

LEGEND

*Land: Enhancing Governance
for Economic Development*



Legal empowerment in agribusiness investments: harnessing political economy analysis

Lorenzo Cotula with Thierry Berger



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Acronyms

CCSI	Columbia Center on Sustainable Investment
CED	Centre pour l'Environnement et le Développement
CFJJ	Centro de Formação Jurídica e Judiciária
EBA	Everything But Arms
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FPP	Forest Peoples Programme
IIED	International Institute for Environment and Development
NGO	non-governmental organisation
NORAD	Norwegian Agency for Development Cooperation
OECD	Organisation for Economic Co-operation and Development
RSPO	Roundtable on Sustainable Palm Oil
SDI	Sustainable Development Institute
Sida	Swedish International Development Cooperation Agency

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About the authors

Lorenzo Cotula is a principal researcher in law and sustainable development at the International Institute for Environment and Development (IIED), where he leads the Legal Tools Team. He is also a visiting research fellow at the Centre for the Law, Regulation and Governance of the Global Economy (GLOBE), Warwick Law School.

Thierry Berger is a qualified solicitor and IIED associate, focusing on law and sustainable development. Prior to his collaboration with IIED, Thierry worked for global law firms for 10 years.

Executive summary

Increased private sector investment in tropical agriculture has created both hopes and fears for rural livelihoods in low- and middle-income countries. In different contexts, rural people have sought inclusion in the business venture as farm workers or outgrowers, negotiated better terms of consultation or compensation, or opposed the deals altogether. One of the major challenges is in empowering rural people to make informed choices, exercise their rights and have their voices heard when dealing with the government or the private sector.

Legal empowerment practitioners – from lawyers to non-governmental organisations and grassroots groups – have pioneered ways to help rural people advance their rights. These interventions often assist people in harnessing the law to protect their land rights, negotiate with companies from a position of strength, redress grievances and influence policy.

Legal empowerment in agribusiness investments presents some distinctive challenges. While interventions often happen at the grassroots, the economic reality of agribusiness investments requires tailoring approaches to the national and, possibly, international dimensions involved. By the time a business venture hits the ground, key decisions will have already been taken at higher levels. These decisions will influence space for local deliberation, and are often difficult to reopen through action at the local level alone.

Legal empowerment practitioners also often find that their work involves helping communities to confront powerful vested interests in government or the private sector. The processes by which land is managed and investments are governed are often inherently political, and they can involve major distributive issues and entrenched power relations. Local, national and transnational elites may resist change that threatens their interests. Political space for advocacy is constrained or reducing in many contexts.

If legal empowerment is to be effective, interventions at national and international levels need to complement grassroots action, and the political dimensions need to be properly considered. In turn, this may require new alliances to tailor and coordinate politically savvy initiatives at different levels. This analytical paper is aimed at legal empowerment practitioners and analysts. It explores how political economy analysis can help practitioners make sense of these issues, and distils insights from practical experience on how legal empowerment initiatives can rise to the challenge.

Political economy: from analysis to action

Seasoned practitioners will have an intuitive understanding of the political and economic context in which they work. But various tools from political economy – the study of the interaction between political and economic processes – could help them to develop a more systematic approach: by using political economy tools, practitioners can make more informed choices on whether legal empowerment can be part of the solution, on the most appropriate approaches, and on ways to manage the risks involved.

This can enable practitioners to design and implement more effective legal empowerment interventions. For example, if political space is constrained some legal empowerment approaches could expose practitioners and communities to significant risk. In such instances, political economy analysis could inform the development of tailored interventions and risk management systems.

A fine-grained understanding of political economy can also help to identify the most promising entry points for practitioners and communities to renegotiate power relations. This understanding could broaden the range of possible interventions to include diverse initiatives at the local, national and international levels. Innovative experiences in legal empowerment provide insights on what this might involve.

Legal empowerment at local to international levels

With regard to local-level interventions, public discourse often emphasises the need to address power imbalances between businesses and ‘communities’. However, political economy analysis highlights that the most difficult issues often relate to renegotiating relationships *within* communities to ensure local leaders are responsive to their constituents. To address these issues, legal empowerment innovators have helped citizens to establish mechanisms to hold local leaders to account.

This may involve developing locally negotiated charters and by-laws, setting up committees to advise leaders on the exercise of their authority, and training community paralegals to accompany the whole process from the bottom up. However, entrenched sociocultural attitudes are difficult to change, and communities may have to fight for these arrangements to be upheld.

Political economy analysis also indicates that, at the national level, large-scale investments may be associated with complex relations that link politicians, high-level government officials and business leaders. In these contexts, working only at the grassroots is unlikely to be enough, and interventions may need to address the politics at a national level.

Consequently, legal empowerment practitioners have developed approaches to work with government – for example, by providing capacity support for government

officials to win their ‘hearts and minds’. Supporting public oversight of government action is a complementary approach – for example, by making investor-state contracts public and developing tools to help citizens to scrutinise these contracts.

Foreign investment has a transnational dimension. Political economy analysis can help to identify those relations that cross national boundaries, and to inform choices on the diverse legal instruments that interventions could engage. In this context, legal empowerment can be applied in relation to international instruments – for example, by helping communities to obtain legal redress or scrutinise the negotiation of international treaties.

