INDIGENOUS PEOPLES: THEIR RIGHT TO COMPENSATION SUI GENERIS FOR ANCESTRAL TERRITORIES TAKEN

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ABSTRACT

Indigenous Peoples (IPs) are owners of their ancestral territories by virtue of their inherent status, through their ancestors, as the original occupants of these Islands. Over the centuries, these territories, or portions thereof, have been taken from them, either by the State itself, or with the State's permission.

As owners, Indigenous Peoples have been entitled to the same protection the legal framework has provided all other property owners, namely, the right to due process, particularly, the right to just compensation.

Moreover, the State has undertaken the obligations of a guardian to better care for the Indigenous Peoples of the Philippines. History, however, shows a breach of these obligations whereby the State, through its acts and omissions, has taken the property of its wards. Under general laws, ordinary wards are entitled to damages for breaches of trust committed by their guardians. Like other wards, Indigenous Peoples are also entitled to damages.

Indigenous Peoples are entitled to compensation — whether just compensation under the due process clause or compensatory damages as a result of the State's breach of its fiduciary obligations towards said Indigenous Peoples — for the past taking of their ancestral territories, or portions thereof.

Despite existing general laws, Indigenous Peoples have not received a single cent, either in the concept of just compensation or damages. This circumstance stresses the necessity for special legislation to be enacted for the effective enforcement of the Indigenous Peoples' right to compensation.

This necessity for a special law is reinforced by the philosophy of Indigenous Peoples towards land and resources. For Indigenous Peoples, their ancestral territories constitute the bases of their cultural integrity, hence, these territories are truly incapable of pecuniary estimation. This divergence between the value given to land and resources by ordinary owners and that given by Indigenous Peoples to their ancestral territories implies that the traditional measures, both locally and internationally, by which compensation is sought and formulated for ordinary property owners are insufficient. Furthermore, recourse to practices by various foreign states emphasizes that not only are Indigenous Peoples entitled to compensation, but to compensation sui generis for ancestral territories taken.

Special legislation is necessary for the effective enforcement of the right of Indigenous Peoples to compensation sui generis.

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INTRODUCTION

[T]he courts could not help us, and even the government officials and politicians take us for granted. It is sad to accept that this government would strangle us and rob us of our rights .... Does blood need to be spilled to regain our ancestral lands?[1]

A. Indigenous Peoples and Their Property Rights

Indigenous Peoples (IPs) of the Philippines, who maintain their traditions and customs, and refuse to integrate with the majority, have been oppressed through the centuries. Their property rights have been flagrantly trampled upon — their ancestral territories taken. The State has miserably failed to protect them. This dereliction is condemnable because of the legal framework recognizing IP's property rights.

Philippine history is split into three periods — the Spanish, the American (including the Japanese occupation during World War II), and the Philippine Republic (up to the present). Legal history is also divided into these periods. The Spanish period introduced the regalian doctrine, whereby all lands not otherwise appearing to be privately-owned are presumed to belong to the State.[2] The regalian doctrine excluded pre-existing rights — the laws then mandated that pre-existing native property rights be respected. The American period continued to protect native property rights. This legal protection was strengthened under the concept of due process which was then transplanted into Philippine soil. Moreover, the State assumed a fiduciary obligation towards the protection of IPs.[3] The Philippine Republic continues to extend protection to Indigenous Peoples' property rights, and has amplified the same.

The 1987 Constitution says: "[t]he State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."[4] With respect to property, "[t]he State ... shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being. The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain."[5] The Constitution protects private property, and provides for compensation when the State takes away said property or acts in such a way that it unduly restricts the use of property, amounting to deprivation.

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1 Letter from the Sulod People to President Aquino (July 28, 1988), *quoted in* Atty. Felix Q. Vinluan, *The Problematique of the Suludnon Ancestral Claims within the West Visayas State University Campus Reservation*, VOL. V, NO. 1 HORIZONS 21 (1994).

2 Republic v. Register of Deeds, 244 SCRA 537, 546 (1995).

3 Rubi v. Provincial Board of Mindoro, 39 Phil 660, 680 (1919).

4 PHILIPPINE CONST. art. II, § 22.

5 PHILIPPINE CONST. art. XII, § 5.

As owners of their ancestral territory, IPs have been deprived of their property without just compensation. In the alternative, granted that the State has made itself the guardian of IPs, it is accepted that in any fiduciary relationship, when the trustee or guardian breaches the trust, he is liable for damages. To date, the government has not paid just compensation nor has it been held liable for damages for its breach of duty as guardian of IPs. IPs are, therefore, entitled to compensation, whether on the basis of just compensation or damages.

IPs have a special relationship towards land and natural resources. For this reason, compensation for IPs should be unique. Like the Philippines, other countries have recently recognized the necessity of dealing with the issue of Indigenous Peoples' property rights. These countries have opted to provide IPs compensation for past acts or omissions of State, no matter how ancient. Moreover, the compensation for IPs in these countries include novel components. In upholding the right of Indigenous Peoples to compensation, an express mechanism for compensation, including components which take into account their special relationship with land and resources must be enacted.

B. The Issue

The Philippine legal framework recognizes (and has recognized) IP's property rights. To date, much of ancestral territory has been taken through the State's acts or omissions. IP's are, therefore, entitled to compensation, one that must necessarily take into account the special relationship which IP's have with land and natural resources.

C. Objectives, Scope and Limitation of the Study

This study aims to provide a rational basis under Philippine law and jurisprudence, supported by international law, for the award of just compensation or damages to IPs for the State's past acts resulting in the taking of ancestral territory.

This study covers the concept of IP's property rights, the regalian doctrine, and the protection given to said property rights. It discusses the fiduciary relationship between the State and IPs, introduced as a governmental policy during the American period. This study reviews the historical legal recognition and protection given to IPs' property rights. It gives an overview of the trends in International Law and in some foreign jurisdictions (i.e., U.S., Canada, New Zealand, Australia) providing for the protection of IPs' property rights (with emphasis on compensation and/or damages).

The recommendations of this paper are restricted to IPs outside the constitutionally-mandated Autonomous Regions.

D. Definition of Terms

For purposes of this study, the following terms shall mean:

"Ancestral domain" — refers to all areas belonging to IPs or Indigenous Cultural Communities (ICCs) comprising of lands, inland waters, coastal areas, and natural resources therein, held, occupied or possessed by IPs/ICCs, by themselves or through their ancestors, communally or individually since time immemorial (specifically since pre-Spanish era), continuously up to the present, except when interrupted by war, *force majeure*, or displacement by force, deceit, stealth, or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare.[6]

"Ancestral lands" — refer to lands occupied, possessed and utilized by individuals, families and clans who are members of the IPs/ICCs since time immemorial (specifically since pre-Spanish era), by themselves or through their predecessors-in-interest, continuously up to the present, except when interrupted by war, *force majeure*, or displacement by force, deceit, stealth, or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to residential lots, rice terraces or paddies, private forests, swidden farms, and tree lots.[7]

"Ancestral territory" — refers to both ancestral domains and ancestral lands, or any portion thereof, including all other natural resources therein, over which IPs/ICCs have the right of ownership since time immemorial (specifically since pre-Spanish times).

"Future acts" – refer to acts by or allowed by, or omissions by, the State, which will necessarily affect IPs'/ICCs' property rights, and which shall necessarily be limited to those which may validly fall under the State's exercise of police power or the power of eminent domain.

"Indigenous Peoples (IPs) or Indigenous Cultural Communities (ICCs)" — refer to groups of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized communities on communally-bound and defined territories, and who have, since time immemorial (specifically since pre-Spanish times), occupied, possessed, or utilized said territories and are owners of the same, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, become historically differentiated from the majority of Filipinos. The term includes peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or the establishment of present state boundaries,

[6] *See* Indigenous Peoples Rights Act of 1997, Republic Act 8371, § 3(a) (1997).

[7] *See id.*, § 3(b).

and who retain some or all of their own social, economic, cultural and political institutions, but who may have resettled outside their ancestral domains.[8]

"IPs' property rights" — refer to the IPs' or ICCs' rights over their ancestral territories, including the right of ownership over the lands and natural resources therein, and has a similar meaning to the terms, "native title", "aboriginal title", and "Indian title" used in foreign jurisdictions.

"Just compensation" — means the "fair and full equivalent for the loss sustained"[9] and which payment of just compensation is "not always required to be made fully in money."[10]

"Past acts" – refer to acts by or allowed by, or omissions by, the State, which have affected IPs'/ICCs' property rights.

"Taking" — refers to entrance upon private property for more than a momentary period, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating, or injuriously affecting it in such a way as to substantially oust the owner, and deprive him of all beneficial enjoyment thereof.[11]

"Time immemorial" — refers to time beyond human memory, or time out of mind. When referring to immemorial possession, it means "possession of which no man living has seen the beginning, and the existence of which he has learned from his elders."[12] It also refers to a period of time when as far back as memory can go, certain IPs/ICCs are known to have occupied, possessed and utilized, as owners, defined territories devolved to them, by operation of customary law, or inherited from their ancestors in accordance with their customs and traditions,[13] and when said term refers to possession, it means possession by IPs/ICCs since pre-Spanish times.

CHAPTER II

INDIGENOUS PEOPLES IN THE PHILIPPINES

A. Indigenous Peoples' Philosophy Towards Land

Land is central to Indigenous Peoples' lives. They believe it is sacred, and that it is the provider of sustenance for all living things, and therefore, must be respected, used carefully, preserved and restored. This attachment to land extends to a countless

[8] *See* R.A. 8371, § 3(h).

[9] Export Processing Zone Authority v. Dulay, 149 SCRA 305, 314-315 (1987).

[10] Association of Small Landowners v. Secretary of Agrarian Reform, 175 SCRA 343, 388 (1989).

[11] Republic v. Vda. de Castellvi, 58 SCRA 336, 350-352 (1974).

[12] Director of Lands v. Buyco, 216 SCRA 78, 95 (1992).

[13] *See* R.A. 8371, § 3(p) (1997).

number of years — land and persons may not be separated.[14] For example, the Lumads in Mindanao believe that to live, till, and manage the land is not only a right and privilege, but also a duty, for land is God's gift for prosperity and livelihood.[15] Immortalized are the words of Macli-ing Dulag, the Kalinga warrior chief from upstream of the Chico River, at the height of the conflict concerning the construction of the dam. When asked by a National Power Corporation engineer where the titles to the land were, so as to prove their ownership, he answered, "You ask if we own the land. And mock us.... Such arrogance to speak of owning the land. When you shall be owned by it. **How can you own that which will outlive you?**"[16] (emphasis supplied). Land to Indigenous Peoples means more than property. The issue of land ownership by Indigenous Peoples touches upon the very right of Indigenous Peoples to go on living — and as our Constitution guarantees, the right to a life that is a good life. This special relationship of Indigenous Peoples to land and their ancestral territories highlights the necessity of settling the issue of the taking of said territories.

B. Taking of Indigenous Peoples' Territories

Philippine history has institutionalized formal ownership of lands through pieces of paper, in vast contrast to indigenous land laws, whereby ownership over land is evidenced by the tribe's use and/or control of land or territory.[17] In studying IPs and their territories, one sees a common history of dispossession, in the Philippines and in foreign jurisdictions. In contrast with the premium placed by the State on paper titles, IPs' claims over land stem from their inherent status as original occupants of their respective lands.[18] The phrase "since time immemorial" is commonly used to describe how indigenous peoples have occupied their particular territories,[19] since their rights arise from their being the original occupants thereof, before the advent of colonization. Many years before the Spaniards colonized the Philippines, Filipinos had already evolved property concepts. Patterns concerning territorial behavior existed all over the Islands. "It was a widespread custom in the large islands of the Pacific that any man acquired for himself and his close kin long term rights to land which he cleared from virgin bush."[20] "[T]here was no need to record in writing the acquisition or conveyance of land," because kinship, communal affiliation and local

[14] Debra M. Hoggan, *Indigenous Philosophy and Land*, World Council of Indigenous Peoples (Marie Smallface Marule ed., 1981), *available online* URL http://www.halcyon.com/pub/FWDP/International/indlnd.txt.

[15] Lumad Mindanaw, *Submission to "Forum: On the need for a Commission on Ancestral Domain,"* January HORIZONS 6 (1989).

[16] Mariflor Parpan Pagusara, *Does native need title?*, November-December DILIMAN REVIEW 69 (1983).

[17] Dante B. Gatmaytan, *Ancestral Domain Recognition in the Philippines: Trends in Jurisprudence and Legislation*, PHILIPPINE NATURAL RESOURCES LAW JOURNAL 43, 47 (1992).

[18] Debra M. Hoggan, *Land Rights of the Indigenous Peoples, International Agreements and Treaties, Land Reform and Systems of Tenure*, World Council of Indigenous Peoples (Marie Smallface Marule ed., 1981), *available online* URL http://www.halcyon.com/pub/FWDP/ International/lndright.txt.

[19] Rene Agbayani, *The Manobos of Arakan Valley: Their Struggles to Regain their Ancestral Domain*, Vol. V No. 1 HORIZONS 11 (1994).

[20] Owen James Lynch, *Native Title, Private Right and Tribal Land Law: An Introductory Survey*, 57 PHILIPPINE LAW JOURNAL 272, *citing* Crocombe, Land Tenure in the Pacific 2 (1971).

custom were enough to guarantee land tenure.[21] Prior to the Spaniards, "Indians", from different districts had already developed their own government, administration of justice, laws by which they condemned persons to death, laws pertaining to marriage, inheritance, and debts.[22] The pre-Spanish conquest system of property relations, and rights arising therefrom evolved by native Filipinos were properly brought to the attention of the foreign sovereign, and said sovereign legally acknowledged and protected said matters.[23]

Today, IPs in the Philippines are estimated to be from twelve to thirteen million persons, or approximately eighteen percent (18%) of the total national population, divided into 110 ethnolinguistic groups. According to a 1996 United Nations study, the IPs in the Philippines are amongst the poorest and most disadvantaged groups in the country, and their major problems are weak political representation, social discrimination and political violence.[24] As of October 1997, the Department of Environment and Natural Resources has certified ancestral territory claims covering an area of approximately 1.3 million hectares, and many more are pending approval in said Department's offices, covering about two million hectares.[25]

The following exemplify the taking of IPs' territories, and said instances, taken together with numerous other instances, have made IPs, indeed, one of the most marginalized groups in the country.

1. The Bataks of Palawan[26]

The Bataks of Palawan are of negrito stock. They live as forest and riverine hunters and subsist on wild honey, yam and wild pigs. A former Batak territory is Tabanag (recognized as such in the 1870s). It is currently a barangay of Puerto Princessa City, and populated mostly by Christians. In the early part of this century, many settlers came and dispossessed the Bataks, who were forced to live further inland. The worst dispossession occurred during the years of 1968-1975, when the Presidential Adviser on National Minorities (PANAMIN) resettled them by force. In 1968, they were moved to the west coast of Palawan near Ulugan Bay into an isolated tract of land. In 1969, they were again resettled, by forcibly carting them off like cattle in military vehicles to another PANAMIN project. This PANAMIN project was another disaster, and in 1975, PANAMIN forcibly moved the Bataks to the Babuyan River area. Here, the Bataks were even deployed as construction workers to work on a helipad to accommodate the arrival of Elizalde (head of PANAMIN) and his team. Tabanag, and other Batak territories are now occupied by the Tagbanua (another IP group), and Visayan settlers.

[21] *See id., citing* Fernandez, Custom Law in Pre-Conquest Philippines, at 103-104 (1976).

