



Tenure Related Issues in Bioenergy Development

Short Guidance

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Francesca Romano and Andrea Rossi

INTRODUCTION

Around 75% of the world's poor live in rural areas, and the majority of them are subsistence farmers, smallholders and pastoralists that depend on land access for their production of food, feed and fibre (Morton, 2007; Quan, 2010). In addition, access to agricultural land, pastures and forests, is important to many communities, especially the rural poor, for access to a broad range of goods that are key to their livelihoods, such as fuelwood, medicinal plants, and subsistence income from wild resources and forest products. Therefore, access to these resources is essential to sustainable development, and respect for tenure rights, including customary ones, is key to the fair and equitable allocation of land resources (GBEP, 2011).

If such resources are expropriated without providing due process or following established procedures, then this may reduce access to food, and more generally to ecosystem goods and services for local communities, jeopardizing their livelihoods. Where there are competing claims among land users, governments, and investors, and where legal protections through due process are not in place, the rapid spread of commercial activity, including bioenergy development, may result in users losing access to the natural resources on which their livelihoods depend (FAO, 2008; Sulle and Nelson, 2009).

Therefore, it is important to include the tenure

dimension in any assessment and planning exercise related to bioenergy development.

This document aims to provide guidance in relation to the prevention and management of risks related to tenure in the context of bioenergy development. The **main question** addressed is:

How could access to land and other natural resources by local communities be affected by bioenergy development?

This question and the associated guidance **apply to**:

1. areas considered for agricultural extensification for bioenergy feedstock production;
2. agricultural areas where a land transaction may take place in order to produce bioenergy feedstock; and
3. forest concessions.

More precisely, this guidance note aims to:

- inform the identification of suitable areas for options 1 and 3 above; and
- provide guidance for the sustainable exploitation of options 1, 2 and 3 above.

Therefore, this guidance does **not apply to:**

- areas where agricultural intensification will take place and no land transactions will be involved; and
- use of both primary and secondary residues from agriculture, forestry and livestock for bioenergy production.

This guidance note is divided into two parts:

The **first part** addresses **the national and local level** and aims to provide guidance to national and local authorities responsible for tenure systems, including the allocation of tenure rights and related procedures.

This part of the guidance note is based on the **FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security**. The Voluntary Guidelines, which are based on an inclusive process of consultations that occurred during 2009-2010, were endorsed by the CFS at its Thirty-eight (Special) Session on 11 May 2012. They aim to “provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security” (FAO 2012a, page iv).

The **second part** of this guidance note addresses the **operator level** and aims to provide guidance to bioenergy investors with regard to the avoidance, minimization and management of physical and economic displacement. This guidance is based on part three of the **web-based BEFS Operator Level Tool**¹, which deals with “Physical Displacement, Change in Access to Resources, Compensation and Income Generation”.

¹ www.fao.org/energy/befs/operator-tool/

NATIONAL/LOCAL LEVEL

1. INVESTMENT POLICY

- Adopt a **national/local investment policy** coherent with other sector policies, in particular with the national/local food security policy, rural development policy and environmental policy.
- Promote **inclusive business models** (e.g. contract farming, partnership farming and joint ventures²⁾) where investors do not acquire tenure rights.

Measure **investment proposals** against specific criteria such as food security, improved livelihoods of local communities and protection of ecosystem services, in order to ensure win-win outcomes.

2. PROTECTING HOLDERS AND THEIR RIGHTS AND ENSURING FAIR AND EQUITABLE LAND TRANSACTIONS

LEGAL FRAMEWORK

- Assess the existing **legal framework** and conduct necessary changes to establish an effective legal framework that:
 - recognizes existing legitimate formal and informal, collective and customary tenure rights, including rights to possess and use land and other natural resources and allocates secure and enforceable titles to individuals and communities;

² For a description of these types of business models and of their implementation in the context of three bioenergy operations, see FAO (2012b).

- establishes equal tenure rights for women and men;
- recognizes the legitimacy of tenure rights created by customary or other traditional practices;
- prohibits the arbitrary deprivation of tenure rights;
- requires different parties to conduct prior independent assessments on the potential negative and positive impacts on tenure rights, livelihoods and food security; and
- provides for adequate compensation for loss of assets at full replacement cost.

INDIVIDUAL TRANSACTIONS

- Ensure that independent **assessments of tenure of land and other natural resources** are conducted prior to any investment. Ensure that these assessments systematically and impartially identify all existing legitimate tenure rights and claims of those people – men and women – potentially affected by the investment, including those of customary and informal tenure³.
- Ensure that appropriate systems are used for the fair and timely **valuation of tenure rights** for specific purposes, such as transaction in tenure rights as a result of investments. Ensure that these systems take into account non-market values, such as social, cultural, religious, spiritual and environmental values

³ For further guidance on land tenure assessments, see section 3 (Consultation and participation).

where applicable. Ensure that sale prices are recorded, analysed and made accessible to provide a basis for accurate and reliable assessments of values.

