

# **A Discussion Paper on the Mining Industry and the Indigenous Peoples Rights Act**

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# **A Discussion Paper on the Mining Industry and the Indigenous Peoples Rights Act**

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## **EXECUTIVE SUMMARY**

Republic Act No. 8371, the Indigenous Peoples Rights Act or “IPRA”, was enacted in 1997. Central to this law are provisions thereunder on the rights of indigenous peoples, or IPs, including those over ancestral domains and lands. The law covers all activities within these areas, including development projects conducted or sought to be conducted in these areas by non-IPs. Current and prospective mining activities, many of which are situated in rural areas inhabited by IPs, are inevitably and directly affected.

Thus, the IPRA has raised a complex range of issues and concerns for the Mining Industry<sup>1</sup> which have resulted in a considerable degree of uncertainty. This uncertainty has been invoked as a major reason for the scaling down and withdrawal in the past year and a half of investments in the Mining sector.

In the Philippine context, perspectives with respect to large-scale mining are sometimes reduced to extremist “anti” or “pro” positions which view the activity as either inherently negative or positive. In such a polarized context, little room is left for genuine dialogue. The interests of mining companies and IPs, for example, have been pitted against each other, and often seem inherently conflicting. Hence, there is a consequent need for the concerned sectors to confront these issues, not in an adversarial manner, but through means which facilitate greater understanding.

The primary purpose then for this Discussion Paper is to focus on these issues raised by the IPRA and to analyze their implications for the Mining Industry. It is not an advocacy project for any particular sector or side, but rather strives to objectively analyze pertinent developments, examine different positions and perspectives. As such, it may serve as a springboard for dialogue and more meaningful discussion among concerned sectors, with a view to formulating proposals for the resolution of such issues.

### **RELEVANT FACTORS IN THE EVOLUTION OF THE IPRA**

In order to examine the impacts of the IPRA on the Mining Industry, an analysis of the IPRA itself and its provisions is necessary. To hopefully contribute to a better understanding of this law, this initial section considers the factual and legal factors that were relevant in its promulgation.

#### **General Description of Indigenous Peoples**

The term “indigenous peoples” as defined by the IPRA refers to groups which:

- have continuously lived as an organized community on communally bounded and defined territory, occupied, possessed and utilized such territories under claims of ownership since time immemorial;
- share common bonds of language, customs, traditions and other distinctive cultural traits; or
- are historically differentiated from the majority through resistance to political, social, cultural inroads of colonization, non-indigenous religions & cultures.

The term “IPs” as defined under the IPRA also includes those descending from original populations who retain some or all of their own social, economic, cultural and political institutions although they may have been displaced from or resettled outside their ancestral domains. Denominated alternatively as indigenous cultural communities (“ICCs”), they are situated in various lowland, forest and coastal areas throughout the country. With a population of approximately twelve to thirteen million in 1993, they constitute roughly 18 % of the total national population and are divided into 110

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<sup>1</sup> As explained in Part III hereof, the term “Mining Industry” shall, for purposes of this paper, refer to companies involved in large-scale mining activities.

ethnolinguistic groups.

Studies conducted by both local agencies and international organizations have identified that among the common characteristics IPs share is the lack of centralized political institutions, since they are organized at the level of the community. They have a worldview which includes a custodial and non-materialist attitude to land, which they regard as sacred and with which they have a symbiotic relationship. This relationship is the basis for what they believe is their collective responsibility as stewards of the earth for future generations.

Some of the IPs' fundamental problems have also been identified, including economic marginalization, social and cultural displacement and political disenfranchisement. Among the factors which have contributed to these problems are the lack of a common vision about development for and by the IPs, the absence of mechanisms for consultation, the lack of consensus among IPs themselves about their development priorities, and pressure on ancestral lands by political and economic development.

There is no question that there are IPs who have been adversely affected by development strategies and activities. In this regard, the 1987 Constitution recognizes the need to balance interests when it provides that the State promotes the rights of IPs within the framework of national unity and development.

## **Legal Developments**

This section examines the legal framework relevant to the promulgation of the IPRA. An overview of pertinent developments in international law, foreign laws and national laws clearly shows that the IPRA was not formulated in a vacuum. Although significant provisions of the IPRA echo principles and concepts not only found in prevailing international laws but also in existing national laws, other important provisions are unprecedented. The primary example of this is the recognition given to a broad range of rights over their ancestral domains and lands, and the natural resources therein.

### *International Law*

Policies in past decades which focused on assimilation of IPs into the mainstream have been replaced by the recognition of IPs' right of self-determination in consonance with other international conventions on human rights. This is what is advocated in International Labour Convention No. 169 ("ILO Convention 169") which also recognizes IPs' rights of ownership and possession over lands traditionally occupied by them.

As for natural resources pertaining to their traditional lands, this Convention recognizes IPs' rights to participate in their use, management and conservation. Whether and to what extent IPs are granted ownership of mineral and other natural resources within their traditional lands is determined by the concerned State. This is consistent with the principle of State sovereignty and is also supported by Article 34 of the same Convention which provides that "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country."

The Draft Universal Declaration on the Rights of IPs recognizes their right to own the total environment and other resources which they have traditionally owned, occupied or used. Being a draft, it is not, however, legally binding. Other international agreements such as those resulting from the Rio Summit highlight the role of IPs and the need to integrate their practices with current approaches in sustainable development. In general,

these agreements called for the recognition of the knowledge of IPs, prescriptions to states to support their culture and to guarantee their effective participation.

### *Foreign Laws*

The foreign laws briefly discussed reflect various perspectives, specifically in relation to IPs rights over the mineral resources within lands traditionally held by them. There is no prescribed way of approaching these issues but, in an apparent reflection of Art. 34 of ILO Convention, these are dealt with in a manner that considers the conditions characteristic of each country. This is also consistent with a State's sovereign prerogative to determine the nature and extent of rights over mineral and other natural resources.

One criticism of the IPRA is that it appears to grant what some consider automatic ownership not only over ancestral lands but over ancestral domains which include, by definition, the mineral and other natural resources therein. It is argued that the grant of ownership over minerals is neither found nor supported in any binding international texts nor under any foreign laws. The nature and extent of rights which are granted under the IPRA to IPs over natural resources within their ancestral lands and domains are fundamental issues pending before the Supreme Court.

### *Philippine Legal Developments*

In recent years, there have been significant legal developments pertaining to the interests of IPs. The 1935 Constitution had no express statement on the matter while the 1973 Constitution had only one provision. In contrast, the 1987 Constitution contains a significant number of provisions on IPs and formally recognizes the concepts of ancestral lands and domains. These provisions reveal the divergence between civil law and customary law as the fundamental issue underlying state policies on IPs. Attempts to balance these apparent antagonisms are evident in provisions like Section 22 or Article II which provides that the "State recognizes and promotes the rights of indigenous cultural communities *within the framework of national unity and development*".

Similar to international legal developments, the different Philippine laws on IPs prior to the promulgation of the IPRA reflect the shift in policy from assimilation to recognition of IPs' right of self-determination. Specific policy shifts are also evident toward community-based management, toward recognizing the value of indigenous knowledge and practices in sustainable development and toward ensuring the participation of IPs in relevant local and national policy bodies.

With respect to ancestral domains and lands, the most significant legal developments took place within the framework of the Department of Environment and Natural Resources ("DENR"). DENR Administrative Order No. 2 ("DAO 2") provided for the identification, delineation and recognition of ancestral land and domain claims leading to the issuance of a Certificate of Ancestral Domain Claim ("CADC") and Certificate of Ancestral Land Claim ("CALC"). Although CADCs and CALCs are significant tenurial instruments, these were not grants of title.

There were many significant legal developments concerning IPs even before the promulgation of the IPRA, such as Section 16 of the Mining Act whereby IPs' prior consent is required before mining activities can be undertaken in ancestral lands. With respect to ancestral domains, the 1987 Constitution recognizes this concept in laws like RA 6734, the Organic Act for the Autonomous Region of Muslim Mindanao, and in rules like DAO 2. Furthermore, significant principles in our Philippine laws prior to the IPRA appear to echo international law principles, including:

- recognition of IPs rights to their ancestral lands;

- the right to be consulted with respect to activities affecting them;
- their right to give their prior consent before certain activities within their ancestral lands or domains may proceed;
- the right to benefit from utilization of natural resources within their ancestral lands and domains;
- the right to be fairly compensated for any damages sustained as a result of certain activities undertaken within their ancestral lands and domains, specifically mining activities;
- a right of priority to be awarded certain contracts within their ancestral lands, in the case of small scale mining, and the priority rights in the exploration, development and utilization of natural resources within their ancestral domains, in the case of the Autonomous Region of Muslim Mindanao;
- the recognition of and respect for customary laws, specifically with regard to determining the extent of their lands and domains;
- their right of effective participation in the local and national levels; and
- the recognition of their role in environmental management.

Although these and other laws promoted the welfare of IPs and expressly called for a recognition of their rights and value, there was no express recognition of the right of ownership by IPs of their ancestral domains, and the natural resources therein, by virtue of their historical occupation and relationship to the same. This is one main area in which the IPRA appears to make a radical legal departure.

### **FOCUSING ON THE IPRA**

The foregoing background on the IPs and the pre-IPRA legal framework sets the stage for consideration of the Act itself. This includes a brief consideration of the issues involved in the present legal challenge to the IPRA before the Supreme Court.

#### **Salient Provisions of the IPRA**

The IPRA<sup>2</sup> was signed into law on 29 October 1997 and took effect on 22 November 1997. It reflects Congress' interpretation of the 1987 constitutional directive to protect the rights of IPs to their ancestral lands to ensure their economic, social, and cultural well being. Pursuant to the second paragraph of Section 5 of Article XII of the Constitution, it also provides for the applicability of customary laws governing property rights and relations in determining the ownership and extent of ancestral domain.

As such, this single law contains the most comprehensive policies and measures concerning IPs in Philippine legal history. It contains an exhaustive enumeration and description of their rights and responsibilities. However, given the context of and purpose for this Discussion Paper, only provisions of the IPRA which impact on large-scale development projects and resource-extractive industries such as mining are discussed.

The IPRA provides that *ancestral domains and lands* cover not only the physical environment but the total environment including the spiritual and cultural bonds to the areas which the IPs possess, occupy and use and to which they have claims of ownership. The concept of 'ancestral domain', which includes natural resources, is much broader than the concept of 'ancestral lands' which refers to areas that have already been subjected to occupation or cultivation. The IPRA qualifies the definitions of ancestral domains and lands with Section 56 thereof, which provides that property rights within the ancestral domains already existing and/or vested upon effectivity of the IPRA shall be recognized and respected.

*Certificates of Ancestral Domain and Land Titles ("CADT" and "CALT")* are titles formally recognizing the rights of possession and ownership of IPs over their ancestral

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<sup>2</sup> Republic Act No. 8371, "An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating A National Commission On Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, And For Other Purposes"

domains and lands, respectively. Formal recognition of these rights by virtue of *Native Title* may also be embodied in the CADT. The IPRA defines ‘*Native Title*’ as pre-conquest rights which, as far back as memory reaches, have been held under a claim of private ownership, have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest.

IPs whose ancestral domains were officially delineated under DAO 2 or any previous ancestral domain program have the right to apply for the issuance of a title over the area without going through the detailed process outlined under the IPRA. Those whose ancestral domains have been officially determined by the National Commission on Indigenous Peoples (“NCIP”) shall be issued the corresponding CADT or CALC. The NCIP has jurisdiction over certified ancestral domains. All lands certified as ancestral domains shall be exempt from real property taxes and other forms of exaction except such portion as are actually used for large-scale agriculture, commercial forest plantation and residential purposes or upon titling by private persons.

The ***Indigenous Concept of Ownership***, as defined in the IPRA, reflects the view that ancestral domains and all resources found therein serve as the material bases of IPs’ cultural integrity. It covers sustainable traditional resource rights, which refer to the right to sustainably use, manage, protect and conserve the land, resources and sites within their ancestral domains and lands in accordance with their knowledge, beliefs, systems and practices. Consequently, the IPRA defines ancestral domains as the IPs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed.

The ***rights of ownership and possession of IPs*** to their ancestral domains delineated under the IPRA include the right to claim ownership over lands, bodies of water traditionally and actually occupied by IPs. These also include the right to develop lands and natural resources subject to Section 56 on vested rights. In the development or exploitation of any natural resources within their ancestral domains, IPs shall have priority rights but may allow a non-member to conduct such activities subject to term limits and to the condition that a formal written agreement is entered into with the IPs.

The IPRA further provides that IPs shall have the right to stop or suspend any project that has not satisfied the requirement on the consultation process necessary in complying with the Certification Precondition. This precondition states that no government agency may grant or renew any concession or enter into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain.

IPs also have the right to manage and conserve natural resources for future generations and the right to negotiate the terms and conditions for the exploration of natural resources for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws.

As used in the IPRA, “***free and prior informed consent***” (“***FPIC***”) means the consensus of all members of the IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community. The following are among the pertinent situations where the free and prior informed consent of IPs must be obtained under the IPRA:

- No government agency shall grant or renew any concession, license or lease, or enter into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. No such certification shall be issued without the FPIC of the IPs concerned.

- The Ancestral Domains Office (“ADO”) of the NCIP shall issue, upon the FPIC of the IPs concerned, certification prior to the grant of any license, lease or permit for the exploitation of natural resources affecting IPs or their ancestral domains.

**Customary laws** are defined under the IPRA as a body of written and/or unwritten rules, customs and practices traditionally and continually recognized, accepted and observed by IPs. IPs have the right to use their own customary laws within their respective communities as may be compatible with the national legal system and with internationally recognized human rights. When disputes involve IPs, customary laws shall be applied. Customary laws of IPs in the land where the conflict arises shall be applied first with respect to property rights, claims and ownership, hereditary succession and settlement of land disputes. Any doubt in the application and interpretation of laws shall be resolved in favor of the IPs.

The IPRA established the ***National Commission on Indigenous Peoples, or the NCIP***, as an independent agency under the Office of the President. It is the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well being of IPs. Composed of seven Commissioners, all belonging to ICCs, among its significant responsibilities are to:

- issue certificates of ancestral land/domain title
- enter into contracts, agreements, or arrangements, with government or private agencies or entities as may be necessary to attain the objectives of the law, subject to existing laws and
- issue appropriate certificates as a pre-condition to the grant of permit, lease, grant, or any other similar authority for the disposition, utilization, management and appropriation by any private individual, corporate entity or any government agency, corporation or subdivision thereof on any part or portion of the ancestral domain taking into consideration the consensus approval of the ICCs/IPs concerned.

### **The Petition Before the Supreme Court**

The present legal challenge to the IPRA before the Supreme Court was filed in September of 1998 by petitioners Isagani A. Cruz and Cesar S. Europa against the NCIP, the Department of Environment and Natural Resources (“DENR”) and the Department of Budget and Management (“DBM”). The Court thereafter allowed the intervention of parties led by Hon. Juan Flavier (“Hon. Juan M. Flavier et. al”), Ikalahan Indigenous People and Haribon Foundation for the Conservation of Natural Resources, Inc. Oral arguments were held on 13 April 1999, after which the Court required the parties to file their respective final memoranda which serve as the primary reference for the arguments summarized herein.

The Court has not ruled on the procedural issues which pertain to the legal standing of the petitioners, the existence of an actual case or controversy, and the principle of respect for the hierarchy of courts. If the Court determines that it does not have and will not assume jurisdiction based on these issues, then the Petition may be dismissed without any ruling on the substantive issues. In this eventuality, the law continues to have full force and effect. However, even if the Court finds that it has no jurisdiction based on technical grounds, it may exercise its discretion to brush aside such technicalities in order to assume jurisdiction and resolve matters involving public interest and substantive justice.

Should the Court determine that it has or will assume jurisdiction, then it may decide the case on the merits. With respect to the substantive aspects in this Petition, petitioners pray for a declaration of unconstitutionality. Specifically, these issues are:

- *Whether or not the IPRA violates the 1987 Constitution, specifically the Regalian Doctrine;*
- *Whether or not the IPRA deprives other interested parties due process and equal protection of the law; and*
- *Whether or not the IPRA impairs the President’s power of control.*

The focus of this section is the first two substantive issues, as it is these which are directly relevant to mining activities within ancestral domains and lands.

*Whether or not the IPRA violates the 1987 Constitution, specifically the Regalian Doctrine*

**Petitioners** maintain that the provisions of the IPRA on the IPs rights of ownership over the land and natural resources within their ancestral domains violate the Regalian doctrine as expressly provided in the 1987 Constitution, that is, that all lands of the public domain, minerals and other natural resources are owned by the State. Petitioners also assert the violation of the provision of the Constitution that the exploration, development and utilization of natural resources shall be under the control and supervision of the State. The Regalian doctrine must be respected, even in areas said to be within ancestral domains. This doctrine protects the rights of all Filipinos to our natural resources. Over 400 years of political history of the Philippines cannot be ignored. The Philippine State is the successor to the rights, duties, powers and responsibilities of the former colonizers.

The **Office of the Solicitor General (“OSG”), representing the DENR and the DBM**, partly joins the petitioners insofar as they assail the constitutionality of IPRA provisions conferring to IPs ownership of natural resources as violative of the Regalian Doctrine. The OSG contends that police power abates vested rights and that through the Constitutions that have been adopted, the State has wrested control of those portions of the natural resources it deems absolutely necessary for social welfare and existence. Time immemorial possession does not create private ownership in cases of natural resources that have been found from generation to generation to be critical to the survival of the Sovereign and its agent, the State.

According to the **NCIP**, the IPRA is consistent with the 1987 Constitution. Since the explicit classification of the public domain does not include ancestral domains or lands, these concepts are not included therein and are, therefore, deemed to be of private character. The Regalian doctrine did not convert all lands and natural resources into public domain. The NCIP further holds that the IPRA does not cause the State to abdicate its rights over natural resources within ancestral domains, but rather seeks to strike a reasonable balance between the interests of IPs and non-IPs in the development of these resources. The foremost requirement therefor is the IPs’ free and prior informed consent.

**Intervenors Hon. Juan Flavier et al** share NCIP’s position that ancestral domains/lands are not lands of the public domain. The rights comprising IPs concepts of ‘ownership’ are defined not under civil law but by the IPRA. Consequently, neither the Regalian doctrine nor customary law will be considered as the primary rule, but there will be a balancing of interests by the State. Regarding rights over natural resources, these may vest on a private holder if held prior to the 1935 Constitution. Natural resources outside ancestral domains are controlled by the State. Those within ancestral domains, as may be defined by Congress, are still controlled by the State as governed by the legislative power granted under Section 5, Article XII. Section 2, Article XII is premised on commercial exploitation, the objective of which was to guard against alien ownership and control of many resources by a few.

For **Intervenors Ikalahan Indigenous People and Haribon Foundation for the Conservation of Natural Resources, Inc.**, the indigenous concept of ownership in the IPRA is different from that in civil law. The IPRA does not deprive the State of its ownership over natural resources. The IPs right to develop lands and natural resources is concomitant with their duty to uphold these for future generations and to ensure ecological ends, not for commercial gains. As far as commercial exploitation of natural resources is concerned, what the law grants to IPs are mere preferential rights, not absolute ownership. Nowhere does it say that the agreement for the exploitation, development and utilization of natural resources is to be entered into between the IPs and non-IPs. This power remains vested with the State. What the law merely requires as a prerequisite is the IPs’ prior and informed consent.

*Whether or not the IPRA deprives other interested parties of due process and equal protection of the law*

The *Petitioners* maintain that the following provisions of the IPRA deprive those who are not IPs of due process and equal protection of the laws: (1) where private lands are included within the coverage of ancestral domains amounting to a deprivation of property; (2) where exclusive jurisdiction to decide disputes involving IPs is vested in the NCIP, which is composed exclusively of members of IPs; and (3) where customary laws are made applicable to settlement of disputes on property rights.

The *NCIP, OSG and the Intervenors* all maintain the contrary position. All invoke the provisions on ancestral domains/lands which are qualified by Section 56 of the IPRA on the recognition of property rights within ancestral domains already existing and/or vested upon the effectivity of the IPRA. Neither is the provision that the NCIP be entirely composed of IPs prejudicial to non-IPs as ethnoninguistic affiliation is not a valid basis for claiming bias or partiality. Finally, customary laws are not the only recourse of non-IPs as other remedies exist in law. Any adverse decision of the NCIP is appealable to the Court of Appeals.

There are thus three basic positions: that of the Petitioners', who allege that the IPRA is unconstitutional; the position of the OSG, which prays for a declaration of partial unconstitutionality; and that of the NCIP and the intervenors, who, despite variances in their legal interpretations of the IPRA, maintain that the law is not unconstitutional.

Should the Court find the Petition meritorious and declare the IPRA unconstitutional, the law would thus lose all force and effect following the doctrine that an invalid act is inoperative, a total nullity. This doctrine, however, is not absolute and admits of certain qualifications since the actual existence of a statute prior to a determination of unconstitutionality may have consequences which cannot always be erased by a new judicial declaration.

If the Court upholds the position of NCIP and the intervenors, it will thus dismiss allegations on the unconstitutionality of the IPRA thereby upholding its validity. In this case, the law continues to be effective, and its execution unhampered. The agencies mandated with its implementation would continue carrying out their task, including filling in whatever gaps or details the Legislature left for administrative action. These agencies shall be duly guided, however, by whatever interpretation or guidance the Court may have provided in its Decision.

Should the Court render a declaration of partial unconstitutionality based on the OSG's position, then those portions of the IPRA which are struck down as invalid by the Court shall lose all force and effect, leaving unaffected the other provisions. Such a declaration requires that the portions not declared invalid can stand independently as a separate statute and that the legislature is willing to retain these portions.

## **THE MINING INDUSTRY**

An analysis of the impacts of the IPRA on the Mining Industry necessarily calls for a consideration of the legal and administrative framework under which the industry operates, relevant economic factors and tenement conditions. The term 'mining industry' shall refer primarily to companies engaged in the large-scale exploration, development and utilization of mineral resources, and the impact on small-scale mining will not be addressed specifically. It is these entities which have mining rights or applications covering large tracts of land in different parts of the country and it is likely that many such areas are either occupied by IPs or are claimed ancestral domains/lands.

### **Legal and Administrative Framework**

#### *Background*

The Philippine Bill of 1902 provided that mineral deposits in public lands were free and open for exploration, occupation and purchase by either citizens of the United States or the Philippines. Under the 1935 Constitution, the Regalian doctrine was expressly adopted, i.e. that all natural resources belong to the State, subject however to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under that Constitution. Pursuant thereto, Commonwealth Act No. 137 was passed in 1936, formally ushering in the leasehold system. However, by virtue of the qualification in the 1935 Constitution, mining claims located and recorded under the Philippine Bill of 1902 were not entirely covered by the new framework insofar as these could be the subject of a patent.

The 1973 Constitution maintained the Regalian doctrine but no longer qualified its application over claims made or rights granted prior to the effectivity of said Constitution. Pursuant thereto, Presidential Decree No. 463 (“PD 463”), the Mineral Resources Development Decree of 1974, was passed. PD 463 continued, however, to recognize rights and reservations made under the Philippine Bill of 1902.

The complete application of the Regalian doctrine over mineral lands and resources came in 1977, with the promulgation of Presidential Decree No. 1214 (“PD 1214”). Under this law, all holders of unpatented mining claims located under the Philippine Bill of 1902 were required to file mining lease applications therefor, thereby waiving their rights to the issuance of mining patents. Otherwise, they would forfeit all their rights to such claims. PD 1214 has been upheld by the Supreme Court as a valid exercise of the State’s police power.

Under the 1987 Constitution, mineral and other natural resources are owned by the State and, except for agricultural lands, shall not be alienated. Natural resources constitute part of the national patrimony and are essential for national economic development and security. Hence, full control and supervision by the State is mandated in the exploration, development and utilization of the country’s mineral and other natural resources.

### *The Mining Act*

The present legal and administrative framework for the large-scale exploration, development and utilization of mineral resources in the Philippines is provided in the Mining Act of 1995<sup>3</sup> and DENR Administrative Order No. 96-40<sup>4</sup> (“DAO 96-40”). The Mining Act was intended as a much-needed boost for the mining industry reeling from weak world metal prices and an economic slump in the middle to late 1980’s.

Although the Mining Act is criticized by some for allegedly favoring large-scale mining and foreign investments, it also contains significant and unprecedented provisions on environmental considerations, community development and on IPs. Like the IPRA, the constitutionality of the Mining Act has been challenged before the Supreme Court. Unresolved now for more than three years, the Court has not, however, restrained the Mining Act’s implementation.

The Mining Act provides that the State, which pursuant to the 1987 Constitution is the owner of all mineral resources, is charged with its implementation. This it does through the DENR and its line bureau, the Mines and Geosciences Bureau (“MGB”). When the national interest so requires, however, the President may set aside and establish mineral reservations. Mining operations therein may be undertaken by the DENR or through any of the modes available to unreserved areas subject to royalty requirements. For other proclaimed reserved lands, mining operations therein shall be first undertaken through an

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<sup>3</sup> Republic Act No. 7942

<sup>4</sup> The Revised Implementing Rules and Regulations of the Mining Act

exploration permit before the same is opened for other mining applications.

On the *scope of mining applications*, these may be made over forest lands, mineral reservations and other lands not covered by valid and existing mining rights and mining applications. Closed to mining applications are areas covered by such rights or applications, and areas expressly prohibited by other laws. Furthermore, other areas may be closed to mining applications for environmental considerations, such as old growth or virgin forests, proclaimed watershed forest reserves, wilderness areas, mangrove forests and national parks. There are also areas over which mining applications shall be subject to the consent of concerned agencies or entities, such as military and other Government Reservations, areas covered by small-scale mining and DENR project areas.

The *modes of development* are provided in Article XII of the 1987 Constitution where the State may directly undertake mining activities or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per cent of whose capital is owned by such citizens. In addition, the President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country.

Pursuant thereto, the primary *modes of acquiring mining rights* or tenements under the Mining Act are exploration permits, mineral agreements, specifically Mineral Production Sharing Agreements (“MPSA”), Financial or Technical Assistance Agreements (“FTAA”) and quarry permits. The areas applied for range from 32,400 hectares onshore for exploration permits to 81,000 hectares onshore for FTAAAs, the latter being open also to fully foreign-owned companies.

*Mineral exploration* is the scientific assessment of the mineral potential of the land. The areas allotted for exploration are much larger given that the odds of finding an economically viable mineral deposit are very high. All areas covered by exploration and other tenements are further subject to *relinquishment requirements*, i.e. the progressive reduction of the contract area wherein the mining contractor returns areas that, based on its exploration activities, have low mineral potential. For mineral agreements and FTAAAs, a maximum of 5,000 hectares or about 6%, of the original contract area may be retained after relinquishment.

As previously stated, while the Mining Act liberalized foreign investment, it also included provisions on environmental protection, community development and IPs, in contrast to any of its legal predecessors. Expounding on these fundamental considerations, DAO 96-40 introduces the concept of *sustainable development in mining* or “sustainable mining”, i.e. development in mining which meets the needs of the present without compromising the ability of the future generations to meet their own needs.

The Mining Act and DAO 96-40 establish an *environmental management framework* for mining operations. Aside from obtaining an Environmental Compliance Certificate issued under Presidential Decree No. 1586, a contractor must prepare different environmental programs for exploration activities and for the life of the mine. It should allocate specific minimum amounts for initial and annual environment-related expenses. To administer these requirements, the Mining Act also establishes an Interagency Contingent Liability and Rehabilitation Fund Steering Committee as well as an environmental guarantee fund mechanism to ensure compensation for damages and rehabilitation for any adverse effects of a mining operation.

With respect to *community concerns*, the Mining Act and DAO 96-40 require, among others, that the holder of a mining agreement or permit shall allocate a minimum of one

percent (1%) of the direct mining and milling costs for community development activities such as the establishment of schools and hospitals. It also provides for compensation in case of damage caused by any mining operations on lives, lands, crops, products and resources.

Specifically on *IPs*, the Mining Act and DAO 96-40 provide that no mineral agreements or permits may be granted without the prior consent of the concerned IPs. If such prior consent is obtained, the concerned parties shall agree on the royalty payment for the ICCs/IPs which may not be less than one percent (1%) of the gross output. The royalty shall form part of a trust fund for the socioeconomic well-being of the IPs concerned, to be managed and utilized by them.

Finally, the Mining Act also contains *economic or fiscal sections* which provide for taxes and fees, available incentives, investment guarantees and for the share of the Government in mineral agreements and FTAAAs. For mineral agreements, this consists of excise taxes while for FTAAAs, a recent DENR Administrative Order embodies a fiscal regime that was largely the result of negotiations with the industry. The Government share in FTAAAs should thus consist of a Basic Share, i.e. direct taxes and fees, plus an Additional Government Share based on one of the following - Net Mining Revenue Option, Cash Flow Based Option or Profit Based Option. It is calculated that this structure will lead to a 50%-50% sharing between the Government and the Contractor.

## **Economic Considerations**

### *General Investment Data on the Mining Industry*

The Philippines is richly endowed with mineral resources. However, mineral endowment alone does not direct the flow of investments. Other factors are essential, including political stability, law and order, bureaucratic efficiency, foreign exchange regulations and permissible foreign and private equity participation.

From 1989 to 1996, exploration expenditures in Latin America more than doubled presumably due, in part, to mining reforms in said countries. In the same period, Asia posted a much more modest increase, with Indonesia and Papua New Guinea as the primary destinations of these investments. In contrast, after an initial increase in investments from 1995 to 1997, investments in mining have decreased in the Philippines. At least 10 foreign companies, whose exploration expenditures in the Philippines amounted to US\$17.920 Million from 1996 to 1999, have either closed or suspended operations.

The outlook for investments in the mining sector is, at best, uncertain. Among other reasons, there are the separate challenges to the Mining Act and the IPRA before the Supreme Court. Even absent these challenges, however, prospective investors are still faced with a complex range of issues involving both policy and implementation. Examples of issues commonly raised are those involving bureaucratic 'red tape', issues in connection with the powers of local government units and environmental issues stressed by local communities, some Church groups and non-government organizations.

Each country's approach toward development of its mineral resources differs depending on its circumstances and priorities. The Philippines is a developing country in which poverty alleviation remains the primary goal. Being richly endowed with mineral resources, the utilization of minerals continues to be a national development option.

### *The Mining Industry and the Philippine Economy*

In 1998, there were a total of 17 operating metallic mines as compared to 18 in 1997 and

20 in 1996. The number of gold mines rose from 5 to 7 in that 3-year period, although copper mines were reduced by two, while nickel mines remained steady at three.

The mining sector's contribution to the national economy has been on the downward trend. In terms of export earnings, the sector's contribution to total Philippine exports has steadily declined from an average of about 14% from 1981 to 1990, to 5.12% by 1995 and 1.8% in 1999.

With respect to GDP, the mining industry's contribution thereto was an average of 1.77% from 1981 to 1992. This has also decreased, albeit less severely, to an average of 1.16% for the period 1996 to 1998. A decrease also marked excise taxes paid by the industry. From a reported high of P438.8 million pesos in 1995, it fell to an average of 112 million pesos for 1996 and 1997. Despite this, the industry still makes significant contributions, considering for example that total taxes paid in 1995 amounted to 810 Million pesos and that the taxes paid by 3 operating companies in Benguet alone amounted to 38 Million in 1996.

As for employment, data from the Department of Labor and Employment shows that the contribution of the mining industry to total employment was an average of 0.43% from 1996 to 1998, although no details can be obtained with respect to the nature of such employment.

Although the mining sector has declined in its percentage contribution to the overall economy, it is still considered a potential source of economic benefits particularly to rural areas where mining operations are generally situated. Under the present legal framework, these potential economic benefits should be balanced with both social and environmental concerns.

#### *Mining Tenements and Applications*

While the contribution of the mining industry to the economy has decreased in recent years due to both domestic and global factors such as the world metal prices, established mineral reserves in the Philippines have increased. In 1994, there were 6.833B MT of metallic and 51.678B MT of non-metallic reserves. Copper, followed by nickel, dominates the metallic reserves while limestone, followed by marble, dominate the non-metallic reserves.

As of April 1999, MGB reports that there were 163 approved EPs, MPSAs and FTAAAs. MPSAs dominate the tenements with 114, followed by 47 EPs. The two FTAAAs are those granted in 1995 to Western Mining Philippines, Inc. and Climax-Arimco pursuant to Executive Order No. 279, presently covering 70,064 hectares. Under process are 1953 MPSA applications covering 4,869,694.63 hectares, 499 exploration permit applications covering 4,678,898.18 hectares and 77 FTAA applications covering 4,229,701.54 hectares. Among MPSA applications, 166 have been endorsed to the DENR Central Office for approval, together with 3 FTAA and 17 EP applications. Of the total mining applications including those for interim permits, 564 cover Region IV.

According to MGB, mineral lands or lands covered by perfected mining rights granted since 1902 cover 800,995 hectares or only 2.67% of the 30 million hectares of Philippine land. Based on current mining rights applications, MGB estimates that mineral lands - those covered by mining patents, lease contracts, mineral reservations, EPs, MPSAs and FTAAAs - will occupy only 1,866,066 hectares of 4.62% of the country's total land area and that not all of these will be used for actual mining operations.

Developing and producing mines are in various stages of operation, while applications are pending before different offices while being subjected to current legal requirements

and procedures. The next section can now analyze how and to what extent all this is affected by the IPRA. This discussion may thus serve as a springboard from which dialogue can take place with a view to generating options and resolutions.

## THE IPRA AND THE MINING INDUSTRY

When the IPRA was promulgated in 1997, the Mining Act's new implementing rules were barely a year old. Given these developments, the complexity and the scope of the IPRA and the legal challenge to its validity, it is understandable that the effect of the IPRA on the Mining Industry is one of uncertainty. This uncertainty raises issues on different levels: (1) General Policy; (2) Legal Framework; (3) Administrative Framework; (4) Economic Considerations; (5) Environmental Considerations; and (6) Internal Operations Of Mining Companies.

Although fundamental legal issues confronting the Supreme Court are also addressed in this section, greater emphasis is given on issues requiring resolution on the administrative level. These issues relate to detailed aspects of implementation that are not and can not generally be covered by a law but are rather left to be filled in by the executing agencies. Discussing these issues is important regardless of the outcome of the court case involving the IPRA, inasmuch as many of them were already relevant in view of previous laws, specifically the Mining Act's provision requiring IPs prior consent to mining activities.

