NOTE

SILENCE OF THE LANDS: PRIOR CONSENT AND ANCESTRAL DOMAIN RIGHTS

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Real change takes time.
And yet precisely because it does, there is no time to lose.

Fr. John J. Carroll, SJ[1]

I. INTRODUCTION

Dr. Rodolfo Stavenhagen, the United Nations rapporteur for the human rights of indigenous peoples (IPs)[2], in his report entitled "Human Rights and Indigenous Issues"[3] says that indigenous peoples

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[1] Fr. John J. Carroll, SJ, *No Time to Lose*, Philippine Daily Inquirer, June 26, 1993, *reprinted in* THE WORLD ACCORDING TO JOHN J. CARROLL, SJ (1999).

[2] For the purposes of this article, the definition of "indigenous peoples" or "indigenous cultural communities" provided by Republic Act No. 8371, more commonly known as the IPRA or Indigenous Peoples Rights Act of 1997 (cumbersome albeit comprehensive) shall be adopted.

> "Sec. 3 (h) – Indigenous Cultural Communities/Indigenous Peoples – refer 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 territory, and 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 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. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or 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 traditional domains or who may have resettled outside their ancestral domains;xxx"

> "have maintained a *special relationship with the land*," this being the source of their livelihood and the "*basis of their very existence.*" When a national government therefore fails to demarcate territories for IPs and *when major development projects* like the construction of dams *are undertaken without their consent, their territorial rights are violated.*
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> He stressed that their right "to preserve, practice and develop their own culture" is linked to the issue of self-identification. But the preservation of their culture entails not simply "the artificial preservation of indigenous (or tribal) cultures in some sort of museum, but also the right of every human community to live by the standards and vision of its own culture." (emphasis supplied)[4]

Such a categorical declaration could not have come at a more opportune or critical time as more and more indigenous cultural communities are displaced, if not destroyed, as their ancestral domains[5] and lands[6] are encroached upon. In the

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[3] The report was presented during the fifty-eighth session of the UNCHR held on February 2002, and dealt with major concerns confronting IPs such as territorial rights, preservation of culture, education, poverty, government, and legal systems. *See* Arlyn V.C.D. Palisoc Romualdez, *UN rapporteur talks about indigenous peoples' human rights*,UP NEWSLETTER, December 16, 2002, p. 1.

[4] *Id.*

[5] Rep. Act No. 8371, Sec. 3 (a) provides:

> "(a) Ancestral Domains – Subject to Section 56 hereof, refers to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, *force majeure* or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to their economic, social and cultural welfare. It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators;xxx"

[6] There is a distinction – whether real, or imagined – between "ancestral domains" and "ancestral lands" in our body of laws. While it remains a contentious issue, it has nevertheless been memorialized in the IPRA, thus:

> Rep. Act No. 8371, Sec. 3 (b) Ancestral Lands – Subject to Section 56 hereof, refers to land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, *force majeure* or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots;xxx

uplands of the Philippines alone, "development projects" (including mining activities) have encroached upon the lives of roughly 3.5 to 6.6 million indigenous peoples resulting in conflicts and dislocation.[7] Along with the loss of the legacy of their rich cultures and traditions – invaluable links to the psyche and the history of the Filipino nation –their indigenous knowledge systems[8] and intimate, mutually beneficial relationship with the land also disappear. Invariably, environmental degradation accompanies the irresponsible and unchecked entry into and exploitation of ancestral domains.[9]

Perhaps more than any other activity, it is mining which has most disrupted the lives of indigenous peoples, for it is in commercial mining[10] – and its large scale utilization of land, forests, water and other natural resources – where the issues of ancestral domain rights, displacement, and environmental rape converge.

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[7] CENTER FOR ENVIRONMENTAL CONCERNS – PHILIPPINES, A PRIMER ON PHILIPPINE ENVIRONMENTAL DATA 9 (1996).

[8] For a thorough understanding of indigenous knowledge systems in the context of ancestral domain rights, *see* V. P. B. YU III, *Controlling Indigenous Knowledge: Towards a Property Regime for Indigenous Knowledge Systems*, 70 PHIL. L. J. 27 (1995).

[9] Charles MacDonald says that timber concessions, water projects, plantations, *mining*, and cattle ranching are five major agents in reducing and destroying the natural environment in which ICCs live, and reducing the freedom of movement of people used to hunting and gathering products from all corners of their territory. *See* CHARLES MACDONALD, *Indigenous Peoples of the Philippines: Between Segregation and Integration*, INDIGENOUS PEOPLES OF ASIA 351 (1995).

[10] "Small-scale mining" is defined under Section 3(b) of the People's Small Scale Mining Act of 1991 (Republic Act No. 7076) as "mining activities which rely heavily on manual labor using simple implements and methods and do not use explosives or heavy mining equipment." Conversely, while commercial mining is not specifically defined under R.A. 7076, it can be deduced that it is any other mining activity which *does* use explosives or heavy mining equipment. A cursory perusal of the congressional deliberations on the Philippine Mining Act of 1995 (Republic Act No. 7942) as well as a reading of its declaration of policy shows that it is the intendment of the latter law to address specially commercial mining.

It must be noted however that proposed House Bill No. 279, An Act Amending Certain Sections of Republic Act No. 7076 or the People's Small-Scale Mining Act of 1991 and for Other Purposes, of the Twelfth Congress of the House of Representatives hopes to address a perceived gap in our mining legislation by providing for two types of small-scale mining: one, "artisanal mining", which "refers to mining activities which heavily rely on manual labor using simple implements and methods and do not use explosives or heavy mining equipment"; and second, "regular small-scale mining" defined as

> mining activities of small-scale miners, which may use or employ modern mining technologies, heavy equipment and explosives; whose operation is supervised or managed by a duly licensed mining engineer and its use of explosive is supervised or managed by a Philippine National Police-licensed blaster or blasting contractor. These small-scale miners may organize themselves into a partnership, corporation or cooperative to qualify for small-scale mining contract.(Section 1)

The bill's proponent, Honorable Zenaida G. Cruz-Ducut, says that through this amendment to the Mining Act, the growth of small-scale mining operators will benefit the economy and allow more Filipinos to reap from our patrimony.

For an account of recent effects of mining pollution, *see Plunder of the National Wealth: Who Has Been Getting the Gold of Mt. Diwalwal?*, PHILIPPINE DAILY INQUIRER, January 30, 2003, A4, col. 3.

It comes as no surprise though that mining has long played a role in our history. Located in the "Pacific Rim of Fire", an area near the Pacific Ocean where constant volcanic and seismic activities occur,

> the Philippines is known to have one of the highest mineral endowment in the world. Of the 76 provinces, 73% (56 provinces) are bestowed with a
> wide range of minerals with economic importance.
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> In 1991, the International Mining Annual Review published data citing the Philippines as the 2nd largest producer of gold (4.0 oz/sq. km), 3rd in copper (0.75 oz/sq. km), and 6th in chromite (0.57 oz/sq. km) in the world, in terms of minerals that could be mined per unit area.[11]

Moreover,

> (T)he Mining industry has continued to be a major contributor to the economy. In 1994, the mining sector contributed 18.8 Billion Pesos to the government coffers or 0.99% of the Gross Domestic Product (GDP). From 1981 to 1994, the mining and quarrying sector contributed an average of 1.50% of the country's GDP.[12]

To fast-track the Philippines on the road to becoming another "tiger economy" in Asia, the Ramos administration passed the Philippine Mining Act of 1995 (Republic Act No. 7942, hereinafter referred to as Mining Act)[13] which provided for maximum exploitation of our mineral resources and consequently for increased government income.[14] Prior to its passage, however, the proposed bills[15] received mixed reactions, owing to provisions only too eager to bare our resources to foreign mining firms[16], and the industry's long notorious history of leaving nature in

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[11] CENTER FOR ENVIRONMENTAL CONCERNS – PHILIPPINES, LIBERALIZATION OF THE PHILIPPINE MINING INDUSTRY, A ROAD TO INDUSTRIAL DEVELOPMENT? 3 (1997).

[12] *Supra.* note 7, at 10.

[13] *Supra.* note 11, at 22.

[14] *Supra.* note 7, at 11.

[15] What would eventually become the Mining Act was a consolidation of House Bill No. 10816 and Senate Bill No. 1639.

[16] To this day, the Financial and Technical Assistance Agreements (FTAAs) – overriding the 60% Filipino, 40% foreign equity rule in the 1987 Constitution – remains a bitter bone of contention. A Petition for Prohibition, Mandamus with Prayer for Temporary Restraining Order was filed before the Supreme Court by

shambles at its wake.[17] One particularly outspoken dissenter did not mince his words in speaking up for the right of indigenous peoples' to have a say about their lands:

> The indigenous people of the Cordillera and in other parts of the country were able to protect their ancestral lands and ancestral domain and from this, were able to *exploit the natural resources in a sustainable manner.*
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> However, with the present development policies of the Philippine government, it has become very difficult for our indigenous brothers to comprehend whether the Philippine government's policy towards them has shifted from a policy of assimilation to a *policy of ethnocide.*
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> It is a fact that where the indigenous people presently live, these are the areas where natural resources are still minimally exploited. It is because *while these natural resources were exploited by the indigenous people, these were at the same time well taken cared of by them.*

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numerous private citizens, indigenous cultural communities, as well as nongovernmental organizations questioning the constitutionality of the R.A. No. 7942 and its implementing rules, and is still pending resolution. It brings to the fore the ridiculous servility with which the law was crafted, giving among others via the FTAA the full repatriation of investments, full remittance of earnings and freedom from expropriation to foreign firms. Included, too, are auxiliary water, timber and easement rights preferential to those rights belonging to peoples living in the mining area. *See La Bugal-B'laan Tribal Association, Inc., et al, vs. Victor O. Ramos, et al,* 7 February 1997.

[17] It would be very difficult to argue that mining is not one of the most ecologically destructive activities every invented by man. One author identified the following potential environmental issues in relation to mine tailings disposal, a necessary complement of commercial mining:

1. Displacement of existing land uses.
2. Removal by clearing or burial of natural habitat including forests and wetlands.
3. Introduction of sediment to the drainage system and/or the sea, either by direct discharge, by overflow from tailings impoundments, by spillage, or by erosion of spoil dumps or tailings impoundments.
4. Introduction of dissolved substances, including heavy metals and cyanides, to rivers, estuaries, and the sea. This can occur by direct discharge, by seepage or by overflow from tailings impoudments.
5. Contamination of groundwaters by seepage from tailings impoundments.
6. Generation of dust from dried out surfaces of tailings impoundments.
7. Changes to riverine and flood plain morphology with possible aggravation of flood effects. *See* ANDRE G. BALLESTEROS, ALL THAT GLITTERS: UNDERSTANDING THE MYTH OF SUSTAINABLE MINING IN THE PHILIPPINES 25, Issue Paper 97-01, September 1997.

It is hard to argue that mineral production, processing, and use generally benefits the local ecosystems concerned or makes them more productive – really, that ecological benefit results at all. There may be a few cases when such direct benefits do occur, but these are exceptions. For a more thorough discussion of associated environmental and management issues involved in mining, *see Mining, Minerals and Sustainable Development: Project Draft Report for Comment*, International Institute for Environment and Development (March 4, 2002) (photocopy on file with author; also available at www.iied.org/mmsd/draftreport.).

