

# Free, Prior, and Informed Consent: an overview

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Kristen Hite, CIEL



**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

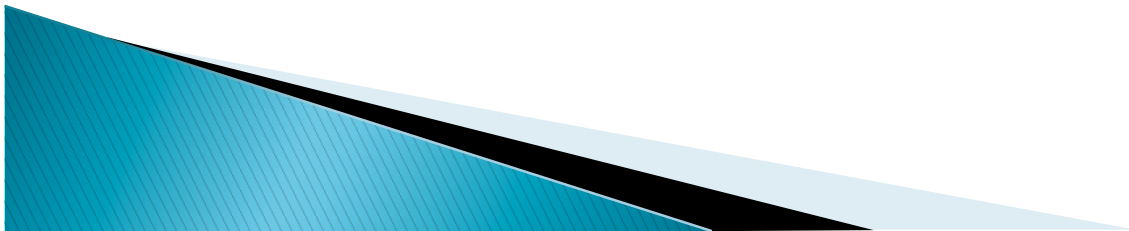
## *Consent*

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.

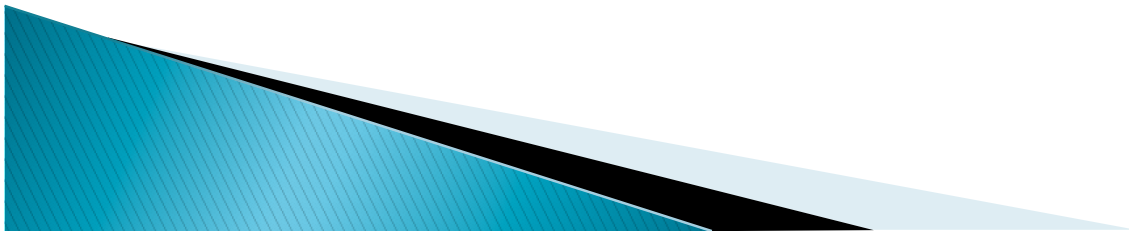


# Rights-based Approach to REDD

Country	Univ. Decl. on Human Rights <sup>1</sup>	Intl. Covenant on Econ., Social & Cultural Rights	Intl. Covenant on Civil & Political Rights	Int. Conv. on the Elim. of Racial Discr.	Conv. on Biological Diversity	ILO Conv. 169	UN Decl on the Rights of Indigenous Peoples	World Cultural & Natural Heritage Conv.	Conv. on Safeguard. of Intangible Cultural Heritage	Univ. Decl. on Cultural Diversity	Conv. on Prot. & Prom. of Cultural Diversity	Conv. on the Rights of the Child	Conv. on the Elim. Discr. Against Women
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<b>Democratic Republic of the Congo</b>	Applies	Party	Party	Party	Party	X	Voted in Favor	Party	X	Voted in Favor	X	Party	Party
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<b>Indonesia</b>	Applies	Party	Party	Party	Party	X	Voted in Favor	Party	Party	Voted in Favor	X	Party	Party
<b>Nepal</b>	Applies	Party	Party	Party	Party	Party	Voted in Favor	Party	X	Voted in Favor	X	Party	Party
<b>Panama</b>	Applies (Voted in favor)	Party	Party	Party	Party	X	Voted in Favor	Party	Party	Voted in Favor	Party	Party	Party
<b>Papua New Guinea</b>	Applies	Party	Party	Party	Party	X	Not Present	Party	Party	Voted in Favor	X	Party	Party
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<b>Vietnam</b>	Applies	Party	Party	Party	Party	X	Voted in Favor	Party	Party	Voted in Favor	Party	Party	Party
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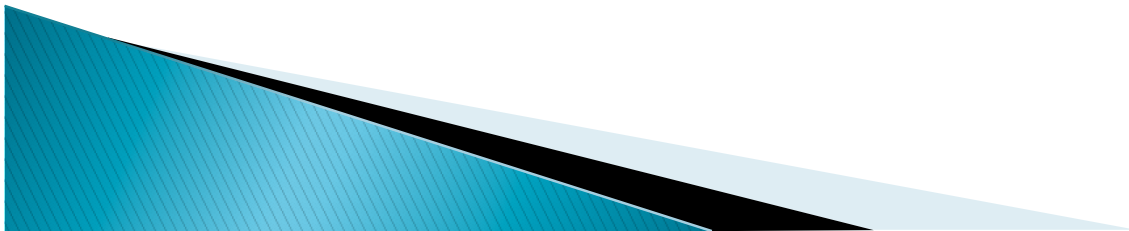
# UNDRIP and FPIC

