

Legislation not necessarily a Guarantee to the Exercise of FPIC in the Philippines

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Editorial

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I. Introduction

The Philippines is one of only a few countries in the world that has legislated the right of free, prior and informed consent of indigenous peoples. In the Philippines, this right emanates from the recognition of ancestral land rights enshrined in the 1987 Philippine Constitution and given flesh a decade later in the Indigenous Peoples Rights Act (IPRA). The IPRA provides, among others, for the delineation and titling of ancestral domains through a Certificate of Ancestral Domain Title (CADT). Within the ancestral domain, all government departments and agencies are strictly enjoined from issuing any concession, license or lease or entering into any production sharing agreement unless the free, prior and informed consent (FPIC) of the indigenous community concerned is obtained. The indigenous community exercises the prerogative to give or withhold its consent to any project or activity that is proposed to be undertaken in their ancestral domain.

However, even while legally mandated, FPIC implementation has sometimes been more in breach than in the true exercise of the right of free, prior and informed consent. Since IPRA's passage in 1997, irregularities have occurred in the conduct of the FPIC process that allowed projects to go through despite objections by members of the community. A good number of issued Certification Precondition (CP) that affirms a community's FPIC were attended by questions of manipulation of the process to benefit companies, often with the collusion of government authorities. Even today controversy surrounds some proposed projects for mining and dam operation, as these are seen to be causing division and disunity in affected indigenous communities.

This case study looks into FPIC implementation in the Forest and Climate Protection Project in Panay (ForClimPanay), a bilateral development project between GIZ and the Philippine government through the Department of Environment and Natural Resources (DENR). Panay is one of the main islands in central Philippines that spans several provinces inhabited by indigenous peoples. Information for the study was gathered and analyzed mainly through personal interviews with DENR and NCIP officials, internet research and the project operations plan supplied by GIZ.¹

II. Legal and Institutional Framework

The definition provided by IPRA contains the general principles of free, prior and informed consent. According to IPRA, "*Free and Prior Informed Consent shall mean the consensus of all members of the ICCs/IPs [indigenous cultural communities/indigenous peoples] to be determined in accordance with their respective customary laws and practices, 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.*"² To fulfil these requirements in order to obtain a community's FPIC, a specific process is laid down by the FPIC Guidelines issued by the National Commission on Indigenous Peoples (NCIP). The government agency tasked to

¹ Requests for pertinent project documents were made to GIZ Manila office and a GIZ official, but only the 2013-2014 operations plan and project factsheets already available on the GIZ website were provided. Additional information was later obtained by INFOE from GIZ officials in meetings and from email correspondence.

² 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 Therefore, and for other Purposes. www.opapp.gov.ph/resources/indigenous-peoples'-rights-act-1997

enforce IPRA, NCIP, is responsible for implementing and overseeing the conduct of the FPIC process. It is also the office that issues the Certification Precondition.

The FPIC process generally consists of several stages with specific activities to be complied with at every stage. These phases and some of the more important activities are:³

- Pre-FPIC Conference – where the proponent submits project and other required documents and a NCIP team conducts a field-based investigation to determine the specific area within the ancestral domain to be affected, possible project effects and the number of communities that may be affected.
- FPIC Conference – entails two community assemblies with formal notice of the date and place within the ancestral domain where it will be held. The first assembly covers an orientation on IPRA and FPIC, validation of areas to be affected, identification of community elders or leaders, and determination of the consensus building and decision making processes of the community.

The second assembly tackles the project presentation by the proponent including operation plan, costs and benefits to the community as well as adverse effects, sharing of opinions by experts and other stakeholders, and an open forum for community members to raise their questions and concerns. After this assembly comes the consensus-building period, where the communities are left to discuss the project's merits and disadvantages among themselves and come to a decision through their own customary processes. No outsider other than NCIP personnel assigned to document the proceedings is allowed during this period.

- Post-FPIC activities - If the community is in favour of the project, their representatives and the proponent discuss the terms and conditions to be embodied in a Memorandum of Agreement which is presented for validation to the community in an assembly. The negotiations and signing of the MOA by authorized representatives of both the community and proponent must be done within the ancestral domain. A Resolution of Consent of the community is then signed and this written consent will be the basis for the issuance by NCIP of a Certification Precondition. If they disapprove the project, the community issues a Resolution of Non-consent.

³NCIP Administrative Order No. 3, Series of 2012: The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012.

Indigenous Peoples Rights Act

Section 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 [National Commission on Indigenous Peoples] 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 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.

The FPIC Guidelines enumerate the type of projects, programs and activities, both large and small scale that need to be subjected to the FPIC process.

Since the passage of IPRA, the FPIC Guidelines have been revised thrice. The latest Guidelines issued in May 2012 tighten some of the regulations in response to past cases of misuse of the FPIC process.⁴ The complaints included creation of new tribal councils, use of consultation attendance sheets to signify consent and offer of money or contracts to win over community leaders or members. *Assessing Free and Prior Informed Consent Implementation in the Philippines*, a policy study supported by GIZ, found procedural and substantial violations of the FPIC Guidelines in a significant number of the 34 cases investigated. The team of researchers who conducted the study in coordination with NCIP concluded: “*The assessment could not state a more than 50% full and faithful implementation of the guidelines. For the most part, indigenous communities have been short-changed, if not deceived by many FPIC applicants.*”⁵ The study, some of whose recommendations have already been addressed in the new FPIC Guidelines, was part of a series of policy studies under the project “Climate-relevant Modernization of Forest Policy and Piloting of REDD in the Philippines” funded under the International Climate Initiative of the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU). Under the new guidelines, NCIP personnel who conduct the required field-based investigation and validation have to subscribe their reports under oath. The ancestral domain will also now be treated as a single unit that is communally owned and thus all communities within it are to be consulted. In the past, only the community where a project was to be undertaken was consulted, which could be circumvented if faced with local opposition merely by moving the project to another area. The general process in obtaining FPIC however remains basically the same under the 2012 guidelines.

