

**INDIGENOUS PEOPLES' RIGHT TO FREE, PRIOR, INFORMED
CONSENT:
REFLECTIONS ON CONCEPTS AND PRACTICE**

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I. INTRODUCTION

Our topic is one that is debated intensely in many indigenous and grassroots communities around the world, in countries that include the Philippines, Canada, Papua New Guinea, Peru, India, and Australia, in the board rooms of the biggest oil and mining corporations, the World Bank and the International Finance Corporation, and in many bodies of the United Nations. In January 2005, under the auspices of the UN Permanent Forum on Indigenous Issues, an inter-agency workshop of UN bodies met in New York to examine their current policies and practices related to “free, prior, informed consent” (“FPIC”). Meanwhile, the UN Working Group on Indigenous Populations, under its standard-setting mandate on the rights of indigenous peoples, is drafting a legal commentary and guidelines for its implementation. FPIC is on the agenda of several international organizations: the Convention on Biological Diversity, the World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO) in relation to access and benefits-sharing of biological resources and associated traditional knowledge, the World Conservation Union in relation to the establishment of parks and protected areas, and other multilateral banks and development and financing agencies with respect to their resettlement policies and other projects affecting indigenous peoples.

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These policy debates are largely the result of effective advocacy by indigenous peoples to have their fundamental human rights respected and to reverse the historical trajectory of unsustainable development based on expropriation of their lands, resources and, increasingly, their knowledge and cultures. Indigenous peoples uphold FPIC as a fundamental right in the development process, designed to safeguard their material interests, cultures, and ecological values, and to minimize harm. Meaningful exercise of FPIC requires a preparedness and capacity among various affected and interested parties to engage in processes based on respect and equality, leading to negotiated outcomes. It also means acceptance of the indigenous peoples' right to reject developments that do not gain community acceptance, based on informed choice.

Jim Anaya and Isabel Madariaga have elaborated on the international law standards and mechanisms that presently apply to FPIC. Numerous papers have been published on the principles and practice of "free, prior and informed consent," covering historical experiences, contemporary case studies, methodological considerations, as well as its standing in contemporary national and international law.² In this paper, I will focus on my own experiences in conducting research and policy advocacy related to FPIC with the aim of highlighting some of the conceptual and practical obstacles in the way of its acceptance and meaningful implementation.

II. THE WORLD COMMISSION ON DAMS

My work on the topic began when I served as a commissioner on the World Commission on Dams (WCD).³ From 1998 to 2000, the WCD carried out

2. See Marcus Colchester & Fergus MacKay, *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent*, available at http://www.iascp2004.org.mx/downloads/paper_107d.pdf (last visited Mar. 7, 2005); Fergus MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527 (2002); ANTOANELLA-IULIA MOTOC & THE TEBTEBBA FOUNDATION, PRELIMINARY WORKING PAPER ON THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT OF INDIGENOUS PEOPLES IN RELATION TO DEVELOPMENT AFFECTING THEIR LANDS AND NATURAL RESOURCES THAT WOULD SERVE AS A FRAMEWORK FOR THE DRAFTING OF A LEGAL COMMENTARY BY THE WORKING GROUP ON THIS CONCEPT, U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), and U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, REPORT OF THE INTERNATIONAL WORKSHOP ON METHODOLOGIES REGARDING FREE PRIOR AND INFORMED CONSENT AND INDIGENOUS PEOPLES, U.N. Doc (2005) (advance unedited version).

3. "The WCD was an independent, international, multi-stakeholder process which addressed the controversial issues associated with large dams. It provided a unique opportunity to bring into focus the many assumptions and paradigms that are at the centre of the search to reconcile economic growth, social equity, environmental conservation and

a global review of the development effectiveness of large dams, studied various policy and technical options for their construction, and made recommendations regarding water and energy development. The WCD findings on large dams and indigenous peoples showed that large dams have disproportionately impacted indigenous peoples, and future dam building continues to target their lands disproportionately. Major consequences include loss of lands and livelihoods, the undermining of the fabric of their societies, cultural loss, fragmentation of political institutions, breakdown of identity, and human rights abuse. This development has had an especially detrimental effect on the indigenous women, leaving the majority worse off than they were before.

Procedurally, these projects consistently fail to identify the distinctive characteristics of affected communities in project planning. Environmental and social impact assessments are absent or inadequate, and fail to appreciate the broader consequences of projects. For example, the projects sometimes fail to carry out watershed-wide planning. Indigenous peoples' customary rights are not recognized, and there has been neither prior negotiation nor prior and informed consent of affected communities.

Inadequate compensation, ill-planned resettlement, and tardy and insufficient reparations are common, as is denial of land of equal value and quality in exchange for the land lost as a result of involuntary displacement, especially for indigenous peoples. Among the underlying institutional, structural and political problems are the inability of cost-benefit analyses to encompass indigenous peoples' priorities and values, a lack of consideration for indigenous peoples in regional and national energy and water policies and plans, their social exclusion in official policies and institutions, the fundamental denial of the right to self-determination, and the prevalence of discrimination in society at the national level.

