

Consent, Citizenship and the Indigenous Peoples

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ABSTRACT

Democracies are founded on the ‘consent of the governed,’ which is actively and explicitly given by the citizens to the state through acts of political participation. One contemporary form of giving consent is the Free and Prior Informed Consent (FPIC), a right given to indigenous peoples as part of their broader right to self-determination. In the Philippines, this right has been incorporated in national laws such as the Philippine Mining Act of 1995 and the Indigenous Peoples’ Rights Act (IPRA) enacted in 1997. This paper proceeds with a discussion of FPIC as embodied not only in national (Philippine) laws but also in international laws and norms. A textual reading of these laws along with a review of NCIP annual reports and existing empirical studies on FPIC implementation in the Philippines is conducted. This is to emphasize FPIC’s critical role in indigenous peoples’ self-determination. A critical discussion of FPIC as ‘Middle Ground’ between the state and the indigenous peoples is also presented with the aim of drawing attention to the factors that shape the contours of this negotiated space. The paper argues that the FPIC process in the Philippines should be aptly seen as a form of ‘Middle Ground’ between two otherwise contending actors, the state as the governing body and the indigenous peoples as the governed. While FPIC is an instrument for indigenous peoples’ assertion of self-determination, it functions at the same time to cultivate, if not strengthen, the indigenous peoples’ sense of citizenship and duty to the state.

Keywords: indigenous peoples, citizenship, self-determination, FPIC, democratic participation, Middle Ground

Consent is a word often invoked in politics. While political scientists may study this word to justify political obligation, politicians fight, some more violently than others, over the right to claim ‘consent of the governed’ during elections. Consent as used in the phrase ‘consent of the governed’ is therefore a fundamental element of democracy. It is the legitimating force of democratic states. Those who are living under a democratic system must therefore know that which gives the state

power *over* its people. This knowledge is critical in understanding the people's democratic role in society vis-à-vis the government's democratic function. While the principle of consent sustains people's involvement in politics, it is also what empowers the state to impose its authoritative rule over its citizens, the governed. Democratic states are therefore measured against the manner and extent by which they gain the legitimate consent of their people, usually through the institution of various forms of political participation.

As Parry and Moysen (cited in Blaug and Schwarzmantel 1988, 444) say, "the decisive test of a democracy is its capacity to encourage its population to play an active role in its government." The quality of democracy, as many scholars argue, is therefore greatly enhanced by ensuring that people exercise meaningful and widespread participation in decision-making. This not only promotes empowerment, as people are given the opportunity to shape decisions, but also allows them to validate the legitimacy of the decision-making process. This, in turn, gives credence to the output of the process—whether it is a new set of leaders, a government policy, or a community project. Pateman (1970) supports this argument along with the idea posited by John Stuart Mill stating that "people become more engaged and better citizens by the mere fact of participating" (cited in Somit and Peterson 2005, 26). Political participation thus becomes an integral element of democracy because it reaffirms 'consent of the governed' which is conventionally assumed in democratic societies on the basis of the social contract. It is therefore only through acts of political participation that such consent can be actively or explicitly given by the governed to the government that it is supposed to obey. Without such consent, no democratic government can claim the moral right to rule and no citizen can be forced to morally obey the state.

To study the notion of consent through various forms of political participation is therefore a matter of political imperative primarily because of its implications for the proper functioning of democracy. Understanding the notion of consent is also critical in sustaining and shaping the relationship between the government and the governed or the state and its citizens. It is within this framework that consent in general, and Free and Prior Informed Consent (FPIC) in particular, will be studied and analysed. In this paper, consent in the form of FPIC will be presented and discussed as a mode of political participation by a specific group of citizens of the Philippine state—the indigenous peoples (IPs).

This paper thus proceeds with a discussion of the FPIC principle as embodied in international and national (Philippine) laws. A textual reading of these laws which are pertinent to the development and application of the concept is undertaken. Furthermore, the

common understanding of FPIC as a tool for indigenous peoples' self-determination is emphasized. This is done through a review of NCIP annual reports and existing empirical studies on FPIC implementation in the Philippines. Lastly, a critical discussion of FPIC as 'Middle Ground' between the state and the indigenous peoples is presented with the aim of drawing attention to the factors that shape the contours of this negotiated space and determine the advantages/disadvantages that the state and the indigenous peoples may gain in coming to such meeting point.

FPIC and Democratic Participation

FPIC, as a contemporary form of democratic participation, is regarded as an affirmation of 'consent of the governed.' This framing establishes the nature of state-indigenous peoples relations in the Philippines explored in this paper, with the state acting as the governing authority and the indigenous peoples considered as part of the governed. Theoretically, this implies certain power dynamics. The context where the state and the indigenous peoples interact is not a level playing field. As Hay (cited in Marsh and Stoker 2002, 280) explains, "action only takes place within a pre-existing structured context... such contexts have sloping contours which act to advantage certain 'players.'" Clearly, in this context, the state has power advantage over indigenous peoples who are considered not only governed but also marginalized by virtue of their "inability" to participate in political decision-making since the colonial years.

The state's power is also manifested by the fact that it is vested with the authority to formulate the rules or processes for seeking consent. The power of the indigenous peoples, however, is reflected in their right to FPIC which has been granted through the Indigenous Peoples Rights Act (IPRA). This is to say that, instead of invoking its right to eminent domain, the state, in recognition of indigenous peoples' rights under the IPRA, grants them the right to ancestral domain along with the power to regulate activities within such domain through FPIC. The state thus provides democratic space for the marginalized indigenous peoples to participate in politics without resorting to violent resistance against or outright rejection of state authority. The indigenous peoples, in participating in state-sanctioned political process such as FPIC, however, embrace the notion of "being governed" by the state. As such, the indigenous peoples as citizens of the state enjoy rights and also perform obligations that are defined under Philippines laws. One of the fundamental rights enjoyed by indigenous peoples under the IPRA is the right to self-determination.