### Legal Issues

With respect to *national policies*, the primary decision-making power to grant large-scale mining tenements was already affected by the Mining Act, which requires mining applicants to obtain the prior consent of concerned IPs should an entity wish to undertake exploration in their ancestral lands. Under the IPRA, however, this requirement extends to all development activities. The extent of the control given to IPs over the development of natural resources within huge tracts of land is unclear and has created much confusion. Thus, the challenge is even greater to clarify the nature and extent of IPs 'control' over mineral and other natural resources within their ancestral domains, vis a vis national laws and development priorities. Otherwise stated, there is an even greater need to balance these national development priorities and IPs right of self-determination.

On the *conflict between the IPRA and the Mining Act*, the Mining Industry needs clear answers to certain fundamental questions. Given the broad provisions of the IPRA such as those on ownership of ancestral domains, to what extent has the Mining Act been repealed by the IPRA? What body of laws now governs mining activities within ancestral domains and lands? What legal framework, including labor and safety requirements as well as environmental rules, is now applicable therein? These issues are essential for the security of mining tenements, for the stability of mining operations, and to enable new investments to be made.

The nature and extent of IPs' *ownership of natural resources within their ancestral domains* are issues that are presently before the Supreme Court. Clarification on these is necessary in determining the relationship among IPs, the NCIP, other agencies of the Government, and non-IPs who wish to participate in the exploration, development and utilization of minerals on ancestral lands/domains. Based on NCIP Administrative Order No. 3, it would appear that NCIP's role in the exploration, development and utilization of natural resources such as minerals would be the issuance of appropriate certifications. The fundamental issue on ownership, however, is not addressed therein.

The IPRA's definition of the *indigenous concept of ownership*, which holds that ancestral domains cannot be sold, disposed or destroyed, raises the question whether mining can take place at all therein. Such an interpretation, however, would run counter not only to other provisions of the IPRA which precisely provide for the possible

development of natural resources, but also to their fundamental right of self-determination. It should be noted that the contemporaneous construction given the IPRA by the relevant agencies involved, specifically the NCIP, the DENR and the MGB does not support such an interpretation.

Under the IPRA, it would appear that the *security of tenure* of a mining operation is also subject continually to the IPs concerned where such operations take place within their ancestral lands/domains. Under the Mining Act, the national government had the exclusive right to approve a mining agreement or permit, and the terms for its operations were embodied in the same, including terms pertaining to suspension, cancellation, termination, and renewal of the agreement. To what extent are these terms affected by the IPRA?

With respect to “*vested rights*” as provided under Section 56 of the IPRA, do these include the multiplicity of rights needed by a contractor in the life of a mine? Confirmation is needed on whether the following constitute “vested rights”:

- mining agreements and permits
- applications for mining rights
- other rights under the terms and conditions of a granted agreement or permit, even if these are to be availed of at a future date<sup>5</sup>
- auxiliary mining rights and miscellaneous permits such as timber rights, water rights, the right to possess explosives and easement rights
- right of renewal of an agreement or permit if there has been compliance with pertinent laws, rules and conditions

On the *priority rights* of IPs in the harvesting, extraction, development or exploitation of natural resources within the ancestral domains, the following questions arise:

- How, and how long, can this priority right be exercised?
- Should the right to explore and utilize minerals in the ancestral domains of each IP first be offered to the IP or its members, before non-members may participate?
- Who exercises this right for the IPs? Can an individual member claim it or must it be the entire community? If it is the latter, how would it be exercised?
- Would this mean that any member of the IPs could file a mining application at a later date and dislodge an application previously filed? Would this effectively alter the traditional practice of “first-come first-served” basis of accepting applications?

Following are among the many questions relating to the requirement to obtain the *free and prior informed consent* of IPs:

- How will the “consensus of all members of the ICCs/IPs,” as determined by the respective customary laws and practices, be obtained, validated and verified?
- Should there be general guidelines and mandatory steps for “Action Plans” to be undertaken by applicants in obtaining FPIC?
- What is the role of tribal leaders?
- How does an IP group indicate its conformity?
- How are customary laws to be determined and applied?
- Will FPIC be validated by the community before being accepted by the NCIP?
- What requirements for process documentation, if any, will there be?
- Would validation by an independent group be desirable, even required?
- How would the process of obtaining FPIC interplay with the social acceptability requirements under the process for obtaining an Environmental Compliance Certificate?

Under the *Certification Precondition* requirement in the IPRA, the NCIP shall issue various certifications in relation to government grants. These must emanate from the head office of the NCIP and not from any of its regional offices. The first and most

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<sup>5</sup> One example would be the exclusive right of the holder of an exploration permit under Section 24 of the Mining Act to receive an FTAA or mineral agreement upon the approval of the contractor’s mining project feasibility and compliance with other requirements of said Act.

common certification issued by the NCIP thus far states that the subject area is neither covered by ancestral land/domain applications nor occupied by IPs. The second pertains to areas not covered by ancestral land/domain applications but where certain conditions have to be applied, such as the obligation to obtain the FPIC of IPs occupying the area. A third deals with areas where the government grant does cover an ancestral domain in which case the certification states that the applicant has complied with the requirements of FPIC pursuant to the IPRA and executed the corresponding MOA with the concerned IPs. Finally, a certification is also issued where a concession or grant is a pre-existing one considered vested upon the effectivity of NCIP Administrative Order No. 1 and, consequently, not covered by the FPIC/Certification Precondition requirements under the IPRA.

Efforts have clearly been made to rationalize and simplify this Certification Precondition process. However, the issues relevant thereto such as FPIC are, by their nature, complex and call for greater clarification. Some of these issues are the following:

- Since NCIP AO 3 states only that requests for Certification Precondition shall be filed with the concerned NCIP Regional Office, who exactly is responsible for securing the above certification, the private applicant or the concerned government agency?
- In relation to Section 59 of the IPRA which states that IPs have the right to stop or suspend any project that has not satisfied the requirement of this consultation process required therein, what is the process and time frame within which they may do either?
- At what point, if any, does the certification become conclusive so that a holder of a grant can be assured that its project can no longer be stopped or suspended on the ground that the consultation process requirement was not complied with?
- Since this right to stop or suspend any project appears only under Section 59, or in situations where there is no overlap of areas covered by ancestral domains and government grants, is it correct to conclude that such right does not apply in other situations?
- Does the NCIP have the discretion, in the determination of what is appropriate, to deny issuance of any such certificate despite the consensus approval of the ICCs/IPs concerned since it is, after all, only required to take the same into consideration?
- What terms should the certification contain so that it provides stability for all the parties concerned?

The IPRA also requires the execution of *formal agreements* with the IPs in case of participation by non-IPs in the development or utilization of natural resources within their ancestral domains. These may be in the form of a written document or an agreement pursuant to the IPs own decision-making process. Consequently:

- How do these provisions affect the provisions of the Mining Act and DAO 96-40 on prior consent to the opening of lands for mining operations and negotiation of a royalty payment for the ICCs/IPs?
- What is the role of the NCIP, DENR, MGB or other government agency in agreements made under either mode?
- How can the community be bound to either a formal agreement or one resulting from their own decision-making process - by its tribal council or other leaders, or only by agreement with the community as a whole?
- Should consent be given through the second mode, how will the decision-making process of the concerned ICC/IP be determined, validated and verified?
- Inasmuch as large mines can operate for several generations, can future generations be bound to such an agreement?

With respect to *dispute resolution and the application of customary laws*, the Mining Act provides that the regional Panels of Arbitrators and the Mines Adjudication board have jurisdiction over disputes involving rights to mining areas, mineral agreements and permits. The IPRA provides that the NCIP shall have jurisdiction over all claims and disputes involving rights of IPs and that customary laws and practices shall be used to resolve disputes involving IPs. In view of the foregoing, several issues arise:

- Who assumes jurisdiction with respect to disputes involving mining agreements, permits or rights in areas within ancestral lands and domains? Who assumes jurisdiction when these disputes involve rights of IPs?

- Will the IPs customary laws be applied where one of the parties to the dispute is a non-ICC? If the Panel of Arbitrators has jurisdiction over a dispute involving IPs, is it therefore required to use customary laws? If so, what will the process be for validating the customary law used?
- Can the IP group concerned agree to arbitration, mediation or other forms of dispute resolution under a mineral agreement or permit?

On the *administrative framework* concerning ancestral domains or areas occupied by IPs, the roles and responsibilities of the NCIP and the other agencies must be clarified with respect to the application, grant and administration of mining tenements. These agencies include the DENR, MGB, NCIP, the Department of Trade and Industry, the Board of Investments, the Bureau of Internal Revenue, the Bureau of Customs and the Department of Labor and Employment.

The NCIP is tasked with complex responsibilities, not the least of which is the delineation of ancestral domains. To effectively perform its functions, sufficient budgetary support is essential.

With respect to *environmental concerns*, how do the rights and responsibilities of IPs within ancestral domains affect the environmental management framework established under the Mining Act? Similarly, how do these responsibilities interplay with the undertakings and commitments under an Environmental Compliance Certificate?

### **Economic Issues**

With respect to *benefit sharing*, NCIP AO No. 3 provides that in the determination of benefits due host IPs in development projects, all benefits provided under existing laws and rules shall apply without prejudice to additional benefits as may be negotiated between the parties. It would thus appear that the rules under the Mining Act on the negotiation and payment of royalties to IPs who consent to mining operations within their ancestral domains continue to be operative. One of the questions that arises, however, is when negotiation for royalty payments and other benefits should take place.

This is relevant because stability of the fiscal regime is essential for mining investors. Such stability necessitates knowing, among others, the identity of stakeholders and their shares, the overall tax burden and government share. Clear rules are needed on how the proceeds from the utilization of minerals within ancestral domains are to be shared among the National Government, the IP community, the local government and any neighboring and host communities.

On the *exemption of ancestral domains from real property taxes*, special levies, and other forms of exaction except such portion as are actually used for large-scale agriculture, commercial forest plantation and residential purposes or upon titling by private persons, clarification is needed as to whether areas used for large-scale mining operations are covered by this exemption. Furthermore, what are 'other forms of exaction'?

In terms of *investments and export earnings*, the Mining Industry is necessarily affected by both global and domestic factors and it is unlikely that the decreasing contribution of the mining sector is the result of any single factor. However, there is general acknowledgement that the separate challenges to the Mining Act and the IPRA before the Supreme Court add to the uncertainty in the legal and administrative framework for mining activities.

This sentiment is echoed by foreign investors, for whom the passage of the IPRA and its IRR have resulted in adding a new dimension of potential uncertainty in the security of

title and another level of bureaucracy. Thus, it is a major factor in the drop in mining investments.

Losses in potential investments or earnings are necessarily significant for a developing country like the Philippines with an average poverty incidence of 32% in 1997, with some rural areas experiencing a poverty incidence higher than 50%. For the economic agencies of the government, this causes great concern given national targets for growth, the country's economic development targets and poverty alleviation efforts.

In view of the foregoing, there is a legitimate need for clarification and harmonization of the laws pertaining to the exploration, development and utilization of mineral resources. The resolution of conflicts between the Mining Act and IPRA, as well as the issuance of clear implementation guidelines, are important concerns for mining investors.

### **Internal Operations of Mining Companies**

Both the Mining Act and the IPRA require that the consent of IPs to mining activities must be obtained. Negotiations with the concerned IPs will thus take place even at the outset, and the relationship with them will last for the entire lifetime of the mining operation. These laws place the primary burden on the mining contractor or applicant to ensure that the process for obtaining IPs consent is free from any external manipulation, interference and coercion.

No doubt many companies have made great strides toward greater corporate citizenship, including commitments to social development and environmental protection. The Mining Industry is no exception. Under the IPRA, there would be a greater need to incorporate community organizers or other social scientists in the internal operations of the company. The negotiation of agreements will also require expanded and even specialized legal skills. And very importantly, mining companies and particularly their field personnel should be well versed with the IPRA and its provisions so as to internalize the principles and requirements thereunder. This is important especially considering that any violation of IPs rights or of any of the provisions of the IPRA may result in criminal liability.

### **Perspectives**

A final word should be made on an important level of impact of the IPRA on the Mining Industry which deals with changes in perspectives towards IPs in development activities. The IPRA brings about a change in the 'playing field' with respect to the exploration, development and utilization of mineral resources. Although the Mining Act already recognizes the need for the consent of IPs to mining operations in their ancestral domains and their right to a royalty from the same, the IPRA contains a broader articulation of IPs rights over their ancestral domains, including the mineral and other natural resources therein.

The change in perspective called for by the IPRA is to see IPs no longer as ordinary stakeholders. All entities involved in development activities within ancestral domains are now challenged by the IPRA to engage with IPs as such empowered stakeholders.

## **CONCLUDING REMARKS**

More than any other development in Philippine legal history, the IPRA has certainly given central and direct focus on IPs. The discussion of relevant factual and legal considerations in the first section hopefully lends greater insight into the law's promulgation. As discussed in the second section, the IPRA recognizes broad and far-

reaching rights pertaining to IPs ancestral lands/domains which affect not only them but inevitably affect all others including those who presently or, in the future, undertake development activities therein.

Significant aspects pertaining to the Mining Industry are the subject of the third section, after which the inevitable interplay between the concerns thereof and the IPRA becomes readily evident. This interplay was analyzed in terms of levels of impact which were discussed in the immediately preceding section. These impacts illustrate the far-reaching extent to which the IPRA affects the implementation of mining laws, applications and the operations of existing mines.

There are different factors present in both Philippine society and the global context that affect mining investments. However, the uncertainty in the IPRA's interpretation and the lack of clarity in its implementation have also had a negative effect. Investors are, understandably, extremely cautious about new rules which can substantially change the conditions upon which they first made the decision to invest, more so of rules which are not clear so that their impact is uncertain.

Such uncertainty and lack of clarity lead to the perception that government policy with respect to mining is, itself, uncertain and unclear. This perception certainly does not help the industry, as it serves as a disincentive for mining investments. Nor does it help achieve national economic or investment targets. Just as importantly, it does not help local government units, local communities and IPs in evaluating whether and to what extent mining activities are conducted within their areas of concern. Clear and stable rules are necessary to enable all stakeholders to make properly informed decisions.

From the different levels of impact discussed in the preceding section, it is clear that there are both fundamental legal issues which are pending in the petition before the Supreme Court and legal issues which can be resolved on an administrative level. These fundamental legal issues concern whether or not the IPRA violates the Regalian Doctrine, whether it deprives other interested parties of due process and equal protection of the law, and whether it impairs the President's power of control.

Specifically, the nature and extent of IPs' ownership of ancestral lands and domains, including the natural resources therein, is the primary issue that requires clarification. It is also necessary to determine the relationship among IPs, the NCIP and other government agencies and non-IPs who wish to participate in development activities within ancestral lands/domains.

However, these issues are exclusively within the jurisdiction of the Supreme Court. Respect for the Court would call for all involved to await its decision. However, neither the parties to the petition nor the other branches of Government are precluded from respectfully manifesting a request for a more expedient resolution, provided the means taken clearly do not constitute interference in the exclusive judicial power of the Court.

Notwithstanding these fundamental issues before the Court, there are many other important issues pertaining to mining activities within ancestral domains/lands which may find resolution on an administrative level. It should be noted that many of the questions raised in the preceding section relate to detailed aspects of implementation that are not and can not generally be covered in a law but are rather left to be filled in by the executing agencies. Furthermore, some of these issues emanate not only from the IPRA, but also from laws like the Mining Act and the Presidential Decree No. 1586 on the Environmental Impact Assessment System. Examples of these are FPIC, the application of customary law, community agreements and concerns of social acceptability.

The conflicts between the IPRA and the Mining Act present many constraints for mining activities within ancestral domains or lands. There is a legitimate need for clarification

and harmonization of these laws pertaining to the exploration, development and utilization of mineral resources especially within ancestral domains and lands.

As previously stated, the Mining Industry needs clear answers to certain fundamental questions: What body of laws now governs mining activities within ancestral domains and lands? What legal framework, including labor and safety requirements as well as environmental rules, is now applicable therein? These issues are fundamental to the security of mining tenements and the stability of mining operations.

On the administrative level, there are various options for resolving these policy issues. One would be through inter-agency rules or regulations, or by presidential issuances such as administrative circulars, orders, or executive orders. Whatever mode is taken, it is essential that genuine and broad consultations are first conducted, in order for the Government to formulate clear policies which will serve the national interest. The concept of national interest should embody the common good and, to every extent possible, the best interests of the stakeholders involved.

Based on the issues raised in the preceding section, those which may possibly be addressed through such administrative or executive actions include:

- clarifying what body of laws governs mining activities within ancestral domains and lands
- scope and application of vested rights
- scope and application of priority rights
- guidelines for obtaining and verifying FPIC
- guidelines for the execution of formal agreements
- harmonizing procedures for dispute resolution
- clarifying roles and responsibilities of different government entities

Clarification of government policies on mining, including the resolution of the foregoing legal and administrative issues, will help in addressing the uncertainties for the Mining Industry which arise from the interpretation and implementation of key IPRA provisions. This should benefit not only the Mining Industry and the Government, but certainly the IPs as well whose welfare the IPRA was precisely designed to protect. The different stakeholders can make properly informed decisions and may find options toward mutually beneficial ways to co-exist only in an environment where clear rules are in place, and more so when these are implemented in a rational and efficient manner.

## FOREWORD

Republic Act No. 8371, otherwise known as the Indigenous Peoples Rights Act or “IPRA”, was enacted in October of 1997. It focuses on the indigenous peoples of the Philippines who are considered among the most disadvantaged sectors in society. For the Mining Industry, the IPRA appears to have resulted in many uncertainties which have been invoked as a major reason for the scaling down and even withdrawal in the past two years of investments in the Mining sector.

Whether and to what extent this is an accurate conclusion to draw, it is clear that the IPRA has raised a complex range of legal, social and economic issues which are all relevant to the Indigenous Peoples, the Mining Industry and other concerned sectors. The interests and objectives of these sectors have been pitted against each other and sometimes seem inherently conflicting. Hence, there is a consequent need for these sectors to confront and understand these issues, not in an emotional or adversarial manner, but through means which may facilitate greater understanding and foster genuine dialogue. It is hoped that such understanding and dialogue will constitute a significant step toward balancing different interests and objectives.

In view of the foregoing, this Discussion Paper has been formulated with the purpose of focusing on the issues raised by the IPRA and analyzing their implications for the Mining Industry. It is not an advocacy project for any particular sector or side, but rather strives to objectively analyze pertinent developments, examine different positions and perspectives. Specifically, it begins with an overview of the evolution of the IPRA with the objective of understanding the contextual and conceptual framework for its promulgation.

Focus then shifts to the IPRA itself and the salient provisions thereof in order to gain a better grasp of the legal framework introduced and established thereby. This includes a brief consideration of the issues involved in the present legal challenge to the IPRA. An overview of the Mining Industry follows, including the legal and administrative framework under which it operates as well as an update on relevant economic factors and tenement conditions.

Finally, the foregoing study and consideration of both the IPRA and the Mining Industry will converge in a discussion of the impacts of the former on the latter and of the issues pertinent thereto. This discussion may thus serve as a springboard from which dialogue within the Industry can take place through a presentation and discussion among its members. This forum may likewise be the basis for further action points and plans.

# **I THE EVOLUTION OF THE IPRA: Relevant Factors**

## **A. SITUATIONAL ANALYSIS**

### **1. Concept**

Indigenous peoples in the Philippines generally refer to groups whose presence and distinctive ways of life pre-date colonial conquest and who, throughout the centuries, have resisted assimilation into what evolved as the more ‘mainstream’ or dominant society. Western-oriented structures, in contrast, typically characterize the latter. Principal examples of such structures are the Philippine national legal system, in general, and property relations in particular.

Different terms have been used over the years to identify these groups which have retained their distinct cultures and ways of life. For example, these ethnolinguistic groups have been referred to as “non-Christian tribes” or “national cultural minorities” in past decades.

Under the current Philippine legal framework, the term “indigenous peoples” is defined by Section 3(h) of Republic Act No. 8371, the Indigenous People’s Rights Act, or IPRA for short, as follows:

“x x x 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, become 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;”

Denominated alternatively as indigenous cultural communities, they are situated in various lowland, forest and coastal areas throughout the country. Such areas are generally regarded by them as their “ancestral domains” or “ancestral lands”, both of which are terms also defined under the IPRA, the nature and extent of which are the subject of on-going debate. These concepts shall be dealt with more exhaustively in succeeding sections of this paper.

### **2. Population and Geographical Location**

In 1993, a mission carried out by the United Nations Development Program and the International Labour Organization (hereinafter, “UNDP-ILO TSS1 Mission”) identified the population of the indigenous peoples in the Philippines to be approximately twelve to thirteen million. This constitutes roughly 18 % of the total national population. They are further divided into 110 ethnolinguistic groups, as provided together with their locations throughout the country in Annex “A” hereof. An ethnographic map illustrating the foregoing is also provided in Annex “B” hereof.

### **3. Shared Attributes**

Indigenous peoples in the Philippines have generally been characterized by certain overlapping criteria. Among these common characteristics are the following:

1. They are descendants of the original inhabitants of a territory which had been overcome by conquest.
2. They are nomadic and semi-nomadic peoples such as shifting cultivators, herders, hunters, gatherers, practicing a labor-intensive form of agriculture which produces little surplus and has low energy needs.
3. They do not have centralized political institutions, and are organized at the level of the community. Decisions are generally made on a consensus-basis.
4. They share a common language, religion, culture and other identifying characteristics and a relationship to a particular territory but are subjugated by a dominant culture and society.
5. They have a different worldview, consisting of a custodial and non-materialist attitude to land and natural resources and want to pursue a separate development from that preferred by the dominant society.
6. They consist of individuals who subjectively consider themselves to be indigenous and are accepted by the group as such.<sup>1</sup>

Based on the foregoing, it is clear that there is a great divergence between the perspectives and practices of indigenous peoples and the so-called dominant society. Nowhere is this divergence more evident than in the perspective toward or relationship to land, as briefly described in the fifth item of the foregoing enumeration. This relationship can be described as symbiotic and is the basis for what they believe is their responsibility as stewards of the earth for present and future generations.

Consequently, land is regarded as sacred by indigenous peoples and their responsibility toward land is fundamentally collective rather than individual. This perspective is manifested through their practices such as their consensus approach to decision-making.

#### 4. Concerns and Conflicts

Given their perspective and relation to land, it is not surprising that land is at the heart of their concerns. This refers specifically to ancestral domains and lands - the delineation, identification and extent thereof, and their rights in relation thereto. Past state policies have generally been either silent or unclear on this matter.

There is one common feature of indigenous peoples that is not mentioned in the enumeration above. Among the most glaring characteristics that indigenous peoples share is their social and economic status. They have long been regarded as among the poorest and most disadvantaged social groups in the country. As a result of a consultative workshop held by the Department of Environment and Natural Resources (“DENR”) and the National Economic Development Authority (“NEDA”) in 1997, three fundamental problems of indigenous peoples were identified. These are (1) economic marginalization; (2) social and cultural displacement; and (3) political disenfranchisement.

The disadvantaged state of indigenous peoples was analyzed by the heretofore cited UNDP/ILO TSS1 Mission as a result of four (4) existing factors:

- the lack of a common vision about development for and by indigenous peoples;
- absence of mechanisms or procedures of consultation with the peoples concerned;
- lack of consensus among indigenous peoples themselves about their development priorities, strategies and alliances; and
- pressure on ancestral lands by political and economic development.

With respect to programs and policies in the pursuit of national economic development:

“The social and environmental destruction of indigenous peoples by development strategies is a

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<sup>1</sup> Consultative Meeting on Indigenous Peoples held on 11 April 1997, Taal Vista Lodge, Tagaytay City by the Department of Environment and Natural Resources and the National Economic Development Authority, hereinafter referred to as the “DENR-NEDA Consultative Meeting”, citing Burger, 1987.

well-documented fact. Erosion of the strength of indigenous societies and the accompanying processes of impoverishment have been brought about by a complex multitude of factors which include colonialism, destruction of the traditional economy, loss of traditional lands and domains, integration into the global economy, modernization and social and environmental degradation due to inappropriate development schemes.”<sup>2</sup>

However, there has been and continues to be increasing recognition of the need to harmonize national development strategies, specifically those involving ancestral domains and lands, with the interests and welfare of concerned indigenous cultural communities. The recognition of this need to balance interests is found in the 1987 Constitution which contains various provisions concerning indigenous peoples and provides the conceptual framework for Philippine laws concerning them, particularly the IPRA. These provisions, together with significant legal developments, both domestically and in the international context, are discussed in the next section.

## **B. LEGAL DEVELOPMENTS**

### **1. International Law**

#### **a. International Labour Organization Convention No. 169**

In 1957, the International Labour Organization (“ILO”) Convention 107 on Tribal or Indigenous Populations was promulgated. The provisions thereof reflect the era in which they were formulated during which relevant policies promoted the assimilation or integration of indigenous peoples into the national mainstream.

Citing developments in international law as well as in the situation of indigenous and tribal groups, new international standards were adopted in 1989 “with a view to removing the assimilationist orientation of the earlier standards”<sup>3</sup>. These new standards are contained in ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries. This is currently the main international legal instrument protecting the rights of indigenous peoples. Article 1(1) thereof defined indigenous peoples as:

“(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs and traditions, by special laws and regulations, and

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the population which inhabited the country or a geographical region to which the country belongs to at the time of the conquest or colonization or the establishment of the present state boundaries, and who, irrespective of their legal status, retained some or all of their own social, economic, cultural and political institutions.”<sup>4</sup>

In contrast to its predecessor, ILO Convention 169 provides for the recognition of indigenous peoples’ right to self-determination in consonance with international instruments such as the Universal Declaration of Human Rights and the International Conventions on Civil and Political Rights and on Social, Cultural and Economic Rights. It emphasizes the need to respect the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development as well as their right to develop their identities, languages and religions.

With respect to the rights of indigenous peoples to lands traditionally held by them, Article 14 thereof provides that:

<sup>2</sup> DENR-NEDA Consultative Meeting, page 20.

<sup>3</sup> 4th Recital, Preamble, ILO Convention 169.

<sup>4</sup> Article 1, ILO Convention 169.

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the rights of the people concerned to use lands not exclusively occupied by them but to which they traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

With respect to natural resources pertaining to lands traditionally held by indigenous peoples, Article 15 of this Convention provides that:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the rights of these people to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The people concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

As illustrated in the foregoing, ILO Convention 169 contains various prescriptions for states to protect the rights of indigenous peoples and implement concrete programs responsive to their needs and welfare. It does not, however, have specific prescriptions with respect to ownership of “mineral or sub-surface resources or rights to other resources pertaining to lands”. This can be inferred from the opening clause of the second paragraph of Article 15, as abovequoted.

This is also consistent with the principle found in Article 34 of ILO Convention 169 which provides that “The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.”

#### **b. The Earth Summit**

Three international agreements were signed at the Earth Summit in Rio de Janeiro in 1992, the largest international gathering thus far for environmental causes. These agreements are the Rio Declaration of Principles known as Agenda 21, the Convention on Biological Diversity and the Statement of Forest Principles. These agreements recognized the role of indigenous peoples and the need to integrate their systems and practices with current approaches in sustainable development.

In general, these agreements called for:

- the recognition of the knowledge and role of indigenous peoples;
- prescriptions to states to support and promote their knowledge, including identity, culture and interests; and
- prescriptions to states to guarantee their effective participation.<sup>5</sup>

#### ***(1) The Rio Declaration on Environment and Development / Agenda 21***

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<sup>5</sup> DENR-NEDA Consultative Meeting, page 2.

Principle 22 of the Rio Declaration on Environment and Development provides:

“Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and fully support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

Pursuant to the Rio Declaration, Agenda 21’s forty chapters constitute a comprehensive action plan for the environment. More than half of these chapters refer to indigenous peoples. Chapter 26 thereof, i.e. Strengthening the Role of Major Groups, provides for the recognition and strengthening of the role of indigenous peoples and their communities. It provides that “indigenous peoples and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination,” and that both national and international efforts should “recognize, accommodate, promote and strengthen the role of indigenous peoples and their communities”.

In this regard, Agenda 21 urges governments and inter-governmental organizations to adopt appropriate national policies and/or legal instruments. These organizations are also encouraged to recognize that indigenous lands should be protected from activities that may be environmentally unsound, or that are socially and culturally inappropriate in view of the traditional knowledge and resource management practices of indigenous peoples.

### ***(2) The Convention on Biological Diversity***

The Convention on Biological Diversity entered into force in December 1993. Its major objectives are the conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Indigenous peoples are mentioned at the outset, in the preamble, where it provides that the Convention recognizes the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles

### ***(3) Statement on Forest Principles***

Although this Statement is non-binding in nature, it is the first international authoritative statement of principles on the management, conservation and sustainable development of all types of forests. It advocates that forest issues and opportunities should be examined in a balanced manner taking into consideration multiple functions and uses of forests, including traditional uses. In this regard, reference is made to indigenous knowledge and practices.

### **c. The 1993 Draft Universal Declaration of the Rights of Indigenous Peoples**

The Philippines participated in the World Conference on Human Rights held in Vienna on 14-25 June 1993 which finalized and approved a Draft Universal Declaration on the Rights of Indigenous Peoples. This Declaration is designed to chart the UN Human Rights Program into the next century. In harmony with general conventions and protocols on human rights, including economic, social and political rights, it provides that indigenous peoples shall have the right to self-determination and that by virtue of that right, they freely pursue their economic, social and cultural development.

Unlike other international conventions and declarations, however, this draft Declaration contains more extensive provisions with respect to the rights of indigenous peoples to lands traditionally held. Specifically recognized in Art. 26 thereof are:

“x x x the rights to own, develop, control and use the lands and territories including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna, and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land tenure and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of, or encroachment upon these rights.”

Being a draft, this document is not legally binding. However, this articulation by various states of such principles and prescriptions may be indicative of a growing recognition of indigenous peoples and their interests.

Many of the principles espoused in the foregoing international instruments, and the prescriptions to states therein, can be found in various national laws. In the Philippines, the IPRA contains the most comprehensive and extensive legislative expression on the rights and welfare of indigenous peoples. These are discussed in succeeding sections of this paper.

## 2. Selected Foreign Legal Frameworks

In recent years, important laws and court decisions have been issued in different countries with respect to indigenous peoples and areas traditionally held by them. Various legal theories and principles have been invoked and adopted in countries like Canada, the United States and Australia.

In Canada, aboriginal or indigenous land, surface and subsurface rights have been established piecemeal through royal proclamations, treaties, by High Court decision, and by statute. Canada's 1982 Constitution recognizes aboriginal title but upholds the extinguishment of such title to all government actions prior to 1982. The 1997 case of *Delgamuukw v. British Columbia* further held that aboriginal title exists as a legal concept but that the burden of proof of title is on the aboriginal group.

Resource development activities such as mining that may affect aboriginal rights or title must be justified by the Government. In such cases, the Supreme Court of Canada has ruled that there must be a valid legislative objective that is compelling and substantial. Furthermore, any such activity must be consistent with the Government's fiduciary obligation to the concerned aboriginal group. This obligation involves, among other things, adequate and meaningful consultation with the affected aboriginal group and compensation depending on the degree or severity of impacts.

In the United States, policy changes throughout the decades respecting Indian tribal groups have led to legal complexities where different parties may own the surface rights and the sub-surface minerals. Indian tribes may actually hold title to minerals in various ways such as treaty abrogation or prior land grants. In such cases, title to Indian mineral rights is usually held by the US in trust for the tribes with the latter as the beneficial owner.

As for Australia, native title was generally not recognized until the 1992 case of *Maabo and Others v. The State of Queensland* where the High Court of Australia (“HCA”) rejected the long-standing notion of *terra nullius*, i.e. that Australia was not “land belonging to no one” in 1788 but was occupied by aboriginal and Torres Strait Islands Peoples whose native title to land survived the Crown's annexation of Australia. It further relaxed the requirements for establishing proof of title to traditional lands. At the same time, however, the HCA also recognized that the Crown could extinguish native title, if the intent to do so was plain and clear.

Australia's Native Title Act of 1993 adopted the *Maabo* court's definition of ‘native

title'. The Act set up a structure for the formation of regional tribunals to hear and decide native title claims and established a system for compensation for past native title extinguishment. Some Australian regions rejected the Native Title Act and passed their own indigenous title and land grant procedures but these were subsequently declared unconstitutional.

Mineral rights generally do not extend from native title, but registered native title holders under Australia's Native Title Act have rights to negotiate activities relating to mining. Specifically, grants of mineral titles, explorations titles and mining and petroleum leases on lands that may be subject to a native title claim are now subject to complex review and the rights of aboriginal groups to negotiate an agreement acceptable to them.

### 3. Philippine Law and Policy

#### a. Developments in State Policy

State policies on indigenous peoples have gone through major changes in this century. In the 1950's, apparently mirroring international law as articulated in ILO Convention 107 which was promulgated in the same decade, the express policy of the Philippine government was the assimilation of indigenous peoples into the mainstream society. This is evident, for example, in Republic Act No. 1888<sup>6</sup>, Section 1 of which provides that:

"It is hereby declared to be the policy of Congress to foster, accelerate and accomplish by all adequate means and in a systematic, rapid and complete manner the moral, material, economic, social and political advancement of the Non-Christian Filipinos, hereinafter called National Cultural Minorities, and to render real, complete and permanent the integration of all the said National Cultural Minorities into the body politic."

By 1978, there was a shift toward a two-pronged approach to indigenous peoples. Although integration was still a national policy, the State then also recognized their right to remain differentiated from the majority. On 09 June of that year, Presidential Decree No. 1414, "*Further Defining the Powers, Functions and Duties of the Office of the Presidential Assistant on National Minorities and for Other Purposes*" was promulgated, and states that:

"It is hereby declared to be the policy of the State to integrate into the mainstream of Philippine society certain ethnic groups who seek full integration into the larger community, and at the same time protect the rights of those who wish to preserve their original lifeways beside that larger community."<sup>7</sup>

Reflecting current international legal norms, assimilation is no longer imposed as an official approach to indigenous peoples. Developments in Philippine policies have led to greater recognition of indigenous peoples. This is clearly reflected in the following comparative perspective of the pertinent provisions of the 1935, the 1973 and the 1987 Constitutions:

1935	1973	1987 Constitution
N O N E	<u>Art XV</u> <u>General</u> <u>Provisions</u>	<u>ART II Declaration of Principles and State Policies</u> Section 22. The State recognizes and promotes the rights of <i>indigenous cultural communities</i> within the framework of national unity and development.
	Sec. 11 The State shall consider the	<u>ARTICLE VI Legislative Department</u> 5 (2) The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms

<sup>6</sup> Republic Act No. 1888, "*An Act To Effectuate In A More Rapid And Complete Manner The Economic, Social, Moral And Political And Advancement Of The Non-Christian Filipinos Or National Cultural Minorities And To Render Real, Complete And Permanent The Integration Of All Said National Cultural Minorities Into The Body Politic, Creating The Commission On National Integration Charged With Said Functions*" (22 June 1957).