> Presently, these indigenous people have become *squatters in their own land* because of past legislated mining and land laws. But because of their indigenous concept of land ownership, they held on to their land and asserted their right to their land and the natural resources found within these.
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> *In the near future, if not corrected, indigenous people would soon become criminals and put into prison because of the provisions in both proposed bills on the Mining Act.*
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> These provisions are on Timber Rights, Water Rights, Eminent Domain Rights and Easement Rights. These provisions are gross violations to Indigenous People's Rights.[18] (emphasis supplied)

Precisely owing to such tenacious advocacy and as a reflection of the decades-worth of lobbying for recognition of indigenous property regimes, a radical albeit welcome provision found its way into the Mining Act:

> Sec. 16. Opening of Ancestral Lands for Mining Operations. – No ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned.[19]

The Mining Act specifically excludes from mining areas occupied by indigenous cultural communities under a claim of time immemorial, except upon the *free and prior informed consent* of concerned individuals.[20] But it seems "the law giveth, yet it taketh away", for while ancestral lands are defined in the Mining Act as

> all lands exclusively and actually *possessed, occupied or utilized* by indigenous cultural communities by themselves or through their ancestors in accordance with their customs and traditions since *time immemorial*, and as may be defined and delineated by law[21]

no mention is made of ownership. Ergo, as the 1987 Constitution provides that *all* lands of the public domain, *minerals* and other natural resources are owned by the State and, with the exception of agricultural lands, all other natural resources shall

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[18] *Position Paper on the Mining Code: Ensuring Genuine Industrialization Through a Satisfactory Mining Code: Presented as a Position Paper at the Public Hearing Called by the Committee on Mining On August 16, 1993* (statement of Engr. Catalino L. Corpuz Jr. Mining Communities Development Center, Baguio City).

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

[20] MINING MINERALS, *supra* note 17, at 7-20.

[21] Rep. Act No. 7942, Sec. 3 (a).

not be alienated,[22] the requirement of prior consent seems to be illusory at best. Two years after the passage of the Mining Act, Republic Act No. 8371 or the Indigenous People's Rights Act of 1997 (hereinafter IPRA) was introduced, ostensibly to correct whatever oversight was committed in the earlier law.

The question now is: what is the nature of "consent" required of indigenous communities under Sec. 16 of the Mining Act? And – granting the rights of IPs were somehow limited by the Mining Act – how does IPRA (and other subsequent laws) impact upon such consent? Finally, what is the characterization of indigenous peoples' rights over their ancestral domains today?

This paper will address the questions posed on the necessity of obtaining the free prior informed consent (thereafter FPIC) of IPs before mining their ancestral lands. Part II of the paper will first provide a background of the struggle of indigenous cultural communities to assert their rights to their ancestral domains. In Part III, the discussion shall center on the prior consent contemplated by the Mining Act and its recognition of ancestral domain rights, while Part IV will demonstrate how the passage of the IPRA and other laws only amplify upon and clarify the same. Part V will delve into the FPIC process, as well as the consequences of "non-consent". Finally, Part VI will present recommendations for the implementation of FPIC provisions, as well as for the strengthening of IP's control over their lands.

II. A HISTORY OF ANCESTRAL DOMAIN

Consequently, the survival of any group directly depends
on its ability to alternately construct and collapse boundaries
within a shared system of meaning so that a
useful and tolerable tension between itself and others,
between closure and exposure, may be found, enjoyed, and re-adjusted.

Maivan Clech Lam in
At the Edge of the State[23]

A. HISTORY OF PRINCIPLE

Indigenous peoples[24] are unique in several ways: one, there exists a profound relationship between indigenous peoples and their lands, territories and

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[22] CONST. art. XII, sec. 2.

[23] MAIVAN CLECH LAM, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION 211 (2000).

resources; two, this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; three, the collective dimension of this relationship is significant; and four, the inter-generational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.[25] Another characteristic of indigenous property rights is that they often are not conceptualized in exclusive terms, but rather as recognized regimes of shared use and property rights between groups. Indigenous communities may migrate over time and may have overlapping land use and occupancy areas.[26]

But the defining, albeit most contentious, precept in relation to communal property ownership is that of aboriginal or native title.[27] It posits that "possession since time immemorial" by one's self and/or by one's ancestor amounts to title which cannot be defeated by any sovereign or by any subsequent law.

That being said, it comes as no surprise that the imposition of Western attitudes of individual resource allocation upon indigenous peoples has caused the disintegration of an unknown number of local level communal systems.[28] The introduction of the westernized concept of private ownership[29] opened a Pandora's box of strange scenarios for indigenous cultural communities. Traditional community leaders frequently exercised illicit prerogatives and sold communal domains.[30] Such traditional leaders are not unlike the tribal dealers of today who have in various ways compromised and seriously undermined the integrity of the ancestral domain and indigenous culture, often by selling off or negotiating the use

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[24] The World Bank, since 1990, now uses "indigenous" to refer to "indigenous, tribal, low caste and ethnic minority groups. Despite their historical and cultural differences, they often have a limited capacity to participate in the development process because of cultural barriers or low social and political status." *See* MARCUS COLCHESTER, *Indigenous Peoples' Rights and Sustainable Resource Use in South and Southeast Asia*, INDIGENOUS PEOPLES OF ASIA 60 (1995).

[25] S. JAMES ANAYA & ROBERT WILLIAMS, JR., *The Protection of Indigenous People's Rights Over Lands and Natural Resources Under the InterAmerican Human Rights System*, 14 HARV. HUM. RTS. J. 33, *available at* http://web.lexis-nexis.com/universe. *See also* MINING MINERALS, *supra* note 18, at 7-18.

[26] *Id.*

[27] *See* GUS B. GATMAYTAN, *Land Rights and Land Tenure Situation of Indigenous Peoples in the Philippines*, 5 PHIL. NAT. RES. L. J. 5 (1992). *See also* PETER DONIGI, INDIGENOUS OR ABORIGINAL RIGHTS TO PROPERTY: A PAPUA NEW GUINEA PERSPECTIVE 33-34 (1994).

[28] OWEN J. LYNCH, JR., *Ancestral Land Rights in the Philippines* 22 (October 1987) (for publication in Universitat Wien, Vienna, Austria; paper available at the Reserved Section, 3rd floor, University of the Philippines College of Law Library).

[29] Ownership is governed by the provisions of the New Civil Code (Republic Act No. 386) under Articles 427 and 429. It is the exercise of all the attributes of ownership – *just utendi, fruendi, abutendi, disponendi et vindicandi* – to the exclusion of others in any manner not prohibited by law. Such private notion of ownership is diametrically opposed to the concept of communal ownership practiced among indigenous, unwesternized or unhispanicized Filipinos. Atty. Marvic M.V.F. Leonen explains the variations among ethnolinguisitic groups of such concept. *See* MARVIC M.V.F. LEONEN, *Weaving Worldviews: Possibilities for Empowerment Through Constitutional Interpretation*, LAWYERING FOR THE PUBLIC INTEREST: 1ST ALTERNATIVE LAW CONFERENCE 27.

[30] *Supra* note 28, at 22.

of ancestral lands.[31] It also foists upon ICCs legal formalities – such as the securing of Torrens[32] certificates of title, application for judicial confirmation of imperfect and incomplete title[33], or even issuance of Certificate of Ancestral Domain Claim[34] – to secure title to lands they already own.[35]

Thus, the most severe problem faced by indigenous people throughout South and Southeast Asia today is the lack of recognition of customary rights to their land. With a couple of exceptions, the collective ownership of traditional lands is nowhere legally secure.[36]

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[31] MAPPING THE EARTH, MAPPING LIFE 12 (Ponciano L. Bennagen & Antoinette G. Royo, eds., 2000).

[32] The Torrens System is defined as "a system for registration of land under which, upon the landowner's application, the court may, after appropriate proceedings, direct the issuance of a certificate of title." (Black's Dictionary, 5th edition, 1979).

Generally, the Torrens system, devised and first introduced in South Australia by Sir Robert Torrens in 1857, refers to the system of "registration of transactions with interest in land whose object is, under governmental authority, to establish and certify to the ownership of an absolute and indefeasible title to realty, and to simplify its transfer." The registration of lands throughout the Philippines "shall be based on the generally accepted principles underlying the Torrens System," so that the system of registration under the Spanish Mortgage Law has been discounted and all lands granted under said system which are not yet covered by a certificate of title issued under the Torrens system are considered as unregistered lands. *See* 1 A. D. AQUINO, LAND REGISTRATION AND RELATED PROCEEDINGS (1997).

[33] Pres. Decree No. 1073 (1977). This law intended to provide some relief from the period given under the Public Land Act (Commonwealth Act No. 141 (1936), specifically Section 45, Chapter VII, and Section 47, Chapter VIII) for filing applications for free patent and judicial confirmation of imperfect and incomplete title to alienable and disposable lands of the public domain which expired on December 31, 1976. The explanatory clause provides

> Whereas, there is still a substantial number of Filipino citizens and members of the National Cultural Communities who are entitled to the benefits of the aforementioned law but have not been able to take advantage of the period for filing their applications because the lands occupied and settled by them have not been surveyed or they are located in municipalities that have not been reached by the cadastral survey program of the government;

See also GATMAYTAN, *supra* note 27, at 13.

[34] In 1993, as a result of the continuing pressure for recognition of indigenous peoples' rights, and the recommendations of the USAID-funded Natural Resource Management Project, then Department of Natural Resources Secretary Angel Alcala signed DENR Administrative Order No. 2, series of 1993 (DAO 02-83). This administrative order provided a mechanism for the delineation of ancestral domains by special provincial task forces. After the delineation process, a Certificate of Ancestral Domain Claim (CADC) or a Certificate of Ancestral Land Claim (CALC), as the case may be, would be issued by the DENR. These instruments provide indigenous peoples some sense of security at least with respect to possession against any prospective DENR project. DAO 02-93, however, introduced the use of 'non-indigenous' methods in the delineation of ancestral domains (such as aerial surveys and use of the Global Positioning System device) and seemed to suggest a hierarchy of methods in mapping which placed culture-based systems at the bottom. *See supra* note 31 at 29-30.

[35] MINING MINERALS, *supra* note 17, at 7-20.

[36] *Supra* note 24, at 64-5. *See also* GATMA

B. INTERNATIONAL LAW

Much international legislation and judicial decisions, voluminous literature and studies directed at indigenous peoples has been generated over the past quarter century by the U.N.[37] and other international human rights institutions.[38] It is argued that this body of authority constitutes customary international law, which should inform any assessment of indigenous peoples' rights over lands and natural resources.[39] Hence, a discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing.[40]

Perhaps most encouraging of all is the recognition made of the link between the economic and social activities of indigenous peoples and their traditional territories:

> Both the Human Rights Committee and the Inter-American Commission have concluded that, under international law, the states'

YTAN, *supra* note 27, at 11.

[37] Among the rights that indigenous peoples press the most at the United Nations is that of self-determination, which the world body first formally enunciated as a right in the 1960 General Assembly *Declaration on the Granting of Independence to Colonial Countries and Peoples*, and reaffirmed in 1966 in both the *International Covenant on Economic, Social and Cultural Rights*, as well as the *International Covenant on Civil and Political Rights*:

> All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. *See supra* note 23, at xxi.

[38] The following is a partial listing in no particular order of relevant declarations and conventions recognizing the rights of indigenous peoples:

1. Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere, U.N. Doc. E/CN.4/Sub.2/476/Add.5, Annex 4 (1981).
2. Declaration of Principles of Indigenous Rights, U.N. Doc. E/CN.4/1985/22, Annex 2 (1985).
3. Declaration of Principles on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1987/22, Annex 5 (1987).
4. Declaration of San Jose, UNESCO Doc. FS 82/WF.32 (1982).
5. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries. Adopted by the General Conference of the International Labour Organisation, Geneva, June 27, 1989. Entered into force September 5, 1991.
6. Agenda 21: Chapter 26, U.N. Doc. A/CONF.151/26 (vol. 3), at 16, Annex 2 (1992).
7. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Adopted by General Assembly resolution 47/135 of 18 December 1992.
8. Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994).
9. Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Eur. Parl. Doc. PV 58 (II) (1994).
10. Proposed American Declaration on the Rights of Indigenous Peoples. Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session.

[39] ANAYA., *supra* note 25.

