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AGRICULTURAL INVESTMENT
PROJECTS:**

CONCEPTS AND GUIDELINES

**Development Law Service
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LEGAL FRAMEWORK ANALYSIS FOR RURAL AND AGRICULTURAL INVESTMENT PROJECTS: CONCEPTS AND GUIDELINES¹

FAO Development Law Service

In recent years, growing attention has centred on the role of law and legal institutions in development. This has coincided with a profound shift in thinking about the role of the state, and a reorientation of governance strategies towards the creation of suitable *enabling environments* for greater private and local initiative. Good laws and functioning legal institutions are essential contributors to the *predictability, security* and *flexibility* needed to define such environments. Conversely, poorly designed and implemented laws can constrain and inhibit investment, distort economic incentives and discourage appropriate government interventions.

A close analysis of the applicable legal framework, therefore, is an important part of assessing the viability of rural and agricultural investment projects. The nature and scope of such an analysis will vary, of course, depending on the type of project. Many of the legal issues involved in an irrigation development project, for example, will differ from those affecting a food control project. Moreover, the type of issues that emerge and the kind of legal analysis required will also be influenced by the legal tradition that prevails in a particular country.

Despite this variety, there are certain basic analytical issues that are likely to be pertinent to most types of project. This paper briefly outlines some general methodological considerations that should be taken into account in approaching these issues during project design and implementation.

It should be stressed that the focus of this paper is specific. Its aim is to assist project designers in recognising and analysing legal issues that may have implications for the success of a particular investment project. This needs to be distinguished from a different kind of undertaking in which the emphasis is on reviewing and improving legislation as an exercise in its own right. For example, much of the work of FAO's Development Law Service involves helping governments design better overall legislative frameworks for agriculture, forestry, fisheries, etc. This type of assistance, which is usually not confined to the concerns of a specific development project, raises wider methodological issues that are not addressed here, though much of the discussion that follows will be relevant in both contexts.

1. Identifying the components of a country's legal framework that are relevant to the investment proposal.

The first question that needs to be asked is: what is the legal framework that governs a particular proposal? As an initial step, this requires understanding in broad terms the overall nature of the legal system in a country. Is it a civil law, common law, Islamic law or other system, or some sort of combination of these? Are

¹ This document has been prepared for inclusion in an FAO Investment Centre web-based reference site, currently under preparation, on the formulation of agricultural and rural investment projects.

there plural legal systems, some formal and some informal, existing simultaneously? Is there a constitution and a bill of rights? How are laws enacted? How are legislative, executive and judicial functions and responsibilities distributed within government?

For many types of projects, there will be sectoral laws that obviously apply to the situation. For instance, in the case of fisheries, forestry, water management, etc., there is usually an easily identifiable core of applicable legal texts. But in most cases, this will represent only a small part of the relevant legal framework.

For example, a country's forestry law cannot be understood without reference to numerous other sectoral or general laws, including:

- the national constitution;
- civil and criminal codes;
- local government laws;
- laws on finance, taxation, contracts, investment, transport, credit, labour, companies and associations;
- laws on environment, land use, soil conservation, wildlife, protected areas, plant protection;
- water laws;
- land tenure laws;
- international agreements to which the country may be a party (such as the International Tropical Timber Agreement, the Biodiversity Convention, etc.)

The relevant instruments will not be restricted to national-level legislation or agreements. They will also include subsidiary legislation, such as ministerial regulations; laws or rules enacted by decentralised units of government, such as provincial or district governments; and court decisions. Furthermore, in many countries, various customary laws apply to the management and allocation of resources in particular communities. In some countries, the operation of these (often unwritten) laws is recognised and condoned explicitly by national legislation. In other cases, the status of customary law in relation to national statutory law is ambiguous. Even in such instances, however, customary law often continues *as a matter of practice* to shape people's behaviour, and therefore needs to be included in the analysis.

Finally, the legal framework is not limited to laws, written or unwritten. It also includes the manner in which laws are implemented, including the institutional apparatus responsible for administering and interpreting the laws.

2. Analysing the substance of the law

The next step is to assess the *substance* of the laws identified in Step 1. The overarching question here is: to what extent does existing law allow, encourage, constrain or prevent the types of activities on which the investment project is focused?

Again, attempts to answer this question will encounter tremendous variety depending on the type of project and the country involved. It is possible, however, to suggest some broad questions that will be relevant in many contexts.