Implementation of the IPRA and the FPIC Guidelines needs to be considered in the overall legal context in the Philippines, in particular the numerous legal provisions for forest and land use. More than half of the Philippines’ land area are forestlands which are all public lands belonging to the State. This means, that the Philippine government, through the Department of Environment and Natural Resources (DENR) “[...] *allocates*

⁴ Interview with Atty John Ray Libiran, NCIP Officer-in-Charge, Technical Management Services Division, Cordillera Administrative Region, Jan 29, 2012.

⁵ GIZ. *Assessing Free and Prior, Informed Consent in the Philippines*, A Policy Brief. April 2013

and issues user rights and tenure instruments in order for the government to gain economic benefits and ensure ecological services.”⁶ These public lands include, among others, forest reserves, national parks, lands allocated to communities, to the private sector and unallocated lands. Land use planning, management and conservation of forests and resources are facing a number of constraints such as the “*involvement of different [government] departments and agencies, each with enabling laws and guidelines, [...] long bureaucratic processes and overlapping functions*”⁷ as well as overlapping land claims and inconsistent land and resource use policies. At the beginning of the 1990’s, efforts had been intensified to decentralize forest management and in 1995, Community-Based Forest Management was declared as the national strategy for sustainable forest management, allowing more equitable access to as well as participatory planning and management of forest resources.⁸ In this regard, two tenurial instruments have been developed: community-based forest management agreements which are awarded to people’s organizations and the certificate of stewardship contract awarded to individuals and families, both instruments for 25 years and renewable for another 25 years. “*Such tenurial instruments are also awarded to indigenous community holders of certificates of ancestral domain claims and ancestral land claims who enter into community-based forest management agreements within their ancestral territory.*”⁹ While laws and regulations for direct management and ownership rights for communities and indigenous peoples seem favorable, implementation is hindered mainly by the lack of a consistent land use policy and necessary technical capacities of communities and local governments. It is here where German development cooperation is aiming to provide support.

III. Forest and Climate Protection in Panay

Like any other public or private entity, German government agencies for international development like GIZ have to work within the legal framework set by IPRA and the FPIC Guidelines for any project they put up within or overlaps ancestral domains. GIZ has been implementing projects in the Philippines on behalf of the German government in the last few decades that largely focused on economic, social and ecological development. Presently, these include the Environment and Rural Development (EnRD) Programme under which a Community-Based Forest Management Component is being implemented and the joint GIZ-KfW Community Based Forest and Mangrove Management Project (CBFMMP) in Panay and Negros. Recently GIZs projects have expanded to climate protection and mitigation initiatives including pilot REDD measures under the German government’s International Climate Protection Initiative (ICI). “*GIZ engagements under BMU funding are a Forest policy and REDD project and various projects on biodiversity conservation and enhancement of protected area management. The projects work at national level on forest and land use policies, planning approaches, and setting incentives for SFM, and at local level with DENR, LGUs and local communities on reforestation, forest rehabilitation and establishment of agroforestry systems and establishing favourable frame conditions for sustainable upland and mangrove management. [...].*”

⁶GIZ (2013) MOREFORESTS: Management of Resources on Forestlands through Enhanced Sustainable Technologies. Page 6. Draft of Nov 2012 retrieved from [http://www.enrdph.org/docfiles/FINAL%20NOV%2029_MOREFORESTS_pp1-92_\[web\].pdf](http://www.enrdph.org/docfiles/FINAL%20NOV%2029_MOREFORESTS_pp1-92_[web].pdf)

⁷ Ibid. Page 8

⁸ Ibid. Page 8 and 13 and GIZ (2013) Pursuing an Enabling Policy Climate for REDD-Plus Implementation in the Philippines: Review and Analysis of Forest Policy Relating to REDD-Plus. Page 18.

⁹ GIZ (2013) Pursuing an Enabling Policy Climate for REDD-Plus Implementation in the Philippines: Review and Analysis of Forest Policy Relating to REDD-Plus. Page 18.

All these interventions base on a collaborative approach between DENR and LGUs and local communities with elaboration of FLUPs (incl. its integration into CLUP), establishment of CMAs [Co-Management Agreements] and secure tenure rights as a basis for investments in forests and land and sustainable management of uplands. This process is now also agreed with partners to be used for protected area management and biodiversity conservation. In principle, it is also appropriate to be applied for sustainable land management in IP areas, whereas the specific situation in Ancestral Domains and related planning and tenure processes require modifications according to the provisions of the Indigenous Peoples Rights Act (IPRA) and its specific instruments".¹⁰

As part of this approach towards the harmonization of forest policy and in order to address deforestation and loss of biodiversity, promote integrated land use planning and to ensure strong social and environmental safeguards in a national REDD-policy, four policy studies are being carried out in the framework of the BMU-ICI funded project *Climate-relevant Modernization of Forest Policy and Piloting of REDD in the Philippines*. These include studies to analyze the key drivers of deforestation, the forest policies and one to clarify carbon rights and a study to assess the implementation of Free and Prior Informed Consent (FPIC) in the Philippines. The support by GIZ for these studies as well as for securing long-term tenure rights represents elements of a rights-based approach.