The WCD's final report, entitled *Dams and Development: A Framework for Decision-making*, proposes:

a rights-and-risks approach as a practical and principled basis for identifying all legitimate stakeholders in negotiating development choices and agreements;
seven strategic priorities and corresponding policy principles for water and energy resources development: (i) gaining public acceptance; (ii) conducting a comprehensive options assessment; (iii) addressing existing dams; (iv) sustaining rivers and livelihoods; (v) recognising entitlements and sharing benefits; (vi) ensuring compliance; and (vii) sharing rivers for peace, development and security; and

political participation in the changing global context. The Commission completed its work with the launch of its final report and disbanded." See The World Commission on Dams at <http://www.dams.org>.

criteria and guidelines to promote implementation of the strategic priorities.⁴ (emphasis added)

The WCD recognized that one of the key challenges in water resources management is to reconcile competing interests and balance social, environmental, and economic considerations:

We believe there can no longer be any justifiable doubt about the following: . . . By bringing to the table all those whose rights are involved and who bear the risks associated with different options for water and energy resources development, the conditions for a positive resolution of competing interests and conflicts are created.⁵

To do this, it proposed moving away from a conventional ‘balance-sheet’ approach, in which benefits to one group are statistically offset against adverse impacts to other sections of society, to a process of negotiation with the stakeholder interests involved.

[T]he Commission believes that fulfilling development needs requires respect for fundamental rights, and not a trade off between them. We believe that an equitable and sustainable approach to development requires that a decision to build a dam or any other options must not, at the outset, sacrifice the rights of any citizen or group of affected people.⁶

“Recognition of rights” and “assessment of risks (particularly rights at risk)” forms the basis of the WCD’s approach to stakeholder analysis and more effective participatory processes, starting with needs and options assessment early in the planning process. In the event that a dam proposal emerged from such negotiations as the most appropriate venture, or as part of a broad range of measures, then the ‘rights and risks’ approach was seen as fundamental to negotiated processes around not only mitigation, monitoring and management measures, but benefit sharing and other steps to enhance the overall development performance of the dam project. It was envisaged as an integrating tool for economic, social, and environmental dimensions. Its relevance goes beyond the dams arena to a wider development context as a tool for stakeholder involvement and effective participation.

The WCD’s “rights and risks” approach explicitly combines human rights impact assessments with risks assessments to encompass in one tool the

4. WORLD COMMISSION ON DAMS, *supra* note 1.

5. *Id.* at xxviii.

6. *Id.* at 204.

concerns and interests of all parties - indigenous peoples whose lands, waters and resources are affected by water and energy resources development, as well as governments, developers, financiers and investors, and others.

Whilst the WCD report is a voluntary norm-setting activity on sustainable development, rather than an inter-governmental negotiation, it nevertheless enjoys broad legitimacy among the various constituencies interested in large dams and water resources development, using a multi-stakeholder, conflict-resolution approach.

One of the WCD's recommendations is to uphold the rights of indigenous peoples in water and energy development policies, programs, and projects by requiring their free, prior and informed consent. The WCD's "Strategic Priority 1" on Gaining Public Acceptance provides policy principles and the rationale for employing participatory decision-making processes, which include indigenous and tribal peoples as decision-makers in negotiations alongside other interested and affected parties (see below). As such, the WCD report takes a human rights-based approach to water and energy resources development. This is consistent with recent progressive developments within the United Nations for a common approach to development cooperation and programming.⁷

A. The Report of the World Commission on Dams⁸ Strategic Priority 1 Gaining Public Acceptance

Public acceptance of key decisions is essential for equitable and sustainable water and energy resources development. Acceptance emerges from recognizing rights, addressing risks, and safeguarding the entitlements of all groups of affected people, particularly indigenous and tribal peoples, women, and other vulnerable groups. Decision-making processes and mechanisms are used that enable informed participation by all groups of people, and result in the demonstrable acceptance of key decisions. Where projects affect indigenous and tribal peoples, such processes are guided by their free, prior, and informed consent.

Recognition of rights and assessment of risks are the basis for the identification and inclusion of stakeholders in decision-making on energy and water resources development.

1.2 Access to information, legal and other support is available to all stakeholders, particularly indigenous and tribal peoples,

7. See UN DEVELOPMENT GROUP, THE HUMAN RIGHTS-BASED APPROACH: STATEMENT OF COMMON UNDERSTANDING, U.N. Doc. (2004) available at <http://www.unicef.org/sowc04/files/AnnexB.pdf> (last visited Mar. 7, 2005).

8. WORLD COMMISSION ON DAMS, *supra* note 1, at 215-216.

women and other vulnerable groups, to enable their informed participation in decision-making processes.

1.3 Demonstrable public acceptance of all key decisions is achieved through agreements negotiated in an open and transparent process conducted in good faith and with the informed participation of all stakeholders.

1.4 Decisions on projects affecting indigenous and tribal peoples are guided by their free, prior and informed consent achieved through formal and informal representative bodies.

1. Rationale

A fair, informed, and transparent decision-making process, based on the acknowledgement and protection of existing rights and entitlements, will give all stakeholders the opportunity to fully and actively participate in the decision-making process.

Because of their scale and complexity, dams affect the existing rights of different groups and create a wide range of significant risks for a diverse range of interest groups. Among those affected are indigenous and tribal peoples, women and other vulnerable groups who have been shown to suffer disproportionately. This has been compounded by negligible participation of these groups in decision-making processes, with the result that planning processes for large dams have frequently overlooked gender and equity aspects. The vulnerability of these groups stems from the failure to recognize, or respect their rights, and from the significant involuntary risks imposed on them.

