



The Global Land Rush: Markets, Rights, and the Politics of Food

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THE GLOBAL LAND RUSH: MARKETS, RIGHTS, AND THE POLITICS OF FOOD

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ABSTRACT

Across the developing world, ownership and use of agricultural land is changing hands at an astounding rate. Rural communities engaged in subsistence or pastoral farming are, in many cases, being pushed out in favor of large-scale investors. These investors are responding to a variety of global forces: some are securing their own food supply while others are capitalizing on land as an increasingly promising source of financial returns. Proponents argue that these investments can support economic development in host States while boosting global food production. But critics charge that these “land grabs” violate a number of human rights and will aggravate food and energy crises. Amidst mounting global protest, two dominant frameworks have emerged to assess and contest the global rush for agricultural land. This Article critically assesses both approaches.

Part I provides an overview of the drivers and impacts of large-scale land transfers, and the problematic land transactions involved. Part II sets out the contours of what I term the “market-plus” approach and of the rights-based approach—the frameworks assumed respectively by proponents and opponents of these deals. Part III analyzes key differences in each framework’s approach to rights and risks, and to land distribution. Part III also assesses the potential of each approach to effectively protect land users’ rights in light of the significant power dynamics at play. I argue that the market-plus approach tolerates and facilitates rights violations, whereas the rights-based approach sets a normative baseline that repudiates impermissible rights impacts and addresses key distributive concerns. The rights-based approach, however, struggles to implement its normative terms. Part IV proposes concrete reforms to help empower affected communities and argues that international actors must be more involved in ensuring rights protections.

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INTRODUCTION

In 2011, Saudi Star PLC leased roughly 25,000 acres of Ethiopia's most fertile farmland from the Ethiopian government to produce rice for export to the Middle East.¹ The investment capitalized on Saudi Arabian state subsidies for the foreign production of staple crops, which is part of the country's strategy to ensure its own food security.² The Ethiopian government signed the Saudi Star contract, and others like it, seeking to revolutionize domestic agricultural production, employ local farmers, and produce more food for local consumption.³ Ethiopian officials claim that land earmarked for agricultural development is "unused" or "under-utilized," and that no communities have been displaced as part of the land deals.⁴ But investigations reveal that the Ethiopian government has actively worked to remove communities from land that is earmarked for commercial agricultural development. According to a report by the Oakland Institute:

Prior to relocation, no community consultation was carried out, either by Saudi Star or the government. Villagers only knew that their land had been given to investors once the bulldozers began clearing the area. When they expressed concern to the government about the clearing of their ancestral lands, government officials reportedly replied, 'You don't have any land, only government has land.'⁵

Those evicted from their lands are struggling to secure housing, food, water, and income.⁶ Farmers have been relocated to areas where there are no farms or food, leading one displaced individual to comment: "Now we're living like refugees in our own country."⁷ As pressures mount on local communities, the Saudi Star is hoping to expand its investment to 500,000 acres within the next 10 years.⁸ The going rate for this land is approximately \$4 per acre per year.⁹

Since 2008, the Ethiopian government has leased out at least 8.9 million acres of land to foreign and domestic investors through arrangements like the Saudi Star contract, and another 5.2 million acres are currently on offer through the Ethiopian government's land bank for agricultural investment.¹⁰ In some regions, the government has plans to relocate 1.5 million people by 2013.¹¹ The relocation program or "villagization" process in Ethiopia's Gambella region—the site of the

¹ Beth Hoffman, *Saudi Company Leases Ethiopian Land for Rice Export*, THE WORLD, Dec. 27, 2011, <http://www.theworld.org/2011/12/saudi-arabia-leased-ethiopia-land-rice-export/>; Andrew Rice, *Is There Such a Thing as Agro-Imperialism?*, N.Y. TIMES, Nov. 22, 2009, <http://www.nytimes.com/2009/11/22/magazine/22land-t.html?pagewanted=all>.

² Rice, *supra* note 1; Oxford Analytica, *Saudis Renew Search for Food Security*, GULFNEWS, Apr. 23, 2009, <http://gulfnnews.com/business/opinion/saudis-renew-search-for-food-security-1.65122>.

³ Hoffman, *supra* note 1.

⁴ *WAITING HERE FOR DEATH*, *infra* note 10, at 18.

⁵ COUNTRY REPORT: ETHIOPIA, *infra* note 11, at 32.

⁶ Hoffman, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ Ed Butler, *Land Grab Fears for Ethiopian Rural Communities*, BBC WORLD SERVICE, Dec. 16, 2010. The \$4 per acre figure is based on the conversion of the \$10 per hectare amount cited in the article. One hectare equals 2.47 acres.

¹⁰ HUMAN RIGHTS WATCH, *WAITING HERE FOR DEATH: DISPLACEMENT AND "VILLAGIZATION" IN ETHIOPIA'S GAMBELLA REGION*, 3 (Jan. 2011)[hereinafter *WAITING HERE FOR DEATH*], available at http://www.hrw.org/sites/default/files/reports/ethiopia0112webwcover_0.pdf; see also *THE MYTH OF JOB CREATION*, *supra* note 22, at 2.

¹¹ The regions of Gambella, Afar, Somali, and Benishangul-Gumuz have been targeted for relocation. See *id.* at 19; see also *THE OAKLAND INSTITUTE, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: COUNTRY REPORT: ETHIOPIA 38* (2011)[hereinafter *COUNTRY REPORT: ETHIOPIA*].

Saudi Star investment—has been particularly devastating for indigenous communities cut off from sources of food, water, healthcare and education.¹² Roughly 70,000 people were slated to be moved in Gambella by the end of 2011.¹³ Many of these relocations have been forced and have taken place without meaningful consultation or compensation.¹⁴ The Ethiopian government has reportedly threatened, assaulted, or detained those resisting the relocation process.¹⁵ As of January 2012, government security forces enforcing the relocations were implicated in at least 20 incidents of rape.¹⁶

Because indigenous communities in Gambella lack formal title to the land they have traditionally occupied,¹⁷ they have no redress in the form of expropriation or compensation procedures under Ethiopian law,¹⁸ despite the Ethiopian Constitution’s strong recognition of customary rights of land tenure.¹⁹ The Ethiopian government’s claim that these lands are “uninhabited” or “underutilized” additionally thwarts the potential for constitutional and legislative protections.²⁰ The Gambella regional government promised basic resources and infrastructure in the new villages to which communities have been relocated, but investigations reveal “inadequate food, agricultural support, and health and education facilities.”²¹ The jobs created will likely not compensate for the number of people displaced,²² and water diverted from local farming and fishing to rice production may force locals to compete for water in addition to land.²³ These relocations also threaten many indigenous communities’ way of life.²⁴ For example, the indigenous Anuak community practices a shifting form of cultivation which is at odds with the sedentary nature of the relocation villages. Similarly, the pastoralist Nuer community must now “abandon their cattle-based livelihoods in favor of settled cultivation.”²⁵

These troubling developments threaten to destroy livelihoods and exacerbate widespread hunger and malnutrition in a country that is already well-known for its cyclical famines.²⁶ Yet investors have expressed little concern for the rights of host populations²⁷ and have instead praised Ethiopia for its low labor costs, tax and duty exemptions, relaxed regulations, and abundant amounts of “undeveloped” land.²⁸

¹² WAITING HERE FOR DEATH, *supra* note 10, at 3.

¹³ *Id.*, at 2.

¹⁴ *Id.*, at 2.

¹⁵ *Id.*, at 2, 34, 35.

¹⁶ *Id.*, at 2. According to Human Rights Watch, these incidents are reflective of the “Ethiopian government’s longtime tactic of stifling opposition to programs and policies through fear and intimidation,” and its “longstanding history of military abuses against the local population.” *Id.* at 32.

¹⁷ See WAITING HERE FOR DEATH, *supra* note 10, at 4.

¹⁸ *Id.* at 72.

¹⁹ See *id.* at 71.

²⁰ *Id.* at 4.

²¹ *Id.* at 2.

²² See OAKLAND INSTITUTE, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: THE MYTH OF JOB CREATION 2 (2011)[hereinafter THE MYTH OF JOB CREATION] (examining the number of jobs created compared to the number of jobs promised and concluding that such promises are often overstated and misleading).

²³ Hoffman, *supra* note 1.

²⁴ See WAITING HERE FOR DEATH, *supra* note 10, at 16-18.

²⁵ *Id.* at 3, 16-17 (noting that the Nuer community’s culture and livelihood is “based largely on finding grazing lands for the Nuer’s cattle.”).

²⁶ See *id.* at 46.

²⁷ See COUNTRY REPORT: ETHIOPIA, *supra* note 11, at 44 (In Ilea village in the Gambella region, “the Indian investor, Karuturi, has repeatedly stated that no land has been lost, and no local people have been displaced” as a result of Karuturi’s investment in Ilea. According to the local people, however, the village’s communal agricultural crops and also its royal cemetery were destroyed when Karuturi arrived in the village and began clearing the land.)

²⁸ See *id.* at 16. The government has also not placed any restrictions on investors’ water use, nor have investors completed environmental impact assessments for their projects. See *id.* at 1.

The Ethiopian experience is not singular.²⁹ In the past five years, interest in purchasing and leasing agricultural land in developing countries has skyrocketed.³⁰ The commodification of foreign land is admittedly nothing new—but the scale and intensity with which recent investments have proceeded is startling.³¹ Reliable measurements are difficult to obtain, and even figures derived from in-country empirical research may under-estimate the scale of investments because of constrained access to data or the exclusion of deals that are still under negotiation.³² All sources agree, however, that the amount of land being targeted for purchase or lease is dramatic. According to the World Bank Group,³³ foreign investors targeted more than 104 million acres of agricultural land between October 2008 and August 2009, representing nearly 10 percent of all non-cultivated arable land worldwide.³⁴ More than 75 percent of these deals took place in Sub-Saharan Africa.³⁵ Another study notes that close to 148 million acres of land were acquired in Sub-Saharan Africa in 2009 alone³⁶—an area the size of Germany and the United Kingdom combined.³⁷

This trend, which was facilitated by the 2008 food and financial crises, is being led by State and private investors, both domestic and foreign.³⁸ In some cases investments are to

²⁹ See, e.g., ALISON ELIZABETH SCHNEIDER, WHAT SHALL WE DO WITHOUT OUR LAND? LAND GRABS AND RESISTANCE IN RURAL CAMBODIA 21 (2011) (In three Cambodian case studies presented in the paper, peasants were “notified of land grabs by the arrival of bulldozers and excavators to clear the land.”).

³⁰ Throughout the Article, I will refer to these transactions as “land transfers.” While land can be transferred in any number of ways, I use the term specifically to describe the acquisition or lease by foreign or corporate parties, of legal interests in the agricultural land of a developing country—typically negotiated via the developing country’s government, or sometimes, additionally, in consultation with proximal communities or individuals.

³¹ WOODROW WILSON INT’L CTR. FOR SCHOLARS, LAND GRAB? THE RACE FOR THE WORLD’S FARMLAND 4 (Michael Kugelman & Susan L. Levenstein eds., 2009)[hereinafter THE RACE FOR THE WORLD’S FARMLAND], available at http://www.wilsoncenter.org/topics/pubs/ASIA_090629_Land%20Grab_rpt.pdf. See WORLD BANK GROUP, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? 9 (2010) [hereinafter RISING GLOBAL INTEREST], available at http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf (noting that this “‘land rush’ is unlikely to slow.”).

³² See LORENZO COTULA, LAND DEALS IN AFRICA: WHAT IS IN THE CONTRACTS? 12 (2011)[hereinafter LAND DEALS IN AFRICA](citing Cotula et al. (2009), Görgen et al. (2009), and World Bank (2010)); Food and Agriculture Organization (FAO) ET. AL., PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT THAT RESPECTS RIGHTS, LIVELIHOODS AND RESOURCES: EXTENDED VERSION 1 (2010)[hereinafter RAI PRINCIPLES](commenting that though good numbers are tough to come by, “it is true that some countries have been confronted with informal requests amounting to more than half their cultivable land area...”); see also GRAIN, LAND GRABBING AND THE GLOBAL FOOD CRISIS (2011), available at http://www.grain.org/bulletin_board/entries/4429-new-data-sets-on-land-grabbing (pointing out that different studies provide disparate land deal figures).

³³ The World Bank Group (WBG) consists of five organizations: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). The World Bank, *About Us*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited April 13 2012). The “World Bank” is the name that has come to be used for the IBRD and the IDA. The World Bank, *What is the World Bank*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:34542~piPK:36600,00.html> (last visited April 13 2012). This Article uses the terms “World Bank,” “World Bank Group,” and “the Bank” interchangeably.

³⁴ RISING GLOBAL INTEREST, *supra* note 31, at xiv.

³⁵ *Id.*

³⁶ See Oakland Institute, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: THE ROLE OF THE WORLD BANK GROUP, 1 (Dec. 2011)[hereinafter ROLE OF THE WORLD BANK GROUP], available at http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_brief_World_Bank_Group_0.pdf

³⁷ See CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK: THE UNITED KINGDOM, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html>; CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK: GERMANY, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html>.

³⁸ Although the media and case studies have largely focused on foreign or inter-regional investments, these deals are also spurred by domestic investors or may be intra-regional in nature. See WARD ANSEEUW ET. AL., LAND RIGHTS AND THE RUSH FOR LAND: FINDINGS OF THE GLOBAL COMMERCIAL PRESSURES ON LAND RESEARCH PROJECT 4 (2012)

produce food for export, while in others they are to produce biofuels or to capture benefits from clean development mechanisms in order to obtain carbon emission credits. In still other cases, entities invest for purely speculative reasons.³⁹ The World Bank Group has helped facilitate these deals by actively supporting the creation of investment-friendly climates and land markets in developing countries.⁴⁰ This global drive to invest in land and boost agricultural production is justified with reference to the ongoing food crisis, which has seen basic commodity prices soar beyond the reach of vulnerable populations.⁴¹ Although renewed investment in agriculture does present a number of opportunities to improve food security and promote economic development, few substantive checks have been placed on these investments. As a result, in countries like Ethiopia, there are “[l]arge discrepancies between publicly stated positions, laws, policies and procedures and what is actually happening on the ground.”⁴²

A wealth of evidence—largely in the form of investment case studies—reveals that, as currently conceived and implemented, many large-scale land transfers are not servicing the goal of ensuring equitable development and sustainable food security in host countries and may, in fact, be further jeopardizing the rights of host populations. Land transfers are taking place in countries already suffering from acute poverty, food insecurity and water shortages, and in environments that lack oversight and regulation. Deals often lack transparency, disregard land users’ rights, and are concluded without meaningful consultation with affected communities. These factors heighten the risk of serious human rights consequences for host populations, further marginalizing already vulnerable groups—small-scale farmers, pastoralists, indigenous peoples, and artisanal fishers who are being displaced from their land and from resources essential to their survival.⁴³

The scale, scope, and impacts of these land transfers—both potential and realized—have elevated the debate around large-scale land deals to the global level.⁴⁴ Many agricultural investments to date have been denounced by civil society groups and farmers’ organizations as “land grabs” that “depriv[e] the poorest from their access to land, and increas[e] concentration of resources in the hands of a minority.”⁴⁵ According to one editorial on the issue, “in rural areas throughout Latin America, Africa and Asia communities and their livelihoods are being crushingly pushed aside in deals that are forcing large-scale migration, violent conflicts, unemployment, deepening poverty and hunger.”⁴⁶

In response to the din of local and international protest, two dominant frameworks have emerged to assess and contest the global land rush. The first approach, led by the World Bank Group, balances the harms arising from land deals against the benefits of generating greater agricultural investment. This approach privileges market-led processes as engines for economic

[hereinafter LAND RIGHTS AND THE RUSH FOR LAND], available at http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf.

³⁹ See *infra* Part I.A.

⁴⁰ See *infra* Part I.A.

⁴¹ See text accompanying *infra* notes 56 - 57.

⁴² COUNTRY REPORT: ETHIOPIA, *supra* note 11, at 1.

⁴³ See *infra* Parts I.B and I.C.

⁴⁴ See *infra* text accompanying notes 51 and 52.

⁴⁵ U.N. Special Rapporteur on the right to food, Keynote Address at the United Nations Conference on Trade and Development [UNCTAD] Commission on Investment, *Enterprise and Development: Principles for Responsible Investment in Agriculture* (Apr. 26, 2010). One such farmers’ organization has launched a campaign against “land grabs.” Press Release, La Via Campesina et al., Stop Land Grabbing Now!! Say No to the Principles of “Responsible” Agro-enterprise Investment Promoted by the World Bank (Apr. 12, 2010), available at <http://www.landaction.org/spip/spip.php?article499>.

⁴⁶ Wendy Harcourt, Editorial, *No More Black Fridays*, 54 DEV. 1, 2 (2011), available at <http://www.palgrave-journals.com/development/journal/v54/n1/pdf/dev2010107a.pdf>.

growth and increased agricultural productivity, but also recognizes the need for proper business, legal and regulatory environments to help investments flourish. This approach is attuned to the rights and needs of vulnerable communities and readily acknowledges that land deals entail significant risks. A heightened focus on rights and a more frank acknowledgment of risks arguably distinguishes the current response of influential international economic actors to land investments from the purely market-based responses of past decades.⁴⁷ For this reason, and for the purposes of this Article, I call this approach the “market-plus” approach. Such terminology recognizes the shift in focus to impacts on local individuals and communities while remaining mindful of the market-based foundations of the solutions offered.

The market-plus approach argues that if carefully disciplined and appropriately regulated, large-scale land transfers can achieve “win-win” outcomes for both the investor and host populations. Such regulation, it is argued, can be achieved through continued facilitation of an appropriate investment climate and adherence to a set of good governance principles.⁴⁸ The market-plus approach is grounded in the treatment of land as a commodity, and seeks to revitalize land that is deemed idle and non-productive to help boost global food production. The formalization of existing land rights, as a means of both clarifying use and ownership rights and facilitating land markets, is central to this approach.⁴⁹

The market-plus approach’s insistence that host communities’ rights can be protected through the creation of robust land markets, coupled with good governance measures, has been met with great skepticism from the human rights community and civil society groups. In response, human rights advocates have put forward an alternate framework. This “rights-based” approach—which is led by the U.N. Special Rapporteur on the right to food (“Special Rapporteur”)—seeks to focus the analytical framework on the positive fulfillment of human rights. Under the rights-based approach States’ human rights obligations must trump other considerations. Land is also instrumentalized under this approach, and is seen as a gateway to the realization of multiple human rights, including the right to food. The rights-based approach encourages alternative forms of investment that do not involve actual land acquisition or the transfer of land rights. To the extent that large-scale land transfers do move forward, this approach also offers a set of principles for regulating the transactions—principles that are grounded in and give expression to States’ obligations under international human rights law.⁵⁰

This Article critically assesses both approaches. Now is an important time to undertake these assessments as countries and leading international bodies are currently deliberating how best to move forward with reforms to agricultural investment and land tenure policies. The Committee on World Food Security (CFS), for instance, is preparing to undertake worldwide consultations to develop a set of principles that will garner broad ownership by States and other key actors.⁵¹ These consultations will consider proposals put forward by both frameworks.⁵² But

⁴⁷ For an overview of these responses, in connection to the issue of food security, see Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 Colum. J. Transnat’l L. 691, 711-718 [hereinafter *The Right to Food*] (describing this feature of the economics-driven approach to food security). See also Saturnino Borrás & Jennifer Franco, *From Threat to Opportunity? Problems with a “Code of Conduct” for Land Grabbing*, 13 Yale Hum. Rts. & Dev. L.J. 507, 512 (2010) [hereinafter *From Threat to Opportunity*].

⁴⁸ See also *From Threat to Opportunity*, *supra* note 47, at 514-515 (asserting that it is widely thought that this two-pronged approach—a favorable policy environment plus a code of conduct—is promising, giving each party something it needs).

⁴⁹ See *infra* Part II.A.

⁵⁰ See *infra* Part II.B.

⁵¹ Committee on World Food Security, *Process of Consultation on Principles for Responsible Agricultural Investment (RAI) Within the Committee on World Food Security*, ¶4 (37th Sess., Oct. 2011).

⁵² *Id.* (“Furthermore, to be inclusive, the consultation should take into account the RAI Principles [proposed by the World Bank Group] as well as related principles elaborated by other institutions with a view to preparing a set of

little effort has been made to consolidate all of the dimensions of the debate: assessing the practice of large-scale agricultural land transfers from a broader and more considered perspective; comprehensively documenting the harms to local populations; attending seriously to the arguments of proponents; and critically evaluating the recommendations of skeptics. This Article seeks to address this gap in the literature, distilling and critically assessing the underlying normative frameworks employed by the market-oriented international financial institutions that facilitate these land transfers and the human rights advocates who oppose them. The Article concludes with concrete recommendations for how to operationalize rights guarantees, a challenge in a world where such rights are so often inadequately protected.

Part I of the Article provides an overview of the drivers and impacts of large-scale land deals, and highlights problematic patterns that have emerged with regard to land transfers and land-related transactions. Part II sets out the contours of the market-plus approach and the rights-based approach, and explores the principles endorsed by each approach for regulating land deals. Part III assesses both frameworks, analyzes key distinctions, and surfaces overlapping problems. In Part III.A, I examine differences in each framework's approach to rights and risks, and to land distribution. I argue that the market-plus framework's "balancing" approach both tolerates and facilitates rights violations, whereas the rights-based approach—which is grounded in international human rights law—sets a normative baseline that repudiates impermissible rights violations and addresses key distributive concerns. Part III.B turns to issues of implementation and assesses the potential of each approach to protect land users' rights. I find that both approaches emphasize procedural safeguards to empower host communities, and conclude that these safeguards are insufficient for contesting the power dynamics at play in land transactions. Part IV proposes concrete reforms to help empower affected communities and argues that international actors must be more involved in securing rights protections. I also argue that the agrarian reforms offered by the rights-based approach represent a more sustainable framework for supporting substantive rights and achieving broader development goals.

I. LARGE-SCALE LAND TRANSFERS: DRIVERS, TRANSACTIONS, AND IMPACTS

This section details the causes and consequences of the rush to invest in agricultural land. Part A offers an overview of the main actors and drivers behind large-scale land transfers, providing essential background for the regulatory measures that I later propose.⁵³ Part B surveys the pattern of problems that have emerged in relation to land transactions, and Part C highlights the negative impacts of large-scale land transfers on host communities. These sections are offered to help contextualize subsequent analysis of the major responses to the global land rush.⁵⁴

practical principles with broad legitimacy and ownership by all stakeholders.”). *See also* Global Donor Platform for Rural Development, *CSF open ended working groups workshop on responsible agricultural investment*, <http://www.donorplatform.org/calendar/icalrepeat.detail/2012/07/02/292/26|32|71|72|28|29/cfs-open-ended-working-groups-workshop-on-responsible-agricultural-investment.html> (July 2, 2012) (last visited July 29, 2012). CFS has already endorsed a related set of guidelines formulated by the FAO, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Committee on World Food Security, *Report of the 38th (Special) Session of the Committee on World Food Security* (38th Sess., May 2012), available at <http://www.fao.org/docrep/meeting/025/md958e.pdf>. The guidelines draw on international human rights instruments as well as other international development agreements, and call for States to respect, protect and fulfill tenure rights. The guidelines additionally focus on developing functioning markets for the transfer of tenure rights. FAO, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (May 2012), available at http://www.fao.org/fileadmin/templates/cfs/Docs1112/VG/VG_Final_EN_May_2012.pdf.

⁵³ See *infra* Parts IV.B and IV.C.

⁵⁴ See *infra* Parts II and III.

A. Drivers and Actors Behind Large-Scale Land Transfers

In the span of just five years, the global agricultural sector has been hit by two inter-related phenomena: first, a dramatic and unprecedented rise in food prices and, second, a renewed international interest in agricultural land investments. These two trends are related in a complex and bi-directional manner. Studies have identified multiple underlying causes of the global spike in food prices, including long-term underinvestment in agriculture, higher fuel prices, climate change, the diversion of food crops to biofuels, speculative investment, and an increased demand for more resource intensive food in emerging market countries.⁵⁵ A number of these same trends, coupled with the international community's response to the food crisis, have also served as drivers for large-scale land investments. Notably, the investment that has taken place includes not only support and loans to existing agricultural producers, but also the purchase or lease of large tracts of 'underutilized' or 'under-producing' agricultural land.

International food prices have been highly volatile since 2006, and in 2007-2008 food prices soared, with basic commodities doubling their average 2004 prices.⁵⁶ The surge in food prices led to widespread social unrest. At the height of the crisis, food riots were reported in over 30 countries.⁵⁷ The global food crisis generated an appropriately global response, which emphasized the need for greater investment in agriculture in developing countries. The World Bank Group has been at the forefront of this response.⁵⁸

To help increase foreign direct investment in agriculture, the World Bank Group works through its private sector subsidiary, the International Finance Corporation (IFC), and its partner organization, the Foreign Investment Advisory Service (FIAS), to provide direct financing and advisory support to agribusiness operations.⁵⁹ The IFC has also begun lending assistance to developing countries in removing obstacles to foreign investment, whether through legislative and policy reforms,⁶⁰ or the creation of investment promotion agencies.⁶¹ Development agencies

⁵⁵ Mandate of the Special Rapporteur on the Right to Food 7 (May 2008), available at <http://www.srfood.org/images/stories/pdf/otherdocuments/1-srrftnoteglobalfoodcrisis-2-5-08.pdf> (presented to the Human Rights Council); see also Bank Information Center, *Amid Food Riots and Shaken Governments IFIs Scramble to Develop a Coherent Response* (May 9, 2008), available at <http://www.bicusa.org/en/Article.3763.aspx>.

⁵⁶ FAO ET. AL., PRICE VOLATILITY IN FOOD AND AGRICULTURAL MARKETS: POLICY RESPONSES (2001) [hereinafter PRICE VOLATILITY], available at http://www.worldbank.org/foodcrisis/pdf/Interagency_Report_to_the_G20_on_Food_Price_Volatility.pdf at para. 11; FAO, *FAO Food Price Index*, available at <http://www.fao.org/worldfoodsituation/wfs-home/foodpricesindex/en/> (last visited August 18, 2012). [hereinafter FAO, Food Price Index].

⁵⁷ ANURADHA MITTAL, *THE 2008 FOOD PRICE CRISIS* 15 (2008). As of July 2012 overall international food prices were higher than they were on average in 2008. FAO, *Food Price Index*, *supra* note 56.

⁵⁸ See the World Bank's "New Deal for Global Food Policy" through which the Bank pledged to increase its lending for agriculture in Africa from \$450 million to \$800 million. Robert B. Zoellick, *A Challenge of Economic Statecraft*, THE WORLD BANK (April 2, 2008), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21711307~pagePK:34370~piPK:42770~theSitePK:4607.00.html>.

⁵⁹ See ROLE OF THE WORLD BANK GROUP, *supra* note 36, at 1; Zoellick, *supra* note 58; see also IFC, GLOBAL AGRIBUSINESS: CREATING OPPORTUNITY IN EMERGING MARKETS 4 (2011), available at http://www1.ifc.org/wps/wcm/connect/17b1c500476244cdab45ef9022d5a78b/Agribusiness_Singles_Dec%2B14.pdf?MOD=AJPERES.

⁶⁰ See Shepard Daniel & Anuradha Mittal, *(Mis)Investment in Agriculture: The Role of the International Finance Corporation in Global Land Grabs* (2010) [hereinafter *(Mis)Investment in Agriculture*] (profiling IFC initiatives that have helped encourage international investment in land by facilitating short- and long-term regulatory reforms in target countries).

⁶¹ ROLE OF THE WORLD BANK GROUP, *supra* note 36, at 1-2. In addition, the WBG's Multilateral Investment Guarantee Agency (MIGA) insures foreign land transfers against various political risks. MIGA, MIGA: GUARANTEEING INVESTMENT IN MANUFACTURING PROJECTS 1 (2011), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/01/17/000333038_20120117234859/Rendere d/PDF/663360BRI0manu00Box365757B00PUBLIC0.pdf.

have also actively facilitated agricultural investment in developing countries,⁶² as have foreign governments. Foreign governments provide critical financial support to investors,⁶³ and help establish the regulatory framework to govern land deals, through national legislation as well as inter-governmental agreements such as bilateral investment treaties (BITs),⁶⁴ cooperation agreements in agriculture, or other inter-governmental deals.⁶⁵

These policies have made agricultural land investments even more attractive to Western investors. With the certainty of a steadily increasing demand for food and emerging climate change markets, many Western investors increasingly view direct investments in land as a safe investment in an otherwise shaky financial climate.⁶⁶ Investment and pension funds are now joining sovereign wealth funds and individual investors in the pursuit of farmland.⁶⁷ As of 2012, an estimated \$14 billion of private capital was invested in farmland and agricultural infrastructure, and experts expect this amount to double or triple by 2015.⁶⁸ These investors understand that farmland and freshwater sources are strategic assets and non-renewable resources, the demand for which is certain to grow.⁶⁹

Since the 2008 food crisis, certain States have also begun to seek opportunities to invest in foreign farmland in order to secure reliable food sources for their domestic populations.⁷⁰ This is particularly evident in relation to investments made by many “resource-poor but cash rich”⁷¹ Gulf States⁷² whose scarce water and soil resources make them heavily dependent on

⁶² See generally THE OAKLAND INSTITUTE, LAND DEAL BRIEF: THE ROLE OF DEVELOPMENT AGENCIES 1 (2011), available at <http://www.oaklandinstitute.org/land-deal-brief-role-development-agencies>.

⁶³ Foreign governments both act as investors and provide essential support to private investors through subsidies, loans, guarantees, and insurance. Foreign government support is also provided through export credit agencies in investor home States and investment promotion agencies in investment host States. LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 27 (2009)[hereinafter LAND GRAB OR DEVELOPMENT OPPORTUNITY?], available at http://www.ifad.org/pub/land/land_grab.pdf.

⁶⁴ BITs create a set of legally enforceable rights for foreign investors against the host State. LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 63, at 32.

⁶⁵ *Id.* at 29, 32-33.

⁶⁶ GRAHAM ET AL., CSO MONITORING 2009-2010 “ADVANCING AFRICAN AGRICULTURE” (AAA): THE IMPACT OF EUROPE’S POLICIES AND PRACTICES ON AFRICAN AGRICULTURE AND FOOD SECURITY: LAND GRAB STUDY 51 (2010), available at <http://www.fian.org/resources/documents/others/report-on-land-grabbing/pdf>; SHEPARD DANIEL & ANURADHA MITTAL, THE OAKLAND INSTITUTE, THE GREAT LAND GRAB: RUSH FOR THE WORLD’S FARMLAND THREATENS FOOD SECURITY FOR THE POOR 4 (2009)[hereinafter THE GREAT LAND GRAB], available at http://www.oaklandinstitute.org/pdfs/LandGrab_final_web.pdf.

⁶⁷ ROLE OF THE WORLD BANK GROUP, *supra* note 36, at 1.

⁶⁸ See INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, FARMS AND FUNDS: INVESTMENT FUNDS IN THE GLOBAL LAND RUSH, 1 (Jan. 2012), [hereinafter IIED, FARMS AND FUNDS], available at <http://pubs.iied.org/pdfs/17121IIED.pdf>; OAKLAND INSTITUTE, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: DECIPHERING EMERGENT’S INVESTMENTS IN AFRICA (2011), available at http://media.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_EAM_Brief_1.pdf.

⁶⁹ Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 504, 516 (2011) [hereinafter De Schutter, *The Green Rush*].

⁷⁰ See GRAIN, *GRAIN Releases Data Set with Over 400 Global Land Grabs*, GRAIN, (Feb. 23, 2012, 5:32 PM), available at <http://www.grain.org/article/entries/4479-grain-releases-data-set-with-over-400-global-land-grabs> (releasing a data set of over 400 large-scale land deals that have been initiated since 2006, and that have been led by foreign investors for the purpose of food crop production).

