Strengthening the Role of Indigenous Peoples and Their Communities in Nature Conservation: A Project Ensuring the Full and Effective Participation of Indigenous Peoples in the Implementation of the Expanded National Integrated Protected Areas System

LEARNING MATERIAL

Community Royalty

JAMES ISRAEL ALIM & TIMOTHY SALOMON

Introduction

Indigenous peoples (IPs) are known as the stewards of a third of remaining forests and around 80 percent of remaining biodiversity globally. This has been attributed to the inherent relationship of IPs with nature as they know not only the physical benefits it provides but also the spiritual significance it holds as they deem it as a place where their gods and ancestors reside.

With their identity and culture intricately woven into the land they live in, IPs are also known for their indigenous knowledge, systems, and practices (IKSPs) that revolve around nature. These IKSPs, which are manifestations of indigenous science, promote environmental protection and sustainability and produce cultural expressions and cultural products that they can call their own.

From this abundance, industries turn to indigenous communities for cultural commodities, natural resources such as timber and minerals to name a few, and even for lands for their business expansion. Business negotiations then take place between buyers, which in this case are the industries but can also be an individual or the government, and sellers, which are the indigenous communities who own the properties. With this said, there should not only be safeguards for both parties but also for the ingenuity behind the product, whether tangible or intangible, being sold as well.

Traditional Knowledge and Community Intellectual Property

Borne out of the experience and relationship of IPs with nature since time immemorial, traditional knowledge or IKSPs have been developed and continues to evolve until the present. These IKSPs determine the survival of indigenous communities as it encompasses indigenous belief systems, meteorological knowledge, and customary laws that shape their forest management and protection mechanisms, agricultural and aquacultural practices, other livelihoods, and most of their community life.

IKSPs reflect how IPs invent and innovate based on their science backed by their practices that are hundreds, if not thousands, of years old. Simply put, IKSPs are indigenous communities' intellectual property.

For example, knowledge by IPs on weather and even bird migration patterns serve as their basis for agricultural cycles of certain crops and availability of certain resources in the wild. There is also their knowledge on the medicinal value of certain wild herbs and the accompanying traditional healing practices that come with it. Aside from these, IPs also have vibrant oral traditions, written literature, visual design patterns, and performance artforms that have been passed on through generations.

When commercial interests learn about these, they usually express their interest in having a hold of these community intellectual properties so they profit from them. When this happens, a negotiation between the indigenous community who is the seller and the prospect buyer of the community's intellectual property. As IPs partake into this negotiation, they must be aware of the rights and protection they have over their community intellectual property. For instance, the community must be well-aware of their right to free, prior and informed consent (FPIC), which means that they have the right to refuse.

Intellectual Property Rights and Protection

There are various international instruments that provide rights and protection on intellectual property in general and IPs' right to intellectual property in focus:

- The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) both state that all individuals have "the right to freely participate in the cultural life of the community and to enjoy the arts and to share in scientific advancement and its benefits" (UDHR Art. 27 [1] and ICESCR Art. 15 [1a, 1b]) and that they have the right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." (UDHR Art. 27 [2] and ICESCR Art. 15 [1c]).
- The Convention on Biological Diversity (CBD) has a provision on respect, preservation, and maintenance of IKSPs relevant to biodiversity conservation, promotion of wider application and involvement of IKSP holders, and encouragement of equitable benefit-sharing mechanisms in favor of IKSP holders [Art. 8j].
- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) particularly covers IPs' right to ownership, control, and protection of their cultural and intellectual property. As stated in Article 31, "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
- The International Labour Organization Convention No. 169 (ILO 169) has a provision on IPs' right to use, manage, and conserve the natural resources in their territories and that this right must be safeguarded (Art. 15 [1]).

In the Philippines, there are also policies that protect all kinds of intellectual property such as Republic Act 8293 or the Intellectual Property Code of the Philippines that states that it affirms all international conventions to which the country is a signatory. Aside from this, there are also local policies that have provisions on IPs' right to their intellectual property.

