

Lessons from Implementing Free Prior and Informed Consent (FPIC) in the Philippines:

A Case Study for Teaching Purposes -
Facilitator's Guide
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Table of Acronyms

AFP	Armed Forces of the Philippines
APIC	Alsons Prime Investments Corporation
ASM	Artisanal and small-scale mining
CADT	Certificate of Ancestral Domain Title
CALT	Certificate of Ancestral Lands Title
CLOA	Certificates of Landownership Agreement
DENR	Department of Environment and Natural Resources
EIA	Environmental Impact Assessment
FPIC	Free, Prior and Informed Consent/Free and Prior Informed Consent
FTAA	Financial and Technical Assistance Agreement
ICCs	Indigenous Cultural Communities
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
INEF	Institute of Development and Peace
IPRA	Indigenous People's Rights Act
IPs	Indigenous Peoples
MGB	Mines and Geosciences Bureau
NCIP	National Commission on Indigenous Peoples
NPA	New People's Army
SMI	Sagittarius Mines Inc.
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WMCP	Western Mining Corporation Philippines

Free and Prior Informed Consent: Overview

Free, Prior and Informed Consent (FPIC) is considered both a *right* of Indigenous Peoples (IPs), as recognised by several international human rights instruments, and a *principle*, which has been incorporated into the social policies and requirements of international financial institutions, mining industry bodies and mining companies themselves (Buppert & McKeehan 2013; Hanna & Vanclay 2013).

FPIC is derived from the collective rights of IPs to self-determination and decision making in regard to their lands and territories (FAO 2014). There is no standard working definition of FPIC, and different interpretations exist as to what FPIC requires (Hostettler 2014). The United Nations Office of the High Commissioner for Human Rights (OHCHR 2013) gives the following guidance:

- **Free** implies that there is no coercion, intimidation or manipulation.
- **Prior** implies that consent is to be sought sufficiently in advance of any authorisation or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.
- **Informed** implies that information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a **consent** process.

Two key instruments that outline the right/principle of FPIC are the International Labour Organization (ILO) Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169, 1989) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007).

ILO Convention 169 (1989) is a legally binding international instrument that has been ratified by 22 countries and was the first to formally lay out the principles of FPIC:

1. *In applying the provisions of this Convention, governments shall:*
 - a. *consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;*

- b. *establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;*
 - c. *establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.*
2. *The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.*¹

ILO Convention 169 also highlights IPs' *"right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development"*.²

In relation to mineral development the convention states that:

*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 peoples 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.*³

It also states that IPs shall not be removed from the lands which they occupy and requires FPIC in cases of their (necessary) relocation:

*Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.*⁴

The UNDRIP (2007) is a non-legally binding international instrument, which has been used as the basis for many FPIC guidelines, criteria, and standards implemented by other

¹ Article 6

² Article 7(1)

³ Article 15(2)

⁴ Article 16(2)

organisations (Buppert & McKeehan 2013). The UNDRIP refers to FPIC in six of its articles, which outline the particular circumstances under which FPIC should be sought, such as relocation or the adoption of legislation, and the need for mechanisms of redress and compensation for lands and resources taken without consent. Like ILO Convention 169, UNDRIP recognises the right of IPs to determine their own development priorities and more specifically connects the principles of FPIC with self-determination. Article 32 states that:

1. *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
2. *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.*
3. *States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

In 2012, FPIC was included in the World Bank's revised International Finance Corporation (IFC) Performance Standards. The 2006 version of IFC Performance Standard 7 already contained guidelines for engagement between IPs and companies, but the 2012 revision of the Performance Standards specifically recognised the right to FPIC under certain circumstances (Hanna & Vanclay 2013). These circumstances include projects on lands traditionally owned by, or under the customary use of, IPs, which are expected to result in loss of access to assets or resources or restrictions on land use, or have other adverse impacts; projects that are expected to result in the relocation of IPs from communally held lands and natural resources subject to traditional ownership or under customary use (which may not be recognised in national laws); and projects that significantly impact on critical cultural heritage (IFC 2012). This requirement is also applicable to companies seeking project finance from Equator Principles Financial Institutions (ICMM 2015).

The International Council on Mining and Metals (ICMM) followed suit in 2013 with its Indigenous Peoples and Mining Position Statement (ICMM 2013), which outlined ICMM members' approach to FPIC, which had not been addressed in its previous Position Statement (ICMM 2008). The ICMM also published an updated Good Practice Guide on Indigenous Peoples and Mining (ICMM 2015), which contains a section outlining ICMM members' approach to FPIC and tools dedicated to providing guidance to companies on the process of obtaining consent from IPs and facilitating good faith negotiations.⁵ Based on

⁵ See Tool 10: Good Faith Negotiation (ICMM 2015, pp. 82-3) and Tool 11: Working to obtain consent: a suggested process across corporate engagement (ICMM 2015, pp. 84-6)

these advancements, some major mining companies have also incorporated the principle of FPIC into their corporate policies (Doyle & Cariño 2013).

In ICMM's view, FPIC comprises a process and an outcome. ICMM members must *work to obtain the consent* of IPs for new projects and changes to existing projects (ICMM 2013). The phrase "work to obtain consent" means that companies must take reasonable steps to secure the FPIC of significantly and adversely impacted IPs regarding the basis on which the project, or modification of a project, will go ahead. This should be done according to an agreed process, which is consistent with the principles of good faith negotiation (ICMM 2015).

The [ICMM] position statement recognizes that where consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of Indigenous Peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply. In such circumstances, ICMM members will determine whether they ought to remain involved with a project (ICMM 2015).

The phrase "work to obtain consent" has garnered some criticism from advocacy organisations like Oxfam due to its lack of clarity around the right of IPs to veto development:

Disappointingly however, the guidance remains silent on the most fundamental criteria for achieving true consent — respect for a community's decision to say "no" to mining. ICMM's statement acknowledges that FPIC processes must enable indigenous peoples to "give or withhold their consent to a project," but rather than requiring companies to obtain consent it requires them to "work to" obtain consent and then determine themselves "whether they ought to remain involved with a project" (Greenspan 2015).

In response to this critique, the ICMM has responded that the ultimate decision remains with governments:

The reality is that governments – in balancing the rights and interests of different groups in society – are tasked with making difficult choices that may limit the rights of individuals or groups: so governments in the first instance, not companies, get to decide whether an Indigenous communities' [sic] right to say "no" is unequivocal. Where States delegate decision-making autonomy over natural resource developments to Indigenous Peoples, if consent is not given then "no" clearly means "no". However, in other circumstances if a government determines that a mining project should proceed where consent is not forthcoming, companies face a difficult choice (Davy 2015).

FPIC has become a key challenge for extractives companies operating on the lands of IPs. Processes of obtaining or working towards obtaining FPIC overlap with many other

processes of engagement between companies, government and IPs, including negotiations around compensation, profit sharing, land access, agreement making, corporate social responsibility, and community development initiatives.

Owen and Kemp (2014, p. 92) identify three pressing challenges for the mining industry in regard to FPIC:

- Addressing the unequal playing field on which IPs (or customary land holders) and developers negotiate on benefits and impacts.
- Aligning industry practice with the business and human rights agenda.
- Building a global framework for integrating locally held notions of rights and entitlement with internally defined norms and social safeguards surrounding the spread and dynamic presence of capital.

The authors also outline four core conditions to safeguard against social risk in the implementation of FPIC, which also represent fundamental challenges for mining companies attempting to operationalise FPIC (Owen & Kemp 2014, pp. 94-6):

1. **Structural compatibility:** the context and culture of some countries are not compatible or conducive to FPIC processes (e.g. in contexts where neither indigenous nor collective land rights are recognised).
2. **Clear process and representation:** How communities are qualified and how the company engages with representative leaders and/or bodies will greatly influence the success or failure of FPIC processes. In addition, attention needs to be paid to how the geographical boundaries of FPIC are established (e.g. whether they should extend beyond the immediate mining footprint).
3. **Adequate allocation of resources:** The time and resources (e.g. human and financial) required to implement FPIC as well as address any power imbalances between the parties are likely to be significant. The adequate allocation of resources needs to consider not only consultation but also training and capacity building, technical supervision, multi-stakeholder engagement and coordination, monitoring, and the establishment of grievance processes, amongst other factors.
4. **Equitable distribution of risk and liability:** There are a range of challenges associated with FPIC, and socio-political issues can hold up or shut down extractive industry projects, often leaving the burden with vulnerable communities. Safeguards and safety nets need to be put in place to deal with the range of issues associated with FPIC and powerful actors should agree on an equitable distribution of risk and liability as part of FPIC processes.

FPIC in the Philippines: Overview

The Philippines is one of Asia's biggest producers of copper, nickel, chrome, zinc, gold and silver (Castillo & Alvarez-Castillo 2009). The Philippines represents an interesting case study of the operationalisation of FPIC, as it is one of the few countries to have adopted the principle into its domestic legislation. FPIC is included in the Indigenous People's Rights Act (IPRA; Republic Act No. 8371, Republic of Philippines 1997) and is mentioned in Executive Order No. 79 (Office of the President of the Philippines 2012), which refers to the Mining Act (1995).

The IPRA (Republic Act No. 8371, 1997) was modelled on the draft UNDRIP, but was passed ten years before the adoption of UNDRIP, and as such represents a landmark legislation internationally (Colchester & Ferrari 2007; Doyle & Cariño 2013). It outlines the obligations of the state to recognise and promote all the rights of Indigenous Cultural Communities (ICCs) and IPs and protect their rights to their ancestral domains to ensure their economic, social and cultural wellbeing (Republic of Philippines 1997). This includes the recognition of customary laws and practices and the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions.

FPIC is defined by the IPRA (Republic of the Philippines 1997) as:

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 [...]

FPIC is required for the exploration, development and use of natural resources; displacement and relocation; and the entry of military personnel, as well as for research and bioprospecting; archaeological explorations; and policies affecting Indigenous people (Castillo & Alvarez-Castillo 2009, p. 277). The IPRA (in theory) gives IPs in the Philippines the right to stop or suspend projects that do not satisfy the consultation process required by the law (Castillo & Alvarez-Castillo 2009, p. 277).

