

# The Indigenous Peoples' Right to Self-Governance and Empowerment

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## ABSTRACT

The indigenous peoples' (IPs) right to self-governance and empowerment has been promoted by the National Commission on Indigenous Peoples (NCIP) through, primarily, the implementation of the principle of Free and Prior Informed Consent (FPIC) and the creation of programs to integrate indigenous peoples and their traditional structures into existing mainstream political institutions. While government reports claim that no complaint against FPIC implementation exists, various case studies and newspaper accounts have documented serious problems and flaws related to the FPIC process as it has been conducted in indigenous communities all over the Philippines. However, the other NCIP programs for IP self-governance and empowerment such as the mandatory IP Representation, creation of Tribal Barangays, certification of Tribal Membership, and institution of IP Consultative Body have been generally well-received by indigenous peoples. This essay examines NCIP's key programs in the promotion of the IPs' right to self-governance and empowerment, with primary focus on the various issues in FPIC implementation. Using both primary and secondary materials, the essay also presents the NCIP's operational definition of IP self-governance and empowerment through its stated programs and policies vis-à-vis a critical discourse on what, in principle, it ought to be.

*Keywords:* Indigenous Peoples' Rights Act, self-determination, informed consent, indigenous peoples, IP empowerment, self-governance, political participation, NCIP.

## Introduction

The Philippine state guarantees the right of indigenous peoples (IPs) to self-governance and empowerment as stipulated in Chapter IV Sections 13 to 20 of Republic Act 8371, otherwise known as the Indigenous Peoples' Rights Act (IPRA), enacted in 1997. At the core of the IPs' right to self-governance and empowerment is the right to participate

in the decision-making processes that would have direct impact on their economic, socio-political, and cultural lives. This right is further embodied in the principle of Free and Prior Informed Consent (FPIC) which is supposed to guarantee the IPs' right to 'manage, develop and use' the resources within their ancestral lands and domains. The FPIC is thus an instrument that ensures the indigenous peoples' active role in determining their own future as it gives them the right to accept or reject projects, programs, and activities conducted within their ancestral domains. As a policy instrument, it also signals to all that "indigenous peoples have rights and interests that will be protected in the development process" (Cariño 2005, 25). As such, the FPIC process is regarded as a primary tool for self-determination and a duty the state owes to its indigenous peoples (Anaya 2005, 7).

The principle of FPIC is also found in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), recognized as a 'standard of achievement' that must be pursued as affirmation of the importance of indigenous peoples as partners in sustainable and equitable development. But even as the legal framework for recognizing and promoting FPIC is already in place both internationally and domestically (Anaya 2005; MacKay 2004a; MacKay 2004b; Tamang 2005), its implementation remains a subject of dispute and criticism from IP scholars, advocates, academics, and the indigenous peoples themselves. For instance, the studies conducted by Sanz (2007) on the Subanons of Canatuan, Batani et al. (n.d.) on Kayapa, Bakun, Fernando and Amul (in Lusterio-Rico et al. 2009) on the Mangyans of Mindoro, and Tebtebba Foundation (n.d.) on the Palaw'ans of Bataraza documented violations of the FPIC process which led to the failure of the indigenous peoples to secure their right to self-determination.

These studies all concluded with tales of IPs' disappointment, frustration, and even rage about the failure of the FPIC process to genuinely protect and promote their rights which are guaranteed under the IPRA. In particular, these studies mainly highlight the violations of the FPIC principle by the state itself, its agents including the Department of Environment and Natural Resources (DENR), Environmental Management Bureau (EMB), and the National Commission on Indigenous Peoples (NCIP), as well as project proponents. These case studies have also shown that the flaws and difficulties in the implementation of FPIC are predicated on the problem of how the concept is understood and operationalized. Thus, these studies have emphasized the need to examine FPIC as it has been operationalized in the FPIC Guidelines of 2006 and to clarify what in principle it should be, both in terms of its meaning and process.

Another study on FPIC by Manuel (2004) similarly examined the problems associated with the implementation of the FPIC principle.

Essentially, the study emphasized the “FPIC paradox” that stems from the disjuncture between what the FPIC provision, in principle, says and how it has been actually applied in Philippine indigenous cultural communities. This paradox is revealed primarily by the many FPIC processes in the country which apparently violated the provisions of the IPRA and its Implementing Rules and Regulations (IRR). Manuel (2004, 8) specifically cites the case of the Mangyans of Mindoro Oriental to illustrate how the FPIC process can be circumvented in order to favor the interests of a mining company. In such case, IPs’ customary laws were allegedly disregarded and no genuine consent was secured despite the fact that the IPRA and its IRR have clearly stipulated the procedures that should govern the proper implementation of the FPIC principle. The study also went further to survey the possible solutions in dealing with such a paradox. Manuel (2004, 10) posits that solutions to the “FPIC paradox” must effectively address key issues such as the government’s role in the FPIC process, sources of reliable information available to the community, and possible inclusion of non-IPs who are also affected by the proposed project in the FPIC process. She also advances the idea that procurement of FPIC must be done at all stages of the project cycle and not just at the initial stage of such a project. Finally, she reiterates that consent, like any other contracts, can also be challenged and thus can be terminated, revoked, or renegotiated at any given time.

In another assessment, the Legal Rights and Natural Resources Center (LRC-KSK/FOE-Philippines, 2007), offers legal critique on the FPIC Guidelines of 2006. In this review of the policy, the major differences between the previous guidelines (NCIP AO 3, series of 2002) and the new FPIC Guidelines of 2006 (NCIP AO 1, series of 2006) are discussed. It concludes that the “2006 Guidelines has further watered down FPIC rights of indigenous peoples or indigenous cultural communities” (LRC-KSK/FOE-Philippines 2007, 6). The Free and Prior Informed Consent Guidelines of 2006 are primarily regarded here as yet another embodiment of the failure of the government, through the NCIP, to protect and promote the rights of indigenous peoples. While the previous regulations on FPIC have been subjected to much criticism because of the “lack of understanding and appreciation of the FPIC” (LRC-KSK/FOE-Philippines 2007, 9), this new set of guidelines is considered to have fared even worse. The Legal Rights and Natural Resources Center recommends challenging the legality of the new FPIC Guidelines since these, in fact, fail to honor or follow in good faith the principle of FPIC as stipulated in the IPRA.

