IV. THE PROVISIONS OF THE IPRA DO NOT CONTRAVENE THE CONSTITUTION.

A. Ancestral Domains and Ancestral Lands are the Private Property of Indigenous Peoples and Do Not Constitute Part of the Land of the Public Domain.

The IPRA grants to ICCs/IPs a distinct kind of ownership over ancestral domains and ancestral lands. Ancestral lands are not the same as ancestral domains. These are defined in Section 3 [a] and [b] of the Indigenous Peoples Right Act, *viz*:

> "***Sec. 3 a) Ancestral Domains***. -- Subject to Section 56 hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators;
>
> ***b) Ancestral Lands***.-- Subject to Section 56 hereof, refers to land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots."

Ancestral domains are all areas belonging to ICCs/IPs held under a claim of ownership, occupied or possessed by ICCs/IPs by themselves or through their ancestors, communally or individually since time immemorial, continuously until the present, except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings with government and/or private individuals or corporations. **Ancestral domains comprise lands, inland waters, coastal areas, and natural resources therein and includes ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable or not, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources.** They also include lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators.[116]

Ancestral lands are lands held by the ICCs/IPs under the same conditions as ancestral domains except that these are limited to lands and that these lands are not merely occupied and possessed but are also utilized by the ICCs/IPs under claims of individual or traditional group ownership. These lands include but are not limited to residential lots, rice terraces or paddies, private forests, swidden farms and tree lots.[117]

The procedures for claiming ancestral domains and lands are similar to the procedures embodied in Department Administrative Order (DAO) No. 2, series of 1993, signed by then Secretary of the Department of Environment and Natural Resources (DENR) Angel Alcala.[118] DAO No. 2 allowed the delineation of ancestral domains by special task forces and ensured the issuance of Certificates of Ancestral Land Claims (CALC's) and Certificates of Ancestral Domain Claims (CADC's) to IPs.

The identification and delineation of these ancestral domains and lands is a power conferred by the IPRA on the National Commission on Indigenous Peoples (NCIP).[119] The guiding principle in identification and delineation is self-delineation.[120] This means that the ICCs/IPs have a decisive role in determining the boundaries of their domains and in all the activities pertinent thereto.[121]

The procedure for the delineation and recognition of **ancestral domains** is set forth in Sections 51 and 52 of the IPRA. The identification, delineation and certification of **ancestral lands** is in Section 53 of said law.

Upon due application and compliance with the procedure provided under the law and upon finding by the NCIP that the application is meritorious, the NCIP shall issue a Certificate of Ancestral Domain Title (CADT) in the name of the community concerned.[122] The allocation of **lands within the ancestral domain** to any individual or indigenous corporate (family or clan) claimants is left to the ICCs/IPs concerned to decide in accordance with customs and traditions.[123] With respect to ancestral **lands outside the ancestral domain**, the NCIP issues a Certificate of Ancestral Land Title (CALT).[124]

CADT's and CALT's issued under the IPRA shall be registered by the NCIP before the Register of Deeds in the place where the property is situated.[125]

(1) Right to Ancestral Domains and Ancestral Lands: How Acquired

The rights of the ICCs/IPs to their ancestral domains and ancestral lands may be acquired in two modes: **(1) by native title over both ancestral lands and domains;** or **(2) by torrens title under the Public Land Act and the Land Registration Act with respect to ancestral lands only.**

(2) The Concept of Native Title

Native title is defined as:

> "*Sec. 3 [l]. Native Title*-- refers to pre-conquest rights to lands and domains which, as far back as memory reaches, have been held under a claim of **private** ownership by ICCs/IPs, have never been public lands and are thus **indisputably presumed** to have been held that way since before the Spanish Conquest."[126]

Native title refers to ICCs/IPs' preconquest rights to lands and domains held under a claim of private ownership as far back as memory reaches. These lands are deemed never to have been public lands and are indisputably presumed to have been held that way since before the Spanish Conquest. The rights of ICCs/IPs to their ancestral **domains** (which also include ancestral lands) by virtue of native title shall be recognized and respected.[127] Formal recognition, when solicited by ICCs/IPs concerned, shall be embodied in a Certificate of Ancestral Domain Title (CADT), which shall recognize the title of the concerned ICCs/IPs over the territories identified and delineated.[128]

Like a torrens title, a CADT is evidence of private ownership of land by native title. **Native title**, however, is a right of private ownership peculiarly granted to ICCs/IPs over their ancestral lands and domains. The IPRA categorically declares ancestral lands and domains held by native title as **never to have been** public land. Domains and lands held under native title are, therefore, indisputably presumed to have never been public lands and are private.

(a) Cariño v. Insular Government[129]

The concept of native title in the IPRA was taken from the 1909 case of ***Cariño v. Insular Government***.[130] ***Cariño*** firmly established a concept of private land title that existed irrespective of any royal grant from the State.

In 1903, Don Mateo Cariño, an Ibaloi, sought to register with the land registration court 146 hectares of land in Baguio Municipality, Benguet Province. He claimed that this land had been possessed and occupied by his ancestors since time immemorial; that his grandfather built fences around the property for the holding of cattle and that his father cultivated some parts of the land.

Cariño inherited the land in accordance with Igorot custom. He tried to have the land adjusted under the Spanish land laws, but no document issued from the Spanish Crown.[131] In 1901, Cariño obtained a possessory title to the land under the Spanish Mortgage Law.[132] The North American colonial government, however, ignored his possessory title and built a public road on the land prompting him to seek a Torrens title to his property in the land registration court. While his petition was pending, a U.S. military reservation[133] was proclaimed over his land and, shortly thereafter, a military detachment was detailed on the property with orders to keep cattle and trespassers, including Cariño, off the land.[134]

In 1904, the land registration court granted Cariño's application for absolute ownership to the land. Both the Government of the Philippine Islands and the U.S. Government appealed to the C.F.I. of Benguet which reversed the land registration court and dismissed Cariño's application. The Philippine Supreme Court[135] affirmed the C.F.I. by applying the ***Valenton*** ruling. Cariño took the case to the U.S. Supreme Court.[136] On one hand, the Philippine government invoked the Regalian doctrine and contended that Cariño failed to comply with the provisions of the Royal Decree of June 25, 1880, which required registration of land claims within a limited period of time. Cariño, on the other, asserted that he was the absolute owner of the land *jure gentium*, and that the land never formed part of the public domain.

