5.0 Recognition of indigenous peoples' ancestral domains

Indigenous peoples in the Philippines. The vast majority of the estimated 12-15 million indigenous peoples (IPs) in the Philippines reside in the uplands with the remaining biodiverse ecosystems which they claim as part of their ancestral domains. Out of the 128 initially identified key biodiversity areas, 96 sites or 75 percent are within the traditional territories of IPs. Most indigenous communities, however, do not have legal recognition over their traditional lands, thus limiting their ability to freely conduct their livelihood activities and exercise their traditional resource management.

This diversity is also reflected in the country's people, consisting of various ethnic groups. There are an estimated 171 languages in the Philippines, of which 168 are living languages and three are extinct. (Grimes, ed., 1992) The numbers also represent the different cultural entities that speak these languages. Successive colonization divided the Philippine population into those who acquired power from colonization and those who lost power because they avoided colonization. The "indigenous peoples" were thus separated from the rest of the population to form a minority.

The NCIP estimates the population of indigenous peoples in the Philippines at between 12 and 15 million distributed into approximately 110 different ethno-linguistic groups or "cultural communities."

Relationship of indigenous peoples to land. Most indigenous Filipinos still live on or near their ancestral lands, which provide them with their livelihoods and help them define their identity. Indigenous peoples still adhere to the traditional view of communal ownership in regard to most of their resources, which include not only the small patches of land that serve as individual farm lots, but also the forest resources found within their ancestral domains. What essentially distinguishes the indigenous

peoples from the rest of the population is their concept of land as granted and entrusted by one Creator for everyone to harness, cultivate, sustain, and live on. This concept is distinct because it adheres to the spirit of collectivism and rejects the notion of land as private property.

The more traditional communities tend to allocate more land for communal use, devoted to controlled activities, i.e. sacred areas, conservation areas, etc. The less traditional the community becomes, individual land ownership increases, and zones designated for communal use decreases. Individual ownership gives a wider latitude to allow investments to enter and even initiate land use conversion. Hence, the demand by indigenous cultural communities (ICCs) is for the recognition of communal ownership, as individualizing ownership of the domain will lead to fragmentation of the community.[19]

Historical overview of indigenous peoples' land issues and the advent of tenurial reforms

Customary tenure. Prior to Spanish colonization, early Filipinos already had fairly developed indigenous property laws and customs for more than 20,000 years (Lynch, 1982). Customary tenure systems were often based on traditional norms and defined oral agreements, and many of these land systems continue to this day.

Commonwealth laws. During the American colonial government, Commonwealth Act 141 was enacted in 1936. It provided for the classification of public lands into "alienable and disposable" lands, "timber" lands, and "mineral" lands. The latter two types of lands are subject to alienation by the State but only through lease. Concerning ancestral lands, Section 44 of the same law (Chapter VII on Free Patents) as amended in 1964 by RA 3872, provided for members of national cultural minorities to be granted free patents over land, whether disposable or not, on condition that they have "continuously occupied and cultivated, either by himself or through his predecessors-in-interest, a tract or tracts of land, whether disposable or not since July 4, 1955." However, little is known if any "cultural minority" actually benefitted from this provision.

Commonwealth Act 141 also had provisions that governed the reservations for the settlement of tribal peoples. A Bureau of Non-Christian Tribes (BNCT) was

[19] Report of IP leaders, Workshop on Land Ownership, UP University Hotel, 17 May 2017.

established to oversee the resolution of the land issues raised by the "savages" or the non-Christian population. The BNCT took the lead in determining areas suitable for establishing non-Christian reservations whose extents were usually smaller in area than the actual ancestral domains of the indigenous community and did not include the hunting grounds and other communally owned and managed areas of the indigenous community. Little is known or documented regarding the participation of the indigenous communities in the establishment of reservations.

The advent of tenure reforms. Following the Second World War, the rising demand for resources exacted its toll on the Philippines as large-scale logging increased in order to meet the demand for timber in Japan and the United States of America. This had a devastating impact on indigenous communities who were dependent on forest resources. The Philippines lost some 9.8 million hectares of its forests from 1934 to 1988. (Liu, et. al., 1993) Roads opened by logging concessions led to the entry of migrants into the ancestral domains of indigenous communities. And as logging and encroachment reached alarming levels, indigenous communities began to agitate for land tenure reform.

