

Consultation and the Courts: Reconfiguring the Philippine Peace Process

Sedfrey M. Candelaria*

Maria Luisa Isabel L. Rosales**

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* '90 LL.M., University of British Columbia; '84 LL.B., Ateneo de Manila University School of Law. The author is the Associate Dean for Student Affairs and a professorial lecturer on Constitutional Law, Public International Law, Political Law Review, International Economic Law, Children's Rights Law, and Indigenous Peoples' Rights at the Ateneo de Manila University School of Law. He is also a Member of the GRP (Government of the Republic of the Philippines) Negotiating Panel for talks with the CPP/NPA/NDF (Communist Party of the Republic of the Philippines/New People's Army/National Democratic Front) and a former Chief Legal Consultant to the GRP Negotiating Panel for talks with the Moro Islamic Liberation Front; Head of the Research and Linkages Office and the Department of Special Areas of Concern of the Philippine Judicial Academy, Supreme Court of the Philippines; Head of the Indigenous People's Desk, Ateneo Human Rights Center; and, President of the CASA/GAL Foundation of the Philippines, Inc. The Author's previous works published in the *Journal* include *Introducing the Indigenous Peoples' Rights Act*, 47 ATENEO L.J. 571 (2002); *The Rights of Indigenous Communities in International Law*, 46 ATENEO L.J. 273 (2001); *The Legal Characterization of the Asia-Pacific Economic Conference (APEC) and the Individual Action Plans in International Law*, 44 ATENEO L.J. 405 (2000); and, *The IMF and the Philippines: Anatomy of a Third World Debt*, 36 ATENEO L.J. 18 (1992). He is also the co-author of *An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes*, 53 ATENEO L.J. 263 (2008); *The Juvenile Justice and Welfare Act of 2006: Changing Patterns and Responses for Juvenile Offending*, 52 ATENEO L.J. 293 (2007); *Legal Concept of Terrorism under International Law and Its Application to Philippine Municipal Law*, 51 ATENEO L.J. 823 (2007); *Testing Constitutional Waters: Balancing State Power, Economic Development and Respect for Human Rights*, 51 ATENEO L.J. 1 (2006); *Courts and Social Context Theory: Philippine Judicial Reform as Applied to Vulnerable Sectors*, 50 ATENEO L.J. 823 (2006); and, *The Philippines and the Convention on the Rights of the Child: Evaluating Compliance with Respect to International Standards for Procedural Rules Involving Children*, 49 ATENEO L.J. 1016 (2005).

** '11 J.D. cand., Ateneo de Manila University School of Law; Member of the Board of Editors, *Ateneo Law Journal*. She was the Associate Lead Editor of Vol. 53, Issue No. 4. The author would like to dedicate her work to Atty. Ma. Filomena R. Legaspi-Rosales and (†) Hon. Voltaire Antonio Y. Rosales.

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I. INTRODUCTION

Taking a survey of the literature on the Mindanao Conflict, it becomes evident that though most publications have thoroughly discussed its history¹ and recent developments,² none have tackled the issues that will most likely plague its future. Consultation is often mentioned but never defined. Yet in the recent Supreme Court Decision, *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)* (MOA-AD case), the validity and very existence of the consultations were highlighted as determinative of the validity of a peace agreement.³ As the matter will most likely recur time and time again, it is unfortunate that at no time did the Court venture to set parameters for the determination whether there has been sufficient consultation.

The Court's very role in the entire framework of the peace process has been left uncertain following a chain of events that defied international trends. Does the Court have the responsibility to assert its influence in the middle of the peace process? Should the Court do so given the highly sensitive nature of these dealings? When is the right time for the Court to make its presence felt? These are just some of the questions that surfaced following the turn of fate in the MOA-AD case.

A. *Scope and Limitations*

This Article gives a brief explanation of the peace process and what it entails. The Article, however, does not discuss the MOA-AD case in detail as many

1. See Nasser A. Marohomsalic, et al., *The Memorandum of Agreement on Ancestral Domain: A Commentary*, IBP J., Sep. 2008, at 71, 90-93.

2. See Vicente V. Mendoza, *The Legal Significance of the MOA on the Bangsamoro Ancestral Domain*, IBP J., Sep. 2008, at 63.

3. *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, 568 SCRA 402 (2008) [hereinafter MOA-AD case].

other works have already comprehensively taken up its history and results. It does attempt to take on a new approach to the discussion of the peace process in that it proposes that certain parameters, based on international studies and local experience, must be set to determine whether or not the requirement of consultation has been met in certain instances such as that in the MOA-AD case. Although these parameters have been adapted from the requirement of consultation in other areas of law such as environmental regulations, they are primarily intended to address the requirement of consultation in the Local Government Code.⁴

Finally, the Court's role in determining whether or not a peace process is constitutional, considering the given parameters is then briefly discussed. This Article in no way presents itself to be a comprehensive discussion of the intricate issues involved in resolving these controversies. It does, however, attempt to be the catalyst for a discussion on concrete steps towards its resolution.

B. Significance

The issue of consultation is not limited to the Memorandum of Agreement on Ancestral Domain (MOA-AD). As Local Government Units (LGUs) discover the immense power they hold and the potential to do great things for their communities with it, what was once considered a passive right to be informed of plans and projects that may affect their area is now being pushed as an indispensable requirement for the approval of any act that may affect constituents in their area.⁵ At this point, the National Government and the

4. An Act Providing for a Local Government Code of 1991 [Local Government Code of 1991], Republic Act No. 7160, § 27 (1991).

SEC. 27. Prior Consultations Required. — No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the *sanggunian* concerned is obtained: Provided, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.

Id.

5. One such example is when Kasibu Mayor Romeo Tayaban, together with the Legal Rights Center (LRC), invoked Republic Act No. 7160's provision on local government autonomy. In a press statement, LRC said that Tayaban petitioned the Supreme Court for a preliminary injunction against the operation of Oceana Gold mining company. The Court was asked to act on the company's failure to get the Local Government Unit's consent and to prevent any further damage to the community. It also wished to remind Oceana Gold to respect and comply with clear demands and to prevent any clear violation of the local autonomy of local governments as guaranteed under the 1987

Local Government seem to be rediscovering the boundaries of their responsibilities and experimenting with delimitation of their roles.