Integral to indigenous peoples' right to self-determination in international law is "the right to freely determine the nature and extent (if any) of their relationship with the state and other peoples"

(Motoc 2005, 9). This also includes the right to maintain the indigenous peoples' economic, social and cultural structures and to freely determine how to dispose of their natural resources and to proceed with their own development based on their own set of preferences, values and aspirations (MacKay 2004, 54; Motoc 2005, 9; see also Anaya 2005). However, there are also those who interpret the right to self-determination to include "the right to form one's own state" (Kymlicka 2001, 123). This right is considered antithetical to state-consolidation and therefore unacceptable from the state's point of view.

Another articulated right of the indigenous peoples is found in Article 27 of the International Covenant on Civil and Political Rights which states that "members of minorities have the right to enjoy their own culture... in community with other members of their group" (Kymlicka 2001, 123). This right is interpreted "to include only negative rights of non-interference, rather than positive rights to assistance, funding, autonomy, or public recognition" (ibid.). As such, this right is considered almost like a token—a little too weak to significantly advance the recognition, promotion and protection of indigenous peoples around the world.

Given that these rights seemingly represent two extreme views, Kymlicka articulates the need to find a middle area, one where "substantive rights of autonomy and self-determination" is found and simultaneously exercised within the framework of a singular nation-state (ibid., 124). This paper will thus argue that one instrument that may embody this principle of middle ground is the FPIC, as posited by Colchester and MacKay (2004). Colchester and MacKay argue that FPIC as 'Middle Ground' creates space for the state and the indigenous peoples to recognize each other's existence. FPIC as a policy instrument also guarantees the indigenous peoples' active role in determining their own future by providing them the right to accept or reject projects, programs and activities within their ancestral domain, all within the framework of national integration.

FPIC in International Law

The process of seeking and granting consent requires fundamental conditions that are necessary to establish its legitimacy. However, the legitimacy of consent is established not only by following the legal procedures for obtaining consent but by ensuring that consent is undisputedly free, prior and informed. This has been clearly articulated in different international instruments that recognize the rights of indigenous peoples specifically their right to FPIC. The International Labor Organization's Convention No. 169 (ILO 169) or the Convention on Indigenous and Tribal Peoples in Independent Countries adopted in 1989, for instance, provides a strong legal

foundation for the implementation of FPIC as a legal guarantee for indigenous peoples' self-governance and empowerment. Article 6 of the Convention states that it is the duty of governments to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly." Article 7 further states that

[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

These particular provisions of ILO 169, along with other provisions pertaining to IP rights to the natural resources within their territories (Article 15) and to indigenous land tenure systems (Article 17), mandate governments to recognize the rights of indigenous peoples to have a say in any resource extraction operation that will be conducted within their territories and to benefit from such activities (Anaya 2005, 10). The Convention on Biological Diversity adopted in 1992 also recognizes the principle of FPIC in Article 15, Section 5 which states that

Access to genetic resources shall be subject to **prior informed consent** of the Contracting Party providing such resources, unless otherwise determined by that Party. (emphasis mine)

In support of these legal documents, the World Commission on Dams (WCD) established in 1998 also adopted the principle of FPIC as a major precondition for the construction of dams within indigenous and tribal peoples' areas in its recommendations on how to address conflicts surrounding the building of large dams (Cariño [Joji] 2005, 23–24). This is, of course, in recognition of the fact that "to be socially legitimate and produce positive and lasting outcomes, development projects should provide for greater involvement of all interested parties," the indigenous peoples included (ibid., 24). Furthermore, the World Bank's Extractive Industries Review (EIR) concluded in its 2003 report that "recognition and implementation of the rights of affected people to prior and informed consent is a necessary condition for extractive projects to be successful in contributing to poverty alleviation and sustainable development" (also cited in Tamang 2005, 3).

In view of these international instruments and the clamor to set standards for FPIC implementation, the United Nations Permanent Forum on Indigenous Issues (UNPFII) conducted a workshop on methodologies regarding FPIC in 2005. FPIC, as officially used during the forum, stands for Free, Prior and Informed Consent. The workshop primarily aimed to identify the elements that comprise the common understanding of FPIC as applied in international and domestic instruments. These elements are:

1. **Free** - This implies that there should be “no coercion, intimidation or manipulation” in the process of obtaining consent.
2. **Prior** - This implies that consent should be “sought sufficiently in advance of any authorization or commencement of activities and [should] respect time requirements of indigenous consultation/consensus processes.”
3. **Informed** - This implies that information is provided that covers (at least) the following aspects:
 - a. The nature, size, pace, reversibility and scope of any proposed project or activity;
 - b. The reason/s or purpose of the project and /or activity;
 - c. The duration of the above;
 - d. The locality of areas that will be affected;
 - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
 - f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
 - g. Procedures that the project may entail. (UNPFII 2005, 10)

The principle of FPIC is also found in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which has been ratified in 2010. The UNDRIP is largely acknowledged as a ‘standard of achievement’ in the recognition and promotion of indigenous peoples’ rights. This is therefore a landmark international instrument that has explicitly recognized the principle of FPIC in its major provisions (Tamang 2005, 4). These major provisions include Articles 10, 18 and 19. Article 10 states that

[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. (UNDRIP Article 10)

Articles 18, on the other hand, provides for proper representation of indigenous peoples in decision-making and their right to “maintain and develop their own decision making institutions.” Most specifically, Article 19 of the UNDRIP provides the strong legal foundation for the principle of FPIC as it stipulates that

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Member states of the United Nations which are signatories to this covenant are therefore duty-bound to respect, recognize and promote the rights of indigenous peoples through the principle of FPIC. While the principle of FPIC is already widely acknowledged in the international arena even prior to UNDRIP, the ratification of the UNDRIP strengthened the notion that states must recognize FPIC both as a moral and legal imperative. The UNDRIP thus became a principal instrument for indigenous peoples all over the world to make a legitimate claim on their right to give or withhold consent to any development projects within their ancestral lands.

FPIC in Philippine Laws

Prior to the enactment of the Indigenous Peoples’ Rights Act (IPRA) in the Philippines, the principle of obtaining consent from indigenous peoples had already been incorporated in both the Philippine Mining Act (henceforth Mining Act of 1995) signed in March 1995 and Executive Order 247 (EO 247) signed in May 1995 by then President Fidel V. Ramos. The Philippine Mining Act of 1995 served as a precursor to IPRA’s principle of FPIC (see also Colchester and Mackay 2004) as it stipulates that “no ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned” (Mining Act of 1995 Chapter III, Section 16).

