UNDERMINING INDIGENOUS LAND RIGHTS: THE IMPACT OF MINING RIGHTS ON PRIVATE LAND RIGHTS OF ICCS/IPS IN THE PHILIPPINES

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INTRODUCTION

A. The Philippine ICCs/IPs: Situation and Legal History

The Philippines' indigenous peoples, composed of over 60 major peoples or communities, constitute a substantial portion of the country's population. As of 1995, there were more than 10.7 million members of indigenous peoples (ICCs/IPs) in the Philippines, or approximately 15.6 percent of the total 1995 population.[1]

Section 3(h) of Republic Act No. 8371, otherwise known as the Indigenous Peoples Rights Act of 1997 (IPRA), defines "indigenous cultural communities/ICCs/IPs" as generally referring to "a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined," and who possess any or all of the following characteristics:

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[1] See NCIP, Comparative Presentation of Estimated Total Population of ICCs/IPs Vs. Total Population by Region/Province (1998).

> (1) who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or
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> (2) who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos, or
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> (3) 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 at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their ancestral domains or who may have resettled outside their ancestral domains.

The "minoritization" of Philippine indigenous peoples was the result of Spanish and American colonization. Pre-hispanic Filipino communities were composed of virtually independent barangays or small kingdoms that, depending on circumstances, were interacted with or were isolated from their neighbors.[2] The Spanish colonization process, however, created a dichotomy between those indigenous communities that, whether voluntarily or by force, submitted themselves to foreign domination and assimilated foreign culture and those indigenous communities that did not so submit and thus preserved their own cultures.[3] This dichotomy was further institutionalized during the American colonial period, dividing Filipinos according to religious and cultural lines.[4]

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[2] William Henry Scott, *The Making of a Cultural Minority*, CRACKS IN THE PARCHMENT CURTAIN 40 (1985).

[3] *Id.*

[4] Charles MacDonald, *ICCs/IPs of the Philippines: Between Segregation and Integration*, in R.H. BARNES et al. (Eds.), ICCs/IPs OF ASIA 345, 348-349 (1995). Section 1 of the Charter of the Commission on National Integration (Republic Act No. 1888) defined "national cultural minorities" as being synonymous with "non-Christian Filipinos." Likewise, Section 120 of the Public Land Act (Commonwealth Act No. 141) equates "national cultural minorities" with "non-Christian Filipinos." Section 2 of Charter of the Presidential Assistant on National Minorities or PANAMIN (Presidential Decree No. 1414) defined "national minorities" as applying to "the non-Muslim hill tribes referred to under Presidential Decree No. 719 and other

The use of religion and culture as measures of "civilization" and as distinguishing factors between "majority" and "minority" Filipinos was carried over into the Philippine Republic. The Philippine Supreme Court as late as 1966 showed this when it stated that "this is specially true in provinces, like those created by Republic Act No. 4695, for its inhabitants belong to the non-Christian and less enlightened minorities of our population, and the administration of their public affairs requires a special kind of tact, understanding and vision, which are not needed in the Christianized regions of the Philippines."[5]

By the middle of the twentieth century, however, the official attitude had shifted from "civilizing" to "integrating" the ICCs/IPs into the body politic, as shown in Section 1 of Rep. Act No. 1888. This law declared it to be the policy of the Congress "to foster, accelerate and accomplish by all adequate means and in a systematic, rapid and complete manner the moral, material, economic, social and political advancement of the Non-Christian Filipinos, hereinafter called National Cultural Minorities, and to render real, complete and permanent the integration of all the said National Cultural Minorities into the body politic." Section 1 of Pres. Dec. No. 1414 echoed the "integration" ethic by stating that it is the policy of the State "to integrate into the mainstream of Philippine society certain ethnic groups who seek full integration into the larger community, and at the same time protect the rights of those who wish to preserve their original lifeways beside that larger community."

The ratification of the 1987 Philippine Constitution embodied another shift in the official attitude of the State from "integration" into "recognition" of the existence of ICCs/IPs as peoples and of their rights. This recognition is embodied in the following Constitutional provisions:

Article II, Section 22:

> The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.

Article XII, Section 5:

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non-Muslim national minorities whether referred to as National Cultural Minorities or Cultural Communities under other laws."

[5] *Pio Felwa, et al. v. Rafael Salas, et al.*, GR No. L-26511, 29 October 1966, 18 SCRA 606, 613 (1966).

> 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.

Article XIV, Section 17:

> 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.

Article XVI, Section 12:

> 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 IPRA is the latest official statement on the legal status of ICCs/IPs within the Philippine body politic.

Various government agencies were created in response to the various shifts in official attitudes relating to indigenous peoples. The Office of the Presidential Assistant for National Minorities (PANAMIN)[6] was replaced by three offices – the Office of Muslim Affairs (OMA), the Office for Norther Cultural Communities (ONCC), and the Office for Southern Cultural Communities (OSCC)[7] – attached to the Office of the President.[8] From 1987 to 1997, the Department of Environment and Natural Resources (DENR) was tasked to administer the delineation of ancestral domains of ICCs/IPs.[9] In 1997, the National Commission on Indigenous Peoples (NCIP) was created pursuant to

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[6] Created under Pres. Decree No. 1414 (1978).

[7] Executive Order No. 122-A, 122-B, and 122-C (1987) respectively.

[8] The latter two offices were later abolished with the creation of the National Commission on ICCs/IPs under Republic Act No. 8371 during the Ramos administration.

[9] DENR Admin. Ord. No. 2, series of 1993, and DENR Administrative Order No. 34, series of 1996.

Republic Act No. 8371, the Indigenous People's Rights Act of 1997, ostensibly providing for the recognition of ancestral domains and lands and the ownership thereof by ICCs/IPs.

B. Philippine Mineral Wealth: Situation and Legal History

The Philippines is a mineral-rich archipelagic country. Estimated metallic mineral reserves in 1996 amounted to approximately 6.682 billion metric tons[10] Non-metallic mineral reserves also run into the billions of metric tons.[11] But falling global prices for most metallic mineral products and higher production costs has forced the Philippine mining industry into decline over the past decade.

MINERAL PRODUCTION: 1987 TO 1997

(Value in thousand pesos)

Mineral Type	1988	1990	1992	1994	1996	1997
Total	22,379,973	22,368,798	24,663,871	18,772,936	18,026,823	17,801,542
Metallic	17,636,556	16,391,683	14,672,018	4,944,959	10,162,886	9,937,605
Non-Metallic	4,743,417	5,977,115	9,991,853	7,863,937*	7,863,937*	7,863,937*

Note: Collated from NSCB, 1998 PHILIPPINE STATISTICAL YEARBOOK (1998), Table 4.10, pages 4-24 to 4-27

* This data is not reliable because the figures for the quantity and value of mineral production in 1994, 1996 and 1997 are identical in all respects. This is a statistical impossibility.

[10] NSCB, 1997 PHILIPPINE STATISTICAL YEARBOOK 4-21 (1997).

[11] *Id.*, at 4-23.

The mineral sector's share in the country's GNP and GDP has also fallen. Mining's share decreased from 1.616 percent of GNP in 1984, to 1.183 percent in 1992, at the close of the Aquino administration, and to 0.758 percent in 1996, past the mid-point of the Ramos administration.

SHARE OF MINING AND QUARRYING GDP
AS PROPORTION OF GDP AND GNP: 1983 TO 1996

Item	1984	1986	1988	1990	1992	1994	1996
As % of GNP	1.616	2.404	1.953	1.555	1.183	0.951	0.758
As % of GDP	1.552	2.323	1.911	1.546	1.203	0.975	0.788

Note: Calculated from data in NSCB, 1997 PHILIPPINE STATISTICAL YEARBOOK (1997), Table 3.3, pages 3-8 to 3-9

Reflecting the decline of the mining industry, excise tax collections of the Government also decreased drastically.[12] The Government sought to address and reverse the trend by promoting private sector mining investments through the enactment of new laws and the promulgation of new rules.

The DENR overhauled the administrative policy framework for the mining industry pending the enactment of a new law to govern mining. Soon after its reorganization, in view of the abolition of service contracts under the 1987 Constitution, the DENR issued DENR Administrative Order No. 57, series of 1989,[13] providing for the guidelines for Mineral Production Sharing Agreements (MPSAs) under Executive Order No. 279[14] (1987). The DENR also issued DENR Administrative Order No. 63, series of 1991, to implement Exec. Ord. No. 279 (1987) and providing for the guidelines for the submission, processing and

[12] ADB, POTENTIAL USES OF MARKET-BASED INSTRUMENTS FOR ENVIRONMENTAL MANAGEMENT IN THE PHILIPPINES 77 (1997).

[13] This was clarified by DENR Circular Order No. 6, series of 1989.

[14] This Executive Order issued by President Aquino authorized the DENR Secretary to negotiate and conclude joint venture, co-production, or production sharing agreements for mining operations and prescribed the guidelines for financial or technical assistance agreements for large-scale exploration, development and utilization of minerals.

approval of applications for Financial or Technical Assistance Agreements (FTAAs) entered into between the Government and foreign corporations wishing to engage in large-scale exploration, development and utilization of minerals.

