

# Assessing Free and Prior Informed Consent (FPIC) implementation in the Philippines<sup>1</sup>

Climate-relevant Modernization of Forest Policy and Piloting of REDD in the Philippines

## Context

The 1987 Philippine Constitution guarantees the recognition of the rights of indigenous cultural communities over their ancestral domains including deciding priorities for their own development. Republic Act No. 8371 or the Indigenous Peoples Rights Act (IPRA) of 1997 was legislated to make these constitutional guarantees operational. The law recognizes the time immemorial possession of the Indigenous Peoples over their ancestral domain, which gave rise to the presumption of private ownership of these lands, including forests.

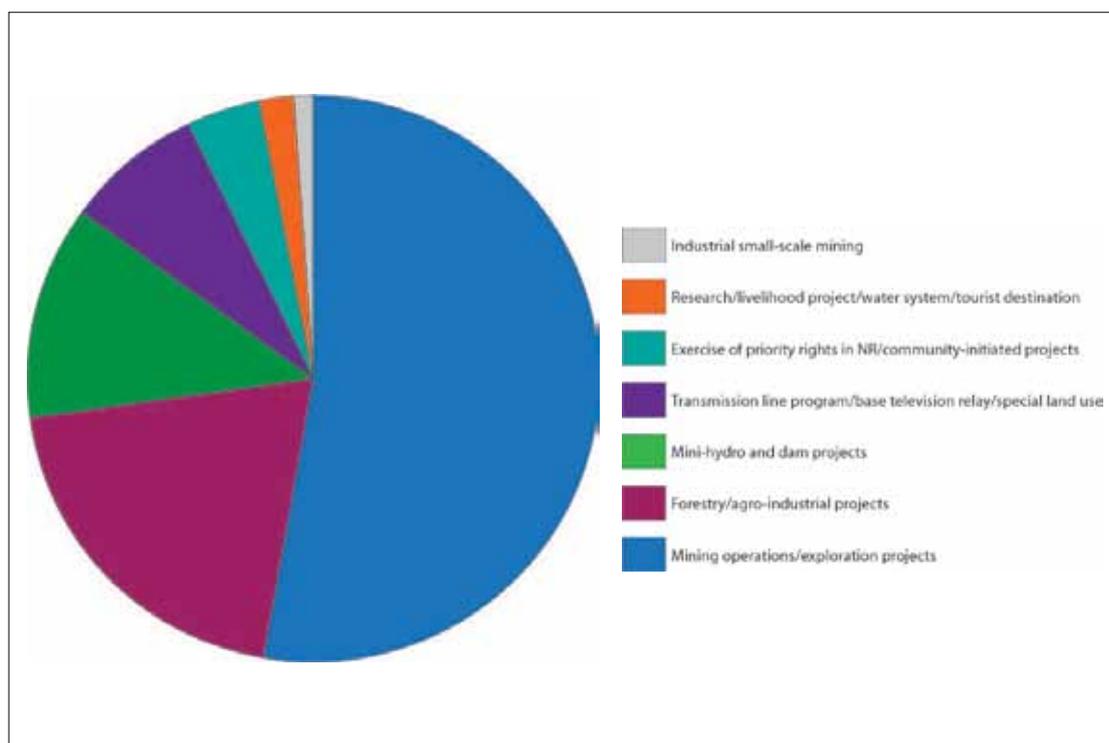
IPRA also recognizes the right of Indigenous Peoples to self-determination, of which Free and Prior Informed Consent (FPIC) is an expression. The FPIC requirement under Section 59 of IPRA states:

*[A]ll 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 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 new concession, license, lease, or production sharing agreement while there is pending application CADT: 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. (Emphasis supplied)*

The IPRA law created the **National Commission on Indigenous Peoples (NCIP)**, an agency with frontline services for the Indigenous Peoples, and it is attached to the Office of the President. The NCIP issues guidelines for the implementation of IPRA, some of which are the NCIP Administrative Orders laying down the FPIC Guidelines of 2002 and 2006, the implementation of which is the subject of this assessment.

<sup>1</sup> This assessment was part of a series of policy studies undertaken in the Philippines under the project "Climate-relevant Modernization of Forest Policy and Piloting of REDD in the Philippines" funded under the International Climate Initiative of the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) and implemented jointly by the DENR-FMB and the German-Development Cooperation-Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. The FPIC Study has been implemented by a team of researchers in close cooperation with the National Commission on Indigenous Peoples (NCIP) under GIZ contract with support from the Non-Timber Forest Products-Exchange Programme (NTFP-EP) through the ASEAN Social Forestry Network supported by the Swiss Agency for Development and Cooperation (SDC). Case studies in the Caraga Region had been supported by the GIZ COSERAM Project funded by the German Federal Ministry for Economic Cooperation and Development (BMZ).



