

Free, Prior, and Informed Consent: an overview

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The Center for International
Environmental Law

What is FPIC?

- ▶ Centuries–old rights–based principle based upon rights to: self–determination; lands, territories and natural resources; culture; freedom from racial discrimination; life and livelihoods.
- ▶ FPIC applies to proposed actions (decisions, activities, projects, etc.) that have the potential to impact the lands, territories, and resources upon which indigenous and tribal peoples depend for their cultural, spiritual and physical sustenance, well–being, and survival.



Elements of FPIC

- *Free should imply no coercion, intimidation or manipulation;*
- *Prior should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;*
- *Informed – should imply that information is provided that covers (at least) the following aspects:*
 - a. The nature, size, pace, reversibility and scope of any proposed project or activity;
 - b. The reason/s or purpose of the project and/or activity;
 - c. The duration of the above;
 - d. The locality of areas that will be affected;
 - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
 - f. Personnel likely to be involved in the execution of the proposed project (including Indigenous Peoples, private sector staff, research institutions, government employees and others) 
 - g. Procedures that the project may entail.

Elements of FPIC

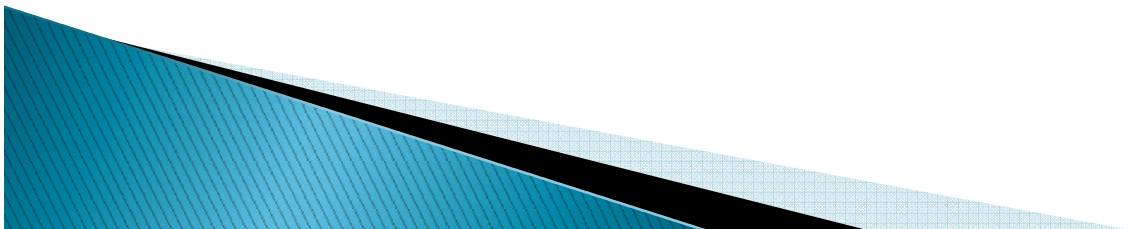
Consent

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation.

Consultation requires time and an effective system for communicating among interest holders. Indigenous Peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as Indigenous Peoples have reasonably understood it.

UN-REDD FPIC obligations

- ▶ UN Secretary General's directive: follow a rights-based approach
- ▶ UNDG Guidelines: require rights-based approach and FPIC consistent with UNDRIP
- ▶ UNDRIP: Arts. 41 and 42, applying arts. 10, 11, 19, 28, 32
- ▶ UN-REDD IP Guidelines: FPIC applies to UN-REDD activities.



Instrumentos Selectos Relevantes a la REDD y el CLPI

País	<u>Decl. Univ. de Derechos Humanos¹</u>	<u>Pacto Int. de Derechos Econ., Soc. y Cult.</u>	<u>Pacto Int. de Derechos Civiles y Polít.</u>	<u>Conv Int. de Elim. de Discrim. Racial</u>	<u>Conv. Diversidad Biológica</u>	<u>OIT Conv. 169</u>	<u>Decl. Derechos de los Pueblos Indígenas</u>	<u>Conv. Patrimonio mundial, cultural y natural</u>	<u>Conv. Salvaquar Patrimonio Cultural Inmaterial</u>	<u>Conv. Prot. y promoc. diversidad expresion. culturales</u>	<u>Conv. sobre los Derechos del Niño</u>	<u>Conv. sobre la elim. de discrim. contra la mujer</u>
Argentina*	Aplica (votó en favor)	Parte	Parte	Parte	Parte	Parte	Votó en favor	Parte	Parte	Parte	Parte	Parte
Bolivia*•	Aplica (votó en favor)	Parte	Parte	Parte	Parte	Parte	Votó en favor	Parte	Parte	Parte	Parte	Parte
Colombia*•	Aplica (votó en favor)	Parte	Parte	Parte+E25	Parte	Parte	Abstuvo & ahora apoya	Parte	Parte	X	Parte	Parte
Ecuador*	Aplica (votó en favor)	Parte	Parte	Parte	Parte	Parte	Votó en favor	Parte	Parte	Parte	Parte	Parte
Guatemala*•	Aplica (votó en favor)	Parte	Parte	Parte	Parte	Parte	Votó en favor	Parte	Parte	Parte	Parte	Parte
Mexico*• °	Aplica (votó en favor)	Parte	Parte	Parte	Parte	Parte	Votó en favor	Parte	Parte	Parte	Parte	Parte
Nigeria*	Aplica	Parte	Parte	Parte	Parte	X	Abstuvo	Parte	Parte	Parte	Parte	Parte
Panama*•	Aplica (votó en favor)	Parte	Parte	Parte	Parte	X	Votó en favor	Parte	Parte	Parte	Parte	Parte
Paraguay*•	Aplica (votó en favor)	Parte	Parte	Parte	Parte	Parte	Votó en favor	Parte	Parte	Parte	Parte	Parte