This Article hopes to serve as a point of departure for the elucidation of the LGUs' level of influence in the decision-making process. The principles underlying the discussion may also contribute to the on-going disputes regarding natural resources and the LGUs' stake.

II. PEACE PROCESS

A. Definition

The peace process is “a political process in which conflicts are resolved by peaceful means ... [It is] a mixture of politics, diplomacy, changing relationships, negotiation, mediation, and dialogue in both official and unofficial arenas.”⁶ The peace process could generate controversial documents, sought to be labeled as peace agreements, at the prenegotiation and implementation stage.⁷ It is suggested that this process works in four different areas simultaneously — the official arena, the quasi-official arena, the public peace process, and civil society.⁸

It has also been proposed that there are two stages to this process — cessation of conflict and peace building.⁹ Each stage is further subdivided into phases under the former — negotiations and cessation of hostilities; and under the latter — transition and consolidation.¹⁰ Cessation of hostilities has as one of its major objectives the signing of peace accords, while transition has the implementation of reforms to build institutions and establish

Philippine Constitution. It was claimed that the implementation of the Oceana Gold's FTAA resulted in the displacement of indigenous peoples residents in Didipio and other communities, affecting livelihood and way of life thereby rendering it illegal.

Mines and Communities, Mining row in Nueva Vizcaya rises on all fronts, *available at* <http://www.minesandcommunities.org/article.php?a=8427> (last accessed May 31, 2009).

6. Harold H. Saunders, *Pre-negotiation and Circum-negotiation: Arenas of the Multilevel Peace Process in TURBULENT PEACE* 483-96 (Chester A. Crocker, Fen Osler Hampson, & Pamela Aall, eds., 2001).
7. Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 379 (2006).
8. *Id.*
9. Nicole Ball, *The Challenge of Rebuilding War-Torn Societies*, in *TURBULENT PEACE*, 721-22 (Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, eds., 2001).
10. *Id.*

security.¹¹ These peace accords such as peace agreements often do not even get to address the root causes of the conflicts.¹²

But peace agreements can result from the different stages of the peace process and can therefore be classified as prenegotiation agreements, framework/substantive agreements, and implementation/renegotiation agreements.¹³ Prenegotiation agreements are like secret bilateral agreements in form but do not include all the interested parties.¹⁴ They are more like political pacts that set the tone for future negotiations rather than binding legal agreements.¹⁵ Substantive/framework agreements sustain cease-fires and attempt to deal with the root causes of conflict by opening the proceedings to the public and including the main groups and international participants.¹⁶ Implementation/renegotiation agreements signify that the peace process has reached its pinnacle.¹⁷ It includes all the interested parties and usually is a result of another round of discussions and horse-trading.¹⁸

Given the circumstances surrounding its birth, it cannot be emphasized enough that peace agreements fundamentally differ from ordinary contracts. The demands of the peace process change the very form and substance of elements of these agreements.¹⁹ Peace agreements may even contain “constitutions” and transitional agreements to pave the way for future agreements.²⁰

Even if they do not follow the legal form of treaties they could be considered to be legally binding international agreements.²¹ It is here, in the enforcement of such binding agreements, that the Courts should begin to assert itself. Any earlier intervention could lead to a stall in the peace process. As will be discussed below, the Court’s relationship to the peace process internationally has been one of a patient guardian. Though still keeping vigilant, it has practiced judicial restraint to the benefit of all.

B. International Epistemological Trends

11. *Id.*

12. *Id.* at 723.

13. Bell, *supra* note 7, at 376 (citing CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 20-29 (2000)).

14. *Id.*

15. *Id.*

16. *Id.* at 377.

17. *Id.* at 379.

18. *Id.* at 378.

19. Bell, *supra* note 7, at 392.

20. *Id.*

21. *Id.* at 381-82.

Most of the ideas circulating on the peace process, however, presume an international conflict. This is why the concept of an official arena is the traditional idea of peace processes involving inter-government negotiations and agreements. Though the quasi-official arena opens its doors to non-government entities that usually serve as mediators, these entities usually still have close ties with the governments concerned.

The concept of a public peace process, on the other hand, seems to have potential to be applicable to domestic conflicts such as the one experienced in the Philippines. It takes a more humanistic approach in that it takes into consideration perceptions, stereotypes, distrust, and other elements that are theorized to cause these conflicts. But even this has been applied to mostly international conflicts. The last arena wherein the peace process is suggested to work is in civil society. This arena seems to most closely depict the conflict in the Philippines in that it is comprised of networks of relationships, often between disputing groups.²² What all these concepts have in common is that the peace process has led to peace agreements in one form or another. The emerging way of thinking demands that parties reach a certain consensus. The time of war is gone and everyone is clamoring to get on (or at least appear to be attempting to do so) the road to peace.

For example, the Chiapas people (through the Zapatista National Liberation Army) and the Mexican government; the Bangladesh and the indigenous peoples of Chittagong Hills Tract; the Indian government and tribal groups from northeast India; France and the Kanaks of Caledonia; and the Guatemalan government and Unidad Revolucionaria Nacional Guatemalteca have all signed peace agreements.²³ Even secessionists in

22. *Id.*

23. *Id.* at 382 (citing Actions and Measures for Chiapas: Joint Commitments and Proposals, and related agreements (San Andres de Larrainzar Agreements), Mex.-Chiapas-Ejercito zapatista de liberacion nacional (EZLN), available at <http://www.usip.org/library/pa.html> (last accessed June 7, 2009); Bangladesh: Chittagong Hill Tracts Treaty, Bangl.-Parbattya Chattagram Jana Samhati Samiti-inhabitants of Chittagong Hill Tracts, available at <http://www.satp.org> (last accessed June 7, 2009); Assam Accord, Aug. 15, 1985, India-Assam Students Union-All Assam Gana Sangram Prishad, and other agreements, available at <http://www.satp.org> (last accessed June 7, 2009); Accord de Noumea, May 5, 1998, Fr.-Kanak, available at <http://www.gouv.nc/static/pages/outils/telechargement/telechargement.htm> (last accessed June 7, 2009) (Though the agreement was not signed, it proposed (Art. 6(5)) that a committee of signatories be set up to take into consideration opinions of local bodies consulted on the agreement, take part in the preparation of legislation, and ensure the proper implementation of the agreement. The agreement also notes that it was approved by the partners to the earlier peace accord.); Agreement on Identity and Rights of Indigenous Peoples, Mar. 31, 1995, Guat.-URNG, UN Doc.

autonomous areas, like those in the Autonomous Region of Muslim Mindanao (ARMM), sign peace agreements with states.²⁴ Georgia and Abkhazia; Moldova and Transdniestria, parties on the island of Bougainville and Papua New Guinea; and Russia and Chechnya have all signed similar peace agreements as well. These agreements, however, present new challenges to the peace process since it involves transitional situations.²⁵

C. *The Local Experience*

The Philippine Peace Process has yet to go beyond the cessation of conflict. Every time it seems that the country is about to enter into the peace building stage, new roadblocks are encountered, such as in the MOA-AD case. It is possible that if the process was allowed to take its natural course then reforms could have been implemented based on the concessions made in MOA-AD. Of course, this remains purely speculative as the Court took a preemptive measure in regard to the process.

