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LEGAL MOBILIZATION IN LARGE-SCALE LAND BASED INVESTMENTS – DOES IT HELP AFFECTED COMMUNITIES?

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Abstract

The paper focuses on one way in which global regulatory frameworks in regards to large-scale land based investments are supposed to work: Through providing local actors with arguments and instruments through which they can defend their rights vis-à-vis investing companies (legal mobilization). So far, systematic research into this issue is missing. The paper will address this gap through providing a theoretical framework based on the concept of legal opportunity structure that includes both a top-down, institutional as well as a bottom-up, actor centered view. Applying the framework to Sierra Leone shows that both legal reform as well as practical opportunities have to be considered for improving the bargaining situation of local actors. Apart from supporting existing research, my findings create new insights: The role of legal assistance for local actors as well as the differences between companies in dealing with legal mobilization should be subject of further research.

Key Words:

large-scale land based investments, law, legal mobilization, Sierra Leone

1. Introduction

When the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)[1] were adopted by the Committee on World Food Security, they were hailed as an important instrument to stop land grabbing through foreign investors. The issue had received broad attention with the rise in large-scale land based investments worldwide since 2008. Many of these land deals were found to have been closed without properly consulting affected populations, who lost access to land and their livelihoods. The VGGT were just one attempt to instill national land governance reforms and better regulate large-scale land based investment deals. However, so far we do not know much about the ways in which affected populations actually make use of legal measures, be it in the forms of arguments, legal representation or the calling on legal institutions.

This paper attempts to fill this gap through developing an analytical framework and applying it to Sierra Leone. Rather than providing final answers the framework is of exploratory character and allows to capture the *"contexts of legal pluralism"* (Polack, Cotula, & Côte, 2013, p. 1) in which large-scale land based investments take place. Consequently, the paper follows a broad understanding of the 'law' better captured in the term of 'legality', which means *"to refer to the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends"* (Ewick & Silbey, 2007, p. 22). This broad understanding of 'legal' includes 'hard' and 'soft' law as well as statutory and customary law. With the framework I try to understand how local actors can make use of these forms of legality. I use the term of legal mobilization to capture a broad array of activities which can in the broadest sense be described as *"[…] the act of invoking legal norms to regulate behavior"* (Zemans, 1983, p. 700)[2]. In consequence my central question boils down to: How do local actors use legal mobilization to protect their interests vis-à-vis companies investing in their land?

In order to answer this question, I turn to the idea of legal opportunity structure, which in my view needs to take into consideration the institutional structure and the practical opportunities of actually using these institutions. Central for the practical opportunities are the knowledge, resources and networks available to local actors. In applying this framework to Sierra Leone and looking at three cases of legal mobilization, I can show the usefulness of my approach. My analysis substantiates existing research on the shortcomings of Sierra Leonean statutory law, which limits the leverage of local actors. The legal reforms underway with

[1] Full title of the Guidelines: Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest

[2] In many studies the term legal mobilization is used equivalent with strategic litigation for example by Andersen (2009) or Hilson (2002); however, used in a broader way it includes everything from using an legal argument or norm to the role of activist lawyers and of course litigation McCann (2004, p. 507).

the new National Land Policy are therefore of high relevance. Furthermore, the examples from Sierra Leone show the importance of customary authorities, who can be hindrance or a driver for successful legal mobilization. This central role of customary authorities has been shown in other cases of large-scale land based investments before. Apart from further substantiating existing research my analysis also shows new research gaps. I find that the networks linking communities to outside actors, especially lawyers play an important role for legal mobilization. These lawyers speak the language of companies and arguments brought forward by them are more likely to be heard. Finally, the case studies allow me to think more closely about the differences between companies and their subsequent reactions. I will formulate some first possible connections in the discussion section; however, I will not be able to go into much detail in this paper. Nonetheless, I believe that this is an important avenue for future research.

I will start this paper by giving an overview over international attempts to regulate large-scale land based investments by International Organizations but also the private sector, before diving into the existing empirical evidence in regards to the usefulness of legal reform for the local population affected by large-scale land based investments. While the review of existing research reveals that we can find examples in which local actors use legal mobilization, more systematic research is so far missing. In a next step, I will present my analytical framework which rests on my own conceptualization of legal opportunity structure. This framework will then be applied to Sierra Leone. I will first map out the institutional opportunity structure before taking a closer look at three individual cases of legal mobilization in different cases of large-scale land based investments in the country. The outcome of the analysis and the avenues for future research will be discussed in the last section.

2. More Regulation – the silver bullet against "land grabbing"?

With the rise in large-scale land-based investments and negative reporting about the issue, calls for regulation were getting louder. Apart from referring to existing human rights obligations and institutions (De Schutter, 2009; Golay & Biglino, 2013) new global governance instruments were created or updated.

In 2010, the World Bank together with the FAO (Food and Agriculture Organization), IFAD (International Fund for Agricultural Development) and UNCTAD (United Nations Conference on Trade and Development) developed "Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources" (World Bank PRAI). The seven principles spell out issues that have to be addressed during large-scale agricultural investment projects such as respect for existing land rights, food security, transparency and consultation of contracts, good business practices, social and environmental

sustainability (FAO, IFAD, UNCTAD, & World Bank Group, 2010). However, they were met with fierce criticism for the non-participatory negotiation process as well as their underlying assumptions about the benefits of large-scale land based investments (Stephens, 2013; The Global Campaign for Agrarian Reform & Land Research Action Network, 2010). In response the Committee on World Food Security (CFS) later on developed its own PRAI (CFS PRAI) containing ten principles. Despite an inclusive and extensive negotiation process the CFS-PRAI received considerable criticism from civil society as well (Gaarde, 2017, p. 70).

Probably the most legitimate instrument in regards to large-scale land based investments was adopted by the CFS in 2012: the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT). The VGGT are regarded as an international answer to the issue of land grabbing, although their focus is a lot broader – suggesting guidelines for the overall governance of tenure. The guidelines demand the consultation and participation of people affected by large-scale land-based investments. Furthermore, the VGGT suggest that states should create new legislation in for example regulating maximum sizes of investments. The VGGT put an emphasis on the protection of human rights and the duty of states to ensure beneficial outcomes for the local population. The guidelines clarify that expropriation of land is only possible under specific nationally regulated conditions and that forced evictions are clear human rights violations. Furthermore, land investment should not threaten an adequate standard of living, especially food security (Bernstorff, 2012; Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 2012). Due to their inclusive negotiation process the VGGT enjoy high legitimacy among international organizations and civil society actors alike (Paoloni & Onorati, 2014; Seufert, 2013).

