

Free Prior and Informed Consent in the Philippines

Regulations and Realities

INTRODUCTION

Indigenous peoples of the Philippines have made significant strides in their efforts to protect their ancestral domains and their identities. Despite their political and economic marginalization, they have managed to gain legal traction in their struggle to defend themselves from various threats.

The Indigenous Peoples' Rights Act requires FPIC prior to the extraction of resources from indigenous ancestral domains and lands.

In 1997, the Philippines Congress enacted the Indigenous Peoples' Rights Act¹ (IPRA) which recognizes indigenous peoples' right to self-determination and provides mechanisms for the protection of indigenous ancestral domains and all resources therein. The IPRA adopted the concept of "free and prior informed consent" (FPIC) as a means to protect indigenous rights and interests and give them a voice in matters that affect them. FPIC in this context requires that indigenous communities be provided with adequate and accessible information, and that consensus is determined in accordance with indigenous peoples' customary laws and practices and free from any external manipulation or coercion. The IPRA requires FPIC prior to the extraction of resources from indigenous ancestral domains and lands. When implemented effectively, FPIC represents a critical tool in the realization of indigenous self-determination, promoting community participation in decision-making and mitigating the risk of social conflict around natural resource projects.

Unfortunately, even with strong legislation in place, indigenous peoples in the Philippines have faced considerable challenges in realizing their right to give or withhold FPIC. This policy note describes the key legal protections for FPIC in the Philippines as well as past obstacles to effective implementation. In addition, the policy note highlights features of implementing rules adopted by the government in 2012 to promote more effective future implementation of FPIC.

¹ Republic of the Philippines, *The Indigenous Peoples' Rights Act of 1997*, Republic Act No. 8371 (1997), <http://www.gov.ph/1997/10/29/republic-act-no-8371/>.

FREE PRIOR AND INFORMED CONSENT: LEGAL FRAMEWORK

While there is no universally accepted definition of FPIC, the principle generally requires that communities must be adequately informed about development projects in a timely manner and should be given the opportunity to approve or reject these projects free from undue pressure. FPIC is a right held by indigenous peoples under international law, and is emerging more broadly as a principle of best practice for sustainable development.

INTERNATIONAL LAW

FPIC is a right held by indigenous peoples under international law, and is emerging more broadly as a principle of best practice in sustainable development.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) recognizes FPIC as an aspect of indigenous peoples' right to property, their cultural rights, and their right to self-determination.² Although United Nations declarations do not have the same legal force as United Nations treaties, the legal significance of the UN Declaration will increase as States begin incorporating its principles into national laws and using them to inform their legal decisions. At the very least, the adoption of the UN Declaration reflects a commitment of governments to abide by principles enshrined in various international instruments as they pertain to indigenous peoples. These international human rights instruments have been interpreted by treaty bodies responsible for their oversight as embodying the requirement to obtain indigenous peoples' FPIC in relation to extractive projects located in their territories. The affirmation of the requirement for indigenous peoples' FPIC emerges from the jurisprudence of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on Economic Social and Cultural Rights.³

The UN Declaration contains significant provisions for indigenous peoples. Related key guarantees include indigenous peoples' rights to participate in decision-making on matters which would affect their rights (Article 18) and the obligations of States to "consult and cooperate in good faith with the

² UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), <http://www.un.org/esa/socdev/unpfi/en/drip.html>.

³ See Cathal Doyle and Jill Carino, *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector*, Indigenous Peoples Links, Middlesex University School of Law, and The Ecumenical Council for Corporate Responsibility (May 2013), <http://www.piplinks.org/report%3A-making-free-prior-%2526amp%3B-informed-consent-reality-indigenous-peoples-and-extractive-sector> and Fergus MacKay, *Indigenous Peoples and the United Nations Human Rights Bodies: A Compilation of UN Treaty Body Jurisprudence, the Recommendations of the Human Rights Council and its Special Procedures, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples*, Volume V (2011-2012), <http://www.forestpeoples.org/sites/fpp/files/publication/2013/01/cos-2011-12.pdf>.

indigenous peoples concerned” to obtain their “free, prior, and informed consent” to legislative and administrative decisions and resource extraction activities that “may affect them” (Articles 19, 32(2)).

International Labor Organization (ILO) Convention 169 on indigenous and tribal peoples, an international convention ratified by 22 countries, has also influenced policies of many countries on the recognition of the rights of indigenous peoples. Article 7 states that indigenous peoples have the right to “decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.” ILO Convention 169 requires FPIC in cases of resettlement, and requires governments to always consult with indigenous and tribal peoples prior to allowing exploration and exploitation of mineral or subsurface resources, with the objective of achieving agreement or consent.⁴

In addition to the United Nations and ILO, several international institutions have embraced the FPIC principle. For example, the African Commission on Human and Peoples’ Rights has called on States to respect the requirement for FPIC,⁵ and the Inter-American Court of Human Rights has ruled in several instances that States failed to meet their FPIC obligations.⁶ In 2012, the International Finance Corporation (the private-sector lending arm of the World Bank Group) endorsed FPIC as best practice when it issued a new FPIC requirement for clients with projects that stand to impact indigenous peoples under certain circumstances.⁷ IFC plays an important role as a standard setter for companies and banks (including the Equator Principle Banks which have also recognized the requirement for FPIC in their standards⁸).