[22] 7 BLARI & ROBERTSON, *The Philippine Islands 1493-1898*, 156-185.

[23] 14 *id.* at 327-329, and 17 *id.* at 151-152.

[24] Ma. Cecilia Dalupan-San Andres, *Ancestral Rights and Community Issues in Philippines Mining*, paper presented to the Mining Philippines '97 Conference, Manila, July 9-12, 1997.

[25] *See id.; Landmark law sets 3.3M has. as tribal lands*, MANILA STANDARD, Oct. 30, 1997, at 1.

[26] Jerry Esplanada, *Lost Tribes*, PHILIPPINE DAILY INQUIRER, March 4-6, 1997.

Today, their settlements may be found on the slopes of Cleopatra's needle, a 1,593 meter mountain. In the mid-1970's, the Bataks numbered at more than 900 persons. Now, less than 400 survive and some are afflicted with malaria, tuberculosis, and diarrhea. Most are malnourished.

2. The Katindu Case — The Manobos of the Arakan Valley in Cotabato[27]

Sitio Katindu was occupied by the Manobos and by their forebears. In the 1960s, they were forcibly driven out by the men of Augusto Gana, a politician from Kidapawan, Cotabato, through the use of armed men and bulldozers. The Manobos' lives were threatened, their houses and crops were burned, and most of the Manobos, in fear, fled the area. Several Manobos were killed from this period up until the late seventies. It was only in 1989 that the Manobos found a partial legal victory when 720 hectares of the original 1,355 hectares of Manobo territory were adjudicated back to them by the DENR as their ancestral land. But why only 720 hectares? The government effectively sanctioned the taking of the balance of 635 hectares, without compensation. Moreover, Gana's men, in disobedience to the DENR decision, continued to squat in said Manobo territory. The lack of effective measures to prevent such blatant taking have left the Manobos to wander from place to place in order to survive.

3. The Sulodnons of Iloilo [28]

The Sulodnons were the original inhabitants of Sitios Manabahan, Agdalusan, Tagbakan, Hagnaya Daku, Hagnaya Gamay, Badiangan, and Tina of barangay Jayobo Lambunao, in Iloilo. In 1951, they were ordered to vacate their lands by the forces of the Philippine Constabulary and the Philippine Ground Force. These orders were allegedly issued as part of an anti-Hukbalahap campaign then enforced. After they were evicted, employees of the Bureau of Lands surveyed the area for the establishment of the Iloilo National Agricultural School (INAS), now the West Visayas State University, notwithstanding the vehement protest of the Sulodnons. Later on, the Sulodnons attempted to enter their old homesites, but were told that the property had already become the property of the school, and that they had no rights whatsoever to said territory.

4. The Chico Dam and the Kalingas[29]

The 1974 Chico River Basin Development Project involved four proposed dams across the Chico River crossing the provinces of Kalinga-Apayao and Mt. Province. The dam was to become the largest hydroelectric power plant in Southeast

[27] Rene Agbayani, *Defense of Ancestral Domain: The Katindu Case Study*, Vol.V No.1 HORIZONS 11 (1994).

[28] Atty. Felix Q. Vinluan, *The Problematique of the Sulodnon Ancestral Claim within the West Visayas State University Campus Reservation*, Vol. V No. 1 HORIZONS 21 (1994).

[29] Atty. Donna Z. Gasgonia, *The Narmada Project and the CHICO: A Comparison*, Vol. I No. 2 HORIZONS 21 (1989), and Mariflor Parpan Pagusara, *Does native need title?* November-December DILIMAN REVIEW 66 (1983).

Asia with a capacity of 1000 megawatts. It would have submerged 2,753 hectares of land, affecting approximately 100,000 indigenous persons, mostly Kalingas. The IPs were never consulted before the project was approved. The government intended to merely notify and then relocate said IPs. When faced with opposition, the government belittled the IPs' claims over their ancestral territories, and demanded to see their paper titles. The government used force. The staunchest opposer among the Kalingas was Macli-ing Dulag, a Kalinga chieftain, who was murdered on April 23, 1980 by Lt. Adalem of the Army. After the murder, the military positioned themselves in the Kalinga villages to suppress any possible opposition. Ironically for the government, the death of Macli-ing Dulag spurred many cause-oriented groups to campaign against the project. The publicity (local and international) of the opposition to the project eventually pressed the government to cancel said project.

5. The Tagbanuas of Narra, Palawan[30]

The Tagbanuas' ancestors roamed Aborlan, near today's Brooke's Point, and settled in scattered areas where they engaged in farming. In the 1950's, a hundred Tagbanua families were resettled in the Tagbanua reservation, together with Atis from Antique, in an area between the Malatgao and the Manaili rivers of Aborlan. The Tagbanuas agreed to the resettlement and the creation of the reservation, because the government promised to provide better services. In July, 1971, part of the reservation was fenced off by the provincial fiscal and a former military commander, on the basis of a government permit originally issued to a certain Felimon Grande who transferred the said permit to said officials. The permit was issued on the basis of the government's asserted ownership over the reservation occupied by the Tagbanuas. Moreover, the government failed to provide the better services it promised the Tagbanuas. The Tagbanuas were never compensated by the government for the loss of their rights to their original ancestral territory and part of the reservation.

6. The Aetas of Central Luzon[31]

The Aetas' ancestors freely occupied the areas of Zambales, Pampanga, Tarlac, Bulacan and Bataan. Eventually, much of the land they once roamed became the Clark Field-Fort Stotsenburg Reservation. During the Marcos regime, the Sacobia Development Authority (SDA) was created covering other lands which did not fall under Clark's jurisdiction. Aeta territory was summarily considered government property. When the Americans were still at Clark, part of the area was used for target practice and the sound pollution and the bombs often disturbed the Aeta dwellings left in the area. The SDA was supposed to become a model in community development, and most Aetas were compelled to become workers, or components in the government's development programs. Until today, the Aetas' vested rights in even a small portion of the territory they once freely roamed has been totally ignored.

[30] PANLIPI, *Modes of Defense of Ancestral Land: Case Studies from the Field*, Vol. I No. 2 HORIZONS 15 (1989).

[31] *See id.*

7. Mangyans of Mindoro and the Loggers[32]

The six major Mangyan tribes have considered the Island of Mindoro home since time immemorial. Swidden farming and trading with foreigners who came to their ports were their economic activities. As the Spaniards and more outsiders arrived on the island, the Mangyans fled to the mountains, and were thereby deprived of the lands below. The most recent cases of dispossession involve mining leases and forest concessions. A classic case occurred in 1986, when the then Ministry of Natural Resources advertised in the Philippine Daily Inquirer and Malaya an Invitation to Bid to cut timber on 46,000 hectares of land in Mindoro. The Mangyans, alarmed, attempted to find out, through an non-governmental organization (NGO), what areas were covered, but the Ministry never acknowledged said inquiry nor replied thereto. Eventually, a timber license agreement was signed via a negotiated sale to a certain Oriental Wood Processing Corporation (OWPC). This agreement covers seven (7) municipalities, affecting 30,000 Mangyans.

8. The Dumagats in Diteki, San Luis, Aurora[33]

This case of the Dumagats involves dispossession by the government under the guise of environmental protection and conservation. The Dumagats, who met the Community Environment and Natural Resources Officer of the DENR, attempted to get official recognition of their ancestral domain. They were summarily told that a portion of their ancestral land fell within the Aurora National Park, and therefore, they were squatters, and had no rights thereto. The government subsumed Dumagat territory in the public domain despite the fact that the Dumagats considered said land as their own since time immemorial.

C. Lack of Effective Mechanism to Enforce Right of IPs to Compensation

IPs are pre-colonial owners. Their rights precede the legal institutions as we know them today. Why have their ancestral territories been taken by the government, or why has the government allowed said taking? Centuries of taking must be stopped and redressed today. Past wrongs cannot be corrected by the mere passage of time. If time has made restitution impossible or impracticable, compensation or damages must, at the very least, be paid.

The fact that IPs are owners of their ancestral territories is, and has always been, recognized and protected within the Philippines' legal framework, theoretically. History, however, illustrates that these laws have been miserably ineffective in protecting IPs' rights as owners, and IPs have been deprived of most of their ancestral territories. Recently, in order to finally *"establish the necessary mechanisms to enforce and guarantee the realization"*[34] (emphasis supplied) of IPs' rights as owners, Congress passed the "Indigenous Peoples Rights Act of 1997" ("IPRA"), or Republic Act 8371.

[32] *See id.*

[33] Donna Z. Gasconia, *Our Ancestral Domain is Within a National Park, What Shall We Do?*, Vol. II No. 1 HORIZONS 12 (1990).

[34] Indigenous Peoples Rights Act of 1997, R. A. 8371, § 2 last par. (1997).

Similarly, the arbitrary taking of private property is not (and has not been) sanctioned by the Philippines' legal system. The taking of private property has required restitution, compensation, or other forms of redress since the Spanish period. History, however, again depicts the failure of the same laws to provide an effective mechanism for IPs to claim the compensation they are justly entitled to, since they have not received a single cent for all the property taken from them in the past.

Section 56 of IPRA provides:

> Existing Property Rights Regimes — Property rights within ancestral domains already existing and/or vested upon the effectivity of this Act shall be recognized and respected.

This section essentially validates past taking of ancestral territory. Yet the IPRA is silent in providing for an effective and specialized mechanism by which IPs may successfully claim compensation. There is an urgent need for an effective mechanism for compensation, and unless special legislation, similar to IPRA, is passed for the payment of compensation to IPs in particular, the right of IPs to compensation may once again be ignored.

CHAPTER III

INDIGENOUS PEOPLES AS OWNERS

The oppressive history of the taking of indigenous peoples' ancestral territories appears all the more revolting when one looks at the legal framework within which said taking took place.

A. Owners Since Time Immemorial

Before the arrival of the Spanish colonizers, native Filipinos had evolved their own legal system. This system of laws was unwritten, but developed in accordance with the usages of their ancestors.[35] This custom law included property concepts such as communal ownership and succession.[36] Pre-conquest Filipinos had nothing written to evidence their ownership over their lands, but under their own customs, they recognized and respected said ownership.

At the time of the Spanish conquest, the prevailing influence on the relationship between conqueror and conquered was natural law. The earliest source of indigenous peoples' property rights under International Law came from Spain, which was being confronted with the colonization of the so-called New World. Renowned Spanish scholar Francisco de Vitoria, who wrote the treatise *De Indis Noviter Inventis*, greatly influenced Spanish colonial policy. Vitoria wrote that there was a bond among all

[35] 16 BLAIR & ROBERTSON, *The Philippine Islands 1493-1898*, 121.

[36] *7 id.*, at 173-196.

men, and regardless of race or creed, each person had the natural right to be treated equally. He declared that as far as Indian title to territory was concerned, Indians had true dominion, and they could not be deprived of their property on the ground that they were not owners thereof.[37] Dutch statesman and jurist Hugo Grotius wrote in *Mare Liberum* that regardless of the fact that Indians were considered idol-worshippers when found by Spain, they had full sovereignty over property, which they could not be deprived of, since it was their natural right. He wrote: *plunder is not excused by the fact that the plunderer is Christian.*[38]

1. Spanish Period

This philosophy of recognizing IPs' title was reflected in the land laws applicable during the Spanish period. Justice Sabino Padilla[39] wrote a book[40] summarizing the most important land laws during the Spanish regime. The first laws on land grants were the "Laws of the Indies" which were promulgated by the Spanish King, to encourage his subjects to settle in the lands of the "Indies", including the Philippines. The Seventh Law[41] of the Indies provided: "[i]n places to be settled as well as in those already settled, the apportionment of lands was to be made *without prejudice to the natives or distinction to persons.*" (emphasis supplied) Under the Ninth Law,[42] "[g]rants to Spaniards of farms and lands were to be made *without prejudice to the natives*; and those lands granted to the damage and prejudice of said natives *were to be returned to the owners thereof.*" (emphasis supplied)

Towards the end of the Spanish regime, the Royal Decree of June 25, 1880 came into existence, providing rules for the adjustment of public land in the Philippines. By virtue of the decree, "[a]ll lands in the Philippines not lawfully owned by private persons ***or*** which had not passed into private ownership by virtue of gratuitous or onerous grants by competent authorities were deemed public lands." (emphasis supplied). Reading this decree in conjunction with the previous laws, one would observe that public lands excluded: i) land considered under law as private (i.e., held by Filipinos at the time of conquest); and ii) those acquired through gratuitous or onerous grant from competent authority.

Any doubts as to the ownership of IPs over their ancestral territories are dispelled as the Philippines was ceded to the United States.

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[37] Frederika Hackshaw, *Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi, in* WAITANGI MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 92, 96 (I.H. Kawharu ed., 1989).

[38] *See id.* at 97.

[39] Justice Padilla was a member of the Philippine Supreme Court for almost 18 years between the years 1946—1964. He was also a member of the *Real Academia Espanola* (international association of persons highly fluent in the Spanish language). A holder of *a Doctori in Jure Civili, meritissimus*, he specialized in land registration laws.

[40] SABINO PADILLA, A STUDY OF THE LAWS ON LAND GRANTS IN THE PHILIPPINES DURING THE SPANISH REGIME (1980).

[41] *See id.* at 4.

[42] *See id.*

2. American Period

In *Carino v. Insular Government,*[43] Carino, a native Igorot, asserted ownership over a piece of land and wanted to register the same. He claimed that: i) aboriginal rights were recognized by American law prevailing in the Philippines at the time, and ii) the "Laws of the Indies" showed "a continuous, consistent, and conscientious purpose to protect the native inhabitants in their persons, liberties and possessions; to *secure their property rights* against Spanish greed and improvidence."[44] Ruling for Carino, Justice Holmes declared: "...our first object in the internal administration of the islands is to *do justice to the natives*, not to exploit their country for private gain."[45] He declared that the Organic Act of July 1, 1902 "...made a bill of rights, embodying the safeguards of the Constitution, and, like the Constitution, extends those safeguards to all. It provides that no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law... *it is hard to believe that the United States was ready to declare that 'any person' did not embrace the inhabitants of Benguet, or that it meant by 'property' only that which had become such by ceremonies of which presumably a large part of the inhabitants never had heard, and that it proposed to treat as public land what they, by native customs and by long association — one of the profoundest factors in human thought — regarded as their own.*"[46] (emphasis supplied)

Justice Holmes, once and for all, expressly provided a standard for ownership of land by IPs — land considered as private by: i) native customs, and ii) long association. He discounted the use of ceremony provided by the colonizer's law. He reiterated the standard used by native Filipinos themselves, before the arrival of the Spaniards. *Carino* dispelled the notion that ownership was held only by persons with "paper" titles, or those who held grants from the State. *Carino* clarified doubts as to whether any of the laws during the Spanish period extinguished the ownership of IPs over their ancestral territories — they did not extinguish said property rights, and *Carino* made it clear that the courts would not interpret said laws otherwise. Significantly, *Carino* was a land registration case. Land registration involves the confirmation of title. Carino, the petitioner, did not hold any grant from the Spanish government, yet the Supreme Court confirmed his ownership.

Another case, *Reavis v. Fianza,*[47] affirmed IPs' property rights over their ancestral territories, namely, over the natural resources therein. An Igorot, Toctoc, did not hold any "paper" title over the mines subject of litigation. The government never granted any title or concession to Toctoc, his heirs and successors, particularly plaintiff, Jose Fianza, who was already Toctoc's grandson. Fianza wanted to stop Reavis (a Westerner) from claiming title to certain gold mines in Benguet. Observing that

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[43] 212 U.S. 449, 53 L. ed. 595 (1909).

