it says that it's not for commercial purposes. So, to do commercial fishing still requires a commercial licence.

Here's all the regions (see Figure 18) and you can see why we've got the octopus, this is our octopus. We've got eight regions in the Northern Territory. The octopus was chosen for a number of reasons. The key one

was that it's not related to any one particular group; the other things, the eight tentacles obviously and the wisdom, and how smart and wise the octopus is as well. So, 85% of the Northern Territory coastline is impacted by that Blue Mud Bay decision. There's another 14% that's currently under claim.



Figure 18. Map of regions in the northern part of the Northern Territory

Source: Bo Carne powerpoint slide

What happened was... – I don't know what the closing off period was to put all your claims in – the Northern Land Council in their wisdom decided to just put a claim on all the intertidal zone, even if it wasn't adjacent to Aboriginal land. So, if it was adjacent to a pastoral lease, they claimed that area. There's all these claims still going on that's yet to be finalised. We expect that soon, 99% of the coastline will be affected by the Blue Mud Bay decision.

So, this is who we are. This is my Board [photo not included]. Sadly, one of my board members passed recently.

The Board is made up of the three Land Councils: the Northern Land Council, the Tiwi Land Council, and the Anindilyakwa Land Council; three representatives from each of those land councils are my Directors. This is for the Northern Territory.

The Board has been very clear and not saying it's our business or Northern Territory, that if other mobs want to work with us, they want to be open to that idea. So, we don't speak just about Northern Territory businesses. So, you know, anyone in the Kimberley or North Queensland, Torres Strait or even here, if we've somebody to work with we'll do that.

When I talk about our reasons, like I said, Aboriginal people control the access to the intertidal zone, so it just makes common sense that we should be running businesses in that space. How do we use the strength of that to then strengthen the access right, to then run these businesses? So the way it is, is that we get a cultural authority through the land councils, all my Directors. If I wanted to run a fishing operation in an area, I need permission. I still need a section 19 access agreement with traditional owners. If I choose not to run the business, if traditional owners want to start the business, then they can do that. They can do their own section 19. And it's a lot easier for them to do the section 19 than it would be for us as a Sea Company doing it.

Currently we're looking at acquiring commercial licences. We've got 11 commercial mud crab licences. That makes us the largest holder in the Northern Territory. I think it's probably the largest holder across

North Australia of commercial mud crab licences, which we've got a few other things, but we've set up a business. So, these guys here, they are Tiwi Islanders.

One family, the Rioli family, they work for my mud crab team. They... support our mud crab operations. They'll take out all the gear, and then they'll return with all the crabs. And then they do all the packaging. We've also got retail marine supplies and we do marketing and sales. So, these are some of the social opportunities.

OUR WORK



Maritime / Seafood Investment aspirations

- Commercial licence acquisition
- Support 11 crab licensees
- Retail marine supplies
- Marketing and sales





Figure 19. Sea Company activities

Source: Bo Carne powerpoint slide

This fellow has 24 years' experience as a commercial barramundi fisherman (See Figure 19). And he was also pearl diving for Paspaley Pearls for 20 years. So, he'd just go between seasons. This is Klaus Jeffrey, some of you might know his brother Russell. He used to play for Geelong and St Kilda (football teams).

Se's one of our fishing mentors [on the phone]. We've got two fishing mentors. Their job is to go out to remote communities and basically find people who are interested in fishing and then teach them the most basic skills around it, and then work out what sort of skill levels they need to be able to run one of our licences.

The idea eventually is that if we've got a community where we've got two or three people that want to use one of our licences, we would issue the licence at a peppercorn lease. So, for a dollar for a year, on the condition that the catch is sold to us and then we run it similar to what a fishing co-op might look like. The other thing that we're doing is around managing.

If you look at all the things going on in North Queensland around gillnets, there's concerns around the barramundi fishery. At first we were worried about buying into that fishery because of that issue, but my Board instructed me to buy into the fishery so that we can actually influence change in that fishery. So that's what we've done, we've just recently bought a commercial barramundi licence.

So that means I sit in at the licensing committee, and I can start influencing how the fishing's undertaken, also influencing government. The last thing I want to point out is that we're going to host an Australian Sea Country conference in Darwin in September, so keep an eye out for that.

There are two key things that we want to discuss in that forum. One is any consideration for a national peak body for First Nations in sea country. The other thing is how do we get consistency across all the

states with Commonwealth legislation on the Native Title Act? And how do we get that consistency at the state level and the Fisheries Act or any other Act?

These are three of our businesses, entities that we've bought or created (Figure 20). We've first bought the Darwin Ship Stores. And then we bought the building that the Darwin Ship Stores sits in. So that's our office. We bought the whole building and it happened to be the Darwin fish market was downstairs. Then we decided we would buy that as well. Now we own the retail and wholesale fish market. We do all the processing there. We've got the Coles and Woolworths contracts.

The Darwin Ship Stores means we're selling products to our own fishing fleet. Anytime we need anchors, crab pots, anything at all, we'll just buy it through our own store and sell it through there. And then we create the other businesses, Premium Seafoods, which will mean all the licences, when they're operating, will be through Premium Seafoods.



Figure 20. The Aboriginal Sea Company's businesses

Source: Bo Carne powerpoint slide

So, what we think looks success through running the Sea Company, will be through our people. We've got Directors, as I said, from the three Land Councils, that's really important. You saw the map, how big the Northern Land Council region was, but the Northern Land Council didn't insist on having the greatest say. They said it's equal representation, three, three and three [Directors each].

They've got a lot of experience, through my Board. They've got really good vision about where they want to go. And strong leadership from the Chair who has got a business, very strong business sense to achieve. Our CEO, me, I was in Fisheries in the Northern Territory department for 17 years before going to the Chief Minister and Cabinet in the whole of government policy, [and] a lot of local stuff as well. And also brilliant, sweet, loyal, hardworking people in the company and down the bottom.

One of our partners and MOU (Memorandum of Understanding) partner is Atlantis Fisheries consulting group. They're very strong on investments, how to make good investment decisions in the fishing industry. So, we got them to do our two-year business plan for us. And now they're also an MOU partner. There's no money exchanged. If we're getting offers to buy a certain license, we can work with it through with these guys and they'll give us some advice around what they think of it.

Some of the advice we take on, some of it we don't. It's not whatever they say, we do. It still goes back to the Board for a final decision to inform them. So achievements – really hard to see that [on the slide]-but

the Aboriginal Fishing Mentor program, I started that 10 years ago when I was at NT Fisheries. Fisheries agreed to give us that program for a year and a half. That's about to expire at the end of the June. I've asked them to hand the program over permanently. They basically said, 'no, we want the money back, but you can keep the program'. I said, 'well, it's not worth keeping the program without the money'. So I told them they can have the program. We run our own. The Cooperative Research Centre for North Australia have also given us three years of funding to continue the program, as long as we come out with a research paper at the end of it.

I said we've got 11 licences in mud crab. That's 22% of the fishery. We've got one barramundi licence, two coastal line licences with five tonnes of black jew fish quota, the retail shop, the coastal lines, [and] we're also working with Austral Fisheries. Austral Fisheries, they're a massive fishery, offshore stuff. They trawl I think they've even got prawn. And my Chairman and I are meeting with them in a couple of weeks just to talk about what sort of business relationship we might have. And it might be just operational advice. And that's probably the extent of it.

Questions [The recording of questions was not clear; a summary version of the question is provided here.]

Question about quota management.

A. So, the commercial mudcrab and commercial barra fishery there, you know. It's not quota managed. It's more around gear. And what's the word for that input, output control. One barramundi licence will be 1000 metres of gillnet. You can break that down into smaller gillnets. One commercial crab licence is 60 crab pots per licence, so you can catch as many as you want with that. The restriction is on the gear side.

Question about fish which are totems.

A. Some of the groups, it is totem, certainly some really important, some of the important areas where they've got the big catchments. The value is not a dollar value. And this is really hard when I talk to the commercial industry and government and they say, 'you know, if you're holding the licence of its value, it's worth this much'. And we say it's not, the value is not how much dollar value you put on. It's having it in your hand so you can actually go and operate it and make a living off it because we never intend to sell our licences. It's jobs for our people.

Question about management arrangements for the barramundi licence.

A. So the way we would do it right now? It has to be based on how you can split that licence. We've got a three-unit barra licence that's 300 metres of net. If a community wanted to use that, we can just basically issue that to them for 12 months.

Question about whether the licence is for the community or named individual.

A. No, you always have to have someone's name on it, but they can have crew. But at the moment the Fisheries rules won't allow us to be able to split that. So if we said we want that 300 metres of net to be used across these two communities and that all three communities have 100 metres in each one – we can't do that.

Question about whether it's the communities that decide to use it in the community.

A. Correct.

Question about aquaculture.

A. Aquaculture is certainly part of our vision. Aquaculture is a big investment though, and we don't have that sort of money to go on by ourselves. So the short answer is, yes, we'd look at the farming stuff, particularly barramundi, because it's already proven. Anything new, we probably will sit back and wait and see what happens with it. And then we might invest into it later. There's some stuff going on there.

Question about who organised the NT barramundi fishing competition.

A. I think that was Sportsbet. So, it was a betting company because they're a sponsor. They're a sponsor and because it's been going nine years, they've been getting nine years of promotion.

Torres Strait Update

Stan Lui

Good afternoon. So my actual proper name is Tibau Stan Lui. But when I went to school down in North Cairns, people couldn't pronounce Tibau. So my middle name, Stan, has stuck with me throughout. But when I'm in trouble at home, Tibau is used. My mob, my people, are from Mer. I come from Murray Island, right out in the east of the Torres Strait. Dauer is one of the islands which is connected with the Murray Island group. Dauer is a big rookery, turtle rookery. We're having issues at the moment with Raine Island, which is a recognised turtle rookery in Queensland because of water inundation. The water inundation is because of sea level rise, the water is affecting the eggs, the turtle eggs, and the temperature is producing all males. Dauer is a high island, we're doing research, and Dauer is looking like one of the refuges that is going to produce female turtles, green turtles for the whole of the northern and Queensland border. You can see all the nesting there.



