

FREE, PRIOR AND INFORMED CONSENT (FPIC): DOES IT GIVE INDIGENOUS
PEOPLES MORE CONTROL OVER DEVELOPMENT OF THEIR LANDS
IN THE PHILIPPINES?

By

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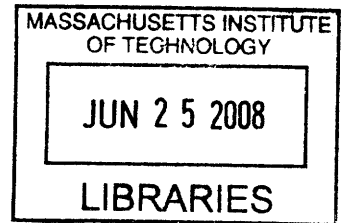
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ABSTRACT

The 1998 Indigenous Peoples Rights Act (IPRA) grants indigenous peoples (IPs) in the Philippines the right to Free, Prior, and Informed Consent (FPIC) with regard to development projects undertaken on their ancestral lands. My thesis explores whether the current practice of generating such consent guarantees indigenous peoples the control over development, particularly in relation to mining, that such procedures were designed to ensure.

Two case studies involving the Mamanwa and the Manobo tribes in Region XIII of Mindanao suggest that the government agencies involved failed to follow the rules set out in the officially approved guidelines that govern the conduct of the FPIC process.

The National Commission on Indigenous Peoples (NCIP) – the operating agency for FPIC in the Philippines – does not seem to have either the facilitation skills or an understanding of the complexity of issues involved required to achieve the goals of the 1998 IPRA. NCIP does not have the resources it needs to do its job and at times appears powerless vis-à-vis the mining companies and the Philippine government which has aggressively pursued the expansion and de-regulation of the mining industry.

In my two representative case studies, the mining companies used the promise of financial benefits at the outset of the consultations to short circuit the required FPIC process. Long-term social and environmental impacts and benefits were hardly discussed. The responses of the mining companies to concerns expressed by the tribes were not transparent. The Memorandums of Agreement (MOAs) produced in both cases hardly mentioned what would be done to meet the concerns of the aboriginal leadership before, during and after mining operations commenced.

Cultural erosion in many IP communities has led to the imposition of centralized decision-making that works against the goals of the FPIC process. In addition, the traditional decision-making procedures employed by IPs are inadequate to generate the kind of conversation required to ensure Free, Prior and Informed Consent.

Finally, most IP communities do not have a long-term development plans. They live on a day-to-day basis merely trying to survive. In the absence of such plans, it is hard to see how the tribes involved can really make informed decisions and ask for appropriate safeguards and shared commitments.

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CHAPTER ONE

INTRODUCTION

The plight of indigenous peoples and their effort to assert their land rights are attracting attention throughout the world.

The United Nations (UN) International Covenant on Civil and Political Rights¹ and the International Covenant on Economic, Social and Cultural Rights² declare that all peoples have the right to self-determination and should be able to “freely determine their political status and freely pursue their economic, social and cultural development” (Part one, Article one, 1966).

The International Labour Organization Convention No. 169 (ILO),³ recognizes the equality of rights between indigenous peoples and the rest of the population of a nation, and declares that “Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedom without hindrance and destruction” (Art. 3).

A number of countries have responded to these international mandates by recognizing the rights of indigenous peoples in their constitutions. Some, like Australia and the Philippines have also

¹ The International Covenant on Civil and Political Rights was ratified by 35 UN member nations in 1976. The Treaty details the basic civil and political rights of individuals and nations. The rights of nations which apply to indigenous communities include self-determination.

² The International Covenant on Economic, Social and Cultural Rights describes the basic economic, social, and cultural rights of individuals and nations which includes the right to self-determination.

³ The ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989 by the International Labour Organization. The Convention outlines the rights of Indigenous Peoples to consultation and participation in making decisions concerning them and their development.

enacted laws recognizing the rights of indigenous peoples to own land. Despite these efforts, however, many indigenous peoples have little control over development projects within their ancestral lands.

Few countries have taken the rights and interests of indigenous peoples into account when making plans for development projects (Errico, p.1). The UN Committee on Economic, Social and Cultural Rights reported in 2001 “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem” (MacKay, p.9). Furthermore, development projects, particularly those in the extractive industries, have caused the displacement of indigenous tribes and the disruption of their livelihoods. According to the UN Commission on Human Rights Special Rapporteur on indigenous peoples’ rights, the impact of extractive industries is “one of the major human rights problems faced by (indigenous peoples) in recent decades” (par. 56, UN Document E/CN.4/2002/97).

The negative effects of development projects, particularly those in the extractive industries, are compounded by the complete lack of participation by indigenous peoples in decision-making (<http://www.austlii.edu.au/au/journals/MelbJL/2003/5.html> retrieved on October 27 at 2:30 PM). The exclusion of indigenous peoples from choices about development taking place within their ancestral lands has stripped them of their right to self-determination – the means by which “indigenous peoples may determine the nature and extent of their relationship with the state and maintain control over their own institutions, territories, and resources without undue external interference” (Morgan, 2007, p.283). Leyla Mehta and Maria Stankovich reiterate how the basic

human rights covenants of the UN recognize the right of peoples as individuals and social collectivities to freely determine their economic, social and cultural development (n.d., p.3). They further articulate how the fundamental human right to self-determination along with other civil, political, economic, social and cultural rights forms the bases for citizen participation and consent in development projects and decisions (Ibid). According to Colchester and Ferrari, “it is only since the mid 1980s that indigenous peoples have made their demands for recognition of their right to give or withhold their free, prior and informed consent (FPIC) to actions that affect their lands, territories and natural resources a central part of their struggle for self-determination” (2007, p.2). Since then, the indigenous peoples’ right to FPIC has been increasingly recognized in international human rights treaties including the 2007 UN Declaration on the Rights of Indigenous Peoples. Fergus MacKay reiterates this in his paper *In Search of Middle Ground: “new international laws and standard-setting exercises have widely accepted that indigenous peoples should have the right to free, prior and informed consent to activities planned on their lands”* (2004, p.1).

BACKGROUND OF THIS STUDY

The 1987 Philippine Constitution indicates that the State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development (Sec. 22 Article II). In addition, the Philippine Constitution stipulates that the State shall recognize, respect, and protect the rights of Indigenous Cultural Communities (ICCs) to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies (Sec. 17 Article XIV).

Pursuant to the Constitution, the Philippine Congress enacted the Indigenous Peoples Rights Act (IPRA) in 1997 recognizing the inherent rights of IPs to their ancestral domains through the principle of *immemorial possession*. This right is rooted in the occupation and utilization of lands considered as communal property of indigenous communities who existed prior to the conquest of Spain. As such, ancestral domains do not follow geographic divisions based on political jurisdictions because they include the cultural area of activities, e.g. hunting ground, of the ancestors of present-day indigenous tribes in the Philippines.

Section 13 of Chapter IV also specifies that the “State recognizes the inherent rights of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall ensure the rights of ICCs/IPs to freely pursue their economic, social, and cultural development.” As such, the law guarantees the principle of free, prior and informed consent (FPIC) defined as the “consensus of all members of the ICCs/IPs to be determined with their respective customary laws and practices, free from any external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community” (g, Chapter II).

Section 7 Part III of the Implementing Rules and Regulations (IRR) of the IPRA subject policies, programs, projects, plans and activities to FPIC including:

- a) Exploration, development, exploitation and utilization of natural resources within ancestral domains/lands;
- b) Research in indigenous knowledge, systems and practices related to agriculture, forestry, watershed and resource management systems and technologies, medical and scientific concerns, bio-diversity, bio-prospecting and gathering of genetic resources.

- c) Displacement and relocation;
- d) Archeological explorations, diggings and excavations in access to religious and cultural sites;
- e) Policies affecting the general welfare and the rights of ICCs/IPs; and
- f) Entry of the military or paramilitary forces or establishment of temporary or permanent military facilities within the domains.

My research focuses on FPIC within the context of exploration, development, exploitation and utilization of natural resources within IP ancestral lands in the Philippines.

STATEMENT OF THE PROBLEM

The exercise of self-determination, i.e. the right to determine and pursue political, social, economic, and cultural development, necessitates the right to free, prior and informed consent.

The IPRA stipulates

The 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 (Section 3, Part III, IPRA IRR).

One of the controversial issues surrounding the practice of FPIC is whether it applies to mining. Most mining projects in the Philippines started before the IPRA was enacted, at a time when

indigenous rights to ancestral lands were not legally recognized. Hence, mining companies occupied and exploited natural resources within ancestral lands without the consent of indigenous communities.

With the enactment of IPRA, a number of mining companies have sought FPIC from indigenous tribes. As of June 2007, the National Commission on Indigenous Peoples (NCIP)⁴ has granted 90 companies a Certificates of Compliance indicating that FPIC has been documented⁵. These Certificates certify that the community has given consent to the entry and/or operation of a company in their ancestral domain. Of the 90, 59 cover large-scale mining projects (Table 1). The rest of the 31 are divided among industrial forestry management projects, construction of dams for flood control and hydropower, small-scale sand and gravel extraction, and research. Out of the 59 mining corporations that have complied with the FPIC process, 39 are operating in Mindanao where just over 60% of the indigenous populations in the country lives. And out of the 39, 18 are located in Region XIII otherwise known as CARAGA region (Table 1).

Table 1: Summary of Issued FPIC Compliance Certificate as of June 2007

Region	No. of Mining Projects	No. of IFMA Projects	No. of Dam/Hydro Projects	No. of Industrial Sand and Gravel (small-scale)	No. of Research Projects	No. of Others*	Total
LUZON							
Cordillera Administrative Region (CAR)	2	0	5	0	0	1	8
Region I: Ilocos	0	0	2	5	0		7
Region II: Cagayan Valley	2	0	0	0	0	1	3

⁴ The NCIP, created by the IPRA, is tasked to oversee the implementation of the law.

⁵ Refers to the Certificate of Compliance issued by the NCIP attesting that the applicant or proponent has complied with the requirements for securing the FPIC of affected indigenous communities in accordance with set Guidelines.

Region III: Central Luzon	1	0	0	0	2	1	4
Region IV: CALABAR & MIMARO	8	1	0	0	1	1	11
Region V: Bicol	4	1	0	0	0	1	6
VISAYAS							
Region VI: Western Visayas	2	0	0	0	0	0	2
Region VII: Central Visayas	1	0	0	0	0	0	1
Region VIII: Eastern Visayas	0	0	0	0	0	0	0
MINDANAO							
Region IX: Zamboanga	3	0	0	0	0	0	3
Region X: Northern Mindanao	3	0	0	0	0	0	3
Region XI: Davao	11	2	2	0	0	2	17
Region XII: SOCCSKSARG EN	4	0	0	0	0	3	7
Region XIII: CARAGA	18	0	0	0	0	0	18
Total	59	4	9	5	3	10	90

Source: NCIP Ancestral Domains Office (ADO)

* Others: Resource management/Livelihood, Telecommunications, etc.

Table 2: Details of Issued FPIC Compliance Certificate to Mining Corporations in the CARAGA Region

Mining Applicant/ Proponent	Location: Barangay/ Municipality/Province	Total Area (Hectares)	Purpose	Date Issued/ Signed
Explosives Consultation and Application	Basag, Taligaman, & de Oro, Butuan City, Agusan del Norte	2,703.20	Mineral Production Sharing Agreement (MPSA)	2/13/2007
SEMCO Exploration and Mining Corporation*			MPSA	10/3/2006
Apical Mining Corporation	Jabonga, Tubay, Santiago, Cabadbaran, Agusan del Norte	7,764.00	Exploration	11/30/2006
SR Metals Incorporated	La Fraternidad, Tubay, Agusan del Norte		MPSA	11/30/2006

PHILSAGA Mining Corporation	Bayugan III, Wasian, & Sta. Cruz, Rosario, Agusan del Sur; Consuelo San Andres, & Imelda, Bunawan, Agusan del Sur	3,555.4630	Exploration and Mining Operation	8/6/2004
PHILSAGA Mining Corporation*				
PHSAMED Mining Corporation (for Bernster Exploration & Agro-industrial Corp.)	Sta. Cruz, Rosario, Agusan del Sur	409.00	MPSA	1/30/2007
Southern Agusan Gold Mine & Exploration Corporation*	Sitios Gacub, Bahay, Costan, Manhulayan; Brgy. La Purisima, Prosperidad, Agusan del Sur		MPSA	7/13/2007
JCG Resources, Incorporation	Alegria, Tubod, & Mainit, Surigao del Norte	3,288.7676	MPSA	1/30/2004
Minimax Exploration Corporation	Tapian, Mainit, Surigao del Norte	14,164.00	Exploration	2/16/2004
Taganito Mining Corporation	Taganito, Urbiztondo, Hayanggabon, & Cagdianao, Claver, Surigao del Norte	4,976.03	MPSA	8/7/2006
Kalamazoo Mining Corporation	Urbiztondo, Claver, Surigao del Norte		MPSA	10/11/2006
Oriental Synergy Mining Corporation	Urbiztondo, Claver, Surigao del Norte	74.00	Exploration	1/16/2007
North Dinagat Mineral Resource Corporation*	Pantukan, & Adlay, Carrascal, Surigao del Sur; Cagdianao, Claver, Surigao del Norte		MPSA	7/13/2007
SEMCO Exploration and Mining Corporation	Pakwan, Lanuza, Surigao del Sur	10,201.0479	Exploration	1/25/2005
PHSAMED Mining Corporation (for Dasagan Mining Corp.)	Javier, Guinhalinan, Barobo, Surigao del Sur	1,215.00	MPSA	1/30/2007
TOTAL AREA		48,350.51		

Source: NCIP Ancestral Domains Office (ADO) * - No data

It is against this backdrop that I want to explore FPIC in relation to mining in the Philippines, particularly in the CARAGA region of Mindanao. What is the experience of indigenous tribes regarding the granting of FPIC for mining operations?

Does the current practice for granting FPIC increase the control that indigenous peoples have over development of their ancestral lands, particularly in relation to mining? Under what conditions does the use of FPIC alter decisions with regard to the entry and operation of mining corporations?

The notion of consent is central to the question I explore in my thesis. The right to say no is supposedly an option in the exercise of FPIC. Often, the reality though is that consent is assumed by mining companies and even by government offices involved. The FPIC process is framed as a conversation about benefits that mining companies will provide. Conditions that do not foster a free and informed consent, as my case studies reveal, result to the absence of an enforceable right for indigenous peoples to say no to mining operations.

METHODOLOGY

I use case studies to examine how FPIC affects indigenous peoples' control of development decisions on their ancestral lands.

Two cases are situated in the CARAGA region of Mindanao. They build on individual and group interviews with members of the Mamanwa and the Manobo tribes, including tribal leaders and members of the Council of Elders. Interviews with representatives of the concerned mining corporations, namely, the Taganito Mining Corporation and the PHILSAGA Mining Corporation were also completed. I interviewed NCIP Community Service Center staff directly involved in the management of the FPIC process. Documents provided by tribal leaders, mining

corporations, and the NCIP with regard to the agreements reached in the FPIC process are used to help frame my reports.

These case studies are supplemented with interviews with NCIP provincial, regional, and national officials as well as with national officials of the Department of Environment and Natural Resource's (DENR) Mine and Geosciences Bureau (MGB). I was also able to talk with several lawyers dealing with IP concerns.

I have outlined the three following measures in order to lay out my analysis of the problem I have set to answer in this thesis.

1. How are decisions made in each indigenous community? What usual methods are used in the process governing FPIC in relation to mineral development? Are the decision-mechanisms adequate to the task of a free, prior, and informed consent?

2. What development plans were in effect in the indigenous community prior to the FPIC process? Has the development resulting from the FPIC process been consistent with the long-term development plans of the indigenous community?

3. What are the on-going involvements of the indigenous community after mining is approved? What kind of continuing monitoring and participation in the development activities of the mining companies might be appropriate?

The second chapter begins with an articulation of the 2002 and 2006 Guidelines governing the conduct of FPIC in the Philippines. While the 2006 guidelines has superseded the former, the 2002 guidelines was used in the case of the Taganito Mining Corporation (TMC) who sought the FPIC of the Mamanwa tribe in Surigao del Norte. The FPIC process with the Manobo tribe in Agusan del Sur employed both the 2002 and 2006 guidelines. The mandated FPIC activities as well as who were involved and in-charge of them are tackled in this chapter.

The third chapter situates the mining industry in the Philippines. The Philippine government has undertaken an active stance in promoting investments for the development of mineral resources in the country. The Mining Act of 1995 has liberalized the country's mining industry. A number of mining rights under the new law, the extent of mining, and the contribution it makes to the economy are discussed in this chapter.

Chapter four tackles the overlap of mining right and indigenous lands. Indigenous tribes in the country and their locations are identified, showing Mindanao to be significantly inhabited by IPs. The data demonstrates an increasing coverage of mining applications and operations within ancestral domains. Government has also embarked on 23 top priority mining projects, 18 of which overlap with ancestral domains. Eleven of these are in Mindanao, five of which are in the CARAGA/Region XIII).

The two case studies are presented and analyzed in Chapter Five. The first case is situated in the province of Surigao del Norte, one of the four provinces comprising the CARAGA Region. The

case deals with the Mamanwa tribe of barangays⁶ Taganito and Urbiztondo in the municipality of Claver and the Taganito Mining Corporation (TMC). I have made a detailed presentation of what transpired in the FPIC process according to the interviewees and the documents I have obtained, incorporating my analysis as I narrated the events. The FPIC process in this case started in February 2006 and concluded with a Memorandum of Agreement (MOA) in July 2006. The second case demonstrates two FPIC processes undertaken with the Manobo tribe in the municipality of Rosario of the province of Agusan del Sur. The FPIC processes in this case present a shortcut undertaking compared to the Mamanwas in the first case. I have tackled the cases in a thematic manner based on the measures I have set. Like the Mamanwa case, the Manobos gave their consent and forged a Memorandum of Agreement (MOA) with the PHILSAGA Mining Corporation. In both cases, the mining companies have been in operation for more than a decade in those ancestral domains.

Chapter Six ties the various chapters to provide a concluding analysis of whether FPIC increases IPs' control of decisions over their ancestral domains. In the midst of an aggressive mineral development in the country, there is tremendous pressure for indigenous communities to exercise what could be a free, prior, and informed consent. The term "prior" is hardly applicable to existing mining companies who are renewing licenses or permits. Mining companies continue to operate as the FPIC process is on-going. The FPIC processes in both cases show a lack of transparency and significant control of the process and outcome by the mining companies. Instead of coming out as a neutral facilitator of the FPIC process, the NCIP's lack of skills and resources and the personal biases of officers involved in the process rendered them more supportive of the mining companies' interests. The complexity of issues involved makes the

⁶ Barangay is the smallest unit of governance in the Philippines. A municipality is composed of barangays.

customary or current cultural decision-making process of indigenous peoples inadequate in assisting them to arrive at a free and informed consent. With IPs' cultural erosion, left on its own, the tribal decision-making breeds division and conflict among leaders and isolation of members.

I recommend the use of a third neutral party acceptable to the mining company, the host barangay government/s, and the IPs to facilitate the FPIC process to ensure a fair, equitable, and legitimate outcome for everyone. The NCIP could take the responsibility of being the convener of the FPIC process. The consultations would do best to produce such an outcome if they are framed as a negotiation of stakeholder interests instead of companies only informing IPs of what they have pre-determined as benefits for them. I have included the barangay as part of the FPIC process since mining companies have the option to charge the community development benefits for the host barangays to the royalty fee due to the IPs. In addition, the FPIC process would have to include an independent or joint Environmental Impact Assessment undertaken by external advisors chosen by the parties. This EIA is intended to incorporate the concerns, i.e. data/information questions and needs, of the host barangay/s and the IPs. The neutral facilitator will also facilitate the Consensus Building among the IPs, ensuring an inclusive process where community interests, representation, and transparency or feedback mechanisms are to be defined. Much is to be done in building the capacities of IP communities to enable them to articulate and manage their development plan without which the IPs continue to live in survival and thus always end up having no choice but give their consent to mining companies. Lastly, to ensure on-going shared decision-making on the development activities of mining companies within ancestral domains, specific workable monitoring procedures would have to be part of the

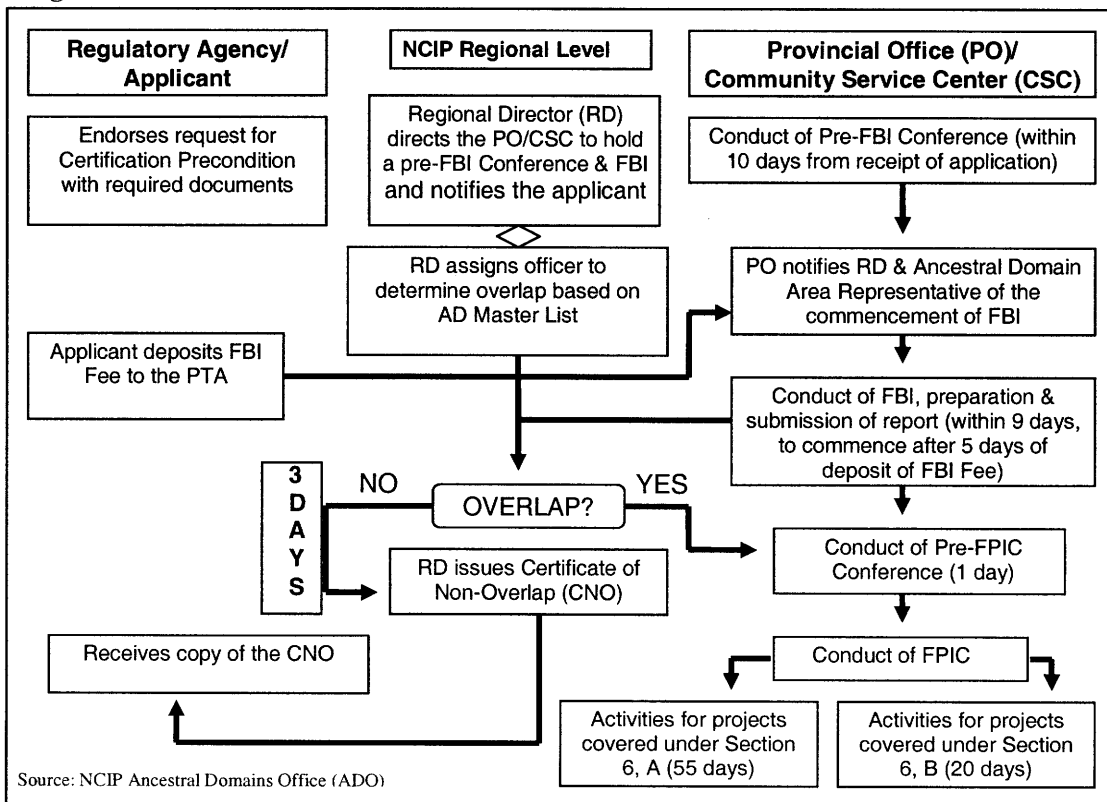
Memorandum of Agreement (MOA) among parties, should consent be given by the IPs. This builds the capacities of barangay communities and IPs to manage the lands when mining operation is completed. More important, this recognizes the right of the IPs over their ancestral domains.

CHAPTER TWO

FPIC IN THE PHILIPPINES

Since the enactment of IPRA in 1997, the practice of FPIC has been governed by two sets of guidelines issued by the National Commission on Indigenous Peoples (NCIP). One is embodied in Administrative Order (AO) No. 3 series of 2002 and a more recent version is contained in AO No. 1 series of 2006 which supersedes the former. The diagram below illustrates the general process that an applicant goes through in securing FPIC. This basically represents the 2006 Guidelines. Differences between the two sets of guidelines are covered in the subsequent discussion.

Diagram 1: General FPIC Process



The guidelines underscore the need to involve indigenous communities in decision-making in the exercise of their right to FPIC. When it comes to projects that are subject to FPIC, the 2006 guidelines place them in one of two categories, namely, large-scale and small-scale, stipulating different procedures for each. FPIC procedures for large-scale projects are governed by Section 26 while small-scale projects are covered by Section 27.

Table 3: Project Categories of Scale

Large-Scale Projects (Part II, Sec. 6, A)	Small-Scale Projects (Part II, Sec. 6, B)
Large-scale development, exploitation and utilization of land, water, air, and other natural resources	Small-scale exploitation and utilization of land, water and natural resources within the ancestral domains/lands as defined under existing laws, rules and regulations of governing or regulating agencies
Exploration of mineral and energy resources	Commercial research undertaken by government, private persons, or corporations or foreign entities for the purposes intended directly or indirectly for commercial use, such as: publication, documentation, paid lectures, among others
Programs, projects and activities that may lead to the displacement and/or relocation of indigenous peoples	Unsolicited government projects for the delivery of socio-economic services and development including projects of charitable institutions, and civic or non-government organizations, the direct and primary beneficiary of which are ICCs/IPs who own the ancestral domain, except when the same are formally coordinated with NCIP or as co-implementor in connection with the latter's programs, projects or activities in which case, no FBI/FPIC is necessary: Provided that the said programs or projects are validated by the NCIP to be acceptable to the intended ICC/IP beneficiaries, either because the same conform with the community's ADSDPP ⁷ or shall become part thereof in the future
Resettlement programs or projects by the government or any of its instrumentalities that may introduce migrants into ancestral domains whether permanent or temporary	Activities that would affect their spiritual and religious traditions, customs and ceremonies, including ceremonial objects or access to religious and cultural sites, archeological explorations, diggings, and excavations unless the council of elders/leaders require the conduct of the FPIC process prescribed under Section 26
Management of protected or environmentally critical areas, and other related joint undertakings	Programs/projects/activities not requiring permits from government agencies
Bioprospecting activities	Feasibility studies for any program, project, activity or undertaking relative to any of those enumerated in Section 6 (A)

⁷ The Ancestral Domain Sustainable Development Protection Plan refers to the plan formulated and adopted by a particular IP community that embodies their vision, framework, goals, objectives, and strategies for the sustainable management and development of their ancestral domain and all resources therein.

	[large-scale projects]
Industrial land use including the establishment of economic zones	Occupation of military or organizing para-military forces, establishment of temporary or permanent military facilities, or military exercises within the domains, except when requested by concerned elders/leaders in writing. Military operations within ancestral domain areas when made in connection with hot pursuit operations, securing vital government installations, programs and projects against clear and imminent danger, shall not require FPIC.
Large-scale tourism projects	
Large-scale agricultural and forestry management projects	
Other activities similar or analogous to the foregoing	

For large-scale projects to be undertaken within ancestral domains, the pertinent government regulatory agency, after receiving the proponent's application for a lease, license, permit, agreement and or concession, must endorse and send the application to a NCIP Regional Office (Part II, Section 7). For projects not requiring permits from a government regulatory agency, the application is filed directly with the appropriate NCIP Regional Office (Ibid). Note that the 2002 Guidelines do not distinguish between projects undertaken within ancestral domains. If ancestral lands are involved, an applicant has to go through the pertinent regulatory agency which then sends the necessary documents to the Ancestral Domains Office⁸ (ADO) of NCIP and not to a Regional Office. The IP communities are not generally privy to this stage of the process as these mainly concern the applicant and government agencies. However, the knowledge of which office the application is lodged is important to the community. As ground reality reflects, informal processes occur even before formal process commences. In the Guidelines, the applicant is required to submit during the pre-FPIC Conference an Environmental and Socio-Cultural Impact Statement that is presumably based on a sound assessment on the ground. While

⁸ The Ancestral Domains Office evaluates the FBI and FPIC documentations and endorses the issuance of a Compliance Certificate to the Commission when consent has been given by an IP community for a mining corporation to operate in their ancestral domain.

the applicant is supposed to discuss with the community the impacts of its project, this is apparently often not the case. Project applicants, like mining companies, would simply declare that they have already submitted their EIA to the pertinent agency. Knowing where the application for a permit is submitted will properly direct the community in getting accurate information needed.

According to the 2002 Guidelines, documents which must be endorsed by a regulatory agency are: a report on the nature and extent of the project, and a technical map indicating affected areas (II, Section 7). The 2006 Guidelines, for large-scale projects, also requires these documents but includes the specific names of the sites covered by the project, the duration of the project, and the operational plan and project activities required by the endorsing regulatory agency (Part II, Sec. 8, a&b). With regard to Mamanwa case, the mining company submitted an operational plan covering 2004-2006 while the company was seeking the FPIC of the tribe for a 25-year operation which was supposed to begin after the MOA was signed in July 2006. The Manobo case shows that an Environmental Conversion and Protection Program being asked by the tribe were not provided by the company. The NCIP has to exercise its authority in ensuring that these documents are likewise submitted by the endorsing regulatory agency and that these are tackled with communities. For projects not requiring a government license or permit, an abstract of the project detailing the advantages and disadvantages of the project and a map of the affected area are required (Ibid).

Upon receipt of the pertinent documents, the NCIP Regional Office must verify from its Master List of Ancestral Domain Areas whether the area applied for by the applicant is within or

overlaps an ancestral domain/s (2006 Guidelines, Part II, Section 9). If no overlap exists as far as the Service Center Head⁹, and the designated Regional Officer are concerned, a Certificate of Non-Overlap (CNO) is issued by the Regional Director to the applicant within three days, noting though that in case an overlap will be later discovered, the applicant will have to go through Field-based Investigation (FBI) and FPIC procedures (Part IV, Section 21). An FBI is a ground investigation undertaken by an FBI Team to determine whether a project overlaps with or affects an ancestral domain, the extent of the affected area, and the indigenous tribe/s whose consent will have to be obtained (Part I, Sec. 5, f). In case of an overlap indicated by the Master List of Ancestral Domain Areas, the Regional Director shall instruct the Provincial Officer to conduct a Pre-Field Based Investigation (FBI) Conference followed by an FBI (Part II, Section 9). In the 2002 Guidelines, the area being applied for a project is presumed to overlap with an ancestral domain. And so the conduct of an FBI is required in all projects securing the FPIC of concerned ICCs.