One of the ICI-funded projects in the country is the Forest and Climate Protection Project in Panay (ForClimPanay) in central Philippines.¹¹ The ForClimPanay project is cooperatively implemented by GIZ and the Philippine Department of Environment and Natural Resources (DENR). It is part of the above mentioned collaborative approach and is integrated with other GIZ projects such as the Forest Policy and REDD+-Project and the EnDR Programme. The ForClimPanay project, started in 2010 and slated to be completed in 2014, targets the preservation of the remaining natural forest in the Central Panay Mountain Range. Its stated objective is to conserve and protect the forest area of some 50,000 hectares that harbor a high biodiversity with endemic plant and animal species, such as the Dulungan Hornbill and *Rafflesia Lobata*. Its other aim is to promote the sustainable use of the natural resources by communities within the forest vicinity. Identified by the project as among the drivers of deforestation and forest degradation are the practices of swidden cultivation, illegal logging, farming on steeper slopes and decay of biomass waste.

The project has three major components: formulation of forest land use plans (FLUP), identification and designation of protected areas as critical habitats for endangered species, and large scale reforestation including establishment of local nurseries. The FLUP are planned to be integrated into comprehensive land use plans of local government units (LGU) and supported by local legislation to ensure the enforcement of protection regulations. Other project activities are awareness raising for local communities on forest and vital habitat protection and promotion of alternative energy sources including

¹⁰ Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Assessment of the Policy/Legal-Regulatory Framework of Community-based Forest Management in the Philippines, January 2013. Published in Manila, June 2013. Page 31

¹¹ Other ICI funded projects in the Philippines can be found under <http://www.international-climate-initiative.com/en/nc/projects/projects/>

afforestation for wood fuel and use of cooking stoves that utilize rice husks especially in rice-growing areas.¹²

The project implementation design calls for the active involvement and participation of local governments particularly at the municipal level. In the framework of the overall collaborative approach to land use planning, GIZ has developed tools for an integrated ecosystem planning and management approach which builds on a participatory land use and development planning process starting at the *barangay* (villages: smallest political units) level and aims at empowering communities.¹³ The LGUs of the 18 municipalities that host the Central Panay Mountain Range are principal partners under a scheme of co-management agreements. Under this scheme, GIZ gives financial and technical assistance for FLUP and financial assistance of Php3 million to each town for rehabilitation of 320 hectares of forest land.¹⁴ The LGUs implement the reforestation activity including identification of sites, while DENR handles the identification, survey and mapping of these areas. The project also assists in critical habitat or biodiversity protection and conservation, which component is facilitated by Haribon Foundation, the project's NGO partner.

Panay is a 12,300-square kilometer island divided into four provinces, all of which are traversed by ForClimPanay project. Eighteen towns¹⁵ in the provinces of Capiz (1 town), Iloilo (3), Aklan (4) and Antique (10) lie within the project area, and all have substantial portions that are ancestral lands and domains of the indigenous peoples generally referred to as Bukidnon. The Bukidnon, which literally means "from the mountains,"¹⁶ inhabit the highlands and interior mountains of Panay island. In Tapaz, the lone Capiz town within the project area, 19 of the 24 host *barangays* are Bukidnon communities. In the three Iloilo towns of Calinog, Lambunao and Janiuay, all or the majority of the included barangays are similarly inhabited by the Bukidnon.

The Bukidnon, who are also known as Sulod (meaning "inside" or "interior"), are mainly farmers who practise a swidden and fallow system of agriculture but today are learning to develop more permanent rice fields on their lands. But the mountainous terrain in their areas limits the development of more rice paddies. They now also plant cash crops such as bananas, coffee and rootcrops for additional income. They use simple farm tools, employing a wooden dibble to dig holes in the soil into which they drop seeds of corn, rice or legumes. For fishing they similarly utilize traditional devices of nets and traps and poisonous leaves and tree bark. While many of the younger generation have adopted lowland ways, meaning that they are being acculturated into mainstream society, the Bukidnon have retained aspects of their culture particularly their oral literature.

