

3. A multi-perspective framework on legal mobilization success

This chapter develops a multi-perspective framework that will help me to answer my research question. The framework and core concepts should be broad and flexible enough to be usable in different empirical contexts but provide some first suggestion for explanatory conditions. As I ask a y-centered research question (how the outcome can be explained), I am faced with a myriad of possible conditions. To narrow possible conditions down, I view my research question through the lens of a simple bargaining model and three theoretical perspectives: A legal, a social mobilization and a business management perspective. In this way, I integrate different research fields, which – I argue – is necessary to understand the dynamics between local actors and foreign companies.

At the outset of my framework, it is necessary to clarify my metatheoretical considerations (chap 3.1). In the next step, I construct company-community relations as an ongoing bargaining process, which sheds light on the asymmetrical power relations that are often at play in interactions between local actors and foreign investors (chap 3.2). Chapter 3.3 then introduces the three theoretical perspectives on answering my research question and central models discussed in the respective literature. Chapter 3.4 finally combines these three perspectives into one framework and suggests central conditions. Finally, chapter 3.5 summarizes the framework, discusses its limits as well as its reach.

3.1 *Metatheoretical considerations*

Before starting to map out my analytical framework, I will discuss two basic assumptions and meta-theoretical considerations. First, (chap 3.1.1), my framework assumes that social actors act according to what is rational for them. I employ the concept of bounded rationality, which for me has two implications: First, actors always act in spaces of imperfect information and second, what is rational is defined by cultural socialization of actors. In consequence, what is rational behavior for a company might not be rational for an affected local community. Second (chap 3.1.2), my theoretical framework rests on the idea of configurational causality: While I do as-

sume that causal mechanisms can be identified, I believe that relevant conditions appear in different configurations, which can lead to the same or different outcomes.

3.1.1 Bounded rationality

My research question deals with human behavior: What do local actors do? How do they use legal mobilization? What does the company do? Do they give in or ignore claims of affected communities? Consequently, I need an underlying idea of how social behavior can be explained. I use the concept of bounded rationality, which assumes that actors act according to what is rational to them, even though that might not follow purely maximum utility assumptions.

The concept of bounded rationality was introduced as a more realistic version of the utility-maximizing understanding of rationality:

“Bounded rationality is simply the idea that the choices people make are determined not only by some consistent overall goal and the properties of the external world, but also by the knowledge that decision makers do and don't have of the world, their ability or inability to evoke that knowledge when it is relevant, to work out the consequences of their actions, to conjure up possible courses of action, to cope with uncertainty (including uncertainty deriving from the possible responses of other actors), and to adjudicate among their many competing wants.” (Simon 2000: 25)

For my dissertation, it is not necessary to go into more detail about the various ways in which bounded rationality and behavioral choice theories have been modeled, theorized and studied empirically (Jones 2003; Gigerenzer/Selten 2002). Instead, I rather use the concept to think about two boundaries of maximum optimizing decision-making in cases of large-scale land deals: Insufficient information processing capabilities and the socio-cultural socialization of actors.

All human decisions are made in settings of insufficient information, as actors do usually not hold universal knowledge about their complex environments. However, even if they possessed the most relevant information to make a cost-benefit calculation, cognitive constraints will keep actors from doing so in a rational-maximizing way. First, actors might simply lack the expertise and the knowledge to interpret available information and draw conclusions. Furthermore, people often follow ‘wishful think-

ing' and ignore information that counters their preferences and wishes for the future. Essentially, "[w]e see what we want to see" (Skovgaard Poulsen 2015: 17). In addition, actors often chose 'default options' over alternatives, which might be more beneficial but more complicated to achieve. Overall, instead of carefully weighing pros and cons, social actors often take cognitive shortcuts, which might result in less favorable outcomes (Skovgaard Poulsen 2015: 17–25).

These dynamics can undoubtedly be found in large-scale land deals: They are often closed in a hasty manner, miss transparency and affected communities often only receive insufficient information (Cotula/Vermeulen 2011: 44). In many cases, locals lack full awareness of the implications – both positive and negative – when signing large-scale land deals. Furthermore, rural communities in developing countries often lack 'viable economic alternatives' (Rutten et al. 2017: 8) and the legal and economic expertise to judge an investment. As a consequence, they might sign a land deal to get the lease money even though it might not be high enough to cover the value that is lost through leasing the land (Millar 2015: 1708).

Cognitive shortcuts also apply to companies' decision-making. A high number of failed agricultural investment projects (GRAIN 2018) and projects, which are struggling financially⁹, shows that investing companies often fail to make proper cost-benefit calculations themselves. Problems are caused, among others, by host country policies, missing infrastructure, missing access to finance, land disputes and management issues (World Bank 2014: 17). Studies show that "from the perspective of the investor, land acquisition is unlikely to be the most profitable business model" (Liu 2014: iv), yet companies pursue them. A purely rationalist-optimizing view on human behavior would therefore not be able to explain both the behavior of investors and affected communities.

If people use cognitive shortcuts to make decisions, how are these shortcuts shaped? One crucial element is cultural socialization. In this context, culture can be understood as:

"[T]he ideas, values, beliefs, behavioral strategies, perceptual models, and organizational structures that reside in individual brains, which can be learned by other individuals through imitation, observation,

9 A study surveying 39 mature agricultural investment projects in Africa and South-east Asia companies found that 55 % were not profitable in financial terms (World Bank 2014: 17).

(plus inference), interaction, discussion, and/or teaching” (Henrich et al. 2002: 344)

Oftentimes, groups share a similar culture, but we can also find subcultures and differences among groups. At the same time, culture is nothing fixed but can evolve and change over time. Cultural socialization leads to individuals taking certain cognitive shortcuts, which are in line with their distinctive cultural norms when making decisions (Henrich et al. 2002). Frequently, culture is linked to geographic spaces. However, certain narratives or assumptions can also be found transnationally. Severine Autesserre for example showed that interveners, who work in peacebuilding interventions often follow the same or similar assumptions about how peacebuilding is supposed to work, regardless of their country of origin. They have been socialized into a specific work environment (Autesserre 2017: 120).