In a unanimous decision written by Justice Oliver Wendell Holmes, the U.S. Supreme Court held:

> "It is true that Spain, in its earlier decrees, embodied the universal feudal theory that all lands were held from the Crown, and perhaps the general attitude of conquering nations toward people not recognized as entitled to the treatment accorded to those in the same zone of civilization with themselves. It is true, also, that in legal theory, sovereignty is absolute, and that, as against foreign nations, the United States may assert, as Spain asserted, absolute power. But it does not follow that, as against the inhabitants of the Philippines, the United States asserts that Spain had such power. When theory is left on one side, sovereignty is a question of strength, and may vary in degree. How far a new sovereign shall insist upon the theoretical relation of the subjects to the head in the past, and how far it shall recognize actual facts, are matters for it to decide." [137]

The U.S. Supreme Court noted that it need not accept Spanish doctrines. The choice was with the new colonizer. Ultimately, the matter had to be decided under U.S. law.

The ***Cariño*** decision largely rested on the North American constitutionalist's concept of "due process" as well as the pronounced policy "to do justice to the natives."[138] It was based on the strong mandate extended to the Islands via the Philippine Bill of 1902 that "No law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." The court declared:

> "The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain. By the Organic Act of July 1, 1902, chapter 1369, section 12 (32 Statutes at Large, 691), all the property and rights acquired there by the United States are to be administered 'for the benefit of the inhabitants thereof.' It is reasonable to suppose that the attitude thus assumed by the United States with regard to what was unquestionably its own is also its attitude in deciding what it will claim for its own. The same statute made a bill of rights, embodying the safeguards of the Constitution, and, like the Constitution, extends those safeguards to all. It provides that 'no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.' In the light of the declaration that we have quoted from section 12, it is hard to believe that the United States was ready to declare in the next breath that "any person" did not embrace the inhabitants of Benguet, or that it meant by "property" only that which had become such by ceremonies of which presumably a large part of the inhabitants never had heard, and that it proposed to treat as public land what they, by native custom and by long association,-- of the profoundest factors in human thought,-- regarded as their own."[139]

The Court went further:

> "[E]very presumption is and ought to be against the government in a case like the present. **It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land.** Certainly in a case like this, if there is doubt or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt."[140]

The court thus laid down the **presumption** of a certain title held (1) as far back as testimony or memory went, and (2) under a claim of private ownership. Land held by this title is presumed to "never have been public land."

Against this presumption, the U.S. Supreme Court analyzed the Spanish decrees upheld in the 1904

decision of ***Valenton v. Murciano***. The U.S. Supreme Court found **no** proof that the Spanish decrees did **not** honor native title. On the contrary, the decrees discussed in ***Valenton*** appeared to recognize that the natives owned some land, irrespective of any royal grant. The Regalian doctrine declared in the preamble of the *Recopilacion* was all "theory and discourse" and it was observed that titles were admitted to exist beyond the powers of the Crown, viz:

> "**"If the applicant's case is to be tried by the law of Spain, we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant.** In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will. For instance, Book 4, title 12, Law 14 of the the *Recopilacion de Leyes de las Indias*, cited for a contrary conclusion in Valenton v. Murciano, 3 Philippine 537, while it commands viceroys and others, when it seems proper, to call for the exhibition of grants, directs them to confirm those who hold by good grants or *justa prescripcion*. **It is true that it begins by the characteristic assertion of feudal overlordship and the origin of all titles in the King or his predecessors. That was theory and discourse. The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books."** (Emphasis supplied).[141]

The court further stated that the Spanish "adjustment" proceedings never held sway over unconquered territories. The wording of the Spanish laws were not framed in a manner as to convey to the natives that failure to register what to them has always been their own would mean loss of such land. The registration requirement was "not to confer title, but simply to establish it;" it was "not calculated to convey to the mind of an Igorot chief the notion that ancient family possessions were in danger, if he had read every word of it."

By recognizing this kind of title, the court clearly **repudiated** the doctrine of ***Valenton***. It was frank enough, however, to admit the possibility that the applicant might have been deprived of his land under Spanish law because of the inherent ambiguity of the decrees and concomitantly, the various interpretations which may be given them. **But precisely because of the ambiguity and of the strong "due process mandate" of the Constitution, the court validated this kind of title.**[142] This title was sufficient, even without government administrative action, and entitled the holder to a Torrens certificate. Justice Holmes explained:

> "It will be perceived that the rights of the applicant under the Spanish law present a problem not without difficulties for courts of a legal tradition. We have deemed it proper on that account to notice the possible effect of the change of

> sovereignty and the act of Congress establishing the fundamental principles now to be observed. Upon a consideration of the whole case we are of the opinion that law and justice require that the applicant should be granted what he seeks, and should not be deprived of what, by the practice and belief of those among whom he lived, was his property, through a refined interpretation of an almost forgotten law of Spain."[143]

Thus, the court ruled in favor of Cariño and ordered the registration of the 148 hectares in Baguio Municipality in his name.[144]

Examining ***Cariño*** closer, the U.S. Supreme Court did not categorically refer to the title it upheld as "native title." It simply said:

> "**The Province of Benguet was inhabited by a tribe that the Solicitor-General, in his argument, characterized as a savage tribe that never was brought under the civil or military government of the Spanish Crown. It seems probable, if not certain, that the Spanish officials would not have granted to anyone in that province the registration to which formerly the plaintiff was entitled by the Spanish Laws, and which would have made his title beyond question good.** Whatever may have been the technical position of Spain it does not follow that, in the view of the United States, he had lost all rights and was a mere trespasser when the present government seized his land. The argument to that effect seems to amount to a denial of **native titles** through an important part of the Island of Luzon, at least, for the want of ceremonies which the Spaniards would not have permitted and had not the power to enforce."[145]

This is the only instance when Justice Holmes used the term "native title" in the entire length of the ***Cariño*** decision. It is observed that the widespread use of the term "native title" may be traced to Professor Owen James Lynch, Jr., a Visiting Professor at the University of the Philippines College of Law from the Yale University Law School. In 1982, Prof. Lynch published an article in the **Philippine Law Journal** entitled ***Native Title, Private Right and Tribal Land Law***.[146] This article was made after Professor Lynch visited over thirty tribal communities throughout the country and studied the origin and development of Philippine land laws.[147] He discussed ***Cariño*** extensively and used the term "native title" to refer to Cariño's title as discussed and upheld by the U.S. Supreme Court in said case.

