

Free, Prior, and Informed Consent and Recourse

January 24, 2011
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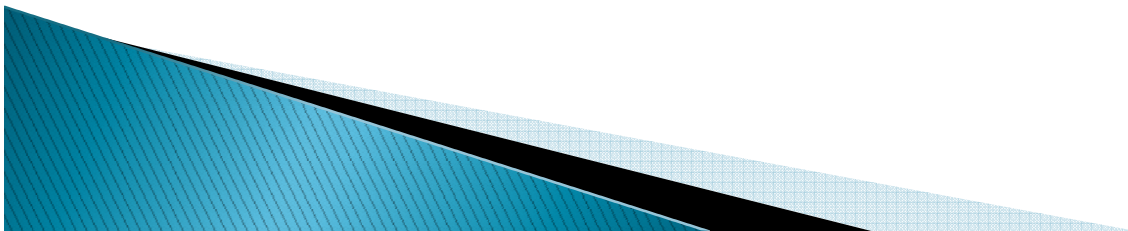


The Center for International
Environmental Law

What is FPIC?

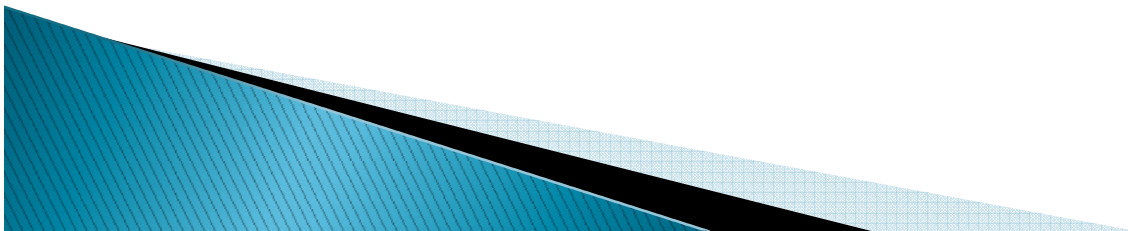
FPIC is a rights-based principle based on rights to:

- ▶ self-determination
- ▶ lands, territories and natural resources
- ▶ culture
- ▶ freedom from racial discrimination
- ▶ life and livelihoods



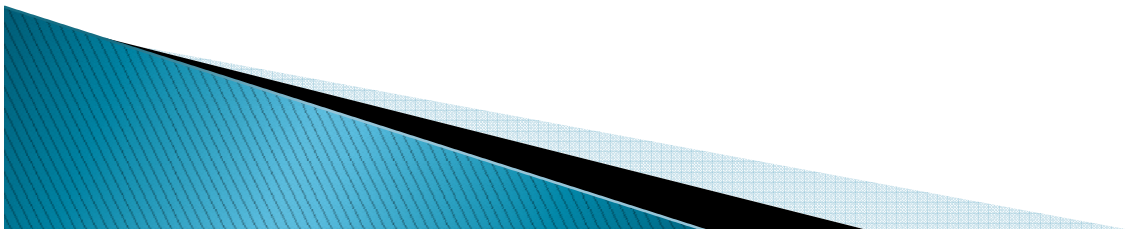
When does FPIC apply?

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.



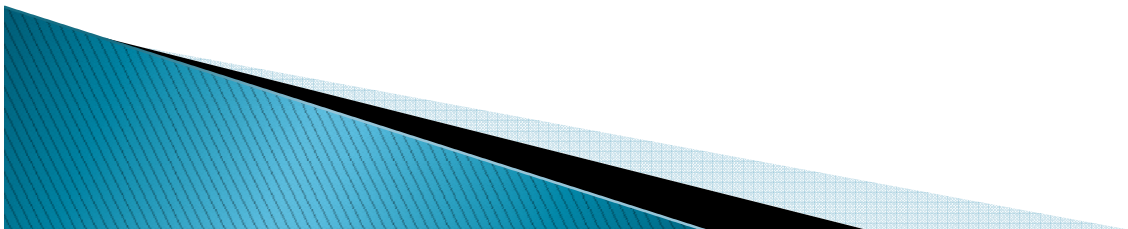
UN-REDD FPIC obligations

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



Rights-based approach: key instruments related to FPIC

- ▶ Universal Declaration on Human Rights
- ▶ ILO Convention 169
- ▶ United Nations Declaration on the Rights of Indigenous Peoples
- ▶ International Covenant on Economic, Social and Cultural Rights
- ▶ International Covenant on Civil and Political Rights
- ▶ Convention on the Protection and Promotion of the Diversity of Cultural Expressions
- ▶ Convention on Biological Diversity