Ikalahan Memorandum of Agreement No. 01 (1974). The Ikalahan communities of Imugan, Unib, Baracbac and Malico were the pioneers in the struggle to gain legal recognition and land tenure security over their ancestral lands in the Philippines. In 1974, they successfully negotiated for Memorandum of Agreement (MOA) No. 01, which legally recognized them as the stewards and managers of some 16,500 hectares of forested land. Ikalahan communities gained exclusive access to the area, although primary governance was still exercised by the government. Provisions in the MOA included the recognition of traditional land allocation, and decriminalization of the harvesting of forest resources for as long as these are for internal and individual use. This landmark agreement ushered in a new paradigm shift in defining policy for the traditional rights of indigenous peoples in public domains. The agreement had a term limit of 25 years, renewable at the option of both parties.

Integrated Forestry Program or LOI 1248. The government later began to acknowledge the role of local people in the management and protection of forestlands and resources. Letter of Instruction 1260 issued in 1982 by then President Marcos, created the ISFP. The ISFP granted stewardship agreements to qualified individuals and communities allowing them to continue occupation (access rights) and cultivation of upland areas (use and management rights), which in turn required them to protect and reforest the area. The program provided security of tenure for a period of 25 years, renewable for another 25

years, through a CSC for individuals or CCFS for indigenous communities. At least 34 indigenous communities opted to participate in the ISFP to secure a CCFS. This program appealed to many indigenous communities as it acknowledged a measure of their traditional and customary tenure practices.

However, the CCFS applied only to areas defined as part of the forest zone, and its coverage was defined through negotiations with the DENR. It covered individual and communally owned and managed areas but was limited to areas that had no other existing tenurial instrument; protected areas and parks were exempted from coverage. Resource utilization was limited to actual local use and local consumption, and harvestable resources were strictly regulated by the DENR.

DENR Administrative Order 02 – Recognition of ancestral lands and domains. In compliance with the 1987 Constitutional provision on the recognition of ancestral domains, the DENR issued AO No. 2, Series of 1993. The order stipulates the rules and regulations for the identification, delineation and recognition of ancestral land and domain claims. Provincial Special Task Forces on Ancestral Domains (PSTFAD) were created to initiate the process of verifying and processing the ancestral domain claims of indigenous communities. CADCs were issued to claims filed by indigenous communities and verified in a process of validation facilitated by the PSTFAD.

As a tenure instrument, a CADC is a "recognition certificate" issued in the names of the nominated IP representatives who hold the CADC in trust in behalf of the community. It has no fixed term and can include and cover all areas that the applicant community can prove to be part of their ancestral lands or domains since time immemorial, including inland and offshore bodies of water. And unlike earlier land tenure arrangements, the CADC recognizes the traditional leadership structure of the indigenous community to exercise governance. However, rules and policies especially on resource utilization are still subject to the "legal framework" of national laws.

The Indigenous Peoples' Rights Act of 1997. Due to the continuous and sustained lobbying efforts and advocacy of indigenous peoples' organizations and their support groups, the landmark IPRA was enacted in 1997 to recognize, protect and promote the rights of indigenous peoples. Provisions include:

Recognition of ownership rights. IPRA goes beyond the past contract-based resource management agreements between the State and the community, and recognizes the "ownership" of the indigenous communities over their traditional

territories which include land, bodies of water and all other natural resources therein.

IPRA provides for a process of titling of lands through the issuance of CADTs. The law gave jurisdiction of all ancestral domain claims to the NCIP, including those previously awarded by the DENR and all future claims that shall be filed.

The basis for filing new claims include the submission of a valid perimeter map, evidence and proof, and the accomplishment of an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). All existing ancestral domain claims previously recognized through the issuance of claims (CADCs) are required to pass through a process of affirmation for titling.

CADTs (and CALTs) are ownership tenurial instruments issued and awarded to an applicant community or clan. The effectivity of these tenurial instruments has no term limits and representatives chosen by the community act as holders of the CADT in trust in behalf of the concerned indigenous community.