PANAMA: Instrumentos Selectos Relevantes a la REDD y el CLPI

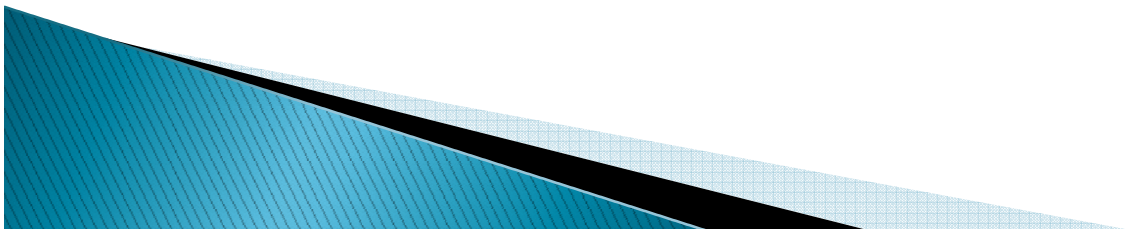
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Specific obligations relevant to REDD and FPIC

Right	Univ. Decl. on Human Rights	Int. Cov. on Econ., Soc. & Cult. Rights	Int. Cov. On Civ. & Pol. Rights	Int. Conv. on the Elim. of Racial Discr.	Conv. On Biological Diversity	ILO Conv. 169	UN Decl on the Rights of Indig. Peoples	Conv. On the Safeguard . of Int. Cult. Heritage	Univ. Decl. on Cult. Diversity	Conv. On the Prot. And Prom. Of Cult. Diversity	Conv. On the Rights of the Child	Conv. on the Elim. Discr. Against Women
Decision-Making, Consent, Access to Information, Participation	Art. 21.1, 21.2, 21.3	Art. 13.1	Art. 14.1, 25(a)-(c)	Art. 5(c)	Art. 10 (c)-(d)	Art. 6.1(a)-(b), 7.1, 7.3, 12, 15.1, 16.2, 17.2, 33.1, 33.2(a)-(d)	Art. 5, 10, 11.2, 18, 19, 23, 28.1, 32.2	Art. 15	Art. 6, 12	Art. 9(a)-(c), 11	Art. 12.1	Art. 14.2(a), 14.2(f)
Property, Lands, Territories, and Natural Resources	Art. 12, 13.2, 17.1, 17.2		Art. 12.1	Art. 5.1(d)	Art. 8(j), 10(c)-(e)	Art. 13, 14, 15, 16.1-16.5	Art. 2(b), 10, 25, 26.1.1, 26.1.2, 29.1					Art. 14.2, 15.2-15.4
Self-Determination	Art. 3, 33.1	Art. 1.1, 1.3	Art. 1.1			Art. 7.1	Art. 3					
Non-Discrimination	Art. 1, 2, 7	Art. 2.2, 26, 27	Art. 2.1	Art. 1.1, 2.1, 2.1(c)		Art. 3.1	Art. 2		Art. 4	Art. 2.3		
Culture	Art. 27.1	Art. 15.1(a)			Art. 10(c)	Art. 5	Art. 11.1, 15.1, 34	Art. 11(a), 12, 13(a), 13(b), 13(d)(iii)	Art. 3, 5, 7, 9, 11, 12(a)	Art. 1, 2.2, 5.2, 8.2	Art. 29.1(c)-(d)	
Life, Livelihood/ Adequate Standard of Living and Health	Art. 3, 25.1	Art. 1.2, 11.1, 11.2 a-b, 12.1, 12.2 a-d	Art. 1.2, 6.1	Art. 5.1(e)	Art. 8(j)	Art. 7.2, 25	Art. 7, 21.1, 24.2				Art. 6.1, 6.1, 24.1, 27.1	Art. 14.2(h)
Religion ,Sacred Sites	Art. 18		Art. 18.1, 18.3, 27	Art. 5.1(d)		Art. 5(a)	Art. 12.1, 12.2				Art. 14.1	
Right to Work		Art. 6.1, 7(a)-(d)		Art. 5.1(e)		Art. 5.1(a)-(c)	Art. 20.1, 20.2					Art. 14.2(e)
Healthy Environment & Sust. Development					Art. 6(a)-(b), 8(e), 8(j), 10	Art. 7.2, 7.4, 30.1	Art. 29.2			Art. 2.5, 2.6, 13	Art. 29.1(e)	Art. 14.2(a)
Access to Remedies	Art. 8		Art. 2.3	Art. 6			Art. 11.2					
Access to Justice	Art. 6, 7		Art. 16	Art. 5.1(a)			Art. 11.2, 32.3, 40				Art. 12.2	