Failure to recognize the rights of all affected groups, whether legally sanctioned or not, coupled with the significant involuntary risk imposed on the most vulnerable, is central to the dams debate and associated conflicts. To be socially legitimate and produce positive and lasting outcomes, development projects should provide for greater involvement of all interested parties. A fair, informed and transparent decision-making process, based on the acknowledgement and protection of existing rights and entitlements, will give all stakeholders the opportunity to fully and actively participate in the decision-making process. Instead of exacerbating existing inequalities, water and energy resources development should be opportunities for achieving a high level of equity.

WCD, consisting of twelve diverse commissioners, embodied the range of protagonists in the dams debate: governments, dam builders and managers, affected communities, indigenous peoples, academics, industry, and development and environment practitioners.⁹ Among the many challenging compromises we

9. See WORLD COMMISSION ON DAMS, *supra* note 1, at Annex VII.

faced, I can confirm that this consensus recommendation was one of the most debated and difficult to reach. Our final recommendation to promote indigenous peoples' free, prior, and informed consent to water and energy development affecting them required detailed answers to a number of difficult questions that continue to provoke debate in the various bodies studying the issue. These include:

- What rights of indigenous peoples are recognized under international and national law?
- Should indigenous peoples enjoy "*special rights*"? What about impacted local communities?
- Will FPIC allow indigenous peoples a "veto" on development? Does FPIC extend to individual veto?
- Will FPIC undermine state sovereignty and eminent domain?
- Can FPIC be "operationalised" without excessive costs and delay?

Our earlier agreement on the core values of equity, efficiency, participatory decision-making, sustainability and accountability, and the adoption of a "rights and risks" approach derived from our joint global review covering economic, environmental, social and technical and financial performance of dams was an enormous help in our reaching a final consensus on these issues.

In the light of WCD findings, and buttressed by the respect and understanding that had developed among the commissioners for each other's distinct perspectives and interests in the dams controversy, we were able to close the negotiations. We agreed to bold recommendations that we knew would not be easy to implement, but that point the way towards addressing the conflicts surrounding large dams.

Free, prior and informed consent as a policy instrument signals to all interested and affected parties (e.g., developers, investors, all government units, and impacted communities) that indigenous peoples have rights and interests that will be protected in the development process.

The WCD's core values and strategic priorities have been broadly accepted by many, but the WCD consensus on the requirement for indigenous peoples' free and prior informed consent was not accepted by World Bank and sections of the dams industry (*see* Fergus MacKay, at pages 65-98 of this volume). Another strategic priority, on "Recognizing Entitlements and Sharing Benefits," notably non-controversial among the WCD commissioners, was also rejected by the World Bank. This WCD recommendation pertains to improving the outcomes of involuntary resettlement programs by ensuring that people displaced by large dams are made project beneficiaries and advantaged as a result of the project. The current World Bank standard to maintain the incomes of those forcibly displaced has resulted in the impoverishment of millions of people in the

past who, in addition to losing income, lost resources that had been available on the land, access to communal land, and suffered loss of livelihood. Indigenous peoples, who have strong cultural attachments to their ancestral lands, have called for the prohibition of involuntary resettlement, and the legal requirement to obtain their free, prior, and informed consent should this happen as a result of development projects. This WCD recommendation states:

Joint negotiations with adversely affected people result in mutually agreed and legally enforceable mitigation and development provisions. These provisions recognize entitlements that improve livelihoods and quality of life, and affected people are beneficiaries of the project.

Successful mitigation, resettlement, and development are fundamental commitments and responsibilities of the State and the developer. They bear the onus to satisfy all affected people that moving from their current context and resources will improve their livelihoods. Accountability of responsible parties to agreed mitigation, resettlement, and development provisions is ensured through legal means, such as contracts, and through accessible legal recourse at national and international levels.¹⁰

III. PHILIPPINE EXPERIENCES OF FPIC

In the Philippines, indigenous peoples' FPIC is required by law for the following activities affecting indigenous peoples: exploration, development and use of natural resources; research and bio-prospecting; displacement and relocation; archaeological explorations; policies affecting indigenous peoples; and entry of military personnel. The Indigenous Peoples Rights Act (IPRA) of the Philippines is among the most explicit legislation in defining the requirements for FPIC.¹¹ Section 3(g) states:

Free and Prior Informed Consent - as used in this Act shall mean the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices,

10. WORLD COMMISSION ON DAMS, *supra* note 1, at xxv.

11. The Indigenous Peoples Rights Act Of 1997, Republic Act No. 8371 (Phil.) [An Act To Recognize, Protect And Promote The Rights Of Indigenous Cultural Communities/Indigenous People, Creating A National Commission Of Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefore, And For Other Purposes], *available at* <http://www.chanrobles.com/republicactno8371.htm> (last visited Mar. 7, 2005).

free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

Based on the recognition of indigenous peoples' rights to their ancestral domain, it contains the following provision with respect to government agencies charged with regulating and monitoring development projects, in order to protect traditional lands from alienation:

Sec. 59. Certification Precondition – all department and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certificate shall only be issued after a field-based investigation is conducted by the Ancestral Domain Office of the area concerned: Provided, That no certificate shall be issued by the NCIP [National Commission on Indigenous Peoples] without the free and prior informed and written consent of the ICCs/IPs concerned: Provided, further, That no department, government agency or government-owned or -controlled corporation may issue concession, license, lease, or production sharing agreement while there is pending application CADT [Certificate of Ancestral Domain Title]: Provided, finally, That the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process.