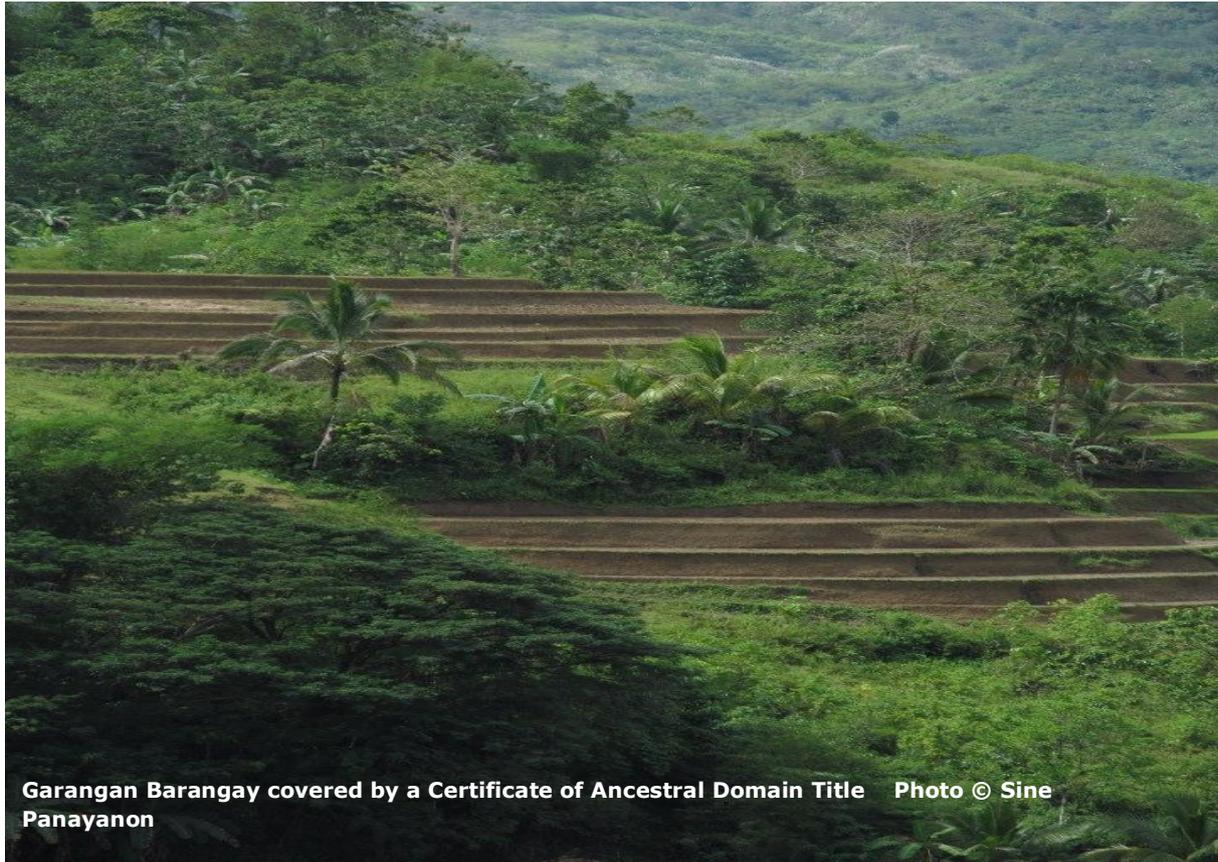
¹² Project Description, Forest and Climate Protection Project in Panay, <http://www.giz.de/de/weltweit/18266.html>

¹³ See: GIZ, SIMPLE: Sustainable Integrated Management and Planning for Local Government Ecosystems. Page 7 and 40. As 5 of the 18 partner municipalities of ForClimPanay coincide with the area where SIMPLE, the integrated management approach, is being implemented, it is expected that these tools and the participatory focus are also being applied to ForClimPanay and the participating municipalities and barangays. Draft from October 2012 accessed under [http://www.enrdph.org/docfiles/PD_SIMPLE_Oct%2024_\[web\].pdf](http://www.enrdph.org/docfiles/PD_SIMPLE_Oct%2024_[web].pdf)

¹⁴ 3 million Php is around 56.000Euro.

¹⁵ The 18 towns are Calinog, Lambunao and Janiuay in the province of Iloilo; Tapas in Capiz; Ibajay, Malinao and Madalag in Aklan; and Pandan, Culasi, Tibiao, Barbaza, Laua-an, Bugasong, Valderrama, San Remegio and Patnognon in Antique.

¹⁶ National Commission for the Culture and the Arts, Culture Profile, Bukidnon, <http://www.ncca.gov.ph/about-culture-and-arts/e-books/e-book.php?id=42&t=2>



Garangan Barangay covered by a Certificate of Ancestral Domain Title Photo © Sine Panayanon

Within the ForClimPanay project area are two ancestral domains with Certificates of Ancestral Domain Title issued by the National Commission on Indigenous Peoples. One of these (CADT No R06-CAL-1204-028) is in the name of a Panay-Bukidnon community with 2,714 members/rights holders and covers over 1,739 hectares in the barangays of Garangan, Masaroy and Agcalaga in Calinog town.¹⁷ Another CADT is held by a community of 171 families of the Iraynon-Bukidnon, consisting of some 6,681 ha in San Agustin barangay in Valderrama town in Antique province.¹⁸ The ancestral domain refers to the territory of an indigenous community that they have occupied since time immemorial and includes all lands, waters and other resources therein. It also covers lands which they have traditional access to for their subsistence activities although they may no longer inhabit them exclusively, such as the home ranges of indigenous nomadic and/or shifting cultivators.¹⁹ Although the delineation of ancestral domains sometimes approximates existing political administrative boundaries like barangays or in some cases an entire municipality as in other regions of the country, the ancestral domain title is issued in the name of the indigenous people or community or their duly recognized elders/leaders. In addition to these CADTs, several ancestral domains covered by Certificates of Ancestral Domain Claim (CADC) are found in Valderrama (2 barangays), Lambunao (1 barangay) and Libacao (2 barangays), the last in Aklan province. The CADC can be converted into an ancestral domain title after undergoing the process of delineation and titling provided for by the Indigenous Peoples Rights Act. Under IPRA, no

¹⁷ NCIP 2011 Accomplishment Report. www.ncip.gov.ph/.../40-annual-accomplishment-report.html?...112...