The essay looks at some of the key issues in relation to the implementation of the FPIC requirement, but also discusses the broader IP right to self-governance and empowerment which the

NCIP is mandated to protect and promote. The study, however, is primarily qualitative and reliant on official government documents such as NCIP annual reports and Commission on Audit (COA) reports, key informant interviews, and secondary materials, including case studies and newspaper articles. Lastly, this study puts forward some exploratory questions that can be considered in a more comprehensive evaluation of NCIP's programs on IPs' self-governance and empowerment that future research should undertake.

### **Key issues on free and prior informed consent (FPIC)**

With the enactment of IPRA in 1997, the principle of Free and Prior Informed Consent (FPIC) was legally enshrined as an integral part of IPs' right to self-determination. As defined in the IPRA, FPIC means

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. (Section 3 (g), IPRA)

To further operationalize the concept of the FPIC, a set of Guidelines was enacted in 2002 and more recently in 2006 by the NCIP Commission en banc. The revised FPIC Guidelines of 2006, however, has been subjected to considerable critique due, apparently, to its inconsistency with the spirit of the IPRA and its flawed implementation in indigenous communities. As such, a critical examination of the FPIC principle and how it has been implemented becomes of great political significance for both the NCIP and the indigenous peoples that it is mandated to serve.

#### ***Issues regarding policy implementation***

One major concern regarding the implementation of the current Guidelines on FPIC is the noticeable increase in FPIC applications for mining and mining exploration projects since 2006. The NCIP reports that of the 312 FPIC Compliance Certificates issued for the period 2004 to 2010, some 166 or 53 % concerns mining operation or exploration projects, majority of which were issued after the FPIC Guidelines were revised in 2006. Such noticeable trend corresponds with the pronouncement made by the administration of President Gloria Macapagal-Arroyo promoting mining as "the salvation of the

country's faltering economy." Corollary to this, the Supreme Court, in 2004, also reversed its own ruling on the unconstitutionality of certain provisions of the Mining Act of 1991 after a fiscal crisis was declared and the National Economic and Development Authority (NEDA) pegged the estimated worth of the country's untapped mineral wealth at \$ 840B (see Ciencia 2010). These developments alarmed indigenous peoples, scholars, and NGO workers who have repeatedly called for the review of the FPIC process given the alleged violations of the procedures for seeking consent especially for mining operations. The summary of compliance certificates and certificates of consent issued by the NCIP from 2004 to 2010 is found in the following tables, disaggregated by region and the nature of project applied for.

Region	C.Y. 2004	C.Y. 2005	C.Y. 2006	C.Y. 2007	C.Y. 2008	C.Y. 2009	C.Y. 2010	Total Per Region	Percentage
CAR	3	1	2	7	8	7	10	38	12%
I	1	0	1	4	3	5	2	16	5%
II	0	0	2	1	1	3	2	9	3%
III	0	1	3	2	9	11	10	36	12%
IV	2	3	3	4	11	15	2	40	13%
V	0	1	2	5	2	1	0	11	4%
VI/VII	0	0	1	1	2	3	0	7	2%
IX	0	0	2	1	4	2	2	11	4%
X	0	0	1	7	10	8	5	31	10%
XI	3	2	7	8	8	3	3	34	11%
XII	1	1	3	5	6	7	4	27	9%
XIII	3	1	7	8	6	10	17	52	17%
<b>TOTAL</b>	<b>13</b>	<b>10</b>	<b>34</b>	<b>53</b>	<b>70</b>	<b>75</b>	<b>57</b>	<b>312</b>	
Percentage	4%	3%	11%	17%	22%	24%	18%		100%

**Table 1.** Summary of Issued Compliance Certificate (Certificate of Compliance to FPIC Process and Certification that the Community has given its Consent). **Source:** Ancestral Domains Office, NCIP.

Region	Mining Operation/ Exploration Projects	Hydro Power Plant/Geo Thermal Projects/ Dam	Industrial Sand & Gravel/ Quarry	Forestry Related Project/Agro Industrial Project	Research/ Processing Plant/ Livelihood Project/Water System/Tourist Destination	Transmission Line Project/ Base Television Relay/Special Land Use/ Others	Exercise Of Priority Right To Natural Resources/ Community Initiated/ Solicited Projects	Total
CAR	10	17	0	4	0	3	4	38
I	6	2	3	1	1	2	1	16
II	5	1	0	3	0	0	0	9
III	15	1	0	13	2	4	1	36
IV	28	2	0	5	3	1	1	40
V	7	2	0	2	0	0	0	11
VI/VII	4	1	0	1	0	1	0	7
IX	7	1	0	1	0	1	1	11
X	9	3	0	14	0	3	2	31
XI	18	4	0	6	0	4	2	34
XII	19	0	0	4	0	2	2	27
XIII	38	2	0	5	0	2	5	52
<b>TOTAL</b>	166	36	3	59	6	23	19	312
PERCENTAGE	53%	12%	1%	19%	2%	7%	6%	100%

**Table 2.** Summary of issued Certificate of Consent (CC) by nature of the project. **Source:** Ancestral Domains Office, NCIP.

