2. Large-scale land deals: overview and debates

Foreign large-scale land deals have received an enormous amount of attention since they were observed as a new global trend in 2008 (GRAIN 2008). The diagnosed new 'land rush' ushered a 'literature rush' (Oya 2013a) with a plethora of reports by non-governmental and international organizations as well as a significant interest by academics. While early publications were characterized by an alarmist tone and were often based on a 'finding out fast' approach (Oya 2013a: 505) more recent research has focused on the complex interplay of a variety of actors from local elites, national governments (Keene et al. 2015) to the role of international financial institutions. Apart from the studies on the causes and consequences of foreign large-scale land investment, research has emerged on the resistance to this trend on the global (Margulis et al. 2013) and the local level (Borras/Franco 2013). I will draw on this existing literature to describe the general trends, causes and consequences of foreign large-scale land deals in chapter 2.1.

The global interest in farmland has not only triggered a lot of literature but has also gained the attention of policymakers and civil society organizations. Debates about the right way to deal with 'the global land grab' developed: from demands on a moratorium on large-scale land deals (FIAN 2011) to different initiatives to create guidelines for investment in land (FAO et al. 2010; De Schutter 2009; CFS 2012). Most observers agree that there need to be better mechanisms in place to ensure proper participation of the local population and the protection of their rights. Essentially legal regulation and reform is seen as the major way forward. In chapter 2.2 I will give an overview of these initiatives undertaken on the international level.

As these steps to rein in land grabbing were taken in different international settings, academics and civil society actors alike debated the suitability of these efforts. A lot of skepticism was formulated using different arguments about why legal reforms would not suffice to protect local populations. At the same time, knowledge on the implementation and use of legal instruments is rather thin. I will describe this research gap in chapter 2.3.

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2.1 Foreign large-scale land deals in developing countries – an overview

Much of the 'landgrabbing' literature points out that large-scale land investments are by no means a new phenomenon (White et al. 2012: 623; Mollett 2016). They have rather existed throughout history, especially during colonial but also post-colonial times. Nonetheless, there has been a significant increase of large-scale land deals for agricultural use since the early 2000s. In the following, I focus on the specificities of this 'new' wave of land deals, its trends, causes and consequences.

2.1.1 Global trends

As described in the introduction, the term large-scale land deals refers to the purchase or leasing of large tracts of land – more than 200 or 500 hectares – through foreign companies. In the following, I will give an overview of these land deals that are focused on agricultural use. What are the characteristics of these deals? Where do they take place? Who are the investors and how are these deals closed?

Numbers on the global phenomenon of large-scale land deals are not easy to come by (Oya 2013a). Figures of a total size of up to 227 million hectares of land acquired globally have been floating around in NGO and media reports (Scoones et al. 2013: 473). However, more realistic estimates for the time period between 2000 and 2016 range between 26.7 (Nolte et al. 2016: vi) and 30 million hectares (GRAIN 2016: 4).

The Land Matrix, which contains the most comprehensive data compilation, recorded 1004 land deals with a size bigger than 200 hectares. In this dataset, an average foreign large-scale land deal has a size of 10.000 hectares. In Africa, the vast majority of land deals consist of leases, whereas in the Americas most deals are actual purchases, pointing to differences in legislation and land tenure systems.

The lease periods were only known for 327 deals, but over 90 % of them lasted for 20 years or longer, up until 99 years. 44 % of the globally leased area is used for the production of oilseeds, mainly oil palm and jatropha, followed by cereal (20 %) and sugar crops (10 %) (Nolte et al. 2016: 8–11).

When it comes to the buying prices and lease rents, the picture remains blurry, mainly due to missing data for individual land deals. However, rent payments, especially in the poorer countries, are quite low, with prices often ranging from 1 to 10 dollars per hectare per year (Nolte et al. 2016: 41).

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The number one target region is Sub-Sahara Africa, in terms of numbers of contracts but also in terms of hectares. As of 2016, the Land Matrix recorded 10 million hectares and included data on another 13.2 million hectares of intended deals (Nolte et al. 2016: vi). Large-scale land acquisitions appear very concentrated. The data shows that the 20 top target countries account for the size of over 80 % of all land deals, with Indonesia, Ukraine, Russia, Papua New Guinea and Brazil being the top 5 in total size (Nolte et al. 2016: 17).

However, the total size does not tell us much about the size in relation to the agricultural land available in country. Older data calculated by Rulli et al. (2013) show that in relation to their size, countries like Uruguay, the Philippines, Sierra Leone and Liberia are top host countries. However, it is not just the mere size of a land deal that is relevant but also its previous use (Edelman 2013: 498; Cotula 2012: 655): Has it been cultivated before? How fertile and profitable is the land? How many people live on the land? Research indicates that only one third of the land deals occur in sparsely populated forest land, while one third of the deals take place in areas with densely populated croplands (Messerli et al. 2014: 453).

On the country level, Nolte et al. (2016) included socioeconomic data in their analysis and show that there are essentially two groups of target countries: One the one hand countries with a low prevalence of hunger and low relevance of agriculture for the GDP (such as Russia, Uruguay, Ukraine). And on the other hand, countries with a high prevalence of hunger and at the same time a high relevance of agriculture for the GDP (such as Sierra Leone, Ethiopia or Laos). Most commentators are especially concerned about the second group of countries and the possible adverse effects land deals might have on food security (Havnevik 2011; Kress 2012). These are the cases I deal with in the rest of the dissertation. As outlined in the introduction, I focus on large-scale land deals in developing countries.

Investors mainly originate from Western Europe and the United States, as well as South-East Asia and the Middle East; though, it is often challenging to determine the country of origin due to the complex structure of transnational corporations. Some companies can be traced back to tax havens like the British Virgin Islands and offshore structures are common (GRAIN 2016: 7). Contrary to commonly voiced narratives, there is no evidence that China plays a bigger role in the 'new scramble for Africa' than European or South-East Asian actors (Nolte et al. 2016: 22–25; Ayers 2013). Most investors are private companies accounting for 71 % of all land investments in agriculture. State-owned entities only cover 6 % of all land deals, while private investment funds are the primary owners of 9 %. How-

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ever, these numbers might underestimate the role of investment and pension funds as they often appear as tertiary shareholders (Nolte et al. 2016: 26). Furthermore, national and international developmental banks have become an important investment partner for many land investing companies (GRAIN 2016: 7).

During the process of closing a land investment deal, national governments but also local communities and their elites play a considerable role. The first step for TNCs planning to invest in agriculture is to get in contact with the host government – oftentimes special investment promotion agencies. In many instances, the government and the investor sign an agreement (e.g. Memorandum of Understanding = MOU), which outlines the planned investment and benefits as well as duties on both sides.

Under this rather broad agreement, a more specific land lease agreement is then signed with local authorities and with landowners (Vermeulen/Cotula 2010: 906). However, when it comes to the consultation of affected communities, who live on the leased land, evidence shows that consultation procedures are often insufficient. Quantitative data is not readily available, but the Land Matrix contains information for 161 cases. In 41 % there was no consultation, some consultation in 43 % and an FPIC (Free Prior and Informed Consent) process in 14 % of the cases (Nolte et al. 2016: 40). However, these numbers are difficult to interpret and reporting bias might be either overly positive or overly negative.