[44] *Id.* at 595.

[45] *Id.* at 597.

Fianza's family had indeed held said mines in "Igorot fashion", the Supreme Court ruled for Fianza, and Reavis was enjoined. Justice Holmes said: "to deny them possession in favor of Western intruders would be to say that the natives had no rights ... that an American was bound to respect."[48]

Reavis again emphasized the standard of ownership as provided by: i) native customs, and ii) long association. *Reavis* expressly characterized IPs' property rights as fully enforceable against third parties. *Reavis* defined the *sui generis* nature of IPs' property rights over ancestral territories — not only do said rights cover land, but they also cover the minerals found therein — emphasizing the fact that ancestral territories have never been part of the public domain as defined under the regalian doctrine.

Hence, IPs remained owners of their ancestral territories through the Spanish and American[49] periods. Upon gaining independence, the Philippine Republic did not change the status of IPs' property rights over their ancestral territories.

3. Philippine Republic

The 1987 Constitution declares that, "[t]he State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."[50] It also provides that "[t]he State ... shall *protect the rights of said communities to their ancestral lands* to ensure their economic, social, and cultural well-being. The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain."[51]

Many statutes have been passed showing concern for the IPs, mainly to address the problem of continuing marginalization of said IPs. Republic Act 3872 (1964), amending the Public Land Act, provided for disregarding the disposable/inalienable classifications of public land in granting rights to IPs.[52] The law may be read

[48] *Id.* at 76.

[49] The Japanese occupation did not affect the status of IPs' property rights. As held in 75 Phil 113 (1945), the laws during the American period did not change by mere change in sovereignty, except for political laws. The laws, including the recognition of IPs' ownership over their ancestral territory continued under the Japanese occupation, there was no interregnum.

[50] PHIL. CONST., art. II, § 22.

[51] *See* PHIL. CONST., art. XII, § 5.

[52] The law provides two things: i) "(a) member of the national cultural minorities who has continuously occupied and cultivated, either by himself or through his predecessors-in-interest, a tract or tracts of land, *whether disposable or not* since July 4, 1955, shall be entitled to the right..." of a free patent; and ii) "(m)embers of the national cultural minorities who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive and notorious possession and occupation of lands of the public domain suitable to agriculture, *whether disposable or not*, under a bona fide claim of ownership for at least 30 years shall be entitled to the rights..." of confirmation of their title over the previously public land. (emphasis supplied). It is important to distinguish the land occupied under this law (public domain occupied since July 1955 or for thirty years) from land considered as private since time immemorial.

consistently with the ownership of ancestral territories by IPs. As the years passed, IPs' territories were encroached on, and the liberal grant of public land under this law could have been considered as one means for IPs to get an equivalent of territories lost to third parties. Another law was Presidential Decree 410 (1974), which declared parts of the public domain occupied by IPs for at least 10 years before said decree, as part of ancestral lands, and declared these public lands as alienable in the event they were not yet classified as such.[53] Considering the widespread displacement of IPs during the Marcos regime, especially under the PANAMIN, the law, penned by then President Marcos, may be considered an attempt to redress said displacement by making certain public lands **a part** of ancestral lands.

The more recent statutes include the Comprehensive Agrarian Reform Law, the NIPAS Act of 1992, the Mining Act of 1995 and the Indigenous Peoples Rights Act of 1997.

The Comprehensive Agrarian Reform Law[54] expressly recognizes the rights of indigenous communities to their ancestral lands as a means of ensuring their economic, social and cultural well-being.[55] Rights under the agrarian reform program are subordinated to IPs' rights.[56] The National Integrated Protected Areas System (NIPAS) Act of 1992[57] defines an indigenous cultural community, recognizing: i) shared customs, and ii) possession since time immemorial of certain territory.[58] The

[53] The law provides: "(a)ny provision of law, decree, executive order, rule or regulation to the contrary *notwithstanding* all unappropriated agricultural lands forming part of the public domain at the date of the approval of this Decree occupied and cultivated by members of the National Cultural Communities for at least ten (10) years before the effectivity of this Decree, particularly in the provinces of Mountain Province, Cagayan, Kalinga Apayao, Ifugao, Mindoro, Pampanga, Rizal, Palawan, Lanao del Sur, Lanao del Norte, Sultan Kudarat, Maguindanao, North Cotabato, South Cotabato, Sulu, Tawi-Tawi, Zamboanga del Sur, Zamboanga del Norte, Davao del Sur, Davao del Norte, Davao Oriental, Davao City, Agusan, Surigao del Sur, Surigao del Norte, Bukidnon, and Basilan *are hereby declared part of the ancestral lands* of these National Cultural Communities and *as such these lands are further declared alienable and disposable if such lands have not been earlier declared as alienable and disposable by the Director of Forest Development*, to be distributed exclusively among the members of the National Cultural Communities concerned...." (emphasis supplied).

[54] Republic Act No. 6657 (1988).

[55] R.A. No. 6657, § 9 (1988) provides: "...ancestral lands of each indigenous cultural community shall include, *but not be limited to*, lands in the actual, continuous and open possession and occupation of the community and its members... The right of these communities to their ancestral lands shall be protected to ensure their economic, social and cultural well-being...." (emphasis provided).

[56] R.A. No. 6657, § 2 (1988) provides: "...(t)he State shall apply the principles of agrarian reform, or stewardship, whenever applicable, in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain, under lease or concession, suitable to agriculture, subject to ... the rights of indigenous communities to their ancestral lands...."

[57] Republic Act No. 7586 (1992).

[58] R.A. No. 7586, § 4(d) (1992) provides: ""(i)ndigenous cultural community" refers to a group of people sharing *common bonds of language, customs, traditions and other distinctive cultural traits*, and who have, *since time immemorial*, occupied, possessed and utilized a territory...." (emphasis supplied).

law mandates the recognition of ancestral lands, customary rights and interests arising therefrom.[59] The NIPAS Act recognizes that the DENR has no power to coerce IPs to relocate outside of their territories or areas of current occupancy — the right of possession is secured. The NIPAS also requres notice and hearing to be given to IPs in the formulation of implementing rules and regulations of said law. The Mining Act[60] expressly recognizes IPs' rights over minerals in their ancestral territories. Just like other property owners, IPs' consent must be secured before any mining operation may be conducted in ancestral lands.[61] Royalty payments are required to be made if any mining operations are undertaken. [62] and royalties are considered income or fruits of properties, and under civil law, the right to fruits of property belong to the owner of said property.

Under the Ramos administration's Social Reform Agenda Framework, there exists the Indigenous Peoples Flagship Masterplan of Operations. This plan seeks to ensure indigenous peoples' cultural, economic and political integrity through the recognition and protection of their rights to ancestral domains.[63] In consonance with said agenda, the most significant law passed by Congress recognizing IPs' property rights is the Indigenous Peoples Rights Act of 1997 (R.A. 8371). The law recognizes the rights of ownership and possession of IPs over their ancestral territories.[64]

Various Administrative Orders of the Department of Environment and Natural Resources (DENR) embody different modes of protecting IPs' property rights. One provides for the delineation and demarcation of ancestral domains and ancestral lands.[65] Two others provide for the management of ancestral domains and ancestral lands.[66] As far as prospecting for genetic resources, the President ordered[67] that no person who wishes to prospect for biological and genetic resources may be allowed within the ancestral lands and domains of indigenous cultural communities except with: i) the prior informed consent of said communities,

[59] R.A. No. 7586, § 13 (1992) provides: "...(a)ncestral lands and customary rights and interests arising therefrom shall be accorded due recognition. The DENR shall prescribe rules and regulations to govern ancestral lands within protected areas: Provided, That the *DENR shall have no power to evict indigenous communities from their present occupancy nor resettle them to another area without their consent*: Provided, however, That *all rules and regulations*, whether adversely affecting said communities or not, shall be *subjected to notice and hearing* to be participated in by members of concerned indigenous community." (emphasis supplied)

[60] Republic Act 7942 (1995).

[61] R.A. 7942, § 16 (1995) provides: "...(n)o ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned."

[62] R.A. 7942, § 17 (1995) provides: "...(i)n the event of an agreement with an indigenous cultural community pursuant to the preceding section, the royalty payment, upon utilization of the minerals shall be agreed upon by the parties...."

[63] Ma. Cecilia Dalupan-San Andres, *supra* note 24.

[64] R.A. No. 8371 (1997), § 7 provides: "(t)he rights of ownership and possession of ICCs/IPs to their ancestral domains shall be *recognized and protected*." § 8 provides: "(t)he right of ownership and possession of ICCs/IPs to their ancestral lands shall be *recognized and protected*." (emphasis supplied)

[65] DENR Department Administrative Order 25 (1992).

[66] DENR Department Administrative Order 2 (1993), DENR Department Administrative Order 34 (1996).

[67] Executive Order No. 247, 18 May 1995.

and ii) said consent to be obtained in accordance with the customary laws of the community. These all simply underscore the fact that IPs have property rights which are entitled to protection.

Aside from the laws and administrative regulations, the recognition of IPs' ownership over ancestral territory has been reiterated in case law.

Shortly after the Americans left, the Supreme Court decided the case of *Oh Cho v. Director of Lands*[68] and reiterated the *Carino* doctrine. Oh Cho maintained a two-pronged claim over a certain parcel of land. He asserted that he was entitled to registration under the Land Registration Act, or at the very least, entitled to a grant from the State through the Public Land Act. The Supreme Court declared Oh Cho disqualified to acquire land under the Public Land Act, because he was an alien, thereby leaving only his claim for registration. The Supreme Court, through Justice Sabino Padilla,[69] denying his demand for registration, and ultimately denying his private ownership over said parcel of land, held:

> The applicant failed to show that he has title to the lot that may be confirmed under the Land Registration Act. He failed to show that he or any of his predecessors-in-interest had acquired the lot from the Government, either by purchase or by grant, under the laws, orders and decrees promulgated by the Spanish Government in the Philippines, or by the possessory information under the Mortgage Law. *All lands that were not acquired from the Government, either by purchase or by grant, belong to the public domain. An* ***exception to the rule*** *would be any land that should have been in the possession of an occupant and of his predecessor-in-interest since time immemorial,* for such possession would justify the presumption that the land had never been part of the public domain or that *it had been* ***private property even before the Spanish conquest***.... The applicant does not come under the exception, for the earliest possession of the lot by his first predecessor-in-interest began in 1880.[70] (emphasis supplied)

Oh Cho clarifies the concept of *long association* or *time immemorial* — it refers to pre-Spanish times. This concept of *time immemorial* is consistent with the status of IPs as the original occupants of their ancestral territories. Today, occupation for a century (i.e., 1897), cannot qualify as *time immemorial* possession. *Oh Cho* tells us that there are two types of land: i) public land, and ii) private land. Private land is further divided into two: i) land originally part of the public domain (the concept of public domain and the regalian doctrine introduced during the Spanish period); and ii) private lands existing before the Spanish conquest. IPs' ancestral territories fall under the latter category.

The case of *Carino* was cited as recently as 1992, in the case of *Director of Lands v. Samuel Buyco*.[71] The Court quoted verbatim the portion of *Oh Cho* quoted above,

[68] 75 Phil. 890 (1946).

[69] *See* note 39.

[70] 75 Phil. 890, 892 (1946).

[71] 216 SCRA 78 (1992).

providing that lands possessed before the Spanish conquest have always been private lands. In said *Director of Lands*, the Buycos applied for registration of land which they claimed to have possessed *since time immemorial*, by themselves and by their predecessors-in-interest, for approximately 80 years. Denying registration, the Court declared that 80 years was not possession *since time immemorial*. *Time immemorial* being defined as time beyond the reach of human memory, time out of mind, and when referring to possession, possession of which no man living has seen the beginning, and the existence of which he has learned from his elders.

Clearly, under the Philippines' legal framework, IPs are and have always been owners of their ancestral territories. Being owners, they have been and are entitled to due process for any deprivation of their property.

B. IPs' Property Rights and Due Process

1. Property Rights and Due Process

Due process originated from England when the noblemen resisted arbitrary dispossession of liberty, life or property by the King. King Edward III's statute 28 proclaimed: "no man, of what state or condition whoever he be, shall be put out of his lands, or tenements ... without he being brought in to answer by due process of law."[72] Due process could be invoked by every person. Due process meant protection of property against arbitrary action.

Before the Spaniards came, native Filipinos practiced their own brand of due process. Sentences were made after investigation, said investigation taking place in the presence of members of the same village. If any litigant felt aggrieved, an arbiter from another village was to be unanimously named. Persons who judged were known to be fair and just men, who gave true judgment according to their customs.[73]

The Spaniards also brought with them a form of due process. In the apportionment of lands deemed convenient for the establishment of towns, the presence of the procurator (or *procurador sindico general* — a person elected by the inhabitants of a town to the local council to promote the people's interests, to defend their rights and to state their grievances) was required.[74] The Sixteenth Law of the Indies, to ensure that natives' rights were not prejudiced in the grant and sale to Spaniards of land measurements, mandated that the fiscal be given notice to examine with diligence the veracity of said claims. The fiscals were instructed to diligently examine all witnesses of land claimants. The presidents and the audiencias were all required to make sure that the lands being granted or sold under public auction did indeed belong to the Crown, making sure that the natives' rights were not prejudiced.[75] Law XVII, Title 12, Book 4, required that applications for the adjustments of lands

[72] ISAGANIA A. CRUZ CONSTITUTIONAL LAW 93 (1993).

[73] 7 BLAIR & ROBERTSON, *supra* note 22 at 179.

[74] PADILLA, *supra* note 40, at 3.

[75] *See id.* at 5-6.

made by persons, other than the Indians who owned them, be refused.[76] Moreover, to protect the natives, if a Spaniard acquired land from said natives contrary to royal cedulas and decrees, said contract could be annulled as provided in the Seventeenth Law of the Indies.[77]

The Royal Order of 25 October 1881 allowed any person who had been aggrieved by a grant of land by the government, to resort to court action against the government.[78] The Royal Decree of 26 December 1884, which provided for the adjustment of titles to public lands, prescribed the process for adjustment, which included notice, a chance to be heard, and the allowance for adverse claims.[79] The Royal Decree of 26 January 1889, which provided for the sale of public lands, in Article 8 thereof, gave any person aggrieved by the action of the government, a cause of action against the government, thereby allowing said person to file a case in court.[80] Article 349, of the Civil Code of Spain, which became operative in the Philippines in 1889, provided that no one could be deprived of his property except by competent authority and with sufficient cause of public utility, and always after proper indemnity. If this requisite was not fulfilled, the courts had the duty to protect, and eventually restore possession to the injured party.

The American regime introduced the due process "clause" into the Philippines' legal system. The Philippine Bill of 1902, in Section 5 thereof, provided that no legislation could be enacted in the Philippine Islands which would deprive any person of life, liberty, or property without due process of law. In the taking of private property, due process of law required judicial intervention. Moreover, the enactment of local legislation, whereby a person could be deprived of property or rights without previous indemnification, was violative of due process of law.[81] Over a decade later, Congress passed the Jones Law of 1916, which similarly provided a due process clause. At the time, due process mandated that "the right of a citizen to his property ... could be taken away only upon an open, public, and fair trial before a judicial tribunal, according to the forms prescribed by the law of the land for the investigation of such subjects."[82] Later, the 1935 Constitution, in Article III, Section 1, provided that "[n]o person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." This "right to due process of law [was] more than a prerogative. It [was] an immanent and inalienable right of every man, woman, and child living under a government of laws."[83] This clause has been embodied in the 1973 Constitution, and most importantly, in the present 1987 Constitution.