Key takeaways

This analysis has direct implications for legal empowerment in agribusiness investments:

- **Politics matters:** Legal minds may be more comfortable dwelling on the technical aspects of the law, but legal empowerment works best when programmes factor in the political dimensions of their work.
- **Harness political economy tools:** Using concepts such as power, structure and agency, and scrutinising the relations that underpin agribusiness investments can help legal empowerment practitioners to make sense of the politics and the diverse sites for action.
- **Broaden the scope to activate the most effective levers:** Addressing entrenched power relations may require activating levers at the local, national and international levels. Interventions may range from establishing grassroots systems for people to hold local leaders to account; through to supporting public scrutiny of government conduct and investor-state contracts; and helping communities to obtain redress via international or transnational channels, or citizens to scrutinise the negotiation of international treaties.
- **Communities must lead:** Legal empowerment is about giving communities the tools to be their own advocates – not doing their campaigning for them. This is a consideration that should guide any interventions combining the legal and the political, and acting at national and international levels.
- **Consider the risks as well as the opportunities:** Depending on the context, renegotiating power relations may expose practitioners and communities to the risk of backlashes. This requires carefully considering the appropriateness of (different types of) legal empowerment interventions, and developing effective risk management schemes for any interventions taken forward.
- **Take a holistic approach:** No single approach is likely to have all the answers. Legal empowerment in agribusiness investments will need to work alongside other approaches, such as harnessing technology or conducting public campaigns.
- **Develop new coalitions:** Working at the national and international levels, and integrating legal empowerment with other approaches may require new local-to-global coalitions between actors with complementary expertise in different areas of law and practice (from land rights to investment protection treaties), and with the ability to act at different levels and in different places.

1. Introduction

Increased private sector investment in tropical agriculture has created both hopes and fears for rural livelihoods and development prospects in low- and middle-income countries. Depending on the context, different groups of rural people have sought inclusion in the business venture as farm workers or outgrowers, negotiated better terms of consultation or compensation, or opposed the deals altogether (Hall et al., 2015). Recourse to law has featured prominently in these strategies, often in conjunction with collective action and public mobilisation (Polack et al., 2013).

One of the major challenges is in empowering rural people to make informed choices, exercise their rights and have their voices heard when dealing with the government or the private sector. Legal empowerment practitioners – from lawyers to non-governmental organisations (NGOs) and grassroots groups – have pioneered ways to help rural people to secure their rights and influence decision-making.

Legal empowerment in agribusiness investments presents some distinctive challenges. While many interventions happen at the grassroots, the economic reality of agribusiness investments requires tailoring approaches to the national and, possibly, international dimensions involved. Legal empowerment practitioners also frequently find that their work involves helping communities to confront powerful vested interests when negotiating with companies or government agencies. Land and investment are politically sensitive issues and space for advocacy is constrained or reducing in many contexts.

If legal empowerment is to be effective, interventions at national and international levels need to complement grassroots action, and the political dimensions need to be properly considered. In turn, this may require new alliances to tailor and coordinate politically savvy initiatives at different levels. This analytical paper is aimed at legal empowerment practitioners and analysts. It explores how political economy analysis can help practitioners make sense of these issues, and distils insights from practical experience on how legal empowerment initiatives can rise to the challenge.

The International Institute for Environment and Development (IIED) is an active player in this field. IIED works with partners in low- and middle-income countries to develop legal empowerment approaches that address the challenges of agribusiness investments at local, national and international levels. This practical experience informed the local-to-global framing of the analytical paper. However,

this paper draws on a literature review and, to ensure arm's length analysis, it focuses on the experiences of other organisations.

The concept and practice of legal empowerment

Legal empowerment involves helping people to engage with the law so that they can achieve what they value. In relation to agribusiness investments, legal empowerment often entails delivering legal services to help people secure their land rights, negotiate with companies from a position of strength, or redress grievances. Beyond helping people make the best possible use of existing laws, legal empowerment can also include enabling people to participate in creating new laws – for example, on land or investment.

In providing legal support, interventions use diverse approaches (Table 1). Many legal empowerment programmes aim to raise people's awareness – for example, about their land rights or a proposed law affecting them. This often involves trainings, radio broadcasts, village theatre and legal education.

But greater awareness is rarely enough. Knowing one's rights does not automatically translate to an ability to navigate complex court or administrative procedures. People may also lack the confidence to act on the newly acquired information. Many interventions work to strengthen this confidence and ability – for example, through supporting local organisations, charters or committees; training community paralegals;¹ setting up hotlines for easier communication; or promoting exchange of experience with communities who have success stories to share.

If people resolve to use law-related processes, they are likely to need specialist expertise. Many legal empowerment interventions provide this support – for example, to map and register lands (Knight et al., 2016) – with community paralegals often supporting relations at the local level. Law-related processes may include administrative proceedings such as land registration and impact assessments; contract negotiations (for example, to help communities negotiate partnerships with companies); court litigation and grievance procedures; and public participation in law-making.

All these approaches aim to equip communities with the tools to fight for their rights – not to advocate on their behalf. In other words, the approaches aim to place people in the driving seat of the changes that affect them, rather than casting them as mere 'beneficiaries'.

¹ Despite their considerable diversity, community paralegal programmes typically train, support and supervise selected community members, who can advise their peers and link up with more qualified staff when needed.

Table 1. Examples of legal empowerment interventions

Aim of intervention	Examples of approaches	Examples of issues/arenas
Raise legal awareness, provide information	Trainings, radio broadcasts, village theatre, legal education	Land rights, investment approval processes, remedies, proposed laws
Strengthen community/individual capacity to act on the legal awareness	Support to local organisations, charters and committees; hotlines; exchanges of experience; community paralegals	Land rights, community–investor negotiations, legal redress, proposed laws
Provide support in law-related processes	Legal advice, law clinics, technical support, community paralegals	Administrative procedures, litigation, grievance mechanisms, community-investor negotiations, participation in law-making

Agribusiness investments: economic and political dimensions

When applied to agribusiness investments, legal empowerment initiatives must often confront two challenges:

1. By the time a business venture hits the ground, key decisions will have already been taken at higher levels. These decisions will influence space for local deliberation, and are often difficult to reopen through action at the local level. For example, the government may have approved an investor–state contract setting important parameters for community–investor relations, and concluded international treaties protecting approved investments.
2. Action to empower communities may question vested interests and raise politically sensitive issues. The processes by which land is managed and investments are governed are often inherently political, and they can involve major distributive issues and entrenched power relations. Local, national and transnational elites may resist change that threatens their interests.