Figure 21. Map of the Torres Strait Islands and regional characteristics

Source: Stan Lui powerpoint slide

My talk today is on decisions in the Torres Strait and how do we make decisions and who actually makes the decisions in the fishery. I want to put some context about where I'm from. That's Torres Strait right up in between Papua New Guinea and the tip of Queensland (Figure 21). We are the only part of Australia that borders another country, so Torres Strait is really of strategic importance to Australia. And I guess the other thing that Torres Strait Islanders feel is that there's a little bit over 200 islands in Torres Strait. Fourteen of those islands are inhabited. But we think that Australia is the biggest island of the Torres Strait [laughter]. That's the regional characteristics.

My island is right out here. This is the continental shelf. We call it the hard edge. It goes from 30 metres deep to 3 kilometres deep. This is the eastern top Eastern Torres Strait is this area here. And then we have the top Western, which is Boigu, Saibai. They are mud islands and they are closer to Papua New Guinea than Australia. Then you come to the central island group, which is sand cays, sand islands with coconut trees. And then you come to the bottom western islands, which is Badu Island, and then you come down here to the Kaurareg, which is Aboriginal land, down to the mainland.

Over here our fishery is coral trout, mackerel, beche-de-mer. When you come over here, it's tropical rock lobster. And then you come to the Central it's tropical rock lobster, trochus shell, pearl shell. And then over here is once again tropical rock lobster, mackerel, coral trout. And then up the top is mub crab, and some tropical rock lobster down here is mixed species.

So that's shown the context. We are one of two indigenous people in Australia. So there's Aboriginal indigenous people and Torres Strait Islands indigenous people. And how I explain the five different cluster groups is our flag. The star represents the five island cluster groups and the *durri* is that *durri* there. That's the ceremonial *durri*, the headdress that warriors used to wear to war. That's their traditional dress there.

[Question from the floor]: On the animals, do you have sea cows, the dugongs?

We do, we do. So out towards the east we've got green turtles. And then this area here is more, dugongs down here. We have actually a dugong sanctuary that we put in here. We've got heaps of seagrass meadows and everything down there.

This is the complex nature of how the system of governance has split Torres Strait up. This here is the border, the sea border, the jurisdiction border. This is a seabed border. So all these crossed lines here, that's Papua New Guinea, that's Australia. So Australia's water goes right up to Solomon Islands as you can see. And then down here is the top hat area. And then these little lines here they are three nautical mile lines. Within these three nautical mile lines is state jurisdiction, Queensland, then outside of that is Commonwealth. We also have the Protected Zone here. ... When I talk about the Protected Zone, Australia has a Treaty with Papua New Guinea. That treaty relates to that Protected Zone. It's a shared zone, free movement between Torres Strait Islanders and people from Papua New Guinea, Western Province, can travel with free movement into those areas as long as you have a permit from the Council where you're visiting.

Torres Strait Islanders have a very mixed culture. We have mixed blood with mainland and mixed blood with Papua New Guinea. So we're very multicultural. Our history, a lot of Japanese pearl shell divers came to Torres Strait. We've got a cemetery there with lots and lots of Japanese graves. And every year, our sister city comes to Torres Strait and has a ceremony, a Japanese ceremony for their ancestors that are in Torres Strait.

One of the important things about the Treaty is Part Four and Article Ten. Why that's important is because our forefathers actually participated and consulted in developing this treaty. The important thing is the principal purpose of the parties in establishing the Protected Zone and in determining its northern, southern and eastern and western boundaries is to acknowledge and protect the traditional way of life and livelihoods of the traditional inhabitants, including the traditional fishing and free movement.

We also have a sea claim in Torres Strait as well, all of our waters. The native title claim was filed in the Federal Court in November 2001. Prior to filing that we had 36 separate claims and we received advice that if you put it in just one claim you would have more success, which we did. But that has now become a bit of an issue. The sea claim for was 42,000 km².

When we won that sea claim, a prescribed body corporate (PBC) was formed for that sea claim and that PBC is another Western system of governance that was implemented on us. That means every single one of those communities has their PBC Chair as part of that claim. The problem we see at the moment is that because of where all these fisheries rich areas are for different species, because it's one sea claim, people from Badu can now come and fish in our area. Because it's one claim. It's never been like that. It's always been you need to get permission to come. That's what's caused the conflict.

There was a part two to that, and the part two was looking at further work to work out what those different areas are, what those traditional boundaries are. The problem we're going to have, we're looking now at traditional boundaries in terms of where the different boundaries are for those different communities. But the problem with that is that a lot of past is going to be brought up.

It's all commercial fishery. The problem is because it's non-exclusive rights. There's already a commercial fishery that exists there. We can commercially fish, but we need to get a commercial licence. So it's non-exclusive. There's the Torres Strait Fisheries Act and Torres Strait Fisheries Regulations that governs how fisheries work. And I'll talk about the Protected Zone Joint Authority (PZJA), which manages the fishery. Currently at the moment it's \$100 for a fishing licence and \$25 per endorsement. And endorsement is whichever fishery you want to fish under. There is no cap for those licences. This was the determination, the right to access to remain in and use claim area, right to access resources and to pay for any purpose, resources in that area. Importantly, the judge also ruled that the right to take resource can be for trading

and commercial purposes. But once again, non-exclusive. So we still have to have a licence to fish and endorsements, \$100 per year for cultural fishing. You can't sell unless you've got a licence to sell.

We developed a little manifesto because we didn't agree with this new model. I've got commercial licences, I wanted to take the numbers off my boat, the commercial registration off my boat number, get my boat approved by my elders, giving me a traditional mark for my boat, and then I was going to go to all the different islands in my boat and get approval and support from them. And when I put it to them, they said, we'll come with you. So if you come to our island, our boats will come with you. I put that to Fisheries. Fisheries changed the regulations to say a buyer processor cannot purchase product unless it's from a licensed seller. So I need a licence to sell. So they changed the thingo because this is what we wanted to do.

They changed the regulations on us. They put a little piece in the regulation there that says a fish receiver cannot buy product from an unlicensed seller. That sort of stopped, squashed that. We could take for cultural purposes as much as we want, or for subsistence or eating whatever. But for commercial purposes, we need a licence. \$100 for a licence for commercial fishing plus \$25 per endorsement.

So their boat would have had to have a licence. Every boat's got a licence, a mark on it. And the marks are different. My mark is DII 008 and that's Darnley Island 008. It's actually cheaper to get this licence for your boat than it is to register it as a recreational boat. We have about 400 licensed fishers, commercial fishers in Torres Strait. How our quota works, there is traditional inhabitant boat licences, commercial licences, which is about 400 of us. And then there is a TVH, a transferable vessel holder's licence, which is non-Indigenous licences.

For the tropical rock lobster fishery, there's a Total Allowable Catch (TAC) that is split, we own 76% of it. And then the other percentage goes to the non-Indigenous fishers. Our 76% is through an Olympic system. Once the fishery opens, you fish it. You fish it until you reach that quota and then it closes. But the non-Indigenous fishers they have a quota allocated to their licence. Their licence they might have you know 100 tonne or whatever it is per licence. The difference with that is we can't take our licence and go to the bank and say, this is an asset and this is what it's worth. But Commercial licence holders can say we've got, you know, 100 tonne of quota on our licence. This is what our licence is worth. It's an asset. And I'll explain a bit more on some of the stuff that we're doing.

The other complexity of management in the past, because we're so strategic for Australia, these are the different Departments that are in Torres Strait. The Torres Strait Regional Authority is the Commonwealth. Then you have regional and state and shire councils, state and local government. Then you have traditional owner governance systems, and then you have all these supporting organisations, including Papua New Guinea (PNG). Because we do quota sharing with PNG as well. So PNG has 25% of our total allowable catch in Torres Strait.

This is all through that Treaty with PNG. Through the Treaty arrangement PNG Department of Environment, National Fisheries, those sorts of things have to be part of our discussions when we talk about fishery management.

This is the governance of the fishery. So the PZJA – that Protected Zone that I talked about – the Commonwealth Fisheries Minister, the Queensland Fisheries Minister and the Torres Strait Regional Authority Chairperson are the decision makers of the PZJA. It's all government. And then there are agencies that support the PZJA, the Department of Agriculture, Fisheries and Forestry, the Australian Fishery Management Authority, TSRA, Queensland Fisheries, there's a scientific advisory committee, consultation meetings.



Figure 22. Torres Strait Protected Zone Joint Authority managed fisheries

Source: Stan Lui powerpoint slide

These are the fisheries that are managed: prawn, tropical rock lobster, Spanish mackerel, pearl shell, barramundi, finfish, crab, trochus, sea cucumber, dugong and turtle (Figure 22). This is the consultative structure. And I'll go through all this and I'll get to the management cost and I'll explain how that affects us as Torres Strait Islander fishermen. The scientific advisory committee, the Torres Strait tropical rock lobster working group, there are all these resource advisory committee and management advisory committees, and we have Torres Strait Islander people on each of these committees that are elected to go on each of these committees.

Annual management costs \$6.4 million. Our fishery is worth \$23.9 million around there, fluctuates a little bit. The thing is, our fishery is not cost recovered. It is the only fishery in Australia that doesn't do cost recovery. So through levies and licences we don't pay for that. But if we want to go to quota management, like the non-Indigenous fishery, we're going to have to pay for that.

I did some sums. From a licence that's worth \$100 it goes up to \$12,000 a year. And most of our licence holders are not avid fishermen, they are weekend fishermen. I joke that a lot of our fishermen will go out to the reef and fish, sell their fish, take that money and pay for Foxtel or Austar so you can watch fishing shows. But that's how we treat the fishery, is like a bank. If kids need books, kids need to go on field excursions and things like that. That's how we fish it. The concept of optimum utilisation is foreign to us.