The National Commission on Indigenous Peoples (NCIP) is the government agency responsible for implementing the IPRA and certifying FPIC (Minter et al. 2012). The NCIP is headed by seven commissioners from major groupings of IPs and also has regional offices (Castillo & Alvarez-Castillo 2009). The Commissioners have administrative, quasi-judicial and quasi-legislative powers (Oxfam America 2013).

The required process for obtaining FPIC is defined and detailed in the NCIP Revised Guidelines on FPIC and Related Processes of 2012, which amended and replaced the FPIC

guidelines of 2006 (AIPP 2014; Republic of the Philippines 2012). The objectives of the revised guidelines were to:

1. Ensure genuine exercise by ICCs /IPs of their right to Free and Prior Informed Consent (FPIC), whenever applicable;
2. Protect the rights of ICCs/IPs in the introduction and implementation of plans, programs, projects, activities and other undertakings that will affect them and their ancestral domains to ensure their economic, social and cultural well-being;
3. Provide, and ensure compliance with the procedure and the standards in the conduct of Field-Based Investigation (FBI) and FPIC process, payment of fees, compensation for damages, execution of Memorandum of Agreements, observance of corporate social responsibility; and imposition of sanctions for the commission of prohibited acts and omissions as hereinafter provided;
4. Ensure just and equitable partnership in environmental management, land use, development and resource use within ancestral domains as well as benefit sharing, between and among the concerned ICCs/IPs and the prospective investor, government agency, local government unit (LGU), non-government organisation (NGO) and other entities desiring to engage or collaborate in such undertaking;
5. Ensure that when priority right to development and utilisation of natural resources is validly exercised by the ICCs/IPs, the same shall be validated in accordance with the spirit and principles of FPIC;
6. Ensure that any benefit derived after the grant of FPIC or as an exercise of priority rights shall be managed and used properly by, for and with the concerned community not forgetting inter-generational obligations; and
7. Guarantee protection of resettled/displaced ICCs/IPs (Republic of the Philippines 2012).

The Revised Guidelines outline the types of projects and activities that are considered extractive/intrusive/large-scale and must therefore undergo an FPIC process involving two community assemblies and a consensus-building period (Balbido 2013). Non-Extractive and/or Small Scale Activities involve negotiation between the community and the application, facilitated by the FPIC team (Balbido 2013). The guidelines allow for a resolution of “non-consent” (veto) in both cases.

Learning Activity 1: Comparing the key features of the main FPIC standards

Learning objective:

For participants to understand, identify and compare and contrast key features of the Indigenous People's Rights Act (IPRA) and other main FPIC standards.

Instructions:

- Provide students with the overview sections of FPIC and FPIC in the Philippines in this booklet, or create a Powerpoint presentation based on this information.
- Break the class into four groups and provide each group with the IPRA and one of the following (included in Facilitator's pack):
 1. International Labour Organisation Convention 169 on Indigenous and Tribal Peoples (available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169)
 2. UNDRIP (available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)
 3. IFC 2012 Performance Standard 7 (Indigenous Peoples) and Guidance Note 7 (available at: http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES and http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES)
 4. ICMM 2013 Indigenous Peoples and Mining Position Statement and 2015 Indigenous Peoples and Mining Good Practice Guide (2nd Ed) (available at <https://www.icmm.com/document/5433> and <http://www.icmm.com/document/9520>)
- Have each group investigate the differences in wording and requirements between the IPRA and each of these four standards in terms of FPIC.
- Provide each group with time to research and prepare a 15-minute presentation on:
 - Brief history of standard
 - Its key points
 - What is the overall aim of the standard?
 - What does it emphasise?
 - How do the wording and requirements differ from the IPRA?
 - Are there any differences in emphasis?
- On the day of the presentations, prepare a wall chart based on the table below using craft paper. Ask the class to write down key points from each presentation about the different FPIC standards (strong points, weak points, points in common, and

differences) on sticky post-it notes, which they can stick on the wall chart at the end. These points can facilitate a discussion.

- Finish the exercise with an overview of the similarities and differences of the standards and discussion about how these might impact on the implementation of FPIC processes.
- **A variation** on this activity is to ask the four groups to listen to the presentations as if they were members of national government, local government, IPs, and company representatives and ask questions of the group presenting accordingly.

Wall chart:

	Points in common with IPRA	Differences to IPRA	Strong points in terms of FPIC processes	Weak points in terms of FPIC processes
ILO Convention 169				
UNDRIP				
IFC PS7 and GN7				
ICMM 2013 Indigenous Peoples and Mining Position Statement, and Good Practice Guide 2015				

Key challenges of FPIC in practice as shown by the Philippines

Implementation of FPIC: Letter of the law versus the “spirit of FPIC”

The Philippine case has been said to demonstrate failure to implement the “spirit of FPIC” by complying only with the “letter of the law” (Buxton 2012). Questions remain as to whether the tightly regulated position on FPIC in the Philippines is helping or hindering a meaningful and useful FPIC process. The Philippines case demonstrates the issues that can arise when FPIC is implemented as a legalistic or bureaucratic process based on fixed procedures (i.e. a “tick-box” approach). Some commentators say that legislation has encouraged companies and the Government to find ways to bypass FPIC or “engineer consent”, rather than integrate its principles into their activities in a holistic way (Campbell 2012). The “top-down institutional design” of FPIC processes in the Philippines, which “prioritise efficiency”, are also said to risk disempowering local communities (Buxton 2012, p. 69).

[F]ollowing the law – whether it explicitly provides for FPIC or not – does not provide comprehensive protections. If you want a project to run smoothly, you better pay attention to soft-law (and the various levels of normative orderings, including Tribal or Indigenous law) otherwise you run into soft-legal problems (Young 2015).

The Revised Guidelines were intended to improve the processes around the implementation of FPIC in the Philippines, and as such are a good indication of the key challenges that companies and IPs have faced in terms of FPIC processes. However, they are also quite prescriptive in terms of the actors to be involved, the processes that must take place, as well as the time periods to be allowed for consultation and decision making. It has been reported that some major points raised by ICCs/IPs and civil society in the consultations during the development of the guidelines, such as removing the time-bound provision for community decision-making, were not included (Tebtebba Foundation 2012). IPs and mining companies have different priorities when it comes to the time required to establish FPIC. Customary decision-making processes tend to be longer and more dispersed, whilst mining companies have strict processes and tight schedules (Greenspan 2013). In theory, FPIC should be obtained in accordance with customary laws and practices of decision making. However, the timeframes and processes outlined in the Guidelines on FPIC are said to be inconsistent with

Creating a space where all positions can be considered equally is crucial to achieving the spirit of FPIC. Legal frameworks are often necessary to force the start of a conversation. But they should look to codify existing practices and norms and be flexible in allowing new norms to develop, based on new partnerships between government, civil society and the private sector. Local communities and governments need to work together to identify shared values – based on both cultural and technical knowledge – and practices for implementing FPIC in a way that empowers local communities (Campbell 2012).

the customs and practices of IPs (Doyle 2009). Unfortunately, violations of FPIC processes continue to be reported (Tebtebba Foundation 2012). It may be too early to tell whether the Guidelines have improved FPIC processes, as there are still numerous issues related to the legacy of problematic FPIC processes conducted in the past (Tebtebba Foundation 2012).

Learning Activity 2: What do the Revised Implementing Guidelines tell us about the key challenges of implementing FPIC?

Learning objective:

To understand the key implementation challenges that the Philippines FPIC guidelines attempt to address.

Instructions:

- Provide the group with a copy of *NCIP Administrative Order No. 01, Series of 2006: The Free and Prior Informed Consent Guidelines of 2006* and *NCIP Administrative Order No. 3, Series of 2012: The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Process of 2012* (see Facilitator's pack).
- Break the class into groups to work on different sections of the Guidelines.
- Provide each group with time to compare sections of the 2006 FPIC Guidelines and 2012 FPIC Guidelines and identify the key changes and issues that have been addressed in the updated guidelines.
- Have each smaller group present back to the larger group.
- **A variation** on this activity is to have groups look at only the 2012 FPIC Guidelines and identify the key implementation issues the guidelines have attempted to address (e.g. representation, timing of processes etc.). The students could also compare the 2012 Revised Guidelines and IFC Guidance Note 7 (available at http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa3336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES) and identify gaps in the Philippines FPIC guidelines.
- **Another variation** is to have individuals complete this learning activity as an assessment or exercise to post to an online forum.

Issues around the definitions of 'Indigenous Peoples' and representation

There is no universally accepted definition of "Indigenous Peoples". The UN system has not adopted a formal definition in recognition of the diversity of IPs and to allow them to define themselves, given that they have historically had definitions imposed on them by others (APF & OHCHR 2013). However, a commonly used description of IPs is based on the working definition given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his 1986 Study on the Problem of Discrimination against Indigenous Populations (UN 2004):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;*
- b) Common ancestry with the original occupants of these lands;*
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);*
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);*
- e) Residence on certain parts of the country, or in certain regions of the world;*
- f) Other relevant factors.*

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group). [...] This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

The IPRA classifies IPs as:

A group of people or homogeneous societies identified by self-ascription and ascription by others, who have continuously lived as organised community on

communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilised 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 colonisation, 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 populations which inhabited the country, at the time of conquest or colonisation, 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' (IPRA Chapter II Section 3(h))

While the IPRA refers to IPs as *homogeneous societies*, many academics point to issues around attempting to group Indigenous peoples into homogenous groups with clear land boundaries, as in practice, this is rarely how things are on the ground. In fact, there may be competing and various interests within one Indigenous group, as well as subtle distinctions between individual interests and positions within the traditional structures that may be blurred by singular definitions (Young 2015):

One inherent problem of a national law is a tendency to essentialise or universalise, to simplify and standardise certain things. Definitions and concepts have to be clearly articulated and simplified, and that's what happened in the case of the IPRA... [It] sought to codify certain concepts like who are the indigenous peoples, what is customary law, what is ancestral domain and so on—as if there was a single definition and operationalisation of the concept on the ground (Raymundo Rovillos, chancellor of University of Philippines Baguio, as cited in Llaneta 2012)

In the case of the Philippines, there has also been migration and conflict that has driven IPs from their traditional territories. At the Didipio gold-copper mine on the island of Luzon, for example, despite the fact that the majority of residents are IPs, many are not originally from the area and as such cannot claim ancestral domain under the IPRA (Rosales 2011).