- The Indigenous Peoples' Rights Act (IPRA) states that "The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs." (Section 32). Moreover, IPRA also states that, "ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts."
- The National Commission on Indigenous Peoples (NCIP) issued an administrative order that stipulates the guidelines on research and documentation of IKSPs and customary laws (CLs). NCIP AO No. 1 Series of 2012 Section 4[f] states that, "the ICCs/IPs shall have the sole and exclusive right to determine the extent, content or manner of presentation of the information or knowledge that may be published or communicated with regard to their religious and cultural beliefs, rituals and/or ceremonial objects and heritage sites." The same AO emphasizes the right to FPIC of ICCs/IPs, which means that they have the right to allow or reject any research and documentation of their IKSPs and CLs (Section 4[d]).
- The NCIP also stipulated in its Administrative Order No 3 Series of 2012 on Free, Prior, and Informed Consent that royalties should not be treated as economic benefits, but as a social justice measure to ICCs/IPs to recognize their management of their inter-generational rights derived from their intellectual and material properties as guaranteed by domestic and international laws. In view thereof, terms and arrangements for the receipt of community royalty payments must be in favor of the needs and desires of the ICCs/IPs as articulated in a Community Royalty Development Plan (CRDP). The funds generated from the CRDP shall be used for programs and projects that redound to the well-being and benefit of the affected ICCs/IPs entitled. Transparency mechanisms shall be clearly stipulated where the ICCs/IP shall be held to account for the use of the royalty payments made with the NCIP granted monitoring and visitorial powers to supervise the implementation of the CRDP. ICCs/IPs have a right to demand periodic review of economic provisions in any CRDP with the frequency of review to be stipulated in formal legal agreement such as in a Memorandum of Agreement (MOA).
- In 2018, the Department Circular No. 2018-03-0005 policy, signed by the Department of Energy Secretary, provides formal recognition to indigenous communities as "power infrastructure host communities." With such recognition, indigenous communities are now entitled to "one centavo per kilowatt-hour (PhP 0.01/kW-hr) of the total electricity sales trust fund that is owned by the power

generators and the recipient communities." As stipulated in the Electric Power Industry Reform Act (EPIRA or RA 9136), the fund is to be allocated to "development and livelihood fund (DLF), reforestation, watershed management, health and/or environment enhancement fund (RWMHEEF) and electrification fund (EF)." Specifically, the DLF and RWMHEEF allocation for host organized ICCs/IPs is five (5) percent.

Community Royalty

There are various means to protect community intellectual property. One of the most accessible to IPs is having a royalty agreement with a buyer (usually a corporation). By definition, royalty refers to a specified amount of money paid to an owner of an intellectual property for its use. In the case of community intellectual property, there should be an agreement between the community and the buyer on the royalty amount and payment terms.

For example, if pharmaceutical companies are interested in the wild herbs found in ancestral domains and IPs' traditional knowledge on the medicinal value of such plants and they want to be granted access to such resources and knowledge, they need to have an agreement with the indigenous community in terms of access and use of community intellectual property and benefit sharing. This agreement, which must be signed by both parties, must stipulate not only the terms of access and use of resources and knowledge but also the terms in sharing the benefits the company will reap out of it, which usually comes in the form of royalty payments.

The same goes with renewable energy companies. If they want to have access and use of resources found inside IPs' traditional territories for harnessing or generating power, they need to have an agreement with concerned indigenous communities and agree upon the royalty payments for the access and use of such resources.

Other prospect buyers might be interested in other community intellectual property (e.g. visual or performance art forms, written literature, oral tradition) but as long as it involves the use of such IKSPs for profit, they should consult with the concerned indigenous communities and have a formal agreement first prior to actual access and use.

Compensation for Social and Environmental Costs

Under Philippine Law, ICCs/IPs have the right to benefit from the utilization, extraction, use and development of lands and natural resources within their ADs and **to be compensated for any social and environmental costs of such activities.**

The concerned ICCs/IPs should be extended all the benefits already provided under existing laws, AOs, rules and regulation governing particular resource utilization, extraction or development projects/activities, without prejudice to additional benefits as may be negotiated between parties.

Adequate time frames must be allotted for the negotiations of compensations for social and environmental costs.