While the Guidelines are clear on what documentary requirements are needed for endorsement, there are information gaps and lack of documentation that may happen but are not remedied. As the case of the Mamanwa tribes shows, the absence of accurate information has weakened the tribe's position to evaluate the project and negotiate their demands such as housing for affected population, mitigating impacts of mining encroachment on forestlands. The same case also illustrates that the accuracy and comprehensiveness of documents to be endorsed can be undermined by the same agency tasked to ensure its proper implementation because the FPIC process continued uninterrupted despite the failure to provide the required documentation.

⁹ A Community Service Center is a field office. A cluster of CSCs is managed by a CSC Head.

Forming the FBI Team is the first step that the NCIP takes to move the FPIC process. The tasks of the FBI Team are, among others, to review the endorsed documents from the applicant and regulatory agency, prepare a work and financial plan that will be the basis for the cost for the Pre-FBI and FBI processes that will be shouldered by the applicant, and submit a narrative report about the field investigation fifteen (15) days after (2006, Part IV, Section 14; 2002, II, Sec. 9, c). The first two tasks mentioned above are accomplished during the pre-FBI Conference that is presided by the Provincial Officer and conducted within ten days from the receipt of the application or endorsement by the regulatory agency (Part II, Section 9). The report generally contains information such as population and location of affected communities, result of interviews with leaders, in order to validate the accuracy of the endorsed documents (Part IV, Section 19). Perhaps, some of the more crucial information expected from the FBI is the documentation of the community's traditional decision-making process (Part IV, Section 19) and the identification of tribal leadership or group of elders.

Since the FBI lays the foundation of the FPIC process, the quality of the FBI Team report is crucial. In the following cases, the lack of accurate information during the FBI stage jeopardizes the IP community's claim and position during negotiation. Coming up with an accurate and comprehensive report is a challenge for the FBI Team as time is limited. The FBI Team is set to begin their work five (5) days after the applicant has deposited the money to finance the FBI process and only has ten (10) more days to complete the process with the last day designated as the pre-FPIC process (2006, Part IV, Section 18).

In relation to the conduct of the FPIC process, there is a general direction towards localization. The 2006 Guidelines on the composition of the FBI Team reduced the number of members from five (5) to three (3) and lodges the responsibility from the Regional Office (2002 Guidelines) to the Provincial Office or Community Service Center (Part IV, Section 12). In fact, in the 2006 Guidelines, the Regional Office is not part of the FBI Team. This transfer of responsibility makes the process more localized. The Provincial Office, at least geographically, is more accessible to the IP communities. As opposed to the bigger jurisdiction of the Regional Office, the Provincial Office has more focus and coherence in dealing with the issues familiar to its area of direct jurisdiction. This localization of the FPIC process is also reflected in the composition of the FPIC Team. The FPIC Team is constituted by the Regional Director (RD) immediately after the RD receives the result of the FBI. It is composed of not more than six members coming from the Provincial and/or Service Center. The team must include, whenever feasible, the Provincial Legal Officer, one Engineer from the provincial or the regional office, and at least one from the FBI Team (2006 Guidelines, Part IV, Section 22).

The FPIC Team is only stipulated in 2006. It is responsible for conducting the pre-FPIC Conference and the FPIC procedures. During the one-day Pre-FPIC Conference, the FPIC Team reviews with the applicant the results of the FBI, presents and sets the schedule of activities to be undertaken in securing FPIC from the affected indigenous communities, and settles the cost of the conduct of those activities. The 2006 Guidelines likewise states that during the pre-FPIC Conference, the following must be accomplished:

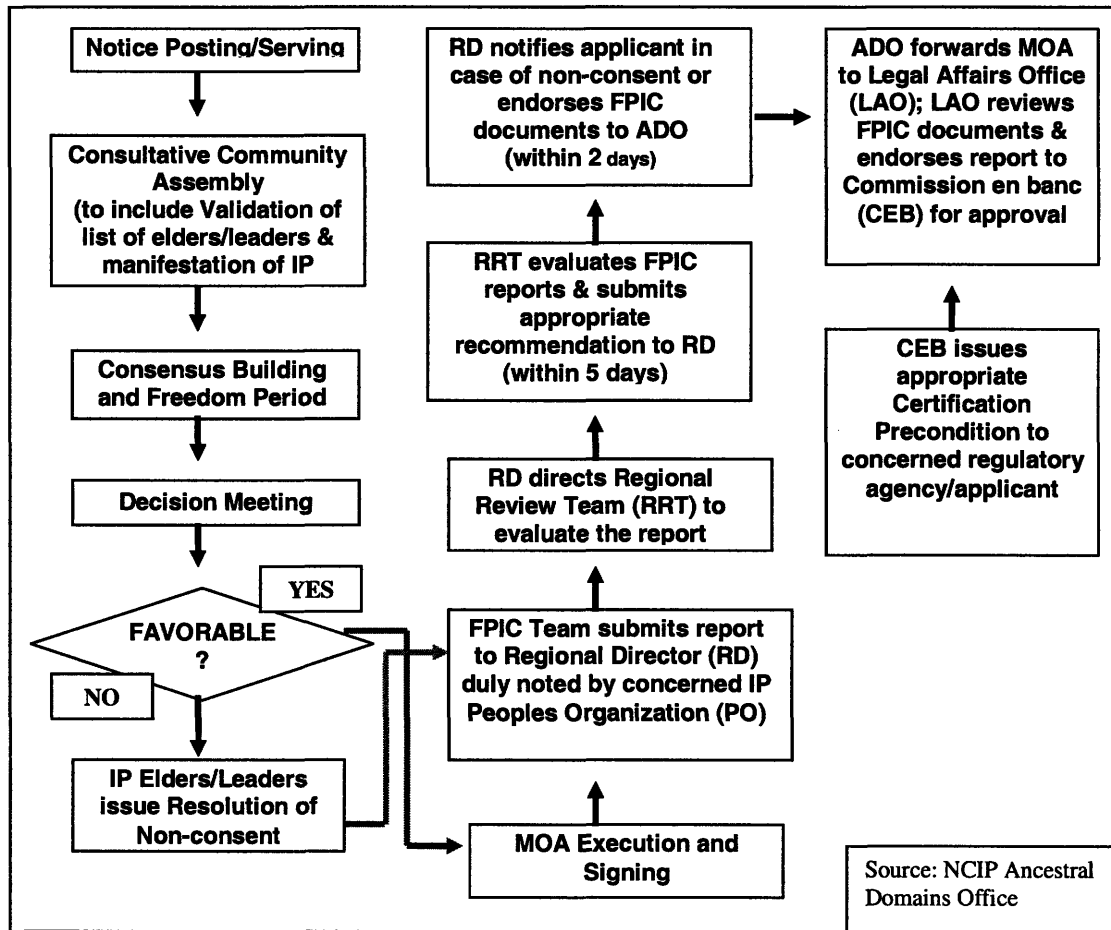
Subsequent submission by the applicant of an undertaking, written in a language spoken and understood by the community concerned, that it shall commit to full disclosure of records and information relevant to the plan, program, project or activity that would allow the community full access to records, documents, material information and facilities pertinent to the same (Part IV, Section 20).

Subsequent submission by the applicant of an Environmental and Socio-cultural Impact Statement, detailing all the possible impact of the plan, 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 effects may be avoided, mitigated and/or addressed (Ibid).

The two major outputs appear overly ambitious. The first output assumes a capable person versed in both the language of the indigenous people and the business sector that can make an accurate translation on paper and to the people in the community. The second output is very crucial to the understanding of the community as it pertains to project impacts. It is surprising that there is no formal stipulation for this statement to be translated as the first. Again, one real challenge of the FPIC process is communicating with the people. Many of the older generation of indigenous communities communicate in a different tradition that use symbols and many did not go through the formal school system. Translations on paper are essential but the greater challenge in achieving the goals of FPIC is communicating what is on paper to the people in a form that is accessible to them.

The activities discussed in the following below are mandatory as per the 2002 Guidelines and the FPIC process for large-scale projects in the 2006 guidelines. The diagram of the mandatory FPIC process/activities basically represents the 2006 Guidelines but differences are subsequently discussed.

Diagram 2: Mandatory Activities for Projects under Section 6-A of 2006 FPIC Guidelines (Projects Requiring Community Consultation)



1. Posting of notices

The 2002 Guidelines provides a more detailed outline of the notices to be posted. Aside from the date and venue of the meeting, notice must include the objectives, nature, and scope of the

project and the identity of the applicant (II, Section 14, a). The 2006 Guidelines meanwhile have only specified the date, time, venue, and agenda of the meeting (Part V, Section 26). While both Guidelines stipulate that the notices be posted in conspicuous areas within the affected communities, the notices are at times too small to be seen given that they are in bond-size papers. They are also at times posted within a short limited time, if not the day, before the meeting. It is imperative, despite the lack of clear directive, that the notice be posted using the local language of the community concerned. They must also ensure that the council of elders/leaders has been served notice of the meeting.

2. Preliminary Consultative Meeting/Consultative Community Assembly

A significant modification in the composition of participants for the meeting concerning large-scale projects is that affected communities are now represented by selected households only (Part V, Sec.26, b). The selection of household representatives is decided by the community themselves according to their customary decision-making. However, the process of selection is not governed by strict guidelines. On the other hand, selection of household can trigger past contentious issues of power sharing since the community is often not homogeneous as demonstrated by the case experiences. Another modification in the 2006 Guidelines is that the regulatory government agency, instead of the Council of Elders/Leaders as stated in 2002, determine which areas are considered affected communities based on the Environmental Impact Assessment (EIA). While the new guideline succeeds in establishing affected communities and impacts of mining in these communities, circumscribing the affected areas to communities directly affected by the project further divides the community. In fact, when two communities are identified as affected areas, the FBI Team, in consultation with the council of elders/leaders

can recommend to the FPIC Team separate assemblies (Part III, Sec. 10, f). Defining which areas are affected or not based on EIA raises questions about direct and indirect impacts of projects and how they are addressed by all the stakeholders.

During the Consultative Community Assembly, validation of elders/leaders, in cases where the ancestral domain has not been titled or where the ICC has not formulated an ADSDPP, is undertaken (Part V, Section 24). The 2002 Guidelines conducts the validation of elders/leaders as a separate activity. Validating authenticity of customary leadership is difficult in a community that has a migrant population. In the case of the Manobo tribe, migrant tribal group who came to the community four decades ago has become part of their decision-making process. But validating cultural leadership has threatened this integration into the community.

During the Preliminary Consultative Meeting/Consultative Community Assembly, the applicant is supposed to present the costs and benefits of the proposed project, the perceived adverse impacts to the community, and the mitigation measures, in addition to scope and operational plan. But communities often attest that mining companies do not tackle the environmental impacts of their project. What are often discussed at the outset are the financial benefits and social services that communities could receive. This approach determines the course of subsequent meetings in the FPIC process. Given that most IP communities are poor, flaunting benefits at the outset often cause division among communities and their leaders as there would be those immediately lured of the benefit offers. The 2006 Guidelines adds that the applicant should include a statement of commitment to post performance bond to take care of consequential damages to the community (Ibid). The community, including those for or against, is supposed to be given time to ask for

clarifications and air their views regarding the proposal. But the preliminary consultation is often held for a half or whole day and companies take most of the time presenting. In the case of mining, given the complexity of issues, the time allotted is inadequate to deal with questions and clarifications from the community members. Also, mining companies as illustrated by my case studies often lack transparency and manipulate the course of the discussions and the outcome of the process. The NCIP/FPIC Team who is only allowed to facilitate and document the proceedings often end up supporting mining companies.

3. Consensus Building and Freedom Period

Both guidelines define consensus building as the participation of the ICCs/IPs in the decision-making processes primarily through their indigenous socio-political structures and the affirmation of the decisions of their duly authorized representatives (2002 & 2006 Guidelines, Part I, Sec. 4, a). This period follows the community assembly and is strictly for the community members and their council of elders/leaders. Only the NCIP representatives to solely document the proceedings are allowed. This period is for the community to exercise 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/consultative community assembly” (2002 Guidelines, I, Sec. 14, d; 2006 Guidelines, Part V, Sec. 26, c). The problem with the Consensus Building period is that it assumes that tribal communities have the capacity for an informed and comprehensive exchange. Such assumption fails to consider that development projects entering IP lands, e.g. dam/hydro, mining, involve issues that are so complex, i.e. multiple stakeholders outside the FPIC process as well as technical and scientific considerations. The enormous task of defining the interests of the community and a corresponding long-term development plan

which could coincide with the time-scale operation of a company cannot simply be left among the IPs without due assistance. Furthermore, because of societal pressure and influences on IPs, in many cases the culture of IPs has been eroded. Current customary/cultural decision-making in a number of instances have isolated tribal members and accrued benefits only to leaders.

4. Community Assembly/Decision Meeting

In the 2002 Guidelines, during the Community Assembly, the household representatives shall vote for the proposed project by raising their hands and the council of elders/leaders will explain the vote (II, Sec. 14, e). But in the 2006 Guidelines, during this Decision Meeting, it is the council of elders/leaders who formally convey to the applicant the decision of the affected community members resulting from the Consensus Building and Freedom Period (Part V, Sec. 26, d). If during the Consensus Building and Freedom Period, it has been agreed upon that decision-making requires the participation of the community members, then voting through hand raising by community members present during the Decision Meeting shall be used; but if the agreed upon traditional decision-making process is bestowed on the council of elders/leaders, then this will prevail (Ibid). The strength or weakness of the tribal institution with decision-making authority influences the outcome of FPIC. Bribery and corruption of tribal leaders instigated by inimical interests is not uncommon at this stage. The lack of necessary skills and knowledge to make a sound decision for the whole village is a tremendous challenge to tribal leadership—and their decisions have to be made under time pressure.

In both guidelines, the terms and conditions for the approval of the proposed project shall be translated into a Memorandum of Agreement (MOA) to be signed by the applicant's authorized

representative, the authorized council of elders/leaders as designated by them, and the Chairperson of the NCIP as the third party or the Regional Director where allowed (2002 Guidelines, III, Sec. 24; 2006 Guidelines, Part VIII, Sec. 46). The 2006 Guidelines requires a Resolution of Consent (ROC)¹⁰ from the authorized IP elders/leaders in case of approval (Part V, Section 28). In case of acceptance of the project, the MOA is drafted by the NCIP Provincial Legal Officer or the Regional Legal Officer and the FPIC Team (2006 Guidelines, Part VIII, Section 43). A version translated to the language of the IPs should also be made (Ibid). Again, the crucial element of translation and communication plays a big role in the final agreement and the ensuing negotiation for alternatives in case of non-approval. Because the FPIC process is highly influenced by the proponent company as my case studies demonstrate, even if the MOA is translated in the local dialect, the IPs need legal assistance during the review and signing of the MOA.

Should the proposed project be rejected, reasons for the rejection has to be stated in writing, including whether or not the community is open to other proposals of similar nature (2002 Guidelines, II, Section 15). An alternative proposal shall be subject to another FPIC process (Ibid). The 2006 Guidelines requires a Resolution of Non-Consent (RNC)¹¹ to indicate the rejection of the proposed project. The applicant may request for an explanation of the decision; and if the applicant can address the reasons for the rejection of the project or can offer an alternative or new proposal, the council of elders/leaders may require for another period to

¹⁰ A Resolution of Consent refers to the resolution adopted by the affected ICC/IP community through their elders/leaders expressing their acceptance of the plan, program, project or activity.

¹¹ A Resolution of Non-Consent refers to the resolution adopted by the affected ICC/IP community through their elders/leaders expressing their non-acceptance of the plan, program, project or activity and stating the reasons thereof.

reconsider their decision, as long as this period does not exceed 15 days beyond the 55-day period (Part V, Sec. 26, d).

Prior to the MOA signing, the 2006 Guidelines directs the NCIP Legal Affairs Office (LAO) to review the document for legal advise before the Ancestral Domains Office (ADO) endorses this together with the FPIC report to the NCIP Commission (Part VIII, Section 44). The MOA signing, in case of approval of the project, or the written Resolution of Non-Consent, in case of rejection, formalizes the issuance of free, prior, and informed consent (FPIC) by the concerned indigenous community with respect to the entry and/or operation of the applicant.

CHAPTER THREE

MINING IN THE PHILIPPINES

MINERALS, PRODUCTION VALUE, ECONOMIC CONTRIBUTION

The Philippines is rich in mineral resources. It is one of the world's top ten producers of gold, copper, nickel, and chromite. In 2005, the country received the Mining Journal Awards for being short-listed as among the 120 mining destinations in the world, i.e. among the top 120 countries that has made significant policy improvements to attract mining investment (<http://www.mgb.gov.ph/news/2005-1201award.htm> retrieved on March 10, 2008 at 10:45 PM).

Out of the total 30 million hectares of land in the country, 9 million hectare or 30% is identified to have high metallic mineral deposits (MGB Briefing Kit on Philippine Minerals Sector, 2004). There is also an abundant non-metallic and industrial minerals in the country, among them are limestone, marble, guano, dolomite, clays, feldspar, rock aggregates, and other quarry resources (Ibid). The MGB's data on mineral reserves show that the country has about 7.1 billion metric tons (BMT) of metallic mineral reserves and 51 billion BMT of non-metallic minerals. The University of Hawaii's East-West Studies Center reports that the Philippines has the third largest gold reserves in the world, the fourth largest copper reserves and the sixth largest chromite endowment (Mining Revisited, 1999, p. 10). The MGB's 2006 data shows nickel reserves to have increased to 1.53 BMT.

Another 1.5% or about 420,000 hectare of the total land area of the county is currently covered by mining rights (MGB Briefing Kit on Philippine Minerals Sector, 2004). But adding up the coverage of the mining rights issued by MGB in 2006, including leasehold contracts as of 2004 already yield a total of 627,854.84 hectares (Table 6). Since 1979-2003, metallic minerals have accounted for 61% of the country's mineral production while the share of non-metallic minerals was 39% (Ibid). Gold contributed 60% and copper 21%. In 2006, MGB reports that the gross production value of mining (including non-metallic minerals) has reached 68.4 Billion Philippine Peso (PhP) or US\$ 1,299,957,618¹². The share of metallic minerals is now more than 80% and the rest comes from non-metallic minerals.

The Gross Value Added (GVA)¹³ of mining has been increasing from 2002-2006. In 2002, it was registered at 21% and has increased to 28% since. In 2006, the estimated GVA at current prices in 2006 reached 59.7 Billion Philippine Peso (PhP) or US\$ 1,134,612,132.

In addition, the mining industry's contribution to exports in 2006 amounted to 2.06 Billion US dollars, a 151% increase from the US\$820 Million record in 2005. Gold, copper, and nickel are the top mineral exports with Japan, Australia, Canada, China, and Korea as major markets.

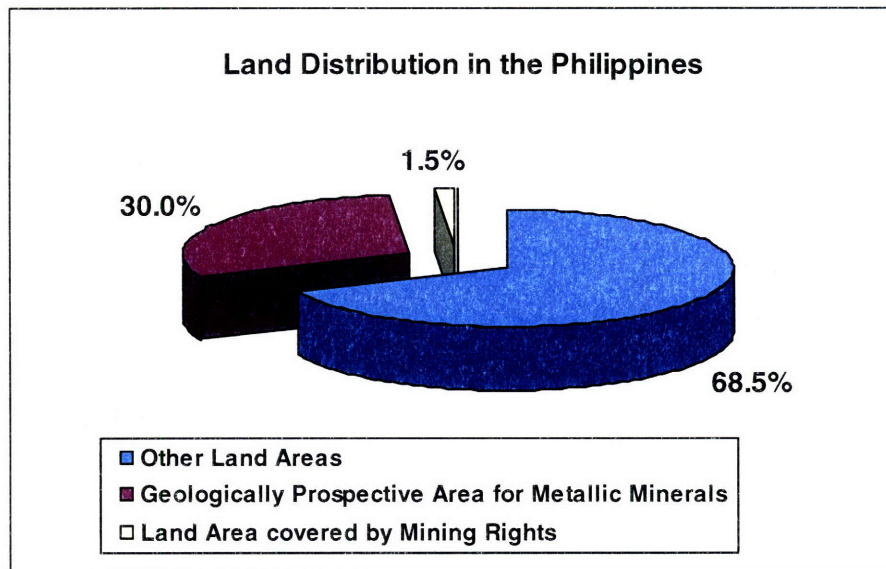
The mining industry also generates income for national and local governments in the form of taxes, fees, and royalties. A total of PhP 2,938.4 Million [US\$ 55, 844.96] was collected by

¹² All currency conversion for mining data is based on the Central Bank of the Philippines' January 2006 monthly average rate which is PhP52.6171 to one US dollar.

¹³ Gross Value Added measures the contribution of a particular sector to the country's GNP; computed by subtracting the cost of production inputs from the gross output of a certain industry. Total GVA does not include crude oil.

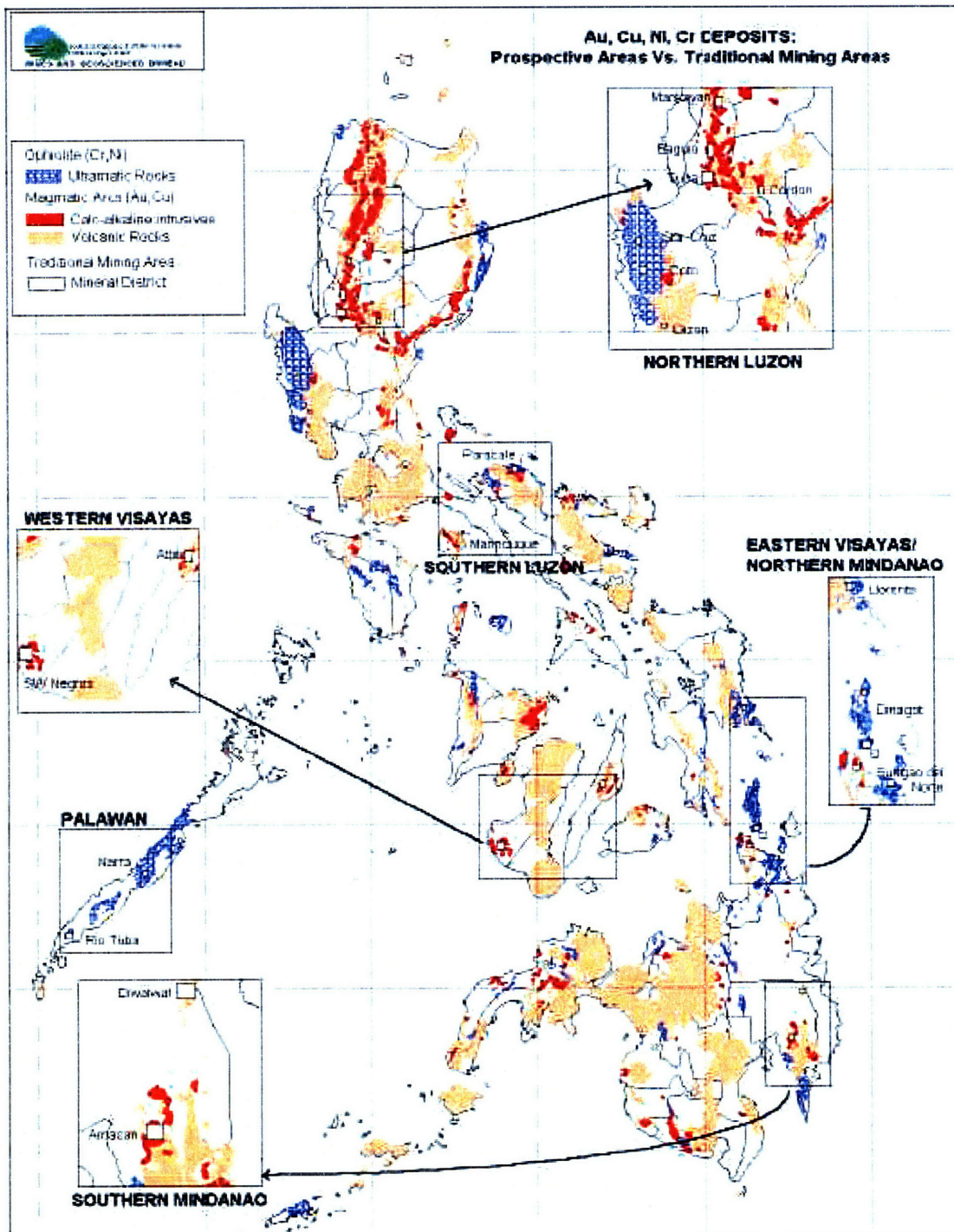
national and local governments in 2005. The estimated national and local taxes to be generated for 2006 is PhP 3.1 Billion [US\$ 58,916,207.85].

Chart 1: Proportions of Land Area in the Philippines with Potential for Metallic Minerals and Area Covered by Mining Permits



Source: MGB Briefing Kit on the Philippine Minerals Sector (2004 Update)

Map 1: Areas in the Philippines with Potential for Metallic Mineralization



Source: Briefing Kit on the Philippine Mineral Sector, 2004)

Table 4: Philippine Metallic Mineral Reserves, 1996

Mineral	Estimated Reserves in Metric Tons
Gold	162,764,000
Copper	4,052,087,000
Nickel	132,747,000 (increased to 1.53 BMT in 2006)
Chromite	36,667,000

Source: MGB/AGHAM

Table 5: Taxes, Fees, and Royalties from Mining, 2005

Fees, Charges & Royalties collected by DENR-MGB	210.2 Million Pesos	US\$ 3,994,899
Excise Tax Collected by BIR	177.9 Million Pesos	US\$ 3,381,030.12
Taxes Collected by National Government Agencies	2,319.9 Million Pesos	US\$ 3,807,125.44
Taxes and Fees Collected by LGUs	230.4 Million Pesos	US\$ 4,378,804.61
TOTAL	2,938.4 Million Pesos	US\$ 55,844.96

Source: MGB Mining Industry Statistics released 30 March 2007

The Revised Implementing Rules and Regulations of the Mining Act (DENR Administrative Order No. 40 Series of 1996) also mandates that companies allocate 1% of the direct mining costs¹⁴/milling costs¹⁵ for the development of host communities¹⁶ and neighboring communities/barangays (Section 134). In addition, the law requires the payment of a royalty fee to the concerned indigenous community in the amount that is not less than one percent (1%) of the contractor's gross output (Chapter IV, Section 16). The expenses that a mining company incurs for community development could be charged against the royalty fee of the IPs (Ibid).

The MGB calculates the amount committed by mining companies for the development of host and neighboring communities at PhP492 Million in 2006. This amount corresponds to 380

¹⁴ Direct mining costs refer to the expenditures directly incurred in all activities preparatory to and in the actual extraction of the ore from the earth and transporting it to the mill plant for mineral processing.

¹⁵ Direct milling costs refer to the expenditures incurred in the mechanical and physical processing and/or chemical separation of the ore from the waste to produce marketable mineral products.

¹⁶ A host community refers to the residents of the barangay/s outside the mine camp, where the mining project is located.

barangays which are said to have benefited through the approved Social Development and Management Program (SDMP)¹⁷ of mining companies. As of March 2006, MGB record shows 32 mining companies with approved SDMP (<http://www.mgb.gov.ph/>). There are no figures specific to what has been allocated and actually given to the indigenous peoples, apart from what barangay governments are supposedly receiving.

MINING RIGHTS

In 1995, Republic Act 7942 otherwise known as the Philippine Mining Act of 1995 was enacted to revitalize the mining industry. The law changed the mode of disposition of mineral lands from a leasehold¹⁸ system to mining agreements. The law establishes three mining rights: Exploration Permit (EP); Mineral Agreement; Financial or Technical Assistance Agreement (FTAA). The exploration permit grants the right to conduct exploration for a period of two years subject to renewal upon the recommendation of the Director of the Mines and Geosciences Bureau (MGB) (RA 7942, Ch. IV). An EP is allowed for a maximum of eight years after which it has to be converted to a Mineral Agreement or a FTAA. Mineral Agreements are of three kinds: Mineral Production Sharing Agreement (MPSA); Co-Production Agreement (CA); Joint Venture Agreement (JVA). The MPSA is an “agreement where the Government grants to the contractor the exclusive right to conduct mining operations¹⁹ within a contract area²⁰ and shares

¹⁷ The SDMP refers to the plans and programs of a mining company in enhancing the development of the host and neighboring communities. These programs include community development projects and activities such as establishment, construction and maintenance of infrastructures including schools, hospitals, roads, and the like; establishment of livelihood industries; and programs on education and health.

¹⁸ In the leasehold system, the government leases the area or gives surface rights to a contractor for a fixed rate or rental and not on what or much was extracted.