Even if consultations take place, they are often considered "as a one-off event rather than an ongoing interaction through the project cycle" (Cotula/Vermeulen 2011: 44). Furthermore, meetings often only include village elders and local elites, lack proper recording and do not necessarily give local communities the realistic option to veto an investment project (Cotula/Vermeulen 2011: 44). Generally, these insufficient consultations processes and the subsequent disregard for the interests of the local population are regarded as highly problematic and often lead to the use of the term land grabbing.

Summing up, the data shows that foreign large-scale land investments are a major issue in a limited number of countries, where previously used land is targeted. Large-scale land deals usually involve a considerable degree of land-use change (Borras/Franco 2012). At the same time, some of the top host countries are among the poorest and food-insecure countries in the world, while investing TNCs usually originate in high-income countries.

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2.1.2 Drivers

The literature discusses different causes and drivers for the sudden rise in large-scale land investments. Global political-economic drivers are identified as an overall push to this kind of investment, while certain host country characteristics function as pull factors to attract investment. Furthermore, a discourse about a specific type of development, global food security and the narrative of 'empty' lands enable and legitimize large-scale land investment deals.

On the global level, three main drivers are usually identified in causing the surge in large-scale land investment since 2007/2008: The food price crisis, the financial crisis and new policies subsidizing bioethanol production. The food price crisis occurred when prices for food stocks like rice, wheat or maize nearly doubled in comparison to the early 2000s (Akram-Lodhi 2012: 121). It did create not only unrest in many countries but also showed the vulnerability of food-importing countries. Reacting to the crisis, Saudia Arabia and other Gulf states, as well as South Korea and China issued programs that incentivized companies to produce food abroad for the home market.

The price volatility also signaled investors that substantial profit could be made within commodity markets at a time when much of the banking sector was in crisis (De Schutter 2011b: 516–517). As investors looked for new places to invest, the agribusiness market became increasingly important. Estimates of 9 billion people living on the planet in 2050 led to predictions that food prices will hike further in the future. Rising food demands in booming economies of Africa are regarded as a 'high-growth market' (Cotula 2012: 662–664). All of a sudden, investing in large-scale agriculture became an attractive investment option, despite high risks (Li 2015).

Last but not least, the 'oil peak' and subsequent government policies in subsidizing biofuels in the European Union but also the US added another incentive to invest in land and use it for the production of oil seeds like sugar cane or oil palm especially among energy and biotech companies (Cotula 2012: 663).

These three interrelated tendencies led to a strong push to invest in land. And while the trend has subsided a little in comparison to the initial 'rush', it is ongoing (GRAIN 2016).

Apart from the global push factors national pull factors are also identified. The number one factor is probably the active strategy of developing coun-

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tries to attract foreign investment in agriculture to increase foreign exchange reserves (Cotula et al. 2014: 915). Also, many developing countries face a huge problem of rural poverty, food insecurity and marginalization of subsistence farmers. Since development assistance and national subsidies in agriculture have been cut in the 1980s, agricultural sectors in many countries have been in dire need of investment (De Schutter 2011b: 509–512). Governments try to attract these investments through advertising their agricultural land and granting tax and tariffs exemptions (Cotula 2012: 669).

Aside from this active role of host states, weaknesses in governance can also be a factor for large-scale land investments. In a World Bank study, Deininger and Byerlee (2011) show that, contrary to the doing-business index assumptions, low levels of rule of law and investors' security increased the interest in farmland investment by foreign investors. Furthermore, rural tenure security was negatively correlated with foreign land investments, showing that less secure tenure made land deals more likely (Deininger/Byerlee 2011: 54–55). These correlations are confirmed by case study evidence, which suggests that post-conflict countries are attractive to foreign investors wanting to secure themselves cheap access to land (van der Haar/van Leeuwen 2013; Shanmugaratnam 2014; Takeuchi et al. 2014: 245).

In addition to these push and pull factors, researchers point to the relevance of enabling discourses that legitimatize the investments. The neoliberal global food security discourse argues that massive investment in agriculture is needed to feed the world in the future and that this investment is best achieved through agribusiness and open markets. In this view, commercialized agriculture is the only way to close the diagnosed 'yield gap,' and small scale farmers who are being pushed out of the market are better off looking for wage labor. In this way, large-scale land investments are regarded as a way to 'feed Arica' (Nally 2015: 343–346; Baglioni/Gibbon 2013: 1571). At the same time, climate change is alluded to, to legitimize large-scale investments in biofuel production, which is supposed to help bring down greenhouse gas emission, while at the same time creating local jobs (Boamah 2011: 163). These narratives are furthermore linked to a broader discourse of development, which regards commercialization as an important element of development and believes that this can best be achieved through foreign investment (Schoneveld 2017: 127). From a postcolonial perspective, these discourses have strong underpinnings of saving the 'savagery' through 'civilization' (Mollett 2016). In the end, these over-

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lapping discourses serve to enable and legitimize large-scale land investments in developing countries.

In conclusion, macro-economic push factors have caused a rising interest in investing in land while state-specific pull factors make some countries more attractive for investors. At the same time, legitimizing discourses around global food security, climate change and development are further enabling the deals.

2.1.3 Consequences

Benefits and risks of large-scale land investment deals are difficult to capture as they might vary significantly depending on the individual investment project, the people concerned and the kind of dimension studied – be they economic, social or ecological (Boamah 2014). At the same time, the necessary baseline data, indicating living conditions prior to a land investment, is usually missing (Cotula et al. 2014: 919). I will nonetheless give a short overview of the mentioned effects of land deals on the local level.

A lot of the research points out negative economic consequences of large-scale land investments. As locals lose access to land, they lose their livelihoods which are based on small-scale farming, herding or collection of products such as firewood and charcoal, building materials, fruits and herbs. Additionally, access to water might also be inhibited. As a consequence, food security might decline as well as the ability to deal with economic shocks (as income becomes less diversified) (Schoneveld 2017: 120). Furthermore, the promise of the creation of new jobs often falls short of expectations (Li 2011). New employment opportunities usually consist of casual labor – often only during certain seasons or mainly in the start-up phase. The number of jobs created fluctuates between different crops, with grains and cereal plantations creating the least amount of employment (Nolte et al. 2016: 43–46).

Nonetheless, wage labor is created, which might be favored by parts of the local population, who for example might not have had access to land (Gilfoy 2015). Also, in cases where wage labor is already an existing form of income, bigger foreign-owned plantations are found to pay higher wages than smaller local businesses (Cramer et al. 2008). Apart from the employment created, other economic benefits expected from foreign investment in agriculture is income through lease rents, increased tax base, technology transfer, market access for local farmers, improved agricultural

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productivity and an increased availability of food commodities on the national level (Görgen et al. 2009: 21; Hallam 2011: 94).

Concerning the social dimension of large-scale land investments, different effects have been pointed out, the most obvious one probably being dispossession and expulsion from the land. The Land Matrix dataset mentions displacement in 57 out of 89 cases for which this kind of information was available. In seven cases, over 10,000 people were reportedly displaced by the respective projects (Nolte et al. 2016: 42). However, these seem to represent rather extreme cases; case study evidence shows that frequently people are not physically relocated through the investment project; even though many might relocate over time due to economic pressure (economic displacement). In many cases, a considerable amount of people remain on the land and serve as wage laborers.

Despite not being displaced, these communities often face a rise in conflicts – within but also between communities, with the company or government officials and within households. Most of these conflicts revolve around being for or against the deal, but also about benefit- and income-sharing and existing land rights (Alden Wily 2009: 30; Hall 2011; Borras/Franco 2013; Millar 2015).