Aside from intergovernmental governance fora, transnational companies also reacted to the surge in large-scale land deals and the surrounding criticism. They suggested principles and roundtables with certification schemes as solution. The instruments regarded as most relevant to large-scale land based investments, are the Equator Principles, which set standards for investment bigger than 10 million dollars, as well as biofuel certification schemes, most notably the Roundtable on Sustainable Biofuels (RSB). While not being specifically designed for large-scale land-based investments these instruments were reformed to contain more safeguards on land tenure issues. In addition they do provide guidance on how affected communities should be consulted. The RSB standards for example demand the application of free, prior and informed consent (FPIC) for all land users affected by an investment (Fortin & Richardson, 2013; Goetz, 2013).

The overall goal of these instruments is the reduction of negative impacts of large-scale land based investments on the local population. However, so far the effects of these policies and regulation on the local level are not clear:

> *"It is of great interest to study how international frameworks trickle down to local policy arenas, how they are used by stakeholders, and how they are finally shaping conflicts at the local level and affecting their results. In particular, their potential for empowering poor stakeholders should be of interest for research and development." (Brüntrup, Scheumann, Berger, Christmann, & Brandi, 2014, p. 433)*

Two dimensions are relevant for this trickle-down effect: A top-down view on the national institutional setup and legal gaps on the one hand, and the bottom-up actual mobilization of the local population on the other hand (Polack et al., 2013, p. 15).

While both dimensions are of great importance most of the empirical research on legal aspects of large-scale land based investments focuses on the first, top-down dimension (Polack et al., 2013, p. 2). The studies conducted usually point out either the shortcomings of national law or the missing implementation of existing laws. In Sub-Sahara Africa legal deficiencies identified include a lacking recognition of customary land rights, missing procedures of land demarcation, unclear provisions in regards to benefit sharing (Schoneveld, 2017, p. 124), as well as insufficient consultation and participation rules (Polack et al., 2013, p. 30). However, even if a country follows 'best practices' in land governance, implementation is often lacking due to missing state capacities or the power of customary authorities, who might not protect the interests of the local population (German, Schoneveld, & Mwangi, 2013; Vermeulen & Cotula, 2010). Legal provisions and the actual practice are oftentimes quite far apart (German et al., 2013; Nolte & Väth, 2015). And, better protection of tenure rights might simply not be sufficient in itself to protect the interests of affected people, who are still in a weak position to negotiate with the companies (Vermeulen & Cotula, 2010).

Apart from this top-down approach, a few studies focus on how affected people actually make use of legal instruments. They offer some interesting bottom-up case-specific examples. Grajales (2015) describes how the Constitutional Court of Colombia as well as the Interamerican Human Righs Court and Commission were called on in the case of large-scale land investments in Colombia. The courts acknowledged that agribusiness investors had greatly profited from forced displacement through militias, a finding which was useful for further mobilizing efforts of displaced people and civil society (Grajales, 2015). In Laos, a village affected by a Chinese rubber plantation used legal argumentation and channels to state officials alongside other resistance mechanisms such as withholding labor or sabotage. The cooperation with state actors was regarded as highly relevant: "*By working within state structures rather than by open confrontation or acts of violence, the Khmu have thus far been able to stall the establishment of the plantation on their lands."* (McAllister, 2015, p. 834). Customary law can also play a role: In a case in Madagascar a local politician was sanctioned with exile (which was later revoked) after having signed land away without having consulted relevant customary leaders (Gingembre, 2015, p. 572). The anecdotal evidence shows that local actors used

different kinds of legality from the local to the international level to pursue their interests. Apart from this case study evidence, Polack et al. (2013) put together a review of cases in which legal mechanisms – they refer to accountability mechanisms – were used by local actors and their allies. They looked at 16 cases from 12 different countries across Sub-Sahara Africa relying on media and NGO reports. A range of strategies was used by local actors – most notably the writing of letters of complaint and petitions aimed at state authorities. In two cases civil society actors called on the grievance mechanism of the Round Table on Sustainable Palm Oil (RSPO), while five cases were brought in front of a court. These formal mechanisms did accomplish marginal improvements but also failed at times: In one of the RSPO cases, the company simply withdrew from the Roundtable and forwent certification. Overall, the success of the action undertaken by local actors remains somewhat unclear. In three cases renegotiations with the company took place; however, the outcome was not known. Three investment projects were abandoned; though this was explained by economic difficulties of the investor and not necessarily resistance by locals. In this regard the review could not provide explanations, but rather pointed out a gap in the literature, which "*has not systematically analysed the actors action- outcome chain of causation"* (Polack et al., 2013, p. 31).

Overall, I can find some evidence for legal mobilization in large-scale land based investment projects. However, the conditions under which local actors will do so as well as chances for success have not been analyzed systematically. This is the gap I will be dealing with in this paper. I suggest a conceptualization of legal opportunity structure, in which I combine a top-down, institutional with a bottom-up, practical perspective.

3. Theoretical framework: Legal Opportunity Structure (LOS)

In order to capture the possibilities for legal mobilization as well as understanding the actual legal action taken I work with the concept of legal opportunity structure (LOS). This concept has been introduced by researchers in the law and society literature, who seek to understand how the law works in the society – from courtrooms and legal institutions to everyday legality. However, the concept of legal opportunity structure is conceptually blurry and has been predominantly applied to Western democracies. In consequence, I develop my own conceptualization, which rests on a differentiation between two dimensions which were already mentioned in part two: the institutional dimension, which entails the potential for legal action on the one hand, and the practical dimension, which helps to understand the challenges in using this potential especially in developing countries on the other hand. Separating these two dimensions analytically helps to understand the relevant parameters for improving the bargaining position of local communities in

large-scale land based investments. In the following, I will discuss how the concept of LOS as used in the literature before turning to my own two-dimensional conceptualization.