For the context of large-scale land investments, this means that not only the different cultures of origin and host country meet but also the different cultures found in a transnational corporation versus the way an investment is understood locally. Foreign agricultural investors often believe in the superiority of agribusiness over small-scale farming (Schönweger/Messerli 2015; Neef 2014: 195) and in their ability to contribute to development in poorer countries through economic rationality and technology (Calvano 2008: 798). Local communities, on the other hand, usually interpret transnational corporations and the promises made according to their cultural framework. Through ethnographic research in a large-scale land deal in Sierra Leone, Gearoid Millar showed that affected communities interpreted their relationship with the company through the lens of the existing patron-client system. Local people perceived the transnational investors as one of the patrons, who will ‘help’ them, and expected all kinds of benefits (Millar 2014: 72–78). In many instances, transnational corporations are perceived by local communities as being “insensitive to their non-economic needs” (Calvano 2008: 798). The meeting of different ‘cultures’ with their underlying norms, ideas and assumptions, poses a considerable challenge to investor-community relations and can easily lead to misunderstandings.

Overall, my concept of bounded rationality is built on the finding that humans use cognitive shortcuts in decision-making. One decisive factor for how an actor evaluates a situation is their cultural socialization containing certain norms and assumptions about the world. At the same time, this does not mean that outside factors and the environment do not play a role. I assume that causal conditions can be identified as relevant for certain choices. Yet, the concept of bounded rationality does show me that I have

to consider the characteristics of social actors when theorizing about their decision-making.

3.1.2 Configurational thinking

Configurational thinking, also referred to as set-relational, is often the basis of qualitative research, even if it is not made explicit (Ragin 2010: 2). On the most basic level, it rests on the assumption that social outcomes can be explained by a number of interrelated conditions, which can work differently in different contexts. Using this line of thinking in my dissertation enables me to identify causal mechanisms, while at the same time taking seriously the various settings in which large-scale land deals take place.

Configurational understanding of causation developed in differentiation to dominant quantitative research. Central to quantitative thinking is the idea of independent causal factors, which can be analytically separated (Ragin 2010: 112), and, which have a symmetric correlatory effect: “an increase in the independent variable prompts an increase in the dependent variable and [...] a decrease in the independent variable coincides with a decrease of the dependent variable” (Rohlfing 2012: 47–48). In contrast, a configurational approach is interested in how conditions produce different outcomes in different combinations and contexts (Ragin 2010: 114). Additionally, symmetry is not assumed: Just because a condition causes a particular outcome, does not mean that the outcome would not be there if the condition would be absent (Ragin 2010: 15).

The underlying assumptions of configurational thinking can be summed up (Blatter/Haverland 2012: 80):

- “almost all social outcomes are the result of a combination of causal factors;
- there are divergent pathways to similar social outcomes (equifinality); and
- the effects of the same causal factor can be different in different contexts and combinations (causal heterogeneity).”

By focusing on the complexity of individual cases, configurational thinking is more holistic and more focused on ‘how’ things take place (Ragin 2010: 109). Instead of speaking about variables, configurational thinking uses the terms conditions and outcomes.

As such, configurational thinking helps me with my research question, which is somewhat exploratory. As outlined in chapter 2.3.2, existing em-

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pirical research is not conclusive under which conditions a more favorable legal situation can help local actors in protecting their interests. There is no linear relationship between legal reform and better outcomes for local actors, even though policymakers and academics assume some kind of link. At the same time, the contexts and the characteristics of large-scale land investments vary considerably. Identifying central success conditions and their combinations, which might play a different role in different settings, seems to be fitting. It enables me to point out relevant factors, which should be taken into consideration by other researchers as well as by policymakers, without making overly simplistic predictions and denying the social complexity of each case (Berg-Schlosser et al. 2009: 6).

In consequence, my research does not aim to identify the ‘net effect’ of a factor but instead focuses on ‘causal complexity’ (Ragin 2010: 6). Overall, the aim of my research is to identify “different contexts and conditions that enable or disable” (Ragin 2010: 5) local actors in successfully using legal mobilization vis-à-vis TNCs.

The final objective of a configurational approach is to identify “the causally relevant conditions that combine to produce a given outcome” (Ragin 2010: 109), also referred to as the configuration. These configurations can be expressed through formulas, but can also be depicted in so-called truth tables.

In many cases, configurational thinking implies the use of Qualitative Comparative Analysis (QCA). However, instead of applying QCA in my analysis, the configurational approach supplies me with a causal logic and a language, which will help me to systematize my empirical findings.

3.2 *A bargaining lens towards company-community relations*

My framework rests on the assumption that local actors and transnational corporations investing in their land find themselves in an interactive and ongoing bargaining situation (Rutten et al. 2017; Shohibuddin et al. 2016). This chapter will introduce this approach (chap 3.2.1) and discuss the consequences such an approach has for answering my research question (chap 3.2.2).

3.2.1 Background: bargaining theory

This chapter provides a short overview of bargaining theory. I use the theory as a heuristic tool that provides me with a particular lens on community-company relations; therefore, I do not go into details on bargaining strategies or game-theoretical modeling. Instead, I focus on the conceptualization of bargaining power and asymmetrical bargaining situations, which is most relevant for thinking about large-scale land deals. Instead of only looking at actual negotiations, I use the bargaining approach to describe the whole situation.

Generally, a bargaining situation emerges between two parties who need to negotiate about something to achieve the desired outcome. Central to the definition of a bargaining situation is the interdependence of two actors, which can take the form of competition over scarce resources (Lewicki et al. 1997: 31). Yet, these situations are also an “opportunity to collaborate for mutual benefit” (Nash 1950: 155).

In the literature, the classic example to describe simple bargaining situations is a buyer-seller setting, where two actors bargain for a price (Lewicki et al. 1997: 32; Hopmann 1998: 56). Speaking in abstract terms, actor A (the buyer) prefers a price at point a, whereas actor B's (the seller) optimal outcome would be price b. However, both actors would be able to agree on a different price, but only to a certain point – the resistance point. These are marked with a' and b' along the issue dimension.