In addition, EO 247, which set the guidelines for the prospecting of biological and genetic resources, stated that biological and genetic prospecting could be allowed within the ancestral lands and domains of the indigenous communities “only with the prior informed consent of such communities; obtained in accordance with the customary laws of the concerned community” (Section 2 [a] EO 247). The law

also prescribed the same requirement for 'prior informed consent' in commercial and academic research agreements entered into by indigenous cultural communities (Section 5 EO 247). While the essence of FPIC concept had already been largely and legally acknowledged as part of international customary practice by the time these two Philippine laws were enacted, they were still recognized as significant initial efforts to keep up with global standards on IP rights promotion. Thus, following international convention on IP rights recognition such as ILO 169 and other emerging multi-lateral agreements on the same, the Philippines, through the Mining Act of 1995 and EO 247, became one of the pioneer states which integrated locally the concept of FPIC.

The IPRA enacted in 1997 under the administration of then President Fidel V. Ramos also provided the legal framework for the recognition of indigenous peoples' right to FPIC. As defined in the IPRA, Free and Prior Informed Consent pertains to

the consensus of all members of the Indigenous Cultural Communities/Indigenous peoples 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 (IPRA Section 3 (g)).

This formulation of FPIC distinctly puts 'informed consent' as a stand-alone concept while 'free' and 'prior' serve as its qualifier or modifier. This is reflected by the fact that the process of FPIC under the IPRA must be conducted in a setting familiar to the indigenous peoples and in a language they can understand. Both of these are generally recognized as crucial elements in making informed decision. The fact that the law clearly mandates that the FPIC process be conducted within the indigenous peoples' 'comfort zone' provides them a guarantee that FPIC deliberation will be accessible and understandable to them. Hence, the decision made can be assumed as deliberate, rational and informed.

To further substantiate the FPIC principle, the Implementing Rules and Regulations (IRR) of the IPRA was also passed in 1998 stipulating that

[t]he ICCs/IPs shall, within their communities, determine for themselves policies, development programs, projects and plans to meet their identified priority needs and concerns. The ICCs/IPs shall have the **right to accept or reject** a certain development intervention in their particular communities. (Implementing Rules and Regulations of the IPRA Part III, Section 3. Free and Prior Informed Consent¹; emphasis mine)

Based on this, the IRR makes clear that the Indigenous Cultural Communities/Indigenous Peoples have the right not only to give consent but to deny consent as well. The IRR also safeguards indigenous peoples against development that is not consistent with the conservation and protection of their ancestral domains/lands, traditional support system of relationship, sustainable and traditional livelihood activities, indigenous management systems, and houses, properties, sacred and burial grounds (IRR-IPRA Part III, Sec. 3a-d). The process of FPIC is therefore seen as a major instrument for indigenous peoples' empowerment, anchored on their right to have significant control over their territories expressed in either their affirmative or negative action on any given proposal.

The IRR of the IPRA further stipulates the activities subject to the Indigenous Cultural Communities/Indigenous Peoples' free and prior informed consent namely: "exploration, development, exploitation and utilization of natural resources within ancestral domains/lands; research in indigenous knowledge, systems and practices; displacement and relocation; archeological explorations, diggings and excavations and access to religious and cultural sites; policies affecting the general welfare and the rights of Indigenous Cultural Communities/Indigenous peoples; and entry of the Military or paramilitary forces or establishment of temporary or permanent military facilities within the domains" (IRR-IPRA Part III, Section 7). The procedures and requirements for securing the indigenous peoples' consent are also contained in Part III, Section 5 of the IRR. As mentioned earlier, FPIC is also a policy instrument designed to protect indigenous peoples' rights in the process of development. Thus, in this section, the **minimum** requirements for the FPIC process are enumerated, including:

1. Posting of notices for every meeting;
2. Conduct of all meetings and proceedings about the proposed policy, program, project and plan in a process and language understood by the Indigenous Cultural Communities/Indigenous peoples concerned;
3. Validation of the minutes of the meetings or proceedings by those who attended the meeting or assembly before finalization and distribution;
4. Validation of consent or rejection by the ICC/IP community through affixing signatures or thumb marks on each and every page of the document signifying consent or rejection that is written in their own language or dialect with corresponding English or Pilipino translation;
5. Conduct of FPIC process for any alternative proposal. (IRR-IPRA Part III, Section 5)

Under Section 6 of the IRR, the obligations of the proponent or the entity seeking FPIC are also set out. These obligations are:

- a. Submit to the IP community an undertaking written in a language spoken and understood by the community concerned that it shall commit itself to full disclosure of records and information relevant to the policy, program, project or activity and allow full access to the records, documents, material information and facilities pertinent to the same;
- b. Submit to the IP community and the NCIP in a language understandable to the concerned community an Environmental and Socio-cultural Impact Statement, detailing all the possible impact of the policy, program, project or activity upon the ecological, economic, social and cultural aspect of the community as a whole. Such document shall clearly indicate how adverse impacts can be avoided or mitigated;
- c. Submit an undertaking in writing to answer for damages which the ICCs/IPs may suffer on account of the policy, program, project, plan or activity and deposit a cash bond or post a surety bond with the NCIP when required by the community equivalent to a percentage of its investments, subject to progressive increase, depending upon the impact of the project. The amount of bond shall be determined by the NCIP with the concurrence of the ICCs/IPs concerned; and
- d. Underwrite all expenses attendant to securing the free and prior informed consent of ICCs/IPs. (IRR-IPRA Sec. 6)

These provisions, however, proved difficult to implement especially with mining operators who were not required to follow 'strict' FPIC procedures under the Mining Act of 1995. Thus, due to pressures from several mining companies who were threatening to pull out their investments because of the FPIC requirement and the possible nullification of their existing permits in accordance with the IPRA, the supplemental NCIP Administrative Order (AO) No. 3 Series of 1998 was promulgated (Tuyor et al. 2007, 11). This particular order allowed for the continued operation of mining companies with existing permit prior to 1998 in IP ancestral lands even without undergoing the process of FPIC. This was regarded as the government's 'compromise' agreement with the mining lobby group, which saw the IPRA and its IRR as seriously 'disadvantageous' to its interests (Tuyor et al. 2007, 11).