The first challenge means that, while grassroots action can delay and possibly undermine project implementation, the most effective levers for influence do not necessarily lie at the local level. As such, legal empowerment efforts may also need to be applied at the national and international level – for instance, by helping citizens to understand and scrutinise investor–state contracts and investment protection treaties (see Box 1). In other words, the economic reality of agribusiness investments has important implications for applicable legal frameworks, and ultimately for legal empowerment strategies. It may also require combining different areas of legal expertise, and the ability to act at different levels and in different places.

As for the second challenge, legal empowerment is fundamentally about renegotiating power relations (Golub, 2005; Cotula, 2007; Mathieu, 2008; Goodwin and Maru, 2014; Domingo and O'Neill, 2014). Typically, legal

Box 1. Promoting public scrutiny of international investment treaties in Myanmar

In Myanmar, land-based investments are particularly sensitive because of the complex interplay between the country's long-running conflict, natural resources and the peace process. Many natural resource projects are in areas inhabited by ethnic minorities, and both conflict and post-conflict situations have facilitated contested land acquisitions (Woods, 2011).

During the democratic transition, the government was negotiating international treaties to protect foreign investment. NGOs voiced concerns about the possible implications that these treaties could have for the ability of the incoming democratic administration to cancel or renegotiate projects, tighten social and environmental standards, or return land where needed. These concerns galvanised grassroots organisations advocating around local agribusiness, mining and hydro projects.

To raise awareness about the significance of investment protection treaties, national and international NGOs held capacity-building and consultation events to help grassroots activists understand the treaties and their potential implications. Myanmar NGOs subsequently issued public statements, which called for caution in negotiating the treaties, raising particular concerns over the risk of land-grabbing and the erosion of land rights in the context of large-scale investments.

Treaty negotiations and public advocacy are still ongoing, and it is too early to assess what difference, if any, the advocacy will make to treaty outcomes. However, this experience illustrates how, in the context of transnational investments, interventions to help people engage with the law can occur at the national and international level, and complement activities at the grassroots.

Sources: Kamout Su et al. (2014); MATA and Lands in Our Hands (2016); TNI (2016).

empowerment interventions in agribusiness investments are not solely or even primarily focused on helping people to win a better deal in monetary terms, but aim to ensure people can make informed choices about development pathways. This has inherent political implications, because enabling people to make their own choices can challenge the views and interests of those in power.

Many lawyers instinctively tend to focus on the technical aspects of legal work, and consider this as being separate from its political ramifications. But legal empowerment interventions can only be effective if practitioners understand the political context and vested interests standing in the way of change, and factor them into their approach.

Harnessing political economy analysis in legal empowerment

Seasoned practitioners will have an intuitive understanding of the political and economic context in which they work. But various tools from political economy – the study of the interaction between political and economic processes – could help them to develop a more systematic approach to address the two challenges discussed. By using political economy tools, practitioners can identify the most effective levers of influence at local, national and international levels; manage the risks involved in harnessing the law to challenge powerful vested interests;² and, ultimately, design and implement more effective legal empowerment interventions.

The next section explores political economy in greater depth, introducing analytical tools and applying them to agribusiness investments in their local, national and international dimensions. Section 3 examines recent examples of legal empowerment interventions in agribusiness investments, focusing on one case for activities at the local, national and international level.

Finally, Section 4 outlines how legal practitioners can apply these insights to enhance their interventions and help communities lay claim to the development they deserve.

² Managing risk is a key issue, especially where political space is constrained; but it deserves a separate paper, and is only cursorily touched upon here.

2. The political economy of agribusiness investments

Broadly defined, political economy examines the interface between the economic and the political.³ However, the term ‘political economy’ encompasses some very different approaches, and the jargon and ‘labelling’ are sometimes confusing (some helpful concepts are outlined in Box 2).

Approaches to political economy draw insights from political science, economics, history, sociology and/or anthropology. Political economy analysis has gained traction in international development circles (e.g. DFID, 2009; World Bank, 2008; NORAD, 2010; Sida, 2013), particularly as practitioners recognise the importance of

politics in influencing development outcomes (e.g. DFID, 2001; Hesse and Ochieng Odhiambo, 2002; and more recently, World Bank, 2016).

The web of relations in agribusiness investments

Political economy analysis can help shed light on the complex relations that underpin agribusiness investments. These ventures often involve many actors and sites of decision-making, resourcing and operation, particularly

Box 2. Key concepts: agency, structure, relations, power and ideas

Political economy concepts can help legal empowerment practitioners to understand the context in which they work, the problems they face, and the opportunities they can seize. While the concepts may at first seem abstract, they can be applied to unlock concrete insights. Key concepts include agency, structure, relations, power and ideas.

- **Agency** is an actor’s ability to deliberately make change happen by taking action, whether individually or collectively. Assessing agency presupposes a clear identification of the actors involved.
- **Structure** refers to the contextual factors that shape options for action. These can be political, economic, social, ecological, geographical, legal, ideational and so on. In effect, structure ‘warps and shapes the strategic topography facing agents’ (Hudson and Leftwich, 2014:75).
- **Relations** link multiple actors, locate them in the context of structure, and are permeated by power.
- **Power** can be understood in different ways. It can affect both structure (because it is pervasive within society, influencing minds and relations) and agency (an actor’s ability to influence others to do something, or to resist others’ demands). Power can operate visibly, such as in formal decision-making; or more covertly, for example through widely accepted narratives about what is ‘modern’ or ‘backward’ (see Gaventa, 2006).
- **Ideas** include all aspects of human thought. They frame the way interests, problems, possible solutions and strategies are perceived and articulated (Rodrik, 2014). Power can influence how people think, as in the above example of narratives about the modernity, or backwardness, of different land uses; but ideas – including perceptions about one’s own and other actors’ power – can also influence relations.

These concepts are directly relevant to legal empowerment, with agency, structure, power and ideas all influencing each other through multiple feedback loops. Greater capacity to exercise rights has been shown to change **relations** by increasing the **agency** of the ‘legally empowered’ (Goodwin and Maru, 2014). Typically, interventions must navigate **power** imbalances and **structural** constraints – for example, where political and economic systems are skewed against certain groups, or influential actors resist change and repress activists.