Despite ‘unofficial’ complaints raised against the FPIC process in and by various indigenous communities, the Philippine Report to the Convention on the Elimination of All Forms of Racial Discrimination (CERD) contends that

In mining areas where FPIC had been granted by the IP communities and where NCIP bestowed its Certificate of Precondition, there were no reported violations of the rights of the IPs/ICCs signifying that the FPIC process is a meaningful, effective and successful mechanism for IP rights protection and empowerment. (CERD Report 2008, 29)

Accordingly, the NCIP lists the number of FPIC Certificates it has issued as one of its major accomplishments and as an indicator of its successful effort to promote IP self-governance and empowerment. In fact, the CERD Report further states that

It should likewise be stressed that there had been no formal protest from any Indigenous Peoples Community indicating that the FPIC process was not being followed, or that Administrative Order No. 1, Series of 2002 as strengthened by Administrative Order No. 1, Series of 2006, which laid down the procedure to be followed in the FPIC process, was defective. (CERD Report 2008, 29)

The Philippine Indigenous Peoples ICERD Shadow Report (2009) paints a different picture, however, and asserts that many FPIC processes in relation to mining were flawed. The report further states that “over 70% of the mining and logging operations on their [IP] lands were being conducted without their FPIC” (PIP ICERD Shadow Report 2009, 34). This assertion is based on the 2008 national survey of the one hundred and eight (108) IP communities that comprise the majority of the Certificate of Ancestral Domain Title (CADT) holders in the country. The report also highlights the defects of the FPIC instrument, including how its process is vulnerable to either manipulation or maladministration. It becomes even more important to ask, in this light, whether the FPIC certification and the FPIC processes that IPs were compelled to undergo actually and positively contributed to the IPs’ exercise of their right to self-governance and empowerment. For while the Philippine government officially claims that the FPIC instrument is without flaw or defect, alternative reports from NGOs and the indigenous peoples themselves contend that the FPIC has actually been used against IPs and, in fact, has facilitated their disempowerment and further exploitation by interests inimical to their own.

Another pressing concern about the implementation of the Guidelines is the much contested prescriptive period for the conduct of mandatory FPIC activities (see Figure 1 for the flowchart of the process). Under the Guidelines, a regular FPIC process must not exceed fifty-five (55) days (Sec 23, AO1, S 2006) unless the elders/leaders requested for an extension in view of some desire to reconsider their decision or accept an amended proposal from the applicant (Sec 26d, AO1, S 2006). Such extension, however, may not exceed fifteen (15) days beyond the prescribed 55-day period of FPIC. A provision in the Guidelines also allows for a ‘special’ FPIC process of a shorter duration and involves consultation with elders or community leaders only. This ‘special’ FPIC process “must be undertaken and terminated within a period of twenty (20) days” (Sec 27a, AO1, S 2006). The FPIC Guidelines of 2006 was thereby heavily criticized for allegedly promoting the disempowerment of indigenous peoples in instituting periods for processing FPIC that are both prescriptive and highly ‘restrictive’.

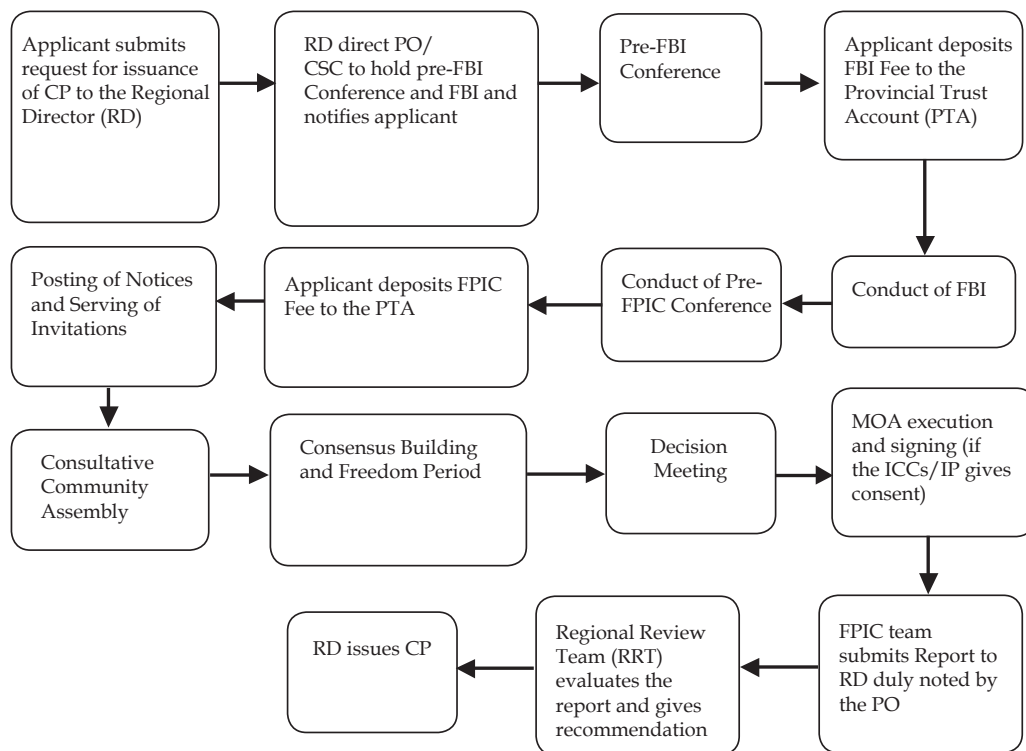
The shortened FPIC process, for instance, is said to undermine the principle of informed consent since it cannot ensure thorough discussion of any proposed project among the indigenous peoples concerned. This, arguably, makes it more difficult for the IPs to exercise their right to FPIC while making it easier for the project proponents to comply with the technical requirements for securing consent, usually at the expense of IPs’ active and informed participation in the process. The regular 55-day period, on the other hand, is also

deemed insufficient by IP rights advocates and the IPs themselves in facilitating genuinely free, prior, and informed consent, especially in relation to applications for large scale and extractive projects. Critics of the Guidelines argue that the prescribed 55 days will not provide indigenous peoples the opportunity to fully know about and properly participate in the following FPIC mandatory activities:

- a. Posting of Notices and Serving of Invitations regarding the conduct of a Consultative Community Assembly (CCA).
- b. Consultative Community Assembly where elders/leaders and other members of the concerned community are gathered to listen to the presentation of the project proposal by the applicant. The community members are also given the opportunity to ask questions, clarify issues and make known to the applicant the decision-making process adhered to or practiced by the community.
- c. Consensus-Building and Freedom Period which is the process of consultation among the community members, led by their elders/leaders, towards arriving at a consensus.
- d. Decision Meeting which is the venue for the elders/leaders to convey the community's decision to the applicant. This can also serve as the venue for decision-making in case community practice requires the participation of the majority members of the community. (Sec 26, AO1, S 2006)