(b) Indian Title

In a footnote in the same article, Professor Lynch stated that the concept of "native title" as defined by Justice Holmes in *Cariño* "is conceptually similar to "aboriginal title" of the American Indians.[148] This is not surprising, according to Prof. Lynch, considering that during the American regime, government policy towards ICCs/IPs was consistently made in reference to native Americans.[149] This was clearly demonstrated in the case of ***Rubi v. Provincial Board of Mindoro***.[150]

In ***Rubi***, the Provincial Board of Mindoro adopted a Resolution authorizing the provincial governor to remove the Mangyans from their domains and place them in a permanent reservation in Sitio Tigbao, Lake Naujan. Any Mangyan who refused to comply was to be imprisoned. Rubi and some Mangyans, including one who was imprisoned for trying to escape from the reservation, filed for habeas corpus claiming deprivation of liberty under the Board Resolution. This Court denied the petition on the ground of police power. It upheld government policy promoting the idea that a permanent settlement was the only successful method for educating the Mangyans, introducing civilized customs, improving their health and morals, and protecting the public forests in which they roamed.[151] Speaking through Justice Malcolm, the court said:

> "Reference was made in the President's instructions to the Commission to the policy adopted by the United States for the Indian Tribes. The methods followed by the Government of the Philippine Islands in its dealings with the so-called non-Christian people is said, on argument, to be practically identical with that followed by the United States Government in its dealings with the Indian tribes. Valuable lessons, it is insisted, can be derived by an investigation of the American-Indian policy.
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> From the beginning of the United States, and even before, the Indians have been treated as "in a state of pupilage." The recognized relation between the Government of the United States and the Indians may be described as that of guardian and ward. It is for the Congress to determine when and how the guardianship shall be terminated. The Indians are always subject to the plenary authority of the United States.[152]
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> x x x.
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> As to the second point, the facts in the Standing Bear case and the Rubi case are not exactly identical. But even admitting similarity of facts, yet it is known to all that Indian reservations do exist in the United States, that Indians have been taken from different parts of the country and placed on these reservations, without any previous consultation as to their own wishes, and that, when once so located, they have been made to remain on the reservation for their own good and for the general good of the country. If any lesson can be drawn from the Indian policy of the United States, it is that the determination of this policy is for the legislative and executive branches of the government and that when once so decided upon, the courts should not interfere to upset a carefully planned governmental system. Perhaps, just as many forceful reasons exist for

> the segregation of the Manguianes in Mindoro as existed for the segregation of the different Indian tribes in the United States."[153]

Rubi applied the concept of Indian land grants or reservations in the Philippines. An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians.[154] It may be set apart by an act of Congress, by treaty, or by executive order, but it cannot be established by custom and prescription.[155]

Indian title to land, however, is not limited to land grants or reservations. It also covers the "aboriginal right of possession or occupancy."[156] The aboriginal right of possession depends on the actual occupancy of the lands in question by the tribe or nation as their ancestral home, in the sense that such lands constitute definable territory occupied exclusively by the particular tribe or nation.[157] It is a right which exists apart from any treaty, statute, or other governmental action, although in numerous instances treaties have been negotiated with Indian tribes, recognizing their aboriginal possession and delimiting their occupancy rights or settling and adjusting their boundaries.[158]

American jurisprudence recognizes the Indians' or native Americans' rights to land they have held and occupied before the "discovery" of the Americas by the Europeans. The earliest definitive statement by the U.S. Supreme Court on the nature of aboriginal title was made in 1823 in *Johnson & Graham's Lessee v. M'Intosh*.[159]

In ***Johnson***, the plaintiffs claimed the land in question under two (2) grants made by the chiefs of two (2) Indian tribes. The U.S. Supreme Court refused to recognize this conveyance, the plaintiffs being private persons. The only conveyance that was recognized was that made by the Indians to the government of the European discoverer. Speaking for the court, Chief Justice Marshall pointed out that the potentates of the old world believed that they had made ample compensation to the inhabitants of the new world by bestowing civilization and Christianity upon them; but in addition, said the court, they found it necessary, in order to avoid conflicting settlements and consequent war, to establish the principle that **discovery gives title to the government by whose subjects, or by whose authority, the discovery was made, against all other European governments, which title might be consummated by possession.**[160] The exclusion of all other Europeans gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. As regards the natives, the court further stated that:

> "Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
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> In the establishment of these relations, the rights of the original **inhabitants** were, in no instance, entirely disregarded; but were necessarily, to a

> considerable extent, impaired. **They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion;** but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the fundamental principle that discovery gave exclusive title to those who made it.
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> **While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy."**[161]

Thus, the discoverer of new territory was deemed to have obtained the ***exclusive right*** to acquire Indian land and extinguish Indian titles. Only to the discoverer-- whether to England, France, Spain or Holland-- did this right belong and not to any other nation or private person. The mere acquisition of the right nonetheless did not extinguish Indian claims to land. Rather, until the discoverer, by purchase or conquest, exercised its right, the concerned Indians were recognized as the "rightful occupants of the soil, with a legal as well as just claim to retain possession of it." Grants made by the discoverer to her subjects of lands occupied by the Indians were held to convey a title to the grantees, subject only to the Indian right of occupancy. Once the discoverer purchased the land from the Indians or conquered them, it was only then that the discoverer gained an absolute title unrestricted by Indian rights.

The court concluded, in essence, that a grant of Indian lands by Indians could not convey a title paramount to the title of the United States itself to other parties, saying:

> "It has never been contended that the Indian title amounted to nothing. **Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."** [162]

It has been said that the history of America, from its discovery to the present day, proves the universal recognition of this principle.[163]

The ***Johnson*** doctrine was a compromise. It protected Indian rights and their native lands without having to invalidate conveyances made by the government to many U.S. citizens.[164]

Johnson was reiterated in the case of ***Worcester v. Georgia***.[165] In this case, the State of

Georgia enacted a law requiring all white persons residing within the Cherokee nation to obtain a license or permit from the Governor of Georgia; and any violation of the law was deemed a high misdemeanor. The plaintiffs, who were white missionaries, did not obtain said license and were thus charged with a violation of the Act.

The U.S. Supreme Court declared the Act as unconstitutional for interfering with the treaties established between the United States and the Cherokee nation as well as the Acts of Congress regulating intercourse with them. It characterized the relationship between the United States government and the Indians as:

> "The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.
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> This relation was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[166]

It was the policy of the U.S. government to treat the Indians as nations with distinct territorial boundaries and recognize their right of occupancy over all the lands within their domains. Thus:

> "From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider **the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.**
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> x x x.
>
> **"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural**

> **rights, as the undisputed possessors of the soil from time immemorial,** with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." x x x.[167]
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> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States."[168]

The discovery of the American continent gave title to the government of the discoverer as against all other European governments. Designated as the naked fee,[169] this title was to be consummated by possession and was subject to the Indian title of occupancy. The discoverer acknowledged the Indians' legal and just claim to retain possession of the land, the Indians being the original inhabitants of the land. The discoverer nonetheless asserted the exclusive right to acquire the Indians' land-- either by purchase, "defensive" conquest, or cession-- and in so doing, extinguish the Indian title. Only the discoverer could extinguish Indian title because it alone asserted ultimate dominion in itself. Thus, while the different nations of Europe respected the rights of the natives as occupants, they all asserted the ultimate dominion and title to be in themselves.[170]