Republic Act No. 7942, the Philippine Mining Act of 1995, revised the regulatory and institutional framework for the entry and operation of large-scale commercial mining enterprises in the country. It also provides investors with fiscal incentives over and above that of other investment incentives programs of the Government. Due to the passage of Rep. Act No. 7942, more mining regulations were changed. Among these were DENR Administrative Order No. 34, series of 1992,[15] providing for the implementing rules and regulations for Rep. Act No. 7076, the People's Small-scale Mining Act of 1991, and DENR Administrative Order No. 40, series of 1996, providing for the revised implementing rules and regulations of Rep. Act No. 7942, the Philippine Mining Act of 1995. As a result of the conversion of the Mines and Geosciences Bureau (MGB) from being a staff bureau of the DENR into a line bureau, the DENR issued DENR Administrative Order No. 24, series of 1995, redefining the roles and linkages between the DENR and the MGB.

Under the Mining Act of 1995, all mineral resources in public or private lands were opened to mineral agreements or financial or technical assistance agreement applications.[16] Excluded from such lands, i.e. closed to mining applications, are lands over which there are existing rights[17] or reservations;[18] and ancestral lands unless the indigenous cultural community has consented to such application and mining project.[19] More specifically, the law enumerates the areas that are considered as closed to mining applications because they are covered by existing rights or reservations:[20]

> (a) In military and other government reservations, except upon prior written clearance by the government agency concerned;

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[15] Subsequently amended by DENR Administrative Order No. 37, series of 1992.

[16] Rep. Act No. 7942 (1995), sec. 18.

[17] "Existing rights" in this case can be construed to mean the vested rights since time immemorial of ICCs/IPs even without the necessary documentation through issuance of titles.

[18] Rep. Act No. 7942 (1995), sec. 18.

[19] Rep. Act No. 7942 (1995), sec. 16.

[20] Rep. Act No. 7942 (1995), sec. 19.

(b) Near or under public or private buildings, cemeteries, archeological and historic sites, bridges, highways, waterways, railroads, reservoirs, dams or other infrastructure projects, public or private works including plantations or valuable crops, except upon written consent of the government agency or private entity concerned;[21]

(c) In areas covered by valid and existing mining rights;[22]

(d) In areas expressly prohibited by law;

(e) In areas covered by small-scale miners as defined by law unless with prior consent of the small-scale miners, in which case a royalty payment upon the utilization of minerals shall be agreed upon by the parties, said royalty forming a trust fund for the socio-economic development of the community concerned; and

(f) Old growth or virgin forests, proclaimed watershed forest reserves, wilderness areas, mangrove forests, mossy forests, national parks, provincial/municipal forests, parks, greenbelts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under the National Integrated Protected Areas System (NIPAS) under Republic Act No. 7586, Department Administrative Order No. 25, series of 1992 and other laws.[23]

Other areas that are closed to mining applications are:

1. Areas which the Secretary of the DENR may exclude based on "proper assessment of their environmental impacts and implications on sustainable land uses, such as built-up areas and critical

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[21] This exclusion is qualified by sec. 15(b)(2) of DENR Admin. Ord. No. 96-40 which requires that the consent of the Government or private entity allowing the area to be opened for mining applications will be subject to the "technical evaluation and validation" by the Mines and Geosciences Bureau.

[22] This exclusion is expanded by sec. 15(a)(1) of DENR Admin. Ord. No. 96-40 to cover "[a]reas covered by valid and existing mining rights and mining applications subject to Subsection b(3) herein." sec. 15(b)(3) of the same administrative order goes on to state that areas covered by FTAA applications may be opened up for quarrying operations.

[23] This exclusion is expanded by sec. 15(a)(2) of DENR Admin. Ord. No. 96-40 to include tree parks, marine reserves, marine parks, and tourist zones.

watersheds with appropriate barangay/municiapl, city, provincial Sanggunian ordinance specifying therein the location and specific boundary of the concerned area;[24]

2. DENR Project Areas unless there is prior consent from the concerned DENR unit.[25]

The declaration that an area is closed to mining is not final because regulations provide that the DENR Secretary can open previously closed areas to mining upon recommendation of the MGB.[26] However, this provision is of doubtful validity and legality because the law itself does not provide the Bureau nor the Secretary with the power to declare that an area explicitly listed in the law as closed to mining applications may now be opened thereto.

A mineral agreement under the 1995 Mining Act, such as a Financial or Technical Assistance Agreement (FTAA) and a Mineral Production Sharing Agreement (MPSA), grants to the contractor the following rights:

1. the exclusive right to conduct mining operations and to extract all mineral resources found in the contract area;[27]

2. the right to convert its agreement into the other types of mineral agreements subject to the approval of the Secretary;[28]

3. the right to mine the area for a period not exceeding 25 years, renewable for another period not exceeding 25 years;[29]

4. the right to transfer or assign the mineral agreement, except an FTAA;[30]

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[24] DENR Admin. Ord. No. 96-40, sec. 15(a)(3).

[25] DENR Admin. Ord. No. 96-40, sec. 15(b)(5). These "DENR Project Areas" are identified by sec. 5(p), id, as referring to "specific portions of land covered by an existing project of the Depatrment such as, but not limited to, Industrial Forest Management Agreement (IFMA); Community Forest Management Agreement (CFMA); Community Forestry Program (CFP); Forest Land Management Agreement (FLMA): and Integrated Social Forestry Program (ISFP)."

[26] DENR Admin. Ord. No. 96-40, sec. 15(b), last paragraph.

[27] Rep. Act No. 7942 (1995), sec. 26, 2nd paragraph.

[28] Rep. Act No. 7942 (1995), sec. 45, DENR Admin. Ord. No. 96-40.

[29] Rep. Act No. 7942 (1995), sec. 32; DENR Admin. Ord. No. 96-40, sec. 34.

5. the right to ingress and egress from the area;[31]

6. the right to occupy the area;[32]

7. the right to cut trees or timber within the mining area as necessary for the mining operations;[33]

8. the right to use water resources for mining operations;[34]

9. the right to possess and use explosives necessary for mining operations;[35]

10. easement rights for the building, construction, or installation, on lands of other persons, of necessary mining infrastructure such as roads, railroads, mills, waste dump sites, tailings ponds, warehouses, staging or storage areas and port facilities, tramways, runways, airports, electric transmission, telephone or telegraph lines, dams and their normal flood and catchment areas, sites for water wells, ditches, canals, new river beds, pipelines, flumes, cuts, shafts, tunnels, or mills.[36]

Rep. Act No. 7942 allows foreign mining companies to explore, exploit, develop, and utilize the country's mineral resources on a large-scale basis in the guise of providing the Government with financial and technical assistance. These rights effectively provide foreigners with natural resource development rights

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[30] Rep. Act No. 7942 (1995), sec. 30; DENR Admin. Ord. No. 96-40, sec. 46. Although subject to the approval of the Secretary, if the application for transfer or assignment is not acted upon by the Secretary within 30 calendar days from the date of official receipt of the application, the transfer or assignment shall be deemed automatically approved unless such is patently unconstitutional, illegal, or violative of pertinent rules and regulations.

[31] DENR Admin. Ord. No. 96-40, sec. 44. See also Rep. Act No. 7942 (1995), sec. 76, providing for the right to enter private lands or concession areas when conducting mining operations therein pursuant to a mineral agreement or permit.

[32] DENR Admin. Ord. No. 96-40, sec. 44. See also Rep. Act No. 7942 (1995), sec. 76, providing for the right to enter private lands or concession areas when conducting mining operations therein pursuant to a mineral agreement or permit.

[33] Rep. Act No. 7942 (1995), sec. 72.

[34] Rep. Act No. 7942 (1995), sec. 73.

[35] Rep. Act No. 7942 (1995), sec. 74.

[36] Rep. Act No. 7942 (1995), sec. 75.

contrary to Art. XII, Sec. 2 of the 1987 Constitution reserving the development and exploitation of the country's natural resources such as minerals to Filipino citizens or corporations or associations sixty percent (60%) of whose capital equity is owned by Filipino citizens. A B'laan community has challenged the constitutionality of the Mining Act of 1995 before the Philippine Supreme Court on a petition for prohibition and *mandamus*.[37]

II. MINERAL RIGHTS IN THE PHILIPPINES: FROM ALIENABLE TO INALIENABLE

The doctrine of State ownership over and inalienability of minerals and other natural resources in the Philippines is a fairly recent development in Philippine Constitutional history. The current formulation of this doctrine (termed the "Regalian Doctrine" in the Philippines) under the 1987 Constitution can be traced no farther back in Philippine legal constitutional history than to the 1935 Philippine Constitution. Prior to that organic law, mineral rights were capable of private appropriation under Spanish law and US law.

A. Private Mineral Rights: Alienability Under the 1872 General Mining Law of the United States and Its Importation into the Philippines

As early as the First Philippine (Schurman) Commission sent by President McKinley, the Philippines' vast mineral wealth was already recognized.[38] The Second Philippine (Taft) Commission was even more cognizant of the existence of such mineral wealth and the economic benefits that it would bring to the United States.[39]

> With respect to the development of mineral wealth, it is clear that the Taft Commission had the interests of American miners and prospectors much in mind, and it is equally apparent that miners and prospectors were among the most active and plentiful groups among Americans who migrated to the islands... the commission ... urged

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[37] La Bugal B'laan Tribal Association, et al v. Victor O. Ramos, et al., GR No. 127882.

[38] WINFRED LEE THOMPSON, THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO 1898-1905 193 (1989).

[39] *Id.*, at 196.