Legal Opportunity Structure

In a broad understanding the legal opportunity structure (LOS) *"represents the degree of openness or accessibility of a legal system to the social and political goals and tactics of individuals and/or collective actors"* (Vanhala, 2012, p. 527). Different elements are included in the concept by different authors: Hilson (2002) for example emphasizes the receptivity of the judiciary as important feature of legal opportunity alongside the actual access rules. Similarly De Fazio (2012) differentiates between access to courts, the availability of justiciable rights and again judiciary receptivity. Other authors also include material and legal resources or existing societal framings (Vanhala, 2012, p. 527).

Studies of legal opportunities suggest that a favorable LOS makes it more likely for social movements to choose legal measures instead of other strategies (Fazio, 2012; Hilson, 2002) and can potentially help marginalized groups advance their political interests (Wilson & Rodríguez Cordero, 2006). Additionally, other factors need to be fulfilled for activists to follow a legal strategy: The availability of necessary resources as well as the movement's identity and self-perception play a role (Jacquot & Vitale, 2014). Furthermore, the strength of one's own allies or the strength of the opponent can be decisive as well as existing cultural and legal framings and counter-framings (Andersen, 2009). Last but not least knowledge and a consciousness about legal possibilities are named as a precondition as well (Vanhala, 2011, p. 17). These factors are included in understandings of LOS by some scholars who follow a broader understanding of the concept, considering the perspective of the actors and their practical challenges. Other authors who follow a rather narrow understanding of LOS focus on the institutional opportunities. I believe that both elements – practical and institutional – should be part of the conceptualization of LOS. However, it does make sense to divide them analytically.

In my own understanding LOS consists of two dimensions. The first dimension can be described as the *institutional opportunity structure* and consists of the legal systems in a country, its access rules and procedures as well as its legal stock (including laws, policies and legal decisions). The second dimension of the *practical opportunities* zooms in on the actors and their positioning vis-à-vis the legal system. Just because someone theoretically has access to the judiciary does not mean that they have practical access. I identify three central factors, which are relevant for this practical access: knowledge, resources and networks. Separating the two dimensions makes sense analytically: The first dimension represents an

institutional and mostly structural perspective, while the second dimension takes a look at the actors and their agency. In this way my conceptualization of LOS avoids overly deterministic assumptions about the effects of the legal system (Vanhala, 2011, pp. 13–14).

To further concretize my conceptualization of LOS I will further describe the two dimensions: the institutional opportunity structure and the practical opportunities. This description is already adapted to the situation of large-scale land-based investments, does however have the potential to be used as a heuristic tool in other situations as well.

Institutional Opportunity Structure

The institutional opportunity structure refers to the legal system in a country, its access rules and procedures as well as its legal stock (including laws, policies and legal decisions). Using my broad understanding of legality, I include the laws and policies of a country, but also international norms and guidelines as well as local and customary rules. The three levels of legality – local, national and international – may each play a different role depending on the country specific context. In addition, it makes sense to distinguish between hard and soft law.

The distinction between hard and soft law is well known in international law. A common definition is made by Abbott and Snidal (2000), who refer to hard law as *"legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law"* (Abbott & Snidal, 2000, p. 421). If international agreements deviate from this definition in the three dimensions of obligation, precision and delegation they speak about soft law. Of course it's possible that accords vary on the different dimensions. Therefore, the differentiation between hard and soft law is not dichotomous but rather a continuum with more or less legalization. In the case of large-scale land based investments most of the global governance instruments lack accountability mechanisms and need to be considered as soft law, in contrast to investor protection, which is enshrined in hard law (Johnson, 2016). Nonetheless, the human rights conventions can provide a hard law hook, if actors can link their grievances caused through large-scale land based investments to human rights such as the right to food or the freedom from forced evictions (De Schutter, 2009; Golay & Biglino, 2013).

I use this distinction between hard and soft law not only for the international level but also for the sub-state level. This has the advantage that I do not solely focus on actual laws (hard law), which are often outdated and might not contain regulations for foreign investment in land. Instead it is often other policy documents such as investments policies, which do formulate rules for foreign investors for example in regard to local

consultation procedures, rent payments but also tax exemptions (Cotula & Vermeulen, 2011, pp. 41–45). These regulations might be very precise and even obligatory to a certain extent. However, oversight and sanctions might not be clearly defined. These policy documents can therefore be regarded as soft law. In addition, using a broad understanding of law allows me to include customary law, which locally governs land tenure issues in many countries, especially in Sub-Sahara Africa (Peters, 2013).

Large-scale land based investments cut across these different levels of law, which are often interconnected in complex ways. Typically, a general contract about the land concession is closed with the national government but has to be specified in agreements with local authorities or landowners. Different government authorities might play a role in the negotiation and implementation phases such as special investment promotion agencies, land and trade ministries, environmental oversight offices as well as local or chiefdom authorities (Cotula & Vermeulen, 2011, p. 42).

In order to systematize the existing complexity, I suggest the following table, which captures both the level of regulation (local, national, international) as well as the degree of legalization (hard-soft law).

	Hard law ⟷ Soft law	
International ↕	Human rights conventions; international courts	Voluntary standards (through IOs or private sector)
National	National laws and courts	National policies and guidelines (e.g. for international investment)
Local	Local and customary law	

Table 1: Institutional oppotunity structure

As a heuristic tool, the table helps to analyze the institutional opportunity structure for each specific case and to get an overview over the potential for legal mobilization. Here, first gaps might already appear in many countries. For example, so far *"[n]o African country has established in its national legislation the principle of free, prior and informed consent"* (Cotula & Vermeulen, 2011, p. 46), which would essentially guarantee a veto-right for local populations. At the same time, missing institutional opportunities on one level could potentially be compensated by referring to another level (Hilson, 2002, p. 239). As mentioned before, the Roundtable on Sustainable Biofuels standards demand the application of FPIC. So, at least in cases where investors seek RSB certification local actors could use this as leverage. However, if they are able to do so depends of course on additional factors. Not all levels and types of law are accessible in the same way. I will discuss these practical aspects of the legal opportunity structure in the next section.