<sup>7</sup> Section 1 on Declaration of Policy, Presidential Decree No. 1414.

<p>customs, traditions, beliefs, and interests of national cultural communities in the formulation and implementation of State policies.</p>	<p>after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, <i>indigenous cultural communities</i>, women, youth, and such other sectors as may be provided by law, except the religious sector.</p> <p><u>ARTICLE XII National Economy and Patrimony</u> Section 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of <i>indigenous cultural communities</i> to their ancestral lands to ensure their economic, social, and cultural well-being. The Congress may provide for the applicability of customary laws governing property rights and relations in determining the ownership and extent of ancestral domain.</p> <p><u>ARTICLE XIII Social Justice and Human Rights</u> Section 6. The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of <i>indigenous communities</i> to their ancestral lands.</p> <p><u>ARTICLE XIV Education, Science and Technology, Arts, Culture, and Sports</u> Section 17. The State shall recognize, respect, and protect the rights of <i>indigenous cultural communities</i> to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.</p> <p><u>ARTICLE XVI General Provisions</u> Section 12. The Congress may create a consultative body to advise the President on policies affecting <i>indigenous cultural communities</i>, the majority of the members of which shall come from such communities. (italics ours)</p>
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The implementation of the State's mandate to recognize and promote the rights of indigenous cultural communities within the framework of national unity and development as stated in Section 22 of Art. II above can also be found in Article X on Local Governments. This article provides for the creation of autonomous regions in Muslim Mindanao and the Cordilleras consisting of "geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics x x x"<sup>8</sup>. The organic act of autonomous regions shall provide legislative power within its territorial jurisdiction over, among others, ancestral domains and natural resources<sup>9</sup>.

With respect to national policy as articulated in the fundamental law of the land, i.e. the Constitution, there is now more recognition for indigenous peoples and their interests. The 1935 Constitution had no express statement on the matter while the 1973 Constitution had only one provision which requires merely that the State shall consider the customs, traditions, beliefs, and interests of national cultural communities in the formulation and implementation of State policies.

In contrast, the 1987 Constitution recognizes the rights of indigenous peoples (Section 22, Article II) their knowledge and cultures, and requires the State to support and promote the same (Section 17, Article XIV), as well as to guarantee their effective participation on both the local and national levels (Sec. 5;2, Article VI and Sec. 12, Article XVI). These echo some of the general principles of international law as expressed in the international conventions and declarations previously cited.

In the 1987 Constitution, the concepts of ancestral lands and domains are present. The right of indigenous peoples to their ancestral lands is articulated in the first paragraph of Section 5 of Article XII and Section 6 of Article XIII. The 1987 Constitution also states in the second paragraph of Section 5, Article XII, that the "Congress may provide for the applicability of customary laws governing property rights and relations in determining the ownership and extent of ancestral domain".

<sup>8</sup> Section 15, Article X on Local Governments, 1987 Constitution.

<sup>9</sup> *Ibid*, Section 20.

These concepts of ‘ancestral lands’ and ‘ancestral domains’, together with the extent thereof and rights thereto, are at the heart of the current legal controversy over the IPRA before the Supreme Court. The specific issues pertaining to these concepts will be discussed more in the next major section of this paper. Conceptually, however:

“The phrase ‘ancestral domain’ is a broader concept than ancestral lands. The former includes lands not yet occupied, such as deep forests, but which generally are regarded as belonging to a cultural region. ‘Ancestral lands’ are those which have been subjected to occupation. The extent of the ancestral domain has to be determined by Congress.

The ancestral lands referred to in Section 5 include both those outside and those inside autonomous regions. For the purpose of protecting indigenous cultural communities, the provision in effect authorizes Congress to prescribe how priorities are to be determined in case of conflict between civil law and customary law.”<sup>10</sup>

It is this divergence between civil law and customary law which is the fundamental issue underlying state policies respecting indigenous peoples. Attempts to balance these apparent antagonisms can be gleaned in some of the aforementioned provisions of the 1987 Constitution. Section 22 of Article II, for example, provides that the “State recognizes and promotes the rights of indigenous cultural communities *within the framework of national unity and development*”. Section 5 of Article XII similarly provides that “The State, *subject to the provisions of this Constitution and national development policies and programs*, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being”.

However, these provisions do not concretely clarify the nature and extent of indigenous peoples’ rights, particularly in relation to their ancestral lands and domains. Neither do they clarify how these rights are to be concretely exercised in the context of a national legal system. Consequently, it was in the hands of Congress to spell out the details and give flesh to the policies enunciated in the 1987 Constitution pertaining to indigenous peoples and their rights to their ancestral lands and domains. This it did, after ten (10) years and numerous attempts. The result was Republic Act No. 8371, the IPRA.

## **b. Legal and Administrative Framework**

Thus far, the situational factors and policy developments relevant to the promulgation of the IPRA have been discussed. As can be seen in the following sections, the IPRA is not the first legal pronouncement on indigenous peoples and their interests.

### ***(1) Prior to the 1987 Constitution***

As discussed in the previous section, Philippine laws pertaining to indigenous peoples, particularly before the 1970’s, generally advocated their integration into the mainstream as a national policy. There was little recognition of any rights to lands traditionally occupied by them.

There was an express policy shift in the 1970’s. Although assimilation was still a national objective, laws such as the previously cited Presidential Decree No. 1414 also recognized the rights of those indigenous peoples who wished to preserve their cultures. The concept of ancestral lands was formally recognized in laws like Presidential Decree No. 410<sup>11</sup> (“PD 410”), although such recognition was generally within the framework established under public land laws. Hence, ancestral lands were expressly defined as lands of the public domain, but which could be applied for by the indigenous peoples occupying and cultivating the same subject to such conditions that were similar to those

<sup>10</sup> Joaquin G. Bernas, S.J., *The 1987 Constitution of the Republic of the Philippines: A Commentary*, page 1028, (1996).

<sup>11</sup> Presidential Decree No. 410, *Declaring Ancestral Lands Occupied And Cultivated By National Cultural Communities As Alienable And Disposable, And For Other Purposes*, (11 March 1974).

required in applying for a free patent or homestead.

Like other claimants of lands of the public domain, indigenous peoples' rights over such lands were defined only by their actual occupation and cultivation. However, PD 410 recognizes occupation and cultivation by the claimants themselves or through their ancestors under a bona fide claim of ownership according to their customs and traditions. This indicates a recognition of customary law insofar as the determination of ownership by indigenous peoples of public land under PD 410 was concerned.

An overview of significant laws pertinent to indigenous peoples prior to the effectivity of the 1987 Constitution is provided in Annex "C" hereof.

## ***(2) Under the 1987 Constitution***

Under the framework of the 1987 Constitution and prior to the promulgation of the IPRA, the different laws and rules dealing with indigenous peoples may generally be classified according to the following subject matters:

1. Implementing Agencies
2. Ancestral Lands and Domains
3. Natural Resources
4. Environmental Protection and Management
5. Autonomous Regions
6. The Promotion of the General Welfare
7. Representation in Local and National Bodies

A more detailed overview of the pre-IPRA legal landscape is attached hereto as Annex "D" while a summary thereof is provided below. Many of these laws included provisions pertaining to indigenous peoples' interests and welfare. Very few of these, however, had them as their focal point.

### **• Implementing Agencies**

Prior to the promulgation of the IPRA, the primary government agencies concerned with indigenous peoples were the Office for Northern Cultural Communities ("ONCC"), the Office for Southern Cultural Communities ("OSCC") and the Department of Environment and Natural Resources ("DENR").

The functions of the ONCC and the OSCC included, among others, the certification, whenever appropriate, of membership of persons belonging to cultural communities for purposes of establishing qualifications for specific requirements of government and private agencies and for other benefits as may be provided by law. These agencies were also tasked to coordinate the enforcement of policies and laws protecting the rights of the cultural communities to their ancestral lands, including the application of customary laws governing property rights and relations, in determining the ownership and extent of ancestral lands. They were also authorized to conduct inspections or surveys jointly with other appropriate agencies, and issue necessary certifications prior to the grant of any license, lease or permit for the exploitation of natural resources affecting their interests.

Despite the broad functions given to the ONCC and OSCC, it appears they operated principally as conduits between indigenous peoples needing development assistance and the various line departments. According to the UNDP-ILO TSS1 Mission of 1993, the operations of the ONCC and OSCC were hampered by institutional weaknesses, namely, inadequate staffing, field infrastructure and funding.

Formally reorganized in 1987 under Executive Order 192<sup>12</sup>, the DENR is the primary government agency tasked to ensure the judicious exploration, development, disposition, utilization, management, renewal and conservation of the country's natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment.<sup>13</sup> As will be seen in the next subsection, its mandate included indigenous peoples particularly in relation to their ancestral lands and domains.

<sup>12</sup> Executive Order No. 192, *Providing for the Reorganization Of the Department of Environment, Energy and Natural Resources; Renaming it as the Department of Environment and Natural Resources and for Other Purposes*, (10 June 1987).

<sup>13</sup> See also Chapter 1, Title XIV on the DENR, Executive Order No. 292, the Revised Administrative Code, (25 July 1987).

- **Ancestral Lands and Domains**

DENR Administrative Order No. 1, Series of 1988, created the Indigenous Community Affairs Division (“ICAD”) under the Special Concerns Office. In 1993, DENR Administrative Order No. 2 (“DAO 2”) added to the ICAD’s functions the coordination of the identification, delineation and recognition of ancestral land and domain claims leading to the issuance of Certificates of Ancestral Domain Claims (“CADC”) and Certificates of Ancestral Land Claims (“CALC”). The objectives of the order were to protect the rights of indigenous peoples and to ensure sustainable development of the natural resources within those lands/domains. Samples of a CADC and CALC issued under DAO 2 are provided in Annexes “E” and “F”, respectively.

As of 06 June 1998, the DENR had awarded 181 CADCs covering an area of 2,546,035 hectares, and 147 CALCs to 3,738 beneficiaries covering an area of 10,095.8882 hectares. A list of said CADCs and CALCs is provided in Annexes “G” and “H”, respectively.

Support for the process laid down in DAO 2 was given through various programs, such as the preparation of Ancestral Domain Management Plans, and other administrative issuances. For example, DENR Special Order No. 31 created a special task force to accept, identify and evaluate and delineate ancestral land claims in the Cordillera Administrative Region.

In 1994, the ICAD was tasked also with implementation of the Social Reform Agenda, the Flagship Masterplan of which prioritized the certification of the IPRA bill. After the issuance of Executive Order No. 263 (“EO 263”) in 1987 establishing Community Based Forest Management as the National Strategy for Sustainable Development of Forestland Resources, DENR Administrative Order No. 34-96 and the implementing rules of EO 263 were issued reorganizing the ICAD into the Ancestral Domain Management Office which coordinated the implementation of Ancestral Domain Management Plans.

Under the foregoing administrative framework, claimed ancestral lands and domains were determined and, in cases found meritorious by the DENR, awarded CADCs and CALCs. These are tenurial instruments which, though short of title, recognized indigenous communities’ claims to their ancestral domains and lands.

- **Indigenous Peoples and Natural Resources**

The different laws pertaining to natural resources, as briefly described hereunder, all contain provisions dealing with indigenous peoples. With respect to lands of the public domain, the prevailing law was Commonwealth Act No. 141. Under this law, a member of the national cultural minorities who has continuously occupied and cultivated, either by himself or through his predecessors-in-interest, a tract or tracts of land, whether disposable or not since July 4, 1955, shall be entitled to have a free patent issued to him. These claims operated within the general conceptual framework established for all public land claimants.

Under Presidential Decree No. 705, the Revised Forestry Code of the Philippines, cultural minorities and other occupants who entered into forest lands and grazing lands before May 19, 1975, without permit or authority, were not to be prosecuted provided they did not increase their clearings and undertook the activities imposed upon them by the Government in accordance with a management plan calculated to conserve and protect forest resources in the area. However, they could be ejected and relocated to the nearest accessible government resettlement area whenever the best land use of the area so demands as determined by the Government.

Republic Act No. 6657, the law enacted in 1988 instituting a Comprehensive Agrarian Reform Program (“CARP”) serves as the primary mechanism of the Government to implement Section 6 of Article XIII of the 1987 Constitution. This clause provides that the State shall apply the principles of agrarian reform or stewardship in the disposition or utilization of other natural resources, including lands of the public domain, under lease or concession, suitable to agriculture, subject to prior rights, homestead rights of small settlers and the rights of indigenous communities to their ancestral lands. The CARP’s implementation may be suspended with respect to ancestral lands for the purpose of identifying and delineating such lands.

Under this law, both ancestral lands and customary laws are recognized. Ancestral lands are limited to those in the actual, continuous and open possession and occupation of the community, subject to the Torrens System. There is also a prescription to protect the rights of indigenous peoples to their ancestral lands to ensure their economic, social and cultural well-being. With respect to customary laws, their systems of land ownership, land use, and modes of settling land disputes of all these communities are recognized and respected.

The mining laws of the Philippines also recognize the concept of ancestral lands as well as customary

laws in the determination of such lands. Under the Philippine Mining Act of 1995 which governs large-scale mining, the term “ancestral lands” refers to all lands exclusively and actually possessed, occupied, or utilized by indigenous cultural communities by themselves or through their ancestors in accordance with their customs and traditions since time immemorial, and as may be defined and delineated by law.

Two other principles set forth in the mining laws deal with “prior consent” and the right of indigenous peoples to participate in the benefits resulting from the utilization of mineral resources within their ancestral lands. The Mining Act of 1995 provides that no ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned and that in the event of an agreement with an indigenous cultural community, the royalty payment, upon utilization of the minerals shall be agreed upon by the parties.

In like manner, the People's Small-Scale Mining Act of 1991 provides that no ancestral land may be declared as a people's small-scale mining area without the prior consent of the cultural communities concerned and that if ancestral lands are declared as people's small-scale mining areas, the members of the cultural communities therein shall be given priority in the awarding of small-scale mining contracts.

## • **Environmental Protection and Management**

The role of indigenous communities in sustainable development is recognized in Republic Act No. 7586 on the establishment of the National Integrated Protected Areas System (“NIPAS”), promulgated in 1992. Under this law, the Protected Area Management Board that is established for each protected area shall include a representative from each affected tribal community.

The term "indigenous cultural community" refers therein to a group of people sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, since time immemorial, occupied, possessed and utilized a territory. Their ancestral lands and customary rights and interests are recognized. They also have the right to be protected against eviction or resettlement without their consent.

Under Executive Order No. 247, issued in 1995, which prescribes the guidelines for the prospecting of Biological and Genetic Resources, the rights of indigenous peoples to their traditional knowledge and practices when this information is directly and indirectly put to commercial use are identified and recognized. Their participation is promoted through their representation in the Inter-Agency Committee on Biological and Genetic Resources which is established as an attached agency to the DENR by this Order.

Likewise issued in 1995, Executive Order No. 263 established the Community-Based Forest Management (CBFM) as the national strategy to ensure the sustainable development of the country's forestlands resources. Under this law, indigenous peoples may participate in the implementation of CBFM activities in recognition of their rights to their ancestral domains and land rights and claims. In this regard, the DENR has various programs such as the Integrated Social Forestry Program along with contractual arrangements like stewardship agreements whereby indigenous peoples, among others, can avail of the same.

## • **Autonomous Regions**

Executive Order No. 220, issued in 1987, created the Cordillera Administrative Region covering the provinces of Abra, Benguet, Ifugao, Kalinga-Apayao and Mt. Province and the chartered city of Baguio. It has authority in the region over, among others, the protection of ancestral domain and land reform, the formulation of educational policies to cultivate the indigenous Cordillera cultures and inculcate traditional values, the development and promotion of indigenous laws, institutions as well as processes for dispute settlement, and the conduct of studies towards codifying the customary laws of the tribes.

Republic Act No. 6734, on the other hand, provides the Organic Act for the Autonomous Region in Muslim Mindanao. This law was promulgated in 1989 and later ratified by referendum. Under this law, “ancestral domains” include all lands and natural resources in the Autonomous Region that have been possessed or occupied by indigenous cultural communities since time immemorial. Also included are pasture lands, worship areas, burial grounds, forests and fields and mineral resources. Excluded however are strategic minerals such as uranium, coal, petroleum, and other fossil fuels, mineral oils, all sources of potential energy, lakes, rivers and lagoons and national reserves and marine parks, as well as forest and watershed reservations. “Ancestral lands” are defined as “lands in the actual, open, notorious, and uninterrupted possession and occupation by an indigenous cultural community for at least thirty (30) years”.

Subject to the Constitution and national policies, the Regional Government shall undertake measures to protect the ancestral domain and the ancestral lands of indigenous cultural communities. Ancestral lands already titled or owned by an indigenous cultural community shall not be disposed of to

nonmembers unless authorized by the Regional Assembly and no portion of the ancestral domain shall be open to resettlement by nonmembers of the indigenous cultural communities.

Indigenous cultural communities have priority rights in the exploration, development and utilization of natural resources within their ancestral domains, subject to the Constitution and national development policies and programs. In the case of corporations, companies and other entities within the ancestral domain of the indigenous cultural communities whose operations adversely affect the ecological balance, the Regional Government shall require them to take the necessary preventive measures and safeguards in order to maintain such a balance.

Tribal courts are also established hereunder which shall determine, settle and decide controversies and enforce decisions involving personal, family and property rights in accordance with the tribal codes of these communities. The Regional Assembly shall define the composition and jurisdiction of these courts as well as provide for the codification of indigenous laws and compilation of customary laws in the Autonomous Region. The customary laws, traditions, and practices of indigenous cultural communities on land claims and ownership and settlement of land disputes shall be implemented and enforced among the members of such community. The provisions of the Muslim Code and the Tribal Code shall be applicable only with respect to Muslims and other members of indigenous cultural communities.

- **Promotion of General Welfare**

Various laws and rules seek to promote the culture and interests of IPs. These include, for example, Proclamation No. 250 issued in 1988 which establishes every second week of July as "Cultural Communities Week" and Republic Act No. 6978 of 1991 whereby indigenous peoples are given priority in the construction of communal irrigation projects. Republic Act No. 7610 or the Anti-Child Abuse law of 1992 considers children in indigenous cultural communities as among the circumstances which gravely threaten or endanger the survival and normal development of children. And as a final example, Proclamation No. 547 of 1995 adopting the Social Reform Agenda (SRA) identifies as one of its key programs the areas covered by CADCs especially within priority provinces as identified by the DENR.

- **Representation in Local and National Bodies**

The participation and representation of indigenous peoples in various local and national bodies is mandated in an increasing number of laws. These include, among others, Executive Order No. 220 Creating a Cordillera Administrative Region, Republic Act No. 7160 providing the Local Government Code of 1991, Republic Act No. 7586 or the NIPAS Act<sup>14</sup>, Republic Act No. 7941 of 1995 providing for the election of Party-List Representatives and Executive Order No. 247 on Biological and Genetic Resources<sup>15</sup>.

## C. DISCUSSION

From the foregoing overview of international law, select foreign legal frameworks and our own national laws, it is clear that the IPRA was not formulated in a vacuum. The IPRA, as will be seen later, contains various principles found in international and national legal texts.

With respect to international laws and conventions, changes in approaches and perspectives towards indigenous peoples can be gleaned. In decades past, the policy was one of assimilation, as illustrated in ILO Convention 107. This has been superseded by policy changes that provide for the recognition of and respect for indigenous peoples.

Presently, there is general recognition of indigenous peoples' right of self-determination and of their collective rights. Their traditional knowledge and role in the sustainable development of natural resources are also recognized, as are their customary laws and practices. Specifically, Art. 14 of ILO Convention 169 recognizes indigenous peoples' rights of ownership and possession over lands traditionally occupied by them. It also recognizes their right to use lands not exclusively occupied by them but to which they traditionally had access for subsistence and traditional activities.

As for natural resources, Art. 15(1) of the same Convention recognizes indigenous

<sup>14</sup> Previously cited under the section on Environmental Protection and Management.

<sup>15</sup> *Ibid.*

peoples' rights to participate in the use, management and conservation of the natural resources pertaining to their traditional lands. Art. 15(2) deals with indigenous peoples' rights when a State retains the ownership of mineral and other natural resources. These are the rights to be consulted with respect to the exploitation of these resources, the right to participate in the benefits of such activities, and the right to be compensated for any damages that may be sustained therefrom. This implies that, under the framework of ILO Convention 169, whether and to what extent indigenous peoples are granted ownership of mineral and other natural resources within their traditional lands is determined by the concerned State. This is consistent with the principle of State sovereignty and with Article 34 of the same Convention which expressly provides that "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country."

The Draft Universal Declaration on the Rights of indigenous peoples appears broader in scope. This non-binding draft provides for the recognition of indigenous peoples' right to own, develop, control and use lands and territories including the total environment of the lands, air, waters, coastal seas, sea-ice, flora fauna, and other resources which they have traditionally owned or otherwise occupied or used.

The foreign laws discussed reflect various approaches to indigenous peoples. In relation to their rights over the mineral resources within lands traditionally held by them, these legal frameworks treat these issues differently. In an apparent reflection of Art. 34 of ILO Convention 169, these are dealt with in a manner that considers that conditions characteristic of each country. This is also consistent with the principle of State sovereignty.

The influence of international legal developments on Philippine laws is evident. The different laws and rules of the Philippines on indigenous peoples prior to the promulgation of the IPRA reflect, for example, the shift in policy from assimilation to recognition of indigenous peoples' right of self-determination. These also reflect, in general, the principles espoused in the Rio Summit such as the recognition of the knowledge and role of indigenous peoples.

Specific policy shifts are also evident toward community based management, toward recognizing indigenous knowledge and practices in sustainable development and toward ensuring the participation of indigenous peoples in relevant local and national policy bodies. With respect to ancestral domains and lands, important legal developments took place within the framework of the DENR. DENR Administrative Order No. 2 provided for the identification, delineation and recognition of ancestral land and domain claims leading to the issuance of CADCs and CALCs. These are not grants of title, rather, CADCs and CALCs are tenurial instruments which recognize the claims of indigenous peoples to their ancestral domains or lands.

As for public land laws, these required indigenous peoples to go through a process similar to that for free patents or homesteads in order to acquire title to lands claimed by them as ancestral. Community-based management programs such as the Integrated Social Forestry Program or stewardship agreements established contractual relationships between indigenous peoples who were granted the same, and the areas subject of said agreements. Other laws, such as the Mining Act, recognized the need for indigenous peoples' consent to development activities within ancestral lands and domains.

In sum, there were many developments in the laws and rules concerning indigenous peoples before the promulgation of the IPRA. Prior to the 1987 Constitution, however, there appears not to have been any legal recognition of the concept of ancestral domains. Under the 1987 Constitution, this concept can be found in laws like RA 6734, the Organic Act for the Autonomous Region of Muslim Mindanao, and in rules like DAO 2.

Other principles in the pre-IPRA legal framework can be found, including:

- recognition of indigenous peoples' rights to their ancestral lands;
- the right to be consulted with respect to activities affecting them;
- their right to give their prior consent before certain activities within their ancestral lands or domains may proceed;
- the right to benefit from utilization of natural resources within their ancestral lands and domains;
- the right to be fairly compensated for any damages sustained as a result of certain activities undertaken within their ancestral lands and domains, specifically mining activities;
- a right of priority to be awarded certain contracts within their ancestral lands, in the case of small scale mining, and the priority rights in the exploration, development and utilization of natural resources within their ancestral domains, in the case of the Autonomous Region of Muslim Mindanao;
- the recognition of and respect for customary laws, specifically with regard to determining the extent of their lands and domains;
- their right of effective participation in the local and national levels; and
- the recognition of their role in environmental management.

Thus, there were many principles in the pre-IPRA legal framework which pertained to the interests and welfare of indigenous peoples. None, however, provided for the recognition of the right of ownership by indigenous peoples of their ancestral domains by virtue of their historical occupation and relationship to the same. As will be seen in the next section, this is one main area in which the IPRA appears to make a radical legal departure.

## **II FOCUSING ON THE IPRA**

The foregoing background on indigenous peoples and the pre-IPRA legal framework sets the stage for consideration of the law itself. This includes a brief consideration of the issues involved in the present legal challenge before the Supreme Court.

Republic Act No. 8371, “An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes” otherwise known as the Indigenous Peoples Rights Act of 1997 or IPRA, was signed into law on 29 October 1997. It took effect on 22 November 1997, fifteen days after its publication on 07 November 1999 in both the *Malaya* and the *Manila Chronicle*.

### **A. SCOPE AND COVERAGE**

The IPRA has 13 chapters covering the following:

I	General Provisions
II	Definition Of Terms
III	Rights To Ancestral Domains
IV	Right To Self-Governance And Empowerment
V	Social Justice And Human Rights
VI	Cultural Integrity
VII	National Commission On Indigenous Peoples (NCIP)
VIII	Delineation And Recognition Of Ancestral Domain
IX	Jurisdiction And Procedures For Enforcement Of Rights
X	Ancestral Domains Fund
XI	Penalties
XII	Merger of the Office for Northern Cultural Communities (ONCC) and for Southern Cultural Communities (OSCC)
XIII	Final Provisions

The IPRA is the congressional articulation of the constitutional directive to protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being. Pursuant to the second paragraph of Section 5 of Article XII of the Constitution, it provides for the applicability of customary laws governing property rights and relations in determining the ownership and extent of ancestral domain.

This single law contains the most comprehensive policies and measures concerning indigenous peoples in Philippine legal history. It contains an exhaustive enumeration and description of the rights and responsibilities of indigenous peoples or indigenous cultural communities or indigenous peoples, hereinafter referred to as “IPs” or “ICCs”.

### **B. SALIENT PROVISIONS**

The IPRA contains provisions on the recognition of the cultural integrity and diversity of ICCs/IPs. This is found in Chapter VI which also contains provisions on Protection of Indigenous Culture, Traditions and Institutions, Educational Systems, Recognition of Cultural Diversity, Community Intellectual Rights, Rights to Religious, Cultural Sites and Ceremonies, Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies, Access to Biological and Genetic Resources, Sustainable Agro-Technical Development and Funds for Archeological and Historical Sites.

With respect to their right to self-governance and empowerment, Chapter IV of the IPRA contains provisions on Support for Autonomous Regions, Justice System, Conflict Resolution Institutions, and Peace Building Processes, Right to Participate in Decision

Making, Right to Determine and Decide Priorities for Development, Tribal Barangays, Role of People Organizations and Means for Development/Empowerment of ICCs/IPs.

Chapter V of the IPRA on Social Justice and Human Rights contains provisions on Equal Protection and Non-discrimination of ICCs/IPs, their Rights during Armed Conflict, Freedom from Discrimination and Right to Equal Opportunity and Treatment, Unlawful Acts Pertaining to Employment, Basic Services, Women, Children and Youth and an Integrated System of Education

Given the context of and purpose for this Discussion Paper, the overview of the salient provisions of the IPRA which follows deals primarily with those that impact on large-scale development projects and resource-extractive industries such as mining.

## 1. Ancestral Domains and Lands

### a. Policy

Section 2(b) of the IPRA provides that the State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

### b. Definition and Composition

As can be seen in table below, the concept of ‘ancestral domain’ is much broader than the concept of ‘ancestral lands’. The latter covers areas which have already been subjected to occupation or cultivation. Ancestral domains, on the other hand, may include larger areas including natural resources like bodies of water and minerals. Specifically, Sections 3(a) and 3(b) of the IPRA define ‘ancestral domains’ and ‘ancestral lands’, respectively, as follows:

ANCESTRAL DOMAINS	ANCESTRAL LANDS
Subject to Section 56*, refers to all areas <ul style="list-style-type: none"> <li>• Generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein;</li> <li>• held under a claim of ownership, occupied or possessed by ICC's/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations; and</li> <li>• which are necessary to ensure their economic, social and cultural welfare</li> </ul>	Subject to Section 56*, refers to land <ul style="list-style-type: none"> <li>• occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in- interest;</li> <li>• held under claims of individual or traditional group ownership; and held continuously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations</li> </ul>
<b>Inclusions</b> <ul style="list-style-type: none"> <li>• Ancestral lands;</li> <li>• Forests and pasture;</li> <li>• Residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise;</li> <li>• Hunting grounds, burial grounds, worship areas;</li> <li>• Bodies of water;</li> <li>• mineral and other natural resources; and</li> <li>• lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators (Sec. 3a)</li> </ul>	<b>Inclusions</b> <ul style="list-style-type: none"> <li>• Residential lots;</li> <li>• rice terraces or paddies;</li> <li>• private forests;</li> <li>• swidden farms; and</li> <li>• tree lots.</li> </ul>

\*Section 56 of the IPRA provides that property rights within the ancestral domains already existing and/or vested upon effectivity of the IPRA shall be recognized and respected.

### c. Indigenous Concept of Ownership

Under the IPRA, ancestral domains and lands cover not only the physical environment but the total environment including the spiritual and cultural bonds to the areas which the ICCs/IPs possess, occupy and use and to which they have claims of ownership.<sup>16</sup>

The *Indigenous Concept of Ownership*, as defined by the IPRA, sustains the view that ancestral domains and all resources found therein serve as the material bases of their cultural integrity. Consequently:

- ancestral domains are the ICCs/IPs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed; and
- it covers sustainable traditional resource rights, which refer to the rights of ICCs/IPs to sustainably use, manage, protect and conserve a) land, air, water, and minerals; b) plants, animals and other organisms; c) collecting, fishing and hunting grounds; d) sacred sites; and e) other areas of economic, ceremonial and aesthetic value in accordance with their indigenous knowledge, beliefs, systems and practices<sup>17</sup>.

### d. Ancestral Domains

#### (1) *Certificate of Ancestral Domain Title*

A Certificate of Ancestral Domain Title (“CADT”) refers to a title formally recognizing the rights of possession and ownership of ICCs/IPs over their ancestral domains<sup>18</sup>. Formal recognition of their rights to their ancestral domains by virtue of *Native Title*, when solicited by ICCs/IPs concerned, shall also be embodied in the CADT<sup>19</sup>.

According to Section 31 of the IPRA, ‘*Native Title*’ refers to pre-conquest rights to lands and domains which, as far back as memory reaches, have been held under a claim of private ownership by ICCs/IPs, have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest.

ICCs/IPs whose ancestral domains were officially delineated under DENR Administrative Order No. 2, series of 1993 or any other previous community/ancestral domain program shall have the right to apply for the issuance of a CADT over the area without going through the detailed process outlined under the IPRA<sup>20</sup>.

Hence, although a CADC or CALC granted under DAO 2 may not be automatically converted into a CADT or CALT, the holders of such CADC or CALC need not undertake the lengthy and tedious process as described in the next section. According to the Ancestral Domains Office of the National Commission on Indigenous Peoples, however, petitions for the issuance of CADTs and CALTs are still subject to field investigation and verification.

#### (2) *Delineation And Recognition Of Ancestral Domains*<sup>21</sup>

##### • Roles

The ICCs/IPs: The concerned ICCs/IPs shall have a decisive role in all the activities pertinent to the identification and delineation of ancestral domains, in line with the guiding principle of self-delineation. The Sworn Statement of the Elders as to the scope of the territories and agreements/pacts made with neighboring ICCs/IPs, if any, will be essential to the determination of these traditional territories.

<sup>16</sup> IPRA, Section 4.

<sup>17</sup> IPRA, Section 5 and Section 3(o).

<sup>18</sup> IPRA, Section 3(c).

<sup>19</sup> IPRA, Section 11.

<sup>20</sup> IPRA, Section 52.

<sup>21</sup> IPRA, Chapter VIII.

**The Government:** The Government shall take the necessary steps to identify lands which the ICCs/IPs concerned traditionally occupy and to guarantee effective protection of their rights of ownership and possession. It shall take measures in appropriate cases to safeguard the right of the ICCs/IPs concerned to land which they may no longer be exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, particularly of ICCs/IPs who are still nomadic and/or shifting cultivators.

• **Process**<sup>22</sup>

1. Petition for Delineation - The process of delineating a specific perimeter may be initiated by:
  - the NCIP with the consent of the ICC/IP concerned, or
  - through a Petition for Delineation by a majority of ICC/IP members filed with the NCIP.
2. Delineation Proper – Delineation will be done in coordination with the community concerned and shall at all times include their genuine involvement and participation. Upon the filing of the application by the ICCs/IPs concerned, the Ancestral Domains Office (“ADO”) of the NCIP shall undertake the: (a) official delineation of ancestral domain boundaries, including a (b) census of all community members therein.
3. Proof Required. - Proof of Ancestral Domain Claims shall include the testimony of elders or community under oath, and other documents directly or indirectly attesting to the possession or occupation of the area since time immemorial by such ICCs/IPs in the concept of owners which shall be any one of the following authentic documents:
  - a. written accounts of the following:
    - (1) the ICCs/IPs’ customs and traditions; or
    - (2) their political structure and institution.
  - b. pictures showing long term occupation such as those of old improvements, burial grounds, sacred places and old villages;
  - c. historical accounts, including pacts and agreements concerning boundaries entered into by the ICCs/IPs concerned with other ICCs/IPs;
  - d. Survey plans and sketch maps;
  - e. Anthropological data;
  - f. Genealogical surveys;
  - g. Pictures and descriptive histories of traditional:
    - (1) communal forests and hunting grounds; or
    - (2) landmarks (ex: mountains, rivers, creeks, ridges, hills, terraces); and
  - h. write-ups of names and places derived from the native dialect of the community.
4. Preparation of Maps - On the basis of such investigation and the findings of fact based thereon, the ADO shall prepare a perimeter map, complete with technical descriptions, and a description of the natural features and landmarks embraced therein.
5. Report of Investigation and Other Documents - A complete copy of the preliminary census and a report of investigation, shall be prepared by the ADO.
6. Posting, Notice and Publication - A copy of each document, including a translation in the native language of the ICCs/IPs concerned shall be posted:
  - a. in a prominent place in the area for at least fifteen (15) days; and
  - b. at the local, provincial and regional offices of the NCIP.

The petition shall be published in a newspaper of general circulation once a week for two (2) consecutive weeks to allow other claimants to file opposition thereto within fifteen days (15) from date of such publication. In areas where no such newspaper exists, broadcasting in a radio station will be a valid substitute. If both newspaper and radio station are not available, mere posting shall be deemed sufficient.