**Figure 1. Classification of Certification Precondition issued by National Commission on Indigenous Peoples based on FPIC given by IP/ICCs**

Source: NCIP, December 2010

As of 31 December 2010, there are 309 areas with issued compliance certificates by the *Commission en banc* of the NCIP, on the basis of completed FPIC processes where consent was given by the communities. The latest data provided by the Ancestral Domain Office of the NCIP show that Certification Precondition covers a milieu of activities and may be disaggregated as shown in **Figure 1**.

However, there has been no monitoring and evaluation of the FPIC processes since the first Certification Preconditions were issued by the NCIP in 2004 despite the numerous issues and complaints raised with NCIP on the FPIC process. With the implementation of the 2006 FPIC Guidelines, there has been a tremendous 63% increase in the percentage of FPIC processes.

**With most potential REDD-Plus sites located in ancestral domains, the iterative**

**FPIC process remains the most concrete and basic safeguard for realizing IP rights in the context of REDD-Plus implementation. It is also a platform for the IPs to enforce their right to the equitable and fair sharing of benefits from the utilization of their natural resources, captured in a Memorandum of Agreement (MOA) that is mutually agreed upon by the parties, the IP and the project proponent.**

The FPIC Guidelines lay down a uniform and mandatory mechanism, but the actual decision-making process varies depending on the customary law of the concerned ICCs/IPs, i.e. whether the community decision is to be given by the elders/leaders or by the community members involved through household representation or otherwise. In practice, the process may include a ritual that could be in the form of an offering, dance, prayer or combination of all these forms.

Whatever the decision-making process is for the community, the FPIC Guidelines stresses the primacy of cultural integrity while ensuring that the processes are empowering the IPs by requiring that the process is presented by the recognized elders/leaders to the community and affirmed by the latter. Despite the customary decision-making processes that may be executed, the guidelines require that consensus-building shall be observed at all times. A separate process for determining and validating the legitimate or recognized elders/leaders is also provided.

### What is FPIC?

FPIC is a mechanism and a process wherein Indigenous Peoples (IPs) undertake their own/independent collective decision on matters that affect them, as an exercise of their right to their land, territories and resources; their right to self-determination; and cultural integrity. Under the IPRA, Free and Prior Informed Consent (FPIC) is defined as:

“The consensus of all members of the ICC [Indigenous Cultural Communities]/IPs which is determined in accordance with their respective customary laws and practices that is free from any external manipulation, interference and coercion and obtained after fully disclosing the intent and scope of the plan/program/project/activity, in a language and process understandable to the community. The FPIC is given by the concerned ICCs/IPs upon the signing of the Memorandum of Agreement (MOA) containing the conditions/requirements, benefits as well as penalties of agreeing parties as basis for the consent.”

A proof that a project proponent has complied with the FPIC process is the Certification Precondition. This is a certification issued by the NCIP, either by the Commission en banc or by the Regional Director, depending on the classification of the project, attesting that the applicant has complied with the requirements of the FPIC Guidelines.

## The Assessment

The main objective of the study is to assess the implementation of the FPIC Guidelines in randomly selected IP communities in the Philippines using both quantitative and qualitative research methodology; the latter particularly used the case study approach. The primary unit of analysis of the case study is the FPIC coverage area within the ancestral domain, defined by the FPIC Guidelines as the direct impact area and/or area that had undergone the process of FPIC. The case study covered 10% of the issued Certification Precondition by 31 December 2010, and randomly selected and “special sites” reported to have unique experiences in FPIC implementation. A total of 34 case studies, involving around 20 ethnic groups, were analyzed for this report, with projects classified in **Table 1**.

**Table 1. Projects of the case studies**

Project type	Number of cases	Percentage
Mining related	17	50%
Energy related	5	14.7%
Integrated Forest Management Agreement	5	14.7%
Conservation/ reforestation	2	5.9%
Others	2	14.7%

Except for the two cases of conservation or reforestation that account for only 5.9% of the total projects evaluated, the rest are either extractive and/or intrusive into the properties of the Indigenous Peoples.