¹⁹ Mining operations refer to activities involving exploration, feasibility, development, utilization, and processing

in the gross output” (RA 7942 Ch. V). In a CA, Government contributes inputs to the mining operations other than the mineral resources, e.g. technology or personnel. And a JVA is where both Government and the contractor organize a joint venture company with both having equity shares (Ibid). In addition, Government is entitled to the gross output of the mining venture. Only Filipino individuals (which include IPs) and corporations (at least 60% Filipino owned, at most 40% foreign-owned) are allowed to apply for a Mineral Agreement. A Mineral Agreement has a term of 25 years and renewable for another 25 years. The Exploration Permit and Financial or Technical Assistance Agreement (FTAA) allows foreign corporations a 100% ownership of a mining project. The terms and conditions for a FTAA including government share are negotiated. The FTAA which fully liberalizes the law is a 25-year contract and is renewable for the same period.

Table 6: Types of Mining Rights under RA 7942

TYPE OF MINING RIGHT	MAXIMUM AREA (HA.)	TERM	QUALIFIED PERSON
Exploration Permit (EP)	32,000 onshore 81,000 offshore	2 years; renewable to a maximum of 8 years	Individuals or Filipino or foreign corporations
Mineral Agreement (MPSA, CA, JVA)	16,200 onshore 40,500 offshore	25 years; renewable for 25 years	Individuals or Filipino corporations
Financial or Technical Assistance Agreement (FTAA)	81,000 onshore 324,000 offshore	25 years; renewable for 25 years	Filipino or foreign corporations

Source: MGB Primers

Mining is classified into large-scale and small-scale. Small Scale Mining Permit grants the contractor the right to explore, develop, and utilize mineral deposits in areas 20 hectares or less.

The Small-scale Mining Act of 1991 (RA 7076) defines small-scale mining as referring to

²⁰ Contract area refers to the land or body of water delineated for purposes of exploration, development, or utilization of the minerals found therein.

activities which rely on heavy manual labor using simple supplements and methods and do not use explosion or heavy mining equipment. Small-scale mining application is under the Provincial/City Regulatory Mining Board (PRMB).²¹

As of January 31, 2008, the MGB has issued a total of 768 mining rights/tenements. This data includes Individual Permits issued only until the 3rd quarter of 2006 and Lease Contracts as of September 2004. As to applications, the 2006 3rd quarter data shows a total of 2,252 being processed. In the same period, there are 18 operating metallic mines and 2,736 non-metallic mines.

Table 7: Number of Approved and Registered Mining Rights as of January 2008

TYPE OF MINING RIGHT	NUMBER OF ISSUED AGREEMENT (APPROVED & REGISTERED)	AREA (HA.)
Mineral Production Sharing Agreement (MPSA)	262	422,804.06
Financial or Technical Assistance Agreement (FTAA)	2	47,308.26
Exploration Permit (EP)	30	117,942.52
Mineral Processing Permit (MPP)	33	
Leasehold Contracts/Patents	312* (as of September 2004)	39,800
Individual Permit (IP)	129* (2006 3 rd Quarter Data)	No data
TOTAL	768	627,854.84

Source: MGB (<http://www.mgb.gov.ph/>); Mining Industry Statistics released 30 March 2007; Briefing Kit on the Philippine Mineral Sector, 2004)

²¹ The Provincial Regulatory Mining Board is the local implementing agency under the direct supervision and control of the Secretary of the Department of Environment and Natural Resources (DENR). The Board is created under Republic Act No. 7076 or known as "People's Small-Scale Mining Act of 1991". The Board can award contracts, settle disputes, formulate and implement rules and guidelines.

Table 8: Number of Mining Rights Application under Process as of 2006 3rd Quarter

TYPE OF MINING RIGHT	NUMBER OF APPLICATIONS UNDER PROCESS
Mineral Production Sharing Agreement (MPSA)	1,278
Financial or Technical Assistance Agreement (FTAA)	55
Exploration Permits (EP)	590
Individual Permit (IP)	295
Mineral Processing Permit (MPP)	34
TOTAL	2,252

Source: MGB Mining Industry Statistics released 30 March 2007

Table 9: Number of Operating Metallic Mines

METALLIC MINERAL	NUMBER OF OPERATING METALLIC MINES
Copper (with gold & silver)	1
Gold (with silver)	7
Metallurgical Chromite (ore & concentrate)	2
Refractory Chromite	1
Chemical Grade Chromite	1
Nickel	5
Nickel Concentrate	1
TOTAL	18

Source: MGB Mining Industry Statistics released 30 March 2007

CHAPTER FOUR

OVERLAPPING MINING RIGHTS AND ANCESTRAL LANDS

Mining areas are often found where indigenous peoples dwell. The Philippines is said to be home to 12 million indigenous peoples also known as Indigenous Cultural Communities (ICCs). The IPs/ICCs are considered to be descendants of the original inhabitants who have managed to resist colonization and have retained their customs, traditions, and way of life (<http://www.ncip.gov.ph/resources/ethno.php> retrieved on March 15, 2008 at 5:00 PM). The IPRA defines IPs/ICCs as

A group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory and, who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural

and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains (Chapter II, Section 3, h).

The ICCs/IPs in the country are composed of 110 ethnolinguistic groups found in the various parts of the archipelago (http://www.ncip.gov.ph/resources/ethno_alphabet.php retrieved on March 16,2008 at 9:30 PM). The table below presents the major indigenous tribes found in the three major regions of the Philippines.

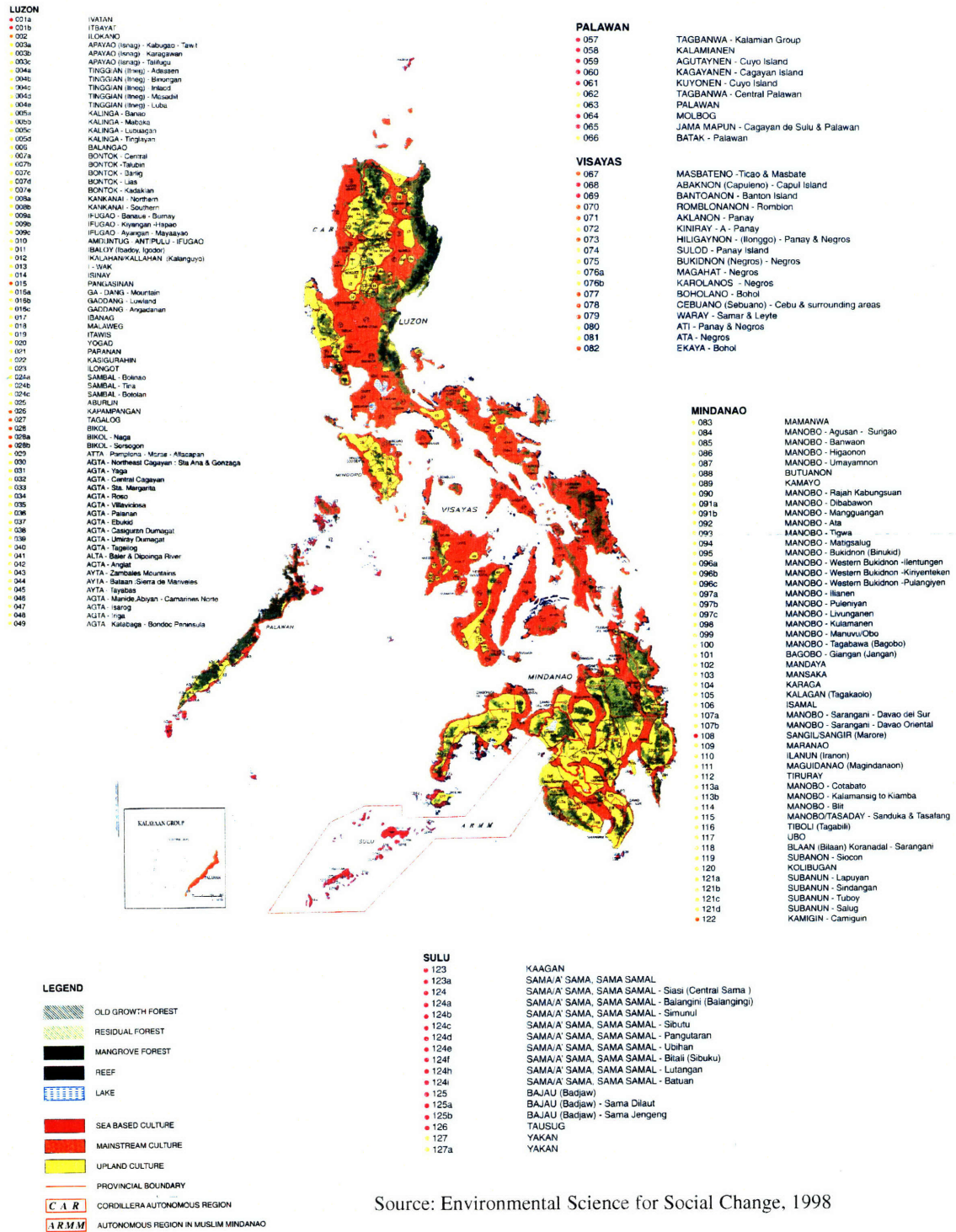
Table 10: Major Indigenous Groups in the Philippines

LUZON	VISAYAS
<p>Cordillera: Collective Name “Igorot”</p> <ol style="list-style-type: none"> 1. Tinguian 2. Isneg 3. Northern Kalinga 4. Bontoc 5. Sagada 6. Ifugao 7. Southern Kalinga 8. Itawis (Itawit) 9. Malaweg 10. Yogad 11. Gaddang (Gad’ang) 12. Kalinga-Isabela 13. Isinay 14. Bugkalot (Ilongot) <p>North, Central, & Southern Luzon: Collective Name: “Negrito”</p> <ol style="list-style-type: none"> 15. Alta 16. Arta 17. Agta 18. Aeta 19. Ayta 20. Atta 21. Ati 22. Dumagat 23. Sinauna 	<p>Mindoro Group: Collective Name: “Mangyan”</p> <ol style="list-style-type: none"> 24. Tadyawan 25. Alangan 26. Iraya 27. Buhid 28. Taobuid 29. Hanunuo 30. Banngon 31. Ratagnon <p>Palawan</p> <ol style="list-style-type: none"> 32. Agutaynen 33. Tagbanwa (Kalamianen) 34. Palaw’an 35. Malbog 36. Batak 37. Tau’t batu 38. Cuyonin (Kuyonen) 39. Agutaynen 40. Tagbanwa 41. Kagayanen

Mindanao	
<p>Non-islamized: Collective Name “Lumad”</p> <p>Major Clusters</p> <ul style="list-style-type: none"> 42. Manobo 43. Bagobo-B’laan-T’boli-Tiruray 44. Mandaya-Mansaka 45. Subanen 46. Mamanwa <p>(There are 18 lumad groups under the major clusters)</p>	<p>Islamized: Collective Name “Moro”</p> <ul style="list-style-type: none"> 47. Badjaw 48. Maguindanaw/o 49. Iranun/Ilanun 50. Kalibugan 51. Maranaw/o 52. Pullun Mapun 53. Samal 54. Sangil 55. Tausug 56. Yakan

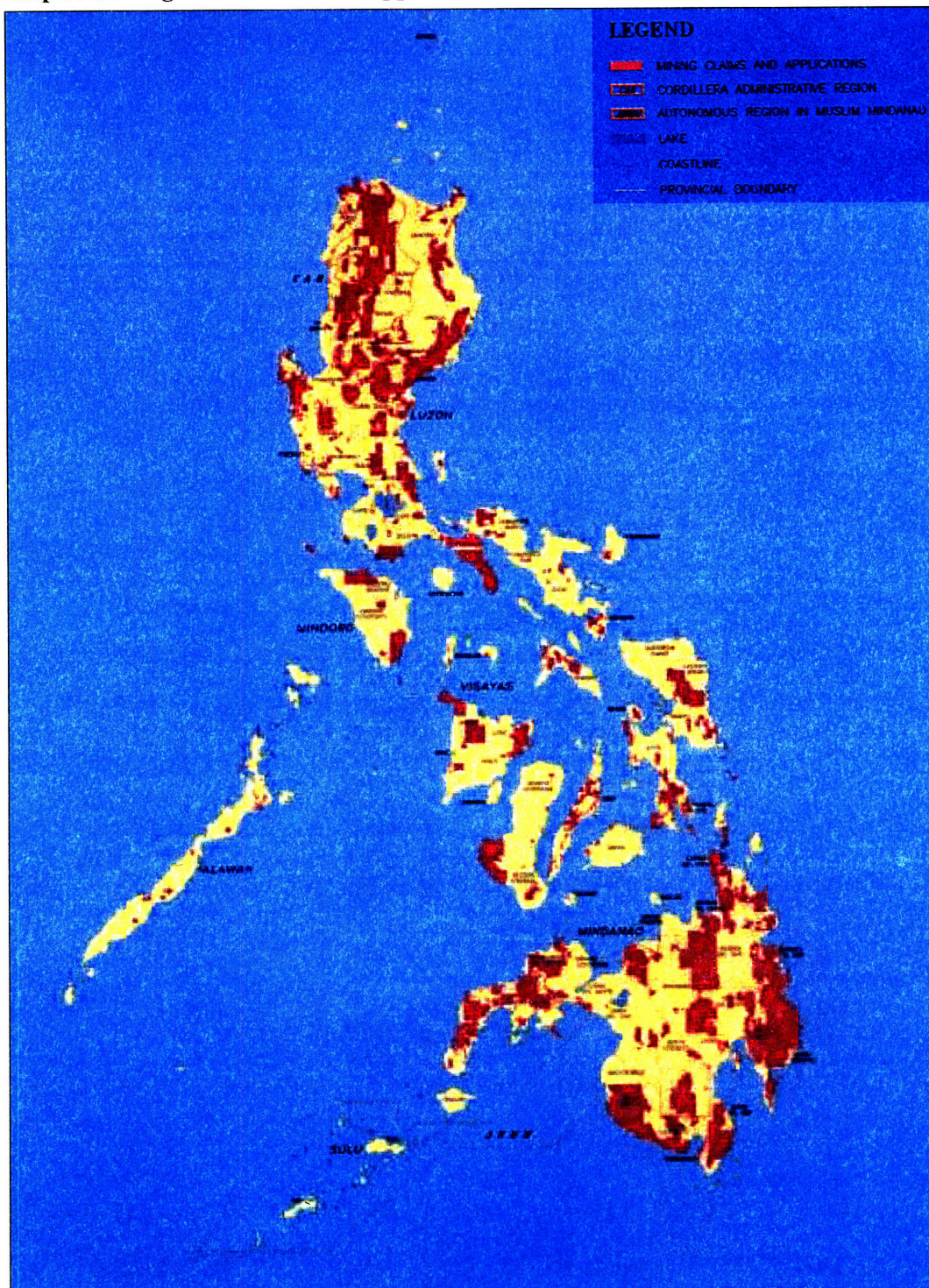
Source: International Work Group for Indigenous Affairs (<http://www.iwgia.org/sw16704.asp> retrieved on March 15, 2008 at 6:00 PM)

Map 2: Cultural Zones/Domains of IPs in the Philippines



Source: Environmental Science for Social Change, 1998

Map 3: Mining Concessions and Applications



Source: Environmental Science for Social Change

Figure 1: Summary of Data Showing Overlap Between Mining Areas and Ancestral Domains

	Area (Ha.)	Percentage
Total land area of the Philippines	30,000,000	100%
Cultural Zones	13,116,817	44%
Total area of awarded CADCs	2,546,036	
Total area covered by mining applications	9,093,886	
Total area covered by mining concessions	295,534	
Mining applications in CADC areas	1,199,849	53%
Mining concessions in CADC areas	28,111	1%
Mining applications in cultural zones	4,945.812	38%
Mining concessions in cultural zones	176,966	1%

Source: ESSC, Mining Revisited, 1999

The cultural zones or domains of indigenous peoples comprise 13,116,817 hectares, that is, 44% of the entire land area of the country (ESSC, 1999). With the IPRA, government began to formally recognize the right of indigenous peoples to their cultural zones or domains by awarding IPs/ICCs a Certificate of Ancestral Domain Claim (CADC) and a Certificate of Ancestral Domain Title (CADT). Prior to the establishment of NCIP, a CADC was issued by the DENR. When the NCIP was set-up, it continued to process applications for CADCs and also took over the conversion process for CADCs to CADTs. The NCIP and the concerned IP/ICC had to go through the same process of survey, delineation, and certification to convert the latter's claim (CADC) to a title (CADT). In 2004, the NCIP removed the process for CADC application, establishing direct application for a CADT.

In 1998, there were 181 CADCs issued by the DENR with a total area of 2,546,036 hectares (ESSC, 1999). This figure is 19% of the total area of cultural zones or domains. At that time,

mining applications reached 1,154 with a total area of 9,093,886 (ESSC, 1999). Mining rights or concessions totaled to 295,534 hectares (Ibid).

A total of 4,945.812 hectares of mining applications were in cultural zones (Ibid). Also, 1,199,849 hectares of mining applications were within CADC areas. As to mining rights or concessions, 176,966 hectares were located in cultural zones while mining concessions within CADCs were at 28,111 hectares (Ibid).

The cultural zones/domains map above depicts only 145 CADCs representing 2,275,171 hectares (Ibid). ESSC estimates that 53% of the 145 CADCs are covered by mining applications while 38% are within cultural zones. At that time, only 1% of mining activities were within CADCs and cultural zones (Ibid). But given the applications, over half of the CADC area was projected to be affected (Ibid).

This projection is not far from what it was as of February 2001 where indigenous lands covered by mining applications already reached 14,498,526, that is, 48.3% of the total land area of the country (<http://projectgaling.blogspot.com/2008/02/after-edsa-mindanaoan-indigenous.html> retrieved on March 15, 2008 at 11:45PM). With the present government's 23 top priority mining projects from 2004-2010, 18 are said to be located in ancestral domains (Ibid). And of the 18, 11 are in Mindanao. Five out of the 11 are in Region XIII.

Table 11: 23 Major Mining Projects of the Arroyo Government

Project	Location	Proponent	Mineral Products	Potential Investment
1. Rapu Rapu Polymetallic Project	Rapu Rapu Island, Albay (Luzon)	Lafayette Phil, Inc. (<i>With Lafayette NL of Australia, LG Collins and KORES of South Korea</i>)	Copper, Gold, Silver, Zinc	42,000,000
2. Palawan HPP Project (<i>The Project consists of 2 components: a nickel processing & limestone mining</i>)	Bataraza, Palawan (Luzon)	Rio Tuba Nickel Mining Corp. and Coral Bay Mining Corp. (<i>Sumitomo Mining & Metals Corp.; Mitsui Co., Ltd & Nissho Iwai Corp., of Japan</i>)	Mixed sulfides of nickel and cobalt (HPAL Process)	180,000,000
3. Masbate Gold Project	Aroroy, Masbate (Luzon)	Filminera Resources Corp. (<i>With Thistle Mining Corporation of Canada.</i>)	Gold, Silver	100,000,000
4. Direct State Development Project	Monkayo, Compostela Valley (Mindanao)	Natural Resources Mining Development Corporation	Gold, Silver	2,000,000
5. Adlay-Cadianao-Tandawa (ACT) Project	Surigao del Norte (Mindanao, Region XIII)	Case Mining and Devt. Corp and CTP Construction and Mining Corporation (<i>With QNI Phils, Inc & BHP-Billiton</i>)	Nickel ore (laterite)	15,000,000
6. Nonoc Iron Fines Project	Nonoc Island Surigao del Norte (Mindanao, Region XIII)	Pacific Nickel Phils., Inc.	Iron fines	7,000,000
7. Siana Gold Project	Surigao del Norte (Mindanao, Region XIII)	JCG Resources Corporation	Gold	10,000,000
8. Didipio Copper-Gold Project	Nueva Vizcaya (Luzon)	Climax Arimco Mining Corporation (<i>With Climax Mining Ltd of Australia</i>)	Copper, Gold, Silver	63,000,000
9. Teresa Gold Project	Mankayan, Benguet (Luzon)	Lepanto Consolidated Mining Corp.	Gold, Silver	80,000,000
10. Padcal Copper Expansion Project	Tuba, Benguet (Luzon)	Philex Mining Corporation (<i>Pan Pacific Co. Ltd.</i>)	Copper, Gold, Silver	15,000,000
11. King King Copper-Gold Project	Compostela Valley (Mindanao)	Benguet Corp. and Nationwide Development Corporation	Copper, Gold, Silver	532,000,000

12. Tampakan Copper Project	South Cotabato (Mindanao)	Sagittarius Mines, Inc. (With Indophil, Inc. MIM Holdings of Aust. & Alsons Devt Co.)	Copper, Gold, Silver	500,000,000
13. Itogon Gold Project	Benguet (Luzon)	Itogon-Suyoc Mines, Inc.	Gold, Silver	10,000,000
14. Canatuan Gold Project	Zamboanga del Norte (Mindanao)	TVI Resources Devt . Phils., Inc. (TVI Pacific, Inc.)	Gold, Silver	7,000,000
15. Far-Southeast Gold Project	Benguet (Luzon)	Lepanto Cons. Mining Company (CRA)	Copper, Gold, Silver	500,000,000
16. Boyongan Copper Project	Surigao del Norte (Mindanao, Region XIII)	Silangan Mindanao Mining Corporation (Anglo American)	Copper, Gold, Silver	500,000,000
17. Pujada Nickel Project	Davao Oriental (Mindanao)	Asiaticus (BHP-Billiton)	Nickel	1,000,000,000
18. Toledo Copper Project	Toledo City, Cebu (Visayas)	Toledo Copper Plc.	Copper, Gold, Silver	100,000,000
19. San Antonio Copper Project	Sta. Cruz, Marinduque (Luzon)	Marcopper Mining Corporation	Copper	100,000,000
20. Mindoro Nickel Project	Mindoro Oriental (Luzon)	Aglubang Mining Corp./Crew Development Corporation	Nickel, Cobalt	1,000,000,000
21. Nonoc Nickel Project	Nonoc Island Surigao del Norte (Mindanao, Region XIII)	Nonoc Processing Corp./ Philnico	Nickel, Cobalt	1,000,000,000
22. Batong Buhay Gold Project	Pasil, Kalinga (Luzon)	Batong Buhay Gold Mines Inc./ PMO/NRMDC	Copper, Gold	200,000,000
23. Amacan Copper Project	Maco, Compostela Valley (Mindanao)	North Davao Mining Corp./PMO/NRMDC	Copper, Gold	200,000,000
TOTAL				6,163,000,000

Source: MGB (http://www.mgb.gov.ph/revitalization_files/revitalization_23projects.htm)

CHAPTER FIVE

This chapter presents what transpired during the process of securing the Free, Prior, and Informed Consent (FPIC) by the Mamanwa tribe in the municipality of Claver, Agusan del Sur, with respect to the application of the Taganito Mining Corporation for a Mineral Production Sharing Agreement (MPSA) and the Manobo tribe in the municipality of Rosario, Agusan del Sur in relation to the application of PHILSAGA Mining Corporation for a similar mineral agreement.

My goal was to answer the following questions:

1. How are decisions made in each indigenous community? What usual methods are used in the process governing FPIC in relation to mineral development? Are the decision-mechanisms adequate to the task of a free, prior, and informed consent?
2. What development plans were in effect in the indigenous community prior to the FPIC process? Has the development resulting from the FPIC process been consistent with the long-term development plans of the indigenous community?
3. What are the on-going involvements of the indigenous community after mining is approved?

CASE ONE: THE FPIC EXPERIENCE OF THE MAMANWA TRIBE IN TAGANITO AND URBIZTONDO OF CLAVER, SURIGAO DEL NORTE

FIELD-BASED INVESTIGATION (FBI)

On **February 24, 2006**, in accordance with the FPIC Guidelines of 2002, the NCIP Regional Director constituted the Field Based Investigation (FBI) Team and instructed the members to conduct a FBI in relation to the application of the Taganito Mining Corporation (TMC) for a conversion of their Mining Contract to a Mineral Production Sharing Agreement (MPSA). The team was directed to carry out the FBI on **February 27-28 and March 1-3** in barangays Cagdianao, Hayanggabon, Taganito, and Urbiztondo of the municipality of Claver, Surigao del Norte. In addition, the work order indicated that the team was entitled to claim from TMC their travel allowances, per diems, and other actual incidental expenses incurred while on field (Report on FBI and FPIC, Annex B). The 2002 Guidelines stipulate a fixed amount of PhP5,000 to be paid by the applicant to the NCIP for the conduct of FBI (Section 13, a).

According to the 2002 Guidelines, the FBI team was responsible for undertaking a review of relevant secondary data within 15 days from the receipt of the work order before proceeding with the FBI. Apparently, this task was not completed either because there were no available secondary data sources pertinent to the project or because the time was too limited (2 days before the FBI). In either case the FBI Team Report on **March 6** did not indicate that a review of secondary sources of data relating to the project had been completed.

The FBI team included the following members: 1) Mr. Eulo Nogan, the FBI Team leader, is the Development Management Officer (DMO)-II in the regional office; 2) Mr. Josue Duhac,

regional Technical Assistance Affairs (TAA)-II; 3) Ms. Juralyn Lorchano, Community Affairs Officer (CAO)-I representing the Community Service Center (CSC) office; and 4) Mr. Allan Pareja, who according to the NCIP Administrative Officer (AO)-IV and also Officer-in-Charge (OIC) of the CSC in Bad-as, is Technical Assistance Affairs (TAA)-I. The fact that he held this position was never indicated in the documents describing him as FBI Team member. He was simply identified as the Representative of the Commissioner in the FBI Team Report (FBI & FPIC Report, Annex F). In three other documents he was simply referred to as FBI Team Member (Annex G-1, I-1, M). The name of the AO-IV and CSC OIC of Bad-as, Mrs. Villarica Lumancas, appears later in the FBI Report as an authorized member of the FBI Team (Annex F).

The 2002 Guidelines specifies that the FBI Team shall consist of not less than five members, two of whom should come from the Regional Office while the other three are supposed to be from the Provincial Office or the Community Service Center (CSC) (Section 9, a). In this case, the FBI Team then had three members from the Regional Office and two from the CSC.

The Acting Provincial Officer who was also the Legal Officer indicated to me that the selection of the FBI Team members was within the authority of the region. It was also noted that the FPIC process was region-centered. The provincial office apparently had no knowledge that the entire FPIC process was completed (Interviewee No. 5).

There were eight people interviewed during the FBI which included barangay officials, the tribal council of elders and leaders in the four barangays (Annex F). A questionnaire was used to ascertain how long the interviewees had lived in said barangays, whether they understood the

classification of the areas and what they know about the indigenous peoples in the area. One of the answered questionnaires (designated as Annex C in the FBI and FPIC Report) reveals that the interview took place on February 11, even before the Regional Director ordered the FBI Team to undertake the FBI. This document is corroborated by a Certificate of Appearance signed by two members of the FBI Team indicating that they were in the barangay on February 11 for the purpose of undertaking the FBI. The other NCIP staff is not one among those indicated in the work order of the Regional Director. The Certificate of Appearance to the Local Government Unit (LGU), the staff notes that he is part of the FBI Team. The list of authorized FBI Team members in the March 6 Report does not include this person. It could be that he was designated to undertake the activity on behalf of one of those FBI Team member designated by the Regional Director. In the report, the CSC OIC of Bad-as was indicated as an authorized member of the FBI Team.

The FBI Report confirmed that the MPSA application of the TMC was within the ancestral domain claim of the Mamanwa tribe. It reiterated that the MPSA application covered four barangays of Cagdianao, Hayanggabon, Taganito, and Urbiztondo without specifying the extent of the application which is said to be 4,976.03 hectares (FBI & FPIC Report, Recommendation for a Certification Precondition dated July 31, 2006). The Report did not indicate the estimated population of Mamanwa in the project area. This lack of data had an impact on the determination of the number of houses to be built by TMC for the Mamanwas in barangays Taganito and Urbiztondo, the two IP “affected areas”. According to the Mamanwas and an FBI Team member, the TMC based the number of houses that needed to be constructed on the old census, which indicated 48 households while the interviewees claimed that the current number of

households at the time of the FPIC process was 64 or 65 (Interviewees Nos. 1, 9). A TMC officer likewise said that during the FPIC process, there were 60 families in Taganito and Urbiztondo combined. Furthermore, the March 6 report did not contain the required initial documentation of the existing decision-making process of the Mamanwa tribe or the list of tribal leaders. Even with this very limited report relative to the requirement of the Guidelines, the FBI Team nonetheless recommended going forward with the effort to secure the Mamanwa tribe's Free, Prior, and Informed Consent (FPIC).

The FBI commenced and ended with a lack of data that added to the confusion that followed. The missing documentation could have helped the Mamanwas make better decisions regarding what might happen over the next 25 years. To illustrate, if the overlap of indigenous land and mining areas had been verified, the Mamanwas might have demanded that the mining operation not encroach on forestlands. As it turned out, the company simply guaranteed that there would be no impact on forest lands (FBI & FPIC Report, Annex I-2 and I-3). If the FBI Team was not able to verify all the relevant data beforehand due to its lack of technical capability, it could have recommended further verification as part of what needed to be done by the stakeholders as part of their decision-making process. In other words, the FBI Team, if prepared adequately prior to the preliminary consultative meeting, could have helped the Mamanwas frame a more complete statement of their demands by helping everyone understand what questions still needed to be answered and what data gaps needed to be filled. Perhaps the team members were under time pressures from higher authorities to complete their assignment (as suggested by the timeline outlined above). Nevertheless, in the end, the legitimacy of the Team and the process was apparently compromised.