> Congress to enact a mining code which would encourage them to continue their efforts.
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> As an appendix to its second annual report, the commission submitted a draft of a mining law for possible congressional action. Noting that the miners and prospectors in the islands were, with very few exceptions, American citizens who quite naturally preferred mining laws patterned after the American models with which they were familiar, the commission recommended the adoption of the essential congressional mining statutes with only such modifications as local circumstances might compel.[40]

The US Congress "generally accepted the Commission's recommendations" that in most essential details followed the commission's recommendations and gave to the commission the authority to promulgate supplementary regulations.[41] The Philippine Act of 1902 dealt in great detail with matters of "the most pressing economic concern to the new American regime: mineral lands and rights, the lands of the religious orders, municipal bonds for public improvements, public franchises, and the coinage of money."[42] Indeed, of the Philippine Act of 1902's eighty-eight (88) sections, forty-five (45) dealt exclusively with matters relating to the acquisition of private mining rights in the Philippines as such phrase "private mining rights" is used in the United States.[43]

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[40] *Id.*, at 197-98, citing US Congress, House, *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1901*, "Public Laws and Resolutions Passed by the Philippine Commission," H. Doc. 2, 57th Cong., 1st sess., 1901, pp. 48, 151-59. The "essential congressional mining statutes" referred to in the passage was the General Mining Law of 1872, as amended, or Act of 10 May 1872, 17 Stat. 91, currently codified in 30 USC §§ 21 – 54.

[41] *Id.*, at 199. See also Act of 1 July 1902, "An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes", ch. 1369, 32 Stat. 691, Secs. 20-65. Among these "supplementary regulations" was Act No. 264 of the Philippine Commission.

[42] *Id.*, at 128.

[43] A concise history of the concept of "private mining rights" in United States law and jurisprudence can be obtained in GARY D. LIBECAP, THE EVOLUTION OF PRIVATE MINERAL RIGHTS: NEVADA'S COMSTOCK LODE (1978). Prior to 1866, title to public lands containing minerals were retained by the United States. The Act of Congress of 26 July 1866, ch. 262, 14 Stat. 251 and currently codified in 30 USC §§ 43, 46, 51, and 53 (1982), otherwise known as the 1866 Mineral Rights Law or the 1866 Lode Mining Act, "ratified existing claims and placed the legislative and judicial support of the Government behind private mineral rights owners ... and became the basis for Congressional policy mineral [sic] for the rest of the 19th and into the 20th centuries." *Id.*, at 203-04. In 1870, the US Congress enacted the Placer Mining Act of 9

The General Mining Law of 1872 allows a prospector to purchase title in fee simple of unappropriated federal land for a nominal charge upon discovery of a "valuable deposit" of minerals thereon.[44] Virtual mirror images of its provisions relating to this private acquisition of mineral lands can be found in the Philippine Act of 1902.[45] This gives rise to the conclusive presumption that the language used by the US Congress with respect to the acquisition of private mineral lands in the Philippine Act of 1902, being virtually identical, mutatis mutandis, with the key provisions of the US General Mining Law of 1872 pertaining to the same matter, is used in the Philippine Act of 1902 in the same sense that they were used in the US General Mining Law of 1872.[46] The enactment of the Philippine Act of July 1, 1902, therefore, effectively extended to the Philippines American mining law concepts relating to the private appropriation of mineral lands that were then (and still are) extant under the General Mining Law of 1872.

This state of affairs with respect to private mineral land rights acquisition prevailed in the Philippines until the enactment of the 1935 Philippine Constitution. None of the various Philippine "independence acts"[47] passed by the US Congress to settle the political future of the Philippines and set the conditions for the creation of its own constitution touched on the matter of acquisition of private rights over mineral resources. Hence, the provisions of the Philippine Act

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July 1870, ch. 235, 16 Stat. 217 and currently codified in 30 USC §§ 35-36, 38, 47, and 52 (1982), allowing "patenting of lands containing placer deposits according to the procedures of the 1866 Act." Carl J. Mayer, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CHI. L. REV. 624, 647-48 (1986). Mayer notes that the General Mining Law of 1872 "codified the Acts of 1866 and 1870." *Id.*, at 648.

[44] 30 USC §§ 22, 29, 37 (1982), derived from Act of 10 May 1872, §§ 1, 6, and 11, ch. 152, 19 Stat. 91, 92, and 94.

[45] See Act of 1 July 1902, §§ 21, 27, and 37, ch. 1369, 32 Stat. 697, 698, and 700.

[46] See *Kepner v. United States*, 195 US 100, 124 (1904), stating that "[I]t is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body", and citing *The Abbotsford*, 98 US 440.

[47] These were the "Jones Law of 1916", Act of Congress of 29 August 1916, ch. 416, 39 Stat. 545; the "Hare-Hawes-Cutting Act of 1933", Act of Congress of 17 January 1933, ch. 11, 47 Stat. 761; and the "Tydings-McDuffie Law of 1934", Act of Congress of 24 March 1934, ch. 84, 48 Stat. 456.

of 1902 continued to be applicable up to the effectivity of the 1935 Philippine Constitution pursuant to the savings clauses in these "independence acts."[48]

B. Regalian Doctrine: Inalienability and State Ownership of Minerals Under the 1935 and Subsequent Philippine Constitutions

The 1935 Philippine Constitution changed the constitutional context for the acquisition of private rights over natural resources, including minerals. It completely abolished the system of private mineral rights that existed up until then under the Philippine Act of 1902 by decreeing that all minerals belong to the State – i.e. the Commonwealth (later the Republic) of the Philippines – thereby expressly imposing the Regalian Doctrine into the Philippine constitutional system; reserving their "disposition, exploitation, development, or utilization" only to Philippine citizens or corporations and then solely through licenses, leases, or concessions; and prohibiting the alienation of natural resources.[49] Private property rights over mineral resources obtained by both Americans and Filipinos under the provisions of the Philippine Act of 1902, and its implementing laws and regulations, were, however, protected.[50]

The 1973 Philippine Constitution reiterated the Regalian Doctrine of State ownership over minerals and prohibiting their alienation;[51] and the reservation of the acquisition of development and exploitation (but not ownership) rights thereto to Filipino natural and corporate nationals through license, lease, or concession arrangements.[52]

The 1987 Constitution also contains the proscription against alienation of minerals and the claim of State ownership over all mineral resources in the

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[48] See "Jones Law of 1916", Act of 29 August 1916, ch. 416, § 31, 39 Stat. 556; the "Hare-Hawes-Cutting Act of 1933", Act of 17 January 1933, ch. 11, §15, 47 Stat. 769; and the "Tydings-McDuffie Law of 1934", Act of 24 March 1934, ch. 84, §15, 48 Stat. 464.

[49] 1935 CONST., art. XII, sec. 1. Being inconsistent with the provisions of the 1935 Philippine Constitution regarding non-alienation of natural resources including minerals, the provisions of the Philippine Act of 1902 in granting private mineral rights could no longer continue in force after the effectivity of the 1935 Philippine Constitution. See 1935 CONST., art. XVI, sec. 2.

[50] 1935 CONST., art. XIV, sec. 1, and art. XVII, sec. 1(1).

[51] 1973 CONST., art. XIV, sec. 8.

[52] 1973 CONST., art. XIV, sec. 9.

country;[53] however, it changed the system for rights acquisition over mineral from a lease or concession system as obtained under the 1935 and 1973 Constitutions into a system that theoretically would ensure that "[T]he exploration, development, and utilization of natural resources [including mineral] shall be under the full control and supervision of the State."[54] These mineral exploration, development, and utilization activites may be directly undertaken by the State, "or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens."[55] The participation of foreign mining companies in mineral resource exploitation in the Philippines was sought to be limited by the 1987 Constitution to only the provision of "either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country."[56]

III. INDIGENOUS LAND RIGHTS IN THE PHILIPPINES: RECOGNITION AND LEGAL HISTORY

A. Necessity for Recognition

The issue of mineral rights as being separate from land rights under the 1987 Philippine Constitution cannot be separated from the issue of recognition of indigenous land rights in the Philippines. Considering that the locations of the areas sought to be covered by most of these mineral agreement (including FTAAs) applications border or are within areas occupied by ICCs/IPs and may be claimed by them as their ancestral domains, more and more conflicts will arise between ICCs/IPs and other communities residing in areas covered by mineral agreements, on one hand, and the DENR and mining companies on the other hand. Out of approximately 100 FTAA applications filed as of January 1997, 71

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[53] 1987 CONST., art. XII, sec. 2, 1st para.

[54] 1987 CONST., art. XII, sec. 2, 1st para.

[55] 1987 CONST., art. XII, sec. 2, 1st para.

[56] 1987 CONST., art. XII, sec. 2, 4th para.

applications were plotted as bordering or explicitly located within lands that are occupied by various ICCs/IPs all over the country.[57]

ICCs/IPs have their own systems governing land and natural resource tenure. Their concepts with respect to land and resources are generally based on and defined by their cultural, social, and economic relationship with such resources. Their own legal and political systems are also shaped by such relationships. The interdependence of resource tenure issues and the issue of political, economic, social, and cultural survival of ICCs/IPs is so great that depriving them of their long-held rights to their lands and resources will have the effect of destroying their very identity as a distinct people. For ICCs/IPs, there is no division between tenure over land and tenure over various kinds of natural resources. Indigenous customary laws and traditions generally stress this interdependence of resource tenure and human survival.

B. Legal History of Recognition

1. Spanish and US Colonial Period: 1565-1935

Of greater importance for Philippine ICCs/IPs, however, than the imposition of the Regalian Doctrine is the fact that in all of the Philippines' various constitutional organic acts – from the Treaty of Paris on down to the 1987 Constitution – all provide for a recognition of resource rights to land and natural resources that had vested in favor of the indigenous inhabitants of the country and was protected by the due process clause and just compensation clauses.