7. Endorsement to NCIP / Insufficiency of Proof / Rejection - In claims deemed to have sufficient proof, the ADO shall prepare a report to the NCIP endorsing a favorable action within fifteen (15) days from publication, and of the inspection process. If proof is deemed insufficient, the ADO shall require the submission of additional evidence. The ADO shall reject any claim that is deemed patently false or fraudulent after inspection and verification, in which case, the ADO shall give the applicant due notice, copy furnished all concerned, containing the grounds for denial. The denial shall be appealable to the NCIP. Where there are conflicting claims among ICCs/IPs on the

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<sup>22</sup> IPRA, Section 52.

boundaries of ancestral domain claims, the ADO shall cause the contending parties to meet and assist them in coming up with a preliminary resolution of the conflict, without prejudice to its full adjudication. In all proceedings for the identification or delineation of the ancestral domains as herein provided, the Director of Lands shall represent the interest of the Republic of the Philippines.

8. Turnover of Areas Within Ancestral Domains Managed by Other Government Agencies. – Upon notification by the NCIP Chairperson certifying that an area is an ancestral domain, the jurisdiction of the Department of Agrarian Reform, Department of Environment and Natural Resources, Department of the Interior and Local Government, and Department of Justice, the Commissioner of the National Development Corporation, and any other government agency claiming jurisdiction will terminate.
9. Issuance of CADT. - ICCs/IPs whose ancestral domains have been officially delineated and determined by the NCIP shall be issued a CADT in the name of the community concerned, containing a list of all those identified in the census.
10. Registration of CADTs. - The NCIP shall register issued certificates of ancestral domain titles and certificates of ancestral lands titles before the Register of Deeds in the place where the property is situated.

### (3) *Rights Pertaining to Ancestral Domains*

#### • **The Rights of Ownership and Possession**

The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected<sup>23</sup>. These include more specific rights, as follows:

**Right of Ownership** – Specifically, this is the right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains.

**Right to Develop Lands and Natural Resources** - Subject to Section 56, this includes the right to:

1. develop, control and use lands and territories traditionally occupied, owned, or used;
2. manage and conserve natural resources within the territories and uphold the responsibilities for future generations;
3. benefit and share the profits from allocation and utilization of the natural resources found therein;
4. negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws;
5. an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they may sustain as a result of the project; and
6. effective measures by the government to prevent any interference with, alienation and encroachment upon these rights.

**Right to Stay in the Territories** – This includes the rights:

1. to stay and not to be removed therefrom;
2. not to be relocated without their free and prior informed consent, nor through any means other than eminent domain;
3. to return to their ancestral domains, as soon as the grounds for relocation cease to exist, in the event relocation is considered necessary as an exceptional measure subject to their free and prior informed consent of the ICCs/IPs concerned having been obtained;
4. when return after necessary relocation is not possible as determined by agreement or through appropriate procedures:
5. to be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development; and
6. to be fully compensated for any resulting loss or injury.

**Right in Case of Displacement** - In case displacement occurs as a result of natural catastrophes, the State shall endeavor to resettle the displaced ICCs/IPs in suitable areas where they can have temporary life support systems, provided that:

1. the displaced ICCs/IPs shall have the right to return to their abandoned lands until such time that the normalcy and safety of such lands shall be determined;
2. should their ancestral domain cease to exist and normalcy and safety of the previous settlements are not possible, displaced ICCs/IPs shall enjoy security of tenure over lands to which they have

<sup>23</sup> IPRA, Section 7

- been resettled; and
3. basic services and livelihood shall be provided to them to ensure that their needs are adequately addressed.

**Right to Regulate Entry of Migrants** and organizations into the domains.

**Right to Safe and Clean Air and Water**, for which purpose, the ICCs/IPs shall have access to integrated systems for the management of their inland waters and air space.

**Right to Claim Parts of Reservations**, *i.e.* to claim parts of the ancestral domains which have been reserved for various purposes, except those reserved and intended for common and public welfare and service.

**Right to Resolve Conflict** pertaining to land in accordance with customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice whenever necessary.

- **Communal Rights**

Areas within the ancestral domains, whether delineated or not, shall be presumed to be communally held, subject to Section 56. Communal rights under this Act shall not, however, be construed as co-ownership as provided in R.A. No. 386 otherwise known as the New Civil Code<sup>24</sup>.

- **Priority Rights Pertaining to Natural Resources within Ancestral Domains (Section 57)**

In the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains, the following rules shall apply:

1. The ICCs/IPs shall have priority rights;
2. A non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilization of the natural resources on the following conditions:
  - a. The period therefor should not exceed twenty-five (25) years, renewable for not more than twenty-five (25) years;
  - b. A formal and written agreement is entered into with the ICCs/IPs concerned or that the community, pursuant to its own decision making process, has agreed to allow such operation; and
  - c. The NCIP may exercise visoratorial powers and take appropriate action to safeguard the rights of the ICCs/IPs under the same contract.

- **Right to Stop or Suspend Projects (Section 59)**

The ICCs/IPs shall have the right to stop or suspend, in accordance with the IPRA, any project that has not satisfied the requirement of the consultation process necessary in complying with the Certification Precondition under Section 59.

Under said Section 59, no department or other governmental agency may issue, renew, or grant any concession, license or lease, or enter into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certification shall only be issued on the following conditions:

1. a field-based investigation is conducted by the ADO of the area concerned;
2. the free and prior informed and written consent of ICCs/IPs concerned has been obtained;
3. there is no pending application for a CADT over the area.

- **Exemption from Taxes (Section 60)**

All lands certified to be ancestral domains shall be exempt from real property taxes, special levies, and other forms of exaction except such portion of the ancestral domains as are actually used for large-scale agriculture, commercial forest plantation and

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<sup>24</sup> IPRA, Section 55.

residential purposes or upon titling by private persons: *Provided*, That all exactions shall be used to facilitate the development and improvement of the ancestral domains.

**e. Ancestral Lands**

**(1) *Certificate of Ancestral Land Title***

A Certificate of Ancestral Lands Title (“CALT”) refers to a title formally recognizing the rights of ICCs/IPs over their ancestral lands.

**(2) *Identification, Delineation and Certification of Ancestral Lands*<sup>25</sup>**

**• For Lands within Ancestral Domains**

The allocation of lands within any ancestral domain to individual or indigenous corporate claimants shall be left to the ICCs/IPs concerned to decide in accordance with customs and traditions. Corporate claimants pertain to families or clans.

**• For Lands which are not within Ancestral Domains**

1. *Who may file* - Individual and indigenous corporate claimants of ancestral lands may have their claims officially established by filing applications for the identification and delineation of their claims with the ADO. An individual or recognized head of a family or clan may file such application in his behalf or in behalf of his family or clan, respectively.
2. *Proof Required* - Proof of such claims shall accompany the application form which shall include the testimony under oath of elders of the community and other documents attesting to the possession or occupation of the areas since time immemorial by the individual or corporate claimants in the concept of owners which shall be any of the authentic documents allowable under the process pertaining to ancestral domains, including tax declarations and proofs of payment of taxes.
3. *Other Documents* - The ADO may require from each ancestral claimant the submission of such other documents, Sworn Statements and the like, which in its opinion, may shed light on the veracity of the contents of the application/claim.
4. *Notice and Publication* - Upon receipt of the applications for delineation and recognition of ancestral land claims, the ADO shall cause their posting and publication in the manner required for petitions for CADTs.
5. *Investigation / Rejection / Conflicting Claims* - Fifteen days after publication, the ADO shall investigate each application. If meritorious, a parcellary survey of the area being claimed shall be conducted. The ADO shall reject any claim that is deemed patently false or fraudulent and shall give the applicant due notice, copy furnished all concerned, containing the grounds for denial. The denial shall be appealable to the NCIP. In case of conflicting claims, the ADO shall cause the parties to meet and assist them in coming up with a preliminary resolution of the conflict, without prejudice to its full adjudication. In all proceedings, the Director of Lands shall represent the interest of the Republic of the Philippines.
6. *Report* - The ADO shall submit a report on every application surveyed and delineated to the NCIP, which shall, in turn, evaluate it. If the NCIP finds such claim meritorious, it shall issue a certificate of ancestral land, declaring and certifying the claim of each individual or corporate claimant over ancestral lands.

**• Option to Secure Certificate of Title Under Commonwealth Act 141, as amended, or the Land Registration Act 496 (Section 12)**

Individual members of cultural communities shall have the option to secure title to their ancestral lands under the provisions of Commonwealth Act 141, as amended, or the Land Registration Act 496 subject to the following conditions:

1. they, by themselves or through their predecessors-in-interest, have been in continuous possession and occupation of the same in the concept of an owner since time immemorial or for a period of not less than thirty (30) years immediately preceding the approval of the IPRA uncontested by the members of the same ICCs/IPs;
2. that this option be exercised within twenty (20) years from the approval of the IPRA.

<sup>25</sup> IPRA, Section 53.

For this purpose, said individually-owned ancestral lands, which are agricultural in character and actually used for agricultural, residential, pasture, and tree farming purposes, including those with a slope of eighteen percent (18%) or more, are classified as alienable and disposable agricultural lands.

(1) ***Rights Pertaining To Ancestral Lands***

• **The Rights of Ownership and Possession**

Section 8 of the IPRA provides that the rights of ownership and possession of ICCs/IPs to their ancestral lands shall be recognized and protected. These include more specific rights, as follows:

**Right to Transfer land/property** - This includes the right to transfer land or property rights to or among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned;

**Right to Redemption** - In cases where it is shown that the transfer of land/property rights by virtue of any agreement or devise, to a non-member of the concerned ICCs/IPs is tainted by the vitiated consent of the ICCs/IPs, or is transferred for an unconscionable consideration or price, the transferor ICC/IP shall have the right to redeem the same within a period not exceeding fifteen (15) years from the date of transfer.

f. **Common Provisions**

(1) ***Fraudulent Claims*** (Section 54)

The ADO may, upon written request from the ICCs/IPs, review existing claims which have been fraudulently acquired by any person or community. Any claim found to be fraudulently acquired by, and issued to, any person or community may be cancelled by the NCIP after due notice and hearing of all parties concerned.

(2) ***Resolution of Conflicts*** (Sections 62-64)

In cases of conflicting interest, where there are adverse claims within the ancestral domains as delineated in the survey plan, and which cannot be resolved, the following general procedure shall be observed:

1. the NCIP shall hear and decide, after notice to the proper parties, the disputes arising from the delineation of such ancestral domains;
2. if the dispute is between and/or among ICCs/IPs regarding the traditional boundaries of their respective ancestral domains, customary process shall be followed;
3. customary laws, traditions and practices of the ICCs/IPs of the land where the conflict arises shall be applied first with respect to property rights, claims and ownership, hereditary succession and settlement of land disputes. Any doubt or ambiguity in the application and interpretation of laws shall be resolved in favor of the ICCs/IPs;
4. as a remedial measure, expropriation may be resorted to in the resolution of conflicts of interest following the principle of the "common good". The NCIP shall take appropriate legal action for the cancellation of officially documented titles which were acquired illegally, provided:
  - a. that such procedure shall ensure that the rights of possessors in good faith shall be respected;
  - b. that the action for cancellation shall be initiated within two (2) years from the effectivity of the IPRA; and
  - c. that the action for reconveyance shall be within a period of ten (10) years in accordance with existing laws.
5. any decision, order, award or ruling of the NCIP on any ancestral domain dispute or on any matter pertaining to the application, implementation, enforcement and interpretation of the IPRA may be brought for Petition for Review to the Court of Appeals within fifteen (15) days from receipt of a copy thereof.

**2. Free and Prior Informed Consent / Certification Precondition**

As used in the IPRA, "free and prior informed consent" shall mean the consensus of all

members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community<sup>26</sup>. Section 3(f) of the IPRA provides, in turn, that *Customary laws* refer to a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective ICCs/IPs.

The free and prior informed consent of ICCs/IPs must be obtained in the following circumstances:

1. No department or other governmental agency shall issue, renew, or grant any concession, license or lease, or enter into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. No such certification shall be issued without the free and prior informed and written consent of ICCs/IPs concerned. (Section 59)
2. The ADO shall issue, upon the free and prior informed consent of the ICCs/IPs concerned, certification prior to the grant of any license, lease or permit for the exploitation of natural resources affecting the interests of ICCs/IPs or their ancestral domains.
3. Should the ICCs/IPs decide to transfer the responsibility over areas found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation, said decision must be made in writing. The consent of the ICCs/IPs should be arrived at in accordance with its customary laws without prejudice to the basic requirements of existing laws on free and prior informed consent. (Section 58)
4. No ICCs/IPs shall be relocated without their free and prior informed consent, nor through any means other than eminent domain. Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free and prior informed consent of the ICCs/IPs concerned. [Section 7(c)]
5. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs. (Section 32)
6. It shall be unlawful to explore, excavate or make diggings on archeological sites of the ICCs/IPs for the purpose of obtaining materials of cultural values without the prior and informed consent of the community concerned. (Section 33)
7. Access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources, shall be allowed within ancestral lands and domains of the ICCs/IPs only with a prior informed consent of such communities, obtained in accordance with customary laws of the concerned community. (Section 35)

### 3. Environmental Considerations

**a. Rights:** Pursuant to Section 7, the ICCs/IPs' rights of ownership and possession of their ancestral domains include:

- to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; and
- the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws.

**b. Responsibilities:** Their responsibilities, on the other hand, are as follows:

- (1) With respect to duly certified ancestral domains occupied by them:
  - To preserve, restore, and maintain a balanced ecology by protecting the flora and fauna, watershed areas, and other reserves;
  - To actively initiate, undertake and participate in the reforestation of denuded areas and other development programs and projects subject to just and reasonable remuneration.
- (2) With respect to ancestral domains or portions thereof which are necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation, as determined by appropriate agencies with their full participation, the ICCs/IPs have the responsibility to maintain, develop, protect and conserve these areas, with the full and effective

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<sup>26</sup> IPRA, Section 3(g).

assistance of government agencies. The ICCs/IPs may transfer this responsibility over these areas provided:

- their consent thereto should be arrived at in accordance with their customary laws without prejudice to the basic requirements of existing laws on free and prior informed consent;
- the decision to transfer responsibility should be in writing;
- the transfer shall be temporary and will ultimately revert to the ICCs/IPs in accordance with a program for technology transfer; and
- no ICCs/IPs shall be displaced or relocated for the purpose enumerated under this section without the written consent of the specific persons authorized to give consent. (Sec. 58)

#### **4. The National Commission on Indigenous Peoples (NCIP)**

The IPRA provided for the abolition of the ONCC and OSCC and, pursuant to Section 40 thereof, established the National Commission on Indigenous Peoples, or the NCIP, as an independent agency under the Office of the President. As such, it is the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of ICCs/IPs, and for the recognition of their ancestral domains as well as their rights thereover.<sup>27</sup>

##### **a. Composition**

The NCIP is composed of seven Commissioners, one of whom shall be the Chairperson, all belonging to ICCs/IPs appointed by the President from each of the following ethnographic areas: Region I and the Cordilleras; Region II; the rest of Luzon; Island Groups including Mindoro, Palawan, Romblon, Panay and the rest of the Visayas; Northern and Western Mindanao; Southern and Eastern Mindanao; and Central Mindanao. They must be natural born Filipino citizens, bonafide members of ICCs/IPs as certified by his/her tribe, experienced in ethnic affairs and who have worked for at least ten years with an ICC/IP community and/or any government agency involved in ICC/IP, at least 35 years of age at the time of appointment, and must be of proven honesty and integrity. At least two Commissioners shall be women and at least two should be members of the Philippine Bar.

The Commissioners shall serve for three years, subject to re-appointment for another term, provided, no person shall serve for more than two terms and shall be compensated in accordance with the Salary Standardization Law. Any member may be removed from office by the President, on his own initiative or upon recommendation by any indigenous community before the expiration of their term for cause and subject to due process.

##### **b. Powers and Functions**

In general, the NCIP is mandated to: review, formulate, implement, and monitor the implementation of policies and programs for the economic, social and cultural development of the ICCs/IPs; to advise the President of the Philippines on all matters relating to ICCs/IPs and to submit within 60 days after the close of each calendar year, a report of its operations and achievements; to decide all appeals from the decisions and acts of all of its various Offices; to promulgate the necessary implementing rules and regulations; and to exercise such other powers and functions as may be directed by the President.

Specifically, the NCIP is mandated to, among other functions:

- issue certificates of ancestral land/domain title
- enter into contracts, agreements, or arrangement, with government or private agencies or entities as may be necessary to attain the objectives of the law, subject to existing laws
- issue appropriate certificates as a pre-condition to the grant of permit, lease, grant, or any other similar authority for the disposition, utilization, management and appropriation by any private individual, corporate entity or any government agency, corporation or subdivision thereof on any

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<sup>27</sup> IPRA, Section 38.

part or portion of the ancestral domain taking into consideration the consensus approval of the ICCs/IPs concerned.

**c. Offices**

The NCIP shall be composed of the Ancestral Domain Office, the Office on Policy, Planning and Research, the Office on Culture, Education and Health, the Office on Socio-Economic Services and Special Concerns, the Office of Empowerment and Human Rights, an Administrative Office, a Legal Affairs Office, Regional and Field Offices, and such other additional offices as it may deem necessary subject to existing rules and regulations. There shall also be an Office of the Executive Director which shall serve as its secretariat and be headed by another presidential appointee recommended by the NCIP. Finally, there shall be a Consultative Body consisting of the traditional leaders, elders and representatives from the women and youth sectors of the different ICCs/IPs who, from time to time, may advise it on matters relating to the problems, aspiration and interests of the ICCs/IPs.

Of the above offices, those that are of particular relevance with respect to the Mining Industry are the following:

- (1) The Ancestral Domain Office shall be responsible for the:
  - identification, delineation and recognition of ancestral lands/domains;
  - management of ancestral lands/domains in accordance with a master plan;
  - implementation of the ancestral domain rights of the ICCs/IPs;
  - the issuance, upon the free and prior informed consent of the ICCs/IPs concerned, certification as a pre-condition to the grant of any license, lease or permit for the exploitation of natural resources affecting the interests of ICCs/IPs or their ancestral domains and to assist the ICCs/IPs in protecting the territorial integrity of all ancestral domains.
- (2) The Office on Policy, Planning and Research shall, among others:
  - undertake the documentation of customary law and establish and maintain a Research Center that would serve as a depository of ethnographic information for monitoring, evaluation and policy formulation; and
  - formulate appropriate policies and programs for ICCs/IPs such as, but not limited to, the development of a Five-Year Master Plan for the ICCs/IPs.
- (3) The Legal Affairs Office shall:
  - advise the NCIP on all legal matters concerning ICCs/IPs;
  - provide ICCs/IPs with legal assistance in litigation involving community interest;
  - conduct preliminary investigation on the basis of complaints filed by the ICCs/IPs against a natural or juridical person believed to have violated ICCs/IPs rights and, on the basis of its findings, it shall initiate the filing of appropriate legal or administrative action to the NCIP.

**5. Dispute Resolution**

**a. Jurisdiction of the NCIP**

The NCIP through its regional offices, shall have jurisdiction and quasi-judicial powers over all claims and disputes involving rights of ICCs/IPs. According to Section 66, it shall be a condition precedent to the filing of a petition with the NCIP that the parties have exhausted all remedies provided under their customary laws and that a certification has been issued by the Council of Elders/Leaders who participated in the attempt to settle the dispute that the same has not been resolved.

Section 70 further provides that no inferior court of the Philippines shall have jurisdiction to issue any restraining order or writ of preliminary injunction against the NCIP or any of its duly authorized or designated offices in any case, dispute or controversy arising from, necessary to, or interpretation of this Act and other pertinent laws relating to ICCs/IPs

and ancestral domains.

Decisions of the NCIP shall be appealable to the Court of Appeals by way of a petition for review<sup>28</sup>.

**b. Application of Customary Laws**

Section 15 provides that the ICCs/IPs shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights.

When disputes involve ICCs/IPs, Section 65 states that customary laws and practices shall be used to resolve the dispute. Section 63 further provides that customary laws, traditions and practices of the ICCs/IPs of the land where the conflict arises shall be applied first with respect to property rights, claims and ownership, hereditary succession and settlement of land disputes. Any doubt or ambiguity in the application and interpretation of laws shall be resolved in favor of the ICCs/IPs.

**6. Penal Provisions**

**a. Punishable Acts: The following are acts punishable under the IPRA:**

- (1) Unauthorized and unlawful intrusion upon, or use of any portion of the ancestral domain (Section 10, Chapter III);
- (2) Any violation of the rights of ICCs/IPs enumerated in this law (Sec. 10, Chapter III);
- (3) Employment of any form of force or coercion against ICCs/IPs (Sec. 21, Chapter V);
- (4) Pertaining to employment (Section 24, Chapter V):
  - to discriminate against any ICC/IP with respect to the terms and conditions of employment on account of their descent
  - to deny any ICC/IP employee of any right or benefit provided by this law
  - to discharge them for the purpose of preventing them from enjoying any of the rights or benefits provided under this law
- (5) Pertaining to Religious, Cultural Sites and Ceremonies (Section 33, Chapter VI):
  - to explore, excavate or make diggings on archeological sites of the ICCs/IPs for the purpose of obtaining materials of cultural value without the prior and informed consent of the community concerned
  - to deface, remove or otherwise destroy artifacts which are of great importance to the ICCs/IPs for the preservation of their cultural heritage

**b. Persons Liable**

If the offender is a juridical person, all officers such as, but not limited to, its President, Manager, or Head of Office responsible for their unlawful act shall be criminally liable therefor, in addition to the cancellation of certificates of their registration and/or license: *Provided*, That if the offender is a public official, the penalty shall include perpetual disqualification to hold public office.

**c. Penalties: The following rules shall apply in the imposition of penalties:**

- (1) ICCs/IPs may elect to follow their customary law or existing laws;
- (2) If they elect customary laws, the penalty shall be determined in accordance with the same, provided:
  - No penalty shall be cruel, degrading or inhuman punishment; and
  - The death penalty or excessive fines shall not be imposed.
- (3) If existing laws are invoked, a violation of any provision of the IPRA shall, upon conviction, be punished by imprisonment of not less than nine (9) months but not more than twelve (12) years or a

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<sup>28</sup> IPRA, Section 67.

fine of not less than One hundred thousand pesos (P100,000.00) nor more than Five hundred thousand pesos (P500,000.00) or both upon the discretion of the court. In addition, he shall be obligated to pay to the ICCs/IPs concerned whatever damage may have been suffered by the latter as a consequence of the unlawful act.

## C. THE PETITION BEFORE THE SUPREME COURT

### 1. Nature of the Case

The petition challenging the constitutionality of the IPRA before the Supreme Court is docketed as G.R. No. 135385, *Isagani A. Cruz and Cesar S. Europa, petitioners versus the Secretary of the Department of Environment and Natural Resources (“DENR”), the Secretary of Budget and Management (“DBM”) and the Commissioners of the National Commission on Indigenous Peoples (“NCIP”), respondents* (hereinafter referred to as the “Petition”).

This case is a special civil action for Prohibition and Mandamus. It prays that:

- a writ of preliminary injunction and/or TRO be issued directing:
  - the NCIP from implementing the questioned provisions of the IPRA, especially Section 59
  - the DENR Secretary to desist from implementing DENR Memorandum Order Circular 98-02, the Interim Guidelines in the Processing of Mining Applications Consistent with the IPRA (“DENR MO 98-02”) dated 13 February 1998
- Sections 3,5,6,7, 8, 52i, 57, 58, 59, 63, 66 and related provisions of the IPRA be declared unconstitutional and invalid;
- a writ of prohibition be issued directing the NCIP to desist from implementing the IPRA, specifically section 59, and directing the DENR Secretary to desist from implementing DENR Memorandum Circular No. 89-02;
- a writ of prohibition directing the Secretary of the Department of Budget and Management to desist from disbursing funds for the implementation of the IPRA
- a writ of mandamus be issued commanding the DENR Secretary to carry out the constitutional mandate to control and supervise the exploration, development, utilization and conservation of the country’s natural resources.

### 2. Provisions Specifically Assailed

The questioned Section 59 states:

“SEC. 59. *Certification Precondition.* - All departments 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 certification shall only be issued after a field-based investigation is conducted by the Ancestral Domains Office of the area concerned: *Provided*, That no certification shall be issued by the NCIP without the free and prior informed and written consent of 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 a pending application for a Certificate of Ancestral Domain Title (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.”

On the other hand, DENR MO 98-02 provides that:

“Consistent with the provisions of Republic Act No. 8371, otherwise known as “The Indigenous Peoples Right Act of 1997” which took effect on 22 November 1997, and pending the formulation and approval of its Implementing Rules and Regulations (IRR) and the establishment/organization of the National Commission of Indigenous People (NCIP), all mining applications including renewal applications over areas which are not occupied by Indigenous People(s) or not covered by application for or approved Certificate of Ancestral Domain Claim (CADC), shall continue to be accepted, processed and approved: *Provided*, That the following additional documents shall be required prior to their approval:

- Certification from the concerned regional/provincial Office of the Northern/ Southern Cultural Communities (ONCC/OSCC) as to the presence/absence of Indigenous People within the applied

area: Provided, That such Certification shall be issued on the basis of a field-based investigation of the applied area to be conducted by the said Office;

- Certification from the Provincial Special Task Force on Ancestral Domains (PSTFAD) as to the presence or absence of applications for or approved Certificate of Ancestral Domain Claim (CADC);

Mining applications including renewal applications over areas occupied by Indigenous People(s) and/or covered by approved CADCs or CADC application(s) shall be accepted/processed, but the approval of which shall be subject to the provisions of the implementing rules and regulations of Republic Act No. 8371.”

Finally, the provisions of the IPRA specifically challenged in this Petition are the following:

- Sec. 3 Definition of Terms [3(a) on Ancestral Domains and 3(b) on Ancestral Lands;
- Sec. 5 Indigenous Concept of Ownership.
- Sec. 6 Composition of Ancestral Lands/Domains.
- Sec. 7 Rights to Ancestral Domains
- Sec. 8 Rights to Ancestral Lands
- Sec. 52 Delineation Process, specifically on the Turnover of Areas Within Ancestral Domains Managed by Other Government Agencies [Section 52(i)]
- Sec. 57 Natural Resources within Ancestral Domains
- Sec. 58 Environmental Considerations
- Sec. 59 Certification Precondition
- Sec. 63 Applicable Laws
- Sec. 66 Jurisdiction of the NCIP

### **3. Background**

The IPRA was signed into law on 29 October 1997 and took effect on 22 November 1997, fifteen days after its publication on 07 November 1999 in both the *Malaya* and the *Manila Chronicle*.

The IRR for the IPRA was promulgated on 09 June 1998 by the NCIP, published in the *Malaya* on 13 June 1998 and filed with the University of the Philippines Law Center on 28 October 1998 in conformity with the Revised Administrative Code of 1987.

On 25 September 1998, this Petition was filed before the Supreme Court. The Resolution of the Court dated 29 September 1998 required respondents to file their Comments within a non-extendible 10-day period. In October, Comments were filed by the NCIP and the OSG representing the DENR and the DBM. Petitioners thereafter filed their Motion to Admit Consolidated Reply the following month.

On 08 December 1998, the Court granted the Motion for Leave filed on 10 November 1998 by Hon. Juan Flavier, Hon. Ponciano Bennagen, tribal leaders and representatives (“Hon. Juan M. Flavier et. al”) to Intervene with Comment-in-intervention attached.

The Court issued a resolution on 19 January 1999 setting the case for oral argument on 02 March 1999, which was later reset to 13 April 1999. On 23 March 1999, the Court issued its Order granting the Motion for Leave to Intervene filed on 16 March 1999 by Commissioner Nasser A. Mahoromsalic of the Commission on Human Rights (“CHR”). On the same day, 23 March 1999, a Motion for Leave to Intervene with its Comment-in-Intervention was also filed by the Ikalahan Indigenous People, or Kalanguya, and Haribon Foundation for the Conservation of Natural Resources, Inc., which was later granted on 13 April 1999.

Oral arguments having proceeded on 13 April 1999, the Court required the parties to file their respective final memoranda, the allegations and arguments of which are summarized in the next subsection.

#### 4. Issues

During the oral arguments heard by the Court on 13 April 1999, the issues were delimited as follows

##### a. Procedural Issues

- *Whether or not the Petitioners have standing to sue*
- *Whether or not there is an actual case or controversy*
- *Whether or not the case was properly instituted before the Supreme Court, i.e. whether the principle of respect for the hierarchy of courts has been violated*

##### b. Substantive Issues

- *Whether or not the IPRA violates the 1987 Constitution, specifically the Regalian Doctrine;*
- *Whether or not the IPRA deprives other interested parties due process and equal protection of the law; and*
- *Whether or not the IPRA impairs the President's power of control.*

In addition to the constitutional provisions pertaining to IPs as quoted on page 8 hereof, the substantive issues also center on the following sections of Article XII of the 1987 Constitution:

“Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant. x x x

Sec. 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain may be further classified by law according to the uses which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such alienable lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than 12 hectares thereof by purchase, homestead, or grant x x x”

#### 5. Outline of Arguments<sup>29</sup> on the Substantive Issues

##### a. Petitioners Isagani Cruz and Cesar Europa

1. The IPRA violates the express provision of the 1987 Constitution that all lands of the public domain, mineral, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, are owned by the State. The grant of ownership of lands of the public domain, minerals and natural resources to ICCs/IPs violates the 1987 Constitution.
2. The IPRA violates the express provision of the 1987 Constitution that the exploration, development and utilization of natural resources shall be under the control and supervision of the State.
3. The Regalian Doctrine must be respected, even in areas said to be within ancestral domains. This doctrine protects the rights of all Filipinos to our natural resources. Over 400 years of political history of the Philippines cannot be ignored. The Philippine State is the successor to the rights, duties, powers and responsibilities of the former colonizers.

<sup>29</sup> The summary of arguments provided herein is based on the final Memoranda submitted by the parties pursuant to the order dated 13 April 1999 of the Supreme Court.

4. Natural law cannot invalidate precepts set by the Constitution.
5. Even assuming that lands of the public domain may be privately owned by ICCs/IPs in the concept of ancestral domains or ancestral lands, the natural resources found therein cannot be privately owned.
6. The 1987 Constitution clearly mandates that the rights of indigenous peoples and cultural communities are subject to the Constitution itself. The Constitution must prevail whether the concept of ownership is the civil law concept or the indigenous concept. Any exercise of police power must be within the bounds of the Constitution.
7. The IPRA deprives those who are not ICCs/IPs of due process and equal protection of the laws, in violation of the Constitution. The inclusion of private lands within the coverage of ancestral domains amounts to deprivation of property without due process of law.
8. The provision of the IPRA which vests exclusive jurisdiction to decide all claims and disputes involving ICCs/IPs in the NCIP, which is composed exclusively of members of ICCs/IPs deprives non-ICCs/IPs of due process of law.
9. The provisions of the IPRA which make customary laws applicable to settlement of disputes on property rights violate the right of non-ICCs/IPs to due process and equal protection of the laws.
10. The IPRA implementing rule which provides that the administrative relationship between the NCIP and the Office of the President is a mere lateral but autonomous relationship for purposes of coordination violates Section 17, Article VII of the 1987 Constitution.
11. The provision which grants ICCs/IPs the right to regulate the entry of migrants and other provisions of the IPRA violates the Constitution.

**b. The NCIP**

1. The IPRA is consistent with the 1987 Constitution, existing laws and jurisprudence. Petitioners are testing R.A. 8371 under a wrong constitutional provision because the law in question was intended to implement not Section 2, Article XII (in relation to Section 3, Article XII) but instead, Section 5, Article XII. Since the explicit classification of the public domain found in Section 3, Article XII does not include either ancestral domain or ancestral land, one may infer that the latter concepts are clearly not included in the concept of public domain, and therefore, deemed to be of private character. Ancestral domains and ancestral lands are outside the scope of public domain, and, therefore, beyond the reach of the classification scheme under Section 3, Article XII.
2. The application of jura regalia did not convert all lands and natural resources into public domain. The petition is premised on the erroneous notion that the regalian doctrine had the effect of converting all lands and natural resources into public domain. Historical legal antecedents of the theory of native title and decisions of the US Supreme Court and this Honorable Court confirm that the colonizers did not intend to strip the native inhabitants or the indigenous peoples of their rights to ancestral domains and ancestral lands by virtue of native title
3. The IPRA does not deprive the State of its averred ownership over public domains and natural resources therein. RA 8371, upon proper reading, does not grant indigenous peoples rights of ownership over public lands and other natural resources. Rather, it recognizes and even mandates respect for the rights of indigenous peoples over their ancestral lands and domains that had never been lands of the public domain.
4. RA 8371 does not take away the State's rights to full control and supervision over the utilization of natural resources; rather, it emphasizes the responsibilities over their ancestral domains, i.e. to consider environmental requirements in the management and development of their domains consistent with their holistic and sustainable lifestyle.
5. RA 8371 does not cause the State to abdicate its rights over mineral lands, lands of the public domains and other natural resources. It seeks to strike a reasonable balance between the interests of indigenous peoples over resources within their ancestral domains, and the interests of non-indigenous peoples in the development of these resources. The foremost requirement for utilization of resources within ancestral domains is that indigenous peoples' free and prior informed consent, through its customary practice shall be secured, and that the indigenous peoples would benefit from the utilization of natural resources.
6. RA 8371 has not deprived DENR of its jurisdiction over public lands. Ancestral domains are not, and

had never been, public lands, and hence placing them under the jurisdiction of some other government agency is tantamount to, if not verily, a deprivation of property without due process of law. Hence, it is the historical mistake of incorporating ancestral domains as part of the public lands that is sought to be corrected by Section 52 of RA 8371.

7. RA 8371 does not deprive private owners of their rights to titled lands within ancestral domains. Section 3 (a) and 3 (b) are both premised on the clause: "Subject to Section 56 hereof," or on the recognition of property rights within ancestral domains already existing and/or vested upon the effectivity of the IPRA.
8. The provisions of RA 8371 on the applicability of customary laws with respect to settlement of disputes on property rights do not violate the due process clause of the Constitution. RA 8371 provides for the primacy of customary law in the settlement of disputes. It does not prescribe customary law as the absolute and the only recourse of non-IPs.
9. The provisions of the implementing rules of RA 8371 on the creation and nature of the Commission do not violate the Constitution. The administrative relationship characterized as 'lateral but autonomous' pertains only to the formulation of policies and programs and matters of day-to-day and internal operations which have been left to the discretion of the NCIP. Section 40 of the same Act provides that the NCIP shall be an independent agency under the Office of the President.