Practical Opportunities

The existence of legal institutions is not enough to guarantee that they are actually used by people to assert their rights (Vanhala, 2012, p. 526). Instead, practical opportunities need to be taken into consideration – essentially the possibilities to actually access the institutional opportunity structure for legal mobilization. Drawing on the legal mobilization but also legal empowerment[3] literature I identify three factors, which – taken together – form the practical opportunities.

The first and probably most obvious factor is knowledge. If you do not know about the laws, regulations and procedures, you cannot refer to them. Many people lack information about their rights or the necessary background education to understand them. Illiteracy and missing language skills add to the problem. In many developing countries legislation is written in the national language which might not be spoken locally (Commission on Legal Empowerment of the Poor, 2008, pp. 32–33). This language issue exists in many cases of large-scale land based investments, as the lease agreements are usually in the national language – often in English, French or Portuguese. Consequently, the local population often fails to fully understand the plans of investors. Socio-legal studies show that higher education generally increases the likelihood of using legal measures. However, legal knowledge can also be obtained informally for example through self-education. Last but not least previous experiences with legal institutions play a considerable role as well (Gallagher & Yang, 2017). In the case of communities affected by large-scale land-based investments it can therefore be decisive if they already hold this expert knowledge, which can be gathered through previous experience (Gingembre, 2015, p. 572).

The second factor is the availability of material and organizational resources: "*In most cases, pursuing a legal campaign is a lengthy, costly and risky process"* (Vanhala, 2012, p. 526). Socio-legal studies show that actors with better financial and organizational resources have better chances in litigation cases (Epp, 1998; Galanter, 1974). Getting legal counsel, developing a legal strategy, financing supportive research or generating publicity for a case might be necessary steps and all require substantive resources (Epp, 1998, p. 19). However, population groups affected by large-scale land based investments are often among the poorest in their countries and certainly in the world economy. Legal advice before signing the lease contract or accessing international arbitration institutions is usually not affordable for these actors. (Cotula, 2011, p. 41). International investors on the other side come equipped with extensive legal advice and financial resources (Vermeulen & Cotula, 2010, p. 913). Apart from not being able to access certain legal strategies a lack of financial resources also puts the local population in a weaker bargaining position: Driven by

[3] The basic idea behind the concept of legal empowerment is that ensuring access to law for the global poor can improve development outcomes (Commission on Legal Empowerment of the Poor 2008).

poverty, unemployment and missing economic alternative local actors often feel like they do not have a choice but sign even an unfavorable deal (Vermeulen & Cotula, 2010, p. 913).

The third factor is the networks that actors have. On the individual level personal networks can for example be helpful in gaining legal expertise through informally connecting to a lawyer (York Cornwell, Taylor Poppe, & Doherty Bea, 2017). For collective actors networks are equally important, for securing funding, exchanging ideas and expertise, but also for building alliances in common struggles (Andersen, 2009, p. 209; Epp, 1998, p. 19). Furthermore, contacts to legal and other administrative authorities can be an advantage in advancing one's own legal claims. In consequence, networks are a valuable source to practically gain access to legal institutions for communities affected by large-scale land based investment projects. They might build local networks and form grassroots organizations, which are often supported by a wide variety of actors such as farmers' associations, local, national and international NGOs, members of the diaspora, journalists, researchers, local authorities or politicians (Polack et al., 2013, pp. 32–39). Strategic relationships with state officials, who have the authority *"to provide and enforce land rights, influence land policies, mediate in conflicts over land deals and the terms of inclusion"* (Rutten et al., 2017, p. 16) can be decisive too. Overall I expect networks to play a big role in the practical opportunity structure, as they present a chance to overcome missing expert knowledge or financial resources.

Of course these three factors are closely related. As already mentioned, networks can play a big role in providing not only resources but also legal and other expert knowledge (Polack et al., 2013, p. 35). At the same time a certain rights consciousness might already be a precondition for local actors to seek the advice from outsiders. Resources can in turn help to access broader networks or specific knowledge too. In a sense the different factors can therefore make up for a lack of another factor. In consequence these three factors are not static, but often change over the course of actions of local communities. Which factors are available and are used to access the institutional dimension can then be answered empirically for each individual case.

In my conceptualization of legal opportunity structure the institutional and practical opportunities are separated for analytical clarity; however, they are of course interrelated. If for example the costs for filing a case are rather low, actors do not need as much financial resources. If access costs are high more resources are needed (Wilson & Rodríguez Cordero, 2006). Thinking more closely about the relationship between the two dimensions makes it clear, that local communities have practical access to the different levels of the institutional opportunity structure to varying degrees. Local actors are for example most likely to hold knowledge about local and customary regulations. Local authorities might be within reach and community members might have contacts to local officials. They therefore have more access to this type of law than to the national or international level. For these levels they are more likely to depend on the support of national and international NGOs. In consequence, the availability of a support network becomes more important for

access to legality on the national or international level. At the same time, referring to a government policy for a legal argument requires a lot less resources than for example pursuing litigation. So, different strategies also require the availability of the three factors to a varying degree. These relationships will be further explored in the following empirical application.

4. Legal Mobilization in Large-Scale Land-Based Investments in Sierra Leone

Sierra Leone has been a hotspot for large-scale land based investments. By mid-2017, 24 foreign land investments were concluded totaling a land mass of more than 750,000 ha (Land Matrix, 2017). These land investments are mainly for the production of palm oil, forestry, rubber, rice, and other food staples. The Sierra Leonean government seeks to attract foreign investors seeing agricultural investment as means to reduce poverty, which has persisted at high levels since the civil war ended in 2002 (Maconachie & Fortin, 2013, p. 260; Melsbach & Rahall, 2012, p. 4). Tax exemptions as well as duty free wavers have been offered to investors (Ministry of Agriculture Forestry and Food Security, 2009) and investment opportunities have been heavily advertised (Menzel, 2015, p. 9). Concerned by these investments, national and international developmental NGOs have rung the alarm bells. They have criticized missing transparency and insufficient community consultations (Melsbach & Rahall, 2012, p. 16), adverse developmental and environmental effects, insufficient compensation and unfulfilled company promises (Action Aid, 2013).