When it comes to positive social effects, corporate social responsibility measures are usually cited. Apart from constructing new infrastructure like roads, housing for employees or electricity grid, investing companies often promise to build or support local schools and health centers, support local farmers with machines or capital and provide skills training and capacity building (Nolte et al. 2016: 46).

Another issue brought up in the literature pertains to social power relations, most importantly gender relations. Yet, again there are two different positions on this issue. One side argues that large-scale land deals can empower women – especially when the investment creates new economic possibilities for them (through wage labor but also through selling produce or cooked meals to workers). The opposite position refers to the circumstance that women are often disadvantaged in tenure systems leaving them without compensation or lease money and therefore making women even more vulnerable to large-scale land deals (Doss et al. 2014; Daley/Pallas 2014; Behrman et al. 2012).

Environmentally, most commentators agree that large-scale land investments are most likely to have negative impacts, such as deforestation and increasing erosion. Agribusiness can result in declining soil quality due to the use of chemicals, reduction of biodiversity through monoculture and possible unintended consequences on local ecological systems through the

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introduction of new plant varieties (Görgen et al. 2009: 24). However, measures can be taken by investing companies in reducing the negative environmental impact as much as possible. Government regulations and oversight are needed to enforce strong standards. At the same time, large-scale investment projects in agriculture can also have positive effects on the environment such as the introduction of less damaging production methods, which could be taken up by the local population (Görgen et al. 2009: 24).

Discussing the economic, social and ecological consequences of large-scale land investments made one thing clear: Positive changes for the local population are not easily delivered. The literature points to a plethora of issues that need to be adequately addressed. At the same time, foreign agricultural investment can provide a chance for the local population and should not be wholly rejected. Nevertheless, even proponents of large-scale land deals agree that there needs to be strong regulation and oversight for these deals to deliver on some of the development promises made. I will discuss these calls for regulation and the actual action taken on the global level in chapter 2.2.

2.2 Global responses to foreign large-scale land deals

The GRAIN report, "Seized! The 2008 land grab for food and financial security", published in 2008, ushered substantial interest in the issue of large-scale land deals. Numerous media and NGO reports followed and warned of the dire consequences for the local population if the trend continued. Calls for regulation of foreign large-scale land investments followed by civil society, international organizations and research institutes.

With the food price and subsequent hunger crisis in 2007/2008 fresh on their minds, international organizations and global governance fora acted quickly in creating new principles and guidelines. At the same time, heated debates about the right form of regulation ensued. I will take a closer look at the discussed ideas focusing on the issue of how affected local actors should be involved in a large-scale land deal.

In a first step, I will describe the differences between a human rights and a market-based approach towards large-scale land deals and land more generally (chap 2.2.1). In a second step, I will describe international instruments, created to address the land rights issues around large-scale foreign investments (chap 2.2.2). Finally, the analysis of these instruments reveals a

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considerable gap in the regulatory framework when it comes to veto rights for local smallholders (chap 2.2.3).

2.2.1 Human rights versus market-based approaches towards large-scale land deals

International actors varied in their approaches towards large-scale land deals. While there was recognition by various actors that regulating large-scale land deals was desirable, the underlying ideas and connected demands diverged. A human rights approach focuses on the rights of affected people and demands their protection. In the market-based approach land is a valuable commodity and regulation can help to create more efficient land markets and mitigate risks for affected populations (Narula 2013). I will discuss these differences further; however, it should be noted that I will do so in an idealized manner – in many real-world examples traces of both approaches can be found.

The basic idea of a human rights based approach to large scale land deals is "that individuals are entitled to specific rights guarantees that cannot be traded away in the context of large-scale land deals" (Narula 2013: 126). In this way, agricultural land investments should not infringe on either ownership or land use rights but also food security and economic development. Even more, land is seen as a "gateway to the realization of numerous human rights" (Narula 2013: 127), such as the rights to food or development. To enable the fulfillment of these rights for as many people as possible, equal land distribution should be favored over free land markets. Furthermore, the human rights approach argues for the protection of customary tenure, especially in terms of use rights.

A human rights approach does, however, not imply the creation of individual land titles (Narula 2013: 149). In the context of large-scale land deals, a human rights perspective means an effective veto right by local smallholders: "In order to be meaningful, consultations must be undergirded by the ability of affected communities-both legally and politically-to withhold their consent." (Narula 2013: 152).

As this approach takes rights as a starting point, there are duty bearers, who are obliged to ensure that rights are kept. These duty bearers are first and foremost host governments but also companies and countries of origin of investors. Affected people are regarded as right-holders, who can make legitimate and enforceable claims (Narula 2013: 126–127). A human

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rights approach does not rule out large-scale investments as such; it instead sets precise boundaries for investment projects.

One proponent of a human rights approach towards large-scale land deals was the acting Special Rapporteur on the Right to Food, Olivier de Schutter. Drawing on existing human rights standards, he developed eleven principles, which were supposed to serve as a baseline for future discussion. The principles clarified that large-scale land investments have serious human rights implications, which need to be addressed as such (Claeys/Vanloqueren 2013). The most obvious is the right to food, which would be violated if a state agreed to a land deal which would be "depriving local populations from access to productive resources indispensable to their livelihoods, unless appropriate alternatives are offered" (De Schutter 2009: 5). Apart from food security, freedom from forced eviction and workers' rights have to be guaranteed. Besides, local people have the right to participate in the decision-making process based on their right to self-determination regarding natural resources and their right to development (De Schutter 2009: 5–12).

Based on these human rights De Schutter recommended that negotiations for large-scale land investments need to be transparent and ensure the free, prior and informed consent (FPIC) of affected communities. States should furthermore take provisions to protect informal tenure rights and consider possible alternatives to large-scale agribusiness investments. Impact assessments need to be carried out as well as ongoing monitoring of companies' commitments (De Schutter 2009: 14–15). Even though only a few actors (states and civil society) endorsed the Principles, they formed the basis for a human rights perspective on large-scale land investments (Claeys/Vanloqueren 2013).

In contrast to a human rights approach, a market-based approach focuses on the reduction of risks for affected populations and investing companies. The focus lies on good governance, which should make foreign investments easier and secure. As such, the rights of affected people are just one risk element that has to be weighed against long-term macro-economic gains: "short-term costs may very well be justified by these long-term gains" (Narula 2013: 137). In this view, market-based solutions such as private investments are the most important driver for economic development. Government regulation should only play a role in mitigating risks for local actors and investors and not be too restrictive. Land is seen as an economic commodity, which should be put to its most efficient use for the overall greater good of economic growth (Narula 2013: 121). This is achieved by

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creating secure land markets based on individual land titles, which should enable land allocation to those with the most productive means. As a consequence, land concentration is not per se regarded as problematic (Narula 2013: 148). Overall,

> "[t]he market[…] approach assumes that robust land markets, coupled with community consultations and good governance measures, can help mitigate the risks and deliver the benefits of large-scale land transfers" (Narula 2013: 151)

In this approach, large-scale land deals are regarded as something positive, while it is admitted that some basic rules have to be applied to mitigate negative effects.