**c. The OSG representing public respondents DENR and DBM**

1. The OSG, representing the DENR and the DBM, partly joins petitioners insofar as they assail the constitutionality of R.A. No. 8371 as violative of the Regalian Doctrine. As for the other questioned provisions, the OSG submits that they pass constitutional muster and represent a valid recognition by Congress of the rights of ICCs/IPs.
2. Insofar as it confers ownership of natural resources upon the ICCs/IPs, the IPRA is unconstitutional for being in violation of the Regalian Doctrine. Section 5 in relation to the definition and composition of ancestral domains segregates these from the public domain and makes them the private but community property which will be perpetually owned by the ICCs/IPs.
3. Sections 3(a), 5 and 7 of the IPRA confer what amounts to ownership in the civil law concept of natural resources upon the ICCs/IPs. The above provisions are contrary to Section 2, Article XII of the Constitution and, as such, are unconstitutional on their face. It notes that the IPRA's implementing rules, specifically Rule III, Part II, Section 1, incorporates therein the concept of ownership in Philippine civil law.
4. Section 2 of Article XIII is a limitation on Section 5 of the same article.
5. Police power as the direct act of the Sovereign abates vested rights of individual persons. Through the mandate of the Constitutions that have been adopted, the State has wrested control of those portions of the natural resources it deems absolutely necessary for social welfare and existence. The State may impair vested rights through a legitimate exercise of police power. Time immemorial possession does not create private ownership in cases of natural resources that have been found from generation to generation to be critical to the survival of the Sovereign and its agent, the State.
6. Individual persons, not groups, are vested with rights. It cannot be disputed that time-immemorial possession is a mode of acquiring title. The real issue is whether such mode of acquiring title may benefit groups of people.
7. Section 2 of Article XII is geared towards cultural and national identity purposes. The purpose of the Regalian Doctrine is to establish a permanent and fundamental policy for the conservation and utilization of all natural resources of the nation, not only as against foreigners but also as against its citizens.
8. Natural law cannot invalidate constitutional precepts. The sovereign is the original source of private titles.
9. IPRA does not deprive non-members of ICCs/IPs of due process and of equal protection of the laws. Ethnolinguistic affiliation is not a valid basis for claiming bias or partiality. The claim of partiality of customary laws is pure speculation.
10. The coverage of ancestral domains and ancestral lands does not prejudice property rights already existing and/or vested upon the effectivity of the IPRA.

11. IPRA does not impair the President's power of control over executive offices. The manifest intent of Congress is to make the NCIP as independent quasi-judicial and quasi-legislative agency to carry out the policies embodied in the law over which the President does not exercise control. The President's power of control extends only to purely executive offices and does not extend to quasi-judicial agencies such as the NCIP. The IPRA does not preclude the President from exercising his power of control insofar as the administrative functions of the NCIP are concerned. Congress may divest the DENR and other government agencies of jurisdiction over ancestral domains.

**d. Intervenor Ikalahan Indigenous People and Haribon Foundation for the Conservation of Natural Resources, Inc.**

1. The rights of ICCs/IPs in IPRA are constitutionally well-entrenched. If different portions of the Constitution seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. When considering constitutional questions, when a law is susceptible of two constructions, one of which will maintain and the other destroy it, the courts will always adopt the former.
2. Definitions taken in the abstract are meaningless. These should not be read separately from provisions which actually create rights and obligations. IPRA does not deprive the State of its ownership over minerals, lands of the public domain and natural resources. Regarding the ICCs/IPs right to develop lands and natural resources (Section 7b), it is concomitant with their duty to uphold it for future generations and to ensure ecological and conservation ends, and not for commercial gains. Second, the right to negotiate terms and conditions granted under this section pertains only to the exploration of natural resources, not to the exploitation, development and utilization of natural resources which, under the constitution, belongs to the State.
3. As far as commercial exploitation of natural resources are concerned, what the law grants to ICCs/IPs are mere preferential rights and not absolute ownership. Nowhere in Section 57, whether express or implied, does it say that the agreement for the exploitation, development and utilization of natural resources is to be entered into between the ICCs/IPs and the non-ICCs/IPs. This power remains vested with the State. What the law merely requires as a prerequisite for any exploitation, development or utilization within ancestral domains by non-ICCs/IPs is that the prior and informed consent of the ICCs/IPs must first be obtained.
4. Refusal of the DENR Secretary to act on mining applications is a non-issue. Petitioners have no standing to question the legality of the Memo Circular. It is for mining companies to assail if indeed the alleged inaction of the DENR Secretary on their mining applications amounts to an illegality.
5. The concept of ownership in the IPRA is different from that in civil law. The root cause of petitioners' misunderstanding of IPRA is that it tries to equate the concept of *ownership* as commonly understood in civil law with the indigenous concept of ownership created under IPRA. Under IPRA, the indigenous concept of ownership has the underlying philosophy that ancestral domains and all resources included therein are not material possessions or assets. Rather, they serve 'the material bases of their cultural integrity'. Ancestral domains are not considered landholdings to be fenced and enclosed from non-ICCs/IPs. The traditional, civil law concept of *ownership* should not be used as a gauge for measuring whether IPRA violated the regalian doctrine.
6. Whether or not the inclusion of private lands within the coverage of ancestral lands/domains amount to a deprivation without due process of law, Section 56 qualifies the challenged definitions and pertinent provisions. Petitioners' interpretation of Sec. 56 will result in absurdity. If all along, the claims of ICCs/IPs to these lands have been fully vested and recognized in law, what is the point of applying for ancestral land/domain titles?
7. Ethnicity has no bearing on impartiality as a judge and neither does the law recognize it as a valid ground for disqualification. The composition of NCIP is justified by its mandate to be the primary government agency to promote and protect the rights and well-being of ICCs/IPs. In any event, a system exists for the removal of NCIP Commissioners on valid grounds under Section 42 of the IPRA. Other remedies likewise exist in law. Any adverse decision rendered by the NCIP is appealable to the Court of Appeals by way of petition for review. It is not immediately final and executory.
8. Petitioners argue in the abstract against the application of customary laws. It should be noted that Congress has allowed the application of customary laws in, for example, the Local Government Code. The use of customary laws is merely preferential and limited only to cases involving property rights, claims and ownership, hereditary succession and settlement of land disputes. Parties may still elevate the matter by way of petition for review to the Court of Appeals, or to Supreme Court.

9. IPRA clearly provides that the NCIP shall be an independent agency under the Office of the President. Citing Section 40, the President has power to appoint, remove NCIP commissioners. “Lateral but autonomous relationship” is only for purposes of policy and program coordination per Sec. 1, Part II, Rule VII of the IPRA implementing rules.

**e. Intervenors Hon. Juan Flavier et al**

1. Ancestral lands are not lands of the public domain. Time immemorial possession in the concept of an owner is sufficient basis to claim protection of vested rights. This vested right is principally embodied in the due process clause. The process leading to the issuance of paper titles does not create the vested and private nature of the right but rather only symbolically but significantly evidences ownership.
2. Ancestral domains are not public. The rights and duties comprising their concepts of ‘ownership’ are defined not under the Civil Code nor the Public Land Act but by the IPRA. The ownership is *sui generis*. The State still retains control over these ancestral domains not through its powers of *dominium* but by its powers *imperium*.
3. It is possible for rights over natural resources to vest on a private holder if these were held prior to the 1935 Constitution. Natural resources outside ancestral domains are controlled by the State – in *imperium* as well as in *dominium* and are governed by Section 2, Article XII of the Constitution. Those within ancestral domains, as may be defined by Congress, are still controlled by the State – but only in *imperium* governed by the legislative power granted under section 5, article XII.
4. Section 2, Article XII is premised on commercial exploitation. The objective was to guard against alien ownership, control of a large amount of a resources by a few and regulation of large commercial extractive ventures. Ancestral domains consider natural resources as part of an entire ecosystem.
5. The second paragraph of Section 5, Article XII uses a different perspective, that of indigenous peoples capable of reasonable resource management. Citing deliberations of the Constitutional Commission, IPs’ rights to their ancestral domains are protected. Citing Section 5 of Article XII, that there is a difference between ancestral lands and domains in the concept of ownership under the civil code and under customary law. Neither the regalian doctrine nor customary law will be considered as the primary rule, but there will be a balancing of interests to be done by the State.
6. Again, citing deliberations of the Constitutional Commission, Section 5 was never meant to be subordinated to Section 2, Article XII. The interpretation proposed is reasonable and pragmatic. It proposes a new balance between community based resource management and full management by the State. The words of the Constitution can bear an interpretation which is not repugnant to the needs of the times.
7. IPRA will not mean that the entire country will be controlled by IPs. IPRA does not pretend to give absolute control over all the resources. The police power of the State could govern the recognition of the rights from domains which have neither been full public open access nor entirely individual.
8. The challenged provisions of the IPRA do not include lands held by others within the purview of ancestral lands and domains. The cardinal primary rights for procedural due process are present in the process for the identification and delineation of ancestral domains and lands. Private owners are protected by Section 56. There is a procedure to follow from any conflict arising from the process, of review and appeals.
9. The challenged provisions of the IPRA which recognize the use of customary law for the settlement of disputes on property rights do not violate due process of law. In order to find that there be prejudice sufficient to render proceedings as unconstitutional, the requirement now is that there must be a finding of specific and undue partiality. The use of customary law is not new. It has been in our statute books ever since the New Civil Code. The Local Government Code, in areas inhabited by indigenous peoples, has recognized the use of indigenous processes for dispute resolution. [Section 399(f) RA 7160, (1991)]
10. Both Section 40 of the IPRA and Rule VII, Part II, Section 1 of NCIP Administrative Order No. 1, series of 1998, state that the NCIP ‘shall be an independent agency under the Office of the President.

## **6. Discussion**

Under the principle of separation of powers, the Legislative, Executive and Judiciary are

the co-equal branches of government. While it is the duty of the legislature to make and enact laws, that of the executive to implement or carry out said laws,

““ It is the duty of the x x x judiciary to construe the law. It is emphatically the province and duty of the judicial department to say what the law is. While the legislative and the executive departments, by enacting and enforcing a law, respectively, may construe or interpret the law, it is the court that has the final word as to what the law means.”<sup>30</sup>

In cases such as these brought before the Supreme Court, however, it is first asked whether it should assume jurisdiction, i.e. to rule upon the procedural issues with respect to legal standing of the petitioners, whether there is an actual case or controversy ripe for adjudication, and whether the principle of hierarchy of courts has not been violated.

If the Court determines that it does not have and will not assume jurisdiction, then the Petition may be dismissed without any ruling on the merits, that is, on the substantive issues. In this eventuality, the law continues to have full force and effect. However, even if the Court finds that it has no jurisdiction based on technical grounds, it may exercise its discretion to brush aside such technicalities in order to assume jurisdiction and resolve matters involving public interest and substantive justice.

Should the Court determine that it has or will assume jurisdiction, then it may continue and issue its Decision on the merits. With respect to the substantive aspects of the Petition, petitioners pray for a declaration of unconstitutionality on the grounds that said law is irreconcilably inconsistent with the Constitution. Representing public respondents DENR and DBM, the OSG holds the view that only those provisions pertinent to ownership of ancestral domains, lands and natural resources therein are inconsistent with the Constitution and, in effect, prays for a declaration of partial unconstitutionality. Public respondent NCIP and intervenors pray for the dismissal of the Petition, all maintaining the position that the IPRA can be read and interpreted in a manner that is neither violative nor inconsistent with the Constitution.

Clearly then, on the substantive issues, the Court is being asked to make a determination with respect to the validity of the provisions of the IPRA vis a vis the Constitution. In principle, the courts may do this since

“x x x the interpretation and application of said laws belongs exclusively to the judicial department. And this authority to interpret and apply the laws extends to the Constitution. Before the court can determine whether a law is constitutional or not, it will have to interpret and ascertain the meaning not only of said law, but also of the pertinent portion of the Constitution in order to decide whether there is a conflict between the two, because if there is, then the law will have to give way and has to be declared invalid and unconstitutional.”<sup>31</sup>

As previously stated, the Court has the final word as to what a law means. In the exercise of its power of judicial review, it may dismiss allegations on the unconstitutionality of the IPRA thereby upholding its validity. In this case, the law continues to be effective, and its execution unhampered. The agencies mandated with its implementation would then carry out their task, including filling in whatever gaps or details the Legislature left for administrative action. These agencies shall be duly guided, however, by whatever interpretation or guidance the Court may have provided in its Decision. In this regard,

“In construing a statute, the enforcement of which may tread on sensitive areas of constitutional rights, the court may issue guidelines in applying the statute, not to enlarge or restrict it but to clearly delineate what the law requires. This is not judicial legislation but defining what the law is.”<sup>32</sup>

<sup>30</sup> *Endencia v. David*, 93 Phil. 696 (1953).

<sup>31</sup> R. Agpalo, *Statutory Construction*, p. 44.

<sup>32</sup> *Ibid*, p. 51.

On the other hand, should the Court find the Petition meritorious and declare the IPRA unconstitutional, it would thus lose all force and effect following that

“Philippine jurisprudence accepts what is called the ‘orthodox view’ with respect to the effect of a declaration of unconstitutionality. This view holds that “an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, inoperative, as if it had not been passed. x x x It is, in other words, a total nullity.”<sup>33</sup>

This view is echoed in Article 7 of the Civil Code which states that “when the courts declare a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.”

This doctrine, however, is not absolute and admits of certain qualifications. As the US Supreme Court stated “The actual existence of a statute prior to such a determination [of constitutionality], is an operative fact and may have consequences which cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, - with respect to particular regulation, individual and corporate, and particular conduct, private and official”.<sup>34</sup>

The Court is not limited, however, to only two options i.e. upholding a law’s constitutionality or declaring its invalidity. The Court, among other options it has in its judicial power, may render a declaration of partial unconstitutionality. This is the ruling prayed for by the OSG, representing public respondents DENR and DBM.

Because of the respect for the principle of separation of powers, courts generally hesitate to declare a law unconstitutional if it can be interpreted in a way so as to effectuate the legislative intent. If the court finds the law to be irreconcilable with the Constitution, however, it has the power to declare it invalid. In other cases, a declaration of partial unconstitutionality may be rendered. Such a declaration requires that the portions not declared invalid can stand independently as a separate statute and that the legislature is willing to retain these portions.<sup>35</sup>

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<sup>33</sup> Cruz, Isagani, *Constitutional Law*, quoting Norton v. Shelby (118 U.S. 425), p. 32.

<sup>34</sup> Bernas, quoting the concurring opinion of Justice Fernando in the case of Fernandez v. Cuerva [121 SCRA 1095 (1967)], in turn quoting Chicot Country Drainage Dist. V. Baxter States Bank [308 U.S. 371 (1940)], p. 864.

<sup>35</sup> Cruz, pp. 33-34.

### **III THE MINING INDUSTRY**

#### **A. DEFINITION AND CONCEPTUAL FRAMEWORK**

An ‘industry’ is considered a sector of commerce. A sector, however, is composed of different players and activities. There is a need to clarify who and what exactly the term “mining industry” refers to, in order to discuss the impacts of the IPRA thereon. At the outset, the ‘mining industry’ could be said to include both large-scale and small-scale mining as well as both upstream - exploration, development, utilization - and downstream activities such as mineral processing. The term would refer to both the private sector, i.e. including mining companies, associations, and cooperatives, and the public sector insofar as it formulates, promotes and implements mining activities as part of the larger economic programs of the government.

For purposes of this paper, however, the focus of the term ‘mining industry’ shall primarily be on entities, corporations or companies, engaged in the large-scale exploration, development and utilization of mineral resources. It is these entities which have either mining rights or applications therefor covering large tracts of land in many different parts of the country. It is more likely than not that many such areas, or portions thereof, are ancestral domains/lands or are claimed as such. Hence, it is this particular sector within the larger industry that is greatly affected by the IPRA and its implementation.

#### **B. LEGAL AND ADMINISTRATIVE FRAMEWORK**

##### **1. Brief Overview of Developments in Mining Laws**

##### **a. Prior to the 1987 Constitution**

The prevailing mining law in the Philippines prior to its cession to the United States under the Treaty of Paris was the Royal Decree of May, 1867, otherwise known as The Spanish Mining Law. Underground gold and copper mines began to operate at this time. During the American occupation from 1900 to 1935, the organic act known as the Philippine Bill of 1902 served as the principal law on mining. It provided, among other things, that mineral deposits in public lands were free and open for exploration, occupation and purchase by either citizens of the United States or the Philippines.

In order to maintain a claim staked under the Philippine Bill of 1902, the holder thereof had to strictly comply with annual work obligations required under said organic act. The importance of complying with such work obligations was reiterated and strengthened in subsequent laws, such as Act. No. 624 of 07 February 1903, prescribing further regulations to govern the location of mining claims. For as long as said obligations were complied with under this framework, there was no period within which a mining claim locator had to apply for a patent.

Under the 1935 Constitution, the regalian doctrine was expressly adopted, i.e. that all natural resources belong to the State, subject however to an important qualification:

“All agricultural timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, **subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution.** Natural resources, with the exception of public agricultural land, shall not be

alienated x x x”<sup>36</sup> (emphasis supplied)

It may be said then that the regalian doctrine did not have retroactive effect with respect to claims over mineral lands of mining claimants who had located and recorded these under the Philippine Bill of 1902 and prior to the effectivity of the 1935 Constitution.

Pursuant to the 1935 Constitution, the republic’s first mining act, Commonwealth Act No. 137, was passed by the First National Assembly on 07 November 1936. This formally ushered in the leasehold system since the alienation of mineral lands was prohibited. However, by virtue of the qualification made in the 1935 Constitution as quoted above, mining claims located and recorded under the Philippine Bill of 1902 were not entirely covered by the new framework insofar as these could be the subject of a patent, provided there was continued and consistent compliance with, among others, annual work obligations. Otherwise, such unpatented claims would be deemed abandoned and open for relocation.

The 1973 Constitution maintained the regalian doctrine but no longer qualified its application over claims made or rights granted prior to the effectivity of said Constitution on 17 January 1973. Pursuant thereto, another mining law was passed. This was Presidential Decree No. 463 (“PD 463”), the Mineral Resources Development Decree of 1974. PD 463 continued, however, to recognize rights and reservations made under the Philippine Bill of 1902.

The full and complete application of the regalian doctrine over mineral lands and resources came in 1977, with the promulgation of Presidential Decree No. 1214 (“PD 1214”). Under this law, all holders of unpatented mining claims located under the Philippine Bill of 1902 were required to file mining lease applications therefor, thereby waiving their rights to the issuance of mining patents. Otherwise, they would forfeit all their rights to such claims.

The Supreme Court has repeatedly ruled that PD 1214 was a valid exercise of the absolute police power of the State, which may impair even vested rights provided there was statutory and constitutional basis for such exercise.

Thus, the Court summarized:

“x x x (1) that the rights under the Philippine Bill of 1902 of a mining claim holder over his claim has been made subject by the said Bill itself to the strict requirement that he actually performs work or undertakes improvements on the mine every year and does not merely file his affidavit of annual assessment, which requirement was correctly identified and declared in E.O. No. 141; and (2) that the same rights have been terminated by P.D. No. 1214, a police power enactment, under which non-application for mining lease amounts to waiver of all rights under the Philippine Bill of 1902 and application for mining lease amounts to waiver of the right under said Bill to apply for patent. In the light of these substantial conditions upon the rights of a mining claim holder under the Philippine Bill of 1902, there should remain no doubt now that such rights were not, in the first place, absolute or in the nature of ownership, and neither were they intended to be so.”<sup>37</sup>

#### **b. Under the 1987 Constitution**

In another significant case, the Supreme Court has explained that

“The adoption of the concept of jura regalia that all natural resources are owned by the State embodied in the 1935, 1973 and 1987 Constitutions, as well as the recognition of the importance of the country’s natural resources, not only for national economic development, but also for its

<sup>36</sup> Section 1, Article XIII on Conservation and Utilization of Natural Resources, 1935 Constitution.

<sup>37</sup> *Atok Big-Wedge Mining Company, petitioner, vs. Hon. Intermediate Appellate Court and Tuktukan Saingan, respondents*, G.R. No. 63528 (09 September 1996).

security and national defense, ushered in the adoption of the constitutional policy of "full control and supervision by the State" in the exploration, development and utilization of the country's natural resources."<sup>38</sup>

Thus it is that under the present framework established under paragraph 1, Section 2, Article XII of the 1987 Constitution, minerals and other natural resources are owned by the State and, except for agricultural lands, shall not be alienated. The utilization of such inalienable lands and resources is no longer allowed through license, concession or lease as they were under the 1935 and 1973 Constitutions. In the exploration, development, and utilization of mineral resources, the State shall have full control and supervision through two (2) modes:

1. it may directly undertake such activities; or
2. it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, under such terms and conditions as may be provided by law. (Par. 1, Sec. 2, Art. XII, 1987 Constitution)

A third mode is allowed by the Constitution in the case of large-scale exploration, development, and utilization of minerals. In such cases, the President may enter into agreements with foreign-owned corporations involving either technical or financial assistance on the following conditions:

1. these shall be in accordance with the general terms and conditions provided by law;
2. these shall be based on real contributions to the economic growth and general welfare of the country;
3. these shall promote the development and use of local scientific and technical resources; and
4. the President shall notify the Congress of every such contract entered into within thirty days from its execution. (Par. 4, Section 2, Art. XII, Constitution)

In the same case, the Court stressed that the objectives of the new system mandated under Section 2 of Article XII are: (1) a more equitable distribution of opportunities, income, and wealth; (2) a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and (3) an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

Pursuant to the foregoing Constitutional provisions, then President Corazon C. Aquino issued Executive Orders 211 and 279<sup>39</sup>. Executive Order No. 211 ("EO 211"), promulgated on 10 July 1987, provided for the interim procedures in the processing and approval of applications for the exploration, development and utilization of minerals pursuant to the 1987 Constitution in order to ensure the continuity of mining operations and activities and to hasten the development of mineral resources. It provided, among other things, that existing mining leases and other grants shall continue and remain in full force and effect. It further provided that the processing, evaluation and approval of all mining applications, declarations of locations, operating agreements and service contracts shall continue to be governed by PD 463, as amended, other existing mining laws and their implementing rules and regulations. However, the privileges granted, as well as the terms and conditions thereof were expressly subject to any and all modifications or alterations which Congress may adopt pursuant to Section 2, Article XII of the 1987 Constitution.

In the same month, or on 25 July 1987, Executive Order No. 279 ("EO 279") was issued prescribing the guidelines for the negotiation of joint venture, co-production, or production-sharing agreements for the exploration, development and utilization of

<sup>38</sup> *Miners Association of the Philippines, Inc., petitioner, vs. Hon. Fulgencio S. Factoran, Jr., Secretary of Environment and Natural Resources, and Joel D. Muyco, Director of Mines and Geosciences Bureau, respondents*, G.R. No. 98332 (16 January 1995).

<sup>39</sup> These were issued pursuant to her legislative powers then under Article II, Section 1 of the Provisional Constitution and Article XIII, Section 6 of the 1987 Constitution.

mineral resources. In addition, guidelines were prescribed for agreements involving technical or financial assistance by foreign-owned corporations for the large-scale exploration, development, and utilization of minerals.

In the previously cited case of *Miners Association vs. Factoran, Jr.*, the constitutionality of two DENR administrative orders issued pursuant to EO 211 and EO 279 was assailed. The petitioners therein alleged that both orders violated the non-impairment of contract clause under Article III, Section 10 of the 1987 Constitution. Specifically, it was alleged that Administrative Order No. 57, series of 1989, unduly pre-terminates existing mining leases and other mining agreements and automatically converts them into production-sharing agreements and that Administrative Order No. 82, series of 1990, declares that failure to submit Letters of Intent and Mineral Production-Sharing Agreements shall cause the abandonment of their mining, quarry and sand gravel permits.

In upholding the validity of said administrative orders, the Court held that Article XII, Section 2 of the 1987 Constitution does not apply retroactively to licenses, concessions or leases granted under the 1973 Constitution. It noted the reservation clause under EO 211 that the terms and conditions of mining leases or agreements granted after the effectivity of the 1987 Constitution shall be subject to any modifications Congress may adopt pursuant to Article XII, Section 2 of the 1987 Constitution. Consequently, the non-impairment of contract clause under Article III, Section 10 of the 1987 Constitution does not apply to the latter. With respect to EO 279, the Court stated that since it has the force and effect of a law, it validly modified the terms and conditions of mining leases and agreements granted under Executive Order No. 211, or after the effectivity of the 1987 Constitution.

The Court then stated that regardless of the aforementioned reservation clause, mining leases or agreements granted by the State, such as those granted pursuant to Executive Order No. 211 are subject to alterations through a reasonable exercise of police power.

“x x x Accordingly, the State, in the exercise of its police power in this regard, may not be precluded by the constitutional restriction on non-impairment of contract from altering, modifying and amending the mining leases or agreements granted under Presidential Decree No. 463, as amended, pursuant to Executive Order No. 211. Police power, being co-extensive with the necessities of the case and the demands of public interest; extends to all the vital public needs. The passage of Executive Order No. 279 which superseded Executive Order No. 211 provided legal basis for the DENR Secretary to carry into effect the mandate of Article XII, Section 2 of the 1987 Constitution.”<sup>40</sup>

The acquisition and administration of mining rights have clearly undergone significant changes within this century alone. This is evident from the development of constitutional provisions on natural resources and, specifically, the developments in the legal framework in mining. In the transition from the 1935 to the 1973 Constitution and from the 1973 to the 1987 Constitution, police power was invoked as the justification in altering previously vested mining rights for the purpose of implementing a new legal framework. The exercise of such power was further justified by the policy that the exploration, development and utilization of the country's natural resources are matters vital to the public interest and the general welfare of the people.

It is this policy that appears as a common thread guiding these developments and transitions. Since 1935, the principle that natural resources are essential for national economic development and security has been firmly entrenched. Hence, these developments logically flow toward a framework which will more completely embody full control and supervision by the State in the exploration, development and utilization of the country's mineral and other natural resources.

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<sup>40</sup> *Miners Association vs. Factoran, Jr.*

## 2. Present Legal and Administrative Framework

The present legal and administrative framework for the large-scale exploration, development and utilization of mineral resources in the Philippines is provided in Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995 (the “Mining Act”) and DENR Administrative Order No. 96-40, or the Revised Implementing Rules and Regulations of the Mining Act (“DAO 96-40”).

The Mining Act was intended as a much needed boost for the mining industry reeling from weak world metal prices and an economic slump which witnessed the successive closure of mines from the middle to late 1980’s. Prior to that period, mining had been a major contributor to the Philippine economy primarily through local investments and export earnings. However, local investments were perceived in the 1990’s to be insufficient to revitalize the industry. After pending in Congress for several years, the Mining Act was passed in 1995 liberalizing foreign investments in mining.

That the Mining Act was successful in attracting foreign investment may be evidenced by the dramatic increase in such investments in 1995, about 700% over 1994<sup>41</sup>. In addition, a significant number of international mining companies filed applications for mining rights.

Aside from liberalizing foreign investments, the Mining Act also includes provisions on environmental protection, community development and indigenous peoples. This is in contrast to any of its legal predecessors. Despite this, the Act is criticized by some as an inherently flawed document, and denounced for allegedly displaying a continuous bias toward large-scale commercial mining and foreign investments.<sup>42</sup>

Like the IPRA, the constitutionality of the Mining Act is the subject of a legal challenge instituted in 1997 before the Supreme Court. More than three years later, it remains unresolved although, again like the IPRA, the Court has not restrained its implementation.

### a. General Policy

Section 2 of the Mining Act provides the general policy of the State with respect to mineral resources, to wit:

“All mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State. It shall be the responsibility of the State to promote their rational exploration, development, utilization and conservation through the combined efforts of government and the private sector in order to enhance national growth in a way that effectively safeguards the environment and protect the rights of affected communities.”

This policy incorporates the State’s main premises for mineral resources development, the most basic of which is its ownership of all mineral resources, whether in public or private lands. The other principles guiding such development flow therefrom, specifically:

1. the responsibility of the State to promote their rational exploration, development, utilization and conservation;
2. the role of the government and private sector in such promotion;

<sup>41</sup> The Philippine Mining Industry: An International Perspective, a briefing paper prepared by the International Mining and Exploration Committee (16 September 1997), p. 18.

<sup>42</sup> A. Ballesteros, *All That Glitters: Understanding the Myth of ‘Sustainable Mining’ in the Philippines* (1997).

3. the objective of national growth;
4. environmental protection; and
5. protection of the rights of affected communities.

Expounding on these fundamental considerations, DAO 96-40 expressly introduces the concept of sustainable development in mining or ‘sustainable mining’, i.e. development which meets the needs of the present without compromising the ability of the future generations to meet their own needs. Specifically, Section 3 of DAO 96-40 provides the following “Governing Principles”:

- “a. Mineral resource exploration, development, utilization and conservation shall be governed by the principle of sustainable mining, which provides that the use of mineral wealth shall be pro-environment and pro-people in sustaining wealth creation and improved quality of life under the following terms:
1. Mining is a temporary land use for the creation of wealth which leads to an optimum land use in the post-mining stage as a result of progressive and engineered mine rehabilitation work done in cycle with mining operations;
  2. Mining activities must always be guided by current best practices in environmental management committed to reducing the impacts of mining and effectively and efficiently protecting the environment;
  3. The wealth accruing to the Government and communities as a result of mining should also lead to other wealth-generating opportunities for people and to other environment-responsible endeavors;
  4. Mining activities shall be undertaken with due and equal emphasis on economic and environmental considerations, as well as for health, safety, social and cultural concerns; and
  5. Conservation of minerals is effected not only through recycling of mineral-based products to effectively lengthen the usable life of mineral commodities but also through the technological efficiency of mining operations.
- b. Investments in commercial mining activities from both domestic and international sources shall be promoted in accordance with State policies and the principles and objectives herein stated.
- c. The granting of mining rights shall harmonize existing activities, policies and programs of the Government that directly or indirectly promote self-reliance, development and resource management. Activities, policies and programs that promote community-based, community-oriented and processual development shall be encouraged, consistent with the principles of people empowerment and grassroots development.”

In the above policy statements, there is clearly an attempt to balance the fundamental considerations previously enumerated. Although it is economic considerations, i.e. national growth, which drives mineral resources development, considerations of sustainability, environmental protection, equity and community development are given emphasis as well. Despite this, there is some criticism, for example, that

“Sustainable mining follows in the same mold as sustainable development, in that rhetoric plays a large part, and that it does not serve to question the points of obvious irreconcilability with the high-growth foreign investor-driven industrialization path x x issues of equity, social displacement, resource control, and national sovereignty remain unanswered. x x x”.<sup>43</sup>

These are issues relating to the formulation of national development policies and priorities. However, as large-scale mining continues to be a development option, the Mining Act and its implementing rules strive to address a broad range of economic, environmental and equity issues with the objective of, among others, promoting concrete and visible examples of ‘sustainable development’ in mining.

## **b. Overview of Salient Provisions**

The Mining Act and the IRR set out a comprehensive framework to carry out the policies

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<sup>43</sup> *Ibid.*

and principles previously stated. Unlike past mining laws and rules, there are extensive provisions on environmental protection, community development and ICCs/IPs. In general, provisions on the following areas, among others, are specifically set forth:

1. Government Management
2. Mineral and Government Reservations
3. Scope of Mining Applications
4. Mining Tenements
  - Exploration Permits (“EP”)
  - Mineral Agreements, such as the Mineral Production Sharing Agreements (“MPSA”)
  - Financial or Technical Assistance Agreements (“FTAA”)
  - Quarry Permits
5. Processing and Transport of Minerals and Mineral Products
6. Development of Mining Communities, Sciences and Mining Technology
7. Mine Safety and Health
8. Environmental Protection
9. Dispute Resolution
10. Economic or Fiscal Provisions

The more salient provisions pertinent to the legal and administrative framework under the Mining Act are presented hereunder following the format of the basic premises and principles enumerated in the previous subsection. The effect of the IPRA on the Mining Act is not, as yet, discussed in order to better describe said framework prior to the promulgation of the IPRA. The implications of the IPRA on the current legal framework in mining and on the Mining Industry shall be discussed in the last main section hereof.

**(1) *The Responsibility of the State to Promote their Rational Exploration, Development, Utilization and Conservation***

**Government Management** (Chapter II, DAO 96-40)

As owner of all mineral resources, the State, through the DENR, is primarily responsible for the conservation, management, development and proper use thereof. The Mines and Geosciences Bureau (“MGB”), a line bureau of the DENR, is charged with the implementation of the Mining Act, with direct charge in the administration and disposition of mineral lands and mineral resources.

**Mineral and Government Reservations** (Chapter III, DAO 96-40)

Upon the recommendation of the Director through the Secretary, the President may set aside and establish mineral reservations on the following conditions:

1. the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development or certain minerals for scientific, cultural or ecological value;
2. public hearings are held allowing the participation of all concerned sectors, communities, organizations and Local Government Units, with prior notice and publication of such hearings;
3. recommendation of the MGB Director through the DENR Secretary; and
4. valid and existing rights shall be respected.

Mining operations in mineral reservations may be undertaken by the DENR or through any of modes available to unreserved areas and are further subject to a royalty of not less than five percent (5%) of the market value of the gross output of the minerals/mineral products extracted therefrom, exclusive of all other taxes. The President may, by proclamation, alter or modify the boundaries thereof or revert the same to the public domain without prejudice to prior existing rights upon recommendation of the DENR Secretary who shall periodically review existing Mineral Reservations.

With respect to government reservations, i.e. proclaimed reserved lands for specific purposes other than mineral reservations (Sec. 5an, DAO 96-40), mining operations therein shall be first undertaken through an exploration permit before the same is opened for other mining applications.

### Scope of Mining Applications (Chapter IV, DAO 96-40)

Mining applications may be made over timber or forest lands, mineral reservations and other lands not covered by valid and existing mining rights and mining applications. Closed to mining applications are areas covered by such rights or applications and areas expressly prohibited by other laws. Furthermore, environmental considerations may also render certain areas closed to mining applications, such as:

1. old growth or virgin forests, proclaimed watershed forest reserves, wilderness area, mangrove forests, mossy forests, national parks, provincial/municipal forests, parks, greenbelts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under the National Integrated Protected Area System (NIPAS) under RA No. 7586, DENR Administrative Order No. 25, series of 1992 and other laws; and
2. areas which the Secretary may exclude based, *inter alia*, on proper assessment of their environmental impacts and implications on sustainable land uses, such as built-up areas and critical watersheds with appropriate barangay/municipal/city/provincial *Sanggunian* ordinance specifying therein the location and specific boundary of the concerned area; and

There are areas over which mining applications shall be subject to the consent of concerned agencies or entities, such as:

1. military and other government reservations;
2. areas near or under public or private buildings, cemeteries, archaeological and historic sites, bridges, highways, waterways, railroads, reservoirs, dams or other infrastructure projects, public or private works, including plantations or valuable crops;
3. areas covered by FTAA applications which shall be opened for quarry resources mining applications, except sand and gravel applications;
4. areas covered by small-scale mining under R.A. No. 7076/P.D. No. 1899; and
5. DENR Project Areas.