- ***Is the law relatively free of regulatory constraints that could inhibit project-related activities?*** Regulatory obstacles can take many forms. In some instances, a particular activity that is a critical component of the project may be directly prohibited by an existing law. But more commonly, regulatory obstacles are indirect, and are not always obvious.

Some of these take the form of bureaucratic procedures that increase the transaction costs and lapsed time requirements of a particular activity, without a corresponding public benefit. There are examples in virtually every legal system of laws surrounded by procedural hurdles that make them extremely difficult to use or apply, while the policy reasons for creating those hurdles in the first place may be spurious or long forgotten. In such cases, one may encounter the phenomenon of professional sub-specialities springing up, in both the public and private sectors, devoted to arranging, obtaining or granting exemptions or permissions that serve little purpose from a public policy perspective, and that add significantly to the cost of doing business. Excessive regulation may also act as a stimulus for rent-seeking behaviour by officials.

- ***Does law provide an appropriate regulatory environment for project-related activities?*** While over-regulation or inappropriate regulation can stifle the initiative needed to make a project a sustainable success, the absence of a suitable regulatory framework can be equally debilitating. Activities that investment projects seek to encourage need to be supported or guided by a body of predictable, understandable and enforceable rules. Where the goal is to foster private investment in some form, pertinent legal issues will include whether there are coherent and effective laws to govern market relations, including laws of contract, laws to facilitate competition, laws that protect property rights, etc. Depending on the context, other issues that will frequently come up in connection with agricultural investment projects include:
 - whether there are appropriate rules governing access to and management of public goods, such as water and other natural resources;
 - whether there are appropriate rules concerning the externalities of public and private actions, including environmental, land use, public safety and other matters;
 - whether there are suitable rules governing the behaviour of government officials, to ensure basic limits on the exercise of discretion.
- ***Are the institutional mandates for government bodies clear, co-ordinated and desirable from the perspective of project implementation?*** Laws may leave it unclear which agency or organisation has the power to make certain decisions. There may be contradictory provisions within sectoral legislation that appear to give the same or overlapping powers to different agencies. There may also be confusion between the powers allocated to different levels of government in a decentralised system.

The result could be that a key implementing agency of a project may find that its authority to undertake certain actions is open to challenge. This type of uncertainty has surfaced, for example, in some countries in transition, where it has proven difficult to determine which among several agencies, at various levels of government, has the power to allocate land for private sector investment. Depending on the context, such lack of clarity can sometimes be reduced by executive action or a decision by cabinet or the head of state regarding the allocation of authority among different government institutions.

There may also be occasions where the legal allocation of authority is clear, but *sub-optimal* from a project perspective – for example, where authority is fragmented among different sub-agencies which do not function well together. This type of situation is likely to be apparent without a statutory analysis, but such an analysis is important for gauging the extent to which fragmented authority is entrenched in law and the scope of legal change that may need to accompany any political decision to reduce the problem.

- ***Does the law provide for the creation or recognition of appropriate stakeholder organisations?*** The implementation of some projects depends in part on the existence of effective organisations of stakeholders. Examples include water users' associations for irrigation development, and local forest management groups for the promotion of community-based forest management. The question for legal analysis is whether there is a legal basis for the *creation* or *recognition* of such entities. In some cases, it may be possible to use existing legal forms provided by general laws on associations or co-operatives. In other instances, new legislation may need to be considered to allow the formation of new types of legal entities, with specific powers and organisational requisites that are more appropriately matched to the particular activity and the socio-economic context in which it takes place.
- ***Does the legal framework provide mechanism(s) by which people can obtain clear and secure rights to the assets they need in order to participate in or benefit from the project?*** The assets referred to here can, of course, take many different forms, depending on the type of project. Frequently in the case of agricultural investment projects, one of the most important assets is land. Security of tenure over land is considered an important condition for investments by agriculturists. What security means will vary from context to context – it is no longer assumed, for example, that it necessarily means full ownership based on individual title to land. But it is possible to identify some basic attributes of tenurial security, such as:
 - freedom from fear that one's rights over land will be taken away unilaterally or unfairly;
 - relative certainty as to the location or extent of the land holding;
 - certainty as to the rules that apply to the use, transfer and inheritance of land;
 - rights over the land that are of a sufficient duration to ensure that one can reap the benefits of improvements one makes to the land.