It is important to note that governments have a critical role to play in the process of engaging with Indigenous Peoples, particularly since it is governments who are a party to instruments such as the UNDRIP and ILO Convention 169, not companies. Their role can include determining which communities are considered to be indigenous, and shaping the processes to be followed for achieving FPIC, negotiating agreements and/or obtaining community input into decision making processes relating to resource projects. However, Indigenous Peoples and their rights exist irrespective of recognition by the state, which is not always forthcoming. One factor that defines people as being indigenous is their self-identification as such (ICMM 2015).

Questions around legitimacy of elected IPs have also been raised in the case of the Philippines. The issue of who is a 'legitimate' Indigenous leader and who is not can be very problematic, as there may be different perspectives on this. There have been claims that some mining companies in the Philippines have used 'divide and rule' tactics that fragment existing power structures of IPs or encourage rivalries to gain consent. Others have been accused of circumventing legitimate indigenous leaders or organisations that do not agree with mining, and instead nominating Indigenous representatives that support development. The NCIP has been accused of similar tactics. At Mount Canatuan, for example, the NCIP was said to have created a company-compliant rather than representative leadership structure in the form of a 'Council of Elders' that was supposedly made up of a number of "illegitimate leaders" (Doyle 2009, p. 59). Similar claims have been directed at anti-mining advocacy groups, who have been said to promote the leadership of particular IPs who are against mining development. In addition, national governments may not recognise the claims of particular IPs for political or nationalist reasons. In this case, companies find themselves in a very difficult situation, because they must maintain positive relations with national governments and respect sovereign law, but also have a duty to respect the rights of IPs.

[M]echanisms and procedures should be established to verify that free, prior and informed consent has been sought. In order for these mechanisms to function properly, indigenous peoples must be included in their development. States are to provide effective mechanisms for redress when the free, prior and informed consent of indigenous peoples has not been sought. (OHCHR 2013)

Indigenous groups may not have the governance structures in place to appropriately reflect what is required in terms of FPIC processes and nominating official leaders. There are additional issues around how companies should act when the traditional structures of IPs are exclusionary (for example, towards the elderly, the young, or women), or appear to encourage systems of patronage.

Clear definitions around what constitutes consensus in FPIC are also lacking. A study by GIZ found that "the traditional notion of community consensus is now being replaced by the concept of "majority rule"" (Calde, Ciencia Jr & Rovillos 2013, p. 48). While this can be seen as an "imposition by the State and other modernising institutions" (GIZ 2013, p. 5), it can also be explained as "accommodation by the Indigenous Peoples themselves of non-indigenous or modern practices" (GIZ 2013, p. 5):

An increasing number of IP communities and peoples may in fact choose to move from customary to state institutions, or both, single-mindedly or simultaneously, depending on the circumstances and perceived immediate benefits that they could derive from these institutions.

Certainly, for all these reasons, verifying that the right to FPIC has been respected is problematic (FPP 2007).

Issues around the categorisation of Indigenous lands

The IPRA differentiates between Ancestral Domains and Ancestral Lands and provides for their registration and titling.⁶ Ancestral Domains cover the total environment, comprising lands, inland waters, coastal areas, and natural resources, and including non-physical spiritual and cultural bonds to the areas that the ICCs/IPs possess, occupy and use and to which they have claims of ownership (Salonga 2014). Ancestral lands include “residential lots, rice terraces or paddies, private forests, swidden farms and tree lots” (Republic of Philippines 1997). Ancestral Lands may be found within Ancestral Domains (Salonga 2014). A *Certificate of Ancestral Domain Title* (CADT) refers to a “title formally recognising the rights of possession and ownership of ICCs/IPs over their ancestral domains” while a *Certificate of Ancestral Lands Title* (CALT) refers to “a title formally recognising the rights of ICCs/IPs over their ancestral lands” (Republic of Philippines 1997). The Revised Guidelines also state that when there are two or more domains affected, the ICCs/IPs owning such domains shall exercise the right to FPIC separately.

The University of the Philippines offers a good overview of these issues and legal framework around Indigenous land tenure in the Philippines in the piece ***Protecting IPs’ Rights to Ancestral Domains and Lands*** available at <http://www.up.edu.ph/protecting-ips-rights-to-ancestral-domains-and-lands/>.

The IPRA states that the Government must “recognise the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain” (Republic of Philippines 1997). It also provides for the right of ICCs/IPs to develop lands and natural resources, which means:

- the right to develop, control and use lands and territories traditionally occupied, owned, or used;
- to manage and conserve natural resources within the territories and uphold the responsibilities for future generations;
- to benefit and share the profits from allocation and utilisation of the natural resources found therein;
- 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;

⁶ Ancestral Domains are all areas generally belonging to ICCs/IPs “comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, communally or individually since time immemorial” (Republic of the Philippines 1997). Ancestral Lands are defined as “land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial” (Republic of the Philippines 1997).

- the right to 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
- the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights (Republic of Philippines 1997).

However, a 2008 report based on a survey of ICCs that received a Certificate of Ancestral Domain Claims/Titles, found that extractive industries were present in more than a third (39.8%) of the 1.85 million hectare ancestral domains covered by the study, and that 73.7 percent of the mining sites were operating without the consent of the tribes (PhilDHRRRA et al. 2008 as cited by Hatcher 2014).

IPs also have to go through a long and bureaucratic process to prove their ownership of the land to acquire CALTs and CADTs, and there are many instances of non-issuance by the government (Romualdo 2012).

Learning Activity 3: Discussing the definition of 'Indigenous Peoples' in the IPRA

Learning objective:

To discuss the IPRA in terms of how it defines IPs and issues around consensus building in terms of FPIC.

Instructions:

- Provide students with *Issues around the definitions of 'Indigenous Peoples' and representation* section of this document or create a Powerpoint presentation based on this information.
- Provide students with a copy of the IPRA and the *NCIP Administrative Order No. 3, Series of 2012: The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Process of 2012* (see Facilitator's pack).
- Hand out one sticky note to each student in the class.
- Instruct students to read the IPRA definition of IPs, and write down one word from the definition that stands out to them (e.g. that they think is problematic or interesting or do not understand), on the sticky note.
- Students will place their sticky notes on a board at the front of the room and explain why they chose the word that they did and what implications it has for FPIC.
- Instruct students to read the IPRA and FPIC Guidelines with a focus on what the documents say about consensus.
- Facilitate a discussion based on the following questions.

- What constitutes consensus under the IPRA and who is responsible for verifying that FPIC has been obtained?
- If government, companies and civil society have all been accused of lack of neutrality, who is in a position to judge whether a claim for Indigeneity is accurate and to verify that consent has been obtained?
- How should a company act if IPs have vested traditional decision-making authority in someone that does not appear to be working towards their best interests?
- Should FPIC only apply to IPs or all community members impacted by mining development?
- What processes should a company follow when a Government is not respecting or protecting the rights of IPs?
- What are some of the land tenure/recognition issues that your country faces in dealing with FPIC?

Imbalance of power, governance and capacity building

The imbalance of power between mining companies and IPs in terms of information and resources complicates meaningful FPIC processes. A lack of understanding of the what mining actually is and its long-term implications, as well as the terms of contracts or agreements that they sign is common, considering that IPs often live in remote areas and may be illiterate or not speak the national language.

According to the ICMM (2015), companies need to ensure that IPs fully understand the interests of the company and the potential impact of the project (both positive and negative). This requires companies to clearly communicate their objectives and plans to IPs and ensure that all risks and opportunities associated with the project are understood by communities. Communicating this amount of information may pose enormous burdens on ICCs/IPs. A simplified approach may work better, but it may be critiqued. As discussed above, some commentators have pointed to the reduction of FPIC to a “tick-box” approach, which has resulted in the manipulation of IPs throughout bribery, coercion and also simply providing skewed information that only reveals the positive impacts of mining (Hanna & Vanclay 2013):

Two important aspects of understanding, necessary for B’laans to participate in a partnership with Western Mining, were understanding of the terms of the contract that they had signed with the company, and understanding of what mining is. Very few B’laans encountered were able to read or write, yet four of the five Tribal Councils had signed the Principal Agreement with the company, and only a handful of B’laans had ever seen a mine (Smith 2006, p. 96, speaking about the Tampakan project).

A common complaint raised is the manipulation of the FPIC process by the NCIP, resulting in the fabrication of indigenous peoples’ consent. The result has been that FPIC is reduced into a checklist that is used to facilitate the entry of development projects into indigenous lands regardless of the wishes of indigenous communities. In addition, the NCIP regularly deviates from its own FPIC rules when it becomes clear that the outcome of the process is likely to involve the community withholding consent. Thus many indigenous communities in the Philippines see the FPIC process as an imposition by the NCIP whereby indigenous peoples are forced to consent, without the option of rejection, in order to get priority projects implemented rather than an expression of their own autonomy (AIPP 2014).

As highlighted by Owen and Kemp (2014), FPIC requires an adequate allocation of resources not only for consultation, but also training and capacity building, technical supervision, multi-stakeholder engagement and coordination, monitoring, and the establishment of grievance processes. The provision of basic services by mining companies to IPs can also exacerbate power imbalances between companies and communities.