## Findings

The assessment involved two processes: the technical/procedural compliance with the FPIC Guidelines and the substantial compliance, which refers to the degree of observance of the basic tenets of the Free and Prior Informed Consent. In effect, substantial compliance is an evaluation to indicate whether the consent of the communities affected was not vitiated, coerced or disregarded.

In the procedural compliance, a significant plurality of the studies does not show violations on the pre-FPIC activities; however, substantial incidents of violations were reported during the actual conduct of the FPIC (41.2%), more so during the MOA signing and post-FPIC activities (50%). In the last two phases, the list of violations reveals a manipulative scheme on the part of the proponents to get the “consent” of indigenous communities.

Findings in the different stages of FPIC implementation are briefly described as follows.

### Conduct of Field-Based Investigation

There are no reported violations in 44% of the case studies, whereas reported violations are on the composition of the Field-Based Investigation, which was limited to a number of barangays rather than all affected barangays and an incident of no actual visits in the affected area .

### Pre-FPIC

Only two case studies reported some violations, but it is worth noting, however, that 11 case studies do not have any data where an evaluation can be arrived at.

### FPIC proper

More than half of the case studies (61.5%) reported violations of the guidelines. The most frequently violated rule is on venue.

FPIC proper is conducted outside the community, limiting community participation and is oftentimes a premeditated design to exclude those who are perceived to be opposed to the project. Other noted violations are on: questionable selection and validation of leaders; management of funds by applicants; transfer of Certification Precondition without FPIC; and absence of consensus-building or the freedom period is not followed. In addition, the number of votes is manipulated to give a semblance of majority vote, a mechanism combining the votes of two different communities in order to get a cumulative consenting vote, clustering the community or phasing the consent of communities.

### MOA signing and post-FPIC activities

Fifty percent of the case studies reported violations during this stage. This is alarming considering that the signing of the MOA is the operative act that binds the IPs to the stipulations contained in the agreement. Just as importantly, the MOA is a proof that the project proponent can now start the project. The reported violations for this stage centered on: signing conducted outside the NCIP provincial office; lack of qualification and/or validation of signatories; lack of knowledge of what was being signed/forgery; absence of NCIP officials during signing; the MOA was not presented to the community before signing; and the MOA does not reflect the true intention of parties. Serious allegations of coercion and kidnap were documented in one MOA signing that took place in another province reachable only by big boats.

The assessment illustrates that with regard to non-implementation of agreed upon or promised benefits, an alarming 80% of the violators were allegedly guilty of this. Admittedly, the FPIC Guidelines is bereft of any strong regulations regarding the monitoring of the MOA implementation.

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**“FPIC implementation” is used to broadly refer to compliance with the FPIC Guidelines, which cover, among other things, the conduct of the Field-Based Investigation, pre-FPIC activities other than the Field-Based Investigation, FPIC mandatory activities, and post-FPIC activities including the signing and implementation of the MOA.**

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On the **substantial implementation of the principles and “spirit” of Free and Prior Informed Consent**, 41.2% of the case reports claimed that the consent of the communities were freely given. However, 35.4% reported that the consent was given by IPs without sufficient information to arrive at a rational decision. An alarming 23.6% or eight case reports stated that consent was not freely given. This involuntary consent is said to be mainly because of the economic status of the IPs; however, instances of direct bribery, coercion, intimidation and manipulation likewise appeared as among the other reasons for not having a free consent.

There are nine case reports that revealed that proponents already started their operations before seeking the consent of the communities, and there are cases where no FPIC was conducted for two reasons: either the project was community initiated or there are no IPs found in the area. **The community-initiated cases were found to be very susceptible to manipulations by the applicants who wish to circumvent the rules.** This has to be seriously looked into.

The consent of the community was equated with the “majority’s preference”, which is expressed in a variety of ways including (a) the use of “sweet-smelling” jackfruit leaves to indicate a vote of approval or guava leaves to show rejection; (b) secret balloting; and (c) raising of hands. Note here that in some instances, community consent actually refers to the decision of a very small group of male leaders.

An interesting finding of this study is that **although indigenous notions of consent do exist, and that there are culture-based and site-specific customary practices of giving consent, the modern and liberal concept of “majority rule” (50+1) had become widely utilized by IP communities.** This may be seen as an effective imposition by the State and other modernizing institutions, but it may also be explained at the same time as an increasing accommodation by the Indigenous Peoples themselves of non-indigenous or modern practices. An increasing number of IP communities and peoples may in fact choose to move from customary to state institutions, or both, single-mindedly or simultaneously, depending on the circumstances and perceived immediate benefits that they could derive from these institutions.