Well TSRA is not a black organisation, it's a Commonwealth government organisation. They sit under NIAA (National Indigenous Australians Agency). This is what my talk is about, who actually makes the decisions (see Figure 23). I don't take offense to that because I think the same thing. Even if we want to go to quota management, the management process that has been implemented in Torres Strait, once again, has had a negative effect on us. We can probably take those costs down, but to responsibly fish and responsibly use a resource you have to do those things. You have to do the research. You have to do the stock assessments. You have to have the management plans. You have to have management in place.

There is a discussion, [about] currently the quota that we hold as traditional inhabitants is held by the TSRA. We have a process in place looking at creating a coop to manage that. But once again, TSRA is providing the funds and the people involved in those decision-making committees. This deal that's

happening in Torres Strait is too good to let go for the powers that be. That's the simple truth of it. And because it's in a strategic area, all those things. So even from Mabou, when you have a look at from Mabou, not a lot has changed for our people.

I don't really know how treaties work, but when I talk to Thomas Mayo, they were going to base the model of the Voice [Indigenous Voice to Parliament] on the TSRA model, because the TSRA is made up of 21 board members that are elected board members from the community. It's almost like ATSIC (the Aboriginal and Torres Strait Islander Commission), the old ATSIC model is still operating in Torres Strait. There's still problems with that as well, because what happens is you have an elected person comes into the TSRA, they get given a portfolio, for example, the environment portfolio, to manage as the board member but have no experience in environmental [work]. They just get appointed from a populist [process].

Yeah, yeah. And the seabed. But it's non-exclusive native title apparently. Once again, it's non-exclusive rights to access fisheries.

I've been in meetings where we've had PBC chairs from different communities in this meeting. And one PBC chair said to the other, 'I'm getting a bigger boat and I'm going to come out to the east there, I'm going to fish for mackerel in the bigger boat'. And he said, 'well, you come out, you don't have permission'. But he says, 'well, I've got a licence that says, I can come out'. And he said, 'well, if you come out, I'll take you to court'. It's these sorts of things. So now the second phase of this sea claim case is meant to be looking at those traditional boundaries. Where are the shared areas and things like that? That's going to be a big heap of work, and people are going to get hurt because there's intermixing of families, there's Islander adoption. There's things that have happened in the past that have been kept in the past, and this is all going to come out when we start having those discussions and people are aware of this. [comments from the floor unclear]

The thing is with Torres Strait Islander people is we've got a big diaspora down south. Maybe 40,000 people live in the Torres Strait Islands. And 42,000 to 48,000 live on the mainland in the diaspora. The elected governance system, lots of different levels of bureaucracy, lots of overlaps and duplication. Lots of confusion at the grassroots level. Minister gets conflicting information. Grassroots people are left out of it.

So , who really makes the decisions?

- Approx 6,000 – 8,000 Torres Strait Islanders living in Torres Strait
- Approx 42,000 live in other area's
- The census shows 55 percent participate in the labour force
- Traditional Inhabitant Elected Governance consists of:
 - Torres Strait Regional Authority Board Members
 - Regional Councillors
 - Native Title Prescribed Body Corporate Chairpersons
 - State Member for Parliament
 - Federal Member for Parliament

Lots of different levels of bureaucracy.
Lots of decisions being made independently.
Lots of overlaps and duplication
Lots of confusion at the grass roots level

Ministers get conflicting information which requiring more consultations



- CONCLUSION CAN'T DECIDE WHO DECIDES




Figure 23. The complexity of decision making in the Torres Strait Islands

Source: Stan Lui powerpoint slide

We own the reef. We think that we own the resources. Yeah. From where you are going to where we are, I'm kind of painting that picture.

From me the take home message from Torres Strait is: Conclusion – we can't decide who decides. My personal opinion in terms of fisheries and where indigenous people are nationally, right, broadly where we are. It's like lot [the] commercial fisheries industry is having a dinner party. We've turned up uninvited. That's where we're at. We've turned up uninvited. And we put a plate and we're saying we're here for dinner. Somebody's got to put food on our plate. I think that's where we're at.

Legal options for greater UN engagement in upholding and recognising Indigenous rights in fishing: Tony McAvoy SC

Introduction

At the Raporo Ainu Nation International Fishing Symposium in July 2023 there was reported to be a deep awareness that, regardless of the form of colonial recognition or respect for First Peoples fishing rights, the relevant colonial government failed to ensure that that such recognition was afforded in fact.

The common experience described at the Symposium was of state mechanisms for recognition and respect of Indigenous rights, while varying greatly from nation state to nation state, failing to ensure protection of the broad right to take fish from arbitrary interference by officers of those states. This is the same all over Australia in my experience (see Figure 24).



Figure 24. Various interactions between Tony McAvoy SC and Indigenous Fishers protecting their Sea Country rights around Australia, including Mr Dintu, Badu island, Quandamooka Rangers, Mulgumpin, and South Coast Fishers

Photo credit: Tony McAvoy SC and Kathryn Ridge

This paper deals with two categories of engagement with the United Nations forms. Part A deals with individual complaints pursuant to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Part B deals with potential engagement with other UN bodies having responsibility for the Indigenous and/or human rights issues.

Part A – United Nations Human Rights Complaints Mechanism

The ICCPR provides in Part IV for the establishment of a Human Rights Committee (HRC) to consider and report upon violations of the rights set out in the ICCPR. The ICESCR provides at Part IV for the establishment of the Economic and Social Council (EcoSoC). The protected rights include:

- Self-determination: Art 1 ICCPR, Art 1 ICESCR;
- Life: Art 6 ICCPR;
- Food: Art 11 ICESCR;
- Interference with privacy, family or home: Art 17 ICCPR;
- Culture: Art 27 ICCPR; Art 15 ICESCR.

Individual complaints may be made to the HRC pursuant to the First Optional Protocol to the ICCPR. Art 1 of First Optional Protocol provides:

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Individual complaints may be made to the EcoSoC pursuant to the First Optional protocol to the ICESCR. Art 1 of the protocol provides:

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.

Recent complaints from Indigenous peoples include:

- Wunna Nyiyaparli Indigenous People v Australia – 23 March 2023 – Articles 1, 2.3, 14.1, 26, 27 ICCPR – Entitlement to be recognised as independent land holders distinct from broader Nyiyaparli group
- Daniel Billy and Others v Australia – 21 July 2022 – 2, read alone and in conjunction with 6, 17, 24 (1) and 27; 24 (1), read alone and in conjunction with 6, 17 and 27; and 6, 17 and 27, each read alone – Failure to take mitigation and adaptation measures to combat the effects of climate change.

There are a variety of issues making collectivised or co-ordinated action potentially problematic. The different circumstances in each jurisdiction make a single form of pleading or the allegation of single species violation of a particular right difficult to isolate.

Nevertheless, there is benefit to be gained from a planned and co-ordinated series of complaints, dealing with a range of issues. For instance, complaints may be sequentially brought in relation to:

- The Right to Life: The notion of the denial or impairment of the right to fish as a violation of the right to life (this could be brought from NSW, Australia as there is no protection of the right to life in domestic legislation);
- The Right to Self Determination: Prosecuting the argument First Nation self determination must include the right to determine their own food and economic needs from the resource (other);
- The right to be free from interference with privacy, family or home;
- The right to Culture: The notion that the right to enjoy culture includes the right to take and use resources in the manner consistent with the way of life. (See Raporo Ainu case)

Part B – Potential Engagement with Other United Nations Bodies

There are three UN bodies mandated to deal specifically with Indigenous Peoples' issues:¹

- The Special Rapporteur on the Rights of Indigenous Peoples.
- The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).
- The United Nations Permanent Forum on Indigenous Issues (UNPFII).

Special Rapporteur on the Rights of Indigenous Peoples.

The current mandate-holder for the Special Rapporteur on the rights of Indigenous Peoples ('Special Rapporteur') is Mr Francisco Cali Tzay.²

Every year, the Special Rapporteur is requested by the Human Rights Council to present an annual report at one of its regular sessions in Geneva.³ The Special Rapporteur's annual reports include a description of the activities carried out during the year in the framework of the mandate and will also normally include discussion of specific themes or issues of particular relevance for the rights of indigenous peoples.⁴

In addition to annual reports, the Special Rapporteur provides the following:⁵

- Special Reports – Extensive observations on specific cases.
- Country Reports – Reports on the overall human rights situations of indigenous peoples in selected countries.
- Communications Reports – Summary of communications sent and the replies received, as well as summaries of exchanges of information on positive developments or initiatives in particular cases.

The Special Rapporteur forms 'part of the system of thematic Special Procedures'.⁶ 'Special Procedures' are, 'mechanisms established by the Human Rights Council to report and advise on human rights from a thematic and country-specific perspective. Special procedures cover all human rights: civil, cultural, economic, political and social as well as issues relating to specific groups. Special procedures mandate-holders are either an individual called a Special Rapporteur, or Independent Expert or a Working Group of five members.'⁷

Special procedures (such as the Special Rapporteur) can act on complaints of alleged human rights violations by sending communications.⁸ Communications are 'letters sent by the Special Procedures to Governments and others, such as intergovernmental organisations, businesses, military or security companies. In these letters, the experts report on allegations of human rights violations they have received'.⁹

The purpose of these communications is to,

- 'draw the attention of Governments and others on alleged human rights violations;
- ask that the violations are prevented, stopped, investigated, or that remedial action is taken;
- report to the Human Rights Council on communications sent and replies received, therefore raising public awareness on individual, and group cases as well as legislative and policies developments they have addressed in a given period.'¹⁰

¹ <https://social.desa.un.org/issues/indigenous-peoples/unpfii>; <https://www.docip.org/en/indigenous-peoples-at-the-un/permanent-forum/>.