It has been said that the NCIP faces severe limitations in carrying out its mandate due to lack of funding and expertise, given their multitude of responsibilities (Capistrano 2010; Hatcher 2014). The same has been said of the Mining and Geosciences Bureau and Department of Environment and Natural Resource (DENR) in terms of their mandate of regulating and enforcing the social and environmental safeguards enshrined in the mining regime and also promoting the mining sector (Hatcher 2014).

Fundamental to the exercise of prior informed consent is access to sufficient information to make a genuine assessment and sufficient time to consider and debate the issues internally. In the Philippines, no case exists where adequate information has been provided to the affected community. The consultation meetings called nominally by the DENR or NCIP to "inform and consult" are too often platforms for the exclusive presentation of company information and propaganda. To date, no consultation has been invited or informed by any independent agency knowledgeable on the issues, let alone any groups critical of mining. This has only occurred where communities or local NGOs have made such efforts out of their own limited resources. (Cariño 2005)

For IPs and the NCIP, various cases have shown a lack of capacity in terms of know-how, knowledge and organisational capacity to be able to enter into negotiations and decision-making processes that result in beneficial outcomes.

[Appendix A](#) provides toolkits and guidance documents developed to build the capacity of IPs and civil society in FPIC processes.

FPIC and its interactions with social license to operate, community development and benefit sharing

Individuals who have worked with mining companies have pointed to the challenges involved in attempting to separate community relations and community development work when it comes to FPIC. The two are necessarily intertwined, but companies can be accused of attempting to influence FPIC processes by providing benefits to communities before consent has been provided. In the early stage of FPIC engagement and negotiations, the provision of infrastructure and services by a mining company may be seen as a form of bribery. It may also be seen to unduly influence FPIC processes where local communities are highly dependent on infrastructure provided by the mine, and fear losing it if they do not consent to development (Hostettler 2014).

This issue has been highlighted in the Philippines where there are high rates of poverty amongst IPs and the largest concentrations of IPs are in the most economically poor regions of the country (Castillo & Alvarez-Castillo 2009). In many areas, government is absent and communities lack the most basic of services. Mining represents an opportunity for development that may not be offered otherwise. Mining companies develop infrastructure and services in order to be able to operate, and also to fulfil requirements for social investment and gaining social license to operate (Campbell 2012). According to the IPRA, IPs have the right to benefit and share the profits from allocation and utilisation of the natural resources found therein. One of the objectives of the 2012 Revised Guidelines on FPIC was to “ensure that any benefit derived after the grant of FPIC or as an exercise of priority rights shall be managed and used properly by, for and with the concerned community not forgetting inter-generational obligations” (Republic of the Philippines 2012). Despite these requirements, some companies have been accused of corrupting FPIC processes through bribery, such as supplying Indigenous leaders with jobs or stipends in exchange for FPIC (Cariño 2005; Greenspan 2013; Hanna & Vanclay 2013). This catches mining companies in a dilemma: can they hire or pay IPs or does it risk being called corruption by those who are dissatisfied?

The role of the government as the party responsible for providing basic services can further complicate the issue. There have been cases in the Philippines, for example, where different levels of government have misused

Didipio mine is located in a remote area where the majority of the population was living below the poverty line prior to the development of the mine. When communities are dependent on a mining company to provide basic services, it can influence FPIC processes towards consent. There have been allegations that initial consultations with community members at Didipio mine highlighted the benefits of mining, such jobs for community members, but not the potential negative impacts, such as relocation and environmental impacts (Oxfam Australia 2007).

mining community investment funds or used them with minimum community input (Campbell 2012). Even if a mining company is attempting to act ethically and responsibly, the government may use mining funds with its own interests in mind.

[Appendix A](#) provides toolkits and guidance documents developed to assist companies in the implementation of FPIC.

FPIC and exploration

FPIC should also be an ongoing process, from exploration through to mine closure (ICMM 2015). The IPRA states that FPIC can only be “obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community” (Republic of Philippines 1997). The Revised Guidelines on FPIC and Related Processes (Republic of the Philippines 2012) provide that:

Unless specifically stated in the MOA, separate exercise of the right to FPIC shall be for each major phase of the proposed activity such as Exploration; Operation or Development; Contracting of operator; and the like.

There have been claims that FPIC in the Philippines has not been carried out during exploration activities and is carried out once the mining company has already established presence and wants to develop. There are several issues to consider in relation to these claims.

For some projects in the Philippines, for example [Tampakan](#), initial exploration occurred prior to the implementation of the IPRA, when FPIC processes were not legislated or recognised in international instruments or industry guidelines. In addition, while large mining companies may sometimes undertake exploration activities themselves, exploration is often undertaken by smaller companies. These junior companies may have few formal social policies and a lack of long-term vested interest in a region, which can result in them paying less attention to FPIC processes. They may also be specialists in exploration but not necessarily in the social aspects of gaining consent from IPs and communities. This same criticism can be applied to exploration personnel who are part of a larger mining company. Exploration is a critical phase in terms of shaping company-community relations, but mining companies can face a range of legacy issues from this phase of the project if the processes of FPIC were not undertaken well.

[A] number of NGOs that work closely with indigenous groups expressed the concern that after exploration has begun, it becomes very difficult for indigenous groups to refuse the project. Indigenous groups may see the project as a fait accompli and feel that it is not possible to stop it. In addition, the benefits of the project may seem more immediate than the costs because the more significant costs have not been felt. For instance, the company may have provided health services to the community during the exploration stage. Yet, in contrast, the most significant potential negative impacts [...] are unlikely to occur at this stage (Lehr & Smith 2010).

Another complicating factor is that mining companies cannot fully know the extent of a proposed project when they are beginning exploration. Exploration itself is a dispersed and transitory activity characterised by uncertainty and ambiguity. Exploration projects typically proceed episodically, with periods of intense activity followed periods of little or no activity. In addition, they may not have sufficient resources to present a comprehensive view of what mining could look like on any piece of land before exploration has taken place. This makes “fully disclosing the intent and scope” of either exploration (or the final project plan) problematic.

By the time a mining company does know how a mining project is going to proceed, significant costs have been spent and the project is often already underway. While FPIC should not be a single point of approval, ongoing FPIC processes at each major phase of mine development, as stipulated in the Revised FPIC Guidelines, and the potential for a vote of non-consent, present an immense challenge to the commercial interests of mining companies, who invest a lot of money into exploration, construction and operations. The [Tampakan project](#) brings some of these issues to the fore.

[T]he impacts of the exploration stage are, from the perspective of [extractives] companies, relatively minimal. Few personnel are on the ground, the risk of significant environmental impact is small, and the impacts are generally short-lived. It is argued that during the exploration stage, it is more reasonable to commence a meaningful engagement process that incorporates the concerns of indigenous people into decision-making about project design in order to establish a social license to operate, without going through a more formal and documented consent process.

In contrast, civil society has argued that exploration does substantially impact communities, including indigenous peoples. For instance, the entry of an exploration team into a remote area can bring debilitating disease. In addition, explosions during exploration can frighten wildlife, temporarily affecting a food source upon which indigenous people may depend for their livelihoods.

The appropriate design of the exploration process could help mitigate these impacts, for instance by forbidding company workers from approaching indigenous people or organizing detonations so as to have a minimal effect on wildlife. There clearly is an opportunity for companies and civil society, including indigenous peoples, to further discuss the impacts of exploration. It is likely that a credible consent policy would, at a minimum, need to apply to phases of company activities that have a significant impact on indigenous populations. (Lehr & Smith 2010)

Given that most projects do not progress beyond the exploration phase, expectation management is another key issue when it comes to FPIC during exploration, in terms of potential developments and corresponding opportunities for the communities (or lack thereof). If the company discloses the development that might occur if the project proceeds to operations, it may build false hope in communities about potential development opportunities, or cause them to plan for a future with the development of the mine in mind (Lehr & Smith 2010).

Mining companies often emphasise their ability, and willingness, to accelerate the development of communities as something that can be used to garner community support. Nevertheless, the behaviour of mining companies as agents of development does have limitations. Mining companies are not aid agencies and they are, ultimately, limited by virtue of the fact that they “are in business to make profit and if they do not make profit, they do not stay in business for very long” (ESSC, 1999: 41)... Whatever social policy the company decides to introduce, it should be participatory and based on mutual commitment with the community. If social acceptability cannot be obtained, the mining company may have to accept the fact that this mine, no matter how well-endowed its ore deposit may be, may not be developed (Holden & Jacobson 2006).

Learning Activity 4: Discussion of the responsibilities of companies and governments in relation to FPIC

Learning objective:

To discuss the responsibilities of companies and other actors in processes related to FPIC.

Instructions:

- Using the following discussion questions, engage in a debating forum that considers the following motions. Students should be given a week to prepare their arguments and then Oxford-style debating round can be held on the following motions which are inter-related and can be complementary.
 - *MOTION 1: Mining companies should exert standards that exceed government expectations on the rights of IPs.*
 - *MOTION 2: Mining companies should hold back some information when engaging with communities during the exploration phase to manage expectations and not build false hope.*
 - *MOTION 3: When operating in remote communities where government presence is limited, the provision of basic services and infrastructure should be the responsibility of mining companies.*
- Following the debate, there should be a convergence forum on points which both debating sides considered to be convincing arguments and note the risk factors of each.
- In a subsequent assignment, ask students to enumerate risks of both affirmative and negative motion approaches.

Discussion questions

- Are instruments like the IPRA useful even if they are not fully respected by Government?
- How do companies distinguish between community relations and community development work in practice?
- What measures can a company put in place to prevent their community development initiatives or “social licence” activities from corrupting FPIC process?

Interests that compete and lead to conflict

The Philippines case illustrates a few key issues in terms of competing or conflicting legislation and policies:

1. National legislation and policies may not be harmonised or consistent.
2. There may be different national and traditional legal systems.
3. National governments and IPs within their territories may have competing or divergent interests.

Legislation

The IPRA says that the “State shall recognise, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions” and also “shall consider these rights in the formulation of national laws and policies” (Republic of Philippines 1997).