Tenure issues are likely to arise with respect to other categories of resources as well, such as trees and water. A legal analysis will seldom be enough in itself to ensure that all the attributes of tenurial security are actually in place. It should be possible, however, to ascertain whether the legal environment is more or less supportive of the creation of clear and secure rights.

3. Analysing the law-in-action

The substantive content of law is, of course, only part of the story. It is also important to try to assess the actual *effect* that relevant laws have on the ground – in what ways do they in fact influence the behaviour of individuals and institutions? There is, of course, frequently not a clear linear relationship between the objectives of a law and what is actually achieved once it is enacted. A particular law may fall short of its intended purpose or have quite unintended secondary effects, for a number of reasons:

- **Lack of political will:** The effectiveness of a law is often undercut by the failure of government to devote sufficient resources or energy to its implementation. In some cases, the passage of a new law may be a way of demonstrating political commitment to reforms about which governments are actually ambivalent when it comes to implementation. Implementation may in some instances also be compromised by corruption, a problem which governments may be unable or reluctant to combat with the necessary vigour.

The absence of necessary political will may also be related to the manner in which a law has been formulated and adopted. In some cases, a particular agency or ministry may successfully push for the enactment of a sectoral law without garnering beforehand the support of the other agencies whose duties may be altered by the new law, or who may be called upon to help implement it. Where this happens, necessary collaboration within government may fall victim to institutional jealousies or to the passive resistance of actors who feel their interests were not taken into account.

- **Failure to anticipate the costs of effective implementation:** Many ambitious laws, internally coherent and technically well-drafted, have been enacted without sufficient prior attention to the costs of implementation. For example, laws may reflect unrealistic expectations about the ability of government to monitor the exploitation of widely dispersed natural resources. Likewise, a law may depend upon the creation of numerous boards, commissions and procedures which require financial or human resources that government does not have. The results in both cases are laws that lie unimplemented or under-implemented.
- **Failure to recognise the limitations of legal reform in bringing about social and economic change:** Laws that require sudden changes in deeply ingrained behaviour may prove difficult to implement. For example, laws that try to restrict the division of property through inheritance in order to reduce fragmentation of agricultural holdings, frequently have little impact on the practice itself, but instead simply push it “underground.”

- **Lack of understanding of the law by various stakeholders:** The implementation of a law may be hampered by a failure to educate government officials about the content and the procedures of the law. As a consequence, those responsible for enforcing a law may do so in ways that deviate from what the legislation requires. Governments also frequently fail to engage civil society in the design of important laws, and to educate people about the contents of a law once it has been passed. As a result, they fail to build up support for the law amongst those groups and individuals most directly affected, and many stakeholders may remain ignorant of how to comply with the law or to take advantage of opportunities that it offers.
- **Weak judicial institutions:** In many countries, the resolution of legal disputes is the responsibility of a court system that is over-burdened and under-financed. The absence of efficient recourse when legal rights or restrictions are violated means that the effectiveness of law is reduced.

The importance of understanding the law-in-action has methodological implications. It means that a thorough analysis of the legal framework cannot rely entirely on a review of written instruments. Such a review needs to be supplemented by an effort to assess the perceptions, activities and interactions of the main stakeholders, including those who may be located outside capital cities.

4. Assessing the feasibility of addressing the legal constraints.

Once the constraining features in the legal framework have been identified, the next step is to analyse how easy or hard it may be to correct those features, or at least to mitigate their impact on the proposed project.

If it is decided that project success will require modifications to the legal framework, it is important to ask what type of government action is required to bring about the particular change. Can it be accomplished through the issuance of regulations or administrative rules by the Ministry most closely involved in the project? From a project perspective, this would be the easiest and quickest solution. Will it require the co-operation of another Ministry? Will it require the action of Cabinet or the Parliament? This may take considerably longer and may entail greater political uncertainties. Determining which type of action is required for a particular change may at times be simple; at other times, careful statutory and constitutional interpretation may be required by national legal experts.

Of course, it is important to emphasise that legal analysis is not solely a tool for identifying legal changes that may be needed in order to accommodate a project. It is also a tool for identifying ways in which the *project itself* might be better designed in order to accommodate legal reality. In other words, legal analysis should never treat either the legal framework or the project as immutable. There will be many times when legal problems might best be addressed by changing some aspect of project design rather than by attempting to change the relevant laws and regulations themselves, provided this does not jeopardise the overall objectives of the project.