Figure 1 Basic bargaining situation

(adapted from Hopmann 1998: 55)

The resistance point is determined by the Best Alternative To a Negotiated Agreement (BATNA), meaning the point at which no agreement would be more favorable for an actor than agreeing to any kind of outcome. Fisher and Ury, who coined the term, argue that knowing one's BATNA is vital in protecting actors against deals, which harm them. In these instances, leaving the negotiations is a better option (Fisher/Ury 2012: 99–102). All agreements between a and a' would be an acceptable outcome for A, while all points between b and b' would leave B better off than without an agreement. The space between b' and a' is the bargaining space in which a

mutually beneficial agreement can be reached. The bargaining process itself is then described as a process of offers and concessions until the two parties reach a settlement point, which is (ideally) located in the bargaining space, therefore leaving both parties better off than without an agreement (Fisher/Ury 2012: 32–33).

This model is overly simplistic in two regards: First, issues are usually far more complex and might not easily fit on a continuum (Hopmann 1998: 76). Second, the model implies rational choice actors, for whom we could objectively identify a mutually beneficial arrangement. However, as described in chapter 3.1.1, actors usually decide in situations of imperfect information and according to their own cognitive biases. Nonetheless, I can use the model as a lens for viewing relations between local actors and companies and reflect upon their bargaining power.

From a bargaining perspective, power is relational and based on dependence. In this relational understanding, the power actor A has over actor B is the dependence B has on A in fulfilling its goals (Emerson 1962). Balanced relationships are those relationships in which the dependence on each other is more or less equal, while a difference in dependence marks asymmetrical relations. In line with my bounded rationality approach, social actors cannot have an objective understanding of how much power they have over another actor; instead, they have perceptions about their power relations. At the same time, material factors still play a role (Zartman/Rubin 2000: 13). Essentially, perceived power is essential for actors' behavior but is also linked to the material reality of the world. Power perceptions usually build on considerations about the distribution of capabilities and resources (Rubin/Zartman 1995: 350).

Research shows that power differences usually have important implications. It is generally accepted that more powerful parties are more likely to have their interests addressed, while the demands of the weaker party are not considered. Strong actors are less incentivized to care about the interests of lower-power parties, which in turn are more reluctant about voicing their views (Wolfe/McGinn 2005: 4–7). Nonetheless, there is some evidence that weaker actors are at times able to change the power relations and might reach a favorable agreement (Rubin/Zartman 1995: 357). In some cases, ideologies of resistance (weapons of the weak), in which the weaker party acts assertively and forms coalitions with other weak actors, can help to overcome power imbalances (Rubin/Zartman 1995: 352). Besides, awareness for interdependence enhances the motivation to search for mutually beneficial agreements. Actors realize that it will help their

prospects if they help the other party to achieve their goal (Wolfe/McGinn 2005: 15).

Overall, the research shows that power imbalances often result in a better outcome for the powerful party; however, power relations and their perceptions are not set in stone and can be changed throughout a bargaining process.

3.2.2 Local actors – TNC relationship: an interactive bargaining process

A bargaining lens helps me to theorize the relationship between local actors and foreign investors. It makes visible power potentials but also power asymmetries between the two parties. However, the notion of a bargaining situation implies two preconditions: First, there needs to be actual possibilities for interaction between local actors and transnational corporations. Second, interdependence between the two actors has to exist. I will show that these two preconditions are met in most cases of large-scale land deals before I discuss the issue of bargaining power.

The first precondition is usually fulfilled, even though in some cases only at later stages of the investment when operations have started. Local actors, even though it might only be a minimal number of people, are usually consulted at some point of a large-scale land deal (Vermeulen/Cotula 2010: 907). These consultations are often not very inclusive, fair or broad (Cotula/Vermeulen 2011); nonetheless, they can present a window of opportunity in which local actors can actively negotiate for a better lease agreement or deny the signature.

Even when there are no or only limited consultations before a lease agreement, more interactions are inevitable once the investor starts operations. Local communities often live on or close to the plantations. They are a source of labor, but they are also affected by the plantations in terms of pollution, reduced access to land and water sources. Contestation against company operations, inter or intra-community conflicts as well as community-government conflicts occur in many places (Borras/Franco 2013: 1730). Companies usually make changes to their initial plans and try to adapt to the local conditions. Rather than seeing large-scale land investment deals as a fixed deal, which is then simply implemented, it makes more sense to conceptualize them as an interactive and ongoing bargaining process (Shohibuddin et al. 2016: 109).

The second precondition, interdependence between the two actors, is mostly met as well: Transnational corporations depend on the cooperation

of local actors not just to gain access to the land, but also to keep a plantation running. When starting consultations with local actors, TNCs have usually invested considerably in a project. They have, in many cases, already signed an agreement with the host government about a particular area, and have started exploration. The more the company has invested in a proposed investment, the more 'location-dependent' (Cotula 2009: 79) they are on local actors, who could, in some way or the other, deny them access to land. Local actors can potentially sabotage plantation equipment or infer considerable reputational costs through national and international campaigns. Even more, investing companies rely on the active cooperation of the local population to recruit labor or to combat bush fires.

Local actors often strive to profit from rents, jobs and corporate social responsibility projects (Borras/Franco 2013: 1735). At times, they also want the investor to leave. For both goals, they are dependent on the actions of the transnational corporation. In most instances, local actors do not have the option of choosing between different investors, weakening their bargaining power (Vermeulen/Cotula 2010: 913). Still, both sides are dependent on each other in fulfilling their goals. A large-scale land investment can consequently be conceptualized as a bargaining situation between a transnational corporation and local communities (Rutten et al. 2017), even if it often is a asymmetrical one.

The described interdependence between local actors and investing firms shows that both sides hold some degree of bargaining power. Companies are dependent on the local population for land, labor and the functioning of the plantations. In contrast, local communities are dependent on the financial investment, jobs and other development opportunities represented by the company. Yet, in reality, the power is usually distributed asymmetrically. Local populations affected by foreign large-scale land investments are usually marked by socio-economic or political marginalization. Despite the trend of urbanization worldwide, most of the world's poorest and food-insecure people live in rural areas (Borras 2009: 6–7). It is in this context that many land deals in developing countries emerge.

