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

SMITA NARULA*

In the past five years, interest in purchasing and leasing agricultural land in developing countries has skyrocketed. This trend, which was facilitated by the 2008 food crisis, is led by state and private investors, both domestic and foreign. 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” disregard land users’ rights and further marginalize already vulnerable groups: small-scale farmers, pastoralists, and indigenous peoples who are being displaced from their land and from resources essential to their survival. Amid mounting global protests, two dominant frameworks have emerged to assess and contest the global rush for agricultural land. This Article critically examines 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 the rights-based approach—the frameworks assumed respectively by proponents and opponents of these deals. Part III analyzes key conceptual differences in each framework’s approach to rights and risks and to land distribution. I argue that the market-plus approach tolerates and facilitates rights violations, whereas the rights-based approach sets a normative baseline that repudiates these impacts and addresses key distributive concerns. Part III assesses the potential of each approach to effectively regulate land deals in practice. I find that both approaches emphasize procedural safeguards to protect land users’ rights and argue that these safeguards are ineffective at contesting the power dynamics at play in land transactions. Part IV proposes concrete reforms to help empower communities most affected by land deals and argues that international actors must be more involved in securing rights protections.

* Associate Professor of Clinical Law and Faculty Director, Center for Human Rights and Global Justice, New York University School of Law. For their insightful comments and helpful discussions, the author thanks with great appreciation Philip Alston, José Alvarez, Kevin Davis, Olivier De Schutter, Ryan Goodman, Sally Merry, and Frank Upham. Any mistakes are the author’s own. For their invaluable research assistance, the author also thanks Abby Deshman, Chris deLaubenfels, Joe Edwards, Ruchira Goel, Vyoma Jha, Wendy Liu, Paul Mertenskoetter, Sunita Patel, Raquel Saavedra, Alex Sinha, Kinga Tibori Szabo, and Alyson Zureick. Work on this Article was supported by the Filomen D’Agostino Research Fund at NYU School of Law and the Louis B. Thalheimer and Juliet A. Eurich Philanthropic Fund, Inc.

This work is dedicated to the life and memory of my father, Hans Raj Narula (1936–2010), who in his longstanding career in international development was an indefatigable advocate of the rights of the marginalized.

INTRODUCTION	103
I. LARGE-SCALE LAND TRANSFERS: DRIVERS, TRANSACTIONS, AND IMPACTS...109	
A. Drivers and Actors Behind Large-Scale Land Transfers	112
B. Land Transfers and Transactions: Documented Problems	115
C. Negative Impacts on Host Communities	117
II. CONTESTING THE GLOBAL LAND RUSH: MARKET VS. RIGHTS-BASED APPROACHES	121
A. The Market-Plus Approach.....	121
1. The Market-Plus Approach to Land: Land as a Commodity.....	122
2. “Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources”.....	124
B. The Rights-Based Approach.....	126
1. The Rights-Based Approach to Land: Land as a Gateway to Human Rights.....	127
2. “Eleven Principles: Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases”.....	130
III. ASSESSING THE FRAMEWORKS: PRINCIPAL DISTINCTIONS AND OVERLAPPING PROBLEMS	132
A. Principal Distinctions: Rights, Risks, and Land Distribution	132
1. Risks vs. Rights Violations	132
a. Framing and its Consequences	132
b. Repudiating Rights Violations and Managing Trade-Offs.....	136
c. Addressing Distributive Concerns and Managing Conflicts Between Rights Holders.....	140
2. Land Markets and Land Distribution	144
a. The Market-Plus Approach: Enhancing Productivity or Exacerbating Problems?.....	145
b. The Rights-Based Approach: Making the Case for Agrarian Reforms	149
B. Overlapping Problems: The Limitations of Procedural Safeguards	151
1. The RAI Principles: A Misplaced Focus on Procedural Fairness....	151
2. The Eleven Principles: Procedural Means for Substantive Ends....	155
3. A Critical Challenge: Generating Political Will	157
IV. EMPOWERING AFFECTED COMMUNITIES	160
A. Resistance Strategies and the Need for Structural Support.....	160
B. Restricting and Regulating Large-Scale Land Transfers	164
C. Reforming our Approach to Land: A Framework for the Future	169
CONCLUSION	172

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 sought to capitalize on Saudi Arabian state subsidies for the foreign production of staple crops, which is part of the country's strategy for ensuring 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

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. At this writing, another 5.2 million acres were on offer through the Ethiopian government's land bank for agricultural investment.⁶ In some regions, the government planned to relocate 1.5 million people by 2013.⁷ The relocation

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> (discussing the company's plans for the farmland); see also Andrew Rice, *Is There Such a Thing as Agro-Imperialism?*, N.Y. TIMES (Nov. 16, 2009), <http://www.nytimes.com/2009/11/22/magazine/22land-t.html?pagewanted=all> (discussing Saudi Star's plan to purchase more than 1 million acres for overseas crop production).

² 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>; Rice, *supra* note 1 (discussing the Saudi Star's hopes of "capitalizing on the Saudi government's initiative to subsidize overseas staple-crop production").

³ Hoffman, *supra* note 1 ("Ethiopia has developed a comprehensive agricultural plan that depends heavily on foreign investment.").

⁴ HUMAN RIGHTS WATCH, *WAITING HERE FOR DEATH: DISPLACEMENT AND "VILLAGIZATION" IN ETHIOPIA'S GAMBELLA REGION 3* (2011) [hereinafter *WAITING HERE FOR DEATH*], http://www.hrw.org/sites/default/files/reports/ethiopia0112webwcover_0.pdf.

⁵ OAKLAND INST., *UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: COUNTRY REPORT: ETHIOPIA 32* (2011) [hereinafter *COUNTRY REPORT: ETHIOPIA*].

⁶ *WAITING HERE FOR DEATH*, *supra* note 4, at 3; see also OAKLAND INST., *UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: THE MYTH OF JOB CREATION 2* (2011) [hereinafter *THE MYTH OF JOB CREATION*].

⁷ The regions of Gambella, Afar, Somali, and Benishangul-Gumuz have been targeted for relocation. See *WAITING HERE FOR DEATH*, *supra* note 4, at 19; see also *COUNTRY REPORT: ETHIOPIA*, *supra* note 5, at 38.

program, or “villagization process” in Ethiopia’s Gambella region—the site of the Saudi Star investment—has been particularly devastating for indigenous communities cut off from sources of food, water, healthcare, and education.⁸ Many of these relocations have been forced and have taken place without meaningful consultation or compensation.⁹ The Ethiopian government has reportedly threatened, assaulted, or detained those resisting the relocation process.¹⁰ As of January 2012, government security forces enforcing the relocations were implicated in at least twenty incidents of rape.¹¹

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.”¹² The jobs created will likely not compensate for the number of people displaced,¹³ and water diverted from local farming and fishing to rice production may force locals to compete for water in addition to land.¹⁴ These relocations also threaten many indigenous communities’ way of life.¹⁵ For example, the indigenous Anuak community practices a shifting form of cultivation that is at odds with the sedentary nature of the relocation villages. Similarly, the pastoralist Nuer community must now “abandon [its] cattle-based livelihood[] in favor of settled cultivation.”¹⁶

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.¹⁷ The lack of farms or food in relocation sites has led one individual to comment: “Now we’re living like refugees in our own country.”¹⁸ Another displaced individual poignantly lamented: “The government is killing our people through starvation and hunger . . . we are just waiting here for death.”¹⁹ Because indigenous communities in Gambella lack formal title to the land they have traditionally occupied,²⁰ they have no redress in the form of expropriation or compensation procedures under Ethiopian law,²¹ despite the Ethiopian

⁸ WAITING HERE FOR DEATH, *supra* note 4, at 3. Roughly 70,000 people were slated to be moved in Gambella by the end of 2011. *Id.* at 2.

⁹ *Id.* at 2.

¹⁰ *Id.* at 2, 34–35.

¹¹ *Id.* at 19–20. According to Human Rights Watch, these relocations 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.

¹² *Id.* at 2.

¹³ See THE MYTH OF JOB CREATION, *supra* note 6, at 2 (examining the number of jobs created compared to the number of jobs promised and concluding that such promises are often overstated and misleading).

¹⁴ Hoffman, *supra* note 1 (“[M]any of the local Anuak tribe . . . worry the rice will dry up the water they rely on for their own farming and fishing.”).

¹⁵ See WAITING HERE FOR DEATH, *supra* note 4, at 16–18.

¹⁶ *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”).

¹⁷ See *id.* at 46 (noting that severe starvation would likely result from the lack of rain in 2011, which had prevented farmers in Gambella from planting crops).

¹⁸ Hoffman, *supra* note 1 (quoting an Ethiopian woman from the Anuak tribe).

¹⁹ WAITING HERE FOR DEATH, *supra* note 4, at 45.

²⁰ See *id.* at 4.

²¹ *Id.* at 72.

Constitution's strong recognition of customary rights of land tenure.²² The Ethiopian government's claim that these lands are uninhabited or underutilized also thwarts the potential for constitutional and legislative protections.²³

Investors have expressed little concern for the rights of host populations²⁴ and have instead praised Ethiopia for its low labor costs, tax and duty exemptions, relaxed regulations, and abundant amounts of "undeveloped" land.²⁵ For its part, the Saudi Star is hoping to expand its investment to 500,000 acres within the next ten years.²⁶ The going rate for this land is approximately \$4 per acre per year.²⁷

The Ethiopian experience is not singular.²⁸ In the past five years, interest in purchasing and leasing agricultural land in developing countries has skyrocketed.²⁹ The commodification of foreign land is admittedly nothing new, but the scale and intensity with which recent investments have proceeded is startling.³⁰ Reliable measurements are difficult to obtain, and even figures derived from in-country empirical research may underestimate the scale of investments because of constrained access to data or the exclusion of deals that are still under negotiation.³¹

²² See *id.* at 71 (noting that the Ethiopian government has failed to recognize traditional land rights systems, instead deeming the land unused or underutilized).

²³ *Id.* at 4.

²⁴ In Ilea village in Gambella, "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. COUNTRY REPORT: ETHIOPIA, *supra* note 5, at 44. According to the local people, however, the village's communal agricultural crops and its royal cemetery were destroyed when Karuturi arrived in the village and began clearing the land. *Id.*

²⁵ 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.

²⁶ Hoffman, *supra* note 1 (discussing the plans for the leased Ethiopian land).

²⁷ Ed Butler, *Land Grab Fears for Ethiopian Rural Communities*, BBC (Dec. 16, 2010), <http://www.bbc.co.uk/news/business-11991926>. 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.

²⁸ For example, in three case studies of land grabs in Cambodia, peasants were "notified of land grabs by the arrival of bulldozers and excavators to clear the land." ALISON ELIZABETH SCHNEIDER, WHAT SHALL WE DO WITHOUT OUR LAND? LAND GRABS AND RESISTANCE IN RURAL CAMBODIA 21 (2011).

²⁹ Throughout the Article, I will refer to these transactions as "land transfers." Although land can be transferred in any number of ways, I use the term specifically to describe the acquisition or lease by state or private investors, both domestic and foreign, of legal interests in the agricultural land of a developing country. These land transfers typically are negotiated by the developing country's government, or sometimes, additionally, in consultation with proximal communities or individuals.

³⁰ 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], 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").

³¹ See LORENZO COTULA, LAND DEALS IN AFRICA: WHAT IS IN THE CONTRACTS? 12 (2011) [hereinafter LAND DEALS IN AFRICA], <http://pubs.iied.org/pdfs/12568IIED.pdf> (noting the figures "must . . . be treated with caution, as they may underestimate the scale"); 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), http://www.grain.org/bulletin_board/entries/4429-new-data-sets-on-land-grabbing (pointing out that different studies provide disparate estimates on the geographic size of land deals).