Ideas are particularly important in legal empowerment because they permeate the law; and because interventions often aim to raise awareness, facilitate access to information or propagate a new idea through precedent-setting litigation that changes the way law is interpreted. The entrenchment of a new legal interpretation can alter the (legal) structure and open new spaces for agency.

³ An influential definition used by the Organisation for Economic Co-operation and Development (OECD) reads: ‘Political economy analysis is concerned with the interaction of political and economic processes in a society: the distribution of power and wealth between different groups and individuals, and the processes that create, sustain and transform these relationships over time’ (cited in DFID, 2009).

where foreign investment is involved (Cotula and Blackmore, 2014).

Operational activities typically rely on the relations that agribusiness firms develop at the local level – for example, to clear land, hire labour or promote support among local communities. But relations at the national level are also very important, because the central government often has the authority to approve investments, issue permits or award land rights. Also, national elites (diverse groups usually including politicians, government officials, business people and possibly traditional rulers and wealthier rural actors) can play a key role in facilitating investments.⁴

Agribusiness investments can involve transnational relations. The investor may be based in a different state, financing may come from firms located elsewhere, and the venture may target export markets in yet other countries. Also, businesses may channel investments through subsidiaries located in third countries for purposes of corporate governance, tax minimisation or investment protection.

These multiple relations are reflected in the diverse legal instruments governing transnational agribusiness investments. These instruments may include:

- National legislation governing issues such as land, water, labour, tax or environmental protection;
- Investor–state contracts such as agribusiness concessions;
- International tax, trade or investment protection treaties; and
- National legislation regulating market access or legal redress in third countries.

In this context, political economy analysis can provide insights on features of structure and opportunities for agency at the local, national and international level; on the most suitably located legal levers of influence; and, ultimately, on the design and implementation of legal empowerment interventions. We now discuss these aspects in greater detail.

Political economy and national governance

While legal empowerment programmes often work at the grassroots, political economy factors at the national level can have far-reaching implications for agribusiness investments, and thus for initiatives working to change the ways investments are made. Contexts are different, and it is difficult to generalise: the features of structure, the constellation of actors and the networks of power relations will vary widely.

For example, if national elites are the primary landowners, they may be incentivised to push for robust governance systems that protect land rights; while in countries where the state owns the land, elites may see

state capture as a means of controlling land and deriving economic benefits from it (Onoma, 2010; and more generally, Bayart, 1993; and Chabal and Daloz, 1999 – all drawing on research from sub-Saharan African countries).

In some cases, the legal structure combines elements of both: the law protects private land ownership rights, which national elites typically hold; but it provides only weak protection to the customary rights of rural people, which could get in the way of elites manoeuvring state institutions to allocate land for their own benefit (see Alden Wily, 2011). Outcomes partly depend on the strength of national NGOs, rural producer associations and legal empowerment practitioners in exercising countervailing power.

There is great diversity in the ideational dimensions as well: while in some countries political elites pursue narrow self-interests, elsewhere they consider their ability to deliver broad-based development as the source of their political legitimacy. Similarly, activists have varying perceptions about the role of law and legal institutions in strategies of change. Nor are situations static: political and economic structures evolve constantly, ideas change, and relatively open political spaces may become more constrained.

In these diverse and evolving contexts, agribusiness investments may create lucrative opportunities for political power-brokers or business leaders in the capital. Large land allocations can offer openings for corruption at different levels of government (Koechlin et al., 2016; De Schutter, 2016). Politicians and domestic entrepreneurs can leverage their links into government to gain economic benefits. In many countries, national elites have directly acquired a great deal of land, sometimes even more than foreign investors in aggregate terms (e.g. Deininger and Byerlee, 2011).

National actors may also have vested interests in foreign investment projects through their involvement as intermediaries, facilitators or local partners. This is illustrated by the joint ventures established with local entrepreneurs and politicians in Cambodia's sugar industry (Sokphea, 2016).

In any given country, members of the legal profession may belong to privileged groups and wield considerable influence (Dezalay and Garth, 2011). Many lawyers earn their livelihoods through brokering large investment deals, and the independence and effectiveness of the judiciary vary considerably.

As a result of these factors, the problem rural people face is not simply a 'lack of capacity'. What often stops them from having their voices heard is not that the processes governing the land and investment do not work, but that these processes work for elite interests rather than marginalised groups.

These complex structural factors and power relations highlight wider issues of governance and, ultimately, affect opportunities for agency. Legal empowerment interventions need to consider these dimensions if they are to deliver

⁴ Notions such as elites involve significant complexities and would require substantially more fine-grained analysis than is possible in this paper. In a real case, political economic analysis would need to identify with precision the actors involved and the relations among them.

change – aiming to understand the political economy all the way down to the individuals involved in specific deals, and their allies. The ensuing interventions may involve developing effective approaches to engage with carefully selected parts of government and to help citizens hold authorities to account.

Political economy at the grassroots

Political economy factors typically shape how agribusiness investments operate at the local level as well, further influencing options for legal empowerment. This affects relations within communities, which often include different interests and uneven power relations based on diverse factors such as status, wealth, income, gender, age, ethnicity or socioeconomic activity. For example, customary authorities may see awarding long-term land leases as a way to reassert their own control over contested land vis-à-vis migrants and neighbouring chiefs (see Box 3).

Political economy factors are also shaped to varying degrees by the relationship between local processes and political interests at the centre. In many low- and middle-income countries, some form of patronage system serves as a means for national elites to rally support from the provinces. Politicians often rely on local power-brokers – such as customary chiefs – to harness blocs of rural votes. These alliances and patronage networks are entrenched by the distribution of post-election rewards. Elections may, therefore, hinge on the material benefits politicians are able to channel to their constituency (Poulton, 2014). The payments, jobs and contracts associated with agribusiness investments can be perceived as the perfect currency for these kinds of transactional politics.

