

# Free, Prior and Informed Consent: **Basic Principles and Implementation**

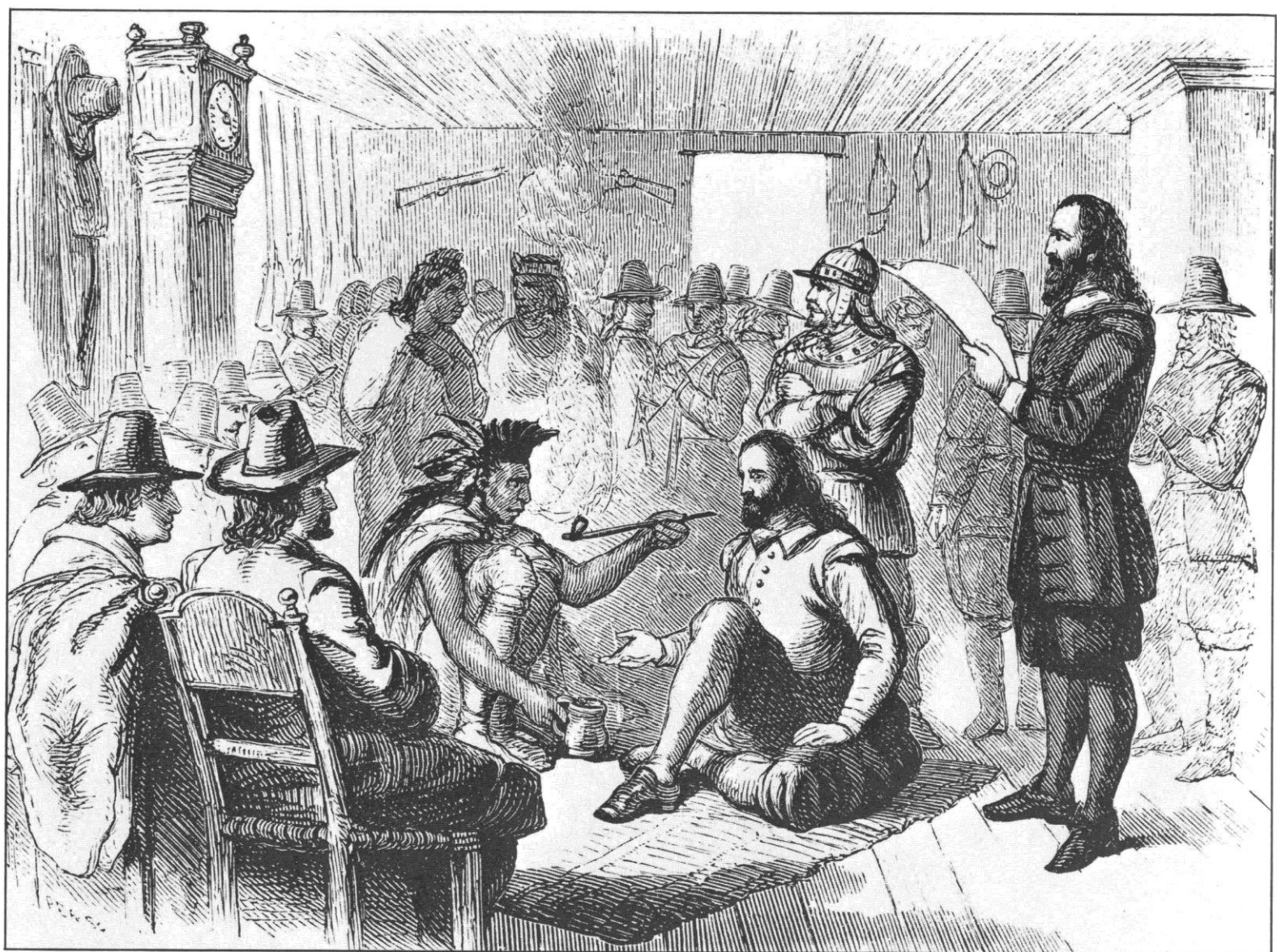
Presentation of Scoping Paper by  
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Forest Peoples Programme  
The Forests Dialogue  
Yale, New Haven, 13<sup>th</sup> – 14<sup>th</sup> April 2010

# Forests for Peoples : Peoples for Forests





# FPIC: a new concept ?





# What is self-determination?

Ted Moses, former Grand Chief of the Grand Council of the Crees who negotiated the Hydro Quebec agreements explains that:

When I think of self-determination, I think also of hunting, fishing and trapping. I think of the land, of the water, the trees, and the animals. I think of the land we have lost. I think of all the land stolen from our people. I think of hunger and people destroying the land. I think of the dispossession of our peoples of their land. ... The end result is too often identical: we indigenous peoples are being denied our own means of subsistence. ... We cannot give up our right to our own means of subsistence or to the necessities of life itself.... In particular, our right to self-determination contains the essentials of life – the resources of the earth and the freedom to continue to develop and interact as societies and peoples.