Coverage of ancestral domains. The definition of ancestral domains covers forests, pastures, residential and agricultural lands, hunting grounds, worship and burial areas, and includes lands no longer occupied exclusively by indigenous cultural communities, but to which they had traditional access, particularly the home ranges of indigenous cultural communities who are still nomadic or shifting cultivators. (IPRA, Chapter 3, Section 3-a)

Principle of self-delineation. IPRA provides for indigenous communities to document and delineate their own ancestral domain claims, and to formulate their own sustainable development and management plans (ADSDPPs), based on their indigenous knowledge systems and practices. Very strict rules of survey and delineation are prescribed by IPRA. Survey grade accuracy is required in the delineation of CADT claims, and surveys should be undertaken only by a licensed geodetic engineer.

A claim for ancestral domain may include terrestrial, coastal and aquatic resources, and airspace – depending on the ability of the applicant-community to generate the required body of evidence and proof. Access is limited to the certified members of the indigenous community or clan who are listed in an official survey, which is part of the documentation of the claim. Migrants or non-IPs may be included if they are recognized and given limited rights as community members through the land tenure and allocation policies as defined in the respective ADSDPPs.

Rights to traditional governance. IPRA respects the community's right to traditionally manage, control, use, protect and develop their ancestral domains, but subject to "consistency" with national laws. The allowable resource utilization includes the right to enjoy the benefits of resources subject to existing national laws on natural resource use and exploitation. The appropriate traditional leadership structure of the indigenous community exercises governance over the CADT. However, the local rules and policies are subject to the "legal framework" of existing national laws. Access and utilization of all natural resources within the coverage of the CADT will require FPIC from the concerned indigenous community.

Implementation of IPRA and its outcomes

Early years. In its first three years of existence, the NCIP was not able to issue a single CADT; rather, it certified community consent for dozens of mining applications, an act which it had no legal power to effect under the IPRA. Initial findings of the Office of the President's Performance Audit reveal that the NCIP was ill-equipped, the staff poorly trained and lacking field experience or appropriate cultural sensitivity to handle land conflicts and issues of resource access affecting indigenous communities.

The Arroyo administration, through the NCIP, committed to fully implement the IPRA and promised to issue at least 100 domain titles by mid-2002. However, the annual budgetary allocations for the NCIP and its ancestral domain management activities remained at a paltry average of 0.07 percent of the national budget. Moreover, the situation did not improve, as the trend in budgetary allocation for Government services towards ancestral domain titling and community resources management continued to decrease. (IFAD, 2001)

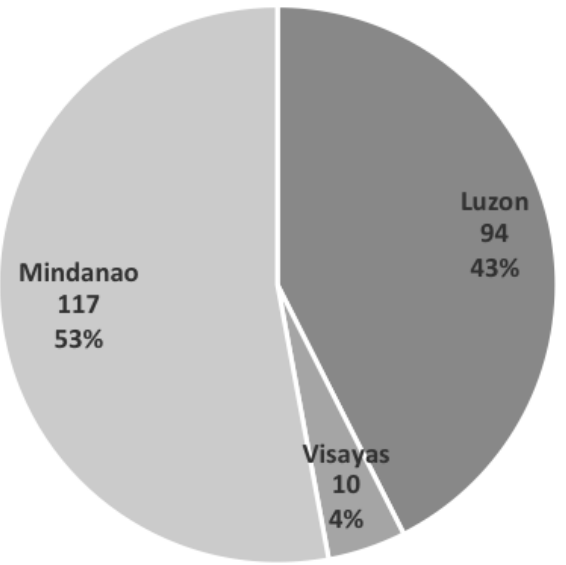
IPRA after 20 years. As of 2018, a total of 221 CADTs have been approved, covering a total area of 5,413,773 hectares of ancestral lands and waters. Some 1,206,026 individuals have directly benefitted from the tenurial security afforded by the approval of the CADTs.

Some 53 percent, or more than half (117) of the CADTs approved are in Mindanao, while 94 CADTs (43 percent) are in Luzon and 10 CADTs (5 percent) are in the Visayas.

Distribution of Direct Beneficiaries. The bulk of the indigenous peoples who directly benefitted from the approval of the CADTs came from Mindanao where a total of 687,448 IPs comprising 55 percent of the total.

Issuance of CADTs. From 2002 to 2010, 156 CADTs were approved. In these eight years, an average of 19.5 CADTs were approved per year. This figure dropped drastically in the next seven years to 9.2 CADTs/year, from 2011 to 2018, when only 65 titles were approved.

Figure 7. Approved CADTs in Luzon, Visayas, and Mindanao.