### **(2) *The Role of the Government and Private Sector in the Promoting the Rational Exploration, Development, Utilization and Conservation of Mineral Resources***

As provided in Section 2 of Article XII of the 1987 Constitution, the State may directly undertake mining activities or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per cent of whose capital is owned by such citizens. In addition, the President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country.

### Mining Tenements

The primary modes of acquiring mining rights or tenements under the Mining Act are exploration permits, mineral agreements, specifically the Mineral Production Sharing Agreement (“MPSA”), Financial or Technical Assistance Agreements (“FTAA”) and quarry permits.

<b>Mining Right</b>	<b>Maximum Area (in hectares)</b>	<b>Term</b>	<b>Qualified Person</b>	<b>Benefit Sharing*</b>
Exploration Permit	32,000 onshore 81,000 offshore	2 years; renewable to a maximum of 6 years	Individuals or Filipino or Foreign corporations	None (research, data collection)
MPSA	16,200 onshore 40,500 offshore	25 years; renewable for a like period	Individuals or Filipino corporations	40% company 60% government
FTAA	81,000 onshore 324,000 offshore	25 years; renewable for a like period	Filipino or foreign corporations	40% company 60% govt. (to start after recovery of initial pre-operating expenses)

Source: A Response to the Issues Raised Against Mining, Horacio C. Ramos, MGB Director, March 1998

\*Please see page 47 hereof for the updated benefit sharing under the FTAA.

Mineral exploration is the scientific assessment of the mineral potential of the land. The areas allotted for exploration are much larger given that the odds of finding an economically viable mineral deposit are very high. All areas covered by exploration and other tenements are further subject to relinquishment requirements, i.e. the progressive reduction of the contract area wherein the mining contractor returns areas that, based on its exploration activities, have low mineral potential. For mineral agreements and FTAAAs, a maximum of 5,000 hectares or about 6%, of the original contract area may be retained after relinquishment.

An FTAA may be entered into for the exploration, development and utilization of gold, copper, nickel, chromite, lead, zinc and other minerals although no FTAAAs may be granted with respect to cement raw materials, marble, granite, sand and gravel and construction aggregates. The phases under an FTAA include an Exploration Period of two (2) years extendible for another two (2) years, a Pre-feasibility Study Phase of two (2) years, a Feasibility Study phase of two (2) years and the development, construction and utilization phases which take up the remaining years of an FTAA.

Quarry permits refer to those that may be granted to a qualified person by the Provincial Governor/City Mayor for the extraction, removal, utilization or disposition of quarry resources. The maximum area which a qualified person may hold at any one time shall be five hectares (5 has) for a term of five (5) years, renewable for like periods but not to exceed a total term of twenty-five (25) years. For large-scale quarry operations involving cement raw materials, marble, granite, sand and gravel and construction aggregates, a qualified person and the government may enter into a mineral agreement.

### **(3) *Protection of the Rights of Affected Communities***

#### **Community Relations Record**

A mandatory requirement under DAO 96-40 for mining applicants is the submission, where applicable, of a "Community Relations Record". This refers to the applicant's proof of its community relations which may consist, but is not limited to, sociocultural sensitivity, the character of its past relations with local communities, cultural appropriateness and social acceptability of its resource management strategies. (Sec. 5j)

#### **Community Development**

Among the more significant provisions of DAO 96-40, it is provided that a holder of a mining agreement or permit shall assist in the development of the host and neighboring communities and mine camp to promote the general welfare of the inhabitants living therein. [Sec. 134(a)] For this purpose, as well as to assist in developing mining technology and geosciences, a minimum of one percent (1%) of the direct mining and milling costs shall be allocated for community development activities. It should be noted that the royalty payment to ICCs/IPs may include the aforementioned allotment.

Examples of such community activities are: the establishment of schools, hospitals, churches and recreational facilities; the construction of access roads, bridges, piers and wharves; the establishment of communication, waterworks, sewerage and electric power systems; the development of housing projects and the establishment of training facilities, livelihood industries and other self-sustaining income-generating activities. (Sec. 135-136, DAO 96-40)

#### **Compensation for Damages (Sec. 199, DAO 96-40)**

Losses and damage caused by any mining operations on lives and personal safety, lands, agricultural crops and forest products, marine life and aquatic resources, cultural and human resources, and infrastructure and the revegetation and rehabilitation of silted farm lands and other areas devoted to agriculture and fishing shall be compensated in conformity with the specific procedures and guidelines provided under DAO 96-40.

#### **Indigenous Cultural Communities / Indigenous Peoples**

The Mining Act and DAO 96-40 identify certain areas over which mining applications are subject to the consent of the agency or entity concerned. These include:

1. areas subject of Certificates of Ancestral Domains/Ancestral Land Claims (CADC/CALC); and
2. areas verified by the DENR Regional Office and/or other office or agency of the Government authorized

by law for such purpose as actually occupied by ICCs under a claim of time immemorial possession.

In these areas, no mineral agreements or permits may be granted without the prior consent of the concerned ICCs/IPs. Prior consent refers to prior informed consent obtained, as far as practicable, in accordance with their customary laws. It should meet the minimum requirements of public notice through various media such as newspaper, radio or television advertisements. The activities to be undertaken should be fully disclosed and the applicant should arrange for a community assembly for that purpose, prior notice of which should be given.

If such prior informed consent is obtained, the concerned parties shall agree on the royalty payment for the ICCs/IPs which may not be less than one percent (1%) of the gross output. Representatives from concerned offices of the Government may be requested to act as mediators in the negotiation for the royalty payment. In case of disagreement concerning said royalty, the DENR shall resolve the same within three (3) months. The royalty agreed upon shall form part of a Trust Fund for the socioeconomic well-being of the ICCs/IPs concerned, in accordance with the management plan formulated thereby. It shall be managed and utilized by them.

#### **(4) *Environmental Protection*** (Chapters XVI to XVIII, DAO 96-40)

##### Environmental Programs

An Environmental Work Program (“EWP”) shall be submitted with respect to exploration activities. It shall detail the environmental impact control and rehabilitation activities proposed including the costs to enable sufficient financial resources to be allocated to meet the environmental and rehabilitation commitments.

An Environmental Protection and Enhancement Program (“EPEP”) shall provide the operational link between the commitments under DAO 96-40 and those stipulated in the Environmental Compliance Certificate (“ECC”) under P.D. 1586. The EPEP shall provide a description of the expected and considered acceptable impacts and shall set out the life-of-mine environmental protection and enhancement strategies based on best practices in environmental management in mining.

An Annual Environmental Protection and Enhancement Program (“AEPEP”) based on the EPEP shall be submitted every calendar year. It shall include, among other things, exploration, development, utilization, rehabilitation, regeneration, revegetation and reforestation of mineralized areas, slope stabilization of mined-out areas, waste dumps (acid mine drainage control), tailings-covered areas, aquaculture, watershed development and water conservation and socioeconomic development.

The mining contractor or permit holder shall allocate:

1. for its initial environment-related capital expenditures - an amount that shall approximate ten percent (10%) of the total capital/project cost or such other amount depending on the environmental/geological condition, nature and scale of operations and technology employed; and
2. for its annual environment-related expenses - a percentage based on the AEPEP which may approximate a minimum of three to five percent (3-5%) of its direct mining and milling costs depending on the environment/geologic condition, nature and scale of operations and technology employed.

Five (5) years before the final decommissioning of the contract or mining area, the contractors or permit holder shall submit its final mine rehabilitation and/or decommissioning plan(s), including its financial requirements up to post-decommissioning over a ten-year period for monitoring purposes.

##### Environmental Management Framework

An Interagency Contingent Liability and Rehabilitation Fund (CLRF) Steering Committee shall, among others, evaluate the submitted EPEP, monitor the established Mine Rehabilitation Funds, administer the Mine Waste and Tailings Reserve Fund and decide on all applications for compensation for damages. In the last function, it shall be assisted by Regional Investigation and Assessment Teams (RIAT).

An environmental guarantee fund mechanism, the Contingent Liability and Rehabilitation Fund (CLRF), shall ensure just and timely compensation for damages and progressive and sustainable rehabilitation for any adverse effect a mining operation or activity may cause. It shall be in the form of the Mine Rehabilitation Fund (“MRF”) and the Mine Waste and Tailings Fees (“MWTF”).

The MRF is maintained by each mining contractor or permit holder to ensure compliance with the commitments under the EPEP and AEPEP, and is composed of a Monitoring Trust Fund (MTF) and a Rehabilitation Cash Fund. A Mine Rehabilitation Fund (MRF) Committee shall be created in each region

where active mining operations exist to manage the foregoing funds and to ensure that the approved EPEPs/AEPEPs are implemented, among other duties. A Multipartite Monitoring Team (MMT) shall serve as the monitoring arm of the MRF Committee.

MWTF shall be collected semiannually from each operating contractor or permit holder based on the amounts of mine waste and mill tailings generated for the said period. The fees collected shall accrue to a Mine Waste and Tailings Reserve Fund to be used for payment of compensation for damages caused by any mining operations and for approved research projects.

**(5) *The Objective of National Growth:***  
Economic or Fiscal Provisions (Chapters XXI – XXIII, DAO 96-40)

**Government Share**

The Government Share in mineral agreements and FTAA's shall be as follows:

<b>MINING TENEMENT</b>	<b>GOVERNMENT SHARE</b>
Mineral Production Sharing Agreements	Excise tax on mineral products as provided for in the National Internal Revenue Code
Co-Production and Joint Venture Agreements	Subject to negotiation considering: (a) capital investment in the project, (b) risks involved, (c) contribution of the project to the economy and (d) other factors that will provide for a fair and equitable sharing between the parties
FTAA	<p>Subject to negotiation considering the (a) Capital investment of the project; (b) Risks involved; (c) Contribution of the project to the economy; (d) Technical complexity of the project; (e) Contribution to community and Local Government; and (f) Other factors that will provide for a fair and equitable sharing.</p> <p>It shall consist of, among other things, the Contractor's corporate income tax, excise tax, Special Allowance, withholding tax due from the Contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign-owned corporation and all such other taxes, duties and fees as provided for in existing laws.</p> <p>The collection thereof shall commence after the Contractor has fully recovered its pre-operating, exploration and development expenses, inclusive. The period of recovery which is reckoned from the date of commercial operation shall be for a period not exceeding five (5) years or until the date of actual recovery, whichever comes earlier.</p>

The detailed provisions of an FTAA are embodied in a pro-forma contract. This was the result of a series of consultations and negotiations held between Government and representatives of the Mining Industry. An important and substantial aspect of this process was the negotiation of the fiscal regime of the FTAA pursuant to the general guidelines enumerated above. At present, the basic structure of an FTAA is represented by the following equation: FTAA Fiscal Contribution = Basic Share + Additional Government Share.

The Basic Share refers to direct taxes and fees, while the Additional Government Share is based on a Net Mining Revenue Option, Cash Flow Based Option or Profit Based Option<sup>44</sup>. It is calculated that the utilization of this structure will lead, in general, to a 50%-50% sharing between the Government and the Contractor.

**Taxes and Fees**

The contractor shall pay national and local taxes, including:

1. Income Tax, per the National Internal Revenue Code, after the lapse of the income tax holiday as provided for in the Omnibus Investment Code of 1987, as amended;
2. Excise Tax on Mineral Products as provided for in the National Internal Revenue Code;

<sup>44</sup> *Net Mining Revenue* – The difference between the cumulative net mining revenue and the cumulative total government share after cost recovery to achieve a 50%-50% sharing; *Cash Flow Based Option* – The difference between the cumulative present value of the project cash flow and the cumulative present value of the total government share to achieve a 50%-50% sharing; *Profit Based Option*- 25% of the additional profit if the 2-6year average ratio of the net income after tax over the gross revenue is .40 or higher

3. Occupation Fees applicable to both public and private lands - 30% of the fees collected in onshore mining areas shall accrue to the province and 70% to the municipality where the onshore mining areas are located. In a chartered City, the full amount shall accrue to the concerned City.
4. Other Fees and Charges as determined by the MGB.

### Incentives Available

The following are the investment incentives available to mining contractors:

1. *Under Executive Order No. 226 (EO 226)*, as amended, otherwise known as the "Omnibus Investment Code of 1987 – These may be availed of by mining contractors on the following conditions:

- They are registered with the Board of Investments (“BOI”);
- They comply with pertinent implementing rules and regulations; and
- No entitlement to any such incentive shall accrue prior to the date of approval of its mineral agreement or FTAA and/or date of BOI registration, as the case may warrant in the latter.

Holders of exploration permits registered with BOI can also avail of fiscal incentives under EO 226, as amended, but only for the duration of the permits or effectivity of EO 226 as amended, whichever comes first.

Mining activities shall always be included in the Investment Priorities Plan of the Board of Investments (“BOI”). BOI registration and enjoyment of incentives thereunder shall be governed by said plan.

2. *Additional Incentives under the Mining Act* - These are available to all contractors in mineral agreements or FTAA's only to the extent in which they are engaged in activities covered by their respective agreements. These are:

- Incentives for Pollution Control Devices - Those acquired, constructed or installed shall not be considered as improvements on the land or building where they are placed and shall not be subject to real property and other taxes or assessments.
- Incentive for Income Tax-Carry Forward of Losses - A net operating loss without the benefit of income tax-accelerated depreciation incurred in any year during the first ten (10) years of the contractor's operation may be carried over as a deduction from taxable income for the next five (5) years immediately following the year of such loss: *Provided*, That the net operating loss shall be deducted from the taxable income derived from the activity covered by the mineral agreement or FTAA.
- Incentive for Income Tax-Accelerated Depreciation – A Contractor may opt that its fixed assets be depreciated at either of the following rates:
  - To the extent of not more that twice as fast as the normal rate of depreciation or depreciated at normal rate of depreciation if the expected life is ten (10) years or less; or
  - Depreciated over any number of years between five (5) years and the expected life if the latter is more that ten (10) years and the depreciation thereon allowed as a deduction from taxable income.

3. *Under laws other than EO 226 and the Mining Act*- Where applicable, these may be availed of subject to:

- compliance with pertinent implementing rules and regulations of said laws; and
- prior approval from the agency administering the fiscal and non-fiscal incentives.

### Simultaneous Availment of Incentives under EO 226 and Additional Incentives under the Mining Act

The contractor must choose between the incentive on Income Tax-Carry Forward of Losses under the Mining Act or the Income Tax Holiday provided under EO 226, as amended. There shall be no switching of these two incentives within the entire prescribed period within which the contractor is entitled to such incentives.

Incentives on Income Tax-Accelerated Depreciation under the Mining Act may be availed of simultaneously with the Income Tax Holiday provided under the BOI registration.

### Investment Guarantees

Contractors are entitled to the basic rights and guarantees provided in the Constitution and such other rights as enumerated hereunder:

1. to repatriate the entire proceeds of the liquidation of any foreign investment in the currency in which it was originally made and at the exchange rate prevailing at the time of repatriation;
2. to remit earnings from any foreign investment in the currency in which it was originally made and at the exchange rate prevailing at the time of remittance;
3. to remit at the exchange rate prevailing at the time of remittance the necessary payments of interest and principal on foreign loans and obligations;
4. to be free from expropriation by the Government of the property represented by investments or loans or of the property of the enterprise except for public use or in the interest of national welfare or defense and upon payment of just compensation.
5. to be free from requisition of property represented by the investment or of the property of the enterprises except in the event of war or national emergency and only for the duration thereof; and
6. to confidentiality, i.e. that any information supplied by the contractor which has been agreed upon as confidential pursuant to the Mining Act and DAO 96-40 shall be treated as such during the term of the project to which it relates, with the exception of information pertaining to the production and sales of minerals, employment, royalty and tax payments, reserves, operational parameters and other data as may be agreed upon.

## C. ECONOMIC CONSIDERATIONS

### 1. General Investment Data on the Mining Industry

Mining is a capital-intensive business with a success rate of less than 1 mine brought into production for every 200 prospects drilled and with pay back periods as long as 8-10 years from discovery being common. This is one acknowledged commercial reality of mining which influences the direction and extent of investments.

Among the criteria for investments is a country's mineral prospectivity. The rich mineral endowment of the Philippines is generally acknowledged. However, mineral prospectivity alone does not and will not dictate where investments are directed and where minerals will actually be utilized. As seen in the table below, despite the Philippines being the 3<sup>rd</sup> and 4<sup>th</sup> most endowed in the world with gold and copper, respectively, it is nowhere among the top ten copper or gold producing states. In contrast, Indonesia, which is in neither list of states endowed with such minerals, is among both groups of top copper and gold producing states.

COPPER		GOLD	
ENDOWMENT	PRODUCTION	ENDOWMENT	PRODUCTION
Chile	Chile	South Africa	South Africa
Panama	USA	Uzbekistan	USA
Poland	Canada	Philippines	Australia
Philippines	Australia	New Zealand	Canada
Zambia	Indonesia	Ghana	Russia
Portugal	Peru	Papua New Guinea	China
Hungary	Zambia	Czechoslovakia	Indonesia
Zaire	Mexico	Zimbabwe	Brazil
Peru	South Africa		Uzbekistan
Yugoslavia	Papua New Guinea		Papua New Guinea

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Source: M. Norris, *The Global Exploration and Mining Industry* (1997)

This is not to say that a country endowed with a mineral resource is thereby compelled to promote its immediate extraction and utilization. The option to develop and utilize its mineral resources, including the manner and extent thereof, lies within the exclusive decision-making process of a country and its people in consideration of its peculiar history, circumstances, needs and development priorities.

Given the present context where mining is a permanent feature of the Investment Priorities Plan, it is worthwhile to note certain investment trends occurring globally, across the Asia-Pacific region and domestically.

As previously stated, mineral prospectivity or endowment alone does not direct the flow of investments. Other general investment criteria apply for the minerals sector and these include: (1) political factors such as political stability, law and order, attitude toward foreign investors and bureaucratic efficiency; (2) foreign exchange regulations and repatriation of capital; and (3) permissible foreign and private equity participation<sup>45</sup>.

A recent World Bank study reveals certain trends in mineral exploration expenditures. As seen in the table below, the bulk of exploration expenditures in 1989 were centered on Canada, Australia and, to a less extent, the USA. By 1996, such expenditures in these countries dropped by about 5%. In contrast, exploration expenditures in Latin America more than doubled, 80% of which were spent in Chile, Peru, Mexico and Argentina. The World Bank theorizes that this increase is due, in part, to mining reforms in said countries.

	Latin Am.	Asia*	USA	Africa	Canada	Australia
1989	13% - 351	8.7% - 234	15.6% - 421	12.1% - 326	26% - 702	24.3% - 656
1996	27% - 1,200	12% - 533	10% - 444	12% - 533	20% - 871	19% - 844

Source: World Bank- situationer on trends in mineral exploration expenditures

\*Pacific/Southeast Asia – for 1996 statistics

In the same period, Asia posted an increase in exploration expenditures of a little over 3%. Of this modest increase, it is generally acknowledged that Indonesia and Papua New Guinea have been the primary destinations of these investments.

“x x x the bulk of exploration expenditures in the region (excluding Australia) was made by foreign companies and that it was almost exclusively confined to Papua New Guinea and Indonesia x x x This is not to imply that Indonesia and Papua New Guinea provide ideal investment climates, however. Indeed, it may be concluded that the lack of proper regimes in other countries in the region has, by default, assisted Indonesia and Papua New Guinea to reach this position.”<sup>46</sup>

This continues to be the trend, at least insofar as Indonesia is concerned. As evidenced in the table below, exploration expenditures in Indonesia exceeded those made in the Philippines by over 600% in 1998.

Country	US\$ Millions
Indonesia	136.4
Philippines	22.6
Laos	7.0
Thailand	1.4
Myanmar	1.3
Malaysia	***
Vietnam	***
Cambodia	***

Source: Metals Economic Group of the Metals Mining Agency of Japan Exploration expenditures in Southeast Asia (1998)

Paid-up local investments in mining increased from 2.8 billion pesos in 1996 to 3.2 billion pesos in 1997, according to data obtained from the Securities and Exchange Commission. For January to May of 1998, paid-up local investments in mining reached

<sup>45</sup> D. Ritchie, *Investment Criteria for International Exploration/Mining Companies in the Asia-Pacific Region*, United Nations Development Program and the Economic and Social Commission for Asia and the Pacific (1993).

<sup>46</sup> *Ibid*, pp. 25-26.

0.7 million pesos, thus indicating a downward movement from 1997. As for paid-up foreign investments in mining, 1996 witnessed a high of 818 million pesos decreasing to 135 million in 1997, but appearing higher at 139 million for the first 5 months of 1998.

Where increased investments and the development of major modern mines were anticipated with the foreign exploration companies that filed mining applications after the passage of the Mining Act in 1995, instead an exodus of these companies has taken place.

#### **Foreign Exploration Companies that Closed/Suspended Operations Between 1997-1999**

Name of Company	Investment Expenditures Between 1996-1999 (US\$ Million)
Western Mining Corp. (Exploration)	10.500
MIM Philippines, Corp.	0.750
Rio Tinto Exploration Philippines	4.120
Placer Pacific Inc.	0.700
Newmont Philippines, Inc.	0.400
Newcrest	0.500
Normandy Asia Phils., Inc.	0.150
Golden Cycle Phils., Inc.	0.100
Barrick Gold Phils., Inc.	0.400
Billiton	0.300
<b>TOTAL</b>	<b>US\$17.920 Million</b>

Source: Chamber of Mines of the Philippines, January 2000

As seen from the foregoing table, exploration investments from these companies alone averaged US\$4.48 million from 1996 to 1999. In contrast for 2000, however, exploration investment funds from six (6) projects are estimated to be about US\$247,500.00 or PhP9,900,000.00.

#### **Mineral Exploration Projects**

Project	Area	Estimated Exploration Investment Expenditures For 2000 (in PhP)
QNI	Surigao del Norte	4,000,000
Mindoro Rerserves Ltd.	Surigao del Norte	700,000
Phelps Dodge (Malampay)	Iloilo	500,000
Minoro (Philex)	Itogon	2,900,000
Indophil	Camarines Norte and Davao del Norte	1,400,000
Hinatuan	Philnico Area	400,000
<b>Total</b>		<b>PhP9,900,000</b>

Source: Chamber of Mines of the Philippines, January 2000

The outlook for investments in the mining sector is, at best, uncertain. Among other reasons, there are the separate challenges to the Mining Act and the IPRA before the Supreme Court. The latter will be discussed more in the succeeding section. Even absent these challenges, however, prospective investors are still faced with a complex range of issues involving both policy and implementation. Examples of issues commonly raised are those involving bureaucratic 'red tape', issues in connection with concerns and powers of local government units and environmental issues stressed by local communities, some Church groups and non-government organizations.

## 2. The Mining Industry and the Philippine Economy

Since mining operations are generally situated in remote parts of the country, it is expected that these can lead to increased employment in such places as well as to the development of company-funded infrastructure and social support facilities. In addition, a company in the production stage contributes to export earnings and pays local and national taxes.

In 1998, there were a total of 17 operating metallic mines as compared to 18 in 1997 and 20 in 1996. The number of gold mines rose from 5 to 7 in that 3-year period, although copper mines were reduced by two while nickel mines remained steady at three.

According to data gathered by the MGB, the following are relevant industry statistics from 1996 to 1998:

	1996	1997	1998
No. of Operating Metallic Mines	20	18	17
Gross Production Value in Mining	P31.1 Billion	P33.1 Billion	P36.8 Billion
Gross Value Added in Mining	P10.5 Billion	P10.2 Billion	P10.5 Billion
Contribution to Gross Domestic Product (NSCB)	1.2%	1.1%	1.2%
Total Mineral Exports (BSP)	\$772 Million	\$764 Million	\$775 Million
Contribution to Total Exports	3.8%	3.0%	2.87%
Excise Taxes Paid	P119 Million	P105 Million	Not yet available
Employment in Mining	113,000	129,000	119,000
Contribution to Total Employment (DOLE)	0.42%	0.46%	0.43%

Source: MGB

The mining sector's participation in export earnings can be used as an indicator of the industry's declining contribution to the economy. In 1980, the mining sector reportedly contributed 21% of such earnings. This decreased to an average of about 14% of total exports from 1981 to 1990. By 1991, it decreased even further to 8.87%, then to 7.37% in 1992.<sup>47</sup> According to the Philippine Environmental Quality Report for 1990-1995 produced by the DENR, specifically the Environmental Management Bureau, the mining industry contributed about 5.79% of total exports in 1994. Steadily declining, the mining industry's contribution to total exports was 1.8% in 1999.

With respect to contribution to GDP, the mining industry had an average of 1.77% from 1981 to 1992. This has also decreased, albeit less severely, to an average of 1.16% for the period 1996 to 1998.

A decrease also marked excise taxes paid by the industry, from a reported high of P438.8 million pesos in 1995, it fell to an average of 112 million pesos for 1996 and 1997. Despite this, it has been noted that the industry still makes significant contributions, considering for example that total taxes paid in 1995 amounted to 810 Million pesos and that the taxes paid by 3 operating companies in Benguet alone amounted to 38 Million in

<sup>47</sup>Clark, *The Philippine Mineral Sector to 2010: Policy and Recommendations*, ADB Sector Study TA No. 1984 – PHI, p. II-2, 1994).

1996.

With respect to employment, the data from DOLE shows that the contribution of the mining industry to total employment was an average of 0.43% from 1996 to 1998. Other than this figure pertaining to direct employment, further details are difficult to obtain. Beyond direct employment, mining operations also have the potential to generate jobs in support industries and community activities such as manufacturing, engineering, environmental and technical consulting, food cooperatives, among others.

Although the mining sector has declined in its percentage contribution to the overall economy, it is still considered a potential source of economic benefits particularly to rural areas where mining operations are generally situated. Under the present legal framework, these potential economic benefits should be balanced with both social and environmental concerns.

### 3. Mining Tenements and Applications

While the contribution of the mining industry to the economy has decreased in recent years due to both domestic and global factors such as the world metal prices, established mineral reserves in the Philippines have increased. In 1994, there were 6.833B MT of metallic and 51.678B MT of non-metallic reserves. Copper, followed by nickel, dominates the metallic reserves while limestone, followed by marble, dominate the non-metallic reserves. As can be seen in Annex K, major Philippine mineral deposits are found throughout the country.

As of April 1999, MGB reports that there were 163 approved EPs, MPSAs and FTAAAs. MPSAs dominate the tenements with 114 covering 185,109 hectares, followed by 47 EPs covering 320,193.67 hectares. The two FTAAAs are those granted to Western Mining Philippines, Inc. and Climax-Arimco pursuant to EO 279, covering presently 70,064 hectares.

Under process are 1953 MPSA applications covering 4,869,694.63 hectares. Of these applications, 379 are located in Region IV. Also under process are 499 EP applications covering 4,678,898.18 hectares, of which 79 and 78 are located in Region XI and IV, respectively. Finally, 77 FTAA applications were still active as of April 1999 covering 4,229,701.54 hectares, of which 14 were lodged in Region II.

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#### MINING APPLICATIONS: APPROVED AND UNDER PROCESS

	MPSA	FTAA	EP		Total
Approved	114	2	47	=	163
Under Process	1953	77	499	=	2529

**TOTAL AREA COVERAGE AS OF APRIL 1999 (in hectares)**

	MPSA	FTAA	EP
Approved	185,109	70,064.00	320,193.67
Under process	4,869,694.63	4,229,701.54	4,678,898.18
<b>Total</b>	<b>5,054,803.63</b>	<b>4,299,765.54</b>	<b>4,999,091.85</b>

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 Source: MGB Mining Tenements Statistics Report, April 1999

Attached hereto is the MGB Mining Tenements Statistical Report as of April 1999 showing the breakdown of approved and pending applications by region (Annex "I"). From this document, it appears that of the total mining applications including those for interim permits, 564 cover Region IV.

In addition, Annex "J" contains data on pending mining applications, indicating therein the stage or phase of application. Among MPSA applications, 166 have been endorsed to the DENR Central Office for approval, together with 3 FTAA and 17 EP applications.

According to MGB, mineral lands or lands covered by perfected mining rights granted since 1902 cover 800,995 hectares or only 2.67% of the 30 million hectares of Philippine land. Based on current mining rights applications, MGB estimates that mineral lands - those covered by mining patents, lease contracts, mineral reservations, EPs, MPSAs and FTAAAs - will occupy only 1,866,066 hectares of 4.62% of the country's total land area and that not all of these will be used for actual mining operations.

It is clear from the foregoing that mining rights and applications therefor currently exist covering large areas all over the country. Developing and producing mines are in various stages of operation, while applications are pending before different offices while being subjected to current legal requirements and procedures. How and to what extent all this is affected by the IPRA, among other issues and implications, will be discussed in the next chapter.

#### **IV THE IPRA AND THE MINING INDUSTRY: IMPACTS AND ISSUES**

Based on the overview in the previous sections of both the IPRA and the Mining Act, it is evident that the impacts of the former on the mining industry are both substantial and far-reaching. Considering alone the overlap in areas covered by both current mining rights and applications and those covered by Certificates of Ancestral Land and Domain Claims, there stands to be significant points of intersection in the implementation of both the IPRA and the Mining Act.

This overlap is also shown when the Ethnographic Map of the Philippines found in Annex “B” hereof and the Distribution Map of Major Philippine Mineral Deposits attached hereto as Annex “K” are juxtaposed. Consider also, as Annex “K” further relates, that 1,199,849 hectares or 53% of mining applications are found in CADC areas, and that IP issues and other related requirements both under the Mining Act and the IPRA are applicable even at the application stage. Even if only a very small percentage of applications is granted, and that those granted are still subject to progressive relinquishment requirements, both legal and practical issues will invariably arise and require resolution commencing from the application stage and throughout the mining operations.

It might seem that the present legal challenges to both the IPRA and the Mining Act would render a discussion of the issues and implications relevant thereto legally tenuous and seemingly fraught with little practical value. However, certain reasonable presumptions can be made and realistic parameters drawn, so that this discussion will be both relevant and meaningful in any eventuality.

In the first place, absent the issuance of an injunction by the Supreme Court and more so of a definitive resolution, the presumption of the IPRA’s constitutionality accorded all duly enacted laws continues to prevail. This applies to the Mining Act as well. Secondly, the review of the framework of the IPRA in Part I and of the Mining Act in Part III shows, among others, that these laws were not formulated in a vacuum but in a context of and as a result of constitutional directives, situational factors, policy and legal trends on both the domestic and international fronts.

These factors are realities that must necessarily be considered regardless of the outcome of the legal challenges. As stated by an official from a mining exploration consultancy firm, recognizing IPs rights, such as CADCs, must be “the most important agenda for the mining industry today because with or without these laws, the United Nations make IP rights a critical factor in global trade”<sup>48</sup>.

Although the IPRA presents the most significant development with respect to IP rights, many of the principles incorporated therein were already in existence prior to its formulation. One example is the recognition of the role of IPs/ICCs in the sustainable development of natural resources, as seen in the NIPAS Act and the law on the Conservation of Biological Diversity. Another is the need for their consent with respect to development activities in areas claimed as their ancestral lands or domains, and their right to benefit from the same. The latter was, in fact, already given express legal recognition in the Mining Act.

The Mining Act’s new implementing rules were issued in 1997. Later in the same year and at a time when the industry was just beginning to adjust to these new rules, the IPRA was promulgated. Given that the IPRA’s provisions are more comprehensive and extensive, and that it is currently the subject of a legal challenge, it is understandable that

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<sup>48</sup> Cabreza, Vincent, “Law Softens Igorots’ Stance on Mining”, Philippine Daily Inquirer, 25 May 1999.

the general effect of the IPRA on the industry is one of uncertainty. This uncertainty raises issues that are broad, far-reaching, and manifested on different levels.

These general levels of impact are identified as follows:

1. General Policy
2. Legal Framework
3. Administrative Framework
4. Economic Considerations
5. Environmental Considerations
6. Internal Operations Of Mining Companies

Following is a discussion of the different issues raised under the foregoing headings. Although various perspectives will be offered on fundamental legal issues before the Supreme Court, greater emphasis is given on issues requiring resolution on the administrative level, that is, on the level of the different agencies and entities tasked to implement both the IPRA and the Mining Act. These issues will be relevant regardless of the outcome of the court case since most of them relate to detailed aspects of implementation that are not and can not generally be covered in a law but are rather left to be filled in by the executing agencies.

## **Levels of Impact on the Mining Industry**

### **A. GENERAL POLICY**

The IPRA has a fundamental impact on the level of policy, and this is felt not only by the national government but by industry in general. National development priorities have traditionally been determined by the Government. Mining, for example, has consistently been promoted as a national development option and is even mandated under the Mining Act as a permanent program under the Investment Priorities Plan. In this context, mining and other industrial activities have generally been driven by both the government and investors.

This approach was, however, already affected under the Mining Act with respect to the Mining Industry. Even according to this Act which was promulgated three years before the IPRA, mining companies need the prior consent of concerned IPs should they wish to undertake exploration in their ancestral lands. Under the IPRA, however, such requirement extends to all development activities. Within ancestral lands or domains, not even the national government can compel development activities to be undertaken therein if the concerned ICCs/IPs refuse. An exception to this would be the State's exercise of police power.

The IPRA reiterates the right of ICCs/IPs to participate fully all levels of decision-making in matters which may affect them. It expressly provides that:

“The ICCs/IPs shall have the right to determine and decide their own priorities for development affecting their lives, beliefs, institutions, spiritual well-being, and the lands they own, occupy or use. They shall participate in the formulation, implementation and evaluation of policies, plans, and programs for national, regional and local development which may directly affect them.”<sup>49</sup>

There are some within the Mining Industry who take exception to these provisions of the IPRA which seem to give IPs, who constitute a minority of the Philippine population, blanket control over disproportionately huge tracts of land. Specifically, apprehension

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<sup>49</sup> IPRA, Section 17.

exists over the extent of their control in the development of natural resources within their ancestral lands or domains. For example, would it thus be possible for one IP group to undertake logging operations in their ancestral lands despite a logging ban in their province or in other parts of the country?

The extent of the control given to IPs over the development of natural resources within their ancestral lands/domains is unclear and has created much confusion. Thus, the challenge is even greater to clarify the nature and extent of IPs 'control' over mineral and other natural resources within their ancestral domains, vis a vis national laws and development priorities. Otherwise stated, there is an even greater need to balance these national development priorities and IPs right of self-determination.