The National Commission on Indigenous Peoples (NCIP), the government agency charged with the implementation of the IPRA, issued its Implementing Rules and Regulations (IRR) in 1998.¹² In 2002, the Commission came out with revised guidelines on the coverage of the FPIC,¹³ which states:

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

12. Admin. Order. No. 03 Ser. of 1998, and its Supplemental Guidelines on the Issuance of NCIP Certificate of Pre-condition in Connection with Applications for Lease, Permit, License, Contract and other Forms of Concession in Ancestral Domains (on file with author).

13. § 6 of Chap. 1 on Preliminary Provisions of NCIP A.O. 3 Series of 2002 (on file with author).

ICCs/IPs shall have the right to accept or reject a certain development, activity or undertaking in their particular communities. The acceptance or rejection of proposed policy, program, project or plan shall be assessed in accordance with the following IPs' development framework and value systems for the conservation and protection of:

Ancestral domains/lands as the ICCs/IPs fundamental source of life:

Traditional support system of kinship, friendship, neighborhood clusters, tribal and inter-tribal relations rooted in cooperation, sharing and caring;

Sustainable and traditional agricultural cycles, community life, village economy and livelihood activities such as swidden farming, communal forests, hunting grounds, watersheds, irrigation systems and other indigenous management systems and practices; and

Houses, properties, sacred and burial grounds.

The IRR and subsidiary guidelines also set out some detailed and prescriptive rules, including mandatory practices within specific time periods for completing the process of FPIC certification, which have raised challenges from indigenous peoples' organizations as to their compatibility with customary laws and practices.¹⁴

Section 14, for instance, specifies: (1) who shall be present, what shall be presented, and the order in which presentations shall be made in the preliminary consultative meeting; (2) the period within which the elders/leaders should hold consultative meetings with their members (fifteen days); (3) who shall be allowed to stay in the community within the fifteen day period, i.e. only the NCIP and only for the purposes of the documentation; and (4) how the decision will be arrived at, i.e., by vote or by raising of hands of community representatives.

Section 29 requires the community to: (1) write down the customary practice of consensus-building to be followed; (2) identify in writing and register with the NCIP their Council of Elders; (3) explain the vote taken; and (4) in case of non-consent, explain in writing the specific reasons for the decision. Lastly, it prescribes in detail what should be stated in the Memorandum of Agreement (MOA) in cases where the community chooses to give consent. These bureaucratic requirements highlight the importance and need for practical guidelines to facilitate the implementation of FPIC. Such guidelines must be based on a review of the actual experiences in its implementation.

14. Emily Manuel, *The Free, Prior and Informed Paradox: Recreating and Existing Tool for Empowerment* 12 PHIL. NAT. RESOURCES L.J. 1 (2004).

A. Case Studies

An examination of the exercise of FPIC in a number of development projects since the passage of the IPRA reveals some of the problems in the implementation of the law. The problems arise in a context of competing policies and conflicting laws prioritized by the Philippine Government in its national economic development strategy.

In the ten years between the first constitutional recognition of ancestral land rights and the passage of the IPRA, new developments have placed new threats against indigenous peoples' land rights. The most far-reaching and significant of these is the passage of the Revised Mining Code in 1995, and the more recent National Mining Policy.

The explicit purpose of the Code was to attract greater foreign investment into the mining sector and to increase the contribution of mining to the national economy. This development objective conflicts with the land rights aspirations of indigenous peoples throughout the country. The majority of the remaining enclaves of land occupied by indigenous peoples are in the mountainous interior, where most of the mineral resources and potential mining activity is concentrated. The Mining Code was hugely successful in attracting foreign investment, and the companies drawn in ranged from small speculative ventures with little or no experience of actual mining to some of the major international mining companies, including Rio Tinto, BHP (Australia), Placer Dome (Canada), and Newmont (USA).

However, even the Mining Code contains a clear requirement that, where mining development is proposed on ancestral lands, the free, prior, informed consent of the affected indigenous peoples must be secured before the project can proceed.¹⁵ In a concerted campaign to overcome its notorious reputation for abuse of local peoples' rights and failure to maintain decent social or environmental standards, the mining industry has often claimed in recent years to be seeking a new approach that contributes to sustainable development.¹⁶ The combination with the Philippine Mining Code offers every opportunity for a manifestation of best practice.

It is revealing and disturbing, therefore, to examine the experience of mining company practice in pursuing access to mineral wealth in different parts of the Philippines. There emerges a pattern of abuse and misrepresentation that covers virtually all projects and involves both small and large firms. Because

15. Mining Act of 1995, Republic Act 7042 § 16 (Phil.) ("No ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned." (on file with author).