⁷¹ Special Rapporteur on the right to food, Addendum to Report of the Special Rapporteur on the right to food, *Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, delivered to the 13th Session of the Human Rights Council 7, U.N. Doc. A/HRC/13/33/add.2 (Dec. 28, 2009)[hereinafter *Large-scale Land Acquisitions and Leases*], available at http://www.srfood.org/images/stories/pdf/officialreports/20100305_a-hrc-13-33-add2_land-principles_en.pdf.

⁷² LAND GRABBING AND THE GLOBAL FOOD CRISIS, *supra* note 32, at 10 (listing Gulf States’ investments around the world by country).

international markets for their food supply.⁷³ Countries with food security concerns and fast-growing populations, such as China, South Korea, and India, have also begun to seek opportunities to produce food overseas.⁷⁴

International and domestic responses to climate change have also triggered a renewed interest in agricultural land. The surging demand for biofuels has led investors to target vast tracts of land in developing countries for biofuel production.⁷⁵ Additionally, projects like the “Clean Development Mechanism” under the Kyoto Protocol have incentivized some States to launch emission-reduction projects abroad, including planting forests in developing countries as a way to meet their compliance requirements under Kyoto.⁷⁶ Implementation of the Reducing Emissions from Deforestation and Forest Degradation (REDD) Scheme, which offers financial incentives for the preservation of extant forests, may also prove to be a driver of large-scale land acquisitions.⁷⁷

B. Land Transfers and Transactions: Documented Problems

The specific form and mechanisms of agricultural land transfers are quite diverse. Land transfers can encompass a range of land use and ownership changes, which are undertaken for a wide variety of reasons,⁷⁸ and which occur through highly diverse legal and political mechanisms. Investors are national and international, public and private, individuals, companies, and investment entities. Precise legal arrangements are to a large extent dictated by national laws and policies, and can include contractual arrangements, long-term leases (some up to 99 years),⁷⁹ or outright purchase.⁸⁰ The size of any single land deal can be quite large, including deals involving 100,000 hectares⁸¹ or even 600,000 hectares.⁸² These transactions may be mediated by a central government authority, approved at a local governance level, or negotiated directly with a private title-holder.⁸³ Despite this diversity, several clear and problematic patterns have emerged in relation to land transfers and land-related transactions.

⁷³ THE GREAT LAND GRAB, *supra* note 66, at 2 (citing GRAIN, SEIZED!: THE 2008 LAND GRAB FOR FOOD AND FINANCIAL SECURITY 9 (2008) [hereinafter SEIZED!]).

⁷⁴ See JOACHIM VON BRAUN & RUTH MEINZEN-DICK, IFPRI POLICY BRIEF 13: “LAND GRABBING” BY FOREIGN INVESTORS IN DEVELOPING COUNTRIES: RISKS AND OPPORTUNITIES 1 (Apr. 2009), available at <http://www.ifpri.org/sites/default/files/publications/bp013all.pdf> (listing Chinese investment in the Democratic Republic of Congo, Mozambique, Tanzania, Zambia, and the Philippines; South Korean investment in Sudan; and Indian investment in Ethiopia).

⁷⁵ The term “biofuel” refers to the range of fuels that are derived from some form of biomass. Investors are mainly from the private sector and Organisation for Economic Co-operation and Development (OECD) member countries. THE GREAT LAND GRAB, *supra* note 66, at 4.

⁷⁶ CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, FOREIGN LAND DEALS AND HUMAN RIGHTS: CASE STUDIES ON AGRICULTURAL AND BIOFUEL INVESTMENT 3, FN 19 (New York: NYU School of Law, 2010) [hereinafter FOREIGN LAND DEALS AND HUMAN RIGHTS], available at <http://www.chrgj.org/projects/docs/landreport.pdf>.

⁷⁷ Special Rapporteur on the right to food, Climate Change and the Human Right to Adequate Food 4 (2010) [hereinafter Climate Change and the Human Right to Adequate Food].

⁷⁸ Saturnino M. Borrás Jr. & Jennifer Franco, *Towards a Broader View of the Politics of Global Land Grab* 13-14 (Initiatives in Critical Agrarian Studies, Working Paper No. 001, 2010) (systematizing land transfers into four main categories: food to food; food to biofuels; non-food to food; and non-food to biofuels).

⁷⁹ David Hallam, *International Investment in Developing Country Agriculture: Issues and Challenges*, 3 FOOD SEC. 1, 2-3 (2011); See Hoffman, *supra* note 1. See also *infra* text accompanying note 110.

⁸⁰ LAND DEALS IN AFRICA, *supra* note 32, at 75.

⁸¹ *Id.* at 13 (noting a 100,000-hectare project in Mali and citing Cotula *et al.*, 2009).

⁸² Hallam, *supra* note 79, at 2-3; see also OXFAM INTERNATIONAL, LAND AND POWER: THE GROWING SCANDAL SURROUNDING THE NEW WAVE OF INVESTMENT IN LAND 18 (2011) [hereinafter LAND AND POWER], available at <http://oxf.am/4LX> (analyzing a 600,000-hectare agreement between Nile Trading & Development Inc. and South Sudan). According to one report, however, “the average sizes of projects above 1,000 hectares are much smaller than what is suggested by media reports.” LAND DEALS IN AFRICA, *supra* note 32, at 13.

⁸³ LAND DEALS IN AFRICA, *supra* note 32, at 78.

Dozens of case studies across a range of industries and countries reveal that large-scale land deals frequently disregard existing land users' rights, lack transparency and accountability, and move forward without meaningful participation by those most affected by these investments.⁸⁴ In part these problems arise because large-scale land transfers are taking place in countries characterized by great inequities, and in the context of extreme power differentials between the actors involved. Investors may also be seeking out such asymmetries in order to secure deals on the most favorable terms. The World Bank has found that investors have primarily focused on countries that "failed to formally recognize land rights,"⁸⁵ implying that investors are attracted to policy environments where protections for host communities are weak.

Many host countries do not formally recognize the land rights of populations that have customarily occupied and used the land, and instead vest all untitled lands in the State,⁸⁶ thereby obviating the need for local approval for land transfers. Under such circumstances land users' rights may not be recognized, resulting in displacement without compensation,⁸⁷ as was the case in the Gambella region in Ethiopia.⁸⁸ Moreover, many countries require that land be expropriated by the government before it can be sold to private investors.⁸⁹ State-sanctioned evictions may be limited to public purpose goals or may extend to encompass private interests as well, in which case there are often significant conflict of interest concerns. The way in which evictions actually occur does not necessarily comply with the intent of governing laws,⁹⁰ and individuals and communities may have limited appeal rights or access to judicial mechanisms.⁹¹

Even where local land rights are legally recognized, they may not be honored in practice,⁹² or negotiations between investors and rights-holders may be plagued with procedural flaws that taint the actual terms of the agreements. According to a study of biofuel projects in Africa, host States frequently negotiate with investors without first consulting local communities that rely on the land for their survival.⁹³ Further, because investor-State negotiations are often opaque, affected community members are unable to discern the likely effects of the deals, let

⁸⁴ See, e.g., FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76; THE GREAT LAND GRAB, *supra* note 66, at 4; OAKLAND INSTITUTE, UNDERSTANDING LAND DEALS IN AFRICA: LAND GRABS LEAVE AFRICA THIRSTY 1 (2011)[hereinafter LAND GRABS LEAVE AFRICA THIRSTY]; RUTH HALL, THE MANY FACES OF THE INVESTOR RUSH IN SOUTHERN AFRICA 4 (2011) [hereinafter THE MANY FACES OF THE INVESTOR RUSH].

⁸⁵ RISING GLOBAL INTEREST, *supra* note 31, at 55.

⁸⁶ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 38, at 50. A 2009 study of land deals in Africa notes that the government of the State hosting a given deal is the typical land grantor, though occasionally the grantor will be a private landowner. LAND GRAB OR DEVELOPMENT OPPORTUNITY, *supra* note 63, at 65.

⁸⁷ In Zambia, for example, most of the land is governed by customary rules that are not formally recognized by the government. In such situations, communal resources and fallow land is "often presumed to belong to 'the state' and communities may be deprived of their customary land rights without consultation, consent or compensation." RISING GLOBAL INTEREST, *supra* note 31, at 98-99. Because existing land rights are not clearly demarcated, there are also serious risks of corruption and illegal land transfers in such circumstances. *Id.* at 98.

⁸⁸ See *supra* Introduction.

⁸⁹ RAI PRINCIPLES, *supra* note 32, at 5.

⁹⁰ RISING GLOBAL INTEREST, *supra* note 31, at 71.

⁹¹ *Id.* The Bank study adds that land transfer approval processes are also "generally ill-defined, centralized, and discretionary, with different parts of the same government often at odds with each other."

⁹² See, e.g., FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76, at 43 (noting this phenomenon in the context of the poor implementation of customary land rights protection contained in South Sudan's Land Act, in which "the new laws are poorly understood and rarely applied."). This is not uniformly the case, however. Mexico, for example, has extensive programs to recognize and record local land rights, with community representation and legal restrictions on large land transfers to outsiders. As a result most communities in Mexico opt to engage in joint ventures with outside partners rather than transfer or lease land outright. RISING GLOBAL INTEREST, *supra* note 31, at 62; RAI PRINCIPLES, *supra* note 34, at 4.

⁹³ Sonja Vermeulen & Lorenzo Cotula, *Over the Heads of Local People: Consultation, Consent and Recompense in Large-Scale Land Deals for Biofuel Projects in Africa*, 37 J. PEASANT STUD. 899, 909 (2010) [hereinafter *Over the Heads of Local People*].

alone participate in the process of shaping them.⁹⁴ The extent to which governments and investors are required to consult with local host communities also varies considerably. Few States require significant input from the communities most affected by the land deals and the States that do require input often inadequately enforce the protective measures included for the affected communities' benefit.⁹⁵ Countries such as Ethiopia and Madagascar require consultation with communities, but these processes do not amount to obtaining consent for the deals in question. Other countries, such as Ghana, Mozambique, and Tanzania, require consent, though it may not be fully informed or free.⁹⁶ In Tanzania, for example, a Swedish company seeking to develop sugarcane-ethanol projects reportedly "paid villagers to come to town meetings at which they voted on the project."⁹⁷ Some villagers were also reportedly "unaware of their land rights when they provided their so-called consent."⁹⁸

When affected communities are consulted, the timetables for concluding transactions may be too short to allow for adequate input.⁹⁹ Community elders or elites are typically the only ones involved in the consultations, which tend to be "one-off event(s)," and mechanisms to resolve divergent preferences amongst community members are non-existent.¹⁰⁰ Often, communities receive poor information on the specifics terms of the land deal.¹⁰¹ Inequities in land deals can also stem from local, political, and social structures. In Mozambique, for example, transfers of community land need the approval of only three to nine community members.¹⁰² In such circumstances, traditionally marginalized or politically weak community members may be excluded from decision-making processes as well as benefits that accrue from the sale or lease of communal resources.

Furthermore, many contemporary land deals result in problematic contract terms that may systematically disfavor local communities. In many cases, there are no contracts.¹⁰³ When contracts do exist, they may fail to delineate specific obligations or provide mechanisms for ensuring investor accountability.¹⁰⁴ The terms of the deals are often vague,¹⁰⁵ or clearly favor the investor.¹⁰⁶ The benefits that do fall to the host State may not reach those who are affected by the

⁹⁴ *Id.*; see also LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 63, at 68, 70-74 (noting many countries' weak community consultation requirements and stating that, "[t]here is a general sense among observers that negotiations and agreements occur behind closed doors.").

⁹⁵ Even in countries with well-developed policy frameworks, these frameworks may not be implemented in practice. *Over the Heads of Local People*, *supra* note 93, at 909 (citing Tanzania and Mozambique as examples).

⁹⁶ *Id.* at 907.

⁹⁷ See FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76, at 13 (citing ACTIONAID, SEKAB-ETHANOL TILL VARJE PRIS HUR SEKABS BIOBRANSLEPROJEKT I TANZANIA DRABBAR LOKALBEFOLKNINGEN [SEKAB-ETHANOL AT WHAT COST? HOW SEKAB'S BIOFUEL PROJECT IN TANZANIA AFFECTS THE LOCAL POPULATION] 14 (Oct. 2009), available at <http://www.mynewsdesk.com/se/pressroom/actionaid/document/view/sekab-etanol-till-varje-pris-hur-sekab-s-biobraensleprojekt-i-tanzania-drabbar-lokalbefolkningen-5785>).

⁹⁸ FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76, at 13.

⁹⁹ *Over the Heads of Local People*, *supra* note 93, at 909.

¹⁰⁰ *Id.*; see also Saturnino M. Borras Jr. et al., *The Politics of Biofuels, Land and Agrarian Change: Editors' Introduction*, 37 J. PEASANT STUD. 575, 586 (2010).

¹⁰¹ *Over the Heads of Local People*, *supra* note 93, at 909.

¹⁰² RISING GLOBAL INTEREST, *supra* note 31, at 102.

¹⁰³ See, e.g., *Over the Heads of Local People*, *supra* note 93, at 17 (noting in the context of biofuel investments in Africa that agreements between the community and investors "are generally not documented in formal documents or legally binding contracts").

¹⁰⁴ See generally, LORENZO COTULA, INVESTMENT CONTRACTS AND SUSTAINABLE DEVELOPMENT: HOW TO MAKE CONTRACTS FOR FAIRER AND MORE SUSTAINABLE NATURAL RESOURCE INVESTMENTS (2010) [hereinafter INVESTMENT CONTRACTS] (outlining and identifying ways to alleviate key weaknesses in current large-scale land investment contracts).

¹⁰⁵ *Id.* at 21.

¹⁰⁶ *Id.*

deals in the first place.¹⁰⁷ Even when the contracts appear well-executed, the long-term consequences of the agreements are not always clear.¹⁰⁸

A land deal in South Sudan, for example, demonstrates that even where land users' rights are legally recognized¹⁰⁹ and consultations are required, it still may not lead to favorable outcomes for host communities. In 2007, a Norwegian company began negotiations for a 99-year lease to 179,000 hectares in Sudan's Central Equatoria State (CES). The company aimed to establish a tree plantation and forest conservation project,¹¹⁰ and earn subsidies from carbon credits.¹¹¹ South Sudan features a decentralized land administration system that allows local governmental units to take the lead in negotiating land deals.¹¹² The deal was negotiated between the investor, the CES Ministry of Forestry and Agriculture, and the affected community. The investor also enjoys extremely close ties to the Ministry: the investor's Sudan Plantation Manager formerly worked for the Ministry, and the Director General of Forestry is a member of the investor's board.¹¹³ The year-long community negotiation process was conducted through a local development committee—which “consulted with the community through its traditional leaders”¹¹⁴—but questions have been raised about the inclusiveness of the process, and whether the consent given was fully informed.¹¹⁵

The resulting Land Title Agreement—which is only five pages in length and is written in very general terms¹¹⁶—is characterized by a number of inequitable terms. The land rental amount indicated in the investment agreement, for example, translates to approximately US \$0.07 per hectare per year, rendering it little more than a symbolic payment.¹¹⁷ The agreement also does not require any production of timber for the domestic market.¹¹⁸ Further evidence of imbalance can be found in the accompanying Community Support Agreement, which requires all able men and women from the host community to contribute two days unpaid work maintaining the road to Juba County in the first five years of the project.¹¹⁹

Given the various problems detailed above, it is unsurprising that a number of land transfers have carried negative impacts for local populations, despite promises of mutual benefit. These impacts are examined below.

C. Negative Impacts on Host Communities

The agricultural sector in the developing world has historically been under-funded,¹²⁰ leading to a decline in agricultural production. Agricultural land investments have the potential to create much-needed infrastructure and reduce poverty in host States. They can, for example, generate employment, encourage the transfer of technology, improve local producers' access to

¹⁰⁷ *Id.* at 42.

¹⁰⁸ *Id.* at 45.

¹⁰⁹ *See supra* note 92.

¹¹⁰ FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76, at 15 (citing GREEN RESOURCES, ANNUAL REPORT 2008: COMPANY REPORT 2009 5 (Aug. 2009) [hereinafter GREEN RESOURCES, ANNUAL REPORT], available at http://www.greenresources.no/Portals/1/Reports/AR_2008_FINAL.pdf).

¹¹¹ As of September 2010, the company was in the final stages of securing title to the land. *Id.* at 36.

¹¹² *Id.* at 43.

¹¹³ *Id.* at 52.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 51 – 53.

¹¹⁶ For example, the Land Title Agreement commits the investor to providing employment opportunities but does not provide any specific commitments in relation to that obligation in ¶ 4.5. *See id.* at 110-11.

¹¹⁷ *Id.* at 54.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 56 (citing the Community Support Program Agreement).

¹²⁰ *See Large-scale Land Acquisitions and Leases, supra* note 71, at 7.

credit and markets, and increase public revenues from taxation and export duties. They can also increase production of food crops to supply local, national, and international consumers.¹²¹ For countries acquiring land abroad to grow staple foods, such investments reduce reliance on international markets and increase food security for investor country populations.¹²² Although increased investment in land may have potentially beneficial impacts, to date this potential has not been realized.¹²³ According to an extensive World Bank study, the results for many host communities have been far from positive. In 2010, the World Bank made public the findings of an in-depth study of the issue in a controversial report entitled *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?*¹²⁴ The study finds that many investments have “failed to live up to expectations and, instead of generating sustainable benefits, contributed to asset loss and left local people worse off than they would have been without the investment.”¹²⁵

Numerous other studies echo these findings.¹²⁶ In many cases, existing land users have been displaced from land that they have occupied for generations, resulting in diminished livelihoods and increased tenure insecurity.¹²⁷ Local populations—who often lose their most fertile and profitable land in acquisitions by foreign investors and national elites¹²⁸—also rarely benefit from these deals.¹²⁹ In fact, because the targeted land is often irrigable and close to existing infrastructure, “conflict with existing land users [is] more likely.”¹³⁰ Additionally, the diminished ability of local producers to procure cultivable land may effectively negate any benefits that may come from increased market access.¹³¹ Moreover, compensation for loss of resources is “rarely adequate,” because ownership rights are not recognized and the new agricultural operations’ real resource requirements, especially water, are not properly taken into account.¹³² Affected communities are rarely compensated for their loss of livelihood¹³³ and employment opportunities generated by the investment may be limited or exaggerated, and may offer unfavorable terms, low wages, or be of a temporary nature during the “initial construction phase.”¹³⁴ Further, the number of jobs created may not compensate for the impact of

¹²¹ *Id.* at 5; JOACHIM VON BRAUN & RUTH MEINZEN-DICK, “LAND GRABBING” BY FOREIGN INVESTORS IN DEVELOPING COUNTRIES: RISKS AND OPPORTUNITIES 2 (2009), available at <http://www.iatp.org/tradeobservatory/library.cfm?refID=106023>.

¹²² *Large-scale Land Acquisitions and Leases*, *supra* note 71, at 6-7.

¹²³ In some cases, it may be too early for such assessments.

¹²⁴ Press Release, World Bank, New World Bank Report Sees Growing Global Demand for Farmland (Sept. 7, 2010), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22694767~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>;

¹²⁵ RISING GLOBAL INTEREST, *supra* note 31, at 71. Investments reviewed in the Bank’s *Rising Global Interest* study “confirm widespread concern about the risks associated with large-scale investments,” including “weak land governance,” a “lack of country capacity” to “manage large-scale investments,” problematic investor proposals, and “resource conflict with negative distributional and gender effects.” RISING GLOBAL INTEREST, *supra* note 31, at xxxiii.

¹²⁶ See *supra* note 84 accompanying text.

¹²⁷ See SEIZED!, *supra* note 73, at 9-10 (noting that by denying land users access to vital natural resources, large-scale land transfers undermine local livelihoods and exacerbate tenure security).

¹²⁸ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 38, at 4, 21 (alleging that national elites are “key players” in the investor spectrum). See also FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76, at 98 (finding that in Mali, many land transfers go unnoticed and remain unpublicized as investing local elites often acquire the land through informal channels.)

¹²⁹ SEIZED!, *supra* note 73, at 9.

¹³⁰ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 38, at 4.

¹³¹ SEIZED!, *supra* note 73, at 9.

¹³² LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 38, at 5.

¹³³ See ROLE OF THE WORLD BANK GROUP, *supra* note 36, at 6.

¹³⁴ See LEGAL Research Action Network, *Global Land Grabs: Investments, Risks, and Dangerous Legacies*, 54 Dev. 5, 6 (2011) (noting that employment opportunities tend to be limited as companies often favor migrant workers over those displaced, and adding that employment terms tend to be unfavorable, with limited security, safety, or pay.); THE

displacement. Such was the case in Mali, where according to one study, the few thousand workers employed in a land deal compensated neither for the displacement of 112,537 farm families, nor for diminished access to food for well over half a million people.¹³⁵

Though taxation and export duties may serve as a source of revenue for the host State, tax revenues are often small because host country governments provide tax incentives in order to attract investors. Taxes are also usually not payable until the investor's operation becomes profitable and weak enforcement mechanisms often leave due taxes uncollected. Benefits such as duty-free equipment imports and special free zones for agricultural products also further decrease the government's revenue.¹³⁶ The possible benefits of large-scale land acquisition can also be subverted by the unpredictability of speculative foreign investments,¹³⁷ which may fail to materialize or perform as promised.

The transfer of land to foreign investors—many of whom export all that they reap—can also induce greater reliance on food imports,¹³⁸ especially for the number of host countries that are already net food importers.¹³⁹ Food security is additionally threatened by a loss of farmland-generated employment and income.¹⁴⁰ In some countries, land transfers are undermining land reform gains¹⁴¹ that are seen by some as essential to addressing the global food crisis.¹⁴² Investment in biofuels can also have broader implications for food security when arable land is diverted from food to fuel production.¹⁴³

In addition, foreign investment can have a serious impact on local water supplies—though this has been explored in less detail than the issue of food security. Abundant water supply is an important consideration for investors, especially for the production of water-intensive biofuels.¹⁴⁴ Host populations may therefore face rising competition for limited water resources,¹⁴⁵ which in some cases may constitute the most salient harm to a local community.¹⁴⁶

OAKLAND INSTITUTE, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: THE MYTH OF ECONOMIC DEVELOPMENT 5 (2011)[hereinafter THE MYTH OF ECONOMIC DEVELOPMENT] (highlighting the pay disparity between smallholder labor and jobs on large, mechanized plantations).

¹³⁵ THE MYTH OF JOB CREATION, *supra* note 22, at 5.

¹³⁶ LAND AND POWER, *supra* note 82, at 11.

¹³⁷ Vera Songwe & Klaus Deininger, *Foreign Investment in Agricultural Production: Opportunities and Challenges*, 45 THE WORLD BANK: AGRIC. & RURAL DEV. NOTES: LAND POL'Y & ADMIN. 2 (2009), available at http://www.landcoalition.org/pdf/08_note45.pdf.

¹³⁸ SEIZED!, *supra* note 73, at 10.

¹³⁹ Shepard Daniel, *Land Grabbing and Potential Implications for World Food Security*, in SUSTAINABLE AGRICULTURAL DEVELOPMENT 34 (M. Behnassi et. al. eds., 2011) [hereinafter *Land Grabbing and Potential Implications for World Food Security*].

¹⁴⁰ Special Rapporteur on the Right to Food, *Breaking the Impasse of the Food Crises* (2011), available at <http://www.srfood.org/index.php/en/component/content/article/1324-breaking-the-impasse-of-food-crises>; see also Legal Research Action Network, *supra* note 134, at 6 (noting that hunger is often not a production problem but an income problem, and adding that employment opportunities tend to be limited as companies often favor migrant workers over the displaced).

¹⁴¹ See *Land Grabbing and Potential Implications for World Food Security*, *supra* note 139, at 32-33 (providing the example of the Philippines in this regard). See also THE MANY FACES OF THE INVESTOR RUSH, *supra* note 84, at 18 (noting that land investment trends are “unravelling the modest gains made in the [Southern African] region towards securing and redistributing rights to land”).

¹⁴² *Land Grabbing and Potential Implications for World Food Security*, *supra* note 139, at 33.

¹⁴³ See THE WORLD BANK, WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT 8, 70-71 (2007) [hereinafter WORLD DEVELOPMENT REPORT 2008], available at http://siteresources.worldbank.org/INTWDR2008/Resources/WDR_00_book.pdf (noting that competition between food and fuel production exists and observing that demand for agricultural feedstocks for biofuel production induces supply shocks in food items that contribute to increasing global food prices).

¹⁴⁴ LAND GRABS LEAVE AFRICA THIRSTY, *supra* note 82, at 2.

¹⁴⁵ See GRAHAM ET AL., *supra* note 66, at 26-27 (“Some observers point out that in fact the global land grab is rather a water land grab...” because the competition revolves around limited water resources and water-rich lands specifically,

The repercussions of unsustainable water use can also extend far beyond farming, reaching both rural and urban populations.¹⁴⁷ In the longer term, there are also troubling signs that large-scale land transfers have the potential to generate conflict,¹⁴⁸ and contribute to environmental harms.¹⁴⁹ The potential for conflict is especially pronounced where socio-economic and ethnic divisions are already profound and life-sustaining resources are already scarce.¹⁵⁰

Increased commercial pressures on land are of particular concern for communities with weak land rights protections and whose livelihoods and food security depend directly on the land at stake. These include small-scale farmers “who cultivate the land in conditions that are often insufficiently secure;”¹⁵¹ herders, pastoralists,¹⁵² and fisherfolk who are particularly dependent on grazing and fishing grounds;¹⁵³ and indigenous peoples and other communities who rely on the products of the forest.¹⁵⁴ Women also face particular disadvantages in the context of these deals.¹⁵⁵ These same populations are also amongst the world’s most food insecure.¹⁵⁶

The severity of the negative impacts described above has sparked a heated debate that centers on the question of whether these investments can deliver on their promises of social and economic development and improved access to food, or instead whether they represent one-sided deals designed to primarily benefit foreign investors and domestic elites. Critics charge that large-scale land transfers are focused less on promoting rural development, and more on facilitating the growth of agribusinesses in host developing countries.¹⁵⁷ Critics additionally

since non-irrigable land is of little to no value.).

¹⁴⁶ LAND GRABS LEAVE AFRICA THIRSTY, *supra* note 84, at 2.

¹⁴⁷ *Id.* at 1.

¹⁴⁸ See THE RACE FOR THE WORLD’S FARMLAND, *supra* note 31, at 15 (reasoning that “the factors at play in most host countries—land, food insecurity, and poverty—make up a combustible mix that could easily explode.”).

¹⁴⁹ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 38, at 4. Some biofuels also contribute significantly to climate change via greenhouse gas emissions. Claire Mahon, *The Right to Food: A Right for Everyone*, in FOOD SYSTEM FAILURE: THE GLOBAL FOOD CRISIS AND THE FUTURE OF AGRICULTURE 8 (2011).

¹⁵⁰ FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76, at 38 (making this point in the context of the influx of foreign investment in post-conflict South Sudan).

¹⁵¹ *Report of the Special Rapporteur on the right to food*, U.N. Doc. A/65/281 ¶ 10 (Aug. 11, 2010), available at http://www.srfood.org/images/stories/pdf/officialreports/20101021_access-to-land-report_en.pdf [hereinafter *Report of the Special Rapporteur on the right to food (2010)*]; see, e.g., *Land Grabbing and Potential Implications for World Food Security*, *supra* note 139, at 31-32 (concluding that there is clear evidence that many land-grab situations leave no room for small farmers and providing the examples of Madagascar and Pakistan); *Large-scale Land Acquisitions and Leases*, *supra* note 71, at 11.

¹⁵² *Large-scale Land Acquisitions and Leases*, *supra* note 71, at 7.

¹⁵³ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶¶ 1, 10.

¹⁵⁴ *Id.* at ¶ 10. Climate Change and the Human Right to Adequate Food, *supra* note 77, at 4 (noting that the implementation of the REDD scheme (see text accompanying *supra* note 77) in particular may “entail risks for forest dwelling communities who have only weakly recognized customary rights over the forests they depend on for their livelihoods.”).

¹⁵⁵ Women are particularly at risk of losing their land in deals negotiated with the male heads of households. *Over the Heads of Local People*, *supra* note 93, at 904; see GRAHAM ET AL., *supra* note 66, at 32-33. So-called “under-utilized” land may also be primarily used by women to provide basic household resources such as water, firewood or other fuel, or traditional medicines. ANDREA ROSSI & YIANNA IAMBROU, GENDER AND EQUITY ISSUES IN LIQUID BIOFUELS PRODUCTION: MINIMIZING THE RISKS TO MAXIMIZE THE OPPORTUNITIES 6, 10 (2008); JULIA BEHRMAN ET AL., THE GENDER IMPLICATIONS OF LARGE-SCALE LAND DEALS 1 (2011), available at <http://www.ifpri.org/sites/default/files/publications/bp017.pdf>. The shift from a reliance on local, traditional knowledge of wild plants and small-holder farming techniques to large-scale, industrialized agriculture may also disproportionately undermine women’s traditional expertise and knowledge. ROSSI & IAMBROU, at 12. And social norms may exclude women from accessing the paid wage labor that is often cited as the main benefit of large-scale farming (BEHRMAN, MEINZEN-DICK & QUISUMBING, at 2) or even when employed, women may receive less education and training, fewer employment benefits, and may be exposed to greater health and safety risks than their male counterparts. ROSSI & IAMBROU, at 12.

¹⁵⁶ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at 16.

¹⁵⁷ SEIZED!, *supra* note 73, at 6,10; LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 38, at 4; see, e.g., Press Release,

caution that such investments may worsen food and energy crises,¹⁵⁸ the very crises they seek to cure. These charges have given rise to the label of “land grabbing” to characterize large-scale land transfers—a term that is often ambiguously defined and that can encompass a wide swath of land use and ownership changes, occurring through highly diverse legal and political mechanisms.¹⁵⁹

Regardless of the labels employed, all sides agree that urgent steps are needed to protect vulnerable host populations. No global actor or institution denies that these problems exist, or that there are serious issues that accompany land investment in developing countries that require immediate attention.¹⁶⁰ The appropriate response to this phenomenon, however, is significantly contested, as explored in Parts II and III.

II. A TALE OF TWO NARRATIVES: MARKET AND RIGHTS-BASED APPROACHES TO LARGE-SCALE LAND TRANSFERS

Two central constituencies have emerged that take distinct perspectives on, and propose differentiated responses to, the recent flood of land deals. This section examines the conceptual underpinnings of each approach, as well as the proposals put forward by these frameworks to address the negative impacts of large-scale land deals and protect land users’ rights. Part A explores the general contours of the “market-plus” approach, and its treatment of land as a commodity. I then examine the “Principles for Responsible Agricultural Investment,” a set of voluntary principles promulgated by the World Bank Group, together with other international institutions. Part B examines the rights-based approach, and its treatment of land as a gateway to the realization of human rights. This section concludes with an overview of the “Eleven Principles”—a set of “minimum” principles proposed by the Special Rapporteur on the right to food to ensure that large-scale land deals are carried out in line with States’ human right obligations.

A. The Market-Plus Approach

The market-plus approach is essentially a market-driven approach with a special sensitivity to the need for regulation. At the most fundamental level, it privileges market-led processes as engines for economic growth and increased food production. This approach is premised on the idea that the market is the most effective mechanism for increasing global wealth

La Via Campesina et al., *supra* note 45 (arguing that such investment results in the “long-term corporate (foreign and domestic) takeover of rural people’s farmlands”).

¹⁵⁸ *From Threat to Opportunity*, *supra* note 47, at 515; Press Release, Dakar Appeal Against Land Grab, G20-Agriculture: Hundreds of organizations say STOP farm land grabbing!, *available at* <http://farmlandgrab.org/post/view/18827>; *see also* La Via Campesina et al., *supra* note 45 (“The [World Bank’s] principles, which would be entirely voluntary, aim to distract from the fact that today’s global food crisis, marked by more than 1 billion people going hungry each day, will not be solved by large scale industrial agriculture, which virtually all of these land acquisitions aim to promote.”).