[40] *Id.*

> obligation to protect indigenous peoples' right to cultural integrity necessarily includes the obligation to protect traditional lands because of the *inextricable link between land and culture* in this context. Thus, *rights to lands and resources are property rights that are prerequisites for the physical and cultural survival of indigenous communities*, and they are protected by the American Declaration, the American Convention, and other international human rights instruments, such as the Convention of (sic) the Elimination of all Forms of Racial Discrimination and the Covenant on Civil and Political Rights. (emphasis supplied)[41]

In its Proposed Declaration on the Rights of Indigenous Peoples, the Inter-American Commission on Human Rights once again articulated the obligation of states to respect the cultural integrity of indigenous peoples, expressly linking property rights and customs to the survival of indigenous cultures. Article VII of the Proposed Declaration, entitled "Right to Cultural Integrity" states:

> 1. Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage, which are important both for their survival as well as for the identity of their members.
> 2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favorable than the standard of international law.
> 3. The states shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.[42]

The United Nations Human Rights Committee has confirmed the said Commission's interpretation of the reach of the cultural integrity norm, as displayed in its General Comment on article 27 of the Covenant of Civil and Political Rights:

> Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of these rights may require positive measures of protection and measures to ensure the effective

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[41] *Id.* Echoing this sentiment that rights to land and the resources found within are imperative in securing the survival of indigenous peoples, Gatmaytan says that "Indigenous Peoples view areas in a holistic, unitive manner. To them, ownership of land means ownership and control as well of all the resources therein." *See* GATMAYTAN, *supra* note 27, at 37.

[42] *Id.*

> participation of members of minority communities in decisions which affect them.[43]

Thus, indigenous peoples' traditional land use patterns are included by the Inter-American Committee as cultural elements that states must take affirmative measures to protect under article 27 regardless of whether states recognize indigenous peoples' ownership rights over lands and resources subject to traditional uses.[44]

Today, a host of international instruments and agreements require consultation with an indigenous community with any decision that may affect it, including decisions to grant concessions to develop natural resources in areas traditionally used or occupied by the same. Under the relevant international standards, the objectives of such consultation are: 1) to establish agreement with the affected community over the proposed development activity, 2) to guarantee that measures be adopted to safeguard the community's interests in the lands, and 3) to ensure that economic and other benefits are given the community.[45]

The most important of the three obligations is the duty to consult and reach agreement with indigenous peoples. The Draft United Nations Declaration on the Rights of Indigenous Peoples[46] recognizes the right of indigenous peoples to determine "priorities and strategies for exercising their right to development" and requires states to obtain the free and informed consent of indigenous peoples before adopting and implementing legislative and administrative measures that may affect them.[47] The Proposed Declaration also affirms the right of indigenous peoples "to be informed of measures which will affect their environment including information that ensures their effective participation in actions and policies that might affect it."[48] These statements of rights to consultation and self-determination are consistent with ILO Convention No. 169 (hereinafter referred to as the Convention), which clarifies that indigenous peoples' right to consultation extends even to decisions about natural resources that remain under state ownership. The Convention states that

> (in) cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] U.N. Doc. E/CN.4/1995/2.
[47] ANAYA, *supra* note 25.
[48] U.N. Doc. E/CN.4/1995/2.

> undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.[49]

Further, the Convention establishes that indigenous peoples "have the right to decide their own priorities for the process of development as it affects their lives ... (and hence) they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly." Consequently, the Convention stipulates that consultations "shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."[50]

Thus, the formulation of free prior informed consent begins to take shape.

> The required consultations with indigenous peoples must be more than formalities or simply processes by which they are given information about development projects. *Clear, complete, and accurate information* is necessary, but that information alone is not sufficient for effective participation in decision-making. Rather, in order to be truly effective, the consultations must also provide indigenous peoples with a *full and fair opportunity to be heard* and to genuinely influence the decisions affecting their lives.[51] (emphasis supplied)

The Colombian Constitutional Court had occasion to elaborate upon the content of meaningful consultations with indigenous peoples in a case dealing with oil exploration within the traditional territory of the U'wa people. It laid down the following guidelines for active and effective consultations that secure indigenous peoples' cultural integrity:

> 1. There must be full disclosure regarding proposed projects;
> 2. There must be full disclosure of the possible effects of the proposed projects;
> 3. The indigenous cultural community must be given the opportunity to freely and privately (without outside interference) discuss the proposed projects within the entire community or among its authorized representatives; and,

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[49] ILO Convention No. 169, art. 15.

[50] ANAYA, *supra* note 25.

[51] *Id.*

> 4. The indigenous community must be given the opportunity to have their concerns heard and to take a position on the viability of the project.[52]

Similarly, the Supreme Court of Canada in its landmark *Delgamuukw* decision concerning aboriginal title held that, in the disposition of indigenous peoples' land and resources,

> there is always a duty of consultation ... this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, (the duty) will be significantly deeper than mere consultation. Some cases ... require the full consent of an aboriginal nation.[53]

Ergo, these international precedents confirm that states are obligated to fully inform and meaningfully consult with indigenous peoples before making decisions disposing of or affecting their traditional lands. States must maintain the objective of reaching an agreement with the indigenous groups concerned, ensure that indigenous groups have meaningful input in the development process as it affects them and ensure that indigenous peoples' interests in land and resources are protected.[54]

C. PHILIPPINE LAWS

Pursuant to a series of laws enacted since 1894, and considerably refined after the declaration of martial law in 1972[55], the Philippine government claims ownership to more than 62.2 percent of the nation's total land mass, or more than 18.6 million hectares. Most of these areas are located within the hilly and mountainous interiors of the major islands, and presumably are home to the country's roughly 12 million indigenous occupants,[56] making the issue of unrecognized property rights over domains – and all the natural resources, including

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[52] *Id.* The court ordered the suspension of an oil exploration permit pending proper consultations.

[53] *Id.*

[54] *Id.*

[55] For a more comprehensive study of ancestral land rights in the Philippines and the accompanying laws, *supra* note 28. *See also* DANTE B. GATMAYTAN, *Land and Tenure Rights in the Philippines: Terrain and Trajectory*, 2 LAND LAWS AND REGULATIONS POLICY STUDY, FINAL REPORT OF THE PHILIPPINES-AUSTRALIA LAND ADMINISTRATION AND MANAGEMENT PROJECT (2002) (unpublished manuscript on file with the author).

[56] OWEN LYNCH, JR., *Recognizing Undocumented Ancestral Property Rights: A Legal Response to Environmental Crises in the Philippine Forest Zones* 1 (November 19, 1987; paper available on file at the 3rd floor, University of the Philippines College of Law Library).

mineral wealth found therein – possessed and utilized since time immemorial all the more pressing. And while admittedly, legal instruments exist at present for the protection of indigenous rights, they either are not applied or are applied in a capricious and uneven manner and not in a way that meets the needs of indigenous peoples.[57]

According to Gus Gatmaytan, "the State has consistently emphasized its ownership and control of the natural resources in the country. Beginning with the 1935 Constitution, which first enunciated the policy, there has been virtually no fundamental change"[58] in this dictum as evinced by Article XII, Section 2 of the 1987 Constitution, to wit:

> Sec. 2. All lands of the public domain, waters, *minerals*, coal petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other *natural resources shall not be alienated.* The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. xxx (emphasis supplied)[59]

Such unilateral pronouncement is founded on the now antiquated principle infamously known as the Regalian Doctrine or *jura regalia*, a policy that has wreaked untold sufferings on countless indigenous peoples. As the name implies, this legal doctrine recalls the time when all titles were valid only when it could be shown that it originated from a grant or sale from the Crown,[60] or its conceptual heir, the State.[61] State ownership of natural resources by virtue of *jura regalia*, as enunciated by the Supreme Court in *Lee Hong Hok v. David*[62], vests ownership in the state as such, rather than the head thereof, and such principle was adopted in virtue of the power of the State to control the disposition, exploitation, development, or utilization of natural resources.[63] The legislature justified the framing of Article XII, Section 2 by citing the need 1) to insure their conservation for Filipino posterity, 2) to serve national interest by preventing the extension into the country of foreign control

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[57] MINING MINERALS, *supra* note 17, at 7-19. *See also Cruz v. Secretary of Environment and Natural Resources*, G.R. No. 135385 December 6, 2000, 347 SCRA 128, at 194, citing the sponsorship speech of Rep. Andolana of House Bill No. 9125, March 20, 1997.

[58] GATMAYTAN, *supra.* note 27, at 17.

[59] CONST., art. XII, sec. 2.

[60] An allusion is made to the "Spanish crown" of the then King Philip after whom the archipelago was named, as the Philippines was subservient to its *conquistador* for 400 years.

[61] GATMAYTAN, *supra* note 27, at 17.

[62] G.R. No. L-30389, December 27, 1972, 48 SCRA 372 (1972).

[63] CARMELO V. SISON AND EDUARDO A. LABITAG, *Examining the 1987 Constitution Relative to Land Policies and Principles*, 2 LAND LAWS AND REGULATIONS POLICY STUDY, FINAL REPORT OF THE PHILIPPINES-AUSTRALIA LAND ADMINISTRATION AND MANAGEMENT PROJECT (2002) (unpublished manuscript on file with the author).

through peaceful economic penetration, and 3) to prevent making the Philippines a source of international conflicts with the consequent danger to its internal security and independence.[64]

> The legal implication of such a policy for the indigenous peoples of the country is two-fold:
>
> Firstly, it vests ownership and control of *land* – and the resources therein – in the hands of the State, to the prejudice of these same communities. The only generally recognized exception to this general rule are lands which were already covered by documents of titles. Lands which are not so titled are treated as part of public or governmental lands, or of the public domain.
>
> Secondly, as a corollary to the above, the *natural resources* found within these public lands are consequently under the control of the State. Hence, even in those rare cases where Indigenous Peoples communities have managed to secure documents of title to their lands, they do not, by virtue of that title acquire ownership or control of the natural resources found within the titled land. This problem is further complicated by the fact that the government's awards of resource rights through licenses, leases or permits, or the current production sharing, joint-venture or co-production agreements are given to persons, natural or juridical, who are not residents of the area, thereby setting the stage for social conflict at the community level. [65]

But the Regalian Doctrine cannot exist in a vacuum, and its applicability should be limited to the purposes for which it had been enacted.[66] Primary among these purposes, based on the report of the Committee on Nationalization and Preservation of Lands of the Constitutional Convention that created the 1935 Constitution, is the need for the Regalian Doctrine as protection against alien control and large-scale holdings of land. The report articulated the following four fundamental principles:

> 1. That land, minerals, forests, and other natural resources constitute the exclusive heritage of the Filipino Nation. They should,

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[64] *Id.* Leonen, on the other hand, posits that jura regalia as preserved in Art. XII, Sec. 2 of the 1987 Constitution "was designed to guard against 1) alien ownership, 2) control of a large amount of a resource by a few, and 3) regulation of large commercial extractive ventures (logging concessions, mining companies et al.)." *Supra* note 29, at 23.

[65] GATMAYTAN, *supra* note 27, at 17-8.

[66] *Supra*. note 29, at 23.

> therefore be preserved for those under the sovereign authority of the nation and for their posterity.
> 2. That the existence of big landed estates is one of the causes of economic inequality and social unrest.
> 3. That the multiplication of landowners by the subdivision of land into smaller holdings is conducive to social peace and individual contentment and has been the policy adopted in most civilized countries after the World War.
> 4. That the encouragement of ownership of small landholdings destroys that institution so deeply entrenched in many parts of the Philippines known as caciquism. It is preventive of absentee landlordism, an institution which springs directly from the establishment of big landed estates and has time and again served as an irritant to the actual toilers of the soil.[67]

As one author aptly observes,

> Section 2, Article XII therefore reflects not just the desire to protect resources but also to economically profit from them. Its very formulation implies that the State views the resources not as part of an integrated ecosystem but as distinct units capable of separate commercial exploitation.[68]

Such view is far removed from the earlier discussion on indigenous peoples' special affinity with the land, and a worldview that considers natural resources as part of an entire ecosystem, and not merely a separable fragment thereof. Resources are not valuable when separately considered. It is the whole ecosystem and its dynamic relationship with their occupant that provides value.[69] A stubborn, if not arrogant, refusal on the part of the State to acknowledge a mistake in national policy, despite lifetimes of oppression, shows a government that persistently misses the forest for the trees.

Section 5, Article XII of the 1987 Constitution exists, however, to soften the blow dealt by Section 2, Article XII: the former provision embodies the legislative power to finally formally recognize the existence of ancestral domains. Thus,

> Section 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall

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[67] *Id.* at 24.
[68] *Id.*
[69] *Id.*

> 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.

But Section 5 of Article XII is a two-faced provision – it seemingly dangles a prize, but leaves it beyond reach. It deceives and confuses on two counts as best explained by two authorities on indigenous land laws.