Given the critical importance of all these mandatory activities and the insufficient time allotted for them, critics of the Guidelines including indigenous peoples' organizations in Baguio (Manuel 2004, 9) and the LRC-KSK/FOE-Philippines, have clamored for the suspension, if not removal, of the period prescription for FPIC. The Philippine Indigenous Peoples ICERD Shadow Report (2008) also recommends the same measure since such timeframe prescription is said to be 'discriminatory' as it places the interest of the mining company above that of the IPs. The prescription is also regarded as "incompatible with traditional decision-making processes, where the participation of all members of the community is normal and can entail long iterative discussions to reach a consensus opinion" (PIP ICERD Shadow Report 2009, 36). The report generally recommends that a new set of FPIC implementing rules and regulations be developed to make it more consistent with the spirit of the IPRA and more responsive to the diverse customary laws and practices of the indigenous peoples (PIP ICERD Shadow Report 2009, 94).





**Figure 1.** Process in the issuance of FPIC certificate (NCIP AO No. 1, S. 2006).

In relation to the conduct of FPIC mandatory activities, issues have also been raised with regard to the role of NCIP in the entire FPIC process. Unofficial reports and complaints from NGOs and IP communities centering on how the project proponent “manufactures” consent in collusion with NCIP personnel have been prevalent in recent years (see Manuel 2004; Tebtebba, FPIC in Bataraza). This led many to question the proper role of NCIP in the FPIC process. Should NCIP act as an interested party or a neutral arbiter? Should it mediate or negotiate on behalf of the IPs or should it simply facilitate the FPIC process? It does not help matters that the NCIP itself does not have a common understanding of its role in such a process. While there are those who argue that NCIP’s foremost mandate is to protect and promote IP rights, which presupposes bias in favor of IPs, there are also those who claim that as a state agency, NCIP should exercise neutrality in processing FPIC and in facilitating dialogues between the IPs and project proponents. This principle of NCIP’s neutrality, however, has been critiqued on several fronts. That NCIP’s “reason for being” is the indigenous peoples, for one, makes it a matter of both political and moral necessity for NCIP to serve its principal client, first and foremost. NCIP’s established rules on financing the FPIC process also makes its capacity for neutrality suspect. As the FPIC Guidelines of 2006 prescribes that the FPIC process should be financed solely

by the applicant, observers and some actual FPIC participants have surmised that NCIP personnel might in fact be beholden to whoever provides funds for carrying out their duty, in this case the project proponent. The following table summarizes the amount that NCIP receives and disburses in relation to the conduct of the FPIC process, including its precursor which is the Field-Based Investigation (FBI).

Year	Collection of FBI Fees	Cash Payment of FBI Fee	Remittance to LCCA*/ FB Account	Cash in Bank-LCCA
2003	473,655.42			34,061,483.31
2004	605,000.00	6,575.00		83,311,143.58
2005	268,976.00	8,335.82		78,417,047.78
2006	1,543,000.00	191,000.00	803,000.00	108,924,686.00
2007	8,802,000.00	623,000.00	1,208,000.00	99,507,962.09
2008	9,887,240.67	1,281,112.87	2,134,461.31	32,674,742.00
2009	12,947,250.18	3,026,262.02		64,686,812.62

\*Local Currency, Current Account

**Table 3.** Collection, expenditure and remittance of FBI/FPIC fees. **Source:** Statement of Cash Flows and Balance Sheet, Consolidated Audited Annual Report, NCIP 2003-2009.

The remarkable increase in FPIC applications since 2006 also resulted in the tremendous growth of NCIP's collected funds for FBI/FPIC. It must be reiterated, however, that these funds directly come from project proponents who are applying for FPIC Certificates. Concerns were raised about the NCIP being perceived as "indebted" to the project proponents and therefore more protective of their interests rather than the IPs'. Doubts were also raised with regard to how the NCIP personnel determine the amount of FBI/FPIC Fee to be charged to the project proponent. While Section 13(g) of the FPIC Guidelines of 2006 states that the FBI Team, which is composed of two (2) members from the NCIP Provincial Office and one (1) from the Community Service Center, shall "observe established and applicable accounting and auditing rules and regulations," it appears that the Team is still allowed to exercise wide discretion in drafting the FPIC financial plan given the non-specificity of this provision on accounting and auditing. In fact, it has been reported that NCIP personnel involved in the FPIC process do not seem to follow the strict rules on accounting and auditing set by the Commission on Audit (COA). The COA Audit Certificate of 2009 reports that no proper accounting of the transactions involving receipts and disbursements was made, resulting in the understatement of NCIP's financial reports on its assets and liabilities. It can also be seen in Table 3 that NCIP's total collection of FBI/FPIC Fees for the period 2004-2009 has reached

PhP 34.5 Million, while it has only reflected a combined total of PhP 9.2 Million funds released for cash payments (PhP 5.1 Million) and remittance to LCCA/FBI Account (PhP 4.1 Million). How can the NCIP account for such a glaring discrepancy? How exactly does the NCIP disburse and spend the funds intended for FBI/FPIC? What kind of accounting and auditing rules and procedures are applied by the NCIP in regard to FBI/FPIC applications?

### **Issues from the ground: Case studies**

One serious issue about FPIC's implementation pertains to the representation of the indigenous peoples in actual decision-making. This can be illustrated using the case of Bataraza, Palawan where the legitimacy of community leaders, apparently representing the Palaw'ans, is strongly being contested. While the Palaw'an tribal leaders or Panglima are supposed to be selected on the basis of their "wisdom and lineage," the NCIP allegedly failed to conduct a validation of the list of elders/leaders resulting in misrepresentation of the Palaw'ans by the "NCIP appointed" chieftains (Tebtebba Foundation, unpublished manuscript). These "NCIP appointed" leaders who were then invited to the consultation meetings were noted to be pro-mining project while the Panglimas, the traditional tribal leaders, were very strong anti-mining advocates (Tebtebba Foundation, unpublished manuscript). As a consequence, some IP communities in Bataraza are now disclaiming the proof of consent allegedly secured by the project proponent (the mining company) through improper consultation and questionable representation. The same problem is experienced by the Subanons of Siocon, Zamboanga del Norte. As the Toronto Ventures Inc. (TVI) continues to operate a full-scale mining activity within the Subanons' ancestral domain, the community has been sharply divided between the pro-TVI faction headed by Juanito Tumangkis and the anti-TVI faction headed by Timuay Boy Anoy (Sanz 2007). Both these groups claim legitimacy as leaders and thus representatives of the Subanons.