¹⁵⁹ For example, the International Land Coalition defines “land grabbing” as acquisitions or concessions of land which are one or more of the following: “(i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.” International Land Coalition, Tirana Declaration, *available at* http://www.landcoalition.org/sites/default/files/aom11/Tirana_Declaration_ILC_2011_ENG.pdf, at 2.

¹⁶⁰ *See infra* text accompanying notes 180-182.

and that it is the most efficient distributor of that wealth.¹⁶¹ If market processes fail, then government intervention may become necessary to mitigate any adverse impacts.

The market-plus approach takes existing distributions of wealth as the baseline and seeks to ensure that populations, in the aggregate, are made better off or at least not worse off than they were before. Here, progress is measured by looking at averages rather than the satisfaction of individual entitlements to resources.¹⁶² In seeking to promote general welfare, the market-plus approach directly prioritizes securing a larger pool of resources so that there is ultimately more to spread around. The market-plus approach accepts that there may be trade-offs across individuals—and across States—on the reasoning that net increases in welfare might off-set contingent declines. It also accepts that certain risks may be necessary in order to maximize economic gains.¹⁶³

Thus, in the context of land deals, the market-plus approach weighs the possible harms of investment to affected communities (risks) against the possibility that investment will produce economic gains that will support the broader public interest (benefits). In this case, the potential benefits include greater economic development within a host country, as well as increased food production for the global population. As described in the next section, proponents of the market-plus approach see the commodification of land as central to achieving these goals.

1. The Market-Plus Approach to Land: Land as a Commodity

The market-plus approach's land-as-commodity framework aims to facilitate the flow of capital into developing countries while simultaneously pushing for the increasingly efficient use of land.¹⁶⁴ The logic of this approach proceeds as follows: there are a number of obstacles to meeting future food demand, including climate change and constraints on the supply of land, water, and energy.¹⁶⁵ These hurdles, when combined with growing demand for food¹⁶⁶ and uncertainty about the future, make food prices more vulnerable to shock-induced fluctuation.¹⁶⁷ If we eliminate market shocks by increasing investment to boost agricultural productivity and build sustainable production systems, however, food prices should stabilize.¹⁶⁸ What is needed is a productivity revolution.¹⁶⁹ Greater yields, however, can only be assured if arable land is first identified, and then transferred to the most efficient user.¹⁷⁰ To achieve these ends, the market-plus approach adopts a two-pronged strategy.

¹⁶¹ See Narula, *The Right to Food*, *supra* note 47, at 702.

¹⁶² *Id.*

¹⁶³ *Id.* at 703.

¹⁶⁴ See generally Songwe & Deininger, *supra* note 137; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 6 (2000) (arguing that the formalization of informal land titles facilitates the use of land as a commodity, enabling local populations to leverage their land to their benefit).

¹⁶⁵ WORLD DEVELOPMENT REPORT 2008, *supra* note 143, at 62.

¹⁶⁶ FAO, *GLOBAL AGRICULTURE TOWARDS 2050 2* (2009), available at

http://www.fao.org/fileadmin/templates/wsfs/docs/Issues_papers/HLEF2050_Global_Agriculture.pdf (stating that “[t]o meet to growing demand for food, agricultural production will need to increase 70 percent by 2050 globally and by 100 percent in developing countries.”).

¹⁶⁷ WORLD DEVELOPMENT REPORT 2008, *supra* note 143, at 62.

¹⁶⁸ *Id.* at 69; WORLD BANK, *GROWTH AND PRODUCTIVITY IN AGRICULTURE AND AGRIBUSINESS: EVALUATIVE LESSONS FROM WORLD BANK GROUP EXPERIENCE x* (2011)[hereinafter *EVALUATIVE LESSONS*]; RAI PRINCIPLES, *supra* note 32, at 1.

¹⁶⁹ WORLD DEVELOPMENT REPORT 2008, *supra* note 143, at 1.

¹⁷⁰ WORLD BANK, *AGRICULTURAL LAND REDISTRIBUTION: TOWARD GREATER CONSENSUS 45-46* (2009) [hereinafter *AGRICULTURAL LAND REDISTRIBUTION*].

First, the market-plus approach seeks to identify agricultural land that can be used more productively,¹⁷¹ as well as “marginal” or “unused” land that can be converted to agricultural use—especially in Africa and Latin America.¹⁷² The Bank has promoted a technocratic approach to achieving these aims, particularly through the use of satellite imagery and agroecological zoning (AEZ) to identify areas where shifts in land usage could make the land more “productive.”¹⁷³ The Bank envisions that information gathered through this technology, coupled with mappings of local land rights, can help identify “underused potential” and help attract investors to farm the land, contract with local farmers, or construct complementary infrastructure.¹⁷⁴

Second, the market-plus approach promotes the formalization of land rights in order to develop robust land markets and facilitate the transfer of land to the most efficient producer.¹⁷⁵ Agrarian communities in developing countries often employ communal visions of land ownership that are not easily reducible to the conventional Western property rights regime of individual land ownership.¹⁷⁶ Even where property is not strictly viewed as a communal resource, title may be secured by informal mechanisms, leaving local individuals’ claims to property ‘insecure’ from a formal legal perspective.¹⁷⁷ In response, advocates of the market-plus approach have long promoted and supported land registration and titling programs in line with the philosophy that security of tenure can help facilitate integration into the market.¹⁷⁸ Such integration, it is argued, can contribute to poverty reduction and greater food security as: a) farmers are incentivized to make long-term, productivity enhancing investments in land; b) farmers gain greater access to credit by using land as collateral; and c) land markets transfer land to the most efficient producers.¹⁷⁹

In line with its land-as-commodity framework, the World Bank Group has actively facilitated large-scale agricultural land transfers in developing countries, as detailed in Part I.¹⁸⁰

¹⁷¹ EVALUATIVE LESSONS, *supra* note 168, at xi; Songwe & Deininger, *supra* note 137, at 218.

¹⁷² RISING GLOBAL INTEREST, *supra* note 31, at 30, 52, 58.

¹⁷³ *Id.* at 77 (noting that AEZ can be used to predict potential yield for rainfed cultivation of wheat, maize, soybeans, sugarcane, and oil palms, and thus may be used to pick out plots that are worthy of investment.).

¹⁷⁴ *Id.* at 78.

¹⁷⁵ WORLD DEVELOPMENT REPORT 2008, *supra* note 143, at 138; *see also* DE SOTO, *supra* note 164, at 6; *see also* Olivier De Schutter, *How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland*, 38 J. PEASANT STUD. 249, 270 [hereinafter *How Not to Think of Land-Grabbing*] (noting that here efficiency is understood as “price efficiency, or competitiveness, rather than as resource efficiency.”)

¹⁷⁶ Shalmali Guttal, et al., *Global Land Grabs: Investments, Risks and Dangerous Legacies*, 54 DEV. 5, 7 (2011); DE SOTO, *supra* note 164, at 162 (claiming that the creation of one integrated property system in developing countries is impossible due to the hundreds of informal systems existing across communities).

¹⁷⁷ RAI PRINCIPLES, *supra* note 32, at 3-4; DE SOTO, *supra* note 164, at 6, 162.

¹⁷⁸ International financial institutions promoted land registration and titling as part of their structural adjustment programmes of the 1970s and 1980s, and more recently under the influential writings of Hernando de Soto. *See* DE SOTO, *supra* note 164; Amrita Kapur, “Catch-22”: *The Role of Development Institutions in Promoting Gender Equality in Land Law - Lessons Learned in Post-Conflict Pluralist Africa*, 17 BUFF. HUM. RTS. L. REV. 75, 81 (2011); *see also* Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism*, 96 CORNELL L. REV., 967, 1000-01 (2011) [hereinafter Thomas, *Law and Neoclassical Economic Development*] (arguing that because of de Soto’s expressed fidelity to the neoclassical belief in the centrality of property rights, his theory became highly influential in legal and institutional reform programs in the field of development).

¹⁷⁹ This set of hypotheses is grounded in a neoclassical economic approach that applies property rights theories to the case of land (Robert E. Smith, *Land Tenure Reform in Africa: a Shift to the Defensive*, 3 PROGRESS IN DEV. STUD. 3, 211 (2003))—a philosophy that deeply informs the Bank’s approach to agricultural investment. The Bank recognizes that there may be merit in allowing small landowners to maintain their ownership over agricultural plots since in many cases smallholders are in a better position to make efficient use of their land, so long, market-plus advocates claim, as the property rights regime that defines land ownership creates a robust land market. RISING GLOBAL INTEREST, *supra* note 31, at 32.

¹⁸⁰ *See supra* text accompanying notes to 58 - 61.

By 2010, however, the negative impacts of these land deals were well-documented and the accompanying public alarm was widespread. The World Bank's own studies¹⁸¹ bolstered these concerns to such an extent that it became widely acknowledged that safeguards had to be put in place in order to ensure that the benefits would materialize, while minimizing the risks.

2. The Market-Plus Response to the Negative Impacts of Large-Scale Land Deals: The Principles for Responsible Agricultural Investment

In January 2010, the World Bank Group, together with the U.N. Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), and the U.N. Conference on Trade and Development (UNCTAD) promulgated the "Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources"¹⁸² ("RAI Principles"). The seven Principles are as follows:

- (1) "Existing rights to land and associated natural resources are recognized and respected";
- (2) "Investments do not jeopardize food security but rather strengthen it";
- (3) "Processes for accessing land and other resources and then making associated investments are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment";
- (4) "All those materially affected are consulted, and agreements from consultations are recorded and enforced";
- (5) "Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value";
- (6) "Investments generate desirable social and distributional impacts and do not increase vulnerability"; and
- (7) "Environmental impacts due to a project are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them."¹⁸³

These voluntary principles—which build on similar initiatives aimed at promoting corporate social responsibility in other industries¹⁸⁴—are intended to serve as the basis for elaborating best practices, guidelines, governance frameworks, and possible codes of practice for the private sector.¹⁸⁵ Fortified by the urgency to increase private investment in agriculture—and in line with the land-as-commodity framework discussed above—the RAI Principles endorse steps to create an environment that facilitates land deals while mitigating their risks.

Principle 1 recognizes that many lands that are classified as "empty" or "unoccupied" are in fact "subject to long-standing rights of use, access and management based on custom," and

¹⁸¹ See RISING GLOBAL INTEREST, *supra* note 31.

¹⁸² RAI PRINCIPLES, *supra* note 32.

¹⁸³ *Id.* at 2, 6, 10, 13, 16, 18.

¹⁸⁴ *Id.* at 1 (citing the Extractive Industry Transparency Initiative and the Equator Principles as examples of such initiatives).

¹⁸⁵ *Id.* at 2. The RAI Principles have garnered interest and support from a number of countries, including members of the G20 who, as recently as June 2012, reaffirmed their commitment to the Principles. See UN Conference on Trade and Development, *The Principles for Responsible Agricultural Investment (PRAI)*, <http://unctad.org/en/Pages/DIAE/G-20/PRAI.aspx> (last visited July 18, 2012).

thus asserts that “Existing use or ownership rights to land, whether statutory or customary, primary or secondary, formal or informal, group or individual, should be respected.”¹⁸⁶ On the reasoning that “[r]ecognition of rights to land and associated natural resources, together with the power to negotiate their uses, can greatly empower local communities,” it calls on to States ensure that (a) “land-related rights are recognized and demarcated”; (b) “procedures for transferring such rights are clearly defined and applied in a transparent manner”; and (c) “expropriation... is strictly limited to situations that affect the public interest rather than routinely applied to transfer of land to private investors.”¹⁸⁷ Principle 1 also urges that specific attention be paid to the land rights of women, indigenous peoples, and herders.¹⁸⁸ Systematic identification of rights holders and registration of land rights, it is argued, should ideally take place prior to consideration of investment proposals on the reasoning that it will attract more investment.¹⁸⁹

The RAI Principles also call for a number of good governance measures, which are seen as conditions for enabling effective investment. Principle 3 states:

Productivity growth through entrepreneurial activity, capital deepening, and innovation is the primary driver of economic progress. Yet new enterprise formation, operation, and profitability are all impeded by deficiencies in the enabling environment, such as lack of clarity as to property rights, difficulty in enforcing contracts, rent-seeking behavior, red tape, slow judicial processes, and so on. It follows that establishing an enabling environment for agricultural enterprise that encourages and facilitates good investment is critical to achieving desirable outcomes.¹⁹⁰

In order to achieve greater transparency, Principle 3 notes that data on land ownership and on land-related investments should be publicly available¹⁹¹ and investments should take place in an appropriate business, legal, and regulatory (BLR) environment. Citing investor testimony that shortcomings in BLR frameworks undermine their investments or deter them from investing all together, Principle 3 calls on host governments to work to improve tangible factors (such as those measured by the World Bank’s “Doing Business Indicators”¹⁹²) as well as intangible factors

¹⁸⁶ RAI PRINCIPLES, *supra* note 32, at 2.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *Id.* at 3, 5.

¹⁹⁰ *Id.* at 8. Such an approach is in line with IFIs’ institutional economics approach which argues that economic growth is best promoted through legal institutions that guarantee property rights, enforce contracts, and protect against the arbitrary use of government power. Frank Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. Int’l L. & Pol. 551, 562 (2009). See Ibrahim F. I. Shihata, *The World Bank and “Governance” Issues in its Borrowing Members*, in *THE WORLD BANK IN A CHANGING WORLD* (Tschofen & Parra eds., 1991) (arguing that good governance in borrowing countries is necessary for the World Bank’s economic programs to be effective); Thomas, *Law and Neoclassical Economic Development*, *supra* note 176, at 997-998 (elaborating on the manner in which concepts of good governance, rule of law, anti-corruption, and protection of property rights became the central tenets of development policy reform programs).

¹⁹¹ RAI PRINCIPLES, *supra* note 32, at 9.

¹⁹² The “Doing Business” project ranks countries based on investors’ access to its land markets as well as the robustness of property rights. THE WORLD BANK & THE INTERNATIONAL FINANCE CORPORATION, *DOING BUSINESS 2012 v* (2012), available at <http://www.doingbusiness.org/~media/FPKM/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf>. But see Kevin Davis & Michael Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 L. & Soc. Pol. 1095, 1104, 1117 (2007) (commenting that reliance on the Doing Business Indicators to advance concrete policy proposals may be premature, and arguing that many different elements of a society’s legal system come together to shape economic or social outcomes, making it difficult to disentangle the relevant causal relationships).

(such as “perceptions regarding a country’s stability and general business climate”).¹⁹³

The RAI Principles also address the investors’ role in facilitating transparency and accountability in land deals. Principle 4, for example, calls on investors to engage in meaningful consultations with host communities. These consultations should result in detailed and enforceable contractual agreements that clearly delineate the intended uses of the land so as to avoid speculative investment.¹⁹⁴ In order to enhance the effectiveness of the consultation process, Principle 4 states that “definitional and procedural requirements in terms of who represents land holders” should be clarified and groups affected should be adequately represented and consulted in an ongoing manner on issues of project design and selection of project areas.¹⁹⁵ Guidelines to inform the content of consultations and formal recordkeeping to document discussions and agreements, it is argued, can also enhance effectiveness.¹⁹⁶

The RAI Principles additionally urge that investments should strengthen food security (Principle 2), “generate desirable social and distributional impacts” (Principle 6), and minimize environmental harms (Principle 7). Principle 5 calls on investors to respect the rule of law and human rights, and cites in particular to the Universal Declaration of Human Rights and to the language of the UN Global Compact, which calls on businesses to “support and respect the protection of internationally proclaimed human rights” and to “make sure that they are not complicit in human rights abuses.”¹⁹⁷

In sum, the RAI Principles recognize the importance of protecting existing land users’ rights and propose that such protections can be delivered through good governance measures, formalized property rights, and meaningful consultations between investors and host communities.

B. The Rights-Based Approach

Attuned to the relationship between land access and the right to food,¹⁹⁸ the Special Rapporteur on the right to food has proposed an alternative framework for assessing large-scale land deals. Rather than disciplining and reacting to market failures, this rights-based approach instead prioritizes the positive fulfillment of human rights.¹⁹⁹ The rights-based approach is premised on the idea that individuals are entitled to specific rights guarantees that cannot be traded away in the context of large-scale land deals. As such, this approach begins with an evaluation of the claims of rights-holders and the corresponding obligations of duty-bearers. It then seeks to develop strategies that both build up the capacity of rights-holders to claim their rights, and help ensure that duty-bearers fulfill their obligations.²⁰⁰ Specifically, the rights-based approach seeks to secure and strengthen the entitlement of relevant groups to land as a productive, rights-fulfilling asset.

¹⁹³ RAI PRINCIPLES, *supra* note 32, at 10. Both Principles 3 and 4 additionally note that investor incentives should be clear and effective and should not facilitate speculative investment. *Id.* at 9-10, 12.

¹⁹⁴ *Id.* at 12.

¹⁹⁵ *Id.* at 10 - 11.

¹⁹⁶ *Id.* at 10.

¹⁹⁷ *Id.* at 14.

¹⁹⁸ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 2.

¹⁹⁹ De Schutter, *The Green Rush*, *supra* note 69, at 506 (emphasizing the need to link the narrow question of how to regulate large-scale investments in land to the broader question of how to ensure security of tenure and protect land users’ rights).

²⁰⁰ Adapted from United Nations, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies* (May 2003), *available at* http://www.crin.org/docs/resources/publications/hrbap/HR_common_understanding.doc.

1. The Rights-Based Approach to Land: Land as a Gateway to Human Rights

An explicit and substantive right to land is not codified under international human rights law,²⁰¹ but secure and stable access to land is seen as a gateway to the realization of a number of human rights, including the rights to: water;²⁰² adequate housing;²⁰³ health;²⁰⁴ an adequate standard of living;²⁰⁵ and the right to food.²⁰⁶ The right to food is codified under the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁰⁷ and requires States to ensure that individuals “alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.”²⁰⁸ Under international human rights law, States must act to respect, protect, and fulfill this right.²⁰⁹

²⁰¹ For more on this point, see *infra* Part IV.C.2.

²⁰² Both the Special Rapporteur on the right to water and sanitation and the U.N. Committee on Economic, Social and Cultural Rights [hereinafter ESCR Committee] have stated that people should not be denied the right to water on the basis of their land status. Commission on Human Rights, *Realization of the right to drinking water and sanitation, Report of the Special Rapporteur, El Hadji Guissé*, U.N. Doc. E/CN.4/Sub.2/2005/25 8 (July 11, 2005); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 5 (Jan. 20, 2003). The ESCR Committee monitors States’ compliance with the ICESCR. In fulfilling its obligations, the ESCR Committee began adopting General Comments “with a view to assisting the States Parties in fulfilling their reporting obligations,” U.N. ECOSOC, *Report on the Twentieth and Twenty-First Sessions*, ¶ 49, U.N. Doc. E/C.12/1999/11 (2000). While the status of the General Comments under international law is unclear, and potentially contestable, they still constitute carefully considered and systematic analyses emanating from a body uniquely placed to offer an interpretation of the norms contained in the ICESCR.

²⁰³ See, e.g., Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, U.N. Doc. E/CN.4/2005/48 13, 15 (Mar. 3, 2005), available at <http://www.humanlaw.org/housing.pdf> (commenting that homelessness is intimately linked to landlessness, and that displacement of communities as a result of large-scale development projects can drive the poor to marginal areas for farming, and threaten social and ecological sustainability).

²⁰⁴ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, ¶ 30 (arguing that by helping to secure food supplies, access to land can be a powerful guard against malnutrition, thereby promoting the right to health).

²⁰⁵ *Id.* at ¶ 1 (arguing that access to land can help secure local livelihoods).

²⁰⁶ *Id.* at ¶ 30 (arguing that access to land can promote the right to food by making food more easily and cheaply available and providing households with a buffer against external shocks, such as the dramatic rise in food prices in 2008); see also *Id.* at ¶¶ 28-29 (arguing that broad-based and equitable land access can further the right to development).

²⁰⁷ The right to food is recognized under Article 25 of the Universal Declaration of Human Rights (Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)) and codified under Article 11 of the ICESCR, which states:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

²⁰⁸ ECOSOC, U.N. CHR, General Comment No. 12, The Right to Adequate Food, U.N. Doc. E/C.12/1999/11 ¶6 (1999)[hereinafter General Comment No. 12].

²⁰⁹ The duty to respect is essentially a duty of non-interference with existing access to rights. The duty to protect requires States to ensure that enterprises or individuals do not deprive individuals of their rights, while the duty to fulfill or facilitate is a positive obligation that requires States to pro-actively engage in, *inter alia*, “activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood.” Office of the High

According to the U.N. Committee on Economic, Social and Cultural Rights (ESCR Committee),²¹⁰ in furtherance of their obligation to *respect* the right to food, States must “refrain from taking measures that may deprive individuals of access to productive resources on which they depend when they produce food for themselves.”²¹¹ The Special Rapporteur argues that this, first and foremost, requires States to ensure security of tenure,²¹² and proposes the following measures in that regard: First, States should confer legal security of tenure through formal titles to land, and should recognize both use and ownership rights, as well as customary and collective rights.²¹³ Second, States should adopt strict anti-eviction laws and strengthen expropriation frameworks to provide clear procedural safeguards for landowners.²¹⁴ Third, States should respect the needs of special groups by ensuring the rights of indigenous peoples under international law,²¹⁵ and by protecting access to the commons (including fishing and grazing grounds) for fisherfolk, pastoralists, and herders.²¹⁶ And finally, respecting the right to food requires that States “prioritize development models that do not lead to eviction, disruptive shifts in land rights and increased land concentration.”²¹⁷

Under the obligation to protect the right to food, the Special Rapporteur counsels that States should protect access to productive resources from encroachment by domestic and foreign private parties.²¹⁸ This includes mapping various land users’ rights and strengthening customary systems of tenure, as highlighted above.²¹⁹ It also includes ensuring that investment agreements comply with relevant obligations under international human rights law, as detailed below in the description of the Eleven Principles.²²⁰ Finally, under the obligation to fulfill the right to food States must “seek to strengthen people’s access to and utilization of resources and means to ensure their livelihoods, including food security.”²²¹ The Special Rapporteur cautions that in situations of highly unequal land distribution, efforts to secure tenure or land use rights may not be sufficient to fulfill this obligation.²²² Instead, a State-led agrarian reform process with significant human rights protections and support to rural development policies may lead to equitable land distribution and help to secure the right to food, along with related human rights.²²³

Commissioner for Human Rights [OHCHR], International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

²¹⁰ See *supra* note 202.

²¹¹ General Comment No. 12, *supra* note 208, at ¶ 15.

²¹² *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 40(a).

²¹³ *Id.* at ¶ 20 – 21; De Schutter, *The Green Rush*, *supra* note 69, at 538.

²¹⁴ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 40(a).

²¹⁵ For more on the rights of indigenous peoples, see *infra* notes 400 and 527 and accompanying text.

²¹⁶ Here the Special Rapporteur adds that the “recognition of communal rights should extend beyond indigenous communities, at least to certain communities that entertain a similar relationship with the land, centered on the community rather than the individual.” *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 40(c); see also Human Rights Council, *Preliminary study on the advancement of the rights of peasants and other people working in rural areas*, U.N. Doc. A/HRC/AC/6/CRP.2 (2010); De Schutter, *The Green Rush*, *supra* note 69, at 537.

²¹⁷ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151.

²¹⁸ *Id.* at ¶ 2 (citing General Comment No. 12, ¶ 15)

²¹⁹ *Id.* at ¶ 41(a). See text accompanying *supra* note 213.

²²⁰ See *infra* Part II.B.2.

²²¹ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 2 (citing General Comment No. 12, ¶ 15). In some instances States may also be under an obligation to provide food directly, for example when “an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal.”

²²² *Id.* at ¶ 27.

²²³ *Id.* at ¶ 38.

2. The Rights-Based Response to the Negative Impacts of Large-Scale Land Deals: The Eleven Principles

In view of the significant impact of large-scale land deals on the right to food, the Special Rapporteur has put forward “The Eleven Principles: Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases” (“Eleven Principles”). The Eleven Principles are based on—and give concrete expression to—minimum standards applicable to large-scale land transactions as required by international human rights law.²²⁴ These Principles call on relevant parties to meet their respective responsibilities to:

- (1) conduct investment negotiations in full transparency with the participation of host communities;
- (2) consult with local populations prior to any shifts in land use, with a view towards obtaining their free, prior, and informed consent for the investment project;
- (3) enact and enforce legislation that safeguards the rights of host communities;
- (4) ensure that investment revenues are used for the benefit of local populations;
- (5) adopt labor-intensive farming systems that maximize employment creation;
- (6) adopt modes of agricultural production that respect the environment;
- (7) ensure that investment agreements include clear obligations and predefined sanctions, with non-compliance determined by independent and participatory *ex post* impact assessments;
- (8) ensure that investment agreements require that a minimum percentage of food crops produced be sold locally;
- (9) conduct participatory impact assessments prior to the completion of negotiations;
- (10) comply with indigenous peoples’ rights under international law; *and*
- (11) provide agricultural waged workers with adequate protection of their fundamental human and labor rights.²²⁵

The Eleven Principles have much in common with the RAI Principles. For example, both sets of Principles call for transparency and consultation with local communities.²²⁶ They both also call for measures to enhance food security,²²⁷ secure land rights,²²⁸ and engage in sustainable environmental practices,²²⁹ and for assurances that investments benefit host communities.²³⁰ On

²²⁴ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at ¶ 5.

²²⁵ *Id.* at 16-18.

²²⁶ See RAI PRINCIPLES, *supra* note 32, Principles 3 and 4; see *Large-scale Land Acquisitions and Leases*, *supra* note 71, Principles 1 and 2.

²²⁷ Principle 2, see RAI PRINCIPLES, *supra* note 32; Principle 8; see *Large-scale Land Acquisitions and Leases*, *supra* note 71.

²²⁸ Principle 1, see RAI PRINCIPLES, *supra* note 32; Principle 3; see *Large-scale Land Acquisitions and Leases*, *supra* note 71.

²²⁹ Principle 7, see RAI PRINCIPLES, *supra* note 32, at; Principle 6; see *Large-scale Land Acquisitions and Leases*, *supra* note 71.

²³⁰ Principle 6, see RAI PRINCIPLES, *supra* note 32, at; Principle 4; see *Large-scale Land Acquisitions and Leases*, *supra* note 71.

the last point, both the Eleven Principles and the RAI Principles seek to ensure accountability through investment agreements that include clear obligations that are enforceable, for example, through the use of predefined sanctions.²³¹

The fact that both sets of principles cover roughly the same terrain is in itself not surprising. Both are, after all, meant to guide important transactional matters surrounding land deals. The Eleven Principles—which preceded the promulgation of the RAI Principles²³²—were also intended to “inform... the adoption of guidelines on land policies and governance by international and regional organizations.”²³³ Furthermore, the principles of transparency, accountability, and participation—which both frameworks emphasize—are key values common to both development and rights-based discourses.²³⁴ The Special Rapporteur has pointed out that, despite “superficial” similarities, his “minimum” principles differ significantly from the RAI principles.²³⁵

First, the voluntary RAI Principles “neglect the essential element of accountability.”²³⁶ By contrast, the Eleven Principles “are not optional; they follow from existing international human rights norms”²³⁷ and give rise to specific obligations that attach to multiple actors. Though the investors’ responsibility to respect human rights is outlined in both the Eleven Principles²³⁸ and the RAI Principles,²³⁹ the RAI Principles are silent on the human rights obligations of the host State. The Eleven Principles also attach responsibilities to additional duty-bearers. In particular, the Eleven Principles note that the home States of private investors “are under an obligation to regulate the conduct of these investors abroad, particularly if the host state appears unwilling or unable to do so.”²⁴⁰ The Eleven Principles add that international financial institutions, which may be involved in facilitating and implementing these investments, are also bound by international human rights law, as part of general international law.²⁴¹

Second, the Eleven Principles focus the inquiry on determining what use of land will promote human rights. Although the Principles are seen as essential to minimizing negative impacts from land deals, adherence to the Principles does not necessarily justify the land investment in question.²⁴² Instead, States must “balance the advantages of entering into [an

²³¹ Principle 7, *see Large-scale Land Acquisitions and Leases*, *supra* note 71; *see* RAI PRINCIPLES, *supra* note 32, at 10.

²³² The Eleven Principles were released in 2009, while the RAI Principles were released in 2010.

²³³ *See Large-scale Land Acquisitions and Leases*, *supra* note 71, at 2.

²³⁴ Narula, *The Right to Food*, *supra* note 47, at 702; Siobhan McInerney-Lankford, *Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective*, 1 J. HUM. RTS. PRAC. 50, 53 (2009).

²³⁵ *How Not to Think of Land-Grabbing*, *supra* note 175, at 255.

²³⁶ *Id.* at 255, 274.

²³⁷ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at ¶ 5.

²³⁸ *Id.* at ¶ 3.

²³⁹ Principle 5, *see* RAI PRINCIPLES, *supra* note 32. Private actors, such as corporations, have not traditionally been viewed as directly bound by international human rights law, but support has recently emerged for the “Protect, Respect, Remedy” framework, which would require corporations and other business enterprises to avoid infringing on human rights and address the negative human rights impacts of their operations. UNHRC, 17th Session, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy”’, (Mar. 21, 2011) U.N. Doc. A/HRC/17/31, *available at* <http://www.businesshumanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>, ¶ 6, Annex ¶ 11. As part of this framework, businesses should also “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” U.N. Doc. A/HRC/17/31. Annex ¶13. To meet these requirements, businesses must exercise due diligence to “become aware of, prevent and address adverse human rights impacts.” U.N. Doc. A/HRC/17/31, at ¶ 56.

²⁴⁰ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at ¶ 5.

²⁴¹ *Id.*

²⁴² *Id.* at ¶ 9.

investment] agreement against the opportunity costs involved, in particular when other uses” of the land might better service the needs and human rights of the local population.²⁴³ Thus, in line with the land-as-gateway framework described above,²⁴⁴ the Eleven Principles call for the prioritization of alternative development pathways that do not lead to significant transfers of land use and ownership rights.²⁴⁵ These and other points of divergence and convergence between the two sets of Principles, and the frameworks of which they are a part, are analyzed in Part III.

III. ASSESSING THE FRAMEWORKS

This section explores the relationship between the frameworks that undergird the rights-based and market-plus approach, and assesses the potential of each framework to protect land users’ rights in light of the significant power dynamics at play. Part A looks at key differences in the frameworks’ approaches towards (1) rights and risks, and (2) land distribution. Part B turns to implementation-related problems that are common to both approaches.

A. Principal Distinctions: Rights, Risks, and Land Distribution

1. Risks or Rights Violations?: Framing and its Consequences

As described in Part I, the negative impacts of large-scale land transfers include forced displacement and dispossession, loss of livelihood, rising food insecurity and water scarcity, among other impacts. The market-plus approach frames these harms as “risks” that must be balanced against the benefits of investment, whereas the rights-based approach frames these harms as violations of populations’ human rights. This section considers the consequences of framing.

a. The Market-Plus Approach: Balancing Away Rights as Risks

In the market-plus approach, the negative impacts of land transactions are framed through a balancing approach that identifies and weighs the risks and benefits of agricultural investment. The market-plus approach expressly acknowledges the “risks” of investment, especially in circumstances “where rights are not well defined, governance is weak, or those affected lack a voice”.²⁴⁶

Risks include displacement of local populations, undermining or negating of existing rights, increased corruption, reduced food security, environmental damage in the project area and beyond, loss of livelihoods or opportunity for land access by the vulnerable, nutritional deprivation, social polarization and political instability.²⁴⁷

At the same time, the market-plus approach affirms the need for even greater private investment in agriculture by highlighting the potential benefits of investment at both the local and global level. The RAI Principles note that many countries have benefited from investment through “better access to capital, technology and skills, generation of employment, and productivity increases.”²⁴⁸ Agricultural investment is also promoted with reference to global food security concerns:

²⁴³ Principle 1, *see id.*

²⁴⁴ *See supra* Part II.B.1

²⁴⁵ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at ¶ 9.