Select International Instruments relevant to REDD and FPIC

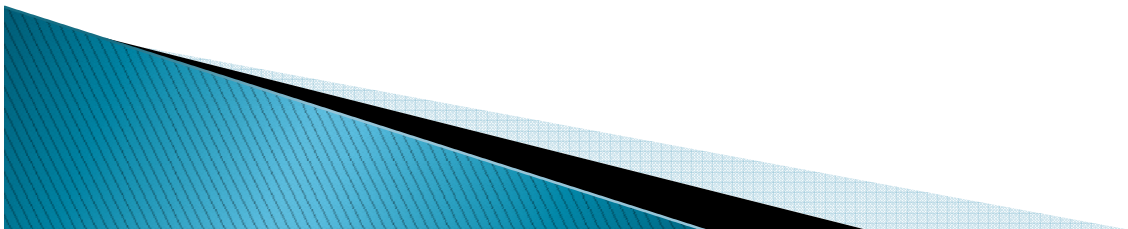
Country	UDHR	ICESCR	ICCPR.	ICERD	ILO Conv. 169	UNDRIP	CBD	Conv. on Safeguard. of Intangible Cultural Heritage	Conv. on Prot. & Prom. of Cultural Diversity	Conv. on the Rights of the Child	Conv. on the Elim. Discr. Against Women
Central African Republic	Applies	Party	Party	Party	Party	Voted in Favor	Party	Party	X	Party	Party
Congo-Brazzaville	Applies	Party	Party	Party	X	Voted in Favor	Party	X	Party	Party	Party
Democratic Republic of the Congo	Applies	Party	Party	Party	X	Voted in Favor	Party	X	X	Party	Party
Kenya	Applies	Party	Party	Party	X	Abstained	Party	Party	Party	Party	Party
Nigeria	Applies	Party	Party	Party	X	Abstained	Party	Party	Party	Party	Party
Sudan	Applies	Party	Party	Party	X	Voted in Favor	Party	Party	Party	Party	X
Tanzania	Applies	Party	Party	Party	X	Voted in Favor	Party	X	X	Party	Party
Uganda	Applies	Party	Party	Party	X	Not Present	Party	Party	X	Party	Party
Zambia	Party	Party	Party	Party	X	Voted in Favor	Applies	Party	X	Party	Party

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.”



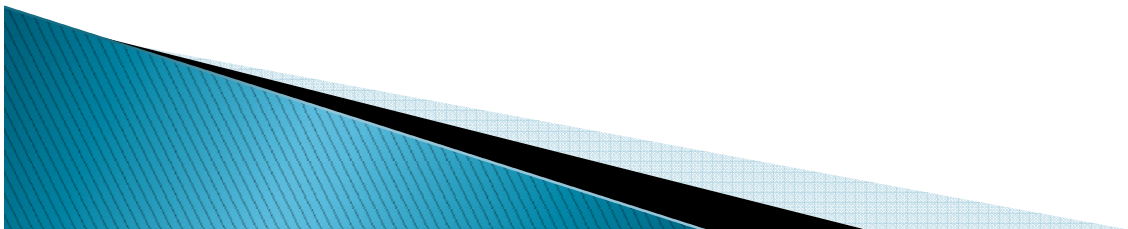
FPIC in international courts

- ▶ Americas: Saramaka
 - ▶ State awarded concessions on tribal land
 - ▶ Consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.
 - ▶ Must both accept and disseminate information, constant communication between the parties.
- ▶ Africa: Endorois
 - ▶ State designated indigenous land as a game reserve
 - ▶ Applied UNDRIP and FPIC
 - ▶ Affirmed right to culture
 - ▶ FPIC requires full and accurate information on the nature and consequences of the process
 - ▶ “Informed” includes notification of adverse consequences, including no right to return


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.