The Court's act of issuing a Temporary Restraining Order against the Peace Panel has been criticized as a hindrance to the peace process, solidifying the Moro Islamic Liberation Front's distrust of the Government's processes.²⁶ Not only did the Court disregard years of negotiations and consultations, it only gave the matter a cursory inspection in its Decision.

The Court could have inquired further into the whole framework of the peace process in order to appreciate that the MOA-AD was merely a precursor to many more interim agreements. Although a plebiscite was

A/49/882-S/11995/256, 36 ILM 285 (1997), available at <http://www.usip.org/library/pa.html> (last accessed June 7, 2009).

24. *Id.* (citing A Question of Sovereignty: the Georgia-Abkhazia Peace Process, available at <http://www.c-r.org/accord/geor-ab/accord7/index.shtml> (last accessed June 7, 2009); Memorandum on the Bases for Normalization of Relations, May 8, 1997, Mold.-Transdniestria, available at http://www.ecmi.de/cps/documents_moldova_memo.html (last accessed June 7, 2009); Lincoln Agreement on Peace, Security and Development on Bougainville, Jan. 23, 1998, Papua N.G.-Bougainville Transitional Gov't-Bougainville Resistance Force-Bougainville Interim Gov't-Bougainville Revolutionary Army-Bougainville leaders, available at <http://www.usip.org/library/pa.html> (last accessed June 7, 2009); Bougainville Peace Agreement, Aug. 30, 2001 available at <http://www.usip.org/library/pa.html> (last accessed June 7, 2009); Truce Agreement: Principles for Determining the Fundamentals of Relations Between the Russian Federation and the Chechen Republic, Aug. 25, 1996, Russ.-Chechnya (on file with Christine Bell)).

25. Bell, *supra* note 7, at 383.

26. Soliman M. Santos, *Constitutional Challenges of Philippine Peace Negotiations*, 54 ATENEO L.J. 263 (2009).

envisioned to be conducted, this would not have put the Bangsamoro Juridical Entity (BJE) into operation. It just could not have done so. For one, the details on the BJE's governance were not yet in place. The intention of the drafters of the MOA-AD was to pave the way for future negotiations and more substantial peace agreements. Never once was the instrument treated as a self-executing document that would lead to the secession of the BJE.

There is obviously a gap between the interpretation of the Court and the peace panel of the very same provisions. But this gap would not seem so wide if both could at least agree on the MOA-AD's locus in the realm of the peace process and the spectrum of peace agreements.

To begin, the authors have taken on the challenge of proposing that if the Court had definitively set the parameters for the determining whether the consultations, one of the essential elements of a valid peace process required by the law, have taken place, then the peace process may have finally moved forward. These parameters would not have sought to be directives on the allowable manner of consultations.²⁷ Rather, they would establish a test that may contribute to expediting the peace process. It would give the next government agency tasked with negotiations a basic framework to work with while formulating its approach to the conflict. Then the authors define the Courts' relationship to the entire peace process and its role in deciding on matters such as compliance with the pre-requisites to the execution of a peace agreement.

III. CONSULTATION: JUST WHEN IS ENOUGH, ENOUGH?

A. International Guidelines

Although there are no parameters set for consultations in the peace process, there have been such guidelines set by International Organizations for the approval of projects that require their funding. Taking a page from their book, the authors seek to translate these international standards into the local barometers for consultation.

1. World Bank

The World Bank established guidelines for processing projects that may affect Indigenous Peoples in order to ensure that their funding would

27. The Court has made it clear that it cannot require that the consultations be conducted in a particular way or manner.

MOA-AD case, 568 SCRA at 473.

provide “culturally appropriate benefits.”²⁸ It established five clear steps in the process — screening, social assessment, consultation with affected communities, preparation of plan or framework, and disclosure.

Previous experiences using their consultation methods left much wanting as the consultations were often superficial. They consisted of brief site visits and were very ineffective because these contradicted the gradual and consensual collective decision-making processes common in local communities.²⁹

Their new policies seek to empower the Indigenous Peoples by making it clear that projects would not be funded if the broad support of the Indigenous Peoples through free, prior, and informed consultation is not given.³⁰ For approval, the proposed projects require —

- (a) screening by the Bank to identify whether Indigenous Peoples are present in, or have collective attachment to, the project area (see paragraph 8);
 - (b) a social assessment by the borrower (see paragraph 9 and Annex A);
 - (c) a process of free, prior, and informed consultation with the affected Indigenous Peoples’ communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project (see paragraphs 10 and 11);
 - (d) the preparation of an Indigenous Peoples Plan (see paragraph 12 and Annex B) or an Indigenous Peoples Planning Framework (see paragraph 13 and Annex C); and
 - (e) disclosure of the draft Indigenous Peoples Plan or draft Indigenous Peoples Planning Framework (see paragraph 15).
7. The level of detail necessary to meet the requirements specified in paragraph 6 (b), (c), and (d) is proportional to the complexity of the proposed project and commensurate with the nature and scale of the

28. World Bank, Revised Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html> (last accessed May 31, 2009).

29. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 183 (2004 ed.) (citing Thomas Griffiths & Marcus Colchester, *Report of a Workshop on Indigenous People, Forests, and the World Bank: Policies and Practices*, Program for Forest Peoples, Center for Information of Multilateral Development Banks, at 32 (May 9–10, 2002)).

30. *Id.*

proposed project's potential effects on the Indigenous Peoples, whether adverse or positive.

...