All sources agree, however, that the amount of land being targeted for purchase or lease is dramatic. According to the World Bank Group,³² foreign investors targeted more than 56 million hectares (138 million acres) of agricultural land between 2008 and 2009.³³ More than 75% of these deals took place in Sub-Saharan Africa.³⁴ Another study notes that close to 60 million hectares (148 million acres) of land were acquired in Sub-Saharan Africa in 2009 alone³⁵—an area the size of Germany and the United Kingdom combined.³⁶

This trend, which was facilitated by the 2008 food and financial crises, is being led by state and private investors, both domestic and foreign.³⁷ In some cases, investments are to produce food for export, while other investments are to produce biofuels or to benefit from carbon emissions credits for clean development mechanism projects. In still other cases, entities invest for purely speculative reasons.³⁸ The World Bank Group has helped facilitate these deals by actively supporting the creation of investment-friendly climates and land markets in developing countries.³⁹ 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.⁴⁰ Although renewed investment in agriculture presents 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.”⁴¹

A wealth of evidence—largely in the form of investment case studies—reveals that many large-scale land investments are not servicing the goal of ensuring equitable development and sustainable food security in host countries and,

³² The World Bank Group 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). *About Us: Who We Are*, WORLD BANK, <http://go.worldbank.org/BLDCT5JMI0> (last visited Nov. 13, 2012). The World Bank commonly refers to the IBRD and IDA. *About Us: What We Do*, WORLD BANK, <http://go.worldbank.org/7Q47C9KOZ0> (last visited Nov. 13, 2012). This Article uses the terms “World Bank,” “World Bank Group,” and “the Bank” interchangeably.

³³ RISING GLOBAL INTEREST, *supra* note 30, at xiv.

³⁴ *Id.*

³⁵ See OAKLAND INST., UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: THE ROLE OF THE WORLD BANK GROUP 1 (Dec. 2011) [hereinafter *ROLE OF THE WORLD BANK GROUP*], http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_brief_World_Bank_Group_0.pdf.

³⁶ See *United Kingdom*, CIA - THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (select “Geography” tab) (last visited Feb. 22, 2013); *Germany*, CIA - THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> (select “Geography” tab) (last visited Feb. 22, 2013).

³⁷ 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) [hereinafter *LAND RIGHTS AND THE RUSH FOR LAND*], http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf.

³⁸ See *infra* Part I.A.

³⁹ See *infra* Part I.A.

⁴⁰ See text accompanying *infra* notes 55–56.

⁴¹ COUNTRY REPORT: ETHIOPIA, *supra* note 5, at 1.

in fact, may 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 increase the risk of serious human rights violations 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.⁴²

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.⁴³ 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."⁴⁴ According to one editorial on the issue, rural communities throughout Latin America, Africa, and Asia "are being crushingly pushed aside in deals that are forcing large-scale migration, violent conflicts, unemployment, deepening poverty and hunger."⁴⁵

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 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.⁴⁶ 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.

⁴² See *infra* Parts I.B and I.C.

⁴³ See *infra* text accompanying notes 50–51.

⁴⁴ Olivier De Schutter, U.N. Special Rapporteur on the Right to Food, Keynote Address at the United Nations Conference on Trade and Development Commission on Investment: Enterprise and Development: Principles for Responsible Investment in Agriculture 1 (Apr. 26, 2010), http://www.srfood.org/images/stories/pdf/otherdocuments/260410_keynote_unctad_principles_responsible_investment.pdf. One such farmers' organization has launched a campaign against "land grabs." See 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), <http://www.landaction.org/spip/spip.php?article499>. For more on La Via Campesina, see *infra* notes 410–13 and accompanying text.

⁴⁵ 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>.

⁴⁶ 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, 711–18 (2006) (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).

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. It is argued that such regulation can be achieved through continued facilitation of an appropriate investment climate and adherence to a set of good governance principles.⁴⁷ The market-plus approach treats land as a commodity and seeks to revitalize land that is deemed idle and nonproductive 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.⁴⁸

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; access to land is seen as a gateway to the realization of multiple human rights, including the right to food. The rights-based approach encourages legal reforms to strengthen security of tenure, and agrarian reforms that lead to more equitable distribution of land for the benefit of small-scale farmers. This approach also encourages investments that support small-scale farming, and that do not involve land transfers or evictions. To the extent that large-scale land transfers do move forward, the rights-based approach offers a set of principles for regulating these transactions—principles that are grounded in and give expression to states' obligations under international human rights law.⁴⁹

This Article critically assesses both approaches. It 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.⁵⁰ These consultations will consider proposals put forward under both frameworks.⁵¹

⁴⁷ See Borrás & Franco, *supra* note 46, at 514–15 (asserting that it is widely thought that using a two-pronged approach—developing a favorable policy environment and establishing a code of conduct—is a promising approach that benefits each party).

⁴⁸ See *infra* Part II.A.

⁴⁹ See *infra* Part II.B.

⁵⁰ Comm. on World Food Sec., Process of Consultation on Principles for Responsible Agricultural Investment (RAI) Within the Committee on World Food Security, ¶ 4 (37th Sess. Oct. 2011); Comm. on World Food Sec., Final Report, ¶ 23 (39th Sess. Oct. 2012).

⁵¹ See *id.*, at Appendix D: Proposed Terms of Reference to Develop Principles for Responsible Agricultural Investment (noting that the principles will take into account the RAI Principles proposed by the World Bank Group and will build on the FAO-formulated Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT). The principles will also take into account existing human rights standards concerning the progressive realization of the right to adequate food). The VGGT are a related set of guidelines endorsed by the CFS in May 2012. Comm. on World Food Security, Rep. of the 38th

But 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 empowering affected communities and securing 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 rights violations and addresses key distributive concerns. Part III.B considers the potential of each approach to effectively regulate land deals. I find that both approaches emphasize procedural safeguards to protect land users' rights 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 further argue that the agrarian reforms promoted 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

In the span of just five years, the global agricultural sector has been hit by two interrelated 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 bidirectional 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.⁵² A

(Special) Session of the Committee on World Food Security, June 11–15, 2012, U.N. Doc CL 144/9 (May 11, 2012), <http://www.fao.org/docrep/meeting/025/md958e.pdf>; FAO, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (2012) [hereinafter VGGT], <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>. See also *infra* notes 452–54 and accompanying text.

⁵² HIGH COMMISSIONER FOR HUMAN RIGHTS, MANDATE OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD 7 (May 2008), <http://www.srfood.org/images/stories/pdf/otherdocuments/1-srtrfnoteglobalfoo>

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.

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

A. Drivers and Actors Behind Large-Scale Land Transfers

International food prices have been highly volatile since 2006, and in 2007–08 food prices soared, with basic commodities doubling their average 2004 prices.⁵⁵ The surge in food prices led to widespread social unrest. At the height of the crisis, food riots were reported in over 30 countries.⁵⁶ 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.⁵⁷

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.⁵⁸ The IFC also assists developing countries in removing obstacles to

dcrisis-2-5-08.pdf; see also *Amid Food Riots and Shaken Governments IFIs Scramble to Develop a Coherent Response*, BANK INFO. CENTER (May 9, 2008), <http://www.bicusa.org/en/Article.3763.aspx>.

⁵³ See *infra* Parts IV.B and IV.C.

⁵⁴ See *infra* Parts II and III.

⁵⁵ FAO ET AL., PRICE VOLATILITY IN FOOD AND AGRICULTURAL MARKETS: POLICY RESPONSES ¶ 11 (2001), http://www.worldbank.org/foodcrisis/pdf/Interagency_Report_to_the_G20_on_Food_Price_Volatility.pdf; *FAO Food Price Index*, FAO, <http://www.fao.org/worldfoodsituation/wfs-home/foodpricesindex/en/> (last visited Aug. 18, 2012) [hereinafter *Food Price Index*].

⁵⁶ ANURADHA MITTAL, U.N. COMM'N ON TRADE & DEV., THE 2008 FOOD PRICE CRISIS 15 (2008) (noting that as of July 2012 overall international food prices were higher than they were on average in 2008); *Food Price Index*, *supra* note 55.

⁵⁷ 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 (Apr. 2, 2008), <http://go.worldbank.org/KRFPZ4OU30>. The Bank's investments in agriculture and related sectors doubled between 2008 and 2012, from \$4.6 billion to \$9.3 billion. See WORLD BANK, GROWTH AND PRODUCTIVITY IN AGRICULTURE AND AGRIBUSINESS WORLD BANK GROUP LENDING TO AGRICULTURE app. B at 99 (2012), available at <http://siteresources.worldbank.org/INTGPAA/Resources/AppendixB.pdf>; WORLD BANK, ISSUE BRIEF: AGRICULTURE AND RURAL DEVELOPMENT (2012), available at <http://go.worldbank.org/BR4VX141Q0>.

⁵⁸ See ROLE OF THE WORLD BANK GROUP, *supra* note 35, at 1; Zoellick, *supra* note 57 (discussing the IFC as the private sector arm of the World Bank); see also IFC, GLOBAL AGRIBUSINESS: CREATING OPPORTUNITY IN EMERGING MARKETS 4 (2011), available at

foreign investment, whether through legislative and policy reforms,⁵⁹ or the creation of investment promotion agencies.⁶⁰ Development agencies have also actively facilitated agricultural investment in developing countries,⁶¹ as have foreign governments. Foreign governments provide critical financial support to investors⁶² and help establish the regulatory framework to govern land deals through national legislation and through intergovernmental agreements such as bilateral investment treaties (BITs),⁶³ cooperation agreements in agriculture, or other intergovernmental deals.⁶⁴

These policies have made agricultural land investments even more attractive to Western investors. With the certainty of a steadily rising 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.⁶⁵ Investment and pension funds are now joining sovereign wealth funds and individual investors in the pursuit of farmland.⁶⁶ As of 2012, an estimated fourteen billion dollars of private capital was invested in farmland and agricultural infrastructure, and experts expect this amount to double or triple by 2015.⁶⁷ These

http://www1.ifc.org/wps/wcm/connect/17b1c500476244cdab45ef9022d5a78b/Agribusiness_Singles_De%2B14.pdf?MOD=AJPERES.

⁵⁹ See SHEPARD DANIEL & ANURADHA MITTAL, (MIS)INVESTMENT IN AGRICULTURE: THE ROLE OF THE INTERNATIONAL FINANCE CORPORATION IN GLOBAL LAND GRABS (2010), http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/misinvestment_web.pdf (profiling IFC initiatives that have helped encourage international investment in land by facilitating short- and long-term regulatory reforms in target countries).

⁶⁰ ROLE OF THE WORLD BANK GROUP, *supra* note 35, at 1–2. In addition, the World Bank Group’s Multilateral Investment Guarantee Agency (MIGA) insures foreign land transfers against various political risks. MIGA, MIGA: GUARANTEEING INVESTMENT IN MANUFACTURING PROJECTS 1 (2011), http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/01/17/000333038_20120117234859/Rendered/PDF/663360BRI0manu00Box365757B00PUBLIC0.pdf.

⁶¹ See generally OAKLAND INST., LAND DEAL BRIEF: THE ROLE OF DEVELOPMENT AGENCIES 1 (2011), http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_brief_role_of_development_agencies_0.pdf (exploring the role of development agencies, multilateral institutions, and “socially responsible” investment funds through a study of fifty land investment deals in seven African countries).

⁶² Foreign governments 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?], http://www.ifad.org/pub/land/land_grab.pdf.

⁶³ BITs create a set of legally enforceable rights for foreign investors against the host state. *Id.* at 32.

⁶⁴ *Id.* at 29, 32–33.

⁶⁵ SHEPARD DANIEL & ANURADHA MITTAL, THE GREAT LAND GRAB: RUSH FOR THE WORLD’S FARMLAND THREATENS FOOD SECURITY FOR THE POOR 4 (2009) [hereinafter THE GREAT LAND GRAB], http://www.oaklandinstitute.org/pdfs/LandGrab_final_web.pdf; 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), <http://www.fian.org/resources/documents/others/report-on-land-grabbing/pdf>.

⁶⁶ ROLE OF THE WORLD BANK GROUP, *supra* note 35, at 1.

⁶⁷ See INT’L INST. FOR ENV’T & DEV., 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 INST., UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: DECIPHERING EMERGENT’S INVESTMENTS IN AFRICA (2011), http://media.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_EAM_Brief_1.pdf.

investors understand that farmland and freshwater sources are strategic assets and non-renewable resources, the demand for which is certain to grow.⁶⁸

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.⁶⁹ This is particularly evident in relation to investments made by many “resource-poor but cash rich” Gulf States⁷⁰ whose scarce water and soil resources make them heavily dependent on international markets for their food supply.⁷¹ 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.⁷²

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.⁷³ Additionally, projects like the Kyoto Protocol’s Clean Development Mechanism have incentivized some states to meet their compliance requirements by launching emission-reduction projects abroad, such as planting forests in developing countries.⁷⁴ Implementation of the Reducing Emissions from Deforestation and Forest Degradation (REDD) Scheme, which offers financial incentives for preserving extant forests, may also prove to be a driver of large-scale land acquisitions.⁷⁵

⁶⁸ 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*].