Local actors often welcome investors initially, as they are desperate for any kind of investment and financial capital. However, local understandings of lease or contract growing agreements and their consequences are often limited (Cotula/Vermeulen 2011: 44). At the same time, TNCs come equipped with international legal advice (Vermeulen/Cotula 2010: 913) and usually the backing of national elites (Keene et al. 2015). In these situations, community members often feel that they do not have the option to reject a proposed lease agreement, even when they are consulted (Gingem-

bre 2015: 566). They express that they might simply not be powerful enough to fight for their interests as this account of an Ethiopian smallholder shows: “We cannot wrestle with these rich investors... we know that they have a link with and support from the government. If we wrestle with them, it is obvious that we will lose” (Ethiopian smallholder cited in Moreda 2015: 527). This view represents many accounts of large-scale land deals, in which local smallholders do face a powerful outside investor.

By constructing large-scale land deals as a bargaining situation, the emphasis is put on opportunities for local actors to improve their position, while at the same time considering the existing power differences. Rather than seeing local communities as mere victims of neoliberal expansion into rural spaces, their agency is stressed. They become central actors, who hold considerable power but are often not able to translate the power into a more favorable outcome. Against this theoretical background, my research question can be read in a new light: How do local actors use legal mobilization as a way to increase their bargaining power vis-à-vis companies?

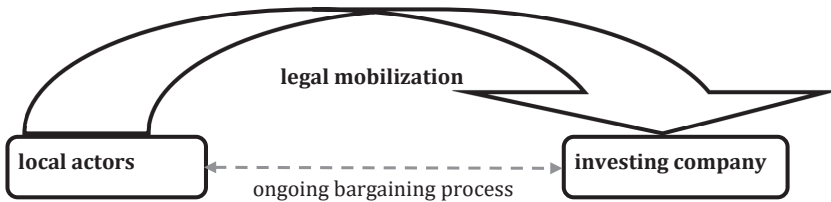


Figure 2 The research question

In order to answer the question, I will now turn to three different perspectives on this question.

3.3 Three theoretical perspectives

Three theoretical perspectives follow the basic bargaining model and my research question. As I am interested in legal mobilization, a legal perspective is the most obvious choice. This perspective suggests that a favorable legal opportunity structure should translate into legal mobilization success for local actors (chap 3.3.1). However, this rather static view needs to be complemented by taking the agency and interaction of local actors and investing companies into account. I consequently discuss a social mobiliza-

tion perspective on the characteristics and activities of local actors (chap 3.3.2), before I introduce a business management perspective with the use of the stakeholder salience model (chap 3.3.3).

3.3.1 Legal perspective

The first and probably most apparent perspective is on legal norms. Viewed from such a perspective, local actors should be successful in their legal mobilization attempts if the law is on their side. Laws that protect formal and informal tenure rights, grant smallholders veto power and ensure that contracts are non-exploitative should lead to investments that are more favorable to the local population and help local actors in achieving their goals. I use the term legal opportunity structure (LOS) from the legal mobilization literature to refer to the opportunities presented by laws and regulations. After introducing the term, I will offer a conceptualization of the LOS, which will help to describe the potential ‘menu’ for the legal mobilization attempts of local actors.

The concept of legal opportunity structure (LOS) draws heavily on the concept of the political opportunity structure (Vanhala 2012: 526–527). The general idea behind the political opportunity structure is that an open political system creates more opportunities for societal actors to influence state policies than a more closed system (Hilson 2002: 242). Similarly, “the 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: 527). It asks “what may be litigated, who can litigate and where and when such litigation can occur” and focuses on “the practical and strategic situation within which groups decide whether or not to become active in the legal arena” (Vanhala 2012: 526–527). Studies of legal opportunities suggest that a favorable LOS makes it more likely for social movements to choose legal measures instead of other strategies (Hilson 2002; Fazio 2012) and can potentially help marginalized groups advance their political interests (Wilson/Rodríguez Cordero 2006). Different studies have different understandings of the legal opportunity structure. Some use the term broadly to include a movement’s identity (Jacquot/Vitale 2014), the strength of one’s own allies, the strength of the opponent and existing cultural and legal framings and counter-framings (Andersen 2009). In contrast, I use a narrow approach to LOS representing the legal norms in a country, its statutory law, customary law, policies and legal decisions.

Even though I only include legal elements in my understanding of the legal opportunity structure, I still follow a broad understanding of legality, as outlined in chapter 1.1. This comprehensive understanding of legality enables me to not only focus on national laws but also to include customary and local regulations, which might not be formalized but are understood locally as binding rules. Furthermore, I can add ‘non-state soft law’ (Olsson 2013: 190), which is necessary if I want to consider the potential role of private-sector driven regulation like certification schemes. In this way, I follow a pluralistic understanding of the legal setup:

“[T]he legal order is pluralistic rather than monolithic. Not only is official state law a maze of diverse, indeterminate, and often contradictory legal traditions, but in addition a multitude of relatively autonomous ‘indigenous’ law traditions contend for preeminence within the many subculture and institutional terrains of society“ (McCann 1994: 8)

The following categorization is only one possibility to get some order into these overlapping webs of legal norms. I will use two dimensions to do so: the degree of formalization and the different levels of law.

The degree of formalization considers the legal nature of the source of law. In international law, this differentiation is often referred to as ‘hard’ and ‘soft’ law (Blutman 2010). Treaties between states are considered hard law, as they are a *“form of legal source recognized by international law”*¹⁰ (Blutman 2010: 606). In contrast, soft law refers to norms that might be of legal relevance, which are, however, not expressed in a formal legal source such as a convention (Olsson 2013: 185).

However, even international binding mechanisms are not necessarily ‘hard law’ in a very narrow sense, because “in the international realm, even binding judicial channels typically lack effective enforcement authority” (Graubart 2008: 33). A clear distinction between hard and soft law is consequently often difficult and it makes more sense to think of the differentiation as a continuum rather than as a dichotomy.

Generally, private governance initiatives by companies, the financial sector or civil society actors are not highly formalized, as they are typically not globally obligatory. Some refer to these initiatives as ‘non-law’, as they are not adopted by states; however, there seems to be an “increasingly blurred boundary between the public and private domains” (Olsson 2013: 190),

¹⁰ Usually this is understood to mean the sources officially listed by art 38(1) of the Statute of the International Court of Justice (Olsson 2013: 185).

making the distinction between international ‘law’ and ‘non-law’ problematic. An example of hybrid forms of governance are the private sector driven sustainability standards like the RSB and the RSPO principles. They are among several certification schemes, which are accepted by the European Union to import biofuel. While companies, who want to import biomass to the EU, can choose from a number of certification schemes, certification is obligatory. The combination of the private sector initiatives and the EU regulations make up a public-private hybrid regime (Schleifer 2013). In consequence, I do not exclude private sector driven regulatory frameworks but simply think of them as less formalized rules.