Two additional bits of evidence raise related concerns. The letter of the Team recommended the issuance of a Certification Precondition despite the Team's acknowledgement that the only secondary data submitted by the applicant were a request letter addressed to the Regional Director (Annex A), a project location map (Annex A-1), and a three-year development plan (Annex A-2) which actually covers the period from 2004-2006. During my interviews with the Mamanwas, an FBI team member seemed to be trying to shape the answers of the interviewees. Despite this, the Mamanwas managed to make some of their concerns known.

PRELIMINARY CONSULTATIVE MEETING

Surprisingly, four days after the report (**March 10**), the Regional Director issued a directive to the FBI Team to conduct the Preliminary Consultative Meeting on **March 13** (FBI & FPIC Report, Annex G-1). The team informed the tribal leaders and elders of the aforementioned four barangays and posted bond-size paper notices inviting members of the Mamanwa tribe in adjacent municipalities that are part of the tribe's application for a Certificate of Ancestral Domain Title (CADT). The notices were in English and Bisaya which is the local dialect of migrants, but is understood and also spoken by most of the Mamanwa in the area.

The meeting which was announced to start at 8:00 AM actually commenced at 11:00 AM in the Barangay (Taganito) Gymnasium. It ended at 3:00 PM. If the list of attendees is accurate (N.B. many of the entries suggest that they could have been written by a few who are able to write), there were almost 300 participants at the consultative meeting. Most of them appear to be Mamanwa members from barangays Taganito and Urbiztondo along with a few from the

municipalities of Bakwag, Tubod, Gigaquit, and Alegria. The Mamanwa tribe's application for an Ancestral Domain Title (CADT) is within these four municipalities and Claver. The Mamanwas affirmed that that the meeting was attended by all tribal leaders (Interviewees Nos. 1 & 2). They indicated that the consultation was attended by most of the household members in Taganito and Urbiztondo. According to an officer of the TMC, this meeting was "very expensive"; costing PhP300,000 [US\$ 5,725.45]²² (Interviewee No. 8).

This consultation is remembered by the Mamanwas as the one at which NCIP brought a tribal datu/chieftain from another province who performed a ritual that was not in accordance with their culture (Interviewee No. 9). This was noted by the Provincial Consultative Body (PCB)²³ Chairman who is also a tribal council leader of Gigaquit (FBI & FPIC Report, Annex G-2). Also, the Mamanwas remember this meeting as the venue where TMC presented benefits and promises (Interviewees No. 1). The interviewees reported that very few questions had been asked. A TMC officer confirmed that the meeting was more of a presentation of the company's plans and activities (i.e. what their product is; what the process is they use in mining, and what the benefits are that they provide to communities (Interviewee No. 8).

The 2002 Guidelines do not explicitly prohibit the Regional Director (RD) from attending the consultative meeting (although the 2006 Guidelines do). The opening message of the Regional Director at the Preliminary Consultative Meeting talked of the ownership rights of IPs to their ancestral domain as mandated by the IPRA [and as such they have the right to decide whether to

²² All currency conversion for the Mamanwa case is based on the Central Bank of the Philippines' July 2006 monthly average rate which is PhP 52.3796 to one US dollar. I am using July 2006 as this is the month in which the MOA was signed and the Compliance Certificate has been issued.

²³ The Provincial Consultative Body is an advisory body created by the NCIP. It consists of traditional leaders, elders, and representatives from women and youth sectors from different ICCs/IPs.

allow the company to continue operating within their ancestral domain]. He also made it clear that the IPs should be grateful to the President and Senators for the creation of IPRA. More importantly, the RD's opening statements underscored that the assembly was the moment for the IPs to decide "if you want your living condition to change or not" (FBI & FPIC Report, Annex G-2). He dubbed the activity as a critical determinant of the future of the IPs, whether their life would yield success or failure. An NCIP officer noted to me that the NCIP Director should have not been in the Consultative Meeting as this put pressure on the IPs (Interviewee No. 9).

A presentation of the benefits that the IPs would receive followed the RD's message. Here, the officer of the TMC disclosed that the Mamanwa community would receive 16% of the amount of the 1% of the direct mining costs that the company is paying to the barangay. According to him, the benefits would also include housing materials, medical and educational assistance and PhP 500,000 [US\$9,542.42] for livelihood projects. Another TMC representative discussed the application of the company for a Mineral Production Sharing Agreement. His explanation included information regarding TMC as being partly co-owned by the Japanese and supplying nickel to Japan and Australia. The representative claimed that there were 219 regular employees and more than 400 contractual and seasonal hires.

My interview with a TMC officer revealed that the company only started to pay 1% of the direct mining costs to the barangays of Hayanggabon, Urbiztondo, and Taganito in 2000 in fulfillment of the 1996 Revised Implementing Rules and Regulations of the Mining Act (Interviewee No. 8). Section 134 of the IRR mandates the allocation of 1% of the direct mining and milling costs for the development of the host community and its neighboring communities. The company has the

option to charge the community development expenses from the 1% of the direct mining costs to the 1% of the company's gross output which IPs are entitled to as royalty payment. A community livelihood cooperative store, called Prime Investments, managed by the Community Technical Working Group (CTWG) of Taganito is funded from the 1% of the direct mining costs in 2000 (Interviewee No. 6).

The difference between the 1% of the direct mining costs and the 1% of the gross output as royalty fee to the IPs and the aforementioned option of the company did not appear to be clear to the Mamanwas. The PCB Chairman/ tribal council leader, during the open forum, commented that 16% from the amount of the 1% of the direct mining costs was too small. The TMC representative's and the NCIP FBI Team's response indicated that the tribe will end up with a total benefit of 1.16%, with the latter not being clear of where the additional 1% was coming from (Report on FBI and FPIC, Annex G2). Whether the two intended to confuse the IPs or whether they themselves were confused, I have no way of telling. But their responses certainly kept the IPs in the dark as subsequent discussions reveal.

Furthermore, it was not explained that the 1% of the direct mining cost is "in the hands of the company" (Interviewees Nos. 6 & 8) and therefore the 16% from the 1% is something that does not go directly to the tribe. The manner by which the 1% is accessed is through a project proposal which is approved by the Mine Rehabilitation Fund Committee (MRFC)²⁴ in accordance with the 5-year Social Development and Management Program (SDMP) of the

²⁴ The MRFC is chaired by the Regional Director of the Mines and Geosciences Bureau (MGB) and the Regional Executive Director of the Department of Environment and Natural Resources as co-chair. It also consists of representatives from the local government units, the mining company/contractor, and non-government organizations and peoples' organizations in the community.

company which is translated into an Annual SDMP (Interviewees Nos. 6, 7, 8, 9, 12). The rules state that 90% of the 1% of the direct mining costs shall be allocated to implement the SDMP and 10% is for the development of mining technology and geosciences and manpower training and development (<http://www.mgb.gov.ph/>, MGB Primer on SDMP). TMC's 5-year SDMP was approved in December 2002 with an allocation of PhP 8,904,072 for its implementation (MGB, Approved SDMP, March 2006). But as earlier stated, the company did not start paying the 1% of the direct mining costs in 2000 (Interviewee No.8).

The current CTWG Chairman who was TMC's Community Relations Officer (CRO) at the time of the FPIC process indicated that the CTWG was established in 2000 to monitor the implementation of the SDMP, i.e. 1% of the direct mining costs. But during the latter part of my interview, he said that the first Chairman of CTWG was appointed in 2005, and the second in 2006-2008 of January, and that he is the third and he got elected January 10, 2008 without his knowledge. A TMC officer confirmed that the CTWG is in an inchoate stage (Interviewee No. 8). The FBI member/CSC OIC of Bad-as communicated that the CTWG consists of 20 members representing different sectors of the three "affected" barangays, namely the barangay captains, church/religious sects, fisherfolks, farmers, women, the Department of Education, Health, the Philippine Coconut Authority (PCA), the NCIP, the MGB, the TMC, and two tribal leaders of Taganito (Datu Rizal Buklas) and Urbiztondo (Datu Alfredo Oloriko). There are only two tribal leaders on the CTWG since Hayanggabon, even if it is part of the considered "affected areas", has no IP residents (Interviewees Nos. 1, 9, 12). The CTWG, according to the CTWG Secretary acts as a "bridge between the community and TMC; the group is responsible for informing the

community how much money they have". She said that TMC holds assemblies to inform the community of their money.

The first step in availing the 1% (as well as the 16% from the amount of the 1%), specifically for livelihood purposes, is for a community member to submit a project proposal to the CTWG (Interviewees Nos. 6, 8, 9, 12). The CTWG screens and endorses proposals for the MRFC which then approves them. The TMC then releases a check for the purchase of the items in the approved project, according to the CTWG Secretary. She added that what the project proponent receives is not a check but the items indicated in the project proposal which is purchased together with the beneficiary. The process for accessing the funds (from the 1%) for non-livelihood projects is basically the same; only the proposal is first submitted to TMC's Community Relations Officer (CRO) to ensure that technical matters, like those relating to infrastructure, are dealt with by the company (Interviewee No. 12). The CRO then gives the proposal to the CTWG to screen and then the CTWG gives it back to the CRO for further review (Ibid). The CRO forwards the proposal to the CTWG which in turn submits the proposal to the CRMF for approval (Ibid).

During my interview with the CTWG Chairman, he illustrated the scheme by which the 1% is allegedly being appropriated, with the 16% (from the amount of the 1%) being divided equally between the Mamanwas of Taganito and Urbiztondo. But what the CTWG Chairman failed to disclose was that this scheme no longer exists. According to a TMC officer, the 16% that was presented to the Mamanwas during the consultation as their share in the 1% direct mining costs has been reallocated for barangays Hayangabon and Urbiztondo (Interviewee No. 8). The

officer said that the CTWG passed a resolution in 2006 approving the new sharing scheme of the 1% of the direct mining costs with barangay Taganito (host community) having 48% share, and barangays Hayanggabon and Urbiztondo with each a 26% share (Ibid). Did the CTWG Chairman and the FBI Team member/ CSC OIC not know of this? At the time of my interview with them, they were still talking about the 16% as being allotted for the Mamanwas of Taganito and Urbiztondo. Why did the tribal leader of Urbiztondo who is part of the CTWG not mention this change? The TMC officer said the new scheme was approved in 2006. Was it before the Preliminary Consultative Meeting, during the succeeding activities or after the FPIC process? Has this something to do with why the 16% was eventually not included in the Memorandum of Agreement (MOA)?

Going back to the open forum that took place during the consultation, a comment related to benefits concerned the small number of IPs being employed by TMC. The TMC representative replied that there are slots for IPs. What they need to do is first file an application. He added that the rotation of workers helps to ensure that more people can work for the company. But a follow-up question revealed that the previous inquiry was meant to probe why the tribal leaders of Taganito and Urbiztondo got employed without having to go through an application process. There was no direct reply to this question. Neither was there an explanation of company policies regarding the employment opportunities offered or the qualifications for hiring. The Mamanwas present at the meeting would not have been able to come away with a sense of where they stood in terms of the employment opportunities that TMC purported to offer. Whether deliberate or not, their responses were ambiguous. Tribal members and an elder in Taganito noted that those who are old are not accepted to work (Interviewees No. 1). Furthermore, they complained that

no one has worked as a regular employee among them since the Memorandum of Agreement (MOA) was signed with TMC. Only seven Mamanwas were able to work for 5.5 months. They were replaced by another batch of seven who worked for the next 5.5 months. Their work entailed loading and maintenance related to the shipment of ores.

A crucial question and comment that also came out during the open forum concerned the selection of a particular datu/chieftain as the tribal leader of Taganito. The IP participant disclosed that she was not aware that the datu was already the recognized tribal leader of the Mamanwa in that barangay (Interviewees No. 1). An FBI Team member suggested that the IP put aside her doubts about the datu being the tribal leader in order to foster unity (FBI & FPIC Report, Annex G-2). The FBI Team leader underscored the IP's comment and publicly noted a leadership conflict (Ibid). Note that the Guidelines instruct the FBI Team to conduct the validation of leaders prior to the consultative meeting. There was no documentation to prove that such verification took place. Nor did the elders and leaders I interviewed mention that any such verification effort took place. But, there is a Certification document dated March 13 signed by four FBI Team members certifying that the 15 IP names on the list are the tribal leaders of the Mamanwa as recognized by their members. If the validation session took place on the same day as the Consultative Meeting, why did the IP participant raise the question regarding the designated tribal leader of Taganito? And also, if the validation took place before the meeting, why did the FBI Team leader acknowledge a leadership conflict instead of informing everyone that a validation of leaders had taken place immediately before the meeting?

The last question was raised by a tribal leader from the municipality of Alegria which is part of the CADT application. He asked whether they could claim a share in the benefits that TMC described (FBI & FPIC Report, Annex G-2). My understanding of his question is, because they are part of the ancestral domain claim, even though they are not directly affected, is whether or not they are supposed to be part of the consent being sought? TMC's reply was a general "we will abide by what is written in the law" (Ibid). The FBI Team leader offered a follow-up "we will abide with the law, especially with our custom and tradition" (Ibid). What exactly that means though, the IPs could only guess.

Both the 2002 and 2006 Guidelines state that in cases where an activity, program, or project affects only a portion of those in an ancestral domain, then only those community/ies shall need to give their consent (Section 16, e; Section 10, b). Why then was this important matter not elucidated during this meeting or in the following meetings that took place?

A consultation of four hours could hardly be expected to yield a meaningful exchange. I would argue that not even a full day would be sufficient. This is the first time that the IPs and even the NCIP heard what the company had to present. It is natural that things would not make sense immediately and hence, that questions would be raised. But the answers to the queries of the Mamanwas were vague and general. The consultation did not foster a better understanding of where the Mamanwas stood in relation to the system of benefit-sharing or the company's hiring policies. No one was able to explain the fees or benefits or the system for allocating them. Critical elements of the FPIC decision-making that could well be a source of conflict, were not explained either. There was very little time for the IPs to raise questions. The FBI Team's

responses sounded like TMC responses. They could have noted the Mamanwas' questions, researched them and returned to present additional information and to discuss follow-up concerns.

CONSENSUS BUILDING

On **March 18**, just five days after the Preliminary Consultative Meeting, a Consensus Building activity was conducted in the NCIP Community Service Center office in Bad-as. At the outset of the meeting, the Provincial Consultative Body (PCB) Chairman/tribal council of Gigaquit who was facilitating asked how long the mining operation of TMC will run. The FBI Team replied that to their knowledge, it would last for 25 years and added that further information on the matter would be divulged during

the final consultation (FBI & FPIC Report, Annex H). The initial discussion focused on the experience of the tribal leaders with regard to the environmental disadvantages associated with having TMC. The leaders noted



that, fish had become scarce over time. The pollution/siltation of the river was also pointed out by those I interviewed. The tribal leaders were ambivalent because while they had a working knowledge of the environmental impacts created by mining in the area, they also cited TMC's claim that the company was not using any chemicals in the process of mining ores.

The Consensus Building is supposed to be the time for the tribe to exercise its traditional consensus building processes -- to weigh the costs and benefits of a proposed project. NCIP officials affirmed that tribal communities have different customary decision-making processes. In some tribes, the council of elders has all the decision-making power; in others it is the tribal leaders. There are also tribes where the council of elders or the tribal leaders may or may not consult the members before making a final decision.

It is not obvious what the traditional or customary decision-making process of each IP community is. Who has decision-making power is a prevalent problem in ancestral domain title applications and FPIC processes. As Commissioner Apostol indicated, “the problem is that there are times when NCIP does not know the real leaders”.

The question of a leadership conflict came out in my interviews, too. When asked how they traditionally make decisions as a tribe, my interviewees remember their ancestors entrusting decision-making power to their elders (Interviewees Nos. 1 & 2). Some said that the tribal elders decided in consultation with the community; others said that the elders exercised the right to do what they wanted (Ibid). According to those I interviewed, there are eight tribal elders in Taganito and Urbiztondo (Interviewees No. 2). They did not know how many tribal elders are there in the other municipalities/barangays covered by the ancestral domain claim (Ibid).

The election of tribal leaders emerged during the creation of the Office of the Southern Cultural Communities (OSCC) in the late 80s when government began to engage with IPs through various programs and projects (Interviewees Nos. 1 & 2). The interviewees expressed that they

have been accustomed to having tribal leaders decide for them (Ibid). According to them the tribal leaders are elected by the community. There are 15 tribal leaders in the whole ancestral domain covering five barangays in Claver. But as a Mamanwa pointed out during the preliminary consultation, they were not aware of the tribal leader of Taganito as their present leader since the death of their previous tribal leader (Interviewees No. 1). The FBI Team member/CSC OIC recognized the presence of a power struggle for the position of tribal leader among the Mamanwas. A tribal elder feeling displaced in the decision-making process expressed that the tribal leaders are making decisions by themselves because of the money involved (Interviewees No. 1). The other players in the leadership of the Mamanwas are the tribal council members. When asked what the role of the tribal council is, the Mamanwas pointed to the CSC OIC for explanation. According to the CSC OIC, the tribal council is responsible for policy-making while the tribal leader approves the policies and is the signatory to agreements made on behalf of the community. A tribal leader is chosen for his knowledge and capacity to engage with government and other entities (Interviewees No. 2).

The leadership conflict is manifested in the gaps of information flow within the Mamanwa community. Mamanwas from Taganito said that there was no community meeting called by the tribal leaders after the Preliminary Consultative Meeting and before the Consensus Building to get the opinions of the tribal members (Interviewees No.1). The Mamanwas of Urbiztondo said the same thing; there was no consultation with them conducted neither by their tribal council nor by their tribal leader prior to the Consensus Building session or in the entire FPIC process (Interviewees No. 2). The FBI Team member/CSC OIC also said that she was not aware if any meeting took place among members and leaders of the tribe. Apparently, in Urbiztondo, there is

a faction between their tribal council members and their tribal leader. The interviewees conveyed that the tribal leader did not want to meet his tribal council and the latter in turn did not meet community members as they were waiting for a meeting with their tribal leader (Interviewees No. 2). There is also a conflict between tribal elders who feel disregarded in the decision-making of the tribal leaders (Interviewees No. 1). A tribal elder disclosed that if there are tribal meetings, not everyone attends because there is a faction between tribal leaders and tribal elders (Ibid). Another interviewee disclosed that the community members do not have any respect for their tribal leader anymore as he is often drunk (Interviewee No. 9). The interviewees do not also remember that their tribal leaders met between the five-day period after the Preliminary Consultative Meeting and the Consensus Building (Interviewees No. 1). But they acknowledged that the tribal leaders have factions and because of this it could have been possible that while there was a meeting among tribal leaders, not everyone was there (Ibid). The TMC Information, Communication, and Education (ICE) Officer also noted that she “do not know what to do with the Mamanwas” because there is division among them.

During the Consensus Building, the tribal leader of Urbiztondo suggested that if they could not come to an agreement, then they should not allow TMC to operate. But the PCB Chairman/tribal council leader noted that they cannot disagree because TMC already exists. During my interviews, when asked if they could have said NO to TMC, the Mamanwas from Taganito felt that they had no choice; if they denied consent to TMC, the company will still operate because “it will anyway be or has already been approved by higher authorities” (Interviewees No. 1). Another batch of interviewees from Urbiztondo expressed that they have been told by TMC that whether they give their consent or withhold it, the company will continue to operate

(Interviewees No. 2). Two other tribal members expressed that all they could do was to add conditions or demands since TMC has been there since 1986 (Interviewees No. 3). Denying TMC their consent meant no agreement and therefore no benefits for them while the company continues to operate (Interviewees No.1). They feel that their situation does not allow them to withhold consent (Ibid).

A representative from TMC thinks though that with the decision-making process of the Mamanwas, they could not be manipulated (Interviewee No. 8). The officer clarified that TMC started its operating contract in 1989; exploration started in 1986 but the contract then was with the Hinatuan Mining Corporation (Ibid). The former Community Relations Officer (CRO) of TMC expressed that during the FPIC undertaking, they felt that the Mamanwas had the power, that whatever their demands were, TMC was at the bargaining end. He added that they could not do something against this situation because the FPIC is required by law.

NCIP officials generally assert that FPIC gives the IPs the right to decide whether to allow a company or not. Two officials though think that IPs give their consent primarily because of their lack of education and because of the economic benefits offered (Interviewees Nos. 7 & 13). The National Director likewise think that without adequate support for the formulation and implementation of an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP), it could happen that IP communities end up having no choice but to give their consent. But he pointed out that there are cases where other IPs have taken the decision to manage mining in their ancestral domain.

According to the NCIP OIC Provincial Officer (PO), the Mamanwa tribes in the province have not received assistance to formulate their ADSDPP; the assistance is currently focused on the IPs in the province of Agusan del Sur. He shared that the monthly budget for the province is PhP10,000 [US\$ 190.85], PhP5,000 [US\$ 95.42] of which is allotted for office rental and the remaining PhP5,000 [US\$ 95.42] for monthly maintenance and operating expenses (MOOE). The CSC OIC added that the two Service Center offices too have only PhP5,000 [US\$ 95.42] each used for rental (PhP2,600) [US\$ 49.62] and MOOE (PhP2,400) [US\$ 45.80]. What the national office does, according to the Director, is source out funds from the social funds of the President or from other government agencies or funding institutions that has funds along the lines of what could be projects for ADSDPP formulation or implementation.

Traditionally, the Mamanwas are food gatherers. Prior to the entry of Hinatuan in 1986 which was replaced by TMC in 1989, they have relied on the forests for resources to sell such as orchids and honeybee, and to produce mat (Interviewees Nos. 1). But according to the Mamanwas, with the presence of TMC their livelihood sources became less accessible (Ibid). And like many IP communities in the country whose lives have been one of struggle for daily survival, they do not have a long-term development plan for their community. Nor has the NCIP assisted them in this regard due to its lack of funding. The absence of a long-term development plan has impacted on the Mamanwas' articulation of their demands as discussed below.

Given the feeling of powerlessness, the tribal leaders, during the Consensus Building, went on to identify their demands which they noted they had to present to TMC by March 23, five days from this consensus building session. These demands were: (Report on FBI & FPIC, Annex H).

1. Royalty fee of PhP1 million per year [US\$ 19,084.84]. This fee should be given directly to the IPs. Besides this fee, social services should be provided.
2. Housing. Concrete housing should be provided to the Mamanwas of Taganito and Urbiztondo, being directly affected by the mining operation. In addition, the demand included house and lot for the Mamanwas in areas considered not to be affected by the mining operation but are within the ancestral domain claim. Four tribal houses should also be provided in specific locations for areas considered not to be affected but which are part of the ancestral domain.
3. Employment. The demand simply states that TMC should provide employment, including regular positions, to the Mamanwas belonging to the ancestral domain. In addition, the tribal leaders from the all the five municipalities covering the ancestral domain should be given a monthly honorarium. The amount was not specified.
4. Scholarship/Educational Assistance. The company should provide schools and teachers; financial support for elementary, secondary, and college students; driving training and other capacity buildings for Mamanwas.
5. Health. The company should construct health centers and provide medicines, a midwife or a nurse or possibly a doctor specifically for Mamanwas in Taganito and Urbiztondo; install a household water system.
6. Environmental concerns. The demand simply states that the mining operation of TMC should not overlap with primary forests. Also, the leaders demanded that the company should allocate a rehabilitation fund which they could access after the lifetime of the mining operation.

7. Livelihood. The company should provide the Mamanwas fruit seedlings and other sustainable crops.
8. Others. Allow the Mamanwas to ride in the TMC bus service. TMC should also provide the Mamanwas their own jeepney for use in cases of emergency.

The demands do not match the time scale of the operation of the mining company, to say the least. While the tribal leaders may have heard that the MPSA is for 25 years, the implications of this are certainly not thought out as reflected in their demands. But who is supposed to be facilitating an informed, comprehensible, and comprehensive exchange of ideas among the leaders and even between the leaders and their members? Who was supposed to explain to them that the IRR of the Mining Act provides for the allocation of a Mine Rehabilitation Fund and that there are rules governing the disbursement of this fund? Who was supposed to guide them in understanding the technical data regarding the extent of the application vis-à-vis the ground reality or current operation in order to ascertain whether an encroachment on primary forests is taking place or even just make sense of the environmental implications of the mining operations over a period of 25 years (in addition to 20 years that the company has been operating)? How were they supposed to know what employment positions exist in the company, what capacities and skills do each require, and what capacity building therefore should they be demanding over a period of 25 years? How were they supposed to know which among their demands could be met in a year or two, in 5 years or 10 or 20 or 25 years, or which among demands are in fact already included in SDMP funded by the 1% of the direct mining costs?

The NCIP maintains that their role in the consensus building session is to document the proceedings as mandated by the Guidelines. A member of the FPIC Team shared that if they ever give advice to the leaders, it is done in private (Interviewee No. 9). Another NCIP officer disclosed that when they think that the IPs' demands are weak, they intervene by advising them in areas like increasing the amount of financial benefit, the number of employment, and educational assistance (Interviewee No. 5). An NCIP Commissioner invoked the rules that during the Consensus Building, the NCIP or the FBI Team does not provide any input (Interviewee No. 13). When asked how they assist communities to understand the complexity of the issues since NCIP is also tasked to protect the rights of the IPs, he replied that before the start of mining operations, NCIP validates if there are provisions for environmental protection. He added that there have been lapses but that they are minor. According to him, there have been more advantages provided by mining companies, e.g. scholarship, who were given consent and of which they have approved. The National Director added that they invite experts to elucidate matters for the IPs. But he noted that the IP community should be the one to express what they do not understand so that NCIP can bring in the expert. The DENR MGB National Director too added that they also come in to give clarification regarding mining, the benefits according to the law and the risks involved but only when requested. An NCIP official commented that MGB is not required to attend; he said MGB is also regarded as pro-mining (Interviewee No. 5). The present OIC Regional Director asserts that there is an advantage in the exclusion of government or the NCIP in the process because an official might have his/her own bias on the matter being deliberated upon.

Does the customary decision-making process stand up to the task of arriving at a free and informed consent? The tribal leaders were talking among themselves. And yet they were not dealing with an issue that is confined among IPs. They are dealing with complex issues that involve multiple policies and stakeholders and long-term implications, i.e. costs and benefits, to the environment and to their lives. But a TMC representative claimed that since they do not have any processing plant, they are just doing “pure mining”, even the “common tao” [regular individual] understands mining and its implications (Interviewee No. 8). As an FBI Team member conveyed, during the Preliminary Consultative Meeting, the TMC presented the disadvantages of mining nickel, particularly soil erosion, and also their reforestation efforts and desiltation process (Interviewee No. 9). But an NCIP official opined that the presentation of companies are often limited to small disadvantages which are mitigated (Interviewee No. 7). But Director Wandag himself asserts that not many understand mining and logging; that the rate of soil erosion differs among minerals being extracted. He added that nobody raises questions though because communities may not also understand the technologies being proposed by companies for mitigation of adverse effects. Director Wandag and the NCIP Acting Provincial Officer recognized that IPs have an idea of the effects of mining but it is not adequate because there are technical aspects of the issues involved. On the other end, the NCIP Regional Director admitted that NCIP has a bit of understanding of the technicalities surrounding mining. The NCIP Acting Provincial Officer confirmed that even NCIP personnel lack technical knowledge.

Leaving the IPs alone to discuss among themselves by invoking customary decision-making does not provide the much needed support for a meaningful appreciation of the long-term and broad-scale implications of their options. Their discussions are determined according to the

presentation of companies, i.e. financial benefit, livelihood, scholarship, and employment. Even these benefits, as reflected in the demands of the IPs, are not framed within a 25-year consideration.

Furthermore, all NCIP officials interviewed define what is just, equitable, and genuine participation as depending on the customary decision-making of the IPs. This definition misses the point that the customary decision-making process of a certain tribe could be isolating its members, especially women who are not part of the tribal leadership structure. This also breeds the division and politics between and among tribal leaders and elders. While these conflicts are often reinforced by companies, deliberately or not, as the case would illustrate, they and the NCIP suffer the resurgence of questions as to who the right leaders were that they should have negotiated with or are supposed to be negotiating with. The agreement ends up being unsustainable.

On the other end, the NCIP's role being solely a documentor does not support an informed decision-making process during the Consensus Building. What is happening is, for those who do not intervene as they say, they could be allowing the biases of powerful tribal leaders or elders to determine the outcome of the meeting. For those who intervene in the Consensus Building or outside of it, they could be imposing their biases to influence the decision of the IPs.

FINAL COMMUNITY ASSEMBLY

A letter dated March 22, 2006 from the Regional Director instructed the FBI Team to conduct the Final Consultation Meeting the following day (March 23) in barangay Taganito (FBI & FPIC Report, Annex I-1). The tribal elders knew that the meeting was to be held on that day.

In this final meeting, the tribal leaders presented their demands as agreed upon in the Consensus Building meeting. The tribal members, too, were present. This time, the tribal leader of Taganito (Datu Rizal Buklas) himself performed the prayer ritual. The Mamanwas I interviewed remembered this as the meeting where the 15 tribal leaders of the ancestral domain were called on stage (Interviewees No. 1). They said that while they were present only the tribal leaders negotiated the deal with TMC (Ibid) on stage. They acknowledged though that the tribal members agreed that their corresponding tribal leader could sign what was agreed upon with TMC (Ibid). What process each community or the entire tribe went through to bestow that right on their tribal leaders was not explained. I would assume that given past practices that tribal leaders have been the decision-makers in the tribe, this was just taken as the case that applies to the FPIC being sought for by TMC. The tribal members also recalled the presence of the Regional Director at that time in this assembly (Ibid).