The Treaty of Paris states that Spain ceded and relinquished to the United States "all the ... immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain ... [but that] the relinquishment or cession ... cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of ... associations having legal capacity to acquire and possess property ..., or of private individuals, of whatsoever nationality such individuals may be."[58]

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[57] See UNAC Secretariat, Mga Aplikasyon ng FTAA at ang mga Lupaing Ninuno ng mga Katutubong Pilipino (July 1998). (On file with author).

[58] See Treaty of Paris, United States-Spain, 10 December 1898, art. VII, 2nd para., 30 Stat. 1754.

President McKinley's Instructions to the Second Philippine (Taft) Commission expressly carried over into the Philippines the US Constitutional stricture that "no person shall be deprived of ... property without due process of law; that private property shall not be taken for public use without just compensation."[59] He stressed that the Commission is to observe that "the provision of the Treaty of Paris pledging the United States to the protection of all rights of property in the islands, as well as the principle of our own Government which prohibits the taking of private property without due process of law, shall not be violated."[60]

The Spooner amendment to the Army Appropriations Bill of 1901, which provided for the initial establishment of civil government in the Philippines, stressed that the exercise of military, civil, and judicial powers by the US President's delegates in the Philippines should be for the "maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion."[61]

The Philippine Act of 1902 provided that "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law"[62] and also contained provisions governing recognition of title and property rights that had vested under Spanish law.[63] Even in the acquisition of private mining rights under the Philippine Act of 1902, prior rights were recognized and protected.[64] The various Philippine independence acts also extended to the Philippines the due process clause with respect to property.[65] The 1935, 1973, and 1987 Philippine Constitutions also had embedded in them the due process clause and the "no taking without just compensation" concept.[66]

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[59] WAR DEPARTMENT, *The President's Instructions to the Commission*, PUBLIC LAW AND RESOLUTIONS PASSED BY THE UNITED STATES PHILIPPINE COMMISSION 8 (1901).

[60] *Id.*, at 9.

[61] Act of Congress of 2 March 1901, ch. 303, 31 Stat. 910.

[62] Act of Congress of 1 July 1902, ch. 1369, §5, 32 Stat. 692.

[63] *Id.*, §§ 14-16, 32 Stat. 696.

[64] *Id.*, §§27, 45.

[65] See "Jones Law of 1916", Act of 29 August 1916, ch. 416, § 3, 39 Stat. 546; the "Hare-Hawes-Cutting Act of 1933", Act of 17 January 1933, ch. 11, §2(n), 47 Stat. 762; and the "Tydings-McDuffie Law of 1934", Act of 24 March 1934, ch. 84, §2(a)(14), 48 Stat. 457.

[66] See 1935 Philippine Const., art. III, sec. 1; 1973 Philippine Const., secs. 1 and 2; 1987 Philippine Const., art. III, secs. 1 and 9.

Indigenous land rights were recognized by the US Supreme Court as also covering mineral rights under both Spanish and US laws. Thus, the case of *Cariño v. Insular Government*[67] simply reiterated that private ownership vested in persons who had occupied land since time immemorial in the concept of owner. This was regardless of the resources that were present within their territories.

The Court in this case stated that even though Spain "in its earlier decrees embodied the universal feudal theory that all lands were held from the Crown ... it does not follow that as against the inhabitants of the Philippines the United States asserts that Spain had such power."[68] Indeed, later in the decision, the Court pointed out that Spanish laws applicable to the Philippines during the time that it was under Spanish sovereignty "seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant... Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will... As prescription, even against crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty."[69]

The Court further pointed out that "[w]hatever may have been the technical position of Spain, it does not follow that, in the view of the United States, he [referring to the indigenous mineral land claimant in this case] had lost all rights and was a mere trespasser when the present Government seized his land. The argument to that effect seems to amount to a denial of native titles ... for the want of ceremonies which the Spaniards would not have permitted and had not the power to enforce."[70] The Court then stated that the Philippine Act of 1902 extended the due process clause to the Philippines and such extension was made applicable to the rights of the plaintiff *Cariño*, and hesitated to declare that Sec. 14 of the Philippine Act of 1902 relating to the confirmation of imperfect titles "was intended to declare every native who had not a paper title a trespasser and to set the claims of all the wilder tribes afloat."[71] In a memorable passage, the Court stressed that:

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[67] 212 U.S. 449 (1908).

[68] *Id.*, at 457-58.

[69] *Id.*, at 460.

[70] *Id.*, at 458.

[71] *Id.*, at 459.

> Whatever the law upon these points may be ... [I]t might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land.[72]

Even for minerals and mineral lands, both the US and Philippine Supreme Courts have been consistent and clear with respect to rights that have vested prior to the 1935 Constitution. In *Fianza v. Reavis*,[73] the Philippine Supreme Court was confronted with a conflict between a foreign miner who sought to establish a mineral claim even prior to the Philippine Act of 1902 and an indigenous occupant who had mined the area since time immemorial. Ruling on the nature of their rights and for the indigenous miner-plaintiff, the Court pronounced:

> This is the provision of law upon which the court below decided the case in favor of the plaintiffs. This view of that court must, in our opinion, be sustained. The statute of limitations of the Philippine Islands in force on July 1, 1902, was ten years. According to the evidence and the findings, the plaintiffs had held and worked on these claims for more than that length of time prior to the 1st of July 1902. They had for more than forty years prior to that date been in possession thereof. That possession had been open, notorious, continuous and under a claim of ownership. The locations made by Reavis in accordance with the Act of Congress of July 1, 1902, were not made until October of that year. They were made after the rights of the plaintiffs had become vested in accordance with the provisions of said section 45, and therefore such locations can not prejudice the plaintiffs.

On appeal to the United States Supreme Court, in *Reavis v. Fianza*, the Court, speaking through Justice Holmes, declared in no uncertain terms that where the land had been occupied by the indigenous claimant in accordance with indigenous customs since before the enactment of the Philippine Act of July 1, 1902, for such period of time sufficient to claim title under Spanish law regardless of whether actual title under Spanish law was obtained, such possession was sufficient for the indigenous claimant to obtain title to the land and the minerals therein under Sec. 45 of the Philippine Act of July 1, 1902, especially in view of

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[72] *Id.*, at 460.

[73] 7 Phil. 610 (1907).

the expressed policy of the US Congress in Sec. 16 of the same act "to respect native occupation of public lands."[74]

In the case of *Kepner v. United States*,[75] the US Supreme Court interpreted the application of US constitutional concepts relating to double jeopardy as embodied in the provisions of the Philippine Act of 1902. The Court stated that the US Congress intended "to carry ... the essential principles of American constitutional jurisprudence to these islands and to engraft them upon the law of this people, newly subject to our jurisdiction."[76] The Court emphasized that "there would seem to be no room for argument that ... it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom..."[77] This implies therefore that US constitutional law concepts with respect to the protection of property under the due process and eminent domain clauses were also applicable to the Philippines in construing the provisions of its various organic acts embodying these clauses.

Since the rights of indigenous communities to both the land and the natural resources – including minerals – that are found therein have vested due to time immemorial possession in the concept of owner, rendering such land and natural resources private in nature and hence outside the scope of the application of the declaration of State ownership over natural resources, such rights cannot now be prejudiced. Indeed, the impact of the application of the *Cariño* and *Reavis* rulings on the legal history relating to mineral rights acquisition in the Philippines is profound.

By stating that occupation of land since time immemorial in the concept of owner by an indigenous person effectively gives rise to ownership rights over the land and natural resources therein due to the application of acquisitive prescription rules under the Spanish colonial legal regime, the *Cariño* and *Reavis* cases stand for the proposition that such private property ownership rights were not among those that were transferred to the United States by Spain under the Treaty of Paris.

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[74] 215 US 16 (1909).

[75] 195 US 100 (1904).

[76] Kepner v. United States, 195 US 100, 121-22 (1904).

[77] Kepner v. United States, 195 US 100, 124 (1904)

That is, such rights were not, in the first place, part of the public domain belonging to the Crown of Spain which Spain could then transfer to the United States. By virtue of the fact that US constitutional doctrines relating to the due process and just compensation clause protections for private property were imposed upon US colonial officials from the very start of the US colonial regime, these pre-existing private property ownership rights in land and natural resources held by indigenous persons were legally protected and could not have been acquired by the United States.

2. Philippine Commonwealth and Republic: 1935-2000

Thus, although there exists sufficient legal basis for stating that undocumented private property rights of ICCs/IPs are already recognized since the Spanish era and even unto the American period,[78] subsequent legislation and Government action have consistently – albeit in a grave misapplication of various constitutional provisions – viewed ICCs/IPs as having no ownership rights over the lands they have occupied and the natural resources that they have used since time immemorial, such view being grounded on the legal fiction of the Regalian Doctrine stating that all natural resources belong to the State.[79] This view has made the ICCs/IPs squatters on their own lands, and gave rise since then to an increasingly militant struggle among indigenous groups in the country for the effective recognition of their land and natural resource rights.

Before 1986, there were already some attempts to address the land struggles of ICCs/IPs. These included Republic Act No. 3872, otherwise known as the Manahan amendment to Section 48 of the Public Land Act, which allowed the process of completion of imperfect titles for lands occupied by "national cultural minorities" regardless of whether these lands were classified as alienable and disposable. Section 4 of Presidential Decree No. 1073, however, limited the

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[78] See Carino v. Insular Government, 41 PHIL. 935 (1909). See Owen J. Lynch, Jr., *Land Rights, Land Laws, and Land Usurpation: The Spanish Era (1565-1898)*, 63 PHIL. L.J. 82 (1988); Antoinette G. Royo, *Regalian Doctrine: Whither the Vested Rights?*, 1(2) PHIL. NAT. RES. L. J. 1 (1988).