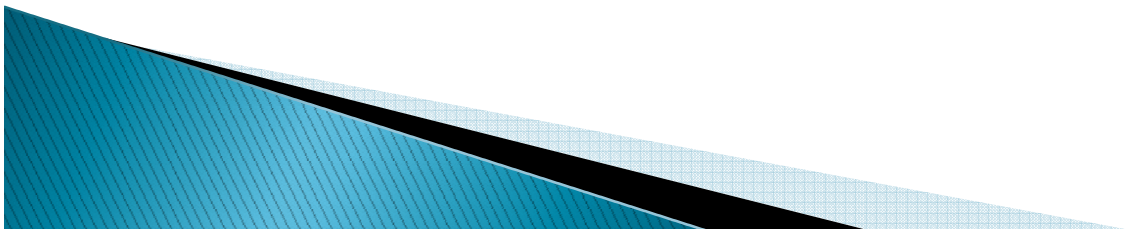
UNDRIP and FPIC

- ▶ **Article 10:** “No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned;”
- ▶ **Article 11** requires States to develop, in conjunction with indigenous peoples, restitution for “property taken without their free, prior and informed consent or in violation of their laws, traditions and customs;”
- ▶ **Article 19** requires that “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;”
- ▶ **Article 28** provides the right to redress for indigenous peoples whose traditional lands have been “confiscated, taken, occupied, used or damaged without their free, prior and informed consent;”
- ▶ **Article 32:** “States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”



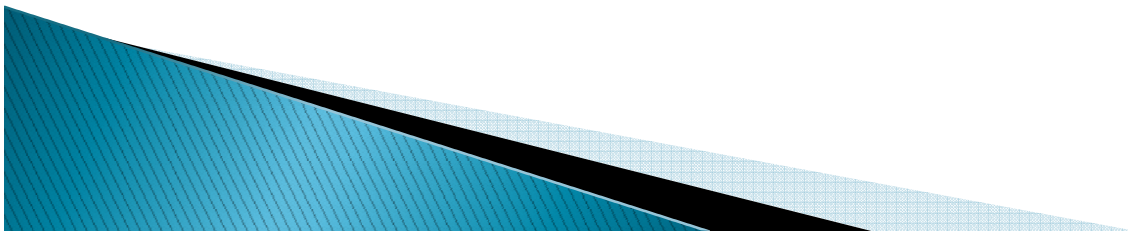
UNDG Guidelines on Indigenous Peoples' Issues

- ▶ No decisions directly related to rights and interests taken without informed consent in matters related to indigenous peoples' lifestyles, traditional lands and territories, cultural integrity as indigenous peoples with collective rights or any other aspect of their lives.
- ▶ The prospecting of natural resources on indigenous land should not be granted if the activity hinders indigenous peoples to continue to use and/or benefit from these areas where the free, prior and informed consent of indigenous peoples concerned has not been obtained.