² <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples>.

³ <https://www.un.org/development/desa/indigenouspeoples/reports-by-the-special-rapporteur-on-the-rights-of-indigenous-peoples.html>.

⁴ Ibid.

⁵ Ibid.

⁶ <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples>.

⁷ [https://unsdg.un.org/2030-agenda/strengthening-international-human-rights/un-special-procedures#:~:text=Special%20procedures%20cover%20all%20human,\(WG\)%20of%20five%20members](https://unsdg.un.org/2030-agenda/strengthening-international-human-rights/un-special-procedures#:~:text=Special%20procedures%20cover%20all%20human,(WG)%20of%20five%20members).

⁸ <https://www.ohchr.org/en/special-procedures-human-rights-council/what-are-communications>.

⁹ Ibid.

¹⁰ Ibid.

Complaints to Special Rapporteur may be lodged via the Special Procedure Submission online form.¹¹ Use of that form is highly recommended.¹² Any individual, group, civil society organisation, inter-governmental entity or national human rights bodies can submit information to the Special Procedures.¹³ The form can be found at: <https://spsubmission.ohchr.org/>. Alternatively, submissions can be made via post to: OHCHR-UNOG, 8-14 Avenue de la Paix, 1211 Geneve 10, Switzerland.¹⁴

The Special Rapporteur will decide whether they will take action on a given submission on the basis of:

- the information received, and
- the scope of her/his mandate.¹⁵

The decision to take action also depends on criteria laid down in the *Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council*.^{15F}¹⁶ Those criteria are expressed in terms relating to the communication that may eventually arise from the complaint being considered, and have been summarised by the UN as follows:

- ‘the communication should not be manifestly unfounded or politically motivated;
- the communication should contain a factual description of the alleged violations of human rights;
- the language in the communication should not be abusive;
- the communication should be submitted on the basis of credible and detailed information;
- the communication should not be exclusively based on reports disseminated by mass media.’¹⁷

The Special Rapporteur will not require the concerned State to have ratified an international or regional human rights treaty, or the alleged victim to have exhausted domestic remedies to send a communication.¹⁸

The Special Rapporteur may take action within 24 hours of a submission being made.¹⁹ However, the process may take longer.²⁰ Status updates on submissions are not provided. It is up to complainants to regularly check the Communications Reports database to see if a communication based on their complaint has been sent and if any reply has been received.²¹

That database can be accessed at: <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

Communications from the Special Rapporteur will by default include disclosure of the names of victims of human rights violations unless the Rapporteur exceptionally decides to withhold them due to concerns regarding the security of the victims.²² For such an exceptional decision to be made, the victims or their representatives must make these security concerns clear in their submissions.²³ It must be made clear in any submission whether the complainants do or do not consent to:

- names of the victims being disclosed in the communications to Governments, intergovernmental organisations, businesses, military or security companies.
- names of the victims appearing in a public report to the Human Rights Council.²⁴

¹¹ <https://www.ohchr.org/en/special-procedures-human-rights-council/what-are-communications>.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ <https://undocs.org/A/HRC/5/L.3/REV.1>.

¹⁷ <https://www.ohchr.org/en/special-procedures-human-rights-council/what-are-communications>.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

Expert Mechanism on the Rights of Indigenous Peoples ('EMRIP')

The EMRIP holds a five-day annual session in which representatives from states, Indigenous Peoples, Indigenous Peoples' organisations, civil society, inter-governmental organisations and academia take part.²⁵ The next session will take place on 8-12 July 2024 in Geneva.²⁶

The EMRIP's mandate is to:

'provide the Human Rights Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration on the Rights of Indigenous Peoples, and assist Member States, upon request, in achieving the ends of the Declaration through the promotion, protection and fulfilment of the rights of indigenous peoples.'^{26F}²⁷

The EMRIP can be contacted via email at: ohchr-expertmechanism@un.org.

Every year, the EMRIP, 'submits annual thematic studies to the Human Rights Council (HRC). Thematic studies document findings on particular topics and provide guidance and recommendations for UN member States, civil society organisations and other stakeholders.'²⁸ and 'produces a report each year on its annual session, and issues official reports and documents relating to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).'²⁹

The EMRIP puts out 'Calls for Input' in which submissions can be made on a particular issue selected by the EMRIP.³⁰ For example, the most recent call, which had a deadline of 21 January 2024, was titled: Call for Inputs: Study on 'Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration'.

The EMRIP is also involved in 'Country engagement'.³¹ Pursuant to paragraph 2 of Human Rights Council resolution 33/25, the EMRIP should:

- (a) Upon request, assist Member States and/or indigenous peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples, as relevant, which may include establishing contacts with other United Nations agencies, funds and programmes;
- (b) Provide Member States, upon their request, with assistance and advice for the implementation of recommendations made at the universal periodic review and by treaty bodies, special procedures or other relevant mechanisms;
- (c) Upon the request of Member States, indigenous peoples and/or the private sector, engage and assist them by facilitating dialogue, when agreeable to all parties, in order to achieve the ends of the Declaration.'³²

During this process, the EMRIP 'will neither seek nor accept instructions from any government, individual, governmental or non-governmental organization or pressure group whatsoever.'³³

Requests for country engagement can be made by either,

- Member states – which should make their request via the Office of the United Nations High Commissioner for Human Rights (OHCHR), or
- Indigenous peoples – which should make their request to the secretariat of the Expert Mechanism in OHCHR via e-mail at: expertmechanism@ohchr.org.

²⁵ <https://www.ohchr.org/en/hrc-subsidaries/expert-mechanism-on-indigenous-peoples>.

²⁶ Ibid.

²⁷ <https://www.ohchr.org/en/hrc-subsidaries/expert-mechanism-on-indigenous-peoples/about-mandate>.

²⁸ <https://www.ohchr.org/en/hrc-subsidaries/expert-mechanism-on-indigenous-peoples/annual-reports>.

²⁹ Ibid.

³⁰ <https://www.ohchr.org/en/hrc-subsidaries/expert-mechanism-on-indigenous-peoples>.

³¹ <https://www.ohchr.org/en/hrc-subsidaries/expert-mechanism-on-indigenous-peoples/country-engagement>.

³² <https://www.ohchr.org/en/hrc-subsidaries/expert-mechanism-on-indigenous-peoples/country-engagement>.

³³ Ibid.

If the proposed engagement is triggered by a request from Indigenous Peoples, the EMRIP will duly inform the member state concerned to make sure the Government agrees to the visit.³⁴

Requests should provide at least the following information:

- a. Requesting institution/organization;
- b. Name of contact person(s);
- c. Description of the situation;
- d. Steps that have been taken to address the issue, including any domestic remedies;
- e. Expected action by and technical advice to be supplied by the Expert Mechanism;
- f. Whether State authorities or other stakeholders have been consulted about or
- g. Informed of the request submitted to the Expert Mechanism;
- h. Proposed time frame; Any other relevant information.'

In actioning a request, the EMRIP will operate under agreed terms of reference that outline modalities of engagement, timelines and the types of activity envisioned, as well as the expected final product.³⁵ These terms will be prepared by the Expert Mechanism in consultation with the requester(s) and other relevant stakeholders and also include modalities for the disclosure of information (in agreement with the requester and other stakeholders).³⁶



Figure 25. Masaki Sashima san addresses EMRIP 19 July 2023 on behalf of the Raporo Ainu Nation

Photo credit: EMRIP

United Nations Permanent Forum on Indigenous Issues ('Permanent Forum')

According to the Indigenous Peoples' Centre for Documentation, Research and Information (DOCIP): 'The Permanent Forum is not a complaint mechanism.'³⁷ The Permanent Forum usually meets for 10 days each year in May in the New York UN Headquarters.³⁸ During those sessions, the Permanent Forum discusses

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ <https://www.docip.org/en/indigenous-peoples-at-the-un/permanent-forum/>.

³⁸ <https://social.desa.un.org/issues/indigenous-peoples/unpfii>.

six mandated areas (economic and social development, culture, the environment, education, health and human rights). Sessions are also usually thematically focused on a specific issue.³⁹

The current Australian member of the Permanent Forum is Dr Hannah McGlade.⁴⁰

DOCIP provides the following contact for the secretariat for the Permanent Forum: indigenous_un@un.org.⁴¹

Recommendation

It is recommended that the Symposium delegates consider forming a working group to:

- a. Identify potential individual complaints regarding violation of the ICCPR or ICESCR;
- b. Consider requesting a thematic report from the Special Rapporteur on Rights of Indigenous People relating to the protection of Indigenous fishing rights;
- c. Consider making collective or separate communications to EMRIP or UNPFII.

National Apology and Reinvigoration of Indigenous Rights in Taiwan, Awi Mona Seediq Tgdaya, Professor of Law and Indigenous Studies, National Dong Hwa University

Foreword

The reinvigoration of indigenous rights, such as self-government, traditional territory, traditional intellectual creations, and tribal public juristic person, has received considerable attention in recent years in Taiwan. Despite all this attention, conceptualization of indigenous rights is an issue that remains little understood by the general public. Who are indigenous peoples? What is indigenous rights? Why is President Tsai Ing-wen apologized to the indigenous groups?