9. Analysis. If, based on the screening, the Bank concludes that Indigenous Peoples are present in, or have collective attachment to, the project area, the borrower undertakes a social assessment to evaluate the project's potential positive and adverse effects on the Indigenous Peoples, and to examine project alternatives where adverse effects may be significant. The breadth, depth, and type of analysis in the social assessment are proportional to the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether such effects are positive or adverse (see Annex A for details). To carry out the social assessment, the borrower engages social scientists whose qualifications, experience, and terms of reference are acceptable to the Bank.
10. Consultation and Participation. Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the borrower:
 - (a) establishes an appropriate gender and intergenerationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples' communities, the Indigenous Peoples Organizations (IPOs) if any, and other local civil society organizations (CSOs) identified by the affected Indigenous Peoples' communities;
 - (b) uses consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits; and
 - (c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation.³¹

31. The Annexes and Paragraphs herein referred to are contained in the original document.

World Bank, *Indigenous Peoples*, OP 4.10 (July 2005). For further understanding of the World Bank's guidelines, see Annex A attached to this Article.

These guidelines are flexible enough to be applicable to communities on opposite sides of the globe while providing sufficient parameters to ensure that substantive consultations are made.

Essentially, the provisions above provide that the formal requirements for consultations are that they be conducted (1) in the local language; (2) with enough time to build consensus; and (3) in a venue that would facilitate the articulation of the locals' preferences. While the substantive requirements demand that the consultations (1) inform the locals of the potential adverse effects of the project and (2) the potential positive effects of the project. In reporting these effects to the community the relative vulnerability given their particular location and culture must be taken into consideration.

2. Asian Development Bank

The Asian Development Bank (ADB) seems to have a different approach to consultations. While they conduct them they come out to be mere supplements to their positivistic approach. Their primary bases for selecting project sites are the human development index and gender index of those districts.³² They define consultation as the means for gaining stakeholder input on proposed or ongoing ADB activities.³³ They identified its primary objective to be the “[improvement of] the quality of ADB decisions by capturing the experience of ... groups, and [giving a] voice to the poor or others who have specialized sector knowledge.”³⁴

Tools are given for members of the ADB team to determine whether consultation is adequate; this guide, nevertheless, does not impose new requirements on the staff and is not subject to compliance under ADB's Accountability Mechanism.³⁵ They take into consideration the activity's scope and objectives, complexity of stakeholder interests, and other social and political factors in the setting. When the activities involve high social, economic, or environmental risks or central objectives, deeper participation is expected. When there are no or few competing interests, less is expected. If the community is considered to be politically hostile then ADB may encourage reform and build local capacity.³⁶

32. ASIAN DEVELOPMENT BANK, VOICES FROM THE FIELD: ON THE ROAD TO INCLUSION 20 (2008).

33. ASIAN DEVELOPMENT BANK, STRENGTHENING PARTICIPATION FOR DEVELOPMENT RESULTS: A STAFF GUIDE TO CONSULTATION AND PARTICIPATION 2 (2006) [hereinafter STRENGTHENING PARTICIPATION].

34. *Id.* at 33.

35. *Id.* at 55.

36. *Id.* at 44.

The substantive requirements of ADB entails that the consultation process addresses the following questions —

- Specifically, which stakeholder groups will be engaged in C&P³⁷ processes based on the stakeholder analysis?
- What decisions need to be made through C&P, and how?
- What is the anticipated breath [sic] and depth of stakeholder engagement at each stage of the project cycle?
- How will C&P be linked to the SPRSS and safeguards requirements?
- How will C&P be used during implementation?
- What C&P methods will be used (Tool 3: Selecting C&P Tools and Methods)?
- What is the timeline for C&P activities?
- How will C&P methods be sequenced?
- How have roles and responsibilities for conducting C&P activities been distributed among the resident missions, consultants, NGOs, and the executing agency?
- Are C&P facilitators/experts required?
- What will the C&P plan cost to implement and what budget will be used (usually project preparatory or other technical assistance, and possibly part of the loan)?³⁸

The formal requirements of ADB are (1) that the stakeholders, based on stakeholder analysis, are present; (2) that experts or facilitators from NGOs are present; and, (3) when serious differences between project sponsors and affected indigenous peoples are evident with regard to project design and implementation, adequate time must be allowed for the government or the project sponsor to resolve these differences, before ADB commits its support for the project.³⁹

B. Domestic Guidelines

I. Consultation Guidelines for the Clean Development Mechanism

Using the various requirements stated in the Departmental Administrative Orders released by the Department of Environment and Natural Resources

37. Consultation and Participation.

38. STRENGTHENING PARTICIPATION, *supra* note 33, at 29-30. For further understanding of the ADB's guidelines, see Annex A attached to this Article.

39. *Id.* at 50-51.

(DENR), parameters were set for the determination whether the consultation with the public can be considered as acceptable. This would then determine whether or not the project proposed under the Clean Development Mechanism should be approved.

The parameters are as follows —

- Adequate announcement or invitation of properly identified stakeholders;
- Democratic agreement on procedures and guidelines for consultation, or when this is not possible, clear and transparent procedures and guidelines for consultation;
- Adequate preparation by the project proponent for the consultation, as reflected in the quality of information provided to stakeholders;
- Designation of an acceptable facilitator for the consultation;
- Adequate representation of traditionally-ignored social categories that include, among others, women, indigenous communities and vulnerable groups (such as the youth, elderly, and disabled) so that their concerns and rights relative to what is legally mandated for them could be protected and considered in the project;
- Choice of a place and time for the meeting that are convenient, and in the case of the venue, accessible and neutral, with a view towards maximizing participation; and
- Comprehensive presentations that are clearly communicated in the language that would be easily understood by the public.⁴⁰

These seem to be the only formally organized criteria for consultation under Philippine law. Though they give an excellent starting point, this set only takes into consideration the proprietary aspect of the MOA-AD. Consultations in incidents such as that must also take into consideration the sovereign aspects of the stipulations in these peace agreements. It must take note of the intricacies of proceedings of that nature. It is these very intricacies that the Court overlooked in making its decision and dismissing the consultations conducted as if they never happened.

2. Proposed Guidelines and Evolving Models of Consultative Processes

40. Department of the Environment and Natural Resources, Interim Guidelines on the Conduct of Stakeholders' Consultation (Aug. 18, 2006).