[79] See also Owen J. Lynch, Jr., *Invisible Peoples and a Hidden Agenda: The Origins of Contemporary Philippine Land Laws*, 63 PHIL. L.J. 249 (1988); Augusto B. Gatmaytan, *Land Rights and Land Tenure Situation of ICCs/IPs in the Philippines*, 5(1) PHIL. NAT. RES. L. J. 5 (1992); Dante B. Gatmaytan, *Ancestral Domain Recognition in the Philippines: Trends in Jurisprudence and Legislation*, 5(1) PHIL. NAT. RES. L. J. 43 (1992).

application of Section 48(b) and (c) of the Public Land Act only to alienable and disposable lands of the public domain. Presidential Decree No. 410 introduced the concept of making a five (5) hectare grant of Land Occupancy Certificates to "national cultural minorities" over specific areas. However, there is no record of any grants under Presidential Decree No. 410 as having been made.

After 1986, in recognition of the strong advocacy of ICCs/IPs, there were some pieces of legislation that incorporated some concept of ancestral land. Various laws that have mentioned ancestral lands are Executive Order No. 122-A, -B, and -C (1987) creating the Office of Muslim Affairs, Office of Northern Cultural Communities, Office of Southern Cultural Communities respectively; Executive Order No. 229 (1987) declaring an agrarian reform program; Executive Order No. 292 (1987), instituting the Revised Administrative Code; the Comprehensive Agrarian Reform Law (Republic Act No. 6657); the Organic Act for the Autonomous Region in Muslim Mindanao (Republic Act No. 6734); the Small-Scale Mining Act (Republic Act No. 7076); the National Integrated Protected Areas System Act of 1992 (Republic Act No. 7586); Republic Act No. 7611 adopting the strategic environmental plan of Palawan; and the Philippine Mining Act of 1995 (Republic Act No. 7942).

The legislative approach to ancestral land recognition was piecemeal. In most it simply protected the right of the indigenous community to possess. In others, it also required studies to be done. Every regular Congress since 1988 up to the passage of Rep. Act No. 8371 had some form of Ancestral Domain Bill pending in their chambers such as Senate Bill (S.B.) No. 909 (1988) in the Eighth Congress and House Bill (H.B.) No. 595 (1992) in the Ninth Congress.

The DENR also sought to provide an institutional mechanism for the administrative recognition of the rights of ICCs/IPs to their ancestral lands and domains. It issued DENR Special Order No. 31, series of 1990,[80] creating a task force to oversee ancestral lands delineation in the Cordilleras; DENR Administrative Order No. 61, series of 1991, providing for ancestral domain claims delineation in Palawan; and DENR Administrative Order No. 8, series of 1992, for ancestral domain claims delineation in Bukidnon. These regulations were eventually superseded and repealed.[81] In 1993, as a result of the studies of the USAID funded Natural Resource Management Project (NRMP), DENR

[80] Amended by DENR Special Order Nos. 31-A and 66, series of 1990.

[81] These administrative orders were subsequently superseded by DENR Administrative Order No. 2, series of 1993, which in turn was superseded by Rep. Act No. 8371 (1997).

Administrative Order No. 2, series of 1993, was signed by then-DENR Secretary Angel Alcala. This administrative order allowed the delineation of ancestral domains by special task forces and ensured the issuances of Certificates of Ancestral Domain Claims (CADC) or Certificates of Ancestral Land Claims (CALC). This ensured possession and the right not to be included in any prospective DENR project. However, these administrative orders could not give legal recognition of the ownership by ICCs/IPs of their claimed ancestral domains. At most, they merely recognized the existence of the claim and the territorial extent of such claim. The actual implementation of these orders, and subsequent administrative regulations governing the delineation of ancestral domain claims, have been very controversial and slow-paced.

It was only in 1997 that Republic Act No. 8371, the Indigenous People's Rights Act of 1997 (IPRA), ostensibly providing for the recognition of ancestral domains and lands and their ownership by ICCs/IPs, was enacted into law and took effect. Up to this writing (late 2000), the IPRA has not yet been fully implemented and no ancestral domain or ancestral land title has yet to be issued pursuant thereto.

IV. THE ICCs/IPs RIGHTS ACT OF 1997: SOLUTION OR FAILED PROMISE IN RESOLVING CONFLICTS BETWEEN MINERAL RIGHTS AND INDIGENOUS LAND RIGHTS?

The IPRA sets up a legal system that enumerates the property rights of ICCs/IPs to their ancestral domains and lands, and their political, social and cultural rights as peoples distinguished from the rest of the Filipino citizenry. This body of rights enumerated by IPRA include the recognition of the ICCs/IPs' right to their ancestral domains and the use of customary laws to govern property relations involving ancestral domains, and their right to their own cultures, traditions and cultural integrity. The law creates an administrative mechanism intended to implement its provisions. This administrative mechanism is expected to operate within the context of existing Constitutional and national laws on resource tenure.

The dominant political and legal system has its own concepts of resource tenure – defined through laws such as the 1987 Philippine Constitution, the

Public Land Act, the Revised Forestry Code,[82] the Philippine Mining Act of 1995,[83] and the Philippine Fisheries Code of 1998[84] among others. The State concept of resource tenure is explicitly expressed in Article XII, Section 2 of the 1987 Philippine Constitution – i.e., that the State owns all natural resources and all lands of the public domain. As a result of this claim of total State ownership, a wide array of disaggregated laws govern different kinds of land and natural resources – based on the legal fiction that each natural resource is independent from all other natural resource and the people dependent thereon.

Nevertheless, the human, civil, political, and property rights of Philippine ICCs/IPs are fully guaranteed and protected by the 1987 Philippine Constitution to the same extent and degree as those of Filipinos. As applied to ICCs/IPs in the Philippines with respect to their ancestral domains and lands, the Constitution would therefore, pursuant to the *Cariño* and *Reavis* rulings, state and recognize that such ancestral domains and lands claimed and owned by them are private property as the Civil Code defines it, with the additional proviso that the natural resources found in such lands are also privately owned, and that as such, have never formed part of the public domain. This means that the Government does not have any right to dispose of the lands that comprise ancestral domains and lands through public land grants such as those under the Public Land Act. Ancestral domains and lands, including the natural resources therein, are not public lands but rather are properties of private ownership as defined under Article 425 of the Civil Code.

The *Cariño* doctrine continues to have full force and effect and has not been affected by the IPRA. The concept of ICC/IP private ownership over their ancestral domains and lands as defined under the IPRA is not equal to the concept of private ownership by individual claimants over their pre-Spanish Conquest-held lands provided for under the *Cariño* doctrine.

A. The Legal Interrelationship Between the ICCs/IPs Rights Act of 1997 and the Mining Act of 1995

Section 7(b) of the IPRA states that, subject to Section 56, ICCs/IPs have the right to develop, control and use the lands and territories inside their ancestral

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[82] Pres. Decree No. 705 (1975).

[83] Rep. Act No. 7942 (1995).

[84] Rep. Act No. 8550 (1998).

domains. However, they only have the right to manage and conserve the natural resources therein, the right to profit from the utilization of such natural resources, and the right to negotiate the terms and conditions for the exploration of such natural resources. Section 57 of the IPRA further defines the right to "manage and conserve" ancestral domain natural resources by providing that ICCs/IPs have "priority rights in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains."

The IPRA creates a distinction in the types of rights applicable to lands and to natural resources within ancestral domains. Under Section 7(b) of the IPRA, with respect to lands, the types of "rights" over them available to ICCs/IPs are to "develop, control and use" whereas with respect to natural resources, the rights available ICCs/IPs are only to "manage and conserve," "profit" and "negotiate." Coupled with the statement in Section 57 of the IPRA that ICCs/IPs have only "priority rights" over natural resources in their ancestral domains, thereby implying that other persons or entities could likewise have rights over natural resources in ancestral domains, it seems clear that the level of control that ICCs/IPs have over the natural resources in their ancestral domains is less than the control that they can exert over the lands in their ancestral domains.

Finally, in view of the listing of land and natural resource rights for ICCs/IPs under Section 7(b) of the IPRA, the "right to claim ownership" over their ancestral domains by ICCs/IPs as stated in Section 7(a) of the IPRA is not fully equivalent to the ownership rights granted to other private property owners under Articles 428 and 429 of the Civil Code.

Under Sections 44(m) and 46(a) of the IPRA, a certification that the area sought to be operated in is located within an ancestral domain and that the ICCs/IPs claiming the ancestral domain has consented to the issuance of the certification must first be obtained by the government or private project proponent from the National Commission on ICCs/IPs (NCIP) through the Ancestral Domains Office (ADO). Such certification can be issued by the ADO only upon the free and prior informed consent of the ICCs/IPs concerned. However, Sections 44(m) and 46(a) of the IPRA jointly list as covered by this certification requirement only those natural resource projects authorized pursuant to permits, leases, grants, licenses or "other similar authority" of a non-contractual nature issued by the Government. The listing indicates that contractual arrangements for natural resource development, utilization and exploitation contemplated under Article XII, Section 2 of the 1987 Constitution – i.e. co-production, joint venture, production-sharing, or technical or financial assistance

– need not have such certification. The case of *Oposa v. Factoran*,[85] decided by the Philippine Supreme Court in 1993, has explicitly pointed out that licenses (which would include concessions, leases, and permits within its conceptual coverage) merely evidence the grant of a privilege by the State to qualified entities and are not contractual in nature.