²⁴⁶ RAI PRINCIPLES, *supra* note 32, at 1.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

The need for more and better investment in agriculture to reduce poverty, increase economic growth and promote environmental sustainability was already clear when there were ‘only’ 830 million hungry people before the food price rise [of 2008]. The case is even clearer today when, for the first time in human history, over a billion people go to bed hungry each night.²⁴⁹

In essence, the market-plus approach argues that the risks inherent in these investments must be balanced against the benefits, and reflects the belief that these benefits can in fact be achieved through such investment.²⁵⁰ This balancing approach is not new, especially in the development context where cost-benefit approaches tend to dominate.²⁵¹ What is new is the elevation of the narrative of the “common good” to the global scale. The potential benefits are not just national, but transnational. The implication is that the benefits significantly outweigh the costs.

To be sure, the rights of host populations are considered under the RAI Principles,²⁵² but these rights are weighed against and sometimes sacrificed in furtherance of other competing interests. As noted by Borrás and Franco, potential infringements of human rights “are (re)framed as side effects of an essentially beneficial cure—they are risks that can be managed in order to make possible a larger good.”²⁵³ The other factors against which these rights are balanced—facilitating agricultural investment or enhancing land productivity—are given equal, if not more consideration than the rights themselves.

This balancing approach is problematic for at least two reasons. First, it tolerates rights violations. Human rights are framed as a dimension of development, a single factor to be weighed among many, rather than a legal system that trumps, and a set of norms that give rise to accompanying obligations.²⁵⁴ The rights of host communities, or violations of those rights, do not necessarily determine whether a land investment is desirable or should move forward; they are simply one among many factors to be considered in a cost-benefit balancing exercise. In other words, the market-plus approach does not give human rights normative weight *as rights*, thereby undermining both their status and vindication.²⁵⁵

²⁴⁹ RISING GLOBAL INTEREST, *supra* note 31, at vi.

²⁵⁰ See also Guttal et al., *supra* note 176, at 6 (noting that many land deals are “ostensibly negotiated under the name of development, food and water security, agricultural investment and energy security.”).

²⁵¹ Doreen Lustig & Benedict Kingsbury, *Displacement and Relocation from Protected Areas: International Law Perspectives on Rights, Risks and Resistance*, 4 CONSERVATION & SOC’Y 404, 412 (2006) (noting this phenomenon in the context of conservations and development-led displacement); see also Smita Narula, *The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the Struggle Against the World Bank*, in HUMAN RIGHTS ADVOCACY STORIES (Deena R. Hurwitz et al. eds., 2009) (noting that the Indian government has maintained that large dams are essential for achieving the “common good,” reflecting the dominance of a “balancing” or “cost-benefit” approach to development over an approach that puts human rights at the center of the debate.).

²⁵² Through, for example, calling on investors to respect human rights. See also McNerney-Lankford, *supra* note 234 (noting that while “a majority of development policies... incorporate human rights concerns, many do so only implicitly....”).

²⁵³ *From Threat to Opportunity*, *supra* note 47, at 512.

²⁵⁴ As Martti Koskenniemi points out, post-liberalization has led to the preference for “flexible and informal standards,” rather than general and uniform rules. While this deformalization has allowed “management problems” to be redressed through scientific and technical expertise, it has also created two dangers. First, international treaty rights and obligations will be determined by “balancing” and “best practice” decisions. Second, deformalization will fail to articulate stable commitments or expectations. Koskenniemi consequently finds that human rights lawyers and activists more often argue that human rights, albeit a particularly important policy, is only a policy among others; this is, of course, far more modest than the ‘rights trumping’ claim. Martti Koskenniemi, *Human Rights Mainstreaming as a Project of Power*, 1 HUMANITY 47, 47-48, 51-52 (2010) available at <http://muse.jhu.edu/journals/humanity/v001/1.1.koskenniemi.html>.

²⁵⁵ See also Lustig & Kingsbury, *supra* note 251, at 411, 412 (noting that the “The focus on risks may attenuate the focus on the *rights* of displaced persons” and adding that when rights have to compete with other interests, the legal

Second, the balancing approach facilitates rights violations. Under the market-plus approach, the character of large-scale land transfers is transformed from that of a “threat” to an “opportunity”²⁵⁶ that must be facilitated and maximized. Here, assessments about the potential benefits of large-scale land transfers also tend to be far more optimistic than current research warrants.²⁵⁷ The framing of rights violations as “costs,” coupled with unwarranted enthusiasm about “benefits,” facilitates further rights violations as it serves to validate large-scale land transfers even in situations where proper regulatory frameworks are not in place to protect host community rights. Indeed the World Bank Group has taken just such an approach.

According to the Bank’s own research, investors are actively targeting weak governance zones, contrary to the hypothesis spelled out in the RAI Principles—that good governance enhances a country’s attractiveness for land-related investment.²⁵⁸ An October 2011 Bank study²⁵⁹ reports the “rather surprising result” that “weak land governance and protection of local land rights seem to be associated with higher rather than lower levels of investment even once other factors are controlled for.”²⁶⁰ In other words, “in contrast to what is found for foreign investment more generally, rule of law and good governance have no effect on the number of land-related investment. Moreover, and counter-intuitively, we find that countries where governance of the land sector and tenure security are weak have been most attractive for investors.”²⁶¹

These (some would say unsurprising) conclusions would suggest that proponents of the market-plus approach, like the World Bank, should advise against aggressive foreign direct investment in agricultural land in situations where governance is weak. The World Bank, however, continues to push for greater investment while simultaneously amplifying calls for good governance and transparency, instead of pausing to reflect on its strategy in the face of its own evidence that such reflection is necessary.²⁶² Furthermore, where countries have acted to protect their citizenry—for example through legislation limiting land purchases by foreigners²⁶³—the World Bank has cautioned against these “protectionist” measures in favor of an approach that

vindication of human rights claims are potentially restricted) (emphasis in original).

²⁵⁶ See generally *From Threat to Opportunity*, *supra* note 47.

²⁵⁷ The RAI Principles for instance continue to tout the benefits of large-scale investments (see text accompanying *supra* note 248) despite the fact that the World Bank’s research has determined that these benefits in many cases have not materialized (see text accompanying *supra* note 124); Transnational Institute, *Why So-Called “Responsible Agricultural Investment” Is to Be Stopped* (Apr. 21, 2011), available at <http://www.tni.org/article/why-so-called-responsible-agricultural-investment-must-be-stopped> (noting that the World Bank’s research “could not find any convincing examples of “wins” for poor communities or countries, only a long list of losses.”). See also Lustig & Kingsbury, *supra* note 251, at 411 (noting in the context of development and conservation-led displacement that legal institutions’ depiction of forcibly displaced communities can be “much more sanguine about the advantages of being resettled and the consequentialist case for balancing, than experience so far warrants.”).

²⁵⁸ See text accompanying *supra* notes 192 - 193.

²⁵⁹ Rabah Arezki et al., *What Drives the Global Land Rush?* 8 (World Bank Series, Working Paper No. 5864, 2011)[hereinafter *What Drives the Global Land Rush?*] available at, <http://elibrary.worldbank.org/docserver/download/5864.pdf?expires=1333504536&id=id&accname=guest&checksum=6BAFC2141668CA07B8745D9095C26376>.

²⁶⁰ *Id.* at 16.

²⁶¹ *Id.* at 3; see also language accompanying *supra* note 85 (noting that the World Bank’s *Rising Global Interest in Farmland* study similarly finds that investors primarily focus on countries that “failed to formally recognize land rights.” RISING GLOBAL INTEREST, *supra* note 31, at 37)

²⁶² The October 2011 study concludes that its finding, “which resonates with concerns articulated by part of civil society, suggests that, to minimize the risk that such investments fail to produce benefits for local populations, the micro-level and project- based approach that has dominated the global debate so far will need to be complemented with an emphasis and determined action to improve land governance, transparency and global monitoring.” *What Drives the Global Land Rush?*, *supra* note 259, at 3.

²⁶³ *Id.* at 17. Countries cited by the study as evidence of this phenomenon include Brazil, Argentina and Ukraine. See text accompanying *infra* notes 467 - 469.

prioritizes efforts to improve land governance, noting that “recognizing local rights, educating right holders, and allowing their voluntary and transparent transfer [] are likely to be a more appropriate policy response.”²⁶⁴ The Bank adopts this attitude precisely because of how evidence of harm is treated under a “balancing” or “cost-benefit” approach. Conceptualizing rights violations merely as necessary risks allows for far less cautionary responses to the problems raised by large-scale land deals. The result is that the rights of host populations are inevitably sidelined.

As analyzed above, the market-plus approach is willing to tolerate great risk to human rights in order to pursue its end goal of facilitating land investment. In addition, by failing to insist on proper regulatory frameworks *prior* to investment, and by continuing to validate and enable large-scale land transfers, the market-plus approach facilitates rights violations by opening the door to rapacious actors. This inherently favors those already in a position of substantial economic power, while effectively sidelining disadvantaged groups whose voice and ability to control the direction and applications of such policies are already severely marginalized. The market-plus approach then argues, rather cyclically, that the creation of robust land markets, coupled with good governance measures can mitigate these risks and protect the rights of host communities. The weaknesses of this argument are explored further below.²⁶⁵

b. The Rights-Based Approach: Establishing a Normative Baseline

In contrast to the market-plus approach, the rights-based approach is grounded in international human rights law, and many of the harms stemming from large-scale land transfers are framed as rights violations. Specifically, the Special Rapporteur argues that the detrimental impacts of land deals on host populations are in direct contravention of a number of human rights, including but not limited to: the right to food, the right to water, the right to be free from forced evictions, the right to an adequate standard of living, the right to self-determination, and the right to adequate remedy.²⁶⁶ The framing of harms as violations of international human rights law triggers a far stricter standard of review that privileges the protection of human rights. The Eleven Principles reflect such an approach. They note that “Agreements to lease or cede large areas of land should *under no circumstances* be allowed to trump the human rights obligations of the States concerned.”²⁶⁷

This section argues that international human rights law can play a crucial standard-setting role.²⁶⁸ International human rights norms are appropriate standards against which investment

²⁶⁴ *Id.*

²⁶⁵ See *infra* Parts III.A.2 and III.B.

²⁶⁶ See generally *Large-scale Land Acquisitions and Leases*, *supra* note 71, at 10-11, 13-14 (explaining how large-scale land acquisitions and leases affect or have the potential to affect these and other rights); see also Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 23 (Philip Alston and Katarina Tomasevski eds., 1984) (commenting that the right to self-determination, as defined by Articles 1 of the International Covenant on Civil and Political Rights (ICCPR) and ICESCR, may be violated when a State permits “the exploitation of the country’s food-producing capacity in the exclusive interests of a small part of the population or of foreign (public or private) corporate interests while a large number of the State’s inhabitants are starving or malnourished.”); see also Christine Chinkin & Shelley Wright, *The Hunger Trap: Women, Food, and Self-Determination*, 14 *MICH. J. INT’L L.* 262, 293 (1993) (arguing that the right to self-determination cannot solely consist of territory, boundaries, and political institutions, but should be defined in terms that recognize the needs of all human beings, including the right to live beyond the bare minimum of survival).

²⁶⁷ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at 13 (emphasis added). If agricultural investment is to be responsible, the Special Rapporteur notes, then governments, in collaboration with the international community, must first ensure that appropriate safeguards are in place to promote responsible investment before moving to legitimize large-scale land investments. Otherwise States will likely struggle to reform regulatory frameworks once investment agreements are finalized. *Id.* at ¶33.

²⁶⁸ As suggested by McInerney-Lankford, “the challenge presented by an absence of legally established normative

projects should be measured.²⁶⁹ International human rights treaties reflect both the consent and consensus of States around specific moral and legal standards. Even where States have not ratified the relevant treaty, a number of human rights norms have become customary international law.²⁷⁰ By setting a normative baseline, human rights law can help repudiate impermissible impacts and address key distributive concerns. When assessed against States' human rights obligations, the nebulous language of "risks" and "benefits" can also give way to more concrete assessments of whether large-scale land transfers impermissibly violate rights, or whether they contribute to their realization. Indeed, in the absence of such a normative baseline, large-scale land transfers may continue to exact an unacceptable toll on vulnerable host populations, without generating the promised benefits.

But the inquiry cannot simply rest on the appropriateness of using a human rights framework; it must also consider whether such a framework is sufficiently robust to accommodate necessary tradeoffs and to manage increasingly complex and inter-dependent global processes in which the rights of multiple communities—both within and across countries—are at stake. This section therefore also raises and responds to salient critiques of a "rights-as-trumps"²⁷¹ approach.

i. Repudiating Impermissible Impacts and Managing Trade-Offs

The import of applying human rights standards to large-scale land transfers can be illustrated by examining each framework's approach to the issue of food security. The potential for greater food insecurity among host populations is among the most serious of concerns that have been raised by the phenomenon of large-scale land transfers. Consistent with the framework in which it operates, the RAI Principles apply a balancing approach to the issue of food security, which in practice undermines the very assurances that the Principles seek to deliver. RAI Principle 2 declares that investments should not "jeopardize food security but rather strengthen it,"²⁷² but does not mandate that investments affirmatively enhance food security as a condition of investment. Nor does Principle 2 establish a minimum level of food security for host populations. Instead, it offers "risk-mitigation measures"²⁷³ to guard against the impacts of the land transfers that the framework promotes. Specifically, Principle 2 encourages stakeholder consultations and participation of local government in project design and negotiation, and counsels generally that "negative impacts on food security should be allayed as far as possible through adjustments in design."²⁷⁴ Principle 2 additionally assumes that all risks can be adequately addressed through the market, and fails to consider the dynamics that complicate this narrative.²⁷⁵ Ultimately, it

baselines in development is potentially answered by human rights law." McInerney-Lankford, *supra* note 234, at 72.

²⁶⁹ See also McInerney-Lankford, *supra* note 234, at 70 (commenting that "[a] legal approach offers a clear rationale for the relevance of human rights to development. Which is simply that it binds as a matter of law and is therefore obligatory.").

²⁷⁰ I have elsewhere argued that freedom from hunger, the minimum core content of the broader right to adequate food, is such a right. Narula, *The Right to Food*, *supra* note 47, at 80-84.

²⁷¹ See Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* (Jeremy Waldron ed., 1984) (introducing a metaphor in which a right trumps non-right objectives).

²⁷² See Principle 2, in *RAI PRINCIPLES*, *supra* note 32, at 7.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ For example, the commentary to Principle 2 suggests that steps should be taken to improve people's ability to purchase food, either through increasing crop yields with better inputs or technology, creating a better local market, or linking people to more profitable distant markets. See *id.* But see text accompanying *supra* note 131 noting that land investments often diminish the ability of local producers to procure cultivable land, which in turn negates any benefits that may come from increased market access; see also discussion accompanying *infra* notes 282 and 299-302.

concludes that integration into the market is necessary and notes, perfunctorily, that “there can still be winners and losers on the regional level which must be dealt with.”²⁷⁶

The Eleven Principles, on the other hand, reflect a “rights-as-trumps” approach. They note that, “States would be acting in violation of the human right to food if, by leasing or selling land to investors (whether domestic or foreign), they were depriving the local population of access to productive resources indispensable to their livelihoods. They would also be violating the right to food if they negotiated such agreements without ensuring that this will not result in food insecurity.”²⁷⁷ As a result, the Eleven Principles insist that land transfers can only be justified to the extent that they “improve local food security by increasing productivity and serving local markets, while avoiding an increase in inequalities of income in rural areas.”²⁷⁸ In other words, under the rights-based approach, the possibility of various benefits is insufficient to justify certain risks—specifically those risks that threaten key human rights.

In response, proponents of the market-plus approach may argue that the goals of investment are not only consistent with those of the rights-based approach, but also mutually reinforcing. In their view, greater foreign direct investment in agricultural land can boost food production and facilitate economic growth. The short-term costs may very well be justified by these long-term gains. If large-scale land transfers are restricted, the argument goes, it may actually diminish the welfare of some host country populations, as well as populations abroad who rely on food imports to assure their own food security. Just as a balancing approach is criticized for sidelining rights, a rights-as-trumps approach is critiqued for failing to accommodate these necessary trade-offs.²⁷⁹

But the rights-based approach (and the legal framework on which it rests) is far more nuanced than these trade-off-related objections suggest. First, the rights-based approach does not reject the need for greater agricultural investment; to the contrary, it argues that agricultural investment can help alleviate poverty if it is geared toward supporting small-holder farming.²⁸⁰ And although some have called for a precautionary approach whereby all large-scale land acquisitions are discouraged²⁸¹—the rights-based approach does not rule out large-scale land transfers *per se*. Rather, it calls on States to be cognizant of their human rights obligations when evaluating their foreign investment policy choices.

Second, international human rights law recognizes that the fulfillment of socio-economic rights will involve trade-offs among various goals. At the same time, it sets specific thresholds to help guide this forward-moving process—a threshold that is notably absent from the market-plus approach. In the long run, large-scale land transfers may spur economic growth and increase food production but in the interim, these transfers may result in greater food insecurity for those unable to afford food at market rates,²⁸² and may give rise to a number of other rights violations

²⁷⁶ RAI PRINCIPLES, *supra* note 32, at 7.

²⁷⁷ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at ¶15.

²⁷⁸ *Id.* at ¶ 8. Principle 9 of the Eleven Principles also calls for impact assessments, prior to the completion of negotiations, “[i]n order to highlight the consequences of investment on the enjoyment of the right to food.” *Id.* at 17.

²⁷⁹ See, e.g. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 113 (2002) (commenting that “The absolutist legal vocabulary of rights makes it hard to assess distribution among favored and less favored right holders and forecloses development of a political process for tradeoffs among them....”).

²⁸⁰ De Schutter, *The Green Rush*, *supra* note 69, at 548-49 (arguing that channeling agricultural investment into small-scale farming will direct that investment “toward the most poverty-reducing ends”).

²⁸¹ See GRAHAM, *supra* note 66, at 9; La Via Campesina et al., *supra* note 45.

²⁸² On this point, Amartya Sen argues that efforts to combat hunger must focus on the “entitlement” that each person enjoys over food, rather than the total food supply in the economy. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 161-162 (1999). Because of low incomes, landlessness, or other factors, the poor lack these entitlements and, as a result, experience greater food insecurity.

as land users are forcibly displaced from their land and sources of livelihood.²⁸³ International human rights law repudiates these impacts. Even as it gives States great leeway in fashioning economic policies to support the fulfillment of human rights, it sets a floor of minimum standards and immediate obligations that States must uphold.

The ICESCR calls on States parties to ensure the “progressive realization” of the rights contained therein, including the right to food.²⁸⁴ Though the full realization of these rights, especially in light of resource constraints, will take time and will involve trade-offs among various goals, international human rights law sets specific standards that must be met as these broader goals are achieved.²⁸⁵ These standards impose specific conditions on how State parties set priorities in order to protect vulnerable communities who often lose out in balancing processes.²⁸⁶ Specifically, under the principle of non-retrogression, States must not engage in conduct that deliberately allows existing levels of rights to regress.²⁸⁷ As noted by the ESCR Committee, “Any deliberately retrogressive measure requires careful consideration and needs full justification by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.”²⁸⁸ Economic, social and cultural rights also include a “minimum core” of attendant obligations that States must realize as soon as possible.²⁸⁹ With respect to the right to food, States must, as a minimum core obligation, “ensure for everyone under [their] jurisdiction access to the minimum essential food that is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”²⁹⁰ And finally, States have immediate obligations to ensure non-discrimination in the provision of economic, social and cultural rights, a principle which is considered in more detail below.²⁹¹

Collectively, these standards set a normative baseline: a threshold below which investments cannot go. Here, States could argue that there are other means to immediately ensure these minimum standards, including, for example, through compensation for loss of land or even the direct provision of food. Such arrangements, however, rarely attend large-scale land transfers, and they are usually insufficient even when they do.²⁹² Furthermore, focusing solely on minimum standards misses the point. Under international human rights law, States must continually strive to achieve the full realization of socio-economic rights (rather than just settling

²⁸³ See, for example, the case of Ethiopia included in the Introduction to this Article. Under international human rights law, evictions can only take place under exceptional circumstances and then too must meet certain standards and must be accompanied by full and fair compensation. See *infra* note 410.

²⁸⁴ ICESCR, *supra* note 207, art. 2(1).

²⁸⁵ For an interpretation of the legal obligations of ICESCR Article 2(1), see generally ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, ¶1 of the Covenant)*, U.N. Doc.E/1991/23 (Dec. 14, 1990) [hereinafter *General Comment No. 3*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument). Here, States must “move as expeditiously as possible” toward the full realization of these rights. *Id.* at ¶ 9.

²⁸⁶ OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, ¶ 22; see also Margot Salomon, *Why Should It Matter that Others Have More? – Poverty, Inequality and the Potential of International Human Rights Law* 11-12 (LSE Law, Soc’y & Econ., Working Paper No. 15, 2010) (arguing that international human rights law rejects the argument that distributional equity must be sacrificed in favor of rapid accumulation of national or global wealth).

²⁸⁷ See *General Comment No. 3, supra* note 285, at ¶ 9; see also OHCHR, *supra* note 286, at ¶ 21 (noting that “The principle of non-retrogression of rights states that no rights can be deliberately allowed to suffer an absolute decline in its level of realization.”).

²⁸⁸ *General Comment No. 3, supra* note 285, at ¶ 9.

²⁸⁹ *Id.* at ¶ 10.

²⁹⁰ ICESCR, *supra* note 207, Art. 11(2); *General Comment No. 12, supra* note 208, at ¶ 6. The ESCR Committee adds that if States are unable to fulfill their minimum core obligation, they have the burden to show that it is due to reasons beyond their control and that that they unsuccessfully requested international assistance. *Id.* at ¶ 17.

²⁹¹ See *infra* Part III.A.1.b.ii and *infra* notes 303 - 304.

²⁹² See text accompanying *supra* notes 132 - 135.

for the bare minimum).²⁹³ This includes ensuring that investments help *improve* access to and utilization of productive resources, and not simply ensuring that they do no harm.²⁹⁴

A third response to trade-off-related objections is that the market-plus approach accepts tradeoffs that may not even be necessary to secure certain utility gains. As a case in point, the market-plus approach promotes large-scale land transfers that often involve trade-offs between existing land users' rights and the needs of populations abroad who rely on food imports to assure their own food security. By contrast, and because it holds investment processes to specific normative standards, the rights-based approach looks for methods that minimize trade-offs. For example, in the case of Saudi investments in Ethiopia, the rights-based approach would offer that investing in large-scale industrialized plantations is not the Saudi investor's only option. Investors might instead support the ability of existing land users and small-scale farmers to make productive use of land, in a more sustainable manner, which can help ensure the food security needs of both Saudi and Ethiopian populations. The market-plus approach does not give due consideration to these alternative development pathways and instead simply assumes that there will be trade-offs, and that there will be "winners and losers on the regional level."²⁹⁵

Dilemmas are of course conceivable under which it is impossible to act without violating someone's human rights. But rights violations under those conditions are inevitable; and they are different from the tradeoffs of concrete rights against vague and uncertain gains endorsed by the market-plus approach. The key point is that the market-plus approach accepts human rights violations even where they are not strictly required, using a "balancing" approach that undercuts the deontological quality of rights, and ultimately undermines their vindication. The rights-based approach repudiates these violations and affirmatively looks for methods that minimize trade-offs—methods that do, in fact, exist.

ii. Addressing Distributive Concerns and Rights Conflicts

International human rights law can also help address salient issues around the distribution of benefits and resources. The market-plus approach purports to address the same issues, but it struggles with a range of distributive concerns precisely because it lacks a normative framework that would provide clear standards for assessing the impact of an investment on host communities, and for holding investors and States accountable when promised benefits are not realized. As a case in point, RAI Principle 6 concerns the ability of investments to "generate desirable social and distributional impacts" and "not increase vulnerability."²⁹⁶ But the lack of a normative baseline against which such benefits should be measured undercuts both the potential of investment projects to advance broader development goals, and the ability to hold investors accountable when projects increase the vulnerability of host communities or fail to generate desirable impacts.

RAI Principle 6 encourages investors to make decisions around benefit-sharing jointly with local communities, presumably through the consultation process signaled in RAI Principle 4.²⁹⁷ This primary focus on the investor-community relationship undermines larger development goals by promoting a piecemeal, project-by-project approach where investors become the real stewards of economic development. Such an approach is neither appropriate nor viable.

²⁹³ See also Salomon, *supra* note 286, at 8 (arguing that by focusing only on what is minimally required, attention is directed solely at the position of the worse-off members of the global society, rather than focusing on the overall inequality that characterizes the contemporary world order).

²⁹⁴ See text accompanying *supra* note 221.

²⁹⁵ See text accompanying *supra* note 276.

²⁹⁶ See Principle 6, in RAI PRINCIPLES, *supra* note 32.

²⁹⁷ See Principles 4 and 6, *in id.*

Investors are not an adequate substitute for the State: they are neither charged with the same level of human rights responsibility as the State under international law, nor are they sufficiently incentivized to self-regulate or act in service of host communities in the process of negotiation.²⁹⁸ Instead, investors' fiduciary duty to their shareholders arguably puts profit-seeking ahead of the interests of the local communities in which they operate. In addition, and without specific standards against which to judge an investment's performance, both investors and States can simply point to the terms of the investment agreement to show that they have played their part—even though those terms may not adequately distribute benefits in the host community's favor or may distribute them inequitably amongst domestic constituencies.

This point, in fact, exemplifies a major problem with the market-plus approach on the question of the distribution of benefits. The market-plus approach argues that large-scale land investments can, *inter alia*, stimulate economic growth, increase agricultural productivity, secure better access to capital, and generate employment opportunities.²⁹⁹ But these markers of success do not account for the distribution of these benefits across individuals. Economic success is often measured by total average growth, such as a rise in gross domestic product or per capita income. This focus on averages hides that fact that economic growth is rarely equitably distributed.³⁰⁰ Even when average economic growth is high, it often bypasses particular populations—populations that are disconnected from market forces because they lack the requisite human capital.³⁰¹ In addition, those who stand to benefit from greater investment and employment opportunities may not be the same individuals or communities who stand to lose their land and livelihood in the process.³⁰² The market-plus approach may also fail to address the role of discrimination against women or against particular ethnic, religious, racial, or caste groups as a reason for their economic exclusion. Human rights norms, in theory at least, can help keep these differentials in check by insisting on specific rights guarantees and on non-discrimination in the provision of those rights.³⁰³ International human rights law recognizes that States must pay heightened attention to members of vulnerable populations. Specific covenants protect those members of the population that might suffer from discrimination, including on the basis of sex, race or ethnicity, among other categories, while also calling for positive measures to ensure the full realization of their rights.³⁰⁴

²⁹⁸ See, for instance, David Graham and Ngaire Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, 34 *WORLD DEV.*, AT 881 (2006) (arguing that information, transparency, and disclosure are necessary but not sufficient to hold corporations accountable in their pledges of self-restraint and voluntary compliance. Because corporations face too many alternative incentives due to market pressures, disclosure requirements need to be mandated and enforced by governments.).

²⁹⁹ RAI PRINCIPLES, *supra* note 32, at 1.

³⁰⁰ Narula, *The Right to Food*, *supra* note 47, at 702; Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 *U.C. DAVIS L. REV.*, 1451, 1482 (1999-2000) (arguing that equating social welfare with national wealth overlooks distributive concerns and that efficiency-increasing measures such as economic liberalization may exacerbate pre-existing distributive inequalities).

³⁰¹ Narula, *The Right to Food*, *supra* note 47, at 702.

³⁰² See *supra* Part I.C.; see also De Schutter, *The Green Rush*, *supra* note 69, at 548-9 (noting that the majority of foreign investment in agricultural supports the creation of large-scale plantations and adding that the benefits of these investments rarely trickle down).

³⁰³ See *infra* note 304; see also KIRK HERBERTSON ET AL., WORLD RESOURCES INSTITUTE, A ROADMAP FOR INTEGRATING HUMAN RIGHTS INTO THE WORLD BANK GROUP 13 (2010) [hereinafter A ROADMAP], available at http://pdf.wri.org/roadmap_for_integrating_human_rights.pdf (Commenting that “Measuring projects by their potential to increase net social welfare—an aggregate calculation—hides the distribution of costs among individuals and communities. Human rights standards can complement an economic perspective by placing greater emphasis on the individual and making sure that economic gains are not undermined by the creation of other drivers of poverty, such as discrimination and exclusion.”).

³⁰⁴ See *General Comment No. 3*, ¶¶ 1-2; ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, ¶2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 7, 8, U.N. Doc. E/C.12/GC/20 (July 2, 2009), available at

This gives rise to a second major critique of a “rights-as-trumps” approach: in application, it may engender a number of conflicts between rights holders.³⁰⁵ In the context of large-scale land deals, for instance, potential conflicts exist between the rights of individuals and communities, and between the rights of host State communities and investor State (home State) communities. The rights-based approach, however, is cognizant of—and attempts to address—these tensions. First, the Special Rapporteur expressly acknowledges that “there is a high risk that traditional, patriarchal forms of land distribution will be further legitimized through the recognition of customary forms of tenure [that he advocates], in violation of women’s rights.”³⁰⁶ “Such risks,” he adds, “should be addressed through the inclusion of strict safeguards in the process of such recognition.”³⁰⁷ Specifically, he notes that such systems should be “carefully scrutinized and, if necessary, amended, to bring them into line with women’s rights, the use rights of those who depend on commons and the rights of the most vulnerable members of the community.”³⁰⁸

Second, the interdependent and global nature of these transactions might engender conflicts between populations across States. In fact, the very language of ICESCR Article 11(2)(b)—which calls on States parties to “Tak[e] into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need”³⁰⁹—could be relied upon by net-food importing states to argue that these investments service the investor State population’s right to food. The rights-based approach addresses this conflict by endeavoring to accommodate rights-holders in multiple States, while simultaneously insisting that in no State should people fall below a minimum standard in terms of their enjoyment of the right to food. Specifically, Principle 8 of the Eleven Principles notes that when entering into agreements with net-food importing countries, contracts should provide for a certain minimum percentage of crops to be sold on local markets.³¹⁰ Furthermore, and as noted above, the rights-based approach also looks for alternative development pathways that do not give rise to such conflicts in the first place.³¹¹

There are additional examples of conflict in the proposals put forward by the rights-based approach. The redistribution of land in favor of one constituency, for instance, may lead to rights deprivations of another constituency; in particular, the right not to be arbitrarily deprived of property and the right to be free from forced evictions might be implicated. Even if such deprivations are meant to further distributive justice goals, these efforts can still result in many

<http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>; ICESCR, *supra* note 207, art. 2(2); Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of racial discrimination (Art., par. 1)*, ¶ 2, U.N. Doc A/48/18 (Mar. 22, 1993), available at

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/d7bd5d2bf71258aac12563ee004b639e?Opendocument>; Human Rights Comm., *General Comment No. 18: Non-Discrimination*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989), available at <http://www.unhcr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

³⁰⁵ On this point see Kennedy, *supra* note 279, at 116 -117 (commenting that “rights conflict with one another, rights are vague, rights have exceptions, [and] many situations fall between rights” and arguing that human rights do not offer a pragmatic framework for addressing such conflicts).

³⁰⁶ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 22.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at ¶ 24. He adds in ¶ 31 that “land reform may be seen as an opportunity to strengthen access to land for women, particularly single women and widows”; see also De Schutter, *The Green Rush*, *supra* note 69, at 538.

