



Key Issues and Questions to be Resolved in Applying FPIC

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All photos and maps from Central Africa provided by John Nelson

Study of FPIC in FSC logging Concessions

- **“FPIC is a complex notion.** The complexity exists in defining at which point it can be said that people’s *informed* consent has really been gained. In our study of seven concessions in three countries, we found only one case where the local communities expressed satisfaction with the existing arrangement for forest management.

in DRC, Rep Congo, Gabon. Jerome Lewis

- “Surprisingly, this company had no legal document explicitly describing this as consent. By contrast, elsewhere we found signed documents used as proof of consent while many villagers were dissatisfied with the relationship they had with the company exploiting the concession they lived in.” (2008: 67).

‘Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin’ (Lewis 2008)


European consent

- A definitive agreement that represents an agreement made at a specific moment in time and which is codified in a signed document.
- *The stronger party hopes to foreclose the negotiation process as a means of finalizing the terms of consent to its permanent advantage.*

Congo Basin consent

- An ongoing relationship of exchange between parties which undergoes revision and renegotiation and which is witnessed by evidence of mutual satisfaction with that relationship. It is based on mutual trust.
- *The weaker party wants to never give it definitively, for this would weaken their claim to share in future benefits*

The differences in power need to be recognized and carefully managed (Lewis)



The 'Indigenous Peoples' category is **one way** of keeping us alert to this issue of power, and alert to the need to address it in an open-ended way

African Commission on Human and Peoples' Rights:

- “Almost all African states host a rich variety of different ethnic groups, some of which are dominant and some of which are in subordinate positions. Basically all of these groups are indigenous to Africa. However, **some are in a structurally subordinate position** to the dominating groups and the state leading to marginalization and discrimination. **It is this situation, which the indigenous concept** in its modern analytic form, and the international legal framework attached to it, **addresses.**” (2006)

Indigenous Forest Peoples in Central Africa can be:

- (i) seen as having an attachment to forest and
- (ii) seen by their neighbours as being ‘first peoples’; and
- these perceptions are part of what is used to keep them in a subordinate position. Ignoring their Rights as IPs would just marginalise them further.

‘Self-definition’ and ***‘non-dominance’*** are the key issues:

Almost all peoples in Africa might identify as being Indigenous if this is to

- (a) resist “subordination to dominating groups and the state” rather than
- (b) to use this claim to ignore the marginalisation of others.

Is acknowledging the rights of Forest Peoples as IPs a clear indicator of (a)?



UN Declaration on the Rights of Indigenous Peoples (2007)

1945 UN Charter: sought to develop friendly relations between nations based on the “principle of equal rights and *self-determination of peoples.*”

- Nations are not peoples.
- Indigenous peoples are no less peoples than other human societies

2007 UNDRIP:

- Indigenous peoples have the right to ***self-determination*** (Article 3) ... to ***autonomy or self-government in matters relating to their internal and local affairs*** (Article 4).
- ***States shall consult and cooperate*** in good faith ***with the indigenous peoples ... to obtain their free and informed consent prior to the approval of any project affecting their lands*** or ... other resources... (Article 32)



Key Rights in UNDRIP

- Rights to the land, territories and natural resources they customarily owned, occupied or otherwise used
- Control what happens on their lands
- Represent themselves through their own institutions
- Exercise their customary law

All of above within framework of State, international human rights and respecting rights of individuals.



Significance of UNDRIP

After hundreds of years of discrimination indigenous peoples have now achieved equality with other peoples

- However because of their history of discrimination and because of their distinctive social systems, respect for their rights requires cultural sensitivity.
- The UNDRIP accords them a degree of autonomy that is not thought necessary for, nor is it aspired to by, many other communities
- ***They don't enjoy 'special rights': they enjoy the same rights in special circumstances***

Why FPIC Now? Good Reasons!

- **Human Rights** stronger and more widely recognised
- **Self determination** and collective rights gain recognition
- **Communities** stronger and pressing for direct control of their own affairs

Why FPIC Now? Not so good Reasons?