# UN Declaration on the Rights of Indigenous Peoples

- IPs are no less peoples than other human societies
- **Article 3:** Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- **Article 4:** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

# Key rights in the UN Declaration

- Rights to the land, territories and natural resources customarily owned, occupied or otherwise used by them
- 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.



# FPIC in International Law:

## International Human Rights Laws:

- FPIC is recognised explicitly in international laws
- UN Declaration on the Rights of Indigenous Peoples
- ILO : 6(2) y 7(1) (aim of securing consent)
- CBD : 8j (indigenous knowledge)

## Jurisprudence:

- FPIC is explicit in legal interpretations
- Committee of Human Rights
- CERD Committee
- InterAmerican Commission and Court of Human Rights
- African Commission of Human and Peoples' Rights

## ***UN Declaration on Rights of Indigenous Peoples: Article 32***

- 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
- 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...*

**(Adopted by UN GA Sept. 2007)**



# 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'**)

# FPIC in international norms:

- UN Development Group Guidelines
- UNDP Policy on Indigenous Peoples
- European Union : IPs policy
- IBD: IPs and re resettlement
- IFAD: IP policy
- World Bank Indigenous Peoples Policy
- **FPICon and Broad Community Support**
- FAO Voluntary Guidelines for Planted Forests: no resettlement without FPIC



# FPIC in voluntary 'best practice' standards:

- Protected Areas : WCPA, WPC, WCC, CBD
- Forestry: Forest Stewardship Council
- Dams: World Commission on Dams
- Mines: World Bank's Extractive Industries Review
- Environmental Impact Assessments: Akwe:kon Guidelines
- Crops: Roundtable on Sustainable Palm Oil, RTRS, RSB....
- Now REDD: UNREDD, CCBA, CCBA/CARE.

# Conflict: costly for companies





# Repression: costly for people





# ***CSR and FPIC: Why companies seek consent: reducing risk***

*'... early attention to FPIC issues can avoid significant costs during implementation...'*

*' Even as we refine what this principle means in operation, there is no question that as a principle and as a practice, free, prior, informed consent is a key part of legitimacy. And if you wonder if that is true, simply ask this question: Is your company better off having the people in the communities where you operate with you or against you? It is just plain common sense.'*

**WRI, 2006, *Development Without Conflict: The Business Case for Community Consent*, Washington DC**





# FPIC in national laws and procedures

- Philippines
- Venezuela
- Bolivia
- Colombia
- Australia (NT)
- Canada (Supreme Court and BC courts)

# Is FPIC a right of 'veto'?

- Does this mean that IPs 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, the jurisprudence clarifies that in 'exceptional circumstances' and where there are 'compelling reasons', the State may push ahead but should still allow the people to express their views through an FPIC approach.
- In such cases, however, the State must then satisfy a number of additional requirements:
  - It must acquire lands and pay due reparations through due process previously established by law
  - Show that the intervention is 'necessary'
  - Show that the cost (to the people) is 'proportional' to the benefit being sought
  - Must be 'with the aim of achieving a legitimate objective in a democratic society'
  - Should not 'endanger their very survival as a people'
- Simply invoking the national interest is not enough.



## Part 2: Lessons from the field

- FPP has been working on FPIC in detail in a number of countries including
  - Russia
  - Indonesia
  - Cameroon and Republic of Congo
  - Guyana, Suriname and Panama
- As well as holding numerous international meetings to review progress with implementation

# Who has the right to FPIC?

- Indigenous peoples
- 'Local communities'
- Definitional challenge very great
- Legal basis unclear
  - 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?
- IFAD policy on access to land: IPs and LCs



# FPIC over what?

- The law gives IPs the right to consent on decision that will effect them, which is more than land
- Laws
- Policies
- Intellectual property
- Cultural heritage
- Changes to institutions

## *UNDRIP Article 19*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent **before adopting and implementing legislative or administrative measures that may affect them.**





# Customary rights and state law

- **Customary rights:** Patterns of long standing community land and resource usage in accordance with indigenous peoples' customary laws, values, customs and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State. (From World Bank Operational Policy 4.10).
- International law recognises custom as a source of rights. These rights obtain independent of whether the State has recognised these areas or not.

# Forests and State lands in Indonesia

- 70% of national territory is defined as 'State forest area'
- 122 m. ha. of forests
- 60-90 million forest people
- Forests assumed to be 'State forest lands'
- Actually only 12% of these 'forests' have been gazetted, mostly PAs
- Meaning not clear if rest are State forests, 'private forests' ('lands with rights attached') or should be excised for farming etc.