16. *See, e.g.*, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, THE MINING, MINERALS AND SUSTAINABLE DEVELOPMENT (MMSD) PROJECT, at http://www.iiied.org/mmsd/what_is_mmsd.html (last visited Mar. 7, 2005).

there is so much evidence, it is necessary to focus on a few illustrative examples. The cases most often referred to are:

1. The Subanen peoples in the Zamboanga peninsula who have come into conflict with, among others, Rio Tinto, the world's largest mining company, and TVI Pacific of Canada – a company with no existing mines. Both Rio Tinto and TVI were focused primarily on potential gold and copper extraction. Rio Tinto has now withdrawn in the face of determined opposition but, despite the clear opposition of the local communities, TVI is pressing ahead with its mining development.
2. In South Cotabato, Western Mining Corporation (WMC), the Australian mining giant, identified a major copper deposit. Their failed interaction with the B'laan people is well documented.¹⁷ WMC also announced their withdrawal following the determined opposition of some B'laan organizations and support organizations in the Philippines and elsewhere. It is deeply disturbing that WMC has now sold its rights to Indophil Holdings, irrespective of B'laan wishes. The B'laan lodged a successful Supreme Court challenge to the legality of the 1995 Mining Code, which allows completely foreign-owned firms to exploit the country's mineral resources, and Financial and Technical Assistance Agreement (FTAA) between the Philippine Government and Western Mining Corporation Philippines, a wholly-owned subsidiary of Western Mining Corporation Holdings Limited of Australia. The 1987 Philippine Constitution requires companies exploiting natural resources to be majority-controlled by Philippine entities. The Philippine Government's subsequent appeal to the Supreme Court resulted in a controversial reversal of the Court's earlier decision for the Philippine mining operations. Stating that “[t]he Constitution should be read in broad life-giving strokes. It should not be used to strangle economic growth or to serve narrow, parochial interests . . . Rather it should be construed to grant the President and Congress sufficient discretion and reasonable leeway to attract foreign investment, as well as to secure for our peoples and our posterity the blessings of prosperity and peace.” The Supreme Court said that the President was constitutionally mandated to enter into agreements with foreign-owned

17. Mike Boyle, “A Word of Warning”, *Australian Mining Corporations and the Philippine Environment*, in AUSTRALIAN PHILIPPINES SOLIDARITY MOVEMENT, (1996).

corporations, and that Congress had the right to review such contracts.¹⁸

3. In Mindoro Island, a Norwegian Canadian company, Crew Development Corporation, has targeted ancestral Mangyan lands for a large nickel mine. This project would involve stripping off at least 1000 hectares of laterite surface layers. This material would then be pumped to the coast in a slurry, through a process using sulphuric acid to extract the nickel and cobalt. The remaining material would be pumped into the sea at the rate of 4 million tons per year for more than twenty years.

These cases and others around the country have revealed some general areas of abuse in the implementation of FPIC:

- systematic failure to respect local institutions, customary laws and practices, and community opinions and preferences, as required by the law;
- control of information and misrepresentation of the local situation in national and international media in support of corporate claims;
- unacceptable efforts to influence local opinion, including cases of bribery and coercion.

1. Systematic Failure of Companies to Prior Consultation with Communities on Site.

In the competitive world of mining, one of the attractions of the Philippine Mining Code is the offer of one-stop access: agreements made between the company and the central government bypass local government, not to mention indigenous communities. These deals can secure exploration rights over vast tracts of land, as well as offer the promise to companies that, should they wish, these exploration rights can be carried through to development and even mining. The companies identified and lodged claims over areas long before informing the affected communities. Researchers in London and Manila had access to the information well before local communities.

In these days of fly-over survey, substantial exploration activity is carried out without any contact with the affected communities on the ground. In the Cordillera region, this has led to some local people defending their land by shooting at overflying helicopters. The Subanen report that, despite their clear expressions of opposition to both mining and exploration, Rio Tinto began ground survey work with the cooperation of the Department of Environment and Natural Resources (DENR) without consulting any Subanen communities. The first notice

18. PHILIPPINE DAILY INQUIRER, Dec. 2, 2004, at p.A1.

the Subanen community at Canatuan had of the entry of TVI Pacific came when a helicopter landed in the area of their sacred grove, identified it as suitable for their mining camp, and began the construction of buildings. Not only was there no prior consent, but throughout the development of the project, the clear wish of the Subanen that TVI withdraw has been ignored and held in check by militarization.¹⁹

Rio Tinto, Newmont, and others did eventually initiate consultation at the local level. However, a pattern emerges around this process. Notice of such meetings is typically grossly inadequate to allow information of the meeting to reach remote communities or to allow reasonable time for access to independent information before the meeting. Such meetings are always called and imposed by the government and company, and never within the control of the landholders.

Despite years of prior interest by Rio Tinto in the 600,000 hectare area identified by the company, only one week's notice was given of the first consultation in Zamboanga del Sur. Typically, the consultation was held away from indigenous land in the provincial capital of Pagadian. Again in the case of TVI, when a meeting was held, it was in the municipal centre, far from the community. Indeed, local Subanen report that the notice of the first meeting with TVI arrived in their community the day *after* the meeting took place.

On February 5, 1997, the Subanen Leaders Forum of Zamboanga del Norte wrote to the regional DENR opposing the entry of Rio Tinto, TVI, and other mining companies. In April, the Bishop of Pagadian echoed these concerns in an open letter to the shareholders of Rio Tinto, which was read at their Annual General Meeting in London. The Bishop's letter reveals some of the mounting local frustration. He wrote, "It seems until now, members of our government here, along with directors in your company, have not been able to hear our appeal."²⁰ In October 1997, Subanen representatives from all over the region came together and issued another unambiguous statement:

We, the timuays [traditional leaders] from [various communities across the region], are united in our stance of opposition to the plan to have our lands mined or any part of the whole of the Zamboanga peninsula. These areas are to be preserved for the future generations to enrich our heritage.²¹

19. Press Release, Philippine Indigenous Peoples Links, Statement on "Breaking Promises, Making Profits: Mining in the Philippines" (Dec. 9, 2004), at <http://qc.indymedia.org/news/2004/12/2012.php> (last visited Mar. 7, 2005).