PHILIPPINE CONSTITUTION OF 1987

The Philippine Constitution has explicit provisions for protection of indigenous rights. It guarantees indigenous peoples’ right to ancestral domains and

4 International Labor Organization, *Convention 169 – Indigenous and Tribal Peoples Convention* (1989), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169.

5 African Commission on Human and Peoples’ Rights, 224: *Resolution on a Human Rights-Based Approach to Natural Resources Governance* (May 2012), <http://www.achpr.org/sessions/51st/resolutions/224/>.

6 Due Process of Law Foundation, *The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru* (2011), <http://www.dplf.org/uploads/1302034794.pdf>.

7 International Finance Corporation, *IFC Sustainability Framework* (effective January 1, 2012), http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_site/IFC+Sustainability+Sustainability+Framework.

8 Equator Principles, *The Equator Principles III* (2013), <http://www.equator-principles.com/index.php/ep3>.

lands. The 1987 Constitution showed a shift in policy “from assimilation and integration to recognition and preservation.”⁹

The following are the relevant articles of the Constitution:

- Sec. 22 of Art. II. The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.
- Sec. 5 of Art. VI. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives¹⁰ shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.
- Sec. 5 of Art. XII. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural wellbeing.
- The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.
- Sec. 6 of Art. XIII. The 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 prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.
- Sec. 17 of Art. XIV. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.

⁹ Reynato S. Puno, *The IPRA: Indigenous Peoples and their Rights* (2008), <http://sc.judiciary.gov.ph/speech/03-10-08-speech.pdf>.

¹⁰ According to the Constitution, party-list representatives constitute twenty per centum of the total number of representatives including those under the party list.

- Sec. 12 of Article XVI. The Congress may create a consultative body to advise the President on policies affecting indigenous cultural communities, the majority of the members of which shall come from such communities.

THE INDIGENOUS PEOPLES' RIGHTS ACT OF 1997 (IPRA)

The IPRA implemented constitutional provisions for the recognition of indigenous peoples' rights and interests over their ancestral domain.

Former President Fidel V. Ramos initiated meetings of the legislative and executive branches of government and civil society to formulate a common development agenda. This agenda became the government's comprehensive framework towards poverty alleviation. A "doable list" was formulated, prioritizing basic sectors' agenda through a "consensus building and consultative collaboration process" of national government agencies and civil society. This has become the "*Social Reform Agenda (SRA)*."¹¹ The SRA is an integrated set of major reforms to enhance democratic processes and enable the citizens to: a) meet their basic human needs and live decent lives; b) widen their share of resources from which they can earn a living or increase the fruits of their labor; and c) enable them to effectively participate in the decision-making process that affects their rights, interests, and welfare.¹² The SRA produced important laws including IPRA.

The IPRA implemented constitutional provisions for the recognition of indigenous peoples' rights and interests over their ancestral domains.¹³ The landmark enactment of the IPRA signaled two paradigm shifts in the way government regarded indigenous peoples. First, it challenged the notion that the state had a monopoly on the exercise of the law. The IPRA recognizes indigenous legal systems which can be used for dispute resolution, identification of the extent of ancestral domains, and decisions on the exploitation of resources, among others. It also recognizes their right to self-determination. Second, it abandoned the perception that indigenous peoples caused the degradation of forests.¹⁴ Before the IPRA, the notion that indigenous peoples destroy forests through "slash and burn" farming systems prevailed.

11 Carlos Bueno, *The Social Reform Agenda*, MetroPost, <http://dumaguemetropost.com/the-social-reform-agenda-p1064-196.htm>.

12 United Nations, *Social Aspects of Sustainable Development in the Philippines* (April 1998) <http://www.un.org/esa/agenda21/natlinfo/countr/philipi/social.htm>.

13 The Constitution in Article XII provides:

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

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

14 June Prill-Brett, *Contested Domains: The Indigenous Peoples Rights Act (IPRA) and Legal Pluralism in the Northern Philippines*, 55 J. LEGAL PLURALISM & UNOFFICIAL L., 11, 16-17 (2007).