# Customary rights

- '*Adat*' used by Dutch to regulate 'native' affairs
- *Adat* communities recognised by Constitution
- But land rights only weakly recognised in 1960 Basic Agrarian Law
- Affirmed in UN treaties and UN Declaration on Rights of IPs



# Weak or Absent Tenures

- Less than 40% of all properties in Indonesia have been titled (WB)
- %age is declining as holdings being created faster than BPN can register
- Extremely few *ulayat* (collective tenures) registered
- Some recognised through local legislative acts but not mapped or recorded
- Procedures for *ulayat* recognition are absent or not well known
- Rural people esp MA v. vulnerable (3,500 land conflicts over oil palm)



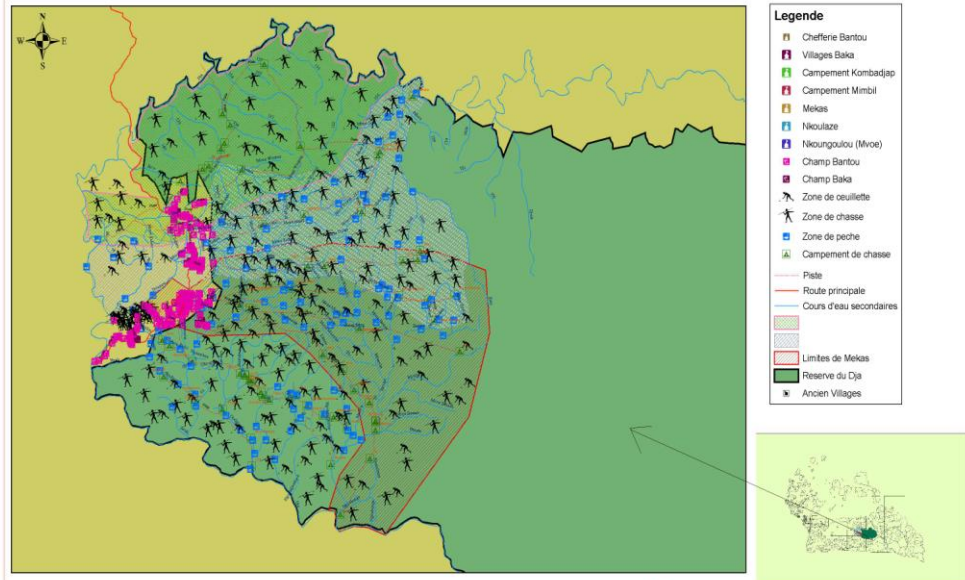


# Community mapping

- Maps can show not just the boundaries of use but also
- Land use zones
- Local names
- Customary rights areas
- Sacred sites
- Historical areas



Carte d'utilisation des ressources forestieres des Baka et Bantou de Nkolmbembe, Mimbil, Mekas et Nkougoulou



Cartographes locaux: Mokomo Dieudonne(Baka); Atyi Jean-Marie(Bantou);  
Djala Luc (Baka) Megolo Bonaventure (Bantou); Djampene Pierre (Baka);  
Assing Didier Claver(Bantou); Onanas Thomas(Baka); Megata Francois(Bantou)  
Appui logistique: Tamo Jerome; Tchenang William. Realisation: Georges Thierry Handja



10 5 0 Kilometers



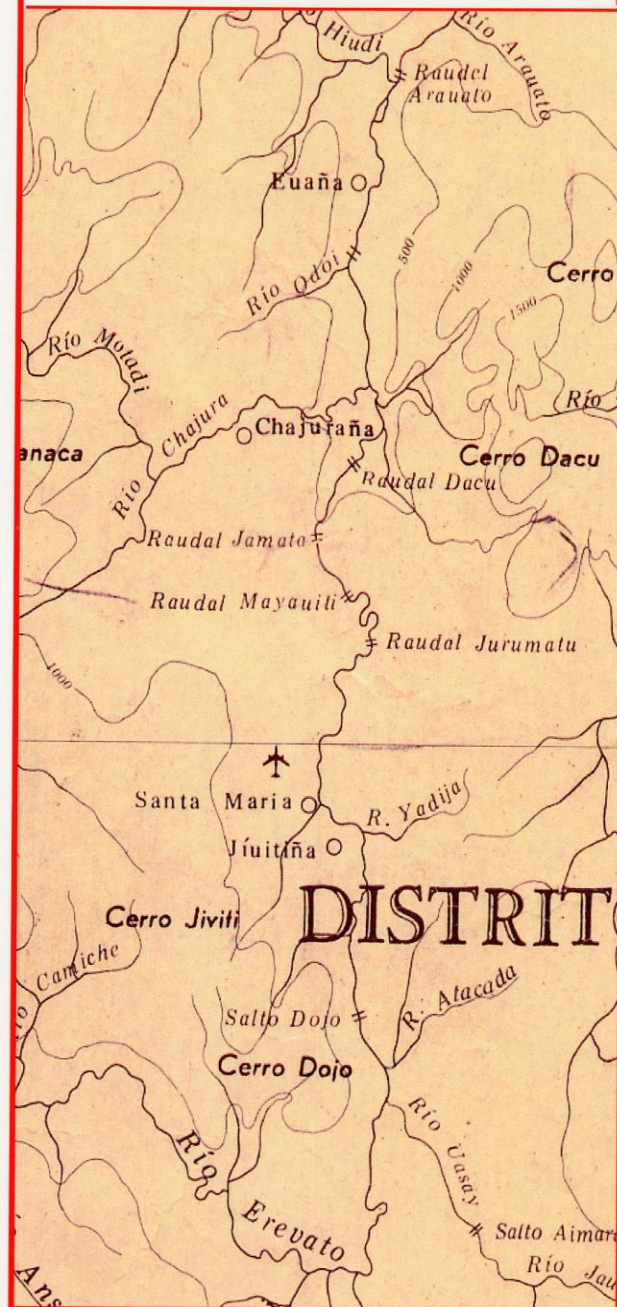
# Mapping ancestral territories

- Participatory maps help communities' show their customary systems and histories of land use
- Such maps are powerful tools in FPIC processes to explain customary rights to governments and companies





## MAKING A MAP - IN THREE STAGES



## OFFICIAL MAP



## NO-NAME MAP



## YE'KUANA-SANEMA MAP



Use  
rights  
or land  
rights?