As early as the 19th century, it became accepted doctrine that although fee title to the lands occupied by the Indians when the colonists arrived became vested in the sovereign-- first the discovering European nation and later the original 13 States and the United States-- a right of occupancy in the Indian tribes was nevertheless recognized. The Federal Government continued the policy of respecting the Indian right of occupancy, sometimes called Indian title, which it accorded the protection of complete ownership.[171] But this aboriginal Indian interest simply constitutes "permission" from the whites to occupy the land, and means mere possession not specifically recognized as ownership by Congress.[172] It is clear that this right of occupancy based upon aboriginal possession is not a property right.[173] It is vulnerable to affirmative action by the federal government who, as sovereign, possessed exclusive power to extinguish the right of occupancy at will.[174] **Thus, aboriginal title is not the same as legal title.** Aboriginal title rests on actual, exclusive and continuous use and occupancy for a long time.[175] It entails that land owned by Indian title must be used within the tribe, subject to its laws and customs, and cannot be sold to another sovereign government nor to any citizen.[176] Such title as Indians have to possess and occupy land is in the tribe, and not in the individual Indian; the right of individual Indians to share in the tribal property usually depends upon tribal membership, the property of the tribe generally being held in communal ownership.[177]

As a rule, Indian lands are not included in the term "public lands," which is ordinarily used to designate such lands as are subject to sale or other disposal under general laws.[178] Indian land which has been abandoned is deemed to fall into the public domain.[179] On the other hand, an Indian reservation is a part of the public domain set apart for the use and occupation of a tribe of Indians.[180] Once set apart by proper authority, the reservation ceases to be public land, and until the Indian title is extinguished, no one but Congress can initiate any preferential right on, or restrict the nation's power to dispose of, them.[181]

The American judiciary struggled for more than 200 years with the ancestral land claims of indigenous Americans.[182] And two things are clear. **First**, aboriginal title is recognized. **Second**, indigenous property systems are also recognized. From a legal point of view, certain benefits can be drawn from a comparison of Philippine IPs to native Americans.[183] Despite the similarities between native title and aboriginal title, however, there are at present some misgivings on whether jurisprudence on American Indians may be cited authoritatively in the Philippines. The U.S. recognizes the possessory rights of the Indians over their land; title to the land, however, is deemed to have passed to the U.S. as successor of the discoverer. The aboriginal title of ownership is not specifically recognized as ownership by action authorized by Congress.[184] The protection of aboriginal title merely guards against encroachment by persons other than the Federal Government.[185] Although there are criticisms against the refusal to recognize the native Americans' ownership of these lands,[186] the power of the State to extinguish these titles has remained firmly entrenched.[187]

Under the IPRA, the Philippine State is not barred form asserting sovereignty over the ancestral domains and ancestral lands.[188] The IPRA, however, is still in its infancy and any similarities between its application in the Philippines vis-à-vis American Jurisprudence on aboriginal title will depend on the peculiar facts of each case.

(c) Why the Cariño doctrine is unique

In the Philippines, the concept of native title first upheld in ***Cariño*** and enshrined in the IPRA grants ownership, albeit in limited form, of the land to the ICCs/IPs. Native title presumes that the land is private and was never public. ***Cariño* is the only case that specifically and categorically recognizes native title. The long line of cases citing *Cariño* did not touch on native title and the private character of ancestral domains and lands. *Cariño* was cited by the succeeding cases to support the concept of acquisitive prescription under the Public Land Act which is a different matter altogether.** Under the Public Land Act, land sought to be registered must be **public agricultural land**. When the conditions specified in Section 48 [b] of the Public Land Act are complied with, the possessor of the land is deemed to have acquired, by operation of law, a right to a grant of the land.[189] The land ceases to be part of the public domain,[190] *ipso jure*,[191] and is converted to private property by the mere lapse or completion of the prescribed statutory period.

It was only in the case of ***Oh Cho v. Director of Lands***[192] that the court declared that the rule

that all lands that were not acquired from the government, either by purchase or grant, belong to the public domain has an exception. This exception would be any land that should have been in the possession of an occupant and of his predecessors-in-interest since time immemorial. It is this kind of possession that would justify the presumption that the land had never been part of the public domain or that it had been private property even before the Spanish conquest.[193] ***Oh Cho***, however, was decided under the provisions of the Public Land Act and ***Cariño*** was cited to support the applicant's claim of acquisitive prescription under the said Act.

All these years, ***Cariño*** had been quoted out of context simply to justify long, continuous, open and adverse possession in the concept of owner of public agricultural land. It is this long, continuous, open and adverse possession in the concept of owner of thirty years both for ordinary citizens[194] and members of the national cultural minorities[195] that converts the land from public into private and entitles the registrant to a torrens certificate of title.

(3) The Option of Securing a Torrens Title to the Ancestral Land Indicates that the Land is Private.

The private character of ancestral lands and domains as laid down in the IPRA is further **strengthened** by the option given to individual ICCs/IPs over their individually-owned ancestral **lands**. **For purposes of registration under the Public Land Act and the Land Registration Act, the IPRA expressly converts ancestral land into public agricultural land which may be disposed of by the State. The necessary implication is that *ancestral land is private.* It, however*, has to be first converted to public agricultural land simply for registration purposes*.** To wit:

> "*Sec. 12. Option to Secure Certificate of Title Under Commonwealth Act 141, as amended, or the Land Registration Act 496*-- Individual members of cultural communities, with respect to their individually-owned ancestral lands who, by themselves or through their predecessors-in-interest, have been in continuous possession and occupation of the same in the concept of owner since time immemorial or for a period of not less than thirty (30) years immediately preceding the approval of this Act and uncontested by the members of the same ICCs/IPs shall have the option to secure title to their ancestral lands under the provisions of Commonwealth Act 141, as amended, or the Land Registration Act 496.
>
> For this purpose, said individually-owned ancestral lands, which are agricultural in character and actually used for agricultural, residential, pasture, and tree farming purposes, including those with a slope of eighteen percent (18%) or more, are hereby classified as alienable and disposable agricultural lands.
>
> The option granted under this section shall be exercised within twenty (20) years from the approval of this Act."[196]

ICCs/IPs are given the option to secure a torrens certificate of title over their individually-owned ancestral lands. This option is limited to ancestral **lands** only, not domains, and such lands must be individually, not communally, owned.