Against this background the possibilities for local communities to protect their interests becomes central. What is the potential for legal mobilization in Sierra Leone and how did local actors react? I will first take a look at the institutional opportunity structure before going into concrete cases of large-scale land based investments and local responses.

Institutional Opportunity Structure in Sierra Leone

A multitude of actors and institutions are involved in governing land tenure in general and foreign large-scale land based investments in particular in Sierra Leone. Oftentimes these institutions lack clear mandates and act on an ad-hoc basis (Conteh & Yeshanew, 2016, p. 33). At the same time land tenure in the Provinces, where all large-scale land based investments are located, is governed by customary law, further complicating the situation. I will shortly discuss these complexities in general terms before using my framework to generate an overview over relevant laws, rules and policies relevant for large-scale land based investments.

The land tenure system in Sierra Leone is usually described as bifurcated or pluralistic (Conteh & Yeshanew, 2016; Maru, 2006; Sturgess & Flower, 2013) being ruled by statutory law and private landownership in the Western area, and by customary law in the Provinces. As customary law varies in different regions, rules governing land tenure vary too. At the same time, the land registration system is highly dysfunctional leading to frequent land disputes in the Western Area but also in the Provinces (Conteh & Yeshanew, 2016, p. 10). In addition to a deficient land administration system, access to justice and conflict resolution is extremely limited: About 70% of Sierra Leoneans have no access to formal legal institutions and use mainly customary mechanisms. Customary mechanisms can include arbitration by the chief or the chiefdom council as well as local courts. However, while being easier to access, these customary institutions often work in a discriminatory or exploitative way and often lack transparent procedures and record-keeping (Conteh & Yeshanew, 2016, p. 2; Davies, 2015, p. 11). Overall both formal as well as informal grievance mechanisms do not receive a lot of trust form large shares of the population, who regard them as unfair and corrupt (Conteh & Yeshanew, 2016). Set against this rather difficult background I now take a closer look at the institutional opportunity structure in the case of large-scale land-based investments in the country. The following table gives an overview.

	Hard law ⟷ Soft law	
International ↑	Human rights: right to property, housing and food (UN and AU level); Jurisdiction of the ECOWAS Community Court of Justice	VGGT, WB PRAI, CFS PRAI, (applicable in some cases: equator principles and roundtables such as the RSB; or OECD guidelines)
National	National law: Provinces Land Act Cap 122, Environmental Protection Agency (EPA) Act, 2008 Jurisdiction of the High Court	GoSiL New Land Policy 2015, MAFFS Investment Policies 2009, SLIEPA Information for Investors 2010
Local ↓	Customary law as understood locally and as practiced by chiefs and chiefdom councils; complaint possibilities to district or province authorities	

Table 2 Institutional Opportunity Structure in Sierra Leone

I already discussed the relevant legal provisions in international hard and soft law in part two of this paper, so I will not go into further detail at this point. However, when it comes to the VGGT, Sierra Leone is one of the pilot countries for implementation. An inclusive institutional framework has been set up and new policies have already been informed by the VGGT (Koch & Schulze, 2017). The guidelines are also well known among civil society making them a key document in the context of Sierra Leone.

At the national level hard, the most important law governing land transactions in the Provinces is the Provinces Land Act Cap 122 signed in 1927[4]. The law defines that *"all land in the Provinces is vested in the Chiefdom Council who hold such land for and on behalf of the native communities concerned"* (The Provinces Land Act, 1927).. In regards to land transactions it is then the Chiefdom Council under the chair of the Paramount Chief who decide about renting[5] land to 'non-natives'. Lease agreements can be up to 50 years with a possible extension of 21 years (The Provinces Land Act, 1927). These provisions of Cap 122 basically grant the main decision making power to the Chiefs making no provisions for the consultation of other stakeholders in the case of foreign land investments (Davies, 2015, p. 17). At the same time the law contains far-reaching competencies for the President of Sierra Leone[6], such as the right to fix the *"settlers' fees"*, to prescribe *"the terms to be embodied in leases"* or to define the way in which the rents are distributed (The Provinces Land Act, 1927).

Another law relevant for large-scale land deals is the Environmental Protection Agency Act of 2008, which created the Environment Protection Agency (EPA) and defined its mandate. The act requires investing companies to conduct an Environmental, Social and Health Impact Assessment (ESHIA) for which the EPA will then provide a license (Davies, 2015, p. 17). The EPA can react to complaints and investigate in specific cases. It does have the power to change or withdraw a license in the case of environmental misconduct (Conteh & Yeshanew, 2016, p. 16). The agency therefore has possibilities to sanction companies, making the provisions made in the act hard law according to my definition. Apart from these two laws other rules referring for example to labor rights and or contract law could potentially play a role as well but will only be considered when playing a role for a specific case.

In contrast to hard laws, soft law policy documents of the Government of Sierra Leone (GoSiL) formulate rules specifically for foreign large-scale land based investments. Especially interesting are the investment policies formulated by the Ministry of Agriculture Forestry and Food Security (MAFFS), guidelines for investors by the Sierra Leone Investment and Export Promotion Agency (SLIEPA) and most notably the National Land Policy adopted in 2015. The document of the MAFFS makes recommendations for large-scale land based investments: Land targeted for biofuels production should be land not used for food production, investment plans should contain provisions for youth employment and corporate social responsibility packages should be included in the lease agreements and agreed upon by the communities. The document also spells out the rent payment: It prescribes a prize of 5 USD per acre of which 50% would go to the landowners, 20% to the district council, 20% to the chiefdom administration and 10% to the

[4] Officially a concessions Act Cap 121 was put into place in 1931 regulating land concessions larger than 5000 acres; however, it was never used and is not applied today according to SLIEPA (2010, p. 4).
[5] Purchase of land is not possible.
[6] The law itself actually speaks about the "Governor in Council" referring to the President today (SLIEPA 2010, p. 5).

national government (Ministry of Agriculture Forestry and Food Security, 2009). The guidelines for investors by SLIEPA go into more detail about the actual leasing process: They specifically mention landowners and demand that they be included in the lease process. The document furthermore spells out that the Environmental, Social and Health Impact Assessment (ESHIA) requires that the process is adapted to the needs of the communities whose free, prior and informed consent (FPIC principle) is necessary. In making these provisions the document refers to the Equator Principles. However, the far reaching FPIC principle only applies to the ESHIA process and not the lease agreement, which is supposed to be signed with the Chiefdom Council and 'representatives' of landowners (SLIEPA, 2010). Overall these policy documents are designed to attract investors, so the provisions they provide for the protection of the local population are rather skim, nonetheless they might be used as a basis for argument if an investor simply ignores them.