I use the dimension of formalization not only for the international level but also for the national and sub-state level.

Using the degree of formalization for the national realm has the advantage that I do not solely focus on statutory laws, which might not contain regulations for foreign investment in land. Instead, it is often other policy documents such as investment policies, which do formulate rules for foreign investors, for example, regarding local consultation procedures, rent payments or tax exemptions (Cotula/Vermeulen 2011: 41–45). These regulations might be exact and even obligatory to a certain extent. However, they are usually less formalized.

On the local level, 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). Customary tenure rights are often not formalized, meaning that the state does not officially recognize them. Nonetheless, they might be highly institutionalized within local social relations and provide locals with local security of tenure (FAO 2002: 11). It consequently makes sense to include these locally understood rules in regards to land rights in the conceptualization of the legal opportunity structure – while at the same time making clear that they are less formalized than national statutory law.

Overall, large-scale land-based investments cut across these different levels of law, which are often interconnected in complex ways. Typically, a 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: 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 formalization (high-low).

Table 3 Conceptualization of the legal opportunity structure

		Degree of formalization	
		high formalization	low formalization
Level of law	International		Voluntary standards (through IOs or private sector)
	National	National statutory law	National policies and guidelines
	Local		Local customary law

As a heuristic tool, the table helps to get an overview of the potential for legal mobilization. Here, first gaps might already appear in many instances. 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: 46). At the same time, missing institutional opportunities on one level could potentially be compensated by referring to another level (Hilson 2002: 239). “In other words, groups employ international law when using local laws is not enough. International law, then, provides extra political leverage to domestic social movements” (Massoud 2006: 10). However, if local actors are able to mobilize international law depends, of course, on additional factors – first and foremost, the mobilization capacities of local actors, which I will deal with in the following chapter.

3.3.2 Social mobilization perspective

A social mobilization perspective focuses on the capacities of local actors to access and use the legal opportunity structure. The perspective denies an overly simplistic legal view that the existence of particular legal norms automatically has an inevitable outcome. Instead, “laws are interpreted, disputed and implemented by numerous state and non-state actors at multiple levels, beginning with the very local” (Franco 2008a: 992). The existence of favorable laws does not imply that social actors are automatically able or willing to apply them (Vanhala 2012: 528). To the contrary, there are considerable barriers to using legal mobilization – such as missing knowledge and missing resources. I discuss these challenges in the context of large-scale land deals before I turn to the mobilization of networks as a way to overcome these barriers. I will introduce the boomerang model as a specific way to conceptualize the role of support networks.

The first and probably most apparent barrier to accessing legal norms is knowledge. If you don't know about the laws, regulations and procedures, you cannot refer to them. The concept of legal empowerment, which describes "the process through which the poor become protected and are enabled to use the law to advance their rights and their interests" (Commission on Legal Empowerment of the Poor 2008: 26), contains information and education as a central cornerstone. However, many people lack education about the rights themselves or the necessary background education to understand laws. People usually need a 'rights consciousness' to be able to use the laws.

Illiteracy and missing language skills add to the problem. In many developing countries, legislation is written in the official language, which might not be spoken locally (Commission on Legal Empowerment of the Poor 2008: 32–33). These language issues can be found in many large-scale land-based investments as the lease agreement is usually in the official language – often in English, French or Portuguese. Consequently, the local population often fails to 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 norms play a considerable role as well (Gallagher/Yang 2017). In the case of communities affected by large-scale land-based investments, it can be decisive if they hold this

expert knowledge, which can be gathered through previous experience (Gingembre 2015: 572).

The second barrier is the availability of material and organizational resources. “In most cases, pursuing a legal campaign is a lengthy, costly and risky process” (Vanhala 2012: 526). Socio-legal studies show that actors with better financial and organizational resources have better chances in litigation cases, acknowledging that the courtrooms do not present equal playing fields for all (Epp 1998; Galanter 1974). Getting legal counsel, developing a legal strategy, financing supportive research or generating publicity for a case all require substantive resources (Epp 1998: 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, which are typically located outside the host countries (Cotula 2011: 41), are not affordable to these actors. Foreign investors, on the other side, come equipped with extensive legal advice and financial resources (Vermeulen/Cotula 2010: 913).

One way of overcoming these barriers and advancing a legal mobilization strategy is through social networks. Personal networks can be helpful, for example, in gaining legal expertise through informally connecting to a lawyer (York Cornwell et al. 2017). In addition, networks are essential for securing funding, exchanging ideas and know-how, but also for building alliances in common struggles (Epp 1998: 19; Andersen 2009: 209). If these alliances are formed with actors on a higher level – such as national and international civil society actors, they can be conceptualized according to the boomerang model.

In its original version, the boomerang model was developed to capture the cooperation between national NGOs from developing countries, who use their connections to transnational civil society actors and NGOs from other states to indirectly pressure the government of the original country (Keck/Sikkink 1998: 12–13). The assumption behind the model is that “international contacts can amplify the demands of domestic groups, pry open space for new issues, and then echo back these demands into the domestic arena” (Keck/Sikkink 1998: 13). These contacts are especially necessary in cases in which domestic governments are not responsive or local actors are somehow blocked from pressuring their governments directly (Keck/Sikkink 1998: 12).

The boomerang model is broad enough to be applied to local-national dynamics (Kraemer et al. 2013) as well as companies as the main addressee (McAteer/Pulver 2009). Adopted to my research question, this means that

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networks could help local actors in gaining access to legal mobilization strategies, which they can then use to directly or indirectly influence the company. In many cases, these networks will consist of civil society organizations like farmers' associations, local, national and international NGOs, but also members of the diaspora, journalists, researchers, local authorities or politicians (Polack et al. 2013: 32–39). Personally knowing political or administrative 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: 16), can provide an important starting point for enforcing one's rights. In consequence, networks are a valuable source to practically gain access to legal institutions for communities affected by large-scale land-based investment projects.