How this plays out, and the extent to which benefits will trickle down to the local level, will depend on context-specific settlements. In very hierarchical structures, there is no need for substantial trickle down: what matters is whether the local leaders benefit (Boone, 2003). The attitudes (‘ideas’) of local leaders also matter. For example,

while some customary chiefs may agree to large-scale land deals to reward themselves and their associates without consulting their communities, other chiefs may consider it their duty to maximise the community benefits.

In supporting the agency of disadvantaged groups, legal empowerment programmes can end up confronting these entrenched sociopolitical structures and relations. A fine-grained understanding of local political economies can help to identify the most promising entry points for grassroots agency. For example, several interventions support rural people in holding to account their traditional leaders, who often act as the local linchpins of patronage systems (see Box 3).

The international political economy of agribusiness investments

Legal empowerment initiatives cannot be divorced from a broader context that is shaped by political and economic processes at the international level. Foreign investments in agriculture take place within a complex web of relations involving multiple states (where export markets, corporate entities or farming activities may be located) and multinational businesses (from financial institutions involved as lenders or equity investors, to big brands sourcing raw materials to sustain their activities).

The breadth and complexity of these factors is apparent in the sugar and ethanol industry, to take one example. In recent years, developments in this sector have been influenced by international trade preference schemes affecting market access; consumption mandates for biofuels, including in high-income countries; and in some cases, direct or indirect support to companies investing overseas (Dubb et al., 2017; McKay et al., 2016).

In the European Union (EU), for example, unilateral trade preferences to least developed countries under the ‘Everything But Arms’ (EBA) scheme have been instrumental in facilitating the spread of sugar industries in South-East Asia (especially Cambodia; see Box 4) and southern Africa

Box 3. Customary authorities and land leases in Ghana

In Ghana, many agribusiness investments involve long-term land leases that are awarded directly by customary authorities. Research suggests that some of these authorities allocate the leases, at least in part, as a deliberate strategy to reassert their own control over land.

In one case, three customary authorities managed adjacent land areas with undefined boundaries. As land competition increased, friendly relations among the authorities became increasingly tense. The authorities allocated land to outside investors, including one very large jatropha venture, as a way to claim control over the contested lands.

Tenant farmers from outside the local landowning families held particularly fragile land rights, and were often faced with dispossession. In this context, labelling people who did not descend from the first occupants as ‘migrants’ undermined the perceived legitimacy of their resistance.

The research illustrates how sociopolitical considerations, and divisions within and between communities, can affect investment processes. The important role of traditional leaders in decision-making also compounds the case for mechanisms to ensure that these leaders act in the best interest of their wider communities.

Source: Boamah, 2014.

– for example, in Mozambique and Zambia (McKay et al., 2016).

Treaties to protect foreign investment are another example of a relevant international instrument (see Box 1). Research suggests that some 65% of agribusiness plantation deals concluded between 2000 and 2015 are protected by at least one investment treaty (Cotula and Berger, 2015). Political and economic factors concerning both structure and agency influence the negotiation of international trade and investment treaties (e.g. Poulsen, 2015, discussing the international political economy of investment treaty making).

In turn, the international structure creates both opportunities and challenges for agency in legal empowerment interventions. Cross-border trade arrangements have provided openings for transnational advocacy (Box 4); but activists have also raised concerns that international investment protection treaties might make it more difficult for citizens to get governments to act on their demands (see Box 1).

Hard and soft power

Power manifests itself in each of these local, national and international arenas, and in the linkages between arenas, in ways that can be loosely categorised on a spectrum from ‘soft’ to ‘hard’. ‘Soft’ power involves, for example, situations where governments or businesses promote public support for large-scale investments through narratives (‘ideas’) that emphasise the purported availability of ‘idle’ land and the desirability of agricultural modernisation.

‘Hard’ power could include situations where authorities subject activists to intimidation and repression, a trend recently witnessed in a number of countries including in Latin America and South-East Asia (Global Witness, 2016; Oxfam, 2016; Sokphea, 2016; see Box 4). The law may itself provide arenas for repression, and some land activists have faced court convictions for their actions (Reuters, 2016).

Disadvantaged group may be able to mobilise countervailing power – for example, by acting together and harnessing available (political, social, legal) levers of influence. Changes in ideas can also underpin agency and ultimately shift power relations – for example, if people acquire self-confidence and begin to question the decisions of their traditional or political leaders.

These overall trends have important implications for legal empowerment, because interventions could expose practitioners and communities to significant risk. Political economy analysis can provide the foundations for robust risk management schemes. At the same time, careful analysis can identify the most promising opportunities to apply countervailing power and increase agency.

To sum up

A political economy lens sheds light on the complex relations involved in agribusiness investments, on the interplay between agency and structure at local, national and international levels, and on how power and ideas permeate all these dimensions. These factors will affect the structural constraints that legal empowerment interventions face, and the most effective vehicles for those interventions to increase rural people’s agency in any given context. Section 3 explores implications for legal empowerment in greater detail.

Box 4. The political economy of Cambodia’s sugar industry: the international dimensions

Cambodia has granted large-scale land concessions since the 1990s, when national law provided little guidance. The 2001 Land Law and the 2005 Sub-Decree 146 established the legal framework for land concessions. As a least-developed country, Cambodia has access to markets in the EU under the EBA.

The Cambodian legal reforms have underpinned substantial increases in the volume of agribusiness concessions. Official figures indicate that between 1996 and 2012, the government awarded concessions for more than 1.2 million hectares of land, though activists suggest that the real figure may be higher. This includes land for sugar plantations exporting to Europe and set up by investors from countries not eligible for the EBA.

At least some agribusiness concessions involve collaboration between international business and national elites. Some large-scale concessions have been accompanied by concerns about negative impacts and human rights violations, and activists themselves have faced repression. At the same time, the international dimensions of Cambodia’s sugar industry have enabled practitioners to mobilise transnational levers in pushing for change. This included transnational court litigation and advocacy to persuade authorities in export markets to suspend trade preferences. However, progress to date has been slow.