Table 1 Human rights vs. market-based approach to land

	Human rights approach	**Market-based approach**
Underlying idea	Land as a means to fulfill human rights and secure livelihoods	Land as a means to create macro-economic growth
Existing land rights	Protection of all forms of tenure systems and use rights	Formalization and privatization of land titles
Land distribution	Equal land distribution to ensure livelihoods of smallholders	Land distribution according to maximum efficient use
Decision making processes in large-scale land deals	FPIC of all affected land owners and users	Consultation of affected land owners and users
Accountability of investors	Binding and enforceable mechanisms	Codes of Conduct

(Source: own compilation based on Narula 2013; Toft 2013)

A comparison of the two approaches shows that there are considerable overlaps when it comes to demands for regulation. Both perspectives agree to "principles of transparency, accountability, and participation" (Narula 2013: 131) as well as the idea of respecting existing tenure rights. Nonetheless, there are considerable differences between the approaches when it comes to underlying ideas about the socio-economic meaning of land, ex-

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isting land rights and the role of land distribution. A human rights approach demands FPIC of local actors, while a market-based approach emphasizes consultations. Furthermore, a human rights approach implies that rights can be claimed and are enforceable. In contrast, a market-based approach wants to limit state intervention and favors a more loosely regulatory regime in the form of codes of conduct (Toft 2013: 1185–1187). Table 1 summarizes these differences between the two approaches. However, it should be noted that this presents an ideal-typical characterization of the two approaches. Most international regulatory instruments contain traces of both approaches as will be discussed in the next chapter.

2.2.2 International instruments for regulating large-scale land deals

In this chapter, I will review the most important international instruments regarding large-scale land deals[6]. I will thereby focus on newly created instruments by international organizations such as the Voluntary Guidelines on the Governance of Tenure and the Principles for Responsible Agricultural Investment. I will also take a look at initiatives by the private sector, exemplary the IFC Standards and two Roundtables (Roundtable on Sustainable Biofuels and Roundtable on Sustainable Palm Oil). I will introduce each instrument in a general way but then focus on specific stipulations made in regard to tenure rights and decision-making processes, as this is my main research interest[7]. The table at the end of the chapter provides an overview of these instruments.

The instrument regarded as an important response to large-scale land deals from a human right perspective was the Voluntary Guidelines on the Governance of Tenure (VGGT), adopted by the Committee on World Food Security (CFS). Through extensive participation rights in this forum, civil society groups pushed for the creation of the VGGT, which were to become the first-ever agreed-upon standards on the global level regarding

6 I will only include instruments, which make specific reference to land tenure issues in relation to foreign investment and are usually discussed in the context of large-scale land deals. Other frameworks exist, which might be of relevance in the broader context, for example the UN Guiding Principles on Business and Human Rights or the OECD Guidelines for Multinational Enterprises. In addition, I leave out regional instruments such as the African Union Framework and Guidelines on Land Policy in Africa.

7 I do not discuss the implementation or empirical effectiveness of individual instruments.

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the governance of tenure (Duncan/Barling 2012; McKeon 2013). The process included various regional and stakeholder meetings as well as extensive intergovernmental negotiations. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (full title) were adopted in 2012 and were applauded by governments and civil society actors alike (Seufert 2013; Paoloni/Onorati 2014). Despite their voluntary nature, the guidelines are regarded as highly relevant due to their high legitimacy (Seufert 2013: 184) as well as their references to binding human rights frameworks (Golay/Biglino 2013: 1643).

In regard to investment in land, the guidelines make a number of stipulations: They demand the consultation and participation of people, "whose tenure rights, including subsidiary rights, might be affected" (CFS 2012: para 12.9). This right to consultations does not include a veto right as it does for indigenous people; nonetheless, the principle of consultation and participation of affected people and the provision of information and support to these groups is a step forward (von Bernstorff 2012: 31).

Furthermore, "[s]tates should ensure that existing legitimate tenure rights are not compromised by such investments" (CFS 2016: para 12.10). The guidelines advise that states should recognize and provide instruments to protect customary tenure systems and collective land rights (CFS 2012: para 9.). Besides, the guidelines suggest that states should create new regulations and policies to regulate large-scale land investment for example, on deciding on maximum sizes or for including parliaments in decision-making (von Bernstorff 2012: 32). In the same vein, investors are asked to respect the rule of law and provide sufficient information on a planned land deal:

> "Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should seek that the agreements are documented and understood by all who are affected." (CFS 2012: para 12.11)

The VGGT furthermore put an emphasis on the protection of human rights and the duty of states to ensure beneficial outcomes for the local population. Land investments should not threaten an adequate standard of living, especially food security (von Bernstorff 2012: 33–37). Besides the host states, who are the primary guarantors of human rights, private businesses are named as being responsible. Also, if states actively support an investment project or they become an investor abroad, they are obligated to "the protection of legitimate tenure rights, the promotion of food security

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and their existing obligations under national and international law" (CFS 2012: para 12.15). This recognition of states' extraterritorial duties, when financing and supporting investment in foreign countries, was a remarkable step and the first time this principle was mentioned in an internationally negotiated document (von Bernstorff 2012: 41).

Prior to the VGGT another document had been created by the World Bank, the FAO (Food and Agriculture Organization), IFAD (International Fund for Agricultural Development) and UNCTAD (United Nations Conference on Trade and Development). The Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (WB PRAI) were created in 2010 and received considerable criticism as a typical market-based instrument. In fact, the WB PRAI emphasized the role of best practice and codes of conduct in dealing with issues around large-scale land deals:

> "Arguably, the magnitude of the present phenomenon and the hazards involved warrant a broader effort to build on ongoing initiatives that involve some mix of guidelines, codes of good or best practice, and perhaps even independently verifiable performance standards coupled with benchmarking." (FAO et al. 2010: 1)

Nonetheless, the seven principles spell out issues that should 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 and social and environmental sustainability (FAO et al. 2010). Furthermore, "all those materially affected" (FAO et al. 2010: Principle 4) should be consulted in land investment deals. As such, the World Bank PRAI suggest that all forms of land rights, also informal rights, should be respected and that governments should create legal frameworks that create clear rules for land transferals. In this way, the World Bank PRAI do emphasize the need for national regulatory frameworks.

The principles were endorsed by the G8 and the G20, but were met with harsh criticism from the UN Special Rapporteur on the Right to Food and civil society organizations (The Global Campaign for Agrarian Reform/ Land Research Action Network 2010). They argued that the principles would simply legitimize the ongoing trend of land grabbing and connected human rights violations. Additionally, the non-inclusive top-down process in which the WB PRAI were developed was criticized (Stephens 2013). In a quite remarkable move, the Committee on World Food Security

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(CFS) decided to only take note of the principles without adopting them, further delegitimizing the World Bank principles (Duncan 2015: 174).

The CFS later developed its own principles for responsible investment (CFS-PRAI). The Principles for Responsible Investment in Agriculture and Food Systems (CFS-PRAI) aim to create investments which "contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food" (CFS 2014: para 10). The ten principles stipulate, for example, that investment should increase food security and lead to development or that grievance mechanisms and transparency measures should be set up (CFS 2014). The principles acknowledge that large-scale land investments are sometimes impossible to design in a responsible manner und should not take place in those situations. Furthermore, they specifically include financing institutions as being responsible for the human rights record of the investments made (Johnson 2016: 77–78). At the same time, the CFS PRAI recognize the role of smallholders as the ones realizing most of the investments in agriculture:

> "Farmers should be recognized as key contributors to food security and nutrition and as major investors in the agricultural sector, in particular taking into account those family farms that invest their own capital and labour in their agricultural activity." (CFS 2014: para 5)

Furthermore, the principles build on existing human rights norms and existing CFS guidelines (CFS 2014: para 19A). Accordingly, decisions about large-scale land deals should involve participation and consultation with affected rights holders in line with the VGGT (CFS 2014: para 25).