A way more far-reaching document is the new National Land Policy (NPL), which was adopted in 2015 and officially launched in March 2017. The process to develop the new policy was very inclusive giving civil society opportunities to comment on draft versions and influence the outcome (FAO staff, interview, 11/25/2016). The document furthermore mirrors many recommendations of the VGGT and is therefore not only described as a major step for land reform in Sierra Leone but also a best practice example for the implementation of the VGGT (Koch & Schulze, 2017). The Land Policy paints a bleak picture of the current land governance system and suggests substantial reforms such as streamlining statutory and customary law, better protecting customary tenure rights and creating land committees on the national, district and local level to ensure efficient land administration (GoSiL, 2015). In regards to foreign land investment the National Land Policy limits the lease for non-citizens to 50 years and a size of 5000 hectares. Local land banks should be developed in which the local population should actively participant to identify suitable land for investment. The NLP furthermore demands that the *"free, prior and informed consent of communities, land owners and users"* (GoSiL, 2015, p. 67) has to be obtained for a planned land investment and should also guide revision of leases and compensations. In addition, legal assistance should be made available to local communities through a fund to be created. Grievance mechanisms should be set up by the company but also by the government. Impact studies including expected effects on food security need to be conducted before an investment as well as monitoring of ongoing projects (GoSiL, 2015, pp. 66–67). So far, these provisions have not been translated into laws; however, the document could still potentially used for arguing for a better inclusion of local stakeholders.

Looking at the local level customary law plays a decisive role. As mentioned above, the Provinces Land Act gives the Chiefdom Council all formal decision making power when it comes to land transactions to outsiders. However, this provision ignores the realities on the ground. In fact, 'landowning families' control

land in the Provinces. 'Outsiders' or 'land users', who are not a member of a landowning family, have to seek permission to use a piece of land and usually pay rent in form of parts of the yield. The chiefdom authorities usually have to approve these arrangements as well; however, their degree of influence over these questions vary from region to region (Conteh & Yeshanew, 2016, pp. 5–6). Participation in decision making process about leasing land to a foreign investor can therefore differ between chiefdoms and depends on locally practiced customary law. Local grievance mechanisms in the case of tenure disputes do exist. In most cases of local land conflicts the population calls on the chiefs to mediate and arbitrate. Yet, the fairness of these processes is regularly called into question (Conteh & Yeshanew, 2016, pp. 23–24). A more formalized mechanism are the Local Courts, which use both customary and statutory law and are part of the formal judiciary in the country (Conteh & Yeshanew, 2016, p. 8). However, the jurisdiction of Local Courts is to limited to 'native' parties excluding cases against companies (Kabbah, 2014). In essence local opportunities to, for example, file a complaint about an international investor is therefore refined to chiefdom and district authorities.

Looking at the institutional opportunity structure the shortcomings of the Sierra Leonean legal system become apparent, most notably the limitations of the Provinces Land Act. The law does not require formal involvement of landowning families in the case of land transfers even though their authority over the land is established in customary law. Other documents are more far reaching, especially the NLP, which requires participation of not just landowners but also users in the allocation but also the transferal of land.

Practical Opportunities and Legal Mobilization in Sierra Leone

I now turn to three concrete cases of legal mobilization in large-scale land based investments in the country[7]. Due to space constraints I will not go into much detail about the individual investment deals[8] but rather stick to my focus on the use of legality either using legal arguments, legal representation or institutions. In the first instance, one community was able to successfully negotiate a more favorable deal with the help of a pro bono lawyer. In the second case a local protest group complained to the Sierra Leonean Human Rights Council, which was however not able to solve the problem to the satisfaction of the group. In the third

[7] The basis for this analysis are 50 semi-structured interviews with different actors such as government authorities, NGO staff and community members in Sierra Leone, conducted during three months of field research in November 2016 and March to May 2017. While not included here NGO and media reports were used to understand the background of the cases.

[8] I will refer to the three companies as company A, B or C, as I am not able to present the cases in their full complexity.

example, the Paramount Chief was able to start renegotiations with the company through arguing a breach of contract.

The first case concerns a community located in the middle of a large-scale land based investment. The investor, company A, had signed a Memorandum of Understanding (MOU) with the Government of Sierra Leone and a Lease Agreement with the Chiefdom Councils of the affected Chiefdoms. However, the company decided to go beyond the requirements of Cap 122 and intended to sign individual acknowledgement agreements with landowning families. Part of the funding for the investment came from development banks and the investor sought certification from the RSB roundtable. In addition, the lease agreement had drawn criticism from local and national NGOs probably putting the company under pressure. These factors might have influenced the company to make these acknowledgement agreements, which were however the same for each landowning family. Most communities and their landowning families decided to sign the agreement; yet, in one community the people decided against it. One community member described the decision in the following way: *"We don't have money neither education, all we have is the land. So if we see people are coming to take away the only thing we have we would not accept"* (community member, interview, 04/11/2017). The community was furthermore worried about the prospects of future generations, who would not have land left to work on. The villagers also consulted with community members living in the city and overseas. They advised them to only lease a smaller portion of the land (community member, interview, 04/11/2017). At the same time, there was considerable pressure from the company as well as Chiefdom Authorities, who had included all of the land of the community in the lease agreement. The people in the community felt that they could not completely reject the agreement, as the government and the Chiefdom authorities were behind the deal. They furthermore wanted to profit from the company in terms of jobs, a farmer development program and other possible benefits (community members, interviews, 03/27/2017&04/11/2017). Through a radio show they learnt about a local NGO, who they contacted. Staff members of the NGOs met with the community and helped them get in touch with a pro bono lawyer (NGO staff, interview, 04/12/2017). The lawyer presented much needed legal support for the community:

> *"We are not educated so in that respect we want somebody who is legally grounded to represent us. We have some issues of land with [company A] and they have been all along asking us to sign an agreement with them; but we told them that we cannot just sign like that, we need to understand the details of the agreement before we sign but unfortunately none of us can read." (community member, interview, 03/27/2017)*

After a couple of negotiation meetings the community reached an agreement with the company. The landowning families signed it after the lawyer had read the agreement to the people in the village. The NGO was also witnessing the process. As fundamental outcome the community gave the company only about 600 acres of land instead of the envisaged 2600 acres (community members, interviews,

03/27/2017&04/11/2017). The community is very content with this result and seems to be in a better situation than surrounding villages, who had lost more land. A staff member of the local NGO argued, that the community still has access to enough land and is even in a position to sell sticks as building material and firewood to other people in the region (NGO staff, interview, 04/12/2017).