Then, in 2002, the Revised Guidelines for the Issuance of Certification Precondition and FPIC² was promulgated to further enhance the FPIC instrument. The promulgation of this set of guidelines evidently affirmed the value of FPIC as a principal and critical element of indigenous peoples' right to self-governance and empowerment.

The Guidelines, officially known as NCIP AO 3, Series of 2002, not only repealed NCIP AO 3 Series of 1998 but also refined the definition and process of FPIC. It provided a detailed and comprehensive description of the FPIC including: a) its primary objectives and guiding principles (Part I); b) its process and procedure requirements (Part II); c) the Memorandum of Agreement or MOA (Part III); d) the role/responsibilities of all concerned parties concerned in the processes of the certification precondition (Part IV); and e) prohibited acts and sanctions related to the process of CP/FPIC (Part V).

The 2002 Revised FPIC Guidelines also established the **mandatory** activities for securing consent instead of merely specifying a set of minimum requirements as stipulated in the IRR of the IPRA. These mandatory activities must be strictly complied with, among other requirements, before the NCIP issues the Certificate Precondition (CP) which is the document attesting the legitimacy of the FPIC obtained from the IP community. Specifically, these mandatory activities which constitute the FPIC process include

- a. *Notices.* Posting of Notices in conspicuous places in and around the area of the concerned ICC/IP community by NCIP that a preliminary consultative meeting will be had.
- b. *Validation of the List of Elders/Leaders.*
- c. *Preliminary Consultative Meeting.* Within fifteen working (15) days from the submission of the applicant's operation plan, a preliminary consultative meeting shall be conducted within the host community.
- d. *Consensus Building.* Within a period of fifteen (15) days after the termination of the last and final preliminary consultative meeting/s, the Elders/Leaders shall complete the conduct of their own consultation meetings with their members in the community employing their own traditional consensus building processes in order to further discern the merits and demerits of the proposal as presented in the preliminary consultative meeting.
- e. *Community Assembly.* Within fifteen (15) days after the lapse of the period provided for community consensus building conducted by the ICC/IP Elders/Leaders, NCIP shall cause the conduct of Assembly of all the members of the community as represented by the household heads. It is on this occasion that the decision of the ICC/IP with respect to the proposal will be made known. (Revised Guidelines for FPIC and Issuance of Certificate Precondition Section 14)

Under the 2002 Revised FPIC Guidelines, this entire process of FPIC may take about sixty-seven (67) to seventy-seven (77) days. This FPIC

process, however, was criticized because it was too tedious and time-consuming and therefore difficult to implement. As proof, no FPIC Certification Precondition (CP) was issued from 2002 to 2003 while only fifty-seven (57) FPIC Certification Preconditions were issued from 2004 to 2006 (see Table 1). Thus, the NCIP under the leadership of Chairman Reuben Dasay A. Lingating, in its 2003 Annual Report, has pronounced the review of the Revised FPIC Guidelines of 2002 as one of its 12 Milestones Agenda and the desire to shorten the FPIC process and delegation of Certification Precondition Issuances on certain projects. This revision of the FPIC process along with its full implementation is part of NCIP's key initiative to "hammer on FPIC as an instrument of empowerment" (NCIP Annual Report 2003, 1).

Aside from the tedious process of FPIC which apparently lessened its efficacy, the 2002 Revised FPIC Guidelines were also amended to "balance the concerns of the state vis-a-vis that of the indigenous peoples," according to (former) NCIP Executive Director Masli A. Quilaman. Dir. Quilaman further stated that while the FPIC instrument affirms the indigenous peoples' "priority rights" over lands and domains that are central to their life and culture, it simultaneously recognizes the fact that the state is the legal owner of all the minerals within and under its territories. The 2002 Revised FPIC Guidelines were thus amended since such policy guidelines have become a major challenge to the state's policy on mining revitalization i.e. its exercise of ownership and use of mineral resources found underground. Apparently, mining companies and other applicants found it difficult to comply with the strict and tedious procedures required to obtain FPIC.

In this light, the NCIP immediately reviewed and revised the FPIC Revised Guidelines of 2002, which resulted in the promulgation of the Free and Prior Informed Consent (FPIC) Guidelines of 2006 on 28 July 2006. The new FPIC Guidelines took effect on 10 October 2006. In the 2006 Annual Report of the NCIP, Chairperson Jannette Cansing Serrano informed that the new Guidelines "provide for a simpler and fast processing of applications of Certification Preconditions (CPs)." This was apparently done by the NCIP "without depriving the rights and the interest of the ICCs/IPs" (NCIP Annual Report 2006). One of the key provisions of the 2006 FPIC Guidelines, therefore, was the shortening of the FPIC process. Under the new guidelines, the FPIC process was categorized into two; the regular FPIC process, which takes 55 days, and a special FPIC process which only requires 20 days.

After the proponent's fulfillment of the requirements stipulated in the Guidelines and the conduct of the mandatory activities that comprise the FPIC process, the community or IP concerned will then issue the certificate of FPIC (or a certificate of non-consent, as the case may be) through their representatives. This certificate is officially

known as the Certification Precondition (CP) issued by the NCIP to attest that the applicant has complied with the FPIC requirements as provided for in the Guidelines. Within just four years of implementing the 2006 FPIC Guidelines, the number of CPs issued by the NCIP increased from 57 to 255 (see Table 1).

Table 1. Comparative Table on FPIC/CP issued from 2002 to 2006 vis-a-vis 2007 to 2010.

FPIC/CP issued from 2002 to 2006		FPIC/CP issued from 2007 to 2010	
2002	0		
2003	0	2007	53
2004	13	2008*	70
2005	10	2009	75
2006	34	2010	57
TOTAL	57	TOTAL	255

Source: NCIP Summary of Issued Compliance Certificate (Certificate of Compliance to FPIC Process and Certification that the Community has given its Consent) as of December 2010.