Aside from intergovernmental governance fora and international organizations, the private sector reacted to the surge in large-scale land deals and the surrounding criticism. They suggested modifications of existing principles and roundtables. The instruments regarded as most relevant to large-scale land acquisitions, are the IFC Performance Standards (as part of the Equator Principles) and biofuel certification schemes, most notably the Roundtable on Sustainable Biofuels (RSB), and the Roundtable on Sustainable Palm Oil.

The Equator Principles were set up as a 'risk management framework' in 2003 to guide large investment projects in countries with poor regulatory capacities. To fulfill the Equator Principles, the IFC Performance Standards on Environmental and Social Sustainability have to be followed. In 2012, the IFC Standards were updated to include "very specific standards about land use and access, as well as guidance for investors and financiers

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on how to best interact with affected communities" (Goetz 2013: 201). IFC Performance Standard 5 specifies that involuntary displacement (defined as physical or economic displacement without the consent of affected people) should be avoided; or if not otherwise possible, negative impacts should be minimized through compensation and livelihood improvement (IFC 2012: 5.1 – 5.3). In doing so, "clients are encouraged to use negotiated settlements meeting the requirements of this Performance Standard, even if they have the legal means to acquire land without the seller's consent" (IFC 2012: 5.3).

The principle of consent of affected people is only inscribed in regard to indigenous people, for which FPIC is required. In other cases, the Standards do not provide any restrictions, meaning that investment projects can be implemented against the will of affected people. In consequence, the IFC standards have received criticism for not going far enough (Goetz 2013: 201).

Other private sector initiatives, mainly roundtables and attached certification schemes, were created by companies, often in collaboration with civil society actors. The Roundtable on Sustainable Biofuels (RSB) is the most far-reaching when it comes to setting standards in regards to land tenure and consideration of local interests (German/Schoneveld 2012: 771). Founded in 2007, the Roundtable established 12 principles for certification for sustainable biofuel production. The RSB principles clearly state that no involuntary resettlement should take place (Goetz 2013: 202). A lease agreement should furthermore only enter into force when all existing land conflicts, including with land users, have been settled following the FPIC principle. This provision is far-reaching as it includes people who might not have ownership rights but are traditional land users, for example, tenants or pastoralists. The RSB also makes provisions in regards to compensation of and creating development for the local population (Fortin/Richardson 2013: 146–147). The RSB principles stick out against other biofuel certification schemes, which only cover the issue very superficially (German/Schoneveld 2012: 772) or focus on environmental concerns and thereby omit socio-economic consequences (Bracco 2015: 138).

However, it is feared that it is precisely this ambitious approach that might make the RSB principles less effective:

> "Unfortunately, due to its comprehensiveness (and associated cost and complexity), the RSB is likely to attract only those companies that are already largely compliant with RSB principles and can therefore benefit from related reputational gains at limited cost" (German/Schoneveld 2012: 776)

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This fear might be realistic, especially against the background that the RSB has to compete against other biofuels certification schemes, which are less comprehensive (Ponte 2014: 267). As of February 2019, only 36 operators (producers and traders) worldwide ever received RSB certification, of which several certifications had already terminated (RSB 15/02/2019).

Another roundtable that is worth considering is the Roundtable on Sustainable Palm Oil (RSPO), as oil palm is one of the main crop grown on new plantations developed through foreign investment (Nolte et al. 2016: 11). The RSPO was founded in 2004 as a response to growing criticism and consumer boycotts due to the alleged unsustainability of palm oil production (Nesadurai 2013: 515). While the initial focus was on environmental issues, NGOs pushed for the inclusion of socio-economic criteria, amongst others, an emphasis on land rights. They were successful in introducing FPIC for local smallholders as one criterion (Pesqueira/Glasbergen 2013: 299–300). In consequence, criterion 2.3 reads: "Use of the land for oil palm does not diminish the legal, customary or user rights of other users without their free, prior and informed consent." (RSPO 2013: 2.3).

The RSPO is similarly far-reaching when it comes to land rights protection as the RSB principles. At the same time, more companies are certified. With 82 growers and 373 palm oil mills (RSPO 15/02/2019) RSPO certified members produce 19 % of the global palm oil production according to information by the roundtable (RSPO).

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Table 2 International instruments regulating large-scale land investments

Instrument	Drafting actors	Addressees	Bindigness	Decision making in large-scale land deals
VGGT	CFS (FAO, governments, civil society, private sector)	Primarily states; also: companies, third party investors (amongst others)	Voluntary; bindingness through implementation into national law	– State as primary guarantor of human rights and responsible investment – Principle of informed consultation and participation of "those whose tenure rights, including subsidiary rights, might be affected" (CFS 2012: para 12.9)
World Bank PRAI	World Bank, FAO, IFAD, UNCTAD	Private sector	Voluntary; best practice approach	– "All those materially affected are consulted, and agreements from consultations are recorded and enforced (FAO et al. 2010: Principle 4)
CFS PRAI	CFS (FAO, governments, civil society, private sector)	States, companies, civil society (amongst others)	Voluntary	– "legitimate tenure rights" should be respected (CFS 2014: para 25) – "Business enterprises should respect legitimate tenure rights in line with the VGGT" (CFS 2014: para 51)
IFC Performance Standards (basis Equator Principles)	IFC (of the World Bank Group) and other development banks	Clients of 94 Financial Institutions (many development banks)	Binding for clients of financial institutions ascribing to IFC standards	– consultation of affected people is advised: "clients are encouraged to use negotiated settlements meeting the requirements of this Performance Standard, even if they have the legal means to acquire land without the seller's consent" (IFC 2012: 5.3)
RSB Principles and Criteria	Industry members, producers, NGOs, intergovernmental organizations	Producers and traders of biofuels and other biomaterials	Binding for companies which undergo certification	– "Free, Prior, and Informed Consent shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for operations" (RSB 2016: 12b)
RSPO Principles and Criteria	Small- and large scale producers and NGOs	Oil palm growers and oil mills	Binding for companies which undergo certification	– "Use of the land for oil palm does not diminish the legal, customary or user rights of other users without their free, prior and informed consent." (RSPO 2013: No 2.3)

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Through comparing the discussed instruments, two issues become visible:

First, most instruments contain traces of a human rights and a market-based approach and end up demanding similar safeguards in regards to large-scale land deals. There are, for example, considerable overlaps between the VGGT and the IFC Performance Standards (Windfuhr 2017).

> "[T]he Performance Standards have not been written explicitly within a human rights-based approach. However, they reflect implicitly the content of several human rights standards, and help to avoid infringement of human rights […] the institutions that apply the IFC PS […] already cover essential core elements of the VGGT" (Windfuhr 2017: 10–11)

At the same time, the VGGT also contain market-based elements and do, for example, fall short of a human rights approach in calling for consultations and not for FPIC as guiding principle. This is a result of international negotiations, in which the demands for veto rights made by civil society members were met with resistance from market-friendly actors (von Bernstorff 2016: 59). In the Roundtable on Biofuels and the Roundtable on Palm Oil, civil society was more successful and managed to introduce the element of FPIC into the principles and criteria. In this way, the roundtables contain details that represent a human rights perspective, even though they are per se grounded in market-based ideas.