Immediately after the passage of the IPRA, retired Supreme Court Justice Isagani Cruz and lawyer Cesar Europa filed a case questioning the constitutionality of the new law. It claimed that the law violated the right of the State to “control and supervise the exploration, development, utilization and conservation of the country’s natural resources.”¹⁵ Some critics of the IPRA, including for example the Chamber of Mines of the Philippines, believed that the law contradicted two established legal principles: that only the State can own lands and that the Department of the Environment and Natural Resources has sole jurisdiction over the forests and mineral resources.¹⁶ Mining and Geosciences Bureau representatives claimed that “[g]iving indigenous peoples priority rights over mineral resources within their ancestral domain....is surrendering the state’s full control over all our resources.”¹⁷

In *Cruz v. Secretary of Environment and Natural Resources*,¹⁸ the Supreme Court of the Philippines upheld the constitutionality of the IPRA with the slimmest possible margin.¹⁹ The decision explained that the IPRA does not violate the Regalian Doctrine (which holds that States owns all lands and waters of the public domain) because ancestral domains are private lands. Lands held since time immemorial are presumed never to have been public. The US Supreme Court promulgated this doctrine with regard to native title in the Philippines over a century ago with the case *Cariño v. Insular Government*,²⁰ which recognized ownership based on time immemorial possession. The decision of the Philippines Supreme Court recognized the private nature of ancestral domains, segregating them from the public domain and the legal concepts that were used to challenge the IPRA’s constitutionality. The incorporation of FPIC in the IPRA raised hopes that the Philippines could prevent the displacement of indigenous peoples.

FPIC has a clear statutory basis in Philippine law, and is one of the most prominent features of the IPRA.²¹ The IPRA defines FPIC as:

[T]he consensus of all members of the ICCs/IPs [indigenous peoples] to be determined in accordance with their respective

15 *New Law on Indigenous Peoples Faces Legal Challenge*, Philippine Center for Investigative Journalism (1998) <http://www.pcij.org/stories/1998/ipra2.html>.

16 *Id.*

17 *Id.*

18 G.R. No. 135385 (December 6, 2000).

19 When the Justices voted they were equally divided: 7-7 (the most recent appointee to the Supreme Court did not take part in the deliberations of the case and did not vote). The Justices deliberated on the case again but the voting remained unchanged. Pursuant to Rule 56, Section 7 of the Rules of Civil Procedure, Justice Cruz’s petition was dismissed.

20 212 US 449 (1909).

21 Republic of the Philippines, *The Indigenous Peoples Rights Act of 1997*, Republic Act No. 8371 (1997), <http://www.gov.ph/1997/10/29/republic-act-no-8371/>.

customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

FPIC is mentioned repeatedly in the IPRA for purposes of protecting indigenous peoples' interests in their ancestral domains. Specifically, FPIC in the context of the IPRA refers to indigenous peoples' right to stay in their territories; right to religious, cultural sites, and ceremonies; right to give or withhold access to their biological and genetic resources and indigenous knowledge related to the conservation, use, and enhancement of these resources; and right to redemption in cases where land/property rights have been transferred without their consent. The IPRA also requires FPIC to "explore, excavate or make diggings on archeological sites" of indigenous peoples and "prior to the grant of any license, lease or permit for the exploitation of natural resources" which would affect indigenous peoples' interests.²²

The IPRA's definitions of ancestral domains and lands are quite comprehensive.

The IPRA's definitions of ancestral domains and lands are quite comprehensive. Ancestral domains are collectively owned and may include lands, inland waters, coastal areas, and natural resources therein (including minerals). Ancestral lands, which have a narrower definition than ancestral domains, may be under individual or traditional group ownership. The law also provides for self-delineation of ancestral domains, including lands which they no longer occupy but have traditionally used:

SECTION 51. *Delineation and Recognition of Ancestral Domains.* — Self-delineation shall be the guiding principle in the identification and delineation of ancestral domains. As such, the ICCs/IPs [indigenous peoples] concerned shall have a decisive role in all the activities pertinent thereto. The Sworn Statement of the Elders as to the scope of the territories and agreements/pacts made with neighboring ICCs/IPs, if any, will be essential to the determination of these traditional territories. The Government shall take the necessary steps to identify lands which the ICCs/IPs concerned traditionally occupy and guarantee effective protection of their rights of ownership and possession thereto. Measures shall be taken in appropriate cases to safeguard the right of the ICCs/IPs concerned to land which may no longer be exclusively occupied by them, but to

²² Id.

which they have traditionally had access for their subsistence and traditional activities, particularly of ICCs/IPs who are still nomadic and/or shifting cultivators.

The IPRA requires that the NCIP certify that the communities gave their consent to the exploitation of natural resources in their ancestral domains as a condition of project approval.

The IPRA also stipulates a role for government in identifying and demarcating ancestral lands through the National Commission on Indigenous Peoples (NCIP). The IPRA created the NCIP, the government agency responsible for developing and implementing policies and programs to protect and promote indigenous peoples' rights. It is composed of seven Commissioners appointed by the President (all members of indigenous communities) that have administrative, quasi-judicial and quasi-legislative powers. The NCIP maintains responsibility for issuing certificates of ancestral domain titles and certification as a pre-condition to the award of any permits, leases, or grants (to companies, government, or any other entity) for use of any portion of an ancestral domain. The IPRA requires that the NCIP certify that the communities gave their consent to the exploitation of natural resources in their ancestral domains as a condition of project approval (Section 46 (a)).