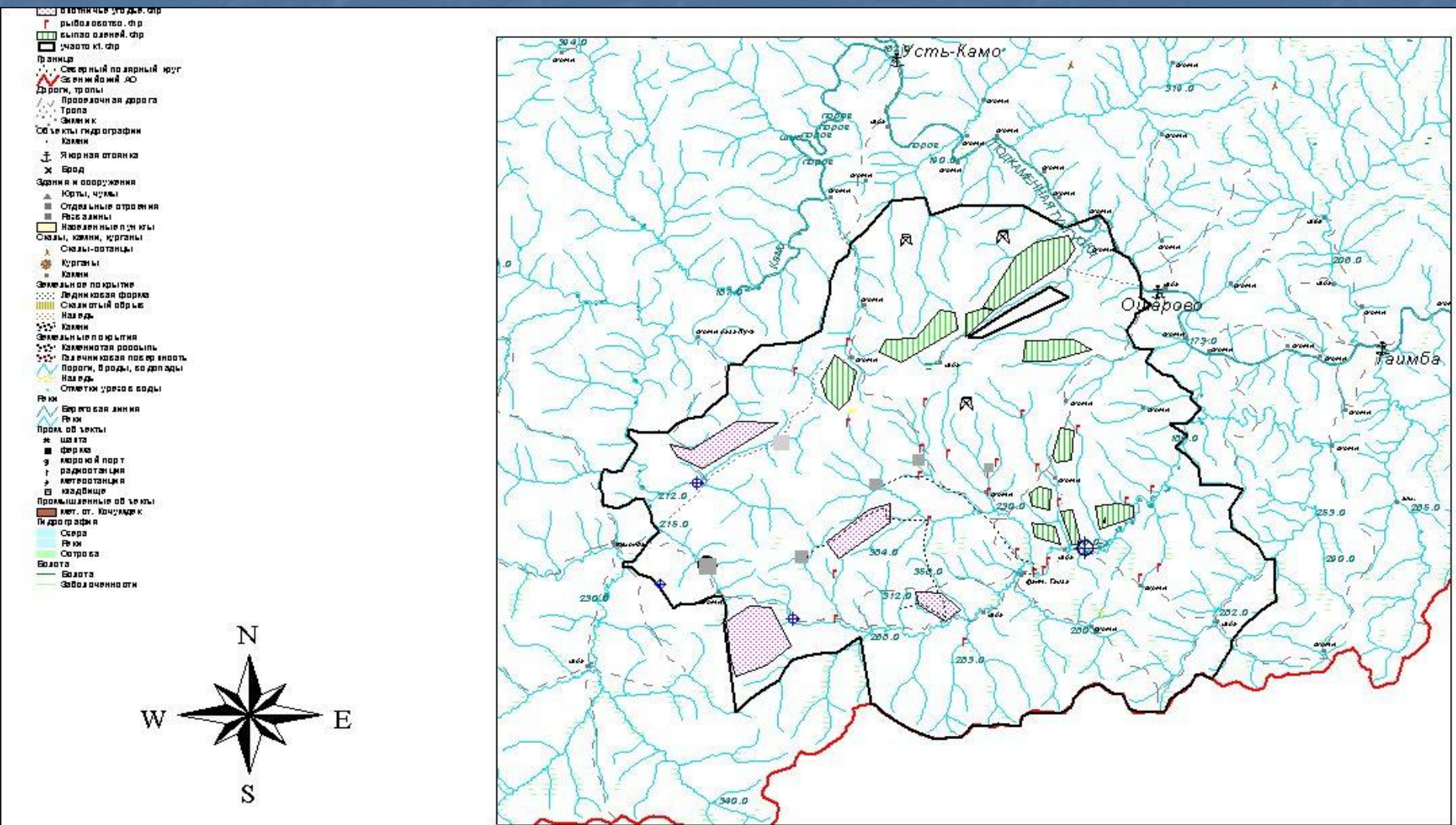
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# Access to winter browse