¹⁸ Mabaquiao, Pilar S. „NCIP gears for Indigenous People’s Day in Antique.“ PIA, August 03, 2011.

¹⁹ NCIP. ADSDPP Primer. www.ncip.gov.ph/downloads/category/1-administrative-orders.html?...48

government agency or corporation can issue a new concession, license, lease or production sharing agreement in an area that has a pending CADT application.

IV. FPIC implementation in ForClimPanay

The ForClimPanay Project provided for a process of consultation and a “voluntary participation” approach in the conduct and implementation of the project and its activities. This involved local communities who are regarded as the project’s driving force and ensured that all project activities would be preceded by “a participatory planning and coordination process guided by the wishes and ideas of indigenous and non-indigenous population groups.”²⁰ The consultation process was conducted on two levels - municipality and community - involving the project implementers, project technical staff, and communities within the project area. Under the voluntary participation approach, communities were free to decide at the end of the consultations whether to take part in the project, specifically the reforestation and agroforestry activity, which was opened to communities for direct participation and financial subsidy. Those who chose to participate had to submit to GIZ, concerned municipal LGU and NCIP a “community-solicited resolution”²¹ that explicitly expressed their request for inclusion in the reforestation and agroforestry project. This was the only project component for which communities were asked to make community-solicited resolutions.

The approach to have community-solicited resolutions before implementation of the reforestation activity was apparently influenced by information NCIP staff shared in initial consultations called by LGUs that an activity or project could forego the prescribed FPIC process if solicited by an indigenous community.²² Another important factor taken into consideration was time constraint in meeting physical targets within the given timeframe. The project’s planting phase was scheduled for 2011-2012, and with a total reforestation target of 2,500 hectares and at least a 2-year plant growth, the activities had to be speeded up to meet project goals by its end in 2014. By 2011 only 191 hectares of the total target area had been planted. In view of the long process the FPIC Guidelines entails, the LGUs proceeded with the consultation process that included obtaining community-solicited resolutions from those who wanted to take part in the reforestation component. However, the LGUs apparently failed to communicate this formally with the NCIP Regional Office.

A large part of the project area is inhabited by indigenous populations, and IPRA and the FPIC Guidelines provide that wherever indigenous peoples are, their free, prior informed consent has to be taken before any project or activity can be undertaken in their areas. While the community-solicited resolution, requested of participating communities, manifests the project’s cognizance of this requirement, the process of consultation and obtaining consent may not have fully reflected some basic principles of FPIC and the requirements for community-solicited projects under the FPIC Guidelines.

²⁰ Dr Jurgen Schade, Comments on Infoe Study on ForClim Project, June 10, 2013

²¹ Dr Jurgen Schade, Responses to Questions of INFOE on ForClimProject , Aug 24, 2013

²² Interview with Melvin Purzuelo, former ForClimPanay Project Senior Adviser for Coordination and Planning.

Information on the project and its components, in particular the reforestation activity, was given to communities prior to implementation.

The consultation and planning process, led by the municipal LGU as project implementer, entailed a series of meetings on the municipal and community levels. In the municipal meetings GIZ and project technical staff gave a project briefing to LGU officials including barangay officials, local community representatives including some indigenous elders/leaders, NCIP and other concerned government agencies. The briefing presented and discussed the project components and forms of assistance offered for each: 1) support for the forest land use planning and the integration of the plan into the Comprehensive Land Use Plan, including establishment of production forests, protection forests and "critical habitat" of threatened animal and plant species, 2) technical and financial assistance for the rehabilitation of degraded forests and preparation and planting of agroforestry areas, and 3) capacity building and training. This level also entailed the forest land use planning activity.

At the community level, the LGU formed municipal technical working groups (MTWG), composed of the municipal environment and natural resources officer (MENRO), planning officer and agriculturist, NCIP field staff and the project's local NGO partner, ILOG Foundation. The first consultation was held in Barangay Maybunga in Laua-an town in early 2012, with the NCIP Regional Director, ILOG and Laua-an MENRO. Other consultations, with NCIP participation, followed in indigenous communities in the towns of Calinog, Lambunao and Valderama. These talks were the start of further consultations that presented and discussed "all of the options, rights and obligations of a possible joint project" with local communities.²³

The community meetings tackled a discussion of the project, its components and activities, factors and drivers of deforestation, forest rehabilitation as well as concerns and questions the community had about the project. At this level, the MTWG and the community also identified the sites for forest restoration and establishment of agroforestry plantations and financial subsidies for these two activities. This included species, number, modalities for payment of subsidies, monitoring criteria and other afforestation details that were later contained in a project agreement forged with the participating community. Subsequent meetings were a follow up of community resolutions of request for participation in areas that favored the reforestation activity.

Among the concerns raised were the project's implications on the economic activities of the indigenous communities. One of these was restricted access and use of forest resources. Under the forest rehabilitation component, community members can harvest what they plant in agroforestry plantations but not in reforestation sites. Forest resource utilization is regulated by government policies, and current regulations require a Resource Use Permit from DENR for the harvest or use of naturally grown and/or planted forest resources in production forests for commercial use. To address this, the ForClimPanay project provides assistance to local communities in facilitating the lengthy process of obtaining such permits.