Second, when focusing solely on the issue of consultation or consent rights of locally affected communities, an interesting picture appears: Globally oriented standards like the VGGT, the World Bank PRAI and the CFS PRAI only demand participation and consultations and are furthermore non-binding. The IFC Standards are binding for clients of banks that subscribe to the Equator Principles and therefore have considerable reach. However, they probably contain the softest language 'encouraging' negotiated settlements. Finally, the two roundtables include FPIC. However, their scope is the smallest – only being binding for companies that aim for certification.

There is, therefore, a considerable gap in international regulatory frameworks when it comes to decision-making power for local communities in large-scale land deals.

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2.2.3 Gaps in international regulation and the question of a right to land

The previous chapter showed that different international actors created several instruments to regulate large-scale land deals. However, none of these instruments grants local smallholders the right to veto on the global level. This gap has not gone unnoticed and has let to numerous calls for the creation of new human rights – most specifically, a right to land. I will discuss this development, which culminated in the UN Declaration on the Rights of Peasants and Other People Living in Rural Areas (UNDROP), which was adopted by the General Assembly in December 2018.

So far, a human right to land has not been formally recognized as a right in itself by international human rights regimes. The right to property, which could potentially protect smallholders from unlawful eviction, presents one possibility to indirectly claim a right to land (De Schutter 2010: 315). However, it depends to a considerable degree on national legal frameworks, which often define the conditions of what constitutes 'lawful' eviction broadly – often to the detriment of local populations (Diergarten 2019: 4). More often, a possible right to land is linked to the right to food, as land is an essential avenue for fulfilling this right for significant parts of the world's rural population (De Schutter 2010: 305). Yet, due to the different ways in which a right to food can be interpreted, this can be problematic:

> "Relying on other human rights to get at the land issue is a risky strategy. […] The interpretation of the right to food for example leaves open whether people feed themselves through direct cultivation of lands or through an income and food distribution system. This flexible interpretation has been misused to justify removing people from their lands because they are not using land 'sufficiently/ efficiently/sustainably'" (Künnemann/Monsalve Suárez 2013: 139)

One way forward would be the creation of a right to land, as it has been accorded to indigenous people through ILO Convention No 169, the UN Declaration on the Rights of Indigenous Peoples and several regional human rights bodies (De Schutter 2010: 311–313). In these frameworks, indigenous people are granted far-reaching rights when it comes to their land, most notably the principle of FPIC in the case of any kind of investment or development project on their domain (Diergarten 2019: 9). Usually, these rights are based on "the cultural attachment that indigenous and tribal peoples have with their territory" (Diergarten 2019: 2), something which is difficult to apply to all smallholders. Nonetheless, the indigenous

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land rights regime provides important lessons in terms of showing that customary and collective land use rights can be protected without necessarily creating individualized land titles (De Schutter 2010: 314).

To address this gap in international human rights law, civil society actors, most prominently La Via Campesina, have demanded the recognition of peasant's rights of which land is an important element. In 2008, the organization drafted a Declaration on the Rights of Peasants and focused its advocacy on the UN Human Rights Council to take up the issue (Claeys 2015: 125–126). Subsequently, the Council formed an intergovernmental working group in 2012 and adopted the final text in 2018, which was later confirmed by the UN General Assembly. UNDROP is the first intergovernmental document, which formulates a right to land for smallholders:

> "Peasants and other people living in rural areas have the right to land, individually and/or collectively, […] including the right to have access to, sustainably use and manage land" (UN General Assembly 12/17/2018: Art. 17.1)

Article 17 of the declaration furthermore specifies that states should protect existing customary and informal tenure systems and carry out agrarian reform to ensure equal access to land 'where appropriate' (UN General Assembly 12/17/2018: Art. 17). The declaration follows the VGGT in providing regulations in regards to investment in and exploitation of resources used by peasants and other people living in rural areas. It demands:

> "(a) A duly conducted social and environmental impact assessment;
> (b) Consultations in good faith, in accordance with article 2.3 of the present Declaration;
> (c) Modalities for the fair and equitable sharing of the benefits of such exploitation that have been established on mutually agreed terms between those exploiting the natural resources and the peasants and other people working in rural areas." (UN General Assembly 12/17/2018: Art. 5.2)

However, the declaration falls short of providing smallholders with a direct veto right. Article 2.3 formulates the principle of "active, free, effective, meaningful and informed participation" (UN General Assembly 12/17/2018: Art. 2.3).

Overall, UNDROP presents a next step in the development of a right to land and has certain consequences for large-scale land investments, such as the necessity to conduct social and environmental impact assessments. Yet, the gap of a general right for peasants and other people living in rural areas

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to veto a possible investment or development project has not been closed. Furthermore, the declaration is non-binding and it remains unclear how it will be taken up and used in practice.

2.3 Debate: How does the law help?

While the appropriate form of regulation in regards to large-scale land deals was debated, a lot of skepticism appeared in terms of the usefulness of new international regulation for the local population. Some civil society actors and academics feared that the new standards would lead to a mere legitimation of large-scale land deals instead of changing anything for the better for the local population. Others argue that new rules would remain ineffective if they were not legally binding. Again, others were more optimistic, claiming that the regulations could work if implemented in the right way. I describe these three lines of argumentation in more detail in the first part of this chapter (chapter 2.3.1), before I turn to existing empirical evidence in chapter 2.3.2. So far, the empirical evidence is mainly anecdotal and missing a clear theoretical background.

2.3.1 Theoretical arguments

The global governance responses to issues concerning large-scale land deals outlined in chapter 2.2 triggered different kinds of reactions by civil society members but also academics. While the Voluntary Guidelines received generally positive feedback, market-based measures such as the World Bank PRAI and private-sector mechanisms were criticized more heavily. Despite different perceptions in regards to specific instruments, I can identify three over-arching arguments[8]: First, there is the radical position, which argues that no large-scale land investment has positive effects for the local population. More regulation is, therefore, not helpful as long as it does not stop and roll back land deals (Borras et al. 2013: 170). The second critical position focuses on the type of international law created: Only binding regulations based on human rights can make a change on the

8 I identify these arguments based on underlying ideas raised by actors. It is not a classification of individuals, activist groups or academics into categories, even though actors might overall tend towards certain positions.

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ground. The third optimistic position expects new rules to have a positive impact on the local population.

The *radical* position developed from a perspective that generally denounces the ability of large-scale agriculture to feed the world and create sustainable economic development. The debate about large-scale land investments is understood as a fight between transnational agribusiness corporations and small-scale family farms. Large-scale land deals are regarded as expressions for the expansion of predatory capitalism. In this view, they destroy the livelihoods of the rural poor, exploit them for cheap labor and expand TNC's control of the food chain. Only international regulation, which stops and rolls back large-scale land deals is regarded as desirable (Borras et al. 2013: 170–171). The most influential civil society advocate of this position is the global peasant movement La Via Campesina. To counter the current focus on agribusiness they suggest the concept of food sovereignty, which aims to bring control over agricultural production back to the local level (Borras et al. 2013: 170–171; McMichael 2015).