# Maps as negotiation tools

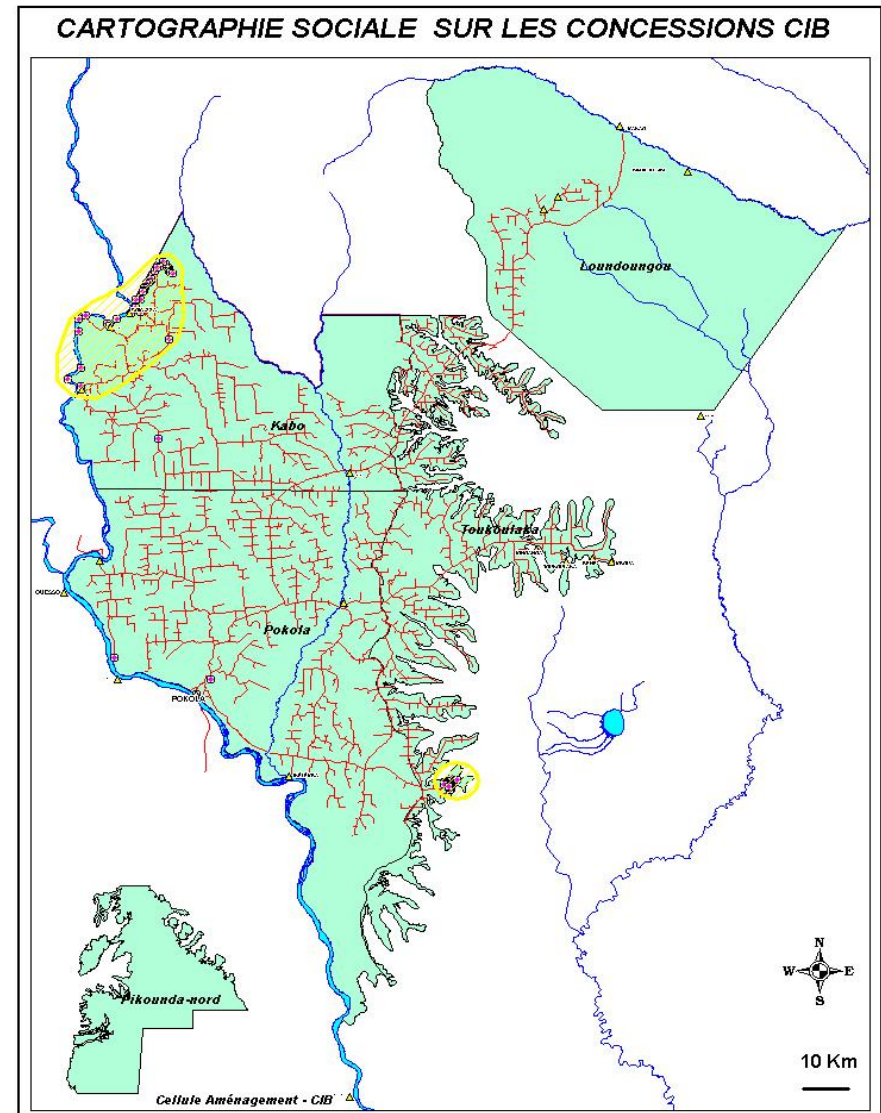


**Венковский АО** 9 0 9 18 мили



# Local negotiation

- Working with Pygmy people in Rep. Congo in CIB logging concession
- Step by step negotiation in cutting zones
- Negotiation over which cutting blocks should be left out as crucial to livelihoods
- Which species should be left because they are valued



# Who gives consent?

- Is the customary leadership enough?
- Indonesia: lack legal personality
- Guyana: colonial village administration now accepted



Social structures very varied: some  
'acephalous', some hierarchical





# Divided leadership: Pasaman Barat and PT PHP

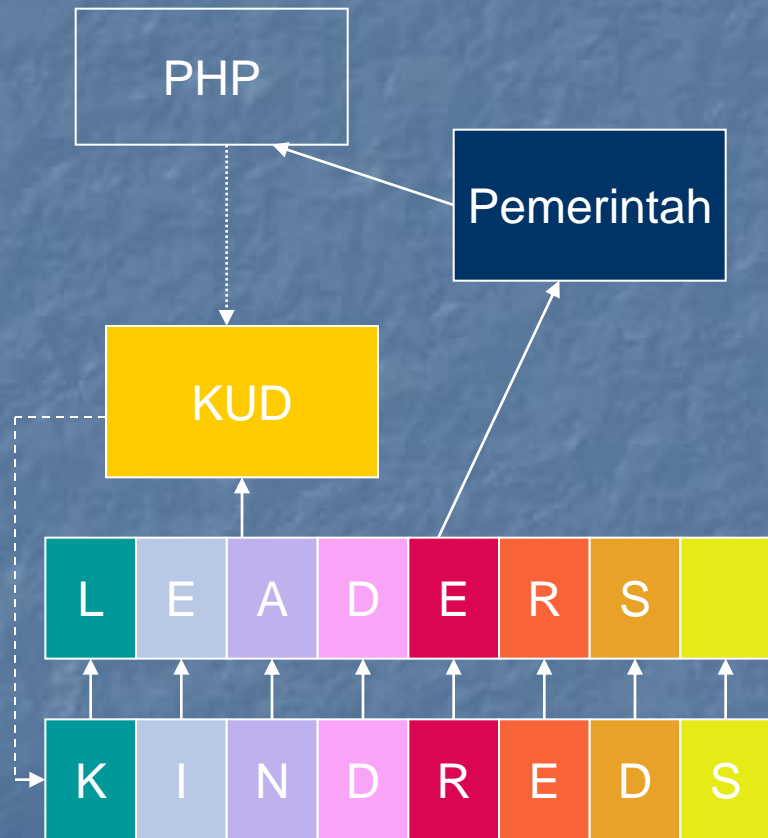
- 'Adat' leadership divided
- Some pro and some contra
- Unclear which leaders have authority
- Divided leadership hinders community from strong negotiation with company