³⁰⁹ ICESCR, *supra* note 207, at 11(2)(b).

³¹⁰ It also notes that this percentage could increase if food commodities on international markets reach certain, unspecified levels. *Large-Scale Land Acquisitions and Leases*, *supra* note 71, Principle 8, at 17; see also *id.* at 16 (“Investment contracts should prioritize the development needs of the local population and seek to achieve solutions which represent an adequate balance between the interests of all parties.”) (emphasis added)). The RAI Principles also suggest a cap on exports. RAI PRINCIPLES, *supra* note 32, at 7. *But see How Not to Think of Land-Grabbing*, *supra* note 175, at 273 (criticizing the World Bank’s approach on this point as too vague to be much help).

³¹¹ See paragraph accompanying *supra* note 295.

rights violations.³¹² To address these concerns, the Special Rapporteur calls for significant rights protections in the process of redistribution.³¹³ In addition, the land rights of indigenous communities may come into conflict with the need to ensure greater access to land for landless non-indigenous communities. This conflict, however, does not have a prescribed solution.

In the end, these are difficult questions that do not lend themselves to easy answers. The rights-based approach recognizes that upholding rights for some may “risk” the rights of others. There are also significant obstacles to implementing the solutions offered to address some of these concerns, as discussed in Part III.B. But from a conceptual standpoint, the fact that these conflicts exist should not invalidate the rights-based approach; conflicts are, after all, intrinsic to any endeavor to manage the distribution of limited resources across multiple stakeholders. The strength of the rights-based approach is that it is grounded in a normative framework that signals to policy makers that they must continuously endeavor to manage these dilemmas in a manner that prioritizes the needs of the most vulnerable communities. The market-plus approach struggles to protect these communities precisely because it lacks these signals and operates in a framework that does not give human rights normative weight; instead it emphasizes average utility gains. The end result of the market-plus approach is that the benefits are rarely equitably distributed, and the “risks” tend to be borne by the same vulnerable groups.

The need to address distributive concerns is particularly salient in relation to land access, an issue that is taken up in the next section.

2. Land Markets and Land Distribution

Land is instrumentalized under both the market-plus approach and the rights-based approach as a means of enhancing welfare. But there are key differences in how each approach defines welfare, which in turn informs their respective approaches toward land distribution. As underscored by RAI Principle 1’s focus on *existing* land rights,³¹⁴ the market-plus approach takes current distributions of land as the baseline and does not consider the need for land redistribution. Instead, and as its name implies, the market-plus approach relies on the market to distribute land to the most efficient producer, and on the use of negotiations and other procedural safeguards to help protect land users’ rights. By contrast, the rights-based approach—which values land as a rights-protecting asset—places great value on how land is distributed. It does not reject market processes but judges these processes by their distributional impacts, and calls on States to assess their policy choices and set up regulatory frameworks cognizant of their human rights obligations. Specifically, States should not permit the deprivation of access to productive resources that are indispensable to their populations’ livelihoods, and must also “strengthen people’s access to and utilization of resources and means to ensure their livelihoods, including food security.”³¹⁵

³¹² Zimbabwe, for example, was roundly criticized for its seizure of white-owned farms in 2000, a process that led to a great deal of violence and instability and that resulted in the concentration of many farms in the hands of President Robert Mugabe’s political supporters. See BBC World Service, *Case Study: Land Reform in Zimbabwe*, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art17.shtml (last visited Aug. 1, 2012) (noting that land redistribution in 2000 was accompanied by violence and that the country plunged into recession shortly after the seizures). See also Lydia Polgreen, *In Zimbabwe Land Takeover, a Golden Lining*, N.Y. TIMES, July 20, 2012, available at http://www.nytimes.com/2012/07/21/world/africa/in-zimbabwe-land-takeover-a-golden-lining.html?_r=1&pagewanted=all (describing how small scale tobacco farmers who received redistributed plots of land after 2000 have thrived in recent years).

³¹³ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 38.

³¹⁴ Principle 1, see RAI PRINCIPLES, *supra* note 32. While Principle 1 purports to recognize a myriad of ownership and use rights, it does not contemplate the redistribution of rights to those who lack entitlements altogether.

³¹⁵ See *supra* Part II.B.1.

These differences between the market-plus approach and the rights-based approach underscore “a fundamental opposition between two concepts of security of tenure; one oriented toward promoting land marketability through titling, and the other oriented towards broadening the entitlements of relevant groups in order to ensure more secure livelihoods.”³¹⁶ As considered below, these conceptual differences, in application, can have a significant impact on the distribution of land,³¹⁷ which in turn can greatly affect substantive rights, as well as productivity goals.

a. Problems Classifying and Allocating “Underutilized” Land

As outlined in Part II, the market-plus approach views land as a commodity whose productivity must be enhanced in order to yield beneficial food production outcomes. Greater yields, however, can only be assured if “available” or “underutilized” land is first identified and then transferred to the most efficient producer. Land titling coupled with robust land markets, it is argued, can help ensure efficient allocation of land, and can stimulate the economic growth necessary to counter food insecurity and rural poverty.³¹⁸

Two distributional issues arise in relation to the classification and allocation of “underutilized” land. The first is that land so classified is rarely truly “available” in the sense of being unused. Land that may be deemed underutilized by World Bank-style efficiency projections may actually provide essential support for local populations, whether by supporting smallholders who work the land, or by providing access to essential resources for fisherfolk or pastoralists.³¹⁹ From a legal perspective, land may appear “available” because those who operate it do so under some system of customary tenure that is not honored by the State and fits poorly into a Western property rights regime.³²⁰ The problem may be compounded by the use of technocratic tools—such as satellite imagery and agroecological zoning—to identify “underutilized” investment-worthy land.³²¹ Simply put, the satellite-level appearance of disuse can be misleading.³²²

³¹⁶ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶21; *see also* Elizabeth Fortin, *Reforming Land Rights: The World Bank and the Globalization of Agriculture*, 14 *Soc. & L. Stud.* 147, 158 - 159 (2005) (demonstrating that the Bank’s definition of security was modified to include the ability of an occupant to sell and mortgage the land and critiquing this definition as “stretch[ing] notions of ‘security’ so as to fit within policies of economic liberalization and privatization.”).

³¹⁷ Here I define distribution in both use and ownership terms.

³¹⁸ *See supra* Part II.A.1.

³¹⁹ *See* text accompanying *supra* notes 24 - 25, 43, 151 - 153; *see, e.g.*, Hallam, *supra* note 79, at 5, *available at* http://www.maff.go.jp/primaff/meeting/kaisai/pdf/0903_3.pdf (identifying this phenomenon in Sub-Saharan Africa). *See also* *How Not to Think About Land Grabbing*, *supra* note, at 260 (commenting that the interest in investing in “under-utilized” land often ignores perceived “non-productive” uses of the land).

³²⁰ *See Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶18; *see, e.g.*, SALLY ENGLE MERRY, *COLONIZING HAWAII* 93, 95 (2000) (discussing how the historical system of land tenancy in Hawai’i, which was based on genealogy and rank, was replaced with a system of private fee-simple landownership based on property ownership and the market, resulting in massive displacement and land alienation for Hawai’i’s indigenous population.).

³²¹ *See* text accompanying *supra* notes 173 - 174.

³²² RAI Principle 4 additionally endorses the use of satellite imagery by local officials to help guide the location of land investments ostensibly in a manner that optimizes “agro-ecological potential” and reduces conflicts. RAI PRINCIPLES, *supra* note 32, at 11. At the local level, the use of satellite imagery may also fail to promote efficient use of land or make formalization of land titling a more expedient and equitable process. A study completed by Frank Upham and Leah Trzcinski on Cambodian legal reform offers a case in point. The authors note that the software that professional surveyors use may not be “flawlessly responsive” for local administrators unfamiliar with the technology. Moreover, the land registration process itself may fall prey to corruption. Leah Trzcinski & Frank Upham, *Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia* 6-16 (September 29, 2011) (unpublished manuscript) (on file with the author).

The second issue concerns the policy choice to put such “underutilized” land on the market. As illustrated by a case study of land transfers in Mali,³²³ the World Bank Group has heavily promoted this option. As the study notes, the Malian Investment Promotion Agency—an agency that is supported by and collaborates with the World Bank³²⁴—advertises that more than 2.5 million hectares are “available” to large-scale investors.³²⁵ The authors of the study express concern about the suggestion that almost half the country’s arable land is available to investors “in a country plagued by hunger and threatened by increasing desertification.”³²⁶ They add that these policies are rooted in World Bank-supported land tenure reform, which itself is “driven by the desire to make farmland more accessible to large-scale investors.”³²⁷ These policies are, in turn, justified with reference to food productivity concerns. I consider the merits of the productivity argument further below.³²⁸

The rights-based approach takes a different starting point from the market-plus approach, asking first whether underutilized land should be redistributed to small-scale farmers, rather than simply assuming that it should be made available to large-scale investors. In more general terms, it questions whether land allocation should be purely market-driven given the number of distributional problems that attend such an approach. As detailed below, the market-plus approach’s commodification of land through land markets and titling programs may serve to exacerbate rather than resolve tenure insecurity, and may reinforce existing hierarchies or lead to further concentration of rural land in a manner that undermines productivity goals. By contrast, and by focusing on rights guarantees, the rights-based approach seeks to keep problematic land distributional impacts in check, and seeks to support more equitable distribution of land.

b. Commodifying Land through Titling Programs: Protecting Rights or Exacerbating Problems?

The prioritization of individual private property rights and the formalization of land rights through titling programs can have significant distributional impacts. First, titling may not recognize the myriad and customary uses of land by rural communities.³²⁹ Second, and as highlighted by the Special Rapporteur, land titling may not lead to security of tenure.³³⁰ To the extent that poorer landowners are vulnerable to pressures to sell their land, titling can facilitate land transfers that are inimical to their interests. Indeed, the more effective titling is at easing land transfers, the more vulnerable poor landowners can become to such pressures.³³¹ In

³²³ OAKLAND INSTITUTE, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: MALI, 2 (2011)[hereinafter UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: MALI].

³²⁴ *Id.* at 10.

³²⁵ *Id.* at 11.

³²⁶ *Id.* at 2, 11. These same concerns and critiques also attend the Ethiopian case study included in the Introduction of this article. See text accompanying *supra* notes ____

³²⁷ UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: MALI, *supra* note, at 2. (The study adds that land users’ rights have been largely ignored in these deals leading to “violations of basic human rights for the people affected.” A lack of transparency has also undermined the ability of local communities to “make informed decisions regarding lease negotiations.”)

³²⁸ See *infra* Part III.A.2.c.

³²⁹ See text accompanying *supra* note 319.

³³⁰ Special Rapporteur on the Right to Adequate Housing, *Basic Principles and Guidelines on Development-based Evictions and Displacement* ¶25 (2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement>; *Report of the Special Rapporteur on the right to food* (2010), *supra* note 151, at 2.

³³¹ Thus, poorer landowners are often better off where selling land is made more difficult, rather than less. *Report of the Special Rapporteur on the right to food* (2010), *supra* note 151, at 11, ¶20; see also Fortin, *supra* note 316, at 164 (citing a 2003 World Bank study saying that land markets “are likely only to be used by the poor to sell their land in the face of economic hardship and instability, their distress exacerbated by the permanence of such a transaction.”); De Schutter, *The Green Rush*, *supra* note 69, at 528.

jurisdictions where access to titles tracks formal claims to land, titling can also reinforce inequitable land distribution.³³² Third, the legal prioritization of individual private property rights can unevenly advantage different portions of the population.

There are many ways in which this uneven advantage may arise. For example, the titling process can fall prey to corrupt local officials.³³³ Small landowners, too, may not be able to afford the costs associated with securing a title to their land.³³⁴ Domestic elites often have easier access to the resources, knowledge and connections necessary to register land rights under formal legal processes.³³⁵ Even where property rights are demarcated and recognized, local elites may be able to capture the community decision-making process to secure individual benefits from communal land.³³⁶ Where local accountability structures are weak, community leaders may exceed their traditional authority and customary rules. The World Bank itself has found that, particularly where investment potential is high, “chiefs have begun to perceive themselves as landowners in their own right, often reducing their subjects to lessees.”³³⁷ Deals negotiated directly between investors and chiefs mean that land, previously seen as common or communal property, is essentially being privatized in a highly *ad hoc* and disjointed manner.³³⁸ In these circumstances, where formally recognized titles conflict with communal land use and ownership practices, titling can actually make it less clear who owns a tract of land.³³⁹

The rights-based approach seeks to minimize the negative distributional impacts outlined above. Specifically, the Special Rapporteur argues in favor of limiting land sales in order to “protect smallholders from pressure to cede their land” and to “protect use rights regarding communal land and preserve communal forms of land management.”³⁴⁰ In addition, the Special Rapporteur urges States to “prioritize development models that do not lead to eviction, disruptive

³³² *How Not to Think of Land-Grabbing*, *supra* note 175, at 269; see Fortin, *supra* note 316, at 170 (arguing that recognizing property rights and creating land markets in the context of extreme inequality may prove a mechanism for reaffirming inequality, rather than a mechanism for redress); see also *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶17 (arguing that a focus on formal ownership can “confirm the unequal distribution of land, resulting in a practice of counter-agrarian reform.”).

³³³ *How Not to Think of Land-Grabbing*, *supra* note 175, at 269.

³³⁴ *Id.*; Annelies Zoomers, *Globalisation and the foreignisation of space: seven processes driving the current global land grab*, 37 J. PEASANT STUD. 429, 432 (2010), available at <http://farmlandgrab.org/wp-content/uploads/2010/06/7-Processes-Driving-Global-Land-Grab.pdf>; De Schutter, *The Green Rush*, *supra* note 69, at 528.

³³⁵ RISING GLOBAL INTEREST, *supra* note 31, at 99; Smith, *supra* note 179, at 213; Zoomers, *supra* note 334, at 432 (showing that attempts to promote land titling in Africa have had a negative distributive effect because “people with good connections, information and resources were able to register land in their names, at the expense of others.”). Similar problems were identified with regard to land titling schemes in nineteenth century Hawai’i. Although commoners (maka’ainana) had the right to apply for permanent land titles, relatively few actually did, for reasons ranging from the unfamiliarity of a formal relationship to land, to the administrative difficulties of filing claims and surveying lands. MERRY, *supra* note 320, at 93-4. The result was land alienation for the maka’ainana as chiefs leased their land to foreigners. *Id.* at 94.

³³⁶ RISING GLOBAL INTEREST, *supra* note 31, at 101.

³³⁷ *Id.* at 103; see also Janine M. Ubink, *Legalising Customary Land Tenure in Ghana: The case of Peri-Urban Kumasi*, in LEGALISING LAND RIGHTS: LOCAL PRACTICES, STATE RESPONSES AND TENURE SECURITY 163-187 (2010) (describing the lack of political accountability of local chiefs in Kumasi, Ghana who successfully redefined customary tenure so as to dispossess farmers and receive payments from urban dwellers willing to pay large sums for land).

³³⁸ RISING GLOBAL INTEREST, *supra* note 31, at 103. Another Bank study finds that in scenarios where “access to land is governed by customary law and practices”—as is the case in much of Africa—“formalization of land rights is complex and can contribute to land grabs by the elite.” EVALUATIVE LESSONS, *supra* note 168, at 47.

³³⁹ *How Not to Think of Land-Grabbing*, *supra* note 175, at 269; Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1000 (2005-2006) (arguing that rising land values make a private property system difficult to maintain when the institutional environment governing land is characterized by competing laws and community norms, which in turn makes it impossible to exclude claimants to land).

³⁴⁰ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶20.

shifts in land rights and increased land concentration”³⁴¹ and to adopt strict anti-eviction laws and strengthen expropriation frameworks to provide clear procedural safeguards for landowners.³⁴² The rights-based approach does not reject titling processes; rather, it calls for greater recognition of use rights over full ownership rights, as well as a greater recognition of customary and collective rights as an alternative to individual titling.³⁴³ Because land titling can have a particularly detrimental impact on women, regardless of the form taken,³⁴⁴ the Special Rapporteur cautions that customary forms of tenure should not be idealized and should itself be subject to reform.³⁴⁵

Here it is important to note that in an effort to better recognize land users’ rights and customary rights, the market-plus approach’s RAI Principles do explicitly broaden the categories of rights that must be recognized and respected to include both ownership and use rights “whether statutory or customary, primary or secondary, formal or informal, group or individual” (RAI Principle 1).³⁴⁶ Although this recognition is significant, it falls short in two key respects. First, the RAI Principles still focuses on *existing* rights, and do not consider the need for land *redistribution* in areas marked by highly inequitable distributions of land. Second, the formalization of these rights is still in service of integrating land users into the market, and facilitating the transfer of land to the most “efficient” user. In similar fashion, the RAI Principles discourage expropriations not on the reasoning that they alienate occupants from their land, but on the reasoning that “[s]uch centralization adds complexity and discretion, [and] makes direct negotiation” between investors and host communities impossible.³⁴⁷ A better solution, the RAI Principles argue, is for States to keep expropriation to a bare minimum and regulate procedures for *transferring* use rights.³⁴⁸ In the end, although the RAI Principles’ attention to land users’ rights and the rights of marginalized communities is to be welcomed, the Principles still lack a nuanced critique of the market and its distributional impacts. Even more significantly, in its own programming, the Bank still prioritizes and promotes individual ownership rights as the most “modern” form of landholding.³⁴⁹

³⁴¹ *Id.*

³⁴² *Id.* at ¶ 40(a); *Large-scale Land Acquisitions and Leases*, *supra* note 71, Principle 3; *see supra* Part II.B.1; De Schutter, *The Green Rush*, *supra* note 69, at 552.

³⁴³ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶¶20 – 21; De Schutter, *The Green Rush*, *supra* note 69, at 538.

³⁴⁴ Because formal title to land is often solely listed with and held by the male head of household, women are effectively excluded from decision-making processes relating to family property. This, of course, greatly undermines the claims of women to the family property. *Over the Heads of Local People*, *supra* note 93, at 904. Where property is held and distributed through customary tenure systems, women often only gain access to land through their husbands or another male family member. Susana Lastarria-Cornhil, *Impact of privatization on gender and property rights in Africa*, 25 *WORLD DEV.* 1317 (1997) (adding that under such circumstances, privatization of land often consolidates property in the hands of male community leaders or male family members, who can make legally-cognizable claims to property.).

³⁴⁵ *See infra* note 408; *see also* De Schutter, *The Green Rush*, *supra* note 69, at 538.

³⁴⁶ RAI PRINCIPLES, *supra* note 32, at 2; *see also* WORLD DEVELOPMENT REPORT 2008, *supra* note 143, at 139 (noting that individual titling can “weaken or leave out communal, secondary, or women’s rights” that titling processes can be captured by bureaucrats and local elites, and commenting that “although individual titling is still appropriate in many cases, it needs to be complemented by new approaches to securing tenure.”).

³⁴⁷ RAI PRINCIPLES, *supra* note 32, at 5 (The Principles add that land users’ rights are especially threatened when compensation is not awarded to those with occupancy rights or when expropriation-related processes are non-transparent and corrupt.).

³⁴⁸ *Id.*

³⁴⁹ *See* Fortin, *supra* note 316, at 170 (commenting that even though the Bank recognizes customary rights, it still sees individualistic ownership rights as the most “modern” form of landholding). According to one Bank study, 85 percent of stand-alone projects related to the Bank’s lending support in the agricultural sector between 1998 and 2008 focused on land administration and efforts to clarify land rights. EVALUATIVE LESSONS, *supra* note 168, at 48. The study also notes that some Bank projects are “attempting to deal with formalization of rights under systems of customary tenure,”

c. Land Markets: Enhancing Productivity or Enabling Land Concentration?

The Bank's continued focus on land titling and land markets is justified with reference to productivity concerns. Specifically, the market-plus approach argues that the productivity of land must be enhanced in order to yield beneficial food production outcomes. Land titling and robust land markets can, in turn, both facilitate investments in land by landowners and also transfer land ownership to the most efficient producer, promoting both economic growth and greater food security.³⁵⁰ Yet, as argued by the Special Rapporteur, there are a number of ways in which the combination of titling and markets actually interferes with the productive allocation of agricultural land.

First, land markets may result in land being taken out of production—as when investments are made for speculative reasons, or when food crops are diverted to biofuels—resulting in both “decreased productivity and in increased landlessness among the rural poor.”³⁵¹ Land sales also tend to favor those with greater access to capital and credit, rather than those who can make the most productive use of land.³⁵² Small farmers may also be priced out by land speculation.³⁵³ Second, the poverty-reducing effects of transforming land into capital³⁵⁴ “presupposes that property is transformed into collateral, collateral into credit and credit into income.”³⁵⁵ But this hypothesized sequence breaks down at key points. To start, smallholders for whom land is a vital social safety net may be reluctant to use their land as collateral.³⁵⁶ Such cases are typical of areas where smallholders have few other opportunities, and they invalidate the market-plus approach's core assumption that it is the legal inability to use land as collateral that prevents property owners from doing so.³⁵⁷ Moreover, titling may not result in greater access to credit from private financial institutions.³⁵⁸ Third, the impact of titling on productivity is at best unclear. Studies produced from 1994-2001 shows few significant effects of titling on production.³⁵⁹ This may especially be the case when titling is promoted in isolation from other

but adds that “these projects are fewer in number.” *Id.*; see also Heinz Klug, *Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law*, 35 J. LEGAL PLURALISM & UNOFFICIAL L. 143 (1995) (UK) (arguing that although Western concepts of property rights are considered flexible enough to incorporate a wide range of specific tenure arrangements, indigenous or communal property regimes—in which individuals may have all the incidents of ownership but not the right to alienate to alienate freely outside the community—are still seen as “less than ownership.”); see also Michael A. Heller, *The Tragedy of the AntiCommons: Property in the Transit from Marx to Market*, 111 HARV. L. REV. 622 (1997) (arguing that when too many owners are given an exclusive right of use, then land tends to be underused, instead of being used most efficiently).

³⁵⁰ KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION 115-16 (2003), available at <http://siteresources.worldbank.org/EXTARD/Resources/336681-1295878311276/26384.pdf> (arguing that improved security of tenure encourages smallhold farmers to invest in the land) (The document has not been approved by the Bank's Board and thus is not an official statement of the World Bank Group, but at least one commentator has noted that the report serves as the Bank's unofficial policy document on land issues. Keith Clifford Bell, *World Bank Support for Land Administration and Management: Responding to the Challenges of the Millennium Development Goals 6* (presented at the XXIII FIG Congress in Munich, Germany, 8-13 October 2006), available at http://www.fig.net/pub/monthly_articles/november_2006/bell_november_2006l.pdf).

³⁵¹ *Report of the Special Rapporteur on the right to food (2010)*, supra note 151, at ¶ 19.

³⁵² *Id.* (citing Celestine Nyamu Musembi, *De Soto and land relations in Africa: breathing life into dead theories about property rights*, in MARKET-LED AGRARIAN REFORM: CRITICAL PERSPECTIVES ON NEOLIBERAL LAND POLICIES AND THE RURAL POOR, (Saturnino M. Borrás Jr. et al., eds., 2008)).

³⁵³ *How Not to Think of Land-Grabbing*, supra note 175, at 270.

³⁵⁴ DE SOTO, supra note 164.

³⁵⁵ *Report of the Special Rapporteur on the right to food (2010)*, supra note 151, at ¶ 19.

³⁵⁶ *Id.*

³⁵⁷ RISING GLOBAL INTEREST, supra note 31, at 216.

³⁵⁸ *Report of the Special Rapporteur on the right to food (2010)*, supra note 151, at ¶ 19; Fortin, supra note 316, at 161 (citing to Bank studies that state that because of “credit market imperfections” and the risks involved in granting credit over small plots of land, “the use of land as collateral for credit is only a remote option.”).

³⁵⁹ See, e.g. Smith, supra note 179, at 211-12 (citing studies that found the effect of tenure security on land improvements to be mixed).

policies that provide essential support to smallholder farmers, such as technical assistance or access to capital.³⁶⁰

The World Bank's own study, released in 2011, appears to validate some of these concerns.³⁶¹ The study finds that World Bank Group interventions have performed "well below average" in agriculture-based economies, most notably Sub-Saharan Africa.³⁶² On the subject of formalization of land rights, the study finds that "Evidence of the impacts of [World Bank Group] efforts on agricultural productivity is sparse, [] particularly for land administration, because these projects do not typically have agricultural productivity as a core objective to be monitored."³⁶³ The report adds that "Greater emphasis is needed on measurement of these impacts to reflect the increasing focus on production and productivity in the Bank's agricultural portfolio."³⁶⁴ The failure of the architects of the market-plus approach to sufficiently measure the impact of their policy prescriptions on agricultural productivity illustrates the need for a more nuanced critique of the market. Moreover, the World Bank appears to recognize that its approach has not generated the most desirable outcomes in agricultural economies, yet it continues to embrace that approach at the most fundamental level.³⁶⁵

The World Bank's approach to land productivity can also be critiqued for its short-sightedness. The development of large-scale plantations for the production of food, energy, and cash crops has already facilitated greater concentration of rural land, turning small-scale farmers into landless agricultural laborers who can barely eke out a subsistence living.³⁶⁶ Even as the Bank now calls for reinvestments in agriculture, and rhetorically supports small-scale farming as elemental to development and poverty reduction in agriculture-based economies,³⁶⁷ it continues to promote the development of agribusiness-driven, export-oriented, capital-intensive farms over owner-operated, small-scale agriculture.³⁶⁸ Here, too, the Bank argues that an effective land market can facilitate productive collaboration between local land holders and investors, and achieve mutually satisfying outcomes.³⁶⁹ Though examples of productive collaboration do

³⁶⁰ *How Not to Think of Land-Grabbing*, *supra* note 175, at 270; *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 19 (citing Nyamu Musembi, *supra* note 352.).

³⁶¹ EVALUATIVE LESSONS, *supra* note 168, at xii. The study evaluated the World Bank Group's activities in the agricultural sector between 1998 and 2008.

³⁶² *Id.* at x, xiv.

³⁶³ *Id.* at xii.

³⁶⁴ *Id.*

³⁶⁵ The Bank has acknowledged that land sales markets have at times failed to increase productivity or reduce poverty, but attributes these failures to capital markets imperfections and policy distortions. DEININGER, *supra* note 350, at xxix. The Bank also dismisses the possibility of government intervention in land sales markets to address credit market imperfections, arguing that such intervention almost always has negative results and should only be undertaken in very limited situations. *Id.* at xxxvi-xxxvii.

³⁶⁶ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, ¶¶ 1, 7; *see also How Not to Think of Land-Grabbing*, *supra* note 175, at 270 (noting that "historically, the creation of a market facilitating sales of land has led to reconcentration of land unless strong support is given to small-scale farmers, particularly in order to allow them to have access to capital."). IFI-imposed structural adjustment programs, along with the liberalization of trade in agricultural products, have also turned a number of food-exporting developing countries into net food-importers over the past 20 years. Smita Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 YALE HUM. RTS & DEV. L.J. 403, 411 (2010) [hereinafter *Reclaiming the Right to Food*].

³⁶⁷ Indeed the RAI Principles open with the statement that "investment to increase productivity of owner-operated smallholder agriculture has a very large impact on growth and poverty reduction." RAI PRINCIPLES, *supra* note 32, at 1; *see also* WORLD DEVELOPMENT REPORT 2008, *supra* note 143, at 1 (noting that the use of agriculture to promote development and reduce poverty in agriculture-based economies "requires a productivity revolution in smallholder farming.").

³⁶⁸ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 7.

³⁶⁹ According to the World Bank, partnerships between small farmers and large investors can be mutually beneficial as long as rights are well-defined and there is a regulatory framework in place to prevent externalities. In this scenario,

exist,³⁷⁰ these are few and far between.³⁷¹ These policy choices are even more surprising in light of the strong empirical evidence that exists in support of agrarian reform and more equitable land distribution as an engine of productivity and economic growth, as examined in Part IV.C.1.

Ultimately, the market-plus approach does not question its own underlying philosophy towards land markets, despite the documented and significant problems with its approach.³⁷² More fundamentally, the market-plus approach seems to disregard an obvious and salient point: land is a finite resource. As the Special Rapporteur notes, land cannot be both given away to investors and be made more available to local users.³⁷³ Attuned to this reality, the rights-based approach urges the need for more creative solutions to productivity problems—solutions that do not separate rural communities from land that serves as both a primary asset and a vital social safety net. The market-plus approach limits the potential for such creativity and closes the door to alternative development pathways. Instead, the market-plus approach relies on negotiations and consultations to empower local communities and discipline market processes.³⁷⁴ At the end of the day, if the land is transferred and industrialized, existing users will likely lose out, regardless of how transparent these transfers are, or how many consultations are involved in the process. The next section questions the utility of these and other procedural fixes for protecting land users' rights.

B. Overlapping Problems: The Limitations of Procedural Safeguards

As analyzed above, the market-plus approach and the rights-based approach are conceptually distinguished in two key respects: their approach to rights and risks, and their approach to land distribution. At the same time, both approaches rely substantially on procedural safeguards to protect land users' rights, and on host States to create appropriate regulatory environments and enforce these safeguards. Although these sets of measures are intended to secure different substantive outcomes, they are each undermined at the level of implementation because of the significant power dynamics at play. In the context of these dynamics—and as evidenced by numerous case studies on large-scale land transfers—procedural safeguards have not empowered affected communities. Rather, such proceduralism has more often than not been co-opted by powerful investors and domestic elites with the willing cooperation of the host State.

1. The RAI Principles: A Misplaced Focus on Procedural Fairness

The market-plus approach assumes that robust land markets, coupled with community consultations and good governance measures can help mitigate the risks and deliver the benefits

active intervention by the State in land transactions is seen as unnecessary. RISING GLOBAL INTEREST, *supra* note 31, at 25-27.

³⁷⁰ See, e.g., FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 76, at 102 (describing a Dutch company's biofuel project in Mali, which features a focus on local participation, including production, processing and consumption).

³⁷¹ See LAND DEALS IN AFRICA, *supra* note 32, at 26-27 (noting that land transfers executed at below-market prices fail to incentivize business models that involve collaboration between investors and smallholders, and that such collaboration is certainly not a universal component of land deal contracts); see also *How Not to Think of Land-Grabbing*, *supra* note 175, at 259 (detailing how small-scale farmers are negatively affected by competitive markets).

³⁷² See also John K. M. Ohnesorge, *The Rule of Law, Economic Development and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA (1999) (arguing that, despite contrary evidence, free market development advocates continually make the faulty assumption that Western-style property rights are necessary for economic development because of biases embedded in the rule of law rhetoric.)

³⁷³ De Schutter, *The Green Rush*, *supra* note 69, at 547.

³⁷⁴ See text accompanying *supra* note 187. As noted by Borrás and Franco, "Proposals for a CoC [Code of Conduct] for land deals necessarily operate within and seek to sustain or extend the existing global industrial agro-food and energy complex..." and "a priori dismiss[] the possibility of other development pathway options." *From Threat to Opportunity*, *supra* note 47, at 515.

of large-scale land transfers.³⁷⁵ RAI Principle 1, for instance, reasons that “[r]ecognition of rights to land and associated natural resources, together with the power to negotiate their uses, can greatly empower local communities.”³⁷⁶ RAI Principle 3 adds that all processes governing land transfers and investments should be “transparent, monitored, and [should] ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment.”³⁷⁷

Greater transparency and accountability are indeed goals worth striving for—especially as so many deals are characterized by a lack of transparency and rights abuse.³⁷⁸ There are also sound reasons to emphasize and seek to correct problems within the legal and regulatory framework since such deficiencies can greatly undermine the human rights of host populations. The RAI Principles’ focus on good governance, however, is not framed as being directly in service of protecting host populations’ rights. Rather, it is in service of facilitating greater investment,³⁷⁹ which in turn, it is argued, can benefit host populations if properly regulated. Here, regulation focuses largely on improving the *process* of large-scale land transfers.