The designation of critical habitats could similarly impose limitations to areas to which indigenous peoples have traditional access and use for their economic and cultural

²³ Dr Jurgen Schade, Comments on Infoe Study on ForClim Project, June 10, 2013

requirements. The project originally considered declaring the whole Panay Mountain Range as a critical habitat but the subsequent operational plan calls for identification of critical habitats in consultation with the local community. As of 2012, no critical habitat had yet been established since the biodiversity assessment still had to be completed. The only protected zone within the project area is the 4-hectare lake, Tinagong Dagat, in a CADC area in Lambunao, declared as such under a prior agreement between DENR and the municipal government. Given that much of the project area especially its mountainous portions is widely inhabited by indigenous peoples, the likelihood is high that establishment of other critical habitats will overlap with ancestral lands and domains with or without a CADT/CADC. This will have adverse impacts on their fallow sites, traditional practice of swidden farming and forest access and use for their livelihoods. As national laws and policies govern protected areas, the communities are made aware of government restrictions through the project's land use planning. Where a protected area overlaps an ancestral domain that has an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP), the ADSDPP and the protected area management plan drawn up by a protected area management board are to be harmonized as provided for under a 2007 joint DENR-NCIP circular.

A broader community participation and representation may have been limited by barangay clustering and community representation by barangay officials.

In community consultations, barangay clustering was resorted to especially in mountain areas where settlements are dispersed and far from village centres. This resulted in the holding of common consultations for several barangays or communities often represented by leaders of sitios (political subdivision within the barangay) who may not necessarily have been the indigenous leaders or elders of the community. This process limited participation and the opportunity of community members who could not travel to the host village to raise their concerns directly with the municipal technical working groups. While the designated representatives were expected to share the information they received with the rest of their community, they may have lacked the technical expertise to explain all aspects of the activity. In the same vein, in municipal consultations which were held in town centers, it was often the barangay council, not the indigenous leaders or elders, who stood as the representative of the indigenous community. The indigenous elders' participation was largely through the barangay council if they happened to be members of this body at the same time.

More importantly, community resolutions signifying their voluntary participation in the reforestation activity was in some cases done jointly by barangay officials and representatives of community elders/council of elders. While indigenous elders are sometimes members of the barangay council, it was the latter that took the lead in making the resolution. The project however notes that an entire barangay can be populated by indigenous peoples, and a community resolution using the letterhead of the barangay to make it official does not diminish a community's full representation or willingness for participation.²⁴ To illustrate this the project cites the following English version of the resolution of the Iraynon-Bukidnon in Maybunga barangay in Laua-an: "we the indigenous people of barangay Maybunga spearheaded by the officials of the Council of Elders appealed to GIZ ... that our barangay be included in the Laua-an Forest

²⁴ Dr Jurgen Schade, Comments on Infoe Study on ForClim Project, June 10, 2013

Management and Agro-forestry Development Project.”²⁵ The FPIC Guidelines on community-solicited activities or projects however requires validation by NCIP whose purpose is to verify, among other things, community representation and consensus in their collective decision to participate in a project to be undertaken in their area.

The project approach of voluntary participation gave communities the option to accept or decline the reforestation activity but its material incentives may have tended to undermine rather than strengthen community values and unity.

The reforestation component offered financial and technical subsidies to the communities through the LGU for the different work phases in the establishment of tree farms and agroforestry plantations. Participating community members were given separate payments for establishing nurseries, raising seedlings, and planting and maintaining these. Half of the total allocated area, usually watersheds far from the settlements, was to be planted to suitable and available forest species. The rest was for agroforestry species to be planted on individually owned lands and woodlots where members could choose what to plant and to reap the harvest. They could avail of free seedlings such as of coffee and cacao distributed by the LGU or use their own seedlings for which they are paid. Some indigenous communities, such as those in Iloilo, elected to cultivate plants they need to continue traditional or alternative new livelihoods, such as rattan which they use for making handicrafts and in other communities, bamboo which they sell in the lowlands. In the CADT area in Calinog town, the Panay-Bukidnon planted their lands to coffee and banana.

These forms of assistance are intended by the project to improve the economic and ecological conditions of rural communities. GIZ views them as a means to help poor rural households with insufficient financial resources to develop more sustainable forms of utilizing the land, and thus end the cycle of poverty and environmental destruction. GIZ also considers them as comparative to payments for environmental services. These subsidies however may have been viewed differently by rural households and may also have had unintended effects.

Many of the local people unsurprisingly were enticed by the grants, given the lack of alternative livelihood options in rural areas. In Calinog where three participating barangays had started rattan plantation establishment, two adjacent barangays that had declined it initially were convinced to join when they saw people there able to purchase more rice supplies or to buy galvanized iron sheets for roofing their houses.²⁶ In January two barangays similarly did not wish to take part as they wanted to undertake only agroforestry development; with half of the total 320-ha allotment for each municipality earmarked for forest rehabilitation, the area that can be developed in a barangay for agroforestry plantations would not be too large. But they eventually decided to participate as the project design could not be changed. Other barangays that refused the project did so only because there were other local or foreign-assisted reforestation projects in their areas that offered bigger financial grants. While providing a good income source for the local population, such an approach which seems prevalent among assisting

²⁵ Ibid

²⁶ Interview with Vic Sardina, ForClimPanay Forestry Consultant, January 14, 2013

agencies has engendered a situation where consent is based on the "highest bidder."²⁷ This undermines the wider purpose of forest rehabilitation and the indigenous people's own traditional beliefs and systems for forest protection. It also tends to weaken community cohesiveness. In Calinog the reforestation project has sparked a conflict between two clans from Hilwan and Aglunoc barangays, with each now claiming ownership of the area that is being cultivated for the project.