Looking at the three factors outlined in the theoretical chapter the centrality of a relevant network becomes clear. The local community would have not been able to negotiate the content of the acknowledgement agreement. They relied on the support by the local NGO and the pro bono lawyer. Both actors are in turn funded by their own network consisting of international NGOs. The resources and expert (legal) knowledge became available to the local population through the network. Furthermore, consulting with community members living outside might have been decisive for the decision to not sign the initial agreement. At the same time, the hard law of Sierra Leone – namely Cap 122 – did not provide any leverage, as formally the landowners do not have to be included in a land transaction. However, international standards (soft law) might have helped to pressure company A into striking a deal with the community: The land investment received considerable criticism from the local NGO but also international civil society actors – amongst others in the home country of the investor – in referring to human rights obligations as well as the FPIC principle. The fact, that investor A tried to paint the picture of sustainable development and received considerable funding from development banks, might have made them open for this line of argumentation. However, when other villages also wanted to renegotiate their acknowledgement agreements the company did not do so (NGO staff, interview, 04/12/2017).

The second case concerns a local activist group who tries to renegotiate the lease agreement with company B, as it has not been agreed upon by the landowners. In fact, the lease agreement was signed by the Government of Sierra Leone (by the Ministry of Agriculture), who subsequently subleased it to company B (local activist, interview, 04/24/2017). However, the local population regards the company as the actor responsible to lead proper negotiations with communities and in particular landowning families. Many landowners claim to never have laid eyes on the lease agreement and had not been aware of the conditions of the deal. The local protest group was formed after a road block, in which villagers had demanded fair negotiations, had been dissolved by the police (local activists, interviews, 04/24/2017&05/02/2017). A member of parliament, who also belongs to a landowning family in the chiefdom, helped imprisoned activists and became the spokesperson of the protest group. Under the pressure of the MP and the activist group some meetings took place between the group, chiefdom authorities, the company and the office of the Vice President, which could however not solve the issue to the satisfaction of the protest group. In a next step the activist group wrote a letter to the Human Rights Commission of Sierra Leone demanding their intervention. The letter makes it clear that they as the landowning families should have been asked for their

consent. Instead, only the Paramount Chief and the Chiefdom authorities (including Section Chiefs) had agreed to the lease and now threatened the activists. The letter also emphasizes that the family land had been used for subsistence agriculture and cash crops and that local livelihoods are now threatened. In consequence, the taking of the land by company B to set up their operations is described as "unlawful". At the same time, the own resistance is described as "lawful", as they as the landowners hold the ultimate authority over the land (letter of local activist group, 12/01/2012). As a result of the letter the Human Rights Commission did attempt to mediate in the conflict. A meeting was called between the members of the activist group, the Paramount Chief and the company. 14 of 19 issues were solved at that meeting. In a second meeting the outstanding 5 issues were supposed to be solved. The Minister of Agriculture as well as the Minister of Lands were invited to this second meeting. However, the Minister of Agriculture and the Paramount Chief did not show up for the meeting leading to a failure of the mediation attempt by the Human Rights Commission (local activist, interview, 05/02/2017). Up until today the conflict between the activist group, the Chiefdom Authorities and company B has not been solved and by now the 12000-hectare palm oil plantation covers the whole of the Chiefdom.

Looking at the case of investment B and the local activist group shows a couple of things. First, again the network was a crucial element for legal mobilization. The formation of the local group and linking up to the MP, who was resourceful and connected to lawyers and NGOs, helped the group. The impact of the national and international NGOs who support the group can certainly be seen, as some of the activists are for example aware of the VGGT and the New Land Policy. Second, just like the first case the national legislation did not work in favor of landowners. Even though there is a strong understanding locally that the landowning families have the authority over the land, Cap 122 only requires the chiefdom authorities to agree to a land transaction. This case clearly demonstrates how customary and statutory law are not in line. Third, this example also shows the relevance of local authorities. The Paramount Chief and his surrounding authorities (including section Chiefs) do not seem to be responsive to the local population. They signed the lease agreement in the name of the Chiefdom without much deliberation and turned to threaten those who objected to the deal. They warned landowners that their land would be taken by force if they did not surrender it voluntarily (local activist, interviews, 05/02/2017).

The third case concerns the renegotiation of a lease agreement based on the claim that a breach of contract occurred. The lease agreement covering about 41000 hectares[9] was initially signed by a British investor. Later the project was sold to an Indian investor. However, the Chiefdom Authorities who had signed the land deal had not been informed about the sale, even though this was stipulated in the contract (NGO staff,

[9] Different documents and interviews mentioned different numbers so the exact size of the lease agreement is difficult to determine.

interview, 03/31/17). The lease document also contained a clause that the lease would be revised every seven years. A NGO report suggested that there were different ideas about the clause: The Paramount Chief claimed that the clause meant a complete renegotiation of the deal, whereas company C argued that it only referred to the lease rates which could be adapted every seven years (Oakland Institute, 2011). Nonetheless, renegotiations of the whole agreement were underway at the time of this research. The Paramount Chief argued that the old investor never informed him about the transferal of the project and consequently declined to sign a renewed lease. The company in turn stopped with the operation and stopped paying rent (NGO staff, interview, 03/31/17). At the same time, company C had some interest in renegotiating the agreement as well: They had only managed to clear and plant an area which is a lot smaller than the leased 41000 hectares and were eager to return some of the land (NGO staff, interview, 04/10/2017). At the time of the visit the outcome of the renegotiations was unclear; however, there were signs that the new lease agreement would be more favorable to the local population and that communities' interests were better represented. Aside from the Paramount Chiefs, a legal NGO as well as a representative of the local landowners' committees were part of the renegotiations. These three parties representing the communities plan to visit each community and inform them about the contents of a new lease agreement (community members, interviews, 04/04/2017&04/10/2017). The new National Land Policy might also help the interests of local communities as it is used as a basis for the renegotiation. The policy does for example stipulate that it is not the government setting the rent but the landowners themselves (NGO staff, interview, 03/31/17). This gives the Paramount Chief and the representative of the landowners more room for maneuver when it comes to the lease payments.