- Structure **agreements with investors** so as to respect and protect all existing use rights even those not explicitly recognized under formal law. Thus, where intending to allocate tenure rights for investments, States should first identify all existing tenure rights and right holders, whether recorded or not. This includes customary communities, smallholders, indigenous peoples and anyone else who could be affected by the investment. All categories of use, from year-round farming to periodic pastoral use should be identified and considered.
- Ensure that **agreements** stipulated with investors contain the following **provisions⁴**:
 - signatory parties;
 - mutually agreed substantive evidence of consent;
 - agreement details (e.g. costs, benefits, requirements, rules and restrictions), ensuring all expectations are voiced and vetted, and the resulting agreements are committed and agreed to by all;
 - project duration;
 - arrangements for making agreements binding;
 - grievance process;

⁴ For further guidance see FAO (2014).

- monitoring and evaluation plan;
- terms for withdrawal of consent;
- agreed next point for consent to be sought;
- independent verification provisions; and
- sanctions for violation of the agreement.

3. CONSULTATION AND PARTICIPATION

- Increase public participation in **processes that influence access to and use of land** such as land use planning, identification of community boundaries, land allocation, etc.
- Ensure that **assessments of land and other natural resources tenure** are done in a transparent and participatory manner involving local land users. Ensure that results are made easily accessible for the public, including by timely translating them into local languages.
- Introduce mechanisms to ensure that all of the parties identified as having existing rights have the opportunity to participate meaningfully, either directly or indirectly, in the **negotiations**. In cases which affects the rights of indigenous peoples the principle of ‘Free, Prior and Informed Consent’ (FPIC)⁵ has to be applied. In other cases, FPIC could

⁵ “Free prior and informed consent” (FPIC), is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use” (Forest Peoples Programme, 2012). FPIC is a key principle in international law and jurisprudence related to indigenous peoples.

be considered as good practice that could be employed on a voluntary base⁶.

4. TENURE DISPUTES RESOLUTION AND GRIEVANCE MECHANISMS

- Establish and provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective **means of resolving disputes** over tenure rights, including alternative means of resolving such disputes. Effective remedies and a right to appeal should be provided.
- Provide access to effective judicial and non-judicial **processes** through which grievances concerning business-related human rights and tenure rights abuses can be raised and remedy can be sought.
- Consider among others the establishment of specialized courts (land courts), government-run complaints offices, and alternative **dispute resolution** mechanisms to deal with the matter and get customary institutions for conflict resolution involved where they operate.
- Ensure that **procedures** for the provision of remedy are impartial, protected from corruption and free from political or other attempts to influence the outcome.
- Reduce legal, practical and other relevant

barriers that could lead to a denial of access to remedy.

5. INCREASE TRANSPARENCY

- Provide transparent **rules on the scale, scope and nature of allowable transactions** in tenure rights and define what constitutes large-scale transactions in tenure rights in the national context based on a participatory and inclusive process.
- Provide **comprehensive information** to ensure that all relevant persons are engaged and informed in the negotiations, and seek that the agreements are documented and understood by all who are affected.
- Require disclosure of relevant **contractual information** such as size and location of the land, foreseen use, period of use, financial payments (rent, duties, and taxes) from companies to national and local governments.
- Establish rules such as clear **indicators and reporting formats** for effective monitoring of the implementation and impacts of agreements involving large-scale transactions in tenure rights.
- Take **corrective action** where necessary to enforce agreements and protect tenure and other rights and provide mechanisms whereby aggrieved parties can request such action.

6 For further guidance on FPIC see FAO (2014).

OPERATOR LEVEL

- Conduct an **independent assessment** of the potential negative and positive impacts on tenure rights, livelihoods and food security.
- Conduct the process of **Free, Prior and Informed Consent (FPIC)**.
- Consider feasible⁷ **alternative project designs** in order to avoid or minimize physical displacement⁸ paying particular attention to impacts on the poor and vulnerable.
- Establish a **mechanism to monitor impacts** on affected communities and the respect of the negotiated agreements, including compensation.

⁷ While balancing environmental, social and financial costs and benefits (IFC, 2012).

⁸ Relocation or loss of shelter as a result of operation-related land transactions and/or restrictions on land use (IFC, 2012).

For further guidance please go to the following sections of the web-based BEFS Operator Level Tool at www.fao.org/energy/befs/operator-tool/en/ :

3.2 Physical Displacement and Compensation/Assistance;

3.3 Displacement and Provision of Assets, and Compensation/Assistance; and

3.4 Displacement and Creation of Income Generating and Subsistence Activities, and Compensation/Assistance.



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LINKS

E-learning curriculum on “The Responsible Governance of Tenure - E-learning to support the implementation of the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests, in the context of National Food Security”: www.fao.org/nr/tenure/e-learning/en/





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www.fao.org/energy/befs/en