Ancestral lands that are owned by individual members of ICCs/IPs who, by themselves or through their predecessors-in-interest, have been in continuous possession and occupation of the same in the concept of owner since time immemorial[197] or for a period of not less than 30 years, which claims are uncontested by the members of the same ICCs/IPs, may be registered under C.A. 141, otherwise known as the Public Land Act, or Act 496, the Land Registration Act. For purposes of registration, the individually-owned ancestral lands are classified as alienable and disposable agricultural lands of the public domain, provided, they are agricultural in character and are actually used for agricultural, residential, pasture and tree farming purposes. These lands shall be classified as public agricultural lands regardless of whether they have a slope of 18% or more.

The classification of ancestral land as public agricultural land is in compliance with the requirements of the Public Land Act and the Land Registration Act. C.A. 141, the Public Land Act, deals specifically with lands of the public domain.[198] Its provisions apply to those lands "declared open to disposition or concession" x x x "which have not been reserved for public or quasi-public purposes, nor appropriated by the Government, nor in any manner become private property, nor those on which a private right authorized and recognized by this Act or any other valid law x x x or which having been reserved or appropriated, have ceased to be so."[199] Act 496, the Land Registration Act, allows registration only of private lands and public agricultural lands. **Since ancestral domains and lands are private, if the ICC/IP wants to avail of the benefits of C.A. 141 and Act 496, the IPRA itself converts his ancestral land, regardless of whether the land has a slope of eighteen per cent (18%) or over,**[200] **from private to public agricultural land for proper disposition.**

The option to register land under the Public Land Act and the Land Registration Act has nonetheless a limited period. This option must be exercised within twenty (20) years from October 29, 1997, the date of approval of the IPRA.

Thus, ancestral lands and ancestral domains are not part of the lands of the public domain. They are private and belong to the ICCs/IPs. Section 3 of Article XII on National Economy and Patrimony of the 1987 Constitution classifies lands of the public domain into four categories: (a) agricultural, (b) forest or timber, (c) mineral lands, and (d) national parks. **Section 5** of the **same Article XII** mentions ancestral lands and ancestral domains but it does not classify them under any of the said four categories. **To classify them as public lands under any one of the four classes will render the entire IPRA law a nullity.** The spirit of the IPRA lies in the distinct concept of ancestral domains and ancestral lands. The IPRA addresses the major problem of the ICCs/IPs which is loss of land. Land and space are of vital concern in terms of sheer survival of the ICCs/IPs.[201]

The 1987 Constitution mandates the State to "protect the rights of indigenous cultural communities to their ancestral lands" and that "Congress provide for the applicability of customary laws x x x in determining the ownership and extent of ancestral domain."[202]

It is the recognition of the ICCs/IPs distinct rights of ownership over their ancestral domains and lands that breathes life into this constitutional mandate.

B. The right of ownership and possession by the ICCs/IPs of their ancestral domains is a limited form of ownership and does not include the right to alienate the same.

Registration under the Public Land Act and Land Registration Act recognizes the concept of ownership under the **civil law**. This ownership is based on adverse possession for a specified period, and harkens to Section 44 of the Public Land Act on administrative legalization (free patent) of imperfect or incomplete titles and Section 48 (b) and (c) of the same Act on the judicial confirmation of imperfect or incomplete titles. Thus:

> "*Sec. 44*. Any natural-born citizen of the Philippines who is not the owner of more than twenty-four hectares and who since July fourth, 1926 or prior thereto, has continuously occupied and cultivated, either by himself or through his predecessors-in-interest, a tract or tracts of agricultural public lands subject to disposition, or who shall have paid the real estate tax thereon while the same has not been occupied by any person shall be entitled, under the provisions of this chapter, to have a free patent issued to him for such tract or tracts of such land not to exceed twenty-four hectares.
>
> **A member of the national cultural minorities who has 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, shall be entitled to the right granted in the preceding paragraph of this section: *Provided*, That at the time he files his free patent application he is not the owner of any real property secured or disposable under the provision of the Public Land Law.**[203]
>
> x x x.
>
> "*Sec. 48*. The following described citizens of the Philippines, occupying lands of the public domain or claiming to own any such lands or an interest therein, but whose titles have not been perfected or completed, may apply to the Court of First Instance of the province where the land is located for confirmation of their claims and the issuance of a certificate of title therefor, under the Land Registration Act, to wit:
>
> (a) [perfection of Spanish titles] xxx.
>
> (b) Those who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of agricultural lands of the public domain, under a bona fide claim of acquisition or ownership, for at least thirty years immediately preceding the filing of the

> application for confirmation of title except when prevented by war or force majeure. These shall be conclusively presumed to have performed all the conditions essential to a Government grant and shall be entitled to a certificate of title under the provisions of this Chapter.
>
> **(c) Members of the national cultural minorities who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive and notorious possession and occupation of lands of the public domain suitable to agriculture, whether disposable or not, under a bona fide claim of ownership for at least 30 years shall be entitled to the rights granted in sub-section (b) hereof."**[204]

Registration under the foregoing provisions presumes that the land was originally public agricultural land but because of adverse possession since July 4, 1955 (free patent) or at least thirty years (judicial confirmation), the land has become private. Open, adverse, public and continuous possession is sufficient, provided, the possessor makes proper application therefor. The possession has to be confirmed judicially or administratively after which a torrens title is issued.

A torrens title recognizes the owner whose name appears in the certificate as entitled to all the rights of ownership under the **civil law**. The Civil Code of the Philippines defines ownership in Articles 427, 428 and 429. This concept is based on Roman Law which the Spaniards introduced to the Philippines through the Civil Code of 1889. Ownership, under Roman Law, may be exercised over things or rights. It primarily includes the right of the owner to enjoy and dispose of the thing owned. And the right to enjoy and dispose of the thing includes the right to receive from the thing what it produces,[205] the right to consume the thing by its use,[206] the right to alienate, encumber, transform or even destroy the thing owned,[207] and the right to exclude from the possession of the thing owned by any other person to whom the owner has not transmitted such thing.[208]

1. The Indigenous Concept of Ownership and Customary Law.

Ownership of ancestral domains by native title does not entitle the ICC/IP to a torrens title but to a Certificate of Ancestral Domain Title (CADT). The CADT formally recognizes the **indigenous** concept of ownership of the ICCs/IPs over their ancestral domain. Thus:

> "*Sec. 5. Indigenous concept of ownership*.- Indigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICCs/IPs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights."