- **States** weaker (liberalization and structural adjustment)
- **Globalization** has brought private sector into direct contact with communities
- **Private sector** wants clear rules vis-à-vis communities to secure their investments from risk

Why is FPIC coming forward?

What does FPIC consist of ?

Right to say **'yes'** or **'no'** to proposed developments on peoples' lands

Consent which is determined in conformity with - or with respect for - peoples' cultures, customary systems and practices

- According to people's own **representative** organisations/ institutions
- Without coercion or duress (**'Free'**)
- Before the initiation of activities (**'Prior'**)
- After the complete sharing of available information on the proposed activities and their implications, according to an agreed process and with adequate time (**'Informed'**)



Establishing customary rights to land and other resources

- International law recognises custom as a source of rights. ***These rights obtain independent of whether the State has recognised them or not.***
- For this reason, International law recognises that ***indigenous peoples' rights do NOT depend on an act of the State because their rights derive from their OWN laws and practices.***

This is because:

- Human rights are considered to be inherent not grants of a government
- Customary law, occupation and use precede and/or are independent of the State

FPIC in international norms?

1. FPIC established in International Norms:
UNDP, UN Dev Group, EU, World Bank IPP, etc.
& in 'Voluntary' Best Practice Standards: Forest Stewardship Council, Protected Areas, etc.

BUT

2. Are FPIC Safeguards being weakened?

- (i) **World Bank OP 4.10** on IP Rights (2005) is much weaker than FPIC required by UNDRIP: WB require FPIC *Consultation/ broad community support* Vs. UNREDD requiring FPIC *Consent*
- (ii) **RPP** (Readiness Preparation Proposal) **draft template** reduces standards further (Jan 2011)

FPIC Safeguards being weakened in emerging draft FCPF RPP template

If the new Multiple Delivery Partners (MDP) Pilot Projects are guided by this then:

(i) Projects can adhere to lower standards
(e.g. WB *consultation* not UNDRIP *consent*)

~~“As per World Bank practice, in~~ In cases of joint co-financing of activities by multiple donors, ~~the highest standards of one of the donors apply to the set of activities for all the donors. . . . (i.e., co-mingling of funds for a single activity), or of involvement of delivery partners other than the World Bank, the parties will come to an agreement on which standards and processes will be applied for a country.”~~

(ii) Projects wont have to adhere to FPIC:

- “Countries that have signed ~~on to~~ the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) ~~will be expected to adhere to~~ should review their responsibilities regarding the principle of free, prior and informed consent (FPIC).
- “~~Activities that may potentially impact Indigenous Peoples and other forest dependent communities, shall follow a human rights based approach and shall adhere to UNDRIP,~~ Countries should be aware of key documents and processes related to consultations”



Is FPIC a right of ‘veto’?

Does it mean indigenous people can reject private sector development plans on their lands?

As a general rule: **yes**.

Does this mean that IPs can overrule the State?

Not exactly, since in ‘exceptional circumstances’ and where there are ‘compelling reasons’, the State may push ahead but should still allow people to express their views through an FPIC approach.

In such cases, however:

The State must then satisfy additional requirements:

- It must acquire lands and pay due reparations through due process
- Show that the intervention is ‘necessary’
- Show that cost (to the people) is ‘proportional’ to benefit sought
- Must be to achieve a legitimate objective in a democratic society
- Should not ‘endanger their very survival as a people’

Simply invoking the national interest is not enough.



Who has the right to FPIC?

- Indigenous peoples
- 'Local communities'

Definitional challenge very great

- All 'peoples' have the right to self-determination
- But do all 'social groups' have same collective rights? Probably not.
- Representation issues very challenging: how is representation of a 'local community' different from devolution to local government?

FPIC over what?