Commentators that are strongly critical of the way FPIC is carried out in the Philippines point to the fact that requirements for FPIC in legislation such as the IPRA are undermined by policies or legislation geared towards promoting mining for development, such as the National Policy Agenda on Revitalising Mining in the Philippines (NMP, 2004) and its correlated Mineral Action Plan (MAP, 2004) or the Philippines Medium-Term Philippine Development Plan (MTPDP) 2004–2010 (Doyle 2009; Hatcher 2014).

Moreover, the IPRA was adopted two years after the Mining Act, which sought to attract increased foreign investment. This has been said to have given a legal advantage to some mining companies, who were able to lodge claims under the 1995 Mining Act before local communities could lodge claims under the 1997 IPRA, “effectively giving the companies prior legal rights to the land” (Hatcher 2014, p. 58). There has been a movement of NGOs and supportive politicians in the Philippines who have been calling for the revocation of the Mining Act of 1995, because of its private-sector led and foreign investment driven agenda (Wetzlmaier 2012).

[T]here were no real efforts to synchronize the Mining Act with the ‘special laws’. We did not want to tackle the special laws, we trusted that local bodies would work out which law was appropriate (...) if necessary they can go back to old laws (Verbrugge 2015 citing interviewee Edwin Domingo).

Sovereignty

In many countries, including the Philippines, national law coexists with customary law (traditional legal systems) that do not necessarily have the same interests. This is called ‘legal pluralism’ (when there are multiple legal systems in a geographic area or governing

the same people). In many countries, including the Philippines, sub-surface resources (e.g. minerals) are vested in the state, to be exploited in the interests of the broader population. This conflicts with the provisions in the IPRA, whereby IPs have the right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations. The IPRA, in fact, defines Ancestral Domains as “comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, communally or individually since time immemorial” (Republic of Philippines 1997). The constitutionality of the IPRA has been questioned on this basis (Oxfam America 2013; Romualdo 2012), as it is said to contradict the principle that sub-surface resources belong to the state, for example:

Mining and Geosciences Bureau representatives claimed that “[g]iving indigenous peoples priority rights over mineral resources within their ancestral domain...is surrendering the state’s full control over all our resources” (Oxfam America 2013).

On the other hand, mining permits awarded by the DENR may be challenged by ICCs/IPs protecting ancestral domain and sacred burial sites by requiring the certificate of FPIC under the IPRA (Raymundo 2014).

Policy

Adding to the complexity, decentralisation has also contributed to intra-government conflicts over large-scale mining. Local politicians are increasingly becoming “gatekeepers of the large-scale mining sector”, using the Provisions of the Local Government Code (which establishes the system and powers of provincial, city, municipal and barangay governments in the Philippines) to oppose the entry of large-scale mining (Holden & Jacobson 2006 as cited by Verbrugge 2015). Some local governments have even issued a ban on mining activities in their territories, as occurred in the case of the Tampakan Project.

Together, this plethora of overlapping laws gives rise to a highly heterogeneous system of mineral resource governance, whereby different government levels and

[T]he 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 utilise 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 [...] 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 (Tamayo 2013).

agencies create contradictory and overlapping laws and administrative rules (Verbrugge 2015).

In 2012, the Philippine Government issued a new Mining Policy in the form of an Executive Order, which required local government ordinances to be brought into line with national laws:

The Department of Interior and Local Government and the LGUs (Local Government Units) are hereby directed to ensure that the exercise of the latter's powers and functions is consistent with and conform to the regulations, decisions and policies already promulgated and taken by the National Government relating to the conservation, management, development and proper utilisation of the State's mineral resources... (Indophil Resources 2012)

When industry interests clash with local interests, the former continues to prevail. To counteract this, the national government, NGOs, and local communities will have to devote resources to promoting the access and information as well as the voice that the indigenous communities need to fully realize the benefits of free, prior, informed consent (Cariño 2005, p. 39).

The reasons behind local politicians opposing large-scale mining include civil society activism, the environmental impacts of mining, top-down decision making and lack of empowerment at the local level, lack of fiscal benefits associated with large-scale mining for local governments or convoluted and non-transparent processes around their distribution (Verbrugge 2015).

Thus the common public interest that the government agencies have an obligation to protect often gets confounded by intra-governmental competition for prominence and resources. This happens at the federal level between agencies and departments and the various laws that they are responsible for as well as between national and subnational governmental jurisdictions. Finding an efficient means by which these common interests of promoting the welfare of citizens needs better coordination.

While we must muster all of the economic, developmental, environmental and technical arguments in support of FPIC, ultimately it will require a political process that prioritises cultural and natural diversity as core values in our lives and our survival (Joji Cariño as cited in Buxton 2012).

Development versus the right to veto

The politicisation of mineral development in the Philippines has meant that the debates around FPIC have been polarised into pro-mining or anti-mining camps (Smith 2006), providing little room for dialogue. Many NGOs and anti-mining advocates claim that the Government's pro-mining agenda is the key driver behind ineffective implementation of FPIC in the country (e.g. Buxton 2012; Doyle 2009; Oxfam America 2013). However, the Philippines ranks in the bottom half of The Economist

Intelligence Unit's global business environment rankings (2014-2018), at 53 out of 82 countries in terms of being conducive to investors (The Economist Intelligence Unit 2014).

The Government of the Philippines has been accused of lack of neutrality and undermining voices of dissent, due to its role as both 'player' (promotor) and 'umpire/referee' (regulator/adjudicator) of mining development. This is a particular issue when it comes to joint ventures, which can further influence the interpretation and implementation FPIC (Campbell 2012). Even the NCIP, which is mandated to represent the interests of ICCs/IPs in the Philippines, has been accused of "serving the interests of the mining companies more than the indigenous communities" (Doyle 2009; Llaneta 2012; Oxfam America 2013).

In practice, it therefore appears that the [Department of Environment and Natural Resources] – along with the NCIP, the Presidency, the Majority of the Congress, the mining investors, and the Chamber of Mines – has been resolutely entrenched within the pro-mining camp. The issue will undoubtedly persist until both mandates are viewed as conflicting and thus clearly segregated (Hatcher 2014).

[T]he strong anti-mining sentiment seen in the Philippines – which has followed from the many environmental disasters and violent conflicts surrounding mining operations – together with the government's prioritisation of mining's contribution to economic growth, has prevented government and civil society from coming together to identify shared values and institutions for upholding those values (Hanna & Vanclay 2013).

Mining companies have an obligation to respect government's expressed sovereign rights and decisions related to IPs (ICMM 2015). They are also required to respect the rights of IPs (ICMM 2015). This is very tricky territory for a mining company to navigate and results in confusion for all parties in the implementation of FPIC.

Companies can exercise their influence on governments to protect the rights of IPs, which is a step towards mitigating social risk (Campbell 2012). However, to a certain extent, mining companies are also reliant on governments to resolve conflicts when it comes to FPIC and make final decisions in terms of the best interests of their population.

While in Philippine legislation, IPs have the right to non-consent of a mining project, in practice, this is rarely definitive. However, projects such as Tampakan have been delayed for many years due in part to issues around FPIC and social license, and companies have pulled out of investment due to these and other complications that make a project financially unviable.

FPIC and Artisanal and Small-Scale Mining

Artisanal and small-scale mining (ASM) has been identified as a potential complicating factor to FPIC processes in the Philippines, as it can fuel local resistance to large-scale mining (Verbrugge 2015). Not only does ASM in the Philippines represent an important livelihood for local communities, but it has also “become embedded in the local institutional fabric” and is “intimately entangled with local political interests” (Verbrugge 2015, p. 455). It may also provide a source of funding for activism against large-scale mining, which due to a range of complex factors – including corruption – may not always deliver the anticipated financial benefits to local communities. For example, small-scale mining is prevalent in Mindanao and has a history linked to different local political interests and armed groups (Verbrugge 2015). These powerful local interests are likely to have aligned themselves with anti-mining activists to protect their personal financial gains from small-scale mining, further complicating the dynamics in the region. In the case of Didipio, ASM has historical importance as it was practiced by community members and IPs prior to the arrival of large-scale mining.

Large-scale mining companies, on their part, continue to approach the [Mines and Geosciences Bureau (MGB)] to issue stoppage orders against illegal ASM, which are then delivered by local government officials, a representative of the Department of Environment and Natural Resources and/or by a delegation of state security personnel. So far however, these stoppage orders have proven futile, in large part, a mining company representative claimed, because “Those delivering the stoppage orders are actually those controlling the small-scale mining. They will take a picture standing next to the closed tunnel, and one week later it is operating again” (Verbrugge 2015, citing a community relations officer of large-scale mining company).

Learning Activity 5: Discussion and written assignment on FPIC and competing interests

Learning objective:

To think about and discuss issues around competing interests in terms of FPIC.

Instructions:

- Assemble students in a study circle and do a “lightning round” focusing on the following question: *Whose responsibility is it – government or company – to resolve issues around diverging interests?*
- The lightning round methodology is aimed at getting short, 10-second responses impromptu from an audience to gauge “gut feelings” after readings have been absorbed.
- After you get the impromptu responses, break up students into groups of four and ask them to discuss the following questions and report back to the larger group on key issues:
 - Have you had to deal with competing local/national interests in your work towards gaining social licence to operate? Is this a common issue?
 - Do you think this issue has no solution or are there some ways to work around these competing interests? What are these? Share your experience.

Written assignment:

The following questions can be used for written essay assignments:

- How should decisions be made in terms of the development opportunities of an extractive project versus the Indigenous right to self-determination?
- What are the gaps in your country’s legislation when it comes to FPIC?
- Do you have issues around ‘legal pluralism’? How are these dealt with?
- Are there aspects of your law which relate to the extractives industries and FPIC that are not harmonised? Has this created confusion for companies or other stakeholders? Have there been initiatives to try and harmonise legislation?
- What are the key gaps in your country’s legislation when it comes to FPIC? Do you think that putting FPIC your country’s legislation would be helpful? Why? Why not?
- Can companies use tri-partite agreements, dialogue tables, mediation and grievance mechanisms to assist in situations where there are disagreements between national governments and IPs?