On the first count, Lynch Jr. succinctly states that, while the first paragraph of Article 5

> provides that "The State ... shall protect the rights of indigenous cultural communities to their ancestral lands," (t)his mandate, however, is subject to the most *onerous qualification* found anywhere in the document. As a result, for the first time in the forty-plus year history of the Philippine Republic, *the State's duty is "subject to ... national development policies and programs."* In other words, the State's constitutional obligation to protect ancestral land rights can be constitutionally subverted by policies and programs which emanate from sources other than those found in the constitution! (emphasis supplied)[70]

On the second count, Leonen reveals and expounds on the difference between "ancestral lands" and "ancestral domains" as formulated by the crafters of Section 5. The discussions on this provision centered on three things: 1) there is a difference between "ancestral lands"[71] and "ancestral domains"[72]; 2) there are differences in concepts of ownership in the Civil Code[73] and under customary law; and 3) neither the Regalian Doctrine nor customary law will be considered as the primary rule for there will be a balancing of interests by the State.[74] In essence,

> (a)ncestral domains are not public. They do not require a grant from the State in order to be held by individuals, families, clans or groupings of families. Thus the second paragraph empowers Congress to allow for the application of customary law (1) to "govern

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[70] *Supra* note 28, at 4-5.
[71] CONST. art. XII, sec. 5, par. (1).
[72] CONST. art. XII, sec. 5, par. (2).
[73] Rep. Act No. 386 (1949).
[74] *Supra* note 29, at 25.

> property rights or relations" and (2) to determine "the *ownership and extent* of ancestral domains."[75]
>
> Correlatively,
>
> > forests, waters, lands, minerals outside ancestral domains are controlled by the State – in *imperium* as well as in *dominium*.
>
> x x x
>
> > Forests, waters, lands, minerals within ancestral domains, as may be defined by Congress, are still controlled by the State – but only in imperium.[76]

By analogy, it can be deduced that even lesser rights are granted to indigenous peoples over their ancestral lands, particularly over the sub-surface resources and minerals. It is suggested that the difference in treatment of rights to mineral wealth found beneath the earth is more apparent than real, for pursuant to Article XII, Section 2, these "minerals ... and other natural resources are owned by the State."[77] Hence, the paradox that despite the distinctions embodied under Article XII, Section 2 between the rights accorded to indigenous peoples to the mineral wealth pertaining to their ancestral domains and ancestral lands, in truth there is no difference for the State lays claim to it all.

It is conceded that the Framers of the Constitution were cognizant of the nuances governing various types of resources in customary law within specific ancestral domains, and did not rely on simplistic land classifications of "agricultural, forestal or timber, and mineral" which were sufficient in the past.[78] But, as has been said before, the law is not neutral, it is a creature of the State[79], and by that rule is subject to its foibles. Such lapses in crafting the fundamental law, despite being well-intentioned, haunts the legislation that follows in its wake.

III. THE PHILIPPINE MINING ACT OF 1995

Rather ominously, the congressional deliberations on House Bill No. 10816[80] – which would later become the Mining Act – began with the flawed

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[75] *Id.*, at 26.
[76] *Id. See* also *supra* note 31, at 25.
[77] CONST. art. XII, sec. 2.
[78] *Supra* note 29, at 27-8.
[79] *Supra* note 31, at 19.
[80] H. No. 10816, 9th Congress, 2nd Session (1993).

premise that the measure of the country's riches is in the amount of its mineral wealth buried under the ground.[81] On that score, Congressman Renato A. Yap, in his sponsorship speech, proceeded to build a case for the revitalization of the mining industry, even as he rebuked environmental groups for "painting mining as a dirty, unnecessary and ecologically devastating exercise."[82] At the time of introduction of H.B. No. 10816 in late 1993, the mining sector was at its most dismal, with only 12 remaining mining firms compared with 32 metal producing firms in operation in the 1970s. Such decline was attributable to plummeting worldwide market prices, especially for metals, as well as to inconsistent and changing laws "that fail to optimize the use of the country's mineral resources and make the (mining) industry uncompetitive in the global market."[83]

The proposed bill promised an attractive mining package chockfull of features that practically gave away our posterity to foreign investors, the most onerous of which is the so-called FTAA or financial or technical assistance agreement[84] which allows a foreign-owned corporation to undertake large-scale exploration, development and utilization of mineral resources. As FTAAs effectively permit up to 100% foreign owned entities to engage in mining activities, the greatest disincentive to foreign investment has been sufficiently addressed, and the floodgates to unhampered exploitation of the country's mineral resources lifted.[85] To dramatize the breadth of destruction contemplated by FTAAs, consider that as of 1997

> 29 months upon enactment (of Rep. Act No. 7942), a total of 125 applications are pending for approval. Though the law only allows for a maximum of 81,000 hectares for mining operation, majority of the FTAA applications cover a total of 100,000 hectares. Approximately, these would cover roughly a total of 12.5 million hectares or 42 percent of the country's total land area. Of these applications, Australian firms head the list of investors followed by Canada and the United States. Moreover, a mining firm is allowed more than one FTAA application.[86]

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[81] Record of House of Representatives 230 (1993-4).

[82] *Id.*

[83] *Id.* For a more thorough account on the history of mining (and its deleterious effects on indigenous communities and the environment) *see supra* note 11; *see also* CENTER FOR ENVIRONMENTAL CONCERNS – PHILIPPINES, WATERSHED 2 IDEAS ON ENVIRONMENT AND SOCIETY: GLOBALIZATION, PHILIPPINES 2000 AND THE PHILIPPINE MINING INDUSTRY (1996).

[84] Rep. Act No. 7942, chapter VI.

[85] BALLESTEROS, *supra* note 17, at 21.

[86] *Supra* note 11, at 29. *See also La Bugal-B'laan Tribal Association, Inc., et al, vs. Victor O. Ramos, et al,* Petition for Mandamus with Prayer for Temporary Restraining Order filed before the Supreme Court, 7 February 1997.

Granting that many areas of mineral resources have traditionally been inhabited or used by indigenous peoples[87], such wholesale tendering of our natural resources belies a concern for indigenous peoples' rights. Nowhere in the proposed measure were concessions to indigenous land rights mentioned.[88]

It must be noted at this junction that an earlier mining legislation, Republic Act No. 7076 or the "Peoples' Small-Scale Mining Act of 1991", already recognized the existence of ancestral lands.[89] But although the earlier law states that "no ancestral land may be declared as a people's small-scale mining area without the prior consent of the cultural communities concerned, this provides protection only from small-scale mining, and not large or industrial scale mining operations which pose the greater threat to the rights of indigenous peoples, as well as the environment."[90]

Conscious of the glaring gap in the proffered bill, Congressman Andolana acquainted the bill's proponent, as well as the House of Representatives, with the more salient points of native title and the ruling heretofore forgotten of *Cariño v. Insular Government*.[91] Expressing his approval of the proponent's acceptance of possible amendments to H.B. No. 10816 to incorporate the rights of indigenous cultural communities to their ancestral domains, Andolana explains how the doctrine of ancestral domain runs counter to the Regalian Doctrine principle:

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[87] MINING MINERALS, *supra* note 17, at 7-17.

[88] When confronted by Congressman Andolana as to whether ancestral domain rights were recognized in the initial draft of H.B. No. 10816, Congressman Yap evasively answered that ancestral domain rights indeed were acknowledged, but only "in principle." *See* Record of House of Representatives 231-2 (1993-4).

[89] Rep. Act No. 7076 (1991), sec. 7.

[90] GATMAYTAN, *supra* note 27, at 27-8.

[91] 212 U.S. 449, 460 (1909). In that decision, time immemorial possession in the concept of owner is sufficient basis to claim protection of vested property rights. Justice Holmes, speaking for a unanimous Court, said:

> Whatever the law upon these points may be, and we mean to go no further than the necessities of the decision demand, *every presumption is and ought to be against the Government* in a case like the present. It 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.* (emphasis supplied)

Congressman Andolana, in his fervor, mistakenly cited the case as *Insular Government v. Carino. See* Record of House of Representatives 232 (1993-4). *See also supra* note 31, at 23. Carino was also reiterated in subsequent rulings: Oh Cho v. Director of Lands, 75 Phil. 890 (1946), Suzi v. Razon, 48 Phil. 424 (1925), Director of Lands v. Buyco, G.R. No. 91189, November 27, 1992, 216 SCRA 78 (1992), Republic of the Philippines v. Court of Appeals, G.R. No. 108998, August 24, 1994, 235 SCRA 567 (1994), Fianza v. Reavis, 40 Phil. 1017 (1909), and Atok Big Wedge v. Intermediate Appellate Court, G.R. No. 88883, January 18, 1991, 193 SCRA 71 (1991).

> MR. ANDOLANA. Mr. Speaker, the ancestral domain concepts (sic) adheres to the fact that long before the Republic of the Philippines was established, private ownership was already recognized and this is so enunciated even in the case of Insular Government versus Cariño. In that case, the Supreme Court adhered to the principle of ancestral domain that even if the government adhered to the regalian doctrine, it still respected the private ownership of this land which had been occupied, cultivated and possessed from time immemorial by cultural communities. Now in that decision, the Supreme Court granted private rights to these cultural communities, including all the resources found in that land, because the Supreme Court believes that even before the establishment of the Republic of the Philippines, there were already customary and traditional laws which governed these cultural communities. And one of these customary laws was the collective ownership of the cultural communities of certain parcels of land and mineral deposits found in those lands.
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> MR. YAP (R.). Yes, Mr. Speaker.[92]

Thereafter, Andolana attempts to continue his exposition before he is interrupted by Yap, leading in turn to a critical and illuminating discourse on the nature of consent required of indigenous communities in what would later become Section 16 of the Mining Act:

> MR. ANDOLANA. Would the distinguished gentleman accept an amendment that mineral resources found on the ancestral domain would belong to the cultural communities and that no exploitation ...
>
> MR. YAP (R.). We will have to study that very well, Mr. Speaker. But perhaps it would please the distinguished Gentleman to learn that this Representation intends to file a bill which would amend the Local Government Code and in effect increase the local government share from mining taxes from 40 percent to 80 percent.
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> Now, it might be difficult to give to that specific cultural community the ownership of the mineral resources, but it could be (given). At the same time, it would probably be simpler and more practical if we just give the share (of cultural communities) to the local

[92] *Id.* For a lengthy treatise on the Cariño ruling, *see also* EDUARDO P. LIZARES, *The Dangerous Fallacy that There Can Be No Valid Title to Land Unless and Until It Has Been Previously Declared Alienable and Disposable*, 75 PHIL. L. J. 64 (2000).

government, not only in terms of their share in taxes but also in terms of royalties.

MR. ANDOLANA. Under the Constitution, even in the implementation of agrarian reform, it is mandated that the cultural communities must be *adequately consulted* and that should there be an implementation of agrarian reform in the matters of land distribution, this ancestral domain owned by cultural communities must be recognized and respected.

MR. YAP (R.). But, Mr. Speaker, this does not only apply to all mining claims but also in all areas where there is mining. And it should be governed by an ancestral land law which was part of the discussion during the last economic summit workshop on natural resources, environment and agri-industrial concerns. I am sure that it will not take long before an ancestral land law is filed in the House of Representatives and such law would cover those areas of public domain which are also part of the ancestral lands of our brothers from the cultural communities.

MR. ANDOLANA. Mr Speaker, under the Local Government Code or Republic Act 7160, it so mandates that no national exploitation, development or whatever shall be done in an area where there are cultural communities without prior consultation and without their consent. *Would the distinguished Gentleman be amenable to an amendment that any mining operation can only be had on areas considered as ancestral lands, if there is adequate consultation and consent from the community?*

MR. YAP (R.). Yes. The committee would certainly agree to that proposition. (emphasis supplied)[93]

Hence Section 16 of the Mining Act, which for purposes of convenience, is reproduced again as follows:

Sec. 16. Opening of Ancestral Lands for Mining Operations. – No ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned.