Consent of the community is contingent on the outcome of the negotiations being to their satisfaction, and can be withdrawn at any time during the negotiation.

Stories on Spotlight: Community Intellectual Property and Royalty

Here are two stories that highlight (a) how the academe has recognized community intellectual property as seen in the case of Dr. Lourdes Cruz, a conferred National Scientist, and her engagements with the Aeta-Magbukon in Bataan in research; and, (b) how indigenous communities can earn community royalty and other benefits from community property in partnership with the local government as seen in the case of the Manobo and Bislig City government.

Aeta-Magbukon and Dr. Lourdes Cruz: "Research for the People" (Morong, Bataan)

- Dr. Lourdes Cruz espouses "research for the people" and follows participatory research methods that take into account the needs and aspirations of ICCs/IPs in the conduct of her research.
- She embedded consultation not only as a minimum requirement for FPIC in the conduct of research, but as an essential part in her data gathering and analysis.
- Aeta-Magbukon leaders and youth were engaged as local researchers and provided the opportunity to hone their research skills and to contribute to knowledge production.
- All intellectual properties were guaranteed prior authorship of the Aeta-Magbukon community through the facilitation of Dr. Cruz, and all income from the knowledge products shall be distributed in accordance with traditional decision-making on benefit-sharing.

MATRICOSO, Bislig City Government, and the Tinuy-an Falls (Bislig City, Surigao del Sur)

- The Manobo Tribal Council of Sote (MATRICOSO) governs the Tinuy-An Falls, the "Niagara falls of the Philippines" as it forms a central role in its ancestral domain as its sacred territory or Indigenous Community Conserved Territory and Area (ICCA).
- They have been providing the public the privilege to partake of the beauty of the falls through community tourism operations managed by their community tourism committee under MATRICOSO.
- Noticing the potential of the area, the city government of Bislig, Surigao del Sur wished to offer assistance to further develop the area to cater to more tourists.
- The MATRICOSO was open to collaborate with the city government and entered an agreement where a city tourism council was formed, and a MOA was signed guaranteeing 10 percent profit share for MATRICOSO and priority employment for Manobos to be selected by MATRICOSO for tour guides and forest guards.
- The city tourism council was then transformed to be the Protected Area Management Board (PAMB) of the Tinuy-An Waterfalls when the Expanded National Integrated Protected Areas System (ENIPAS) law was passed formally declaring the Tinuy-An Falls Protected landscape as a Protected Area.

The Community Royalty Development Plan

According to NCIP's Revised FPIC Guidelines of 2012, ICCs/IPs should create a Community Royalty Development Plan (CRDP) to effectively manage and use the royalties.

Among the matters that IP organizations (IPOs) should take into consideration in crafting the CRDP include: a) clarity and appropriateness of royalty management structure, b) equitability of benefit-sharing, c) transparency and accountability mechanisms, and of course, d) prioritization in terms of fund allocation.

The CRDP can be formulated with the assistance of public or private agencies **provided** that the ICCs/IPs consent to it. After the development of the CRDP, it will be verified and validated by a concerned NCIP field office and then it will be submitted to the NCIP En Banc for confirmation.

Steps in Crafting the CRDP

The CRDP development process might vary depending on the community and/or the entity assisting them but in general, the following steps are undertaken:

- *Situational Assessment:* The development of the CRDP usually begins with a situational assessment on the part of the indigenous community. This involves looking at the positive and negative aspects of the community, its strengths and weaknesses as well as the opportunities and threats that affect it.
- *Community Vision Appraisal:* Community members must also reflect on the vision they have for their community and how successful they are in the attainment of their vision based on their current situation. This will result in the identification of the challenges and needs of the community in the realization of their vision, which would inform the succeeding steps.
- *Determination of Priorities:* Based on the needs identified, the community members should then look at what can be fulfilled through the CRDP or through other means. Insights gained from this step would inform the prioritization in fund allocation.
- *Agreement on Allocation:* With the priorities identified and settled through consensus, the community needs to agree on the actual allocation of funds.
- *Agreement on Implementation:* With the actual fund allocation determined and agreed upon, the final step is the agreement on implementation of the CRDP.