[76] Antoinette Royo, *Regalian Doctrine: Whither the Vested Rights?*, December PHILIPPINE NATURAL RESOURCES LAW JOURNAL 4 (1988).

[77] PADILLA, *supra* note 40, at 6.

[78] *See id.* at 19.

[79] *See id.* at 30-35.

[80] *See id.* at 61.

[81] Roxas v. City of Manila, 9 Phil. 215, 221 (1907).

[82] La Compania General de Tabacos de Filipinas v. French, 39 Phil. 34, 53 (1918).

[83] Raquiza v. Bradford, 75 Phil. 50, 65 (1945).

"The due process clause was kept intentionally vague so it would remain also conveniently resilient.... The very elasticity of the due process clause was meant to make it adaptable to every situation, enlarging or constricting its protection as the changing times and circumstances may require."[84] Due process entails a procedure, and protects against arbitrariness. Everyone has the right to due process and this right must be interpreted in a flexible manner. IPs are, and have been entitled to due process. The due process clause today and the laws in the past never made any distinctions. IPs can invoke the right to due process and cannot rightly be discriminated against. The due process clause must, therefore, be adapted to suit the special circumstances of IPs today. Due process requires a consideration of: i) the IPs' history of dispossession, ii) the largely informal manner of the appropriation of IPs' ancestral territories, and iii) the massive physical dislocation that IPs have undergone. Due process for IPs will require remedial measures — looking back into history to correct past wrongs.

The due process clause talks of property. Property includes all things which may be the subject of appropriation,[85] or which may be the lawful subject of contracts. It includes real or immovable property such as lands, buildings thereon,[86] and personal or movable property, such as cars, television sets,[87] and it includes vested rights.[88] As owners, the IPs' right over their ancestral territories is property protected by due process. Being protected by due process, IPs are entitled to certain procedural safeguards, such as notice and hearing, and their ancestral territories cannot be arbitrarily taken or disturbed by the government.

2. Taking of Property and Compensation

Of course, no person lives in isolation. All private property is subject to the control of the State for the common good. "The use of property bears a social function,"[89] and "every holder of property, however absolute and unqualified his title may be, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."[90] Property is, therefore, subject to the police power of the State.

Regulation, however, must be differentiated from taking or deprivation. This power to take has always been exercised sparingly subject to limitations, since the Spanish period. The Ninth Law of the Indies required restitution if a land grant was prejudicial and damaging to the natives.[91] The land grant laws of Spain did not,

[84] Ynot v. Intermediate Court of Appeals, 148 SCRA 659, 667 (1987).

[85] CIVIL CODE, art. 414 (1950).

[86] *See* CIVIL CODE art. 415.

[87] *See* CIVIL CODE art. 416.

[88] 1 JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 40 (1987).

[89] PHIL. CONST. art. XII, § 6.

[90] United States v. Toribio, 15 Phil. 85, 93 (1910).

[91] PADILLA, *supra* note 40, at 4.

therefore, sanction capricious taking of natives' property rights. The Royal Order of 25 October 1881[92] gave any person aggrieved by a grant of land under said law, the right to resort to court action against the administration or government (though not the grantee), based on the theory that the responsibility for the grant causing damage was that of the government's and not of the grantee's.

Today, although the State may regulate the use of property, "private property shall not be taken for public use without just compensation."[93] In other words, "no person shall be deprived of his property except by competent authority and for public use and always upon payment of just compensation. Should this requirement be not first complied with, the courts shall protect and, in a proper case, *restore the owner in his possession*."[94] This "right of eminent domain [is] inherent in it (the State) as a body sovereign. In the exercise of its sovereign right the state is not subject to any limitation other than those imposed by the Constitution which are: firstly, the to taking must be for a public use; secondly, the *payment of just compensation* must be made; and thirdly, *due process must be observed in the taking*. Beyond these conditions, the exercise by the State of its right of eminent domain is subject to no restraint."[95] "The power of eminent domain is inseparable from sovereignty, being essential to the existence of the State and inherent in government even in its most primitive forms. No law, therefore, is ever necessary to confer this right upon sovereignty or upon any Government exercising sovereign or quasi-sovereign powers."[96] The exercise of eminent domain may be resolved as an issue of due process, because even if there were "*no organic or constitutional provision in force requiring compensation to be paid, the seizure of one's property without payment, even though intended for a public use, would undoubtedly be held to be a taking without due process of law* and a denial of the equal protection of the laws."[97] (emphasis supplied). This right to take must not be used capriciously or arbitrarily, otherwise there is a violation of due process, and acts of both Congress and the Executive may end up as nullities.[98] Property is, therefore, subject to the State's power of eminent domain. IPs' ancestral territories may be taken by the State, but the State's power to take is subject to the very stringent conditions of due process. The dispossession of IPs of their ancestral territories over the centuries fails to meet the requirements of due process. In most cases, IPs were never given notice and hearing, and for all cases, just compensation has never been paid.

"Taking" under eminent domain involves particular circumstances such as: i) entrance by the expropriator into the property; ii) said entrance must be more than momentary; iii) the taking must be under some color of authority; iv) the property must be used for a public purpose or *informally appropriated*, or injuriously affected;

[92] *See id.* at 19.

[93] PHIL. CONST. art. III, § 9.

[94] CIVIL CODE, art. 435.

[95] Republic v. Juan, 92 SCRA 26, 40 (1979).

[96] Visayan Refining Co. v. Camus 40 Phil 551, 558 (1919).

[97] Visayas Refining Co., 40 Phil 551 at 560-561.

[98] De Knecht v. Bautista, 100 SCRA 661, 666-667 (1980).

and v) the use of the property for said public use must result in ousting the owner and depriving him of the beneficial enjoyment of said property.[99] (emphasis supplied) Over the centuries, the State itself, through its instrumentalities, has occupied, or by its permission, has allowed many "lowlanders" or outsiders to occupy ancestral territories, thereby driving away IPs who really are the rightful owners and occupants of the same. The taking of ancestral territories has been mostly through informal appropriation — based on the government's assumption that said territories are public land (i.e., making part of the Dumagat ancestral territory as part of the Aurora National Park).

Moreover, in the exercise of the right of eminent domain, the proper proceeding must be instituted. "[T]o hold that the mere declaration of an intention to expropriate, without instituting the corresponding proceeding therefor before the courts, with assurance of just compensation, would already preclude the exercise by the owner of his rights of ownership over the land, or bar the enforcement of any final ejectment order that the owner may have obtained against any intruder into the land, is to sanction an act which is indeed confiscatory and therefore offensive to the Constitution."[100] "[A]lthough due process does not always necessarily demand that a proceeding be had before a court of law, it still mandates some form of proceeding wherein notice and reasonable opportunity to be heard are given to the owner to protect his property rights."[101] Where the law does not provide for hearing and no judicial proceedings are commenced, and an "automatic appropriation" results, there is a violation of due process.[102] To date, very few IPs have had the opportunity to be heard as far as the taking of their ancestral territories is concerned.

The taking of IPs' ancestral territories is *fait accompli*. The IPs' right to due process has been violated in a long, complicated history. Given that under the IPRA, property rights (not belonging to IPs) existing within ancestral domains are to be respected, and for reasons of practicability, the only redress available for past violations of IPs' right to due process is the payment of just compensation. Therefore, an effective mechanism for said payment is warranted.

3. Just Compensation for IPs

The Spaniards documented the existence of native property regimes and laws in force prior to their arrival. They recognized that natives lived in the Philippines. The Laws of the Indies and other land grant laws up to the enactment of the Civil Code of 1889 mandated that natives' rights were not to be prejudiced. Indigenous peoples' property rights were never distinguished as being inferior or otherwise subject to arbitrary taking in these laws. The responsibility of the State to protect IPs' rights under the law was absorbed by the American government under the Treaty of Paris,

99 Republic v. Vda. de Castellvi, 58 SCRA 337, 350-352 (1974).

100 Familara v. JM Tuason & Co., 49 SCRA 338, 341 (1973).

101 Manotok v. National Housing Authority, 150 SCRA 89, 102 (1987).

102 Manotok, 150 SCRA 89 at 105.

because these laws were non-political in character.[103] The American regime embedded the due process clause, as known today, in the Philippines' legal system. *Carino* established that property rights prior to the coming of the Spaniards existed, were never extinguished by Spanish laws and that the United States government intended to respect those rights. These rights have never been expressly extinguished by the State. The Japanese occupation did not interrupt the continuity of the legal system respecting private property rights, said laws being non-political. The laws passed under the Philippine Republic never extinguished IPs' property rights to their ancestral territories. Even the Land Registration Decree, whose purpose is to provide an organized system for the titling of private lands, does not require private lands to be registered, said decree neither granting nor extinguishing private property rights in case of registration or non-registration. The 1987 Constitution expressly recognizes indigenous rights, but this provision really grants nothing new. IPRA or R.A. 8371, signed by the President on October 29, 1997, once more, expressly recognizes IPs' ownership of ancestral territories.

Despite the continuity and apparent protection the legal system has provided for indigenous property rights, why has their marginalization continued over the centuries? Why did the government, through PANAMIN, transport the Bataks from place to place in Palawan, resulting in the Bataks losing possession and control of ancestral territory previously occupied by them, amounting to an eventual usurpation of said lands by other persons? Why did the government not act in protecting the Manobos in Sitio Katindu from the forcible usurpation of their property by the politician Gana? The DENR's adjudication of half of the original area to the Manobos after almost thirty years does not comply with the requirements of due process — half of Manobo property was taken and said taking sanctioned by the government without any just compensation. As far as the Sulodnons of Iloilo are concerned, their eviction from their various sitios on the basis of national security in 1951, as part of the campaign versus insurgents, should not have been permanent because the permanency of eviction resulted in deprivation of their property. Much less should the government have transferred said property to the West Visayas State University — this appropriation of property by the government required the payment of just compensation, which the government never paid. If the Kalingas did not garner the same international publicity which eventually pressured the government to cancel the said Chico Dam project, their property would have been taken arbitrarily. Must indigenous peoples have to die like Macli-ing Dulag for the government to respect their property rights? Will indigenous peoples have to die before getting just compensation? As far as the Tagbanuas of Palawan are concerned, after voluntarily ceding some of their ancestral territory in exchange for a reservation, their property rights over the reservation were violated when the government issued permits over a portion of the same to third parties for the harvest of trees. For the unfortunate Aetas of Central Luzon who have nowhere to go today, given that one part of their territory has become Clark Base, and the other having become a pilot development area (the Sacobia Development) by law, their territory has been lost via governmental

103 Co Kim Cham v. Valdez Tan Keh, 75 Phil. 113 (1945). The Supreme Court held that a mere change in sovereignty did not abrogate non-political laws.

action without just compensation of any kind. For the Mangyans in Mindoro, the single contract granting a timber license covering 46,000 hectares of Mangyan territory was done without any respect for Mangyan rights. The contract deprives the Mangyans of much valuable timber, and effectively disturbs their possession of the same area. In assuming Dumagat territory in the Province of Aurora into the Aurora National Park, even with the laudable purpose of environmental preservation, the State took said property without paying just compensation in assuming said area as public land.

The laws protecting private property in general have been clearly insufficient for the effective protection of indigenous property rights. Partly a problem of enforcement, partly due to the condescending attitude of the State and other Filipinos towards indigenous peoples in the past, and partly due to the divergence of views held by the indigenous people and the State concerning property, where the indigenous generally do not rely on paper titles, and the State placing a premium thereon, special legislation was necessary. IPRA is Congress' answer. However, IPRA is silent as to the compensation that must be paid for ancestral territories taken in the past. The general principles of due process and general laws on eminent domain have been proven inadequate to enforce the IPs' right to compensation. The special circumstances of IPs make it imperative for the payment of just compensation to be provided for in special legislation, whose urgency is highlighted when viewed under IPRA which expressly protects third party rights within ancestral territories.

The necessity of special legislation on just compensation will generate the question of what kind of just compensation should be given, or by what method/s IPs should be compensated. Since the issue of just compensation for IPs is a novel question in Philippine law, it becomes necessary to look at the general principles of international law, and at other foreign jurisdictions.

C. Just Compensation for IPs and International Law

1. Just Compensation for IPs — Sui Generis

Philippine jurisprudence has provided several guidelines in determining just compensation. "Just compensation is defined as the full and fair equivalent of the property taken from its owner by the expropriator."[104] Just compensation, therefore, contemplates an equal replacement for ancestral territory or parts thereof taken. From the IPs' point of view, however, there can be no true equivalent to the territories on which they have based their cultural and social integrity. "The measure is not the taker's gain but the owner's loss."[105] The special attachment, the spiritual bond of IPs to their ancestral territories, must be given the highest consideration.

[104] Association of Small Landowners v. Secretary of Agrarian Reform, 175 SCRA 343, 378 (1989).

[105] B.H. Berkenkotter & Co. v. Court of Appeals, 216 SCRA 584, 586-587 (1992).

"To determine just compensation, the trial court should first ascertain the market value of the property, to which should be added the consequential damages after deducting therefrom the consequential benefits which may arise from the expropriation. If the consequential benefits exceed the consequential damages, these items should be disregarded altogether, as the basic value of the property should be paid in every case."[106] "The market value of the property is the price that may be agreed upon by parties willing but not compelled to enter into the contract of sale."[107] "Among the factors to be considered in arriving at the fair market value of the property are: i) cost of acquisition; ii) the current value of like properties; iii) its actual or potential uses; and in the particular case of lands, iv) their size, shape, location, and the tax declarations thereon."[108] (emphasis supplied). For ancestral territories, some of these factors may be difficult or impossible to determine. How can one, for example, determine the cost of acquisition of territory occupied before the Spanish conquest? It would not be right to value it at zero, since in acquiring said territory, IPs actually worked on the land. IPs may not have declared any of said territory for taxation purposes, and the taking of said territory would have made such declaration impossible.

"[J]ust compensation is to be ascertained as of the time of the taking, which usually coincides with the commencement of the expropriation proceedings. Where the institution of the action precedes entry into the property, the just compensation is to be ascertained as of the time of the filing of the complaint."[109] The past taking of ancestral territory having been primarily through informal appropriation, or without the institution of the appropriate proceedings, and often, in stages of encroachment, the time of valuation may have to be determined on a case to case basis (i.e., the most blatant point of taking).

"Payment of just compensation is not always required to be made fully in money."[110] Since IPs' valuation of their ancestral territories cannot be fully equated in pesos and centavos, non-monetary consideration acceptable to IPs should also be included in the determination of just compensation. "[T]here must be full payment of just compensation before the title to the expropriated property is transferred."[111] This principle does not hold true for most ancestral territories (or portions thereof) held by third persons in good faith.

One may glean from the aforementioned that just compensation for IPs is *sui generis*, and that the current state of Philippine law and jurisprudence requires the importation of concepts from abroad in order to operationalize the meaning of just compensation for IPs.

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] Association of Small Landowners Inc. v. Secretary of Agrarian Reform, 175 SCRA 343, 388 (1989).

[111] Land Bank of the Philippines v. Court of Appeals, 249 SCRA 149, 160 (1995).