(i) *In General*

Reconfiguring the existing guidelines to suit the needs of a peace process, the authors propose that for a consultation to be considered valid, it must comply with the following formal requirements —

- (1) before the consultation is announced, a profile of the community must be made indicating distinct characteristics of the community such as the internal social structure, dominant personalities, customs, and dialects spoken in the area;
- (2) an invitation to participate must be posted in two public areas in each of the communities concerned and published for twice in the span of two weeks in a newspaper of general circulation;
- (3) the consultation must be collectively attended by at least a simple majority of the entire population of the communities concerned;
- (4) the consultation must be held on easily accessible public property in each of the affected areas;
- (5) the consultation must be conducted in the local dialect;
- (6) the facilitator of the consultation must be mutually agreed upon by representatives from the government and the concerned communities; and
- (7) a written report detailing the matters discussed must be submitted to a designated government agency within 10 days of its conclusion.

The substantive requirements of the consultation are simply that at the very least (a) the potential adverse effects of the proposal given the particular socio-cultural, economic, and political situation of the community; and (b) the potential positive effects of the proposal given the same factors are discussed.

The formal requirements would hopefully ensure that the concerned parties are fully informed of their rights or at the very least substantial effort was made to inform them of such rights. Then when consultations are held on public property and in the local dialect, the interested parties, no matter how destitute or politically powerless, are given a concrete opportunity of being informed and of expressing their concerns. The presence of a facilitator chosen by all parties and the subsequent written report would better secure the legitimacy of the proceedings. By requiring that the consultations take some legal form at a given time, the Courts will be able to properly assess the progress of the peace process. It will enable it to stage its entry into the process with reason and reassure non-state actors, who already mistrust of the government and its legal processes, that their chains are not simply being yanked.

(ii) *Evolving Models*

(a) Philippine Ecumenical Peace Platform (PEPP) Dialogue

Religious leaders have taken the initiative to breathe new life into the negotiations for peace between the National Democratic Front of the Philippines (NDF) and the Government of the Republic of the Philippines (GRP) peace panels.⁴¹ Archbishop Antonio J. Ledesma has identified three substantive requirements for dialogue used by the PEPP: (1) as part of the agenda, local communities must define their values (regarding the culture of peace, respect for human rights, and the value of peace dialogues) regardless of who is in power on either side; (2) there must be a presumption of good faith by both parties in order to maintain neutrality and balance; and (3) the root problems of the conflict, like agrarian reform, must be tackled in the dialogue and result in the forging of preliminary agreements.⁴²

He also pinpointed two formal requirements: (1) a panel of knowledgeable persons or academics or experts on the history of the conflict must be present; and (2) civil society stakeholders must also be present to open up the process to players at the grassroots level.⁴³

This framework progresses from the cold standards set by International Organizations and acknowledges the central role faith plays in the peace process. It concedes to the softer side of a seemingly political-economic problem. In bringing in long-ignored key personalities, such as Muslim and Christian women, the process utilizes innovative solutions to the conflict.

(b) Bishops-Ulama Conference (BUC)

In the recent years, the bishops of the Catholic Bishops' Conference of the Philippines (CBCP) and the *ulamas*⁴⁴ have been meeting regularly to thresh out issues on peace and development.⁴⁵ President Gloria Macapagal-Arroyo tasked the BUC to craft a framework for peace and the BUC accepted this

41. Antonio J. Ledesma, *On the Role of Religious Communities in the Peace Process*, 54 ATENEO L.J. 276 (2009).

42. *Id.*

43. *Id.* at 277-78.

44. *Ulamas* are "the body of Mullahs (Muslim scholars trained in Islam and Islamic law) who are the interpreters of Islam's sciences and doctrines and laws and the chief guarantors of continuity in the spiritual and intellectual history of the Islamic community."

WordNet, Search for *ulama*, available at <http://wordnetweb.princeton.edu/perl/webwn?s=ulama> (last accessed June 9, 2009).

45. Ledesma, *supra* note 41, at 276.

mission.⁴⁶ The “deep consultative process”⁴⁷ requires that the views of (1) the stakeholders form the private sector, (2) the LGUs, and (3) those that may be affected in any way be taken into consideration when discussing the economic-development agenda of the Philippines.⁴⁸

In a recent development, Fr. Albert Alejo, S.J., stated that the launch of *Konsult Mindanaw* has opened up the consultation process to everyone — Muslims, Christian, and Lumads alike.⁴⁹ The process of the project includes “the youth, women, urban poor, professionals, business practitioners, rural poor, peasants, academe, *ulama* (for Muslims), Madrasah (for Muslims), traditional leaders (for Muslims and Lumad), religious leaders, the non-government organizations (NGOs) and the internally displaced persons (IDPs) or ‘bakwet,’” as well as artists, armed groups, media practitioners, and children.⁵⁰ These consultations were slated to take place from April until June of 2009.⁵¹

These consultations would not replace the formal peace talks between the GRP and the MILF, which would still be closed off from these groups. Their input will only be taken as “suggestions [that] might help to hasten the peace process.”⁵²

Combining the experiences of various actors in the peace process, consultations undertaken by the BUC have begun to stay conscious of those who are talking and what they are talking about.⁵³ This evolving model’s substantive requirements for valid consultations are: (1) significant issues like land ownership must be addressed;⁵⁴ (2) the involvement of state, non-state, and global actors must be admitted;⁵⁵ (3) psychology must be used to understand the deep-seated resentment for the other, which affects this

46. Santosh Digal, Arroyo taps Bishop-Ulama Conference to lead initiative for peace in Mindanao, *available at* <http://www.cbcnews.com/?q=node/4281> (last accessed June 9, 2009).

47. *Id.*

48. *Id.*

49. Mark S. Ventura, Bishop-Ulama Conference launches Konsult Mindanaw, *available at* <http://www.cbcnews.com/?q=node/8210> (last accessed June 9, 2009).