⁶⁹ See Press Release, GRAIN, GRAIN Releases Data Set with Over 400 Global Land Grabs (Feb. 23, 2012), <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).

⁷⁰ Special Rapporteur on the Right to Food, Addendum to Rep. 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; LAND GRABBING AND THE GLOBAL FOOD CRISIS, *supra* note 31, at 10 (listing Gulf States’ investments around the world by country).

⁷¹ THE GREAT LAND GRAB, *supra* note 65, at 2 (citing GRAIN, SEIZED!: THE 2008 LAND GRAB FOR FOOD AND FINANCIAL SECURITY 9 (2008) [hereinafter SEIZED!]).

⁷² See Joachim von Braun & Ruth Meinzen-Dick, “Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities, IFPRI POLICY BRIEF 13, 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).

⁷³ 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 65, at 4 (noting that increased biofuel demand is largely a result of ambitious targets that certain oil-dependent countries have established for biofuel production and for increasing the proportion of biofuels used in land transport).

⁷⁴ CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, FOREIGN LAND DEALS AND HUMAN RIGHTS: CASE STUDIES ON AGRICULTURAL AND BIOFUEL INVESTMENT 3 n.19 (2010) [hereinafter FOREIGN LAND DEALS AND HUMAN RIGHTS], available at <http://chrgj.org/wp-content/uploads/2012/07/landreport.pdf>.

⁷⁵ 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].

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 reasons⁷⁶ 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 ninety-nine years)⁷⁷ or outright purchase.⁷⁸ The size of any single land deal can be quite large, including deals involving 100,000 hectares⁷⁹ or even 600,000 hectares.⁸⁰ These transactions may be mediated by a central government authority, approved at a local governance level, or negotiated directly with a private title-holder.⁸¹ Despite this diversity, several clear and problematic patterns have emerged in relation to land-related transactions.

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.⁸² 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 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,"⁸³

⁷⁶ 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).

⁷⁷ David Hallam, *International Investment in Developing Country Agriculture: Issues and Challenges*, 3 FOOD SEC. 1, 2–3 (2011), available at http://www.maff.go.jp/primaff/meeting/kaisai/pdf/0903_3.pdf; see also Hoffman, *supra* note 1 (discussing Ethiopia's land lease).

⁷⁸ LAND DEALS IN AFRICA, *supra* note 31, at 75.

⁷⁹ *Id.* at 13 (noting a 100,000-hectare project in Mali and citing LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 62).

⁸⁰ Hallam, *supra* note 77, at 2–3; see also OXFAM INT'L, LAND AND POWER: THE GROWING SCANDAL SURROUNDING THE NEW WAVE OF INVESTMENTS 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 31, at 143.

⁸¹ LAND DEALS IN AFRICA, *supra* note 31, at 78.

⁸² See, e.g., FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, at 34 (concluding that two key institutions, the Tanzanian Investment Centre and Tanzania's National Biofuels Task Force, "should ensure the meaningful participation of affected communities in its work"); THE GREAT LAND GRAB, *supra* note 65, at 4 (noting, for example, that leases have been made to Chinese rubber manufacturing companies despite severe food insecurity); RUTH HALL, THE MANY FACES OF THE INVESTOR RUSH IN SOUTHERN AFRICA 4 (2011) [hereinafter THE MANY FACES OF THE INVESTOR RUSH] (noting that many deals are for land that is already occupied and claimed by local peoples); OAKLAND INST., UNDERSTANDING LAND DEALS IN AFRICA: LAND GRABS LEAVE AFRICA THIRSTY 1 (2011) [hereinafter LAND GRABS LEAVE AFRICA THIRSTY], http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_brief_land_grabs_leave_africa_thirsty_1.pdf (noting that "investors see Africa as an 'uncrowded space of opportunities'").

⁸³ RISING GLOBAL INTEREST, *supra* note 30, at 55.

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,⁸⁴ 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,⁸⁵ as was the case in Ethiopia's Gambella region.⁸⁶ Moreover, many countries require that the government expropriate the land before it is sold to private investors.⁸⁷ State-sanctioned evictions may be limited to public interest 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,⁸⁸ and individuals' and communities' appeal rights or access to judicial mechanisms may be limited.⁸⁹

Even where local land rights are legally recognized, they may not be honored in practice⁹⁰ 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.⁹¹ Further, because investor-state negotiations are often opaque, affected community members are unable to discern the likely effects of the deals, let alone participate in the process of shaping them.⁹² The extent to which governments and investors are required to consult with local host communities also

⁸⁴ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 37, 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 62, at 65.

⁸⁵ 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 30, 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.

⁸⁶ See *supra* Introduction.

⁸⁷ RAI PRINCIPLES, *supra* note 31, at 5.

⁸⁸ RISING GLOBAL INTEREST, *supra* note 30, at 71.

⁸⁹ *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." *Id.*

⁹⁰ See, e.g., FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, 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"). But this is not uniformly the case. 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 transferring or leasing land outright. RAI PRINCIPLES, *supra* note 31, at 4; RISING GLOBAL INTEREST, *supra* note 30, at 62.

⁹¹ 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).

⁹² *Id.*; see also LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 62, 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").

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.⁹³ Countries such as Ethiopia and Madagascar require consultation with communities, but these processes may not be observed in practice and may 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.⁹⁴ 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."⁹⁵ Some villagers were also reportedly "unaware of their land rights when they provided their so-called consent."⁹⁶

When affected communities are consulted, the timetables for concluding transactions may be too short to allow for adequate input.⁹⁷ Community elders or elites are typically the only ones involved in the consultations, which tend to be one-off events, and mechanisms to resolve divergent preferences amongst community members are non-existent.⁹⁸ Often, communities receive poor information on the specific terms of the land deal.⁹⁹ 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.¹⁰⁰ In such circumstances, traditionally marginalized or politically weak community members may be excluded from decisionmaking 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.¹⁰¹ When contracts do exist, they may fail to delineate specific obligations or provide mechanisms for ensuring investor accountability.¹⁰² The terms of the deals are often vague¹⁰³ or clearly favor the investor.¹⁰⁴ The benefits that do fall to the host state may not reach the communities affected by the deals in

⁹³ Even in countries with well-developed policy frameworks, these frameworks may not be implemented in practice. Vermeulen & Cotula, *supra* note 91, at 909 (citing Tanzania and Mozambique as examples).

⁹⁴ *Id.* at 907.

⁹⁵ See FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, at 13.

⁹⁶ *Id.*

⁹⁷ Vermeulen & Cotula, *supra* note 91, at 909.

⁹⁸ *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) (discussing divergent preferences).

⁹⁹ Vermeulen & Cotula, *supra* note 91, at 909.

¹⁰⁰ RISING GLOBAL INTEREST, *supra* note 30, at 103.

¹⁰¹ See, e.g., Vermeulen & Cotula, *supra* note 91, at 909 (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").

¹⁰² 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).

¹⁰³ *Id.* at 21.

¹⁰⁴ *Id.*

the first place.¹⁰⁵ A land deal in South Sudan offers a case in point and demonstrates that even where land users' rights are legally recognized¹⁰⁶ and consultations are required, it still may not lead to favorable outcomes for host communities.

In 2007, a Norwegian company began negotiations for a ninety-nine-year lease to 179,000 hectares in Sudan's Central Equatoria State (CES). The company aimed to establish a tree plantation and forest conservation project¹⁰⁷ and to earn carbon credit subsidies.¹⁰⁸ South Sudan features a decentralized land administration system that allows local government units to take the lead in negotiating land deals.¹⁰⁹ 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; the Director General of Forestry is a member of the investor's board.¹¹⁰ The year-long community negotiation process was conducted through a local development committee, which "consulted with the community through its traditional leaders."¹¹¹ But questions have been raised about the inclusiveness of the process and whether the consent given was fully informed.¹¹²

The resulting Land Title Agreement, which is very general and only five pages long,¹¹³ is characterized by a number of inequitable terms. The land rental amount indicated in the investment agreement, for example, translates to approximately \$0.07 U.S. per hectare per year, rendering it little more than a symbolic payment.¹¹⁴ The agreement also does not require any production of timber for the domestic market.¹¹⁵ 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 unpaid workdays during the first five years of the project to maintain the road to Juba County.¹¹⁶

Given the myriad land transfer and transaction-related problems detailed above, it is perhaps unsurprising that large-scale land transfers have carried many negative impacts for local populations, despite promises of mutual benefit. These impacts are examined below.

¹⁰⁵ *Id.* at 39, 42.

¹⁰⁶ *See supra* text accompanying note 90.

¹⁰⁷ FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, at 15 (citing GREEN RESOURCES, ANNUAL REPORT 2008: COMPANY REPORT 2009, at 5 (Aug. 2009), http://www.greenresources.no/Portals/1/Reports/AR_2008_FINAL.pdf).

¹⁰⁸ As of September 2010, the company was in the final stages of securing title to the land. FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, at 36.

¹⁰⁹ *Id.* at 43.

¹¹⁰ *Id.* at 52.

¹¹¹ *Id.*

¹¹² *Id.* at 51–53.

¹¹³ 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 paragraph 4.5. *See id.* at 110–11.

¹¹⁴ *Id.* at 54.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 56 (citing the Community Support Program Agreement).

C. Negative Impacts on Host Communities

The agricultural sector in the developing world has historically been underfunded,¹¹⁷ 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 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.¹¹⁸ For countries acquiring land abroad to grow staple foods, such investments reduce reliance on international markets and increase food security for investor-country populations.¹¹⁹

Although increased investment in land may have potentially beneficial impacts for host communities, to date this potential has not been realized.¹²⁰ To the contrary, the results for many of these communities have been far from positive. In 2010, the Bank published the findings of an in-depth study of agricultural land investments in a controversial report entitled *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?*¹²¹ 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.”¹²² Numerous other studies echo these findings and conclude that host communities rarely benefit from these deals.¹²³

In many cases, local populations lose their most fertile and profitable land in acquisitions by foreign investors and national elites.¹²⁴ Existing land users are often displaced from land that they have occupied for generations, resulting in diminished livelihoods and increased tenure insecurity.¹²⁵ In fact, because the targeted land is often irrigable and close to existing infrastructure, “conflict with existing land users [is] more likely.”¹²⁶ Compensation for resource loss is “rarely adequate,” because ownership rights are not recognized and the new agricultural operations' real resource requirements, especially water, are not properly taken into

¹¹⁷ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 7.

¹¹⁸ *Id.* at 5; VON BRAUN & MEINZEN-DICK, *supra* note 72, at 2.

¹¹⁹ *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 6–7.

¹²⁰ In some cases, however, it may be too early for such assessments.

¹²¹ Press Release, World Bank, New World Bank Report Sees Growing Global Demand for Farmland (Sept. 2010), <http://go.worldbank.org/XWESRO2MT0>.

¹²² RISING GLOBAL INTEREST, *supra* note 30, 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.” *Id.* at xxxiii.

¹²³ See *supra* note 82 and accompanying text.

¹²⁴ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 37, at 4, 21 (stating that national elites are “key players” in the investor spectrum); see also FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, at 99 (finding that in Mali, many land transfers go unnoticed and remain unpublicized as investing local elites often acquire the land through informal channels).

¹²⁵ See SEIZED!, *supra* note 71, 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).

¹²⁶ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 37, at 4.

account.¹²⁷ Affected communities are often not compensated for their loss of livelihood¹²⁸ 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.”¹²⁹ Further, the number of jobs created may not compensate for the impact of 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.¹³⁰

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 further decrease the government’s revenue.¹³¹ The possible benefits of large-scale land acquisition can additionally be subverted by the unpredictability of speculative foreign investments,¹³² 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,¹³³ especially for the number of host countries that are already net food importers.¹³⁴ Food security is additionally threatened by the loss of farmland-generated employment and income.¹³⁵ In some countries, land transfers are undermining land reform gains¹³⁶ that are seen by some as essential to addressing the global food crisis.¹³⁷ Investment

¹²⁷ *Id.* at 5.