The provision of the FPIC Guidelines on community-solicited projects was not wholly observed.

GIZ notes that "the resolution of the IP Elders for voluntary inclusion in the project is in accordance with the provision of the FPIC Guidelines or NCIP Administrative Order No. 1 Series 2006, Section 31 on Community-Solicited or *Initiated Activities*: `Subject to NCIP validation, programs, projects and activities solicited or initiated by the concerned ICC/IP themselves where the activity is for the delivery of basic services or for the establishment of social enterprise to be undertaken within or affecting the ancestral domain, do not require compliance with the FBI/FPIC requirement as provided in this Guidelines."²⁸

Under the 2006 FPIC Guidelines that were in effect when ForClimPanay commenced, community-solicited activities or initiatives do not need to undergo the prescribed FPIC process. However, as stated in the opening phrase of the abovesited provision, community-solicited activities are "subject to NCIP validation." The same provision states: "The NCIP shall validate whether or not:

- a. The ICC [indigenous cultural community], in fact, voluntarily solicited or initiated the plan, program, project or activity to be undertaken;
- b. The plan, program, project or activity conforms with the community's ADSDPP or in the absence of the ADSDPP, the concerned community considers the same to form part already of the ADSDPP that they will formulate in the future;
- c. The ICC knows the extent of the plan, program, project or activity and its socio-cultural/ environmental impact to the community;
- d. The parties acknowledge their obligations; or
- e. The plan, program, project or activity is for the delivery of basic services or for the establishment of social enterprise or enterprise development involving community interest affecting land and resource use that would provide employment or generate income to improve the living condition and economic development of the concerned ICC/IP.

The Rules and Process of Validation as described hereafter shall be observed in the conduct of the field based validation."²⁹

The validation process, as contained in Section 34 of the 2006 FPIC Guidelines, entails field investigation and follows prescribed rules and procedures. In the case of the ForClimPanay project, the NCIP validation would determine whether the community-solicited resolution is in proper order. The validation team constituted for the purpose will

²⁷ Interview with Melvin Purzuelo, ForClimPanay Project Senior Adviser for Coordination and Planning,

²⁸ Dr Jurgen Schade, Comments on Infoo Study on ForClim Project, June 10, 2013

²⁹ NCIP Administrative Order No.: 01. Series of 2006, The Free and Prior Informed Consent (FPIC) Guidelines of 2006

undertake a field investigation to verify the community’s consent and signatures. Any dissension by community members would have to be addressed in the final decision or agreement made by the community, and in this regard NCIP determines the community’s customary way of resolving conflict. Some instances of conflict reportedly occurred with regard to the reforestation project. In three barangays in Calinog that requested for inclusion in the reforestation activity, not all were in favor as some families declined to participate. In addition, some of the community’s elders wanted to perform a ritual that involved an animal offering, which the LGU did not accommodate as the request for purchase of a pig was not part of the reforestation budget.³⁰ Ensuring that such conflicts are adequately addressed in the community’s final decision would be part of the validation work.

Where a community resolution is made and signed by the elders or leaders of a community, the validation will also verify whether they are duly recognized as such by the community, the ways of selecting or becoming elders being dependent on customary law. If it is prepared and signed by a barangay captain or other barangay officials, they should be at the same time the community elders or members who have been designated or decided on by the community to perform these specific functions on behalf of the community.³¹

If judged in proper order, the signed community resolution is submitted by the validation team to the NCIP regional director; otherwise the community has to make another resolution to include the new conditionalities or agreements. The NCIP regional director then issues a certification precondition for the requested project. In big projects where a full-blown FPIC process is required, it is the NCIP Commission en banc that issues the certification precondition. The expenses for the validation are to

be shouldered by the project proponents including the partner agency that wants the project undertaken.³² The provisions of the 2006 FPIC Guidelines on community-solicited or initiated projects remain basically the same under the 2012 FPIC Guidelines.

2006 FPIC Guidelines

Validation Process for Community-solicited or -initiated Projects

Section 34. *Object and Process of Validation.* Validation is intended to determine the consent of the community relative to programs and projects mentioned in Sections 31 [Community-solicited or initiated Projects], 32, 33, 40, and 41. The process of validation shall be as follows:

- (1) The NCIP *motu proprio*, or upon receipt of the written request for validation, the Regional Director shall constitute a team from the provincial office or service center, as the case may be, to conduct a field validation;
- (2) The team shall immediately conduct the validation and thereafter submit the appropriate report to the Regional Director within ten (10) days from commencement of the field validation;
- (3) Depending on the result of the validation, the Regional Director shall within three (3) days, from receipt of the report, issue the Certificate Precondition and/or take such appropriate measures for plans, programs, projects or activity referred to in Section 33 hereof. For those covered under Sections 31 and 32, the Regional Director shall endorse the validation documents to the Commission through ADO for the issuance of a Certificate Precondition and/or for appropriate action; and
- (4) The process of validation shall be done through interviews of elders/leaders and other community members;

Even if an activity is covered under Sections 31, 32, 33, 40, and 41, the NCIP may exercise its injunctive powers upon written complaint of any member of the affected community to enjoin the conduct or continued implementation of the program, project, plan or activity in order to safeguard the rights and interests of the community.