## **B. LEGAL FRAMEWORK**

### **1. Conflict between the IPRA and the Mining Act**

The Mining Act of 1995 is a special law on large-scale mining in the Philippines. The IPRA, on the other hand, was passed in 1997 and is a special law dealing with ICCs/IPs. As with most laws, the IPRA contains a repealing clause in Section 83. Said Section 83 provides expressly that PD 410, EOs 122-B and 122-C are repealed by the IPRA, and that "all other laws, decrees, orders, rules and regulations or parts thereof inconsistent with [the IPRA] are hereby repealed or modified accordingly". The issue arises, therefore, as to whether and to what extent the Mining Act has been repealed by the IPRA.

Some initiatives have been taken in this regard, including the formation by the Office of the President of a Task Force upon a memorandum filed by the governor of the Board of Investments. The objective of the Task Force was to address and reconcile the conflicting concerns of the Mining Act and the IPRA. NCIP also issued Administrative Order No. 3 ("AO 3") which attempts to harmonize certain provisions of the IPRA with the laws pertaining to development activities. Pertinent portions of NCIP AO 3 will be cited under appropriate sections hereunder.

Specific provisions of the Mining Act are affected by the IPRA. How does the latter impact on the following such instances, among others:

- Section 16 of the Mining Act and Section 16 of DAO 96-40 which provide that no ancestral land shall be opened for mining operations without the prior consent of the ICC/IP concerned.
- Section 17 of the Mining Act and Section 16 of DAO 96-40 which provide for a royalty payment for utilization of minerals to form part of a trust fund for the socioeconomic well-being of the ICC/IP.
- With respect to FTAAs, Section 36 of the Mining Act and Sections 58, 59 and 61 of DAO 96-40 provide a process for its negotiation. Should the NCIP and concerned ICCs/IPs be included in this process, and if so, to what extent?
- Section 76 of the Mining Act provides that, subject to prior notification, "holders of mining rights shall not be prevented from entry into private lands and concession areas by surface owners, occupants, or concessionaires when conducting mining operations therein x x x". Is this effectively repealed by the IPRA?

These issues concerning the implementation of the IPRA and the Mining Act are detailed under some of the following sections. The effective implementation of both laws will be difficult to accomplish unless concrete and positive efforts are made to clarify these

matters.

For the Mining Industry, certain fundamental questions need clear answers. What body of laws now governs mining activities within ancestral domains and lands? What legal framework, including labor and safety requirements as well as environmental rules, is now applicable therein? These issues are essential for the security of mining tenements, for the stability of mining operations, and to enable new investments to be made.

## **2. Ownership of Minerals**

The issue of ICCs/IPs ownership of their ancestral lands and domains, including mineral and other natural resources therein, is a fundamental one awaiting resolution by the Supreme Court. More accurately, it is the nature and extent of such ownership that requires clarification. It is also necessary in determining the relationship among ICCs/IPs, the NCIP and other agencies of the National Government, and non-members of the ICCs/IPs who wish to participate in the exploration, development and utilization of minerals on ancestral lands/domains.

One criticism of the IPRA is that it appear to grant, on its face, what some consider automatic ownership not only over ancestral lands but over ancestral domains which include, by definition, the mineral and other natural resources therein. It is argued that the grant of ownership over minerals is neither found nor supported in any binding international texts nor under any foreign laws. The nature and extent of rights which are granted under the IPRA to indigenous peoples over natural resources within their ancestral lands and domains are fundamental issues pending before the Supreme Court.

On the administrative level, NCIP AO No. 3 dated 13 October 1998 attempts to harmonize its functions with those of other agencies. It provides a general process in the issuance of a certification that the free and prior informed consent (FPIC) of ICCs/IPs has been secured. It would appear therefrom that NCIP's role in the exploration, development and utilization of natural resources such as minerals would be the issuance of appropriate certifications. The fundamental issue on ownership, however, is not addressed therein.

With respect to ownership, Section 5 of the IPRA provides that the indigenous concept of ownership generally holds that ancestral domains are the ICCs/IPs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. One concern over this provision is that if mineral resources are part of ancestral lands/domains, this could logically lead to the conclusion that ICCs/IPs cannot sell, dispose or destroy such resources. Following this logic, this would then mean the IPRA itself prohibits ICCs/IPs from developing or utilizing mineral resources as this would necessarily mean the extraction and disposition of these resources.

However, such an interpretation would run counter not only to other specific provisions of the IPRA which precisely provide for the possible development of these resources, but also to their fundamental right of self-determination. It is a principle of statutory construction that an interpretation which gives effect to all the provisions of a law should be favored over that which would render certain provisions ineffective. Furthermore, the contemporaneous construction given the IPRA by the relevant agencies involved, specifically the NCIP, the DENR and the MGB does not support such an interpretation.

## **3. Security of Tenure**

Fundamentally, mining involves the application for, acquisition or and exercise of mining

rights. Due to the capital intensive nature of the industry and the uncertainty in actually finding economically viable deposits, security of tenure is essential in any mining operation. This security is affected when the source of rights is not clear, or is multi-layered. Under the Mining Act, the national government had the exclusive right to approve a mining agreement or permit, and the terms for its operations were embodied in the same. This included terms pertaining to suspension, cancellation, termination, and renewal of the agreement. To what extent are these terms affected by the IPRA?

#### 4. Vested Rights

Significant provisions of the IPRA, including the definitions of ancestral lands/domains [Sections 3(a) and (b)] the right to develop lands and resources [Section 7(b)] and communal rights (Section 55) are qualified by the phrase “Subject to vested rights under Article 56 x x x”. Article 56 states that property rights within the ancestral domains already existing and/or vested upon effectivity of the IPRA shall be recognized and respected.

The issue of exactly what a ‘vested right’ pertains to necessarily arises. Does this include only granted mining tenements? Of the mining tenements, does the term ‘vested rights’ include both mining agreements and permits? The latter, if construed as a privilege given by the State and always subject to its revocation, may not enjoy the status of a vested right. Are applications for mining rights excluded inasmuch as these precisely are still in that preliminary phase and are not yet grants from the government?

In this regard, Section 3 of NCIP AO 3 on “Recognition of Existing/Vested Rights and Pending Applications for Lease, Permit, License, Contract and Other Forms of Concession” provides that:

“All leases, permits, licenses, contracts and other forms of concession in Ancestral Domains already existing, and/or vested upon the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall be recognized and respected. As such, the concerned lessees/permittees/licencees/contractors/concessionaires are not covered by the provisions of the Act of FPIC and NCIP Certification Precondition; and

New and renewal applications filed prior to the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall have priority in securing the NCIP Certification Precondition and FPIC, if applicable, upon endorsement of the concerned government agency.”

Hence, it would appear from the foregoing that NCIP’s interpretation of ‘vested rights’ under Section 56 of the IPRA includes both granted concessions and applications therefor pending at the time of the effectivity of NCIP DAO 1. Granted concessions are expressly not covered by the requirement to obtain FPIC or by the Certification Precondition requirement.

As for pending new and renewal applications, these shall have priority in securing the NCIP Certification and FPIC, if applicable. In the latter case, however, it is not clear what this ‘priority’ means and over whom it is enjoyed. Can and does this ‘priority’ status accorded to pending new and renewal applications override the priority rights of ICCs/IPs under Section 57 of the IPRA? This is further discussed in the next section.

In addition, other questions remain. These include the following:

- Does section 56 protect all the rights under the terms and conditions of a granted agreement or permit, even if these are to be availed of at a future date? An example would be the exclusive right of the holder of an exploration permit under Section 24 of the Mining Act to receive an FTAA or mineral agreement upon the approval of the contractor’s mining project feasibility and compliance with other requirements of said

Act.

- Similarly, are the auxiliary mining rights and miscellaneous permits recognized under Chapter XII of the Mining Act likewise considered ‘vested rights’ that are protected by Section 56 of the IPRA? Such auxiliary mining rights include timber rights (Section 72), water rights (Section 73), the right to possess explosives (Section 74), easement rights (Section 75) and the right of entry into private lands and concession areas (Section 76).
- Finally, the different mining permits and agreements provide for the terms thereof, renewable for a specified period. If there has been compliance with the terms and conditions of its grant and of pertinent laws, rules and regulations, does the mining contractor or permit holder have a right to the renewal of its term? And if so, is this a vested right under Section 56 of the IPRA?

## 5. Priority Rights

Section 57 of the IPRA provides that the ICCs/IPs have priority rights in the harvesting, extraction, development or exploitation of natural resources within the ancestral domains and that a non-member may be allowed to take part therein for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years.

There is no indication as to how, and how long, this priority right can be exercised. Certain questions thus arise:

- Should the right to explore and utilize minerals in the ancestral domains of each ICC/IP first be offered to the ICC/IP or its members, before non-members may participate?
- Who exercises this right for the ICCs/IPs? Can an individual ICC/IP member claim this "priority," or must it be the entire ICC/IP community? If it is the latter, how would it be exercised?
- Would this mean that any member of the IPs/ICCs can file a mining application at a later date and dislodge an application previously filed? Would this effectively alter the traditional practice of “first-come first-served” basis of accepting applications?

## 6. Free and Prior Informed Consent

Section 3(g) of the IPRA provides that Free and Prior Informed Consent (“FPIC”) means the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

A consideration of the foregoing definition of FPIC immediately raises issues - how it is possible to get the consensus of ALL members of an IP group? Is that, in fact, the customary way of obtaining consent from IPs? What is the role of tribal leaders? How does an IP group indicate its conformity? Apprehension thus exists that

“Even if the majority within an IP group may consent to mining as one form of development, the prescribed manner of the FPIC and the lack of an implementing framework in the IPRA makes it virtually impossible for any project to not only get approved, but implemented.”<sup>50</sup>

<sup>50</sup> Gerard Brimo, Chairman, Chamber of Mines of the Philippines, Remarks at the forum sponsored by the Environmental Science for

In this regard, NCIP AO 3 provides in Section 5 thereof on the “Issuance of Free and Prior Informed Consent” that the issuance of FPIC or rejection of the request therefor by the concerned ICCs/IPs shall be in accordance with the following procedure:

“Within 15 days upon the completion of the field-based investigation report, the NCIP Main Office shall officially notify in writing the applicant of such overlap and the need to secure the FPIC, furnishing the concerned NCIP regional office and endorsing government agency with copies of such notification.

Thereafter, the following steps shall be observed:

- b.i. Within 30 days upon being notified, the applicant shall submit its Action Plan to secure FPIC to the concerned NCIP Regional Office.
- b.ii. Within 30 days upon its receipt, the Action Plan shall be approved or disapproved by the concerned NCIP Regional Office; Provided, That the applicant shall be accorded the opportunity to revise and resubmit the same within 30 days upon receipt of the notice of approval.
- b.iii. Within 7 days upon receipt of the approved Action Plan, the same shall be implemented by the applicant.
- b.iv. Within 30 days upon the issuance of the FPIC or rejection of the request therefor, the concerned NCIP Regional Office shall issue the Certification and endorse the same to the concerned government agencies, copy furnished the applicant.

In cases of conflicting Ancestral Land/Domain claims, the concerned NCIP Regional Office shall issue accordingly an Interim Clearance to the applicant within 30 days after the notification referred to in 5(a) hereof, with the condition that it poses no objection to the application; Provided, That in the event the conflict is resolved, the applicant must secure the FPIC as provided herein.

x x x

Upon issuance of a favorable FPIC to an application therefor and the corresponding approval thereof by the concerned government agency, the existing laws, administrative orders, rules and regulations governing the activities authorized under such approved application shall be followed and complied with.”

Pursuant to the foregoing, the process for securing the FPIC from the concerned ICCs/IPs is a matter to be determined primarily by the private applicant as incorporated in its “Action Plan”.

In this regard, both substantive and procedural issues remain. Noting the definition of FPIC, how is the “consensus of all members of the ICCs/IPs,” as determined by their respective customary laws and practices, obtained, validated and verified? How will the process to obtain FPIC be concretely operationalized? Specifically:

- Should there be general guidelines and mandatory steps for such “Action Plans”?
- How are customary laws to be determined and applied?
- Would every applicant have to undertake separate socio-anthropological studies to determine indigenous decision-making processes and how would these be validated?
- What will the role be, if any, of the NCIP’s Office on Policy, Planning and Research which is tasked with the documentation of customary law and serves as the depository of ethnographic information for monitoring, evaluation and policy formulation?
- Will FPIC be validated by the community before being accepted by the NCIP?
- What requirements for process documentation, if any, will there be?

- Would validation by an independent group be desirable, even required?
- How would the process of obtaining FPIC interplay with the social acceptability requirements under the process for obtaining an Environmental Compliance Certificate?

The foregoing are clearly relevant to new and pending mining applications, for which the requirement to secure FPIC in areas covered by ancestral domains is applicable. However, with respect to granted concessions or formal agreements with ICCs/IPs executed prior to the effectivity of NCIP AO 1, Section 3 of NCIP AO 3 provides that:

“(a) All leases, permits, licenses, contracts and other forms of concession in Ancestral Domains already existing, and/or vested upon the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall be recognized and respected. As such, the concerned lessees/permittees/licencees/contractors/concessionaires are not covered by the provisions of the Act of FPIC and NCIP Certification Precondition.

x x x

(c) Any formal written agreement and/or ICCs/IPs resolution issued by the concerned ICCs/IPs prior to the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall be deemed as consent.”

Consequently, granted concessions and formal written agreements or ICCs/IPs resolutions executed prior to the effectivity of NCIP DAO 1 are deemed compliance with the FPIC requirement under the IPRA. Thus, it can be concluded that in these cases, the parties thereto are no longer bound by any new or other FPIC requirements under the IPRA.

However, Sections (b) and (d) of the same order, NCIP AO 3, also provide:

“(b) New and renewal applications filed prior to the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall have priority in securing the NCIP Certification Precondition and FPIC, if applicable, upon endorsement of the concerned government agency.

x x x

(d) New and renewal applications filed during the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall have priority in securing the NCIP Certification Precondition and FPIC, if applicable, upon endorsement of the concerned government agency.”

Unless these portions of NCIP AO 3 were inadvertently misprinted, it appears that the same rule of ‘priority’ is enjoyed by new and renewal applications filed both prior to and during the effectivity of NCIP AO 1. Thus, this rule covers ALL new and renewal applications. It is unclear what “priority in securing NCIP Certification and FPIC” means in either case, over whom this is enjoyed, and how this would be applied. It further appears to be inconsistent with the priority rights enjoyed by ICCs/IPs under Section 57 of the IPRA and previously discussed herein.

## **7. Certification Precondition**

Under the IPRA, the NCIP is empowered to issue various certifications in relation to grants, concessions, licenses, leases or production-sharing agreements, hereinafter referred to as government grants. These certifications must emanate from the head office of the NCIP, and not from any of its regional offices which are tasked to conduct the field-based investigation and forward their recommendations to the head office.

In the issuance of such certifications, it appears that three situations are contemplated:

1. where the area covered by a government grant does not overlap with any ancestral domain;
2. where the government grant covers an ancestral domain or portion thereof; and
3. where the subject area is not covered by the FPIC requirements or the Certification Precondition requirements under the IPRA.

With respect to the first situation, two kinds of certifications have been issued by the NCIP. The first, and most common thus far, is the certification that the subject area is neither covered by ancestral land/domain applications nor occupied by IPs. A sample of this certification is attached hereto as Annex “L”. The second kind is the certification issued where the subject area is not covered by ancestral land/domain applications but certain conditions have to be applied. An example of such conditions is the presence of IPs, in which case the certification is issued on the condition that the corresponding FPIC and MOA will be obtained.

With respect to areas where the government grant does cover an ancestral domain or portion thereof, the certification issued must state whether the applicant has complied with the requirements of FPIC pursuant to the IPRA, with the corresponding MOA with the concerned IPs attached where one has been executed. Examples of this kind of certification as well as of an executed MOA are attached hereto as Annexes “M” and “N”, respectively.

With respect to the third situation, that is, where the subject area is not covered by the FPIC requirements or the Certification Precondition requirements under the IPRA, Section 3-a of NCIP AO No. 3 in relation to Section 56 of the IPRA are invoked. Article 56 states that property rights within the ancestral domains already existing and/or vested upon effectivity of the IPRA shall be recognized and respected while Section 3 of NCIP AO 3 on “Recognition of Existing/Vested Rights and Pending Applications for Lease, Permit, License, Contract and Other Forms of Concession” provides, in pertinent part, that:

“All leases, permits, licenses, contracts and other forms of concession in Ancestral Domains already existing, and/or vested upon the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall be recognized and respected. As such, the concerned lessees/permittees/licencees/contractors/concessionaires are not covered by the provisions of the Act of FPIC and NCIP Certification Precondition x x x”

In other words, the requirements on FPIC and the NCIP Certification Precondition are not made to retroact to those permits or other forms of concession already existing upon the effectivity of the IPRA’s implementing rules and regulations. An example of an NCIP certification applicable to this situation is attached hereto as Annex “O”.

From 05 August 1998 to 09 June 1999, 168 NCIP certifications were issued, 163 of which related to mining activities. Of the 163 certifications issued related to mining, 158 of these were of the first kind, i.e. where the subject area was neither occupied by IPs nor covered by CADT/CALT applications. The detailed breakdown illustrating these certifications is contained in Annex “P” hereof.

The NCIP has clearly attempted to rationalize and simplify this Certification Precondition process. However, the issues relevant thereto such as FPIC are, by their nature, complex and call for greater clarification. Some of these issues are discussed hereunder, depending on whether a subject area overlaps with any ancestral domain or not.

*(1) Where the Area Covered by a Government Grant  
Does Not Overlap with any Ancestral Domain*

With respect to areas covered by a Government grant which do not overlap with any ancestral domains, Section 59 of the IPRA seems to be the prevailing section. Said Section 59 provides that no government agency may issue, renew, or grant any concession, license or lease, or enter into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. This certification be issued only upon the following conditions:

- a. a field-based investigation is conducted by the ADO of the area concerned<sup>51</sup>
- b. the free and prior informed and written consent of ICCs/IPs concerned has been obtained; and
- c. there is no pending application for a Certificate of Ancestral Domain Title (CADT).

In relation hereto, the ICCs/IPs have the right to stop or suspend, in accordance with the IPRA, any project that has not satisfied the requirement of this consultation process.

Section 4 of NCIP AO 3 on the “Issuance of NCIP Certification Precondition for NON-ICC/IP Areas” provides that:

“Requests for NCIP Certification Precondition shall be filed with the concerned NCIP Regional Office. The cost of actual expenses in the conduct of the required field-based investigation, to be undertaken by the concerned NCIP Regional Office, shall be borne by the applicant. The pertinent field-based investigation report including recommendation shall be submitted to the NCIP main office within 30 days from receipt of the request. The NCIP shall act on (sic) request for NCIP Certification Precondition only upon endorsement of the concerned government agency.

If the area applied for does not overlap any Certified or Claimed Ancestral Land/Domain, the Certification to that effect shall be issued by the NCIP within 7 days upon receipt of the pertinent field-based investigation report.”

In spite of the foregoing attempt to clarify the procedure for complying with the Certification Precondition in areas not covered by ancestral domains, the following matters require clarification:

- Who is responsible for securing the above certification, the private applicant or the concerned government agency?
- Do the ICCs/IPs have to option to either stop or suspend a project? What is the process and time frame within which they may do either?
- In relation to the preceding question, at what point, if any, does the certification become conclusive so that a holder of a grant can be assured that its project can no longer be stopped or suspended on the ground that the consultation process requirement was not complied with?
- Since FTAAAs are not among the enumerated agreements, should they be deemed included under the general terms “grant” or “concession”, or are they deemed exempted from this requirement, or are they excluded from grants that may be issued?

*(2) Where the Government Grant Covers an Ancestral Domain or Portion Thereof*

Section 44(m) of the IPRA provides that the NCIP shall issue “appropriate certificates as a pre-condition to the grant of permit, lease, grant, or any other similar authority for the

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<sup>51</sup> The format for the field-based investigation and verification report has been standardized by the NCIP in a memorandum signed by the NCIP Chairman in October 1999.

disposition, utilization, management and appropriation by any private individual, corporate entity or any government agency, corporation or subdivision thereof on any part or portion of the ancestral domain taking into consideration the consensus approval of the ICCs/IPs concerned”.

In this regard, what specifically are the certifications required for mineral exploration, development and utilization under the IPRA? Does the NCIP have the discretion, in the determination of what is appropriate, to deny issuance of any such certificate despite the consensus approval of the ICCs/IPs concerned since it is, after all, only required to take the same into consideration? What terms should the certification contain so that it provides stability for all the parties concerned?

Specifically, Section 46 of the IPRA provides that the ADO shall issue, upon the free and prior informed consent of the ICCs/IPs concerned, certifications prior to the grant of any license, lease or permit for the exploitation of natural resources affecting the interests of ICCs/IPs. Should this certification issued by the ADO under this section be construed as one of the “appropriate certifications” that the NCIP issues under the above-cited Section 44(m)?

Since the right of ICCs/IPs to stop or suspend any project appears only under Section 59, or in situations where there is no overlap of areas covered by ancestral domains and government grants, is it correct to conclude that such right does not apply in other situations? Or is the right to be construed broadly as applying to all projects where the consultation process, presumably toward obtaining FPIC, is attacked?

The process for securing FPIC in areas covered by ancestral domains, and the issues arising in relation thereto, were discussed previously in subsection 6 hereof.

## **8. Formal Agreements**

Section 57 of the IPRA provides that the ICCs/IPs have priority rights in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains. However, a non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilization of the natural resources for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years. The participation of such non-member is conditioned on either of the following:

- the execution of a formal and written agreement entered into with the concerned ICCs/IPs; or
- that the community, pursuant to its own decision making process, has agreed to allow such operation.

From the above, it appears that there are two kinds of agreements that can be utilized by the ICCs/IPs with respect to the development and utilization of natural resources by a non-member within its ancestral domain. The first is a formal written agreement, an NCIP-approved example of which is attached hereto as Annex “N”. The second is an agreement pursuant to the ICCs/IPs own decision-making process. Consequently:

- How do these provisions affect the provisions of the Mining Act and DAO 96-40 on prior consent to the opening of lands for mining operations and negotiation of a royalty payment for the ICCs/IPs? Are the provisions of the Mining Act concerning the grant of permits and agreements superseded by said Section 57 of IPRA? Or must a non-member of an ICC/IP obtain both an agreement with the concerned ICC/IP and a mining tenement?

- What is the role of the NCIP, DENR, MGB or other government agency in agreements made under either mode?
- How can the community be bound to either a formal agreement or one resulting from their own decision-making process - by its tribal council or other leaders, or only by agreement with the community as a whole?
- Should consent be given through the second mode, how will the decision-making process of the concerned ICC/IP be determined, validated and verified?
- Can future generations be bound to such an agreement? Inasmuch as large mines can operate for several generations, can such agreements be binding on an inter-generational scope?

As previously stated, Section 3(c) of NCIP DAO 3 provides that “Any formal written agreement and/or ICCs/IPs resolution issued by the concerned ICCs/IPs prior to the effectivity of NCIP Administrative Order No. 1, Series of 1998, shall be deemed as consent”. This would imply that where such formal written agreements have already been obtained at the stated time, the same are equivalent to FPIC and the parties thereto are no longer bound by any new or other FPIC requirements under the IPRA.

### **9. Dispute Resolution; Application of Customary Laws**

Under Chapter XIII of the Mining Act, the regional Panels of Arbitrators and the Mines Adjudication board have jurisdiction over (a) disputes involving rights to mining areas; (b) disputes involving mineral agreements or permits; and (c) disputes involving surface owners, occupants and claimholders/concessionaires. Section 66 of IPRA, on the other hand, provides that the NCIP shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs. In view of the foregoing, several issues arise:

- Who assumes jurisdiction with respect to disputes involving mining agreements, permits or rights in areas within ancestral lands and domains? Who assumes jurisdiction when these disputes involve rights of ICCs/IPs?
- Section 65 provides that customary laws and practices shall be used to resolve disputes involving ICCs/IPs. Does this rule apply where one of the parties to the dispute is a non-ICC? If the Panel of Arbitrators has jurisdiction over a dispute involving ICCs/IPs, is it therefore required to use customary laws? In any event and under whichever government entity, what will the process be for validating the customary law or practice to be used?
- Finally, can the ICC/IP concerned agree to arbitration, mediation or other forms of dispute resolution under a mineral agreement or permit?

### **C. ADMINISTRATIVE FRAMEWORK**

Section 52(i) of the IPRA provides that once the NCIP certifies that an area is an ancestral domain, the jurisdiction of all other Government departments is terminated. Concern arose, not surprisingly, over which government agency had jurisdiction over mineral resources, particularly with respect to the granting of mining rights and permits. One perspective would be that such jurisdiction belongs to the NCIP, although concern exists as to whether it can be organizationally and technically equipped to exercise such regulatory powers.

In any event, various agencies were already involved in the application for and grant of mining tenements even prior to the promulgation of the IPRA. This is evident from the overview provided in Part III hereof. Clarification is needed as to how these different agencies and offices are to coordinate in the grant of mining rights, other rights and permits incidental or appurtenant thereto. These agencies and offices include:

1. DENR;
2. MGB;
3. NCIP;
4. BOI;
5. Department of Trade and Industry;
6. Bureau of Internal Revenue and
7. Bureau of Customs.
8. Department of Labor and Employment

In summary, with respect to ancestral domains or lands and areas occupied by IPs, clear and transparent rules with respect to the roles and responsibilities of the NCIP and the other agencies listed above are essential for any entity desiring to commence or continue mining or any other commercial activity therein. The legal and administrative framework covering safety, labor and environmental requirements, to fiscal terms and conditions – the clarity, certainty and stability of these are essential not only to the industry and government regulators but to IPs and all other stakeholders.

Finally, the NCIP is tasked with varied and complex responsibilities, not the least of which is the delineation and verification of ancestral lands and domains. It is unlikely that it can effectively perform its functions if it is hampered, as it has been since its inception, by budgetary constraints and other funding difficulties. Hence, sufficient budgetary support should be ensured to effectively implement these rules.

#### **D. ENVIRONMENTAL CONSIDERATIONS**

As seen in Part III hereof, an environmental management framework governs mining activities from exploration to the post-decommissioning period. How do the rights and responsibilities of IPs/ICCs with respect to environmental considerations within ancestral lands/domains affect this framework? Similarly, how do these responsibilities interplay with the undertakings and commitments of a mining contractor under its Environmental Compliance Certificate?

#### **E. ECONOMIC CONSIDERATIONS**

##### **1. Investments**

As discussed in the previous section on the Mining Industry, there has been a steady decline in, among others, mining exploration investment expenditures and the mining industry's export earnings in recent years. The mining industry's participation in export earnings has declined by almost ten percentage points from the early '80s to the mid-'90s. And the past two years have seen the suspension or closure of at least ten foreign exploration companies. For the Mining Industry and the economic agencies of the government, this causes great concern given national targets for growth, the country's economic development targets and poverty alleviation efforts.

Losses in potential investments or earnings are necessarily significant for any country. This is especially true for a developing country like the Philippines with an average

poverty incidence of 32% in 1997, with some rural areas experiencing a poverty incidence higher than 50%<sup>52</sup>.

It is unlikely that the decreasing contribution of the mining sector to investments or exports is the result of a single factor. A broad range of issues, including economic, social and environmental concerns, affects mining activities. However, there is general acknowledgement that the separate challenges to the Mining Act and the IPRA before the Supreme Court add to the uncertainty in the legal and administrative framework for mining activities.

“The enactment of the Indigenous Peoples Rights Act (IPRA) made things more difficult, and this sent mixed signals to local and foreign investors in so far as the future and direction of the mining industry is concerned. The Constitutional challenge to the FTAA and the Mining Act as well as the challenge to the constitutionality of the IPRA which have no decision yet, remains to be a stumbling block to the mining industry’s development.”<sup>53</sup>

This sentiment is echoed by some foreign investors who identified the IPRA and the uncertainties created by it as one reason for the recent drop in investments. The Philippine-Australia Business Council (“PABC”) recently issued a Manifesto which noted that “concerns of the minority communities about the possible use of their ancestral lands; x x x” was one condition which has “hindered the Philippine mineral industry from realizing its full potential”.<sup>54</sup> For many in the industry, the passage of the IPRA and its IRR has

“added a new dimension of potential uncertainty to the security of title and another level of bureaucracy and red tape to the system. Many of the majors who had applied for FTAAAs believe that it will take many months to resolve and have chosen to cut back their expenditure commitments and adopt a ‘wait and see’ attitude. The resolution of the issues of conflict between the Mining Act and IPRA and the issuance of clear implementation guidelines are understood and accepted by all parties are essential if the Philippines is to benefit from levels of exploration investment approaching those of ‘95 and ‘96.”<sup>55</sup>

This is not to say, however, that investors deny the legitimacy of issues concerning IPs and their rights. The same PABC Manifesto previously cited further provided, among other things, recognition of the rights of indigenous peoples, a principle that is implicit in the Mineral Industry Code of Conduct for the Environment first disseminated in February of 1999.

Rather, there is generally a real need for clarification and harmonization of the laws pertaining to the exploration, development and utilization of mineral resources within ancestral lands and domains.

## 2. Benefit Sharing

Section 5(d) of NCIP Administrative Order No. 3 provides that:

“(d) In the determination of the benefits due the host ICCs/IPs to be embodied in the MOA, all benefits already provided under existing laws, administrative orders, rules and regulations covering particular resource utilization, extraction or development projects/activities shall apply, without prejudice to additional benefits as may be negotiated between the parties on an ‘ex gratia’ basis. In case where existing laws, administrative orders and rules and regulations do not provide for benefits, such benefits due to host ICCs/IPs shall be negotiated between the parties.”

It would thus appear from the foregoing that the provisions of the Mining Act with

<sup>52</sup> Source: National Statistics Office

<sup>53</sup> A. Disini, *State of Mining Investments in the Philippines*, Chamber of Mines Newsletter, Vol. 11, No. 15, (Jan-Mar 1999).

<sup>54</sup> PABC Manifesto, issued at Hotel Intercontinental Manila, Makati City, (18 November 1998).

<sup>55</sup> R. Guest, *Facing New Challenges*, Journal of Energy, Environment and Minerals, Vol. I, No. 01, (October-November 1998), p. 29.

respect to the negotiation and payment of royalties to ICCs/IPs who consent to mining operations within their ancestral domains or lands continue to be operative.

This is relevant because stability of the fiscal regime is essential for mining investors. Such stability necessitates knowing, among others, the identity of stakeholders and their shares, the overall tax burden and government share. Certain provisions of the IPRA raise various questions that potentially impact on the benefit-sharing scheme under mining agreements. These include:

1. Should negotiation for royalty payments and other benefits take place when first securing FPIC to the mining operations, or may this be done at a later time? Is this completely within the discretion of the negotiating parties or should there be guidelines in this regard?
2. How are the proceeds from the utilization of minerals within ancestral domains to be shared among the National Government, the ICC/IP community and any neighboring and host communities?
3. Section 60 of the IPRA provides that ancestral domains are exempt from real property taxes, special levies, and other forms of exaction except such portion as are actually used for large-scale agriculture, commercial forest plantation and residential purposes or upon titling by private persons. Consequently:
  - Are areas within ancestral domains that are covered by large-scale mining operations covered by this exemption?
  - What are 'other forms of exaction'? Would they include occupation fees?

## **F. INTERNAL OPERATIONS OF MINING COMPANIES**

Both the Mining Act and the IPRA require that the consent of IPs to mining activities must be obtained. Negotiations with the concerned IPs may thus take place even at the outset, and the relationship with them will last for the entire lifetime of a mining operation. These laws place the primary burden on the mining contractor or applicant to ensure that the process for obtaining IPs' consent is free from any external manipulation, interference and coercion.

No doubt many companies have made great strides toward greater corporate citizenship, including commitments to social development and environmental protection. The Mining Industry is no exception. Under the IPRA, there would be a greater need to incorporate community organizers or other social scientists in the internal operations of the company, whether as personnel or independent consultants. The negotiation and formulation of any agreements, among others, will also require expanded and even specialized legal skills. And very importantly, mining companies and particularly their field personnel should be well versed with the IPRA and its provisions so as to internalize the principles and requirements thereunder. On a practical level, this would be essential considering that any violation of ICCs/IPs rights or of any of the provisions of the IPRA may result in criminal liability under its penal section<sup>56</sup>.

## **G. PERSPECTIVES**

An important level of impact of the IPRA on the Mining Industry remains to be discussed. This deals, in particular, with changes in attitude and what might be called a

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<sup>56</sup> Please see page 27 hereof on punishable acts under the IPRA.

paradigm shift with respect to IPs/ICCs in development activities. It is an over-arching impact since it inevitably permeates through the other levels of impact and underlies most, if not all, the issues raised in relation thereto.

In general, the IPRA brings about a change in the 'playing field' with respect to the exploration, development and utilization of mineral and other natural resources within ancestral lands and domains. Although the Mining Act already recognizes the need for the prior consent of IPs/ICCs to mining operations in their ancestral lands/domains and their right to a royalty from the same, the IPRA recognizes the IPs/ICCs rights over the mineral resources within their ancestral lands/domains. The exact nature and extent of these rights are fundamental legal issues pending before the Supreme Court.

Notwithstanding these legal issues, the change in perspective called for by the IPRA is to see the IPs/ICCs no longer as ordinary stakeholders. All entities involved in development activities within ancestral lands/domains are challenged by the IPRA to engage with them as such empowered stakeholders.

## V. CONCLUDING REMARKS

More than any other development in Philippine legal history, the IPRA has certainly given central and direct focus on ICCs/IPs. The discussion of relevant factual and legal considerations in Part I hereof hopefully lends greater insight into the law's promulgation. As discussed in Part II, the IPRA recognizes broad and far-reaching rights pertaining to their ancestral lands/domains which affect not only them but inevitably affect all others including those who presently or, in the future, undertake development activities therein.

Significant aspects pertaining to the Mining Industry are the subject of Part III hereof, after which the inevitable interplay between the concerns thereof and the IPRA becomes readily evident. This interplay was analyzed in terms of levels of impact, which levels were discussed in the immediately preceding section. These levels of impact illustrate the far-reaching extent to which the IPRA affects the implementation of mining laws, mining applications and the operations of existing mines.

There are different factors present in both Philippine society and the global context that affect mining investments. However, the uncertainty in the IPRA's interpretation and the lack of clarity in its implementation have also had a negative effect on mining investments. Investors are, understandably, extremely cautious about new rules which can substantially change the conditions upon which they first made the decision to invest, more so of rules which are not clear so that their impact is uncertain.