The right of ownership and possession of the ICCs/IPs to their ancestral domains is held under the indigenous concept of ownership. This concept maintains the view that ancestral domains are the ICCs/IPs private but community property. It is private simply because it is not part of the public domain. But its private character ends there. The ancestral domain is owned in common by the ICCs/IPs and not by one particular person. The IPRA itself provides that areas within the ancestral domains, whether delineated or not, are presumed to be communally held.[209] **These communal rights, however, are not exactly the same as co-ownership rights under the Civil Code.**[210] Co-ownership gives any co-owner the right to demand partition of the property held in common. The Civil Code expressly provides that "[n]o co-owner shall be obliged to remain in the co-ownership." Each co-owner may demand at any time the partition of the thing in common, insofar as his share is concerned.[211] To allow such a right over ancestral domains may be destructive not only of customary law of the community but of the very community itself.[212]

Communal rights over land are not the same as corporate rights over real property, much less corporate condominium rights. A corporation can exist only for a maximum of fifty (50) years subject to an extension of another fifty years in any single instance.[213] Every stockholder has the right to disassociate himself from the corporation.[214] Moreover, the corporation itself may be dissolved voluntarily or involuntarily.[215]

Communal rights to the land are held not only by the present possessors of the land but extends to all generations of the ICCs/IPs, past, present and future, to the domain. This is the reason why the ancestral domain must be kept within the ICCs/IPs themselves. The domain cannot be transferred, sold or conveyed to other persons. It belongs to the ICCs/IPs as a community.

Ancestral lands are also held under the indigenous concept of ownership. The lands are communal. These lands, however, may be transferred subject to the following limitations: (a) only to the members of the same ICCs/IPs; (b) in accord with customary laws and traditions; and (c) subject to the right of redemption of the ICCs/IPs for a period of 15 years if the land was transferred to a non-member of the ICCs/IPs.

Following the constitutional mandate that "customary law govern property rights or relations in determining the ownership and extent of ancestral domains,"[216] **the IPRA, by legislative fiat, introduces a new concept of ownership. This is a concept that has long existed under customary law.**[217]

Custom, from which customary law is derived, is also recognized under the Civil Code as a source of law.[218] Some articles of the Civil Code expressly provide that custom should be applied in cases where no codal provision is applicable.[219] In other words, in the absence of any applicable provision in the Civil Code, custom, when duly proven, can define rights and liabilities.[220]

Customary law is a **primary**, not secondary, source of rights under the IPRA and uniquely applies to ICCs/IPs. **Its recognition does not depend on the absence of a specific provision in the**

civil law. The indigenous concept of ownership under customary law is specifically acknowledged and recognized, and coexists with the civil law concept and the laws on land titling and land registration.[221]

To be sure, **the indigenous concept of ownership exists even without a paper title.** The CADT is merely a "formal recognition" of native title. This is clear from Section 11 of the IPRA, to wit:

> "*Sec. 11. Recognition of Ancestral Domain Rights.*-- The rights of ICCs/IPs to their ancestral domains by virtue of Native Title shall be recognized and respected. Formal recognition, when solicited by ICCs/IPs concerned shall be embodied in a Certificate of Ancestral Domain Title, which shall recognize the title of the concerned ICCs/IPs over the territories identified and delineated."

The moral import of ancestral domain, native land or being native is "belongingness" to the land, being people of the land-- by sheer force of having sprung from the land since time beyond recall, and the faithful nurture of the land by the sweat of one's brow. This is fidelity of usufructuary relation to the land-- the possession of stewardship through perduring, intimate tillage, and the mutuality of blessings between man and land; from man, care for land; from the land, sustenance for man.[222]

C. Sections 7 (a), 7 (b) and 57 of the IPRA Do Not Violate the Regalian Doctrine Enshrined in Section 2, Article XII of the 1987 Constitution.

1. The Rights of ICCs/IPs Over Their Ancestral Domains and Lands

The IPRA grants the ICCs/IPs several rights over their ancestral domains and ancestral lands. Section 7 provides for the rights over ancestral **domains**:

> "*Sec. 7. Rights to Ancestral Domains.*-- The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights include:
>
> *a) Right of Ownership*.- The right to claim **ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them** at any time within the domains;
>
> *b) Right to Develop Lands and Natural Resources*.-- **Subject to Section 56 hereof, the right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve**

> **natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws;** the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they may sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights;"
>
> *c) Right to Stay in the Territories*.-- The right to stay in the territory and not to be removed therefrom. No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain. x x x;
>
> *d) Right in Case of Displacement*.-- In case displacement occurs as a result of natural catastrophes, the State shall endeavor to resettle the displaced ICCs/IPs in suitable areas where they can have temporary life support systems: *x x x;*
>
> *e) Right to Regulate the Entry of Migrants.*-- Right to regulate the entry of migrant settlers and organizations into their domains;
>
> *f) Right to Safe and Clean Air and Water*.--For this purpose, the ICCs/IPs shall have access to integrated systems for the management of their inland waters and air space;
>
> *g) Right to Claim Parts of Reservations*.-- The right to claim parts of the ancestral domains which have been reserved for various purposes, except those reserved and intended for common and public welfare and service;
>
> *h) Right to Resolve Conflict*.-- Right to resolve land conflicts in accordance with customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice whenever necessary."

Section 8 provides for the rights over ancestral **lands:**

> "*Sec. 8. Rights to Ancestral Lands*.-- The right of ownership and possession of the ICCs/IPs to their ancestral lands shall be recognized and protected.

> *a) Right to transfer land/property*.-- Such right shall include the right to transfer land or property rights to/among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned.
>
> *b) Right to Redemption*.-- In cases where it is shown that the transfer of land/property rights by virtue of any agreement or devise, to a non-member of the concerned ICCs/IPs is tainted by the vitiated consent of the ICCs/IPs, or is transferred for an unconscionable consideration or price, the transferor ICC/IP shall have the right to redeem the same within a period not exceeding fifteen (15) years from the date of transfer."

Section 7 (a) defines the ICCs/IPs the **right of ownership** over their ancestral **domains** which covers (a) lands, (b) bodies of water traditionally and actually occupied by the ICCs/IPs, (c) sacred places, (d) traditional hunting and fishing grounds, and (e) all improvements made by them at any time within the domains. The **right of ownership includes** the following rights: (1) the right to develop lands and natural resources; (b) the right to stay in the territories; (c) the right to resettlement in case of displacement; (d) the right to regulate the entry of migrants; (e) the right to safe and clean air and water; (f) the right to claim parts of the ancestral domains as reservations; and (g) the right to resolve conflict in accordance with customary laws.

Section 8 governs their rights to ancestral **lands**. Unlike ownership over the ancestral domains, Section 8 gives the ICCs/IPs also the right to transfer the land or property rights to members of the same ICCs/IPs or non-members thereof. This is in keeping with the option given to ICCs/IPs to secure a torrens title over the ancestral lands, but not to domains.

2. The Right of ICCs/IPs to Develop Lands and Natural Resources Within the Ancestral Domains Does Not Deprive the State of Ownership Over the Natural Resources and Control and Supervision in their Development and Exploitation.