* There were 117 FPIC/CPs Issued in 2008 according to the 2008 NCIP Annual Report.

The NCIP continuously lists the number of FPIC/CP it has issued as one of its major accomplishments in its annual reports (see Peñalba 2011). By 2010, the NCIP reported that it had issued a total of three hundred twelve (312) Compliance Certificates. These compliance certificates issued by the NCIP, in effect, became the testament to the effectiveness of the FPIC instrument in promoting IP right to self-determination (see also Peñalba 2016). In fact, the NCIP's deliberate and concerted effort to shorten the FPIC process starting in 2003 and resulting in the promulgation of the new FPIC Guidelines in 2006 could prove such a point. It could be noted that there was a staggering increase in the number of FPIC Compliance Certificates issued by the NCIP as a result of such revisions. This development, which many observers presumed was a direct consequence of the shortening of the FPIC process, seemed to suggest that NCIP's goal all along had been to facilitate as many FPIC applications as possible, concluding with project approval. What reinforced this notion is the fact that NCIP did not keep any official record of FPIC applications that were deficient, discontinued or disapproved from 2002 to 2010. This therefore raised concerns about the accuracy and integrity of government reports pertaining to FPIC.

FPIC as IP's Instrument for Self-Determination: Contending Narratives and Negotiated Resolutions

The FPIC principle is not only defined in **Section 3 (g)** of the IPRA but is also contained or mentioned in other provisions of the law such as in **Section 7 (c)** or *Right to Stay in the Territories*; **Section 32** or *Community Intellectual Rights*; **Section 33 (a)** or *Rights to Religious, Cultural Sites and Ceremonies*; **Section 35** or *Access to Biological and Genetic Resources*; **Section 46 (a)** or *Ancestral Domains Office*; **Section 52 (b)** *Petition for Delineation [of ancestral domain]*; and **Section 58** or *Environmental Considerations*. All these provisions uphold the fundamental right of the indigenous peoples to FPIC. Such frequency of reference to FPIC in the IPRA clearly manifests the importance of this concept in the accomplishment of the law's primary objective, which is to guarantee the protection of indigenous peoples' cultural integrity while ensuring their maximum participation in decision-making. The IPRA, through the FPIC requirement, also guarantees the IP's right to determine and express their own notion of well-being and development as a people. Based on the above-mentioned provisions, the FPIC's substantive meaning can therefore be derived in its critical function as an instrument for IP's self-determination as expressed in their self-governance and empowerment. This notion has been commonly articulated and highlighted by the state in its official records, specifically in the annual reports of the NCIP.

In NCIP's annual reports from 2002 to 2009, for instance, FPIC is always framed as the "foremost instrument of IP self-governance and empowerment." This is to say that the conduct of the FPIC process, in itself, could strongly indicate IP's assertion of their right to decision-making and their right to determine the course of their own development. NCIP Annual Report of 2005, for instance, pronounced that "[FPIC] is a control mechanism instituted by virtue of IPRA as inroads into the ancestral domains of indigenous peoples resulted more often to (*sic*) their disenfranchisement and marginalization." Furthermore, the issuance of CP as the proof that FPIC is legitimately obtained is said to be "the primary IP's mechanism to ensure that their rights, interest and welfare are protected and that they derive equitable benefits from development projects that enter their ancestral domains/lands" (NCIP Annual Report 2006). NCIP also referred to FPIC as the "foremost requirement before any project may be introduced in any area covered by the ancestral domain..." (NCIP Annual Report 2004 and 2008). FPIC's implementation was also very successful that the Philippine Report to the Convention on the Elimination of All Forms of Racial Discrimination (CERD 2008, 29) even contended that there is no reported case of FPIC violation or any formal protest from indigenous peoples against its conduct.

However, several documented cases of FPIC violations in the Philippines, specifically those related to mining, challenged the state's claim of effective and "flawless" implementation of the FPIC principle. The Fact Finding Mission to the Philippines conducted in July–August 2006 headed by UK Member of Parliament Clare Short which looked into mining concerns and conflicts in the country, for instance, validated the havoc that mining has brought into the lives of indigenous peoples. In the report's foreword given by Short, this has been stated about mining in the Philippines

[m]y own conclusion from the visit was that I have never seen anything so systematically destructive as the mining programme in the Philippines. The environmental effects are catastrophic as are the effects on people's livelihoods. (Short 2006 in Stankovitch et al. eds. 2007)

The Report also found "several incidents where companies violated the legal guidelines and 'engineered' the required consent" (Stankovitch et al. eds. 2007, 2). The Fact Finding Team also "heard compelling evidence" that indigenous peoples' right to FPIC is "being systematically denied" to them (*ibid.*, 13). Based on the Report, the indigenous peoples apparently lamented that they felt that

...mining companies lacked respect for their traditional cultures, viewing their right to FPIC as a technical obstacle to be overcome as quickly as possible rather than a necessary protection of rights. (*ibid.*).

Another evident theme that emerged during the team's visit to IP communities is what appears as the mining companies' conscious design to "capitalize on or generate division within indigenous communities" to get a favorable outcome for their proposal (*ibid.*). The Report further asserts that although there are strong legal instruments for the protection of IP rights in the Philippines, their implementation have been evidently flawed. The Report also notes that the government's focus on speeding up the FPIC application process may have even reduced the protection that indigenous peoples are provided with under existing laws. Given this, the team "recommends that the existing FPIC process be declared invalid and proposes that an investigation into the role of NCIP's in the FPIC process be undertaken by the office of the Ombudsman" (*ibid.*, 28).