The FBI Team read the consolidated demands of the tribal leaders on stage. At the outset, the TMC representative asserted that the discussion should focus on the written demands and any additional claims should be dealt with later (FBI & FPIC Report, Annex I-2 and I-3). Regarding the PhP1 million [US \$ 19,084.84] royalty fee that the tribe requested, the TMC representative pointed out that the company is already paying a royalty fee to the government being the owner

of the land designated as a mineral reservation (Ibid). As such, he asserted that no other payment would be made by the company (Ibid). The tribal leader of Urbiztondo commented that TMC's practice of paying only to the government in previous years is a manifestation of the lack of respect for the rights of the IPs (Ibid). The TMC representative argued that going through the FPIC process was an expression of respect for the tribe (Ibid). The PCB Chairman/tribal leader of Gigaquit ended up defending that what they are requesting might not be a royalty fee but rather a share of the profits (Ibid). The TMC representative commented that what was requested in the demands was a royalty fee and therefore that is what the negotiation should cover. Again, he stressed that because TMC is already paying government a royalty fee, no royalty fee could be paid to the IPs (Ibid).

The NCIP Regional Hearing Officer, Atty. John Edwin Luneta, opined that there was a conflict with this royalty fee being requested by the tribal leaders because it was already being paid to government which owns the land (Ibid). Note that there was continuing confusion regarding the royalty fee vis-à-vis the 1% of the direct mining costs which came out during the Preliminary Consultative Meeting. In this Final Consultative Meeting, the tribal leader of Urbiztondo also brought up that to their understanding they did not have a clear share yet from the 1% of the direct mining costs; they were just being allotted a measly 16% share (Ibid). The reply of the TMC representative was that their 16% share from the amount of the 1% of the direct mining costs was all that was required by law and that they were part of the planning [referring to the CTWG in which the datu is a member] (Ibid).

During the meeting, the confusion regarding royalty fees was reinforced by mixing the matter with conversations regarding land ownership and whether the ancestral domain had a title or not. Datu Hedi, the PCB Chairman, asked what the conversation meant; did it mean that there was no clarity that the area was an ancestral domain (Ibid). Atty. Luneta replied that there is currently an application for a title to which the TMC representative claimed that the area is therefore not yet clear as an ancestral domain. But did not the FBI result establish that the area is an ancestral domain which is why the FPIC process was being undertaken?

The NCIP Regional Hearing Officer explained that TMC could not accept the term royalty fee since the company is already paying government a royalty fee (FBI & FPIC Report, Annex I-2 and I-3). So he proposed that in order for the meeting to proceed, the NCIP should study the accurate or proper term to use, as would TMC (Ibid). The tribal leaders succumbed and asked that they be informed of the so-called study (of the proper term) in order to understand the matter, that is, when they have acquired an ancestral domain title (Ibid). The NCIP Acting Provincial Officer at that time had to assuage the fears of the tribal leaders regarding the formal recognition of their ancestral domain. Why would an NCIP Regional Hearing Officer not know that given the fact that an FPIC process was undertaken, it was clear that the area was an ancestral domain and that the FBI had established this in its report? Did it matter if the Mamanwa tribe had a title? Did they not apply for a Certificate of Ancestral Domain Title (CADT) in 2004? And why was it that TMC was willing to give other benefits to the Mamanwas if they were not considered part of an ancestral domain? Why would an NCIP officer make NCIP's own rules ambiguous, unless of course, he himself did not understand the rules?

In my interview with the tribal leader of Urbiztondo, he said that it was clear to the tribal leaders that they negotiated for a fixed amount of PhP1 million [US\$ 19,084.84] instead of 1% of the gross output because they had no idea as to or any way of knowing how much the gross output of the company would be. What the tribal leader knew was that TMC negotiated for PhP500,000 [US\$ 9,542.42] because they also had to pay others [fees]. But an FBI Team member revealed that TMC considered PhP1 million to be large (Interviewee No. 9). A TMC officer shared that the company thought even PhP500,000 [US\$ 9,542.42] was huge and they are concerned with how the IPs would use or manage the money (Interviewee No. 8). Furthermore, the officer indicated that the demands of the IPs were not realistic. The interviewee added that the company was reluctant to grant a considerable amount; given the educational level of the IPs (Ibid). In addition, the TMC officer commented that the IPs already had so much meaning that there were three mining companies excluding TMC already operating in the two barangays and providing benefits to them (Ibid). The FBI Team member/CSC OIC confirmed that the following corporations are in Urbiztondo: the Taganito Mining Corporation (TMC), the Oriental Synergy Mining Corporation (OSMC), and the Kepha Mining Corporation; In Taganito, there is TMC. According to an OSMC employee, OSMC is providing the tribal elders of Urbiztondo with a monthly honorarium of PhP3,000 [US\$ 57.25] and a half sack of rice each. A CTWG officer and former TMC officer commented that with so many mining companies in the area, the IPs might end up being indolent (Interviewee No. 12).

The concern of the TMC officer regarding the judicious management of the PhP500,000 [US\$ 9,542.42] (which eventually was called livelihood benefit and not royalty fee) was validated by the tribal members. According to them, the TMC was afraid that the money would

not be used properly; they know this to be the reason for the decision to release the said amount of money only if there are project proposals, even when the money is deposited in the bank account of the tribal organization (AMPANTRIMTU)²⁵ representing only barangays Taganito and Urbiztondo (Interviewees No. 2). The signatories to the account are the chairman, and the treasurer of AMPANTRIMTU, and the NCIP FBI Team member/CSC OIC of Bad-as. The TMC Information, Communication, and Education (ICE) officer said the company does not have anything to do with the release and monitoring of the money (from the Php500,000/US\$ 9,542.42) once it is deposited in the bank account of the tribal organization. The NCIP CSC OIC said she supervises the release and use of the funds for individual IP households, ensuring that at least a greater part of the amount goes to its intended purpose.

The FBI Team member/CSC OIC narrated her experience with the release of funds for the IPs who have availed themselves of the funds Php500,000 [US\$ 9,542.42]. She said that those who have been granted Php 6,000 [US\$ 114.51] which is the maximum one can get through a project proposal have not been using the money properly. Some of them, according to her, would not spend all the money on what they stipulated in their proposal, but would buy a radio, cell phone, go drinking or singing in videoke bars. Those IPs, she said, would presume the money was theirs. An NCIP official thought that what the IPs did with their money was their problem (Interviewee No. 7).

²⁵ AMPANTRIMTU refers to the tribal organization that is the signatory to the Memorandum of Agreement. It is headed by the tribal leader of Urbiztondo (Datu Alfredo Oloriko) as the Chairman and the tribal leader of Taganito (Datu Rizal Buklas) as Vice-Chairman. The organization covers only the two considered “affected areas” which are Taganito and Urbiztondo.

As of interview date (January 19, 2008) the remaining balance of the PhP500,000 [US\$ 9,542.42] livelihood benefits was PhP130,000 [US\$ 2,481], according to the NCIP CSC OIC. Every time AMPANTRIMTU and she approve a proposal, she makes



sure that she releases the money in public with a picture taking (to safeguard herself from allegations). She also keeps a record of all the transactions with the bank and the Mamanwa recipients of the livelihood benefit. She explained that the PhP500,000 [US\$ 9,542.42] livelihood benefit is released by TMC in two tranches as the MOA stipulates. The first one, she said, was issued in June 2006, while the second tranche was distributed in December 2006. Mamanwa households who have availed themselves of the funds have used them for livestock (hog, carabao) raising, and for starting mini-stores. I saw a number of grocery items in the new houses (which was also their mini-store) constructed by TMC for households in Urbiztondo. But the location of their houses is not accessible as they complained of except for some employees of the Oriental Synergy Mining Company (OSMC) who will have an office nearby. Given that the Mamanwas do not have any experience or training running small-scale business, and given their daily needs, they would likely end up consuming the grocery goods they are supposed to sell. The CSC OIC also conveyed that AMPANTRIMTU has also started communal coconut production on a combined total of 36 hectare land in Taganito and Urbiztondo. The project she said started in May (or June) 2006. This information is revealing for the MOA was only signed

in July 18, 2006 (FBI & FPIC Report, Attached Copy of the MOA). The AMPANTRIMTU was organized in June 22 (Interviewee No. 9). At the time of the MOA Ratification in June 23, the PCB Chairman/tribal leader of Gigaquit did not agree that AMPANTRIMTU should be the signatory to the MOA since it only represented the Mamanwas in the barangays of Taganito and Urbiztondo (FBI & FPIC Report, Annex K). But the AMPANTRIMTU eventually turned out to be the MOA signatory. This conflict is discussed further in the latter part of this case study.

With regard to the demand of a royalty fee, was the decision not to grant the IPs their entitled royalty fees only a semantic matter? The 1996 IRR of the Mining Act clearly provides the term royalty payment for the IPs which should not be less than 1% of the gross output of the company (Section 16). If we were to stick to the argument of the TMC and the NCIP Regional Hearing Officer, the royalty fee that TMC is paying government is called the “government share” and takes the form of an excise tax (Section 212). So the royalty fee for the IPs, the government share and the 1% of the direct mining costs are different from one another but are interrelated. Did the TMC representative and the NCIP Regional Hearing Officer know this? Why did they fail to explain that the company is allowed to count the royalty fees for IPs in calculating its government share/royalty fee and that the expenses for community development from the 1% of the direct mining costs could also be charged towards towards the 1% royalty fees for the IPs? If they clarified these matters, it could then turn out that the 16% of the amount of the 1% of the direct mining costs could have been negotiated by the IPs, contrary to what the TMC representative declared that the 16% was already determined by law. But it seems that TMC had already determined that the benefits for the Mamanwas will have to be the Php500,000 [US\$ 9,542.42] livelihood assistance already mentioned in the Preliminary Consultative Meeting. This could explain why the 16% supposedly offered to the IPs during the Preliminary

Consultative Meeting was later reallocated for the barangays, as a TMC officer explained. The TMC representative's comment that the PhP500,000 [US\$ 9,542.42] is huge apparently made sense for the company not to grant the tribe a royalty fee of 1% of the gross output. The responses of the company during this critical meeting which was supposedly a negotiation certainly kept the Mamanwas in a state of confusion, apprehension, and submission.

Without any further discussion and resolution of the tribal leaders' demand for a PhP1 million royalty fee [US\$ 19,084.84], the meeting proceeded to the demand for more housing. The TMC representative said that the tribal leaders specifically demanded 48 houses for Mamanwas in



Taganito and Urbiztondo. But the Mamanwas and an FBI Team member explained that TMC based the number of houses on the old census in 1997; if the number of houses needed was based on the number of households at the time of the FPIC process, there were already 35 (CSC OIC said 34) households in Taganito; Urbiztondo has 29 households (CSC OIC said 31) (Interviewees Nos. 1, 4 & 9). This means that they needed 64 or 65 houses, not 48. At the time of my interview, there were already 14 houses constructed for the Mamanwas in Taganito which were occupied (Interviewees Nos. 1). More than half of the households had not

been provided housing yet (Interviewees Nos. 1, 3). For Urbiztondo, there were already 20 houses built (Interviewees No. 4). The Mamanwas in Urbiztondo though was going back and forth from their old houses to the new houses constructed by the company. They said that the location of the new houses was not suitable; they were “placed up in the mountains”.

The Mamanwas complained that their demand for concrete housing was not considered



(Interviewees Nos. 1 & 2). They ended up with light wood materials as the Memorandum of Agreement (MOA) stipulated using low-cost housing of light materials (MOA, July 18, 2006). The FBI Team member/CSC OIC explained that TMC could have made its decisions

based on its knowledge of other IPs in other areas where concrete housing is not deemed appropriate to the culture. The Mamanwas also remarked that until the time of my interview with them, there was no household water or sanitation or electricity as had been promised (Interviewees Nos. 1, 2 & 4). The MOA stipulates that the housing and water and toilet and electric facilities shall be implemented on a staggered basis starting in 2006. The MOA underscored that the electricity would be at the “expense” of the IPs. I assume this means that the monthly electric bills would be shouldered by the Mamanwa households. But this arrangement was not clear with the IPs. They repeatedly complained of the lack of the aforementioned facilities; that they had only an electric post; and they never mentioned that they

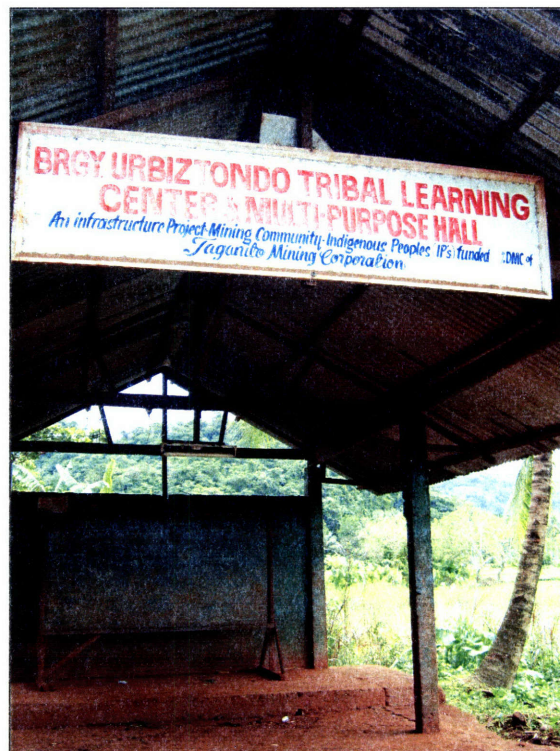
were supposed to pay for household electricity which they expected to be installed (Interviewees Nos. 1 & 2). During my visit to the housing site of Urbiztondo, there were hollow blocks in the area which according to the Mamanwa residents were going to be used for the construction of communal water and toilet facilities. Again, they said the MOA stated that these facilities would be provided for all households.

As to the housing for Mamanwas in other municipalities covering the ancestral domain, two tribal leaders suggested that the funds should be drawn from their share of the 1% of the direct mining costs (FBI & FPIC Report, Annex I-2 and I-3). The TMC representative asserted that the company could not decide on the matter as only the tribe could make a decision regarding the share that the other unaffected areas could have (Ibid). But he added that TMC was willing to build four tribal houses as requested (Ibid). During my interview, the FBI CSC OIC confirmed that three concrete tribal house buildings were already constructed.

Another point tackled during the meeting was the employment demands of the tribal leaders. Here, the TMC representative clarified that employment with the company depends on vacancy and qualification while he told the tribal leaders that Taganito and Urbiztondo Mamanwas would be given priority (FBI & FPIC Report, Annex I-2 and I-3). He said that TMC would also like to have Mamanwa regular employees (Ibid). What positions existed in the company and what the corresponding qualifications were was not elaborated. Regarding monthly honoraria for tribal leaders, he said that this demand would be integrated with others and asked that an exact amount be specified (Ibid). With what "other concerns" this demand was to be integrated, was not stated.

As noted earlier, the Mamanwas claimed that no one has become a regular employee yet among them but there were those who have worked in loading and maintenance on a shifting basis; seven Mamanwas for 5.5 months, replaced by another batch of seven for the next 5.5 months (Interviewees Nos. 1). The MOA stipulated eight for casual and rotational employment; this was supposed to be divided into four for drilling/exploration and four for loading/maintenance.

A number of training sessions had been provided by the company (Interviewees Nos. 1, 2, 8, 9). Four women from Urbiztondo and another 15 from Taganito had undergone handbag and mat making training (Interviewees Nos. 1 & 2). The CSC OIC estimated 25 graduates. They said this handicraft training, conducted from December 5-23 by the Department of Trade and Industry (DTI), was the idea of the TMC Information, Communication, and Education (ICE) officer. According to them, the TMC ICE officer told them that their products would be displayed and marketed in Surigao, i.e. at the provincial level. The TMC ICE officer confirmed that she was connecting with other non-government organizations and trying to find markets for the products of the Mamanwa women. The Mamanwa women said it took 18 days for a bag to be completed. They said many of them had not finished one.



A training center managed by the CTWG was created by TMC with the use of the 1% of the direct mining costs (Interviewees Nos. 1). Trainings in the areas of heavy equipment operation, repair, electronics, and driving are provided by the Technical Education and Skills Development Authority (TESDA) (Interviewee No. 11). TESDA has already produced 4 Mamanwa graduates (two in Taganito and two in Urbiztondo) trained in mechanical automotive repair (Interviewees Nos. 1, 2 & 9). The FBI Team member/CSC OIC informed me that there were seven slots in the said trainings for the IPs. While others initially participated in the training, they did not finish because the trainings did not include allowances (Interviewees Nos. 1 & 9). Hence, the trainee did not have any income to sustain their families (Ibid). There is a PhP50 [US\$ 0.95] per day allowance though during the on-the-job (OJT) training phase (Ibid). In addition, the TESDA selection criteria included the ability to write or sign one's name.

Regarding the demand for scholarship, the TMC representative assured the tribal leaders that even if they did not ask for this, TMC would still have provided them (FBI & FPIC Report, Annex I-2 and I-3). He said TMC would provide s for students and trainings for Mamanwas related to driving, operating heavy equipment, and running drilling machines (Ibid). The MOA requires these trainings and further states that those trained IPs could be “integrated into the TMC workforce if already qualified”. As to the scholarships, it guarantees to “expand the existing non-formal Learning Center with subsidized teachers” and “provide financial assistance to four deserving college students in Surigao Colleges (Ibid).

The Mamanwas confirmed that there is a school building that could be used as an Alternative Learning Center (Interviewees Nos. 1 & 9). They also recognize that two Mamanwa teachers

and the school supplies were being subsidized by TMC from the 1% direct mining costs (Ibid). The two teachers of elementary education were paid an allowance of PhP3,000 per [US\$ 57.25] month and provided free health services (Interviewee No. 9). While there are four slots for college scholarship from both barangays, there was only one scholar, Michael Denapa, at the time of my interview (Ibid). Michael wanted to take up mining/geological engineering but since this course was not offered in the province, he ended up taking civil engineering (Ibid). With regard to the demands on health services which includes a health center complete with medicines, a midwife/nurse and possibly a doctor in the two barangays, the TMC representative replied that these were already included in the “social services” (FBI & FPIC Report, Annex I-2 and I-3). He meant that these services were already part of the social development plan funded by the 1% direct mining cost (Interviewee No. 9). But Mamanwas disclosed that only the check-ups were free and only those working at TMC were provided with free medicines (Interviewees Nos. 3).

The TMC representative likewise guaranteed during the meeting that the mining area did not encroach on forestlands and that a rehabilitation fund has been deposited in a government account (FBI & FPIC Report, Annex I-2 and I-3). Lastly, the TMC representative promised that they would have more bus stops and would permit Mamanwas to ride when there were no more employees who needed a ride.

What was eventually given to the Mamanwas reflected the absence of a long-term consideration of the quality of their lives. Even an NCIP official admitted that the benefits for the Mamawas were small (Interviewee No. 7). While he admitted that the IPs’ use of funds was a concern, the

share [from the 1%] is rightfully theirs; the company should have given it to them; what the Mamanwas did with their money was their problem (Interviewee No. 7). The official added that what the company could assist the Mamanwas in building their capacity to manage their benefits wisely (Ibid).

The tribe did not have an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). Their demands reflected the absence of a long-term vision or plan. They accepted what was offered to them, in part, because they lacked important information. If that information had been provided by the parties and if NCIP had facilitated a more meaningful discussion, the Mamanwas would probably have broadened their demands – thinking in terms of a 25-year time horizon for themselves as well as for future generations. The company would have realized that the Php500,000 [US\$ 9,542.42] was not much as the long-term plan that could have resulted from the information-sharing would have indicated timeframe and incremental use of funds for the welfare of the community.

The NCIP FBI Team seemed to lack the capacity to figure out what information should have been put on the table and what the necessary skills were to facilitate information-sharing and problem-solving appropriate to the situation. These limitations could have been due to a lack of training. It could also have been the product of the biases of the individuals involved. Whatever the reasons were, the FBI Team reinforced a less than ideal process even if the Mamanwa tribe got some benefits via the MOA.

RATIFICATION OF THE MEMORANDUM OF AGREEMENT

The FBI Team leader wrote a letter **June 19, 2006** to the tribal leaders inviting them to a meeting at the CSC Bad-as office on **June 23** “to present what has been discussed in the meeting in Butuan City, Agusan del Norte with respect to the demands of the tribe after they were analyzed by the Board of Directors of the TMC” (FBI & FPIC Report, Annex J). There is no document that shows what transpired at the Butuan meeting. An FBI Team member though confirmed that a third meeting held in a hotel in Butuan took place (Interviewee No. 9). This was where the MOA was drafted. The CTWG Chairman who was formerly TMC’s Community Relations Officer (CRO) also affirmed that it was at this third meeting that the MOA was drafted. If one does not include the consensus building of the tribal leaders (as this was just among themselves), indeed the third meeting was the Butuan meeting.

An FBI Team member claimed that all the tribal leaders were present in the Butuan meeting (Interview No. 9). Was the MOA drafted then during the meeting or was it simply presented? It seems unlikely that it could have been drafted within a day with the tribal leaders providing their input on matters that never came up in the previous meetings but which became part of the MOA.

The letter likewise states that the draft MOA would be discussed before it was presented to the Taganito and Urbiztondo tribal assembly (FBI & FPIC Report, Annex J). The document in the local or Visayan dialect, when translated in English also says that the meeting was to “also include the discussion on the Mamanwa tribes found within these aforementioned barangays” (Ibid).

In the previous meetings, the tribal leaders of all five municipalities comprising the ancestral domain have been the ones “negotiating” with TMC. This was the first time that the decision-making process was framed as being confined to Mamanwas in Taganito and Urbiztondo.

The June 23 meeting turned out to be the time for the ratification of the MOA (FBI & FPIC Report, Annex K and K-1). This MOA is allegedly the result of the draft MOA and the “analysis of the Board of Directors of TMC” as the letter of the FBI Team leader stated. After the reading of the MOA, the PCB Chairman/tribal council leader of Gigaquit demanded that a “vehicle to haul their product to the market” should be included in the MOA. An NCIP officer went on to enumerate the benefits that TMC had already agreed to provide (Ibid). Here, it was clear that the PhP1 million royalty fee [US\$ 19084.84] that was being demanded became a PhP500,000 [US\$ 9,542.42] livelihood assistance (Ibid). It could be assumed that this became clear with the tribal leaders during the drafting of the MOA, if they were indeed present at the event. It turned out that the 16% of the amount of the 1% of the direct mining costs would not be part of the MOA. Who decided the amount PhP500,000 [US\$ 9,542.42]? Clearly, TMC decided it was not using the term “royalty fee” as it asserted in the supposedly final community assembly on March 23. The NCIP and the TMC never got to do the so-called “study of the proper term” [referring to the use of the term “royalty fee”] that they promised to undertake.

The FBI Team leader asked if the tribe had an “organized group that will be used as the contracting party with TMC” (Ibid). Surprisingly, the tribal leader of Urbiztondo claimed that Taganito and Urbiztondo that they have agreed on/organized a group which they call AMPANTRIMTU (which is roughly translated as Association of Mamanwa Tribe in Taganito

and Urbiztondo). At this point, the PCB Chairman/tribal leader of Gigaquit registered that this was not agreeable to them because they wanted the organization to represent the five municipalities covering the ancestral domain (FBI & FPIC Report, Annex K). The Visayan documentation shows that the FBI Team leader acknowledged this remark and suggested that the organization be called CLAGIBATUAL (which is translated as Organization of Mamanwas in Claver, Gigaquit, Bacuag, Tubod, and Alegria) to which the Datu supposedly agreed (Annex K-1). The English documentation notes that the response of the FBI Team leader to the datu's remark was "that is good if it is also acceptable to the TMC" (Annex K).

The FBI Team leader later informed the Resident Mine Manager of TMC in a letter dated **June 28** that in the aforementioned meeting of the tribal leaders, they agreed to call their organization CLAGIBATUAL (FBI & FPIC Report, Annex L). The attached list of officers of the organization indicated the two tribal leaders of Taganito and Urbiztondo as the Vice-Chairman and Chairman, respectively (Ibid). All the rest are designated as Board of Directors (Ibid).

At this point, the issue of who got to decide or gave consent became unclear. And the question subsequently divided the tribe and tribal leaders. Now there were two organizations.

AMPANTRIMTU, according to an FBI Team member was organized on June 22 with Datu Oloriko as the Chairman (Interviewee No. 9). This was the day before the third meeting.

ANOTHER FINAL COMMUNITY ASSEMBLY AND MOA SIGNING

The Regional Director, on June **29**,2006 ordered the FBI Team to conduct "another consultation meeting" on the following day (**June 30**) (FBI & FPIC Report, Annex L-2). In this assembly,

the benefits previously discussed were read by NCIP as part of the MOA (FBI & FPIC Report, Annex L-3 and L-4)). NCIP declared that the Mamanwas through the CLAGIBATUAL approved the MOA and gave their consent. (Ibid). Mamanwas present affixed their signature to a statement authorizing Datu Oloriko (Urbiztondo), Datu Rizal Buklas (Taganito), and Datu Emiliano Hedi (PCB Chairman/Head Claimant of ancestral domain title) to sign the MOA with TMC (Annex L-5). The statement declared that those Mamanwas were members of CLAGIBATUAL (Ibid).

The MOA signing took place in **July 18, 2006** at the Gateway Hotel in Surigao del Norte, according to the CTWG Chairman who was TMC's Community Relations Officer then. The MOA was signed by five TMC officers, by the NCIP Regional Director, and by the three abovementioned tribal leaders. Witness signatories were the 12 other tribal leaders, the Officer-in-Charge of the Regional Office of the MGB, and the Mayor of the province. The twist in the story is that the three tribal leaders signed as representatives of AMPANTRIMTU not CLAGIBATUAL. It could be that the tribal members who affixed their signatures as CLAGIBATUAL authorizing the three tribal leaders to sign the MOA gave their consent to AMPANTRIMTU as the contracting party to the MOA.

Both the 2002 and 2006 Guidelines state that when an activity, program, or project affects only a portion of an ancestral domain, only those communities within an affected area shall give their consent (Section 16, a; Section 10, b). The NCIP Provincial Officer referred to these Guidelines. Commissioner Apostol affirmed the same point and defined affected areas as the geographical location of the applicant's activity. The NCIP Regional Director suggested that the affected area

includes the surrounding communities as well. The Director of the DENR Mines and Geosciences Bureau (MGB) explained that for them the affected area is the impact area which covers only the immediate operations of the mining tenement. According to him, progressive mining companies are open to considering an expanded impact area. He added that MGB and NCIP have not yet together delineated what should be considered secondary and primary impact areas. He added that they still need to sit down to determine what constitutes a realistic impact area.

While tribal leaders from the five municipalities covering the ancestral domain were “negotiating” with the company, it was not clear to them that an IP organization representing only the Mamanwas in the two barangays would be the signatory to the MOA. If they understood this, it seems unlikely that AMPANTRIMTU would have been organized the day before this third meeting. Nor would the PCB Chairman/tribal leader of Gigaqut have agreed that AMPANTRIMTU would be the only contracting party. Now the Mamanwas are divided.

The IPRA and the Guidelines define FPIC as “the consensus of all members of the ICCs/IPs which is determined in accordance with their respective customary laws and practices...” (g, Chapter II; Section 5, d). Since the FBI did not document what the current customary decision-making of the Mamanwa tribe was, it would have been best to verify the matter in the course of the FPIC process. The FBI Team and the TMC could have not assumed that the tribal decision-making process was contrary to what has been taking place – that ALL tribal leaders have been “negotiating” all through out. If such decision-making process was not going to be eventually recognized, the FBI Team and the TMC should have brought up the matter at the outset so that

the tribal leaders could have addressed this during their Consensus Building session. If one would say that the customary decision-making is confined only within the Consensus Building session as it seems to be defined, then is this not determining what customary decision-making is for the tribe? NCIP officials, when asked what equitable, fair, genuine participation is, say that it depends on the customary decision-making process of the tribe. But when the tribe indicates that their customary decision-making includes all tribal members or leaders of the ancestral domain, suddenly they are told that the decision-making depends on the law; customary decision-making suddenly becomes not part of the law. This contradiction reflects the conflict that it breeds among members and leaders of indigenous tribes.

In addition, the 2002 Guidelines state that the council of leaders within the ancestral domain shall determine whether or not a given activity or project affects the entire ancestral domain or only a portion of it (Section 16, a). While in the same section the law states that only those affected shall give their consent, the determination of who are affected is bestowed to the tribal leadership. As mentioned, this concern was not integrated in the FPIC process so that decision-making process regarding who should decide and/or be the signatory to the MOA could have been tackled and resolved early on within the tribal leadership instead of pitting them against one another. Given the way the way the final part of the part was handled, the leadership conflict got resolved through the assertion of power by TMC and maybe the concerned tribal leaders of the “affected areas”.

THE MEMORANDUM OF AGREEMENT

To sum up, the only benefit with a specific amount in the MOA is the PhP500,000 livelihood assistance [US\$ 9,542.42]. This money was used by Mamanwa households for livelihood projects such as mini grocery stores and livestock raising. The rest the benefits in the MOA are funded from what is already in the 1% direct mining costs that is being paid to the barangay governments on a project basis; may be except for the housing of the Mamanwas which according to TMC's ICE officer is on top of the PhP500,000 [US\$ 9,542.42] and outside of the 1% direct mining costs. While the two tribal leaders of Taganito and Urbiztondo are members of the Community Technical Working Group (CTWG), there is no guarantee that they are able to negotiate for the welfare of the Mamanwas. If they were able to before TMC sought for their FPIC, granted they knew they were part of the CTWG, they would have not asked for what they wrote down in their demands which most were already told to them as existing. But then again, their demands were shaped by what was presented in the Preliminary Consultative Meeting. When their demand for a fixed financial payment was more than what was presented, they received ambiguous statements and information.