50. *Id.*

51. *Id.*

52. *Id.*

53. Cristina Montiel, *Peace Negotiations as a Subjective Conversation between Groups*, 54 ATENEO L.J. 287 (2009).

54. *Id.*

55. Rudy B. Rodil, *Conflict between the Moro Liberation Fronts (MIM-MNLF-MILF) and the Government in Historical Perspective*, 54 ATENEO L.J. 256 (2009).

dialogue;⁵⁶ (4) a common definition for peace must be found and used as a goal;⁵⁷ (5) the consultation must regularly oscillate between state and non-state actors; (6) the consultation must be conscious of the stage of development of the state;⁵⁸ and (7) the dialogue must be premised on the idea that it is community-based yet it keeps in mind the welfare of all Filipinos.⁵⁹

The only formal requirements that emerged from these discussions are that (1) the consultations must be held locally and involve the LGUs as well as civil society, including religious sectors;⁶⁰ (2) the consultations be spearheaded by interfaith dialogue and cultural awareness;⁶¹ (3) the consultations be coupled with investments and basic infrastructure development;⁶² (4) the consultations be safeguarded by mutual security arrangement to keep the peace;⁶³ and (5) the consultations must end all forms of armed rebellion.⁶⁴

As indicated in the title of this Subsection, these models are still evolving — they are a work in progress. Only time and experience can tell requirements could surface as being imperative for any genuine dialogue to take place.

IV. COURTS: WHAT ARE THEY TO DO?

Aware of the precarious nature of the peace process, Courts, more often than not, have opted out of deciding cases so early in the cycle since it would question the constitutionality of another branch of government's

56. *Id.*

57. Montiel, *supra* note 53, at 290.

58. *Id.*

59. Camilo Miguel M. Montesa, *Is There a New Government Paradigm in Addressing Internal Armed Conflicts?*, 54 *ATENEOLJ* 280, 282 (2009).

60. President Gloria Macapagal Arroyo, Speech during the Launching Ceremony of the Bishops-Ulama Conference - Armed Forces of the Philippines - Philippine National Police (BUC-AFP-PNP) Forum for Peace (Sep. 12, 2007), *available at* http://www.ops.gov.ph/speeches2007/speech2007_sep12.htm (last accessed June 9, 2009).

61. *Id.*

62. *Id.*

63. *Id.*

64. Montesa, *supra* note 59, at 284.

actions and unsettle the parties.⁶⁵ Writing peace agreements is difficult enough without having the Court taking its vigilance to new heights.⁶⁶

A. International Experience: Courts and the Peace Process

In the past, other jurisdictions have limited the Court's role to dealing with the after effects of the peace process.⁶⁷ Courts do not wield the executioner's axe in the international realm. The Bosnian government even had to restructure its judiciary and revoke the death penalty because of concessions made in peace agreements.⁶⁸ In Rwanda, it was not the domestic Courts who were tapped to contribute to the peace process; rather, the United Nations was brought in to guard the transitional stages.⁶⁹

Although it is acknowledged that the State must take the reigns of these delicate negotiations, this has been done so through ministries created specifically to guard the peace process.⁷⁰ In a survey of the peace processes around the world, not once is the Court burdened with the specialized task of seeing the peace process through or intervening for the people in the middle of it. Courts have simply been patient watchdogs, pouncing only once it is clearly necessary.

This is because peace agreements are seen as mechanisms to secure durable peace.⁷¹ If Courts are constantly looking over the shoulder of the drafters to these agreements then none of the parties will feel at ease. The shared interest in avoiding hostilities does not guarantee peace. Peace requires trust and cooperation, which can only be fostered by "reducing uncertainty about actions and intentions, and by controlling accidental violations."⁷² The reservation that any sort of concessions made between the parties may be thrown out in the middle of the process by the Court is not at all conducive to peace.

65. JOAQUIN G. BERNAS, *THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES* 860-61 (1996 ed.).

66. See Andrew Filbert, *The Art of the 'Impossible': Writing Peace Agreements During War*, 36 PS: POL. SCI. & POL. 765 (2003).

67. Jeremy Sarkin, *The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. L. 143-72 (2001).

68. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 583 (2002).

69. *Id.* at 626-27.

70. JOHAN GALTUNG, *50 YEARS: 100 PEACE & CONFLICT PERSPECTIVES* 14 (2008).

71. Virginia Page Fortna, *Scraps of Paper? Agreements and the Durability of Peace*, 57 INT'L ORG. 337, 338 (2003).

72. *Id.* at 340.

B. The Court's Role as Suggested by Christine Bell

This is why Christine Bell has attempted to stabilize the Court's involvement in the peace process. She asserts that the Courts have a dual-edged role in that though they lend legitimacy to the peace agreements,⁷³ they also hold in their hands its destruction amidst political support for it.⁷⁴ This, however, does not mean that they should prevent peace agreements from being signed. They may enter when its enforcement goes beyond the scope of the instrument. Preventing peace agreements from coming to fruition, however, would be a usurpation of the executive and legislative powers.

The Courts are meant to enforce its provisions. They draw their jurisdiction from it.⁷⁵ When domestic courts examine the political and legal questions involved in a peace agreement, they do so only after an agreement has been entered into.⁷⁶ In doing so they attempt to determine whether or not this document is in the proper legal form, whether it is a foundational interpretative document or a treaty, and whether it is a political document that must be discussed or one which deals with purely political questions and must therefore be set aside.⁷⁷ They have the capacity to "extend and develop the agreement's meaning where they find it to be part of the legal framework."⁷⁸

The Court's role in ensuring that the peace agreements are upheld and enforced by the executive as envisioned in the instrument is of vital importance since "the state has attached its reputation to the agreement and has a self-interest in the integrity of the international legal system."⁷⁹ It should not be forgotten that the purpose of these agreements is to stop the massive bloodshed. When the Court comes in but fails to provide clear and unequivocal guidelines on how to proceed with the peace process, the non-state actors retreat from the process they did not trust in the first place. The birth of a peace agreement is a step forward and its invalidation is two steps back.

If binding court decisions cannot be turned to for the legalization of peace agreements then these agreements could be treated as results of arbitration proceedings. This means that a framework of hybrid legal pluralism must be adopted wherein an actor, like the Courts, cannot claim a monopoly over the authority to sustain a peace agreement. It must

73. Bell, *supra* note 7, at 387.

74. *Id.* at 389.

75. *Id.*

76. *Id.* at 388.

77. *Id.*

78. *Id.* at 389.

79. Bell, *supra* note 7, at 386.

acknowledge that the dynamic processes for peace involve the joint efforts of state and non-state actors — locally and internationally.⁸⁰

The presence of these other parties is important when internal conflicts are involved, the process must transcend the normal channels “so as to address the illegitimacy of the preagreement legal and political order.”⁸¹ It is in these types of conflicts that the legitimacy and role of law goes unacknowledged by the other parties to the agreements. If the Court is to insist that one flick of its pen can render all other efforts nugatory then these non-state actors will find no difficulty in upholding *status quo* and simply continue to operate outside the law. They never recognized the legitimacy of the government and its processes anyway, so the Court’s action would just give them another reason to go on as they did before.