The law even provided for royalty payments for ICCs upon the utilization of the minerals,[94] again pursuant to amendments introduced by Andolana. What is

[93] Record of House of Representatives 232 (1993-4)
[94] Rep. Act No. 7942, sec. 17.

interesting to note is Congressman Yap's remark at this juncture of the difficulty of identifying specific cultural communities as their "specific areas are not bounded by metes and bounds on the ground", leading to conflicts regarding mining claims.[95] He then mentions the provisions in Republic Act No. 7160, otherwise known as the Local Government Code of 1991 (thereafter Local Government Code), providing for prior consultations as well.[96]

Notwithstanding the challenges presented to implementing the law owing to the issue of proper delineation of lands, the preceding discourse clearly demonstrates the intent to provide for consent[97] that is prior, informed, and most importantly, free. The "adequate consultation" envisioned by the framers of the Mining Act is one that must necessarily take into account the common practice of indigenous cultural communities of arriving at a genuine agreement. It is a general principle of law that any consent obtained for any activity that is *ex-post facto* or after the fact, misleading or inaccurate, or vitiated by fraud, force, intimidation or threat, is no consent at all. But more often – for various reasons ranging from the mistrust of IPs by mining companies, or their outright rejection of the provisions mandating the necessity for consent, or sometimes the difficulties presented by the execution of the law's implementing rules – the standard of adequacy of these consultations is never met.

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[95] Record of House of Representatives 233 (1993-4). Note, too, Congressman Andolana's acute observation of how "ancestral domain does not consider municipal boundaries. Their (ancestral domain claimant's) boundary was based on whether the land was a burial ground, a worship area, a sacred place, or fishing ground."

[96] Republic Act No. 7160 provides the following two provisions requiring consultations with indigenous cultural communities:

> Sec. 26. *Duty of National Government Agencies in the Maintenance of Ecological Balance.* – It shall be the duty of every national agency or government-owned or controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of cropland, rangeland, or forest cover, and extinction of animal or plant species, to *consult* with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of the project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.
>
> Sec. 27. *Prior Consultations Required.* – No project or program shall be implemented by government authorities unless the *consultations mentioned in Sections 2(c) and 26* hereof are complied with, and prior approval of the sanggunian concerned is obtained: *Provided*, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.

[97] "Consent" is defined as, among other concepts, "agreement", "approval", "assent" or "consensus." BURTON'S LEGAL THESAURUS 3rd ed. (2001).

In fact, "in some situations, conflict is increased by a lack of understanding about traditional attitudes toward land or tribal ways of making decisions. It is not always clear to those outside the indigenous group how to proceed, what constitutes prior consent, when the answer is 'no', or what the appropriate means of negotiation may be."[98] Equally, even the indigenous communities themselves may be divided over how to respond to potential mining activities, and this may lead to discord and conflict within the communities.[99] Worse yet, as observed by one nongovernmental organization working closely with an indigenous community in Palawan, the requirement of obtaining the prior consent of the indigenous peoples in the concerned area may even lead to a strategy known as "consultation aggression": after the tribal councils and indigenous peoples' organizations have been alerted to an impending development project in their area and have passed their resolutions vetoing the same, the project proponents would ceaselessly visit the *datus* to secure their consent. These tribal leaders would be told that the proposed project had already been approved and will be implemented, so that the *datus* had no choice but to give their consent. Moreover, the project staff would take turns isolating each *datu*, telling each that other *sitios* had already consented, and that their *sitio* had no choice but to agree as well. After each session, the cornered *datus* would learn from others that in fact none of the tribal *sitios* had signified their consent.[100]

All of these problems in the implementation of the free, prior informed consent proviso of the Mining Act only affirm what has been aptly observed of rulemaking in the Philippines: "(The IP's) rights to land and resources are protected by a maze of legislation, but the elites and their political allies regularly find ways to circumvent the laws and to seize or otherwise use tribal lands."[101]

A. NATURE OF CONSENT

Now that mining firms have been categorically banned from operating in ancestral lands sans the prior consent of the indigenous cultural community

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[98] MINING MINERALS, *supra* note 17, at 7-21.

[99] *Id.*

[100] The cited experience is used by analogy, such being the experience of IPs whose domains are subject to Republic Act No. 7586 or the National Integrated Protected Areas System Act of 1992, another legislation that recognizes ancestral property rights. In the paper by PAFID Executive Director Dave de Vera, "consultation aggression" was described as having two chief characteristics: 1) repeated, relentless consultations that drain community resources even as community plans and decisions are trivialized and set aside by a centralized, planning agency, and 2) the intentional creation of factions to divide an indigenous community and destabilize, divide or discredit local organizations and leaders. PHILIPPINE ASSOCIATION FOR INTERCULTURAL DEVELOPMENT (PAFID), FIELD EXPERIENCES IN IMPLEMENTING PROTECTED AREAS IN ANCESTRAL DOMAINS: INDIGENOUS PEOPLES' RIGHTS AND THE MANAGEMENT OF BIODIVERSITY CONSERVATION PROGRAMS 2-3 (November 21, 2001) (paper on file with author).

[101] INDIGENOUS PEOPLES, ETHNIC GROUPS, AND THE STATE 47 (1997).

concerned, the questions arises: what is the nature of the consent required? Is it that of "owner", "possessor", "steward"[102], or akin to that of a local government unit? For under our Civil Code, only the owner or lawful possessor of a thing has the right to exclude any person from the enjoyment and disposal thereof.[103]

Owing to the earlier distinctions made between "ancestral land" and "ancestral domain", the Mining Act's choice of terminology is confusing: for if the intention were really to protect the indigenous peoples' rights to their territory, would it not have been more proper to substitute "ancestral domain" for "ancestral land" in Section 16?[104] For it is only in ancestral domains where indigenous peoples are yielded the full rights of ownership over all natural – including mineral – resources.

Not once during the congressional deliberations did the tenacious Congressman Andolana use "ancestral land" to refer to the right of the indigenous people in issue – he consistently used only the term "ancestral domain," perhaps knowing only too well the nuances contemplated therein. It was only during the period of amendments of H.B. No. 10816 when Congressman Lopez, presumably with the concurrence of Andolana, switched to using "ancestral land" and submitted the present wording of Section 16.[105] Curiously and fortuitously enough, however, Congressman Yap reverts to using "ancestral domain" during his second and final

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[102] The term "stewardship" appears in Article XIII, Section 6 of the 1987 Constitution, and was proposed by Commissioner Romulo who characterized the concept as akin to usufruct. It means giving the individual "free use or free occupancy but he would not be given a legal title to the land.

> Sec. 6. The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead right so small settlers, and the rights of indigenous communities to their ancestral lands.
>
> The State may resettle landless farmers and farmworkers in its own agricultural estates which shall be distributed to them in the manner provided by law.

For a lengthy treatise on stewardship, *see supra* note 62, at 8-10.

[103] Rep. Act No. 386 (1949), art. 429. Note too that the amendment was formerly presented as "Section 15" of H.B. No. 10816.

[104] Rep. Act No. 7942 in Section 3 provides:

> Sec. 3. Definition of Terms –As used in and for the purposes of this Act, the following terms, whether in singular or plural, shall mean:
> (a) "Ancestral lands" refers to all lands exclusively and actually possessed, occupied, or utilized by indigenous cultural communities by themselves or through their ancestors in accordance with their customs and traditions since time immemorial, and as may be defined and delineated by law.

[105] Record of the House of Representatives 306-8 (1993-4).

sponsorship speech for H.B. No. 10816 wherein he reports among other matters that "(the) Senate has adopted from the House version the following provisions: ... (2) the recognition of the rights of cultural communities over the *ancestral domain.*"[106] Finally, the implementing rules of the Mining Act[107] states that "in areas claimed as ancestral lands *and domains* ... mining applications may not be granted without the prior consent of the concerned indigenous cultural community."[108]

Therefore, notwithstanding the absence of an explicit formulation in the Mining Act on the rights accruing under ancestral domain, it is respectfully submitted that the prior consent required under Section 16 of the Mining Act is that of owner of the minerals and all other resources in the area concerned. An opposite interpretation would be in disregard of the clear aim to recognize and respect the rights of indigenous cultural communities to their ancestral domain – and legislative history.

Even Congressman Yap acknowledged that an ancestral land law needed to be passed to fully ascertain and preserve once and for all ancestral domain rights. And owing to the doubts cast by the infelicitous terminologies used in the Mining Law as discussed – giving the provision on prior consent the feel of an "after-thought" amendment albeit unjustified – the subsequent passage of IPRA[109] was welcome.

IV. IPRA AND ITS IMPACT ON FPIC

Don't mistake us. We are not a backward-looking people. Like others we want development and we want to improve our lives and the lives of the next generations; we want better education, better health and better services. But we want to control this development in our land and over our lives. And we demand a share both in decision-making and in the benefits of development.

- Tinggian statement[110] -

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[106] Record of the House of Representatives 515 (1994-5).

[107] DENR Adm. O. No. 95-23 (1995).

[108] *Id.*, at Section 18.

[109] The IPRA was signed into law on October 29, 1997, and became effective on November 22, 1997. Its Implementing Rules and Regulations were approved on June 9, 1998, and subsequently became effective 15 days after publication.

[110] *Supra* note 24, at 73, *citing* Tinggian statement cited in Richard Dorrall, *The Dialectic of Development: Tribal Responses to Development Capital in the Cordillera Central, Northern Luzon, Philippines* (1990).

The IPRA is the State's implementation of the constitutional command[111] to recognize the rights of indigenous cultural communities to their ancestral lands and domains.[112] "[T]hese rights are interpretations of the State of the political victories of generations of indigenous peoples, by their leaders and communities, acting singly or with others, and by support groups who stood by them."[113]

As expected, IPRA dissatisfied sectors traditionally involved with the exploitation of natural resources.[114] Mining firms were understandably incensed at the government for dealing a heavy blow to the mining industry and immediately began to exert efforts to undermine the law.[115] A study prepared by the Philippine Exporters Confederation estimated that 1.2 million hectares (53 %) of areas identified in mining applications are found in areas covered by Certificates of Ancestral Land and Domain Claims. It was even argued that the law violated the constitutional maxim that wealth must be utilized and conserved for the common good.[116]

As aptly observed by one prominent nongovernmental organization, "*[a]t the moment*, the IPRA remains the clearest and most accessible legal means of asserting community rights to their lands and resources."[117] Moreover, the IPRA is considered by many as a viable legal basis for further addressing the long-standing confusion over (or deliberate distortion of) traditional resource use rights, particularly in relation to the claims of the State itself.[118]

After definitively defining and protecting ancestral domains and ancestral lands, as well as defining free and prior informed consent, in its pertinent provisions[119] as follows,

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[111] CONST. art. XII, sec. 2.

[112] *Supra* note 31, at 19.

[113] *Id.*

[114] GATMAYTAN, *supra* note 55.

[115] Note, for example, how then pro-mining DENR Secretary appointee Cerilles made attempts to change the membership in the NCIP "to make it more malleable for the mining industry: the Cerilles nominee for NCIP Chair, Cesar Sulong, is a former mayor of a municipality in Cerilles' district in Zamboanga del Sur, and has had graft charges filed against him; on the other hand, the Cerilles nominee for NCIP Executive Director, Atty. Juris Rita Duenas, had no qualifications at all as an advocate for indigenous rights. *See supra* note 31, at 35.

[116] MINING MINERALS, *supra* note 17, at 7-20.

[117] *Supra* note 31, at 38.

[118] *Id.*, at 32. *See also* Rep. Act No. 8371 (1997), secs. 4-12, 13-20, 21-28, and 29 to 37 providing for specific legal definitions of the rights of indigenous peoples to their ancestral lands/domains, their right to self-governance and empowerment, and provisions addressing justice and human rights, and cultural integrity respectively.

[119] Rep. Act No. 8371, secs. 4, 5, 6, 7 and 8. *See* also Section 3 (a, b and g) defining Ancestral Land, Ancestral Domain, and Free and Prior Informed Consent, respectively.