Other reports and case studies show how FPIC in Philippine indigenous communities has been strongly contested by the IPs themselves. Indeed the phenomenon of consent being politically manufactured or engineered by state agents and development proponents has already been documented in several IP communities. For example, in an FPIC process conducted in Mindoro Oriental, it was alleged that the NCIP only procured the consent of one organization of Mangyans which turned out to be in favor of the mining project, while completely disregarding other groups known to be anti-mining. A report which consists of "alleged signatures, thumbprints

and photographs of participants” was produced as proof of consent although many of the concerned IPs complained that no consultation was conducted in their community (Manuel 2004, 8). This is validated by a recent case study on Mindoro done by Fernando and Amul (in Lusterio-Rico et al. 2009) as regards mining exploration in the area. The study highlighted, among others, the “contentious FPIC-granting process” that seriously challenges the legitimacy of the mining operation in the affected indigenous communities in the area. The study contends that the mining companies are seen to be conducting operations in these communities without FPIC, as supported by claims of the Mangyans that they were “fooled into cooperating with the mining company” when the land survey that they thought was for their Certificate of Ancestral Domain Title or CADT applications was, instead, used for the company’s mining permit application (Fernando and Amul in Lusterio-Rico et al. 2009, 87).

Local communities in Palawan, discussed earlier, also have a similar experience in the FPIC process that involves the Rio Tuba Nickel Mining Corporation (RTNMC), the proponent of the Hydro Metallurgical Processing Plant (HPP) which is to be built within their ancestral domain. A study conducted by Tebtebba Foundation (unpublished manuscript), using the method of in-depth interviewing, documents the experience of the Palaw’ans being allegedly misled by the staff of the RTNMC into signing attendance sheets that RTNMC actually intended to use as part of HPP’s endorsements. The Palaw’ans complained they were deceived by the project proponent when their signatures in ordinary attendance sheets were used, without their knowledge, as proof that they have endorsed the project. The process of FPIC, in both cases of the Mangyans and the Palaw’ans, thus became contentious because consent was said to be simply “manufactured” or procured without genuine consultation with the IPs, and FPIC process in these two cases was conducted under very dubious circumstances.

More recent developments in the Cordillera also validate these serious flaws in the implementation of the FPIC which undermine its integrity. In September 2009, both the people of Bakun and Bokod in Benguet expressed alarm about possible violations of the FPIC process in their respective communities. The IPs of Bakun stormed the NCIP office at the Provincial Capitol grounds demanding that the signing of the Memorandum of Agreement (MOA) between Bakun and Royalco Philippines Inc., an Australian-based mining company, be stopped on the grounds that the mining company used deception in obtaining consent by consulting only the “few landowners” of the areas to be affected (“Bakun IPs Storm NCIP Office,” *Northern Dispatch*, September 13, 2009, 1). The IPs of Bakun were able to successfully stop the MOA signing. They were also able to stop Royalco from conducting drilling and mineral sampling activities by putting up

barricades to block the entry of Royalco equipment into their domain just a few days before the scheduled signing of the MOA ("Bakun IPs Storm NCIP Office," 2).

In the case of Bokod, a complaint was made about the obvious bias of the NCIP in favor of the Clean Rock Renewal Resources Energy Corporation (CRRREC) which was seeking consent for a geothermal project situated within the Bokod ancestral domain. The Bokod people claimed that the NCIP manipulated the FPIC process to compel the residents to vote in favor of the geothermal exploration. On May 14, 2009, the residents of Bokod overwhelmingly rejected (56 against, 7 in favor, and 17 abstentions) the exploration request of CRRREC during a community assembly, but a second assembly was held on August 20, 2009 which resulted in a favorable decision (48 in favor and 34 against the exploration) for CRRREC ("Bokod Hit NCIP for Bias in FPIC," *Northern Dispatch*, September 6, 2009, 1). Bokod residents now appeal to various agencies to ensure that due process and consensus-building is observed in securing this particular FPIC. Their claim that the NCIP has manipulated the outcome of the community assembly to favor CRRREC has clearly put the entire FPIC process in question, with the NCIP being subjected to severe criticism on account of this controversy. One Bokod elder, Victor Wales even lamented that "It seems the NCIP as an agency, which is supposedly tasked to take care and protect the rights of the indigenous peoples, is the one persecuting, abusing and misleading the indigenous peoples of Benguet" ("Bokod Hit NCIP," 6). This alleged "orchestration" of the FPIC process by the NCIP itself thus posed serious questions on the capacity of the NCIP to faithfully implement the principle of FPIC and guarantee the protection of indigenous peoples' rights.

Among these many stories of FPIC failure, the case of the Tagbanuas of Coron stands out for the simple reason that the FPIC process seemed to have worked well in their case. Using the FPIC as a legal tool, the Tagbanuas were able "to regulate or restrict the entry of visitors and tourists to Coron Island" as a way to manage, develop and protect their ancestral domain (Mayo-Anda et al. 2006, 19; see also La Vina et al. 2007). The Tagbanuas also organized themselves and started collecting entrance fees from visitors and tourists who wished to enjoy Coron Island. In effect, they succeeded in establishing strong control over their own natural resources while benefitting financially from doing so. The case of the Tagbanuas proves that FPIC can indeed be an instrument for empowering indigenous peoples. In exercising their right to FPIC, the Tagbanuas were given the opportunity to practice self-governance and strengthen the community bond toward the achievement of a common goal.