Networks, which are helpful for local actors, can be pre-existing organizations such as farmers' associations or NGOs, working in a region. In many instances, networks between local smallholders and civil society actors need to be created in the face of an incoming investor or raising grievances. These might either happen through local actors reaching out to national and international NGOs, or through NGOs approaching affected communities and offering their support. A critical literature on transnational NGO advocacy has rightly pointed out that many local groups do not get the attention and support of transnational civil society and have to sell their cause in a certain way to appeal to the logic of international NGOs (Bob 2005). In the realm of large-scale land deals, support from international NGOs might be more readily available as the civil society mobilization around the issue has been immense since it appeared on the agenda in 2008. However, this does not mean that the goals of civil society organizations and local actors are necessarily the same, which might lead to misrepresentation of local demands by NGOs (Gilfooy 2015; Boamah 2011). Consequently, local actors need to be aware of the risks of paternalistic behavior of supportive organizations (Schramm/Sändig 2018).

Yet, while the cooperation with civil society actors can be problematic for local actors in some cases, I argue that some kind of support network is necessary for local actors to access the LOS.

3.3.3 Business management perspective

Finally, a business management perspective focuses on the investing companies and explains their reactions to local demands and their legal mobilization attempts. Stakeholder salience models try to understand why firms

listen to certain outside actors and not to others: Actors that are regarded as ‘relevant stakeholders’ are given more attention. In the following, I will explain this approach by focusing on a revised stakeholder salience model (Ali 2017), which uses the three attributes of power, legitimacy and organization to differentiate the ‘salience’ of actors.

From a business perspective, managers face the “empirical reality that virtually anyone can affect or be affected by an organization's actions” (Mitchell et al. 1997: 854). So, whom or what should they pay attention to? The stakeholder salience model, first developed by Mitchell et al. (1997) and later revised and refined by others, represents practical advice as well as an analytical frame for understanding companies’ decisions. In its revised version by Ali, the combination of the three attributes power, legitimacy and organization¹¹ of actors helps to understand their ‘salience’ for the company. I use this model as an analytical tool to understand companies’ reactions to local demands. In consequence, the attributes are not ‘objective’ characteristics of potential stakeholders, but rather subject to the judgment of the respective management of a company¹².

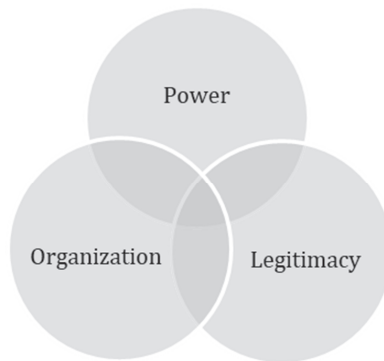


Figure 3 Stakeholder salience model following Ali (2017: 163)

11 In the original version, Mitchell et al. include ‘urgency’ instead of organization (Mitchell et al. 1997). However, the ability to create a certain urgency can be subsumed under the factor of power, leading Ali to abandon this factor and instead introducing the factor of organization (Ali 2017: 154).

12 This is not the approach taken by Ali, who aims to create a normative model of stakeholder salience (Ali 2017). I rather follow Mitchell et al. who emphasize the cognitive dimension of the model.

Power is probably the most obvious. An actor who holds considerable power over the company, for example, in terms of funding or being able to incur high costs, is more likely to be taken seriously. Corporate power is often defined in line with a dependence perspective described in the chapter on bargaining theory (chap 3.2.1). “When stakeholders control access to some needed resource, the stakeholders have the ability to put those resources at risk and thereby endanger the firm’s survival.” (King 2007: 24). This power is not necessarily stable but can change over time (Mitchell et al. 1997: 866). One way in which social actors try to influence a firm is, for example, through reputational damage, which might discourage investors and lead to falling stock prices (King 2007: 40). Power can, therefore, be exerted indirectly. At the same time, companies differ in their vulnerability to these types of collective action due to their funding structure, but also the respective industry¹³, their main markets or their country of origin (Garvey/Newell 2005: 397–398).

The factor of legitimacy is more difficult to grasp. Mitchell et al. rely on Suchman in their definition in which legitimacy is “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (Suchman 1995 cited in Mitchell et al. 1997: 866). This definition shows that legitimacy is not only a matter of perception but is incrementally linked to the cultural and normative mindset of managers who ascribe legitimacy to claims or not. In consequence, the attribute of legitimacy does not reflect some independent normative assessment but instead follows the impressions of high ranking company staff (Ali 2017: 164). Against this background, the demands of local communities might not be automatically regarded as legitimate by TNCs. Transnational corporations often think of development in purely technical and economic terms. They view low-wage jobs as a benefit for the local population. In consequence, some companies regard demands and complaints by local communities as ungrateful (Calvano 2008: 798).

13 Generally, companies whose economic success relies a lot on ‘branding’ such as typical in the footwear or apparel industry are more vulnerable to reputational damage than other non-branded industries (Spar/La Mure 2003: 84–85). However, most cases of large-scale land deals are not part of the branded industries and the products such as crude palm oil or bioethanol are not directly bought by the final consumer but are usually further processed along the value chain. Classic consumer boycotts are therefore not a realistic option in the many cases of large-scale land deals.

Yet, companies have different approaches to local communities. These views are often linked to different corporate cultures and company identities (Waldron et al. 2013: 401).

“The distinct histories and cultures of firms also shape their perceptions of their responsibilities to the communities in which they invest; [...] The stance of corporations on these issues ranges from a position of non-engagement to reactive responses to demanded spaces through to more explicit commitments to formal ‘invited’ spaces for community participation.” (Garvey/Newell 2005: 398)

In consequence, different companies may ascribe different degrees of legitimacy to local actors and therefore respond differently to their demands.

The third attribute, organization, is linked to the recognition “that stakeholders who have mobilized themselves, created coalitions, initiated collective actions, and improved their position in the social network will have access to more resources, and will have more power over the target firms.” (Ali 2017: 161). Groups may have legitimate claims and might even have some potential power; however, if they are not organized into a collective voice their interests might simply not be heard (Ali 2017: 162). Just as power and ascribed legitimacy, the degree of organization can change over time.