Though a strong law, IPRA has some weaknesses. Concerns have been raised about the way in which it simplifies and standardizes concepts like indigenous peoples, customary laws, and conceptions of ancestral domain.²³ This glosses over the differences among various indigenous communities in the Philippines. IPRA has also been undermined by other laws on natural resources like the Mining Act, which results in confusion in its implementation.²⁴

However, despite these challenges, clearly the law strengthened indigenous peoples' rights to their ancestral domains and cultural integrity. There have been many attempts to water down important provisions of the law, but so far indigenous communities and civil society organizations in the Philippines have been successful in defending it.

PHILIPPINE EXPERIENCE WITH FPIC IMPLEMENTATION

Unfortunately, over the years FPIC processes in the Philippines have often been subverted. Mining companies have exhibited a pattern of manipulation

23 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples* (2012) <http://www.up.edu.ph/index.php/more-on-up/22-forum/410-the-road-ahead>

24 Id.

Weaknesses in FPIC processes have been related to both inadequate systems and implementation failures.

and misrepresentation in numerous projects.²⁵ Weaknesses in FPIC processes have been related to both inadequate systems and implementation failures. For example, systemic weaknesses have included:

- FPIC required only once (prior to 2012)²⁶—at the commencement of a project.
- No procedure for impugning consent once given or for suspending a project which has not complied with the rules for securing FPIC.²⁷
- Only consent from indigenous peoples required, even when the project can affect non-indigenous populations.²⁸
- No monitoring mechanisms on violations committed during the FPIC process and implementation of the Memorandum of Agreement (MoA) between the mining company and the indigenous peoples.²⁹
- Signing of MoA outside the communities can contribute to mistrust by communities of their leaders/designated signatories.³⁰

Implementation issues have also plagued FPIC processes, including, for example:

- Failure of companies to conduct prior consultations with communities on site.³¹
- Failure to respect indigenous peoples' customary process in arriving at decisions,³² and their FPIC protocols or manifestos.³³
- Misrepresentation of the local situation through the media, and control of information flow.³⁴

25 Joji Carino, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT'L & COMP. LAW 19 (2005).

26 This matter has been addressed. Section 20 of the NCIP guidelines now provide: "Unless specifically stated in the MOA, separate exercise of the right to FPIC shall be for each major phase of the proposed activity such as Exploration; Operation or Development; Contracting of Operator; and the like."

27 Emily L. Manuel, *The Free and Prior Informed Consent Paradox: Recreating an Existing Tool for Empowerment*, 12 PHIL. NAT. RES. L.J., 3, 10-11, (2004).

28 *Id.*

29 Robie Halip, *FPIC: The Philippine Experience*, presentation in the 2nd Regional UNREDD Information Exchange Meeting: FPIC Shared Learning (2012).

30 *Id.*

31 Joji Carino, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT'L & COMP. LAW 19 (2005).

32 Robie Halip, *FPIC: The Philippine Experience*, presentation in the 2nd Regional UNREDD Information Exchange Meeting: FPIC Shared Learning (2012).

33 Cathal Doyle and Jill Carino, *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector*, Indigenous Peoples Links, Middlesex University School of Law, and The Ecumenical Council for Corporate Responsibility (May 2013), <http://www.piplinks.org/report%3A-making-free-prior-%2526amp%3B-informed-consent-reality-indigenous-peoples-and-extractive-sector>.

- Use of gifts for bribery and coercion.³⁵
- Failure of government to intervene to ensure FPIC prior to project initiation.³⁶
- Information provided solely by the project proponent, with government providing inadequate guidance on information content and limited public dissemination of information.^{37 38}
- Insufficient information, education, and communication on the FPIC process, available grievance mechanisms, and on the project itself to inform decision-making.³⁹



Home of Manolita y Loloy Galvez, who refused to sell their property to a mining company. The company then built the mine around their house. (Photo courtesy of DIOPIIM Committee on Mining Issues (DCMI)).

34 Joji Carino, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT'L & COMP. LAW 19 (2005).

35 *Id.*

36 Emily L. Manuel, *The Free and Prior Informed Consent Paradox: Recreating an Existing Tool for Empowerment*, 12 PHIL. NAT. RES. L.J. 3, 10-11 (2004).

37 The new guidelines also address this issue. Under Section 22, "Sharing by an expert/s, if engaged or invited, to include presentation of the result of the EIA if available, expert opinion/s on any aspect, recommendation/s, and identification of affected area/s; and "Remarks or inputs of other stakeholders, e.g., concerned NGAs, LGUs, NGO, IPO" will be aired during the second assembly.

38 Emily L. Manuel, *The Free and Prior Informed Consent Paradox: Recreating an Existing Tool for Empowerment*, 12 PHIL. NAT. RES. L.J. 3, 10-11 (2004).

39 Robie Halip. *FPIC: The Philippine Experience*, presentation in the 2nd Regional UNREDD Information Exchange Meeting: FPIC Shared Learning (2012).