According to Bell, what is needed is a “judiciary that is willing and able to engage with the legal and political nature of transition and the implications of its own role”⁸² using a “transformative approach to constitutional interpretation.”⁸³ What she is calling for is a forward-thinking Court that uses the law to allow its people to thrive.

The problem, however, seems to be that judges who do take on this challenge are often accused of taking off the blinds of justice and stepping into the realm of politicking. And this may very well cast a shadow upon the judiciary and the judicial function. Also, the intermittent nature of the peace process would be a test of the capacity of key state actors to act outside the constitution while still performing a judicial role (one essentially constitutional).⁸⁴

C. Domestic Reality

This new role of the judiciary in an ever-evolving context has yet to be grasped by the Judiciary. In determining the Philippine Court’s role, it is essential that the framework of the entire Peace Process be kept in mind. As mentioned earlier, the Peace Process has two stages and four phases. Once placed in its context it would be clear where the judiciary stands and how it should act.

For example, in the MOA-AD case the Court found the Peace Agreement to be self-executing. Although they could not classify it as “an international agreement or unilateral declaration binding on the Philippines ... [the] act of guaranteeing amendments is, by itself, already a constitutional

80. *Id.* at 402-06.

81. *Id.* at 406.

82. *Id.* at 393.

83. *Id.*

84. *Id.*

violation that renders the MOA-AD fatally defective.”⁸⁵ The Court found that these guarantees rob the people of the Philippines of their constitutional right to directly participate in the decision-making process through the process of initiative or indirectly through Congress.⁸⁶

But the MOA-AD actually amounted to an incomplete peace agreement since it merely provided for further agreements.⁸⁷ It was simply an attempt to develop the peace process and start the sequence of issues to be taken on.⁸⁸ Therefore, its validity should not have been considered a justiciable controversy. By taking on this political question, the security given by the separation of powers is threatened.

I. Justiciability

In a case involving the DENR and ancestral land claims, the Court made it clear that it could not make a ruling on the perceived threat that DENR may approve the application for certificates of ancestral land claim.⁸⁹ The Court even defined a justiciable controversy as

a definite and concrete dispute touching on the legal relations of parties having adverse legal interests which may be resolved by a court through the application of a law ... [C]ourts will not touch an issue involving the validity of a law unless there has been a governmental act accomplished or performed that has a direct adverse effect on the legal right of the person contesting its validity.⁹⁰

In *PACU v. Secretary of Education*,⁹¹ the Court also declined to strike down a regulation issued by the Secretary of Education since the Petitioners had suffered no wrongdoing as a result of the law therefore they could not grant them any relief from it either.⁹²

But in the MOA-AD case the Court declared that —

[t]he contents of the MOA-AD is a matter of paramount public concern involving public interest in the highest order. In declaring that the right to information contemplates steps and negotiations leading to the

85. MOA-AD case, 568 SCRA at 522.

86. *Id.* at 521.

87. *Id.* at 463.

88. *See Bell, supra* note 7, at 391.

89. *Cutaran v. Department of Environment and Natural Resources*, 350 SCRA 697, 705 (2001).

90. *Id.* at 704-05 (citing VICENTE G. SINCO, PHILIPPINE POLITICAL LAW 360 (1962 ed.); *Tan v. Macapagal*, 43 SCRA 678 (1972)).

91. *PACU v. Secretary of Education*, 97 Phil. 806 (1955).

92. *Id.* at 810.

consummation of the contract, jurisprudence finds no distinction as to the executory nature or commercial character of the agreement.⁹³

In doing so, the Court failed to appreciate the distinct nature of peace agreements as discussed by Bell, an author the Court itself cited in making its decision.⁹⁴ It took the peace agreement out of its context (in the peace process framework) and prematurely terminated this round of the peace process undertaken by the executive branch.

2. Separation of Powers

Although the Supreme Court has the power to declare an international or executive agreement unconstitutional,⁹⁵ the Court generally does not touch the issue of constitutionality unless it is truly unavoidable.⁹⁶ The power of judicial review has its limitations in scope in that only controversies and actual cases (their very *lis mota*) can be taken up.⁹⁷ The Court should not take on questions of wisdom, justice, or expediency of legislation.⁹⁸

Judicial restraint benefits the public by allowing the political processes to take its natural course. In fact, “[t]he doctrine of separation of powers calls for each branch of government to be left alone to discharge duties as it sees fit.”⁹⁹ In this instance, however, the Court declared the executive to have acted in grave abuse of its discretion¹⁰⁰ even when the pertinent consultation process was not carried out and declared that the very concept underlying this one agreement, in an acknowledged series of agreements,¹⁰¹ is unconstitutional.¹⁰²

3. Political Question

The Court made a decision on the wisdom of the principles chosen by the executive, a matter classified as a political question, since it determined that it was a matter of public concern. But it is well established that the Courts do

93. MOA-AD case, 568 SCRA at 467-73.

94. *Id.* at 503.

95. PHIL. CONST. art. VII, § 5 (2) (a) – (b).

96. *Sotto v. Commission on Elections*, 76 Phil. 516, 522 (1946).

97. *Francisco v. Nagmamalaskit na mga Mananaggol ng mga Manggagawang Pilipino, Inc.*, 415 SCRA 44, 121(2003).

98. *Id.*

99. *Guingona v. Court of Appeals*, 292 SCRA 402 (1998) (citing *Planas v. Gil*, 67 Phil. 62, 73 (1939)).

100. MOA-AD case, 568 SCRA at 473.

101. *Id.* at 463 & 519.

102. *Id.* at 477-508.

not have the power to decide on matters that involve a political question.¹⁰³ Political questions are “those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government.”¹⁰⁴

Political questions include such areas as the conduct of foreign policy, the ratification of constitutional amendments, and the organization of each state's government as defined in its own constitution. The political question doctrine, as part of the concept of justiciability, is in place to set a limit on what could otherwise be an adamant force. It secures the fences between the three branches of power. It allows the Court to dismiss cases even if they have already acquired jurisdiction or to apply its wisdom in the choice of issues it takes on. As discussed above, appropriate matters are called justiciable controversies and may proceed to court. Political questions are not regarded as appropriate matters; they are not justiciable and generally, should be dismissed.¹⁰⁵

Admittedly, the issues involved are of public concern.¹⁰⁶ Nonetheless, the Court could have considered more extensively the sensitivity surrounding the proceedings. The overall plans of the MOA-AD were far from being enforced at that point. The plebiscite that was to be conducted would have just paved the way for further negotiations. This would have been proof of the government's sincere intention rectifying the parlous Bangsamoro dilemma.