## Recent developments

In view of all the issues raised about the implementation of the FPIC principle, there are now efforts to evaluate and reform the FPIC Guidelines of 2006 coming from the government itself. The NCIP in particular, through En Banc Resolution No. A-015, has created a Technical Working Group (TWG) to review the FPIC Guidelines of 2006 for its amendment/revision. In the Resolution signed on 01 March 2011, the current NCIP Commission states that

[it] believes that there is still a need to review the Guidelines in order to address issues and concerns, alleged allegations of irregularities during the conduct of the FPIC Process which are not clearly responded to by the provisions of the present Guideline; and [it] desires to come out with a more definite and comprehensive guideline that will address existing and future issues, concerns, and problems relative to the conduct of the FPIC based on experiences of its implementation in the past five (5) years.

The TWG is led by Atty. Basilio A. Wandag, who is also the current Executive Director of the NCIP. Corollary to this, the NCIP Commission *en banc* also declared a thirty (30)-day moratorium on the processing of new Certification Precondition (CP) applications through Memorandum Circular 001 Series of 2011. The NCIP Commission stated that the moratorium was anchored on the on-going review of the FPIC Guidelines of 2006 and took effect from April 27, 2011 to May 27, 2011. The Commission also directed the Regional Directors to submit a status report on all CP applications undergoing processing within their respective Ethnographic Region to the NCIP Commissioner. Similarly, the House Committee on National Cultural Communities (NCC) headed by Cong. Teddy B. Baguilat, Jr. came up with Resolution No. 887 seeking a review of the FPIC Guidelines of 2006. The Committee also formed a Technical Working Group to conduct an evaluation of the implementation of the Guidelines with the following objectives:

1. To ensure that the FPIC process is indeed a process that serves to realize the rights of indigenous peoples to self-determination.
2. To consolidate proposed amendments to the 2006 FPIC Guidelines of NCIP based on recommendations from cases handled by the NCC Committee and inputs from various NGOs/IPOs/members of the academe for the crafting of a new guideline on the implementation of FPIC.

3. To make the FPIC guideline consistent with the UN Declaration on the Rights of Indigenous Peoples and other relevant international instruments.

The TWG of the National Cultural Communities also identified the following key issues that formed the basis of its critique of the existing Guidelines:

1. Role of the NCIP as the facilitator in the FPIC Process
2. Issue of “time-bound process” which pertains to the period prescription for the Regular (55 Days) and Special (20 Days) FPIC process which is said to be insufficient to ensure free, prior, and informed consent
3. Issue on “who gives consent”
4. Issue on the coverage of FPIC or how to properly determine which area/s should be covered by the FPIC requirement
5. Pre-Field Based Investigation (FBI) Conference and Pre-FPIC Conference
6. Budget for the conduct of the FPIC
7. Determination of the Impact Areas
8. Mechanism for filing of complaints and addressing grievance
9. Contents of the Memorandum of Agreement (MOA) particularly in terms of the restoration of the affected area after the project period and the absolute preservation of any sacred sites of the community
10. Transferability of the MOA
11. Role of the LGUs in the FPIC Process
12. Conduct of the Environment Impact Assessment (EIA) and Socio-cultural Impact Assessment (SIA)
13. Education Information Campaign
14. Conformity of the Guidelines with the UNDRIP and other international standards
15. Monitoring of company activities in affected communities
16. Classification of projects which would undergo either the regular or special FPIC process
17. Use of ADSDPP or community development plan in relation to the process of FPIC
18. Establishment and Management of Community Trust Fund/s
19. Resolution of Non-Consent or the provision requiring IP communities to explain in writing why they are refusing to grant their consent to the applicant
20. Amount or extent of information to be disclosed to the IP community

21. Concept of certificate of non-overlap which needs to be refined or redefined
22. Process of issuing the Certificate of Precondition (CP)

These reform efforts made by NCIP and the Committee on National Cultural Communities validate the growing concern from the IP communities, NGOs/POs, and IP rights advocates about the flawed implementation of the FPIC instrument and the need to immediately address it. The fact that the joint committee opened the deliberation process to the members of civil society and the indigenous peoples themselves also gave hope that the new FPIC guidelines will be more appropriate and effective in responding to the problems created by its improper application in the past. The TWG of the NCC had consolidated its final amendments to the guidelines with those of the TWG of the NCIP resulting in the promulgation of Administrative Order 3 Series of 2012 or The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012. This new FPIC law is already the fourth attempt to capture in details what the principle of FPIC ought to be. In the meantime, it is also equally imperative to look at how the NCIP has tried to fulfill its mandate of promoting the indigenous peoples' self-governance and empowerment through means other than the implementation of the FPIC requirement.

### **Self-governance and empowerment: key programs of the NCIP from 2002 to 2010**

In 2002, one of the main issues confronted by the indigenous peoples, as reported in the NCIP Annual Report, was that "...no representation of IPs in local legislative and special bodies" existed. This problem prompted the NCIP to pilot a program on Mandatory Representation of IPs in selected Local Government Units (LGUs) from 2004 to 2009, which resulted in significant success in pilot areas such as Zamboanga-Sibugay, Compostela Valley, Surigao del Sur, Surigao del Norte, Agusan del Sur, Agusan del Norte and Misamis Oriental (NCIP Annual Report 2008, 20). Although IPs now have local representation in these places, Director (OIC) Masli Quilaman of the NCIP Office of Empowerment and Human Rights (OEHR) still emphasized the need to strengthen this program and ensure that there is IP representation in all LGUs where IPs have presence. By 2009, IP leaders who had assumed posts as Sanggunian Members had totalled one hundred four (104), ninety-eight (98) of whom served in the Sangguniang Pambarangay, four (4) in the Sangguniang Bayan, one (1) in the Sangguniang Panlalawigan, and one (1) in the Sangguniang



Panlunsod (NCIP Annual Report 2009, 35). This LGU representation, according to Director Quilaman, is one concrete and important means by which self-governance and empowerment of the indigenous peoples can be achieved. In fact, Director Quilaman promised to focus on this program of mandatory IP representation, along with the full and proper implementation of the FPIC process, as the main agenda of the OEHR.