Mining in Zamboanga Peninsula

In the Zamboanga Peninsula in Mindanao, Philippines, Subanen indigenous peoples have experienced first-hand flawed FPIC processes. International and national mining companies have had presence in the area. Unfortunately, to date FPIC implementation has been inadequate. FPIC processes have not been conducted in all relevant Subanen ancestral domains (only select areas), and a number of complaints have been lodged against the government and companies, including of bribery, coercion, the imposition of predefined boundaries, and disregard for community decisions.

The Subanen of Mt. Canatuan, the area of operation for mining company TVI Resources Development Inc., filed a complaint against the Philippine government with the United Nations Committee on the Elimination of Racial Discrimination (CERD) in 2007 for human rights violations. This resulted in recommendations from CERD to address the concerns. The government acknowledged that it had not yet obtained consent for mining operations in Mt. Canatuan, but to date has not acted to address CERD recommendations. In May 2011, TVI Resources Development Inc. publicly admitted its responsibility and agreed to negotiate on penalties.

Source: Cathal Doyle and Jill Carino, *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector*, Indigenous Peoples Links, Middlesex University School of Law, and The Ecumenical Council for Corporate Responsibility (May 2013).

In 2009 a consortium of indigenous peoples provided a detailed outline of their concerns with regard to the operationalization of FPIC in the Philippines in a shadow report submitted to the United Nations Committee on the Elimination of all forms of Racial Discrimination (CERD).⁴⁰

Despite recommendation by CERD that the NCIP address these shortcomings,⁴¹ it continued to face accusations of failure to adequately protect indigenous rights. Concerns raised against the NCIP with regard to FPIC include:

- Half-heartedly implementing or even subverting the process for acquiring FPIC;
- Recognizing false tribal leaders (dubbed tribal “dealers” by indigenous peoples) to further the claims of mining companies;⁴²

40 Indigenous Peoples of the Philippines Shadow Report to UN CERD (2009), http://www2.ohchr.org/english/bodies/cerd/docs/ngos/PIP_Philippines75.pdf.

41 CERD Concluding Observations to the Philippines UN Doc CERD/C/PHL/CO/20 available at <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/29a6f7d271567705c125763b004b65cc?OpenDocument>.

42 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples*, (2012) available at <http://www1.up.edu.ph/index.php/the-road-ahead-for-the-indigenous-peoples/> citing Ahni, J. (2011, June 3.) *Indigenous Palawan leaders to confront the National Commission on Indigenous Peoples in*

- Riding roughshod over the indigenous communities' customary laws and governance systems;⁴³
- Implementing a defective Ancestral Domain Sustainable Development and Protection Plan and a long, cumbersome and often expensive process for securing certificates of ancestral domain title and land title.⁴⁴

An assessment of the NCIP by the University of the Philippines at Baguio City found that some indigenous communities perceive that it “was serving the interest of the mining companies more than the indigenous communities, especially since the government has been actively pushing for the mining industry.”⁴⁵ Recent research has highlighted the following challenges to the NCIP fulfilling its mandate:

- Insufficient NCIP staff capacity;⁴⁶
- Inadequate budget support;⁴⁷
- Inadequate review of the contents of the MoA by the NCIP's Regional Review Team;⁴⁸
- Reliance on limited documents provided by the regulating agency/proponent;⁴⁹

Manila, Intercontinental Cry, <http://intercontinentalcry.org/indigenous-palawan-leaders-to-confront-the-national-commission-on-indigenous-peoples-in-manila/>.

43 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples* (2012) available at <http://www.up.edu.ph/index.php/more-on-up/22-forum/410-the-road-ahead> citing *National Commission on Indigenous Peoples asked to respect Subanen decision-making process*, Indigenous Peoples Issues and Resources (April 27, 2010), from http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=4971:national-commission-on-indigenous-peoples-asked-to-respect-subanen-decision-making-process&catid=32:southeast-asia-indigenous-peoples&Itemid=65.

44 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples*, (2012) available at <http://www.up.edu.ph/index.php/more-on-up/22-forum/410-the-road-ahead> citing Sagbigal, E. *Indigenous tribes see unity in diversity*, *Bulatlat*, Volume 2, Number 5 (March 10-16, 2002), <http://www.bulatlat.com/news/2-5/2-5-ozamis.html>.

45 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples*, (2012) available at <http://www1.up.edu.ph/index.php/the-road-ahead-for-the-indigenous-peoples/> quoting Dr. Dr. Raymundo Rovillos, Chancellor of University of the Philippines, Baguio in a forum held in the University.

46 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples*, (2012) available at <http://www1.up.edu.ph/index.php/the-road-ahead-for-the-indigenous-peoples/> and Robie Halip. *FPIC: The Philippine Experience*, presentation in the 2nd Regional UNREDD Information Exchange Meeting: FPIC Shared Learning (April 19-20, 2012) http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=7121&Itemid=53.

47 *Id.*

48 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples* (2012) <http://www1.up.edu.ph/index.php/the-road-ahead-for-the-indigenous-peoples/>.