Let me add a number of salient points regarding the MOA. The MOA covers the Rights of TMC which basically turns the situation around – now it is TMC which is exercising its right to FPIC on their mining areas and operations (Article Two, B, d). The full cooperation of the Mamanwas are required for TMC to be able to exercise unhampered and uninterrupted mining operations within the MPSA areas and also the peripheral properties of the company (Article Two, B, a & b). The question is not why these are in the MOA, provided these were part of the discussions which apparently did not come out in the documentations or in my interviews, but

whether the Mamanwas understood what these agreements meant. The Mamanwas, through the two tribal leaders who are signatory to the MOA, filed a complaint last February 5, 2008 to the Bureau of Immigration and Deportation Commissioner against the company, alleging displacement and neglect of their condition (<http://www.mindanao.com/blog/?p=3366> retrieved on April 25 at 7:00 PM). The two chieftains also alleged that the agreements were not fully explained and admitted that they signed the MOA so as to get their share the soonest (Ibid). The IP leaders did not have any legal counsel who could have reviewed the MOA with them prior to signing. The 2006 Guidelines accommodates complaints relating to the interpretation and implementation of the MOA through the Regional Hearing Officer who shall decide on the matter. NCIP's Commission is authorized to decide on complaints regarding irregularities in carrying out the FPIC process after a certification of compliance has been issued.

In the section regarding the Commitments and Obligations of the AMPANTRIMTU, the Mamanwas have basically relinquished their rights over their ancestral lands, providing "free access to ANY properties covered by the IPs ancestral domain", and guaranteeing the company their full cooperation including "consenting in writing to the creation of a lien, mortgage or other appropriate encumbrance over the MPSA in order to secure financing..." (Article Two, C, 2, 3 & 4). The Rights of the AMPANTRIMTU covers the right to receive the benefits stipulated in the MOA, the right to receive rehabilitation compensation in accordance with the law, and the right to a dialogue with the company in case of conflicts in the implementation of the MOA (Article Two, D, 1, 3, 4). It is interesting to note that one of the rights guarantees the Mamanwas to an "informed and intelligent participation in the formulation and implementation of this

Memorandum and related documents, contracts, agreements, and studies” (Article D, 2). The details of this provision could be further threshed out to give meaning to this right.

This leads me to the absence of a mechanism for the monitoring of the MOA. The NCIP is assigned the obligation to ensure the implementation of the MOA (E, 2). In effect, NCIP is tasked to monitor the MOA. But NCIP admitted that they do not monitor the MOA, only the PhP500,000 [US\$ 9,542.42] livelihood assistance (Interviewee No. 9). Another NCIP official said, the monitoring is supposedly done by the NCIP Provincial, but the office has no monitoring system yet (Interviewee No. 5). The CTWG only monitors the 1% direct mining costs (Interviewees Nos. 9, 12). But when asked how the group is monitoring the 1% payment since the company holds the money, he said that the respective sectors represented in the CTWG do their own monitoring (Interviewee No. 12). But the 2002 Guidelines state that the MOA should contain the monitoring and evaluation schemes (Section 23, i).

The MOA contains no provision regarding environment protection except the part that stipulates the existence of a Mine Rehabilitation Fund which shall be used for damages resulting from the mining operation (Article Two, A, 7). Environmental impacts are said to be monitored by the Provincial Multi-partite Monitoring Team (MMT) which is tasked by the Department of Environment and Natural Resources (DENR) to monitor a company’s or a contractor’s compliance with environmental laws and regulations in accordance with the rules on Environmental Impact Statement (EIS). According to the MGB Director, the MMT is headed by the DENR and MGB, and consists of the local government/barangay units, non-government organizations, and community organizations. The NCIP Director and the Director of the Mines

and Geosciences Bureau indicated that matters relating to environmental concerns, e.g. EIA, go through the DENR's rules and regulations. As a Commissioner confirmed, when it comes to mining, it is the business of the DENR/MGB; he said NCIP's concern is the welfare of the IPs (Interviewee No. 13). One of course would wonder how the environmental impacts of mining are not related to the welfare of the IPs. An IP commented that the MOA does not contain environmental protection provisions; if there are efforts on the part of the company, it is not part of the MOA; what the MOA, contains, according to him, is all about money (Interviewee No. 10). Again, the Guidelines stipulate that the MOA should include detailed measures to conserve/protect any affected portion of the ancestral domain for watersheds, mangroves, wildlife sanctuaries, forest cover, and the like (Section 243, g).

The CTWG Chairman/former Community Relations Officer (CRO) of TMC also noted that CTWG has nothing to do with complaints regarding the implementation of the MOA; it is the CRO who handles the matter. The MOA stipulates a section on Conflict Resolution (Article VII). Where the conflict is between and among the IPs, the traditional dispute resolution process of the IPs shall be used (Article VII, 2, a). Conflicts between the IPs of the two barangays and TMC shall be subject to a Panel of Arbitrators consisting of one representative each from the two parties and an NCIP officer chosen by the two parties (Article VII, 2 b). The decision of the Panel is deemed final, non-appealable and immediately executed (Article VII, c). According to the Mamanwas, if there are conflicts, they understand that NCIP is the one in-charge; they can file a complaint with NCIP and the legal officer will take care of talking to the company (Interviewees Nos. 1). The MOA confirms that conflicts not covered by the provisions on conflict resolution shall be subject to NCIP (Article VII, 2, d).

Clearly, the Mamanwas do not have any on-going involvement with the implementation of the MOA after having signed it. They are simply recipients of the benefits stipulated therein. The MOA does not provide for any monitoring and evaluation that could forge a relationship between partners since the Mamanwas are the owners of the ancestral domain and the company is utilizing their land for the next 25 years. But to monitor a MOA entails articulating among other things the details required by the Guidelines. The MOA is too general and limited that one wonders what could be jointly monitored by the parties. The scholarship provision for instance stipulates four college students to be financially assisted. One is going to monitor for 25 years that four college students were provided scholarships by TMC. A provision on cultural sensitivity generally states that the company shall recognize and respect the AMPANTRIMTU in preserving and developing their culture without any details on how the company will go about doing this.

In the end, the NCIP endorsed the MOA and signed it as a third party. In my view, the way the FPIC was carried out disregards the intent that FPIC be used as an empowerment tool. The IPs ended up having very little control over what happened to their land even though they supposedly gave their Free, Prior, and Informed Consent.

CASE TWO: THE FPIC EXPERIENCE OF THE MANOBO TRIBE IN ROSARIO, AGUSAN DEL SUR

There were several FPIC processes that took place in Rosario with respect to the application of the PHILSAGA Mining Corporation (PSMC) for a Mineral Production Sharing Agreement (MPSA).

The NCIP Regional Office informed me that the documentation of the proceedings of the FPIC processes is with the national office. But the national office was unable to locate the documentation of the FPIC process that took place in Rosario but was able to provide me that of the Taganito Mining Corporation and the Mamanwa tribe in Claver, Surigao del Norte which I used for the first case. Nonetheless, there are a number of salient points that could be drawn out from the interviews I conducted last January and the Memorandum of Agreements I have obtained.

CURRENT CULTURAL DECISION-MAKING

The Manobos remember that traditionally, the datu/chieftain who was recognized as the “spirited” one, the strongest among the other datos exercised decision-making power in the tribe (Interviewees Nos. 16). But over time, due to the development of civilization and the introduction of religion, they said that their customary decision-making system had to adapt (Ibid). They said that also due to various laws, such as the Local Government Code and the IPRA, their decision-making system went through changes (Ibid).

Currently, compared to the Mamanwas in the first case, the current decision-making of the Manobos in Rosario is exercised by the tribal council of elders. The members of the council of elders are elected by their fellow “genuine” IP leaders and also the IP migrant leaders. There are 18 datu/chieftains comprising the council of elders coming from the six barangays of the ancestral domain. The 18 council of elders represent the six barangays through the tribal organization called CAMMPACAMM²⁶. There are eleven barangays in the municipality of Rosario. The CAMMPACAMM represents the recipient of the Certificate of Ancestral Domain Claim issued at that time by the Department of Environment and Natural Resources (DENR) in June 1998. At present, CAMMPACAMM is undergoing an application for a Certificate of Ancestral Domain Title (CADT). The current Chairman of the organization, Rodging Reyes, known as Datu Mabantao II, replaced his father who died in 2005. He conveyed that the perimeter survey confirming a 22, 554.9457 hectares as part of the ancestral domain has been completed.

According to him too and other council of elders, before NCIP validated and finally recognized in December 10, 2007 who the “genuine” IP leaders as a result of the tribe’s application for an ancestral domain title, the CAMMPACAMM considered even the IP migrants who came from nearby municipalities as part of the decision-makers in the organization (Interviewees Nos. 16, 23). As one tribal leader confirmed, he was once considered as part of those making decisions in CAMMPACAMM; there were 13 of them coming from Bayugan 3; but now that has changed; there are only seven from Bayugan 3 who sit as decision-makers in the organization; he acknowledged that he is not part of the council of elders (Interviewee No. 19). These IP

²⁶ CAMMPACAMM stands for the six cultural areas of the ancestral domain of the Manobos in Rosario. These cultural zones are: Cabantao, Maligaya, Marfil, (areas of) Pamintigan, Caulisihan, Maputi, and Matanog.

migrants whose ancestors came to Rosario in the late 1950s are now simply recognized and designated as “tribal leaders” (Interviewees Nos. 16, 19, 23). According to the council of elders, NCIP’s validation of “genuine” leaders is based on establishing genealogical roots which has to show that one’s roots were within the areas claimed (Ibid). So even if one is a Manobo leader in the area but one’s ancestors only migrated there, then one could not be considered a “genuine” IP leader, i.e. he could not be elected to the council of elders. He is known as a tribal leader but his jurisdiction is within his own clan or area (Ibid).

But the interviewees said that CAMMPACAMM, being the decision-making body consists of the tribal council and council of elders. When asked who comprise the tribal council, they replied that it is the sectoral leaders and the tribal leaders (Ibid). When asked to clarify who and what the sectoral leaders are, there was much confusion on this too. The council of elders ended up asserting that they are likewise known as sectoral leaders. Apparently, the confusion is due to the situation that there are also tribal leaders, i.e. IP migrants, who call themselves sectoral leaders (Interviewee No. 17, 19). The idea of a sectoral leader came when the ancestral domain was divided into management areas facilitated by the DENR (Interviewee No. 19) who awarded the Certificate of Ancestral Domain Claim (CADC) in 1998. These areas were known as sectors (Ibid). A list of 15 sectoral areas shows nine members of the council of elders as sectoral leaders (Profile of the Manobo Tribe in CADC 153, Environmental Science for Social Change, 2005). It could be then that the other sectoral leaders could either be tribal leaders, i.e. IP migrants, or other “genuine” Manobo sectoral leaders who are not in the council of elders. An IP migrant tribal leader though said he is a sectoral leader too because he manages his own clan or area or sector of IP migrants (Interviewee No. 17, 19). In my subsequent discussions, I would be using

council of elders and tribal leaders to distinguish the two groups of Manobos in Rosario, those whose ancestors were “rooted” in the area, and those who migrated. I will also use the term sectoral leaders to refer to “genuine” Manobo datu/s/leaders who are not elected to the council of elders.

While the CAMMPACAMM still includes the tribal leaders as part of the organization, and that they could register their opinions and recommendations during assembly, it now got clear to the council of elders that the decision-making should be confined among the council of elders as per result of the NCIP having “screened the leaders” (Interviewee Nos. 16, 23, 24). From 44 IP leaders consisting of tribal leaders, sectoral leaders, and council of elders, the decision-makers have been reduced to 18 datu/s/chieftains comprising the council of elders (Interviewee Nos. 16, 23).

In making a decision, the council of elders meets first to discuss and resolve matters among themselves; then they go back to the barangay tribal chieftain to inform him of the results of the discussions and he in turn is responsible for disseminating the information to the tribal members (Interviewee No. 23). The CAMMPACAMM Chairman asserted that it is the council of elders who make the decisions and not him. Yet, later he admitted that when he thinks that a decision made by the council of elders is “not good”, he does not allow its approval. The Vice-Chairman of CAMMPACAMM confirmed that it is the council of elders who makes the decisions and not the Chairman. But a tribal leader conveyed otherwise; he thinks that the Chairman is the one making the decisions; that he was even responsible for selecting the Vice-Chairman and other

officers (Interviewee No. 19). According to the council of elders, their functions include the formulation and implementation of policies in the ancestral domain (Interviewees Nos. 16).

The changes in the decision-making process of the tribe, instead of moving towards the creation of inclusive mechanisms for the participation of tribal members became more confined to a select few – the CAMMPACAMM officers and the council of elders. The NCIP verification of “genuine” IP leaders brought the concentration of power in the hands of the CAMMPACAMM leadership. As an effect, tribal members whether migrants or “genuine” are further isolated in the decision-making process and new conflicts have been generated among tribal leaders, i.e. IP migrant leaders, and “genuine” IP leaders. Now, the Manobos do not only struggle against the non-IP migrant settlers but are also pitted against one another. I understand the concern that IP migrant leaders at times overpower the “genuine” IP leaders. But the process of empowering the latter in a manner that IP migrants would appreciate entails more than a verification process of establishing who is “genuine” and who is not. This requires a process where the IP leaders, migrants or “genuine” should negotiate among themselves how they could creatively share power not only among themselves but with their members.

With the previous decision-making structure which included IP migrant leaders, one would see in the following discussions that this already posed a number of dangers such as the lack of transparency in the transactions with PHILSAGA and the confinement of benefits among leaders. In my view, NCIP failed to consider these dangers in carrying out the process for the verification of “genuine” IP leaders as part of the requirements for the tribe’s application for a Certificate of Ancestral Domain Title (CADT). NCIP was simply concerned with carrying out the required

verification activity without due consideration of its implications among the Manobos, whether migrants or “genuine” in the ancestral domain. This is not uncommon in government agencies where accomplishments are often measured by whether an activity has been conducted or not rather than by its outcomes and impacts.

BAYUGAN 3, WASIAN, AND STA. CRUZ MOA

Who then decided in the FPIC process for PHILSAGA’s application for supposedly an exploration [for gold] permit in barangays Bayugan 3, Wasian, and Sta. Cruz? The council of elders remembered that a community consultation was conducted in May 2003 at the Bayugan Catholic Church (Interviewees Nos. 16, 23, 24). They said the NCIP Regional Director at that time attended the said event (Ibid). Present too were representatives from the PHILSAGA Mining Corporation, the FBI Team leader Mr. Eulo Nogan, and member Mr. Hosue Duhac, and other NCIP personnel from the province (Ibid). On the part of the Manobos, there were tribal leaders, sectoral leaders, and council of elders (Interviewees Nos. 16, 17, 24, 25). The council of elders maintained there were community members but a tribal leader qualified that only those who were available came, and whoever was brought by the datu with them (Interviewees Nos. 16, 17).

CAMPACAMM officers disclosed that the council of elders, sectoral leaders, and tribal leaders had second thoughts whether to give PHILSAGA their consent or not (Interviewees Nos. 16, 23). But they said that there was pressure from the NCIP Regional Director then to speed up the process (Ibid). According to the council of elders, the NCIP Director conveyed in his message

during the assembly that “blessings are here; your difficulty or poverty will [now] disappear” (Ibid). The council of elders disclosed that they demanded for a PhP150,000 [US\$ 2,856.75]²⁷ monthly royalty payment but that the NCIP Regional Director told them that was too much (Interviewees Nos. 16). So they said the tribal council and council of elders proposed for PhP25,000 [US\$ 476.13] per month which was accepted by the company (Ibid). When asked why the amount was reduced at such, the council of elders admitted that the company agreed to give a cash advance of PhP150,000 [US\$ 2,856.75] so the Memorandum of Agreement (MOA) got drafted (Ibid). Another CAMMPACAMM officer confirmed too that the MOA was already there, they were just made to add (Interviewee No. 23). This statement apparently indicates that the community consultation they were referring to which they said was held in May 2003 was the “Community Assembly” which the 2002 Guidelines designate as the venue to convey the decision of the IPs to the company (Section 13, e). All throughout the interviews, this was the only consultation that they referred to was conducted. The other that they mentioned was already the MOA signing which they said was held in Bunawan (Interviewees Nos. 16). The CAMMPACAMM Chairman too confirmed he attended this event to sign. He said, in the previous meeting/consultation, he was not around and he felt that he could have been the one who made the decision. The stories point to the absence of a Preliminary Consultative Meeting.

The English version of the MOA provided by the NCIP national office is dated May 15, 2003. One of the datu/s/leaders in Wasian has no signature. The Visayan version of the MOA provided by CAMMPACAMM which the council of elders said they first signed is likewise dated May 15,

²⁷ All currency conversion for the Bayugan 3 MOA is based on the Central Bank of the Philippines' May 2003 monthly average rate which is PhP 52.5072 to one US dollar. I am using May 2003 as this is the month in which the MOA was signed.

2003 and all datus had their signature on top their handwritten names. In the English version, in which the council of elders claimed followed later, the names of all signatories are typewritten. In the Visayan version, only the names of the PHILSAGA President and the NCIP Regional Director are typewritten; the names of the datus are all handwritten. Among the datus who are signatories to the MOA, six are in the list of the council of elders. As the council of elders admitted, before the validation of “genuine” IP leaders conducted by NCIP, decision-making was shared with IP migrant leaders.

The experience of the Manobos with respect to NCIP’s role is no different from that of the Mamanwas in Taganito and Urbiztondo. There was apparently a significant amount of pressure from the NCIP Regional leadership. But in Rosario, the Regional Director did not seem to have a double-sided message. I surmise that this is because with the Mamanwas, there was a Preliminary Consultative Meeting where there was considerable presence of tribal community members, while in Rosario he directly dealt with the CAMMPACAMM leadership which was in existence for about eight years when the tribe’s FPIC was sought for. This organizational presence/absence in my sense also explains why in Taganito and Urbiztondo, the mandated activities as per 2002 Guidelines were followed, while in Rosario there seems to be a serious disregard of the FPIC process.

Compared to the Mamanwa tribe in Taganito, the Manobo tribe of Rosario had an established organization when PHILSAGA sought for their FPIC. CAMMPACAMM is said to have been organized in 1995 (Profile of the Manobo Tribe in CADC 153, Environmental Science for Social Change, 2005). While the decision-making process then included the tribal leaders, i.e. IP

migrant leaders, it reflects a centralized system. Compared to the Mamanwa experience in the first case, the Manobo tribal leaders and council of elders did not mention about the involvement of the community members in the FPIC process. The idea of community members having taken part in the process was only indicated by a tribal leader who said “those who were available and brought by the datu/chieftains came” (Interviewees Nos. 16, 17). The tribal secretary of Bayugan 3 herself and another Manobo who is a member of KABUHHAN, an IP Women’s Association, confirmed that they were not aware of the FPIC process or activities that took place (Interviewees Nos. 18). They said that they only learned that FPIC took place when they heard that the datu/chieftains were receiving an honorarium (Ibid). As to the Consensus Building period, a council of elder disclosed that there was no discussion among the council of elders at that time (Interviewee No. 2). He said that the IP leaders per barangay decided on their own even if there was only one MOA; two Wasian council of elders decided not to give their consent but the MOA indicates that there were other leaders in Wasian who signed the agreement. The council of elders of Bayugan 3 and Sta. Cruz said they agreed to give their consent together with other sectoral and tribal leaders (Interviewees Nos. 16).

According to a council of elder from Wasian, he did not agree because the 1% from the gross output that the company was offering was too little for him; he said if they agreed to 5% which he tried to demand, he could have agreed; but the company told them that the law only stipulates 1% (Interviewee No. 25).

As NCIP officials say, what is fair, equitable, and genuinely participatory depends on the customary decision-making process of the tribe concerned. But by all indications the decision-

making process of the tribe does not at all guarantee genuine participation and a fair and equitable outcome for the community. Left on their own, the CAMMPACAMM leadership was deciding without due consultation and thorough consideration of the matter with their members as well as fellow leaders in the other barangays of the ancestral domain. If one is to follow the FPIC Guidelines stipulating that only the consent of the affected barangays of the ancestral domain should be involved in the FPIC process, even this criterion was apparently not followed. There seems to have been no consultation of tribal community members in the three barangays. With regard to a discussion or a Consensus Building among the IP leaders in the three barangays, they each went on their own and ended voting prior to considering the merits and demerits of the proposal within a long-term timeframe. It appears that the leaders succumbed to the PhP25,000 [US\$ 476.13] monthly royalty payment because they were given a PhP150,000 [US\$ 2,856.75] cash advance by the company.

The worst thing was that NCIP was around. In the stories, the leaders had in fact pointed out that they felt pressured by the Regional leadership. The information that needed to be discussed on the table as mandated by law was supposed to have been facilitated by the NCIP FBI Team. But as the story unfolded, the NCIP Regional leadership had its bias. The FBI Team apparently did not have the power to carry out their task independently.

As to the PhP150,000 [US\$ 2,856.75] cash advance, the PhP100,000 [US\$ 1,904.50] was divided among 20 council of elders, sectoral leaders, and tribal leaders of the affected barangays (Interviewees Nos. 16). The PhP50,000 [US\$ 952.25] went to CAMMPACAMM; the money was spent on office rental and administrative matters (Ibid). The PhP 25,000 [US\$ 476.13]

monthly payment better known among the IP leaders as honorarium continued to be divided among the 20 council of elders, sectoral leaders, and tribal leaders (Interviewees Nos. 16).

During the interviews, the council of elders communicated that PHILSAGA has stopped giving them the PhP25,000 [US\$ 476.13] monthly honorarium because there is no longer an exploration activity in Bayugan 3 (Interviewees Nos.16). The council of elders thought that the PhP25,000 [US\$ 476.13] was for the exploration period which was what the MOA period is, that is, from May 2003 to May 2008 (Ibid). But they then realized when they ceased to receive the payment that the said benefit is only given when there is drilling activity (Ibid). The leaders said that they did not scrutinize the Visayan version of the MOA which they first signed. The last drilling activities, according to a council of elder were from the months of February 2007-July 2007 (Interviewee No. 21). A payment voucher from PHILSAGA indicated that the amount of PhP25,000 [US\$ 476.13] was still issued in June 8, 2007 for the royalty payment agreement. While the PhP25,000 [US\$ 476.13] monthly honorarium had stopped, a PHILSAGA officer claimed that they continue to supply 12 sacks of rice to the tribal council and council of elders in Bayugan 3 and three sacks of rice for the leaders of Wasian (Interviewee No. 30). The council of elders confirmed this statement to be true (Interviewees No. 16). But the MOA does not contain a provision regarding this benefit. An account voucher provided by the officer of PHILSAGA shows PhP36,450 [US\$ 694.19] as payment for the rice subsidy to the IP leaders of Bayugan 3, Wasian, and Sta. Cruz (April 23, 2007). The ten sacks of rice for Sta. Cruz leaders are part of the current MOA with them which is tackled in the following section.

The council of elders said that they understood that their consent was being sought for an Exploration Permit (EP). But the MOA indicates an application for a Mineral Production Sharing Agreement (MPSA). And it states that PHILSAGA is obliged to provide the 1% of the gross output to CAMMPACAMM of which 70% shall go directly to the community according to the allocation to be determined by CAMMPACAMM (No. 1, a). Further, the MOA states that the 30% shall be left with PHILSAGA as this fund shall be supervised by the NCIP to support projects for the “good of the community” (No. 1, b). It is on the third page of the MOA that the PhP25,000 [US\$ 476.13] is stated as monthly payment to the “legitimate tribal sectoral leaders of Bayugan 3 within the exploration period only” (No. 9).

According to the Director of the Ancestral Domains Office (ADO), the FPIC process for Exploration Permit and for Mineral Production Sharing Agreement is separate. This was confirmed by the Director of the Mines and Geosciences Bureau (MGB). But he added that NCIP should ensure that when IPs give their consent for exploration, it should follow that this is carried out for the exploitation and production operation. He said that that it is difficult to deal with a change, i.e. allowing exploration and later on disallowing exploitation and production when mineral reserves have been found.

I think the IP leaders were told as they narrated that PHILSAGA is seeking for their consent for exploration without clarifying that the mining agreement they were applying for was an MPSA. And this is so because in the event that ore reserve is found, they can then proceed to exploitation and production without having to go through another FPIC process. And the company, in my view, did not clearly communicate the message that they were applying for an

MPSA because an exploration does not require the 1% of the gross output as benefit to the IPs since the company has no income yet. And as in the case of Sta. Cruz which is later discussed, even when the company is already transporting ore for processing, it is still able to still justify that the mining operation which it categorizes as development is still considered under exploration stage since it is not yet profitable.

Note that in Bayugan 3, PHILSAGA has a processing plant. A PHILSAGA officer claimed that the company has been paying 1% of the direct milling costs to the barangay of Bayugan 3 (Ibid). Furthermore, he informed that Bayugan III also has a Community Technical Working Group (Ibid). The process for the release of the 1% of the direct milling costs is similar to that in Taganito. The 1% of the direct milling costs is released only when there is a resolution coming from the CTWG who approves a project based on the 5-year Social Development Management Plan (SDMP) of the company (Ibid). The resolution in turn is approved by the Mines Rehabilitation Fund Committee (MRFC) which consists of the MGB Regional Director, the Provincial Governor, the NCIP Regional Director, the Municipal Mayor, a non-government organization representative, and one of the council of elders of CAMMPACAMM (Ibid). The PHILSAGA officer though admitted that the 1% direct mining costs is still in the hands of the company and it is released directly to beneficiaries of approved projects (Ibid). But he said that there should be a separate local government bank account where the fund should be deposited (Ibid).

There is a disconnection between the benefit that is being provided to the barangay, i.e. 1% of the direct milling costs, and that of the Manobos which is also the case with the Mamanwas in

Taganito and Urbiztondo. But in this case it is more pronounced as it appears that the 1% of the direct milling costs that is going to the barangay has not been part of the conversations among the IP leaders, PHILSAGA, and NCIP. The problem with bringing in this information is that it could drag in the barangay government and the CTWG into the FPIC process which they are not officially part of and subject them to a negotiation of the 1% of the direct milling costs to formally include the Manobos which shall be reflected in the MOA of the latter with the company. This is also the problem faced by the FPIC process of the Mamanwas; while there were more information provided to them regarding the 1% of the direct mining costs that was going to the barangay and the projects where the money has been spent, in the end, the Mamanwas did not have any royalty fee that could have been drawn from the said funds because the FPIC process does not include the barangay government and CTWG members. In fact, at first the Mamanwas were offered to have 16% from the amount of the 1% of the direct mining costs going to the barangay but they eventually were denied of this share in the MOA. The rationale was that this share was already allocated for them by the barangay and the CTWG but as it turned out, this “supposed” share was later reallocated to two barangays upon the decision of the CTWG. This is how the Mamanwas ended up with a PhP500, 000 livelihood assistance instead of a so-called royalty fee. The conflict arising from the separate process of negotiation with the barangay government/CTWG and with the IPs is acknowledged by the CAMMPACAMM leadership. An officer of the organization commented that the local government does not know its place given the IPRA (Interviewee No. 23). An NCIP officer from the province remarked that many are against FPIC, even the local government units because of the said competition for the pie (Interviewee No. 28).

Going back to what the PHILSAGA officer claimed, the said council of elder though never mentioned being a member of MRFC nor of the CTWG. He simply said that since the exploration had stopped, they have stopped receiving the PhP25,000 [US\$ 476.13] monthly honorarium; he confirmed that the 12 sacks of rice for Bayugan 3 are still being provided; this is true for the three sacks of rice for the Wasian leaders (Interviewees No. 16). But the MOA mentions that a 30% from the 1% direct milling costs belongs to the tribal people and that this is where medical benefits for them shall be taken from (No. 4, b). But in the course of the interview, the PHILSAGA officer conveyed that the MOA was approved up to the NCIP regional level but it did not reach the national office (Ibid). The English version of the MOA I got though came from the national office and at the top of the notary page is the signature of the NCIP Chairperson at that time indicating a Commission en Banc's Resolution No. 076 dated August 6, 2004. But the PHILSAGA officer asserted that there was no Compliance Certificate issued by the NCIP national office with regard to the FPIC process that took place (Interviewee No. 30).

The council of elders never conveyed the MOA as not having been approved at the national level. What they knew was that exploration was finished and that the MOA will soon expire. But the statement of the PHILSAGA officer might explain the absence of documentation regarding this case. Nonetheless, the MOA indicates a very confined process among PHILSAGA, the CAMMPACAMM leadership, and the NCIP Region. And the NCIP Region seems to have proactively influenced this process because they had a chance of accessing and supervising 30% of what would have been paid from the 1% gross income of the company in the event that an

exploitation of minerals took place. That money would have been used to fund the works of NCIP in Rosario.