B. IPs' Property Rights and Due Process

a. Overview

The Philippines "adopts the generally accepted principles of international law as part of the law of the land."[112] The sources of international law include international conventions, international customs, general principles of law recognized by civilized nations, and subsidiarily, judicial decisions and teachings of highly qualified publicists of various nations.[113]

The right of IPs to compensation involves two concepts: i) human rights, and ii) compensation. Both are matters of international law. "The international law of human rights parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws."[114] Also, "the practice of States that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally."[115] Members of IPs, like any other human being, are entitled to the rights set forth in the Universal Declaration of Human Rights,[116] as adopted by the General Assembly of the United Nations on December 10, 1948, to which the Philippines is a signatory. A member of an IP is "born free and *equal in dignity and rights*."[117] He is "entitled to all the rights and freedoms set forth in the Declaration, *without distinction of any kind, such as race, color, ...*"[118] He has "the right to own property alone as well as in association with others" and he shall **not *"be arbitrarily deprived of his property."***[119] He has ***"the right to an effective remedy*** by the competent national tribunals *for acts violating the fundamental rights granted him by the constitution or by law."*[120] (emphasis supplied)

An important convention is the United Nations International Labour Organisation (ILO) Convention No. 169 (Convention Concerning Indigenous and

[112] PHIL. CONST. art. II, § 2.

[113] I AN BROWNLIE, RINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (4th ed. 1990).

[114] LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 1022 (2d ed. 1987).

[115] *Id.* at 999.

[116] The Declaration, at its adoption, was not a treaty and not an international agreement, but the duty to "observe faithfully and strictly" said Declaration, was unanimously proclaimed by the United Nations General Assembly in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, and in the 1963 Declaration on the Elimination of All Forms of Racial Discrimination. HENKIN *supra* note 114, at 987-988.

[117] Universal Declaration of Human Rights, Dec. 10, 1948, UN General Assembly, art. 1, *available online* URL http://www.un.org/Overview/rights.html.

[118] *See* Universal Declaration of Human Rights., art. 2.

[119] *See* Universal Declaration of Human Rights., art. 17. It has also been said that the mere fact that the Declaration says that an individual has the right to own property warrants no conclusion that there is a human right to property, but "(a)ll states have accepted a limited core of rights to private property, and violation of such rights, as State policy, may have already become a violation of customary law." HENKIN *supra* note 114, at 997.

[120] *See* Universal Declaration of Human Rights., art. 8.

Tribal Peoples in Independent Countries).[121] The Convention applies to tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own traditions or by special laws or regulations. *"Self-identification as indigenous* or tribal shall be regarded as the fundamental criterion for determining the groups to which the provisions of the Convention apply."[122] The Government is *responsible for the protection of the rights of these peoples* and is obliged to provide for systematic action which should include measures that ensure that these peoples *"benefit on an equal footing* from the rights and opportunities which national laws and regulations grant to other members of the population."[123] "The *rights of ownership* and possession of the peoples concerned over the lands which they traditionally occupy shall be recogni[z]ed."[124] "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded."[125] In the exploitation of resources pertaining to their lands, they are to receive *"fair compensation for any damages* they may sustain as a result of such activities."[126] They have the *right against being removed from their lands.* In case their removal is necessary as an exceptional measure, their prior informed consent must be obtained. Their *right to return* to their lands must be respected (once the ground for relocation ceases to exist). In case such return is not possible, they must be given equivalent lands (of the same quality and legal status) as per agreement with competent authority or in the absence of agreement, in accordance with appropriate procedures. *Compensation may also be in money or in kind,* as may be preferred by said peoples. *Any* resulting *loss or injury* from said relocations *must be fully compensated.*[127] (emphasis supplied)

[121] Indigenous and Tribal Peoples Convention, 1989, June 27, 1989, International Labour Organisation General Conference, *available online* URL http://www.halcyon.com/pub/FWDP/ International/ ilo_169.txt.

The Philippines has not ratified the Convention, but ratification of said Convention has been recommended to the Senate. "Law-making treaties create general norms for the future conduct of the parties." Although "(s)uch treaties are in principle binding only on parties... the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12 (4th ed. 1990). Moreover, the document itself should be considered as embodying principles of law considered acceptable to the international community of States, having been drafted by members thereof.

[122] *See* Indigenous and Tribal People's Convention, art. 1.

[123] *See id.*, art. 2.

[124] *See id.* art. 14.

[125] *See id.* art. 15

[126] *See id.*

[127] *See id.* art. 16.

Other documents such as the draft of the United Nations Declaration of Rights of Indigenous Peoples[128] and the International Covenant on the Rights of Indigenous Nations (formulated by IPs themselves)[129] echo a similiar right against arbitrary deprivation of property and a right to just or fair compensation.

All of the above recognize the right against deprivation of property without due process, and mandate the payment of just compensation. The question, however, remains as to how just compensation for IPs may be operationalized. Compensation for the taking of the property of aliens is required in international law.[130] "The elements constituting just compensation are not fixed or precise, but, in the absence of exceptional circumstances, compensation to be just must be equivalent to the value of the property taken and must be paid at the time of taking or with interest from that date and in an economically useful form."[131] There is the Hull formula, the requirement that compensation for expropriated property must be "adequate, prompt and effective."[132] The State's responsibility for injury to persons, as an international concern, does not only involve the treatment of aliens. History shows that governments in the past negotiated "protections for ethnic minorities with which they identified, even those who as a matter of law held the nationality of the country in which they lived."[133] IPs' right to compensation exists, from the international human rights law perspective, and from the international law requirement of compensation for the taking of private property. However, in the same manner that Philippine municipal law's traditional concept of just compensation is deemed inadequate to meet the special requirements of IPs, it can be said that the traditional international law concept of compensation — having developed from the circumstances of taking an alien's

[128] One of the premises of this draft formulated by the Working Group in the United Nations is the concern that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting in the dispossession of their lands, territories and resources. **Article 7** of the Draft gives IPs the collective and individual right of *redress for any action which may or actually dispossess them of their lands, territories or resources.* **Article 10** declares their right against being forcibly removed from their lands and territories. Any relocation must be based on prior informed consent, after *agreement on just and fair compensation*, and preferably, with option to return. **Article 21** provides for the right to fair and just compensation for deprivation of IPs' means of subsistence and development. **Article 26** expresses IPs' ownership of their lands and territories, and provides the *right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.* **Article 27** declares that IPs have the right to the *restitution* of lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, damaged without their free and informed consent, and if restitution is not possible, they have the right to just and fair compensation, which may be freely agreed upon, or may take the form of lands, territories and resources equal in quality, size and legal status. The Draft is *available online* URL http://www.halcyon.com/pub/FWDP/International/drft9329.txt.

[129] The Covenant was signed on July 28, 1994 by the Crimean Tartars, the Numba People of Sudan, the Confederacy of Treaty Six First Nations, the Opetchscht First Nation, and the West Papua Peoples Front. The Covenant is *available online* URL http://www.halcyon.com/pub/FWDP/ International/icrin-94.txt.

[130] HENKIN *supra* note 114, at 1109.

[131] *Id.* at 1112.

[132] *Id.* at 1113. The name was derived from the exchanges between the US Secretary of State Hull and Mexican Minister of Foreign Relations where said compensation was asserted in diplomatic exchanges and international tribunals for American nationals' properties taken by the Mexican government.

[133] *Id.* at 982.

property — is not sufficient to meet IPs' needs. Hence, recourse must be made to current State practice or custom. The *Carino* doctrine was handed down by the US Supreme Court in the first decade of this century. Today, legal doctrines developed in the United States still have persuasive effect on Philippine law and jurisprudence, in novel areas, or in areas originally culled from American law. One such area is the treatment of IPs' rights. The United States itself, being a common law jurisdiction, looks to her sister common law countries, for developments in legal doctrines, including developments on the issue of native title, or Indian title, or aboriginal title as the case maybe, in Canada, New Zealand, and Australia. It is thus appropriate to look to these four jurisdictions to see how they have operationalized the meaning of compensation.

b. Selected Foreign Jurisdictions

(i) United States of America[134]

In *United States v. Alcea Band of Tillamooks,*[135] the Court considered compensable the taking by the State of lands under Indian occupancy, even if title to said lands was never previously recognized by the State through treaty or statute. The Court said that as early as the Ordinance of 1787, it was mandated that: *"the utmost good faith shall always be observed toward the Indians; their property shall never be taken from them without their consent."* (emphasis supplied) The Court also said that in 1872, when Congress provided for the settlement of the Dakota territory, compensation was mandated. The Court, quoting *Minnesota v. Hitchcock,* 185 U.S. 373, declared:

[134] In 1823, in 5 L. ed. 681, Chief Justice Marshall said that the rights of the original inhabitants, the Indians, were not to be disregarded. They were the rightful occupants of the soil, with legal and just claim to retain possession and use of said land according to their own discretion. The Court, however, qualified the rights of the Indians — said rights being impaired by the "discovery" of European settlers. No distinction was made as to the authority of the Crown/State over vacant lands and lands occupied by Indians, title to both were vested in the Crown, Indians held only the right of occupancy (distinguished from the Philippines where ownership of ancestral territory was never vested in the State). Later, in 31 U.S. 515 (1832), the Court explained that the concept of "discovery", at least within the group of persons who acknowledged the concept, gave to the nation making the discovery, the exclusive right to acquire the soil, and to make settlements on it. This concept cut-off the right of competition among those who had agreed to it. Discovery merely regulated the rights of the Europeans themselves, but could not validly affect the rights of those already possessing the land, being aboriginal occupants or as occupants since time immemorial. Discoverers merely had the exclusive right to purchase, but the basis of said exclusive right to purchase could not be a denial of the right of the possessor to sell. In 261 U.S. 219, 227 (1923), the Court reiterated the United States' policy of respect for the Indian right of occupancy from the beginning. In 314 U.S. 330 (1941), the Court said that a tribal claim to land need not necessarily based on treaty, statute or other governmental action, that the absence of official recognition of the right of occupancy was not conclusive. In the United States, indigenous rights have been dealt with via treaty or by law. Upon "discovery" by European settlers, Indian rights were generally considered as limited to the right of occupancy. By virtue of treaties, however, fee simple title over certain lands were held by Indians. The concept of trusteeship also existed, whereby the members of the Indian population were considered wards of the State.

[135] 91 L. ed. 29 (1946).

> Whether this tract... was properly called a reservation,... or unceded Indian country,... is a matter of little moment ... the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.[136]

Almost a decade after, in *Tee-Hit-Ton Indians v. United States*,[137] the Court modified its ruling and said that the extinguishment of Indian rights was not compensable unless said rights had been previously recognized by Congress through law, or otherwise. Nevertheless, in the U.S., compensation has been the rule, rather than the exception, before and after *Tee-Hit-Ton*. In *United States v. Creek Nation*,[138] the government disposed of lands held by Indians under fee simple title (as a result of a treaty) and the State failed to cancel said official disposition after knowledge of its error. The Court said that the disposition was a compensable appropriation by the State.

In *Shoshone Tribe v. United States*,[139] the Shoshone tribe had the exclusive right of occupancy and its beneficial incidents to a reservation by virtue of a treaty, although the ownership of the land was still vested in the United States. The Court declared that the State's action allowing another tribe to occupy said reservation was compensable taking. Damages recoverable included: i) the actual value of the property right/s taken, and ii) the additional amount necessary to make said compensation just, such as interest, taking into consideration all the circumstances attendant.

In *United States v. Klammath and Moadoc Tribes*,[140] the Indian tribes had possessed, since time immemorial, 20,000,000 acres within the States of California and Oregon. Congress authorized the executive department to enter into a treaty with said Indians for the purchase of said lands. A treaty was negotiated, and a reservation for said Indians was established. Subsequently, unalloted lands within the reservation were conveyed by the government to a private company without the consent of the tribes, and without any compensation. Later on, compensation was paid by the government, but the issue of what to consider in determining compensation was raised, specifically, if the value of the timber thereon was to be considered, and the Supreme Court said yes.

In *United States v. Santa Fe Pac. R. Co.*,[141] the Court said that a law providing an offer of compromise[142] with an Indian group (Walapais) for the settlement of Indian title could not be considered, by itself, as being an extinguishment of Indian title in

[136] 91 L. ed. at 38.

[137] 348 U.S. 272 (1955).

[138] 79 L. ed. 1331 (1934).

[139] 81 L. ed. 360 (1936).

[140] 82 L. ed. 1219 (1937).

[141] 314 U.S. 330 (1941).

[142] A limited reservation area was to be created exclusively for the Walapais Indians, in exchange for all lands beyond the reservation.

the absence of: i) an express intent, and ii) the offer of compromise being accepted by the Walapais, because federal policy was geared towards the protection of Indians as wards of the State, and the law, in case of doubt, had to be interpreted against the State. In the same case, the Court took notice of the fact that the Walapais were at one time forcibly relocated to the offered reservation under an order by the Indian Department. The Court said that such a high-handed method could not result in the forfeiture of Indian lands in favor of the government.

A clear case of compensation for Indian title extinguished is the native title settlement provided for under the *Alaska Native Claims Settlement Act of 1971 (ANCSA)*.[143] The law uses criteria such as: i) land loss, and ii) revenue sharing. The settlement agreed upon by the government and the indigenous population involved: i) retention of native title (inclusive of surface and subsurface rights) over twelve percent (12%) of the state or 38 million acres;[144] ii) financial compensation in the amount of US$962 million,[145] payable over a number of years; and iii) services necessary to set up several levels of corporations serving as vehicles through which title and monetary funding can be coursed through, said corporations owned by the indigenous persons as stockholders. The services to be provided, as a component of just compensation, is important to aid IPs in adjusting to their inevitably altered status as being owners of more than ancestral territory. The case of Alaska is a particularly compelling example of the evolution of thought concerning respect for native title, because the indigenous people of Alaska, through this settlement, obtained fee simple title over more land than previously held in trust for other native Americans.

In the case of *County of Oneida, New York v. Oneida Indian Nation of New York State*,[146] respondent Indians sued petitioner for damages, alleging that their ancestors conveyed tribal land to New York State under an agreement dated in 1795, that violated the law, making the said agreement void.[147] The Indians sought compensation for a specified period of time when a part of the land was occupied by petitioner. The Supreme Court held that the Indians had a federal common law right of action for violation of their possessory rights and the petitioner was liable, even after over a century. This case says that native title claims for compensation today, for wrongs committed in a very distant past, must still be given due course.

[143] 43 U.S.C., ch. 33, *available online* URL http://fatty.law.cornell.edu/uscode/43/ch33.html.

[144] 43 U.S.C., ch. 33, § 1611.

[145] *See id.*, § 1605.

[146] 470 U.S. 226 (1985).

[147] Nonintercourse Act of 1793 provided that no person or entity could purchase Indian land without the Federal Government's approval.

(ii) Canada[148]

Since the 1970's, negotiations for native title claims have been ongoing, mostly under what is known as the Comprehensive Claims Policy. Generally, the settlements of native title have provisions on: i) self-government, ii) ownership over land, surface/

[148] Canada officially has four indigenous peoples: i) Treaty/status Indians, ii) non-status Indians, iii) Inuits, and iv) Metis (ASSEMBLY OF FIRST NATIONS RESOURCE CENTER, ASSEMBLY OF FIRST NATIONS: THE STORY, (1995)). Status Indians are those defined by law, the Federal Indian Act. Non-status Indians are those who are Indian by ancestry and culture but are not registered under said Indian Act. The Inuits are the Eskimos and the Metis, technically, are mixed people, only partly aboriginal (ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION, NATIVE TITLE INTERNATIONAL RESPONSES 4 (1994)). The Royal Proclamation of October 7, 1763 by King George III recognized the Indians as "nations or tribes" and acknowledged that they had the right of continued possession over traditional territories until said territories were "ceded to or purchased by" the Crown. The Indians were not to be molested, their rights were to be protected, and third persons were proscribed from entering or unlawfully occupying Indian lands which were not previously purchased or ceded to the Crown. Over a century later, in 1867, under Section 91(24) of Canada's first Constitution, the Constitution Act 1867, the federal government was given authority to make laws governing Indians and Indian lands. The Indian Act of 1876, which consolidated all previous Indian legislation — defined Indian status and provided for the administration of Indian affairs. In 1884, the Indian Act was amended to outlaw cultural and religious ceremonies such as the potlatch, as part of the government's policy of assimilation. In 1927, the Indian Act was again amended making it illegal to "receive, obtain, solicit or request from any Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim" (said claim referring to land or territorial claims, which had earlier been denied by the government), without government consent (MINISTRY OF ABORIGINAL AFFAIRS, BRITISH COLUMBIA, HISTORICAL REFERENCES, (1997)).