49 *Id.*

- Insufficient interagency coordination.⁵⁰

Former President Gloria Macapagal-Arroyo actively promoted mining as a platform for development in the Philippines. During her term, she transferred the NCIP to the control of the Department of Agrarian Reform, and later moved it under the Department of Environment and Natural Resources.⁵¹ The Department of Environment Natural Resources maintains responsibility for issuing mining concessions, thus the transfer created a conflict of interest and undermined the NCIP's power. This further eroded indigenous peoples' trust in the NCIP.

RECENT FPIC DEVELOPMENTS IN PHILIPPINE LAW

The rules aimed to clarify provisions that are most prone to abuse, misrepresentation, graft, and corruption.

The current administration – led by President Benigno Aquino III – has taken measures to improve the situation of indigenous communities. The government moved NCIP back under the Office of the President,⁵² “to ensure concerted efforts in formulating and implementing policies, programs and projects geared towards the protection and promotion of the rights and welfare of Indigenous Cultural Communities/Indigenous Peoples.”⁵³ The administration also allocated additional budget for NCIP to set up a quasi-judicial court. The court tries to resolve issues related to IPRA, reducing, if not eliminating, the need for litigation in other courts.⁵⁴ In addition, the administration appointed as NCIP Chairperson Zenaida Brigida Hamada-Pawid, who worked in civil society before joining government. She has a history of advocating for indigenous rights, so progressive NCIP reforms under her term come as no surprise.

NCIP released new rules for FPIC implementation in 2012.⁵⁵ The rules aimed to clarify provisions that are most prone to abuse, misinterpretation,

50 Id.

51 Perseus Echeminada, *NCIP welcomes its return to the Office of the President*, Philippine Star, (November 11, 2010) <http://www.philstar.com/headlines/628670/ncip-welcomes-its-return-office-president>.

52 Id.

53 Executive Order No. 11, s. 2010.

54 Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples*, (2012), <http://www.up.edu.ph/index.php/the-road-ahead-for-the-indigenous-peoples/> quoting NCIP Chair Zenaida Brigida Hamada-Pawid.

55 Republic of the Philippines, Administrative Order No. 03-12 or *The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012* (April 2012), <http://ncip12.wordpress.com/issuances/the-revised-guidelines-on-free-and-prior-informed-consent-fpic-and-related-processes-of-2012/>.

misrepresentation, graft, and corruption.⁵⁶ The Chamber of Mines of the Philippines protested the new rules, arguing that NCIP failed to consult with stakeholders on the revised rules, finding fault with a few provisions, and citing potential investment losses and delays in a number of key exploration and mining projects. The Mines and Geosciences Bureau of the Department of Environment and Natural Resources also questioned the rules, arguing that they would discourage investments in mining.

Nevertheless, the NCIP published the revised FPIC rules on May 16, 2012 as a way to address the implementation challenges described in the previous section. Section 3 of Administrative Order No. 03-12 or the “The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012” embodies the Declaration of Policy, stating that:

1. The FPIC actualizes and strengthens the exercise by ICCs/IPs [indigenous peoples] of their rights to Ancestral Domains, Social Justice and Human Rights, Self-Governance and Empowerment, and Cultural Integrity;
2. The right of ICCs/IPs to the management, development, use and utilization of their land and resources within their own ancestral domains shall be given utmost regard;
3. No concession, license, permit or lease, production-sharing agreement, or other undertakings affecting ancestral domains shall be granted or renewed without going through the process laid down by law and these Guidelines.

The text below highlights some of the key features of these generally quite progressive implementing rules, which:

1. **Stipulate clearly that indigenous peoples have the right to develop a resolution of consent or a resolution of non-consent.** Both types of resolutions are adopted by the affected indigenous communities or through their duly authorized elders/leaders and enable communities to express their acceptance or refusal to accept the proposed plan, program, project or activity. In the case of a refusal to accept, the non-consent resolution must also document the reasons for the refusal (Section 5).

⁵⁶ Celeste Ann Castillo Llaneta, *The Road Ahead for the Indigenous Peoples*, (2012) <http://www.up.edu.ph/index.php/more-on-up/22-forum/410-the-road-ahead> quoting NCIP Chair Zenaida Brigida Hamada-Pawid.

The rules require the participation of indigenous leaders on the field research team.