20. Geoff Nettleton, *Rio Tinto in the Philippines: shortcomings and lessons*, Mines and Communities website, at <http://www.minesandcommunities.org/Company/rio3.htm> (last visited Mar. 7, 2005).

21. *Id.*

In 1998, the Catholic Bishops Conference of the Philippines voiced its own solidarity with the Subanen and others calling for the elimination of the Mining Code and specifically for the withdrawal of Rio Tinto, TVI, and Philex Gold (another Philippine-Canadian company operation in Zamboanga), “in compliance with the wishes of the indigenous Subanen and the majority of inhabitants of the area.”²²

In Mindoro, not even the local government was notified of the entry of Mindex of Norway (now taken over by Crew Development Corporation of Canada). The provincial vice governor reported that the first indication he got of the mining activity was when indigenous people from the area came in to complain about the presence and activity of the company within their lands.

In this particular case, the regional director of the NCIP issued a Certification Precondition, stating that the project area does not overlap with ancestral domains, despite prior ancestral domain claims by indigenous Mangyan organizations. When the same company applied for a new license from the Department of Environment and Natural Resources (DENR), the NCIP regional director issued a Certificate of Free Prior and Informed Consent, following a dialogue between a newly organized group, Kabilogan, and the mining company. The new organization was set up by the NCIP official, bypassing the established Mangyan organizations in the area which actively opposed the mining project. Kabilogan was established by members of the two pre-existing organizations, and included among its leadership many non-Mangyan company employees active in the structures and processes of the organization. The founding meeting was held in the company compound. Members of Kabilogan report that they were told by NCIP that their previous organizations were not officially recognized and that if they wanted to make land claims they needed to organize within Kabilogan and cooperate with the company.

The legal officer of the provincial NCIP office issued an affidavit citing his superior as directly responsible for the usurpation of the right of the Alangan and Tadyawan Mangyans to self-determination.

. . . Director Chollipas who used her office in the manipulation and coercion to obtain their (Mangyans) consent to sign the MOA after maneuvering in facilitating the organization of Kabilogan, as registered Mangyan organization. This she did, after being repeatedly turned down by the legitimate Mangyan people's organization to give the FPIC in favor of the mining company.

Director Chollipas has been in the forefront of Kabilogan organizing and continued to do so up to the present. On March 12, 2001, she was actively participating again in another MOA signing between the Mangyans and the

22. *Id.*

mining companies held at the Treehouse Beach Resort in Brgy Wawa, Calapan City.²³

On March 19, 2001, the Mangyan organizations of KPLN and SANAMA presented before the Office of the President their strong opposition to the mining activities of Mindex/Crew/Aglubang, together with their request to stop the Mindoro Nickel project. Bishop Warlito Cajandig, Apostolic Vicar of Calapan, Oriental Mindoro, articulated the concrete recommendations: (1) that the Mineral Production Sharing Agreement (MPSA) issued to Aglubang Mining Corporation by then DENR Secretary be reviewed and eventually be revoked, and (2) that the Certification for Free, Prior and Informed Consent anomalously issued by the NCIP be nullified for grave and serious legal defects in the manner by which it was deceptively obtained.²⁴

This failure to respect indigenous wishes and institutions has been widespread. Western Mining Corporation (WMC), working closely with government agencies, invested heavily in gaining local support for its copper project in South Cotabato. Nonetheless, in some areas it failed. The duly-recognized local indigenous organization rejected WMC requests to enter into signed agreements with the company. This came about in part because indigenous leaders, most of whom had no previous experience on which to draw to anticipate how a mine might look or affect on their land and life, were able to visit working mines through the support of church organizations, NGOs, and other indigenous organizations. They were appalled by the experience and returned to actively oppose mining on their land.

To resolve this conflict of indigenous and company interests, the Office for Southern Cultural Communities (“OSCC” – replaced in 1997 by NCIP) moved rapidly to withdraw recognition of the traditional organizations and resistance leaders, and reconvene the organization with more compliant leaders. The facilitating role played by the government agency for the company became even more evident when a B’laan community was visited by a joint WMC and OSCC delegation. The government agency pressed community leaders to sign a seventy-page memorandum with the company on the spot. No opportunity to seek private legal advice or debate or read the document within the community was possible in advance.

The imposition or cultivation of rival leaderships is common when mining engenders conflict within communities. In the case of the TVI project in Zamboanga, the Subanen of Canatuan established the Siocon Subanon Association, Inc. (“SSAI”) because their traditional forms of leadership were not recognized by the Philippine government. Led by Timuay Jose Anoy, the SSAI has consistently opposed the entry of mining concerns in their lands. In November

23. Edwin Gariguez, *The Mangyans and the Mindoro Nickel Project of Mindex/Crew/Aglubang Mining Corporation: A Case of Deception and Manipulation in Obtaining Free, Prior and Informed Consent* (unpublished manuscript, on file with author).