However, if the project is for the development and utilization of the natural resources within the ancestral domain and the project proponent is not a member of the ICC/IP claiming the ancestral domain, Section 57 of the IPRA will require that the project proponent must still obtain the consent of the ICCs/IPs concerned to the project in the form of a formal and written agreement with the ICCs/IPs or in any other form consistent with the community's own customary law decision-making process. Section 57 of the IPRA also states that the exploitation of natural resources within an ancestral domain by non-ICCs/IPs may be allowed only for a maximum period of twenty-five (25) years renewable for another maximum period of twenty-five (25) years. The same provision does not contain any listing as to what types and nature of legal authority the natural resource project must be or have for this consent requirement to be applicable.

The consent requirement in Section 57 of the IPRA, hence, applies to natural resource projects authorized pursuant to permits, licenses, leases, concessions or other grants of privileges issued by the State as well as to projects authorized pursuant to contractual arrangements between the State and the project proponent. Thus, for natural resource projects within ancestral domains operating under contractual arrangements with the State under Article XII, Section 2 of the 1987 Philippine Constitution – i.e. co-production, joint venture, production-sharing, or technical or financial assistance – the project proponent must still obtain the ICCs/IPs' consent as required by Section 57 of the IPRA even though the certification requirement under Section 44(m) and 46(a) of the IPRA need no longer be met.

It should be noted that Sections 44(m) and 46(a) together and Section 57 of the IPRA contemplate two (2) different kinds of ICC/IP consent. Sections 44(m) and 46(a) of the IPRA refer to the consent of the ICC/IP to the issuance of the NCIP certification referred to by these provisions while Section 57 refers to the consent of the ICC/IP to the project itself. Natural resource projects authorized under the State's privilege granting and licensing power have to obtain the two kinds of ICC/IP consent contemplated in both Sections 44(m) and 46(a)

[85] GR No. 101083, 30 July 1993, 224 SCRA 792 (1993).

and Section 57 of the IPRA. Natural resource projects authorized under contracts with the State need to obtain only the ICC/IP consent contemplated by Section 57.

Section 59 of the IPRA requires that Government departments and agencies must, prior to such issuance or entry, obtain a certification from the NCIP through the ADO that the area affected does not overlap with any ancestral domain. The ADO may issue the certification only after a field-based investigation is conducted by it and only after the ICCs/IPs concerned has given their free and prior informed and written consent to such issuance of the certification. It is only when the ADO has certified that the area is not within an ancestral domain that other departments and agencies may issue, renew or grant concessions, leases or licenses or enter into production-sharing agreements over natural resources in the project area.

Section 59 of the IPRA provides the ICCs/IPs with the right to stop or suspend any project that has not complied with the consultation process required in the provision. Such right must be exercised in accordance with the remedial provisions of the IPRA, i.e. by filing a petition for injunction with the NCIP under Sections 66 and 69(d) of the IPRA; and/or by filing a criminal action against the violator under Section 72 of the IPRA. Existing remedies under the Rules of Court for prohibition and mandamus may also be availed of.

Areas covered by existing mining agreements are excluded from being made part of an ancestral domain or land due to the fact that such mining agreements give rise to property rights in favor of the private contract holder protected by Section 56 of the IPRA. The law is deemed read into every contract, and the constitutional non-impairment of contracts clause is limited where the law is enacted in the exercise of the police power of the State.[86] The policy considerations of promoting and protecting the rights of ICCs/IPs to their ancestral lands and domains reflected in the IPRA, which being intended for the welfare of the ICCs/IPs is a police power enactment, should be deemed read into, and be integral parts of, the terms and provisions of the mining contracts, as well as resulting in implicit amendments into the provisions of Rep. Act No. 7942 itself. Of course, this interpretation is one that will have to be decided upon favorably by the Philippine Supreme Court in order for it to prevail.

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[86] Abe v. Foster Wheeler Corporation, GR No. L-14785, 29 November 1960.

The Philippine Supreme Court in *Primero v. Court of Agrarian Relations*[87] has had occasion to rule that where the law is "unquestionably a remedial legislation promulgated pursuant to the social justice precepts of the Constitution and in the exercise of the police power of the State to promote the common weal"[88], the non-impairment clause could not be availed of to challenge such law and thus upheld the State's right to impose additional requirements or even impair not only the remedies but even the very substance of the contracts, such impairment being made pursuant to the exercise of police power. [89]

Hence, while Section 56 of the IPRA operates to protect mining contracts from being automatically rendered void simply by being located within a titled ancestral land or domain, Section 56 *does not*, however, operate to exempt the mining contract holder and the Government from complying with the requirements laid down in other provisions of the IPRA intended to protect and promote the rights of ICCs/IPs to their lands and domains. These requirements are additional impositions made by the State on mining contracts in the exercise of its police power through the IPRA.

Among these provisions is Section 57 of the IPRA, which requires a formal written agreement with the ICCs/IPs, or that the community has, through its own decision-making process, agreed to allow such natural resource exploitation and development operations of the non-ICC/IP. This provision does not make any distinction as to whether the project is already existing or still being proposed. *Ubi lex non distinguit, nec nos distinguere debemos.*[90] Hence, existing mining contract holders, in order for their contracts to remain valid and effective, must comply with Section 57 of IPRA and obtain the consent of the ICCs/IPs for the *continued* operation of their project. Non-compliance with Section 57 of the IPRA will constitute a violation of the terms and conditions of the mining contracts. Such violation "shall be sufficient ground for cancellation" of the contracts.[91]

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[87] 101 Phil. 675 (1957).

[88] Primero v. Court of Agrarian Relations, 101 Phil. 675, 680 (1957).

[89] See discussion in JOAQUIN G. BERNAS, SJ, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 400-406 (1996).

[90] "Where the law does not distinguish, neither should we distinguish."

[91] Rep. Act No. 7942 (1995), sec. 96.

However, if the mining agreements – i.e. Mineral Production Sharing Agreements (MPSAs) and Financial and Technical Assistance Agreements (FTAAs) – were entered into after the IPRA took effect, the areas they pertain to and the property rights arising thereunder will henceforth be subordinate to any future ancestral domain or land claim of an ICC/IP under the IPRA.

ICCs/IPs have the right to develop, control and use lands and territories traditionally occupied, owned, or used by them. They can negotiate the terms and conditions for the exploitation of natural resources for the purpose of ensuring ecological, environmental protection and conservation measures.[92] They have priority rights in the harvesting, extraction, development or exploration of any natural resources within the ancestral domains.[93]

Because IPRA is a later enactment of Congress, it partially but substantially amends the Mining Act. FTAAs, being instruments which authorize the exploitation of natural resources, cannot be issued without giving due regard to the rights of ICCs/IPs which are now recognized by IPRA. IPRA imposes an additional requirement before FTAAs can be issued: they can be issued only after the terms and conditions of the extraction are negotiated by the ICCs/IPs concerned, in accordance with their decision-making processes.

The community is entitled to receive no less than 1% of the gross output of the mining operations as royalty payments. The royalties shall form part of a Trust Fund for the socioeconomic well-being of the community in accordance with a management plan formulated by the same in the ancestral land or domain area.[94] There is nothing in the Mining Act nor its rules preventing communities from negotiating for better terms. The 1% royalty mentioned in the Mining Regulations is actually the minimum level and not the ceiling.

While the provisions of the IPRA may in some ways provide for a greater degree of protection and recognition of indigenous land rights than were previously available, the law itself nevertheless has not yet been fully implemented despite the fact that almost three years have passed since its enactment. This has mostly been due to the pressures exerted by the mining industry against its full implementation.

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[92] Rep. Act No. 8371 (1997), sec. 7 (b).

[93] Rep. Act No. 8371 (1997), sec. 57.

[94] DENR Adm. Ord. No. 96-40, sec. 16. See also Rep. Act No. 7942 (1995), sec. 58, for a list of "credited activities."

B. Present Day Acquisition of Mineral Rights: The Mining Act of 1995 versus the ICCs/IPs Rights Act of 1997 – Undermining Indigenous Land Rights?

In a period when total Government environmental spending has been decreasing, public sector investment in the mineral industry has been increasing to facilitate and support the entry of private sector investments into the industry. The political will of the Philippine Government to increase investments in the mineral resources sector in the country can be clearly observed from the fact that since the enactment of Rep. Act No. 7942, the budget of the Mines and Geosciences Bureau (MGB) grew by an average of 10.03 percent from 1995 to 1997 and by 82 percent from 1997 to 1998.[95] This increased by almost 10 percent for 1999.[96]

The passage of Rep. Act No. 7942 and the promulgation of its implementing rules and regulations have proved to be effective spurs for private investors. Forty-seven (47) Exploration Permits (EP) have been granted as of August 1998, of which at least seventeen (17) were granted to foreign mining companies "after tying-up with local companies."[97] The granted EPs cover a total of 369,332.52 hectares.[98] Furthermore, as of August 1998, a total of 131 Mineral Production-Sharing Agreements (MPSAs) have been entered into by the Government with various domestic mining companies, covering a total area of 218,699.13 hectares,[99] with another 1,914 MPSA applications still pending.[100]

According to figures from the MGB, as of 6 March 1997, a total of 114 FTAA applications were filed. Of this figure, 49 were filed before the effectivity of Rep. Act No. 7942, 14 during the period between such effectivity and the effectivity of DENR Admin. Ord. No. 40, series of 1996, Rep. Act No. 7942's revised implementing rules and regulations, and 46 thereafter.[101] And by 10 October 1997, there were a total of 115 FTAA applications under process,

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[95] LRC-KSK, *Some Truths About the DENR's 1998 Budget Proposal*, 8:1 PHIL. NAT. RES. L.J. 29, 45 (1997).