The law gives indigenous peoples the right to consent on decision that will effect them, which is more than land. It also includes:

- Laws, Policies, Changes to institutions (UNDRIP Article 19)
- Intellectual property and Cultural heritage

Chad Cameroon Oil Pipeline



Pipeline, Bagyeli & the Forest

- World Bank funding for the pipeline triggered:
- **Safeguard policies**, to mitigate impact of pipeline on Bagyeli and Forest: World Bank created: (i) IP Plan & (ii) Environmental Fund
- **IP Plan**: inadequate, didn't recognise land rights
- **Forest**: WB funded Campo Ma'an Park > Bagyeli expelled

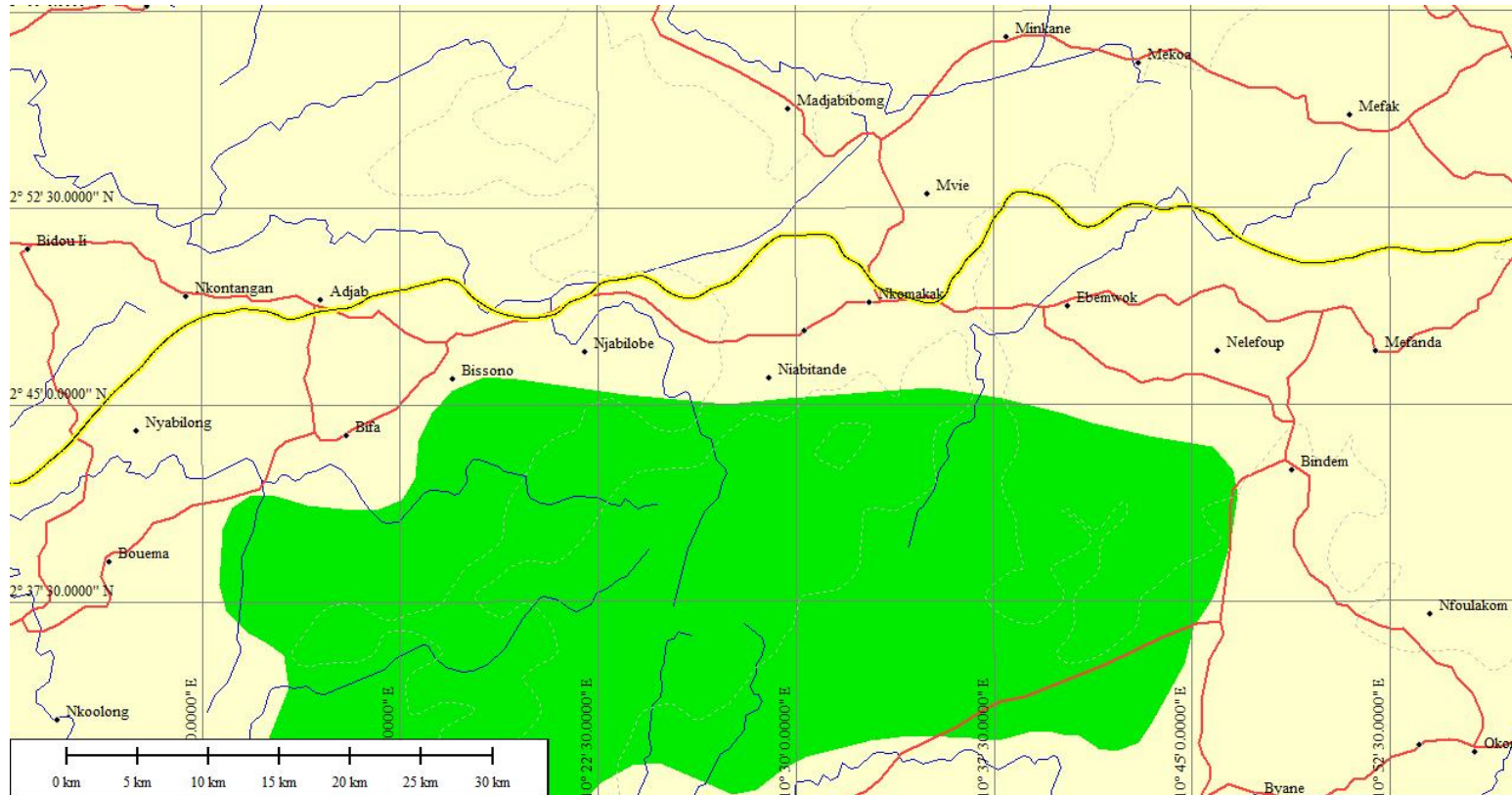
Mapping, asserting rights

- **FPP, CED, Okani** worked with Bagyeli to create land use maps demonstrating enduring right to Forests such as at Campo Ma'an.
- **Consequently use rights recognised**: right to hunt and gather in forest recognised;
- **But not land rights**: right to live there not yet recognised.

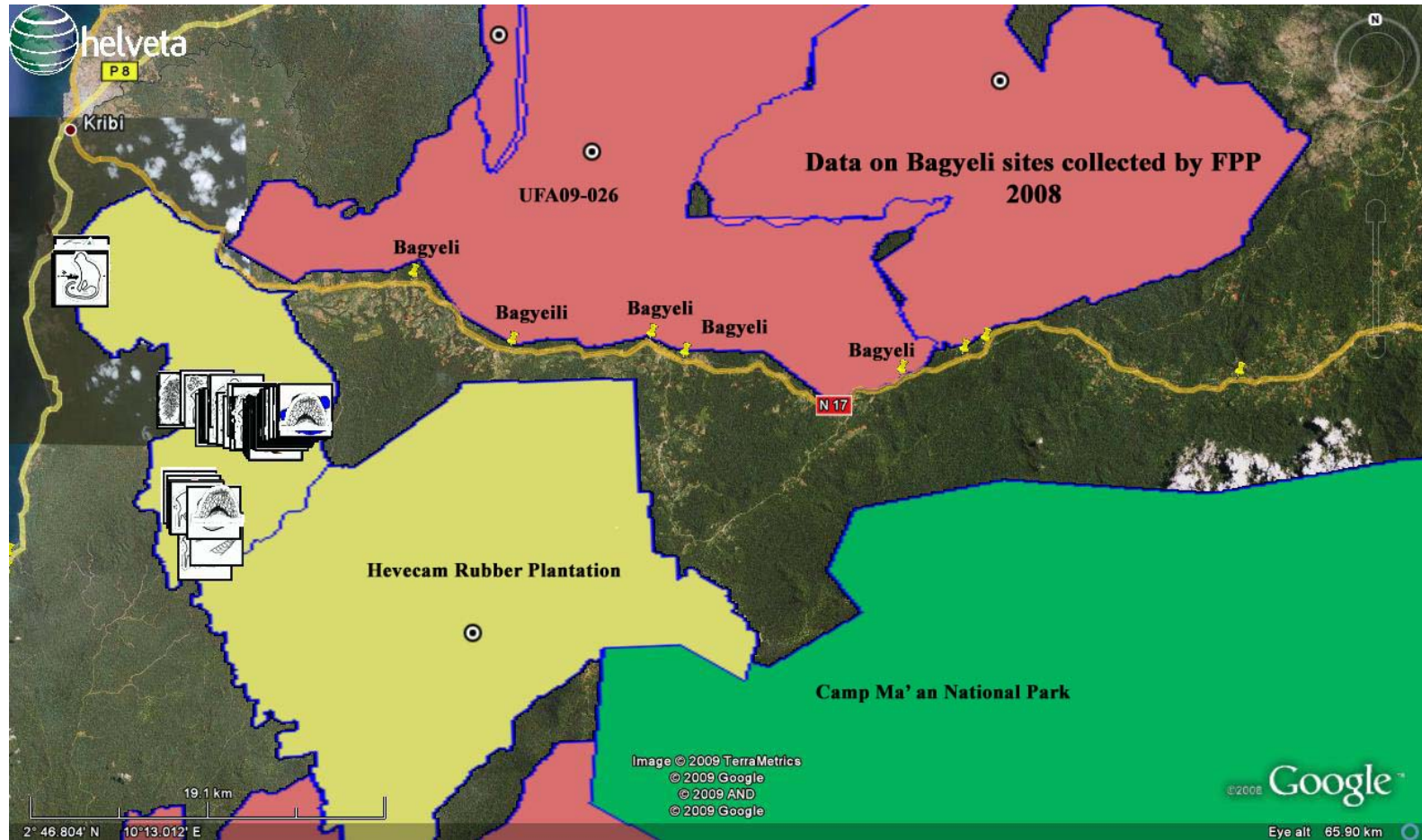
World Bank Consultations / Communities Mapping

The new 'pipeline'?