Apart from the food sovereignty movement, other civil society actors as well as academics raise this fundamental critique about global regulation of large-scale land investments. The critique focuses on two linked arguments: First, global governance efforts legitimize large-scale land investments without questioning the underlying neoliberal logic. Goetz (2013) describes this for the private sector driven Equator Principles and RSB:

> "[..]both instruments engage in the construction of an understanding of sustainability (e.g. biofuels, risk) that frames debates around how investments shall take place, while removing from consideration the far-reaching questions of whether these investments should occur at all." (Goetz 2013: 204)

Similar fears were raised in regards to the World Bank PRAI (Stephens 2013) as well as the CFS RAI (Gaarde 2017: 70). Considering the human rights-based VGGT there are fewer critical voices, although the same fear is raised. The Civil Society Mechanism (CSM) of the Committee on World Food Security voiced some disappointment with the VGGT:

> "We deeply regret the fact the guidelines do not explicitly challenge the untruth that large-scale investments in industrial agriculture, fisheries and forests are essential for development." (CSM 2012)

This disappointment is echoed by some researchers who point out that the VGGT can be interpreted in many different ways, which might open the

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door for more large-scale land deals (Borras et al. 2013: 172; Paoloni/Onorati 2014: 396).

The second argument posits that global regulations do not only legitimize large-scale land deals but even make them easier, as they help to create land markets. The NGO GRAIN argues: "[T]he main objective of regulatory processes is still to formalise land markets and titles, which experience tells us will lead to further concentration of land in the hands of few" (GRAIN 2016: 3). In this view, policies that aim at enhancing tenure security through formalization commodify land and make it easier for investors to acquire. Due to the socio-economic inequalities between investors and small-scale land-holders fair negotiations are not possible and would in the end only foster further dispossession (Borras/Franco 2012: 54; De Schutter 2011a: 268–270).

Essentially, advocates of this radical position fear that regulatory efforts will only change the manner of large-scale land investments, which will still be against the interests of rural populations (Borras et al. 2013).

The second, *critical* position looks at international regulation more optimistically. New global instruments are regarded as a step forward to protect local interests. However, it is regarded as problematic that the regulations are not binding and largely depend on the goodwill of companies and national governments for implementation. In this view, a human rights-based approach is regarded as the better option and existing instruments are criticized for lacking accountability.

The most criticized instruments in this regard are the market-based World Bank PRAI and private-sector mechanisms, which are based on the logic of voluntary self-regulation by the companies themselves (The Global Campaign for Agrarian Reform/Land Research Action Network 2010: 7). Certification schemes can provide some kind of accountability but only from corporations who voluntarily undergo certification (Johnson 2016: 80). In contrast to these private-sector mechanisms, the VGGT target nation-states as primarily responsible. Even though the guidelines are voluntary, they are indirectly obligatory as they are rooted in human rights, which nation-states are supposed to guarantee (Golay/Biglino 2013: 1643). As states are supposed to translate the guidelines into laws and policy programs, bindingness can be created. "Regardless of these contributions, the VGGT itself lacks accountability mechanisms, as no actors need to account for actions they take in line with the VGGT and no actors have agreed to be bound by its provisions." (Johnson 2016: 77). The implementation of the voluntary guidelines depends on the goodwill and capacities of states.

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These processes can easily get co-opted by transnational corporations and national elites and the question remains if new laws and regulations can be efficiently enforced (Claeys/Vanloqueren 2013: 196; Narula 2013: 151).

The missing bindingness of global governance instruments to regulate large-scale land investments is regarded as especially problematic in light of the strong legal protection investors are guaranteed under current international investment law, usually in the form of Bilateral Investment Treaties (BITs) signed between states. These BITs contain clauses on protecting investors not only from expropriation but also from new laws and regulations. So-called umbrella clauses declare every breach of contract as a breach of the BIT, making it possible for investors to call on transnational tribunals. In consequence, the space for governments to change policies, for example, in the realms of environmental protection or land governance, is severely limited by these treaties (Brüntrup et al. 2014: 453–457). This investment protection regime creates a strong imbalance between investors and affected communities: While investors can easily call on an international arbitration system – which usually also work in their favor – local communities who might be adversely affected by an investment do not have such a right (Johnson 2016; Cordes/Bulman 2016). This imbalance can only be overcome with binding regulations and obligatory accountability mechanisms.

The third, *optimistic* position focuses on the positive effects new regulations can have, despite their shortcomings. There are generally two arguments made in this regard:

First, civil society actors can use new governance instruments to push for favorable policies and to build up pressure vis-à-vis companies. The VGGT suggest that multi-stakeholder platforms are created on the regional and national level to discuss ways of implementation. These provisions are an entry point for NGOs and peasant representatives to demand participation in law-making processes. Furthermore, the clear anchoring of the VGGT in human rights language provide civil society actors with strong arguments when making demands vis-à-vis a transnational corporation (Paoloni/Onorati 2014: 398; McKeon 2013: 118; Seufert 2013: 185). In a similar vein, private sector certification schemes can function as a reference point. They have the potential to increase the transparency of land deals as auditing is obligatory and reports are made public. Civil society actors can use a company's membership in a certification scheme as leverage to have their claims heard (Fortin/Richardson 2013: 153–154).

Second, states but also International Financial Institutions (IFIs) can translate voluntary guidelines into binding law and regulations, which can

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then be used by local actors. The biggest chances for implementation and usefulness for the local population are ascribed to the Voluntary Guidelines. Their provisions should be translated into national law with the participation of all relevant groups in the country (CFS 2012: para 26.2). National legal frameworks for improved tenure security can potentially provide economic leverage for right-holders (Vermeulen/Cotula 2010: 900). Commentators also ask International Financial Institutions to use the VGGT to reform their obligatory conditions for companies who rely on their funding (Paoloni/Onorati 2014: 384). In essence, the hope is that national laws and regulations by IFIs can turn voluntary agreements into binding rules, which can then help the local population to protect their interests.

These three different positions are not mutually exclusive. Seufert, for example, notes that small-scale food producers were disappointed that the VGGT did not wholly rule out large-scale land investments (radical position). However, given the reality of global governance, they did have the feeling that they achieved a vital document they can use for their struggles (optimistic position) (Seufert 2013: 185). Often commentators do seem to believe in the usefulness of new global governance instruments (optimistic position) – especially of the Voluntary Guidelines – while they simultaneously argue that these instruments would have a more significant impact if they were binding (critical position).

At the same time, it is often not clear what the empirical basis for the underlying assumptions is. What do we know about the usefulness of legal instruments – be they international or national – for the local population?

2.3.2 Existing empirical research

Empirical research on the actual use of international as well as national law by the local population affected by large-scale land investments is rather sparse. Most of the empirical literature focusing on legal aspects of large-scale land deals point out the shortcomings of national law or the missing implementation of existing laws. Apart from this top-down approach, a few studies focus on how affected people actually make use of legal mobilization from a bottom-up perspective. I will present these perspectives in the first step, before I make a short excursion into the broader literature on local resistance against large-scale land deals. Several gaps will appear, which I will discuss in a third step.

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When it comes to a top-down view on the effectiveness of existing or new regulations, national legislation and policies are often at the center of analysis. In Ethiopia, for example, the process of negotiating large-scale land deals was highly centralized, giving the state the power to make decisions irrespective of customary land use rights (Mulleta et al. 2014). Legal deficiencies were also found in other Sub-Saharan African countries, such as lacking recognition of customary land rights, missing procedures of land demarcation and unclear provisions in regards to benefit-sharing (Schoneveld 2017: 124; Polack et al. 2013: 19–21). At the same time, some countries included provisions for Environmental and Social Impact Assessments "modeled after international best practices" (Schoneveld 2017: 125). Yet, capacities for implementation are often missing, a study of Schoneveld showed (Schoneveld 2017: 126). Existing differences in the land tenure system between different countries (Nigeria, Ethiopia, Zambia, and Ghana) did not change the situation on the ground:

> "This study shows that despite profound differences in especially land laws, local land users are systematically dispossessed of valuable livelihood resources without redress. This highlights that regulatory frameworks relevant to land tenure have limited bearing on outcomes." (Schoneveld 2017: 129)

However, the study noted that none of the four studied countries did provide affected smallholders with the right to withhold consent (Schoneveld 2017: 124).