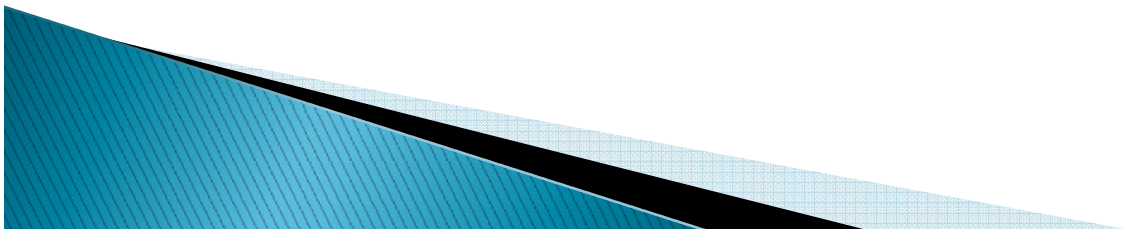
UN-REDD Operational Guidance

- ▶ Free, Prior, and Informed Consent must be adhered to, and is essential to ensuring the full and effective participation of Indigenous Peoples and other forest dependent communities in policy-making and decision-making processes within UN-REDD Programme activities.
- ▶ No decisions directly related to rights and interests taken without informed consent in matters related to indigenous peoples' lifestyles, traditional lands and territories, cultural integrity as indigenous peoples with collective rights or any other aspect of their lives.



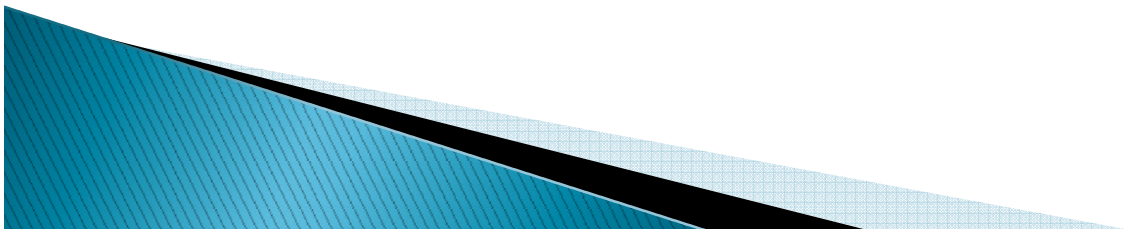
Operationalizing FPIC

- ▶ National Programmes follow operational guidance developed through the Global Programme, including guidance on engaging with indigenous peoples, other forest dependent communities and civil society organizations.
- ▶ The UN-REDD Technical Secretariat ensures the policies and strategies decided by the Policy Board are implemented and adhered to, manages UN-REDD's overall monitoring and evaluation functions for both the global and NJPs, and provides an ombudsman system for complaints.
- ▶ Ensuring rights requires an effective system for considering complaints and resolving conflicts.



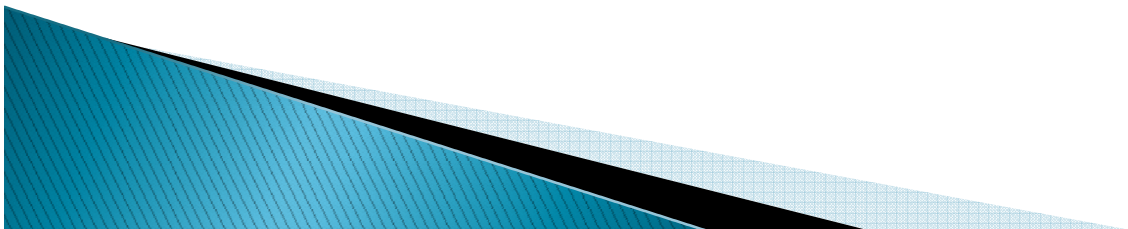
Recourse mechanism: some options

- ▶ Support the development of community-articulated procedures for expressing consent and resolving disputes
- ▶ Specify the obligations of UN-REDD actors to resolve complaints
- ▶ Refer complaints to existing entities competent in the subject matter, and/or
- ▶ Hear the complaints directly



What is a recourse mechanism?