[96] Rep. Act No. 8745 (1998), sec. 1.X.B.

[97] Richel B. Langit, *17 big firms bag mining deals in RP*, MANILA TIMES 1, 16 January 1998.

[98] MGB, Update of Exploration Permits (EP) Issued As of August 1998. (On file with author).

[99] MGB, Summary Listing of Approved MPSA as of July 17, 1998. (On file with author).

[100] MGB, Mining Rights/Applications Update as of July 1998. (On file with author).

[101] MGB, Summary of FTAA Applications (As of March 6, 1997). (On file with author).

covering a cumulative area of 6,797,309.78 hectares (approximately 23 percent of the total land area of the country).[102] As of July 1998, two (2) FTAA applications[103] have been approved covering 83,753 hectares, while another 83 FTAA applications covering 4,317,718 hectares are pending approval.[104] However, the locations of the areas sought to be covered by most of these FTAA applications border or are within areas are occupied by ICCs/IPs and may be claimed by them as their ancestral domains.

The enthusiasm in the mining industry sparked by the Mining Act of 1995 is not shared by thousands of local communities who are threatened by the entry of not only gigantic earth-moving equipment but armed security personnel, permanent and semi-permanent structures which threaten to displace their homes and farms, fences, tailings dams and ponds, pollution and other disturbances to their lives. The mining industry has been wracked with a series of controversial industrial disasters such as the tailings spillage from the Marcopper tailings dam in Marinduque in March 1996, resulting in the death of the Boac River and Calancan Bay.[105]

The promise of development is belied by experiences of mining communities such as those hosting the massive open-pit operations of Benguet Corporation in the Cordilleras, Marcopper in Marinduque, the North Davao Mining Corporation, Apex Mining Company, and Sabena Mining Corporation in Davao del Norte, Atlas Consolidated in Cebu and many others.[106] In the documented cases that traced long histories of corporate mining in various parts of the country, it was shown that the "trickle-down" development promised by corporate mining failed to materialize and even worsened the economic and social

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[102] MGB, Status of Financial/Technical Assistance Agreements (FTAAs) Update as of October 10, 1997. (On file with author).

[103] These are the FTAAs of Climax-Arimco in Didipio, Nueva Vizcaya and Quirino (approved 24 June 1994 covering 25,596 has.); and of Western Mining in Columbio, Sultan Kudarat, Davao del Sur, and South Cotabato (approved 22 March 1995 covering 58,157 has.). *Cf.* MGB, Mining Rights/Applications Update as of July 1998. (On file with author).

[104] *Id.*

[105] See Marvic MVF Leonen and Vicente Paolo B. Yu III, *Philippines*, in THE DISPOSSESSED: VICTIMS OF DEVELOPMENT IN ASIA 334-337 (1997) for a brief discussion of this mining disaster.

[106] For relevant case studies, see John McAndrew, "The Impact of Corporate Mining on Local Philippine Communities," ARC Publication (1983); and "Tao-Kalikasan", newsletter of Lingkod Tao-Kalikasan, Manila.

poverty of local communities while leaving a landscape of environmental waste.[107] Given the immensity and intensity of present threats posed by corporate mining interests, local communities stepped up organized responses to delay, halt and oppose the encroachment of mining corporations in their areas. The struggle of indigenous communities against mining interests further highlighted the defense of their human and ancestral domain rights as well as their right to self-determination.

Incidents of armed violence from mining guards and the military assigned to assist the mining companies and community displacement have already occurred in, for example, the FTAA area of Western Mining Corporation (WMC), an Australian company, in southwestern Mindanao. Members of the B'laan tribe have been forced out of their ancestral domains and homes in Colombio, Sultan Kudarat, as a result of military operations designed to facilitate the entry of WMC into the area. The company has also used its own community organizers and a wide range of financial incentives for various local community leaders in an obvious divide-and-conquer strategy to gain the consent of the B'laans. In Aurora province, on the Pacific seaboard of Luzon island, intense multi-sectoral opposition has also risen against the mining agreement applications of a large number of domestic mining companies who have tie-in arrangements with foreign mining companies.

The enactment of the IPRA resulted in the suspension of the processing of FTAA and other mining agreement and permit applications effective last 18 November 1997, several days before the IPRA took effect. The suspension was valid until the NCIP was to have been established pursuant to the IPRA.[108] On 20 April 1998, the NCIP issued a Resolution stating that it is suspending all actions on the issuance of certifications required under Sec. 44(m), 46(a), and 59 of Rep. Act No. 8371 "until such time that the Rules and Regulations implementing the IPRA is [sic] promulgated and that the NCIP has the organization and capacity to evaluate in full the requests for certification according to the procedures to be set forth in the IPRA IRR, and when all records

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[107] In the Cordillera Administrative Region, for instance, which has seen 80 years of strip mining conducted by the giant Benguet Corporation, its six provinces still belong to the 20 poorest provinces in the country. According to a 1996 issue of Ibon Profiles, out of the 118,000 families surveyed, roughly 61% are unemployed in the Cordilleras despite Benguet Corporation's promises of bringing employment to the people.

[108] Richel B. Langit, *Mining deals have to await tribal body*, MANILA TIMES 1, 5, 18 November 1997.

necessary have been turned over to the NCIP."[109] This suspension was lifted on 30 June 1998 with the effectivity of the implementing regulations of the IPRA on 28 June 1998.[110]

The NCIP, however, is supportive of the mining industry. NCIP Admin. Ord. No. 3, series of 1998, provided supplemental guidelines on how to obtain the NCIP Certification precondition and "free and prior informed consent" under the IPRA. It exempts existing natural resources lease, permit, license, or contract-holders, including mining rights-holders, from having to obtain such "free and prior informed consent."[111] It considers any formal agreements or resolutions made or issued by ICCs/IPs prior to the effectivity of NCIP Admin. Ord. No. 1, series of 1998, as such "consent."[112] It likewise provides for a prioritization scheme with respect to applications for the issuance of the NCIP certification.[113] The order furthermore provides for a time-bound process for the issuance of the certifications[114] and of obtaining "free and prior informed consent."[115] Laying down a time-bound process will create the possibility of violating community decision-making processes in order to ensure that the time limitations for official action imposed by the order are met. It also makes the process of obtaining the ICCs/IPs' "free and prior informed consent", and the NCIP's Certification, into a mere bureaucratic procedure rather than making it a mechanism whereby the ICCs/IPs will be truly empowered to determine the thrust and direction of the development of their communities and their ancestral domains.[116]

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[109] NCIP Resolution No. 7-98, dated 20 April 1998.

[110] NCIP Memorandum No. 42-98, issued on 30 June 1998, in view of the effectivity of the IPRA's implementing regulations on 28 June 1998, and directs the NCIP's Ancestral Domains Office, its Regional Directors, and Provincial Officers to Aact on requests for the issuance of certifications on the presence or absence of ICCs/IPs in certain areas or whether certain areas are covered by applications for Certificates of Ancestral Land or Domain Claims or Titles;" advises its regional and field offices to "conduct field investigations and to coordinate with DENR Offices with regards (sic) to such requests" for certifications; and directs the Ancestral Domains Office "to issue the proper certification upon the recommendations of Regional and Field Offices."

[111] NCIP Admin. Ord. No. 3, series of 1998, sec. 3(a).

[112] NCIP Admin. Ord. No. 3, series of 1998, sec. 3(c).

[113] NCIP Admin. Ord. No. 3, series of 1998, sec. 3(b) and (d).

[114] NCIP Admin. Ord. No. 3, series of 1998, sec. (4).

[115] NCIP Admin. Ord. No. 3, series of 1998, sec. 5(a) and (b).

[116] This effect is similar to the social acceptability provisions laid down in DENR Admin. Order No. 37, series of 1996, providing for the implementing regulations for the Environmental

Another controversial provision in the order allows the NCIP to grant an "Interim Clearance" to the applicant for an NCIP Certification, "with the condition that it [the NCIP] poses no objection to the application," in instances where there are "conflicting Ancestral Land/Domain Claims."[117] The issuance of such clearance will allow the applicant to go on with the processing of its natural resource contract applications – i.e. mineral agreements, forest plantation agreements – with the DENR absent the ICCs/IPs' "free and prior informed consent" required in the IPRA, albeit subject to the condition that the applicant for such NCIP certification shall subsequently obtain the "free and prior informed consent" of the ICCs/IPs "in the event that the conflict is resolved."[118] Making the requirement for "free and prior informed consent" subject to the resolution of the ancestral lands/domain claims conflict renders such requirement potentially nugatory. In the event that no resolution of such conflict takes place, the requirement of obtaining the "free and prior informed consent"of the ICCs/IPs, whose presence thereon is already recognized because of the recognition of the existence of such conflicts, need not be complied with at all. In effect, the Interim Clearance to be issued by the NCIP in the event that there are conflicts over ancestral land/domain claims constitutes the NCIP Certification contemplated in the IPRA without, however, having been subjected to to the "free and prior informed consent" of the affected ICCs/IPs. This is a potential loophole which is patently illegal and violative of the IPRA.