In combination, the three attributes present the stakeholder salience model, as depicted in figure 3. Actors who are perceived to have all three attributes will be ascribed the highest salience (Ali 2017: 164). Their claims will trigger some reaction by the company. However, as has been described in chapter 3.2.2 local communities often lack decisive power resources and might furthermore lack the legitimacy in the eyes of business managers. Michell et al. refer to this type as ‘demanding stakeholders’. They “are the ‘mosquitoes buzzing in the ears’ of managers: irksome but not dangerous, bothersome but not warranting more than passing management attention, if at all” (Mitchell et al. 1997: 875). However, when legitimacy is added, this might well open up “access to decision-making channels” (Mitchell et al. 1997: 870). Consequently, the stakeholder model is not static and can help to conceptualize changes in stakeholder salience of actors and the subsequent responses by companies.

3.4 Explaining legal mobilization success

Looking at the three perspectives, certain overlaps and relationships become visible. I will discuss these relationships through the lens of bargain-

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ing power (chap 3.4.1), which will inform my understanding of three core conditions, which I will conceptualize in a second step (chap 3.4.2).

3.4.1 Bringing the three perspectives together

All three perspectives make valid assumptions about the conditions under which local actors will be able to pursue legal mobilization successfully. The legal perspective emphasizes the role of the legal opportunity structure. In contrast, a social mobilization perspective reminds us that local actors usually need some kind of support to access the LOS. The business management literature finally stresses the role of company characteristics, such as the corporate culture, in reacting to claims made by locals. I will integrate these three perspectives into one framework through discussing interactions and overlaps between the approaches using the lens of bargaining power.



Figure 4 Three theoretical perspectives

The starting point is the legal opportunity structure. It presents locals with different options for framing their claims and calling on institutions on different levels. When adding a social mobilization view, it becomes apparent that not all levels are accessible in the same way. 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 with local officials and politicians, which can help to enforce rights and procedures. Locals, therefore, have more access to customary law than to the national or international level. For these levels,

they are more likely to depend on the support of national and international civil society actors. In consequence, the availability of a support network becomes more critical for access to legal norms on the national or international level.

At the same time, one can link different levels of the legal opportunity structure to the business management perspective. According to the stakeholder salience model, companies are most likely to react to efforts that exert considerable power or legitimacy. In consequence, companies are most likely to react to formalized law, as legal sanctions and negative court decisions can considerably hurt business or even lead to a complete failure of the investment (Eesley/Lenox 2006: 772). Consequently, hard law provides local actors with considerable bargaining power vis-à-vis TNCs.

Less formalized forms of rules and regulations can still present opportunities for local actors through legitimizing their claims and demands. International norms and principles are likely to be more effective in this regard than customary rules, as company managers do not usually have a good understanding of local customary law and might not consider claims made in this regard as legitimate. It consequently seems likely that legal mobilization attempts based only on customary law will fail. This consideration underlines the need for support networks that are necessary if local actors want to use national or international soft and hard law. If referring to international soft law principles is helpful for local actors depends on the receptivity of the company to these issues. If the company's corporate culture and identity is defined through adhering to certain international norms, managers will regard credible claims based on these norms as more legitimate and are consequently more likely to act upon them. Besides, some international norms can also provide local actors with considerable indirect power: For example, in the case of the IFC standards, future funding of a company might rely on its compliance with the standards. Local actors might be able to use this indirect power to exert pressure on the company and improve their bargaining situation. However, once again, they are likely to rely on civil society support to do so.

These considerations show that there are different ways in which local actors can improve their bargaining power through legal mobilization. On the one hand, a favorable legal opportunity structure that provides them with hard law can help them to make legitimate and powerful claims. On the other hand, soft law can give local actors leverage, especially if a company is receptive to such claims, either because of the corporate culture or their funding mechanism. In both cases, local actors are likely to rely on some outside support network.

3.4.2 Conceptualization of core conditions

To make the three perspectives usable for my empirical research, I conceptualize three conditions: the national legal opportunity structure (NLOS), support networks of local actors (NET), and the company's receptivity (REC). Rather than defining single indicators, I discuss different ways in which a condition can be fulfilled¹⁴. As the context of cases and legal mobilization strategies can vary considerably, the conditions can take various forms. My conceptualization here, therefore, only provides some guiding questions instead of measurable indicators for my case studies.

The first condition derived from the legal perspective is the favorability of the *national legal opportunity structure* (NLOS). As discussed in the previous chapter, hard law can provide local actors with the most bargaining power. Legal norms that are precise, obligatory and delegated to an authority for implementation and enforcement can be used to force companies to change their behavior. In these cases, just the threat of action can be quite effective. Research showed, for example, “that tight environmental regulation causes manufacturing firms to attach more importance to environmental activist groups and adopt more preventive approaches to pollution management” (King 2007: 37).

I argue that only national law provides this kind of hard law hook in the case of large-scale land deals. None of the international regulatory efforts discussed in chapter 2.2 are legally binding for companies and states and most of them lack accountability mechanisms¹⁵ (Johnson 2016). While human rights treaties are higher formalized instruments than the CFS-RAI, the VGGT or private sector principles, locally applying human rights can be very difficult due to “the realities of a technical culture of rights-application” (von Bernstorff 2016: 72). In order to identify a right to food violation through large-scale land deals, detailed baseline data and extensive data gathering efforts are most likely needed. Some investments might present apparent human rights violations, for example, forceful displacement of people; many cases – especially in democratic countries – are, however, in a grey area where the breach of social and economic rights is

14 Blatter and Haverland describe these as functional equivalents, which can often only be defined in the context of the individual case study (Blatter/Haverland 2012: 64).

15 The certification schemes might provide some accountability; however, as discussed they only apply to companies who actively decide to adhere to the principles.

an issue of interpretation. In consequence, in most cases of large-scale land deals, international regulation does not present the power of hard law, which can only be provided by national legislation.

Therefore, identifying if a legal opportunity structure is favorable to local demands is mainly tied to national law. How helpful the national legal opportunity structure is for local actors depends on the demands they are making and is specific to the issue area. The NLOS could be favorable in labor rights protection but unfavorable when it comes to environmental concerns. As my main research interests lie in land rights protection and processes of negotiating land deals, I will focus on legislation in this regard. Following the bargaining logic, a favorable NLOS would provide local actors with a veto position over a land deal. The power to withhold consent can be used to achieve one's goals; yet, as described in chapter 3.2.2 the negotiation process is often perceived as very asymmetrical and local actors might lack the expertise to make fully informed decisions. Therefore, a favorable NLOS should contain further provisions to protect the interests of smallholders, who can then call on these regulations.