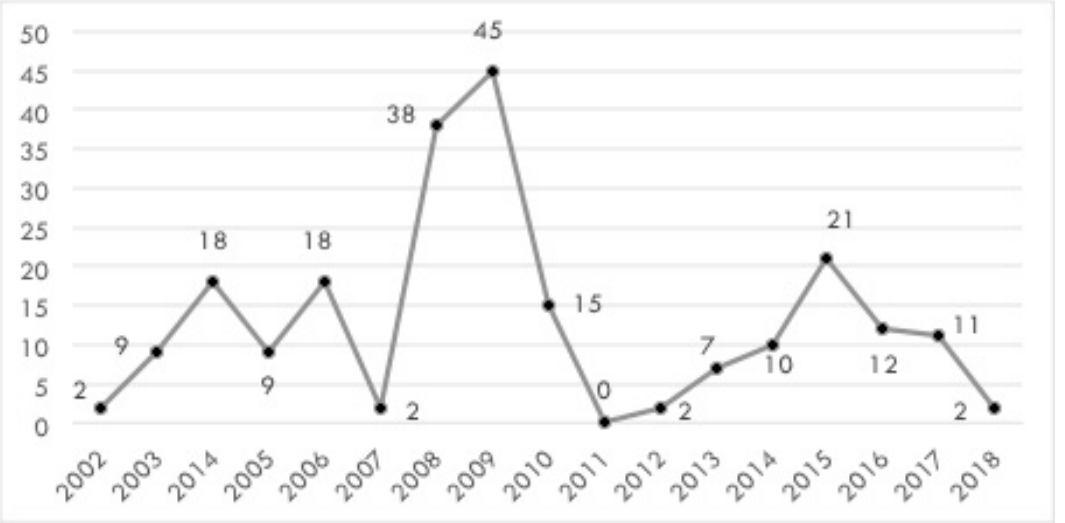
Source: NCIP, 2018

Reasons for decline. Several reasons can be cited for the noticeable drop in the approval of CADTs starting in 2011: *One:* In 2011, the NCIP initiated the drafting of the NCIP Administrative Order 4 of 2012, or the Revised Omnibus Rules on Survey and Delineation – in order to improve the efficiency of the survey and delineation process, increase safeguards against fraudulent claims and ensure the legality and acceptability of NCIP surveys. But during the review and drafting process, all CADT applications were held in abeyance.[20] *Two:* The delayed processing of CADT applications due to the non-compliance of NCIP personnel to the regular processes and the approved Work and Financial Plans (WFP) of the CADT applications. In the COA Audit Review of NCIP performance for 2011, the COA stated, that "the process of CADT application was not in consonance with the approved WFP, this resulted in the delayed processing of CADT application which deprived the IPs of their rights provided for in Sec. 7, of the IPRA" (COA, 2011).

Targets, accomplishments and delays. The approval rate of CADTs has been commendable at 80 percent of annual target over the past four years (no data was available for 2014). This may be attributed to several factors, including: increase in funding, and increased personnel skills and familiarity with the rules and processes of CADT applications. However, while the NCIP reported that it exceeded its CADT target for 2016 with a 109 percent accomplishment rate, the

[20] Interview with Commissioner C. Calzadao, 19 June 2018, UP University Hotel

Figure 8. Issuance of Certificates of Ancestral Domain Titles (CADTs), 2002-2018.



Source: Commission on Audit, Executive Summary: COA NCIP Annual Audit Reports, various years.

COA Audit Team noted in its report, "the CADT processing was very slow and was in violation of the prescribed rules under the Omnibus rules on delineation. The duration of the CADT applications ranged from 1 year and 7 months to 15 years relative to its approval resulting into delay in securing the right of ownership over their AD (ancestral domain)" (COA, 2016).

In 2017, although the NCIP reported that it fully accomplished its targets, the COA once again noted in its Report that "the delayed implementation of the delineation of the Ancestral Domain Title as provided for in the NCIP AO 4, Series of 2012 or Revised Omnibus Rules on Survey and Delineation of Ancestral Domains, deprived the protection of rights on the possession and ownership of their ancestral domains" (COA, 2017).

Policy issues affecting the issuance of CADTs

Table 13. NCIP targets and accomplishments on CADTs approved, 2013-2017.

Year	Number of CADTs Approved		Completed CADTs as % of Target
	Target	Completed	
2013	12	7	58
2015	29	21	72
2016	11	12	109
2017	11	11	100
Total	**63**	**51**	**80**

Source: Commission on Audit, Executive Summary: COA NCIP Annual Audit Reports, various years.