# Complex *adat* structure

- Land is owned by women and by kindreds
- Kindreds (*kaum*) choose leaders
- Leaders hand land to government
- Government hands land to company
- Company gives plasma to KUD
- KUD gives plasma to KUD members
- Lots of room for manipulation



# Challenges to participation

- Capacity
- Language
- Legal status
- Caste, class, status and gender divisions





# 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 right and resources for independent counsel (legal or NGO)
  - Allow scope for customary norms to be respected
  - Allow people to say 'no'.

# Free of what?





# Prior to what?

- Proposal?
- Planning?
- Permits?
- Operations?

102°20'

103°00'

# KONSESI HTI APP & APRIL DI SEMENANJUNG KAMPAR TERHADAP TUTUPAN HUTAN PROV. RIAU -2008

▲  
1:500000

0°40'

0°40'

Sungai Rawa  
Penyengat

Teluk Lanus

Labuhan Bilik  
Segamai

Pulau Muda

Teluk Binjai

Teluk Meranti

- Desa
- Batas Kabupaten
- Batas Administrasi
- Kekurangan Teluk Meranti
- Kawasan Suaka Margasatwa
- Tutupan Hutan 2008
- Hutan Alam Rawa Gambut
- Hutan Alam
- Hutan Mangrove
- Nil
- Konsesi HTI 2008
- APP
- APP's Partners
- RAPP
- RAPP's Partners
- Rencana HTI RAPP Ring Kampar



Dept. Data Base & GIS  
Scale Up 2009

102°20'

103°00'