Although ancestral domain delineation was a component of the Ramos administration's Social Reform Agenda, it never received the budgetary support that it deserves. While DENR Admin. Order No. 2 providing for the delineation of ancestral domains and lands all over the country was issued in 1993, it was only in 1995 that funding for the implementation of the program was formally incorporated into the DENR's annual budget. But the funding support for this program remained very limited. In 1995, the program was allocated only P 10.008 million, rising to a peak of P 96.697 million in 1997, and going down again to P

Impact Assessment System under Pres. Decree No. 1586 and Pres. Decree No. 1152. Such DENR regulation, in effect, considers social acceptability as simply a bureaucratic process of proving that consultations and/or hearings were conducted on the way towards obtaining an Environment Compliance Certificate (ECC) rather than as a means by which affected communities can exercise an effective right to reject or veto a proposed development project.

[117] DENR Admin. Order No. 37, series of 1996, sec. 5(c).

[118] DENR Admin. Order No. 37, series of 1996, sec. 5(c).

13.913 million in 1998.[119] For 1999, the total ancestral domains budget combined of the DENR and the NCIP amounts to P 35.525 million, including P 17.915 million with the DENR and P 17.61 million with the NCIP.[120] However, considering that the funding is directed mostly towards salaries rather than actual field operations, this means that no work is being done by the NCIP nor the DENR to actually conduct ancestral domain delineation activities as mandated under Rep. Act No. 8371.

Indeed, the performance record of the DENR's ancestral domain delineation program has been dismal. Since DENR Admin. Ord. No. 2 was issued in 1993, only 181 CADCs covering a total area of 2,531,968 hectares, and 146 CALCs[121] covering a total area of 10,095.64 hectares benefitting 3,737 persons, have been issued to ICCs/IPs as of 6 June 1998.[122] The total combined area coverage of CADCs and CALCs issued up to the middle of 1998 of 2,542,063.64 hectares is only 8.47 percent of total national land area – notwithstanding the fact that most ICCs/IPs are among the upland rural poor who dwell within forestlands and who comprise approximately one-third of the national population.[123] The DENR Secretary, Antonio Cerilles, suspended on 22 July 1998 the issuance of

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[119] Note that in contrast to that of previous years, the 1998 DENR budget for its ancestral domain program does not contain any item for capital outlays -- the item used to fund survey equipment acquisition and operations. The entire 1998 budget is allocated solely for personnel salaries and maintenance, operating and other expenses. This means that the DENR cannot undertake acquire new survey equipment nor undertake any survey activities to delineate ancestral domains on its own. Rather, it must rely on private survey teams funded by the ancestral domain claimants or their supporters. See LRC-KSK, supra note 106.

[120] Rep. Act No. 8745 (1998), sec. 1.X.A.A.III.b.4 and sec. 1.XXVI.K.III.b.

[121] Certificates of Ancestral Land Claims issued by the DENR under DENR Admin. Ord. No. 2, series of 1993.

[122] See DENR, List of Certificate of Ancestral Domain Claims (CADC) Issues As of June 6, 1998; and DENR, List of Certificate of Ancestral Land Claim (CALC) Issued As of June 6, 1998.

[123] In 1980, at least 14.4 million people were estimated to be forest zone residents. The 1990 estimate was that such population would increase to 18.6 million. See Owen J. Lynch, Jr. and Kirk Talbott, *Legal Responses to the Philippine Deforestation Crises*, 20 N.Y.U. J. INT'L. L. & POL. 679, 684-685 (1988), citing MA. CONCEPCION J. CRUZ, INTEGRATED SUMMARY REPORT: POPULATION PRESSURE AND MIGRATION: IMPLICATIONS FOR UPLAND DEVELOPMENT 3, 12-13 (Aug. 1986) (Los Banos Center for Policy and Development Studies Working Paper No. 87-06). Based on the figures above and a mid-range estimate of the annual upland forest zone population growth rate identified by Cruz, this author estimates total upland forest zone population in 1998 at 22.84 million, or roughly 33 percent of current national population.

CADCs.[124] No CADTs or CALTs has been issued by the NCIP since its creation in 1997.

C. Taking the Indigenous Peoples Rights Act of 1997 to Court

The IPRA itself has been subjected to legal attack in a petition before the Philippine Supreme Court to have some of its provisions declared as unconstitutional. This petition for prohibition and mandamus was filed by former Philippine Supreme Court Justice Isagani A. Cruz and Cesar Europa on 25 September 1998.[125] The main argument of the petitioners is that the ancestral domain ownership provisions of Rep. Act No. 8371 violate the doctrine of full State ownership and control over all natural resources in the Philippines. Impleaded as respondents to the petition were the DENR, the DBM, and the NCIP. Acting as counsel for the DENR and the DBM, the Office of the Solicitor General filed their comment essentially agreeing with the main argument of the petitioners.[126]

The NCIP disagreed and argued that the private ownership of ancestral lands of ICCs/IPs is based on natural law recognizing time immemorial possession and that such native title are vested rights protected since the American period.[127] However, the State, according to the NCIP, retains ownership over natural resources within ancestral domains subject to the priority rights of the indigenous inhabitants.

Over 100 representatives of ICCs/IPs communities all over the country, joined by Senator Juan Flavier, who authored Rep. Act No. 8371, and former Constitutional Commissioner Ponciano Bennagen, intervened in the proceedings and filed their own comment-in-intervention, arguing that the private ownership of ancestral domains since time immemorial covers both land and natural resources, and that the Regalian doctrine cannot be applicable to ancestral

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[124] DENR, *DENR suspends issuance of ancestral domain claim certificates, conducts probe on illegal sale of ancestral lands*, 22 July 1998 Press Release.

[125] Petition, Isagani A. Cruz and Cesar S. Europa v. The Secretary of Environment and Natural Resources, the Secretary of Budget and Management, and the Chairperson and Commissioners of the National Commission on ICCs/IPs, GR No. 135385, dated 24 September 1998 and filed the following day.

[126] *Id.*, Solicitor General's Comment.

[127] *Id.*, Comment of the NCIP.

domains. The recognition of the private nature of lands and natural resources within ancestral domains is a constitutional mandate co-equal with that of the Regalian doctrine.[128]

Other parties also intervened, formally and informally. Tabang Mindanaw and the Government's Panel for Talks with CPP-NPA-NDF submitted letters to the Philippine Supreme Court pushing for the upholding of the constitutionality of the law.[129] The Commission on Human Rights also filed its comment-in-intervention, stressing that the law should be upheld because it supports and adopts the principles of international human rights adopted by the Philippines.[130] The Haribon Foundation and the Ikalahan Indigenous People also submitted their own comment-in-intervention, arguing that lands within ancestral domains are privately owned while the natural resources therein are held in the concept of stewardship.[131] The case is still pending with the Philippine Supreme Court as of this writing.

D. Conclusion

From the discussion in this paper, what seems to be clear is that even though legal reasoning and logic concerning the application of constitutional principles of due process and just compensation on indigenous land rights would indicate that such rights are protected and recognized from the very beginnings of Philippine constitutional history, the economic rationale for maximizing mineral production seems to prevail in terms of giving miners – from the Spanish and

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[128] *Id.*, Comment-in-Intervention of 112 ICCs/IPs, Juan, Flavier, Ponciano Bennagen, and others.

[129] The Tabang Mindanaw letter was signed by Howard Q. Dee in his capacity as Co-Chair thereof, while the Peace Panel letter was signed by the members of the panel -- Howard Q. Dee, Rodolfo Biazon, Rene Sarmiento, and Risa Hontiveros-Baraquel.

[130] Petition for Intervention of the Commission on Human Rights, Isagani A. Cruz and Cesar S. Europa v. The Secretary of Environment and Natural Resources, the Secretary of Budget and Management, and the Chairperson and Commissioners of the National Commission on ICCs/IPs, GR No. 135385, dated 16 March 1999 and filed 22 March 1999.

[131] Comment-in-Intervention of the Ikalahan Indigenous People and the Haribon Foundation for the Conservation of Natural Resources, Inc., Isagani A. Cruz and Cesar S. Europa v. The Secretary of Environment and Natural Resources, the Secretary of Budget and Management, and the Chairperson and Commissioners of the National Commission on ICCs/IPs, GR No. 135385, dated 23 March 1999 and filed 9 April 1999.

American periods up to the present – effectively more favorable treatment than ICCs/IPs.

This is clearly borne out by the fate of the Indigenous Peoples Rights Act of 1997. Even though its historical, political, and legal underpinnings justify its full and effective implementation, economic interests behind the implementation of the Mining Act of 1995 have undermined the IPRA. In a social and political context – such as in the Philippines – in which law and legislation are generally conceived as alien to the mass consciousness of the people who are most affected by it, law is only as good as those who implement or do not implement it wish it to be. In the absence of strong political will on the part of the Philippine Government to prioritize the recognition and protection of indigenous land rights over mining interests, the IPRA will continue to languish on the wings of the legal stage, as ineffectual and worthless as mine tailings are for indigenous farmers who wish to grow crops on mined-out lands.

On the other hand, the undermining of the IPRA could lead to greater community cohesion and action among ICCs/IPs communities all around the country. As those communities who have pinned their hopes on the passage of the IPRA start to realize that it is nothing more than another dead letter legislation, they might then conclude that they would be better off, organizationally and effectively, by concentrating their hopes and aspirations for just, effective and prompt recognition of their age-old land rights on their common action and united stand against those interests who would deny them their just land rights.

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