Effect of JAO No. 01 of 2012. In 2011, a Joint Task Force was established among the DAR, DENR, NCIP and the LRA. The main objective was to resolve overlaps in jurisdictional and policy mandates among the respective government organizations.

In January 2012, JAO 01-2012 was issued, establishing the mechanisms to prevent and resolve the contentious areas and issues at the national and field levels. The LRA is the agency overseeing the ROD, the government office that administers the Torrens system of registration of real estate ownership in the country and judicially confirms and records all land titles in government archives.

The purpose of the JAO is to facilitate and coordinate the process of registration of the Ancestral Domain/Land titles issued by NCIP with the other titling agencies: DENR-LMB, DAR and DOJ-LRA – to avoid the overlap of titles under the registration regime and to comply with section 56 of IPRA to respect prior, existing rights within ancestral domains.

The main concern of the JAO is to prescribe a process for the preparation of the map projection to identify titled lands, which might overlap with CADT/CALTs. This information is only available and under the technical jurisdiction of the DENR-LMB. The JAO covers all land, tenurial and utilization instruments that are issued by the DAR, DENR and the NCIP and the registration thereof by the LRA.

However, the implementation of JAO 1-2012 has been marred by government inertia, ambiguity of who takes the lead and the limited capacity of frontline implementors of the respective agencies to perform their expected duties as outlined.

The guidelines set forth in the JAO for the preparation of map projections was a main objective to streamline the process of CADT/CALT registrations. However, rather than facilitate the preparation of map projections, the JAO has resulted in a bureaucratic gridlock that has impeded the registration of ancestral domains by withholding the necessary information from the NCIP and thereby blocking the registration process with the LRA.

The net effect of the JAO has been injurious to the rights of IP communities. The JAO has created a regime which frustrates the registration of CADT/CALTs with the local ROD rather than facilitates it. It is worth noting that since the approval of JAO 1-2012, no CADT/CALTs throughout the country has been registered under it.

The JAO has resulted in the further marginalization of indigenous peoples. The IPs still are struggling to come up with strategies to resolve these agency-jurisdiction contested areas, realize the registration of their CADT and finally have the CADT awarded. This should not be the case if the JAO was functional. Rather, the affected IPs should be able to devote their energy and time to positive activities – i.e., improving their management over their CADT, developing their ancestral domain and livelihoods, and addressing existing threats of encroachment of illegal logging in forested areas and illegal cattle pastures in grasslands.

The non-registration of CADTs has fostered a negative attitude among local governments and national agencies to question ancestral domain rights. The never-ending prolonging of the registration and awarding of the CADT has undermined the indigenous people's rights to ancestral domain. It has encouraged the other groups and government agencies to disregard or selectively respect the rights of the IPs to their CADT area.

Out of the 221 approved CADTs to date, only 50 have so far been registered under LRA.

Uncertainty in ARMM. Since NCIP's inception in 1998, a representative of the Central Mindanao Ethnographic Region has been appointed to the NCIP. The jurisdiction of this commissioner includes several provinces and a city of the Autonomous Region of Muslim Mindanao (ARMM). However, no CADT application from the ARMM has been processed and approved by the NCIP. This is mainly due to the uncertainty and potential conflict of jurisdiction between the NCIP and the ARMM Government. As a result, thousands of indigenous Teduray, Lambangian and Manobo communities have not been able to secure CADTs over their ancestral domains. It is only in the past two years that the NCIP has taken the initiative to support the CADT claim of the Teduray-Lambangian ancestral domain claimants in South Upi, Maguindanao.

Emerging policy issues and threats

Expansion of Special Economic Zones. Special Economic Zones or ecozones consist of selected areas in the country that are transformed into highly developed agro-industrial, tourist/recreational, commercial, banking, investment, and financial centers, and where highly trained workers and efficient services will be made available to commercial enterprises.

The first ecozones in the country were established in ancestral domains. As in the case of the Mining Act, new and more powerful governance structures and planning modalities were put in place, which supplanted the existing traditional leadership structures and resource management arrangements of the affected indigenous communities. Moreover, these new ecozones did not recognize the rights and ownership of the IPs of their ancestral domains.