This focus on procedural fairness is a natural extension of the framework in which the RAI Principles operate. In the absence of a substantive normative baseline against which to assess the benefits and harms of large-scale land investments, the discourse—around both the problem and the solution—shifts to procedure. Although the RAI Principles acknowledge that large-scale land transfers may have adverse impacts on host populations, they largely understand these issues as arising from procedural problems: consultations either do not take place, or are not meaningful; contracts either do not exist, or lack essential clauses that would define parties’ rights and responsibilities; and so on. Diagnosing the problem as procedural naturally leads to solutions that focus on creating new or better procedures, all the while leaving substantive considerations around project legitimacy unaddressed. As such, the RAI Principles fail to question the “why” of large-scale land transfers, focusing instead on the “how.”

The RAI Principles’ focus on procedural corrections over substantive outcomes is exemplified by its approach to community consultations and investment contracts. RAI Principle 4 calls for consultations with all those materially affected and for the enforcement of agreements arising out of consultations. This recommendation responds to “an important initial lesson emerging from case studies”—namely, “that even where community consultation is formally required to approve land investments, it may not offer communities adequate opportunities to either voice their concerns or hold investors accountable.”³⁸⁰ RAI Principle 4 thus attempts to remedy this problem by calling for better consultations and procedural safeguards.³⁸¹ As considered below, these solutions fall short in three key respects.

³⁷⁵ See *supra* Part II.A.

³⁷⁶ RAI PRINCIPLES, *supra* note 32, at Principle 1.

³⁷⁷ *Id.*, at Principle 3.

³⁷⁸ See *supra* Part I.B.

³⁷⁹ See also LAND RESEARCH ACTION NETWORK, *Why We Oppose the Principles for Responsible Agricultural Investment (RAI)* (Oct. 9, 2010), available at <http://www.landaction.org/spip.php?article570> (arguing that the RAI Principles “are primarily concerned with facilitating enabling conditions for a ‘stable and efficient investment climate’ for corporations, regardless of the production model.”). In similar fashion, the World Bank Group’s “Investment Across Borders” [IAB] benchmarking initiative—wherein a country ranks favorably only if investors have access to its land markets—focuses “primarily on laws and regulations governing foreign companies’ access to industrial land, and less on legal protections for countries’ citizens and environments.” See The World Bank Group, *Investing Across Borders 2010*, THE WORLD BANK GROUP 1, 41 (2010), available at <http://iab.worldbank.org/~media/FPDKM/IAB/Documents/IAB-report.pdf>.

³⁸⁰ RAI PRINCIPLES, *supra* note 32, at 11. For more on problematic consultations, see *supra* Part I.B.

³⁸¹ See RAI PRINCIPLES, *supra* note 32, at 11.

First, the RAI Principles' call for consultations does not include a requirement of *consent*. Although RAI Principle 4 notes that the “consultative process should allow communities to turn down investors if they so desire,”³⁸² it falls short of requiring consent, focusing instead on the mechanics of the consultative process.³⁸³ The distinction between consultation and consent is crucial, and this is particularly true in the context of land deals. In order to be meaningful, consultations must be undergirded by the ability of affected communities—both legally and politically—to withhold their consent when faced with certain investment projects or proposals. Otherwise, consultations could simply be reduced to box-checking measures, rather than delivering outcomes that are chosen by affected communities.³⁸⁴

The second problem with the RAI Principles' approach to consultations is that community input is not envisioned at the most critical point in the policy-setting process. RAI Principle 4 notes that investments should be “designed consistent with local people’s vision of development,”³⁸⁵ and calls for the linking of land transfers to “local land use and overall development plans;”³⁸⁶ the Principles, however, are silent on the need for macro decisions around “overall development plans” to undergo a meaningful and consultative process. There is also little evidence to show that in countries now being targeted for land investment, the initial impetus to create land markets or make arable land available to foreign investors underwent a deliberative and transparent process with affected communities.

The intimate connection to land—and its life sustaining and identity-forming qualities—certainly makes the case for greater deliberation with and input from those who stand to be most affected by such deals. But such deliberation and input must be ensured much earlier in the process so that economic planning itself becomes a rights-promoting exercise. Consequently, community participation must occur at the policy development stage rather than being relegated to consultations around individual land deals that are taking place within this larger policy framework. Accountability and transparency must also be triggered sufficiently early in the policymaking process such that there is ample opportunity for policies and institutions that might be inherently weighted against marginalized communities within developing countries to be scrutinized and recalibrated before their implementation.³⁸⁷

A third problem with the RAI Principles' approach to consultations is that significant problems in the implementation and enforcement of consultation-related rules and outcomes—i.e. contracts—are insufficiently addressed. Here, the rights-based approach faces similar problems, especially with effectively implementing some of the procedural safeguards reflected in the Eleven Principles, as explored below.³⁸⁸ In some cases, the problem is a rule-making one, meaning sufficient laws or standards do not exist to mandate or guide consultations. But in many

³⁸² *Id.*

³⁸³ In similar fashion, the World Bank’s own internal policy around “involuntary settlement” (Operational Policy 4.12)—which covers “economic and social impacts that both result from Bank-assisted investment projects, and are caused by the involuntary taking of land”—does not include a requirement of consent, only that “Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.” *Operations Manual*, WORLD BANK (2011), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

³⁸⁴ See also LAND RESEARCH ACTION NETWORK, *supra* note 379 (arguing that the RAI Principles “do not recognize the rights of small scale, local food producers to secure productive resources, to produce and be food self-sufficient through their own means, to safe and healthy environments, and to the principle of Free Prior Informed Consent.”)

³⁸⁵ RAI PRINCIPLES, *supra* note 32, at 10.

³⁸⁶ *Id.*

³⁸⁷ See, for example, Borrás, *supra* note 100, at 584 (noting in the context of the development of biofuels that “[t]he opportunities of local people, or even wider social movements, to penetrate and influence such policy processes remain limited.”).

³⁸⁸ See *infra* Part III.B.2.

cases, the problem concerns how these rules are implemented or enforced. Even when laws requiring consultation are in place, they may not be enforced or may be implemented in an *ad hoc* manner or in a manner that favors specific constituencies.

The World Bank itself acknowledges the limited impact of law on the consultative process in land transfers. It notes,

[L]aws are often insufficient for ensuring that consultation is meaningful and results in agreements that can be enforced. Even if consultations are mandatory, their usefulness may be limited by a lack of clarity about who must participate, what information needs to be made available beforehand, and whether the output of such meetings is formally recognized or enforceable.³⁸⁹

Even attuned to these problems, the solution it proposes is a greater focus on rule-making. To wit,

To be effective, consultations must be undertaken before approval, with clear rules on who has to attend, what type of information has to be available in advance, and how outcomes are to be recorded and enforced. To improve the chances of a meaningful process and resultant benefit sharing, local stakeholders need to enter consultations with a clear understanding of their legal rights, the issues at stake, and the rules of engagement.³⁹⁰

The RAI Principles note that “consultation should ultimately lead to proper contractual arrangements.”³⁹¹ In fact, both the RAI Principles and the Eleven Principles urge that contract terms be clearly stated and that agreements include pre-defined sanctions in case of non-compliance.³⁹² But the significant problems related to the very consultations that give rise to these contracts suggest that agreements will rarely articulate terms that equitably share the benefits.³⁹³ Even if such terms are articulated, and specified in human rights terms,³⁹⁴ their enforcement remains a significant concern.

For the market-plus approach, the current ineffectiveness of these measures has not, however, led to a reassessment of strategy; rather, it has simply given rise to calls for more good governance measures³⁹⁵ and for more investment in agricultural land. In simpler terms, this tautological argument proceeds as follows: (1) Good governance measures are needed to create objective and predictable rules; (2) These rules must be consistently followed and enforced by government;³⁹⁶ (3) When these rules are not implemented or appropriately enforced, more rules are needed to correct for the initial failings of reform.³⁹⁷ Yet, the deeper problems associated

³⁸⁹ RISING GLOBAL INTEREST, *supra* note 31, at 106.

³⁹⁰ *Id.*

³⁹¹ RAI PRINCIPLES, *supra* note 32, at 12.

³⁹² Principle 7, *see Large-scale Land Acquisitions and Leases*, *supra* note 71; Principle 4, *see* RAI PRINCIPLES, *supra* note 32.

³⁹³ *See also* text accompanying *supra* notes 109 - 119.

³⁹⁴ *See* Principle 7, *Large-scale Land Acquisitions and Leases*, *supra* note 71 (noting the need for contracts to include “clear and verifiable commitments related to... the long-term sustainability of the investment and its compliance with human rights.”).

³⁹⁵ As a case in point, on the issue of lack of enforcement capacity (point (iii) above), the Principles point to weaknesses in the judicial capacity of target countries that may make enforcement difficult and suggest the establishment of alternative fora such as alternative dispute resolution mechanisms. RAI PRINCIPLES, *supra* note 32, at 12-13.

³⁹⁶ *See* Shihata, *supra* note 190, at 85.

³⁹⁷ *See also* Jedidiah Kroncke, *Law & Development as Anti-Comparative Law*, 45 VAN. TRANS. L.J. 477, 490-497 (2012) (discussing historical examples in which “the repetition of past errors and consistent lack of empirically

with land deals cannot be resolved by rule-making alone. As demonstrated by case studies discussed in Part I.B, formalistic measures such as consultations and contracts do not help mitigate “risk” or distribute benefits because they are often hampered by significant power interests working at cross-purposes. By failing to interrogate why procedural protections are either insufficient or unenforced, the prescription of ‘better procedure’ will likely fail to achieve better outcomes.³⁹⁸ Moreover, adherence to formally-approved processes, without sufficient attention to substantive outcomes, may help sanitize problematic transactions for investors and host States as they can then claim that they have abided by the rules and are not responsible for any shortcomings in a project’s success. Ultimately, the market-plus approach fails to address the reality that procedural measures, on their own, may not improve substantive outcomes.

2. The Eleven Principles: Procedural Means for Substantive Ends

The rights-based approach offers a number of advantages over the market-plus approach. It sets a substantive baseline that must at least be met, if not exceeded, in order for investments to move forward. Its focus on distributive concerns also makes it a more powerful framework for ensuring adequate benefit-sharing—both between investors and host communities, and among various groups within host communities. Principle 1 of the Eleven Principles calls on host States to first consider whether land can be put to other uses that would better serve the long-term needs of the community and the “full realization of their human rights.”³⁹⁹ This framework puts the rights and needs of affected communities at the forefront of the discussion around development policy—rather than leaving discussion of community interests to the negotiations around individual land deals. The Eleven Principles also require that “any shifts in land use can only take place with the *free, prior and informed consent* of the local communities concerned,”⁴⁰⁰ thereby affording affected populations far greater agency in the decision-making process.

But the Eleven Principles, too, focus on procedural safeguards to protect land users’ rights.⁴⁰¹ Like the RAI Principles, they emphasize the need for transparent negotiations, community consultations, and binding agreements⁴⁰²—safeguards that may be similarly ineffective at contesting the power dynamics at play. Like the RAI Principles, they also call on host States to implement a host of legislative reforms. Whereas the RAI Principles call on host States to create a proper business and legal environment to help facilitate land transfers,⁴⁰³ the Eleven Principles seeks the enactment and enforcement of legislation to safeguard host

demonstrable effects” nevertheless still leads to the reassertion of reform through “the unassailable desirability of continued optimism and renewed effort.”).

³⁹⁸ See also *From Threat to Opportunity*, *supra* note 47, at 520 (commenting that an “uncritical belief in the basic beneficence of formalistic and legalistic measures” raises significant concerns.).

³⁹⁹ Principle 1, *Large-scale Land Acquisitions and Leases*, *supra* note 71.

⁴⁰⁰ Principle 2, *Id.* (emphasis added). The “free, prior, and informed consent” standard normally attaches to indigenous populations under international law but according to the Special Rapporteur, extending the requirement to other communities having a similarly strong relationship to the land, on which they depend for their livelihoods, would be justified and would help to ensure that States and investors seriously consider the human rights impacts of their land transfers. See *supra* note 216; see also Antoanella-Iulia Motoc et al., *Standard Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent* ¶ 45 (UN Working Group on Indigenous Populations, Working Paper No. 1, July 14, 2005) (commenting that “[s]elf-determination of peoples and the corollary right of free, prior informed consent, is integral to indigenous peoples’ control over their lands and territories, to the enjoyment and practice of their cultures, and to make choices over their own economic, cultural and social development” and clarifying that these rights “cannot be weakened to consultation of individual constituents about their wishes.”).

⁴⁰¹ The Eleven Principles are explicit about the procedural nature of their contribution: it is noted that one of the Principles’ main aims is to “ensure that negotiations leading to land acquisition and leases comply with a number of procedural requirements, including the informed participation of local communities.” *Large-scale Land Acquisitions and Leases*, *supra* note 71, at 1.

⁴⁰² Principles 1, 2, and 7, *see id.*

⁴⁰³ Principle 3, *see* RAI PRINCIPLES, *supra* note 32.

communities' rights as ends unto themselves.⁴⁰⁴ Principle 3, for instance, calls on States to “assist individuals and local communities in obtaining individual titles or collective registration of the land they use, in order to ensure that their rights will enjoy full judicial protection.”⁴⁰⁵ These safeguards aim to secure a rights-based conception of security of tenure, which as noted above, is geared toward “broadening the entitlements of relevant groups in order to ensure more secure livelihoods.”⁴⁰⁶ In implementation, however, these reforms may be contested or co-opted, or they may be insufficiently enforced. This is especially true of reforms that are aimed at strengthening tenure security, since land is both a primary source of wealth and a primary site for contestations of power, as considered in the three examples below.

On the subject of customary land rights, the Special Rapporteur cautions that greater recognition of use and customary rights—which he advocates as an alternative to individual titling—may serve to disenfranchise portions of the community, particularly women.⁴⁰⁷ The Special Rapporteur then proposes that such problems “should be addressed through the inclusion of strict safeguards in the *process* of such recognition.”⁴⁰⁸ But this proposal does not satisfactorily answer how such a process might be managed and implemented; nor does it question whether such a top-down process can effectively navigate entrenched power dynamics. As argued by Robert Smith in the context of critiquing land tenure reform in Africa, “the dynamic process of titling, especially if implemented with imperfect governance, frequently reduces tenure security and equity although designed to enhance both, and is unlikely to make efficient users win the day.... If tenure insecurity is fundamentally due to an inability of rights-holders to get their rights enforced, whether the legal instruments are customary or statutory, then the problem ultimately traces back to powerlessness, and proposed solutions must address this.”⁴⁰⁹

Similarly, on the subject of consultations, although the Eleven Principles set a much higher bar by requiring consent, they do not provide satisfactory indications about the kinds of community governance structures that may be necessary to ensure that consent is secured through a robust and collective decision-making process. Because these investments deeply affect communal resources and often occur through traditional governance structures that may sideline marginalized groups, this remains a central question that is not addressed by either approach. In concrete terms, this means that the procedural requirement for community consultation or consent will remain ambiguous, as will any outcomes stemming from such consultations.

The question of whether procedural safeguards can overcome complex power dynamics also surfaces with regard to governing forced evictions. The Eleven Principles reflect the human rights principle that forced evictions may only occur under extremely limited circumstances.⁴¹⁰

⁴⁰⁴ Principle 3, *Large-scale Land Acquisitions and Leases*, *supra* note 71 (“In order to ensure that the rights of local communities will be safeguarded at all times, States should adopt legislation protecting these and specifying in detail the conditions according to which shifts in land use, or evictions, may take place, as well as the procedures to be followed.”).

⁴⁰⁵ Principle 3, *see* RAI PRINCIPLES, *supra* note 32.

⁴⁰⁶ *See* text accompanying *supra* note 316.

⁴⁰⁷ *See supra* text accompanying notes 344 - 345.

⁴⁰⁸ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 22 (emphasis added). *See also supra* note 308 and accompanying text.

⁴⁰⁹ Smith, *supra* note 179, at 219.

⁴¹⁰ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at Principle 2. These conditions are spelled out in the ESCR Committee’s comment on the right to adequate housing. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 7: The Right to Adequate Housing*, U.N. Doc. E/1998/22. Annex IV (1997), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/157/26/PDF/G9815726.pdf?OpenElement> (*General Comment No. 7* notes that States must refrain from forced evictions, must use “all appropriate means” to protect the right to adequate housing... including the adoption of legislative measures,” take legal measures against its agents or third parties who carry out forced evictions, and “ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or

Collectively these requirements provide for States to ensure that evictions serve a legitimate public purpose, that they are not discriminatory, that they meet the requirements of due process, and that they are accompanied by fair compensation.⁴¹¹ In other words, the right to be free from forced evictions sets forth procedural standards that will bar evictions in some circumstances and permit them in others. Procedural safeguards, however, can all too easily be co-opted by the State, whose claims about what constitutes a public purpose may not be easily contested. In the context of land investments in particular, States may be able to use the very general and under-scrutinized language of “economic development” to justify takings in the public purpose.⁴¹² Indeed the model of economic development being promoted by the World Bank—that of foreign and private investment in agricultural land as an engine of development and growth—allows for a liberal application of the public purpose doctrine, and for the transfer of communal lands to private commercial investors.

An essential problem with both the market-plus approach and the rights-based approach is that their proposed legal—and particularly procedural—reforms necessarily rely on the willingness of the host State to implement these reforms. This posture further assumes a self-executing, “trickle-down” quality of the law wherein top-down processes can effectively navigate entrenched power dynamics. This problem is not specific to large-scale land transfers; it reflects a general shortcoming of both good governance and human rights frameworks wherein the State is both the target as well as the guarantor of the reforms promoted.⁴¹³ But the State and its ruling elite are not neutral agents of social change.⁴¹⁴ To the contrary, State actors and domestic elites may actually benefit from investors’ unregulated behavior,⁴¹⁵ and as such have little incentive to protect existing land users’ rights. This may especially be the case where land users belong to different ethnic, religious, or caste groups, or are members of indigenous communities.⁴¹⁶

Even if one were to assume the existence of a benevolent State, one must still ask whether legal reforms alone can serve as a vehicle for social change. Numerous commentators have noted the limits of law reform in effecting social change. Dan Banik, for example, argues

bodies.”; *see also* Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Basic Principles and Guidelines on Development-Based Evictions and Displacement, U.N.Doc. A/HRC/4/18, available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf (providing, *inter alia*, that evictions should only be carried out “for the purpose of promoting the general welfare”; should be “reasonable and proportional”; and should be “regulated so as to ensure full and fair compensation and rehabilitation.”). Principle 2 of the Eleven Principles adds that evictions must also be accompanied by alternative resettlement or access to productive land. Principle 2, *see* RAI PRINCIPLES, *supra* note 32.

⁴¹¹ *See supra* note 410.

⁴¹² *See also Kelo v. City of New London*, 545 US 469, 480 (2005) (defining “public use” as “public purpose,” and finding that the taking of property for the purpose of economic development can satisfy the “public use” requirement of the Fifth Amendment of the U.S. Constitution).

⁴¹³ *See also Makau Mutua, Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 67 (1997) (arguing this point in the context of human rights law and citing Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917 (1991)).

⁴¹⁴ Smita Narula, *Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective*, 26 WIS INT’L L.J. 255, 333, 335 (2008) (I make this point in the context of discussing non-implementation of rights protections for India’s “untouchables.”).

⁴¹⁵ According to one study, “foreign investment dependence benefits the elite segments of the income-earning population over the poorer eighty percent.” Linda Beer & Terry Boswell, *The Resilience of Dependency Effects in Explaining Income Inequality in the Global Economy: A Cross-National Analysis, 1975–1995*, 8 J. WORLD-SYS. RES. 30, 52 (2002), available at <http://jwsr.ucr.edu/archive/vol8/number1/pdf/jwsr-v8n1-beerboswell.pdf>

⁴¹⁶ Privileges accorded to investors may also be the result of government corruption and acceptance of bribes by government officials. *See* FRED PEARCE, *THE LAND GRABBERS: THE NEW FIGHT OVER WHO OWNS THE EARTH* 43-47 (2012) (detailing the accounts of American investors who have targeted land deals in South Sudan because of lax investment oversight and the prevalence of local corruption); *see also From Threat to Opportunity, supra* note 47, at 509 (commenting that deals are characterized by “close partnerships (or collusion) between foreign investors and the national governments that rule over the lands in question.”).

that legal strategies are insufficient because they “underestimate the ability of political actors to ignore, bypass or selectively implement judicial recommendations and verdicts.”⁴¹⁷ Instead, “[b]oth in principle and in the development experience, legal empowerment is much more a matter of civil society and bottom-up initiatives.”⁴¹⁸ Studies of land reform initiatives seem to support this assertion. Ben Cousins, for example, has reviewed post-apartheid South Africa’s history of land redistribution, its attempts at securing property rights, and its continued eviction of small land-holders.⁴¹⁹ He argues that focusing solely on legal reform is inadequate to secure social change. Law is “only one source of rule-making in society”; and both formal and informal institutions “centrally involve issues of power, authority and contestation” and therefore must be taken into account.⁴²⁰ Jennifer Franco takes a similar view of the land reform movement in the Philippines, and the continued struggle of agrarian movements to realize and maintain available legal entitlements.⁴²¹ As several scholars studying the recent land transactions suggest, “clear and secure land property rights are necessary but not sufficient to guarantee protection of rural poor land rights.”⁴²² Recent case studies on large-scale land transfers also provide support for the “critique that legal empowerment through legislative reform, while effective in certain important regards, is intrinsically limited by the quality of laws and institutions, and more fundamentally by the milieu of the political economy.”⁴²³

In the end, one cannot rely solely on the political will of the host State or rest on legal platforms alone.⁴²⁴ Although legal guarantees and transparent consultative processes are critical, they must be accompanied by a process of political and social mobilization that in turn compels domestic actors to restrict large-scale land transfers and undertake key agrarian reforms. Part IV looks at resistance strategies that are developing to contest the global rush for agricultural land. It also cautions that these strategies alone may be insufficient to confront current conditions of economic globalization wherein a multitude of global actors are involved in shaping domestic agricultural policies. Part IV therefore also calls for essential institutional reforms at the international level to help empower affected communities and operationalize rights guarantees.

⁴¹⁷ Dan Banik, *Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication*, 1 HAGUE J. ON THE RULE OF L. 117, 128 (2009).

⁴¹⁸ *Id.* at 129.

⁴¹⁹ Ben Cousins, *How Do Rights Become Real? Formal and Informal Institutions in South Africa’s Land Reform*, 28 INT’L DEV. STUD. BULL. 59 (2007); Ben Cousins, *Capitalism obscured: the limits of law and rights-based approaches to poverty reduction and development*, 36 J. PEASANT STUD. 893 (2009).

⁴²⁰ See also Ryan Bubb, *State, Law and Property Rights in West Africa* (2009) (showing that in spite of very different property laws in Ghana and Cote d’Ivoire de facto property rights were nearly identical at the borders reflecting the minimal influence of formal laws on shaping community property rights); Frank Upham, *The Man Who Would Import: A Cautionary Tale about Bucking the System in Japan*, 17 J. JAPANESE STUD. 323 (1991) (noting that informal community norms of obedience can be as powerful a means of enforcing government policy as formal legal power, as shown by a case study of the Japanese bureaucracy which is able to effectively regulate Japanese business even in areas where it has no legal power); Kennedy, *supra* note , at 117 (arguing that human rights promote the idea that justice can be achieved by securing rights on paper rather than through people making political decisions, and thus ultimately fail to bridge the gap between “law in the books and law in action, between legal institutions and the rest of life.”).

⁴²¹ Jennifer C. Franco, *Making Land Rights Accessible: Social Movements and Political-Legal Innovation in the Rural Philippines*, 44 J. DEV. STUD. 991 (2008).

⁴²² *From Threat to Opportunity*, *supra* note 47, at 518.

⁴²³ *Over the Heads of Local People*, *supra* note 93, at 913. Kevin Davis makes a related point. He argues that “[u]niversal claims about the role of law in development are inherently suspect” specifically because they “necessarily deny the significance of local variations.” Kevin Davis, *Legal Universalism: Persistent Objections*, 60 U. TORONTO L.J. 537, 538 (2010). There may be important differences in how a given society measures development, for example (*Id.* at 541); or societies may differ in “ways that alter the causal connections between law and social or economic outcomes.” *Id.* at 542.

⁴²⁴ See DAVID KINLEY, *CIVILISING GLOBALISATION. HUMAN RIGHTS AND THE GLOBAL ECONOMY* 108 (2009) (arguing that “It is better to cajole and persuade all states, individually and collectively, to tackle development using all the persuasive resources to hand, including legal instruments, rather than trying to do battle on the narrow definition of legal prescription alone,” and citing with approval Kennedy, *supra* note, at 108 – 9).

IV. EMPOWERING AFFECTED COMMUNITIES

Given the dynamics described in Part III.B, it should come as no surprise that neither set of principles has been effectively implemented in practice—a conclusion that is confirmed by several recent case studies.⁴²⁵ Both sets of principles are admittedly new, and as with any set of guidelines, it will take time for them to penetrate global processes and generate sufficient buy-in. Still, the key question arises as to whether preliminary examples of non-compliance will simply be repeated, or if instead there are realistic prospects that these frameworks will constrain future land investment deals.⁴²⁶ The RAI Principles are voluntary in nature, and there is currently no mechanism set up to monitor investor compliance.⁴²⁷ These Principles operate in a corporate social responsibility framework, problematically relying on the self-regulation of the private sector.⁴²⁸ The Eleven Principles help overcome some of these concerns by adopting an accountability framework in which States are called upon to live up to their obligations under international human rights law. But as evidenced throughout this Article, host States often lack the political will to follow through on their human rights obligations in practice.

Problems enforcing rights guarantees on the domestic plane are further compounded by dynamics on the international plane. Investment-related obligations may conflict with States' obligations to ensure human rights.⁴²⁹ In practice, these conflicts are often resolved in favor of the investor as States try to incentivize greater investment.⁴³⁰ The fragmentation of international law⁴³¹ has also enabled separate accountability frameworks. This presents obvious risks. The pressure to yield to financial obligations is typically far stronger than is the pressure to uphold human rights. For example, international financial institutions may tie development loans to recipient State reforms to remove obstacles to foreign investment or implement market-based

⁴²⁵ See, e.g. UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: MALI, *supra* note 323; OAKLAND INSTITUTE, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: COUNTRY REPORT: SIERRA LEONE (2011) (showing that land deals conducted subsequent to the elaboration of both sets of principles exhibit many, if not all, of the traditional problems and are seemingly unaffected by either framework).

⁴²⁶ On this point, critics have pointed out that the simple promulgation of the Eleven Principles may not be enough to safeguard against the detrimental aspects of large-scale land acquisitions. See, e.g., GRAHAM ET AL., *supra* note 66, at 8, 9 (noting for instance, the difficulties posed by delays caused by interweaving the implementation of regulations that conform to the Eleven Principles with other national policies, and the inability of governments to enforce these regulations). Regarding the RAI Principles, the World Bank notes that although the RAI Principles have served to “remind[] countries and investors of their responsibilities and draw[] attention to policies that seemed to violate them... the real challenge is to make [the Principles] operational in a country setting.” RISING GLOBAL INTEREST, *supra* note 31, at 3.

⁴²⁷ See Anastasia Telesetsky, *Resource Conflicts over Arable Land in Food Insecure States: Creating an United Nations Ombudsman Institution to Review Foreign Agricultural Land Leases*, 3 GOTTINGEN J. INT'L L. 283 (2011) (commenting that “self-regulatory codes of conduct do not provide sufficient oversight of the leasing process” and calling for the creation of a U.N. Ombudsman to provide legal and technical oversight and support for host States).

⁴²⁸ For problems with such an approach, see *supra* note 298 and accompanying text.

⁴²⁹ See JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 375-377 (2011) (showing that a State's ability to regulate in protection of human rights may be constrained by the State's foreign investment obligations under bilateral investment treaties).

⁴³⁰ See Lorenzo Cotula, *International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection Under Human Rights and Investment Law in Africa*, S. AFR. Y.B. INT'L L. 62, 66 (2008) (commenting that the human right not to be arbitrarily deprived of property—as found in the Universal Declaration of Human Rights—is often overshadowed in favor of ensuring investor property-security); see also LUKE ERIC PETERSON, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION 37 (2009) (arguing that host States do not always represent the interests of their citizenry when faced with the choice of protecting human rights or attracting wealthy foreign investors).

⁴³¹ See Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663 (2005) (noting the existence of a global legal order with a plurality of norms with “no precise hierarchical order.”); see also E. Benvenisti & G. W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L.REV. 595, 595 (2007) (calling attention to how a fragmented paradigm may be exploited by powerful States to further their interests at the expense of weaker States.).

land policies.⁴³² Countries that are parties to bilateral investment treaties may be penalized with multi-million dollar arbitral awards and may fear being shunned by the foreign investment community for failing to abide by specific treaty clauses and contract obligations.⁴³³ Yet, these same concerns do not arise when the recommendations of U.N. human rights treaty bodies and experts are ignored. Violating human rights may very well lead to swift condemnation by civil society groups, but these protests do not generate the same level of pressure that is created through market competition.⁴³⁴

To put it plainly, the rights-based approach offers a strong normative framework, but lacks the power to implement its terms. The market-plus approach has far greater power, and institutional backing, but lacks the normative framework. This inverse relationship suggests the need for greater integration between the two frameworks, in service of protecting land users' rights and empowering affected communities. This section considers a range of measures to facilitate such integration and support bottom-up initiatives that are building to contest the global land rush. I argue that both international and domestic pressure must be brought to bear on host States and investors alike to help close accountability gaps and secure meaningful rights protections.⁴³⁵

Part A looks at resistance strategies that are building to contest large-scale land transfers and argues that these strategies must be complemented and supported by international actors and reforms. Part B argues that far greater substantive restrictions must be imposed on large-scale land transfers, and proposes a number of such measures. Part B also argues that international actors such as international financial institutions and investor home States must be more involved in a rights-protecting role. Part C argues in favor of the agrarian reforms proposed by the rights-based approach, and argues that these reforms can support both substantive rights and development goals. In order to ensure implementation of these reforms, however, the World Bank must change its own approach to land markets and land distribution. Human rights law, too, must evolve from an instrumentalist approach toward the development of a substantive right to land.

A. Resistance Strategies and the Need for Structural Support

There exists a range of forms of opposition to large-scale land deals. Social movements, both national and transnational, are building. Some frame their grievances in human rights terms, while others operate using a food sovereignty paradigm.⁴³⁶ Collectively, these movements give

⁴³² See, e.g., THE WORLD BANK, STRENGTHENING THE BUSINESS ENVIRONMENT FOR ENHANCED ECONOMIC GROWTH (2011), available at <http://web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&Projectid=P112264> (discussing the implementation of certain business-promoting policies as a condition for a loan to Mexico). See also text accompanying *supra* note 59 - 61 (noting how the World Bank Group has begun lending assistance to developing countries in removing obstacles to foreign investment in land.).

⁴³³ See ALVAREZ *supra* note 429, at 374-375 (noting a “lack of equal remedies” between human rights and investment regimes).

⁴³⁴ Experts comment that market pressure is the very reason that developing countries sign bilateral investment treaties that may not adequately protect their interests. See, e.g., Tillmann Rudolf Braun, *Globalization: The Driving Force in International Investment Law*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION (Asha Kaushal et. al. eds., 2010). But see ALVAREZ, *supra* note 429, at 135 (offering a more nuanced analysis of the variegated reasons why developing countries enter BITs).

⁴³⁵ See also KINLEY, *supra* note 424, at 189 (arguing for multiple forms of pressure to compel States to “plug the gaps in their own laws regarding corporate behaviour within their jurisdiction.”).