Learning Activity 6: Role Play based on issues that have arisen at Didipio Mine

Learning objective:

To reflect on the interests of different parties in negotiation processes in order to reach agreement and gain insight into the complexity of FPIC, using Didipio Mine as a case study.

Instructions:

- This is a take-home learning activity to present in class following independent research.
- Provide students with a print-out of the Brief Background on the following page (or develop a presentation based on this information), and the following resources (included in the Facilitator's pack):
 - **Oxfam Mining Ombudsman Report on Didipio (2007)**, available at:
<http://resources.oxfam.org.au/pages/view.php?ref=214>
 - **OceanaGold Response to Business and Human Rights Resource Centre (2009)**, available at: <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/OceanaGold-re-Didipio-24-Nov-2009.pdf>
 - **OceanaGold Sustainability Reports**, available at:
<http://www.oceanagold.com/sustainability/sustainability-reports/>
 - **Commission on Human Rights of the Philippines Resolution CHR (IV) No. A2011-004 (2011)**, available at:
<http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/position%20papers/pdf/reso2011-004.pdf>
 - **Statement on the Human Rights Situation in Brgy. Didipio, Kasibu, Nueva Vizcaya** (Commission on Human Rights of the Philippines 2011), available at:
http://www.chr.gov.ph/MAIN%20PAGES/news/PS_17Jan2011_didipio.htm
 - **Striking gold - but who benefits? Mining in the Philippines (2013)** by Publish What You Pay (PWYP) <https://www.youtube.com/watch?v=TS7qHipZJNM>.
 - **OceanaGold Technical Report for the Didipio Gold/Copper Project (2014)**, available at: <https://www.oceanagold.com/wp-content/uploads/Didipio-NI43-101-Technical-Report-compressed.pdf>
- Ask students to undertake their own research of the Didipio case and identify more recent materials since the mine started operations in 2013. These may include media coverage, corporate communications on the project, NGO commentary and academic articles.
- Break group into three sub-groups, representing community members, the company and a group of mediators.

- Coach the mediators using “The Mutual Gains” approach that has been documented in some of the work of the Consensus Building Institute (CBI) – in particular, share the reading of the case of the Niger Delta, available at: http://www.cbuilt.org/sites/default/files/Corporate%20and%20Community%20Engagement%20in%20the%20Niger%20Delta_Lessons%20Learned.pdf (see Facilitator’s pack).
- Provide the students with a week to read the resources provided and undertake their own independent assessment of the Didipio case, in preparation for a mediation role play between the company and community members.
- Allow for 3 hours to run a mediated working session to identify key points of negotiations to emerge and be worked through by the groups. The goal of the 3-hour exercise should be to come up with a one-page framework agreement between the parties.

Brief Background

The Didipio Gold-Copper Operation is located approximately 270km north of Manila in the southern part of the Mamparang mountain range, in a relatively isolated and sparsely populated valley. It straddles the borders of Nueva Vizcaya and Quirino provinces on Luzon Island. The site is located 30km south of the Quirino provincial capital of Cabarroguis, to the south-west of the more densely populated Cagayan Valley. It is located along a stretch of the Dinauyan River, which flows into the Didipio River, which eventually discharges into the Diduyon River, which is used as a source of irrigation water (Griffiths, Holmes & Moore 2014). Agriculture is the main economic activity in the area. The majority of families in the region were living below the poverty line prior to the development of the mine.

Indigenous miners from Ifugao Province first discovered alluvial gold deposits in the Didipio region in the 1970s, and it became recognised as a gold province. While artisanal miners have been active in the area, there are no records of production (OceanaGold 2014). A succession of companies have undertaken exploration activities in the region, but prior to the Didipio operation, there had been no large-scale mining in the region (Griffiths, Holmes & Moore 2014). Didipio was the first mining project awarded a Financial Technical Assistance Agreement (FTAA) by the Philippine Government. This was in 1994, before the passage of the 1995 Mining Act.

OceanaGold inherited a situation of divided support and mistrust amongst parts of the local community on acquiring the project in late 2006 (ICMM 2009). Construction was completed in 2012 and full commercial operations started in April 2013. Under the FTAA, the company has a period of five years to recover all pre-operation costs, after which time the government is entitled to 60% of net revenues (EJ Atlas 2015).

Learning activity 7: The B'laan and Tampakan Mining Project

Learning objective:

To discuss the complexities of the Tampakan project in terms of FPIC.

Instructions:

- Provide students with the four-page overview of the Tampakan project on the following pages, as a handout. Alternatively, create a Powerpoint presentation with key points from the information provided on the following pages.
- Have students write a two-page brief to a new mining company about to work in the area.
- Role play a meeting where each of the interest groups discussed in the case study below (i.e. mining company, IPs, local/provincial/national government, church and anti-mining groups, etc.) is represented and must provide their point of view to the new mine manager.
- Break into small groups and discussion these questions:
 - What recommendations would you make to the company?
 - What are some possible avenues to enable the different parties to reach an agreement? Would this be possible at this stage?
 - Given the amount of investment the company has made in the Tampakan Project, and its potential revenue streams, what are the implications for FPIC and particularly the possibility of a veto by IPs?
 - What issues can you identify in this case that resonates with your own experience of FPIC?
- Students should consider:
 - De-escalation strategy and implementation of a due consultation process with IPs (Hostettler 2014).
 - Mediation strategy using objective mediators.
 - Grievance mechanisms and compensation.
- **An alternative activity** is to break the larger group into two to three smaller groups and facilitate a discussion based around the following questions, which each group will take notes of and present back to the whole class:
 - What are the key challenges for a mining company in gaining FPIC that you can identify in relation to the Tampakan Project? For example, large geographic area, different administrative areas, politicised project, legacy issues, pre-existing conflict, processes and definitions of FPIC, the capacity of institutions to implement FPIC etc.
 - What do the Didipio and Tampakan cases illustrate about the value of:
 - a. FPIC as a process in its own right whether or not it is a legal requirement?
 - b. FPIC as a condition for formal agreement?

Tampakan Overview

Brief description

The Tampakan Copper-Gold Project is one of the largest undeveloped copper-gold deposits in the Southeast Asia-Western Pacific region. It has estimated reserves of 15 million tons of contained copper and nearly 18 million ounces of gold (Indophil Resources 2016b). The project was first explored in the early 1990s, before legislation with provisions for FPIC were in place to guide the engagement between companies and IPs. The Financial & Technical Assistance Agreement (FTAA)⁷ for the project was approved in 1995. It was the second FTAA granted to a transnational mining company in the Philippines (the first was for the Didipio project) and as such was considered a “test case” for future applications (Lansang 2011, p. 135).

The project is located approximately 50km north of General Santos City on the island of Mindanao, the southernmost island in the Philippines group (Indophil Resources 2015). State provision of services is largely lacking in the region. Mindanao also has a long and complex history of conflict, associated with traditional customs, clan rivalries, and religious and political insurgencies (Glencore Xstrata 2014). The project covers an area of approximately 10,000 hectares and sits across nine barangays⁸, four municipalities in four different provinces⁹, and two regions¹⁰, as well as the traditional territory of the B’laan socio-linguistic group of IPs. Approximately 1000 existing households (5000 people) would have to be relocated from the mine area if the project proceeds (SMI 2016).

The estimated capital cost of developing the project is US\$5.9 billion (SMI 2013). By 2013, more than US\$500 million had been invested in the project on exploration, feasibility and environmental impact assessment studies, and community health and education programs (SMI 2013). However, a number of issues have delayed the project, including environmental permitting delays; issues around local government endorsement (Galvez 2015); a provincial ordinance banning open-cut mining in South Cotabato (Feliciano 2015); and issues related to security and social licence to operate (Forrestal 2012) more broadly given the highly politicised media attention Tampakan has received across the Philippines. Furthermore, securing FPIC from ICCs/IPs has presented a range of challenges to the project developers (SMI 2013), which are difficult to de-couple from broader issues related to social license to operate.

⁷ An FTAA is a partnership between the Philippine Government and a transnational mining corporation, which allows the Government to take a pre-determined share of project cash flow once development capital is paid back. FTAA’s have a fixed term of 25 years and an option to extend for a further 25 years. The original title to the FTAA was granted to Western Mining Corporation Philippines Inc (Indophil Resources 2016a).

⁸ A barangay is equivalent to a village or ward; it is the smallest administrative division or political unit in the Philippines.

⁹ These are Malungon (Sarangani), Columbio (Sultan Kudarat), Tampakan (South Cotabato) and Kiblawan (Davao del Sur)

¹⁰ Regions XI (Davao) and XII (SOCCSKSARGEN)

History of ownership

The Tampakan Project was initially explored in the 1990s by Western Mining Corporation Philippines (WMCP), a subsidiary of Western Mining Corporation Holdings Limited, an Australian company. WMCP withdrew from the project in 2002 (reportedly due to financial constraints as well as opposition from local residents), and transferred its FTAA to Sagittarius Mines (Felix 2006).

The Tampakan Project is now operated by Sagittarius Mines Inc. (SMI), which has recently become fully Philippine owned. From April 2007 until May 2013, Xstrata and Indophil held 40% controlling equity in SMI.¹¹ Indophil Resources NL held 37.50 percent of these shares, and Xstrata held the major stake (62.50%), and also managed the Tampakan project. Xstrata was acquired by Glencore in May 2013. Indophil used to be an Australian public company but was delisted from the Australian Securities Exchange when it was acquired by Alsons Prime Investments Corporation (APIC), a Philippines-based entity and part of the Alcantara Group, in January 2015 (Dumlao-Abadilla 2015; Indophil Resources 2015). In August 2015, Glencore sold its shares in the Tampakan project to APIC.

