



Free Prior and Informed Consent in the DRC; Key strategic considerations to move the policy process forward

Glenn K Bush, Melaine Kermarc and Joseph Zambo

Summary

This policy briefing paper¹ aims to stimulate discussion to help critically understand key conceptual elements of Free Prior and informed Consent (FPIC) and how they relate to operational opportunities and constraints in the DRC. The brief focuses on current gaps in the national debate surrounding the development of the national framework guidelines for FPIC. The brief discusses critical issues related to resolving key strategic deadlock over the development of the national FPIC framework, focusing on adequately defining an agenda for the development of the REDD+ FPIC framework guidelines and the application of FPIC more broadly than the forest sector. We find that significant work is needed to improve the scope, content and quality of the early draft focusing on resolving the debate between FPIC policy and law. The status of FPIC in the DRC can be resolved by:

1. Improving stakeholder understanding of the nature of policy and law by clearer definition
2. Widening the context of FPIC beyond the forest sector, to all natural and environmental resources in the DRC
3. Developing the national FPIC in REDD+ framework directive policies, standards and best practices to closely align with the homologation process

Defining FPIC

Globally the principle of FPIC does not presently have a universally accepted definition even though it is embedded in the legal framework of international laws. The general principles of FPIC requires that project-affected communities be adequately informed in a timely manner about development actions that affect them, and be given the opportunity to approve (or reject) a project prior to the commencement of operations. International law establishes FPIC as a basic right for indigenous peoples and communities, derived from the rights to self-determination and to participation.

The element of “free” implies no coercion, intimidation or manipulation; “prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; “informed” implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; “consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions. (United Nations 2011)

Achieving FPIC in the DRC means that the consent be derived in accordance with customary law and practices, but does not explicitly mean that every member in the community provide consent. The challenge then is how to ensure that every eligible community member is at least aware of potential project activities and understand their options to exercise rights and opportunities to engage in the process and have a point of view represented. The FPIC principle is a means to empower communities, by granting them the authority to define their own goals and to have a meaningful say in their development.

¹ The opinions expressed in this policy brief are those of the authors alone and do not reflect an official standpoint of the Woods Hole Research Center or Projet Equateur sponsors.

DRC National FPIC policy debate

FPIC in the Democratic Republic of Congo has been hotly debated for some years to date. Establishing the principle of FPIC is essential as a foundation for building a transparent and equitable system of assigning indigenous peoples (IP) and local community (LC) rights, roles and responsibilities for the management and benefit streams from the exploitation of DRC natural and environmental resources. A national process is underway to establish the strategic framework and operational directives to achieve FPIC in the context of the emerging national Reduction of Emissions from Deforestation and Degradation (REDD+) architecture. National policies to enact REDD+ seek to fundamentally change the interaction between people and their forests to promote the conservation of forest carbon, thereby reducing global greenhouse gas emissions and improving the base for climate mitigation and adaptation. The objective of FPIC is to ensure that REDD+ financed project activities do not adversely affect the social welfare of those communities (as a whole or in part), obtain the communities consent and that the proceeds of any interventions are shared equitably by stakeholders. This issue firmly supports the need to establish a comprehensive policy framework directive on FPIC in REDD+.

Key strategic issues in developing the REDD+ framework directive on FPIC

Policy vs law? There is vagueness in the stakeholder debate which originates from an ambiguous comprehension of the relationship between policy and law. A policy can be equally viewed as an outcome (desirable end state) and a process (means to an end). Public policy usually represents the decision made by a designated body considering a range of options and assessing potential impacts according to specified criteria. Law is a system of rules enforced by governments to regulate behavior. The formation of laws may be influenced by a constitution (written or unwritten) and the rights encoded therein. A law is a formal system of rules and guidelines that are derived for the welfare and equity in society, regulating the actions of its members and potentially imposing sanctions. A policy is informal as it is just a statement or a document of what is intended to be achieved in the future. Thus policies are concerned with specific outcomes and law is concerned with social justice. Laws thus serve the purpose as tools to achieve policy in a socially acceptable manner. Some of the ambiguity noted above is contextual in that the national framework guidelines on FPIC are about formulating policy on a matter of social justice.

Is a DRC National law on FPIC for REDD+ necessary? The framework guidelines must provide comprehensive direction to ensure that FPIC is achieved as a socially inclusive and participatory process. Whilst an FPIC law may be needed in the DRC in the broadest sense, much can be achieved with respect to REDD+ without one. The global REDD+ framework convention specifies that REDD must “do no harm” to local communities (and biodiversity). Performance monitoring is required in the social sphere (REDD+ social and environmental standards – SES). Essentially REDD+ is contract based (payments for performance), giving it a legal base and provisions are being made in the global and subnational architecture to define the FPIC. Whilst national legislation on FPIC might be useful, if standards for FPIC are outlined in the national REDD+ policy and future REDD project/program contracts stipulate FPIC standards and procedures then FPIC becomes a legally binding requirement governed using existing national contract law. The DRC national REDD+ homologation process can also be used as control respect of FPIC standards without need for additional legal instruments.

FPIC standards can only be achieved through a systematic operational procedure to engage local communities in the design, development and implementation of a REDD+ financed emissions reduction scheme. Thus the guidelines should strive to develop an operational definition of what REDD+ programs in the DRC must do to adhere to the principles of FPIC and provide a process and procedures to ensure FPIC is achieved (FPIC process). This resonates with the well-established principles of common property resource management conditions (Ostrom, 1990) and the FPIC standards and process must typically strive to take each in to consideration:

Meeting the Ostrom design principles reinforces the need to establish policy framework guidelines for the national REDD+ program on FPIC. The framework guidelines should define the key terms and processes by which FPIC will be achieved. Guidelines should set out the operating principals, including performance standards and indicators, organization and institutional provisions for the collection, management, and archiving of data from projects and programs, minimum standards for social impact monitoring systems and rules for engaging communities to ensure adequate participation. It should also outline conflict resolution mechanisms and processes for the administration of sanctions against stakeholder who fail to perform to established roles, and

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responsibilities. The legal framework can be built on existing text regarding the resolutions of conflicts over contractual disagreement.