5. Weighing the risks

One of the main purposes of the four steps outlined above, is to help calculate the risks posed to the project by weaknesses in the legal framework. Little can be said in the abstract about how any particular attribute of the legal framework should be weighed – such a weighing would by necessity be context-specific, with law only one of many dimensions being taken into account. However, two somewhat countervailing considerations should be kept in mind while assessing the risks:

- On the one hand, it is important to be realistic in analysing the importance of law-related risks. No legal system is flawless, and it is often possible to achieve promising development results in a less-than-ideal legal environment. Just as *good* laws do not in themselves ensure good results on the ground, so *poor* laws do not always lead to bad results, if there is sufficient will on the part of government and others to find ways of mitigating their weaknesses.
- On the other hand, however tempting it may be to find temporary or stop-gap solutions to legal flaws, it is also important to keep a wider frame of reference in mind. It may be possible to side-step legal problems for the time being, especially while the project is in full swing and has a high profile. However, unless the more significant problems are dealt with in a forthright manner, then there may well be difficulties in replicating project approaches outside the context of the project, or in sustaining project successes beyond the life of the project.

The question of “risk” needs to be posed in another way as well, one that is sometimes overlooked: what are the potential risks to the recipient country if legislative measures are adopted to facilitate a particular project? This may not be a serious issue where the changes involved are minor and narrow in scope. But on occasion, the reforms required may have important ramifications for government and civil society that extend well beyond the framework of the project.

In such cases, special care must be taken to ensure that the eagerness of government and its international partners to finalise a project agreement does not result in far-reaching legal reforms being rushed through – ie, without careful analysis, consultation, consensus-building and scrupulous attention to the details of drafting. When such processes are short-circuited, the long-term effectiveness of a new law and its ownership by both government and society at large will be at risk. Of course, project-inspired legal reforms are not unique in facing this risk – there are many instances around the world of law reforms that suffer from these same defects, without international pressure being a factor. However, to the extent that an investment project encourages or re-enforces such practices, it benefits neither the project nor the country as a whole.

6. Timing of the Analysis

For reasons already alluded to above, the timing of legal analysis can be crucial. As a general rule, the analysis should be initiated early within the overall framework of project identification-preparation-implementation. This will serve two purposes. First, it will ensure that project design is carried out with any potential legal constraints and opportunities already in full view. Strategies for dealing with legal problems can thus

be planned from the beginning, rather than those problems coming to light only after much time and expense has gone into project design.

Second, in case changes to the legal framework are warranted, ample time needs to be allowed to ensure that the process is carried out carefully, with sufficient consultation and in compliance with applicable procedures.

There may also be value in further legal analysis during the execution of the project itself. For example, it can be useful during a mid-term evaluation to investigate whether unforeseen legal issues have emerged, and to assess the effectiveness of any legal reforms that have been put into place earlier in the project.

7. Conclusion

Legal framework analysis is an important part of the design and implementation of rural and agricultural investment projects. This short paper has outlined the basic elements required in order to ensure that such an analysis is both thorough and directly relevant to the practical concerns of project designers, implementers and stakeholders.

As argued above, close analysis of written legal texts, while essential, is only the starting point for a careful review of the legal framework. The process requires as well an assessment of how important laws function in practice, in order to identify any critical gaps or discrepancies between written law and law-in-action, and the factors that contribute to those gaps and discrepancies.

Effective legal analysis also requires the identification of *feasible* options either for improving the legal framework and/or modifying the project approach to accommodate legal realities. This in turn involves an assessment of the risks that various legal weaknesses pose to project objectives – to what extent can they be, or will they have to be, “lived with?”; to what extent are they such fundamental threats to project goals that they will need to be addressed in a forthright fashion if the project is to go forward? Questions such as these underscore the importance of starting the process of legal review early in the project cycle, so that basic design decisions can benefit from the insights it provides and, if necessary, appropriate legal reforms can be carefully drafted, debated and adopted.

Two final principles need to be kept in mind. First, ownership and consensus amongst stakeholders are key to the effectiveness and sustainability of any legal reform. Second, any given legal change may have implications for a country and its citizens that go well beyond the specific context of a particular project. Care needs to be taken to ensure that these principles are respected, and that they are not diluted by *rushing* major legal changes through because of the pressure on government and its international partners to conclude an agreement.