> Sec. 3 (g) Free and Prior Informed Consent – as used in this Act shall mean the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community;[120]

arguably, the IPRA's second most important achievement is its establishment of a seven person National Commission on Indigenous Peoples or NCIP, replacing two earlier bodies concerned with "cultural minorities."[121] Section 38 of the law instituted the NCIP as "the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the ICCs/IPs and the recognition of their ancestral domains as well as their rights thereto."[122] Also,

> (s)ection 44 (e) empowers the NCIP to "issue certificate of ancestral land/domain title." As section 56 provides that existing property rights in third parties will be "recognized and respected," this legislative power requires the Commission to establish a definition of ancestral land/domain title and to make a determination on extinguishments. Under its quasijudicial powers, the NCIP can resolve disputes between indigenous and non-indigenous claimants and between competing claims of indigenous people. It also can "take appropriate legal action" for the cancellation of titles that have been granted illegally, which is a common problem in many parts of the country.
>
> This legislation allows the well-established land law system of the Cordillera tribes in central Luzon to gain recognition under Philippine Law. The legislation also inaugurates the process of stabilizing indigenous people's land rights in other parts of the country where settlers, business operations and government actions continue to usurp aboriginal ancestral lands.[123]

Predictably, as is wont to happen when big industry comfort zones are breached, less than a year after IPRA was signed into law, a case was filed before the Supreme Court questioning its validity. The special civil action for prohibition and mandamus, filed by former Justice Isagani Cruz and practitioner Atty. Cesar Europa,

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[120] Rep. Act. No. 8371, chap. II, sec. 3 (g).
[121] *Id.*, chap. XII, sec. 74.
[122] *Id.* at sec. 38.
[123] ANAYA, *supra* note 25.

assailed its constitutionality, and enjoined its implementation, claiming that certain provisions of the IPRA and its implementing rules "amount to an unlawful deprivation of the State's ownership over lands of the public domain as well as minerals and other natural resources therein, in violation of the regalian doctrine embodied in Section 2, Article XII of the Constitution."[124]

In essence, the IPRA has been challenged on the following bases:

1) The Constitution provides that minerals are owned by the state. However, the IPRA provides that ancestral domains include minerals and that the ICCs/IPs have claims of ownership by virtue of their pre-conquest rights traced since time immemorial.
2) Under the Native Title Concept, indigenous peoples' property rights can be interpreted to extend since time immemorial, and therefore property rights granted later by the government (such as mining rights) are effectively extinguished.
3) Interpreted in the extreme, the IPRA could mean that an indigenous person can file a mining application and dislodge any prior vested mining rights or applications. It is also not the state but the ICCs/IPs who have the right to enter into agreements for the development and use of the natural resources.
4) The IPRA states that in the principle of self-delineation, ancestral domain shall be identified and delineated by the ICCs/IPs themselves. The principle of self-delineation is unclearly defined, as is the definition of ancestral domain, which may mean that millions of hectares are closed to mining.
5) In the realm of mining, the main question being raised is on the proper authority to grant and manage minerals and mining rights:

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[124] *Cruz v. Secretary of Environment and Natural Resources*, G.R. No. 135385, 347 SCRA 128, 158-161 (2000). The petitioners specifically prayed for the following:

(1) A declaration that Sections 3, 5, 6, 7, 8, 52[i], 57, 58, 59, 63, 65 and 66 and other related provisions of R.A. 8371 are unconstitutional and invalid;
(2) The issuance of a writ of prohibition directing the Chairperson and Commissioners of the NCIP to cease and desist from implementing the assailed provisions of R.A. 8371 and its Implementing Rules;
(3) The issuance of a writ of prohibition directing the Secretary of the Department of Environment and Natural Resources to cease and desist from implementing Department of Environment and Natural Resources Circular No. 2, series of 1998;
(4) The issuance of a writ of prohibition directing the Secretary of Budget and Management to cease and desist from disbursing public funds for the implementation of the assailed provisions of R.A. 8371; and
(5) The issuance of a writ of mandamus commanding the Secretary of Environment and Natural Resources to comply with his duty of carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization and conservation of Philippine natural resources.

> the Department of Environment and Natural Resources or the National Council on Indigenous Peoples.[125]

Although the petition was eventually dismissed[126], as the votes in the Court sitting *en banc* were equally divided and failed to meet the necessary majority needed even despite re-deliberation[127], the case elicited a re-examination of *jura regalia* and native title[128], and forced legal minds and lay men alike to contemplate what actual changes – if any – the IPRA brought to bear on ancestral domain rights.

The petitioners in *Cruz* would never have filed the petition in the first place had they understood from the start what it meant to belong to indigenous cultural communities, and appreciated the concept of native title that the latter were fighting for, as all the rights ensuing from IPRA merely ensure their continued existence as a people.

As already discussed, even before IPRA, indigenous communities already possessed many rights under both international and Philippine laws. These laws affirmed the *sui generis* nature of indigenous property rights: that these are not beholden to any western understanding of ownership, but exist as a matter of fact and not of any conscious choice of indigenous peoples – their intimate, holistic as well as communal connection with the land for centuries is something that defines them, and should hardly be a cause for their persecution.[129] Thus, "in light of the acknowledged centrality of lands and resources to indigenous cultures and economies, the requirement to provide meaningful redress for indigenous land

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[125] MINING MINERALS, *supra* note 17, at 7-20. *See also supra* note 29, and *Cruz vs. Secretary of Environment and Natural Resources*, G.R. No. 135385 December 6, 2000.

[126] Worth noting is the different treatment of the State to separate pending petitions – one questioning the validity of the Mining Act, another questioning the validity of the IPRA. Despite the constitutional presumption afforded our laws, the government chose to suspend the implementation of the IPRA for two years. This is in stark contrast with its handling of the Mining Act which it continues to implement despite the petition challenging its validity which remains pending in the Supreme Court to date.

[127] *Id.* Seven (7) justices voted to dismiss the petition, and these were Justices Kapunan, Belosillo, Quisumbing, Santiago, Puno, Mendoza and the Chief Justice. Seven (7) justices voted to grant the petition, and these were Justices Panganiban, Vitug, Melo, Pardo, Buena, Gonzaga-Reyes, and De Leon. Accordingly, pursuant to Rule 56, Section 7 of the Rules of Civil Procedure, the petition was dismissed.

[128] It has been said "that most lawyers and law students have never even heard of native title." *Supra* note 28, at 3.

[129] Modern notions of cultural integrity and self-determination join property precepts in the affirmation of *sui generis* indigenous land and resource rights. The ILO Convention No. 169, Section 13, frames indigenous land rights in this manner:

> In applying the provisions of this Part of the Convention, governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

See JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 104-107 (1996).

claims implies an obligation on the part of states to provide remedies that include for indigenous peoples the option of regaining lands and access to natural resources."[130]

The Mining Act, contrary to the view that it further diluted rights to ancestral domains, actually bolstered indigenous property rights via Section 16. There has never really been any legal barrier to its implementation other than the desire of some to stick to a limited interpretation of its provisions on prior informed consent and recognition of native title. What other reason could there have been for alluding to the possession, occupation, and utilization of lands "in accordance with their customs and traditions since time immemorial" but to refer clearly to native title?[131] And the legislature would not have included Section 16 requiring the prior consent of indigenous cultural communities before entry into ancestral land if it had not intended for such assent to be in the concept of owner.

Most important, despite the wording of Article XII, Section 2 of the Constitution which states that "Congress *may* provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain,"[132] this is not to say that a subsequent law like the IPRA had to be passed to vest ownership on indigenous peoples over their ancestral lands and domains.

This leads to no other conclusion than that indigenous peoples could already assert their rights to their ancestral domains and the mineral resources found therein relying solely on the spare but meaningful provision in the Mining Act on prior consent even prior to the passage of IPRA. The later law simply enshrines with bold and undaunted finality vested rights held since time immemorial.[133]

V. FREE PRIOR AND INFORMED CONSENT PROCESS

Historically, governments have formulated mining development policies while steering clear of indigenous communities, and mining companies have always preferred to negotiate directly with central government about royalties and taxes. Practical experience has demonstrated, however, that there are benefits to be had in consulting with the IPs, not the least of which is gaining their genuine support for the mining endeavor. It goes without saying that such consultation must be an effort in good faith to take the community's concerns into consideration as opposed to one

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[130] *Id.*,at 106-107.

[131] Rep. Act No. 7942, sec. 3 (a).

[132] CONST. art. XII, sec. 5, par. 2.

[133] Recently, the NCIP approved about 600 Certificates of Ancestral Land or Domain Titles (CALTs and CADTs) for an initial 6,158 hectares in Baguio, Davao, Palawan and Zambales – the first to be processed since the constitutionality of the IPRA was challenged before the Supreme Court. *See* GATMAYTAN, *supra* note 55.

that is merely perfunctory and pro forma. As expressed in a comprehensive report on mining and sustainable development

> In the context of sustainable development, the key points about community participation in decision-making are that it recognizes the rights of communities to representation and engagement in processes that affect them, and that *it bases the interaction between the mining project and the community on the values, goals and aspirations of the community affected.* The project is best cast in terms of whether it will help or hinder the realization of these aspirations. *For example, the community may be less concerned with traditional measures of benefits such as income and employment and more concerned with social well-being, self-determination, and the impact of mining on cultural values and local institutions.* An absence of community decision-making is likely to result in ineffective or inappropriate arrangements for the distribution of benefits and the mitigation of costs, and a lack of systems or institutions able to ensure that benefits can be sustained after mining ceases. [134](emphasis supplied)

The process of obtaining the free, prior and informed consent (FPIC) of indigenous peoples in a meaningful way, concededly, is fraught with difficulties. There are four main problem areas, namely:

1) objections of national governments to direct consultation between mining companies and communities;
2) ill-defined processes for responding to the specific needs of indigenous groups and providing information on a time scale and in a form that is amenable to traditional processes of debate, decision-making, and negotiation;
3) uncertainty by industry as to appropriate behavior with respect to indigenous communities in areas of unsettled land claims and the definition of approaches that contribute to the just, expeditious, and effective settlement of land use disputes (such as using local intermediaries who may lack sympathy for indigenous concerns and understanding of emerging global norms); and
4) the lack of clear visions and structures recognizing the obligations of mine owners to indigenous peoples, of business incentives needed to provide more equitable treatment of indigenous communities as a norm in overseas operations, and of indigenous community capacity to negotiate and understand the risks, costs, and benefits of mining.[135]

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[134] MINING MINERALS, *supra* note 17, at 9-39-40.
[135] *Id.*, at 7-22.

But the fact is unchallenged: no matter how vulnerable a mining company makes itself to the wisdom (or caprice) of indigenous stakeholders, the amount of control yielded to the indigenous community is directly proportionate to the sense of ownership, involvement, and maybe even magnanimity the latter will feel towards the development project. In other words, "(if) the indigenous or aboriginal organization has clear control over its land, a legal right to at least some share of the revenues from the mineral endowment, and a right to say no or to negotiate the terms and conditions under which mining will occur from a position of power, it may decide that mining can proceed. Where their control over their land is challenged, they are denied a decision-making role, and they get no share of any revenues, the result is likely to be fairly predictable – and quite negative to proposals for mining."[136]

A. VETO POWER

The IPRA essentially complements the FPIC provision of the Mining Act by requiring a Certification Precondition issued by the NCIP previous to the commencement of any mining project.[137] Such Certification Precondition is an attestation by the said office that the area proposed to be mined is outside of an ancestral domain, and shall only issue upon the free and prior informed and *written* consent of the ICCs/IPs concerned; and should said area be within an ancestral domain, it shall be subject to all the vested rights of the indigenous communities therein *and* shall also require their free prior and informed consent.[138] Further, "that no department, government agency or government-owned or –controlled corporation may issue new concession, license, lease, or production sharing agreement while there is a pending application for a CADT."[139] And finally – and appropriately – "the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process."[140] The ultimate part of Section 59 of the IPRA, therefore, is the basis for the veto power accorded indigenous peoples should they reserve their consent in Section 16 of the Mining Act. Such right to exclude an area from mining is consistent with the consequences of "non-consent" and the concurrent right of an owner to reserve the enjoyment of his property for himself.

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[136] *Id.*, at 7-23.

[137] Rep. Act No. 8371, sec. 59.