¹²⁸ See ROLE OF THE WORLD BANK GROUP, *supra* note 35, at 6.

¹²⁹ See OAKLAND INST., UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: THE MYTH OF ECONOMIC DEVELOPMENT 5 (2011) (highlighting the pay disparity between smallholder labor and jobs on large, mechanized plantations); Land 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).

¹³⁰ THE MYTH OF JOB CREATION, *supra* note 6, at 5.

¹³¹ LAND AND POWER, *supra* note 80, at 11.

¹³² Vera Songwe & Klaus Deininger, *Foreign Investment in Agricultural Production: Opportunities and Challenges*, AGRIC. & RURAL DEV. NOTES: LAND POL’Y & ADMIN. (The World Bank, Washington, D.C.), Jan. 2009, at 2, <http://siteresources.worldbank.org/INTARD/Resources/335807-1229025334908/ARDNote45a.pdf>.

¹³³ SEIZED!, *supra* note 71, at 10.

¹³⁴ Shepard Daniel, *Land Grabbing and Potential Implications for World Food Security*, in SUSTAINABLE AGRICULTURAL DEVELOPMENT 34 (M. Behnassi et al. eds., 2011).

¹³⁵ 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 Land Research Action Network, *supra* note 129, 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).

¹³⁶ See Daniel, *supra* note 134, at 32–33 (providing the example of the Philippines); see also THE MANY FACES OF THE INVESTOR RUSH, *supra* note 82, 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”).

¹³⁷ Daniel, *supra* note 134, at 33.

in biofuels can also have implications for food security when arable land is diverted from food to fuel production.¹³⁸

Large-scale land transfers can have a serious and negative 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.¹³⁹ Host populations may therefore face rising competition for limited water resources,¹⁴⁰ which in some cases constitutes the most salient harm to a local community.¹⁴¹ The repercussions of unsustainable water use can also extend far beyond farming, reaching both rural and urban populations.¹⁴² In the longer term, there are also troubling signs that large-scale land transfers have the potential to generate conflict¹⁴³ and contribute to environmental harms.¹⁴⁴ The potential for conflict is especially pronounced where socio-economic and ethnic divisions are already profound and life-sustaining resources are already scarce.¹⁴⁵

Increased commercial pressures on land are particularly concerning 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,”¹⁴⁶ herders, pastoralists,¹⁴⁷ and fisherfolk who are particularly dependent on grazing and fishing grounds;¹⁴⁸ and indigenous peoples and other communities who rely on the products of the forest.¹⁴⁹ Women also face particular disadvantages in the context of these

¹³⁸ 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).

¹³⁹ LAND GRABS LEAVE AFRICA THIRSTY, *supra* note 82, at 2.

¹⁴⁰ See GRAHAM ET AL., *supra* note 65, at 26–27 (“Some observers point out that in fact the global land grab is rather a water land grab due to the fact that agricultural investment is pointless without water.”).

¹⁴¹ LAND GRABS LEAVE AFRICA THIRSTY, *supra* note 82, at 2.

¹⁴² *Id.* at 1.

¹⁴³ See THE RACE FOR THE WORLD’S FARMLAND, *supra* note 30, 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”).

¹⁴⁴ LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 37, at 8. 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 83, 89 (2011).

¹⁴⁵ FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, at 38 (making this point in the context of the influx of foreign investment in post-conflict South Sudan).

¹⁴⁶ U.N. Special Rapporteur on the Right to Food, *Rep. of the Special Rapporteur on the Right to Food*, 65th Sess., ¶ 10, transmitted by Note of the Secretary-General, U.N. Doc. A/65/281 (Aug. 11, 2010) (by Olivier De Schutter), available at http://www.srfood.org/images/stories/pdf/officialreports/20101021_access-to-land-report_en.pdf [hereinafter *Special Rapporteur on the Right to Food* (Aug. 2010)]; see, e.g., *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 11; Daniel, *supra* note 134, 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).

¹⁴⁷ *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 7.

¹⁴⁸ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶¶ 1, 10.

¹⁴⁹ *Id.* ¶ 10. Climate Change and the Human Right to Adequate Food, *supra* note 75, at 4 (noting that the implementation of the REDD scheme in particular may “entail risks for forest dwelling

deals.¹⁵⁰ These same populations are also amongst the world's most food insecure.¹⁵¹

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 countries.¹⁵² Critics additionally caution that such investments may worsen food and energy crises,¹⁵³ 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.¹⁵⁴ 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, pressing issues that accompany land investment in developing

communities who have only weakly recognized customary rights over the forests they depend on for their livelihoods”).

¹⁵⁰ Women are particularly at risk of losing their land in deals negotiated with the male heads of households. See GRAHAM ET AL., *supra* note 65, at 32–33; Vermeulen & Cotula, *supra* note 91, at 904. So-called “under-utilized” land may also primarily be used by women to provide basic household resources such as water, firewood, or other fuel, or to provide traditional medicines. 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>; ANDREA ROSSI & YIANNA LAMBROU, GENDER AND EQUITY ISSUES IN LIQUID BIOFUELS PRODUCTION: MINIMIZING THE RISKS TO MAXIMIZE THE OPPORTUNITIES 6, 10 (2008). 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 & LAMBROU, *supra*, at 12. Social norms may prevent women from becoming paid-wage laborers, even though such jobs are often cited as the main benefit of large-scale farming. BEHRMAN, *supra*, at 2. Even if a woman is employed, she may receive less education, less training, and fewer employment benefits and may be exposed to greater health and safety risks than her male counterparts. ROSSI & LAMBROU, *supra*, at 14.

¹⁵¹ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, at 16.

¹⁵² SEIZED!, *supra* note 71, at 6, 10; LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 37, at 4; see, e.g., Press Release, La Via Campesina et al., *supra* note 44 (arguing that such investment results in the “long-term corporate (foreign and domestic) takeover of rural people's farmlands”).

¹⁵³ Borrás & Franco, *supra* note 46, at 515; Press Release, Dakar Appeal Against Land Grab, G20-Agriculture: Hundreds of Organizations Say STOP Farm Land Grabbing! (Jun. 20, 2011), <http://farmlandgrab.org/post/view/18827>; see also OXFAM INT'L, “OUR LAND, OUR LIVES”: TIME OUT ON THE GLOBAL LAND RUSH 2 (Oct. 2012), http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf (noting that “[t]wo-thirds of agricultural land deals by foreign investors are in countries with a serious hunger problem. Yet perversely, precious little of this land is being used to feed people in those countries . . .”).

¹⁵⁴ 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.

INT'L LAND COAL., TIRANA DECLARATION 2 (May 27, 2011), http://www.landcoalition.org/sites/default/files/aom11/Tirana_Declaration_ILC_2011_ENG.pdf.

countries.¹⁵⁵ The appropriate response to this phenomenon, however, is significantly contested, as explored in Parts II and III.

II. CONTESTING THE GLOBAL LAND RUSH: MARKET VS. RIGHTS-BASED APPROACHES

Two dominant frameworks have emerged that take distinct perspectives on, and propose differentiated responses to, the recent flood of land deals: a market-led approach and a rights-based approach. This Part 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. Part II.A explores the market-plus approach and its treatment of land as a commodity. Part II.B examines the rights-based approach and its treatment of land as a gateway to the realization of a range of human rights.

A. *The Market-Plus Approach*

Led by the World Bank Group, 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. The market-plus approach is premised on the idea that the market is the most effective mechanism for increasing global wealth and that it is the most efficient distributor of that wealth.¹⁵⁶ If market processes fail, however, 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.¹⁵⁷ In seeking to promote general welfare, the market-plus approach directly prioritizes securing a larger pool of resources so that there are ultimately more resources to spread around. The market-plus approach accepts that there may be trade-offs across individuals—and across states—reasoning that net increases in welfare might offset contingent declines. It also accepts that certain risks may be necessary in order to maximize economic gains.¹⁵⁸

Thus, in the context of land deals, the market-plus approach weighs the possible harms (risks) of investment to affected communities against the possibility that investment will produce economic gains (benefits) that will support the broader public interest. 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 Part, proponents of the market-plus approach see the commodification of land as central to achieving these goals.

¹⁵⁵ See *infra* text accompanying notes 175–77.

¹⁵⁶ See Narula, *supra* note 46, at 702.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 703.

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

The land-as-commodity framework of the market-plus approach aims to facilitate the flow of capital into developing countries while simultaneously pushing for the increasingly efficient use of land.¹⁵⁹ 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.¹⁶⁰ These hurdles, when combined with growing demand for food and uncertainty about the future, make food prices more vulnerable to shock-induced fluctuation.¹⁶¹ If we eliminate market shocks by increasing investment to boost agricultural productivity and build sustainable production systems, food prices should stabilize.¹⁶² What is needed is a productivity revolution.¹⁶³ But greater yields can only be assured if arable land is first identified, and then transferred to the most efficient user.¹⁶⁴ To achieve these ends, the World Bank Group has adopted a two-pronged strategy.

First, the World Bank seeks to identify agricultural land that can be used more productively,¹⁶⁵ as well as “marginal” or “unused” land that can be converted to agricultural use, especially in Africa and Latin America.¹⁶⁶ The World Bank has promoted a technocratic approach to achieving these aims, particularly through the use of satellite imagery and agroecological zoning to identify areas where shifts in land usage could make the land more productive.¹⁶⁷ The World 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.¹⁶⁸

Second, the World Bank promotes the formalization of land rights in order to develop robust land markets and facilitate the transfer of land to the most

¹⁵⁹ See generally 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); Songwe & Deininger, *supra* note 132 (exploring how development partners can help protect local peoples by facilitating the necessary preconditions for investment, such as enforceable property rights).

¹⁶⁰ WORLD DEVELOPMENT REPORT 2008, *supra* note 138, at 62; FAO, *GLOBAL AGRICULTURE TOWARDS 2050*, at 2 (2009), available at http://www.fao.org/fileadmin/templates/wsfs/docs/Issues_papers/HLEF2050_Global_Agriculture.pdf (stating that to meet the growing demand for food, agricultural production will need to increase 70% by 2050 globally and by 100% in developing countries).

¹⁶¹ WORLD DEVELOPMENT REPORT 2008, *supra* note 138, at 62.

¹⁶² WORLD BANK, *GROWTH AND PRODUCTIVITY IN AGRICULTURE AND AGRIBUSINESS: EVALUATIVE LESSONS FROM WORLD BANK GROUP EXPERIENCE* 22 (2011) [hereinafter *EVALUATIVE LESSONS*], available at http://siteresources.worldbank.org/EXTGPAA/Resources/Agribusiness_eval.pdf; RAI PRINCIPLES, *supra* note 31, at 1; WORLD DEVELOPMENT REPORT 2008, *supra* note 138, at 69.

¹⁶³ WORLD DEVELOPMENT REPORT 2008, *supra* note 138, at 1.

¹⁶⁴ See *infra* note 169 and accompanying text.

¹⁶⁵ *EVALUATIVE LESSONS*, *supra* note 162, at xi; Songwe & Deininger, *supra* note 132, at 2.

¹⁶⁶ *RIISING GLOBAL INTEREST*, *supra* note 30, at 125 (advocating that countries with a high level of unused land should identify areas where investments can provide optimal benefits).

¹⁶⁷ *Id.* at 78 (noting that agroecological zoning can be used to predict potential yield for rain-fed cultivation of wheat, maize, soybeans, sugarcane, and oil palms, and thus may be used to pick out plots that are worthy of investment).

¹⁶⁸ *Id.*

efficient producer.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ In response, the World Bank has 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.¹⁷² 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;¹⁷³ b) farmers gain greater access to credit by using land as collateral; and c) land markets transfer land to the most efficient producers.¹⁷⁴

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.¹⁷⁵ 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 studies¹⁷⁶ 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.

¹⁶⁹ WORLD DEVELOPMENT REPORT 2008, *supra* note 138, at 138; *see also* DE SOTO, *supra* note 159, at 6; Olivier De Schutter, *How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland*, 38 J. PEASANT STUD. 249, 270 (2011) [hereinafter *How Not to Think of Land-Grabbing*] (noting that here efficiency is understood as "price efficiency, or competitiveness, rather than as resource efficiency").