**Overall, the assessment shows that in most cases, there had been considerable procedural and substantial violations of the FPIC Guidelines. The assessment could not state a more than 50% full and faithful implementation of the guidelines. For the most part, indigenous communities have been short-changed, if not deceived by many FPIC applicants.**

## Recommendations for NCIP

- NCIP staff must fully understand the FPIC principles and process;
- Assess its capacity to perform its mandate;
- The NCIP should be beefed up with technical expertise;
- The NCIP should conduct a thorough background investigation about the applicants, including a projected income from the projects, and make this information available to the IPs;
- The NCIP should conduct a social and Environmental Impact Assessment of projects, and make the information available to the community;
- The NCIP must be constantly reminded that its mandate is to protect the rights of IPs—it has a preferential bias for IP rights (NCIP should not work on behalf of companies);
- Strengthen the role of the Regional Review Team especially in ensuring that the FPIC process was implemented accordingly and the MOA reflects the sentiments of the community;
- Complete and make accessible to the public a database consisting of a master list of the ancestral domain and all relevant project documents including Field-Based Investigation reports, Certification Precondition issued and monitoring; and
- Conduct regular local inter-agency meetings for proper coordination.

## FPIC financing

- a. NCIP should be provided with sufficient funding to insulate it from undue influence from vested interests.
- b. Contingency funds should be added in the work and financial plans for the Field-Based Investigation and FPIC processes.
- c. The Field-Based Investigation applicant should directly disburse expenses without depositing it with the NCIP to avoid delays and accusations of corruption, among others.
- d. There should be different requirements and expenses for projects according to coverage/scale. Expenses should be commensurate to the project size.
- e. There should be a clear provision on what to do with unused FPIC funds. A time limit should be set for the applicants to withdraw unused funds.
- f. Expenses incurred for the FPIC should be audited, and the financial report should be presented to the community.

## Recommendations for policy makers

Based on the foregoing findings, this study puts forward the following recommendations toward improved FPIC Guidelines:

1. The FPIC process should include not only the directly affected areas and IP communities but also those areas that will be affected by the project (e.g. upstream and downstream communities, IPs and non-IPs, migrant IPs).
2. The ancestral domain should be the primary unit for consideration in FPIC, not the political boundaries.
3. The Certificate of Compliance should not be transferrable to other companies without the FPIC of the Indigenous Peoples concerned.
4. The IP communities should be allowed sufficient time to collectively deliberate on the application and give their consent. They should not be tied to very tight time lines imposed by the applicants and NCIP.
5. FPIC should be implemented in each phase of the project (in mining, FPIC should be done before the conduct of due diligence, exploration, extraction, etc.).
6. Full disclosure of information to the community should be done in a language and manner understandable to them.
7. Conduct of Environment Impact Statement/Assessment before the conduct of the FPIC should take place as it will be part of the information that the community will take into consideration when they make their decision.
8. Build the capacity of the National Commission on Indigenous Peoples (NCIP) to perform its mandate.
9. There should only be one Certification Precondition issued for one application.
10. Provision for specific and adequate operational guideline for NCIP staff, IPs or LGUs, in cases of violation of the substantial and technical guidelines of the FPIC process.
11. Provision for stakeholder engagement for the NCIP on monitoring FPIC contracts with the view that it is not only the economic benefits that need to be assessed but also the cultural and environmental impacts of development-oriented projects and investments into the ancestral domain.
12. Establish/clarify and disseminate information about grievance mechanisms within the FPIC processes and how these processes can be availed by the community. The available grievance mechanisms should be part of the topics to be discussed during the meetings with the community.
13. Improve guidelines on execution and monitoring of Memorandum of Agreements (MOA) by providing the following rules:
  - The deliberations on the content of the MOA should involve IPs as widely as possible;
  - The draft MOA should be brought to the community, explained to the IPs and translated in their indigenous language before it is finalized and signed;
  - The signing of the MOA should be done within the community;
  - The implementation of the MOA should be closely monitored by the NCIP and/or a multi-stakeholder body with guidelines on monitoring put in place;
  - Clear provision on royalties and benefit sharing schemes in order that IPs are not short-changed; and
  - The MOA should explicitly include a provision for a grievance mechanism—a check against non-implementation of the provisions of the MOA.

*A number of these recommendations were already addressed when the NCIP issued the 2012 FPIC Guidelines, which became effective on 16 May 2012. The field researchers involved in this study have also shared practical lessons to inform the formulation of the said new guidelines.*

For more information

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