Example of UNDG Guidelines interpreting UNDRIP: 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 FPIC has not been obtained.



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

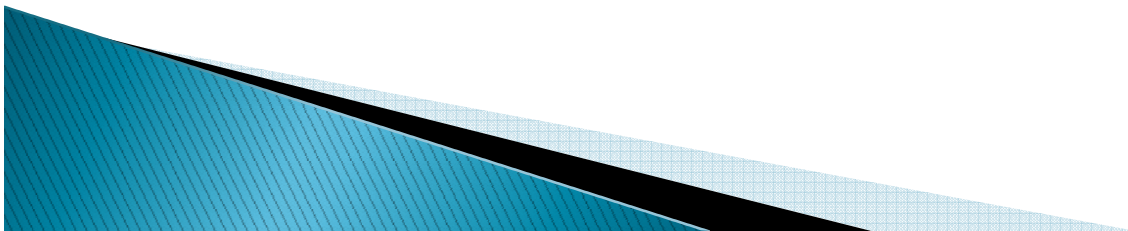
Consent

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.

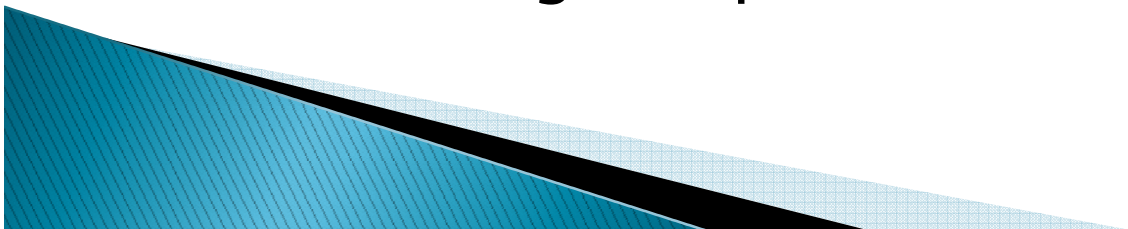
UN-REDD Operational Guidance

- ▶ 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.



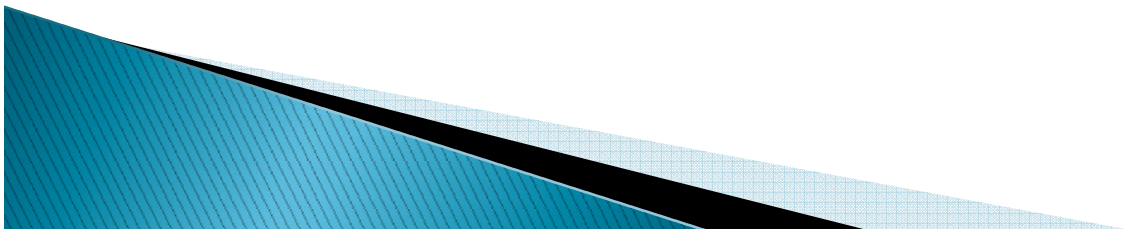
Operationalizing FPIC

- ▶ National Programmes follow operational guidance developed through the Global Programme.
- ▶ The UN-REDD 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.



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.