- ▶ A complaint mechanism considers and addresses adverse impacts resulting from case-specific activities.
- ▶ Complaints may be based on specific harm and/or violations of specific obligations and procedures.
- ▶ Complaints are processed and solutions are considered on a case-by-case basis.

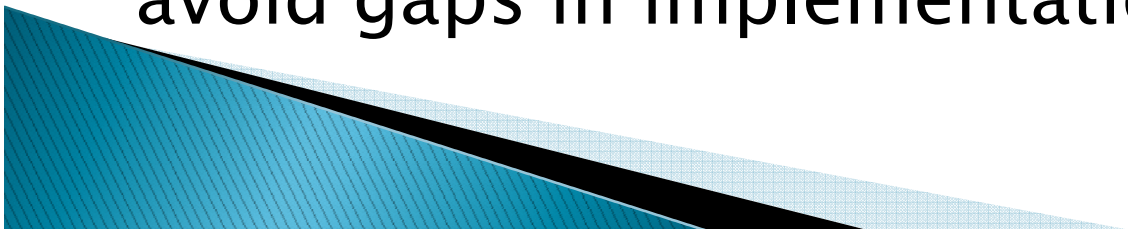


Complaint Mechanism: Key Principles

- ▶ Accessibility
- ▶ Independence
- ▶ Credibility/legitimacy
- Transparency
- Efficiency
- Effectiveness

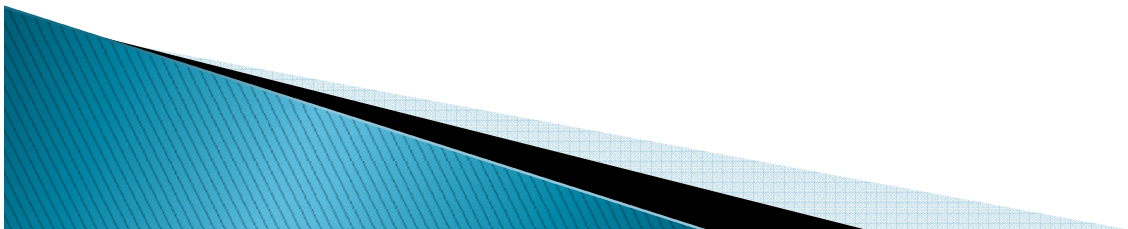
➤ How do we ensure independence and also retain authority for effective implementation?

➤ How do we respect sovereignty and also avoid gaps in implementation of obligations?



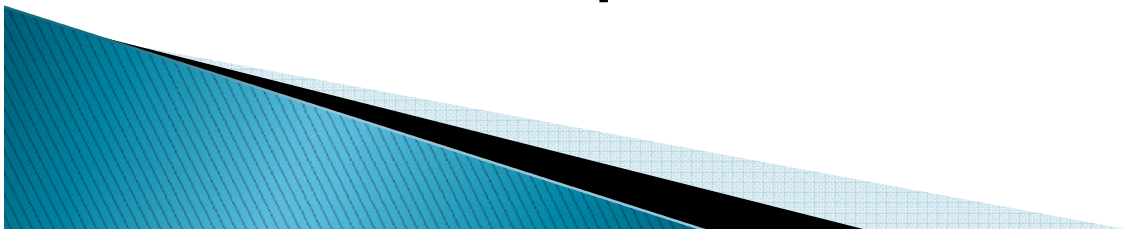
Complaint Mechanism: Possible Functions

- ▶ Reporting: UN Special Rapporteurs
- ▶ Fact-finding: World Bank Inspection Panel
- ▶ Arbitration: NAFTA Chapter 11--ICSID/UNCITRAL
- ▶ Litigation: Inter-American Court of Human Rights
- ▶ Mediation: IFC Compliance Advisor Ombudsman
- ▶ Donor Accountability: National Human Rights Institutions for OECD countries.