³⁰ Interview with Vic Sardina, ForClimPanay Forestry Consultant, January 14, 2013

³¹ Interview with Hilda Verzola, Secretary to NCIP Regional Director, Cordillera Administrative region, August 30, 2013

In the ForClimPanay project, no validation for the community solicitation of the reforestation project was made. The NCIP Region 6 Office did not receive any request for validation from the concerned communities that would have formally started the validation process.³³

V. Obstacles and Challenges

Almost two decades since its passage, the IPRA, in particular the FPIC Guidelines, continues to face obstacles as well as new challenges. One is the legal environment in which conflicting laws and views on land use and ownership operate. While the Philippine Constitution recognizes indigenous peoples' ancestral domains and their rights to develop and utilize these territories according to their customary land use and resource management systems, it also enshrines the Regalian Doctrine. This doctrine vests ownership in the State of all lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forms of potential energy, forests or timber, wildlife, flora and fauna, and other natural resources. Further, it grants the State control over use, management and disposition of these natural resources, which except for agricultural lands cannot be alienated. In pursuit of these functions, various laws have been passed to administer and govern these resources, with the DENR as the lead government agency charged with their implementation: 1995 Mining Act over mineral lands, the National Integrated Protected Areas System Act (NIPAS) over national parks and reservations and Presidential Decree (PD) 705 or the Revised Forestry Code over forests and timberlands. Most of these natural resources however are found on indigenous peoples' ancestral lands and domains, giving rise to contentious situations and conflicts and undermining of indigenous rights.

The Revised Forestry Code, enacted in 1975 and still in effect today, declares all lands 18 degrees and above in slope as public land, making indigenous peoples who have long inhabited the mountain regions of the country, "squatters" on their own land. As in the ForClimPanay project, DENR considers indigenous lands without the protective mantle of a CADT/CADC as timberland where any individual who wants to cut a tree, even one he/she has planted, is required to obtain a permit from the DENR. In this regard, CBFM as a tenurial instrument recognizes the State as the owner of the land in contrast to CADT where ownership lies in the indigenous community. The 1995 Mining Act, which liberalized the mining industry, opens mineral resources in both public and private lands for development through applications for mineral agreements or financial technical assistance agreements. A flagship industry in the previous government when the Mining Act was passed, mining investments continue to be encouraged by the current administration that considers it vital in advancing the country's economic development. In the Assessment of FPIC Implementation in the Philippines that found considerable violations of the principles and "spirit" of the FPIC Guidelines, the majority of the case studies looked at involved mining and other exploration projects. Most of the national parks that have been and are proposed to be proclaimed protected areas are the homelands of various indigenous groups. As cited earlier, DENR and NCIP have made efforts to harmonize NIPAS and IPRA provisions where protected areas overlap ancestral domains, but such efforts are few and far between.

IPRA is circumscribed by other conditions and provisions. It recognizes existing or vested property rights within ancestral domains before its effectivity in 1997, such as mining

³² Ibid

³³ Interview with NCIP Regional Director Alfonso Catolin, Region 6, August 29, 2013

concessions, timber concessions and big landholdings. Further the State under the Regalian Doctrine has the power of eminent domain under which it can take over indigenous lands for public use, and several of IPRA's provisions are subject to national interest and development. Despite these limitations, IPRA remains the principal legal instrument that specifically provides for the protection and advancement of indigenous peoples' human rights and all other rights guaranteed under the Philippine Constitution. Although its implementation has not always been successful, the FPIC Guidelines operationalizes the safeguarding of these rights, especially over their ancestral domains and the kind of development these should take. Its force of law is also a means to oblige local and foreign agencies and programs to recognize the right to FPIC and respect its exercise by indigenous communities. But as the foregoing case shows, greater effort has to be exerted by both government and private entities to have knowledge of the pertinent laws and regulations that govern ancestral domains and indigenous rights. In addition they should engage indigenous communities as equal partners in the sustainable development of their lands and other natural resources and in their own social and economic advancement.

The 2012 FPIC Guidelines includes carbon trade among large scale projects that must go through the FPIC process. This is in recognition of the looming economic interest in remaining intact forests that mostly thrive in indigenous peoples' lands. GIZ sees a more complicated FPIC process under the new Guidelines and a need for certain adjustments to make it specific to REDD+, for which discussions with NCIP are being conducted. This may delay its implementation which could lead to deferment of support for indigenous peoples for REDD+ to non-indigenous areas.³⁴ GIZ is further developing and operationalizing social, such as FPIC, biodiversity and governance safeguards and elaborating a safeguards information system for REDD+ as part of the measurement, reporting and verification approach. The results will be used to support the implementation of the Philippine National REDD-plus Strategy with a safeguards system along international standards.

REDD+ and other climate change initiatives are still in a pilot stage in the country but like the ForClimPanay project are already having an impact in indigenous communities. The increasing activity in climate change mitigation and the carbon trade that underpins REDD+ that will inevitably involve indigenous communities make a stricter compliance of free, prior informed consent critical. It is not only compelled by IPRA and FPIC Guidelines. It is vital to enable indigenous peoples to have a real voice in this commercial trend of forest development to better protect their rights, interests and ancestral domains.

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