24. *Id.*

2001, a meeting took place in which a new pro-TVI leadership was elected. It was immediately recognised by the company, which entered into agreement with it. The original leadership, including Jose Anoy, were absent from the meeting. They continue to protest its illegality, and assert that many who participated were from outside the ancestral domain area and had no right to participate or seek election. The rival group has been dubbed by the local people as 'TVSSAI'.

In response to this conflict, the Philippine government required the establishment of a Council of Elders, to be drawn from both the original SSAI and the TVI-backed group, as part of granting the ancestral domain title in the area. This imposed Council of Elders has no traditional standing in Subanon society, but was charged with representing community interests, even though some members were not from the area. The "TVSSAI" has actively engaged in discrediting, vilifying and maligning the traditional Subanon community leaders, who remain opposed to the project.

This new organisation also gave consent to the mining development, which was strongly protested by community organisations. Within days, the Philippine government granted TVI a partial license to operate. Despite a legal challenge to this license and an appeal for a temporary injunction to halt the use of the gold-processing plant, the company has been allowed to proceed.²⁵ Open-cast mining has started at the heart of Siocon, resulting in the forcible displacement of forty-seven community members, including Timuay Jose Anoy.

2. Misrepresentation of the Local Situation through the Media, and Control of Information Flow

Fundamental to the exercise of prior informed consent is access to sufficient information to make a genuine assessment and sufficient time to consider and debate the issues internally. In the Philippines, no case exists where adequate information has been provided to the affected community. The consultation meetings called nominally by the DENR or NCIP to "inform and consult" are too often platforms for the exclusive presentation of company information and propaganda. To date, no consultation has been invited or informed by any independent agency knowledgeable on the issues, let alone any groups critical of mining. This has only occurred where communities or local NGOs have made such efforts out of their own limited resources.

Indigenous communities are asked to make decisions solely on the basis of company information. There are no provisions in the process to allow community groups without exposure to or experience with mining to independently inspect similar mines or independently assess the record or practice

25. CHRISTIAN AID, *BREAKING PROMISES, MAKING PROFITS: MINING IN THE PHILIPPINES* (2004), at <http://www.christianaid.org.uk/indepth/412philippines/index.htm> (last visited Mar. 7, 2005).

of the company making proposals. In the few cases where travel to other mining sites is included in the process, it has been exclusively under the patronage of the company. In brief, no serious effort or provision has been made to allow for informed decision-making.

In their reports of local consultations, mining companies omit the clear expressions of local opinion. At a Pagadian consultation with Rio Tinto, the Subanon present were overwhelmingly and forcefully opposed to the entry of the company on their land. Despite this, Rio Tinto's exploration manager, Henry Agupitan, reported to the DENR that the meeting had been "very successful." Subsequently, this trick was repeated in a consultation attended by representatives of the company from London in response to the Bishop's letter to the Annual General Meeting. There, Agupitan quoted selected passages from a letter indicating that communities in the adjoining province were open to dialogue with the company. The full text of the letter was subsequently publicized, as starting with: "We strongly oppose the entry of Tropical Exploration Philippines Inc. (the name under which Rio Tinto was operating in the Philippines), Toronto Ventures Inc., and other mining firms, in the ancestral domain in our province." When the Rio Tinto chairman was subsequently challenged on these points of misrepresentation he responded that "it is precisely because over 300 people attended that we saw it as 'very successful,' not for the result, but as the start of a dialogue with that community."²⁶

Having failed to acknowledge or respect the abundantly clear criticism of Subanen organisations, the company chose to adopt the tactic of calling instead on an outside anthropological expert to determine what Subanen opinion was. On the basis of the briefest of visits, the anthropologist submitted a two page report which made no recommendations and drew no conclusions. This intervention was quoted repeatedly by the company as clear confirmation of its license to proceed. This approach further angered and frustrated the Subanen, who attended meetings and signed petitions to remove the company only to find that their clearly expressed views would only to be allowed if "interpreted" by a company-hired researcher.

In Mindoro, the strength of opposition to the Crew mining project is deep and broad. Opposition rallies mobilise in the thousands. The governor, provincial board, and ten local mayors, have put themselves on record as opposing the project. The major alliances of indigenous peoples in the region oppose it. The scoping study meetings were stopped by protestors. The project has no local acceptance. However the company has taken measures to control the flow of information. In 1999, a local news agency, which local journalists report was financed by Mindex, began operation. The agency has certainly supplied favourable coverage of the company in the national press despite the sustained local opposition.

26. *Id.*

TVI has had particular problems in its claims of local support. Despite all company efforts, the recognised ancestral land holders remain opposed to the company operations.

Like other companies, TVI has made attempts to ignore opponents and their organisations, and promote the development of a tame alternative. Subanen from another area were recruited to work for the company and also lodged an ancestral land claim over the area. Under the patronage of the company, this group has also been recognized, and they occupy the relocation housing and participate in a company-initiated “co-operative.”

3. Gifts and Hospitality, Bribery and Coercion

It is clear from various accounts that some companies have invested heavily in winning over the press. Other questionable efforts to influence decision-making have also been made.

WMC has devoted jobs and projects to secure the support of local leaders. Houses and community halls have been built. Relatives of the *datus* (tribal chiefs) have been added to the company pay role as community liaison officers. Some *datus* have been taken to Manila and, according to reports, given lavish hospitality and taken to night clubs. Everywhere, companies promise jobs and roads and clinics and the moon to decision-makers in extremely poor communities. However, their promises have few controls and no bonds against failure to deliver.