Other reports and case studies also show how FPIC in Philippine indigenous communities has been widely contested and, oftentimes, misinterpreted, misconstrued or simply manufactured. This is illustrated in the case of the Blaans of Southern Mindanao who are facing displacement due to the mining operations of Sagittarius

Mines, Inc. (Beyer cited in Carino [Jill] 2013). Beyer recounts that the mining firm used “misrepresentation, manipulation and militarization” to obtain FPIC from “fake tribal leaders” who were given material rewards for endorsing the mine exploration activities (2013, 189–90). Even more alarming is the alleged connivance among the NCIP, the mining operators and the “fake tribal leaders” (which were reportedly created by NCIP itself) in pushing for mining in the indigenous communities of the Blaán. Another story from the Irayas of Mindoro island reflects the discontents of the indigenous peoples with regard to the integrity of NCIP in facilitating FPIC. Based on the case report, the NCIP personnel “persistently convinced people” to consent to mining in their area asserting that “there is progress in mining just as the Cordillera people have experienced” (Bibal cited in Carino [Jill] 2013). The NCIP in collusion with the proponent, Agusan Petroleum and Mining Company (APMC), also allegedly manipulated the results of the FPIC vote in favor of APMC. This was done by using attendance sheets meant for food provision as attachment, meaning additional votes, in favor of APMC’s proposal (ibid.). These specific cases illustrate some of the problems associated with obtaining consent in Philippine indigenous communities.

These cases also highlight the evident imbalance between the state and the indigenous peoples in terms of FPIC application. For while the state guarantees indigenous peoples’ right to FPIC, it also imposed mining as a development priority which seems to be at odds with the indigenous peoples’ notion of development and proper use of their ancestral domain. In fact, the mining industry is said to be the prime violator of indigenous peoples’ right to FPIC as articulated in the Philippine Indigenous Peoples ICERD Shadow Report (2009) which asserts that many FPIC processes in relation to mining had been flawed (see Penalba 2011). This is the result of the national survey conducted in 2008 among 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 claims “that over 70% of the mining and logging operations on their [indigenous peoples] lands were being conducted without their FPIC” (PIP ICERD Shadow Report 2009, 34). In a recent assessment of 34 FPIC cases in the Philippines, including 17 cases related to extractive activities like mining, Calde et al. (2013) recount “that there are more case studies (38.2%) reporting that the consent was given by IPs without sufficient information to arrive at a rational and well-informed decision” (57). Furthermore, their study concludes that

...although a considerable number of cases reported no violations committed in the field-based investigation stage (44.2%), there was

a substantial number of cases that reported incidents of violations during the actual conduct of the FPIC (38.2%) and during the conduct of the MOA signing and post-FPIC activities (29.4%). The data on the last two phases (FPIC proper and MOA/post-FPIC) are quite alarming, as it is during these phases when the more substantial aspects (content-wise) of the FPIC are deliberated and ultimately settled. (ibid.)

Given the growing concern especially among indigenous peoples about the apparent failure of the FPIC process to promote and secure IP’s right to self-determination, the House Committee on National Cultural Communities (NCC) headed by Representative Teddy B. Baguilat, Jr. conducted an independent investigation of FPIC’s implementation across the country. In House Resolution No. 887, Representative Baguilat also formally sought for “a review of the FPIC from Indigenous Peoples Communities for mining and other development projects in ancestral domains” (NCC Technical Working Group on the Review of FPIC, 2011). As a result, a Technical Working Group on the Review of FPIC was formed to assess the implementation of the 2006 FPIC Guidelines and draft amendments that will be incorporated in its revised version.

This effort by the NCC corresponded with the effort of the NCIP to amend the same guidelines through En Banc Resolution No. A-015, which also created a TWG headed by NCIP Executive Director Basilio A. Wandag (Penalba 2011, 204). These separate TWGs eventually merged to consolidate the proposed amendments to the 2006 FPIC Guidelines. The result of this was the promulgation of NCIP Administrative Order No. 3, Series of 2012 or “The Revised Guidelines on the Free and Prior Informed Consent (FPIC) and Related Processes of 2012” on 13 April 2012.

Among the most notable features of the Revised FPIC Guidelines of 2012 is the incorporation of the concept of inter-generational responsibility. Section 4 (e) of the Guidelines refers to inter-generational responsibility as an operating principle that must be observed in the implementation of the revised Guidelines. Accordingly, this means that

[the] indigenous concept of ownership sustains the view that ancestral domains are considered property which belong to all generations and therefore cannot be sold, disposed or destroyed. The ICCs/IPs shall have **priority rights** to manage and pursue sustainable and responsible development plans, programs, projects or activities within their ancestral domain. (emphasis supplied)

This salient provision of the new Guidelines not only emphasizes the collective nature of ownership of ancestral domain and its sustainable use for future generation but also the notion that indigenous peoples

only have priority rights over their resources and not exclusive or sole rights to such. Clearly, it is still the state that has the right of eminent domain. The state claims this right and the indigenous peoples know and recognize it. Another significant addition to the Guidelines is the section on "Management of Royalties and Similar Benefits" (Revised Guidelines of FPIC of 2012 Part VIII). Royalties, according to the Revised Guidelines, "shall not only be treated as economic benefits due Indigenous Cultural Communities/Indigenous Peoples but social justice measure, and in the management of the same, the inter-generational rights of the Indigenous Cultural Communities/Indigenous Peoples must be recognized, promoted and protected." In light of this, the NCIP, as the state agency mandated to promote and protect IP rights, is entitled to "direct financial and management audits of Indigenous Peoples Organizations (IPOs) managing royalties and other benefits or exercise its visitatorial powers as provided for by law" (Part VIII Section 64). This role of NCIP as a "monitoring body" reflects, once again, the state's extensive reach even as indigenous peoples try to assert their self-determination.

In the 2012 Revised FPIC Guidelines, the time prescription for the FPIC process was also modified in light of complaints from indigenous peoples about its inflexible and restrictive application under the previous guidelines. Based on the new guidelines, two community assemblies are to be held before any decision or consensus is communicated to the proponent. This is excluding the number of days needed to conduct the First and Second community assemblies which is not pre-determined under the new guidelines, the FPIC process for extractive/intrusive/large scale activities may take between 17 to 67 days to complete from the date of the Second community assembly. FPIC process for non-extractive/small-scale activities, however, requires two meetings with the Council of Elders/Leaders. Decision-making or consensus-building can only start ten (10) days after the First meeting and must be concluded not more than thirty (30) days thereafter. This significant change in FPIC's procedural time frame under the Revised Guidelines reflects the compromise agreement reached by the state and the indigenous peoples. While the state bargained for imposing time "prescription" to satisfy bureaucratic rules and procedures, the indigenous peoples demanded that the new time "prescription" be more flexible and sensitive to indigenous peoples' traditional consensus-building processes which cannot be strictly time-bound (NCC TWG on the Review of FPIC, 2011). The result, therefore, is an "adjustable" FPIC time frame which gives both the state and the indigenous peoples enough room to fulfill their respective duties without compromising the efficiency and integrity of the entire FPIC process.