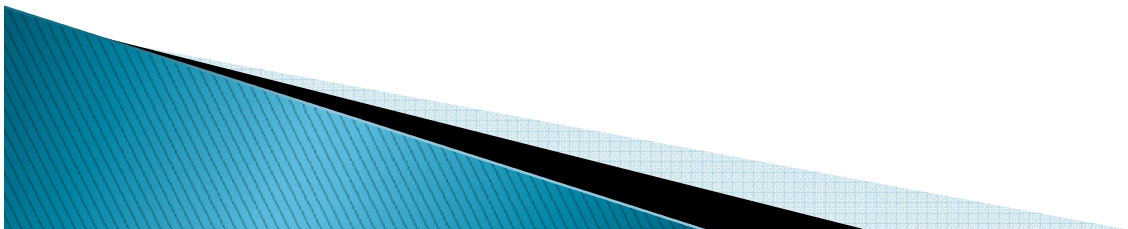
Types of remedies available

- ▶ Issue findings of fact
- ▶ Provide compensation for harm
- ▶ Offer remediation activities to restore to earlier condition
- ▶ Injunction to suspend or halt activity
- ▶ Sanction: punish activity to communicate unacceptability of action.
- ▶ Precautionary measures to avoid future impacts or harm.



Existing options for hearing complaints

- ▶ Indigenous or community-specific tribunals
- ▶ National tribunals
- ▶ UN-REDD Secretariat: Ombudsman function
- ▶ UN Human Rights System
- ▶ UN agency accountability mechanisms
 - MDTF Office
 - UNDP Evaluation Office
- ▶ Utilize partner accountability mechanisms
 - World Bank Inspection Panel (if FCPF/FIP country)
- ▶ Utilize donor accountability mechanism
 - OECD National Contact Points



Enabling Conditions
for FPIC

**Strengthen National
Engagement**

**Strengthen Community
Engagement**



Recognize traditional rights	<ul style="list-style-type: none"> • Identify any gaps between national laws and international obligations. • Identify nationally significant areas for REDD and corresponding rights • Identify areas where rights may overlap or be in conflict. • Include data in national baseline. 	<ul style="list-style-type: none"> • Support community efforts to identify lands, territories, and resources • Receive information on voluntary identification of community-based rights.
Strengthen institutional support & Develop procedures	<ul style="list-style-type: none"> • Develop national policies and procedures to engage communities and respect rights. • NJP maintains procedures for dissemination of information. 	<ul style="list-style-type: none"> • Develop community-specific procedures for engaging in discussions regarding REDD. • Identify the mechanisms that can resolve disputes over violation of articulated consent procedures.
Consider equitable benefit sharing.	<ul style="list-style-type: none"> • NJP develops procedures to consider and respond to community needs for location-specific REDD activities. 	<ul style="list-style-type: none"> • Identify community needs and priorities regarding management of land and other natural resources.
Build capacity and share experiences	<ul style="list-style-type: none"> • Identify and share procedures that have worked for FPIC • Participate in training regarding development of and participation in FPIC procedures. 	<ul style="list-style-type: none"> • Identify and share procedures that have worked for FPIC. • Consistent with community interests and needs, build adequate capacity to engage in planning and negotiations.

Measures to facilitate FPIC	Strengthening of Communities (consistent w/ comm. interests).	Strengthening of State Laws, Institutions and Policies
Clear resource rights	<ul style="list-style-type: none"> • Identify and resolve resource issues, including through assisting mapping efforts and recognizing community property rights 	Map territories and clarify community-based property rights.
Clear understanding of how to initiate and pursue engagement of communities in planning process	<ul style="list-style-type: none"> • Recognize need to initiate request. • Provide opportunities for meaningful participation of communities in planning processes • Establish mechanisms and procedures to facilitate FPIC process 	Identify criteria and procedures to guide efforts to obtain FPIC
Planning process is responsive to community needs	<ul style="list-style-type: none"> • Respond to Community needs 	Identify community needs and priorities regarding management of land and other natural resources
Adequate capacity to engage in planning and negotiations	<ul style="list-style-type: none"> • Support capacity-building efforts of local communities for FPIC processes 	Consistent with community interests and needs, build adequate capacity to engage in planning and negotiations
Independent mechanism to ensure that requirements are met and enable remedy	<ul style="list-style-type: none"> • Recognition of and support for mechanism. • Build community awareness of and support ability to use mechanism 	Consistent with community interests and needs, understanding of and capacity to use mechanism