In 2003, the NCIP also made strong efforts to constitute the Indigenous Peoples' Consultative Body (IPCB) with the primary objective of pushing for IPs' self-governance and empowerment. The IPCB is an independent council composed of five representatives from the traditional leaders, women, and youth of each ancestral domain area and forced/displaced resettled IP community (NCIP Annual Report 2005, 19). Additional representatives from Indigenous Peoples Organizations (IPOs) and Tribal Council (TC) also sit in the IPCB at the municipal and provincial levels. The NCIP, in its 2003 Annual Report, stressed that the creation of the Consultative Body will "immediately enhance" the following concerns:

1. Policy discussions on the creation of tribal barangays;
2. Mandatory representation in policy-making bodies and other local legislative councils;
3. Registration of IPOs, and accreditation of NGOs; and
4. As a widely and adversely represented but united and forceful policy determining body and a socio-economic and political lobby group, to advance with vigor, competence and integrity the greater interests and well-being of the 12 million IPs nationwide.

The IP Consultative Body, thus, functions as the "empowering mechanism" for IPs' meaningful participation in decision-making. It is also considered integral to the success of the two other major activities pertinent to the protection of IP rights, namely the Ancestral Domain/Land Delineation and Titling and the formulation of the Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). This is because the IP Consultative Body primarily guarantees the articulation of IPs' aspirations and interests in planning and decision making. Such empowering function of the Consultative Body is further detailed in the 2004 Annual Report of the NCIP which states that the Consultative Body will serve as the venue to:

1. discuss issues affecting the Indigenous Peoples and to provide information and advice to the policy-making of the NCIP;

2. recommend programs and projects to be undertaken by the NCIP;
3. monitor the implementation of policies, programs, projects and activities of the NCIP and other government agencies related to matters affecting the Indigenous Peoples; and
4. assist in managing and resolving conflict using traditional process and the justice system of the Indigenous Peoples.

By 2008, sixty-three (63) IPCB and three (3) City Consultative Bodies had been set up, even as the eight (8) Ethnographic Regional Consultative Bodies and a National Consultative Body have yet to be constituted (NCIP Annual Report 2008, 18). Among the major accomplishments of these IPCBs are the increased participation of the IPs in the resolution of community conflicts, enhanced conceptualization of project proposals for funding grants, and the development of the proposed Guidelines on the Mandatory Representation of IPs in Local Legislative Councils and Other Policy Making Bodies (NCIP Annual Report 2008, 18-19). The Interim National Consultative Body, composed of selected Chairpersons of Provincial Consultative Bodies (PCBs), was also convened on November 5-7, 2008. They convened to discuss their accomplishments and some relevant issues related to their budget, sustained operation, representation, and resolution of complaints filed against PCB officials. In two years, the number of Provincial Consultative Body has increased from sixty-three (63) to sixty-six (66) according to Cresencio Patnaan, former Director of the Office of Empowerment and Human Rights. If this is any indication, it would seem that the NCIP mechanism for IP participation established through the IP Consultative Body is indeed working toward the promotion of IP self-governance and empowerment.

Other programs that support the IPs' rights to self-governance and empowerment include the Empowerment of Indigenous Peoples for Governance and Sustainable Development of Ancestral Domains (EIPGSDAD) launched by NCIP in 2004 and the continuing program on the creation of Tribal Barangays and confirmation of Tribal Membership. The creation of tribal barangays is promoted to "enable the ICCs/IPs to fully exercise their right to self-governance through the practice of their traditional leadership structures, forms of governance and justice systems which will likewise enhance their cultural integrity" (CERD Report 2008, 40). The program on Tribal Membership and Issuance of Certificate of Confirmation (of ethnicity) was undertaken for the purposes of scholarship application, travel abroad, legitimizing customary marriage and civil status, employment, livelihood grants, and height waiver requests (NCIP Annual Report 2008, 20).

This program apparently enhances the efficient identification of IP members by agencies and offices of Government and other entities with programs directed to address IP concerns” (CERD Report 2008, 21). The program is also said to be an “effective tool to ward off the submission of fraudulent COCs by applicants who pretend to be IPs” (CERD Report 2008, 21). The NCIP has also conducted programs for conflict resolution, providing legal services to the IPs and capability-building of IPs through trainings, seminars, workshops, conferences, and assemblies. In summary, the activities conducted by the NCIP within the period of 2002 to 2010 to promote the IP right to self-governance and empowerment can be classified into six major domains:

1. Mandatory Representation of IPs in Legislative Councils and Other Local Policymaking Bodies;
2. Creation of the IP Consultative Body on different levels of government (municipal, city, provincial, regional and national);
3. Creation of Tribal Barangays and Certification of Tribal Membership;
4. Capability building in governance, peace, development, wealth management and GAD concerns;
5. Assistance to CADC/CADT application and ADSDPP formulation and implementation; and
6. Proper implementation of the process of Certification Precondition (CP) and Free and Prior Informed Consent (FPIC).

Are these programs, by themselves, indication enough that IPs have successfully accomplished self-governance and become empowered? While these efforts of the NCIP have been duly recognized, these have also been critiqued by some for their failed and flawed aspects. An evaluation of all these programs must be undertaken in the same manner that the critical right to FPIC and how it has been implemented over the years have recently undergone thorough scrutiny. It should also be emphasized that such assessment must duly include the actual voices and experiences of the IPs by actively involving them in every step of the evaluation process.

### **Evaluating the NCIP program on IPs’ self-governance and empowerment**

The effectiveness of a policy or program is primarily measured by its ability to accomplish articulated set goals or produce desired

results. In assessing the NCIP's effectiveness in promoting the IP's right to self-governance and empowerment, one must revisit what this right is for, what it aims to accomplish, and what indicators have been set by the IPRA to gauge its results. In what follows, we examine the concept of self-governance based on the IPRA and how NCIP has tried to realize it through its programs including the concept of IP empowerment and how the NCIP has given it meaning through its policy actions. The section concludes with evaluation questions that can help NCIP explore possible complementary activities (or even alternatives) to its existing programs on promoting IPs' self-governance and empowerment.