[138] *Id. See also* Chapter III, Sections 4, 5, 6, 7, 8, and 11; Chapter IV, Sections 16 and 17; and Chapter V, Section 29.

[139] *Id.*, at Section 59. *See also* Sections 3 (c), 11 and 52.

[140] *Id.*, at Section 59.

The companion provisions on FPIC in the implementing rules of IPRA serve to further explain how such is obtained. First, the rules confirm again that free and prior informed consent gives IPs the "right to accept or reject a certain development intervention in their particular communities"[141], and that, within their communities, they may "determine for themselves policies, development programs, projects and plans to meet their identified priority needs and concerns."[142] What is more, the provisions on FPIC were made generally applicable to all the provisions of the IPRA "as an instrument of empowerment, (enabling) IPs to exercise their right to self-determination."[143]

The procedure and requirements for securing ICCs/IPs prior consent has six basic components: 1) the consensus building process particular to each indigenous cultural community shall be followed in obtaining consent; 2) information about the proposed extractive development activity must be disseminated to all members of the concerned indigenous community; 3) assessment of the concerns or issues by appropriate assemblies in accordance with customs and traditions, and discernment and initial decision by the recognized council of elders; and 4) affirmation of the decision of the Elders by all the members of the community. The NCIP is required to witness, assist in, and document each step of this FPIC process.[144] The requirement of notice and due process must also be observed, as exemplified by the requirement that the abovementioned proceedings be conducted in the language understood by the community.

The project proponent, in addition, shall commit itself to: nothing less than a full disclosure of relevant information upon which the consent can be knowledgeably based; submission of an environmental and socio-cultural impact assessment detailing all the possible ecological, economic, social and cultural repercussions the project may have on the indigenous community, and how these impacts may be avoided; and, the posting of a surety bond with the NCIP that is equivalent to a percentage of its investments to answer for any damages the ICCs/IPs may suffer due to the mining activity. It is also the project proponent who underwrites all the expenses incurred in obtaining the FPIC.[145] All these agreements integral to the process of obtaining free prior and informed consent are ultimately embodied in a Memorandum of Agreement to be executed by and between the

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[141] NCIP Adm. O. No. 1 (1998), rule IV, part III, sec. 3.
[142] *Id.*
[143] *Id.*, at rule IV, part III, secs. 1 and 2.
[144] *Id.*, at sec. 5.
[145] *Id.*, at sec. 6.

proponent, host ICC/IP community and the NCIP, inclusive of penalties for non-compliance and or violation of its terms and conditions.[146]

B. PROBLEMS AND NCIP ADMINISTRATIVE ORDERS

Despite the undeniable aim of the IPRA and a host of laws and jurisprudence to accord indigenous peoples their just rights to their ancestral domains, still there are ways to honor the IPRA more in its breach than in its observance.

Pursuant to the mandate of the NCIP to facilitate the FPIC process and the issuances of Certification Precondition in connection with applications for lease, permit, license and other forms of concession in ancestral domains, and in deference to an earlier administrative order, supplemental guidelines were promulgated in the form of NCIP Administrative Order No. 03 (thereafter Order) which was adopted on October 13, 1998.[147] This Order contained the following onerous (and disastrous) provision:

> Section 3. Recognition of Existing/Vested Rights and Pending Applications for Lease, Permit, License, Contract and Other Forms of Concessions –
>
> a.) All leases, permits, licenses, contracts and other forms of concession within Ancestral Domains already existing and/or vested upon the effectivity of NCIP Administrative Order No. 1, Series of 1998 *shall be recognized and respected.*
>
> As such, the concerned lessees/permittees/licensees/contractors/concessionaires *are not covered by the provisions of the (Indigenous Peoples' Rights) Act on FPIC and NCIP Certification Precondition.*[148](emphasis supplied)

As if that were not enough, like a nail pounded on the cause of ancestral domain rights,

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[146] *Id.*, at sec. 8. Interestingly, Section 26 of NCIP Administrative Order No. 3 (2002) also provides that "any person/party who willfully violates or fails to comply with his duty or obligation under the provisions of the MOA may be proceeded in accordance with the customary laws and practices of the host or concerned ICC/IPs and sanctions may be imposed in accordance therewith, provided it is not cruel and humanly degrading. xxx "

[147] NCIP Adm. O. No. 03 (1999), *reprinted in* 10 National Administrative Register 276 (January-March, 1999). The filing date of this Order with the National Administrative Register is January 06, 1999.

[148] *Id.*, at sec. 3 (a).

> c. Any formal written agreement and/or ICCs/IPs resolution issued by the concerned ICCs/IPs prior to the effectivity of NCIP Administrative Order No. 1, Series of 1998, *shall be deemed as consent.*[149](emphasis supplied)

Thus did these two seemingly insignificant provisos practically foreclose any chance of setting aright any irregularities inflicted on indigenous peoples in the process of obtaining their free and prior informed consent in the past! Even the subsequent issuance of another administrative order[150] did little to correct the mistake.[151]

Nonetheless, it is suggested that, the IPRA itself being a social justice legislation, and pursuant to the principle in law that mere implementing rules can never go higher than its source, the foregoing administrative orders must not, indeed cannot, defeat the very purposes for which the IPRA was written.

C. RIO TUBA CASE STUDY

Unfortunately, despite all the safety nets in place to guarantee compliance, neither does Section 59 of the IPRA hinder opportunistic mining companies from obtaining the necessary government permits without undergoing the FPIC process. Recently, in direct violation of the law, the Rio Tuba Nickel Mining Corporation (RTNMC for brevity) was able to obtain an Environmental Compliance Certificate (ECC), a document that is needed prior to the commencement of any mining activity, from the DENR sans the requisite consultations with the indigenous peoples concerned. This Filipino-Japanese mining concern has been engaged in surface strip-mining for nickel silicate ore in Barangay Rio Tuba, Bataraza, Palawan, since 1967; since then an estimated 500 families living near the area have been affected with health problems and siltation of their fields. RTNMC was able to obtain the ECC in August 2002 for its planned Hydrometallurgical Processing Plant (HPP) – leading to worries that the ensuing limestone quarrying would further poison the water source of more than 30 families of the Palawan indigenous community who have long occupied the land forming part of the quarry site.[152]

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[149] *Id.*, at sec. 3 (c).

[150] NCIP Adm. O. No. 3 (Series of 2002).

[151] *Id.*, at sec. 36, which states that "this (sic) guidelines shall apply to all *pending* applications for issuance of Certification Precondition and Issuance of Certificate of Free, prior and Informed Consent by the IP/ICC," thus excluding all such certifications already issued. While the later administrative order fleshed out even more, and made stricter, the requirements to obtaining free and prior informed consent, these measures prove helpless against the uncompromising wording of the earlier administrative order.

[152] Environmental Legal Assistance Center, Inc., A Position Paper on the Rio Tuba Nickel Mining Corproration's Hydrometallurgical Processing Plant Project (undated; unpublished manuscript, on file with the author). The proposed HPP project violates the the requirements of the following laws – among many others – on social acceptability and free prior and informed consent: Indigenous People's Rights Act (Republic Act

Not only was the NCIP, the primary government agency responsible for the implementation of the FPIC process and the IPRA, palpably absent in the meeting called to sign the petition in favor of the HPP project – attendees from the indigenous community were even made to sign attendance sheets that were later passed off as their "free prior and informed consent" to RTNMC's proposal.[153] The indigenous leaders sadly narrate in their letter to DENR Secretary Heherson Alvarez (who was the incumbent official then):

> Nais din po naming pabulaanan na kami ay nag-indorso sa proyektong nabanggit dahil marami sa amin na pumirma sa akalang ito ay isang attendance lamang ngunit kami ay nalulungkot ng napabalitang kami raw ay pumapayag na. (We also want to clarify that we did not really endorse the project as many of us who signed it thought it was an attendance sheet, and are saddened when we heard news saying we had already agreed.)[154]

Instead of immediately moving for the cancellation of the ECC, however, the NCIP to date is assisting RTNMC by conducting the FPIC process albeit belatedly – as if wanting to turn back the hands of time to amend a mistake.[155] The trouble is this is not how the law works: consent must clearly come at the onset of a project, not at its end. The FPIC process is not some rubber eraser that a mining company can conveniently whip out – for then nothing would stop firms like RTNMC from backtracking on its obligation to consult each and every time,[156] making a mockery of the law and defeating it.

No. 8371), Philippine Mining Act (RA 7942), Philippine Environmental Impact Statement (EIS) System and its guidelines (PD 1586, and DENR Department Administrative Order 96-37). *See also* Flier entitled "Pala'wan Tribes Oppose Nickel Mining in Southern Palawan" from Task Force 63, a Special Task Force created by Memorandum Order No. 63 (August 15, 2002) of Malacanang which "(provides) for the creation of a special task force to address the emergency situations adversely affecting the indigenous peoples." (copy on file with author)

[153] *Id.*

[154] Letter from *"Mga Katutubong Palaweno sa Sitio Kulantud, Bgy. Iwahig, Bataraza"*, to Honorable Heherson Alvarez (DENR Secretary) (August 18, 2002) (on file with author). *See also* Resolusyon No. 3 of the Barangay Council Meeting held at Barangay Iwahig, Bataraza, September 30, 2002, entitled *"Resolusyong Bawiin ng Department of Environment and Natural Resources (DENR) ang Kanilang Ipinagkaloob na Environmental Compliance Certificate (ECC) sa RTNMC (Rio Tuba Nickel Mining Corporation) para sa Hydrometallurgical Processing Plant (HPP) Upang Tutulan ang Operasyon Nito sa Barangay Rio Tuba, Bataraza, Palawan* (copy on file with the author).

[155] Ironically, according to Director Ulysses Brito, NCIP Director for Region 4, the recent FPIC process they started with RTNMC was a first for them. *See* E-mail from Environmental Legal Assistance Center, Inc. (ELAC) Area Coordinator for Palawan, Atty. Grizelda "Gerthie" Mayo-Anda, to the author, a senior law student at the University of the Philippines College of Law (February 1, 2003) (copy on file with the author).

[156] *Id.* Quoting from Atty. Mayo-Anda's e-mail:

> From ELAC's perspective, RTNMC was pressured to conduct the FPIC process after NGOs (in) Palawan with Pos (peoples' organizations) and community leaders from Bataraza

Finally, it is of no help that then DENR Secretary Alvarez thinks that securing an FPIC is "premature" in this case[157] as "no Ancestral Domains application has been filed with the DENR": with respectful apologies to the honorable secretary, petitions for CADTs, or Certificates of Ancestral Domain Title under IPRA[158], are now lodged with the NCIP, and not with the DENR as he opines.[159] Also, under the IPRA, the absence of a legal instrument or CADT delineating the ancestral domain is no excuse for not going through the FPIC process.[160] In any event, as already explained, RTNMC cannot now obtain the FPIC of the indigenous community concerned lest it railroad the process.

The free and prior informed consent process is continually being refined by practice and history, always taking into account that it exists for the benefit of indigenous peoples. Ultimately, the only stumbling block that exists is the political will to follow to the letter – and spirit – its provisions.

VI. RECOMMENDATIONS

The key to ensuring an effective, efficient, and genuine FPIC process is the involvement in decision-making of indigenous cultural communities on issues that affect them, and the certainty that their powers and rights are respected by the international community, mining companies and both central and local government.

The following recommendations are presented to strengthen the FPIC process and the personality of indigenous peoples on various fronts:

1. Establishment of an international body and a Mining Ombudsman

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participated in a Senate Inquiry last December 13 (before Senator Jaworski), and highlighted the fact that the company was issued an ECC despite the absence of a(n) (FPIC) ...

[157] Letter from the Honorable Secretary Heherson Alvarez, Department of Environment and Natural Resources, to Most Reverend Bishop Dinualdo Guttierez, D.D., Chairman of the CBCP Episcopal Commission on Social Action, Justice and Peace (August 29, 2002) (copy on file with the author).

[158] Rep. Act No. 8371, chap. VIII.

[159] Letter from the Honorable Secretary Heherson Alvarez, Department of Environment and Natural Resources, to Atty. Grizelda Mayo-Anda, Area Coordinator for Palawan of ELAC (October 8, 2002) (copy on file with the author). *See also* Rep. Act No. 8371, sec. 52 and DENR Adm. O. No. 2 (1993).