¹⁷⁰ DE SOTO, *supra* note 159, 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); Land Research Action Network, *supra* note 129, at 8.

¹⁷¹ DE SOTO, *supra* note 159, at 6, 162; RAI PRINCIPLES, *supra* note 31, at 3–4.

¹⁷² International financial institutions promoted land registration and titling as part of their structural adjustment programmes of the 1970s and 1980s, and more recently in response to the influential writings of Hernando de Soto. 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); 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) (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); *see also* DE SOTO, *supra* note 159.

¹⁷³ 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 small-holder farmers to invest in the land). The document has not been approved by the World 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 World 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, Oct. 8–13, 2006), available at http://www.fig.net/pub/monthly_articles/november_2006/bell_november_2006.pdf.

¹⁷⁴ This set of hypotheses is grounded in a neoclassical economic approach that applies property rights theories to the case of land, a philosophy that deeply informs the Bank's approach to agricultural investment. Robert E. Smith, *Land Tenure Reform in Africa: A Shift to the Defensive*, 3 PROGRESS IN DEV. STUD. 3, 211 (2003). The Bank recognizes that there may be merit in allowing small landowners to maintain their ownership over agricultural plots since in many cases small-holders are in a better position to make efficient use of their land, so long as the property rights regime that defines land ownership creates a robust land market. RISING GLOBAL INTEREST, *supra* note 30, at 35.

¹⁷⁵ *See supra* text accompanying notes 57–60.

¹⁷⁶ *See supra* text accompanying notes 121–22.

2. “Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources”

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”¹⁷⁷ (“RAI Principles”). These voluntary principles, which build on similar initiatives aimed at promoting corporate social responsibility in other industries,¹⁷⁸ are intended to serve as the basis for elaborating best practices, guidelines, governance frameworks, and possible codes of practice for the private sector.¹⁷⁹ The seven RAI 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”;
- 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.”¹⁸⁰

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. RAI 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.”¹⁸¹ Thus it asserts that “[e]xisting

¹⁷⁷ RAI PRINCIPLES, *supra* note 31.

¹⁷⁸ *Id.* at 1 (referencing the Extractive Industry Transparency Initiative and the Equator Principles as examples of such initiatives).

¹⁷⁹ *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 U.N. 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).

¹⁸⁰ RAI PRINCIPLES, *supra* note 31, at 2, 6, 10, 13, 16, 18.

¹⁸¹ *Id.* at 2.

use or ownership rights to land, whether statutory or customary, primary or secondary, formal or informal, group or individual, should be respected.”¹⁸² 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 “land-related rights are recognized and demarcated”; “procedures for transferring such rights are clearly defined and applied in a transparent manner”; and “expropriation . . . is strictly limited to situations that affect the public interest rather than routinely applied to transfer of land to private investors.”¹⁸³ RAI Principle 1 also urges that specific attention be paid to the land rights of women, indigenous peoples, and herders.¹⁸⁴ Systematic identification of rights holders and registration of land rights, per RAI Principle 1, should ideally take place prior to consideration of investment proposals on the reasoning that it will attract more investment.¹⁸⁵

The RAI Principles also call for a number of good governance measures, which are seen as conditions for enabling effective investment. RAI 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.¹⁸⁶

In order to achieve greater transparency, RAI Principle 3 notes that data on land ownership and on land-related investments should be publicly available¹⁸⁷ 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, RAI Principle 3 calls on host governments to work to improve tangible factors

¹⁸² *Id.*

¹⁸³ *Id.* at 3.

¹⁸⁴ *Id.* at 2.

¹⁸⁵ *Id.* at 3, 5.

¹⁸⁶ *Id.* at 8. Such an approach is in line with the institutional economics approach of international financial institutions (IFIs), 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 also 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, *supra* note 172, at 997–98 (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).

¹⁸⁷ RAI PRINCIPLES, *supra* note 31, at 9.

(such as those measured by the World Bank's Doing Business Indicators¹⁸⁸) as well as intangible factors (such as "perceptions regarding a country's stability and general business climate").¹⁸⁹

The RAI Principles also address the investors' role in facilitating transparency and accountability in land deals. RAI 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.¹⁹⁰ In order to enhance the effectiveness of the consultation process, RAI 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.¹⁹¹

The RAI Principles additionally urge that investments should strengthen food security (RAI Principle 2), "generate desirable social and distributional impacts" (RAI Principle 6), and minimize environmental harms (RAI Principle 7). RAI 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 U.N. 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."¹⁹²

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*

The U.N. Special Rapporteur on the Right to Food has proposed an alternative framework for assessing large-scale land deals. Instead of disciplining and reacting to market failures, this rights-based approach prioritizes the positive fulfillment of human rights.¹⁹³ The rights-based approach is premised on the idea that individuals are entitled to specific rights guarantees that cannot be traded away

¹⁸⁸ The "Doing Business" project ranks countries based on investors' access to land markets as well as the robustness of property rights. WORLD BANK & INT'L FINANCE CORP., *DOING BUSINESS* v (2012), available at <http://www.doingbusiness.org/~media/FDPDKM/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. INQUIRY 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).

¹⁸⁹ RAI PRINCIPLES, *supra* note 31, at 10.

¹⁹⁰ *Id.* at 12. RAI Principles 3 and 4 note that investor incentives should be clear and effective and should not facilitate speculative investment. *Id.* at 9–10, 12.

¹⁹¹ *Id.* at 10–11.

¹⁹² *Id.* at 14.

¹⁹³ De Schutter, *The Green Rush*, *supra* note 68, 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 the protection of land users").

in the context of large-scale land deals. This approach begins by evaluating 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 helps ensure that duty-bearers fulfill their obligations.¹⁹⁴ Specifically, the rights-based approach proposes strategies to secure and strengthen the entitlement of relevant groups to land as a productive, rights-fulfilling asset.

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,¹⁹⁵ but secure and stable access to land is seen as a gateway to the realization of numerous human rights, including: the right to water;¹⁹⁶ the right to adequate housing;¹⁹⁷ the right to health;¹⁹⁸ the right to an adequate standard of living;¹⁹⁹ and, most especially, the right to food.²⁰⁰ The right to food is codified

¹⁹⁴ See U.N. Office of the High Comm'n for Human Rights, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies*, at 3 (May 2004) (by M.L. Silva), available at http://www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/external-publications/un-the-human-rights-based-approach-to-development-cooperation/UN_Common_Understanding_on_Human_Rights-Based_Approach_to_Development_Cooperation_and_Programming.pdf (noting, for example, that a rights-based approach to development should assess and develop strategies to build the capacity of communities).

¹⁹⁵ For more on this point, see *infra* Part IV.C.

¹⁹⁶ Both the Special Rapporteur on the Right to Water and Sanitation and the U.N. Committee on Economic, Social and Cultural Rights ("ESCR Committee") have stated that people should not be denied the right to water on the basis of their land status. Comm. on Econ., Soc. & Cultural Rights, 29th Sess., *General Comment No. 15 on the Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, at 7, U.N. Doc. E/C.12/2002/11 5 (Jan. 20, 2003), <http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94>; Special Rapporteur on the Promotion & Protection of Human Rights, *Realization of the Right to Drinking Water and Sanitation*, at 8, U.N. Economic & Social Council, Comm'n on Human Rights, Subcomm'n on Promotion & Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2005/25 (July 11, 2005) (by El Hadji Guissé). The Committee on Economic, Social and Cultural Rights (ESCR Committee) monitors states' compliance with the International Covenant on Economic, Social and Cultural Rights (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." Comm. on Econ., Soc. & Cultural Rights, Rep. on the Twentieth and Twenty-First Sessions ¶ 49, Apr. 26–May 14, 1999 & Nov. 15–Dec. 3, 1999, U.N. Doc. E/C.12/1999/11 (2000). While the status of the General Comments under international law is unclear, and potentially contestable, General Comments still constitute carefully considered and systematic analyses that emanate from an international body that is uniquely placed to offer an interpretation of the norms contained in the ICESCR.

¹⁹⁷ See, e.g., Comm'n on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, at 13, 15, Economic and Social Council, U.N. Doc. E/CN.4/2005/48 (Mar. 3, 2005) (by Miloon Kothari), available at <http://www.humanlaw.org/housing.pdf> (commenting that homelessness is intimately linked to landlessness, and that the 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).

¹⁹⁸ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 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).

¹⁹⁹ *Id.* ¶ 1 (arguing that access to land can help secure local livelihoods).

²⁰⁰ *Id.* ¶ 30 (arguing that access to land can promote the right to food by making food more easily and cheaply available and by providing households with a buffer against external shocks, such as the dramatic rise in food prices in 2008); see also *id.* ¶¶ 28–29 (arguing that broad-based and equitable land access can further the right to development).

under the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁰¹ and requires states to ensure that individuals, either “alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.”²⁰² Under international human rights law, states must take measures to respect, protect, and fulfill this right.²⁰³

According to the U.N. Committee on Economic, Social and Cultural Rights (ESCR Committee),²⁰⁴ to further 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.”²⁰⁵ The Special Rapporteur argues that respecting the right to food, first and foremost, requires states to ensure security of tenure,²⁰⁶ and proposes the following measures in that regard: First, states should confer legal security through formal titles to land and recognize both use and ownership rights, as well as customary and collective rights.²⁰⁷ Second, states should adopt strict anti-eviction laws and strengthen expropriation frameworks to provide clear procedural safeguards for landowners.²⁰⁸ Third, states should respect the needs of special groups by ensuring the rights of indigenous peoples under international law²⁰⁹ and

²⁰¹ Article 11 of the ICESCR 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); *see also* S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967). The right first found expression in Article 25 of the Universal Declaration of Human Rights. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

²⁰² U.N. Economic & Social Council (ECOSOC), Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 12: The Right to Adequate Food*, ¶ 6, U.N. Doc. E/C.12/1999/511 (1999) [hereinafter *General Comment No. 12*].

²⁰³ This typology of states’ duties was originally developed by the former Special Rapporteur on the Right to Food, Asbjørn Eide. *See* ECOSOC, Subcomm’n on Prevention of Discrimination & Prot. of Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987). It is now a widely used framework for analyzing states’ obligations generally, *see International Human Rights Law*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Jan. 26, 2013).

²⁰⁴ *See supra* note 196.

²⁰⁵ *General Comment No. 12, supra* note 202, ¶ 15.

²⁰⁶ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 40(a).

²⁰⁷ *Id.* ¶¶ 20–21; *cf.* De Schutter, *The Green Rush, supra* note 68, at 538 (noting concerns over customary land tenure and further adding that such customs can be discriminatory and “should not be idealized”).

²⁰⁸ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 40(a).

²⁰⁹ For more on the rights of indigenous peoples, *see infra* notes 375, 466 and accompanying text.

by protecting access to common resources (including fishing and grazing grounds) for fisherfolk, pastoralists, and herders.²¹⁰ 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.”²¹¹

In furthering their obligation to *protect* the right to food, the Special Rapporteur counsels that states should protect access to productive resources from encroachment by foreign and domestic private parties.²¹² This includes mapping various land users’ rights and strengthening customary systems of tenure, as highlighted above.²¹³ The obligation also requires states to ensure that investment agreements comply with relevant obligations under international human rights law.²¹⁴

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.”²¹⁵ 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.²¹⁶ Instead, states should pursue “agrarian reform that leads to more equitable land distribution for the benefit of smallholders” on the reasoning that small-scale owner-operated farms are more productive and encourage more responsible uses of the soil.²¹⁷ The Special Rapporteur encourages states to channel agricultural investment into small-scale farming, instead of transferring land rights to large-scale investors.²¹⁸ To the extent that large-scale land transfers do move forward, the Special Rapporteur also offers a set of principles for regulating these transactions.

²¹⁰ The Special Rapporteur argues that the “recognition of communal rights should extend beyond indigenous communities, at least to certain communities that entertain a similar relationship with the land, centred on the community rather than the individual.” *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 40(c); *see also* Advisory Committee on the Right to Food, *Preliminary Study on the Advancement of the Rights of Peasants and Other People Working in Rural Areas*, Human Rights Council ¶¶ 70–72, U.N. Doc. A/HRC/AC/6/CRP.2 (2010), available at http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/docs/session6/A.HRC.AC.6.CRP.2_en.pdf (explaining that overcoming the problem of land insecurity requires agricultural reform that benefits small land holders and a new international human rights instrument); De Schutter, *The Green Rush*, *supra* note 68, at 537 (explaining that strengthening individual property rights may prevent some groups, such as fisherfolk, from accessing rivers and the sea).