Despite strong denials by TVI, there are reports that the company has offered money in return for support. The Christian Aid and PipLinks Report documented a case in which a village captain submitted a sworn affidavit that he was offered money by TVI's chief of security in return for supporting a motion promoting TVI.²⁷ Likewise, members of the Council of Elders reported being offered 5,000 pesos (\$90) to support the pro-TVI resolution at the meeting in Zamboanga in October 2002. The Council of Elders are paid 6,000 pesos (\$105) a month by TVI as an honorarium for attending meetings. The company defends these payments on the grounds that it is offered to supporters and critics alike. However, the only people who attend Council of Elder meetings now that payments are offered are pro-TVI members. In Subanon culture, to take money implies acceptance of and even an obligation towards the giver.

In 1999, to prevent the entry of drilling equipment onto the mining site in Siocon, local people mounted a picket. Forty-five people maintaining a peaceful picket were manhandled, bound and beaten by a combined force of company security and the Philippine police. Leading company employees were present.

27. *Id.*

Local leader Onsino Mato attempted to read out their rights under the IPRA to prevent the entry of this equipment onto their land. He was beaten and arrested, removed from the site, and held for sixteen hours.

TVI reported the incident to the Toronto stock exchange as a story of paid picketers from outside the area causing isolated incidents of trouble. In fact, the company now faces the united opposition of the government-recognized ancestral landholders, the local church, other Subanen organisations, lowland farmers, and the current municipal mayor and council. SSAI has lodged a formal complaint in Canada against this misrepresentation.

TVI has maintained its grip on the area and advanced due especially to its deployment of a heavily armed security force. This Special Civilian Armed Auxiliary (SCAA) is a hybrid para-military group trained and armed by the Philippine military, but controlled by a security firm hired by the company and paid as company employees.

At its height, the SCAA numbered more than one hundred. Their weapons included high-powered rifles and even a howitzer field gun. The group was used both to secure the site claimed by the company, the core ancestral land and sacred grove of the Canatuan people. They have also been used to intimidate and drive away local residents. The local population includes not only Subanen but also some small-scale miners who pre-date the company's presence in the area and who live amicably along side the Subanen.

There is clear evidence to show that TVI has used its guards to establish checkpoints on the public highway to surround and isolate Canatuan. They can and do arbitrarily bar access to the community. A traditional leader has been barred from passing across "company land" on his way home to his house; he is forced to make a six kilometer detour.

Guards also have been instructed to bar access to goods; they have confiscated many goods, including food in some cases, and then extorted payments for its release. The checkpoints are also used to prevent small-scale miners from removing their tailings from the site as the company claims rights over all minerals on the site, although these miners pre-date the company by five years.

When local people asserted their right to free access to their community by carrying supplies in along foot trails, barbed spikes believed to have been placed there by the guards were found on the trail. Shooting incidents have been frequent; local residents have been fired upon and injured. Some incidents of indiscriminate or drunken firing have taken place, as have incidents of deliberate firing at signs of the small-scale miners' cooperative.

In March 2004, a group of protestors attempting to bar TVI from taking its digging equipment up the road to Canatuan were shot at by TVI security. Four people were injured by shrapnel. There are numerous other reports of human rights abuses by the SCAA, especially against small-scale miners. This militarization of mining is a disturbing and increasingly widespread development

that grows directly out of the misrepresentation, and the rising tension and conflict that inevitably follows.

In Mindoro, the frustration of local opposition being ignored by the company controlled national media and government exploded in 1999 with the burning down of company buildings. In response, the company requested increased militarization to secure their investment. Similar requests are reported to have been made by TVI for a battalion of troops to defend against insurgents. WMC was also accused by their critics of being behind the increased militarization, particularly military operations in and around Tampakan. A Canadian mining expert was killed in Nueva Vizcaya. The tension around mining sites is mounting across the country. The Philippine government must seriously reconsider its mining policy and reassess its implementation of IPRA.

This is indicative of the failure of mining projects to obtain the free, prior and informed consent of the affected indigenous communities and to respect their choices. The Philippine experience demonstrates a failure to implement the “spirit” of FPIC, as distinct from “engineering consent,” and formal compliance with the “letter” of the law. The case studies from the Philippines highlight the importance of robust regulatory frameworks at the national level, but also the need for national and local capacity and resources to ensure that the rights of indigenous peoples are truly respected in development projects.

IV. CONCLUSION

The power of free, prior, and informed consent lies in its potential to transform oppressive conditions by introducing processes that require negotiated agreements between indigenous peoples and the broader society. It requires relationships of respect and understanding among the interested and affected parties in a development process whose outcome lies in the hands of the parties themselves. While we must muster all of the economic, developmental, environmental, and technical arguments in support of FPIC, ultimately it will require a political process that prioritizes cultural and natural diversity as core values in our lives and our survival.

The experience of indigenous communities in the Philippines stands as a vehement reminder that surface level change is not sufficient; despite progressive law that promises to involve indigenous communities in the future of their ancestral lands, the indigenous voice continues to be manipulated and ignored in the face of foreign owned mining firms. When industry interests clash with local interests, the former continues to prevail. To counteract this, the national government, NGOs, and local communities will have to devote resources to promoting the access and information as well as the voice that the indigenous communities need to fully realize the benefits of free, prior, informed consent.