A major turning point in the government's Indian policy was the Trudeau-Chretien White Paper of 1969. It proposed to get rid of Indian status as a 'special' ethnic/racial category. It proposed the phaseout of the Indian Act, the Department of Indian Affairs, and its objective was to ensure that no special rights were given to Indians beyond the individual rights already given to all Canadian citizens. The White Paper was made without consulting the natives, despite the enormous effects it would have had on their rights. Moreover, at the time the Paper was being formulated, there were ongoing negotiations for possible changes in the Indian Act. The reactions to the Paper were very negative (TED S. PALYS, Ph.D., PROSPECTS FOR ABORIGINAL JUSTICE IN CANADA (1996)). Around the time of the White Paper's release, the Nisga'a Tribal Council brought a law suit against the government of British Columbia alleging that their aboriginal rights had not been extinguished. The Nisga'a attempt at establishing native title was rejected before the case reached the Supreme Court of Canada. Undaunted, in November 1971, the Nisga'a chiefs of the four villages in the Nass valley, together with village elders wearing their traditional sashes, traveled to Ottawa for the hearing of their case in the Supreme Court of Canada. For five days, seven judges heard the argument of the appeal. Then they reserved their decision for fourteen months. Justice Judson, speaking for three judges, said that if said title existed, it had been extinguished by pre-Confederation enactments of the old colony of British Columbia (later Supreme Court of Canada cases interpreted Judson's decision to mean that title was indeed recognized, but merely eventually extinguished). Justice Hall, on the other hand, speaking for another three judges, found that the Nisga'a, had aboriginal title, and that said title had never been lawfully extinguished, and that the title could still be asserted (THOMAS BERGER, NISGA'A: PEOPLE OF THE NASS RIVER foreward (1993)). The seventh judge dismissed the case on a technicality. He did not address the issue of aboriginal title. Even if the Nisga'a apparently "lost" the case, six judges accepted the view that English law, in force in British Columbia when colonization began, had recognized Indian title to the land. Such aboriginal title was rooted in long-time occupation, possession and use of traditional territories. Title existed, whether or not Europeans recognized it (MINISTRY OF ABORIGINAL AFFAIRS, BRITISH COLUMBIA, LANDMARK COURT CASES: CALDER DECISION 1973 (1997)). Justice Judson, described the nature of Indian title, thus:

> The fact is that when the settlers came the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.

Justice Hall said:

> What emerges from the ... evidence is that the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law, having developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico.

Justice Hall said that the court should not be bound by the past and its mistaken notions about Indians and Indian culture. For him, Nisga'a title could be upheld today, regardless of the prospect of innumerable legal tangles — right was right. In 1974, the Federal government started negotiations with the Nisga'a in north western British Columbia for the settlement of their claims.
The 1972 elections returned the Liberals to power as a minority government, so they depended on the opposition's support. This situation plus the promulgation of Calder in February 1973, resulted in aboriginal title becoming a major issue in politics. The first federal government statement on the negotiation of comprehensive claims was in 1973. In 1976, the federal government adopted a "comprehensive land claims policy." Comprehensive claims are based on the concept of aboriginal title (traditional use and occupancy). It includes hunting, fishing, trapping, rights, financial compensation, and other economic and social benefits. Comprehensive claims arise in parts of Canada where native title has never been dealt with by treaty or otherwise (JAMIESON BAINS (Solicitors), SPECIFIC CLAIMS IN CANADA (1997)). There is a prescribed procedure for the Comprehensive Claims Process (DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, COMPREHENSIVE CLAIMS (MODERN TREATIES) IN CANADA (1996)). The process begins when the federal government accepts an aboriginal group's claim (with the requisite supporting evidence). The federal government will accept the claim if the statement confirms that: i) the aboriginal group is, and was, an organized society, ii) the organized society has occupied the specific territory over which it asserts aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by european nations, iii) the occupation of the territory by the aboriginal group was largely to the exclusion of other organized societies, iv) the aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes, v) the group's aboriginal title and rights to resource use have not been dealt with by treaty, and vi) aboriginal title has not been eliminated by other lawful means. Then negotiations will take place. When the terms of the final agreement have been approved by all parties (the indigenous group, the provincial government, the federal government), the agreement is implemented by federal settlement legislation. The rights the aboriginal group receives from the federal and provincial/territorial governments are protected by the Constitution and cannot be altered without the consent of the Aboriginal group. Other than the *Comprehensive Claims* policy, for the fulfillment of treaties, and enforcement of Federal government administration obligations over reserve land, band funds, and other similar assets, the government has provided for *Specific Claims*. Specific claims allow treaty groups to seek fulfillment of lawful treaty obligations, including redress for government's default in providing for Indian land entitlements, as well as, redress for acts of mismanagement of Indian lands and assets.
A new Constitution was passed in 1982 which expressly provides for the protection of the rights of aboriginal peoples of Canada. In 1 SCR 1075 (1990), a member of the Musqueam Indian band appealed his conviction for fishing with a net other than permitted by the Fisheries Act. He argued that his use of a different net was justified and protected under Section 35 of the Constitution Act. The Supreme Court overturned the conviction and said that the Constitution Act of 1982 provided a strong measure of protection for aboriginal rights, and that proposed government regulations had to be constitutionally justified. The Court also ruled that: a.) aboriginal and treaty rights are capable of evolving over time and must be interpreted in a generous and liberal manner; b.) the government may regulate existing aboriginal rights only for a compelling and substantial objective (i.e., conservation and management of resources); and c.) after conservation goals are met, aboriginal groups must be given priority to fish for food over other user groups.

subsurface resources, iii) hunting, fishing and trapping rights, and iv) monetary compensation.

The following[149] are examples of comprehensive claims which have been settled since the 70's when the federal government's policy was announced.

(1) James Bay and Northern Quebec Agreement (JBNQA) and the Northeastern Quebec Agreement (NEQA) — Signed in 1975 and 1978, respectively, affecting 19,000 Cree, Inuit and Naskapi of northern Quebec, this was the first comprehensive claim to be settled. The agreements provided for: i) ownership over 14,000 square kilometers of territory, ii) $230 million in compensation, and iii) exclusive hunting and trapping rights over another 150,000 square kilometers.

(2) Inuvialuit Final Agreement — Signed in 1984, affecting 2,500 Inuvialuit in the western Arctic, the settlement provides for: i) 91,000 square kilometers of land, ii) $45 million to be paid over 13 years and two special funds, a $10 million Economic Enhancement Fund and a $7.5 million Social Development Fund, iii) guaranteed hunting and trapping rights, and iv) equal participation in the management of wildlife, conservation and the environment.

(3) Gwich'in Agreement — Signed in 1992, affecting the Gwich'in, it provides for: i) approximately 24,000 square kilometers of land in the northwestern portion of the Northwest Territories and 1,554 square kilometers of land in the Yukon, ii) a non-taxable payment of $75 million to be paid over 15 years, iii) a share of resource royalties from the Mackenzie Valley, iv) subsurface rights, and hunting rights, and v) a greater role in the management of wildlife, land and the environment.

(4) Nunavut Land Claims Agreement — Signed in 1993, affecting 17,500 Inuit of the eastern Arctic, represented by the Tungavik Federation of Nunavut, and so far the largest comprehensive claim in Canada, it provides for: i) 350,000 square kilometers of land, ii) financial compensation of $1.17 billion over 14 years, iii) the right to share in resource royalties, iv) hunting rights, and v) a greater role in the management of land and the environment. This agreement also committed the federal government to a process which divides the Northwest Territories and will creates a new territory of Nunavut by 1999.

(5) Umbrella Final Agreement — Signed in 1993 with 14 Yukon First Nations represented by The Council for Yukon Indians, it sets out the terms for the final land claim settlements in the Yukon territory. Other final land claim agreements were also reached with four of the First Nations: 1.) the Vuntut Gwitchin First Nation, 2.) the Champagne and Aishihik First Nations, 3.) the Teslin Tlingit Council and 4.) the First Nation of Na-cho Ny'a'k Dun. All these agreements provide the four Yukon First Nations with: i) a land settlement of 17,235 square kilometers, ii) financial benefits of $79,895,515, and iii) participation in wildlife and other management boards. In addition to their land claim, the four First Nations also negotiated self-government agreements which give them more control over land use on settlement lands and greater authority in areas such as language, health care, social services and education.

(6) Sahtu Dene and Metis Agreement — Effective 1994, affecting the Sahtu Dene and Metis, it provides for: i) 41,437 square kilometers of land (of which 1,813 square kilometers will include mineral rights), ii) $75 million over 15 years, iii) a share of resource royalties from the Mackenzie Valley, iv) guaranteed wildlife harvesting rights, and v) participation in decision-making bodies dealing with renewable resources, land-use planning, environmental impact assessment and review, and land and water use regulations.

(7) Nisga'a Agreement-in-Principle — Initialed on February 15, 1996 with the Nisga'a, it provides for: i) the establishment of a Nisga'a Central Government with ownership and self-government over 1,900 square kilometers of land in the Nass River Valley, ii) a $190 million cash settlement. It also outlines: i) ownership of surface and subsurface resources on Nisga'a lands, and ii) provides for their entitlements to Nass River salmon stocks and wildlife harvests.

Canada has essentially opted for negotiation as a primary mechanism for the settlement of native title issues. In the agreements, the principle of revenue sharing (like the U.S. and New Zealand) also appears (i.e., royalties), and aside from land and monetary compensation, components of just compensation include: i) other economic rights (i.e., hunting, fishing, trapping rights) and ii) participation in policy making, especially concerning the environment (also an issue of autonomy).

[149] DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, COMPREHENSIVE CLAIMS (MODERN TREATIES) IN CANADA (1996), *available online* URL http://www.inac.gc.ca/pubs/information/treaty.html.

(iii) New Zealand[150]

In New Zealand, the Treaty of Waitangi of 1840, and the common law notion of aboriginal title are the sources of indigenous property rights. The Treaty required

[150] In New Zealand, two modes of enforcing native title exist: i) the Treaty of Waitangi, and ii) the common law concept of aboriginal title. The Treaty of Waitangi, a treaty of cession and the basis for the founding of New Zealand, was signed by the representatives of the British Crown and several Maori chiefs in 1840. The chiefs ceded to the Queen, absolutely and without reservation, all the rights and powers of Sovereignty (Article 1 thereof). The Queen confirmed and guaranteed the chiefs, full, exclusive, undisturbed possession of their lands, estates, forests, fisheries and other properties, for as long as said chiefs wished to retain them. The Queen also had the exclusive right of pre-emption (Article 2). The Queen's protection and all the rights and privileges of British subjects were extended to the Maoris (Article 3). The treaty recognized the pre-European settlement property rights of the Maori people, and was intended to ensure the protection of Maori land and resources in perpetuity, unless there was legal alienation. The Government was duty bound to protect Maori property interests in the same way as European settlers' property interests were protected and its failure to do so would be a breach of the treaty. The treaty manifested the Crown's recognition of the survival of Indian sovereignty until ceded by said tribes. Historical records showed that the belief then was that tribal consent was a condition precedent to the validity of the Crown's *imperium* over said tribes (Paul McHugh, *Constitutional Theory and Maori Claims, in* WAITANGI MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 30 (I.H. Kawharu ed., 1989). In the case of R v. Symonds ([1847] NZPCC (1840-1939) 387 (New Zealand)), Chief Justice Martin and Justice Chapman declared the existence of aboriginal title. They confirmed the validity of the sovereign's right of pre-emption, but explained that said right did not allow the Crown to arbitrarily extinguish native title. This right of pre-emption was conditioned on the desire of the Maori to sell the land, and absent the Maoris' consent, aboriginal title could not be extinguished.
The years immediately after the founding of New Zealand did not produce a peaceful relationship between the Maoris and the settlers. Despite the Treaty's express provision on the Crown's right of pre-emption, many unauthorized "sales" to Europeans occurred. Also, there were British military invasions into Maori lands. Most damaging to Maori interests was the legal confiscation of Maori lands on the ground that said Maoris were rebels (Interview with Pat Bowler, Senior Partner, RUSSELL, McVeagh McKenzieBartleet & Co, in Pasig, Metro Manila (25 Sept., 1997). These facts constituting a backdrop, the case of Wi Parata v. Bishop of Wellington ([1877] NZJR 72 (New Zealand) was decided. Chief Justice Prendergast declared that the Treaty of Waitangi was a nullity. This decision was based on the requirements of positive theory: that parties to a treaty had to meet certain body politic requirements and the Court said that these requirements were not met by the Maoris. This same reasoning posited that New Zealand was terra nullius, and the inhabitants rights were not entitled to any common law recognition or protection and could be extinguished by the Crown arbitrarily. The Court conceded that at most, the Treaty could only be considered enforceable if embodied in legislation. Otherwise, it had no force. Wi Parata was later embodied in the Native Lands Act of 1909, and the Maori Affairs Act of 1953.

Subsequent cases have paved the way for the reassertion of Maori rights under the Treaty and under common law. In Tom Te Weehi v. Regional Fisheries Officer ([1986] 1 NZLR 680 (New Zealand)), the Court upheld common law fishing rights. The Court noted that Maori customary rights of fishing continued even after the change of sovereignty. In Te Renanga o Muriwhenua v. Attorney General, the Court of Appeal ruled in favor of Maori fishing rights against the Government in trying to impose management quotas (Richard Bartlett, *Aboriginal Land Rights at Common Law: The Likely Decision of the High Court in Mabo v. Queensland, in* AMPLA Yearbook, 494 (1992).

The most significant development has been the Treaty's incorporation into municipal law (although limited) through Section 9 of the State-Owned Enterprises Act (SOEA) of 1986, which provides that: "(n)othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of Waitangi. In [1987] 1 NZLR 641 (New Zealand), the Court, interpreting Section 9 of the State-Owned Enterprises Act (SOEA) 1986, rejected CJ Prendergast's declaration that the Treaty of Waitangi was a nullity, it accepted that the Treaty was: "a living instrument taking account of the development of international human rights norms, and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty." The Court held that transfers of Crown land could not be made to state-owned enterprises until safeguards were in place to ensure that Maori claims were protected. Other than the SOEA, the Treaty is still not directly enforceable today. Maori property rights must be established in accordance with native title at common law, and the Treaty of Waitangi may be used in the interpretation of said law.

that Maori land rights be respected, and the only burden imposed on said rights, was a right of pre-emption in favor of the Crown. In 1877, the Treaty was struck down as a nullity in terms of municipal law by Chief Justice Prendergast in the case of *Wi Parata v. Bishop of Wellington.*[151] The Maoris' property rights were not considered a serious issue for about a century after that.