²¹¹ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 40(d).

²¹² *Id.* ¶ 2 (citing *General Comment No. 12*, *supra* note 202, ¶ 15).

²¹³ *Id.* ¶ 41(a); *see supra* text accompanying note 207.

²¹⁴ *See infra* Part II.B.2.

²¹⁵ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 2 (citing *General Comment No. 12*, *supra* note 202, ¶ 15). In some instances states may also be obligated to provide food directly in order to ensure rights are being met, 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.” *Id.* ¶ 2.

²¹⁶ *Id.* ¶ 27.

²¹⁷ *Id.*

²¹⁸ U.N. Special Rapporteur on the Right to Food, *Rep. Submitted by the Special Rapporteur on the Right to Food*, 16th Sess., ¶8, U.N. Doc. A/HRC/16/49 (Dec. 17, 2010) (by Olivier De Schutter) [hereinafter *Special Rapporteur on the Right to Food* (Dec. 2010)], available at <http://www2.ohchr.org/english/issues/food/docs/A-HRC-16-49.pdf> (arguing that investing in smallholder farming is more effective at reducing poverty and combating hunger); De Schutter, *The Green Rush*, *supra* note 68, at 507 (“[B]enefits . . . could result from expanding support to small-scale farmers, in particular by strengthening their access to land and water.”).

2. “Eleven Principles: Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases”

The Special Rapporteur’s “Minimum Human Rights Principles Applicable to Large-scale Land Acquisitions or Leases” (“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.²¹⁹ Although the Eleven Principles are seen as essential to minimizing the negative impacts from land deals, the Special Rapporteur notes that adherence to the Principles does not necessarily justify the land investment in question.²²⁰ Instead, states must “balance the advantages of entering into [an 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.²²¹ Where large-scale land deals do take place, the Eleven 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.²²²

The Eleven Principles have much in common with the RAI Principles. For example, both sets of principles call for transparency and consultation with local

²¹⁹ *Large-scale Land Acquisitions and Leases*, *supra* note 70, ¶ 5.

²²⁰ *Id.* ¶ 9.

²²¹ *Id.* at 16.

²²² *Id.* at 16–18.

communities.²²³ They both call for measures to enhance food security,²²⁴ secure land rights,²²⁵ and ensure sustainable environmental practices.²²⁶ Both sets of principles also call for assurances that investments benefit host communities,²²⁷ including through investment agreements that contain clear enforceable obligations.²²⁸

The fact that both sets of principles cover roughly the same terrain is not surprising. Both the RAI Principles and the Eleven Principles are, after all, meant to guide important transactional matters surrounding land deals. The Eleven Principles—which preceded the promulgation of the RAI Principles²²⁹—were also intended to “inform . . . the adoption of guidelines on land policies and governance by international and regional organizations.”²³⁰ Furthermore, the principles of transparency, accountability, and participation—which both frameworks emphasize—are key values common to both development and rights-based discourses.²³¹

The Special Rapporteur has pointed out that, despite “superficial” similarities, his “minimum” principles differ significantly from the RAI Principles.²³² First, the Eleven Principles focus the inquiry on determining what use of land will promote human rights. Thus, in line with the land-as-gateway framework described above,²³³ the Eleven Principles call for prioritizing alternative development pathways that do not lead to significant transfers of land use and ownership rights.²³⁴ Second, the Eleven Principles “are not optional; they follow from existing international human rights norms”²³⁵ and give rise to specific obligations that attach to multiple actors, including host states, investors, investor home states, and international financial institutions.²³⁶ By contrast, the voluntary

²²³ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 16, princs. 1, 2; RAI PRINCIPLES, *supra* note 31, at 8–13, princs. 3, 4.

²²⁴ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 16, princ. 8; RAI PRINCIPLES, *supra* note 31, at 6, princ. 2.

²²⁵ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 16, princ. 3; RAI PRINCIPLES, *supra* note 31, at 2, princ. 1.

²²⁶ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 17, princ. 6; RAI PRINCIPLES, *supra* note 31, at 18–20, princ. 7.

²²⁷ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 16, princ. 4; RAI PRINCIPLES, *supra* note 31, at 16–18, princ. 6.

²²⁸ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 17, princ. 7; RAI PRINCIPLES, *supra* note 31, at 10.

²²⁹ The Eleven Principles were released in 2009; the RAI Principles were released in 2010.

²³⁰ *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 3–4.

²³¹ Siobhan McInerney-Lankford, *Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective*, 1 J. HUM. RTS. PRAC. 51, 53 (2009) (explaining that local participation and accountability are well established in development discourse and also are rooted in a rights-based approach to development); Narula, *supra* note 46, at 702.

²³² *How Not to Think of Land-Grabbing*, *supra* note 169, at 255.

²³³ See *supra* Part II.B.1.

²³⁴ *Large-scale Land Acquisitions and Leases*, *supra* note 70, ¶ 9.

²³⁵ *Id.* ¶ 5.

²³⁶ 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.” *Large-scale Land Acquisitions and Leases*, *supra* note 70, ¶ 5. 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. *Id.* Private actors, such as corporations, have not traditionally been viewed as directly bound by

RAI Principles “neglect the essential dimension of accountability.”²³⁷ Though the RAI Principles outline investors’ responsibility to respect human rights,²³⁸ they are silent on the human rights obligations of other actors.

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: PRINCIPAL DISTINCTIONS AND OVERLAPPING PROBLEMS

This Part explores the relationship between the frameworks that undergird the rights-based approach and the market-plus approach. Part III.A looks at key differences in each framework’s approach toward (1) rights and risks, and (2) land distribution. Part III.B assesses the potential of each framework to regulate land deals and protect land users’ rights in light of the significant power dynamics at play in land transactions.

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

1. Risks vs. Rights Violations

a. *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, and rising food insecurity. 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 host populations’ human rights. This Part considers the consequences of such framing.

The market-plus approach expressly acknowledges the risks of land investments, especially in circumstances “where rights are not well defined,

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. See Rep. 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” Framework*, ¶ 6, Annex ¶ 11, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles on Business*], available at <http://www.businesshumanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>. 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.” *Guiding Principles on Business*, *supra*, Annex ¶ 13. To meet these requirements, businesses must exercise due diligence to become aware of, prevent and address adverse human rights impacts. *Id.* Annex ¶ 17;

²³⁷ *How Not to Think of Land-Grabbing*, *supra* note 169, at 255, 274.

²³⁸ See RAI PRINCIPLES, *supra* note 31, at 13–16, princ. 5 (noting that investors have a high responsibility to ensure that their projects minimize the impact on local communities and that investors should respect human rights).

governance is weak, or those affected lack a voice.”²³⁹ The RAI Principles note that these 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.”²⁴⁰

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.”²⁴¹ The market-plus approach also promotes agricultural investment with reference to global food security concerns:

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.²⁴²

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.²⁴³ This balancing approach is not new, especially in the development context where cost-benefit approaches tend to dominate.²⁴⁴ 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.

²³⁹ RAI PRINCIPLES, *supra* note 31, at 1.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² RISING GLOBAL INTEREST, *supra* note 30, at xii. The “over a billion” figure is based on 2009 FAO estimates. FAO, THE STATE OF FOOD INSECURITY IN THE WORLD 11 (2009), <ftp://ftp.fao.org/docrep/fao/012/i0876e/i0876e.pdf>. In 2012, the FAO revised its estimates to indicate that nearly 870 million people were chronically undernourished in 2010–12. The new estimates are said to be based on improvements in FAO methodology. FAO, EXECUTIVE SUMMARY TO THE STATE OF FOOD INSECURITY IN THE WORLD 1 (2012), <http://www.fao.org/docrep/016/i2845e/i2845e00.pdf>.

²⁴³ See Land Research Action Network, *supra* note 170, at 6 (noting that many land deals are “ostensibly negotiated under the name of development, food and water security, agricultural investment and energy security”).

²⁴⁴ 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 351 (Deena R. Hurwitz et al. eds., 2009) (noting that the Indian government has maintained that large dams are essential for achieving the “common good,” which reflects the dominance of a “balancing” or “cost-benefit” approach to development over an approach that puts human rights at the center of the debate).

To be sure, the rights of host populations are considered under the RAI Principles,²⁴⁵ but these rights are weighed against and sometimes sacrificed to further other competing interests. As noted by land and rural politics scholars Saturnino Borrás and Jennifer 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.”²⁴⁶ The other factors against which these rights are balanced—facilitating agricultural investment and boosting global food production—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 gives rise to accompanying obligations. 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*,²⁴⁷ thereby undermining both their status and vindication.²⁴⁸

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”²⁴⁹ that must be facilitated and maximized. Here, assessments about the potential benefits of large-scale land transfers tend to be far more optimistic than current research warrants.²⁵⁰ 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.

²⁴⁵ For example, the RAI Principles call on investors to respect human rights. See McInerney-Lankford, *supra* note 231 (noting that while “a majority of development policies . . . incorporate human rights concerns, many do so only implicitly”).

²⁴⁶ Borrás & Franco, *supra* note 46, at 512.

²⁴⁷ See Lustig & Kingsbury, *supra* note 244, at 411, 412 (noting that 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 vindication of human rights claims are potentially restricted).

²⁴⁸ *Id.*

²⁴⁹ See Borrás & Franco, *supra* note 46, at 511 (explaining how “the phenomenon of land-grabbing takes on the character of an opportunity, rather than a threat”).

²⁵⁰ The RAI Principles, for instance, continue to tout the benefits of large-scale investments, see text accompanying *supra* note 241. This is 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 122; Transnational Inst., *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 244, at 411 (noting in the context of development and conservation 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”).

An October 2011 Bank study²⁵¹ 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.”²⁵² 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.”²⁵³

These conclusions (unsurprising to some) would suggest that proponents of the market-plus approach 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.²⁵⁴ 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.

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.²⁵⁵ This framing of harms as violations of international human

²⁵¹ 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?*], <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-5864>.

²⁵² *Id.* at 16.

²⁵³ *Id.* at 3; see *supra* text accompanying note 83 (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.”) (quoting RISING GLOBAL INTEREST, *supra* note 30, at 55).

²⁵⁴ The October 2011 study concludes that its finding, “which resonates with concerns articulated by parts 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 251, at 3.

²⁵⁵ See generally *Large-scale Land Acquisitions and Leases*, *supra* note 70, 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 Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 23 (Philip Alston & Katarina Tomasevski eds., 1984) (commenting that the right to self-determination, as defined by article 1 of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the ICESCR, may be violated when a state permits “the exploitation of the country’s food-producing capacity (natural resources) 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.”); 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).

rights law triggers a far stricter standard of review: The Eleven Principles note that “[a]greements to lease or cede large areas of land should *under no circumstances* be allowed to trump the human rights obligations of the States concerned.”²⁵⁶

Parts III.A.1.b–c argue that international human rights law can play a crucial standard-setting role.²⁵⁷ By setting a normative baseline, human rights law can help repudiate negative 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 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 a punishing toll on vulnerable host populations without generating the promised benefits.

International human rights norms are also appropriate standards against which investment projects should be measured.²⁵⁸ 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, states may be obligated to uphold rights that have become customary international law.²⁵⁹ At the same time, 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 interdependent global processes in which the rights of multiple communities—both within and across countries—are at stake. Parts III.A.1.b–c therefore also raise and respond to salient critiques of a “rights-as-trumps”²⁶⁰ approach.

b. Repudiating Rights Violations and Managing Trade-Offs

The potential for greater food insecurity among host populations is one of the most significant concerns raised by large-scale land transfers. An examination of each framework’s approach to this contentious issue also serves as a useful entry point for illustrating the need for a normative framework for regulating these deals.

Consistent with the framework in which they operate, the market-plus approach’s RAI Principles apply a balancing approach to the issue of food security. In practice, however, such an approach undermines the very assurances that the Principles seek to deliver. RAI Principle 2 declares that investments should not

²⁵⁶ *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 15 (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 would likely struggle to reform regulatory frameworks once investment agreements are finalized. *Id.* ¶ 33.

²⁵⁷ As suggested by McInerney-Lankford, *supra* note 231, at 72, “the challenge presented by an absence of legally established normative baselines in development is potentially answered by human rights law.”