Prior to the contact with colonial settlers, indigenous territories were under the sole control of Taiwan indigenous nations. Indigenous territorial governance depended upon traditional indigenous regulatory rules and spiritual ties. Since the arrival of Dutch settlers in the 1600s, dispossession of traditional lands and territories has been one of the major problems facing indigenous peoples in Taiwan. In retrospect, the non-recognition of aboriginal title and absence of national reconciliation with indigenous peoples have gradually devastated indigenous rights foundation embedded in the Constitution and constructed by the Indigenous Peoples Basic Act of 2005. Legislatively speaking, the Indigenous Peoples Basic Act has broken new ground in the government's relationship with indigenous peoples. However, Taiwan's history of law-making and policy implementation has caused significant bitterness and frustration for indigenous peoples. Although Taiwan's President Tsai Ing-wen last August delivered the National Apology to Indigenous Peoples, which laid out a comprehensive scheme to restore the historical and transitional justice for indigenous rights. The prospect that indigenous peoples will find remedies for their problems under the Indigenous Peoples Basic Act is not a promising one. Accordingly, this paper takes the stand of indigenous human rights with a comparative study approach, which aims at exploring whether the existing legal design on indigenous rights, corresponding to the cultural conceptualization of traditional tribal governance, in conformity with constitutional entrenched value of cultural diversity. This research argues that until this issue is substantially resolved, the existing uncertainty about restoration of indigenous justice and reinvigoration of indigenous rights will continue.

The reinvigoration of indigenous rights consists of two interlocking aspects: the realization of indigenous historical and transitional justice and the implementation of aboriginal title jurisprudence. First, this paper endeavors to discover the effects of indigenous movements towards comprehensive land claims. Second, this research attempts to establish the fundamental legitimacy of aboriginal title within the legal

³⁹ Ibid.

⁴⁰ <https://social.desa.un.org/issues/indigenous-peoples/unpfii/current-unpfii-members>.

⁴¹ <https://www.docip.org/en/indigenous-peoples-at-the-un/permanent-forum/>.

framework of Taiwan. I reason that identifying and affirming the legitimacy of indigenous historical and transitional justice is the keystone for the realization indigenous right of self-government in Taiwan.

In Taiwan, there are sixteen officially recognized indigenous nations. The population of these groups comprises roughly 2.4% of Taiwan's population. Throughout the Japanese occupation and Taiwan (Republic of China) rule, government officials continued to profess a desire to protect indigenous peoples, while attempting to get them to shift from traditional life to that of the modern-state civic member. In actual practices, indigenous communities were dispossessed of their traditional territory and mostly relocated to areas considered undesirable by the non-indigenous population. Generally speaking, a number of key social and economic indicators have shown a huge gap in development between indigenous peoples and the general Taiwanese population. Despite the extensive natural resources situated within their traditional territories, indigenous peoples are the most impoverished minority groups in Taiwan. The combination of indigenous social, cultural, and economic deficiencies and the abundance of valuable resources within their traditional lands is absurdly ironic to indigenous peoples. Academic empirical studies have attributed these indigenous deficiencies to two critical factors. One is the non-recognition of an indigenous inherent right to land. Another factor is the general lack of indigenous control over, and effective participation in, their own affairs, such as primary education programs and indigenous land governance. The complaints of various indigenous communities comport with these studies.

In 1999 Mr. Chen Shui-bian, the then presidential candidate of the Democratic Progressive Party, signed a partnership agreement with leaders of Taiwan indigenous tribes for his campaign. After his election, President Chen signed another agreement with these leaders and reconfirmed his administration to honor the commitments in the earlier agreement. The government pledged to ensure that indigenous peoples would have the tools to become self-sufficient and self-governing by recognizing indigenous rights to land and self-government. After being re-elected for the second term in 2004, President Chen declared that the government would commit to a government-to-government relationship with indigenous tribes and add a special indigenous chapter to the R.O.C. Constitution.

These actions opened up a new indigenous rights dialogue between indigenous peoples and the Taiwan Government. During the first 50 years under the Chinese Nationalist Party, the Taiwan Government engaged in a series of inappropriate policies designed to control, subjugate, and assimilate indigenous peoples. Since President Chen has been in office, the government has taken some positive steps. The Indigenous Peoples Basic Act stipulates that the government should recognize indigenous land rights, and assist the development of self-government based on the will of each tribe. However, despite policy developments and emerging indigenous legislations, indigenous rights still lack substantiation.

Indigenous self-government has always been an important channel to reconstruct the special relationship between indigenous peoples and the nation-state. Now is the time that Taiwan Government flaunt to restore indigenous historical and transitional justices. It truly is a facing issue to implement the indigenous right to self-government. Apart from unsuccessful specialized legislation, Indigenous Peoples Basic Act, on the other hand, reflects the principles of self-governance and participatory informed consent mechanism, which conceive the multi-models of indigenous self-government. Nevertheless, an important revision had been added to the Indigenous Peoples Basic Act, i.e. *buluo* (部落) can be a public juristic person with ratification by the central authority. This research dwells upon avoiding the national legal framework which may put indigenous self-government in a structure of uniformity and homogenization, and furtherance to terminate the sui generis nature of indigenous rights.

To elaborate, this research embraces four primary goals: (1) to understand the unique status of indigenous rights in Taiwan and discover whether indigenous peoples could establish aboriginal title claims within the legal framework of Taiwan; (2) to explore the relationship between National Apology and the reinvigoration of indigenous rights; and (3) to analyze government-to-government relations and its role in advancing indigenous peoples' right of self-government in Taiwan. The basis of my argument is that indigenous peoples' rights will continue to be undermined and subsumed into a Han ideology of discrimination and assimilation, unless the National Apology to indigenous peoples is recognized and strengthened.

Reconceptualization of indigenous peoples' rights in the international context

Everything about indigenous peoples is inextricably interwoven with, and connected to, the land. The indigenous struggle for land rights has largely been defined by the common law doctrine of 'discovery and conquest' and the doctrine of '*terra nullius*'.⁴² The United States used the discovery doctrine to justify the takeover of Indian lands. In a similar fashion, Australian law used the concept of *terra nullius*, the legal myth that Australia had no previous owners.⁴³ However, classical international law held that only vacant

⁴² James Tully, *Aboriginal Property and Western Theory: Recovering a Middle Ground*, in *Property Rights* 158-169 (Ellen Frankel Paul et al. eds., Cambridge University Press, 1994).

⁴³ *Milirrpum v. Nabalco Pty Ltd and the Commonwealth of Australia* (the Gove Land Rights Case), (1971) 17 FLR 141; *Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1. The *Gove Land Rights Case* reinforced the conservative legal position that

land could be claimed by discovery, not land that was owned and occupied by indigenous peoples. The U.S. courts have been inconsistent in characterizing indigenous rights, employing rationales based on a limited interpretation of Indian sovereignty as well as reasoning based on the concept of original Indian title⁴⁴.

In actuality, the discovery doctrine is one of the most misunderstood concepts of international law. This principle was manipulated by Europeans to rationalize their presence, in the New World and elsewhere, on lands previously inhabited by indigenous peoples. Because most lands had inhabitants, and the traditional legal doctrine hindered expansion, the term *terra nullius* was expanded to include lands that were uncultivated according to European standards, i.e., where the inhabitants had no fixed residences but roamed the territory like 'wild beast in a forest'⁴⁵. Additionally, under the doctrine of discovery, the discoverer gained title good against all other Europeans, but it did not perfect title as against original inhabitants⁴⁶. The lands 'discovered' by Europeans were in fact already owned by indigenous peoples, and governed by the laws and traditions of indigenous societies. The discovery doctrine, according to Michael C. Blumm, 'was a principle of international law which sought to reconcile European notions of land ownership and sovereignty with aboriginal possession'⁴⁷. However, the most that discovery could do was to grant priority to the discovering state vis-à-vis other potential colonizers in pursuing trade with or purchasing land from the indigenous nations.

Thus, the doctrine of discovery, inasmuch as it has been used to justify claims of sovereignty over indigenous lands, is a legal fiction without justification. Its purported justification is prejudicial treatment of indigenous peoples simply based on the fact that they were not Christians at the time of European arrival. By stripping indigenous peoples of most of their lands and powers to govern themselves, the discovery doctrine stands as a monumental violation, not only of the most fundamental human rights of indigenous peoples, but also of the 'natural rights' of humankind.

Perhaps the most fundamental justification for indigenous rights is that indigenous peoples lived on and occupied the land before the arrival of colonial settlers. A claim of prior occupancy suggests that, all other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent settlers⁴⁸. Aboriginal title stems from this prior occupancy. Hence, aboriginal title is 'a right to the land itself' which is proprietary in nature⁴⁹.

Along with the ongoing developments of indigenous rights in the international regime. Aboriginal title as indigenous inherent right creates a *sui generis* form of property within a number of national legal systems.⁵⁰ Furthermore, this form of property has been complemented by a number of international instruments to protect indigenous interests in land over the past three decades. The international initiative has been spearheaded by the International Labour Organization (ILO), which has expressly safeguarded aboriginal title in its groundbreaking Conventions No. 169 of 1989⁵¹. In Robert A. Williams Jr.'s

before colonization Australia was *terra nullius* and that Aboriginal title could not be enforced in the common law of Australia. It was until the *Mabo* decision that the principle of *terra nullius* has been set aside.

⁴⁴ Early well-noted cases known as 'Marshall Trilogy', established the foundations for the development of U.S. Federal Indian Law and Policy. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823); *Worcester v. Georgia*, 31 US (6 Pet.) 515 (1832); and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁴⁵ Robert Gray, *A Good Speed to Virginia*, quoted by Harry C. Porter in *The Inconstant Savage: England and North American Indian 1500-1600* (Southwest Books Services, 1979).

⁴⁶ *Worcester*, *supra* note **Error! Bookmark not defined.** In Marshall's decision, "This principle, acknowledged by all Europeans, because it was the interests of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it (namely, the indigenous peoples). It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."

⁴⁷ Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 *Vermont L. Rev.* 713, 714 (2004).

⁴⁸ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* 78 (University of Toronto Press, 2001).

⁴⁹ *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 14 (S.C.C.)

⁵⁰ *Guerin v. The Queen*, [1984] 2 S.C.R. 335. (It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of surrendering Indians.) *Mabo*, *supra* note 2. (Native title has its origin in and is given its content by the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.) *Begay v. Keedah*, 19 Indian L. Rep. 6021 (Navajo Supreme Court 1991). (Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajo have always occupied land in family units, using the land for subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership.)