Proposed Mballam iron ore rail line from REDD area of Ngoyla Mintom/Tridom

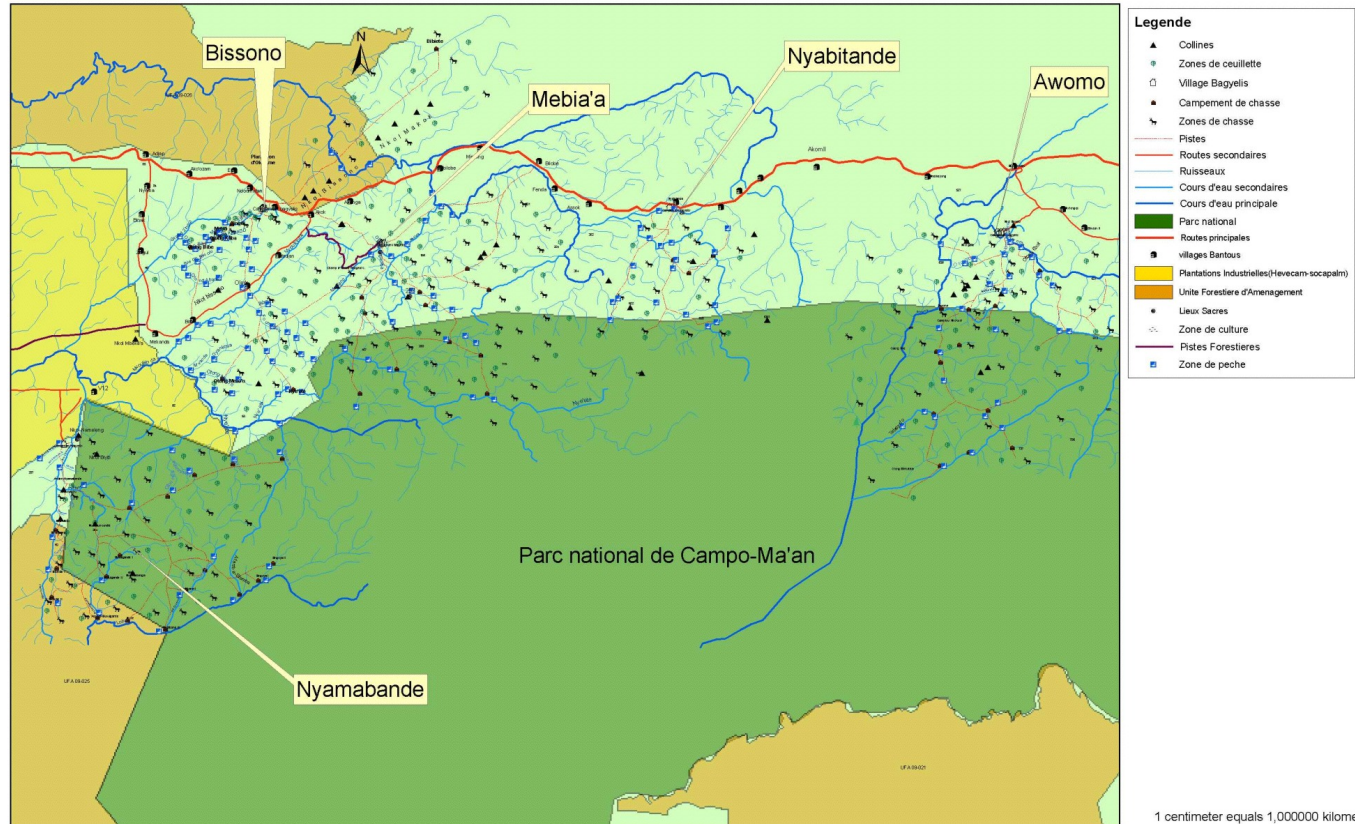


On whose land? . . .