Sources: Subedi, 2012; OpenDevelopmentCambodia, 2015; Sokphea, 2016.

3. Implications for legal empowerment interventions

Harnessing the law: the potential – and the limits

As we have seen, legal empowerment mobilises the law to help rural people exercise their rights and have their voices heard. But the ‘power of law’ to deliver favourable outcomes will vary considerably according to the context. The political economy factors outlined above will also have important implications for which legal empowerment approaches are more likely to prove effective in any given case.

In effect, tensions may emerge between the formal body of law underpinning the ‘social contract’ between the government and the governed, and the informal sociopolitical processes that determine how authority is exercised in practice. The principles enshrined in a country’s constitution or its land laws (for example, to recognise the land rights of rural people) are not always aligned with the implicit sociopolitical deal shaped by political economy factors operating at the national, local and international levels. As a result, ‘progressive’ land laws protecting local rights may be undermined by a *de facto* policy thrust that favours elite interests.

This does not mean that scope for change is necessarily limited. Working through legal avenues can be effective. The law is an important dimension of ‘structure’ in any country, and legal frameworks can provide instruments that enable agency to succeed. This can be done, for example, by implementing to their full potential legal provisions requiring community consultation or consent; by activating laws that require disclosure of information; or by providing redress for past wrongs. But while legal empowerment approaches tend to mobilise the formal legal dimensions of the social contract, they are more likely to maximise impact – and minimise possible risks – if they properly consider the political economy factors at play.

Tailoring interventions to address political economy factors

One insight from the political economy analysis of agribusiness investments, discussed in Section 2, is the plurality of relevant sites and relations. Faced with complex structural factors at national and international levels, interventions that only promote local-level agency, even if successful, may struggle to achieve durable change. Instead, grassroots action may need to work alongside interventions that harness legal instruments at the national and international levels.

The sets of legal empowerment approaches discussed in Section 1 (raising awareness, strengthening capacity to act, and providing support in law-related processes; see Table 1) also apply to national and international contexts. They may involve, for example, raising public awareness about the negotiation of investor–state contracts or international treaties, or providing legal support in activating international and transnational recourse mechanisms.

In addition, the structure of decision-making authority, in law or in practice, can affect strategic choices for legal empowerment. If customary chiefs or local governments wield considerable influence, then it may make sense to design grassroots-level interventions to help local people hold them to account. But if the central government is the main arbiter on land decisions, then a different set of approaches may be required.

At each level, features of structure also have implications for identifying the most effective approaches to promote agency. In a review of legal empowerment programmes, Goodwin and Maru (2014) found that most took place in politically open countries. This finding raises questions as to whether legal empowerment can be a viable strategy until sufficient political space exists. Any legal empowerment initiative in constrained political spaces would require particularly rigorous assessment and effective management of risks for all actors involved, including practitioners and communities.

Similarly, litigation-based approaches have delivered tangible results in relation to some agribusiness ventures – for example, in Sierra Leone (Smalle, 2016). But they

require an enabling structure, including a robust rule of law, and an independent and effective judiciary. Where political space is constrained, litigation and even language emphasising ‘rights’ may be counterproductive. In such cases, capacity support and dialogue-based strategies might be more appropriate.

What follows are examples of how legal empowerment interventions have sought to address the challenges of agribusiness investments at the local, national and international levels. These experiences provide insights on how interventions can respond to the political economy factors discussed in Section 2.⁵

Local: diffusing power, promoting accountability of local leaders

Public discourse around agribusiness investments often focuses on the need to address power imbalances between businesses and ‘communities’. However, given the complex political economy factors that may be at play at the local level, the most difficult issues often relate to renegotiating relationships within communities to ensure local leaders are responsive and accountable to their constituents.

Many legal empowerment initiatives address this issue, which will manifest differently according to varying structures. For example, the relevant authorities may be customary leaders, such as in Ghana (Brong Ahafo Regional House of Chiefs, 2012; Cotula et al., 2016),

Liberia (Kaba and Keyser, 2014) and Sierra Leone (Conteh, 2015); or local government bodies, such as in Tanzania (Kisambu, 2016) and Senegal (Fall, 2017).

A variety of legal empowerment approaches can be adapted to help strengthen agency in accordance with specific contexts. For example, several interventions supported the drafting of locally negotiated charters to set the ground rules for handling proposed investments, including who needs to be consulted (Brong Ahafo Regional House of Chiefs, 2012; Kaba and Keyser, 2014; Fall, 2017). Some such initiatives have specifically sought to address gender issues – for example, through encouraging communities to consider ways to ensure effective participation of women in local decision-making (e.g. Kisambu, 2016).

In these contexts, legal empowerment interventions have trained paralegals to give people a clearer understanding of their rights and to help them to develop land charters (e.g. Kaba and Keyser, 2014; Massay, 2016; Fall, 2017). In addition, interventions have helped to establish committees of elected representatives to advise authorities on the discharge of their functions (Brong Ahafo Regional House of Chiefs, 2012; Kaba and Keyser, 2014; Cotula et al., 2016). These kinds of initiatives can help to strengthen the ability of rural people to take action (agency), and their ‘readiness’ to handle investments on their own terms.

This is not to underestimate the challenges. Decision-makers may pay lip service to such consultative

Box 5. Improving the accountability of local leaders in Liberia

An example from Liberia, which has witnessed a wave of new agribusiness investments, shows how effective legal empowerment can help a community to resist attempts by local leaders to circumvent commitments to consult their constituents.

Since 2009, the Liberia-based Sustainable Development Institute (SDI) and international NGO, Namati, have been working with more than 40 communities to help secure land rights. Community paralegals supported this action, helping to map community lands, clarify boundaries, develop by-laws stipulating rules for local land governance, and to elect a diverse, representative Land Governance Council.