⁴³⁶ See, for e.g., Peter Rosset, *Food Sovereignty and Alternative Paradigms*, 54 DEV. 21, 28 (2011), <http://www.palgrave-journals.com/development/journal/v54/n1/pdf/dev2010102a.pdf> (arguing that “Only food sovereignty based on genuine agrarian reform, and the defense of land and territory against land grabbing, offers a real alternative to the multiples crises we are facing.”). The concept of food sovereignty was originally proposed by La Via

expression to a profound source of discontent over large-scale land transfers—that they fundamentally alter the relationship of communities to their environs and undermine democratic control over agricultural policy decisions. These movements also seek to challenge the power dynamics that undergird large-scale land transfers, and to give greater voice and agency to communities made most vulnerable by these deals. La Via Campesina, for instance, is an international grassroots movement that promotes and defends food sovereignty and small-scale sustainable agriculture “as a way to promote social justice and dignity.”⁴³⁷ Member organizations⁴³⁸ have mobilized against “land grabs” through large-scale protests, meetings with government officials, and other actions aimed at raising awareness, shifting the terms of the debate, and compelling policy changes.⁴³⁹ Both global and local campaigns—some connected to La Via Campesina and others that have evolved separately from it—claim multiple successes, but also face much resistance.

Campaigns and popular protests have successfully derailed or at least forestalled some large-scale land deals. In 2009, for instance, widespread public protests against the lease of approximately half of Madagascar’s arable land to the Korean company Daewoo led to a coup that ousted the country’s president. The government of Madagascar subsequently cancelled the deal with Daewoo.⁴⁴⁰ In Mozambique, China’s plans to invest \$800 million into rice production had to be cancelled because of domestic political opposition.⁴⁴¹ In the Philippines, public protest halted a deal between China and the Philippines government involving 1,240,000 hectares of land.⁴⁴² Another \$4.3 billion deal for 500,000 hectares of rice paddies was stalled in Indonesia,⁴⁴³ as was the largest land deal in South Sudan after local leaders and communities appealed directly to Members of Parliament and to the President in July 2011, stating that they “unanimously, with strong terms, condemn, disavow or deny the land-lease agreement” between the government and a Texas-based company.⁴⁴⁴ Civil society actors in investor home States may also prove to be influential. In February 2012, for example, Iowa State University withdrew its involvement in a

Campesina in 1996, which defined the term as “the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity.” Raj Patel, *Food Sovereignty*, 36 J. Peasant Stud. 663, 664-665 (2009). For more on La Via Campesina see *infra* notes 437 - 438 and accompanying text. As a policy paradigm, food sovereignty stands in distinction from “food security” and the “right to food,” both of which are seen to have distinct and much narrower meanings. Michael WINDFUHR & JENNIE JONSÉN, *FOOD SOVEREIGNTY: TOWARDS DEMOCRACY IN LOCALIZED FOOD SYSTEMS* 23 (2005).

⁴³⁷ La Via Campesina, *What is La Via Campesina?*, <http://www.viacampesina.org/en/index.php?Itemid=44>. Since the movement began in 1993, it has pushed for “comprehensive land reform granting peasants and sustainable family farmers, both men and women, control over the land they cultivate.” *International Conference of Peasants and Farmers: Stop land grabbing!*, LA VIA CAMPESINA NOTEBOOK 1, 13 (2012), <http://viacampesina.org/downloads/pdf/en/mali-report-2012-en1.pdf>.

⁴³⁸ La Via Campesina comprises about 150 organizations in 70 countries, and claims to represent around 200 million farmers worldwide, paying particular attention to the rights of women farmers. *What is La Via Campesina?*, *supra* note 437; La Via Campesina, *The International Peasant’s Voice*,

http://viacampesina.org/en/index.php?option=com_content&view=category&layout=blog&id=27&Itemid=44; see also Annette Aurélie Desmarais, *United in the Via Campesina*, FOOD FIRST (Nov. 28, 2006), <http://www.foodfirst.org/node/1580> (describing the history and structure of La Via Campesina).

⁴³⁹ *International Conference of Peasants and Farmers: Stop land grabbing!*, *supra* note 437, at 6.

⁴⁴⁰ See Javier Blas, *South Koreans to lease farmland in Madagascar*, FINANCIAL TIMES, Nov. 19, 2008; see also Paul Valley, *Wish You Weren’t Here*, INDEP. ON SUNDAY, Aug. 9, 2009.

⁴⁴¹ Peter Goodspeed, *South Africa’s white farmers hope for Congo*, NAT’L POST, Oct. 22, 2009; Geoffrey York, *Land: Africa’s last great treasure*, GLOBE & MAIL (May 6, 2009); Valley, *supra* note 440.

⁴⁴² Valley, *supra* note 440.

⁴⁴³ *Outsourcing’s third wave*, THE ECONOMIST (May 21, 2009), <http://www.economist.com/node/13692889>.

⁴⁴⁴ John Vidal, *Indian agribusiness sets sights on land in east Africa*, THE GUARDIAN (Aug. 25, 2011), <http://www.guardian.co.uk/global-development/2011/aug/24/indian-agribusiness-land-east-africa>.

controversial land deal in Tanzania following growing public pressure from a number of U.S.-based civil society actors.⁴⁴⁵

But these examples are few and far between, especially when compared to the number of deals that have moved forward; this suggests that the success of social movements may be both short-lived and dependent on the extent to which civil society goals align with those of political and foreign actors.⁴⁴⁶ In some countries, those mobilizing in opposition to these deals have also endured considerable backlash. Local protests have been clamped down with brute force,⁴⁴⁷ and social activism on the part of peasant movements or other civil society actors has been criminalized.⁴⁴⁸ The ability of social movements to change the substantive course of policy decisions is also undermined by the significant power dynamics at play at the international level.⁴⁴⁹ The market-plus approach continues to enjoy far greater institutional and State backing

⁴⁴⁵ Led by Iowa-based Agrisol Energy LLC (“AgriSol”), the deal involves leasing over 800,000 acres and threatens eviction for more than 160,000 people. The deal has reportedly moved forward without public consultation and without apparent plans for compensation or relocation. Press Release, Oakland Inst., Lives on Hold—AgriSol’s Land Deal in Tanzania Create an Uncertain Future for More than 160,000 People, (July 9, 2012), available at <http://www.oaklandinstitute.org/press-release-lives-hold-agrisols-land-deal-tanzania-creates-uncertain-future-more-160000-people>. The deal is being contested by a number of actors, including the Oakland Institute, Sierra Club US, Sierra Club Canada, Iowa Citizens for Community Improvement, and the national consumer advocacy non-profit Food & Water Watch. The deal was also examined by the prominent journalist Dan Rather. Letter from Sierra Club US and Sierra Club Canada, to AgriSol, Do Not Displace 162,000 People in Tanzania (Oct. 20, 2011), available at <http://media.oaklandinstitute.org/letter-sierra-club-us-and-sierra-club-canada-do-not-displace-162000-people-tanzania>; Press Release, Iowa CCI, Iowa CCI Statement to the Press in Light of New Report from Oakland Institute (July 9, 2012), available at <http://www.oaklandinstitute.org/iowa-cci-statement-press>; National Nonprofit Food & Water Watch Joins Complaint Against Rastetter, Exposes Another AgriSol Executive as Complicit in Tanzania Land Grab NORTHCENTRALPA.COM (July 19, 2012), available at <http://www.northcentralpa.com/feeditem/2012-07-19-national-nonprofit-food-water-watch-joins-complaint-against-rastetter-exposes-an>; Dan Rather Reports: Trouble on the Land (transcript) OAKLAND INST. (Sept. 27, 2001), available at http://media.oaklandinstitute.org/sites/oaklandinstitute.org/files/Dan_Rather_Reports_631.pdf. Iowa State University’s involvement was revealed in June 2011, and the University withdrew from the deal in February 2012. Nicholas Miller, Report alleges AgriSol is associated with human rights violations in Tanzania, THE DAILY IOWAN (JULY 9, 2012), available at <http://www.dailyiowan.com/2012/07/09/Metro/28986.html>; Iowa State University Withdraws Completely from AgriSol Energy’s Investment Deal in Tanzania, OAKLAND INST. (Feb. 12, 2012), available at <http://www.oaklandinstitute.org/iowa-state-university-withdraws-completely-agrisol-energy%E2%80%99s-investment-deal-tanzania>.

⁴⁴⁶ In Madagascar, for example, there were other factors at play. The urban poor were already angered at the high prices of fuel, and some have characterized the land deal as a “spark” that ignited an already-simmering national discontent. Vallely, *supra* note 440; Rice, *supra* note 1; Sebastien Berger, Madagascar’s new leader cancels Korean land deal, THE TELEGRAPH, Mar. 18, 2009, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/madagascar/5012961/Madagascars-new-leader-cancels-Korean-land-deal.html> (noting that immediately after the change in leadership analysts suggested that “other foreign investors were unlikely to be affected.”).

⁴⁴⁷ See Transnational Institute, *supra* note 257 (noting that countries such as Cambodia, Ethiopia and Ghana “are using legal and brute force to suppress local contestation.”).

⁴⁴⁸ In Sierra Leone, for example, 40 local landowners were reportedly arrested in October 2011 for blockading Socfin Agricultural Company Sierra Leone Ltd.’s (Socfin SL) plantation project in Pujehun district. *Sierra Leone: Popular Resistance and Corporate Landgrabbing in Sierra Leone*, ALL AFRICA (May 3, 2012), available at <http://allafrica.com/stories/201205031196.html>. At least 15 local community activists have also been imprisoned for their voicing their dissent to Socfin’s land deal. See also text accompanying *supra* notes 15 and 16 (discussing the Ethiopian government’s crackdown against those resisting forced relocations).

⁴⁴⁹ In 2006, for example, at the FAO-organized International Conference on Agrarian Reform and Rural Development in Brazil, “a strong mobilization of peasants and small-scale farmers put land reform back on the world political agenda.” According to La Via Campesina, the Conference declaration, signed by 92 States, recognizes “the need to support sustainable family farming and the redistribution of land and other agrarian resources,” as well as the role of peasant movements and rural organizations in setting agricultural policy. However, La Via Campesina notes, “due to strong resistance on the part of ‘developed’ countries, the declaration was never implemented, as shown by the new wave of land grabbing we are witnessing today.” *International Conference of Peasants and Farmers: Stop land grabbing!*, *supra* note 437, at 13.

and thus tends to prevail over these movements' concerns. These asymmetries test assumptions about the roles that "strategies of disavowal and resistance" can play in "opening the spaces for constructive participatory engagement under current conditions of globalization."⁴⁵⁰ Put simply, resistance strategies need structural support.

To help empower host communities and support social movements, both normative and accountability frameworks at the international level must cohere and evolve. As Kingsbury and Lustig note, "legal norms and institutions provide a language and a venue for framing and assessing the morality, the rationality, even the ideology of specific policy choices concerning conservation and displacement."⁴⁵¹ Social movements can then tactically engage in advocacy with these institutions, or pursue resistance strategies outside of them.⁴⁵² The next section sets forth a range of proposals for reforming normative and accountability frameworks to help protect land users' rights and empower affected communities. I argue that especially in light of domestic power imbalances, international actors such as home States and international financial institutions must be more involved in protecting human rights, and that there is a legal basis for their role.

There are, of course, those who would argue that foreign actors, including international financial institutions, should stay out of the agricultural policies of developing nations entirely.⁴⁵³ But such a position is not politically viable, even if rooted in legitimate and longstanding discontent over the impact of international financial institution ("IFI") policies on agrarian communities in the Global South. Moreover, the concern here is not with foreign direct investment *per se*, but rather with deals that give investors unfettered control over land and natural resources without adequate consideration of how these deals affect human rights. With appropriate regulation and when grounded in rights considerations, foreign agricultural investment has enormous potential to contribute to hunger and poverty solutions—especially where investments are geared toward strengthening and supporting small-scale farming, a point further considered below.⁴⁵⁴

B. Restricting and Regulating Large-Scale Land Transfers

The need to more effectively regulate land investment activity and protect land users' rights is paramount. If rights are to be taken seriously there must be less tolerance of "risk" in land deals and less reliance on ineffective procedural safeguards such as consultations and negotiations for protecting land users' rights. Instead, large-scale land transfers must themselves be subject to far greater substantive restrictions. In addition, investor home States and IFIs must be more involved in a regulatory role, particularly because one cannot rely solely on the political will of host States, or on investors to police themselves. The next section offers a range of regulatory measures for host States, home States, and IFIs alike.

1. Restricting Large-Scale Land Transfers

Host States possess the power and responsibility to mitigate—if not eliminate—many of the harms associated with large-scale land transfers. Most obviously, host States can determine whether problematic land deals may proceed at all. States can, for instance, impose moratoria on

⁴⁵⁰ Lustig & Kingsbury, *supra* note 251, at 405.

⁴⁵¹ *Id.* at 406.

⁴⁵² *Id.*

⁴⁵³ See, e.g., *Responsible farmland investing? Current efforts to regulate land grabs will make things worse.*, GRAIN (Aug. 22, 2012), available at <http://www.grain.org/article/entries/4564-responsible-farmland-investing-current-efforts-to-regulate-land-grabs-will-make-things-worse> (stating that "rather than help[ing] financial and corporate elites to "responsibly invest" in farmland, we need them to stop and divest.").

⁴⁵⁴ See *infra* Part IV.C.1.

large-scale land deals, allowing themselves the opportunity to evaluate the rights impacts of these deals,⁴⁵⁵ and giving domestic institutions time to develop the ability to stave off some of the ill effects of the deals in the event that they are resumed.⁴⁵⁶ It is also possible to impose conditional moratoria; Argentina, for example, has recently passed legislation stipulating that no more than 15 percent of the country's land may be foreign-owned.⁴⁵⁷ Here it is important to consider the potentially deleterious role played by domestic investors and not simply limit transfers involving foreign investors. Moratoria could be especially useful in States that possess weak governance structures or underdeveloped regulatory frameworks, such as the nascent Republic of South Sudan.⁴⁵⁸ Under some circumstances, States may wish to go even further than forestalling the possibility of future deals, cancelling existing deals that (for example) fail to live up to their productive promises or do not comply with operative domestic legislation.⁴⁵⁹

States may also pass legislation directly aimed at the content of land transfer contracts. In this context, there is wide latitude for creativity. Some of the most straightforward measures place caps on the maximum size of land transfers⁴⁶⁰ or on the maximum length of land leases.⁴⁶¹ Such measures can be helpful because the "risks" of large-scale land transfers are often compounded by their immense scale and duration.⁴⁶² States may also opt for legislation that restricts purely speculative investments; for example, States may require land transfer contracts to contain development conditions that investors must satisfy in order to retain control of the land.⁴⁶³ States can also restrict the use of "freezing clauses," which lock in the State of applicable domestic legislation, in perpetuity, from the moment that a land transfer contract is finalized.⁴⁶⁴ Such clauses are inherently inflexible and can preclude upgraded regulations.⁴⁶⁵

Although the measures best suited for a given country will vary by context, it is important for host States to recognize the tools available to them in asserting some crucial level of control over the terms and prevalence of large-scale land transfers. Of course the primary challenge to the effective use of that power lies in summoning and sustaining the requisite political will. As argued above, political pressure exerted by domestic movements can and have played a critical role.⁴⁶⁶ In some countries, like Brazil,⁴⁶⁷ Argentina,⁴⁶⁸ and Ukraine,⁴⁶⁹ failed investments have

⁴⁵⁵ See LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 38, at 65 (advocating moratoria in order to allow time for democratic debate about the merits and demerits of permitting land deals).

⁴⁵⁶ See David K. Deng, *The New Frontier: A Baseline Survey of Large-Scale Land-Based Investment in Southern Sudan*, NORWEGIAN PEOPLE'S AID 1, 37 (2011), available at http://www.npaid.org/filestore/NPA_New_Frontier.pdf (advocating moratoria in order to allow domestic institutions a chance to establish themselves).

⁴⁵⁷ Shane Romig, *Argentina fences off land to foreign buyers*, WALL STREET JOURNAL, Dec. 23, 2011, available at <http://farmlandgrab.org/post/view/19829>.

⁴⁵⁸ See, e.g., Deng, *supra* note 456, at 37 (arguing for a moratorium on land deals in the Republic of South Sudan due to its fragile state).

⁴⁵⁹ RISING GLOBAL INTEREST, *supra* note 31, at 133. A number of legal doctrines permit governments to breach contracts with private parties—for example, to prevent long-term, inefficient lease arrangements. See generally Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. R. 313 (1999) (defending, *inter alia*, the public trust and sovereign acts doctrines on efficiency grounds).

⁴⁶⁰ See, e.g., Romig, *supra* note 457 (describing legislation in Argentina that caps land ownership by foreigner individuals or companies at 1,000 hectares, thus creating a *de facto* cap on the size of any deal featuring a foreign buyer).

⁴⁶¹ See, e.g., Land Union of Ukraine, *Ukraine's parliament passes law on land market* (July 20, 2011), available at <http://farmlandgrab.org/post/view/18960> (describing legislation in Ukraine that limits land leases to a period of no longer than 50 years).

⁴⁶² See text accompanying *supra* notes 79 - 82.

⁴⁶³ See LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 63, at 107 (recommending development benchmarks as a method of discouraging land speculation).

⁴⁶⁴ INVESTMENT CONTRACTS, *supra* note, at 72 (advocating against the use of freezing clauses "under all circumstances" and also adding that such clauses may be found unenforceable in some jurisdictions).

⁴⁶⁵ *Id.*

⁴⁶⁶ See *supra* Part IV.A.

resulted in domestic pressure and even legislation to limit the purchase of land by foreigners.⁴⁷⁰ But sustaining this political will is an especially difficult task in the face of prominent IFIs that continuously promote even the minatory elements of land transfers. As noted above, the World Bank objects to State implementation of “protectionist” measures aimed at restricting (or exerting various forms of control over) land deals.⁴⁷¹ But the point of considering such measures is to expand the host State’s arsenal for combating forces that have disproportionately strong negative effects on the rights of vulnerable rural populations—the same populations that ought to be at the forefront of the World Bank’s concern, even by its own explicit standards. The current push-back on moratoria in countries such as Tanzania and Ukraine suggest that domestic movements must be complemented and supported by international reforms,⁴⁷² which are considered below. Otherwise, the success of these movements will continue to be piece-meal and short-lived.⁴⁷³

2. Engaging the Regulatory Power of Global Actors

Because of the ease with which host States and investors can undermine host populations’ rights,⁴⁷⁴ the regulatory power of home States and international financial institutions must be engaged to fill critical accountability gaps when host States neglect their rights obligations or when investors are complicit in rights violations. The World Bank Group, in particular, has a critical role to play given the enormity of its influence on land investments and on agricultural policies in the developing world—a scale of influence that far outstrips that of human rights experts and institutions.⁴⁷⁵ As described throughout this Article, the World Bank Group has played a pivotal and powerful role in creating land markets and facilitating large-scale land transfers—the very investments that have given rise to the problems that their RAI Principles

⁴⁶⁷ An August 2010 legal opinion of the Federal Attorney-General of Brazil extended the application of a Brazilian law that restricts the acquisition of rural land by foreigners to acquisitions of land by Brazilian companies controlled by foreigners. Foreign companies, even if acting through a subsidiary in Brazil, are restricted to specific quotas when buying land. See Raymond Colitt & Reese Ewing, *Brazil curtails land sales to foreigners*, REUTERS, Aug. 24, 2010, <http://www.reuters.com/article/2010/08/24/brazil-land-idUSN2425631120100824>.

⁴⁶⁸ In December 2011, the Argentinean parliament approved the Rural Land Law, which caps land sales to foreign investors. The bill aimed to encourage “responsible foreign investment” and safeguard the right of the Argentinean people over its resources. See *Declaration of the Argentinean government regarding the legislative proposal for the Rural Land Law*, (Apr. 27, 2011), available at <http://www1.hcdn.gov.ar/dependencias/dsecretaria/Periodo2011/PDF2011/TP2011/0001-PE-11.pdf>.

⁴⁶⁹ The Ukrainian bill prohibits the purchase of land by foreigners, but continues to permit leasing. Land Union of Ukraine, *supra* note 461. Recent political developments threaten to jeopardize the moratorium, but as yet it remains in place. Oksana Grytsenko, *Investments on hold as farmland battle intensifies*, KYIV POST, Mar. 8, 2012, <http://www.kyivpost.com/content/business/investments-on-hold-as-farmland-battle-intensifies-123941.html>; see also *infra* note 472.

⁴⁷⁰ *What Drives the Global “Land Rush”?* *supra* note 259, at 17.

⁴⁷¹ See text accompanying *supra* notes 263 - 264. The Bank’s study adds that in light of the fact that a number of land deals involve nationals and not foreigners, excluding foreigners “may exacerbate rather than resolve governance challenges by, for example, limiting competition.” *What Drives the Global Land Rush?*, *supra* note 259, at 17.

⁴⁷² In April 2011, President Viktor Yanukovich told lawmakers during a speech to parliament that Ukraine needed a “fully fledged” market for farmland to boost the agricultural industry’s efficiency, and so would allow farmland sales in 2013 for the first time to stimulate investment. Graham Stack, *Foreign investors run fingers through Ukraine’s black earth*, BUSINESS NEWS EUROPE Apr. 15, 2011, http://www.bne.eu/story2630/Foreign_investors_run_fingers_through_Ukraines_black_earth.

⁴⁷³ In October 2009, the Tanzanian government suspended new biofuel projects in Tanzania in response to growing pressure from farmers and NGOs protesting the land losses, food shortages, and other issues associated with foreign biofuel investments. New biofuel projects, however, resumed just six months later with the development of draft guidelines for Tanzania biofuel’s sector. Peter G. Veit et al, *Biofuel Investments Threaten Local Land Rights in Tanzania*, INT’L LAND COAL. LAND PORTAL 1, 2-3 (Feb. 28, 2012), http://landportal.info/sites/default/files/biofuel_investments_land_rights_tanzania.pdf.

⁴⁷⁴ See, for example, the Ethiopia case study presented in the Introduction to this Article.

⁴⁷⁵ Lustig & Kingsbury, *supra* note 251, at 411 (discussing the importance of the World Bank because of “the scale of its influence on projects and on laws in developing countries”).

now seek to address. These initiatives have not, however, been led by a deliberative process.⁴⁷⁶ And although the World Bank Group supports investment by, *inter alia*, providing advisory support and direct financing to investors,⁴⁷⁷ it does not monitor the human rights impacts of these investments or otherwise regulate investor activities.⁴⁷⁸ Moreover, Bank policies and programming are measured—if at all—against internal standards (which themselves may vary greatly) or which lack a normative element and corresponding legal commitments.⁴⁷⁹ In other words, even as the World Bank Group calls for greater consultations, accountability, and for investors to respect for human rights in the context of land deals, it does not apply these very same standards to its own policy-setting and project monitoring processes.⁴⁸⁰

International financial institutions are bound by international human rights law, as part of general international law.⁴⁸¹ I have elsewhere argued that the status of international financial institutions as *multi-state* actors can provide an additional basis for subjecting them to the requirements of international human rights law through the many member States that have ratified human rights treaties.⁴⁸² In light of these obligations—and in order to effectively address the “risks” and mitigate the harms—the World Bank must cease its support of large-scale land transfers in environments where appropriate regulatory frameworks are not in place to manage them, or where there are clear threats to inviolable rights. Where investments do proceed, the Bank should help monitor possible human rights impacts, such as through mandatory impact reports from investors it supports. Some advocates have urged the International Finance Corporation—the private sector subsidiary of the World Bank Group—to better incorporate international human rights standards into its Social and Environmental Sustainability Policy and Performance Standards.⁴⁸³ More generally, the World Resources Institute (WRI) has

⁴⁷⁶ RISING GLOBAL INTEREST, *supra* note 31, at 3 (noting that the RAI Principles are not the product of broad consultations.).

⁴⁷⁷ See text accompanying *supra* notes 59 to 61.

⁴⁷⁸ The FIAS assesses its projects explicitly in business-friendly terms. See *FIAS: Investment Climate Advisory Service, Strategy for FY08-11*, FIAS 1, 39 (2007), available at <https://www.wbginvestmentclimate.org/uploads/FIAS%20FY08-11%20Strat%20Doc%20Final.pdf>; see also, ROLE OF THE WORLD BANK GROUP, *supra* note 36, at 7. Oxfam has observed that IFC Performance Standards omit a number of important factors, including consideration of the human rights impacts of the projects it supports. OXFAM INTERNATIONAL, REVIEW OF IFC PERFORMANCE STANDARDS SUSTAINABILITY POLICY 10 (2010), available at <http://www.oxfamamerica.org/publications/review-of-ifc-performance-standards-and-sustainability-policy>.

⁴⁷⁹ McInerney-Lankford, *supra* note 234, at 71.

⁴⁸⁰ Siobhan McInerney-Lankford posits a number of reasons for enduring tensions and disconnects between human rights and development institutions, including legal or mandate constraints, political resistance and value-based objections, divergences in approaches around formulating policy, and difficulties in measuring impact. McInerney-Lankford, *supra* note, at 55-56. Galit Sarfaty explains the dissonance between rhetoric and reality as symptomatic of the Bank’s organizational culture. Although rhetorically the World Bank has been more mindful of the need to consider human rights into its operations, these concerns are not systematically incorporated in staff decision-making or consistently considered in lending operations. Sarfaty, *supra* note 481, at 647.

⁴⁸¹ *Large-scale Land Acquisitions and Leases*, *supra* note 71, at ¶ 5. See also Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 A.J.I.L. 647, 657-58 (2009) (reviewing the Bank’s obligations under international law and noting disagreement amongst legal scholars on this point).

⁴⁸² Narula, *The Right to Food*, *supra* note 47, at 41. For more on the international framework on the right to food and its effect on relevant actors see generally Narula, *Reclaiming the Right to Food*, *supra* note 366. See also *infra* notes 488 - 489 and accompanying text regarding the extra-territorial obligations of States to respect and protect human rights.

⁴⁸³ *(Mis)Investment in Agriculture*, *supra* note 60, at 30. For example, Performance Standard Five on Land Acquisition and Involuntary Resettlement aims to minimize project-related displacement, but focuses largely on regulating the process for resettling and compensating displaced communities rather than providing robust protections for their tenure rights. International Finance Corporation, *Performance Standard 5: Land Acquisition and Involuntary Resettlement*, in INTERNATIONAL FINANCE CORPORATION’S POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (Jan. 2012), available at http://www1.ifc.org/wps/wcm/connect/9959ce0049800a91ab32fb336b93d75f/Updated_IFC_SustainabilityFramework_Compounded_August1-2011.pdf?MOD=AJPERES. See also OXFAM INTERNATIONAL, *supra* note 478, at 10-11

recommended that the World Bank (and other relevant parties) conduct human rights impact assessments, allow affected populations to shape projects in meaningful ways, carefully monitor projects for compliance with human rights standards, and implement accountability mechanisms—in advance—in case human rights violations take place even so.⁴⁸⁴ Whether the World Bank is suited to take on such a normative role is, of course, the subject of considerable debate.⁴⁸⁵ And although the recommendations offered above may prove effective, a far greater means of empowering affected communities and ensuring their rights is for the World Bank to change its approach to land distribution, a point further considered below.⁴⁸⁶

Home States, too, provide extensive political and financial support to investors,⁴⁸⁷ and in that capacity can play an important regulatory role. Like international financial institutions, investor home States are also increasingly being urged to take cognizance of their human rights obligations.⁴⁸⁸ I have elsewhere argued that these obligations should at least extend to respecting and protecting human rights *extraterritorially*, including through regulation of the activities of their investors operating abroad.⁴⁸⁹ Home States could, for example, require their investors to disclose standardized information on the environmental, labor rights, and human rights impacts of their investments.⁴⁹⁰ These regulations would allow for direct monitoring of investors by home

(outlining several perceived shortcomings in the IFC's Performance Standards; and recommending the building of widely-accepted human rights considerations into these standards, and the offering of better guidance to clients in how to respect human rights while developing their projects).

⁴⁸⁴ A ROADMAP, *supra* note 303, at 18. Other steps include empowering affected communities to use the Bank's grievance mechanism and using human rights indicators to help measure development success. *Id.* at 13, 40.

⁴⁸⁵ See Sarfaty, *supra* note 481, at 647, 650 (commenting on the *ad hoc* and discretionary manner in which human rights are currently incorporated into Bank operations, and arguing that the integration of human rights must be accompanied by a process of norm socialization that legalizes human rights instead of "economizing" them). See also McInerney-Lankford, *supra* note, at 71 (observing that "A legal approach draws human rights beyond the 'narrative' of development policy, into the realm of practical application in development instruments and to concrete standards, rules, tools and indicators. However, without anchorage in specific, binding legal obligations such an application would appear difficult to undertake and a normative assessment improbably upheld."); but see Martti Koskenniemi, *supra* note 254, at 56-57 (arguing that the more human rights professionals seek to carry out their activity in a professionally competent way, the more their activity will resemble the activity of those other experts—economic, security, etc.—and that this undermines a distinct commitment to human rights. Koskenniemi advocates for human rights experts to instead act as critics and watchdogs and to stay outside regular administrative procedures and flag the interests and preferences of those who are not regularly represented in administrative institutions). But see, Lustig & Kingsbury, *supra* note 251, at 411 (noting that the "management of the World Bank regard it as an operational entity, supporting specific projects and programmes in borrowing countries, and not as a norm-making agency building general international law.").

⁴⁸⁶ See *infra* Part IV.C.1.

⁴⁸⁷ See *supra* text accompanying notes 63 - 64.

⁴⁸⁸ See, e.g., THE MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHT (2011), available at <http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf>. The Maastricht Principles—which were adopted in September 2011 by a group of experts in international law—"aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights." *Id.* at Preamble; see also *Large-scale Land Acquisitions and Leases*, *supra* note 71, at ¶ 5 (noting that the home States of private investors "are under an obligation to regulate the conduct of these investors abroad, particularly if the host state appears unwilling or unable to do so.").

⁴⁸⁹ I propose that the ICESCR can be extraterritorially applied using the obligation of international cooperation, particularly with regard to the duties to respect and protect social and economic rights. I further argue that home States must exercise due diligence in regulating the activities of corporate actors where it can be shown that the home state exercises decisive influence over the ability of these actors to operate in an unregulated manner abroad. One means of satisfying the due diligence obligation is for home States to regulate corporate activity through the enactment of domestic legislation with extraterritorial reach. Narula, *The Right to Food*, *supra* note 47, at 745.

⁴⁹⁰ Nadia Cuffaro & David Hallam, *Land Grabbing in Developing Countries: Foreign Investors, Regulation and Codes of Conduct*, at 11, paper presented at International Conference on Global Land Grabbing, University of Sussex, Apr. 6-8, 2011; see also Graham & Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, 34 WORLD

States and increase investors' accountability to civil society in both home and host States.⁴⁹¹ Studies have shown that mandatory disclosure policies can improve environmental outcomes, though the results have been mixed.⁴⁹² Efforts must also be made to address the factors that drive large-scale land transfers, such as biofuel mandates,⁴⁹³ and speculative investments in agricultural commodities,⁴⁹⁴ and in farmland and agricultural infrastructure.⁴⁹⁵

Additionally, steps can be taken to reform the underlying investment framework, for example by incorporating human rights concerns into bilateral investment treaties. The text of both "model" and existing BITs could, for instance, be reformed to more explicitly include human rights concerns. For example, changing the preamble of a BIT to state that investments must be consistent with human rights could help shift the treaty's aims and influence its interpretation.⁴⁹⁶ Even further, additional chapters could be included to outline the obligations of investors, home States, and host States alike.⁴⁹⁷

The recommendations offered above are important ones, and, if heeded, could at least begin to remedy accountability gaps on the international plane, in service of protecting rights on the domestic plane.⁴⁹⁸ These recommendations also require substantial political will.⁴⁹⁹ Investors

DEVELOPMENT 868 (2006).