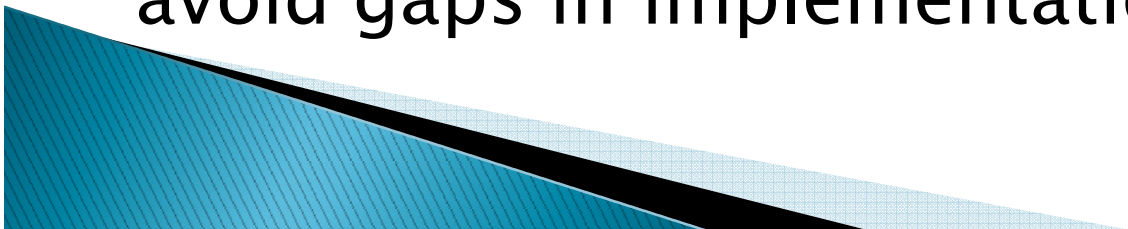


Complaint Mechanism: Key Principles

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

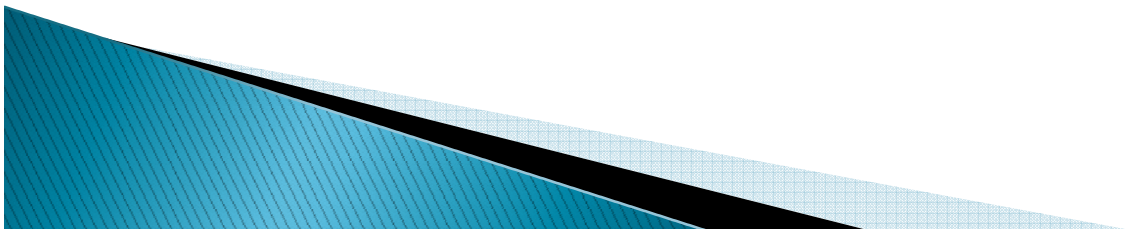
➤ How do we ensure independence and also retain authority for effective implementation?

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



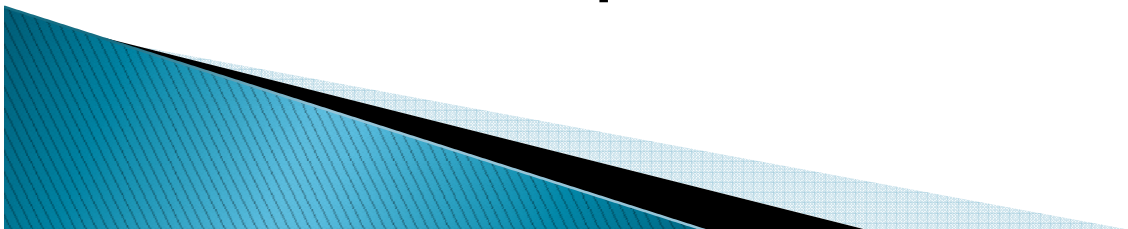
Complaint Mechanism: Possible Functions

- ▶ 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.



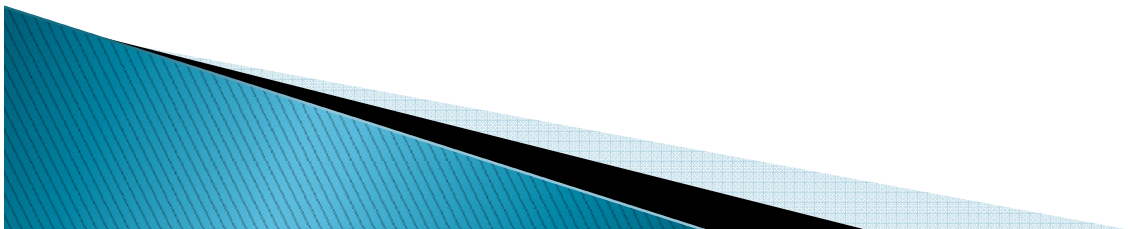
Types of remedies available

- ▶ 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.



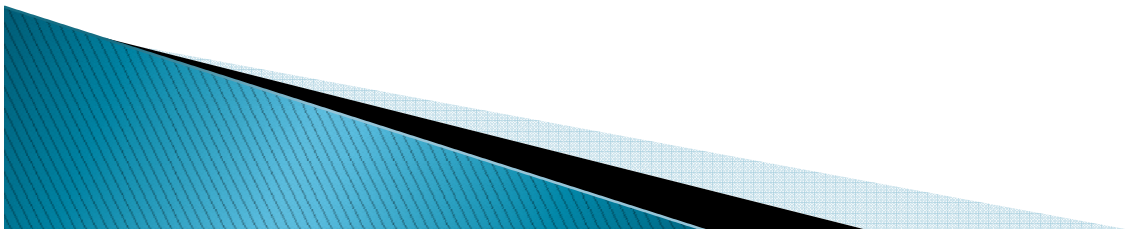
Existing options for hearing complaints

- ▶ 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



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



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

THANK YOU!

Useful websites:

- ▶ Database of grievance mechanisms:
<http://www.baseswiki.org>
- ▶ World Bank Inspection Panel:
<http://www.worldbank.org/inspectionpanel>
- ▶ UN Human Rights Bodies:
<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>
- ▶ CIEL website: <http://www.ciel.org/>
- ▶ Questions khite@ciel.org