In one community, the by-law included a rule that elders and traditional leaders must consult the wider community before allocating land to investors. This by-law faced a crucial test in 2013, when elders signed a contract to lease 20,000 hectares to a commercial operator without consulting the community. With the support of SDI and Namati, paralegals and members of the Land Governance Council met with the elders. Although at first the elders resisted scrutiny of their decision, asserting their customary power to allocate land, they eventually agreed to attend a community meeting.

At the meeting, many people voiced their opposition to the deal and reminded the elders of their commitment under the by-laws. This development was very significant, because challenging traditional leaders is rare in Liberia. In the end, the elders agreed to cancel the lease and to observe the by-laws by consulting the community in any future deliberations.

In this case, legal empowerment played a key role in protecting community interests, both in terms of the original adoption of the by-laws, and the subsequent assistance given to ensure they were respected. This example shows that community agency can succeed in renegotiating local power relations.

Source: Kaba and Keyser, 2014; Knight, 2017.

⁵ The analysis primarily draws on materials authored by the practitioners who implemented the interventions. This type of evidence differs in important respects from independent research, and ultimately does not allow a systematic assessment of the effectiveness of different interventions. However, the materials do provide invaluable first-hand insights on the real opportunities and challenges involved.

mechanisms. In practice, they are often reluctant to accept curbs on their powers despite the best efforts of a legal empowerment team. Nevertheless, as the example from Liberia shows, these mechanisms can open new spaces for communities to claim power and hold their leaders to account (Box 5, overleaf).

National: supporting government and holding it to account

Where the central government plays a key role in the political economy of land and investment, legal empowerment practitioners have developed approaches for reaching out to government officials or holding them to account. These approaches vary widely, reflecting diverse structures and theories of change.

Some interventions have worked with the national government, in tandem with activities designed to support local constituencies. For example, in Mozambique the Food and Agriculture Organization of the United Nations (FAO) and the Centro de Formação Jurídica e Judiciária (CFJJ) developed a twin-track approach that combined training for community paralegals to act as local ‘agents of change’, with capacity support for government officials and judges to win their ‘hearts and minds’.

The intervention created a critical mass of people who could promote fuller implementation of land legislation, in effect working to improve both agency in the communities and structure in the bureaucracy. However, the country still faces important unresolved issues affecting land governance, including those involving large-scale investments (Tanner and Bicchieri, 2014).

Pushing for greater government transparency is another complementary way to tackle structural political economy factors at the national level – for example, by making investor–state contracts public. International transparency campaigners have long pushed for this to happen, and some countries, including Liberia, require such disclosure by law.

Unfortunately, these contracts are typically made public after the government has signed them, drastically narrowing the scope for meaningful public consultation. Nevertheless, making contracts public may create incentives for both government and companies to avoid agreeing egregiously unfair terms, and provide opportunities for NGOs to monitor compliance.

However, contracts are often technical and difficult to understand, so the public may have little chance of making sense of them even if they are published. Legal empowerment programmes have been supporting citizens to understand and scrutinise contracts, improving citizens’ agency to hold authorities to account (Box 6).

International: opening routes to accountability

There are many situations where structural factors prevent legal empowerment approaches from making headway at the local or national level – perhaps because the judiciary is ineffective or lacks independence, or because the authorities are impervious to pressure. In such cases, the transnational dimension of foreign investment may provide opportunities for agency.

Acting in host countries or via supranational bodies can open up many possible arenas for action. Practitioners have helped rural people to pursue transnational litigation to hold parent companies or downstream buyers to account, or called for trading partners to review their trade preferences. For example, activists persuaded the EU to take steps towards monitoring the impacts of agribusiness operations that companies set up in Cambodia to take advantage of the ‘Everything But Arms’ scheme, though follow up has been slow (Sokphea, 2016; Davis, 2016; see also Section 2, Box 4).

Some legal empowerment practitioners have helped people to initiate international human rights proceedings against governments, or file complaints against companies with grievance mechanisms run by third-party certification bodies. From a legal empowerment perspective, ensuring that communities are in the driving seat – despite the geographical remoteness of the dispute settlement forum – is essential, and an important separation of legal empowerment from public advocacy (Box 7).

Box 6. Complementing contract disclosure with capacity support

Legal empowerment practitioners have worked to help citizens to scrutinise investor–state contracts. The Columbia Center on Sustainable Investment (CCSI) established a global online repository of publicly available investor–state contracts for agriculture or forestry called Open Land Contracts. The project posts contracts online and, importantly, provides summaries of their technical aspects and tools, allowing comparison with other contracts.

Work is now underway to empower citizens to use these tools, in Cameroon, CCSI has provided support to the Centre pour l’Environnement et le Développement (CED) to pilot approaches designed to help citizens make practical use of the Open Land Contracts database. This includes providing training and developing guidelines so that people can evaluate the social obligations included in investor–state contracts and hold parties to account.

Source: Cordes, 2017.

Box 7. Activating the Roundtable on Sustainable Palm Oil complaints mechanism in Liberia and Indonesia

The growing global demand for palm oil is a major driver of land acquisition in tropical countries. To address concerns over the social and environmental impact, the Roundtable on Sustainable Palm Oil (RSPO) was established in 2004 as a multi-stakeholder certification body. It elaborated a set of standards and rules for businesses, including: respecting customary land rights; obtaining free, prior and informed consent; and ensuring plantations did not encroach on areas essential to a community's cultural identity.

The RSPO standards and rules are not binding; their leverage hinges on a company's fear of losing market access, since buyers committed to sustainable palm oil may boycott its product if its certification is withdrawn. A complaints procedure was set up to deal with any claims of a company failing to meet its commitments or breaching applicable law.

Over the years, the Forest Peoples Programme (FPP), an international NGO, has supported communities to bring complaints before the RSPO on issues including land restitution, compensation or development benefits. These procedures have allowed communities to seek a remedy outside of the local judicial system, which in many cases would lack the capacity to hear their case within a reasonable timeframe and in accordance with due process.