- ▶ **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

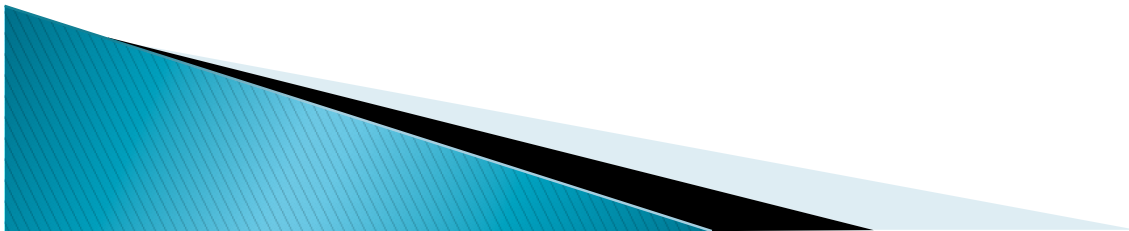
- ▶ No decisions **directly related to rights and interests** taken without **informed consent** in matters related to indigenous peoples' lifestyles, **traditional lands and territories, cultural integrity** as indigenous peoples with collective rights or any other aspect of their lives.
- ▶ The prospecting 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.





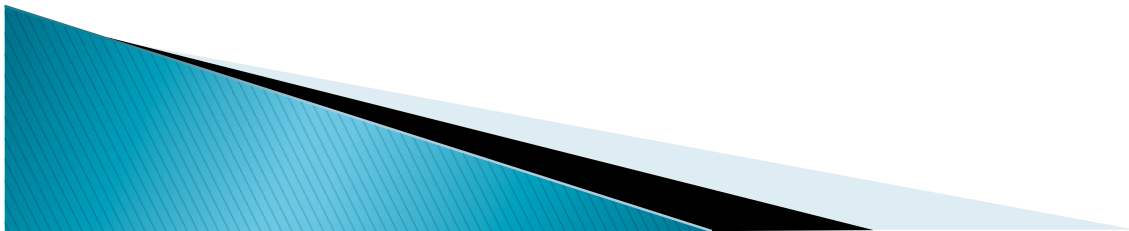
# UN-REDD Operational Guidance

- ▶ 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.



# Vietnam: Select International Rights Instruments

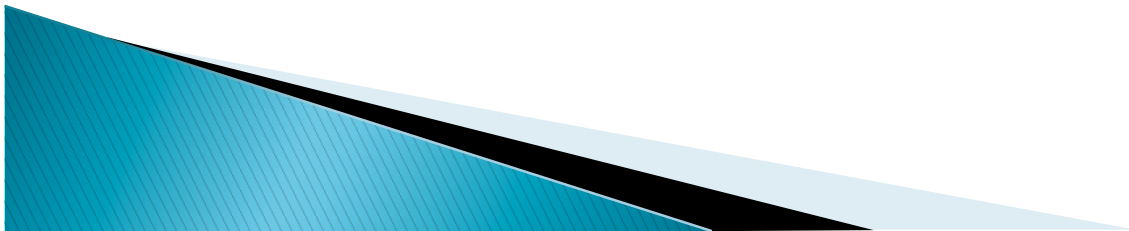
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# Specific obligations relevant to REDD and FPIC

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	World Cult. And Nat. Heritage Conv.	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
<b>Decision-Making, Consent, Access to Information, Participation</b>	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)
<b>Property, Lands, Territories, and Natural Resources</b>	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
<b>Self-Determination</b>	Art. 3, 33.1	Art. 1.1, 1.3	Art. 1.1			Art. 7.1	Art. 3						
<b>Non-Discrimination</b>	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		
<b>Culture</b>	Art. 27.1	Art. 15.1 (a)			Art. 10(c)	Art. 5	Art. 11.1, 15.1, 34	Art. 5(a)	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)	
<b>Life, Livelihood/ Adequate Standard of Living and Health</b>	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)
<b>Religion ,Sacred Sites</b>	Art. 18		Art. 18.1, 18.3, 27	Art. 5.1(d)		Art. 5(a)	Art. 12.1, 12.2					Art. 14.1	
<b>Right to Work</b>		Art. 6.1, 7 (a)-(d)		Art. 5.1(e)		Art. 5.1(a)-(c)	Art. 20.1, 20.2						Art. 14.2 (e)
<b>Healthy Environment &amp; Sust. Development</b>					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)
<b>Access to Remedies</b>	Art. 8		Art. 2.3	Art. 6			Art. 11.2						
<b>Access to Justice</b>	Art. 6, 7		Art. 16	Art. 5.1(a)			Art. 11.2, 32.3, 40					Art. 12.2	