Then came the Treaty of Waitangi Act 1975, creating the Waitangi Tribunal empowered to hear and assess Maori claims against the Crown. In 1985, the jurisdiction of the Tribunal was expanded to investigate claims dating back to 1840. After investigation, the tribunal was to make a recommendation to the government for redress. During that period, however, the government could still disregard completely the Tribunal's recommendations. The turning point for the Maori was the State Owned Enterprises Act of 1986 (SOEA),[152] which finally incorporated the Treaty of Waitangi into municipal law, making the Treaty enforceable in circumstances covered by said law.

Suddenly, government policy shifted towards the enforcement of the Treaty. In December, 1989, direct negotiations with Maori were begun for claims based on the Treaty of Waitangi. The government found itself obliged to offer settlement to the Maori people. In December 1994, the Office of Treaty Settlements of the Department of Justice announced the plan to set aside an initial $1000 million "Settlement Envelope" to settle all "historical" claims for grievances arising from Crown action prior to 21 September 1992. The Maori were not bound or obliged to negotiate. However, if they chose to, such settlement would be considered binding.[153]

A huge time gap exists between the total negation of aboriginal title in *Wi Parata* (1877) and the recent reversion to accepting native title (1980's), including the Treaty's incorporation into the SOEA (1986). Today's non-Maori New Zealanders cannot be excluded from their lands in New Zealand — prescription, laws, the Torrens system, and pure practicality justify this. Compensation, however, for ancient and new grievances, is a different story. Non-Maoris can claim a legitimate place in New Zealand partly under treaty partly from time. However, time itself cannot bar the obligation of the Crown to give effect to the treaty, and to remedy acts done inconsistent with said Treaty in the past. An imperative for giving compensation where restoration is no longer practicable, therefore, exists.[154] Hence, negotiations with the government involve claims dating back to 1840, when the Treaty of Waitangi was signed.

[151] [1877] NZJR 72 (New Zealand).

[152] The State Owned Enterprises Act of 1986 (New Zealand) is *available online* URL http://www.knowledge-basket.co.nz/gpprint/acts/public/text/1986/an/124.html.

[153] New Zealand Department of Justice, *Crown Proposals for the Settlement of Treaty of Waitangi Claims,* January Maori Law Review (1995), *available online* URL http://www.kennett.co.nz/ maorilaw/1995/95jan.htm.

[154] F.M. Brookfield, *The New Zealand Constitution: The Search for Legitimacy, in* WAITANGI MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 1, 14-15 (I.H. Kawharu ed., 1989).

From the above, one would glean: i) a period subject to negotiation — from the founding of New Zealand in 1840 up to September 1992, and ii) the element of voluntarism — the Maori are not compelled to settle, but most have entered into negotiations for pragmatic purposes.

A landmark claim was partially resolved in the *Muriwhenua Land Report of 1997*.[155] This claim is interesting because it involves contracts by the Maori with the settlers. The Waitangi Tribunal declared that the Muriwhenua land claims were well-founded. Prior and immediately after 1840 when the Treaty was signed, the Maori executed agreements with settlers "transferring" lands to said settlers. Under Maori custom law, these transfers were merely temporary; no ownership was conveyed. Moreover, whatever rights existed under these transfers were conditioned on the incorporation of said settlers within the Maori community, not an alienation of said rights to outsiders.

After the Treaty of Waitangi was signed, however, two ordinances were enacted, allegedly to ratify purchases of land by settlers from the Maoris. These laws were meant to confirm the title of settlers. At the same time, the laws provided for limits as to the amount of land each settler could hold. The ownership of lands in excess of the prescribed limit was deemed vested in the State. The Maoris, therefore, claimed that the government failed to purchase the lands under its right of pre-emption (said lands never validly transferred by them to the settlers in accordance with their own laws), and the government's ratification of said transfers via the two ordinances were invalid.

The Waitangi Tribunal accepted these claims of the Maoris, noting that government action resulted in the marginalization of the people on marginal lands, which were insufficient for the Maoris' traditional subsistence, and inadequate for a sound agrarian economy. The economic and social consequences included physical deprivation, poverty, social dislocation, loss of status and more. The Tribunal recommended a transfer of substantial property, taking into consideration the possibility of creating an economic base for the tribes, and placing the burden of proof on the Crown showing proper title to Crown land. This decision involved at least 300,000 acres of land in transactions dating prior to 1865. This case tells us that ancient wrongs, by the mere passage of time, do not become moot. They remain valid, compensable acts or omissions today.

Among the claims that have been partially settled under the Treaty is that of the Tainui. In December 1994, a basic document was signed by Tainui claimants and the Crown, providing for a more detailed deed of settlement in the future. The document contained the following points:

[155] Waitangi Tribunal, *Muriwhenua Land Report 1997*, May Maori Law Review (1997), *available online* URL http://www.kennett.co.nz/maorilaw/1997/03/31.htm.

1. An **apology from the Crown** for confiscating Waikato-Tainui land.
2. An estimate of the modern value of the land at $12 billion.
3. Return of the Te Rapa Air Force Base valued at $4.123 million.
4. A gradual transfer of 35, 787 acres of Crown controlled properties.
5. The **naming** of certain properties honoring the first **Maori king**.
6. Transfer of rentals accumulated from certain forest assets.
7. Reimbursement of costs for research and negotiation of the claim.
8. The establishment of a land trust fund of $170 million, less the value of lands transferred (an amount of 0.5%-0.7% of market value of lands).
9. The Tainui, in exchange, give up claims for certain forest and mineral areas, such relinquishment considered **a "gift" by the Tainui to the nation.**
10. A gross-up clause, in case the settlement envelope appropriated by the government increases, a proportional share in the increase.
11. Claims of ownership with respect to the Waikato River, where multi-million dollar dams are located are not included in the settlement.[156] (emphasis supplied)

The above settlement provides excellent pointers on how to determine just compensation for IPs. *First*, there is the notion of partial settlement. Considering that the taking of ancestral territories has been undertaken through the centuries, and negotiations (mandated or not) may take many years, partial settlements should be acceptable. *Second*, IPs are interested in non-monetary compensation (or compensation that may be impossible to value in terms of money). Salient non-monetary features in the above include: i) the letter of apology from the Crown, ii) naming of properties in honor of the first Maori king, and iii) classifying the extinguishment of native title as a gift of the Maori to the nation. *Third*, revenue sharing (i.e., rental from forest reserves) is also a conspicuous point, the same concept taken into consideration by the United States in its *ANCSA* and in Canada's executed settlements. *Fourth*, the concept of services is also included (like *ANCSA*) or at least, the monetary equivalent thereof. In sum, the settlement includes: i) a clear delineation of land and resources permanently set aside for the Maori, ii) monetary compensation, and iii) non-monetary items.

[156] New Zealand Department of Justice, *Heads of Agreement between HM the Queen and RTK Mahuta and the Tainui Maori Trust Board and others*, January Maori Law Review (1995), *available online* URL http://www.kennett.co.nz/maorilaw/1995/95jan.htm.

(iv) Australia[157]

[157] The legal system which Europeans brought upon settlement in Australia was based on the theory that the land was "terra nullius", notwithstanding the fact that aboriginals had already possessed the same. Aborigines and their title to land were ignored in the establishment of (Western) Australia and power exercised by the Sovereign was by such means as the law of the Sovereign prescribed. The title of aboriginal peoples in land was ignored because, at that time, there was a common opinion that the aborigines had no legal interest in land (Western Australia v. The Commonwealth (1995) 183 C.L.R. 373). In Attorney General v. Brown (1847), a coal miner in New South Wales challenged the ownership of minerals by the Crown, the Court, of course, dismissed the miner's claims and declared that the lands in the Colony, "are, and ever have been, from the time of its first settlement in 1788, in the Crown." Moreover, there was dicta to the effect that the Crown's title was inconsistent with any interest of "ancient owners". In the case of Milirrpum v. Nabalco Pty Ltd (1971), the Court denied that any aboriginal title or interest existed at common law (Richard Bartlett, *Aboriginal Land Rights at Common Law: The Likely Decision of the High Court in Mabo v. Queensland, in* AMPLA Yearbook, 494 (1992)). This all changed with *Mabo* (2nd) case. Eddie Mabo was one of the Merriam people of Murray Island in the Torres Strait of Australia. In 1982, he, together with four others, sought confirmation of their traditional land rights. They alleged that Murray island, its surrounding reefs and islands had been inhabited and possessed by the Merriam people continuously and exclusively. That although the British Crown became the sovereign in 1879, when the islands were annexed, their rights had never been validly extinguished by the sovereign, hence their action for recognition under Australia's current legal system. This case was Mabo v. Queensland *(2nd)* ((1992) 175 C.L.R. 1), decided in 1992 by the High Court of Australia. The High Court held that the rights of native people did not automatically disappear as a result of European annexation, and their rights to land continued as native title. The Court rejected the notion that Australia was *terra nullius* at the time of European settlement. And although the Crown acquired "radical" title to all land in Australia, this did not extinguish existing native title. Native title could be extinguished by the Crown validly through: 1.) legislation, or 2.) the granting of interests in land, such as freeholds, to 3rd parties. In the case of States, however, the extinguishment through legislation had to comply with the Racial Discrimination Act of 1972 (law passed by the Commonwealth itself which attempted to erase all forms of racial discrimination). After complying with the Racial Discrimination Act, extinguishment of native title by States, according to the majority, could be accomplished without compensatory damages.
Under the Constitution of Australia, the Commonwealth has to pay "just terms" for acquisition of property from States or persons (ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION, CURRENT ISSUES THE MABO JUDGMENT 6 (1994)). Property rights are, therefore, protected under the Constitution. The Racial Discrimination Act, on the other hand, ensures equality in the enjoyment of rights for all races (including aborigines).

Under Section 10(1) of said Racial Discrimination Act, equality of enjoyment of the right to own and inherit property is assured. Although the Racial Discrimination Act does not alter the characteristics of native title, it confers on aborigines security in the enjoyment of their title to property, to the same extent as the holders of titles granted by the Crown. "Property" includes land and chattels, as well as interests therein. If previously under the general law, the indigenous person uniquely has a right to own or inherit property within Australia arising from indigenous law and custom, but the security of enjoyment of that property is more limited than the security enjoyed by others (of a different race), by Section 10(1), security in the enjoyment of said indigenous person of his property becomes equal to that of the others. Security in the right to own property carries immunity from arbitrary deprivation of the property. Section 10(1) thus protects the enjoyment of traditional interests in land recognized by the common law. If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or upon prescribed conditions *(including the payment of compensation)*, a State law which purports to authorize expropriation of property characteristically held by aborigines for: *1.) additional purposes*, or *2.) on less stringent conditions* (including lesser compensation), said law would be inconsistent with §10(1) of the Racial Discrimination Act (Western Australia v. Commonwealth 185 C.L.R. 373 [1995]).

Both the Constitution and the Racial Discrimination Act, therefore, proscribe arbitrary deprivation of native title. The Mabo case recognized aboriginal title at common law, which may be asserted against the whole world, for the use, occupation, possession and enjoyment thereof. Such native title exists in accordance with the laws and customs of said indigenous people, provided: 1.) said people have maintained their connection with the land, 2.) their title has not been extinguished by act of Imperial, Colonial, Territory, or Commonwealth governments.

After approximately two centuries of denial, Australia's High Court finally recognized the existence of native title in the case of *Mabo v. Queensland (2nd)*.[158] The response of the Commonwealth Government to said decision was the Native Title Act of 1993, whose applicability commenced on January 1, 1994. The main objective of the Act[159] is to recognize and protect native title. It aims to provide for the validation of past acts invalidated by native title, and to establish a mechanism whereby native title and future dealings may proceed. The determination of native title[160] under the Act means determining: i) whether native title exists in relation to a particular area of land and waters; ii) if it exists, who holds it; iii) what native title rights are conferred (i.e., possession, occupation, use and enjoyment of land or waters) on its holders to the exclusion of all others; and iv) the existence, nature and extent of any other interest in relation to the land or waters that may affect native title rights and interests.

Section 14 of the Native Title Act provides for the validation of past acts by the government, particularly those in favor of third parties — such validation deemed necessary due to native title interests. Past acts are divided into several categories under said section.

Category A, refers to freeholds and certain leases. Native title is considered completely extinguished, but compensation must be paid.

Category B, refers to other leases not covered under Category A, and native title is partially extinguished to the extent it is incompatible with the grant by the State, and compensation must also be paid.

Mining leases comprise the third category (C), and there is no extinguishment of native title. However, there is an impairment, because said title is subject to the lease (for the term thereof) and any legitimate renewals, but compensation must be made under the relevant mining regime.

Category D involves all other grants like licenses and permits, and native title is not extinguished, but is subject to the grant. Compensation must also be paid on just terms.

Native title holders may recover compensation from the Commonwealth, the State or the Territory, as the case requires.[161] Compensation must generally be made in money. However, native title holders may seek compensation, in whole or in part, in the transfer of property, provision of goods, and/or services.[162]

[158] 175 C.L.R. 1 (1992).

[159] Native Title Act, 1993, § 3, §10 (Austl.)

[160] *See id.*, § 225.

[161] *See id.*, § 45(2).

[162] *See id.*, § 51(5), § 51(6).

The law also covers future acts which are divided into offshore and onshore acts.[163] Offshore acts which affect native title are generally permissible.[164] As far as onshore acts are concerned, the act is permissible if said act is also allowed over *ordinary title* (versus native title) land. Either way, the native title holder is entitled to compensation, like ordinary title holders. The government is entitled to extinguish native title if the title holders agree, or if it is under a Compulsory Acquisition Act.[165] But any future extinguishment entitles native title holders to compensation. Indigenous peoples affected have the right to resort to judicial process or they may choose to invoke their "right to negotiate (RTN)" under the Act.

Wik Peoples v. The State of Queensland & Ors; The Thayorre People v. The State of Queensland & Ors[166] is a landmark case involving the interpretation of the Native Title Act of 1993. Here, the Wik Peoples claimed native title to land on the Cape York Peninsula in Queensland. They were joined by the Thayorre People, whose claim overlapped that of the Wik Peoples. Two pastoral leases granted by the Queensland government covered land within both claims — one set to expire in 2004, while the other, never actually having been occupied as a pastoral lease was actually converted into an aboriginal reservation in 1922. The High Court said that native title could only be extinguished by a written law or an act of Government which *showed a clear and plain intention to extinguish* native title. The Statute in Queensland providing for pastoral leases did not show such intention. Said pastoral leases did not give exclusive (to the exclusion of all others) possession to the pastoralists. Said leases did not necessarily extinguish all native title rights — said rights were merely subject to the lease. In case of conflict between rights under the lease and native title rights, the rights under the lease would prevail. The Wik and the Thayorre Peoples had to go back to the Federal Court to present evidence to prove native title. This case illustrates a *past act* which may be validated under the Native Title Act, said act not extinguishing native title completely, but requiring the payment of compensation in so far as native title rights are impaired. Aside from going back to the Federal Court, the Wik and Thayorre People had the option to *negotiate* with the government for the settlement of all pertinent issues under the procedure provided for in the Native Title Act.

Many claims have been brought forth since the passage of the law in 1993. The practical difficulties of clashing interests, amassing evidence, and the business and economic implications have made the so-called settlement of native title issues both cumbersome and tedious. Nevertheless, it is being done. Compensation is one main characteristic in balancing native title interests with those of third parties, the government being responsible for the payment of said compensation. Considering that before *Mabo (1992)*, aboriginal title was never seriously considered a legally

163 *See id.*, § 253.

164 *See id.*, § 235(8).

165 *See id.*, § 11, § 21, § 23(3).