²⁵⁸ *See id.* 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”).

²⁵⁹ I have elsewhere argued that the right to be free from hunger, the minimum core content of the broader right to adequate food, is such a right. Narula, *supra* note 46, at 80–84.

²⁶⁰ *See* Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 152 (Jeremy Waldron ed., 1984) (introducing a metaphor in which a right trumps nonright objectives).

“jeopardize food security but rather strengthen it,”²⁶¹ but does not mandate that investments affirmatively enhance food security as a condition of investment. Nor does RAI Principle 2 establish a minimum level of food security for host populations. Instead, it offers “risk-mitigation measures”²⁶² to guard against the impacts of the land transfers that the framework promotes. Specifically, RAI 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.”²⁶³ RAI Principle 2 additionally assumes that all risks can be adequately addressed through the market, and fails to consider the dynamics that complicate this narrative.²⁶⁴ Ultimately, it 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.”²⁶⁵

The Eleven Principles, on the other hand, reflect a “rights-as-trumps” approach. They note that, “[s]tates 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”²⁶⁶ 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.”²⁶⁷ 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

²⁶¹ See RAI PRINCIPLES, *supra* note 31, at 7, princ. 2.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ For example, the commentary to RAI Principle 2 suggests steps 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 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. SEIZED!, *supra* note 71, at 9. See also discussion accompanying *infra* notes 271, 289–92.

²⁶⁵ RAI PRINCIPLES, *supra* note 31, at 7.

²⁶⁶ *Large-scale Land Acquisitions and Leases*, *supra* note 70, ¶ 15.

²⁶⁷ *Id.* ¶ 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.

for sidelining rights, a rights-as-trumps approach is critiqued for failing to accommodate these necessary trade-offs.²⁶⁸

But the rights-based approach (and the legal framework on which it rests) is far more nuanced than these 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.²⁶⁹ Although some have called for a precautionary approach, whereby all large-scale land acquisitions are discouraged,²⁷⁰ 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 agricultural 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. In the interim, however, these transfers may result in greater food insecurity for those unable to afford food at market rates²⁷¹ and may give rise to a number of other rights violations as land users are forcibly displaced from their land and sources of livelihood.²⁷² 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 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.²⁷³ The full realization of these rights, especially in light of resource constraints, will take time and will involve trade-offs between various goals. However, international human rights law establishes specific standards that must be met as these broader goals are achieved.²⁷⁴ These standards impose specific conditions on how States Parties set

²⁶⁸ See, e.g., David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 113 (2002) (commenting that “[t]he 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 . . .”).

²⁶⁹ See *supra* note 218. De Schutter, *The Green Rush*, *supra* note 68, at 548–49 (arguing that “channel[ing] agricultural investment into small-scale farming . . . aims to ensure that investment will be directed ‘toward the most poverty-reducing ends’”).

²⁷⁰ See GRAHAM, *supra* note 65, at 9; La Via Campesina et al., *supra* note 44.

²⁷¹ 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* 161–62 (1999). Because of low incomes, landlessness, or other factors, the poor lack these entitlements and, as a result, experience greater food insecurity.

²⁷² See, for example, the case of Ethiopia included in the Introduction to this Article. Under international human rights law, evictions can only take place in exceptional circumstances, must meet certain standards, and must be accompanied by full and fair compensation. See *infra* note 385.

²⁷³ ICESCR, *supra* note 201, art. 2(1).

²⁷⁴ 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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument). Here, states must “move as expeditiously and effectively as possible” toward the full realization of these rights. *Id.* ¶ 9.

priorities in order to protect vulnerable communities who often lose out in balancing processes.²⁷⁵

Specifically, under the principle of non-retrogression, states must not engage in conduct that deliberately allows existing levels of rights to regress.²⁷⁶ As noted by the ESCR Committee, “[a]ny 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.”²⁷⁷ Economic, social and cultural rights also include a “minimum core” of attendant obligations that states must realize as soon as possible.²⁷⁸ 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.”²⁷⁹ And finally, states have immediate obligations to ensure non-discrimination in the provision of economic, social and cultural rights.²⁸⁰

Collectively, these standards set a normative baseline: a threshold below which investments cannot fall. Here, states could argue that there are other means to immediately ensure these minimum standards, including, for example, compensation for loss of land or even the direct provision of food. Such arrangements, however, rarely accompany large-scale land transfers, and they are usually insufficient even when they do.²⁸¹ 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, to the maximum of their available resources,²⁸² rather than just settling for the bare minimum.²⁸³ This includes ensuring that investments help *improve* access to and utilization of productive resources, and not simply ensuring that the investments do no harm.²⁸⁴

²⁷⁵ Office of the U.N. High Comm’r for Human Rights (OHCHR), *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, ¶ 22, U.N. Doc. HR/PUB/06/12 (2006), available at <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>; 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).

²⁷⁶ See *General Comment No. 3*, *supra* note 274, ¶ 9 (noting that retrogression should be carefully considered); see also OHCHR, *supra* note 275, ¶ 21 (noting that “[t]he principle of non-retrogression of rights states that no rights can be deliberately allowed to suffer an absolute decline in its level of realization”).

²⁷⁷ *General Comment No. 3*, *supra* note 274, ¶ 9.

²⁷⁸ *Id.* ¶ 10.

²⁷⁹ ICESCR, *supra* note 201, art. 11(2); *General Comment No. 12*, *supra* note 202, ¶ 6. The ESCR Committee adds that if a state is unable to fulfill its minimum core obligation, it has the burden to show that its failure to do so is due to reasons beyond its control and that it unsuccessfully requested international assistance. *General Comment No. 12*, *supra* note 202, ¶ 17.

²⁸⁰ See *infra* notes 293–94 and accompanying text.

²⁸¹ See *supra* text accompanying notes 127–30.

²⁸² ICESCR, *supra* note 201, art. 2(2).

²⁸³ See Salomon, *supra* note 275, 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).

²⁸⁴ See *supra* text accompanying note 215.

A third response to trade-off-related objections is that the market-plus approach accepts trade-offs 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 large-scale land transfers to set up industrialized plantations are not the 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 in turn 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."²⁸⁵ Dilemmas are of course conceivable under which it would be impossible to act without violating someone's human rights. But rights violations under those conditions are inevitable, and are different from the tradeoffs of concrete rights for 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: Its balancing approach 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.

c. Addressing Distributive Concerns and Managing Conflicts Between Rights Holders

The phenomenon of large-scale land transfers has also given rise to significant concerns around the distribution of benefits and resources. Both approaches purport to address these concerns but the market-plus approach struggles with a range of distributive issues precisely because it lacks a normative framework that would provide clear standards for assessing the impact of an investment on host communities. As a case in point, RAI Principle 6 states that investments should "generate desirable social and distributional impacts" and "not

²⁸⁵ See *supra* text accompanying note 264. 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." *Supra* note 46, at 515. The Bank argues that an effective land market can facilitate productive collaboration between local land-holders and investors and achieve mutually satisfying outcomes. RISING GLOBAL INTEREST, *supra* note 30, at 25–27. Though examples of productive collaboration do exist, these are few and far between. See, e.g., FOREIGN LAND DEALS AND HUMAN RIGHTS, *supra* note 74, at 102 (describing a Dutch company's biofuel project in Mali that focuses on local participation, including production, processing and consumption); LAND DEALS IN AFRICA, *supra* note 31, 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 169, at 259 (detailing how small-scale farmers are negatively affected by competitive markets).

increase vulnerability²⁸⁶ but lacks a normative baseline against which such impacts should be assessed. Instead, RAI Principle 6 encourages investors to make decisions around benefit-sharing jointly with local communities, presumably through the consultation process signaled in RAI Principle 4.²⁸⁷

This primary focus on the investor-community relationship promotes a piecemeal, project-by-project approach where investors become the stewards of economic development. Such an approach is neither appropriate nor viable. 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.²⁸⁸ 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 broader problem with the market-plus approach on the question of the distribution of benefits. The market-plus approach argues that large-scale land transfers can, among other benefits, stimulate economic growth, increase agricultural productivity, secure better access to capital, and generate employment opportunities.²⁸⁹ But these markers of success do not account for the distribution of these benefits across individuals. Economic success is often judged by an average measure of growth, such as a rise in gross domestic product or per capita income. This focus on averages obscures the fact that economic growth is rarely equitably distributed.²⁹⁰ 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.²⁹¹ 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 transfer process.²⁹² The market-plus approach may also fail to

²⁸⁶ RAI PRINCIPLES, *supra* note 31, at 16, princ. 6.

²⁸⁷ *See id.* at 10, 16 (Principle 4, noting that sustainable investments should be conducted in a participatory manner that reflects the local development vision and Principle 6, explaining how to enhance social sustainability).

²⁸⁸ *See, e.g.,* David Graham & Ngaire Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, 34 *WORLD DEV.* 868, 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).

²⁸⁹ RAI PRINCIPLES, *supra* note 31, at 1.

²⁹⁰ Narula, *supra* note 46, at 702; Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 *U.C. DAVIS L. REV.* 1451, 1482 (2000) (arguing that equating social welfare with national wealth “overlooks distributive concerns” and that “efficiency-increasing measures such as economic liberalization may exacerbate preexisting distributive inequalities”).

²⁹¹ Narula, *supra* note 46, at 702.

²⁹² *See supra* Part I.C.; *see also* De Schutter, *The Green Rush*, *supra* note 68, at 548–49 (noting that “the vast majority of foreign investment in agriculture goes to the creation of large plantations” but the benefits of these investments rarely trickle down).

address the role of discrimination against women or against particular ethnic, religious, racial, or caste groups as a reason for their economic exclusion.

The rights-based approach, in theory at least, can help keep these differentials in check by insisting on specific rights guarantees and on the non-discriminatory grant of those guarantees.²⁹³ 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 while also calling for positive measures to ensure the full realization of their rights.²⁹⁴ Critics of the rights-based approach might argue that such a framework, in application, engenders conflicts between rights holders.²⁹⁵ 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 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.”²⁹⁶ “Such risks,” he adds, “should be addressed through the inclusion of strict safeguards in the process of such recognition.”²⁹⁷ 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.”²⁹⁸

Second, the interdependent and global nature of these transactions might engender conflicts between populations across states. In fact, the very language of

²⁹³ See *infra* note 294. Kirk Herbertson also commented 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.

KIRK HERBERTSON ET AL., A ROADMAP FOR INTEGRATING HUMAN RIGHTS INTO THE WORLD BANK GROUP 13 (2010), available at http://pdf.wri.org/roadmap_for_integrating_human_rights.pdf.

²⁹⁴ *General Comment No. 3*, *supra* note 274, ¶¶ 1–2; U.N. Comm. on Econ., Soc., & Cultural Rights [CESCR], *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 <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>; ICESCR, *supra* note 201, art. 2(2); Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Discrimination* (art.1, par. 1), ¶ 2, U.N. Doc A/48/18 (Mar. 22, 1993), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d7bd5d2bf71258aac12563ee004b639e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d7bd5d2bf71258aac12563ee004b639e?Opendocument); Office of the High Comm’r for Human Rights, *General Comment No. 18: Non-Discrimination*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989), available at <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

²⁹⁵ As an example of this critique, see Kennedy, *supra* note 268, at 116–17, 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.

²⁹⁶ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 22.

²⁹⁷ *Id.*

²⁹⁸ *Id.* ¶ 24. The Special Rapporteur adds in paragraph 31 that “land reform may be seen as an opportunity to strengthen access to land for women, particularly single women and widows.” *Id.* ¶ 31; see also De Schutter, *The Green Rush*, *supra* note 68, at 538.

ICESCR article 11(2)(b)—which calls on States Parties to “[t]ak[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”²⁹⁹—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 require that the land investor sell a certain minimum percentage of crops on local markets.³⁰⁰ 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.³⁰¹

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 the deprivation of another constituency’s rights; 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 still can result in many rights violations.³⁰² To address these concerns, the Special Rapporteur calls for significant rights protections in the process of redistribution.³⁰³ In addition, the land rights of indigenous communities may 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

²⁹⁹ ICESCR, *supra* note 201, art. 11(2)(b).