Following the Court's long line of decisions on justiciability, separation of powers, and political questions and considering the unique situation of peace agreements, it is but logical to conclude that the Court must only take its place as the final arbiter of justice nearing the end of the peace process. The peace process is fragile and the vigilance of the Court easily sets off the balance of power carefully cultivated over years of negotiations.

V. CONCLUSION

*[T]he road to control human conflicts passes through knowledge acquired the same way as the knowledge with which we control nature.*¹⁰⁷

103. *Cutaran*, 350 SCRA at 705 (citing ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 257-59 (1998 ed.)).

104. *Tañada v. Cuenco*, 103 Phil. 1051, 1067 (1965).

105. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); 1 JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 404-08 (1987).

106. MOA-AD case, 568 SCRA at 467.

107. GALTUNG, *supra* note 70, at 14.

The peace process is plagued with uncertainties. The actions of those who are not even intrinsically privy to the drafting of the peace agreements could flush out years of progress in the blink of an eye. But nothing makes the discourse on peace more trepidatious than the lack of information on either side of the table. Dialogue is simply impossible when two parties are not even clear on the premise of the entire dispute.

Courts should operate within the dynamic framework of the peace process. The unique nature of the peace process demands a flexibility in approach. The lone fact that non-state actors do not recognize the Philippine government and operate outside the constitutional framework should alert the Court of the novelty of the case. The locus of the MOA-AD in the spectrum of peace agreements should have forewarned the Court of the political intricacies of its judgment.

Once the pertinent consultations have taken place and the peace process has considerably gone past the negotiation stage, then the Court may assert itself without fostering the deeply-rooted feelings of suspicion of the government's ulterior motives. These small steps will then begin to chip away at the obstacles to peace in the Philippines.

In situating the MOA-AD in the framework of a peace process and pinpointing its locus in the spectrum of peace agreements, the authors aim to set a common ground to begin this critical dialogue. In setting the parameters for valid consultations, the authors hope to contribute to establishing a premise on the validity of any peace agreement entered into in the future for this dialogue. And in defining the role of the Court, the authors aspire to crystallize a government process adapted to the peculiar circumstance of peace negotiations.

ANNEX A

*OP 4.10, Annex A - Social Assessment*¹

These policies were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject.

OP 4.10 – Annex A

July 2005

The breadth, depth, and type of analysis required for the social assessment are proportional to the nature and scale of the proposed project's potential effects on the Indigenous Peoples.

The social assessment includes the following elements, as needed:

A review, on a scale appropriate to the project, of the legal and institutional framework applicable to Indigenous Peoples.

Gathering of baseline information on the demographic, social, cultural, and political characteristics of the affected Indigenous Peoples' communities, the land and territories that they have traditionally owned or customarily used or occupied, and the natural resources on which they depend.

Taking the review and baseline information into account, the identification of key project stakeholders and the elaboration of a culturally appropriate process for consulting with the Indigenous Peoples at each stage of project preparation and implementation (see paragraph 9 of this policy).

An assessment, based on free, prior, and informed consultation, with the affected Indigenous Peoples' communities, of the potential adverse and positive effects of the project. Critical to the determination of potential adverse impacts is an analysis of the relative vulnerability of, and risks to, the affected Indigenous Peoples' communities given their distinct circumstances and close ties to land and natural resources, as well as their lack of access to opportunities relative to other social groups in the communities, regions, or national societies in which they live.

The identification and evaluation, based on free, prior, and informed consultation with the affected Indigenous Peoples' communities, of measures necessary to avoid adverse effects, or if such measures are not feasible, the identification of measures to minimize, mitigate, or compensate for such effects, and to ensure that the Indigenous Peoples receive culturally appropriate benefits under the project.

1. World Bank, OP 4.10, Annex A – Social Assessment, *available at* <http://go.worldbank.org/JZP1C5JRQ0> (last accessed May 31, 2009).

ANNEX B

Tool 5: Tips for Effective Consultation²

The main objective of consultation with CSOs, governments, the private sector, and residents of affected communities is to improve the quality of ADB decisions by capturing the experience of these groups, and give voice to the poor or others who have specialized sector knowledge.

Added objectives of consultations are to understand the different needs of different population groups, get executing agencies more involved to support effective implementation, set the stage for downstream C&P activities, and support governments in becoming more transparent and involving citizens in decisions that affect their lives.

Preparations:

- Plan carefully and make sure adequate time and resources are available to support the consultations (refer to Tool 2: Developing a C&P plan).
- Be clear from the outset about what the C&P process is attempting to achieve in terms of specific outputs and their indications.
- Work closely with resident missions.
- Engage governments to the fullest extent possible, encouraging a spirit of collaboration and country ownership.
- Ensure diversity and representativeness among stakeholders (e.g., do not invite only those known to be favorable toward the project under consideration).

Provide information and feedback:

- Provide information to key groups on the process and timeline before consultations begin in the local language and style.
- Ensure ample time and resources for quality translation.
- Keep groups fully informed of the process.
- Maximize transparency, making as much information available as possible.

Conducting the Consultation:

- To avoid unrealistic expectations, be clear from the start of the meeting what is, and what is not, under consideration; state clearly what ADB can do and what it can only influence.

2. ASIAN DEVELOPMENT BANK, STRENGTHENING PARTICIPATION FOR DEVELOPMENT RESULTS: A STAFF GUIDE TO CONSULTATION AND PARTICIPATION 33-35 (2006).

- Make sure that the group rules are clear and acceptable and that views are seriously considered.
- Use a skilled facilitator where necessary; in many cases, a local facilitator will be best but in others, a local/international facilitation team may be better.
- Do not dominate the discussion; listen carefully and note experience and opinions.
- Focus on future actions where possible.

Follow-up:

- Send participants a summary of the meetings shortly afterward and invite corrections and changes.
- Give further feedback on which points have been accepted and which ones have not been and explain why.
- Follow up after the process concludes, especially if there appear to be opportunities for added collaboration.