The RSPO mechanism is by no means perfect: it is subject to delays, it is short-staffed and has been accused of leniency towards companies. The success of the initiative will depend, largely, on a company's willingness to engage. However, the mechanism can help to ensure a company at least listens to a community's grievances, or comes to a negotiating table.

Given the geographical remoteness of the process from the affected communities, it is particularly important for legal empowerment initiatives to invest time and resources in extended outreach to ensure community members lead the process. This grassroots engagement is essential to ensure that diverse constituencies have a voice, to keep people informed and to develop a unified vision to pre-empt possible 'divide-and-rule' tactics on the part of investors, local actors or the state.

Source: Lomax, 2015.

4. Ways forward

As increased private sector investment in tropical agriculture creates both hopes and fears for rural livelihoods, legal empowerment has an important role in helping people to secure their land rights and have a greater say in decision-making. In implementing their approaches, practitioners often find themselves untangling complex relations at local to international levels, and helping communities to confront powerful vested interests. Legal activists would need to navigate these issues if they are to be effective.

Many interventions that promote legal empowerment in agribusiness investments already reflect a good grasp of these factors, so there is experience from which further lessons can be learned. An explicit political economy lens could help practitioners to design politically savvy programmes that span local and international arenas, and identify which coalitions, may be best placed to deliver them at different levels. A political economy lens could also help manage the risks, especially in places where political space is constrained and legal activism can expose people to intimidation and repression.

Harnessing political economy analysis does not necessarily require significant investment in conceptual frameworks or institutional processes. Conceptual frameworks can help, but they also present limitations. Commentators have critiqued some of the donor-led political economy frameworks for their overly general nature and limited operational relevance (Hudson and Leftwich, 2014).

However, a political economy lens would involve explicit efforts to grasp the political and economic forces at play, and could lend concepts to illuminate complex realities – including ‘power’, ‘structure’ and ‘agency’. Practical steps such as working with trusted local partners who understand the issues and the context can help to achieve a fine-grained understanding.

Translating the analysis into action would inform the choices of communities and practitioners on whether legal empowerment can be part of the solution in any given context. It can also guide choices on the most effective approach, or combination of approaches, and on developing robust risk management schemes.

Given the complex transnational relations and entrenched power imbalances, no single tactic is likely to provide all the answers. Legal empowerment can, therefore, only ever be one element in a broader strategy.

Even the most dedicated practitioners acknowledge that, ultimately, ‘the law is not enough’ (after Tanner and Bicchieri, 2014), and a holistic range of approaches will be needed to ensure that private sector investments work for rural communities.

There is also a need to consider the full range of possible entry points for legal empowerment interventions. Though the approach has often been to provide legal services at the grassroots, the transnational nature of foreign investment calls for reframing legal empowerment to include the broader scope for action this paper has identified at the national and international levels.

Relevant entry points range from taking grievances to supranational or third-party bodies such as the RSPO, to helping citizens activate or scrutinise transnational or international legal instruments that can affect local relations. In turn, this broader understanding of legal empowerment will create new opportunities to explore local-to-global alliances capable of integrating diverse forms of expertise to work at different levels.

This broader approach also requires carefully navigating the fine line between legal empowerment (helping people understand and engage with the law) and outright advocacy (undertaking direct campaigning). In a legal empowerment context, it is essential for communities to take ownership and responsibility for the action.

Depending on the context, ensuring that communities are in the driving seat may involve helping them to establish new arrangements for managing their affairs – such as locally negotiated charters and grassroots organisations. But making these systems work requires more than just agreeing on the rules: entrenched attitudes are slow to change, particularly when the arrival of commercial investments raises the economic stakes. The example of community action in Liberia shows that citizens may need to ‘claim’ new spaces to overcome resistance from their leaders.

At the same time, tackling power relations may require working with those in power, rather than only confronting them. The twin-track approach tested in Mozambique exemplifies a way to combine training community paralegals with supporting the government officials responsible for implementing the law. If citizens are to claim new spaces for public engagement and oversight, it is important that those who are in a position of authority are able to listen.

This analysis has direct implications for legal empowerment in agribusiness investments:

- **Politics matters:** Legal minds may be more comfortable dwelling on the technical aspects of the law, but legal empowerment works best when programmes factor in the political dimensions of their work.
- **Harness political economy tools:** Using concepts such as power, structure and agency, and scrutinising the relations that underpin agribusiness investments can help legal empowerment practitioners to make sense of the politics and the diverse possible sites for action.
- **Broaden the scope to activate the most effective levers:** Addressing entrenched power relations may require activating levers at the local, national and international levels. Interventions may range from establishing grassroots systems for people to hold local leaders to account; through to supporting public scrutiny of government conduct and investor–state contracts; and helping communities to obtain redress via international or transnational channels, or citizens to scrutinise the negotiation of international treaties.
- **Communities must lead:** Legal empowerment is about giving communities the tools to be their own advocates – not doing their campaigning for them. This is a consideration that should guide any interventions combining the legal and the political, and acting at national and international levels.
- **Consider the risks as well as the opportunities:** Depending on the context, renegotiating power relations may expose practitioners and communities to the risk of backlashes. This requires carefully considering the appropriateness of (different types of) legal empowerment interventions, and developing effective risk management schemes for any interventions taken forward.
- **Take a holistic approach:** No single approach is likely to have all the answers. Legal empowerment in agribusiness investments will need to work alongside other approaches, such as harnessing technology or conducting public campaigns.
- **Develop new coalitions:** Working at the national and international levels, and integrating legal empowerment with other approaches may require new local-to-global coalitions between actors with complementary expertise in different areas of law and practice (from land rights to investment protection treaties), and with the ability to act at different levels and in different places.

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Land: Enhancing Governance for Economic Development (LEGEND) is a DFID programme that aims to improve land rights protection, knowledge and information, and the quality of private sector investment in DFID priority countries. It includes the development and start-up of new DFID country land programmes, alongside knowledge management activities, a challenge fund to support land governance innovations, and management of complementary DFID grants. The implementation of LEGEND is supported by the Core Land Support Team.

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