⁴⁹¹ Others have called for greater transparency in land investments contracts, suggesting that home States could introduce disclosure requirements for agricultural investors. Such a provision could mirror the Extractive Industries Transparency Provision in the U.S. Dodd-Frank Act, which requires oil, gas and mineral companies listed on the US Securities and Exchange Commission to publicly disclose their payments to foreign governments. See Oakland Institute et al., *Dealing with Disclosure: Improving Transparency in Decision-Making Over Large-Scale Land Acquisitions, Allocations and Investments*, OAKLAND INST. 10, 45 (2012), available at <http://www.oaklandinstitute.org/dealing-disclosure-improving-transparency-decision-making-over-large-scale-land-acquisitions>.

⁴⁹² Magali Delmas et al., *Mandatory Information Disclosure and Environmental Performance in the Electricity Industry*, 2-3 (draft paper, Oct. 2006), available at http://www.hks.harvard.edu/m-rcbg/papers/delmas_montes_shimshack_oct2006.pdf (last visited July 24, 2012) (reviewing the empirical literature).

⁴⁹³ Advocates have urged members of the G20 to end biofuel mandates, subsidies, and tax breaks in order to ease this pressure on land acquisition. See, e.g., Clare Coffey, *G20 and Biofuels*, ACTIONAID (July 12, 2012), <http://www.actionaid.org/eu/2012/07/g20-and-biofuels> (last visited July 29, 2012).

⁴⁹⁴ In the U.S., for example, recent financial reforms under the Dodd-Frank Act have attempted to limit speculation by limiting the number of agricultural commodities that can be held by any one trader, among other provisions. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §737, 124 Stat. 1376-2223 (2010). Further efforts, however, may be needed to rein in speculative investments. See UN Special Rapporteur on the Right to Food, *Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility*, 6 (Briefing Note No. 2, Sept. 2010), available at http://www.kontextwochenzeitung.de/fileadmin/user_upload/2012/5/23052012/UN-Nahrungsmittelspekulation.pdf.

⁴⁹⁵ Some investment funds are more heavily regulated than others and funds pursue different strategies for managing their land investments, with some exercising direct control over agricultural operators as well as asset managers. IIED, FARMS AND FUNDS, *supra* note 68, at 2, 3. Given these differences, a one-size-fits-all model may not work to regulate investment activity. However, home States could consider creating incentives for funds to structure their investments in ways that support rather than undermine small-scale farmers, such as by encouraging investment in agricultural equities that provide capital to companies with strong track records of collaboration with local communities and farmers. See, *id.* at 4.

⁴⁹⁶ See MARC JACOB, INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS 10 (2010) (noting that preambular language that references human rights can influence the interpretation of a BIT's object and purpose, which in turn can influence the interpretation of substantive provisions); AARON COSBEY ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATORS' HANDBOOK 2 (2005), available at http://ces.iisc.ernet.in/envis/sdev/investment_model_int_handbook.pdf (explaining the interpretive significance of the Preamble and offering an example of how the Preamble could be written to balance the rights and obligations of investors and States).

⁴⁹⁷ See COSBEY ET AL., *supra* note 496, at 34 (noting that inclusion of a chapter that references human rights obligations makes these rights concrete rather than illusory).

⁴⁹⁸ See also see also Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT'L L. REV. 1399, 1417, 1424 (2003) (arguing in the trade context that "connecting human rights and trade can serve to highlight the ultimately emancipatory objectives of trade liberalization as well as to achieve desirable integration in international law" (1424) and that incorporating human rights "may not only prevent declines in human rights enforcement, but may also achieve

are not likely to support changes that could potentially undercut their profitability from an investment. And host States may worry that stronger protection for human rights would erode their ability to incentivize investment. But States should be compelled to institute such reforms—including by civil society actors in investor home States—both in furtherance of their rights’ obligations and in recognition of the overlapping interests between investment and human rights regimes. As noted by José Alvarez, “Investment treaties are generally seen as different from human rights conventions insofar as they are just a means to an end rather than is the case for human rights—which most see as an end in themselves. At the same time, however, the social goals of those who conclude investment treaties—securing sustainable economic development—is itself important precisely because it enables human beings to flourish.”⁵⁰⁰

Increasingly, economic thought also acknowledges the importance of government intervention to address market deficiencies, as reflected in the RAI Principles. BITs, too, appear to be evolving in a direction that acknowledges the importance of government intervention to correct market failures, and recognizes that host States may define development “to include other forms of human flourishing in addition to entrepreneurial freedom.”⁵⁰¹ Meanwhile, international human rights law on the right to food calls on governments to pursue reforms, both individually and through international cooperation, to improve methods of production, conservation, and distribution of food.⁵⁰² In this respect, but also more generally, the material provisions of international human rights treaties—such as the ICESCR—overlap considerably with policies of international financial institutions and development agencies.⁵⁰³ In a broader sense, human rights are both ends of and instruments for economic development.⁵⁰⁴ These many points of convergence suggest that the two approaches can work to reinforce one another.⁵⁰⁵ This is especially so in the case of agrarian reforms, as considered below.

gains through access to the relatively rigorous enforcement mechanisms of international trade organizations” (1417)).

⁴⁹⁹ See, e.g. Damon Vis-Dunbar, *Norway Shelves its Draft Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS, June 8, 2009, <http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/> (reporting on the recent backlash in Norway surrounding the issue of including human rights considerations in BITs).

⁵⁰⁰ ALVAREZ, *supra* note 429, at 62. Alvarez adds that States parties to the ICESCR “appear to have accepted the proposition that economic development, as well as the rights to shelter, food, or health that this enables, is itself a human rights.” ALVAREZ, *supra* note 429, at 62.

⁵⁰¹ See ALVAREZ, *supra* note 429, at 164-165 (citing AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000)). Alvarez adds that such an evolution mirrors changes in mainstream approaches to economic development, and points to significant differences between the 1987 US Model BIT and the 2004 US Model BIT as reflective of this evolution. ALVAREZ, *supra* note 429, at 150-171. More recently, proposed changes to the US Model BIT were challenged from within the government. See generally, REPORT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY 59 (2009) (exemplifying the debates for and against reforms to the US Model BIT to include human rights obligations). But the resulting 2012 Model BIT was ultimately amended to “increase transparency and public participation, and to strengthen the protection of labor rights and the environment.” Charlene Barshefsky et. al, *United States to Resume Bilateral Investment Treaty Negotiations on the Basis of a Revised Model Treaty* WILMER HALE (May 15, 2012),

<http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=10150>; 2012 U.S. Model Bilateral Investment Treaty, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

⁵⁰² ICESCR, *supra* note 207, Art. 11.

⁵⁰³ McInerney-Lankford, *supra* note 234, at 53.

⁵⁰⁴ To the extent that they are instruments, “the policy consequences of a rights approach overlap considerably with a modern economic approach” to development. Narula, *The Right to Food*, *supra* note 47, at 702 (citing Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 WORLD DEV. 465, 469 (2004)).

⁵⁰⁵ On the ability of human rights and development paradigms to be mutually reinforcing, see generally HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (Philip Alston & Mary Robinson eds., 2005).

C. Reforming our Approach to Land: A Framework for the Future

In addition to imposing greater restrictions and regulations on large-scale land deals, States must also be encouraged to pursue alternative development pathways. Most significantly, and in light of its significant and decades-long influence over land reforms and agricultural policies in developing countries, the World Bank Group must reform its own approach to land markets and land distribution. The development of land markets and the facilitation of large-scale land transfers cannot remain the default policy option, and should not be imposed automatically without an understanding of how these investments affect the human rights and development needs of a range of stakeholders, in both the immediate and long-term.⁵⁰⁶ At the same time, international human rights law on the question of land rights must itself evolve from an instrumentalist approach toward the development of a substantive entitlement to land for those whose very survival depends on it.

1. Making the Case for Agrarian Reform: The Convergence of Rights and Productivity Goals

As analyzed in Part III, the market-plus approach assumes that trade-offs are necessary to service agricultural productivity and efficiency goals, but on this point, rights and productivity goals can be seen to converge: specifically, more secure, equitable access to land for rural communities can help ensure local communities' rights while also supporting broader economic growth and food security goals.⁵⁰⁷ As such a strong case can be made, at least in some contexts, for pursuing the agrarian reforms proposed by the rights-based approach.

Article 11(2)(a) of the ICESCR calls on States parties to “improve methods of production, conservation and distribution of food by . . . developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.”⁵⁰⁸ This article, the Special Rapporteur notes, should be interpreted “as encouraging agrarian reform that leads to more equitable distribution of land for the benefit of smallholders, both because of the inverse relationship between farm size and productivity and because small-scale farming (and linking farmers more closely to the land) may lead to more responsible use of the soil.”⁵⁰⁹ Equitable land distribution can help encourage economic growth, reduce rural poverty, and enhance opportunities for the empowerment of women, among other human rights benefits. This is especially the case when beneficiaries of such reforms are “supported through comprehensive rural development policies,” which provide “support for land users in their utilization of the land.”⁵¹⁰

⁵⁰⁶ See Upham & Trzcinski, *supra* note 322, at 1 (using the experience of Cambodia to illustrate the practical problems of instituting a one-size-fits-all model of land reform).

⁵⁰⁷ The Bank recognizes that in countries characterized by “highly unequal distribution of land” a strong case can be made for redistributing property rights. EVALUATIVE LESSONS, *supra* note 168, at 46; AGRICULTURAL LAND REDISTRIBUTION, *supra* note 170, Foreword (noting that land redistribution “holds the promise of significantly reducing poverty and increasing broad-based agricultural growth.”). The Bank prefers to support “market-led approaches that seek to match willing buyers and sellers,” (*Id.* at 46) which may have some of the same pitfalls as land titling for poor communities. See *supra* Part III.A.2.b; see also *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 38.

⁵⁰⁸ ICESCR, *supra* note 207, Art. 11(2)(a).

⁵⁰⁹ *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151, at ¶ 27.

⁵¹⁰ *Id.* at ¶ 24. The Special Rapporteur notes that “The failure of Latin American reforms when compared with Asian reforms has been attributed to the fact that Latin American reforms have traditionally focused solely on access to land, neglecting rural development policies.” *Report of the Special Rapporteur on the right to food (2010)*, *supra* note 151 (citing DEININGER, *supra* note 350, at 146). For more on East Asian reforms, see text accompanying *infra* notes 511 - 513. The Special Rapporteur offers that such policies could, *inter alia*, enable smallholders to become more competitive against larger farms, and improve smallholders' access to credit. *Report of the Special Rapporteur on the*

The World Bank's own studies confirm a strong correlation between growth rates and equitable distribution of land.⁵¹¹ For instance, following World War II, Japan, South Korea, and Taiwan instituted redistributive land reform that successfully created highly egalitarian access to land.⁵¹² The World Bank acknowledges that land reform was successful in these instances, equalizing land assets and income distribution among rural society, which in turn contributed to the “democratization and social and political stability in the postwar era.”⁵¹³ These and many other examples⁵¹⁴ point to a large number of small, independent farmers being more efficient overall than industrialized agriculture, even where efficiency is defined by the market as promoting economic growth. When efficiency is defined to include resource efficiency (as in managing agricultural resources in a sustainable manner) or social and political stability, the results are even further skewed in favor of independent smallholders.⁵¹⁵ By contrast, a default preference towards large-scale land transfers may undermine productivity and efficiency important goals by leading to a concentration of land rights.⁵¹⁶ In the long-run, the development of large-scale plantations also threatens ecological sustainability, while possibly contributing to political and social instability.⁵¹⁷

In the end, the World Bank's failure to take a less universal approach may undermine the Bank's own mandate of supporting economic development.⁵¹⁸ Moreover, supporting agrarian policies that favor small-scale farmers—including, where needed, land redistribution in favor of these farmers—directly services the Bank's efforts to ensure food security given the startling fact that of the over 1 billion people hungry in the world today, approximately 500 million depend on small-scale agriculture. These individuals are hungry both because “the price they receive for their crops is too low and they are less competitive than larger production units”⁵¹⁹ and because they “cultivate plots that are often very small—which makes the vast majority of them net food buyers.”⁵²⁰

right to food (2010), *supra* note 151, at ¶ 38. On this point, Robert Smith comments that: “If low credit uptake is the problem, then land tenure reform, especially in the advanced form of titling [which is advocated by the market-plus approach], is an expensive solution.” Smith, *supra* note 179, at 216. Elizabeth Fortin adds that, “Rather than continuing to advocate the use of land as a means of accessing credit, it would be better to concentrate research into other, more desirable means of accessing resources.” Fortin, *supra* note 316, at 162.

⁵¹¹ DEININGER, *supra* note 350 (analyzing land policies in 73 countries between 1960 and 2000 and showing that growth rates achieved were two to three times higher in countries where land distribution was initially more equitable).

⁵¹² Keith Griffin et al., *Poverty and Distribution of Land*, 2 J. AGRARIAN CHANGE 279, 302 (2002); Cristobal Kay, *Why East Asia Overtook Latin America: Agrarian Reform, Industrialization and Development*, 23 THIRD WORLD Q. 1073, 1074 (2002).

⁵¹³ Toshihiko Kawagoe, *Agricultural Land Reform in Postwar Japan: Experiences and Issues* 34 (World Bank Pol’y Res., Working Paper 2111, 1999).

⁵¹⁴ See DEININGER, *supra* note 350. Frank Upham suggests that much of the explanation for the Bank's under-attention to the policy implications of unexpected examples of economic growth and social advancement “lies in the way economists understand the world. Put starkly, they simplify and generalize.” Upham, *From Demsetz to Deng*, *supra* note 190, at 593. The World Bank's (1) strong emphasis on mathematical modeling and (2) the fact that the World Bank has to “understand and act in the *entire world*” exacerbate the frequency of this issue. *Id.* at 594-95 (emphasis in original).

⁵¹⁵ De Schutter, *The Green Rush*, *supra* note 69, at 545-546 (arguing that competitiveness should not be confused with resource efficiency. Although large industrialized plantations are more competitive, they are less efficient per hectare than are small farms.).

⁵¹⁶ *Report of the Special Rapporteur on the right to food* (2010), *supra* note 151.

⁵¹⁷ As considered in Part I.C., in countries already suffering from food and water shortages, and already starkly divided between the rich and poor, large-scale land transfers and the displacements they often entail can have a polarizing effect, lead to political instability, and even violent conflict.

⁵¹⁸ See, e.g., A ROADMAP, *supra* note 303, at 3 (arguing that the “failure of the WBG to more fully and systematically integrate human rights into its policies and programs has prevented these institutions from delivering on the development outcomes they seek.”).

⁵¹⁹ *Report of the Special Rapporteur on the right to food* (2010), *supra* note 151, ¶ 1.

⁵²⁰ *Id.*

Ultimately, plausible empirical evidence suggests that it is possible to pursue the market-plus approach's central goal of increasing the productivity of agricultural land use—an aim effectively canonized in the ICESCR—while improving local populations' access to and utilization of productive resources. Such an approach is not only viable, but in some cases may be preferable, both for its means and its ends: it allows states to respect crucial individual and community interests, as required under international human rights law, while at the same time offering better results in efficiency terms.

2. Advancing International Human Rights Law on the Right to Land

As considered throughout this Article, for many rural communities secure and stable access to land serves as a gateway for the realization of a range of human rights. Although the international human rights framework offers many important tools for addressing problems with land investments, further normative developments are needed to strengthen the ability of human rights law itself to secure the very access to land that is so crucial to these rights. Specifically, international human rights law must evolve in the direction of developing a substantive right to land.

A broad-based substantive right to land is not codified under international human rights law. International human rights law does guarantee the more limited right not to be arbitrarily deprived of property.⁵²¹ In addition, States cannot, without meeting certain conditions, evict communities who lack legal title but have settled and come to rely on a piece of land.⁵²² But the right to property, which protects the rights of existing property owners, does not provide support for the claims of a majority of those who are affected by land deals—those who are landless, or those whose relationship to land is difficult to formalize in ownership terms.⁵²³ Moreover, the procedural protections that attach to eviction processes can easily be circumvented as States have broad discretion to expropriate land in the public interest, as explored in Part III.B.⁵²⁴ More fundamentally, if access to land continues to primarily be given instrumental consideration—as an asset that serves as a gateway to the achievement of other rights—then States can continue to claim that other means exist to satisfy these corollary rights.⁵²⁵ For many rural communities, land also serves far more than an instrumentalist function: it is constitutive of dignity, identity, and cultural continuity. It is clear then that current conceptions of land in international human rights

⁵²¹ The Universal Declaration of Human Rights (“UDHR”), for example, guarantees the right to own property and prohibits the arbitrary deprivation of property. UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 207. The Convention on the Elimination of all forms of Racial Discrimination also protects “the right to own property alone as well as in association with others” in order to combat discrimination. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), art. 5(v), Jan. 4, 1969, 660 U.N.T.S. 195, *available at* <http://www2.ohchr.org/english/law/cerd.htm>. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women protects “the ownership, acquisition, management, administration, enjoyment and disposition of property.” Convention on the Elimination of All Forms of Discrimination against Women, art. 16 (1), 3 Sept. 1981, 1249 U.N.T.S. 513, 19 I.L.M. 33 (1980). The right to property is not apparent in either of the two foundational human rights covenants—the ICCPR and the ICESCR; this omission has been attributed to significant divergences of opinion between States over how the right should be formulated and interpreted. Luis Valencia Rodriguez, *The right of everyone to own property alone as well as in association with others*, Final Report, Commission on Human Rights, U.N.Doc. E/CN.4/1994/19 (25 November 1993), ¶36, 10.

⁵²² *Large-scale Land Acquisitions and Leases*, *supra* note 71, at 9. *See also supra* note 410.

⁵²³ *See also* Borrás & Franco, *supra* note 78; Sofia Monsalve, *Justiciability of Economic, Social and Cultural Rights: Progresses, State of the Debate*, in 2 RIGHT TO FOOD J. (2003) (distinguishing a property rights approach from the “right to property” which she frames as “the right to have land for those who have not got land, who do not have enough land or whose ownership of land is not recognized”).

⁵²⁴ *See supra* text accompanying notes 410 - 412.

⁵²⁵ *See also* Mark Tushnet, *A Critique of Rights*, 62 TEX. L. REV. 1363, 1384-1385 (1984) (arguing that rights suffer from political disutility, in the sense that if a right to achieve Y is only pragmatically useful as a means to X, Y will be abandoned as soon as some other means to X appears more promising).

law do not provide sufficient normative support to individuals and communities affected by land investments and that greater normative development is needed to help protect land's intrinsic and instrumental value.⁵²⁶

Land as a substantive human right has been most developed with regard to the rights of indigenous peoples, for whom land is an important part of their spiritual and cultural identities.⁵²⁷ In this view, the value of land arises out of the relationships between a group of people and the land that they use, care for, or occupy rather than out of the relationship between land and the market. The indigenous rights framework is now being extended to non-indigenous communities, but these steps are still in their infancy.⁵²⁸ The jurisprudence of the Inter-American Court of Human Rights, for example, suggests that the requirements applicable to indigenous peoples can be extended to at least certain tribal communities that entertain a similar relationship to their ancestral lands and that are centered on the community rather than on the individual.⁵²⁹ However, this framework has not been extended to the full spectrum of groups affected by large-scale land deals, groups such as small-holder farmers and peasants whose relationship and attachment to land is no less significant but to date has not been sufficiently addressed by international human rights law.⁵³⁰

Extension of the indigenous rights framework, at least as it relates to land and resource use, to all other communities is not necessarily feasible or desirable. Indigenous peoples have

⁵²⁶ See also Special Rapporteur on Adequate Housing, *supra* note 410, at ¶ 31 (calling on the U.N. Human Rights Council to “ensure the recognition in international human rights law of land as a human rights.”)

⁵²⁷ See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 10, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/drip.html>; Int'l Labor Org. [ILO], *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, C169, Art. 16(2), ILO Doc. C169 (June 27, 1989), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>; see also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: <http://www.unhcr.org/refworld/docid/4b8275a12.html> [accessed 26 August 2012] (ruling, in a case involving the Kenya government's eviction of the indigenous Endorois people from their home for... , that the eviction violated the Endorois people's right as an indigenous people to property, health, culture, religion, and natural resources.); *Sarayaku v. Ecuador*, Inter-Am. Ct. H.R., No.17/12 (July 25, 2012), available at http://www.corteidh.or.cr/docs/comunicados/cp_17_12_esp.pdf (ruling that the State of Ecuador violated the rights of the indigenous Kichwa people of Sarayaku by not executing free, prior, and informed consultation with the indigenous people before starting oil development in their land); see also Elisabeth Wickeri & Anal Kalhan, *Land Rights Issues in International Human Rights Law*, 4 MALAY. J. HUM. RTS. 16, 18-19 (2010).

⁵²⁸ See, e.g., *supra* note 400 (on the Special Rapporteur's suggestion that the “free, prior, and informed consent” standard that normally attaches to indigenous peoples be extended other communities).

⁵²⁹ See *Moiwana Community v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 132-33 (June 15, 2005)(citing *Mayagna (Sumo) Awas Tingni Community*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151 (Aug. 31, 2001)(“the Moiwana community members, a N'djuka tribal people, possess an ‘all-encompassing relationship’ to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. Thus, this Court's holding with regard to indigenous communities and their communal rights to property under Article 21 of the Convention must also apply to the tribal Moiwana community members: their traditional occupancy of Moiwana Village and its surrounding lands... should suffice to obtain State recognition of their ownership.”); *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 86 (Nov. 28, 2007) (“the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.”).

⁵³⁰ Land rights have also been developed in the context of women's rights. See generally Wickeri & Kalhan, *supra* note 527, at 19. In particular, CEDAW mandates that States parties ensure women's equal treatment in land and agrarian reforms and land resettlement schemes (Art. 14(g)) and ensure equality between women and men in the ownership, management and disposition of property in marriage (Art. 16(h)). Convention on the Elimination of all forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www2.ohchr.org/english/law/cedaw.htm>. Unlike indigenous rights, however, the women's rights framework does not explicitly posit a special relationship between women and land but instead mandates equal treatment between the sexes as in land-related dealings.

particular histories, cultures and self-limited identities that are not necessarily analogous to all communities and individuals affected by land investments.⁵³¹ However, the indigenous rights framework does provide some inspiration and a fruitful start for building substantive guarantees for rural communities for whom access to land is essential to their very survival.⁵³² Additional normative work on a right to land can draw from the indigenous rights framework but requires separate development as well, by academics and human rights mechanisms alike. Even if normative issues were resolved, the implementation of a substantive right to land remains highly contested and uncertain.⁵³³ Still, greater normative clarity can provide a stronger foundation to support calls for land redistribution, and can fortify the struggles of social movements, while also setting a benchmark for States and international financial institutions in the pursuit of essential agrarian reforms. Collectively, these developments can help empower rural communities and the social movements that support them, and can help establish a more sustainable framework that attends to our land-related needs today and safeguards them into the future.

CONCLUSION

In the past five years, hundreds of millions of acres of agricultural land have been targeted for lease or purchase. Land transfers are taking place in environments characterized by acute poverty, food insecurity, and a lack of oversight and regulation. The resulting negative impacts on host communities are now well-documented. Simultaneous food, financial, and climate crises see no signs of abating. Commercial pressures on agricultural land are therefore not likely to diminish any time soon, raising the specter of further violations of host populations' rights. In the face of this likely future, strategies to more effectively protect host communities and support sustainable uses of land are desperately needed. Two dominant frameworks have emerged to take on this weighty task: a rights-based approach, led by the U.N. Special Rapporteur on the Right to Food, and a "market-plus" approach, led by the World Bank Group. This Article critically assessed both approaches.

In Part III.A I argued that human rights are perilously unprotected under the market-plus approach, which reframes rights violations as "risks" and balances them against the benefits of agricultural investment—benefits that are touted with unwarranted enthusiasm. This balancing act also facilitates rights violations as it validates large-scale land transfers even in situations where proper regulatory frameworks are not in place to protect host community rights. I further argued that the grounding of the rights-based approach in international human rights law helps establish a normative baseline for assessing land investments. International human rights law can play a critical standard-setting role as it includes a number of threshold guarantees that help repudiate rights violations while addressing key distributive concerns.

⁵³¹ See Lustig & Kingsbury, *supra* note 251, at 409 ("Indigenous groups have strong and durable identities, and have been able to form national and transnational coalitions to pursue their normative agendas, making them surprisingly difficult for opponents (including governments) to block. The indigenous category, although imprecise, is to some extent a self-limiting one—many governments are able to support new norms on indigenous issues because they do not expect this to be costly for them.").

⁵³² For instance, the indigenous rights framework offers that the right need not (and indeed should not) be a universal right, but a right of specific communities that entertain a specific relationship to land. Under this framework, the right is also not an inalienable right. It does, however, afford rights-holders greater agency in decisions around how to make use of their land.

⁵³³ See generally Jennifer Franco, *Making Land Rights Accessible: Potentials and Challenges of a Human Rights Approach to Land Issues*, TRANSNAT'L INST. (April 2006), available at www.tni.org/archives/docs/200702051733154350.pdf.

I also raised and rebutted salient critiques of a “rights-as-trumps” approach. Specifically, I considered whether a human rights framework can accommodate necessary tradeoffs and manage increasingly complex and inter-dependent global processes in which the rights of multiple communities are at stake. I concluded that the rights-based approach (and the legal framework on which it rests) is far more nuanced than the trade-off-related objections suggest. International human rights law recognizes that the fulfillment of socio-economic rights will involve trade-offs among various goals. At the same time, it sets specific thresholds to help guide this forward-moving process—thresholds that are notably absent from the market-plus approach, which endorses tradeoffs between concrete rights and vague and uncertain gains. Moreover, because it holds investment processes to specific normative standards, the rights-based approach affirmatively looks for investment options that minimize trade-offs—methods that do, in fact, exist. The rights-based approach also attempts to address conflicts that may arise among rights-holders. And although these conflicts raise questions that are difficult to fully resolve, I conclude that the strength of the rights-based approach is that it provides a normative framework that elevates the importance of prioritizing the needs of the most vulnerable communities that are affected by land investments. The market-plus approach falls short in this regard, precisely because it lacks the framework to give the rights of these communities normative weight, and instead emphasizes average utility gains.

Access to land is of particular importance in the debate between the market-plus approach and the rights-based approach. Land is instrumentalized under both approaches as a means of enhancing welfare, but there are key differences in how each approach defines welfare, which in turn informs their respective approaches toward land distribution. I argued that the market-plus approach’s failure to identify any substantive standard against which to assess the social and distributional impacts of the market—or otherwise limit the vulnerability of host communities in the context of these deals—has fundamental implications for the distribution of this key asset. In particular, the market-plus approach overlooks the potential of land markets to reinforce existing power structures and deprive land users of a vital rights-protecting resource.

In many respects, the use of satellite imagery to identify investment-worthy sites stands as a metaphor for the market-plus approach to land. Technocrats, physically and professionally removed from the land in question, use tools that are even further removed in time and space in order to assess land’s current and potential value. This approach assumes that land and resources can be quantified by objective, distant images, and that the myriad uses, customs, and benefits informing the interests of land users can be captured, guaranteed, and marketized through written, formally-demarcated rights. These assumptions belie the complexity of land’s real value to those who depend on it as a source of spiritual, social, and economic sustenance as well as a guarantor of rights. Indeed those who make decisions about the “value” of land may very well be the furthest removed from an understanding of its worth.

Because the rights-based approach values land as a means of promoting a broad range of human rights, it seeks to keep the problematic distributional impacts of the market in check. Specifically, it prioritizes alternatives to large-scale land transfers, calls for measures to improve tenure security, and in cases of highly unequal land distribution, it promotes a State-led process of land redistribution. These policies have been shown to have substantial benefits; with proper supports, small-scale farming can strengthen food security, while more equitable land distribution has been linked to economic growth.

Part III.B turned to issues of implementation and assessed the potential of each approach to protect land users’ rights in light of the significant power dynamics at play in land transactions. I argued that the procedural safeguards offered by the market-plus approach, such as

consultations and contracts, fail to empower those routinely left out of the development debate. Indeed, the more the market-plus approach views the human rights impacts of land deals as a technical problem to be addressed through procedural safeguards, the more it struggles to address the actual power dynamics that underlie these abuses. The rights-based approach, too, struggles at the point of implementation. Like the market-plus approach, the rights-based approach offers a range of procedural safeguards that in the context of entrenched power dynamics may come up short in efforts to protect land users' rights.

I argued that an essential problem with both the market-plus approach and the rights-based approach is that their proposed legal—and particularly procedural—reforms necessarily rely on the willingness of the host State to implement these reforms. But as the experience of large-scale land transfers makes clear, such deference and faith in the State to design and implement processes and policies that are truly responsive to land users' needs is not warranted, nor is the faith that these procedures will be followed where such procedures are meant to benefit marginalized groups. I conclude that one cannot rely solely on the political will of the host State or rest on legal platforms alone. Although legal guarantees and transparent processes are critical for ensuring rights, political and social mobilization is required to close the gap between law and action, between procedural safeguards and substantive outcomes.

Part IV.A looked at resistance strategies and bottom-up initiatives that are developing to contest the global rush for agricultural land, and the power dynamics that undergird them. Social movements are growing, but protesting communities frequently struggle for greater agency over local resources and more lasting input into decision-making around agricultural policies—policies that are increasingly being shaped by a multitude of global actors. Part IV therefore considered essential institutional reforms to help empower affected communities and operationalize rights guarantees. In Part IV.B I argued that, instead of relying on ineffective procedural safeguards, large-scale land transfers must themselves be subject to far greater substantive restrictions. I proposed a number of measures to restrict these transfers—in both scale and duration, and sometimes outright. In addition, I argued that investor home States and international financial institutions must be more engaged in a regulatory role, as one cannot rely on the political will of host States, or on investors to police themselves. I proposed a number of regulatory measures, and also urged home States and IFIs to address the factors that are driving these deals, and reform underlying investment frameworks to better incorporate human rights concerns.

More fundamentally, I argued that in order to truly empower affected communities, host States and international partners must consider prioritizing the agrarian reforms promoted by the rights-based approach that call for more equitable distribution of land, and for sustainable uses of that land. As discussed in Part IV.C, these reforms can both ensure substantive rights and support productivity and economic development goals. In order for these important goals to be realized, however, the World Bank Group must change its approach to land markets and land distribution. Specifically, it must reevaluate the increasingly discredited philosophy that large-scale industrialized agricultural production can ensure the developmental and food security needs of the planet in a sustainable and equitable way. At the same time, international human rights law, too, must normatively evolve from an instrumentalist approach to land rights towards the development of a substantive right to land for those communities who depend on it for their very survival. I argued that collectively, these developments can help empower rural communities, and can help establish a more sustainable framework that attends to our land-related needs today and safeguards them into the future.

The changes called for in this Article necessarily require the willing participation of a wide range of actors. Social movements and civil society actors across States have a particular

role to play in compelling domestic and global actors to undertake key reforms. The responsibilities of global actors involved in land deals are also increasingly being addressed in human rights law terms. Even if these actors are unmoved by a sense of legal obligation, they should be compelled to undertake necessary reforms as a matter of self-interest. As the case of large-scale land transfers makes clear, in today's globalized world one country's agricultural policy has the potential to affect individuals around the world. In other words, the "risks" entailed in these investments are not limited to host State populations alone. In the short term, these deals have already had a discernible impact on the human rights of host communities. In the long term, how we invest in agricultural land will have enormous implications for global food and climate crises, and for the capacity of that land to service increasingly global needs. In the end, we cannot continue to be constrained by paradigms that inherently preclude us from resolving the problems we face as a global community. Instead, we need a shift in how we think about the phenomenon of "land-grabbing," beginning with the recognition that substantive and sustainable outcomes must frame the debate as we move forward.