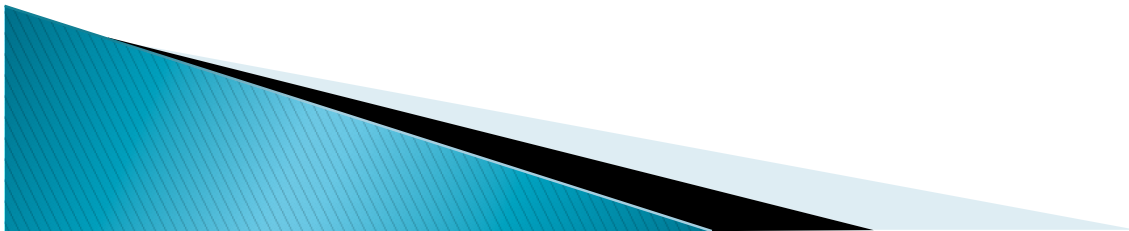
# Resolving conflicts: some options

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



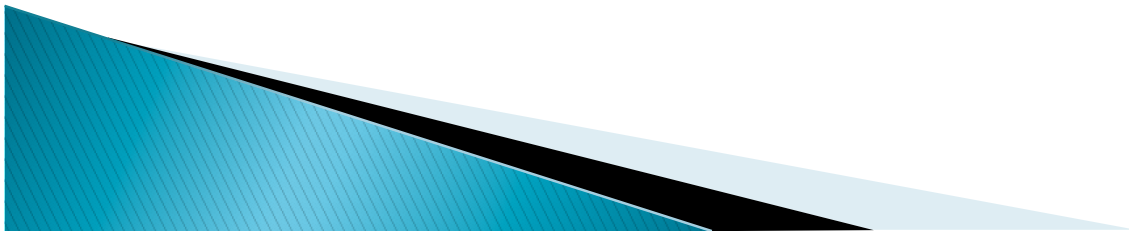
# What is a recourse mechanism?

- ▶ A recourse 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.



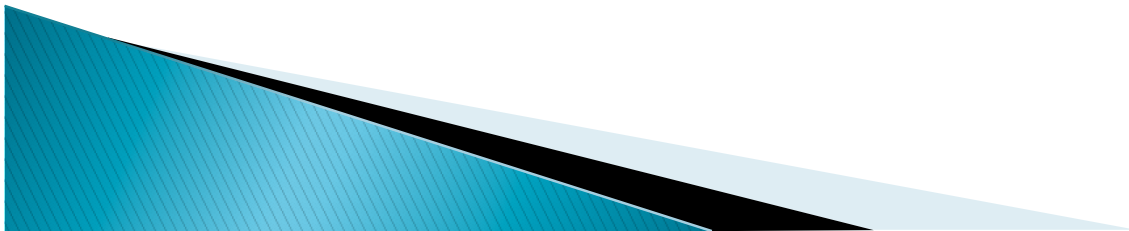
# Recourse Mechanism: Key Principles

- ▶ Accessibility
  - ▶ Independence
  - ▶ Credibility
  - ▶ 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?



# Existing options for hearing complaints

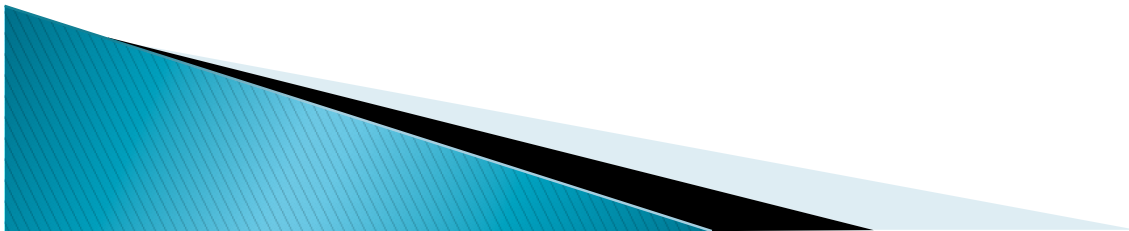
- ▶ Indigenous or local tribunals
- ▶ National tribunals
- ▶ UN-REDD Secretariat: Ombudsman function
- ▶ UN Human Rights System
- ▶ UN agency accountability mechanisms
  - MDTF Office
  - UNDP Evaluation Office
- ▶ Partner accountability mechanisms
  - World Bank Inspection Panel (if FCPF/FIP country)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





# 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 Advisory 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.



# THANK YOU!

Questions? [khite@ciel.org](mailto:khite@ciel.org)