In addition, the land tenure system needs to be included in the analysis, as it might provide some actors with a veto right. Others, who might have customary rights, might not have them formally acknowledged by the state. These issues link back to debates about the regulation of large-scale land deals presented in chapter 2.2.

I will analyze the NLOS not on the case level, as I will do for the other two conditions; instead, I will evaluate the NLOS on the national level for each of the case study countries. To ensure that the findings from my empirical analysis link back to debates about international regulation, I will construct a 'collective optimum' (chap 4.1.1) through referring to human rights-based approaches to regulation. I will then use this collective optimum to evaluate national legal opportunity structures in the empirical analysis.

The second condition derived from the social mobilization perspective is the *strength of the support network (NET)*. There are different options of what a strong support network might look like. In the case that the national legal opportunity structure is favorable towards local goals, local actors still need help to claim their rights and trigger the enforcement of existing rules. One possibility would be direct or indirect links to those state officials, who are powerful enough to enforce existing laws and are open to helping local actors (O'Brien/Li 2008: 13). In other cases, local actors might rely on the help of a lawyer or civil society organization to under-

These are different ways in which networks support local actors in their legal mobilization attempts. How strong or weak the network support is, can, therefore, not be identified on an abstract level but only in the concrete empirical situation.

However, even managers following a corporate egoist logic might employ social corporate responsibility instruments as long “as it contributes to the externally perceived economic value of their firms” (Waldron et al. 2013: 402). The existence of some form of CSR measures or claims by the company to adhere to best practice principles alone can, therefore, not be regarded as a sufficient indicator for the receptivity of the company to local claims. Instead, broader company behavior and communication have to be taken into account. Possible indicators could be the amount of efforts put into community relations and grievance mechanisms, open and

transparent communication vis-à-vis local communities (Jahansoozi 2006) or previous behaviors from other projects (King 2007: 36). Furthermore, statements made by company personnel in regards to their general opinion of local actors can provide further insights into their perception of the legitimacy of claims made (Clarkson 1995: 97). Commitment to independent social auditing such as through private sector certification schemes or due to funding from banks following IFC rules can also be a sign for a more serious dedication to international principles than the mere mentioning of best practices. Companies that seek certification or receive funding from IFC regulated banks can be pressured through these instruments, as they can cause the company considerable economic costs.

Overall, there are two factors, which can be decisive for the receptivity of a company: A corporate culture that puts a lot of emphasis on being receptive to local demands or a corporate structure that provides additional leverage to local actors.

Table 4 Conceptualization of core conditions

Condition	Guiding questions for empirical research
NLOS favorab ← → unfavorable	Do local smallholders have the right to veto a large-scale land deal? Does the legislation protect customary land rights? Are there government regulations protecting local actors from entering into unfair contracts? (see further in chap 4.1.1)
NET strong ← → weak	Are local actors connected to administrative staff with the ability to enforce regulations and laws? Are local actors connected to lawyers who support them with legal advice or litigation? Are local actors connected to civil society actors who provide knowledge and resources to help them access legal arguments and institutions? Are local actors connected to civil society actors who create a broader campaign to pressure other actors such as governments, their agencies or banks to exert pressure on a company?
REC receptive ← → unreceptive	Does the corporate structure make the company vulnerable to economic pressure (through certification schemes or funding from IFC banks)? How open and transparent is the communication of the company vis-à-vis local communities? Do statements of company's managers imply an unreceptive or a receptive corporate culture? Are there previous examples in which the company acted unreceptive towards local demands?

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The table summarizes my conceptualization of my three core conditions. As my concepts need to be broad enough to accommodate a variety of empirical observations, the guiding questions only serve as a first orientation. In the case studies, additional context-specific information might indicate a condition as well and will be included in the research. For simplicity's sake, the conditions are presented as dichotomous; however, it makes sense to perceive them as continua, for which the threshold is not easily objectively defined.

3.5 Summary of the framework

This chapter will shortly summarize my framework and discuss its reach and limits.

Overall, my analytical framework incorporates a multi-perspective view on large-scale land deals. The underlying assumption is that local communities and investing TNCs find themselves in an interactive and ongoing bargaining process even though power relations are often asymmetrical to the advantage of investors. Legal mobilization in this relationship can be viewed from three perspectives: a legal (focusing on the structure), a social mobilization or a business management (focusing on either local actors or the respective company) perspective. Bringing the perspectives together enabled me to deduce three core conditions: the favorability of the national legal opportunity structure, the strength of support networks and the receptivity of the company. These core conditions will serve as the basis for my empirical analysis, which will specify the relationship between them and add possible additional conditions.

My analytical framework has the advantage that it is broad enough to be adaptable to a variety of empirical cases. I developed it with smallholder rights in large-scale land deals in mind, but it can be easily adapted to fit other issue areas such as environmental or labor concerns. Even more, the framework should also work in other kinds of company-community relationships, as long as some sort of interdependency between the actors is there.

The framework is based on the premise of the rule of law in a country. While this does not imply that laws get implemented automatically, it does assume that administrations or courts will respect legitimate claims based on legal rules and regulations in the respective country. Consequently, the framework might be of limited use in authoritarian systems.

Apart from the adaptability of the framework, it is also able to accommodate new conditions. Additional theoretical perspectives or empirical research can add conditions. My three core conditions can be seen as a starting point. My empirical analysis will point to additional conditions, which can be included in future research.

While my analytical framework is broad enough to apply to many empirical contexts, it does have limits in regards to causal mechanisms and predictability of outcomes. First, my three conditions can be linked through different causal pathways, some of which I discussed in the previous chapters. In other words, my framework does not describe the processes that are linking the three conditions in a generalizable manner. Instead, this is what my empirical research intends to do through tracing the processes in individual cases. Second, my framework has limited predictability due to the context-specificity and the interdependence of the three conditions. However, it is not the aim of the framework to be able to predict outcomes but rather to provide a systematic way of explaining the outcomes of legal mobilization attempts of local actors, without neglecting the empirical complexities of each case.