FPIC and B'laan Indigenous Peoples

The project is located on traditional territory of the B'laan¹² socio-linguistic Indigenous group. The B'laan are represented by 10 ICCs who have been granted communal land tenure in the form of one Certificate of Ancestral Domain Claim (CADC) and three Certificates of Ancestral Domain Title (CADT), with an additional CADT pending (pers comm. May 2016). While many academic and media reports suggest that the B'laan are opposed to mining in the region (Cariño 2005; Skene 2006; Stavenhagen 2003), according to sources close the project, there are many B'laan that support development of Tampakan, as they are historically marginalised by other groups in the region and have few economic opportunities or resources (pers. comm., March-May 2016).

Since the early 1900s, different governments in the Philippines have encouraged migration to Mindanao as part of settlement and agrarian reform programs (Smith 2006). In fact, there are two categories of ethnic minorities in Mindanao – the Muslim Moros and the Lumads (which include the B'laan) – both who have been displaced by Christianised settlers, largely from the Visayas and Luzon (Paredes 2015; Smith 2006). It is said that the colonisation of the land in the region by Visayan farmers, which was promoted by the Philippine government, forced the B'laan into remote and barren areas (pers. comm. Smith 2006). According to Smith (2006, p. 78):

Visayan and state institutions, social legal and economic, dominate B'laan life, which has come to revolve around exchange and other relationships with outsiders. Elements of traditional life irrelevant to such relationships have fallen away, and an individual B'laan's well-being now depends as much upon securing the cooperation of a Visayan patron, as upon that of another B'laan.

¹¹ The 60% non-controlling equity shareholders in SMI are the Tampakan Mining Corporation and Southcot Mining Corporation (known as the Tampakan Group of Companies) (Feliciano 2015; SMI 2013).

¹² Different spellings exist, including *Blaan*, *Bla'an* and *Bla-an*.

The prospect of a mine offers the B'laan opportunities for socio-political recognition as an Indigenous group, as well as royalties, infrastructure, services and other economic opportunities (pers. comm., March-May 2016). The negotiation between WMCP and the B'laan in the early 1990s for exploration resulted in the signing of 'Principal Agreements' that provided well-needed health and educational infrastructure in the region (pers. comm., May 2016; Davis 1998). WMCP also assisted the B'laan with resources to help them obtain CADCs/CADTs, through funding for ethnographic and archaeological surveys (Davis 1998). Some have accused the company of undertaking these activities to influence the B'laan to agree to mining (e.g. Wetzlmaier 2012), but it has been said that the company would have been equally criticized if it had not done so (pers. comm., March 2016). According to Davis (1998, p. 241),

many local Visayan squatters have been resentful of [the company's] recognition of the traditional interests of the highland Bla'an. The protestations from the wider non-Bla'an community were the catalyst to [the company's] extension of the community relations programme beyond the local highland Bla'an to encompass the non Bla'an communities in the lowlands.

In fact, it has been said that Visayans, rather than the B'laan, drive much of the opposition to the mine (pers. comm., March 2016). However, many academic and media reports also suggest that the B'laan themselves are opposed to Tampakan (Cariño 2005; Skene 2006; Stavenhagen 2003). There is at least one group of B'laan that has recently expressed strong opposition to the project, to the point where they asked to be excluded from the NCIP-run FPIC processes (pers. comm., May 2016; SAC Marbel 2014). In 1997, another group, the "church-based La Bugal B'laan Tribal Association" (DINTEG and KALUHHAMIN 2015), took WMCP to the Supreme Court stating the FTAA it received (and the Mining Act of 1995 upon which it was based, which allowed foreigners to exploit the Philippines' natural resources) was unconstitutional (Lansang 2011). On the other end of the spectrum, a group of B'laan Elders released a press release in 2013, stating that a human rights report produced by the Institute of Development and Peace (INEF) in relation to the project was "anti-mining propaganda" (B'laan Leaders and Elders 2013).

All of this challenges notions of the B'laan as a homogenous group. In fact, determining who is a 'legitimate' Indigenous leader for FPIC processes can also be very problematic for a mining company. Indigenous groups may not have the governance structures in place to appropriately reflect what is required in terms of FPIC processes and nominating official leaders. At the Tampakan Project it has been said that B'laan communities did not have well defined leadership or decision-making structures to provide a basis for FPIC negotiations (pers. comm., May 2016). In fact, it has been said that no central system of authority existed amongst the B'laan IPs in the region prior to the arrival of the mining company, despite claims of WMCP to the contrary (Smith 2006, p. 88):

[T]he company consistently held that; "Bla-an power structures appear to have centered around a single 'strongman': [Western Mining 1997:36]. Initial discussions with B'laans had however indicated, that while B'laan society was no formal democracy, neither was it one in which strong men wielded personal - and presumably coercive - power. [...] Principal Agreements had long been standard practice in the mining industry, and [there is] a growing

body of information which indicated that the company might be seeking B'laan customs to fit with mining practices rather than the other way around.

In 2003, the Special Rapporteur on the Rights of Indigenous Peoples issued a statement saying:

As a result of this mining operation, it was reported that the B'laan were deprived of their right to determine their own economic, social and cultural development and their property was disposed of. No genuine consent was given by the indigenous peoples. They argue that their leaders were tricked by the authorities into signing agreements which they could not fully understand and which have not benefited them (Stavenhagen 2003).

This statement is controversial from the perspective of personnel that have worked on the Tampakan Project (pers comm. May 2016), but it raises important issues in terms of FPIC processes and understanding on the part of IPs. In traditional society, B'laan did “not consider themselves to be ‘owners’ of the land they occupy” (Davis 1998, p. 237) but rather saw “their role more in terms of ‘guardians’, ‘custodians’, ‘managers’, or ‘keepers’ of the land” (Davis 1998, p. 237). They did not have concepts of ‘sale’ of land, but rather agreements to ‘lease’ land (Davis 1998, p. 237). Various government agrarian reform processes as well as negotiations over compensation for the Tampakan Project have changed B'laan relationships to land, because rigid individual or communal land ownership and titling systems do not align with traditional ones.

During government land reform processes, the B'laan lodged claims for individual parcels of land recognised by Certificates of Landownership Agreements (CLOAs) (pers. comm., May 2016; Neame & Villarante 2013). Negotiations with the company over compensation for land then pushed the B'laan to apply for communal land tenure in the form of CADCs/CADTs (pers. comm., May 2016). The “overlapping and duplication” (Sidchogan-Batani 2003, p. 4) of land policies complicated matters for the company in terms of negotiating for FPIC (pers. comm., May 2016). Communal land claims required CLOAs to be cancelled or converted to CADCs/CADTs (Mayuga 2014; NCIP 1998), which caused delays in recognition of the B'laan's communal land tenure (pers. comm., May 2016). There were also CLOAs held by non-IPs on B'laan ancestral territory (pers. comm., May 2016). Because these CLOAs were registered title at the Register of Deeds, the NCIP was never able to formally lodge the CADTs and have them recognized under the Philippines Torrens system of titling. For this reason, WMCP personnel thought it would be appropriate to negotiate with all title holders and applicants at the same time, but the NCIP insisted that negotiation processes with IPs be kept separate (pers. comm., May 2016).

To complicate matters further, there are numerous other groups with a presence in Mindanao representing different interests, including local and national government, advocacy organisations, and political and religious groups (Holden 2013, 2014). These include the New People's Army (NPA), the armed wing of the anti-government communist party, and the Catholic Church, both which have a strong presence in the region.

The NPA is against mining due to its environmental impacts that disrupt the natural resources upon which the rural poor – the party's main recruitment base – are reliant on for their livelihoods (Holden 2014). They are also “critical of the fact that many mines are operated, either in whole or in part, by foreign corporations” (Holden 2014, p. 76), and are against what they perceive to be

neoliberal policies of the Philippine Government. There have been a number of government-sponsored military operations in Mindanao, including reports of extrajudicial killings of anti-mining activists linked to the NPA by the Armed Forces of the Philippines (AFP) (Hatcher 2014; Holden 2014). There have also been clashes between security guards for the Tampakan Project and the NPA (Hatcher 2014; Holden 2014). The B'laan are associated with the NPA by default because the region is a stronghold for the political party, but the interests of the NPA do not necessarily align directly with those of the IPs (pers. comm., March 2016). While the presence of the Tampakan Project is claimed to have exacerbated conflict in the region, the determinants of violence are difficult to determine. In fact, it has been said that a lot of the conflict in the region that may be tribal or personal is presented in the media as “anti-mining” (pers. comm., March-May 2016).

Some groups of B'laan have aligned themselves with church groups, which has connected them to international civil society and provided a platform for anti-mining actions and media attention (Holden 2013). The church in the Philippines is known for its advocacy on the impacts of mining on IPs and anti-mining activism more broadly (Holden 2013, p. 221). However, the church's motivations for strong opposition to the Tampakan Project in the face of some B'laan support for the project has also been questioned (pers. comm., March 2016).

Certainly, the B'laan's relationships with a variety of groups have added to the complexity of FPIC processes in terms of determining the interests of different parties and reaching consensus, and bring to light issues around influence and co-optation. The fact that the project covers such a large geographical area and a number of different administrative units and Indigenous domains/territories – all with diverse political and financial interests – has proven particularly challenging from an FPIC perspective (per comm, March-May 2016).

Operations at Tampakan have not yet commenced and FPIC processes have not been taken to completion. With the advent of a new government in Philippines in June 2016, there remains a value-based tussle even within the cabinet ranks.

The Finance Secretary Carlos Dominguez is a partial owner in Sagitarius mines and hence supportive of the project, while the incoming secretary of environment, Gina Lopez has publicly condemned the project with the following words:

*“Tampakan is on top of hundreds of hectares of agricultural land, the food basket of Mindanao, and you want to put a 700-hectare open-pit mine? I don't care how much money they give us. It's not worth it. Who is making the money here and who is taking the risk?”*¹³

The FPIC process could surely inform this debate between government ranks as well.

¹³ Lopez vs. Dominguez: July 26, 2016: <http://politics.com.ph/lopez-v-dominguez-denr-chief-says-no-tampakan-mine-owned-dof-chief/>

Learning Activity 8: Simulation – Moving forward with FPIC in 2020: what have we learned in the Philippines?