FPIC as a Form of 'Middle Ground'

The principle of FPIC can be regarded as a 'Middle Ground' between the state and the indigenous peoples. Colchester and MacKay (2004) posit such idea, arguing that FPIC as 'Middle Ground' creates the space for the state and the indigenous peoples' to recognize each other's existence. They further argue that FPIC "has been an accepted principle of negotiations between indigenous and industrial societies for hundreds of years" (Colchester and MacKay 2004, 29). In view of this, FPIC as 'Middle Ground' is considered a crucial arena of encounter between the state, which aims to encompass indigenous peoples, and the indigenous peoples, which struggle to exercise autonomy from the state.

Due to this unique nature of the 'Middle Ground', it essentially becomes a contested space. As Colchester and MacKay (2004, 26) point out, "[t]he Middle Ground is not a comfortable place" since two very different cultures interact in it. On one hand, the state is forced to compromise or meet the indigenous peoples halfway by recognizing not only the indigenous peoples' existence but also their right to self-determination usually expressed in their demand for autonomy and respect for their traditional way of life and structures of governance. On the other hand, the indigenous peoples are also forced to compromise or meet the state halfway by recognizing the state's authority and participating in state-sanctioned practices that are arguably different from the indigenous peoples' traditional processes and structures.

The 'Middle Ground' also provides the state and the indigenous peoples an "alternative negotiated process in which each side both rejects seeking to impose its will through violence" (ibid.). In the 'Middle Ground', the state and indigenous peoples therefore become negotiating parties instead of enemies. The state, for example, still bears the power of eminent domain but the indigenous peoples are given right to ancestral domain along with **priority rights** to access, manage and use the resources within it through the FPIC. The FPIC is, thus, both an instrument used by the state to gain the consent of the indigenous peoples as the governed and also a tool used by the indigenous peoples to engage with the state and exercise their right to self-determination. The view that FPIC is a viable negotiating instrument between the state and the indigenous peoples is supported by the fact that many international standards and laws in place today embody such principle.

The question now is how to make the FPIC work to the full advantage of the indigenous peoples, who, relative to the state, come to the 'Middle Ground' with less power because of their historical marginalization? Colchester and MacKay (2004) argue that in order to operationalize FPIC and make the 'Middle Ground' a 'safer place

for indigenous peoples to negotiate and secure agreements," certain minimum standards must be set-up and agreed upon. These minimum standards must be accepted by governments and the private sector (ibid., 27). Among the most pertinent of these minimum standards are:

- a. Legal recognition of the peoples' own representative institutions, and means for them having legal personality;
- b. Clear and acceptable mechanisms for the participation of indigenous peoples in decision-making;
- c. Timely provision of information in the right forms and the right languages;
- d. Detailed, open and participatory environmental and social impact assessments, which should include respect for and use of indigenous knowledge, establishment of sound and agreed base line data, joint assessment of risks and open consultations with all affected groups;
- e. Culturally appropriate mechanisms to ensure the participation of the marginalized groups within indigenous societies such as women and children, the elderly and those who are illiterate;
- f. Staged processes which allow plenty of time for indigenous peoples to consult among themselves and reach conclusions according to their own mechanisms of decision-making;
- g. Benefit sharing options including revenue sharing or joint ownership schemes;
- h. Mechanisms to ensure the transparent and equitable administration of funds for community benefit, and
- i. Capacity building of indigenous peoples' institutions. (ibid.)

On the part of the indigenous peoples, the need to agree among themselves on the representative institutions that will be recognized to negotiate on their behalf and how these can be made accountable to them should first be addressed (ibid., 28). Otherwise, the indigenous peoples coming to the 'Middle Ground' without such agreement may find themselves more divided than united, a problem indigenous peoples around the world experience in undergoing the process of FPIC. This problem is probably best exemplified by the case of the Maya International Cooperative Biodiversity Group (Maya ICBG) research project which failed when the Maya people themselves disagreed about the process of prior informed consent and the appropriate body to represent them in such process (Feinholz-Klip et al. cited in Wynberg et al. 2009).

In the Philippines, the cases of Blaans of Mindanao and Irayas of Mindoro mentioned earlier prove how vulnerable the FPIC process

is to manipulation and misrepresentation. In these cases, the divided indigenous peoples were not able to take full advantage of the FPIC process as a venue for advancing their rights. If the indigenous peoples, however, make their negotiating institution truly representative, responsible and accountable, coming to the 'Middle Ground,' that is FPIC, and interacting with the state can be a fruitful political exercise.

Theoretically, to frame FPIC as a form of 'Middle Ground' also provides valuable insights about how to establish and maintain peaceful relations between the state and the indigenous peoples. If FPIC is to be regarded as a space for productive compromise, both the state and the indigenous peoples might actually be motivated to engage in discourse rather than in a violent confrontation. In effect, FPIC will create a venue for healthy deliberation between the state and the indigenous peoples toward the goal of building consensus. However, although this may be a good way of framing FPIC, it is very challenging to find its successful application in actual state-indigenous peoples' interaction in the Philippines. This is in view of various empirical studies done on FPIC which mostly concluded with a negative account of how the principle has been applied on the ground. The 'Middle Ground' does not also confer equal rights and benefits to both the state and the indigenous peoples. While it remains an arena of possibilities, it is actually "up for grabs" or subject to capture by the more dominant force. The one who comes to the 'Middle Ground' more prepared or more empowered than the other will therefore have the ability to shape the contour of this contested space.