⁵¹ International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989 (entered into force 5 September 1991). Detailed provisions made for the protection of indigenous land rights are framed in the Part II of the Convention. In particular, article 14(1) provides that, [t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands

words, it is ‘international law’s most concrete manifestation of the growing recognition of indigenous peoples’ rights to property in lands’⁵². In the inter-American sphere, indigenous rights to land are strengthened in the American Declaration on the Rights of Indigenous Peoples⁵³. Additionally, indigenous peoples have a deep relationship with the land they live in. Thus, indigenous rights to land, territory, and resources cannot be separated from traditional indigenous forms of property and cultural survival. As the American Declaration states, Article XXV,

1. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship with their lands, territories, and resources and to uphold their responsibilities to preserve them for themselves and for future generations.
2. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
3. 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.
4. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

One of the most important international initiatives for indigenous peoples is the United Nations Declaration on the Rights of Indigenous Peoples,⁵⁴ which provides further evidence of the increasingly international recognition of indigenous peoples’ property rights in lands. Article 26 of the Declaration reads,

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. 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.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned⁵⁵.

In short, aboriginal title as indigenous peoples’ inherent right is inextricably interconnected with international instruments. We can observe a pattern of activity by the UN bodies and other international organizations, such as the Organisation of American States (OAS), in conjunction with numerous state practices. According to Robert A. Williams Jr., ‘The international norms that recognize rights based on indigenous peoples’ traditional landholdings and resource use are increasingly incorporated and reflected in the domestic legal practice of states throughout the American region and the world’⁵⁶. These activities demonstrate a steadily broadening consensus that aboriginal title is a rule of customary international law⁵⁷.

Indigenous people’s rights in contemporary Taiwan

Historically, indigenous peoples have been excluded from any meaningful input into how, when, and why governmental policies concerning their affairs are implemented. This situation has changed somewhat after the establishment of the Council of Indigenous Peoples, Executive Yuan in 1996. The new indigenous policy finally opens the door to communications and negotiations between indigenous peoples and the

not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

⁵² Robert A. Williams, Jr., *Amicus Curiae Brief* (presented by the National Congress of American Indians in the case of the Mayagna (Sumo) Community of Awas Tingni), Inter-American Court of Human Rights Case No. 11.577.

⁵³ AG/RES. 2888 (XLVI-O/16), adopted on June 15, 2016.

⁵⁴ A/RES/61/295, U.N. General Assembly, 13 September 2007.

⁵⁵ *Id.* Relevant provisions are Article 25 and Article 27.

⁵⁶ Williams, *supra* note 11.

⁵⁷ Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Hum. Rts. J.* 57, 109 (1999). As Wiessner concludes, “Today, many of these proposed or actual prescriptions, coinciding, as they do, with domestic state practice ... have created a new set of shared expectations about the legal status and rights of indigenous peoples that has matured and crystallized into customary international law.”

Taiwan Government. Since the Council was established, indigenous people have had some influence on legislation affecting their rights⁵⁸.

In the contemporary era, indigenous *Zirán Zhǔquán* (自然主權, inherent sovereignty) and self-determination have become major issues on the national and international stage. Since the 1990s, the indigenous movements in Taiwan have concentrated on two interlocking goals related to inherent sovereignty and self-determination: self-government rights and traditional territorial claims. In the first changing-power of 2000-2004, the then Taiwan's Presidential Chen Shui-bian signed and reconfirmed the semi-official alliance treaty, 'A New Partnership between Aborigines and the Taiwanese Government'⁵⁹ with indigenous representatives. This alliance treaty purported to foster indigenous self-determination and economic development. In 2004, the Taiwan Government under Chen's presidency further announced that it would structure its relations with indigenous tribes on a *Guó yu Guó* (國與國, Nation-to-Nation) basis. Finally, a milestone accomplishment for indigenous rights was reached when President Chen signed the *Yuánzhùmínzú Jīběnfǎ* (原住民族基本法, Indigenous Peoples Basic Law) in January 2005, which is designed to implement a new policy of indigenous human rights.

The Indigenous Peoples Basic Law was and is seen as out of step with the bulk of traditional Taiwanese law, because it singles out a segment of society on the basis of race. The Basic Law removes significant portions of indigenous property from the commercial mainstream and gives the Council of Indigenous Peoples and other government officials a degree of discretion that is not only intrusive but also offensive to other members of the society. For example, the exercise of indigenous hunting rights within the national parks has created tension between groups advocating the preservation of indigenous culture and environmental conservation groups. Furthermore, the Basic Law requires that any economic or development activity within *Yuánzhùmínzú Chuántǒng lǐngyù* (原住民族傳統領域, indigenous traditional territory) proposed by the government or a non-indigenous party must be approved by, and share its benefits with, the local indigenous community. The Basic Law has been criticized in every aspect. The majority of opponents tend to be non-indigenous who demand the Basic Law be abolished because it violates normative standards of equality. Even the national apology to indigenous peoples delivered by the current President Tsai emphasized as follows:

After the democratic transition, the country began to respond to the appeals of indigenous movements. The government made certain promises and efforts. Today, we have an Indigenous Peoples Basic Law that is quite advanced. However, government agencies have not given sufficient weight to this law. Our actions have not been fast enough, comprehensive enough or sound enough. For this, I apologize to the indigenous peoples on behalf of the government.

In an effort to achieve self-government, indigenous peoples have sought constitutional, legislative, and policy reforms. The adoption of the Indigenous Peoples Basic Law is the most significant development in the past decades. However, indigenous peoples maintain that any form of delegated authority is inconsistent with indigenous inherent rights of land and self-government. While the existing Indigenous Peoples Basic Law is landmark legislation that has frightened the Han majority, it fails to address the fact that indigenous peoples still have serious limitations, namely, a reduced land base and restrictions on indigenous self-government.

The historical retrospection of Taiwan illustrates that colonial experiences imposed on the indigenous peoples manifested some similarities to the colonization experienced by aborigines in the New World, including 'indigenous land dispossessions and colonizers' settlements', 'imposed legal systems upon tribal societies', and 'integrationist and assimilationist policies towards indigenous peoples'⁶⁰. However, while the principle of recognizing aboriginal title had become well-entrenched in common law jurisprudence before the end of the 19th century, it did not achieve the same recognition in Taiwan after nearly two centuries.

Nevertheless, Taiwan Government has repeatedly stated its commitment to protecting indigenous human rights in a number of official pronouncements, as well as through negotiation and legislation, which aims to satisfy indigenous interests of self-government while safeguarding the integrity of the state's sovereign power. The aforementioned Indigenous Peoples Basic Law is built upon two vital issues that have been the focus of this paper, namely the rights of indigenous peoples to land and to self-government.

⁵⁸ For examples, Indigenous Peoples Basic Law, Indigenous Peoples Employment Rights Protection Act, Status Act For Indigenous Peoples, and Indigenous Peoples Education Act.

⁵⁹ The New-Partnership between Aborigines and Taiwanese Government was signed on September 10, 1999 between 11 major Aboriginal representatives and the DPP Presidential Candidacy, Mr. Chen Shui-bian. These electoral promises were further refined and discussed in the 2000 DPP White Paper on Aboriginal Policy (*Yuanzhuminzu zhengce baipishu*). On October 19, 2002, President Chen reconfirmed the treaty; thus becomes an official document which highlights the guiding principles of the government platform.

⁶⁰ Paul G. McHugh, *Aboriginal Societies and The Common Law: A History of Sovereignty, Status, and Self-Determination* 124-127 (Oxford University Press, 2004); Peter H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of Toronto Press, 2005).

And yet, the Indigenous Peoples Basic Law merely provides abstract recognition of these rights. The actual content and application of these rights remains uncertain and open to interpretation. The most infamous case was the promulgation of Yuánzhùmínzú Tǔdì Huò Bùluò fànwéi Tǔdì Huàshè Bànfǎ (原住民族土地或部落範圍土地劃設辦法, Regulation of demarcating indigenous peoples land or tribal land area) issued by the Council of Indigenous Peoples in February 2017.

It has been a huge debate on the protection of indigenous rights in the context of legal reform. One of the focal point lies at how and to what extent the State's legal system and social transformation construct indigenous cultural development and needs. This deliberation embedded with academic and practical values, which not merely manifests on the study of legal history. In actuality, from a wider research framework based on law and society and law and cultures, the above-mentioned Regulation is significant because it triggers academic community involvements into legal transformations within post-colonial discourse since legal reception of western idea of State law. A number of issues have been examined and widely discussed for the past year, such as indigenous traditional organization, conceptualizations of indigenous dispute resolution, and establishment of relational cultural/legal pluralistic-based judicial system. Although formal recognition of indigenous rights to land and self-government has occurred, with the enactment of Indigenous Peoples Basic Law, the issue remains controversial within Taiwan. Domestic normative and structural difficulties reduce the likelihood that the principles of indigenous self-determination, collective land rights, and self-government rights will be internalized and institutionalized in the legal framework of Taiwan.

Recognition of Indigenous laws

Taiwan's Indigenous Laws are embedded with two basic theories and principles. One is cultural integrity and self-government, and another is effective participation. Comprehensively speaking, the cores of Indigenous Peoples Basic Law were constructed upon the concepts of Yuánzhùmínzú (原住民族, indigenous peoples) and Bùluò (部落, tribal community). Furthermore, the formal recognition of aboriginal title contributes to at least two goals. First, the recognition of aboriginal title affirms indigenous peoples' distinct interests in land, which are based on prior occupation and culturally and spiritually specified rights and responsibilities. Second, the recognition of indigenous entitlements to land enhances indigenous peoples' right of self-determination⁶¹. Paradoxically, the current Taiwanese regulatory mechanisms for recognition of indigenous land entitlements fail to recognize certain aspects of indigenous interests in land, especially the collectivity of indigenous title to the land.