The Regalian doctrine on the ownership, management and utilization of natural resources is declared in **Section 2, Article XII of the 1987 Constitution**, viz:

> "*Sec. 2*. **All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State.** With the exception of agricultural lands, all other natural resources shall not be alienated. **The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or, it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital**

> **is owned by such citizens.** Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.
>
> The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.
>
> The Congress may, by law, allow **small-scale utilization of natural resources by Filipino citizens,** as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.
>
> The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for **large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils** according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the state shall promote the development and use of local scientific and technical resources.
>
> The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution."[223]

All lands of the public domain and all natural resources-- waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources-- **are owned by the State**. The Constitution provides that in the exploration, development and utilization of these natural resources, the State exercises full control and supervision, and may undertake the same in four (4) modes:

> "
> 1. The State may directly undertake such activities; or
> 2. The State may enter into co-production, joint venture or production-sharing agreements with Filipino citizens or qualified corporations;
> 3. Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens;

> 4. For the large-scale exploration, development and utilization of minerals, petroleum and other mineral oils, the President may enter into agreements with foreign-owned corporations involving technical or financial assistance.

As owner of the natural resources, the State is accorded primary power and responsibility in the exploration, development and utilization of these natural resources. The State may directly undertake the exploitation and development by itself, or, it may allow participation by the private sector through co-production,[224] joint venture,[225] or production-sharing agreements.[226] These agreements may be for a period of 25 years, renewable for another 25 years. The State, through Congress, may allow the small-scale utilization of natural resources by Filipino citizens. For the large-scale exploration of these resources, specifically minerals, petroleum and other mineral oils, the State, through the President, may enter into technical and financial assistance agreements with foreign-owned corporations.

Under the Philippine Mining Act of 1995, (R.A. 7942) and the People's Small-Scale Mining Act of 1991 (R.A. 7076) the three types of agreements, i.e., co-production, joint venture or production-sharing, may apply to both large-scale[227] and small-scale mining.[228] "Small-scale mining" refers to "mining activities which rely heavily on manual labor using simple implements and methods and do not use explosives or heavy mining equipment."[229]

Examining the IPRA, there is nothing in the law that grants to the ICCs/IPs ownership over the natural resources within their ancestral domains. The right of ICCs/IPs in their ancestral domains includes **ownership, but this "ownership" is expressly defined and limited in Section 7 (a)** as:

> "Sec. 7. a) *Right of ownership*-- The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;"

The ICCs/IPs are given the right to claim ownership over "lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains." It will be noted that this enumeration does not mention bodies of water not occupied by the ICCs/IPs, minerals, coal, wildlife, flora and fauna in the traditional hunting grounds, fish in the traditional fishing grounds, forests or timber in the sacred places, etc. and all other natural resources found within the ancestral domains. **Indeed, the right of ownership under Section 7 (a) does not cover " waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna and all other natural resources"**

enumerated in Section 2, Article XII of the 1987 Constitution as belonging to the State.

The non-inclusion of ownership by the ICCs/IPs over the natural resources in Section 7(a) complies with the Regalian doctrine.

(a) Section 1, Part II, Rule III of the Implementing Rules Goes Beyond the Parameters of Sec. 7 (a) of the IPRA And is Unconstitutional.

The Rules Implementing the IPRA[230] in Section 1, Part II, Rule III reads:

> "*Section 1. Rights of Ownership*. ICCs/IPs have rights of ownership over lands, waters, and natural resources and all improvements made by them at any time within the ancestral domains/ lands. These rights shall include, but not limited to, the right over the fruits, the right to possess, the right to use, right to consume, right to exclude and right to recover ownership, and the rights or interests over land and natural resources. The right to recover shall be particularly applied to lands lost through fraud or any form or vitiated consent or transferred for an unconscionable price."

Section 1 of the Implementing Rules gives the ICCs/IPs rights of ownership over "lands, waters and natural resources." The term "natural resources" is not one of those expressly mentioned in Section 7 (a) of the law. Our Constitution and jurisprudence clearly declare that the right to claim ownership over land does not necessarily include the right to claim ownership over the natural resources found on or under the land.[231] **The IPRA itself makes a distinction between land and natural resources. Section 7 (a) speaks of the right of ownership only over the land within the ancestral domain. It is Sections 7 (b) and 57 of the law that speak of natural resources, and these provisions, as shall be discussed later, do not give the ICCs/IPs the right of ownership over these resources.**

The constitutionality of Section 1, Part II, Rule III of the Implementing Rules was not specifically and categorically challenged by petitioners. Petitioners actually assail the constitutionality of the Implementing Rules in general.[232] Nevertheless, to avoid any confusion in the implementation of the law, it is necessary to declare that the inclusion of "natural resources" in Section 1, Part II, Rule III of the Implementing Rules goes beyond the parameters of Section 7 (b) of the law and is **contrary to Section 2, Article XII of the 1987 Constitution.**

(b) The Small-Scale Utilization of Natural Resources In Sec. 7 (b) of the IPRA Is Allowed Under Paragraph 3, Section 2 of Article XII of the Constitution.

Ownership over natural resources remain with the State and the IPRA in Section 7 (b) merely grants the ICCs/IPs the right to manage them, *viz*:

> "Sec. 7 (b) Right to Develop Lands and Natural Resources.-- Subject to Section 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they may sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights;"

The **right to develop lands and natural resources** under Section 7 (b) of the IPRA enumerates the following rights:

> a) the right to develop, control and use lands and territories traditionally occupied;
>
> b) the right to manage and conserve natural resources within the territories and uphold the responsibilities for future generations;
>
> c) the right to benefit and share the profits from the allocation and utilization of the natural resources found therein;
>
> d) the right to negotiate the terms and conditions for the exploration of natural resources for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws;
>
> e) the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they may sustain as a result of the project;
>
> f) the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights.[233]

Ownership over the natural resources in the ancestral domains remains with the State and the ICCs/IPs are merely granted the right to "manage and conserve" them for future

generations, "benefit and share" the profits from their allocation and utilization, and "negotiate the terms and conditions for their exploration" for the purpose of "ensuring ecological and environmental protection and conservation measures." It must be noted that the right to negotiate the terms and conditions over the natural resources covers only their exploration which must be for the purpose of ensuring ecological and environmental protection of, and conservation measures in the ancestral domain. It does not extend to the exploitation and development of natural resources.