Such uncertainty and lack of clarity lead to the perception that government policy with respect to mining is itself, uncertain and unclear. This perception certainly does not help the industry, as it serves as a disincentive for mining investments. Nor does it help achieve national economic or investment targets. Just as importantly, it does not help local government units, local communities and IPs in evaluating whether and to what extent mining activities are conducted within their areas of concern. Clear and stable rules are necessary to enable all stakeholders to make properly informed decisions.

From the different levels of impact discussed in the preceding section, it is clear that there are both fundamental legal issues which are pending in the petition before the Supreme Court and legal issues which can be resolved on an administrative level. These fundamental legal issues which require judicial resolution, discussed under Part II-C hereof, concern whether or not the IPRA violates the Regalian Doctrine, whether it deprives other interested parties due process and equal protection of the law, and whether it impairs the President's power of control.

Specifically, the issue of ICCs/IPs ownership of their ancestral lands and domains, including mineral and other natural resources therein, is certainly the most significant. More accurately, it is the nature and extent of such ownership that requires clarification. It is also necessary in determining the relationship among ICCs/IPs, the NCIP, other government agencies and units, and non-members of the ICCs/IPs who wish to participate in the exploration, development and utilization of mineral and other natural resources within ancestral lands/domains.

However, these issues are exclusively within the jurisdiction of the Supreme Court. Respect for the Court would call for all involved to await its decision. However, neither the parties to the petition nor the other branches of Government are precluded from respectfully manifesting a request for a more expedient resolution, provided the means taken clearly do not constitute interference in the exclusive judicial power of the Court.

Notwithstanding these fundamental issues before the Supreme Court, there are many other important issues pertaining to mining activities within ancestral domains or lands

which can possibly be resolved on an administrative level. It should be noted that many of the questions raised in the preceding section relate to detailed aspects of implementation that are not and can not generally be covered in a law but are rather left to be filled in by the executing agencies. Furthermore, some of these issues emanate not only from the IPRA, but also from laws like the Mining Act and the Presidential Decree No. 1586 on the Environmental Impact Assessment System. Examples of these are FPIC, the application of customary law, community agreements and concerns of social acceptability.

Unless concrete and positive efforts are made, the conflicts between the IPRA and the Mining Act present many difficulties for mining activities within ancestral domains or lands. There is a legitimate need for clarification and harmonization of these laws pertaining to the exploration, development and utilization of mineral resources especially within ancestral domains and lands.

As previously stated, the Mining Industry needs clear answers to certain fundamental questions: What body of laws now governs mining activities within ancestral domains and lands? What legal framework, including labor and safety requirements as well as environmental rules, is now applicable therein? These issues are fundamental to the security of mining tenements and the stability of mining operations.

On the administrative level, there are various options for resolving these policy issues. One would be through inter-agency rules or regulations, or by Presidential issuances such as administrative circulars, orders, or executive orders. Whatever mode is taken, it is important that genuine and broad consultations are first conducted, in order for the Government to formulate clear policies which will serve the national interest. The concept of national interest should embody the common good and, to every extent possible, the best interests of the stakeholders involved.

Based on the issues raised in the preceding section, those which may possibly be addressed through such administrative or executive actions include:

- Clarifying what body of laws governs mining activities within ancestral domains and lands
- scope and application of vested rights
- scope and application of priority rights
- guidelines for obtaining and verifying FPIC
- guidelines for the execution of formal agreements
- harmonizing procedures for dispute resolution
- clarifying roles and responsibilities of different government entities

Clarification of government policies on mining, including the resolution of the foregoing legal and administrative issues, will help in addressing the uncertainties for the Mining Industry which arise from the interpretation and implementation of key IPRA provisions. This should benefit not only the Mining Industry and the Government, but certainly the IPs as well whose welfare the IPRA was precisely designed to protect. The different stakeholders can make properly informed decisions and may find options toward mutually beneficial ways to co-exist only in an environment where clear rules are in place, and more so when these are implemented in a rational and efficient manner.

## LIST OF ANNEXES

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- “P” List of NCIP Certifications issued from 05 August 1998 to 09 June 1999



**ANNEX “A”**

<b>Main ICC Groups</b>	<b>General Location</b>	<b>Estimated Population</b>
Kankana-ey	Benguet Baguio City Mountain Province	125,000
Ibaloi	Baguio City Benguet	93,000
Bontoc	Mountain Province	148,000
Tinggian (Itneg)	Abra	57,000
Ifugao	Ifugao	180,000
Kalinga	Kalinga-Apayao	106,000
Yapayao (Isneg)	Kalinga-Apayao	56,000
Bago	Ilocos Norte Pangasinan	16,000
Ibanag	Isabela Cagayan	1,105,000
Ilongot (Bugkalot)	Nueva Vizcaya Aurora Quirino	28,000
Gaddang	Quirino Nueva Vizcaya	60,000
Itawis	Cagayan	45,000
Ivatan	Batanes	12,000
Aeta (Agta, Pugot)	Kalinga-Apayao Cagayan Bataan Zambales Pamapanga Tarlac Bulacan Quirino Aurora Rizal Quezon Isabela Camarines Norte Camarines Sur	194,000
Remontado	Aurora Rizal Quezon	7,000
Alangan (Mangyan)	Mindoro Oriental, Mindoro Occidental	50,000
Batangan (Mangyan)	Mindoro Oriental, Mindoro Occidental	52,000
Batak	Palawan	9,000
Buid, Buhid (Mangyan)	Mindoro Oriental, Mindoro Occidental	2,000
Cuyonon	Palawan	29,000
Dumagat	Aurora Rizal Quezon	26,000
Hanunuo (Mangyan)	Mindoro Oriental, Mindoro Occidental	70,000
Iraya (Mangyan)	Mindoro Oriental, Mindoro Occidental	20,000
Palawanon	Palawan	35,000
Tadyawan (Mangyan)	Mindoro Oriental, Mindoro Occidental	56,000
Tagbanua	Quezon Palawan	116,000
Tao't Bato	Quezon Palawan	158
Aeta-Abiyan	Camarines Norte Camarines Sur	11,000
Agta	Camarines Sur	7,000
Cimaron	Sorsogon	9,000
Isarog	Camarines Norte	8,000
Itom	Albay	11,000
Kabihug	Camarines Norte Camarines Sur	10,000
Mayon	Camarines Sur	9,000
Pullon	Masbate Camarines Sur	9,000
Ati	Negros Occidental Iloilo Antique Capiz	57,000
Magahat/Corolanos	Negros Occidental	1,000
Sulod	Iloilo Aklan	12,000
Magahat	Negros Occidental	8,000
Eskaya	Bohol	2,000
Badjao	Tawi-Tawi Zamboanga del Sur Jolo Basilan Cebu	192,000
Kalibugan	Basilan Zamboanga del Sur Jolo Tawi-Tawi	50,000
Subanen	Zamboanga del Sur Zamboanga del Norte	280,000

	Misamis Occidental	
Bukidnon	Bukidnon Misamis Oriental	227,000
Banwaon	Bukidnon	48,000
Camiguin	Camiguin Island	58,000
Dibabaon	Agusan Davao del Norte	59,000
Higao-non	Agusan Bukidnon Misamis Occidental Misamis Oriental	184,000
Mamanua	Agusan del Norte Agusan del Sur	25,000
Matigsalog	Bukidnon	247,000
Talaandig	Bukidnon	129,000
Tigwahanon	Agusan del Norte Agusan del Sur Misamis Occidental	32,000
Umayamnon	Bukidnon Agusan	91,000
Blaan	Davao del Sur North Cotabato Sultan Kudarat	370,000
Kalagan	Davao del Sur South Cotabato	96,000
Languilad, Tanguliod	Davao del Norte	114,000
Mandaya	Surigao del Sur Surigao del Norte	311,000
Manobo Blit	South Cotabato	20,000
Manguangon	Davao South Cotabato	4,000
Mansaka	Davao del Norte	120,000
Matigsalug	Davao del Sur Davao del Norte	116,000
T'boli	South Cotabato	240,000
Tagakaolo	Davao del Sur	111,000
Tasaday	South Cotabato	65
Ubo	South Cotabato	18,000
Bagobo	North Cotabato Sultan Kudarat Davao del Sur South Cotabato	170,000
Ilianen	North Cotabato Sultan Kudarat	18,000
Manobo	Agusan del Sur Agusan del Norte South Cotabato North Cotabato Davao del Sur Sultan Kudarat	600,000
Tiruray	Maguindanao North Cotabato Sultan Kudarat	190,000
Maguindanao	Mindanao Provinces Palawan and other places	1,190,000
Maranao	Mindanao Provinces Palawan and other places	1,500,000
Tausug	Mindanao Provinces Palawan and other places	800,000
Yakan/Sama	Mindanao Provinces	800,000
Iranon	Mindanao Province	180,000
	<b>TOTAL</b>	<b>12,151,223</b>

Source: Consultative Meeting on Indigenous Peoples held on 11 April 1997, Taal Vista Lodge, Tagaytay City by the Department of Environment and Natural Resources and the National Economic Development Authority, citing Nayahangan, 1993.

## ANNEX “C”

### **SIGNIFICANT LAWS PERTAINING TO Ips PRIOR TO THE 1987 CONSTITUTION**

Republic Act No. 1888, An Act To Effectuate In A More Rapid And Complete Manner The Economic, Social, Moral And Political And Advancement Of The Non-Christian Filipinos Or National Cultural Minorities And To Render Real, Complete And Permanent The Integration Of All Said National Cultural Minorities Into The Body Politic, Creating The Commission On National Integration Charged With Said Functions (22 June 1957)

The Commission on National Integration established hereunder was tasked to effectuate the policy then of assimilation of indigenous peoples into the mainstream society. Its general function was to further the agricultural, industrial and social development of the National Cultural Minorities and their progress in civilization. As such, it was the custodian and administrator in charge of the disposition of public lands in the provinces and regions inhabited by the National Cultural Minorities reserved for, among others, settlements and townsites. It was further tasked with effectuating the settlement of all landless members of the National Cultural Minorities by procuring homesteads for them or by resettling them in resettlement projects of the National Resettlement and Rehabilitation Administration.

The Commission on National Integration was later abolished under Presidential Decree No. 690 promulgated on 22 April 1975. The same law also established the Southern Philippines Development Administration.

Presidential Decree No. 410, Declaring Ancestral Lands Occupied And Cultivated By National Cultural Communities As Alienable And Disposable, And For Other Purposes (11 March 1974)

The term “ancestral lands” is defined as lands of the public domain that had been in open, continuous, exclusive and notorious occupation and cultivation by members of the National Cultural Communities by themselves or through their ancestors, under a bona fide claim of acquisition of ownership according to their customs and traditions for a period of at least thirty (30) years before the date of approval of said decree. The interruption of the period of their occupation and cultivation on account of civil disturbance or force majeure would not militate against their right.

Also included in the term were unappropriated agricultural lands forming part of the public domain at the date of the approval of this Decree occupied and cultivated by members of the National Cultural Communities for at least ten (10) years before the effectivity of said decree. These lands were further declared as alienable and disposable if these had not been earlier declared as such and were to be distributed exclusively among the members of the National Cultural Communities concerned unless they were reserved resettlement areas under the DAR or for other public or quasi-public purposes. Occupants of ancestral lands had ten (10) years from the date of approval of this decree within which to file applications to perfect their title to the lands occupied by them, otherwise, they would lose their preferential rights and the land would be declared open for allocation to other deserving applicants.

Presidential Decree No. 1017, Prohibiting Persons from Entering Into Unexplored Tribal Grounds And Providing Penalty Therefor (22 September 1976)

The term “unexplored tribal grounds” referred to: the habitat of isolated tribes in the interior of Tboli municipality, South Cotabato from the forested area of Mount Malibato, through Mt. Parker and the entire mountain range from Mt. Parker through Mt. Busa to the Manubo Blit - Tasaday Reservation; the habitat of isolated tribes in the Daguma mountain range and the forested area of Kulaman Valley; the forested area between Ransang and Candawaga, Quezon, Palawan and the municipality of Bataraza, Palawan, inhabited

by isolated tribesmen under Ambilan Antal; and such other areas inhabited by isolated tribes as declared by the President . This decree rendered it unlawful for any person without prior authority from the Office of the President upon recommendation of the Presidential Assistant on National Minorities to enter unexplored tribal grounds or to establish contacts with the National Minorities for the purpose of conducting studies into their customs, traditions, practices and beliefs.

Presidential Decree No. 1414, Further Defining The Powers, Functions And Duties Of The Office Of The Presidential Assistant On National Minorities And For Other Purposes (09 June 1978)\_\_\_

The office of the Presidential Assistant on National Minorities, or PANAMIN, was designated as the principal agency designated to act for and in behalf of the President in all matters pertaining to “National Minorities” and to effectuate the policy of the State to integrate into the mainstream ethnic groups seeking such integration, and at the same time protect the rights of those who wish to preserve their original lifeways. The PANAMIN had the exclusive authority to, among others, issue certifications attesting to bona fide membership in a tribal or ethnolinguistic group considered as National Minorities.

## ANNEX “D”

### SIGNIFICANT LAWS AND RULES PERTAINING TO IPs UNDER THE 1987 CONSTITUTION AND PRIOR TO THE PROMULGATION OF THE IPRA

- **Implementing Agencies**

The Office For Northern Cultural Communities And The Office For Southern Cultural Communities, created under Executive Order No. 122-B And Executive Order No. 122-C respectively (30 January 1987)

After the 1986 EDSA Revolution, the Office of Muslim Affairs and Cultural Communities was abolished by virtue of Executive Order No. 122 (Abolishing The Office Of Muslim Affairs And Cultural Communities, 30 January 1987). In its place, the Office for Muslim Affairs, the Office for Northern Cultural Communities (“ONCC”) and the Office for Southern Cultural Communities (“OSCC”) were created by virtue of Executive Orders No. 122-A, 122-B and 122-C, respectively.

The functions of the ONCC and the OSCC included, among others, the certification, whenever appropriate, of membership of persons belonging to cultural communities for purposes of establishing qualifications for specific requirements of government and private agencies and for other benefits as may be provided by law. These agencies were also tasked to coordinate the enforcement of policies and laws protecting the rights of the cultural communities to their ancestral lands, including the application of customary laws governing property rights and relations, in determining the ownership and extent of ancestral lands. They were also authorized to conduct inspections or surveys jointly with other appropriate agencies, and issue necessary certifications prior to the grant of any license, lease or permit for the exploitation of natural resources affecting their interests.

The Department of Environment and Natural Resources (the “DENR”)

Formally reorganized in 1987 under Executive Order 192<sup>1</sup>, the DENR is the primary government agency tasked to ensure the judicious exploration, development, disposition, utilization, management, renewal and conservation of the country's natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment.<sup>2</sup> Their mandate was expanded to include IPs, particularly the delineation of their ancestral lands and domains.

- **Ancestral Lands and Domains**

DENR Administrative Order No. 1, Series of 1988, created the Indigenous Community Affairs Division (“ICAD”) under the Special Concerns Office. In 1993, DENR Administrative Order No. 2 (“DAO 2”) added to the ICAD’s functions the coordination of the identification, delineation and recognition of ancestral land and domain claims leading to the issuance of Certificates of Ancestral Domain Claims (“CADC”) and Certificates of Ancestral Land Claims (“CALC”). The objectives of the order were to protect the rights of indigenous peoples and to ensure sustainable development of the natural resources within those lands/domains.

In 1994, the ICAD was tasked also with implementation of the Social Reform Agenda, the Flagship Masterplan of which prioritized the certification of the IPRA bill. After the issuance of Executive Order No. 263 (“EO 263”) in 1987 establishing Community Based Forest Management as the National Strategy for Sustainable Development of Forestland Resources, DENR Administrative Order No. 34-96 and the implementing rules of EO 263 were issued reorganizing the ICAD into the Ancestral Domain Management Office which coordinated the implementation of Ancestral Domain Management Plans.

- **Indigenous Peoples and Natural Resources**

Commonwealth Act No. 141, An Act To Amend And Compile The Laws Relative To Lands Of The Public Domain, As Amended

A member of the national cultural minorities who has continuously occupied and cultivated, either by himself or through his predecessors-in-interest, a tract or tracts of land, whether disposable or not since July 4, 1955, shall be entitled to have a free patent issued to him for such tract/s of land provided that at the

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<sup>1</sup> Executive Order No. 192, *Providing for the Reorganization Of the Department of Environment, Energy and Natural Resources; Renaming it as the Department of Environment and Natural Resources and for Other Purposes*, (10 June 1987).

<sup>2</sup> See also Chapter 1, Title XIV on the DENR, Executive Order No. 292, the Revised Administrative Code, (25 July 1987).

time he files his free patent application, he is not the owner of any real property secured or disposable under this provision.

Members of the national cultural minorities who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive and notorious possession and occupation of lands of the public domain suitable to agriculture, whether disposable or not, under a bona fide claim of ownership for at least 30 years shall be conclusively presumed to have performed all the conditions essential to a Government grant upon application with the proper court for confirmation of their claims and the issuance of a certificate of title under the Land Registration Act.

Presidential Decree No. 705, Otherwise Known As The "Revised Forestry Code Of The Philippines", As Amended (19 May 1975)

Under this law, entry into and cultivation of forest lands shall only be allowed through by authority of the Government. For this purpose, a complete census of cultural minorities and other occupants in forest lands with or without authority or permits from the government, showing the extent of their respective occupation and resulting damage, or impairment of forest resources, should have been conducted.

Cultural minorities and other occupants who entered into forest lands and grazing lands before May 19, 1975, without permit or authority, were not to be prosecuted provided they did not increase their clearings and undertook the activities imposed upon them by the Government in accordance with management plan calculated to conserve and protect forest resources in the area. However, they could be ejected and relocated to the nearest accessible government resettlement area whenever the best land use of the area so demands as determined by the Government.

Republic Act No. 6657, An Act Instituting A Comprehensive Agrarian Reform Program To Promote Social Justice And Industrialization, Providing The Mechanism For Its Implementation, And For Other Purposes (10 June 1988)

This law is intended as one of the government's primary mechanisms to implement Section 6 of Article XIII of the 1987 Constitution which provides that the State shall apply the principles of agrarian reform or stewardship in the disposition or utilization of other natural resources, including lands of the public domain, under lease or concession, suitable to agriculture, subject to prior rights, homestead rights of small settlers and the rights of indigenous communities to their ancestral lands. For this reason, the implementation of this law may be suspended with respect to ancestral lands for the purpose of identifying and delineating such lands.

The term "ancestral lands" is defined herein to include, but not be limited to, lands in the actual, continuous and open possession and occupation of the community and its members, provided, however that the Torrens Systems shall be respected. The rights of indigenous peoples to their ancestral lands shall be protected to ensure their economic, social and cultural well-being. In line with the principles of self-determination and autonomy, the systems of land ownership, land use, and the modes of settling land disputes of all these communities must be recognized and respected.

Republic Act No. 7076, An Act Creating A People's Small-Scale Mining Program And For Other Purposes (27 June 1991)

No ancestral land may be declared as a people's small-scale mining area without the prior consent of the cultural communities concerned. If ancestral lands are declared as people's small-scale mining areas, the members of the cultural communities therein shall be given priority in the awarding of small-scale mining contracts.

Republic Act No. 7942, An Act Instituting A New System Of Mineral Resources Exploration, Development, Utilization, And Conservation (03 March 1995) and DENR Administrative Order No. 96-40, the Revised Implementing Rules and Regulations

The Mining Act of 1995 expressly provides that the State shall recognize and protect the rights of the indigenous cultural communities to their ancestral lands as provided for by the Constitution. To further implement this provision, the Act provides that no ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned. In the event of an agreement with an indigenous cultural community, the royalty payment, upon utilization of the minerals shall be agreed upon by the parties. The said royalty shall form part of a trust fund for the socioeconomic well-being of the indigenous cultural community.

The term "ancestral lands" refers to all lands exclusively and actually possessed, occupied, or utilized by indigenous cultural communities by themselves or through their ancestors in accordance with their customs and traditions since time immemorial, and as may be defined and delineated by law. "Indigenous cultural

community", in turn, refers to a group or tribe of indigenous Filipinos who have continuously lived as communities on communally-bounded and defined land since time immemorial and have succeeded in preserving, maintaining, and sharing common bonds of languages, customs, traditions, and other distinctive cultural traits, and as may be defined and delineated by law.

Other terms and provisions pertinent hereto are discussed in Part III hereof.

- **Environmental Protection and Management**

Republic Act No. 7586, An Act Providing For The Establishment And Management Of National Integrated Protected Areas System, Defining Its Scope And Coverage, And For Other Purposes (01 June 1992)

The role of indigenous communities in sustainable development is recognized by this law. The "National Integrated Protected Areas Systems (NIPAS)" is the classification and administration of all designated protected areas to maintain essential ecological processes and life-support systems, to preserve genetic diversity, to ensure sustainable use of resources found therein, and to maintain their natural conditions to the greatest extent possible.

The term "indigenous cultural community" refers herein to a group of people sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, since time immemorial, occupied, possessed and utilized a territory. Their ancestral lands and customary rights and interests arising shall be recognized. The DENR shall prescribe rules and regulations to govern ancestral lands within protected areas subject to notice and hearing with the participation of concerned indigenous communities. However, the DENR shall have no power to evict indigenous communities from their present occupancy or resettle them to another area without their consent.

There shall be a general management planning strategy to serve as guide in formulating individual plans for each protected area including the protection of indigenous cultural communities. The Protected Area Management Board that is established for each protected area shall include a representative from each affected tribal community, where applicable.

Republic Act No. 7611, An Act Adopting The Strategic Environmental Plan For Palawan, Creating The Administrative Machinery For Its Implementation, Converting The Palawan Integrated Area Development Project Office To Its Support Staff, Providing Funds Therefor, And For Other Purposes (19 June 1992)

The SEP establishes a graded system of protection and development control over the whole of Palawan, including its tribal lands, forests, mines, agricultural areas, settlement areas, small islands, mangroves, coral reefs, seagrass beds and the surrounding sea. This shall be known as the Environmentally Critical Areas Network, or ECAN. The ECAN shall ensure, among others, the protection of tribal people and the preservation of their culture.

Under this law, the term "tribal land areas" refers to the areas comprising both land and sea that are traditionally occupied by the cultural minorities. These shall be treated in the same graded system of control and prohibition as in the others abovementioned except for stronger emphasis in cultural considerations. The SEP, therefore, shall define a special kind of zonation to fulfill the material and cultural needs of the tribes using consultative processes and cultural mapping of the ancestral lands.

The terrestrial component may be subdivided into smaller management components such as the area of maximum protection or core zone. This zone shall be strictly protected and maintained free of human disruption. Natural forests, peaks of mountains and habitats of endangered and rare species are examples of core zones. Exceptions, however, may be granted to traditional uses of tribal communities of these areas for minimal and soft impact gathering of forest species for ceremonial and medicinal purposes.

Executive Order No. 247, Prescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, their By-Products and Derivatives, for Scientific and Commercial Purposes; and for Other Purposes (18 May 1995)

Among the objectives of this law is the regulation of the research, collection, and use of species, genes and their products. In this regard, the rights of indigenous cultural communities to their traditional knowledge and practices when this information is directly and indirectly put to commercial use are identified and recognized. Their effective participation is promoted through their representation in the Inter-Agency Committee on Biological and Genetic Resources which is established as an attached agency to the DENR by this Order.

Executive Order No. 263, Adopting Community-Based Forest Management (CBFM) As The National Strategy To Ensure The Sustainable Development Of The Country's Forestlands Resources And Providing Mechanisms For Its Implementation (19 July 1995)

Indigenous peoples may participate in the implementation of CBFM activities in recognition of their rights to their ancestral domains and land rights and claims. In this regard, the DENR established various programs such as the Integrated Social Forestry Program along with contractual arrangements like stewardship agreements whereby indigenous peoples, among others, could avail of the same. This is intended as one mechanism to implement Section 17 of Article XIV which mandates the State to recognize and respect the rights of the indigenous peoples to their ancestral domains and consider their customs, traditions and beliefs in the formulation of laws and policies.

- **Autonomous Regions**

Executive Order No. 220, Creating A Cordillera Administrative Region, Appropriating Funds Therefor And For Other Purposes (15 July 1987)

Under this law, the Cordillera Administrative Region (“CAR”) was created covering the provinces of Abra, Benguet, Ifugao, Kalinga-Apayao and Mt. Province and the chartered city of Baguio. It has authority in the region over, among others, the protection of ancestral domain and land reform, the formulation of educational policies to cultivate the indigenous Cordillera cultures and inculcate traditional values, the development and promotion of indigenous laws, institutions as well as processes for dispute settlement, the conduct of studies towards codifying the customary laws of the tribes, including the pagtas of the bodong system, the preservation and enhancement of indigenous customs, traditions, languages and cultures, the strengthening of the bodong system of tribal unity and cooperation and the protection and preservation of the cultural identity, values, mores and norms of the various ethno-linguistic groups in the Cordilleras.

Republic Act No. 6734, An Act Providing For An Organic Act For The Autonomous Region In Muslim Mindanao (01 August 1989)

The term "indigenous cultural community" as used in this law includes tribal peoples residing in Muslim Mindanao whose social, cultural and economic conditions distinguish them from other sectors of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

“Ancestral domains” are defined herein to include all lands and natural resources in the Autonomous Region that have been possessed or occupied by indigenous cultural communities since time immemorial, except when prevented by war, force majeure, or other forms of forcible usurpation. Also included are pasture lands, worship areas, burial grounds, forests and fields and mineral resources. Excluded however are strategic minerals such as uranium, coal, petroleum, and other fossil fuels, mineral oils, all sources of potential energy, lakes, rivers and lagoons and national reserves and marine parks, as well as forest and watershed reservations.

“Ancestral lands” are defined as “Lands in the actual, open, notorious, and uninterrupted possession and occupation by an indigenous cultural community for at least thirty (30) years are ancestral lands”.

Subject to the Constitution and national policies, the Regional Government shall undertake measures to protect the ancestral domain and the ancestral lands of indigenous cultural communities. Subject to rights already vested under the provisions of existing laws, the constructive or traditional possession of lands and resources by an indigenous cultural community may also be granted judicial affirmation provided the petition therefor is instituted within ten (10) years from the effectivity of this law. The procedure for judicial affirmation of imperfect titles under existing laws shall, as far as practicable, apply to the judicial affirmation of titles to ancestral lands. Ancestral lands already titled or owned by an indigenous cultural community shall not be disposed of to nonmembers unless authorized by the Regional Assembly. No portion of the ancestral domain shall be open to resettlement by nonmembers of the indigenous cultural communities.

Indigenous cultural communities have priority rights in the exploration, development and utilization of natural resources within their ancestral domains, subject to the Constitution and national development policies and programs. In the case of corporations, companies and other entities within the ancestral domain of the indigenous cultural communities whose operations adversely affect the ecological balance, the Regional Government shall require them to take the necessary preventive measures and safeguards in order to maintain such a balance.

A system of tribal courts, which may include a Tribal Appellate Court, is established. These courts shall determine, settle and decide controversies and enforce decisions involving personal, family and property

rights in accordance with the tribal codes of these communities. The Regional Assembly shall define the composition and jurisdiction of these courts as well as provide for the codification of indigenous laws and compilation of customary laws in the Autonomous Region. The customary laws, traditions, and practices of indigenous cultural communities on land claims and ownership and settlement of land disputes shall be implemented and enforced among the members of such community. The provisions of the Muslim Code and the Tribal Code shall be applicable only with respect to Muslims and other members of indigenous cultural communities.

The Regional Governor shall be assisted by a Cabinet of nine (9) members, at least four of whom shall preferably come from indigenous cultural communities. It shall, among others, initiate, formulate and implement special development programs and projects, responsive to the particular aspirations, needs and values of the indigenous cultural communities (Art XII, Sec. 2) and recognize indigenous structures or systems which promote peace and order (Art. XIV, Sec. 6).

Finally, a Bureau on Cultural Heritage may be created to “plan, initiate, implement and monitor cultural programs, projects and activities that shall institutionalize the preservation and enhancement of the positive elements of the indigenous culture of the inhabitants of the Autonomous Region” and shall coordinate with other concerned agencies engaged in similar and related activities.

- **Promotion of General Welfare**

Proclamation No. 250, Declaring The Period From July 3-9, 1988 And Thereafter The Second Week Of July Of Every Year As "Cultural Communities Week" (20 April 1988)

This Proclamation was issued in recognition of the importance of indigenous tribal Filipinos to national unity and development and in recognition of the need to promote and preserve their rich cultural heritage.

Republic Act No. 6978, An Act To Promote Rural Development By Providing For An Accelerated Program Within A Ten-Year Period For The Construction Of Irrigation Projects (24 January 1991)

In the planning, construction and management of irrigation projects, the National Irrigation Administration should give priority to the construction of communal irrigation projects, beneficiaries of the Comprehensive Agrarian Reform Program and members of the indigenous cultural communities.

Republic Act No. 7610, An Act Providing For Stronger Deterrence And Special Protection Against Child Abuse, Exploitation And Discrimination, And For Other Purposes (17 June 1992)

Under this law, "circumstances which gravely threaten or endanger the survival and normal development of children" include, "being a member of a indigenous cultural community and/or living under conditions of extreme poverty or in an area which is underdeveloped and/or lacks or has inadequate access to basic services needed for a good quality of life".

The right of children of indigenous cultural communities to protection, survival and development consistent with the customs and traditions of their respective communities, in addition to the rights guaranteed to children under this Act and other existing laws, is recognized. For this purpose, an alternative system of education for them which is culture-specific and relevant to their needs shall be developed by the government which shall also accredit and support non-formal but functional indigenous educational programs conducted by non-government organizations in said communities. Their right to basic social services and equal attention in health and nutrition shall be ensured, and indigenous health practices shall be respected and recognized. They have the right against any and all forms of discrimination against children of indigenous cultural communities, which if committed, results in criminal liability.

Indigenous cultural communities shall be involved in planning, decision-making implementation, and evaluation of all government programs affecting children of indigenous cultural communities.

Republic Act No. 7875, An Act Instituting A National Health Insurance Program For All Filipinos And Establishing The Philippine Health Insurance Corporation For The Purpose (14 February 1995)

The Government shall provide public health services for all groups including indigenous peoples, displaced communities and communities in environmentally endangered areas. A "Health Care Provider" refers to, among others, a community-based health care organization which is an association of indigenous members of the community organized for the purpose of improving the health status of that community through preventive, promotive and curative health services.

Proclamation No. 547, Adopting an Official Definition of Social Reform Agenda (SRA) Programs and Projects for Budgetary and Other Purposes (06 March 1995)

The Social Reform Agenda programs and projects adopted by the Ramos Administration catered to, among other sectors and areas, those covered by Certificate of Ancestral Domain Claims (CADCs) especially within priority provinces as identified by the Department of Environment and Natural Resources (DENR);

Administrative Order No. 206, Creating A National Committee On The International Decade For The World's Indigenous Peoples, And Declaring 1995-2005 As National Decade For Filipino Indigenous Peoples (13 July 1995)

The period from 1995-2005 is declared hereunder as the National Decade of Philippine Indigenous Peoples. To prepare the appropriate national program therefor, an inter-agency national Committee for the International Decade of the World's Indigenous Peoples was created.

- **Representation in Local and National Bodies**

In line with the policy to ensure their effective participation in national issues, representation of indigenous peoples in various local and national bodies is mandated by, among others, the following laws:

1. Executive Order No. 220 Creating A Cordillera Administrative Region (15 July 1987)<sup>3</sup> - Every tribe shall have one (1) representative to the Cordillera Regional Assembly, the policy-formulating body for the CAR. The Cordillera Executive Board, the development body and implementing arm of the CAR, shall include six (6) representatives from the Cordillera Bodong Administration and twelve (12) representatives from the different ethno-linguistic groups in the Cordillera.
2. Republic Act No. 7160, An Act Providing For A Local Government Code Of 1991 (10 October 1991) - Among the regular members of the sangguniang panlalawigan, sangguniang panlungsod, sangguniang bayan and sangguniang barangay, there shall be one (1) sectoral representative from any of the following sectors: the urban poor, indigenous cultural communities, disabled persons, or any other sector as may be determined by the sanggunian concerned within ninety (90) days prior to the holding of the next local elections as may be provided for by law.
3. Republic Act No. 7586, the NIPAS Act<sup>4</sup> - The Protected Area Management Board that is established for each protected area shall include a representative from each affected tribal community, where applicable.
4. Republic Act No. 7610<sup>5</sup> - Indigenous cultural communities, through their duly-designated or appointed representatives shall be involved in planning, decision-making implementation, and evaluation of all government programs affecting children of indigenous cultural communities. Indigenous institution shall also be recognized and respected.
5. Executive Order No. 208 on the National Commission on the Role of Filipino Women (10 October 1994)
6. Republic Act No. 7903, An Act Creating A Special Economic Zone And Free Port In The City Of Zamboanga Creating For This Purpose The Zamboanga City Special Economic Zone Authority, Appropriating Funds Therefor, And For Other Purposes (23 February 1995) - One representative each from the Department of Labor and Employment (DOLE), labor sector, cultural minorities, business and industry sectors shall formulate a mechanism under a social pact for the enhancement and preservation of industrial peace in the City of Zamboanga.
7. Republic Act No. 7941, An Act Providing For The Election Of Party-List Representatives Through The Party-List System, And Appropriating Funds Therefor (03 March 1995) - Any organized group of persons may register as a party, organization or coalition for purposes of the party-list system by filing a verified petition with the Commission on Elections stating its desire to participate as such. The sectors shall include labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals.
8. Executive Order No. 247 on Biological and Genetic Resources<sup>6</sup> (18 May 1995) - The effective participation of indigenous peoples is promoted through their representation in the Inter-Agency Committee on Biological and Genetic Resources.

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<sup>3</sup> Previously cited under the section on Autonomous Governments.

<sup>4</sup> Previously cited under the section on Environmental Protection and Management.

<sup>5</sup> Previously cited under the section on Promotion of the General Welfare.

<sup>6</sup> Previously cited under the section on Environmental Protection and Management.

**ANNEX “K”**

**Distribution Map of Major Philippine Mineral Deposits  
and  
Description in Overlaps in  
Areas Covered by Mining Applications/Concessions and CADC Areas**

**Distribution Map of Major Philippine Mineral Deposits**  
*Source: Philippine Environmental Quality Report 1990-1995*

*Description of Overlaps*

<b>Area of Awarded CADCs</b>	<b>2,546,036 hectares</b>
<b>Mining Applications in CADC areas</b>	<b>1,199,849 hectares or 53%</b>
<b>Mining Concessions in CADC areas</b>	<b>28,111 hectares or 1%</b>

*Source: Mining Revisited*

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