When it comes to the issue of local participation through consultations or consent, existing legal frameworks often only grant minimal participation rights to affected communities (Polack et al. 2013: 30). Yet, even when progressive laws are in place, they might not have the desired outcome. Comparative case studies from Sub-Sahara Africa find that even when 'best practice' legislation is in place, community consultations and decision-making processes were insufficient for protecting local rights. The reasons are a lack of proper implementation due to missing capacities of state actors but also the power of customary authorities, who did not make decisions in the interests of the local population (Vermeulen/Cotula 2010; German et al. 2013). Legal provisions and the actual practice are often 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 in a weak position to negotiate with the companies (Vermeulen/Cotula 2010).

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> "This raises the question of whether legal frameworks are of limited effectiveness due to deficiencies in design and enforcement, or whether similar outcomes occur through diverse pathways." (German et al. 2013: 14)

On a positive note, some authors suggest that large-scale land investment deals can be a driver for legal innovation, either through creating pressure on national legislators (Nolte/Väth 2015; Alden Wily 2014) or through a subsequent questioning of customary authorities (Bottazzi et al. 2016). Despite these possible positive legal innovations, research in this field leads to skepticism about the decisive role of legal reform for smallholders affected by large-scale land deals.

This top-down view on the law and its effects for local actors should be complemented with a bottom-up perspective:

> "Ultimately, much depends on how legal frameworks are appropriated and used by citizens in their accountability strategies. Promising legal entries may remain underutilised – or citizen action may push the boundaries of applicable law." (Polack et al. 2013: 30)

On the one hand, it is noted that local actors often lack the capacities to claims their rights and involve the judiciary system (Schoneveld 2017: 128). On the other hand, several case studies show that local actors are taking measures to claim their rights through litigation, calling on administrations to enforce the law or using customary rules. Grajales (2015) describes how activists called on the Constitutional Court of Colombia as well as the Interamerican Human Rights Court and Commission 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). Research on mobilization efforts by the Q´eqchi´ indigenous people in Guatemala shows the importance of forming alliances for strategic litigation. The resistance against oil palm and sugar cane investors included a variety of support strategies from different allies:

> "Strategic litigation involves grounded practices of resistance exerting pressure 'from below', together with politico-juridical advocacy 'from above', and support from research and social communication 'from the sides'." (Alonso-Fradejas 2015: 506)

Other cases show how legal argumentation was part of the resistance strategy of local actors towards an investing company. In Laos, a village affect-

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ed 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 the observing researcher: "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: 834). This might be especially relevant in a context like Laos where open protests are difficult to organize (McAllister 2015: 828). 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: 572). The evidence from these case studies shows that legal mobilization by local actors does take place; however, success conditions were not at the center of analysis of these studies.

Apart from single case studies, 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. They describe a range of actors who are involved in citizen action: National and international NGOs were key supporters for affected people, while peasant movements mainly played a role in francophone West-Africa (Polack et al. 2013: 34). Local actors used a range of strategies – 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 (Polack et al. 2013: 40–41).

Overall, the success of the action undertaken by local actors remains somewhat unclear in the review. In three cases, renegotiations with the company took place; however, the outcome unknown. Three investment projects were abandoned, though this was explained by economic difficulties and not necessarily resistance by locals. In this regard, the review could not provide explanations, but rather pointed out a gap in the literature:

> "The literature that documents citizen action has not systematically analysed the actors action-outcome chain of causation. This desk-based study does not therefore attempt to draw conclusions on causal relations between specific actors or strategies and outcomes, which more

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> in-depth comparative field research methods would tackle more effectively." (Polack et al. 2013: 31)

While the literature which focuses specifically on the role of legal arguments, representation or legal institutions in large-scale land deals is rather sparse, more research exists around resistance more generally (Hall et al. 2015). Parts of this literature builds on conceptualizations of peasant resistance (Moreda 2015; Kandel 2015; Martiniello 2015) and focuses on forms of 'everyday resistance'. The term describes little uncoordinated acts of individual defiance, for example, foot-dragging, pilfering or slander (Scott 1985: 27). Yet, these local and often spontaneous acts are often not visible to outsiders (Borras/Franco 2013: 1725).

When organized forms of collective contention appear, local actors are often linking to national and international allies, many times NGOs or transnational agrarian movements (Rocheleau 2015; Temper 2019). These processes and possible difficulties developing the cooperation with NGOs are further studied (Larder 2015; Gilfoy 2015). Yet, the literature usually does not systematically inquire about the conditions under which these mobilizations are successful. Nonetheless, effective networks (Rutten et al. 2017) are usually mentioned as well as economic pressures on companies:

> "Activism against companies has shown to be most successful when it impacts upon profit or previsions of future profit (often related to reputation with specific audiences), scaring investment and increasing risk for investors." (Temper 2019: 202)

So far, only one case study specifically focused on the role of the company in explaining its reactions to critique (Salverda 2018). The European investor in Zambia studied, was highly aware of the 'land grabbing' debate, tried to avoid potentially contentious behavior, and applied the VGGT. The case shows that 'the countermovement' to large-scale land deals can have positive effects on investors, who might over time "feel 'obliged' to respond and/or may become even more open to (some of) the concerns raised" (Salverda 2018: 13). However, in order to understand variation between different responses, "much more investigation on the ground is needed" (Salverda 2018: 14).

Reviewing the arguments made in regards to international regulation and the existing empirical evidence presented in this chapter gaps become visible.

First, existing evidence seems to indicate that legal improvements in regards to local rights in large-scale land deals do not automatically lead to

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better outcomes for affected communities. At the same time, case studies find that local actors can successfully pursue their goals by claiming their rights through administrations, courts or other state institutions. It, therefore, becomes clear that the most relevant question is not whether new laws and regulation provide local communities with better outcomes, but rather under which conditions this can happen. This is the research question this dissertation addresses (as discussed in chapter 1): Under which conditions can local actors successfully pursue their goals through legal mobilization?

Second, the literature that uses a bottom-up perspective on local actors employing legal means, focuses on individual cases and does not, apart from the overview by Polack et al., include systematic comparisons. The review by Polack et al. does provide evidence from several cases; however, these are not theorized systematically. As pointed out earlier, they are not able to provide causal explanations. There is, therefore, a need for a systematic comparative analysis, which is able to identify some causal relations.

Third, the broader literature on resistance against large-scale land deals points to the importance of civil society networks for successful campaigns in influencing the investor. Yet, most of the studies do not focus specifically on explaining success or failure of resistance. Furthermore, there is only one study that analyses the responses of a company more closely. Differences in company reactions have not been analyzed by this literature, which is another gap this dissertation will address.

The remainder of this dissertation will deal with these three gaps through creating a heuristic framework, which will then guide a systematic case comparison. The framework will consider three perspectives: A legal, a social mobilization and a business management perspective. As there is no linear relationship between existing laws and better outcomes for local communities, a configurational approach, which considers causal complexity, seems especially fitting. I will further elaborate on this framework in the next chapter.

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