Traditionally speaking, the special relationship of indigenous people to land has various social, cultural, spiritual, economic and political dimensions which are collective in nature. This collective dimension is significant to the traditional indigenous land tenures. In contrast, the existing Taiwanese land rights regime focuses on private, individual title and is premised on commercial, monetary values, which are 'alien to the collective social organization of indigenous communities'. Although the Indigenous Peoples Basic Law affirms that government should 'recognize indigenous peoples' right to land,' it is unclear whether indigenous communities have the right to own land, or have the right to own land collectively. The failure of the Taiwanese government to accord appropriate legal rights to traditional indigenous interests to land probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples in Taiwan.

In the context of common law aboriginal title, James Tully argues for proper recognition of the distinct and pre-existing set of relations with land enjoyed by indigenous peoples before expropriation⁶². Further, Tully emphasizes the need to avoid seventeenth to nineteenth-century cultural biases in understanding both the nature of aboriginal nations and the characteristics of the property systems of those peoples⁶³. As mentioned above, the recognition of aboriginal title enhances the indigenous right of self-determination. Clearly, indigenous self-government requires that it be 'indigenous peoples' who identify and articulate the interests of aboriginal title – the recognition of indigenous legal authority and indigenous traditional laws.

The recognition of indigenous legal authority and indigenous traditional laws has also found strong support from international human rights laws. The ILO Convention No. 169 declares that indigenous peoples must be consulted in good faith prior to the establishment of any policies that concern them and

⁶¹ Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, E/CN.4/Sub.2/2001/21, at para. 39 (11 June 2001); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* 104-106 (University of Toronto Press, 2001).

⁶² James Tully, ed., *Philosophy in an Age of Pluralism: Essays in Honour of Charles Taylor* (Cambridge University Press, 1994).

⁶³ *Id.*

stresses that states must take into account the aboriginal customary laws⁶⁴. There is also broad recognition of indigenous traditional laws in the UN Declaration on the Rights of Indigenous Peoples. It views the recognition, preservation and promotion of customary indigenous laws as a key element for advancing indigenous right of self-government.⁶⁵ In particular, the UN Declaration on the Rights of Indigenous Peoples affirms that 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' and accords full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources⁶⁶.

Similarly, important aspects regarding the principle of recognition of indigenous customary laws is set out in Article 34 of the Indigenous Declaration:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

In terms of the legitimacy and cultural 'match' of the Indian tribal government, Joseph P. Kalt comments that, 'governance depending on the consent of the governed hinges critically upon shared conceptions of legitimacy in the use of power and authority.'⁶⁷ Legitimacy in this context means that 'the governed have confidence in, and support the government.'⁶⁸ Hence, indigenous peoples are entitled to develop institutions of self-government appropriate to their circumstances and to match the reality of their contemporary indigenous cultures.

The close interdependence of indigenous peoples, their lands and their customary laws has been recognized in international law⁶⁹. It is also evident that the recognition of indigenous traditional laws can make effective implementations to both indigenous rights of self-determination and self-government, two core objectives of the UN Declaration on the Rights of Indigenous Peoples. Since 2000s, ethnic relations in Taiwan changed from an assimilationist framework to a new multicultural approach based on the partnership between the indigenous peoples and the Taiwan Government. Indigenous rights are not constitutionally recognized, nor are their own traditional governance authority, which form the political and legal barriers that prevent indigenous peoples from full realization of a self-government right. In addition, disparities continue to exist between the indigenous and non-indigenous populations with regard to employment, income, health, education, and access to the court system. In the course of indigenous empowerment, nothing illustrates this process better than the complex issue of indigenous land rights. I see the economic aspect as the short-term goal and the social justice empowerment as an interim measure. By securing the financial capacity and consolidating the institutional measures, indigenous peoples in Taiwan may have a better chance of achieving self-government.

Conclusion

More than 540,000 people living in Taiwan are descendants of the Austronesian people who had a rich, self-sufficient culture on the island until Europeans started arriving 400 years ago. These indigenous peoples established their own sovereignty and operated as a constitutional regime. In 1895, these independent political entities were conquered by the Japanese Empire, and fifty years later they were annexed by the Republic of China. The successive changing of colonial regimes has had its toll on indigenous peoples and resulted in the loss of most of their lands. Furthermore, during some periods of colonial rule, they were prohibited from speaking their language and discouraged from practicing their cultural traditions. Ever since Taiwan became a part of the R.O.C. in 1945, and particularly beginning in the

⁶⁴ ILO Convention No. 169 Article 8 states, "1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights."

⁶⁵ Preamble to the U.N. Declaration on the Rights of Indigenous Peoples states, "Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment."

⁶⁶ Article 26 of the U.N. Declaration on the Rights of Indigenous Peoples states

⁶⁷ Joseph P. Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in *American Indian Constitutional Reform and the Rebuilding of Native Nations* 197 (Eric D. Lemont, ed., University of Texas Press, 2006).

⁶⁸ U.N. Permanent Forum on Indigenous Issues, International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance (New York, 11-13 January 2006) by Paul L.A.H. Chartrand, PFI/2006/WS.3/4.

⁶⁹ World Commission on Environment and Development [the Brundtland Commission], *Our Common Future* (Oxford University Press, 1987). According to the report of the Brundtland Commission, "The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and other resources that sustain their way of life – rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence, the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their areas."

1970s, an indigenous movement has been underway, and indigenous peoples now want to regain control over their land and their right to govern themselves.

The protection of indigenous rights and traditional cultures, since 1980 onward, along with the UN advocacy for international indigenous human rights, has received considerable attention in recent years both domestically and internationally. On February 2, 2005 the enactment of the Indigenous Peoples Basic Law signified a new milestone for indigenous rights and traditional cultures' legalization and justification. A preliminary study of the Indigenous Peoples Basic Law shows that the legislative foundations of contemporary indigenous rights are built upon the following principles: (1) Indigenous historical and transitional justices; (2) Realization of the multiculturalism and substantial equality; and (3) Effectuation of indigenous autonomy, self-government, and self-determination.

Paragraphs 11 and 12 to the Additional Articles 10 of the Republic of China (ROC) Constitution, which affirmed the existing indigenous rights and multiculturalism, have acquired constitutional status of basic rights by virtue of the adoption of ICCPR, ICESCR and its implementing act. In addition, the relationships and connections to the land and natural resources are the bases for indigenous identity, and their spiritual and cultural distinctions within indigenous traditional society. Therefore, land and natural resources are widely recognized as the core elements of indigenous cultures, which have been substantiated through the Indigenous Peoples Basic Law into a bundle of indigenous cultural rights, including those rights to land, natural resources, self-government, customary laws, traditional knowledge, and free, prior, and informed consent.

The paradigm within which Taiwan Government addresses indigenous issues is, for the most part, consistent with that endorsed by the UN Declaration on the Rights of Indigenous Peoples and other UN international human rights instruments. However, this paper has shown that States with superior political, economic and military power have control over the norms and rules of international law and can control their selective implementation. As currently enacted, Yuánzhùmínzú Tǔdì Huò Bùluò fànwéi Tǔdì Huàshè Bānfǎ (原住民族土地或部落範圍土地劃設辦法, Regulation of demarcating indigenous peoples land or tribal land area) **has** impaired the ability of indigenous peoples to enjoy their right of self-government.

Modern legal system is based upon the westernized individual liberalism. Neither can this individualized-focus regime accommodate indigenous traditional cultural habitus, nor can it realize indigenous community life rules. From the standpoint of cultural relativism and indigenous self-determination, how to harmonize within the liberal multiculturalism structure, the constitutionality of individual right and the cultural integrity and identity of indigenous collective right is the main concern of this paper.

This paper emphasizes that indigenous self-government has always been an important channel to reconstruct the special relationship between indigenous peoples and the nation-state. Now is the time that Taiwan Government flaunt to restore indigenous historical and transitional justices. It truly is a facing issue to implement the indigenous right to self-government. Apart from unsuccessful specialized legislation, Indigenous Peoples Basic Law, on the other hand, reflects the principles of self-governance and participatory informed consent mechanism, which conceive the multi-models of indigenous self-government.

To conclude, the question of the Taiwanese indigenous peoples' rights to land and self-government originated from historical and transitional justices are problematic primarily for three different reasons. Firstly the legislation on the concept is unclear, secondly the rights depend on historical relationships and thirdly the rights are a source of conflict. This paper begins with the active development and presentation of indigenous rights in the international and domestic regime. Next, to take the stand of indigenous human rights with a comparative study approach, which aims at exploring whether the existing legal design on indigenous rights, corresponding to the cultural conceptualization of traditional tribal governance, in conformity with constitutional entrenched value of cultural diversity.

President Tsai Ing-wen stressed in the National Apology to Indigenous Peoples that,

I know that even now, there are some around us who see no need to apologize. But that is the most important reason why I am representing the government to issue this apology today. To see what was unfair in the past as a matter of course, or to treat the pain of other ethnic peoples as an unavoidable part of human development, this is the first mindset that we, standing here today, resolve to change and overturn.

Rather than seeking formal statehood, however, indigenous peoples seek legitimacy and authority as the juridical subject within the Taiwanese state. In reviewing the State's relationship with indigenous peoples, the core issue remains as how can, and how should, the state empower the autonomy and effectiveness of indigenous governance in the relationship between indigenous peoples and cultural integrity. Overall, the goal of this paper is to study how indigenous communities come to be imagined as the 'nation', creating a society in which such independent nations within postmodern states can share power in a spirit of mutual respect.

Resolution of the South Coast International Indigenous Fishing Symposium 2024

That the delegates and attendees agree that an International Action Working Group be formed to consider and report upon options for complaints and/or communications to the United Nations about the protection of Indigenous Fishing Rights.