The IPRA defines self-governance as the indigenous peoples' free pursuit of their economic, social and cultural development based on their own indigenous systems of governance as may be compatible with existing national laws. This concept of self-governance is also inextricably associated with the concept of empowerment. Empowerment based on the IPRA is equated with development that is preferred and determined by the IPs themselves. The IPs' right to self-governance and empowerment therefore intends to help the IPs develop their capacities to the fullest so as to be able to direct their present and future life as autonomous communities. Do the policies and programs of NCIP facilitate the realization of this goal?

Cornell (2007) posits that indigenous governance must take into account both the efficacy and legitimacy of the governing structure being established. While efficacy has to do with finding appropriate and effective ways of governing, legitimacy refers to the authenticity of both the governing structure and the people who run it. The NCIP's programs on the creation of Tribal Barangays and mandatory IP representation toward self-governance should be evaluated based on such criteria. Are Tribal Barangays appropriate and effective governance structures for the IPs? Are they legitimate? Or more specifically, do they manifest the manner by which the indigenous peoples want to be governed and their preference as to who should govern them? In regard to mandatory IP representation in legislative councils and other local decision-making bodies, are IPs effective in engaging in these mainstream political structures? Can the mandatory IP representation also guarantee that IP leaders who are put in positions of power within mainstream politics are truly 'representative' of IP interests?

Cornell (2007, 161) argues that there may be difficulty in determining the 'self' in self-governance and this, of course, has serious implications for the level of efficacy and legitimacy of indigenous governance. A careful analysis or even a possible "rethinking" of "who is the self" should therefore be a primary concern for all those engaged in promoting or instituting indigenous governance. How

should IPs, for instance, properly determine who would govern them? Do IPs have a common understanding of the 'self' in self-governance? Is it indeed possible for IPs to practice and maintain their indigenous systems of governance within the framework of a unitary state? These questions actually raise more difficulties in ascertaining the 'self' in self-governance, especially for indigenous communities which are not homogenous and where the perception, practice, and distribution of power may have complex variations. With this, it becomes more challenging for NCIP to find common grounds on which to build and support IPs' structures for self-governance.

Concerning empowerment, how exactly does NCIP envision it for IPs? Does it entail incorporating IPs into the mainstream? Looking at the programs it has instituted over the years to promote IP empowerment, it would seem that the NCIP has facilitated IPs' integration into existing and mainstream decision-making structures. NCIP's program on Mandatory Representation of IPs in Legislative Councils and Other Local Policymaking Bodies, the creation of the IP Consultative Body on different levels of government (municipal, city, provincial, regional and national), and the establishment of Tribal Barangays, for example, suggest strongly that IPs' access to formal government structures is a crucial key to their empowerment, especially if accompanied by the proper implementation of the FPIC provision. The empowerment of the IPs is certainly predicated on the idea that they should become subjects (or active participants), and not just objects of decision making. But while participation is key to empowerment, Narayanan (2003) points out that it is not always a guarantee that marginalized sector would become empowered through it. Narayanan further argues that

The use of participatory tools in themselves falls short of bringing about real participation as it, instead of challenging the power relationship, may promote participation in the existing power structure. (Narayanan 2003, 2486)

For Narayanan, empowerment through participation must necessarily require the "dismantling of existing power relations." He asserts, additionally, that success in developing marginalized peoples is only possible if "empowerment precedes participation." To what extent does FPIC empower IPs? Are IPs empowered by their participation in processes and programs initiated and established by the NCIP such as mandatory IP representation, or the Tribal Barangays and IPCBs? While numbers may provide tangible indicators of the NCIP's success, IP empowerment is a phenomenon which cannot be easily or conveniently defined in statistical figures alone. Further research should therefore be undertaken to analyze comprehensively

how the programs of the NCIP have effectively contributed to indigenous peoples' empowerment and exercise of self-governance.

## **Conclusion**

The principle of Free and Prior Informed Consent (FPIC) is one of the foremost legal instruments guaranteed by the Indigenous Peoples' Rights Act of 1997 (IPRA) to promote the IPs' right to self-determination and empowerment. The conditions under which FPIC is obtained in Philippine indigenous communities, however, have resulted in serious questions about the integrity of the FPIC process as both principle and process. The unfortunate experiences of IPs with the FPIC thus far cast doubt on its legitimacy and its effectiveness in ensuring the active participation of the IPs in political decision-making. In spite of this, official government reports contend that the FPIC has been a functional and meaningful tool toward the ends of IP self-determination, presumably evidenced by the lack of complaints from indigenous communities about what others allege as its flawed or defective implementation or processes. That there are opposing versions of FPIC implementation in IP communities underscores a basic political problem, i.e., the lack of agreement between the government (through the NCIP), and the indigenous peoples concerning their respective understanding and assessments of the FPIC principle.

NCIP's other programs in promoting IPs' right to self-governance and empowerment such as the creation of Tribal Barangays, certification of Tribal Membership, and Mandatory IP representation seem to highlight the importance of indigenous peoples' integration into existing and mainstream decision-making structures as a key element of such right. NCIP's efforts to institute the Indigenous Peoples' Consultative Body (IPCB) has also been recognized as an important program to empower IPs and promote their self-governance, though the establishment of the National IPCB has proved to be a major challenge for NCIP and the many indigenous peoples scattered across the country who are practicing different indigenous traditions and modes of governance. However, the Philippine Indigenous Peoples ICERD Shadow Report (2009) questions the efficacy of these structures in bringing about genuine IP self-governance and empowerment. The report even recommends that these structures be radically recast to become more representative of IPs, more accountable to them, and more appropriate or responsive to their needs and realities. As urgent measures, the report proposes the following: 1) the current Consultative Body structure should be abolished because it is arbitrary; 2) the NCIP should be stopped from

organizing tribal councils; and 3) the consultative body guidelines should be revised (PIP ICERD Shadow Report 2009, 19).

Given these different perspectives, further and future research should analyze comprehensively how the programs the NCIP has instituted over the years have effectively contributed to indigenous peoples' empowerment, as well as their exercise of self-governance. Ideally, thorough case studies should be conducted in specific indigenous communities to achieve this objective.

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