Principles for Managing a Commons (Elinor Ostrom, 1990)

1. Define clear group boundaries.
2. Match rules governing use of common goods to local needs and conditions.
3. Ensure that those affected by the rules can participate in modifying the rules.
4. Make sure the rule-making rights of community members are respected by outside authorities.
5. Develop a system, carried out by community members, for monitoring members' behavior.
6. Use graduated sanctions for rule violators.
7. Provide accessible, low-cost means for dispute resolution.
8. Build responsibility for governing the common resource in nested tiers from the lowest level up to the entire interconnected system.

Developing the FPIC framework guidelines; key agenda items.

Preparation of the final framework guidelines on FPIC is clearly going to require a concerted and more proactive effort in coordination to ensure that FPIC is adopted in the broad context of natural resource management in the DRC. The framework guidelines should seek to establish where consensus lies between stakeholders on critical issues and must clearly articulate issues relating to the following matters:

1. Defining the policy objective
2. Problem identification, scoping and definition, including the process for stakeholder consultations and selection
3. Generating solutions, conceptual framework, working parameters, goals of the policy, expected outcomes, distinguish policy options from policy implementation options
4. Comparative analysis of the social, environmental and economic costs and benefits of the implementation options
5. Selected policy implementation measures,
6. Performance measurement, monitoring and evaluation –setting standards and reporting

Early drafts of the framework guidelines need to be critically reviewed to ensure that the above items are adequately represented and that selected policy implementation measures and standards are built on a logical platform of evidence and discussion, with clear objectives established from the outset. It is the issues of unclear objectives that the brief will discuss as the critical bottle neck to concluding debate on the framework guidelines.

FPIC is an issue much broader than REDD+

Whilst REDD+ might be driving current debate on FPIC in the DRC, it is essential that the FPIC also be understood in terms of its relevance to a wider range of natural resource management matters affecting both indigenous people and local communities. This is particularly relevant given the challenges of reconciling statutory approaches with customary resource management regimes. FPIC in the DRC, whilst being driven by the current global and national political interest in REDD+, is also clearly applicable to the mining sector or any situation where state concessions overlap with customary rights over environmental resources, such as forest or agricultural concessions. Ghana for instance already has well defined policies and is well on its way to instituting an FPIC law developed in the context of the mining sector. In addition there is also current policy debate in DRC on Payments for Ecosystem Services approaches to develop market based mechanisms to resolve environment and development conflicts. FPIC is highly relevant to situations where any local communities or indigenous people will be affected by a scheme using financial or "in kind" benefits sharing schemes as incentives for environmental management outcomes e.g. water shed management, agri-environmental schemes or forest and biodiversity conservation.

Currently in the DRC there is no overarching (cross-sector) legislation specifically considering the rights of local communities over natural resources or the necessity for the state to consult them. Current legislation on IP and LC rights to resources is orientated towards specific sector, such as towards forest management practices e.g. Forest Code 2002, the Community Forest Management Decree (2nd of August 2014). As such the Forest Code (2002) "Cahier des Charges" outlines specific procedures for community consultation and benefits sharing from

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state awarded forest concessions that overlap with customary forest rights. In addition the recent Community Forest Management Decree (2014) also recognizes the right of IP and LC to form community based organization to run state forest concessions.

The challenge with this important legislation remains its impartial enforcement and monitoring. Nonetheless, FPIC as a legal right should be debated in the broader natural resource management context as a law to ensure social justice. Does DRC need a law on FPIC? The answer depends on the extent that actions to ensure FPIC can be institutionalized in various sectorial policies. However if a law is needed on FPIC, it should not be REDD+ specific and must cover the gamut of possibilities where indigenous and local people's rights to natural resources are concerned. The specificity of the FPIC under the REDD+ program can be defined in a national policy and implemented through the homologation process.

Conclusions

The national Reduction of Emissions from Deforestation and Forest Degradation (REDD+) readiness process has initiated widespread national discussion regarding the indigenous people (IP) and local community (LC) *de facto* rights over land and environmental resources. Land and resource tenure is an important issue in the DRC given the context of uncertain tenure arrangements for such groups under the state legislative system. There is high potential for REDD+ to produce important recognition for IP & LC rights, and benefits from stewardship practices, but equally the potential for gross inequities. FPIC is a critical tool to proactively address potential negative social impacts in the design and early implementation phase of REDD+ financed sustainable forest management programs. Key recommendations moving forward are:

1. Improve stakeholder understanding of the nature of policy vs law and the policy development process, to clearly define the scope and objective of the FPIC framework guidelines, through expert training and international experience of similar processes in other countries
2. Conduct a thorough review of non-forest sector related laws and policies to understand the institutional and legislative basis for FPIC, widening the concept FPIC to all natural and environmental resources in the DRC
3. Establish the REDD+ framework directive as soon as possible as a platform to develop associated laws, standards and operational best practices.
4. Review how REDD+ related FPIC can be institutionalized within the national REDD+ homologation process

“Zamba Malamu – The Forest is Good”

Projet Equateur aims to regenerate forests, improve livelihoods and promote economic development in the Democratic Republic of Congo (DRC). Named after the DRC province where it is located, the project utilizes novel community-based approaches to combat deforestation to develop and test models for a “Green Economy”.

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