166 AUSTRALIAN LEGAL INFORMATION INSTITUTE: HIGH COURT OF AUSTRALIA, Wik Peoples v. The State of Queensland & Ors; The Thayorre People v. The State of Queensland & Ors (1996), *available online*URL http://www.austlii.edu.au/do2/disp.pl/au/cases/cth/high_ct/unrep299.html?query=%7Ew ik%20+%20%22native%20title%22.

enforceable right, the Native Title Act is indeed a legal feat for indigenous peoples, since it recognizes that past government acts have impaired aboriginal interests, and aboriginal peoples are entitled to compensation in cases of impairment.

c. Lessons for the Philippines

In *Tee-Hit-Ton Indians v. United States*,[167] the US Supreme Court said that the extinguishment of American Indian rights was not compensable unless said rights were previously recognized (treaty, law, etc...). Yet the United States has, as a general rule, paid compensation. The IPs in the Philippines do not encounter the same legal block to compensation, since there are no treaties requiring the distinction between recognized IPs and those not recognized. Also, Philippine IPs' right of ownership has been recognized since the Spanish period. In *United States v. Creek Nation*,[168] government disposition of Indian land was a compensable appropriation by the State. Similarly, government disposition of ancestral territory in the Philippines should be compensable. In *United States v. Klammath and Moadoc Tribes*,[169] the value of timber on Indian land was considered in determining compensation. In the Philippines, in determining compensation to be given to the Mangyans of Mindoro, for example, the value of timber on Mangyan territory must be considered. In *United States v. Santa Fe Pac. R. Co. (1941)*,[170] the Court said that forcible relocations could not result in the forfeiture of Indian lands in favor of the government. Under the same light, forcible relocations of IPs in the Philippines cannot deprive said IPs of their right to compensation for any resultant taking of ancestral territories.

The Alaska case provides distinct pointers. The criterion of revenue sharing in the *ANCSA* is particularly important for the Aetas in Central Luzon, whose ancestral territory has basically been taken up by Clark Base and the Sacobia Development Authority. Clark today is known for its revenue generating activities. It is but right that the Aetas be given a fair share of said revenues as just compensation. The component of services (i.e., setting up corporate vehicles for IPs to help them manage their new resources better) may become an important aid to IPs in adjusting to their inevitably altered status as being owners of property other than ancestral territory.

Canada emphasizes the importance of the method of case-to-case negotiation, highlighting the importance of the special circumstances of each IPs' history. Essential components of compensation include: i) other economic rights which may consist of protecting traditional activities (i.e., hunting, fishing, trapping in accordance with customs); and ii) joint environmental policy-making for ancestral territory (or whatever may be left thereof).

Taking a cue from New Zealand, the Philippines should adopt a similar policy of providing a definite period which will be the subject of claims for compensation

167 348 U.S. 272 (1955).

168 79 L. ed. 1331 (1934).

169 82 L. ed. 1219 (1937).

170 314 U.S. 330 (1941).

(i.e., from the Spanish conquest upto October 1997). Athough the element of voluntarism adopted by the New Zealand government is laudable, it is suggested that there be compulsory negotiation to finally settle the issue of compensation. The partial settlement of the Tainui claim provides excellent pointers on how to determine just compensation for IPs in the Philippines, most especially the components which are not capable of pecuniary estimation (i.e., letter of apology).

Australia tells us that the extinguishment of IPs' rights over ancestral territories occurs by degrees. The provision of IPRA expressly providing that existing rights within ancestral domains are to be respected may be considered a validation of past acts of the State prior to the passage of said law. Two issues, however, remain: i) whether the IPs' rights over said territories are completely extinguished, and ii) whether the acts of extinguishment should be classified into categories. Of course, whatever category said acts of extinguishment may fall under, the payment of just compensation will be required. Australia's law also provides two modes of settling the issue of compensation: i) judicial process, and ii) negotiation.

From the principles enunciated in international conventions and in the four aforementioned jurisdictions, IPs have property rights stemming from their status as original occupants of their territories. These property rights, however called, cannot be taken away from them arbitrarily. Any taking is compensable, even if said taking occurred in the very distant past — since the passage of time cannot right centuries of wrong. For reasons of practicality, restitution of full property rights has not been availed of, instead, compensation for any impairment of said rights has been the common solution. In settling the issue of native title, including the determination of what just compensation means, two modes of settlement appear: i) judicial action, and ii) case-to-case negotiation. The process of settlement is clearly a time-consuming process and a milestone method or partial settlement process is acceptable. The settlement process necessarily includes a definite delineation of land rights or territory. Compensation for impairment or the taking of rights includes: i) land or other property; ii) money, in a lumpsum, in installments, or through revenue-sharing schemes; iii) other economic benefits such as hunting, fishing, trapping rights, or tax-exemptions; iv) services (i.e., the establishment of corporate vehicles) or the monetary equivalent thereof (i.e., for research and negotiation); v) items not easily quantifiable in money such as an apology, or honoring a leader of an indigenous people; and vi) policy-making participation on issues affecting their rights (i.e., environmental management).

All of the above provide supplementary guidelines to what should constitute just compensation for IPs in the Philippines.

CHAPTER IV

THE GOVERNMENT'S FIDUCIARY OBLIGATION

Indigenous peoples are entitled to just compensation for ancestral territory taken, as discussed in the previous chapter, because as owners, they are entitled to due process. Even absent the due process clause, they are entitled to damages because the State, as the IPs' guardian, has historically breached its duties, resulting in the marginalization of IPs in the Philippines. Hence, a mechanism for compensatory damages is necessary.

A. Government as Guardian of IPs

During the American period, the doctrine of the State as guardian of indigenous peoples was introduced. This doctrine evolved from US government policy dealing with the treatment of American Indians. A fiduciary relationship existed between the State and said IPs.[171] President McKinley's Instructions to the Philippine Commission of April 7, 1900 mandated the Commission to adopt the same course followed by the U.S. Congress in dealing with the tribes of North American Indians.[172] "From the beginning of the United States, and even before ....[t]he recognized relation between the Government of the United States and the Indians may be described as that of guardian and ward."[173]

Guardianship involves a fiduciary relationship.[174] A fiduciary relation may embrace either technical or informal fiduciary relations. "It exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence."[175] "Neither party may ... take selfish advantage of his trust, or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of good faith *and with the full knowledge and consent of that other*."[176] (emphasis supplied) Guardianship, being a trust relationship of the most sacred nature, is always for the ward's well-being and not that of the guardian.[177] As guardian, the State has certain fiduciary obligations. The question that arises, therefore, is: what exactly do these obligations mean?

In *United States v. Klammath and Moadoc Tribes*,[178] the Court declared that the power of the State to control the affairs of Indians as its "wards" did not allow the

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171 Rubi v. Provincial Board of Mindoro, 39 Phil 660, 679-680 (1919).

172 Rubi, 39 Phil. 660

173 Rubi, 39 Phil., at 694.

174 *See* CIVIL CODE, art. 1455.

175 BLACK'S LAW DICTIONARY 564 (5th ed. 1979).

176 *See id.*

177 III-A OSCAR M. HERRERA, REMEDIAL LAW 194 (1996).

178 82 L. ed. 1219 (1937).

State to appropriate Indian lands for its own use, or to give it to others without paying just compensation. In *United States v. Mitchell*,[179] the US Supreme Court said that a fiduciary relationship necessarily arises when the Government assumes elaborate control over Indian property. The necessary elements of a trust are present: i) a trustee, the State; ii) a beneficiary, the Indians; and iii) a trust corpus, Indian property.

This fiduciary obligation of the State towards indigenous peoples has also been recognized in other common law jurisdictions. In *New Zealand Maori Council v. Attorney General*,[180] the New Zealand Court said that the Treaty of Waitangi had created fiduciary obligations, and the Crown's duties included the active protection of Maori people's rights in the use of their lands and waters. In *Guerin v. The Queen*,[181] the Canadian Supreme Court recognized aboriginal rights inside and outside reserves. It underlined the federal government's fiduciary responsibility for aboriginal peoples. In this case, the Musqueam Indian Band sued the Crown for breach of trust over 162 acres of reserve land which had been leased to a golf club since the late 1950s. The Court ruled that the federal government, as trustee of the land, had not disclosed all the necessary information to the Band, and did not lease the land on terms favorable to said Band, and had therefore, breached the trust reposed upon it.

In *Mabo v. Queensland (2nd)*,[182] J. Toohey described the fiduciary obligation of the Crown as ensuring that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders, and if the Crown failed to comply with said obligation by performing an act contrary to the interests of the titleholders (i.e., arbitrarily alienating property concerned), the Crown is considered to have breached its duty and is, therefore, liable.

The Philippine government took upon itself the duty to protect IPs and to secure their property rights. However, instead of fulfilling such duty the government has taken their ancestral territories or has allowed others to usurp said territories. The government can be considered as having acted contrary to the best interests of IPs (as evidenced by their present day marginalization) and, therefore, as having breached its fiduciary responsibility towards IPs. This breach makes the government liable.

B. Government Liability for Damages

In *United States v. Mitchell*,[183] the Court held that the existence of a trust relationship between the State and the Indians mandates that the Government is liable for damages for the breach of its fiduciary duties. A trustee who violates a trust may be subjected to a general action for damages,[184] and a general action should

[179] 463 U.S. 206 (1983)

[180] 1 N.Z.L.R. 641 [1987].

[181] [1984] 2 S.C.R. 335, *available online* URL http://www.bloorstreet.com/200block/rguerin.htm.

[182] (1992) 175 C.L.R. 1.

[183] 463 U.S. 206 (1983)

[184] IV ARTURO M. TOLENTINO CIVIL CODE OF THE PHILIPPINES 670 (1991).

still be allowed, notwithstanding the general doctrine of governmental immunity from suit, since "[t]he doctrine of governmental immunity from suit cannot serve as an instrument for perpetrating an injustice on a citizen."[185]

C. Necessity for a Mechanism Providing for the Payment of Damages

The solution to the problem of IPs with respect to the protection of their ancestral territories has required special legislation, evidenced by RA 8371 or the Indigenous Peoples Rights Act of 1997. As previously discussed, there is no provision for just compensation for past taking of ancestral territory. There is also no provision for damages. Even if the IPs have a valid cause of action against the government and decide to sue, and although their suit may fall within an exception to the general rule that the government is immune from suit, one problem remains, the fact that the Constitution mandates that "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law."[186] Unless there is special legislation providing for an appropriation for the payment of damages to IPs on the basis of breach of trust, IPs may never receive what they are entitled to.

CHAPTER V

CONCLUSION AND RECOMMENDATIONS

a. Conclusion

The Indigenous Peoples of the Philippines comprise one of the most marginalized sectors in Philippine society. Their poverty, ill-health, and often-endangered status require the study of the reasons behind their plight today, and mandates immediate action through remedial legislation.

IPs have been owners — owners since time immemorial of their ancestral territories by virtue of their being the original occupants thereof, before the Spanish conquest. IPs' rights have been recognized and protected under their own laws, under the laws of Spain applicable to the Philippines, under the laws existing during the American period, and under the Philippine Republic, until the present. Being owners of their ancestral territories, they have always possessed the right against arbitrary deprivation thereof — the laws of Spain, the United States, and the Philippine Republic have reflected and still reflect a consistent policy of protecting private property, and have required both procedural and substantive safeguards.

In short, IPs have been and are entitled to due process with respect to their ancestral territories. Said territories could not and cannot be taken arbitrarily, and if ever they have been or are taken for a justifiable purpose under the law, certain

[185] Ministerio v. Court of First Instance of Cebu, 40 SCRA 464, 470 (1971).

[186] PHIL. CONST. art. VI, § 29(1).

procedures are mandated. Most importantly, if the taking of ancestral territory is justifiable for a public purpose, and even if the proper procedures are followed, just compensation is required to be paid.

Many ancestral territories, or portions thereof, have been taken from IPs today, and due process mandates that IPs be justly compensated. Aside from due process, the United States introduced the fiduciary obligation of the State towards IPs. This fiduciary obligation requires the State to act in the best interests of said IPs, and prohibits the State from appropriating as its own IPs' property rights. In the event that the State fails to comply with this fiduciary obligation, by appropriating IPs' property as its own, or by allowing third parties to prejudice IPs' interests, it is liable for damages as trustee, as is the case in any other fiduciary relationship. History has shown that the State has many times appropriated IPs' ancestral territories as its own, and has allowed third parties to prejudice IPs' rights. IPs, therefore, have a cause of action against the government, which technically, may not be barred in court.

Compensation for IPs is based on two grounds, namely: i) that the right of indigenous peoples to their ancestral territories has been and is protected property under the legal system, which can only be impaired or taken away by the State in the valid exercise of police power or eminent domain, always observing the requirements of due process, any justifiable taking requiring just compensation; and ii) the State, as guardian of indigenous peoples, has the fiduciary obligation to ensure their welfare, including the protection of their rights, and the resulting marginalization of said peoples over time is proof of breach of said obligation, making the State liable for damages.

IPs are, therefore, entitled to compensation — whether just compensation under the due process clause, or compensatory damages for breach of fiduciary obligation by the State.

The history of dispossession of IPs makes a clear case of proving that the existing general laws on protecting private property and providing remedies therefor have been ineffective in the protection of IPs' property rights. Republic Act 8371, the Indigenous Peoples Rights Act of 1997, should be seen as Congress' solution to the legal framework's factual inadequacy. Although the law merely reiterates the ownership of IPs' of their ancestral territories — a doctrine long existing in the Philippine legal system — it is hoped that said law will be more effective in protecting IPs' rights, being special legislation. Unfortunately, the law fails to address squarely the issue of compensation, the compensation that IPs are entitled to — whether just compensation for ancestral territories taken under the due process clause, or compensatory damages for breach of fiduciary duty by the State. The law fails to look backward, to wrongful past acts. Even if the law validates other rights within ancestral territories, the State's liability remains, since wrong cannot be justified by the mere passage of time. The law being inadequate with respect to compensation, an effective mechanism for compensation should be provided under a special law.

C. RECOMMENDATIONS

In creating special legislation, the following should be considered.

First, a measure of the territory taken must be provided. Since IPRA (R.A. 8371) provides for the delineation of ancestral domains and ancestral lands, the actual portion of said territories taken may be gleaned from Section 56 thereof which provides: "[p]roperty within the ancestral domains already existing and/or vested upon the effectivity of this Act, shall be recognized and respected." The rights referred to may be considered equivalent to the rights taken from IPs claiming said territory.

Second, there must be a determination of whether or not any and all rights "respected" within ancestral territories completely extinguish IPs' rights over the same areas, or if extinguishment of IPs' rights will be graduated in the same manner provided in Australia's Native Title Act of 1993.

Third, there must be a selection of methods through which compensation may be demanded — voluntary negotiation or via court action (if IPs cannot agree with the Government) — something similar to the implementation of agrarian reform where there exists: i) the voluntary offer to sell procedure, and ii) the compulsory acquisition procedure.

Fourth, there must be a selection of criteria to determine the value of territory taken, integrating therein the value given to said territories by IPs' because of their spiritual and cultural attachment to said territories, not merely relying on the basis used for ordinary land acquisition.

Fifth, there must be a selection of acceptable components of just compensation, aside from land and money, such as: i) other guaranteed economic rights (i.e., fishing, hunting), ii) compensation incapable of monetary valuation (i.e., letters of apology), and iii) participation in policy making processes involving IPs' territories, especially in environmental management. Lastly, in cases of negotiation, partial settlements (or a milestone method) should be allowed due to the lengthy time that negotiations will conceivably take before final settlement.

Absent an express mandate, and a clear, specific mechanism for the payment of compensation for ancestral territory taken, indigenous peoples' rights may continue to be an empty promise in our Constitution.