It was agreed that the initial International Action Working Group include:

- Mori Ichikawa
- Awi Mona
- Stan Lui
- Russ Jones and
- Tony McAvoy SC

It was noted that the Sami People were unable to join on this occasion, and an invitation will be extended to them to nominate a member.

Danny Chapman, Kathryn Ridge and Janet Hunt volunteered to be secretariat.

Narooma

The Joonga Land and Water Aboriginal Corporation hosted the International Indigenous Fishing guests on a beautiful cultural tour of Nar-oo-ma and the Wagonga Inlet. Guests enjoyed local seafood caught by Martin Stewart.

Wally, Yvonne and Martin Stewart, and Kevin Mason (aka Phantom) hosted the tour and explained the longstanding relationships Walbunja People have with this area and the significant cultural areas of Guluga and Biamanga.



Figure 26. International Indigenous Fishing Rights participants at Nar-oo-ma on Wagonga Inlet

It was an incredible exchange of views, with Dolly Garza singing along with Russ Jones from the Haida nation, and Syan Jayayod loved seeing the sea.

Canberra

The South Coast International Indigenous Fishing Symposium 2024 guests and Walbunja men, Wayne Carberry and Robert Chewing, travelled to Canberra, and made sure to stop first at the Aboriginal Tent Embassy.

Leah House, a First Nations custodian from Canberra welcomed all the guests and explained the significance of holding the Aboriginal Tent Embassy space for over 50 years, opposite the Australian Parliament House. She acknowledged the long-standing cultural relationship with the South Coast People.

Again, Russ and Dolly Garza shared their thanks by song, beautifully.



Figure 27. At the Aboriginal Tent Embassy, Canberra

Photo credit: Michael Power

Australian Parliament and Press Briefing

The South Coast International Indigenous Fishing Rights Group attended Parliament and briefed Zali Stegall MP on the outcomes of the Symposium.



Figure 28. Meeting with Zali Stegall MP at Parliament House, Canberra

Photo credit: Michael Power

After the briefing, Australian Greens Senator David Shoebridge hosted the South Coast International Indigenous Fishing Symposium 2024 Parliamentary Press Briefing in Reconciliation Week, highlighting the shared experience of Indigenous fishers globally and the need for a more systematic response to ensure proper recognition of their cultural rights to fish.



Figure 29. Press Conference in the Mural Hall, Parliament House, hosted by Senator David Shoebridge
Photo credit: Michael Power

Annexure A Raporo Ainu Declaration

The International Symposium

The Right to Catch Salmon in the Rivers as Indigenous Right

2023 Raporo Declaration

On the 26th~28th May, 2023, in Urahoro Town, Hokkaido, Japan, as a result of a call to action from the Raporo Ainu Nation, we held the international symposium on Indigenous rights, The Right to Catch Salmon in the Rivers as Indigenous Right-A Gathering of Indigenous People who Live from the Sea (i), the Forest (o) and the Rivers (ru)(hereafter 'International Symposium')

Against the background of the Raporo Ainu Nation's struggles against the government of Japan, which continues to completely deny their Indigenous rights to land and resources, initially, the International Symposium was planned with the intention of learning from progressive Indigenous peoples of the world about the state of their Indigenous rights recovery and the progress of their struggles.

However, during the International Symposium, as Indigenous participants from throughout the world reported that they are engaged in an ongoing struggle against national and provincial governments to protect their inherent rights, it became clear that the various problems being experienced by the Raporo Ainu Nation are common ones shared by the world's Indigenous peoples.

As a result, the participants of the International Symposium felt it necessary to issue a statement that calls attention to the on-going struggles of Indigenous people to regain the rights eroded by colonization, and have crafted this Declaration:

We, the Indigenous peoples of the world, recognizing the importance of cooperation and solidarity in the struggle against the shared problem of the recovery of Indigenous peoples' rights, hereby jointly issue the following Declaration.

1. Rights based on traditions and customs

We Indigenous peoples possess the collective rights to the lands and resources that we have used traditionally and customarily in each region since long before colonial states were established.

2. Explicit stipulation of Indigenous rights in Constitutions and other laws

Indigenous rights to land and resources are not rights which have been created by Constitutions or laws of colonial governments, but are rather inherent rights of each Indigenous group founded in tradition and custom.

We demand that each country confirm these inherent rights of Indigenous peoples by stipulation in their Constitution, and that they provide for the specific content in law.

3. Implementation of the law respectful of Indigenous rights

Justice systems including laws in each country must protect lives, cultures, and traditional ceremonies based on the ancient customs of Indigenous peoples, 3

When implementing the law, in order not to violate the inherent rights of any Indigenous group, law enforcement officers in each country must fully understand and respect the content of Indigenous rights. Courts and law enforcement officers must never impose unjust punishments or other disadvantages for the exercise of Indigenous rights to land and resources.

4. The right to revitalize and develop

We Indigenous peoples possess the right to practice, maintain, protect, as well as revitalize and develop the traditions and customs of each of four Nations. No country can violate this right.

5. Natural resource management through the traditional knowledge of Indigenous peoples

Each country, when using natural resources, must act in accordance with the traditional wisdom of Indigenous peoples, who possess profound knowledge about the biological diversity in their territories.

6. The participation of Indigenous peoples in natural resources regulatory procedures

Each country, when managing and regulating natural resources, must engage in prior consultation with, provide full information to, and obtain the free, prior, and informed consent of each concerned Indigenous group which possesses the inherent rights to these natural resources.⁴

7. The recognition of the priority of Indigenous peoples' rights

Each country, when using natural resources, must ensure that commercial and recreational use by non-Indigenous persons does not deprive any Indigenous group of their rights to these resources.

8. Prohibition of deprivation of Indigenous rights on the grounds of resource protection

States may not deprive Indigenous groups of their inherent right to natural resources on the grounds of, or under the guise of, resource protection if alternative conservation measures are possible.

9. Exercise of sustainable Indigenous rights

We confirm that in utilizing traditional knowledge, we are the ones who are engaged in sustainable fisheries, and we take pride in our practice of sustaining our natural resources for the next generations.

Hereby, we confirm the above items as well as resolve to continue the struggle against the unfair invasion of our inherent rights, pledge to always share information, mutually contact one another, form a network of solidarity, and struggle in collaboration, as well as declare that we will further expand this struggle to the world.

Finally, we close by quoting the words of Danny Chapman, who espoused our common feelings during the Symposium.

The story of the indigenous peoples gathered at this international symposium will not end with this symposium. We need to continue our struggle. We need to stand in solidarity with each other. We need to tell our story to the world. What I want to say to you is that we must continue this struggle. I hope that we will continue to be connected.

Danny Chapman
November 30, 2023

Amos Lin: Amis Nation (Taiwan)

Maraos: Yami Nation (Taiwan)

Awi Mona: Seediq Nation (Taiwan)

Danny Chapman: Aboriginal Man (the Walbunja Clan): Chairperson of New South Wales Aboriginal Land Council (NSWALC)

Kathryn Ridge: Lawyer for Aboriginal Peoples

Joe Watkins :Enrolled Member, The Choctaw Nation of Oklahoma

Nang Jingwas Russ Jones : Hereditary Chief, Haida Nation

Skuvllaalbmá Áslat Niillas Áslat, Aslak Holmberg

Sámiráđi Presideanta, President of the Saami Council

Raporo Ainu Nation (Chairperson, Masaki Sashima)

Annexure B Masaki Sashima, Raporo Ainu Nation Chairman, Address to EMRIP, 19 July 2023

The 16th Session Mechanism on the Rights of Indigenous Peoples

Item 8 : Panel Discussion

The Right of Indigenous Peoples to engage freely in all their traditional and other economic activities, with a focus on fishing rights

Raporo Ainu Nation

The Legal Team for the Lawsuit over Ainu Salmon Fishing Right
Shimin Gaikou Center

1. We are an organization of Ainu, indigenous peoples in Japan.
2. Our ancestors had lived in the Urahoro Tokachi River valley and called the sea, mountains and rivers around us 'loru', where they used exclusively for fishing salmon or hunting.
3. Salmon, Gods sent us is the very important food, trade goods, material of shoes and clothes and important resources of Ainu's economic activities.
4. However, about 150 years ago, the Japanese Government took possession of Hokkaido and prohibited fishing salmon in rivers. The ban on fishing salmon and hunting in the fields made Ainu starved and forced many Ainu to leave their Kotans due to hunger and loss of their livelihood.
5. Even today, the Japanese domestic laws such as Fisheries Resources Protection Act, the Fisheries Act and the Hokkaido Inland Waters Fisheries Adjustment Regulations based on them prohibit catching salmon in rivers.
6. It is a clear violation of the Article 20, 25, 26 of the UN Declaration, which guarantee the indigenous peoples' rights of traditional economic activities, lands and natural resources.
7. Fishing salmon in rivers as our ancestors had been doing is our identity as Ainu. In 2020, we filed a lawsuit to the Sapporo District Court seeking confirmation of our indigenous right as Ainu to fish salmon in our domestic river. The defendants, the Japanese Government and the Hokkaido Prefecture, externally agree with the UN Declaration and admit Ainu as an indigenous peoples, but never make any reference to the historical facts that Ainu had fished salmon and hunted deer freely before the Meiji period. They deny our indigenous right to fish salmon in the river because of the current Japanese domestic laws and regulations. If we fish salmon in the river as our ancestors had been doing, we will be arrested as poachers.

We request the EMRIP as following;

- We request the EMRIP and other UN organizations to urge the Japanese Government strongly to admit indigenous peoples' rights of traditional lands and natural resources.
- We request the EMRIP and other UN organizations to urge the Japanese Government and other States to obligate their law enforcement officials and legal professionals to master international human rights laws and treaties
- The EMRIP and other UN organizations should establish an institution to monitor whether States guarantee indigenous peoples' rights of traditional lands and natural resources.

Thank you, Chairperson.