The Community Relations Officer of PHILSAGA though noted that there is an on-going MOA (outside the FPIC MOA) between CAMMPACAMM and PHILSAGA with regards to the use of the latter of the water source which is within Bayugan 3. PHILSAGA is paying CAMMPACAMM and the IP leaders of Bayugan 3 PhP15,000 [US\$ 366.41]²⁸ per month (Ibid). A company voucher dated June 8, 2007 has been released to the CAMMPACAMM Vice-Chairman. The Vice-Chairman confirmed that he receives the amount every month; he said PhP9,000 [US\$ 219.84] goes to CAMMPACAMM account while PhP2,000 [US\$ 48.85] goes to the tribal leader, PhP1,000 [US\$ 24.43] goes to the Manobo whose area is where the water comes from, PhP1,500 [US\$ 36.64] goes to the Bayugan 3 tribal chieftain, and PhP1,000 [US\$ 24.43] is used as a transportation fund for the council of elders of Bayugan 3.

FPICs and MOAs in Sta. Cruz

PHILSAGA started in May 17, 2001, according to the Community Relations Officer of the company. He explained that before PHILSAGA, mining operations in the area have undertaken a number of mining corporations starting with the BANAHAW Mining Corporation whose ownership was transferred from one company to another and was eventually bought by PHILSAGA (Ibid).

²⁸ The currency conversion for the Bayugan 3 water rights MOA is based on the Central Bank of the Philippines' January 2008 monthly average rate which is PhP40.9381 to one US dollar. I am using January 2008 since the month of the MOA is not indicated but the year when the MOA was signed is indicated to have been in 2005.

Alcorn Mining Corporation, a partner of PHILSAGA, went through the process of securing the FPIC of the tribe under the leadership then of Datu Mabantao, the deceased father of the current CAMMPACAMM Chairman (Interviewees Nos. 16). But according to the council of elders, the mining application of Alcorn then was pending because the area they applied for was also the area applied for by the PICOP Resources Incorporated for Industrial Forest Management Agreement (IFMA) (Ibid). So in the end, the consent given by the tribal leadership did not materialize (Ibid). The second MOA that the council of elders remembered was signed by the former NCIP Regional Director (Ibid). But they said that the current NCIP Regional Director invalidated this after calling for a review of the process undertaken (Ibid). The council of elders provided me a copy of the said MOA. They said there were no minutes of the consultations that transpired and the signatories were a combination of the council of elders and tribal leaders. There is also a copy of the Sta. Cruz MOA which shows NCIP being represented by the former NCIP Chairperson who is now the Commissioner for Region XIII. She has not signed the document though. Also, the said Sta. Cruz MOA is signed by a combination of council of elders and tribal leaders. This MOA which is an English version is dated January 22, 2006. There is also a more recent MOA which is a Visayan version dated January 22, 2007 but which the former NCIP Chairperson has not also signed. But she issued a Compliance Certificate (i.e. that the company has complied with the FPIC process and that the community has given its consent) signed and dated January 31, 2007 (NCIP Compliance Certificate Control No. CCRXIII-07-01-61). But the said 2007 MOA appears to be a translation of the English MOA dated January 22, 2006. The year could have just been a typographical error. I will use the MOA dated January 22, 2007 in the next discussions since this is dated as the most recent and that the provisions stipulated are the ones being implemented as per interviews with the council of elders, tribal

leaders, and the company representative. The PHILSAGA project as reflected in this MOA is known as the Anoling [Sta. Cruz] Gold Project.

An additional note regarding this MOA and the Compliance Certificate; both are consistent with the application number of the Mineral Production Sharing Agreement (MPSA) but the former stipulates 405 hectares of mining operation but the latter has 409 hectares. Equally important, the life span of the agreement is stated to be ten years and renewable for another five years (MOA, No. 2.7). But the Compliance Certificate from the National Chairperson at that time states that the term of the agreement is 25 years and renewable to another 25 years (No. 5). This is the term of an MPSA.

A picture shown by a PHILSAGA officer has a caption “tribal community assembly meeting” and was dated January 10, 2007 (Interviewees No. 30). He identified those in the picture as Datu Mabantao II (CAMMPACAMM Chairman), Mr. Eulo Nogan and Mr. Josue Duhac (FBI Team leader, and member), Forester Caldeo (from Provincial Environment and Natural Resources Office), Mr. David Egerani (a VSO²⁹ Mining Specialist detailed at the Provincial Governor’s Office). If the date of the picture is compared to the Work Plan for the FPIC process prepared by the FBI Team leader, Mr. Eulo Nogan, January 10 appears as the “Community Assembly” (2002 Guidelines) where the final decision of the council of elders was supposed to be conveyed to PHILSAGA. So was there a Preliminary Consultation as indicated in the Work Plan? No one has a copy of the minutes of the Preliminary Consultative Assembly/ Consultative Community Assembly, if it ever took place. The PHILSAGA Community Relations Officer (CRO) showed a

²⁹ The Volunteer Service Organization is an international development charity that sends volunteers across the globe to work with disadvantaged communities.

copy of the voucher paid to the NCIP Regional Office in the amount of PhP199,000 [US\$ 4068.34] for the conduct of the entire FPIC process. The voucher is dated December 20, 2006. This FPIC process was already subject to the 2006 Guidelines which took effect in October 2006.

Like in the case of Bayugan 3, the company agreed to give the Sta. Cruz IP leaders a cash advance of PhP250,000 [US\$ 5,110]³⁰(Interviewees Nos. 16). This amount is indicated in the MOA as royalty fee representing the first five months of mining exploration that already started in April 2006 (No. 3.1). The MOA also stipulates another PhP150,000 [US\$ 3,066.59] cash advance that shall cover the first three months of 2007 (Ibid). But the council of elders never mentioned this amount. In addition, another provision states that should PHILSAGA already proceed to mineral production, the PhP50,000 [US\$ 1,022.20] will be replaced with a 1% royalty fee based on gross income (No. 2.3).

The story of the council of elders missed the Consensus Building among the six IP barangays consisting of the ancestral domain. The decision to give consent was made among the leaders of Sta. Cruz and the leadership of CAMMPACAMM. And it seems, like in the case of Bayugan III, the cash advance offer and the monthly honorarium was influential to the leaders' decision.

The council of elders said that 50% of the PhP250,000 [US\$ 5,110] cash advance was used for livelihood assistance projects (small farms and hog raising) for sectoral ("genuine") IP leaders of

³⁰ All currency conversion for the Sta. Cruz MOA is based on the Central Bank of the Philippines' January 2007 monthly average rate which is PhP 48.9143 to one US dollar. I am using January 2007 as this is the month in which the MOA was signed and the Compliance Certificate has been issued.

Sta. Cruz (Ibid). The 20% was used for projects by tribal community members while the 10% was used as mobilization, e.g. meetings, by the tribal council of Sta. Cruz and the remaining 20% went to CAMMPACAMM for office rental and administrative expenses (Ibid.). According to the council of elders too, they have been receiving the monthly royalty fee of PhP50,000 [US\$ 1,022.20] as contained in the MOA.

The council of elders and tribal leaders remarked that PHILSAGA is not doing exploration anymore; they are traveling ore already to the processing plant located in Bayugan 3. They confirmed that a 1% royalty fee was being paid already but that they do not know how much is the 1% gross output of the company (Interviewees Nos. 16, 23). A tribal leader shared that the said royalty fee already released by PHILSAGA were in the amount of PhP61,000 [US\$ 1,247.08] released in October 2007 and PhP42,000 [US\$ 858.64] issued in December 2007 (Interviewees Nos. 17). He added that 50% of the amount was for the IP leaders of Santa Cruz and 50% was for the tribal community (Ibid). The amount was allegedly deposited to the account of the CAMMPACAMM (Ibid). There are three signatories to the account of the organization: the Chairman (Datu Mabantao II), the Business Manager (Datu Gawahon), and the Secretary (Datu Tumowahong II). But as pointed out earlier by the tribal leader, no audit has been conducted in two years (Ibid).

A PHILSAGA officer confirmed that the company has been giving a 1% royalty fee from the gross income to CAMMPACAMM on top of the PhP50,000 [US\$ 1,022.20] monthly royalty fee for exploration (Interviewee No. 30). He said they have released the amount of PhP23,000 [US\$ 470.21] last January 2008 as payment for the production period of October-December 2007

(Ibid). The 1% royalty fee he said is released on a quarterly basis (Ibid). He added that they have not removed the PhP50,000 [US\$ 1,022.20] royalty fee for exploration because the 1% royalty fee from the gross output did not exceed PhP50,000 [US\$ 1,022.20] yet as they are not really into the stage of mineral production yet but rather they are still into mineral development (Ibid). But then he mentioned that the company is already paying a 1% direct mining costs to the local government of Sta. Cruz (Ibid). The check, he said, is being given to the barangay treasurer; the barangay council then takes care of how it is allocated (Ibid). But there seems to be a contradiction in what the officer has said, if PHILSAGA is not into mineral production yet, why is it paying a 1% direct mining costs to the barangay? Also, as a tribal leader confirmed, PHILSAGA issued PhP61,000 [US\$ 1,247.08] for the tribe last October 2007 (Interviewee No. 17). This contradicts the PHILSAGA officer's claim that they are still giving the PhP50,000 [US\$ 1,022.20] monthly royalty fee on top of the 1% of the gross income because the latter has not reached an amount bigger than PhP50,000 [US\$ 1,022.20].

Here one can see again how local government benefits are negotiated separately from the benefits of the IPs. And because of this, the Manobos end up getting less knowing only that the reason is because of the company not getting enough profit yet without figuring out that the 1% of the direct mining costs being paid to the local government has something to do with what they are getting.

During the "negotiation" with PHILSAGA, the IP leaders were told that there would be an exploration and in the event that signs of gold reserve is found, exploitation and production shall be undertaken (Interviewees Nos. 23, 25). But the leaders do not understand why PHILSAGA is

already transporting ore to the milling site and yet they say that they are not into production yet, they are only in the stage of development which they explain is still part of exploration. The Engineer in the mining sites and the CRO of PHILSAGA explained that development simply refers to the construction of mining tunnels and claimed that while there are ores being processed already, the amount is considered not profitable at this point. Engineer Manuel Barbas qualified that only when they have done intensive drilling at sea level would their operation be profitable since the ore reserve, he said would be more accurate at that point.

Another benefit stipulated in the MOA is the provision of ten sacks of rice for the tribal council leaders for Sta. Cruz (No. 3.3). The council of elders and tribal leaders confirmed that they have been receiving this, including the sectoral leaders (Interviewees Nos. 16, 17). Each leader is allotted one sack of rice (Ibid).

Another interesting agreement in the MOA is the section that gives priority to CAMMPACAMM as the provider of sand and gravel and timber for the mining operation of PHILSAGA (No. 41). This provision is confirmed by the Community Relations Officer (CRO) of the company and council of elders who shared that CAMMPACAMM supplies timber for the underground tunnels for the mining operation of PHILSAGA. The Manobos are engaged into falcatta and gmelina production. It is estimated that 60% of the Manobos in the ancestral domain are into tree production ((Profile of the Manobo Tribe in CADC 153, Environmental Science for Social Change, 2005). In addition, other suppliers of timber pass through CAMMPACAMM (Interviewees Nos. 16). CAMMPACAMM gets PhP.50 cents [US\$.01 cents] per board foot of timber supplied by other sources (Interviewee No. 30). A tribal leader and a council of elder

complained that PHILSAGA's payment for the timber is often delayed from two to four months (Interviewees Nos. 17, 24).

As to employment, nobody is able to say how many Manobos in Sta. Cruz are employed by PHILSAGA. Datu Tumowahong conveyed that he at times substitutes his in-law who is a security guard for the company, earning PhP205 [US\$ 4.19] per day. According to Datu Triumph, a tribal leader, for underground mining one can earn a minimum of PhP1,500 [US\$ 30.67] per 15th day of the month, only when there is work. He added that maximum earning is PhP8,000 [US\$ 163.55] per square meter but this is divided among 10-15 workers. He estimates that one meter takes about three days to mine. According to the contractor hired by PHILSAGA to manage one of the mining tunnels, the salary of contractual workers depends on their output; the highest is PhP3,000 [US\$ 61.33] per 15 days; and the minimum is PhP2,000 [US\$ 40.89] per 15 days (Interviewee No. 32). Being a contractor, he receives 5% of the gross income of his workers and what is left is divided among his workers and also including him (Ibid). The contractual workers include the rake operators, the timber men, those who shovel the blasted pieces of ore, and those who put them in sacks (Ibid). The said contractor has 35 contractual workers under him but he himself does not know how many IPs or non-IPs is in his team (Ibid). The project Engineer Mr. Manuel Barbas that maximum employment could reach 260 but currently they only have 160 workers in the three tunnels. But he said he does not have the list of employees; since they are on a contract basis, the contractor supposedly has the said list.

Like the MOA in Taganito, employment is said to be based on skills and qualifications (No. 4.2). The difference is that the application is subject to the recommendation of the sectoral leaders, approved by the tribal chieftain and noted by the CAMMPACAMM Chairman (Ibid).

Also, CAMMPACAMM is given the authority to identify and approve two deserving students who will be given college scholarship assistance by PHILSAGA (MOA, No. 4.4). The council of elders did not seem to know of this power as manifested in the way they conveyed the situation that PHILSAGA has not provided the scholarship assistance yet. The CAMMPACAMM shall also determine the beneficiaries of the dental and medical mission that PHILSAGA will conduct in collaboration with NCIP (MOA, No. 4.6). In addition, a PhP10,000 [US\$ 204.44] shall be allocated annually for health services (Ibid). The council of elders claimed that health and medical assistance provision has not been provided by the company.

There are several reasons why I think these “other benefits” are not being provided. It could also be that the company thinks they are already getting or will be getting these benefits through the 1% direct mining costs paid to the barangay. Also, CAMMPACAMM has not been formally claiming these benefits and as such PHILSAGA has not proactively provided them. And I think this is because CAMMPACAMM has not set a long-term plan where they could integrate a programmatic schedule of availing these benefits. And the lack of a long-term program is due to the absence of an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). But it is also because the CAMMPACAMM leadership does not have the time to really focus on the concerns of the organization and the tribal community. They have not as an organization thoroughly reviewed the MOA since they have signed it. The Chairman admitted having limited

time as he works as an extension worker/ technician in the government Fiber Industry Development Authority in the nearby province of Agusan del Norte. He is only able to go home to Rosario during week ends. Because of this limitation, he disclosed that he often sends representative to meetings. A council of elder too shared that the Chairman is also very young [indicating his lack of experience] (Interviewee No. 24). Also, it seems that the leaders have been focused on the honorarium benefit and their supply of timber for PHILSAGA. In addition, the MOA in itself is general. There is no time frame or schedule for the release of funds for the annual health services, the construction of the health center, the provision for two college scholarships, etc. But the MOA stipulates that an implementation schedule should be provided by PHILSAGA to NCIP. Given the complaints of the council of elders, either NCIP has not received the document or that NCIP has not informed and provided the leaders a copy of the document. Lastly, there is no monitoring and review mechanism which could hold parties to account for the implementation of the MOA. As a CAMMPACAMM officer said, after the MOA they had nothing to do with the company, they just wait or request for the release of their benefits (Interviewee No. 23). The lack of a mechanism where parties could come together and review the MOA and even thresh out details which were not articulated creates an informal condition whereby CAMMPACAMM is reduced to a requesting party when availing of the benefits. It could also be that CAMMPACAMM would not want to feel being perceived as “requesting” for benefits every now and then.

A disturbing provision in the MOA talks about the company providing relocation and a financial assistance of PhP40,000 [US\$ 817.76] to every displaced IP family due to mining operation (No. 4.3). No one mentioned of this provision and I did not have a copy of the MOA until after the

interviews. But given what appears to be a shortcut FPIC process and a centralized tribal decision-making, I wonder how the amount was determined and whether concerned families were part of the decision-making during the Consensus Building of the tribe, if it took place. As I claimed earlier, there could have been a discussion only among the IP leaders of Sta. Cruz and the CAMMPACAMM leadership. But this apparently did not consider the implications of the displacement and relocation provision of the MOA, or it could be that this was not discussed with them or that they do not remember this because the focus of the conversations have been on the cash advance, the monthly honorarium, and the supply of timber to PHILSAGA.

PRIOR DEVELOPMENT PLANS

The Manobos of Rosario are engaged in more livelihood sources than the Mamanwas in the first case. Rice and corn production are major sources of household income (Profile of the Manobo Tribe in CADC 153, Environmental Science for Social Change, 2005). They are grown in rice paddies and in upland areas. Buyers usually go to the Manobo households to purchase rice and corn which they in turn sell in the market. The Manobo households also grow abaca, coffee, root crops, and fruit trees such as banana, rambutan, marang, durian, and lanzones. These produce are usually brought to the market to be sold. Rosario is a highway town, so other municipalities could easily access the produce of the communities. The basic problem that Manobos face in their agricultural livelihood is the lack of capital primarily to finance farm inputs, e.g. chemical fertilizers (Ibid). In addition, the Manobos also engage in poultry and livestock production, e.g. chicken, pig, duck, cattle, and goat, to augment their income (Ibid). Swine production is a primary source of income used for the education of Manobo children and for emergency purposes. The Manobos likewise are into planting production tree species, primarily falcatta,

and also gmelina. There are no figures as to the extent of this activity but ESSC's documentation estimates 60% of the Manobos in the ancestral domain are into tree production. Small-scale mining in the form of gold panning and tunnel operation is also an additional source of income for the Manobos in Rosario. Rosario is said to have a rich deposit of gold, making it the center of gold mining in the province of Agusan del Sur (Profile of the Manobo Tribe in CADC 153, Environmental Science for Social Change, 2005). A gram of gold dust is sold for about PhP600 [US\$ 14.66]³¹ at a minimum (Ibid). Tunnel operation normally involves seven workers and a financier who is often not from the place or who is a non-IP migrant. Gold from small-scale mining activities is mainly sold in the nearby municipalities of San Francisco and in Butuan as well as in Davao City (Ibid). Small-scale mining is rampant in Bayugan 3 and Sta. Cruz. The estimated annual average household income from engaging in small-scale mining activity as a part time source of income is PhP38,000 [US\$ 928.23] (Ibid).

But like the Mamanwas in the first case, the Manobos of Rosario do not have an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP) yet (Interviewees Nos. 16, 23). They have started in October 2007 to collect the required data that will inform them in the formulation of their ADSDPP (Ibid). The Chairman also admitted that they have not designated their sacred and burial grounds. A PHILSAGA officer commented that the tribe should at least have a five-year development plan to guide the way royalty payments are being used (Interviewee No. 30). He said that currently, the said payments are not used properly by the tribe; they are just being divided among the IP leaders (Ibid).

³¹ Small-scale mining income currency conversion is based on the Central Bank of the Philippines' January 2008 monthly average rate which is PhP 40.9381 to one US dollar.

The MOA stipulates that PHILSAGA shall provide CAMMPACAMM PhP100,000 [US\$ 2,044.39]³² for the protection and management of the ancestral domain's environment, e.g. watershed, and sacred grounds based on the tribe's Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). In my opinion, this is the reason why NCIP and CAMMPACAMM are currently pursuing the development of the latter's ADSDPP; there is available funds from PHILSAGA for implementing parts of the ADSDPP plan.

MONITORING

There is no provision on monitoring in the MOA. As the CAMMPACAMM leadership confirmed, once the MOA has been signed, they have no business in the mining operation of the company (Interviewee No. 23). Like the Mamanwas in Taganito and Urbiztondo, the Manobos in Rosario have become mere recipients of the benefits stipulated in the MOA. When asked how the company guarantees that the royalty fee they are paying the IP leaders of Sta. Cruz is really 1% of their gross income, the Community Relations Officer (CRO) replied that these could be verified through the report submitted to the Mines and Geosciences Bureau (MGB) as well as the documents from the Central Bank and the Bureau of Internal Revenue verifying their income. The CAMMPACAMM leadership admitted not knowing what is supposed to be in the MOA (Interviewee No. 23).

³² This currency conversion is based on the Central Bank of the Philippines' January 2007 monthly average (PhP48.9143 to one US dollar) as the amount is part of the MOA with Sta. Cruz.

UNDERSTANDING FPIC

How do the parties understand FPIC? The CAMMPACAMM leaders disclosed that the NCIP/FBI Team did not really explain what the FPIC Guidelines contain, the details of the process and the implications of what they were going through (Interviewees Nos. 22, 23). The IP leaders admitted that the only thing they understand about FPIC as explained to them by NCIP is that they have the prerogative to give or withhold their consent to a company who wants to operate or continue operating in their domain (Interviewees Nos. 21, 23). The Chairman noted too that when there is illegal activity in the area such as small-scale mining, this should be reported in order to get subjected to their FPIC. The leaders emphasized that if they do not give their consent, the company has no power (Ibid). But they contradicted themselves when they admitted that PHILSAGA has been there for a long time and also the company according to them had already negotiated with the barangay and so they had no choice but to ask for benefits (Interviewees Nos. 17, 21, 23).

But the amount of benefits that the IP leaders agreed to does not seem to have a clear basis. It is only apparent that the amount was determined by the company offering for cash advances in the two MOAs which I surmise the leaders found to be relatively huge. The FPIC which was supposed to be a process for weighing the costs and benefits of PHILSAGA's gold mining project was reduced to the royalty payment or honorarium of the IP leaders. In my sense, this was a convenient source of income for the IP leaders, including getting a percentage share in the sale of timber which they have been given priority to supply. If one reviews the MOAs, in no better way do they capture what the Mamanwa leader in Claver commented, that the "MOA is all about money" (Interviewee No. 10).

An NCIP Regional officer herself narrated a case involving two datu/chieftains in Remedios T. Romualdez in Agusan del Norte who had different positions regarding the entry of a mining company in their area; one datu is for the operation of the mining company while the other is against. The NCIP Regional officer candidly shared that she talked to the datu who was against and told him that when he dies, he has no money while the other datu has. So she asked the datu what then would he prefer; with this, the officer said she was able to convince the datu to give his consent.

Another NCIP Regional officer who is based in the province asserted that she sees no weaknesses in the FPIC process; she said that the communities are the ones deciding, not the leaders (Interviewee No. 29). But then she later admitted that she was not part of the FPIC process that took place. Also, she thought that the IP leaders do not understand the environmental impact of mining, that the focus of the process was more financial. Yet, she also claimed that the 55-day period for the FPIC process is too long for investors, they get impatient that is why some of them violate the rules.

The CAMMPACAMM leadership disclosed that given their limited understanding of the FPIC, they did not as well know what should be in the MOA, what they were supposed to negotiate (Interviewee No. 23). Among the information that were not explained to the IP leaders were the environmental implications and mitigation technologies (Interviewee No. 25). The CAMMPACAMM leadership admitted that they do not know the difference in terms of implications between open pit mining and underground mining which PHILSAGA uses. The 2006 Guidelines stipulates that the MOA should contain detailed protection or conservation

measures of the affected areas of the ancestral domain critical for watersheds, mangroves, wildlife sanctuaries, and forest cover (Section 45, g). But the MOA with Sta. Cruz simply states that PHILSAGA shall submit to NCIP their Environmental Conversion and Protection Program (NO. 2.8). A council of elder confirmed that they have been requesting for the company's Environmental Protection Plan but as of interview date, the CAMMPACAMM has not received any (Interviewee No. 24).

When asked whether the FPIC process strengthened their decision-making, most of the answers are equated to the honorarium, rice provision, and share in supplying timber to the company. But somewhere in the conversation, some IP leaders made comments regarding their decision-making as having been centralized and divided, with IP leaders of the three barangays and the CAMMPACAMM leadership cornering most of the benefits. As a tribal leader and a council of elder pointed out, there is no unity in the tribe (Interviewees No. 17, 25). They commented that the way decision-making is carried out with the FPIC process does not fit the idea of being a one ancestral domain where decisions are supposed to be shared among tribal members and leaders (Ibid). He added that even if the ultimate decision is made by those affected, there must be a process for sharing information and knowledge as well as explaining the various positions and concerns of all tribal members and leaders in order to have a clearer understanding and bigger picture of the matter being decided upon by their colleagues in the affected areas (Ibid).

A PHILSAGA officer views FPIC in terms of the benefits they provide to the tribe. The officer enumerated a number of benefits, e.g. basketball court, water system, that they have provided aside from those stipulated in the MOA for the MPSA (Interviewee No. 30). In addition, he said

that FPIC has helped because community members have been given “proper information”. It turned out that what he meant was, before there were community members who were against them because they had their own tunnel, i.e. small-scale mining activities, but then they agreed to PHILSAGA operating in their area for a compensation (Ibid).

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

The Philippine government enacted the Mining Act of 1995 to maximize the development of the country's mineral resources to spur economic development. There is no doubt that mining makes a considerable contribution to the Philippine economy. In recognition of the environmental degradation caused by mining, however, the Mining Act of 1995 and its Revised Implementing Rules and Regulations (IRR) contain environmental and social provisions viewed by the Mines and Geosciences Bureau as significant improvements. Like the IPRA, the Mining Act mandates that companies obtain the "prior informed consent" of indigenous communities before Mineral Agreement, FTAAAs, or mining permits can be approved. The IPRA explicitly includes the term "free" in the description of tribal consent required before mining companies can enter and operate in indigenous domains. Mining companies entering or renewing permits to operate (such as the Taganito Mining Corporation and the PHILSAGA Mining Corporation) have been subject to the process of Free, Prior, and Informed Consent (FPIC) established in the IRR of the IPRA and its pertinent Guidelines.

The 2002 and 2006 Guidelines prescribe the FPIC process. Neither of the two cases I studied, however, followed the rules. Both cases involved renewal of operations. This makes the term "prior" in the FPIC not applicable. Nonetheless, if NCIP had followed its own rules, they would have been forced to decide whether indigenous peoples could grant free and informed consent "after the fact."

The FPIC process in both cases was very rapid. The Manobo case was clearly cut short compared to the Mamanwa process. The FPIC with the Mamanwas went through all the mandated activities while the process with the Manobos combined consultation and decision meeting in a way that the regulations never intended.

**How are decisions made in each IP community? What decision-making methods are used?
Are the mechanisms adequate to determining free, prior, and informed consent?**

AN ASSESSMENT OF NCIP'S ROLE IN THE FPIC PROCESS

The FPIC timeline were driven by the NCIP Regional Office. Why they scheduled things as they did is not clear. It is not unusual for government offices to focus on getting done with an activity since they are often evaluated based on the number of activities they complete. In other words, the NCIP and FBI Team were not worrying about meeting the underlying goals of the FPIC process – empowerment of IPs, i.e. a tool for self-determination. If this had been the case, they would not have been so determined to speed everything up.

There are probably other factors that affected the decisions of the NCIP regarding its management of the FPIC process. And these factors could very well explain why NCIP failed to guarantee an informed process free of manipulation. For one, NCIP lacks the funding it needs to meet its obligations. The pressure exerted by the NCIP Regional leadership in the Manobo FPIC process in Bayugan 3, Rosario seems to have been influenced by the provision in the Memorandum of Agreement (MOA) that NCIP will get to supervise a portion of the royalty payment to the IPs for the implementation of projects for the tribal community. This is

apparently the case with Sta, Cruz, Rosario as well. PHILSAGA agreed to provide the tribal organization, CAMMPACAMM, the amount of PhP 100,000 [US\$ 2,044.39] for the implementation of its Ancestral Domain Sustainable Development and Protection Plan (ADSDPP).

The conduct of the FPIC activities, with the exception of Consensus Building efforts, is financed by the mining company. The FBI Team receives a per diem for the conduct of its activities, the rental of transportation vehicles, and expenses for communication materials. These are shouldered by the mining company.

The PhP199,000 [US\$ 4,068.34] issued by PHILSAGA to the NCIP Regional Office does not match what appears as a shortcut process in Rosario. The FBI Team work plan contains a total amount of PhP32,000 [US\$ 610.71] for the conduct of the Consensus Building process in Sta. Cruz, Rosario. The Consensus Building process, though, is not supposed to be shouldered by the company since it involves only the IP leaders and in some cases the tribal members. In the case of the FPIC process in Taganito, PhP300,000 [US\$ 5,725.45], is likewise considered huge by an officer of the TaganitoMining Corporation given that there were only two consultation meetings. Given the amount of money provided by the companies, it would have been possible to conduct all the required FPIC activities in Rosario, including additional consultations in both cases.

In the two case studies, the FBI Team members displayed a simplistic understanding of their facilitation responsibilities during the FPIC process. NCIP officials I interviewed agree that facilitation simply means allowing the conversation among the parties to flow. But this

disregards the fact that the company comes to the negotiation table with disproportionate financial resources and knowledge as well. In other words, there is a power imbalance. To facilitate, therefore, means to ensure that no party controls the conversation. But the FBI Team and the Regional Hearing Officer allowed the company representatives to drive the conversation during the preliminary consultation and during the final decision meeting. Instead of supporting the IPs by pushing for clarification on the part of the Taganito Mining Corporation, the NCIP allowed ambiguous and evasive responses from the TMC representatives. Worse, their replies also followed the company representatives' line of thinking.

The aforementioned situation reveals two things: NCIP's lack of facilitation skills and its failure to understand pertinent provisions in the Mining Act. During the FPIC process, the IPs were confused about the difference between the royalty payment (to which the law entitles them) and the 1% of the direct mining and milling costs paid to local government for community development purposes. The NCIP failed to manage the exchange of information in a way that enlightened the IPs on this matter. They, themselves, seemed confused in their replies to the IPs which only reinforced the position of the TMC. In the case of Rosario, these issues apparently were not brought out during the conversation, and NCIP did nothing to inform the Manobos about the 1% of the direct milling and mining costs being paid to the concerned barangays.