What proof is there of that?

CARTES DE GESTION DES RESSOURCES FORESTIERES DE CINQ COMMUNAUTES BAGYELI DE L'ARRONDISSEMENT D'AKOMII



CARTE REALISEE PAR LES POPULATIONS DE CINQ COMMUNAUTES DE L'ARRONDISSEMENT D'AKOMII EN COLLABORATION AVEC LE CENTRE POUR L'ENVIRONNEMENT ET LE DEVELOPPEMENT(CED)

Villages impliqués: Nyamabande (Ghaangang Isang, Koma Elobet Jorok), Awomo (Egango Nion, Pata, Omba Dendoum) Nyabitande (Belo, Les Moko, Praso) Bissono (Noh Simo, Dymba Jua, Omba Joseph et Nio Pierre) Mebiaa (decole Bagyeli)
Appui technique apporté par: Centre pour l'Environnement et le Développement (Centre de gestion, Thierry, Olivier, Cassi) Forest Project Project (Bisoso et Tchoukwa), Département cartographe (Ondore Vira)
Remarque importante: Les informations contenues dans cette carte sont une meilleure représentation de l'importance de la forêt pour les peuples bagyeli que la base d'une carte topographique exacte, des données et des informations ont été collectés, analysés et digitalisés à l'aide de logiciels ArcGIS. La carte pour servir comme outil de base dans la négociation entre les différents parties prenantes pour une gestion durable des ressources naturelles.
Reproduction: Cette carte est le fruit d'un travail de collaboration entre les populations du Bagyeli de Bissono, le Centre pour l'Environnement et le Développement et Forest Project Project. La reproduction de celle-ci est strictement interdite sans autorisation écrite préalable.
Pour toute information, contactez: Le Centre pour l'Environnement et le Développement(CED) BP 3430 Yaoundé, Cameroun, et Forest Project Project 1, Forestry Centre, Strada 4, Moson in Marsh, 0516 9802, UE.
Source: Carte topographique IGN France de 1:50000 (édition de 1995) pour les données de base. Analyse des données et digitalisation: Du 8 juillet au 25 septembre 2003. Traitement: Du 09 au 21 octobre 2003. Finalisation: 25 octobre au 25 novembre 2003

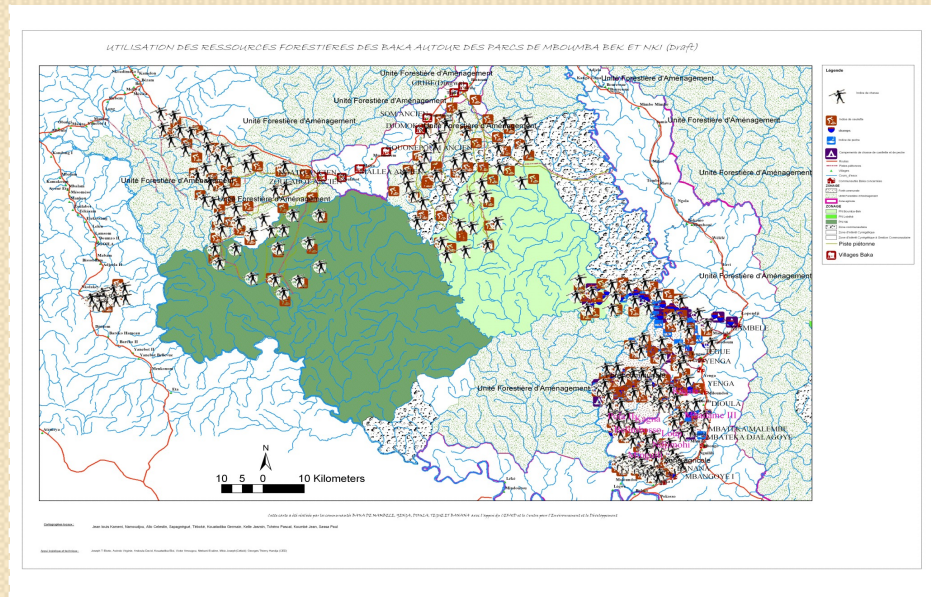


Participatory mapping can show not just the boundaries of use but also:

- Land use zones
- Local names

- Customary rights areas
- Sacred sites
- Historical areas

*Left: Baka mapping in Cameroun
Right: Mboumba Bek & Nki*



Community mapping

F, P, I & C Issues summary:

1. **FREE** of what?
2. **PRIOR** to what?
 - Proposal?
 - Planning?
 - Permits?
 - Operations?
3. Who provides the **INFORMATION**?
4. **CONSENT** by what process? And how long does it take?



- Proposals to include 'low-impact logging' in REDD schemes in Guyana

People have the right to choose their own representative institutions

- Is the customary **leadership** enough?
- Is the introduced leadership system accepted?
- Indonesia: customary bodies lack legal personality
- Guyana: colonial village administration now accepted
- Every place will be different: right to choose their own representation

Social structures very varied: some more egalitarian, some more hierarchical

Both provide challenges:

- (i) **egalitarian** because everyone has to agree
- (ii) **hierarchical** because some may not be consulted

Other key issues concerning consultation and consent:

Capacity, Language, Legal status

As well as: Caste, class, status and gender divisions

Who gives consent?



Rule of thumb

Sound consensus-based decisions emerge best from processes that:

- Are ***iterative***
- And ***inclusive***
- Take time and allow ***interim offers*** to be taken back to community for discussion
- Ensure the right and the resources for a chosen ***independent counsel*** (legal or NGO)
- Allow scope for ***customary norms*** to be respected
- Allow people to say '***no***'.

ONE STEP FORWARD:

Local negotiation can be a successful iterative process

- In Rep. Congo, Forest People have been mapping their forest in CIB logging concession
- Step by step negotiation in cutting zones over
 - (i) which cutting blocks should be left out as crucial to livelihoods
 - (ii) which species should be left because they are valued

ONE STEP BACK:

If there are no sanctions for companies non-compliance

- Certification bodies in FSC have not made FPIC requirement a 'major'
- So instead of being failed for non-compliance companies are asked to make 'corrective actions' over coming years
- Result: Communities lose what little leverage the process gave them

An ongoing process



Lessons from Indonesia: FPIC can work

Obstacles:

Lack of legal recognition of customary rights

- replacement of customary institutions by a uniform village administrative system
- unfettered exercise of the States' 'controlling power' over natural resources
- Forestry laws which are applied as if the State owned all forests
- Patrimonial and un-transparent governance
- Repressive use of security forces by private sector

Achievements:

Agreements have been (re) negotiated on good faith basis

- oil palm companies have restituted lands to communities (Sambas)
- compensation has been paid for damages (Sambas)
- local governments to recognise community livelihoods in protection forests (Lewolema);
- communities have been able to revitalise their customary



REDD & FPIC: 2 Issues or One?

Are we trying to reconcile two issues:

- **REDD** as part of the solution to Climate Change; and
- **FPIC** as a way of acknowledging local peoples rights

Or is there a single solution to a single problem?

*Ensure communities regain control of their environments (Solution)
to stop*

economic powers driving climate change by destroying localities (Problem)

FPIC – A Procedural or Substantive right?

- Most agencies have focused on FPIC as a **procedural** process detached and *disconnected* from **substantive** rights (to land, property, livelihood, food, means of subsistence, self-determination, culture etc).
- How do we ensure FPIC is tied to and flows from these other collective rights, that it is not a tick box exercise that precedes projects but is an ongoing part of restoring power and benefit to communities?