The Philippine Export Zone Authority (PEZA) has declared that it will pursue the establishment of at least 300 new ecozones Philippines. These ecozones will have an area ranging from 1,000 hectares up to 4,000 hectares. A cursory review of the proposed sites of ecozones shows the potential impact these will have on the land tenure of indigenous peoples.

Climate change impacts on ancestral domains. The ancestral domains of the indigenous peoples are in places marked by extreme physical and ecological conditions, covering areas from mountain ridges to reefs. Most of these areas are in high-risk zones with ecosystems that are highly sensitive to the slightest changes in climate. Over the past decade, indigenous communities have noticed extreme changes in the weather patterns that have affected their livelihoods. Traditional indicators for the start of the planting seasons have gone into disarray. The prolonged droughts and sometimes very early rains coupled with extreme typhoons have had a serious impact on the lives of many indigenous communities in the country.

Expansion of investments and mining. The bulk of the last remaining forests, natural resources and environmentally critical areas, which provide essential ecosystem services such as watersheds, are within ancestral domains. These resource-rich areas are often targeted for exploitation by investors. The staggering number of mining applications in ancestral domains attests to this fact. The emergent trend of large-scale agricultural investments in Palawan and Central Mindanao also threaten the tenurial security, access and control of indigenous communities over their ancestral domains. While some indigenous communities may have the wherewithal to engage big business, an overwhelming majority of communities do not have the capacity to actively challenge and engage those who have interest over their lands.

2015 Supreme Court decision. The 2015 Supreme Court (SC) decision on the Aberasturi vs. Unduran et.al. case could have a profound impact on the implementation of IPRA. The SC decision has effectively clipped the ability of the

NCIP to assert its quasi-judicial authority in the resolution of conflicts involving indigenous peoples and non-indigenous opponents. Citing their experiences, many IPs do not see a level playing field in the Regular Courts.

Conclusion

Some 18 percent of the total land area of the Philippines are now covered by CADTs and are considered legally owned and governed by indigenous peoples. This is by far the most commendable accomplishment of IPRA in the past 20 years. No other country in the world can lay claim to a similar accomplishment. This was achieved with very limited resources and deserves commendation.

While CADTs have been issued, many ICCs still face the problem of confronting migrants and other powerful interest groups who are in-situ or aim to utilize their ancestral domains. In many instances, the CADT holders are not able to exercise and enforce their traditional governance over their ancestral domains thus rendering the CADT as a worthless piece of paper. The IPRA is one of the most progressive asset reform laws enacted. It challenges the Regalian Doctrine, which is the bedrock of land jurisprudence in the country.

However, the NCIP's ability to deliver the promise of IPRA has been severely hampered by other policy issuances and/or agreements that clearly dilute the authority that has already been vested in the NCIP by IPRA. The case of JAO 01 and its impact on the titling process clearly illustrates this point.

However, a lot of work needs to be done to further streamline the process of the survey and delineation of ancestral domains. The current delineation process is expensive, long and tedious, focuses more on the technical acceptability of spatial data, and most often leaves very little participation to the affected communities, and rarely accommodates critical spatial information from the perspective of the local people.

For IPs, land rights are associated with territory and de facto rights to traditional self-governance that go beyond private property and legal titles. The ultimate measure of land rights is self-governance.

Recommendations

- **The NCIP should have the political will to assert the authority granted it by the IPRA.** It should not give up its authority merely based on ensuring

harmony with other government agencies. The IPRA is a special law and rightfully challenges the status quo in order to correct the centuries of injustice suffered by the IPs. The NCIP should take the lead in challenging the national legal system. The very basis of the IPRA is the Native Title, which in itself is already a strong message that IPRA does not recognize the Regalian Doctrine.

- **This study supports and reiterates the recommendations of the COA Audit team, which in its report in 2017 recommended that the NCIP:** (a) revisit the omnibus rules on the recognition and titling of ancestral domains/land on the process flow of delineation; (b) formulate policies to expedite the compliance of the concerned provincial offices to the delayed implementation on the delineation and recognition of ancestral domain/ land titles; and, (c) the submission of the necessary reports so as not to further delay the issuance of a CADT. (COA, 2017)

- **In this regard, equal effort and resources should be allocated to the strengthening of the capacities of communities to active and effectively engage other stakeholders.** This shall enable the communities to effectively enforce their traditional governance over their ancestral lands and domains. ■

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A young fisher in Marihatag, Surigao del Sur.
Photo by NFR