There is a need to enhance the facilitation skills of NCIP staff and to upgrade their knowledge of the relevant provisions of the Mining Act and the Environmental Impact Statement (EIS) law. Giving Free, Prior, and Informed Consent involves more than giving or withholding consent, it means negotiating the terms under which mining might proceed. Also, NCIP staff need to

enhance their documentation skills to better capture the salient features of the discussions that do take place among the parties. NCIP's lack of funding is a serious obstacle to training its personnel.

The way the FPIC process was carried out by the NCIP could also be attributed to the personal biases of the FBI Team members and the Regional leadership. In both cases, the Regional Director indicated to the IP leaders and the tribal communities that they had the opportunity to get themselves out of poverty by giving consent to the mining companies. The FBI Team could have felt pressured by the Regional Director's bias which was clearly manifest in all his public messages.

NCIP officers also admitted to giving advice to the IPs regarding the benefits they should demand and even to giving consent assuming the benefits were sufficient. But such acts reflect a bias that reduces the FPIC process to nothing more than a conversation about money. This might grow out of a genuine concern about the economic conditions facing the IPs, but it could also demonstrate a lack of understanding about the complexity of issues surrounding mining and their long-term implications for the IP community.

NCIP's confidential coaching could reflect their view that the mining companies are here to stay; there are just too many stakeholders outside the FPIC process exerting pressure, e.g. including local governments and national officials. The NCIP may think that the only option is for IPs to negotiate for a share in the benefits of mining. This reflects a sense of powerlessness in light of the clout of mining companies. The NCIP Regional Hearing Officer clearly demonstrated this

powerlessness when he reinforced the TMC representative's argument that the royalty fee being demanded by the Mamanwa tribal leaders could not be granted because TMC was already paying the government a royalty fee. The NCIP FBI Team tended to show deference to mining company representatives compared to the IP leaders and tribal community members.

This behavior is not strange. In the Philippines, respect often gets equated with power. And power is often defined solely in terms of socio-economic status or political muscle. So, despite the pronouncements that the IPs do possess power as a result of the FPIC provision of IPRA, they have not been accorded a level of respect equal to that bestowed on mining companies during the FPIC process. If the NCIP officers conducting the FPIC process considered themselves powerless in relation to the mining officials, they in turn regarded the IPs as powerless in relation to themselves, in addition to being powerless against the mining corporation. This mapping of social and positional position allowed the team to disregard the concerns raised by the IPs and to identify with the reasoning behind the companies' unwillingness to negotiate benefit offers.

For how could the Memorandums of Agreement been approved by the national leadership despite lacking what the Guidelines stipulate as minimum content? The MOAs are so general that environmental and cultural protection provisions are more or less ignored. The conflict resolution provision of the English version of the Mamanwa-TMC-NCIP MOA is detailed compared to its Visayan version. The MOA of the CAMMPACAMM (Sta. Cruz)-PHILSAGA-NCIP is solely about financial benefits. It is apparent, too, from the documents and interviews that the only part of the MOA discussed with the IPs in each case were those pertaining to the

benefits they would receive. Other stipulations in the MOA were set by the NCIP and the mining companies. Looking at the non-financial provisions of the MOA negotiated with the Mamanwas, it is hard to see how the IPs could have agreed on their inclusion if they were actually discussed. My sense is that they were not reviewed until after the MOA was ready for signing.

Did the NCIP do enough to ensure a free and informed FPIC process for the IPs in both cases? The answer is clearly NO. The timeline of the FPIC process was what the mining companies wanted. The leadership of the Mines and Geosciences Bureau and the NCIP thought that the FPIC process took too long. I would assert that the manner in which it was facilitated by the FBI Team was more in keeping with the interest of the mining corporations than the welfare of the IP communities. The FPIC process should probably be facilitated by a neutral party whose job it would be to ensure a fair process. The role and functions of such a neutral is elaborated in the pages that follow.

AN ASSESSMENT OF THE METHODS USED IN THE FPIC PROCESS

Preliminary Consultation, Decision Meeting, and MOA Drafting

The Preliminary Consultative Meeting is usually conducted within a half or whole day. This is not adequate for a meaningful consultation. What takes place is mere information dissemination. Even the information presented is highly selective. As NCIP officials themselves acknowledged, mining companies present only the advantages and benefits. If ever adverse effects, particularly

environmental impacts, are tackled, they are presented as negligible and are oversimplified with regard to corresponding mitigation technologies.

There needs to be a genuine admission of the long-term environmental impacts of mining operations. Companies should not assure communities that no environmental damage is going to take place. This runs contrary to what communities actually see happening. The community members may not have a very high level of educational attainment, but they are not stupid. Despite the assertion of some mining company representatives and NCIP officers that the IPs are smart, they treat them as if they do not understand their own best interest.

The historical marginalization of indigenous peoples brought about by colonizers, commercial logging and mining companies, and government has been possible because society has viewed IPs to be uneducated and uncivilized. This view continues to find expression in the lack of transparency and manipulation that IPs are subjected to during the FPIC process. One could say that the reason for such deceptive tactics is to safeguard the interests of the mining companies at the expense of the communities. This is the prevailing view. I believe that the broader picture (including the details of the costs, particularly of the environmental impacts that communities will bear) are not presented because those concerned think that the IPs will not understand. I am not saying that everything will be understood by the IPs, but it is the responsibility of the company to translate into intelligible findings what they understand to be the likely impacts of their project.

No one expects the mining companies to know all the environmental impacts it will cause over the lifespan of its operations. But there are certainly some known environmental damages that could be estimated. Companies would do better in restoring the trust of indigenous peoples if they shared available information in a comprehensible manner. They also need to indicate where mitigation might be possible along with the uncertainties. Since not everything can be known, communities will have to decide given the information they have about environmental costs and benefits of mining projects. The companies take a risk of being rejected, but the communities absorb a much greater risk when they give consent to mining operations since after the lifetime of the operations they are left to deal with the costs.

UNDERTAKING AN INDEPENDENT OR JOINT ENVIRONMENTAL IMPACT ASSESSMENT

The FPIC process should probably require an independent or joint Environmental Impact Assessment. The neutral facilitator could set-up a process for involving external advisors to prepare an EIA. These advisors should be selected by the parties. The NCIP and the neutral could recommend possible candidates. The parties would also have to determine the questions and information they want the external advisors to address. The external advisors, on the other hand, would have to discuss with the parties how they intend to proceed. The timeline would have to be agreed upon by the parties. What an independent or joint environmental impact assessment does is incorporate the concerns of the IPs and the host barangays. A neutral facilitator can provide a common frame for understanding the forecasts. Given uncertainties of science-related matters, the neutral would help parties establish criteria for determining acceptable levels of uncertainties as well as mechanisms for dealing with their implications.

A shared understanding of the actual, perceived, and projected environmental costs of a project would prepare local government and communities to make better decisions. If they decide to give their consent, they need to know how they would allocate the mining benefits to develop their communities and how they would mitigate the adverse impacts of mining. This includes a decision about what to do with the mined properties when the mining company is gone. In addition, the shift towards creating an informed process can open up a sustained partnership among community members, indigenous peoples, the mining company, and other stakeholders. In this manner, indigenous peoples can be treated as having a stake in the long-term development of their ancestral lands. Memoranda of Agreement could be better formulated to reflect such continuing relationships.

FRAMING THE FPIC PROCESS AS A CONSULTATION-NEGOTIATION PROCESS

In both cases, benefits were discussed solely in terms of money. At the outset of the consultations, the companies highlighted royalty payments as benefit to the IPs. The council of elders in Rosario, admitted giving their consent primarily because of the cash advance offered by PHILASAGA. The Mamanwa tribal leaders found themselves formulating their demands within the narrow parameters of the benefits identified by the Taganito Mining Corporation.

Emphasizing royalty payments at the very beginning of a consultation or during the FPIC process downplays the importance of creating a channel through which the real concerns and interests of the IPs can be articulated. Mining companies are well aware that the focus on monetary benefits can be viewed as bribery. Given the economic circumstances of the IPs,

putting at the forefront the offer of royalty payments and financial livelihood assistance has been determinative of the decision of the Manobos and the Mamanwas to give their consent.

Furthermore, focusing on financial benefits alone has diverted the IPs from scrutinizing other non-monetary concerns. Then again, given the limited time for consultation, there is really no way all the concerns of the IPs could be addressed.

Several information needs were raised by the Mamanwas during the preliminary consultation.

The Manobo leaders indicated that they, too, would have brought out these concerns if there had been a real opportunity for exchange during the preliminary meetings with the mining company.

One of their concerns was the connection between the royalty payment due to the IPs and the 1% of the direct mining and milling costs also due to the barangay for community development.

Since the mining companies have been in operation for a number of years, the required payment of a 1% of the direct mining and milling costs to the barangays has been on-going. While this information was disclosed in the preliminary consultation with the Mamanwas, the relationship of this benefit to the royalty payment due the IPs was not clarified. In both cases, the IPs did not understand that whatever was used to support community development from the 1% of the direct mining and milling costs could be charged against their royalty payment. This was apparently the reason why in the end the Mamanwas were not given royalty payment but instead a PhP500,000 [US\$ 9,542.42] livelihood assistance grant. The Manobo leaders were not at all informed during the FPIC process about the existence of the 1% of the direct mining and milling costs being paid to the barangays. IP leaders did not understand that the other benefits stipulated in the MOA were already part of the community development fund managed by the Community Technical Working Group in the barangay.

Mining companies may fear that disclosure of information clarifying the required royalty payments to local government and to IPs could lead to the latter's realization that there is actually little left for them thus encouraging them to withhold consent. But this information is critical to the IPs' understanding of what they ought to be negotiating (both with the mining companies and the local governments). Given that this information would bring local governments into the picture, I would assert that the barangay governments should be included in the FPIC process. How IPs and local government would negotiate for the allocation of their shares of the same funds would require another venue in the FPIC process. The point is, whatever development funds the barangay government has allocated for the IPs from its 1% of the direct mining and milling benefit, need to be considered in the MOA between the mining company and the indigenous tribes. More important, the IPs should be able to negotiate for an appropriate allocation for their long-term development instead of just being at the receiving end of what local governments plan for them. Local governments have long neglected the well-being of IPs.

These are three conditions for what I consider to be a genuine consultation. First, consultation has to extend over time; it cannot be a one shot activity. Consultation needs to be broken down into several stages. Second, the outcomes of consultation should not be pre-determined. This means that the process should not be reduced to nothing more than information dissemination. Finally, consultation should involve principled³³ negotiations among numerous stakeholder

³³ The term "Principled Negotiation" was coined by Roger Fisher and William Ury in *Getting to Yes*. For Lawrence Susskind, this negotiation is known as "Interest-based Negotiation" or the "Mutual Gains Approach to Negotiation". Both focuses on negotiating interests compared to the traditional hardline bargaining where negotiations are based on positions. Interest is the defined as the reason behind a position. One of the arguments for an interest-based negotiation is that there could be a number of options corresponding to an interest which is not true for a positional bargaining approach.

interests. It calls for stakeholders to do problem-solving dialogue aimed at meeting the interests of all those at the table.

The preliminary consultation and the final community assembly/decision meeting in the two cases were driven by the mining companies with the support of the NCIP Regional leadership and the FBI Team. The Memorandum of Agreement (MOA) in each case makes clear who was running the process. While a review of the MOA, as well as all other pertinent documents relating to the conduct of the FPIC process, was supposedly undertaken by the national office before attaching its signature and/or issuing a Compliance Certificate, it is apparent that this task was not taken seriously. That an NCIP legal officer helped draft and review the MOA with the IP leaders does not guarantee that the document is fair. The MOA with the Mamanwas was the product of a process that I consider far from “free and informed”. Legal assistance should be provided to the IPs to help them review the MOA before they sign.

Consensus Building

Consensus Building sessions are supposed to employ the traditional decision-making process of the IPs. Customary decision-making process varies in each IP community. In addition, since the IPs have been subjected to so many societal impacts, including those imposed by mining operations, traditional decision-making process is often invisible.

In the case of the Mamanwas in Taganito and Urbiztondo, the elders were the decision-makers prior to the arrival of government projects on their lands. These created a distinction between tribal elders and leaders, the latter being elected or designated to engage with government. With

the Manobos in Rosario, decision-making was shared among IP migrant leaders and “genuine” IP leaders, i.e. those whose ancestors were rooted in the place. The concept of sectoral leaders was introduced by the Department of Environment and Natural Resources (DENR) when the tribe was awarded its Certificate of Ancestral Domain Claim (CADC). IP migrant leaders and “genuine” IP leaders are both called sectoral leaders. The introduction of IPRA further required them to determine who was “genuine” and who was entitled to make decisions for the IP community.

The problem with this decision-making set-up is that most areas are not homogeneously inhabited by “genuine” IPs. There are migrant IPs as well as non-IPs. The determination of who is a “genuine” IP leader impacts even the migrant IPs within each ancestral domain. The point is, current decision-making in the Manobos in Rosario divides the IP community into migrant and “genuine” IPs. Who, then, represents the sentiments and interests of the migrant IPs in the FPIC process? Equally important, the use of the customary decision-making in Consensus Building isolates the “genuine” tribal members.

The NCIP has not been able to ensure that the full range of community interests is discussed among tribal leaders and members. That depends on the IPs’ customary decision-making process. Since the IPRA and its Guidelines require the creation of an IP organization to represent the tribe in its ancestral claim and in the MOA signing, customary decision-making has become centralized in IP communities. This is not to say that traditional, i.e. tribal ancestors’ decision-making was not centralized. In fact, the two IP communities in my case studies suggest that the eldest chieftain considered to possess the “spirit” made decisions on behalf of the tribe.

The difference is, this chieftain had legitimacy and was recognized by the whole community. Equally important, decision-making for him was a lot less complex. He did not have to deal with the external forces and entities that have become part of the realities that IP communities have to engage today. Designating so many kinds of leaders, e.g. sectoral leaders, a council of elders, tribal council leaders (required by various government policies including the IPRA) has contributed to the cultural erosion of IP communities and resulted in centralized decision-making that is probably not appropriate to the complex realities that IPs currently face. Such centralized decision-making has led to divisions among IP leaders and isolation of tribal members. The dynamics between IP leaders and members mimics what is happening between mining companies and IPs – the absence of genuine consultation with tribal members.

The non-representation of community interests is most evident in the case of Rosario where the royalty payment and the sacks of rice are being divided among IP leaders. While in Taganito, no financial benefit goes directly to the leaders; the livelihood benefit is accessed by all community members in affected areas. But this is the case because the mining company decided to do it this way and NCIP is making sure that the benefits are spread out among community members. This arrangement was possible because the Mamanwas did not have an organization at the time of the FPIC process, not until they needed one at the last stage for the purpose of signing the MOA. Because the company was not clear about who to talk to, this allowed the participation of tribal leaders and members from the other barangays within the ancestral domain, even though they are not part of the directly affected areas. Even then, tribal members were spectators to the unfolding of the conversations that were taking place between their leaders and the mining

company representatives. Many tribal elders felt displaced as they were not consulted during the decision-making.

Now that the Mamanwas have an organization that represents IPs in the affected barangays, this may become the new customary decision-making process when it comes to matters related to the MOA with the Taganito Mining Corporation. When it comes time to make decisions for the whole ancestral domain, however, customary decision-making process may take a different form. How many “customary” decision-making process can there be for one ancestral domain?

When it comes to Consensus Building, the IPs could use their customary decision-making process, which may mean including all leaders in each ancestral domain. But, when it comes to the MOA signing, only those IP leaders in affected areas are going to give their consent because decision regarding the allocation of benefits is within their authority. This divides the decision-making process between those who are directly and not directly affected. This could be invoked as the customary decision-making process, too. This was the case with the Manobos in Rosario. This has created a conflict between “genuine” IP leaders in the directly affected and not directly affected barangays of the ancestral domain. Just recently, their “customary” decision-making process was changed to reflect the designation of the council of elders as “genuine” IP leaders. This new decision-making structure has also exacerbated conflicts between migrant IP leaders and “genuine” IP leaders. In the case of the Mamanwas, the FPIC process created a division between the tribal leaders. The tribal leaders of Taganito and Urbiztondo (with the Provincial Consultative Body Chairman) represented the organization that was then formed to become the signatory to the Memorandum of Agreement (MOA). The customary/traditional decision-

making (which I prefer to call current cultural decision-making) whether it includes all IP leaders or only the leaders of directly affected areas isolates tribal members, breeds conflict among leaders, and benefits primarily only those in decision-making positions.

An equally important point about Consensus Building meetings is that a conversation among IP leaders -- even if it includes those in the non-affected areas -- is inadequate given the complexity of the issues at stake. There seems to be an assumption that indigenous decision-making processes are sufficient to generate a comprehensive and informed conversation among IPs. But, this disregards the fact that IPs have been and continue to be marginalized in Philippine society. They need significant support to build their capacity to engage with government leaders and investors.

The NCIP says it is just a documentor of Consensus Building meetings. The NCIP FBI Team never pursued the questions and concerns of the IPs during the preliminary consultation. The FBI Team also seemed to lack an understanding of the relevant information related to these concerns. In both cases, the Consensus Building was shaped solely by the discussion of financial benefits offered by the companies. The confusion of the IPs was not addressed and their understanding of the situation they were in did not increase.

ENSURING AN INCLUSIVE CONSENSUS-BUILDING PROCESS

Given the complexity of issues surrounding mining and the free and informed consent being sought from the IPs, a day of consensus building is not enough. Like consultation, Consensus Building requires a process. Venues need to be arranged to help:

- Identify the various interests of all community members
- Surface the questions and information needs of the IPs
- Make sense of data or information provided to the IPs in the course of on-going consultations with the company and the local government
- Identify data or information needs as well as outside sources of assistance
- Agree on how decisions are going to be made and how benefits are going to be allocated, if the tribe gives its consent
- Formulate mechanisms for transparency and community involvement during the FPIC process and post FPIC processes
- Formulate a community development vision and long-term plan; this needs to be done regardless of whether a tribe gives or withholds consent

The consensus building process described above is not linear; it is iterative. The NCIP cannot be mere documentors. Given the institutional limitations and personal biases of NCIP officers, it seems inappropriate for them to facilitate a consensus building process of this kind. There is a need for a neutral facilitator to assist the IPs in their consensus building efforts.

The Consensus Building portion of the FPIC process could still be limited to IPs, but it has to be inclusive and fair, i.e. the scope of participation should include all relevant tribal members and should capture their concerns and interests. Customary or current cultural decision-making should probably not be left as is.

EMPLOYING A NEUTRAL PARTY TO FACILITATE THE FPIC PROCESS

I have asserted the need for a neutral party to facilitate the FPIC process. Given the history of mining in the Philippines, distrust pervades the relationships among mining companies, government, and indigenous peoples. Today, this skepticism is aggravated by the inability of the NCIP to facilitate the FPIC process and the undue influence exerted by mining companies.

A neutral party acceptable to the mining company, the IP tribe, and the barangay government would be best. There are neutrals in the country who could manage these conversations. Unlike an arbitrator, a mediator does not possess any decision-making power regarding the issues at the table. The neutral's impartial stance towards the parties and on the substantive issues they face helps to establish the integrity of the process. If any party thinks that the neutral has become biased at any point, he/she would be disqualified. Among the challenging questions that need to be tackled in employing a neutral are: Who are they? Who would pay for them? Who would hold them accountable?

The NCIP would be most effective as the convenor of the FPIC process. Being a convenor means maintaining a list of neutral facilitators from which the parties can select. The NCIP should be responsible for contacting the selected neutral and briefing him/her about the task at hand. In addition, NCIP will introduce the selected neutral to the parties who must then clarify their expectations. The NCIP FBI Team should continue to conduct the Field Based Investigation to verify whether an FPIC process is necessary. The task of determining the customary decision-making process of the tribe should be the responsibility of the neutral rather

than the FBI Team. The team would still join the FPIC process, mainly assisting the IPs in generating data that could help them in the consultation-negotiations.

Prior to the first formal consultation-meeting of the parties, the neutral should undertake an assessment of the interests and concerns of the stakeholders involved. This review would help the neutral determine the best possible way to proceed, i.e. agenda, work plan, timetable, and budget. The assessment would also help the neutral identify the most appropriate representative of the mining company, the host barangay/s, and the IP tribe to bring into the consultation-negotiation process.

Such assessments are produced by interviewing the barangay government and the mining company officials to have a sense of the issues and concerns that are most important to them. Potential representatives of the barangay/s and the mining company would be identified during the interviews. For the indigenous peoples, the assessment could take the form of an initial Consensus Building session among the IPs prior to the first meeting of all the stakeholder representatives. At the first Consensus Building session, the customary/current cultural decision-making process would be clarified. The choice representatives of the company and the barangay/s would have to be agreed upon by the tribe. This approach would ensure that whoever represents the tribe in the FPIC process has the legitimacy to negotiate on behalf of the tribe. The tribe would also have to agree on transparency and feedback mechanisms between their representative/s and the community members.

Assist Parties to Articulate their Interests

The neutral would perform a number of roles and functions in facilitating the FPIC process, including assisting the parties in clarifying their interests. Interests often encompass substantive, procedural, and psychological needs. Many consultations and negotiations fail because they deal only and immediately with substantive concerns without regard for people's concerns about a respectful and fair process.

Establish Ground Rules

For the parties to be able to understand and respond to each other's multiple interests, the neutral has to manage the conversation. To do this, ground rules are needed that can be developed based on the initial interviews with the parties. Through the ground rules, the neutral ensures that the parties treat each other with respect, recognize the legitimacy of each other's interests and right to participate and be heard. It is therefore crucial that the neutral enforces the agreed upon ground rules. The ground rules could also cover issues of interaction between the parties and the media.

Assist Parties in Developing and Weighing Options

An important role of the neutral is assisting parties to develop a number of options to address each other's interests. The IPs would have to be reassured that withholding consent is a real option. It is their task to weigh this option alongside others, i.e. assess which of the options would best meet their most important interests. It is the neutral's role to help parties generate and make sense of data to enable them to assess whether their options will be met. Note that the

development of options and the assessment of options should be undertaken, separately. This is to ensure that as many options as possible are generated before parties set out criteria for choosing among them.

Ensure Follow-through Mechanisms

The neutral ensures that parties live up to what they have committed in the agreements, should a consent be given by the tribe. In this capacity, the neutral assists the parties defining a detailed and workable monitoring procedure to bind all the parties to their commitments.

What development plans were in effect in the indigenous community prior to the FPIC process? Has the development resulting from the FPIC process been consistent with the long-term development plans of the indigenous community?

BUILDING THE CAPACITIES OF INDIGENOUS COMMUNITIES TO ARTICULATE AND MANAGE THEIR DEVELOPMENT

Most IP communities do not have long-term development plans. Indigenous peoples live day-to-day. Most are engaged in traditional agricultural practice known as swidden farming or shifting cultivation. There is less and less land available for this subsistence means of livelihood, as more and more so-called development interventions, including mining, encroach upon ancestral domains. The IPs have been pushed out of their homelands and from their traditional sources of livelihood. While these development interventions purport to provide new livelihood opportunities for the IPs, the IPs have not been able to generate much employment. Education for IPs remains wanting. Trainings that will help them find employment and move up the ladder

in companies and even public offices within their ancestral domains are not provided.

Companies, as in the case of mining, often bring in outside works or employ migrant non-IPs since they are the ones who meet job qualifications. IPs end up being contractual and seasonal workers all their life, if they are ever employed at all by these companies. While mining companies may provide livelihood training assistance, such is the case with the Taganito Mining Corporation, the trainings are sporadic and not well thought out. Handbag-making training, for example, is over but few trainees finish a product that can be sold. The market for products has not been thoroughly researched. The mini grocery stores that the IPs have set-up in their homes usually fail. Mining companies have yet to demonstrate that they have contributed to a change in the well-being of IP communities. Most IP communities remain poor and the cultural integrity of those communities continue to erode.

The NCIP is supposed to assist the IPs in the formulation of their Ancestral Domain Sustainable Development and Protection Plans (ADSDPP). These are supposed to be “the manifestation of their (IP) rights to self-governance and self-determination” (ADSDPP Guidelines, Section 2). But the NCIP national leadership admits to having no available funds to assist IPs in formulating their ADSDPPs. Further, the NCIP has to out source funds from other government agencies and forge partnership with non-government organizations and external funding institutions to help prepare ADSDPPs.

With government unable to assist the IPs in addressing their poverty situation, the IPs are left with very little or no leverage at all in deciding whether to give or withhold consent. The playing field is simply lopsided. While government has the responsibility to help level the

playing field for the IPs, it does not have the capacity or the commitment to do so. In the end, IP communities have no choice but give consent to mining companies even if the terms are unfavorable. Whatever benefits companies offer, to the IPs they are a blessing. Ultimately, the decisions of indigenous communities reflect their desperate need to survive. Given this fact, I assert that the FPIC process requires neutral facilitation.

In addition, I propose that the formulation of an ADSDPP become part of the FPIC process, especially in cases where a community does not have such a plan. If a community already has an ADSDPP, it must be taken into account in making decisions about proposed mining operations. The requirements and forms for ADSDPP formulation should be simplified. The NCIP FBI Team should work closely with the IP community, assisting them in generating the data needed to formulate their ADSDPP. I recommend that IP communities should be assisted by another entity in the formulation and advocacy of their ADSDPP in the FPIC process. A number of non-government organizations are already supporting indigenous communities in their ADSDPP formulation.

I recognize that even with an ADSDPP, IPs could still end up having no choice but give consent. After all, the ADSDPP does not necessarily guarantee development. What the ADSDPP does provide is a basis for making demands of a mining company. The IP community should determine whether the company's proposals will meet their development vision within the lifespan of the mining operation. The IP community would then have a clearer basis for making a decision.

Indigenous communities might still feel that their choice is limited due to the fact that mining companies have been operating in their ancestral domains for many years (as is the case with the Manobos in Rosario and the Mamanwas in Taganito and Urbiztondo). Even in IP communities where mining companies are just about to enter, the IPs could end up feeling pressured by the government since the country's economic development relies heavily on investment of mining operations. With these limitations, the ADSDPP could still be a tool to require accountability from mining companies.

With an ADSDPP, the mining company should have a better appreciation as to which benefits it needs to offer and how they can contribute to what IPs have defined for themselves as their long-term development goals. Companies have a responsibility to ensure the development of IP communities so that when their operations cease, communities are able to stand on their own. The Memorandums of Agreement (MOAs) in my case studies do not reflect any such concern.

The ADSDPP should focus on not only economic benefits, but also capacity-building to ensure livelihood assistance. Equally important, it should address environmental and cultural considerations, e.g. protection of watersheds and sacred grounds. At present, the ADSDPP, the FPIC process, and Environmental Impact Assessments are unrelated processes. They ought to inform and reinforce each other.

What are the on-going involvements of IPs after mining is approved? What kind of continuing monitoring and participation in the development activities of the mining companies might be appropriate?

CREATING ON-GOING SHARED DECISION-MAKING

The Memorandums of Agreement (MOAs) reflect what seems to be the understanding of mining companies and the NCIP regarding FPIC – that the act of giving consent takes away any authority from the IPs regarding subsequent regulation of the activities of mining companies. The MOAs do not contain mechanisms through which IPs are involved in an on-going review of the activities of mining companies, including the social and environmental impacts of their operations over time. The IPs are hardly aware of the existence of monitoring mechanisms. Often, IP leaders do not even know that they have been named as members of certain monitoring mechanisms. If they do, they are unable to keep up with the conversation. Furthermore, monitoring mechanisms often do not function as intended.

To be effective, I propose monitoring mechanisms that detail the procedures for on-going managed efforts to deal with the limitations of the FPIC process. Furthermore, monitoring mechanism should also assess whether known information is still true within what is sure to be a changing environment surrounding the operation of mining projects. Monitoring procedures require stakeholders to review their assumptions surrounding each agreement. The neutral facilitator can help to ensure that part of the agreement covers the establishment of monitoring procedures that provide the flexibility to accommodate new information to address emerging stakeholder concerns.

In light of my recommendations, legislative and policy reforms must be in place. To safeguard the right of indigenous peoples to determine and pursue their economic, social, and cultural development, the FPIC IRR and Guidelines need to include the use of a neutral whose task is to guarantee a legitimate process. Also, policies have to stipulate provisions for ensuring external support to indigenous communities to strengthen their negotiation capacities during the FPIC process. External advisors or organizations could assist in the conduct of an independent or joint environmental impact assessment and in the communities' formulation of long-term development plans prior to negotiation with mining companies. External legal assistance should be made available particularly during the review and signing of the Memorandum of Agreement. In addition, the inclusion of the barangay in the FPIC process could better inform tribal communities of the relationships of different payments made by mining companies. In this case, IP communities would be in a better position to negotiate and make a decision whether to give or withhold consent.

Since the Mining Act and its IRR were passed before the IPRA, revisions to reflect coherence with the IPRA and a new FPIC IRR and Guidelines are called for. Particularly important is a recognition of the indigenous peoples' right to say no to mining operations as a real option in the exercise of FPIC. This requires conditions such as the inclusion of neutral facilitator, joint environmental impact assessment, and joint monitoring procedures that build the capacities of indigenous communities to engage in defining their development path and in managing their ancestral domains.

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