Prescribed Uses of Royalty

Essentially, the use of royalty must be for the benefit of the owners of the intellectual property so it must fund programs and/or projects that will positively impact the well-being of the community. Section 62 of the NCIP's Revised FPIC Guidelines of 2012 prescribes allocations to the following categories: emergency concerns, investments (can be short-, medium-, or long-term), livelihoods and social development (required to be at least 30 percent of each and every release), education and training, cooperative development, credit, salaries, and mutual assistance among others. On the guidelines, it is also stated that the royalty must never be allocated towards repair for damages the company caused since it is their obligation to cover such item.

Transparency Mechanism

To ensure transparency in fund handling and management, the IPO is expected to prepare periodic financial reports and annual financial statements, copies of which must be submitted to the NCIP. Aside from this, financial reports should be disclosed to the general membership of the IPO on their annual assembly where they discuss community-level matters, finances included.

Practical Tips in Negotiations for Community Royalty

- Consider international and national standards as MINIMUM BASIS for computation of economic provisions.
- For any activities conducted prior to securing proper FPIC, disturbance fees are due to the affected ICCs/IPs, and must be provided on top of the community royalty fees.
- Payment for ecosystem services should be asserted as cost of doing business as the ecosystem services the ICCs/IPs provide are NECESSARY AND INSEPARABLE from the enterprise of energy production and/or water distribution for the case of public utilities.
- Review of economic provisions should be asserted on a periodic basis to enable the adaptation of rates subject to the changing standards and economic conditions that might emerge in the future.
- Transparency must be guaranteed especially for financial aspects as this is the basis for royalty payments and profit-sharing arrangements. ☐

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The Asian NGO Coalition for Agrarian Reform and Rural Development (ANGOC) a regional association of national and regional networks of civil society organizations (CSOs) in Asia actively engaged in promoting food sovereignty, land rights and agrarian reform, sustainable agriculture, participatory governance, and rural development. ANGOC member networks and partners work in 10 Asian countries together with some 3,000 CSOs and community-based organizations (CBOs). ANGOC actively engages in joint field programs and policy discussions with national governments, intergovernmental organizations (IGOs), and international financial institutions (IFIs).

33 Mapagsangguni Street, Sikatuna Village, Diliman, Quezon City 1101 Philippines
Tel: +63-2 8351 0581 | Fax: +63-2 8351 0011 | Email: angoc@angoc.org | Website: www.angoc.org

The formation of Bukluran Para sa Pangangalaga ng Kalikasan ng Pilipinas (BUKLURAN, Inc.) or the Philippine Indigenous Peoples Community Conserved Territories and Areas Consortium (Philippine ICCA Consortium) is a nationwide network of community membership-based indigenous people's organizations (IPOs) of all ethnographic types. It is premised on bringing together indigenous peoples who assert and utilize traditional governance to protect community-conserved areas. Common to its members is the shared view that indigenous peoples' survival depends on the protection of valuable knowledge systems and the ancestral lands on which we thrive and persist. Our community-conserved areas can become the ultimate driving force in the conservation of biodiversity when our rights to our land and resources are respected and recognized.

Our main purpose is to carry out and realize the full recognition and respect for the rights, governance and self-management of our ancestral lands.

c/o PAFID: 71 Malakas Street, Diliman, Quezon City, Philippines
Tel: +63-2 89274580 | Fax: +63-2 84355406

Philippine Association for Intercultural Development, Inc. (PAFID) is a social development organization which has been assisting Philippine indigenous communities to secure or recover traditional lands and waters since 1967. It forms institutional partnerships with indigenous communities to secure legal ownership over ancestral domains and to shape government policy over indigenous peoples' issues. PAFID works exclusively with the indigenous peoples' sector, specifically upon written or signed requests for assistance from indigenous communities or their representatives. PAFID envisions indigenous communities as responsible stewards of their resources.

71 Malakas Street, Diliman, Quezon City, Philippines
Tel: +63-2 89274580 | Fax: +63-2 84355406
Email: pafid@skybroadband.com.ph, pafid@yahoo.com | Website: www.pafid.org.ph