Simply stated, the ICCs/IPs' rights over the natural resources take the form of management or stewardship. For the ICCs/IPs may use these resources and share in the profits of their utilization or negotiate the terms for their exploration. At the same time, however, the ICCs/IPs must ensure that the natural resources within their ancestral domains are conserved for future generations and that the "utilization" of these resources must not harm the ecology and environment pursuant to national and customary laws.[234]

The limited rights of "management and use" in Section 7 (b) must be taken to contemplate small-scale utilization of natural resources as distinguished from large-scale. Small-scale utilization of natural resources is expressly allowed in the third paragraph of Section 2, Article XII of the Constitution "in recognition of the plight of forest dwellers, gold panners, marginal fishermen and others similarly situated who exploit our natural resources for their daily sustenance and survival."[235] Section 7 (b) also expressly mandates the ICCs/IPs to manage and conserve these resources and ensure environmental and ecological protection within the domains, which duties, by their very nature, necessarily reject utilization in a large-scale.

(c) The Large-Scale Utilization of Natural Resources In Section 57 of the IPRA Is Allowed Under Paragraphs 1 and 4, Section 2, Article XII of the 1987 Constitution.

Section 57 of the IPRA provides:

> "*Sec. 57. Natural Resources within Ancestral Domains.*-- The ICCs/IPs shall have **priority rights** in the **harvesting, extraction, development or exploitation of any natural resources** within the ancestral domains. A non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilization of the natural resources for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years: *Provided*, That a formal and written agreement is entered into with the ICCs/IPs concerned or that the community, pursuant to its own decision-making process, has agreed to allow such operation: *Provided finally*, That the NCIP may exercise visitorial powers and take appropriate action to safeguard the rights of the ICCs/IPs under the same contract."

Section 57 speaks of the "**harvesting, extraction, development or exploitation** of natural

resources within ancestral domains" and "gives the ICCs/IPs 'priority rights' therein." The terms **"harvesting, extraction, development or exploitation" of any natural resources within the ancestral domains obviously refer to large-scale utilization.** It is utilization not merely for subsistence but for commercial or other extensive use that require technology other than manual labor.[236] The law recognizes the probability of requiring a non-member of the ICCs/IPs to participate in the development and utilization of the natural resources and thereby allows such participation for a period of not more than 25 years, renewable for another 25 years. This may be done on condition that a formal written agreement be entered into by the non-member and members of the ICCs/IPs.

Section 57 of the IPRA does not give the ICCs/IPs the right to "manage and conserve" the natural resources. Instead, the law only grants the ICCs/IPs "priority rights" in the development or exploitation thereof. Priority means giving preference. Having priority rights over the natural resources does not necessarily mean ownership rights. The grant of priority rights implies that there is a superior entity that owns these resources and this entity has the power to grant preferential rights over the resources to whosoever itself chooses.

Section 57 is not a repudiation of the Regalian doctrine. Rather, it is an affirmation of the said doctrine that all natural resources found within the ancestral domains belong to the State. It incorporates by implication the Regalian doctrine, hence, requires that the provision be read in the light of Section 2, Article XII of the 1987 Constitution. **Interpreting Section 2, Article XII of the 1987 Constitution**[237] **in relation to Section 57 of IPRA, the State, as owner of these natural resources, may directly undertake the development and exploitation of the natural resources by itself, or in the alternative, it may recognize the priority rights of the ICCs/IPs as owners of the land on which the natural resources are found by entering into a co-production, joint venture, or production-sharing agreement with them. The State may likewise enter into any of said agreements with a non-member of the ICCs/IPs, whether natural or juridical, or enter into agreements with foreign-owned corporations involving either technical or financial assistance for the large-scale exploration, development and utilization of minerals, petroleum, and other mineral oils, or allow such non-member to participate in its agreement with the ICCs/IPs.** If the State decides to enter into an agreement with a non-ICC/IP member, the National Commission on Indigenous Peoples (NCIP) shall ensure that the rights of the ICCs/IPs under the agreement shall be protected. The agreement shall be for a period of 25 years, renewable for another 25 years.

To reiterate, in the large-scale utilization of natural resources within the ancestral domains, the State, as owner of these resources, has four (4) options: (1) it may, of and by itself, directly undertake the development and exploitation of the natural resources; or (2) it may recognize the priority rights of the ICCs/IPs by entering into an agreement with them for such development and exploitation; or (3) it may enter into an agreement with a non-member of the ICCs/IPs, whether natural or juridical, local or foreign; or (4) it may allow such non-member to participate in the agreement with the ICCs/IPs.

The rights granted by the IPRA to the ICCs/IPs over the natural resources in their ancestral domains merely gives the ICCs/IPs, as owners and occupants of the land on which the resources are found, the right to the small-scale utilization of these

resources, and at the same time, a priority in their large-scale development and exploitation. Section 57 does not mandate the State to automatically give priority to the ICCs/IPs. The State has several options and it is within its discretion to choose which option to pursue. Moreover, there is nothing in the law that gives the ICCs/IPs the right to solely undertake the large-scale development of the natural resources within their domains. The ICCs/IPs must undertake such endeavour always **under** State supervision or control. This indicates that the State does not lose control and ownership over the resources even in their exploitation. Sections 7 (b) and 57 of the law simply give due respect to the ICCs/IPs who, as actual occupants of the land where the natural resources lie, have traditionally utilized these resources for their subsistence and survival.

Neither is the State stripped of ownership and control of the natural resources by the following provision:

> "*Section 59. Certification Precondition*.-- All departments and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing or granting any concession, license or lease, or entering into any production-sharing agreement. without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certification shall only be issued after a field-based investigation is conducted by the Ancestral Domains Office of the area concerned: *Provided*, That no certification shall be issued by the NCIP without the free and prior informed and written consent of the ICCs/IPs concerned: *Provided, further*, That no department, government agency or government-owned or -controlled corporation may issue new concession, license, lease, or production sharing agreement while there is a pending application for a CADT: *Provided, finally*, That the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process."

Concessions, licenses, lease or production-sharing agreements for the exploitation of natural resources shall not be issued, renewed or granted by all departments and government agencies without prior certification from the NCIP that the area subject of the agreement does not overlap with any ancestral domain. The NCIP certification shall be issued only after a field-based investigation shall have been conducted and the free and prior informed written consent of the ICCs/IPs obtained. Non-compliance with the consultation requirement gives the ICCs/IPs the right to stop or suspend any project granted by any department or government agency.

As its subtitle suggests, this provision requires as a precondition for the issuance of any concession, license or agreement over natural resources, that a certification be issued by the NCIP that the area subject of the agreement does not lie within any ancestral domain. The provision does not vest the NCIP with power over the other agencies of the State as to determine whether to grant or deny any concession or license or agreement. It merely gives the NCIP the authority to ensure that the ICCs/IPs have been informed of the agreement and that their consent thereto has been obtained. Note that the certification applies to agreements over natural resources that do not

necessarily lie within the ancestral domains. For those that are found within the said domains, Sections 7(b) and 57 of the IPRA apply.

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