Conclusion

The Philippines became one of the pioneer states that incorporated the FPIC concept in national legislation in accordance with international customary law and other global standards which set that respect for IP right to FPIC is something the state owes its indigenous peoples. This norm influenced the drafting of the IPRA to a point where IPRA fully adopted the concept of FPIC as it had been articulated and used in the international community. The formulation of the FPIC Guidelines first in 2002, then in 2006 and, more recently, in 2012 cast the FPIC principle as an important democratic process within the national legal structure. A close reading of the provisions of the IPRA and its IRR along with these three sets of Guidelines promulgated by the NCIP to operationalize the FPIC concept would reveal the critical importance of FPIC in advancing IP's self-determination. This self-determination, however, does not mean the right to secede from the Philippine state. It also does not mean mere recognition of indigenous peoples' right to enjoy their culture without interference from the state. Rather, it involves the meaningful participation of indigenous peoples in

political decision-making while maintaining their cultural integrity as a distinct community.

The right to self-determination as manifested by indigenous peoples' exercise of self-governance is clearly state defined and regulated. Indigenous peoples are citizens of the Philippine state and as such must therefore abide with existing national laws. This is articulated in the IPRA (Chapter IV, Section 15) which states that

The ICCs/IPs shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and **as may be compatible with the national legal system and with internationally recognized human rights.** (emphasis supplied)

FPIC, defined as a consensus-building process based on customary law, does not escape this qualification. The entire process of FPIC is sanctioned by the state through the NCIP to ensure not only the promotion of IP rights and cultural integrity but also the protection of Philippine national and even territorial integrity. FPIC thus becomes a meeting point between national and customary laws. It is a middle ground for the state and the indigenous peoples. It is a common space where nation-building and indigenous autonomy cohabit as valid and non-mutually exclusive aspirations. The NCIP asserts this by saying that "[the FPIC] provision is one indigenous peoples' leverage in balancing the interests of the State and its individual constituents" (NCIP Annual Report 2006). The state proves this by heeding the call of the indigenous peoples to recast the 2006 FPIC Guidelines and enact a new one that is more culturally-sensitive and more responsive to the genuine needs and aspirations of Philippine indigenous communities. The indigenous peoples' continued participation in the FPIC process and their vigilant action to expose its malfunctions also seem to affirm their belief that it is crucial to their self-determination. In support, in the existing literature on FPIC, no IP or IP advocate has ever expressed disagreement with FPIC as a *principle*, though many of them have claimed it is problematic in terms of *procedures*.

It also bears emphasis to properly locate the practice of FPIC within the broader realm of democracy and the specific notion of 'consent of the governed.' On one hand, indigenous peoples who exercise FPIC get to freely enjoy their rights, including priority rights to natural resources, but all within the state's purview. The state, on the other hand, claims legitimacy among these indigenous peoples who allow themselves to be subjected to state sponsored and sanctioned policies. FPIC, as a democratic practice, is thus aimed at cultivating, if not strengthening, the indigenous peoples' sense of

"belonging" through their participation in the political system. This is to say that the principle and practice of FPIC should not only be seen as a 'special' or distinct right accorded to the indigenous peoples but a form of giving consent that essentially reinforces their sense of citizenship and duty to the state. The space created by the practice of FPIC may thus be considered a functional (middle) ground for political interaction between the state, as it aims to gain consent, and its citizens, as they clamor for both recognition and representation.

In this light, the FPIC process in the Philippines should be aptly seen as a form of 'Middle Ground' between two otherwise contending actors, the state as the governing body and the indigenous peoples as the governed 'subjects.' While there may appear to be an evident power imbalance in such 'Middle Ground' in favor of the state, the indigenous peoples are still given the opportunity to advocate for their own interests and deal directly with the state through FPIC. One stellar example of this is how indigenous peoples may invoke their ancestral domain rights to counter the state's exercise of eminent domain. By granting indigenous peoples the right to give or withhold consent, they are placed in a strategic position to control the use of the resources within their ancestral domains. In effect, indigenous peoples can become powerful 'gatekeepers.' Given this, the state is put in a difficult balancing act between respecting indigenous people's right to FPIC and exercising its own right to determine the priority interest for the entire nation, sometimes by using its power of eminent domain. This tension illustrates democracy in action and how "consent of the governed" can become a powerful leverage for the indigenous peoples. However, while there may be indigenous cultural communities who are able to assert their right to ancestral domains over eminent domain, this is more the exemption than the rule. How the 'Middle Ground' can be a legitimate, productive and effective mechanism to create a wider and more stable democratic space for the marginalized sectors such as the indigenous peoples, therefore, is yet to be fully seen.

Given the central role of FPIC in our practice of democracy, it needs to be given serious thought and attention. The recently enacted FPIC Guidelines of 2012 hold much promise in ensuring that IP rights to their lands, indigenous knowledge systems, and other material resources will now be fully recognized, protected and promoted. Both the NCIP and the indigenous communities have learned valuable lessons from their respective experiences with the old FPIC guidelines. What needs to be done now is to vigorously document actual cases of FPIC conducted under the new guidelines with the aim of exposing discourses that will enlighten us about the contemporary meaning, process and practice of FPIC in Philippine indigenous communities. It is also worth suggesting that NCIP begin to tally all FPIC processes

conducted in the country regardless of outcome and record both the common and uncommon issues raised by indigenous peoples as regards the conduct of such processes.

Finally, the concept of FPIC is undoubtedly evolving. It is undergoing a process of construction and reconstruction with the state and the indigenous peoples as the primary players. The state, thus far, has been aggressive in securing its own interest as it negotiates with the indigenous peoples through the FPIC. The indigenous peoples, however, seem to be at a disadvantage given their possible lack of competence to confront the powerful state, their disunity or their social and economic vulnerabilities. How the state can make competent and engaged citizens out of the indigenous peoples will therefore have significant bearing on how successful they can be in utilizing their right to free and prior informed consent. Still, FPIC represents a 'Middle Ground.' Both the state and the indigenous peoples can position themselves to benefit from it and in the process strengthen democracy by widening and securing this space for the meaningful participation of the marginalized in society.

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