Learning objective:

For the class to apply, analyse and evaluate what they have learned about FPIC in a simulated but plausible context and by creating and putting themselves in the shoes of key stakeholders in the process.

Instructions:

- Instruct the class to prepare for and participate in a Conference Simulation based on the contained in the boxes below (you can print this as a handout).
- Groups should be given the task ahead of time and are expected to engage deeply with and cite the resource material provided. Special attention should be paid to [Key challenges of FPIC in practice as shown by the Philippines](#).
- If possible, connect the class with people associated with FPIC in the Philippines by Skype.
- To create the environment of a conference, the group should:
 - Create a banner or Powerpoint slide with the conference title.
 - Arrange room to make sure all are able to speak and present their views.
 - Provide bottles of water, name, plates, flags etc.
 - Appoint a chair person to lead the meeting and introduce groups.
 - Appoint a note taker.

Part One:

- Divide class into four groups: national government, local government, local Indigenous peoples, and company representatives.
- Get groups to prepare a 15 minute engaging presentation based on the questions provided.
- Each group presents followed by 15 minutes of questions and time for written reflection of key learning.

Part Two:

- Divide class into four multi stakeholder groups each containing at least one member of national government, local government, local Indigenous peoples and company representatives.
- Based on readings, presentations and discussion, ask them to write down and present three recommendations to government.
- Conduct a plenary session to select the most useful recommendation concerning FPIC and the exploitation of natural resources in areas with IPs in 2020.

Scenario:

The Philippines is one of the few countries to have adopted the principle of FPIC into its domestic legislation. Both the Mining Act of 1995 and the Indigenous People's Rights Act (IPRA 1997) contain clauses the around FPIC. Yet the experience of FPIC in places like Tampakan and Didipio suggest we have a lot to learn. The exploitation of natural resources in areas with many IPs continues to grow. In 2020 it is time to look back over 25 years of FPIC in the Philippines and make recommendations for its future.

You are invited to participate in a conference ***Moving forward with FPIC what have we learned in the Philippines 2020***. It will be held in a regional centre and the objectives of the event are the following:

- To listen to all stakeholder's experience of FPIC.
- To discuss and evaluate the use of FPIC in the Philippines.
- To make recommendations to Government and IPs/ICCs about FPIC for the future exploitation of natural resources in areas with many indigenous people.

National Government

The Philippine case has been said to demonstrate failure to implement the "spirit of FPIC" by complying only with the "letter of the law" (Buxton 2012). Questions remain as to whether the tightly regulated position on FPIC in the Philippines is helping or hindering a meaningful and useful FPIC process. The Philippines case demonstrates the issues that can arise when FPIC is implemented as a legalistic or bureaucratic process based on fixed procedures (i.e. a "tick-box" approach).

From the point of view of central government, read through case material provided and watch the videos. Then prepare a presentation introducing yourself and talking about:

- Key points in relation to FPIC Mining Act of 1995 and the Indigenous People's Rights Act (IPRA) (1997) and in the Philippines
- The positive and challenging aspects of FPIC process for Government in Philippines.
- Add another point from your research.

Local Indigenous People

The spirit of FPIC is that development should become accountable to peoples' distinctive cultures, priorities and unique paths to self-determination, not endanger their very survival (Carino & Colchester 2010).

From the point of view of local IPs, read through case material provided and watch the videos. Then prepare a presentation introducing yourself and talking about:

- Your people's experience of the FPIC process.
- How has it affected you and your community ?
- Has it provided a process for indigenous people's voice to be heard?
- What would you say to other IPs in areas with rich natural resources who are going to engage with the FPIC process?
- Add another point from your research.

Company representatives

Following the law – whether it explicitly provides for FPIC or not – does not provide comprehensive protections. If you want a project to run smoothly, you better pay attention to soft-law (and the various levels of normative orderings, including Tribal or Indigenous law) otherwise you run into soft-legal problems (Young 2015).

From the point of view of the company, read through case material provided and watch the videos. Then prepare a presentation introducing yourself and talking about:

- What has been your experience of FPIC processes?
- What issues have been difficult for you?
- What have you learned what advice would you give to Indigenous People and Government.
- Add another point from your research.

Local Government

Adding to the complexity, decentralisation has also contributed to intra-government conflicts over large-scale mining. Local politicians are increasingly becoming “gatekeepers of the large-scale mining sector”, using the Provisions of the Local Government Code (which establishes the system and powers of provincial, city, municipal and barangay governments in the Philippines) to oppose the entry of large-scale mining (Holden & Jacobson 2006 as cited by Verbrugge 2015). Some local governments have even issued a ban on mining activities in their territories, as occurred in the case of the Tampakan Project.

Together, this plethora of overlapping laws gives rise to a highly heterogeneous system of mineral resource governance, whereby different government levels and -agencies create contradictory and overlapping laws and administrative rules (Verbrugge 2015).

From the point of view of local government, read through case material provided and watch the videos. Then prepare a presentation introducing yourself and talking about:

- What have been the main issues for local government many kilometres from the law makers in the capital attempting to work with companies and Indigenous Peoples and FPIC?
- Think about the mine life cycle – exploration, construction, operation. How has this impacted on your work?

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Appendix A: Toolkits and guidance documents

Toolkits and guidance documents for IPs and civil society

The ***Handbook on Free, Prior and Informed Consent: For Practical Use by Indigenous Peoples' Communities*** was produced by the International Alliance of Indigenous and Tribal People of the Tropical Forests (IAITPTF) and the Indigenous Peoples Foundation for Education and Environment (I.P.F). It is meant for practical use by IPs and is largely based on the experiences of IPs in different countries, including the Philippines, Malaysia, Tanzania, Nepal, Panama, Suriname and Costa Rica. Available at: http://www.thai-ips.org/Documents/FPIC_Handbook_Final.pdf

The ***Indigenous Peoples Guidebook on Free Prior and Informed Consent and Corporation Standards*** was developed by First Peoples Worldwide (FPW), the International Indian Treaty Council (IITC) and Trillium Asset Management (Trillium). It reviews the FPIC standards and rights-based approaches of international, regional and national institutions. Available in English and Spanish from: <http://firstpeoples.org/corporate-engagement/fpic-guidebook>

The ***Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC)*** was developed by Asia Indigenous Peoples Pact (AIPP). The manual is designed for trainers and facilitators to use as a guide when conducting training with IPs on FPIC. It consists of eight modules covering: the concept and principles of FPIC; international legal instruments on FPIC; safeguard policies of international financial institutions; the national legal framework on Indigenous peoples and FPIC in the Philippines and its implementation; and case studies from Asia illustrating the experience of Indigenous peoples with projects funded by international financial institutions. The modules can be adjusted according to the type of audience. Available at: <http://www.aippnet.org/index.php/publication-sp-2697/environment/manuals/1495-training-manual-for-indigenous-peoples-on-free-prior-and-informed-consent-fpic>

Oxfam's ***Strengthening community understanding of free, prior and informed consent trainer's manual*** is a trainer's manual that was developed to help strengthen and build the capacity of community activists, community based organisations, other non-government organisations and community educators to support communities to understand FPIC. The trainer's manual is divided into three main sections:

- Section 1: Planning FPIC training programs
- Section 2: Delivering FPIC training programs
- Section 3: Other resources for trainers.

Available at: <http://www.oxfam.org.hk/en/TrainersManual.aspx>

Making FPIC Work: Challenges and Prospects for Indigenous Peoples is the fourth in a series of working papers issued by the Forest Peoples Programme. It explores the practical experiences of indigenous peoples seeking to exercise their right to FPIC. Available in English, Spanish, French and Indonesian from: <http://www.forestpeoples.org/topics/civil-political-rights/publication/2010/making-fpic-free-prior-and-informed-consent-work-chal>

Toolkits and guidance documents for companies

The 2015 **ICMM Indigenous Peoples Guide** is primarily aimed at providing guidance to companies on good practice where mining-related activities occur on or near traditional indigenous land and territory. Available at: <https://www.icmm.com/page/115445/indigenous-peoples-and-mining-good-practice-guide>

FPIC and the extractive industries: a guide to applying the spirit of free, prior and informed consent in industrial projects was developed by the International Institute for Environment and Development (IIED). The paper seeks to articulate the relevance of FPIC to company policy and practice, while also providing a balanced consideration of the relative responsibilities of government and civil society. Available from: <http://pubs.iied.org/pdfs/16530IIED.pdf>

BSR's **Engaging with Free, Prior and Informed Consent report** is based on a literature review and includes input and ideas from those who attended an FPIC Workshop for Extractives Companies held in London on June 19, 2012. It highlights key issues around interpretation and application of FPIC, state's relationship with FPIC and the linkages between FPIC, the social license to operate, and benefit sharing. Available at: http://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf

The ***Guidelines for Applying Free, Prior and Informed Consent: A Manual for Conservation International*** were created as a companion tool to Conservation International's *Indigenous Peoples and Conservation International Policy*. They were developed in collaboration with their Indigenous Advisory Group. Whilst they are not specific to the mining industry, the guidelines are user-friendly and could be adapted to a mining context. The guidelines are designed to balance the needs for broad principles, prescriptive standards, and a flexible approach for ensuring FPIC with Indigenous peoples. They consist of nine steps grouped into three stages that outline the elements required to achieve an effective FPIC process. Available from: http://www.conservation.org/SiteCollectionDocuments/CI_FPIC-Guidelines-English.pdf

Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges is a report exploring the benefits that Talisman Energy Inc. might derive and the challenges it might encounter if it were to adopt a policy to secure the FPIC of Indigenous peoples potentially impacted by its global operations. Available at: <http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy>

FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC) were developed to facilitate improvement implementation of FPIC in Forest Stewardship Council certified forests and plantations. While these guidelines are not specific to the mining sector, they answer some tricky questions in regard to the right to FPIC and clarify some key issues in terms of implementation. Available at: <https://ca.fsc.org/preview.fsc-guidelines-for-fpic.a-505.pdf>