2. **Provide for “field-based investigations” which consist of research on-the-ground to determine the project overlap with and/or impact to indigenous lands and identify the indigenous peoples who will either grant or withhold their FPIC.** The rules require the participation of indigenous leaders on the field research team. Indigenous leaders, project sponsors, and the relevant government agency must agree on issues such as costs, format for documenting the activity (photo, video, etc.), and other relevant processes, and the results of the field-based investigation must then be validated in a community assembly.
3. **Provide for the creation of an FPIC Team in each province.** Teams include: a Provincial Officer, Provincial Legal Officer, engineer from the provincial or regional office, head of the field-based investigation team, and two indigenous elders or leaders as selected by the community (Section 16). The FPIC Team holds the following responsibilities (according to Section 18):
 - a. Convene, with prior notice, the first general assembly to validate: (1) field-based investigation report; (2) identity of the indigenous elders and leaders; (3) decision-making process; (4) census of indigenous peoples (migrant or otherwise); (5) Area affected; (6) Existence of boundary conflict with other ancestral domains;
 - b. Document and facilitate conflict resolution mechanism by the selected elders/lead ers, should there be any dispute to be resolved;
 - c. Facilitate and document the proceedings of the assembly and be responsible for the interpretation, translation, clarification, or elaboration of matters discussed or taken up;
 - d. Orient the participants on the pertinent provisions of IPRA at all stages and activities;
 - e. Present the agreed work and financial plan during the assembly;
 - f. Invite the appropriate independent experts, if available, to give their opinions on any aspect of the project;
 - g. Should the indigenous communities agree to the activity, help draft the Resolution of Consent and the MoA, or Resolution of Non-Consent;

- h. Make an accounting, in accordance with generally accepted accounting and auditing rules, of all monies and properties received in relation to the conduct of the FPIC; and
 - i. Prepare and submit FPIC report with recommendations, and an executive summary of the same, both duly signed under oath by the team leader and members.
4. **Provide for multiple applications of FPIC throughout the life of the project.** The rules require that: “Unless specifically stated in the MoA, separate exercise of the right to FPIC shall be for each major phase of the proposed activity such as Exploration; Operation or Development; Contracting of operator; and the like” (Section 20).
5. **Call for the implementation of two community assemblies.** The first assembly is held as soon as an FPIC fee⁵⁷ has been paid. In addition to formal notice of representatives of the ancestral domain and others, written notice must be posted, “seven (7) days before the activity in conspicuous places in and around the concerned ICC/IP [indigenous peoples] Community” (Section 22). During the assembly participants will receive orientation on IPRA and the FPIC process, validate the field-based investigation report, identify and validate indigenous leaders, determine the consensus-building process that will be implemented, receive the work and financial plan for the process, and arrange for dispute resolution mechanisms.

The second community assembly features a presentation by the applicant of the project. Section 22 of the rules stipulates that this presentation should include:

- a) The Operation Plan and the scope and extent of the proposal;

⁵⁷ The NCIP’s Revised Guidelines on Free and Prior Informed Consent (FPIC) of 2012 contains provisions regarding the FPIC fee. The FPIC fee is paid for by the applicant (company) based on the work and financial plan (WFP) for field based investigation (FBI) or FPIC conference. The WFP shall be agreed upon by the applicant, the concerned indigenous peoples’ representatives and the NCIP during the pre-FBI/FPIC conference. The WFP shall include costs of (a) food and snacks, lodging and transportation expenses of those who will be actually involved in the FBI process; (b) Documenting the FBI activities i.e. photo and/or video, cassette recording and development, reproduction of documents; and (c) Others as may be agreed by all the parties during the Pre-FBI/Pre-FPIC conference. The computation of expenses or costs must be based on rates applicable in the particular area where the FBI/FPIC is to be undertaken. The fee is deposited in a trust account established for the purpose by the regional office of the NCIP. NCIP Guidelines available here: <http://www.ncip.gov.ph/downloads/category/1-administrative-orders.html?download=3:ao-3-the-revised-guidelines-on-fpic-and-related-processes-of-2012>.

- b) The cost and benefits of the proposal to indigenous communities and their ancestral domains;
- c) The perceived disadvantages or adverse effects to the community; and
- d) The measures adopted by the applicant to avoid or mitigate these.

Experts and other stakeholders may be invited to participate, and communities have the opportunity to ask questions and raise any concerns. The rules stipulate that indigenous communities “shall be left alone to agree on their decision-making/consensus-building schedules and when to come out with their decision.”

The FPIC Team must explain the Memorandum of Agreement to the community “in a language they speak and understand.”

- 6. **Require a validation assembly once agreement has been reached among communities.** The FPIC Team must explain the MoA to the community “in a language they speak and understand” (Section 22). Communities must confirm and both parties must sign the agreement before it is binding. The resolution of consent or non-consent is also signed.
- 7. **Denote excluded areas.** These include sacred grounds and burial sites of indigenous communities, identified international and local cultural and heritage sites, critical areas identified or reserved by the indigenous people s for special purposes, and other areas specifically identified by indigenous peoples (Section 25).
- 8. **Prohibit several acts that might lead to abuse of the process during the time in which an FPIC application is pending.** For example, applicants must avoid: using force, coercion or intimidation to any degree, bringing firearms on community visits; bribery or promise of money, privileges or rewards; clandestine negotiations with indigenous communities; etc. Similarly, NCIP employees must refrain from accepting money or gifts from applicants; attempting to unduly influence the outcome of the process; failing to act appropriately in response to complaints coming from communities members; holding unauthorized meetings such as “wining and dining drinking sessions”, etc. Finally, indigenous community members or leaders must also refrain from soliciting or receiving money or gifts, negotiating or mediating without authority, attempting to unduly influence the outcome of the process, etc. (Section 65). The rules also describe sanctions for violations of its conditions (Section 66).