# Consent by what process?





# How long does it take?

## Customary rights : customary laws







**No to oil palm**

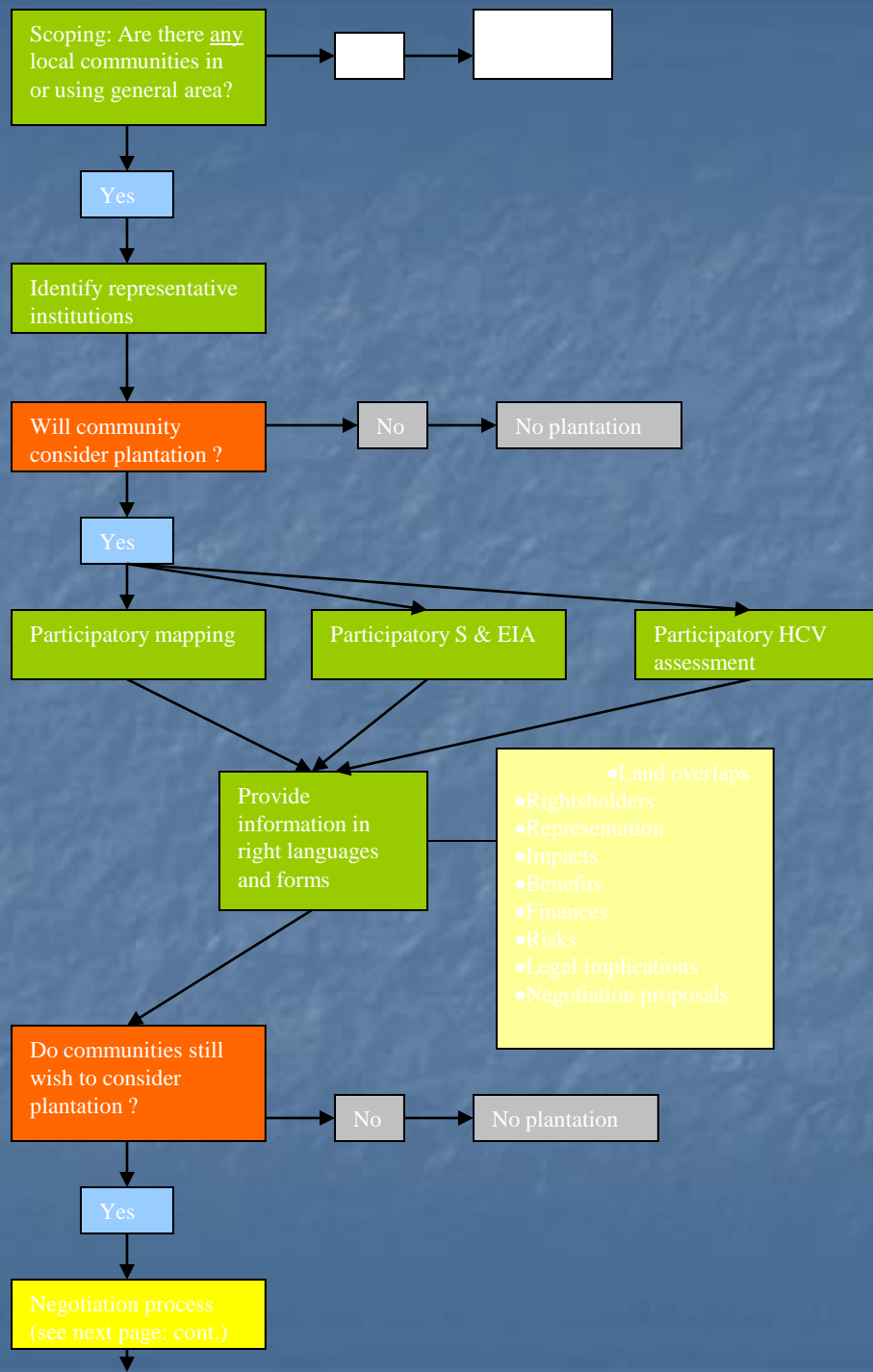


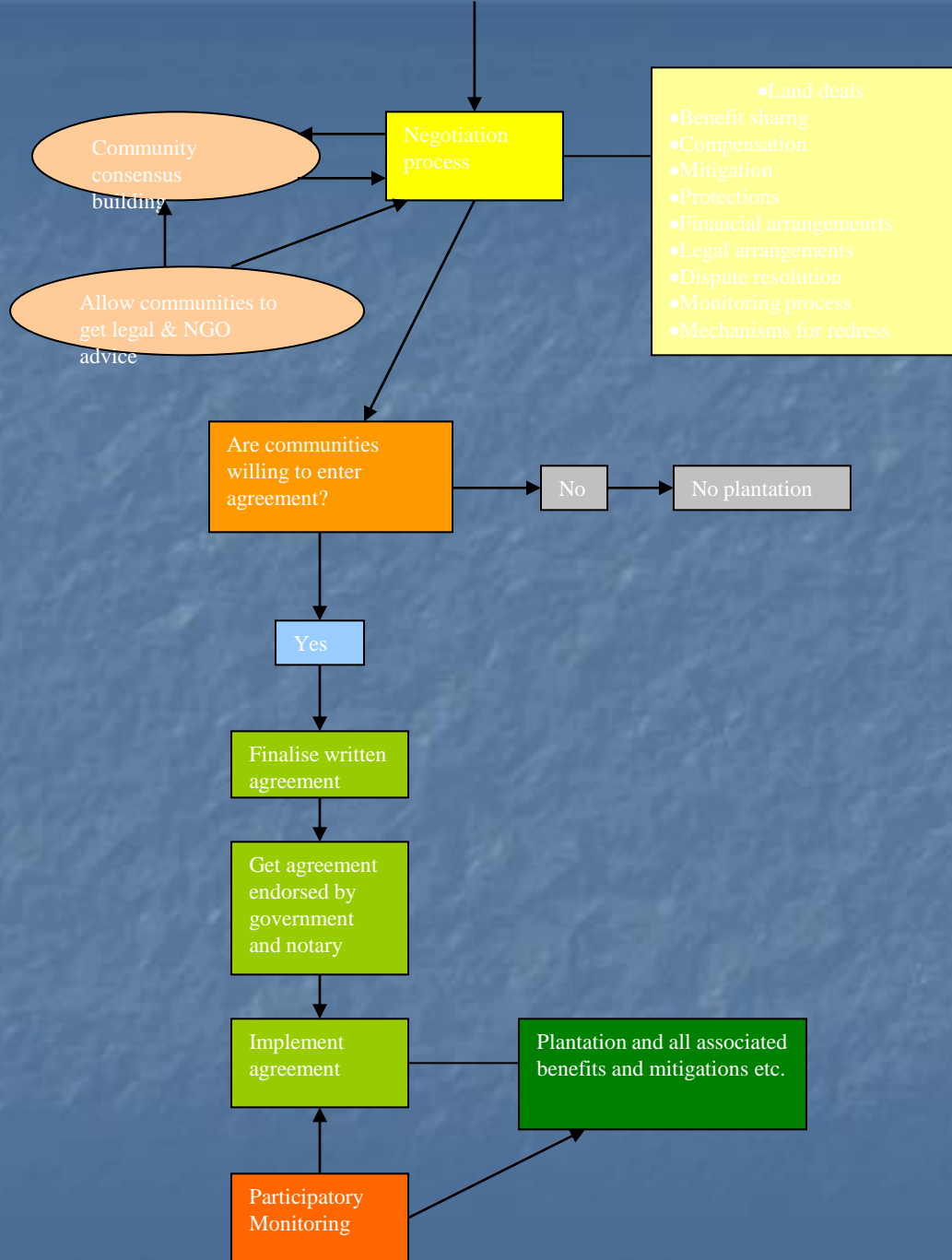
# Who provides the information?