The outcome of the renegotiations are not know, yet case C shows three points: Once again, the network of local actors plays an important role, even though the Paramount Chief himself decided not to resign the old lease agreement. However, the landowners did receive legal advice from the legal aid NGO which should improve their bargaining position. Second, the role of the Chiefdom Authorities is again extremely important. Unlike in case B, the Paramount Chief seems to be responsive to the complaints by the local population that the company did not fulfill their promises. He actively works on achieving a better deal for the population. Third, the effects of the new Land Policy can already be watched. Through vesting more decision making power locally the Land Policy strengthens the bargaining position of local actors.

5. Discussion and Conclusion

The analysis of the institutional opportunity structure as well as the practical opportunities in Sierra Leone underline findings of existing research but also create new insights and show avenues for future research.

In regards to existing research, the empirical evidence underlines the shortcomings of the Sierra Leonean legal structure and the need for reform. Especially in case B but also in case A, landowners would have a much stronger case, if their customary tenure rights would be protected more efficiently by statutory law. That hard law can make a difference can be seen in a case so far not mentioned here: Local communities successfully pursued litigation with the help of a pro bono lawyer in the case of an investor who bought land in the Provinces from a Paramount Chief. As The Provinces Land Act Cap 122 does not allow land to be sold, both the Chief as well as the company were found breaching the law. The High Court of Sierra Leone ordered the return of the land and the compensation of local communities (NGO staff, interviews 04/10/2017&05/12/2017). Therefore, statutory law is followed and litigation can be successful. In consequence, the upcoming reforms formulated in the National Land Policy seem to be a promising step.

Another finding is the high relevance of the role of customary authorities – especially against the background of Cap 122, which gives the Chiefdom Council the final authority over land transferals. While the Paramount Chief in case B seems to have acted against the will of landowning families and many community members, the Paramount Chief in case C seems to be more responsive trying to renegotiate the lease agreement with the company. This finding is in line with existing research from Sierra Leone, which emphasizes the power of customary authorities over many community matters (Acemoglu, Reed, & Robinson, 2014) and their problematic role in facilitating large-scale land based investments (Yengoh, Steen, Armah, & Ness, 2016). Similar settings in which local authorities misuse their power in order to profit from an investment to the disadvantage of the general population have also been reported in the broader literature on large-scale land based investments (German et al., 2013).

Other points, which became visible through the case studies, are the role of legal assistance and the different reactions by different companies, which I suggest needs further research. In all three cases in Sierra Leone networks play a central role for local actors to get access to the relevant knowledge and resources for example in the form of legal assistance. Case A is a paradigmatic example in that regard: Without the help of the local NGO, who in turn provided the contact with the lawyer, it would have been almost impossible for the community to negotiate their own agreement with the company. Community members emphasized that most of them are not literate, let alone in legal language. Furthermore, one interviewee mentioned that the company had asked the community who their legal representation was and seemed to be surprised when the lawyer showed up (NGO staff, interview, 04/12/2017). Having this lawyer therefore seems to have been essential for this community. This element of legal assistance has started to receive attention by practitioners experimenting with different forms of legal empowerment (Cotula & Berger, 2017). However, these attempts are rather recent and more research on this issue would be highly relevant from an academic as well as practical perspective.

Last but not least, the case studies show that companies react differently to legal mobilization of local actors. While company A decided to make an individual deal with the landowners from the community, company B seems rather unresponsive to local complaints. They instead followed a strategy of delegitimizing the local activist group and involved NGO networks. Understanding different reactions by investing companies is however key for explaining success of legal mobilization. Stakeholder salience models from the business management literature can help in this regard. They formulate assumptions about why business managers listen and react to certain claims and not to others (Mitchell, Agle, & Wood, 1997, p. 854). Mitchell at al. (1997) suggest looking at three attributes of possible stakeholders to discern their salience for the company: power, legitimacy and urgency. So, if a company presumes that an actor has considerable power, regards their claims made as legitimate and senses some urgency, the company is more likely to respond to this actor. Applying this model to the case of large-scale land based investments and linking it to the opportunities for legal mobilization will create a differentiated picture about which strategy of legal mobilization might be necessary for success. A company which is for example funded by development banks might be more likely to respond to complaints made by local actors than a company which does not depend on outside actors for financing. The power local actors can gain through legal mobilization is certainly higher in the first case, as they might be able to influence decisions about future funding through referring to international guidelines. Companies who identify themselves with a sustainable development approach and rely on certification schemes might also regard arguments based on soft law regulation as more legitimate. Overall, it can be expected that having a lawyer might make the claims of communities more legitimate in the eyes of transnational companies, as they are used to legal language. Furthermore, claims based on customary law might not trigger a response from a company as they might simply lack the awareness and knowledge of customary rules. These preliminary ideas should be developed further and show the potential of linking different literature strands.

Summarizing this paper, it has become clear that legal regulation on the international level drippling down to the national and local level is regarded as an important step in creating responsible foreign investment in land. I took a closer look at one way through which this could happen, namely legal mobilization at the local level. I argue that both the institutional opportunity structure as well as practical opportunities make up the legal opportunity structure for local actors. While legal regulation for example protecting customary tenure rights is one element for improving the bargaining situation of local actors, the practical opportunities are equally important. Supportive networks and legal assistance seem especially relevant. However, if one wants to understand the conditions for success of legal mobilization attributes reactions of investing companies have to be taken into consideration as well such as suggested above.

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