While the above stipulations put in place important safeguards to promote effective FPIC implementation, some indigenous and civil society groups have identified concerns with certain aspects of the rules. For example, the rules prescribe a time limit on indigenous peoples' decision-making processes which may not accord with the actual process indigenous communities undertake to evaluate projects and make informed decisions.⁵⁸ This time limitation was included as a last minute modification to the rules by the NCIP. Such limitation in earlier versions of the rules had been subject to strong criticism by indigenous peoples on the grounds of being culturally inappropriate and unreasonable. UN CERD also called on the government to ensure realistic timeframes for consultation processes to maintain consistency with the spirit of FPIC.⁵⁹ The rules also stipulate that project proponents have the opportunity to seek consent every six months.⁶⁰ In exercising their rights to self-determination and FPIC some communities may decide to reject a project for a number of years, and in these cases should not be forced to reconsider their decision. Finally, while it is useful that the rules require two community assemblies, in fact more assemblies will likely be needed for complicated projects – such as those in the oil and mining sectors – to ensure that community members have the opportunity to receive information on the project and have time to process the information and formulate questions.

Despite these significant shortcomings, the implementing rules nevertheless go a long way towards promoting effective and participatory implementation of FPIC in accordance with the IPRA when compared to previous flawed implementing rules. They are only recently being put to the test.

CONCLUSION

The enactment of the IPRA in 1997 and the inclusion of FPIC in its provisions helped promote the protection of indigenous rights in the Philippines. Used strategically, the IPRA is a powerful piece of legislation that guarantees indigenous communities the right to self-determination and recognition of

58 Section 22 provides that towards the end of the *Second* community assembly, ...the ICCs/IPs shall be left alone to agree on their decision-making/consensus-building schedules and when to come out with their decision. This activity must not be undertaken less than ten (10) days from the date of the Second community assembly and must be completed within a reasonable time but not more than two (2) months thereafter.

59 CERD Concluding Observations to the Philippines UN Doc CERD/C/PHL/CO/20 (August 27, 2009), <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/29a6f7d271567705c125763b004b65cc?OpenDocument>.

60 Under Section 27, after a community rejects a project, “No FPIC process for any similar proposal shall be undertaken within six (6) months from the issuance of non-consent.” This suggests that the process can be repeated a mere six months after a community rejects the project.

ancestral domains. The law enables communities to reject any project that they believe will affect their communities negatively. However, weaknesses have been identified in the implementation of the law. Indigenous communities have seen FPIC subverted as a result of inadequate implementation by both government and industry.

While FPIC requirements in law represent one critical tool to promote meaningful engagement with indigenous communities in decision-making pertaining to natural resource development, a host of other issues must be considered in order to ensure that States and project sponsors respect the spirit of FPIC in practice. For example, governance conditions must be strong enough to ensure that there is space for active citizen engagement in policy making both at the national and local level. Adequate resources must also be allocated to ensure genuine interaction with indigenous representatives in the formulation of policy change and monitoring. Resources are also needed to ensure the provision of independent information to communities, and to support community participation in human rights and environmental and social impact assessments and in project level decisions.⁶¹

Corporations also have the obligation to respect human rights, as noted in the United Nations Guiding Principles for Business and Human Rights, and should operate at least to internationally recognized human rights standards.⁶² A company and financiers' due diligence, where indigenous peoples are involved, should include an indigenous-led FPIC process at the earliest possible stage of a project, prior to the issuance of licenses or concessions and before the commencement of any mining activities.⁶³

The promising recent revision of the FPIC implementing rules in the Philippines demonstrates that the NCIP is aware of implementation challenges and attempting to address them. Effective implementation of the new rules will be critical if the Philippine government hopes to achieve real community participation in natural resource decision-making and genuine protection of indigenous peoples' rights.

61 Statement from the Indigenous Peoples and Extractive Industries Network (IPEIN) to the Forum on Business and Human Rights (December 22, 2012), <http://int.piplinks.org/statement-indigenous-peoples-and-extractive-industries-network-%28ipein%29-forum-business-and-human-right>.

62 For more information on company commitments to FPIC in particular, see Marianne Voss and Emily Greenspan, *Community Consent Index: Oil, Gas and Mining Company Positions on Free, Prior, and Informed Consent (FPIC)*, Oxfam America Research Background series (2012), www.oxfamamerica.org/publications/community-consent-index.

63 Cathal Doyle and Jill Carino, *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector*, Indigenous Peoples Links, Middlesex University School of Law, and The Ecumenical Council for Corporate Responsibility (May 2013), <http://www.piplinks.org/report%3A-making-free-prior-%2526amp%3B-informed-consent-reality-indigenous-peoples-and-extractive-sector>.

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