[160] ICCs/IPs are given the *option* to apply for a CADT or CALT that merely operates to *formally* recognize their rights over their lands – in no manner did the IPRA intend for this to be a condition sine qua non to the validity of their claim over these areas on the principle of native title. *See* Rep. Act No. 8372, Sections 3 (c) and (d), and 11. *See also* NCIP Adm. O. No. 3 (2002), Part II.

At a session attended solely by indigenous peoples – during the consultation phase of a report on sustainable mining global in scope – participants recommended that an international regionally representative indigenous peoples body, that may be run exclusively by, and for ICCs/IPs, be established to police mining stakeholders. Such international organization shall, among other responsibilities, participate in a standard-setting process to govern the mining industry at all levels, and assess corporate and project performance with respect to the treatment of and negotiation with indigenous communities everywhere. In addition, it will provide conflict and dispute resolution mechanisms that shall bind ICCs/IPs, the mining industry and its members, and states alike.[161]

A mining ombudsman may also be appointed by such international body. His duties shall include assisting and educating indigenous communities in developing countries where basic human rights are being threatened by the actions of mining companies. In such cases, he may or may not mediate the negotiation process leading to a resolution. This example of third-party intervention has already been tried and tested abroad by the Oxfam Community Aid Abroad Mining Ombudsman. Established in February 2002, it raises the perceived violations of ICC/IP rights by Australian-based mining companies in operations abroad directly with the companies concerned in Australia.[162]

It must also be stressed in this regard that, regardless of the attitude of the government towards indigenous property rights, to ensure the cooperation of the indigenous community concerned in the long term, mining companies should always treat ICCs/IPs as if consent were required.

The appearance of an international representative body of indigenous cultural communities, as well as a mining ombudsman, are but natural developments in an international community that continues to foster increased respect for indigenous peoples' rights.

2. Fine-tuning the FPIC Process and Inclusion of a Social Impact Assessment System

While there is really no way of by-passing the traditional and generally time consuming means of consensus-building practiced by ICCs in arriving at free and prior informed consent, there are ways to make it simpler, speedier, and time bound.

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[161] MINING MINERALS, *supra* note 17, at 7-23 and 9-40-41.

[162] The Ombudsman receives complaints from a network of contacts abroad that includes IPs and landowners. Upon receipt of a complaint from any of its contacts in Asia, the Pacific, Africa and Latin America, the Mining Ombudsman commences on-site investigations which he then transmits to the mining company concerned for initial action. *See id.*, at 9-31.

One way is by forming local consultative bodies at the proposed mining area partially composed of IPs and other stakeholders, generating media attention, and holding public fora, to disseminate information about the project as widely as possible, and to gather opinions and suggestions. This way the management plan of the mining activity, if accepted by the community, will more closely adhere to the expectations of all involved.[163]

Second, a closer examination of the present NCIP Administrative Order No. 3[164] is in order. Section 31 of the order prohibits any of the following acts or omissions as prejudicial to the interest of the IP community in the attainment of their consent or as an act in circumvention of the intent of the law in requiring their free, prior and informed consent:

> a.) By the applicant
>
> 1. Employment or use of force, threat, coercion, intimidation, at any degree or in any manner, including those done by individuals or group of persons acting for the applicant;
> 2. Bringing of firearm/s in the community during visits by the applicant or group of persons acting for the applicant. When needed, armed security shall be obtained from local police authorities or the AFP as requested by NCIP;
> 3. Bribery or promise of money, privilege, benefit or reward other than what is presented by the applicant/proponent during the preliminary consultative meeting with the Council of Elders;
> 4. Clandestine or surreptitious negotiations with IP individuals or members of the community concerned done without the knowledge of the council of leaders or elders;
> 5. Delivery to the community or to any of its members of donations of any kind; xxx[165]

Section 34 of the same NCIP order likewise provides that "the petition for non-issuance of the certificate precondition can be given due course only when the same is raised on the ground of commission of any of the prohibited acts as declared (in Section 31) *or on ground of irregularity in the procedure as provided in these guidelines that substantially affects the interest of the parties involved.*"[166] Any of the same acts or omissions

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[163] For a lengthy discussion on community mapping processes, principles and local experiences, which by analogy can also be applied in obtaining the prior consent of ICCs/IPs in mining, *see also* DAVE DE VERA, SARAGPUNTA AND PAFID, (December 2002) (copy on file with author).

[164] NCIP Adm. O. No. 3 (Series of 2002).

[165] *Id.*, at sec. 31 (a). *See also* sec. 31(b), (c), (d), and sec. 32.

[166] *Id.*, at sec. 34.

shall constitute sufficient ground for the revocation of the certificate precondition if already issued.[167]

Another paragraph should be added under Section 31 (a) providing that "knowingly misleading or misdeclaring facts, or providing incomplete information leading to the issuance of an FPIC shall constitute ground for the *permanent* cancellation of the certification precondition and/or the certificate of FPIC." This new proviso will ensure that all consultations had between the mining company and the indigenous community will be done in good faith.

Lastly, "social impact assessment (SIA) is currently the most widely appreciated tool used to address the impact and mitigation of social issues associated with mine development."[168] In essence is it an on-going dialogue with the ICCs/IPs in a given project that integrates knowledge of potential social consequences into the mining company's decisions. Despite the possible bias in favor of mining firms who initiate the SIA, and the absence of a widely recognized standard that is well known, and consistently used, the SIA in theory is the best means to safeguarding the interests of indigenous communities. The adoption of a social impact and assessment system in the Philippines introduces the dimension of social cost into the management plan of every mining endeavor.[169]

3. Education of IPs, Increased Participation in Local Government, and Accomodation of IP Judicial Systems

As one author has commented, illiteracy is the central obstacle to any policy of integration of indigenous communities in the long run.[170] While recognition of ancestral property rights and the integration of indigenous peoples' into the mainstream are not mutually exclusive – nor is the latter preferred – it is admitted that

> (it) is through education, especially elementary education, that indigenous peoples will be able to understand and eventually adapt to or change the rules of a system into which history has thrown them. An ability to master the language and principles of the political, judicial, and administrative mechanisms of the wider social machinery is a precondition of their active participation in the local and supralocal government system and of the defense of their rights.[171]

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[167] *Id.*, at sec. 32 (a).
[168] MINING MINERALS, *supra* note 17, at 9-42.
[169] *Id.*, at 9-42-44.
[170] *Supra* note 9, at 353.
[171] *Id.*

An increased participation in local government by IPs, and exploitation of the avenues afforded for their participation in the management of resources, is advisable. The Local Government Code[172] made provisions for tribal barangays in Section 386 (a): it said that "to enhance the delivery of basic services in the indigenous cultural communities, barangays may be created in such communities *by an Act of Congress*."[173] As the IPRA came six years after the Local Government Code, the "Act of Congress" requirement could be well taken as sufficiently met.[174]

An increased respect for the decisions of modern tribal courts is also highly encouraged. It is most unfortunate that the Philippine judiciary gives little weight to the rulings of tribal courts, judging them to be below the "sophistication" expected of tribunals. On the other hand, abroad "the legal interpretations and understandings of indigenous peoples' property rights, found in the growing corpus of published judicial opinions by these modern tribal courts, consistently emphasize the *sui generis* nature of the traditional land and resource use patterns that constitute forms of property in particular indigenous communities."[175] A becoming deference to the rulings of our own tribal courts would be a step in the direction of further protecting ancestral domains.

4. Budget Allocation

The presence of political will is one thing, the availability of sufficient funds to implement the law quite another. As of February 12, 2003, the NCIP has only been allotted 386 million pesos by the Department of Budget and Management (thereafter DBM), or only about a quarter of the budget it direly needs, to fulfill its mandate. The DBM reasons that this is all it can afford to release to the NCIP. Commissioner Lagtum Pasag of the NCIP laments the situation saying that a big chunk of the denied funds would have gone towards the delineation activities of the NCIP, as well as needed travel allowances for its staff.[176]

As proof of its commitment to recognize and promote the rights of indigenous cultural communities, the government should prioritize the implementation of the laws that realize the same by making the necessary

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[172] Rep. Act No. 7160 (1991).

[173] Tribal barangays need not satisfy the minimum 2,000 population requirement provided by law. *See id.*, at sec. 386 (a), par. 1.

[174] *Supra* note 32, at 40. *See also* NCIP Adm. O. No. 3 (2002), sec. 4 (i).

[175] More than 150 indigenous judicial systems function in the United States today. These tribal courts apply and develop "tribal law" or "customary law" in disposing of their cases, and their decisions are recognized by the American legal system as fully enforceable. *See* ANAYA, *supra* note 25.

[176] Telephone Interview with NCIP Commissioner Lagtum Pasag (February 12, 2003). Commissioner Pasag also said that he intends to lobby for an increase in the NCIP budget before the DBM towards the end of the month, and is endeavoring to provide each regional office with at least one computer and one vehicle.

appropriations. Otherwise, government bodies such as the NCIP are left without the wherewithal to proceed and are left with a toothless bit of legislation.

As international norms develop, legislation accumulates, and industry best practices continue to evolve, so too will the concept – and nature – of free prior and informed consent transform the rights of indigenous peoples into a living reality.

VII. CONCLUSION

President Gloria Macapagal-Arroyo recently made policy changes aimed at revitalizing the mining industry. In response to her initiative, Gerardo Brimo, chairman of the Chamber of Mines, remarked that nothing would come of it if the five-year old court case challenging the constitutionality of the Mining Act remains unresolved[177] as foreign investors will continue to shun the country. Brimo also called attention to the problems the industry faces with the IPRA, particularly the provision on prior consent, and urged the NCIP "to streamline the procedures for getting consent from indigenous peoples" saying that if "the process of getting consent is too tedious and makes it very difficult to obtain, then who would bother with it? ... The irony is because the rules are so tight you won't be able to get consent and the IPs are deprived of a choice and they lose out."[178]

It is another case of missing the forest for the trees. While Brimo makes a point, he already deprives the IPs of a real choice by tweaking at the rules that call for the use of indigenous consensus-building processes. Perhaps the solution lies in undertaking the FPIC process with the goal of engaging the community in a *real* consultation – not one that, from the onset, has its eye on bagging the prize.[179]

> [T]he Constitutional recognition of ancestral territory rights, and the jurisprudence, laws and administrative regulations promulgated pursuant to that recognition, do not create or establish these rights. These legal instruments only affirm its existence within

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[177] *La Bugal-B'laan Tribal Association, Inc., et al. v. Victor Ramos, et al.*, Petition For Prohibition, Mandamus with Prayer for Temporary Restraining Order (February 7, 1997).

[178] CATHY ROSE A. GARCIA, *High Court Ruling On Mining Act Crucial to Government Plans*, BUSINESS WORLD, January 30, 2003.

[179] The Philippine mining industry is being buffeted and faces its strongest challenge to date. The Dapitan Initiative, launched at the historic Jose Rizal Shrine of Dapitan City on October 11, 2002, aims at raising public awareness on the burgeoning issue of mining, and towards harnessing public participation in calling for the scrapping of the Mining Act. Attended by an initial set of 24 lead advocates from various sectors – the academe, church, legal profession, women, business, entertainment, among others – the Dapitan Initiative, whose principles are embodied in the Dapitan Declaration, is now envisioned to play a catalyst role for the growth of a mass-based movement of advocates carrying the mounting people's call against an unjust mining regime. *See* THE DAPITAN INITIATIVE (SPECIAL ISSUE ON MINING), 5 TAN-AWAN 3 (2002) (also available at www.lrcksk.org).

> the legal and political system of the Philippines, and commit the State to the duty of respecting and strengthening them.[180]

The passage of the Mining Act with its section on free prior and informed consent, and the IPRA, only echo the marked determination of indigenous peoples and our legislators to secure indigenous property rights with resounding finality.

The resources of the earth and our indigenous peoples are a shared heritage. The sooner Filipinos learn to appreciate and defend indigenous cultures and rights to their ancestral domains, the more wealth the country saves for future generations.

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[180] *Supra* note 31, at 37.