## Iterative processes







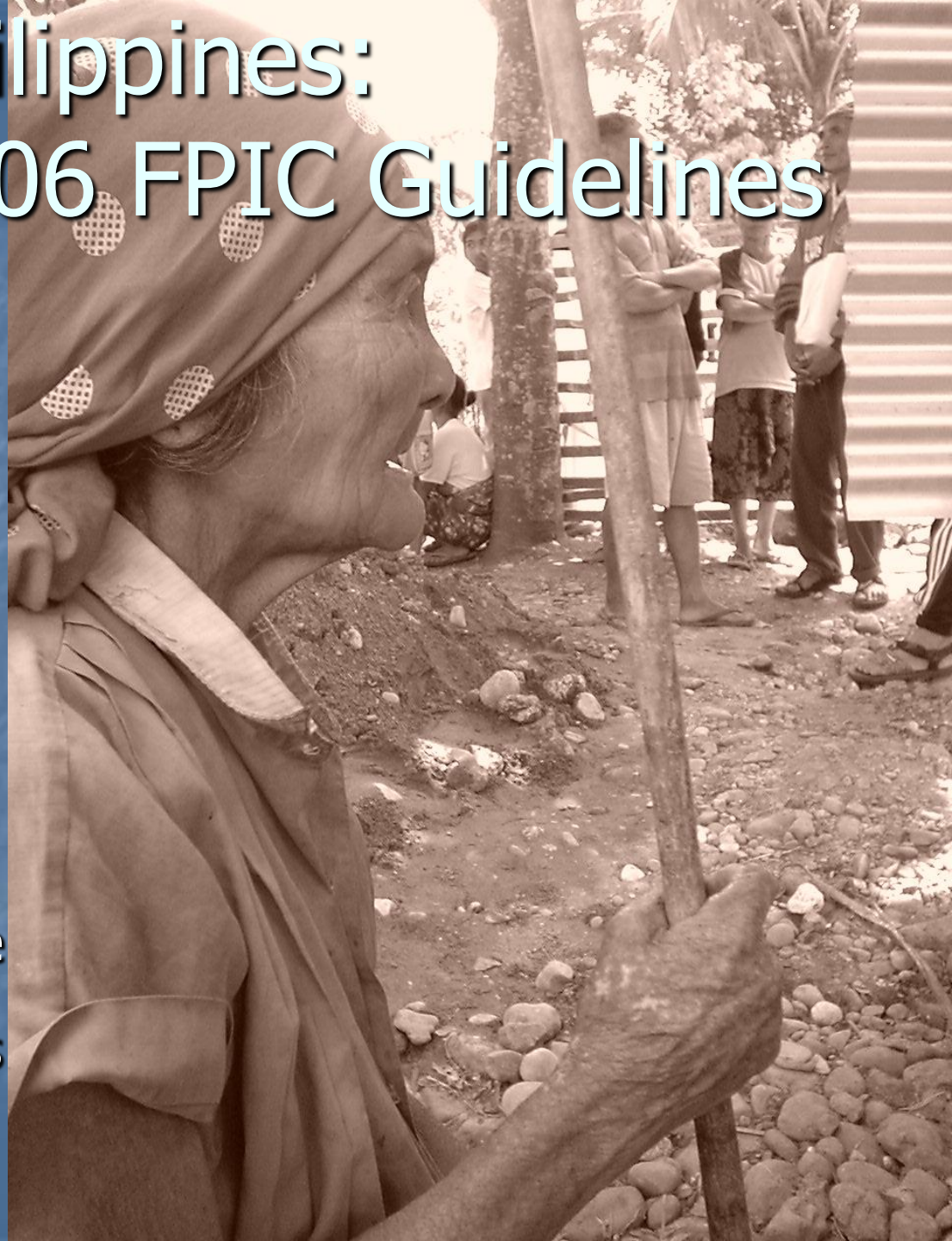
# Who verifies FPIC was achieved?

- 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



# Philippines: NCIP and 2006 FPIC Guidelines

- FPIC has become technical and procedural, very complex, increasingly weakened
- Guidelines do not conform with the definition of FPIC
- It unduly imposes government standards and policies
- Shifts the burden to the Indigenous Peoples to substantiate their rights to ancestral domains





# FPIC and REDD

- CCBA, CARE, UNREDD require FPIC
- World Bank FCPF Charter requires respect for countries' international obligations (but OP, which requires only FPICon now being replaced by SESAs)
- UNREDD and FCPF now being combined? Which standards will apply? Who and how accountable?
- Meanwhile numerous requests for simplified guidance
- Risks of making FPIC a 'one stop shop' stand alone with simplified check list instead of iterative and
- Instead of part of wider RBA to development



# BHP, Ekati Diamond Mine





# Lessons from Indonesia: FPIC works!

## 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 institutions (Lusan).







A photograph showing five people walking away from the camera on a dirt path. The path is flanked by a dense forest of tall, thin trees with green foliage. To the right of the path, there is a large, prominent mound of reddish-brown soil. The sky is overcast and grey. The entire image is framed by a dark blue border with a subtle, wavy texture.

[www.forestpeoples.org](http://www.forestpeoples.org)

Thank you