³⁰⁰ 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 70, at 17, princ. 8; *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.”). The RAI Principles also suggest “call options,” which could function like caps on exports. RAI PRINCIPLES, *supra* note 31, at 7. *But see How Not to Think of Land-Grabbing*, *supra* note 169, at 273 (criticizing the World Bank’s approach because it leaves significant questions unaddressed).

³⁰¹ *See supra* text accompanying note 285.

³⁰² 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 Case Study: Land Reform in Zimbabwe*, BBC, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/ca_sestudy_art17.shtml (last visited Aug. 1, 2012) (noting that shortly after land redistribution was announced in 2000, the country plunged into recession and that significant violence arose as farms were taken by squatters); *see also* Lydia Polgreen, *In Zimbabwe Land Takeover, a Golden Lining*, N.Y. TIMES (July 20, 2012), 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).

³⁰³ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 38.

strength of the rights-based approach is its normative framework that compels policymakers to 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 such signals and instead operates in a non-normative framework that emphasizes average utility gains. As a result, benefits are rarely equitably distributed and risks tend to be borne by the same vulnerable groups.

The need to address distributive concerns is particularly salient in relation to land access. As considered below, 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.

2. Land Markets and Land Distribution

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. The market-plus approach takes current distributions of land as the baseline and does not consider the need for land redistribution. Instead, as its name implies, the market-plus approach relies on the market to distribute land to the most efficient producer. In contrast, the rights-based approach, which values land as a rights-fulfilling asset, places great value on how land is distributed and to whom. The rights-based approach makes the case for alternatives to large-scale land transfers, calls for legal reforms to strengthen tenure security, and promotes state-led agrarian reforms to support small-scale farming and to achieve more equitable land distribution.³⁰⁴

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 towards promoting land marketability through titling, and the other oriented towards broadening the entitlements of relevant groups in order to ensure more secure livelihoods.”³⁰⁵ As considered below, these conceptual differences, in application, can have a significant impact on the distribution of land,³⁰⁶ which in turn can greatly affect substantive rights as well as productivity goals.

³⁰⁴ See *supra* Part II.B.1.

³⁰⁵ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 21; see also Elizabeth Fortin, *Reforming Land Rights: The World Bank and the Globalization of Agriculture*, 14 SOC. & L. STUD. 147, 158–59 (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”).

³⁰⁶ Here I define distribution in both use and ownership terms.

a. *The Market-Plus Approach: Enhancing Productivity or Exacerbating Problems?*

As outlined in Part II.A, 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, proponents argue, can help ensure efficient allocation of land.³⁰⁷

This land-as-commodity framework gives rise to a number of distributional concerns. First, land that is classified as underutilized 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.³⁰⁸ 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.³⁰⁹ The problem may be compounded by the use of technocratic tools—such as satellite imagery and agro-ecological zoning—to identify “underutilized” investment-worthy land.³¹⁰ Simply put, the satellite-level appearance of disuse can be misleading.³¹¹

Second, the prioritization of individual private property rights and the formalization of land rights through titling programs may not recognize the myriad and customary uses of land by rural communities.³¹² More fundamentally, land titling may not lead to security of tenure.³¹³ To the extent that poorer landowners are vulnerable to pressures to sell their land, titling can facilitate land transfers that

³⁰⁷ See *supra* Part II.A.1.

³⁰⁸ See *supra* text accompanying notes 15–16, 42, 146–48; see, e.g., Hallam, *supra* note 77, at 5 (identifying this phenomenon in Sub-Saharan Africa); see also *How Not to Think of Land Grabbing*, *supra* note 169, at 260 (commenting that the interest in investing in “under-utilized” land often ignores perceived “non-productive” uses of the land).

³⁰⁹ See *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 18; see, e.g., SALLY ENGLE MERRY, COLONIZING HAWAI‘I: THE CULTURAL POWER OF LAW 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).

³¹⁰ See *supra* text accompanying notes 167–68.

³¹¹ 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 31, 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, and 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 (Sep. 29, 2011) (unpublished manuscript) (on file with author).

³¹² See *supra* text accompanying note 308.

³¹³ Special Rapporteur on the Right to Adequate Housing, *Basic Principles and Guidelines on Development-based Evictions and Displacement*, ¶ 25, U.N. Doc. A/HRC/4/18 (2007), available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf; *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, at 2.

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.³¹⁴ In jurisdictions where access to titles tracks formal claims to land, titling can also reinforce inequitable land distribution.³¹⁵ The legal prioritization of individual private property rights may also disproportionately advantage better-resourced or elite sectors of the population.³¹⁶

Here it is important to note that the market-plus approach's RAI Principles do move beyond individual property rights. In an effort to better recognize land users' rights and customary rights, the Principles 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."³¹⁷ Although this recognition is significant, it falls short in two key respects. First, the RAI Principles still focus on *existing* rights and do not consider the need for land *redistribution*. Second, the formalization of these rights is still in service of integrating land users into the market, and facilitating the transfer of land.³¹⁸ Thus, although the RAI Principles' attention to the rights of land users and marginalized communities is to be welcomed, the Principles still lack a nuanced critique of the market and its distributional impacts. Moreover, in its own

³¹⁴ Thus poorer landowners are often better off where selling land is made more difficult rather than less. *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, at 11, ¶ 20; *see also* De Schutter, *The Green Rush*, *supra* note 68, at 528; Fortin, *supra* note 305, at 164 (citing a 2003 World Bank study that indicated 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").

³¹⁵ *How Not to Think of Land-Grabbing*, *supra* note 169, at 269; *see* Fortin, *supra* note 305, at 170 (arguing that recognizing property rights and creating land markets in the context of extreme inequality may prove to be a mechanism for reaffirming inequality rather than a mechanism for redress); *see also* *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 17 (arguing that a focus on formal ownership can "confirm the unequal distribution of land, resulting in practice in a counter-agrarian reform").

³¹⁶ Small landowners, for example, may not be able to afford the costs associated with securing title to their land. Annelies Zoomers, *Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab*, 37 J. PEASANT STUD. 429, 432 (2010), <http://farmlandgrab.org/wp-content/uploads/2010/06/7-Processes-Driving-Global-Land-Grab.pdf>; *see also* De Schutter, *The Green Rush*, *supra* note 68, at 528. Domestic elites also often have easier access to the resources, knowledge, and connections necessary to register land rights under formal legal processes. RISING GLOBAL INTEREST, *supra* note 30, at 99; *see also* Smith, *supra* note 174, at 213; Zoomers, *supra*, 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"). 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. RISING GLOBAL INTEREST, *supra* note 30, at 100. The titling process also can fall prey to corrupt local officials. *How Not to Think of Land-Grabbing*, *supra* note 169, at 269.

³¹⁷ RAI PRINCIPLES, *supra* note 31, at 2, princ. 1; *see also* WORLD DEVELOPMENT REPORT 2008, *supra* note 138, at 139 (noting that individual titling can "weaken or leave out communal, secondary, or women's rights" and that titling processes can be captured by bureaucrats and local elites and also commenting that "although individual titling is still appropriate in many cases, it needs to be complemented by new approaches to securing tenure").

³¹⁸ In similar fashion, the RAI Principles discourage expropriations not because they alienate occupants from their land, but because "such centralization adds complexity and discretion [and] makes direct negotiation" between investors and host communities impossible. RAI PRINCIPLES, *supra* note 31, at 5. A better solution, the RAI Principles argue, is for states to keep expropriation to a bare minimum and regulate procedures for *transferring* use rights. *Id.*

programming, the Bank continues to prioritize and promote individual ownership rights as the most “modern” form of landholding.³¹⁹

The market-plus approach’s land-as-commodity framework also gives rise to a number of productivity-related concerns. The Bank’s continued focus on land titling and land markets is justified with regard to the need to boost food production. Yet there are a number of ways in which land markets can actually interfere with the productive allocation of agricultural land. For instance, land markets may result in land being taken out of production, such as when investments are made for speculative reasons or when food crops are diverted to biofuels, which decreases productivity and increases landlessness among the poor.³²⁰ 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.³²¹ Small farmers may also be priced out by land speculation.³²²

Further, the impact of titling on productivity is, at best, unclear. Studies produced from 1994–2001 show few significant effects of titling on production.³²³ This may especially be the case when titling is promoted in isolation from other policies that provide essential support to smallholder farmers, such as technical assistance or access to capital.³²⁴ The World Bank’s own study, which evaluated the World Bank Group’s activities in the agricultural sector between 1998 and 2008,³²⁵ does little to assuage these doubts. On the subject of formalization of land rights, the study found that “[e]vidence 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.”³²⁶ The study concludes that Bank interventions have performed “well below average” in agriculture-based economies, most notably Sub-Saharan Africa.³²⁷

³¹⁹ See Fortin, *supra* note 305, at 170 (commenting that even though the World Bank recognizes customary rights, it still views individual ownership rights as the most “modern” form of landholding). According to one World Bank study, eighty-five percent of stand-alone projects related to the World Bank’s agriculture-related lending between 1998 and 2008 focused on land administration and efforts to clarify land rights. EVALUATIVE LESSONS, *supra* note 162, at 48. The study also notes that some World Bank projects are “attempting to deal with formalization of rights under systems of customary tenure” but adds that “these projects are fewer in number.” *Id.*; see also Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transit from Marx to Market*, 111 HARV. L. REV. 621, 622 (1997) (arguing that when too many owners are given an exclusive right of use, the land tends to be underused instead of being used most efficiently).

³²⁰ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 19.

³²¹ *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 41 (Saturnino M. Borrás, Jr. et al. eds., 2008)).

³²² *How Not to Think of Land-Grabbing*, *supra* note 169, at 270.

³²³ See, e.g., Smith, *supra* note 174, at 211–12 (citing studies that found the effect of tenure security on land improvements to be mixed).

³²⁴ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 19 (citing Nyamu Musembi, *supra* note 321); *How Not to Think of Land-Grabbing*, *supra* note 169, at 270.

³²⁵ See EVALUATIVE LESSONS, *supra* note 162, at xii.

³²⁶ *Id.* at xii. 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 173, at xxix.

³²⁷ *Id.* at x, xii, and xiv.

The World Bank's approach to land productivity can also be critiqued for its shortsightedness. 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.³²⁸ Even as the Bank now calls for reinvestments in agriculture and rhetorically supports small-scale farming as essential to development and poverty reduction in agriculture-based economies,³²⁹ it continues to promote the development of large-scale, agribusiness-driven, export-oriented, and capital-intensive farms over owner-operated, small-scale agriculture.³³⁰ This default preference towards large-scale land transfers can undermine productivity goals by concentrating land rights.³³¹ In the long-run, the development of large-scale plantations can also threaten ecological sustainability while possibly contributing to political and social instability.³³²

Ultimately, and as evidenced above, the market-plus approach does not question its own underlying philosophy towards land markets and distribution, despite the documented, significant problems with its approach.³³³ The market-plus approach also disregards an obvious and salient point: land is a finite resource. Land cannot both be given away to investors and be made more available to local users.³³⁴ Attuned to this reality the rights-based approach highlights the need for policies that do not separate rural communities from land that serves as both a primary asset and a vital social safety net. More fundamentally, the rights-based approach takes a different starting point than the market-plus approach, asking first whether underutilized land should be redistributed to small-scale farmers, rather than simply assuming that land allocation should be market-driven.

³²⁸ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶¶ 1, 7; *see also How Not to Think of Land-Grabbing*, *supra* note 169, 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).

³²⁹ 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 31, at 1; *see also* WORLD DEVELOPMENT REPORT 2008, *supra* note 138, 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”).

³³⁰ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 7.

³³¹ *Id.*; *see also infra* Part III.A.2.b.

³³² As considered in Part I.C., in countries that already suffer from food and water shortages and that are 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 result in violent conflict.

³³³ *See* 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* 91, 94 (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).

³³⁴ De Schutter, *The Green Rush*, *supra* note 68, at 547.

b. *The Rights-Based Approach: Making the Case for Agrarian Reforms*

In line with its land as a gateway to human rights framework, the rights-based approach seeks to strengthen rural communities' access to land while minimizing the negative distributional impacts of the market. 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."³³⁵ In addition, the Special Rapporteur urges states to "prioritize development models that do not lead to eviction, disruptive shifts in land rights and increased land concentration"³³⁶ and to adopt strict anti-eviction laws and strengthen expropriation frameworks to provide clear procedural safeguards for landowners.³³⁷

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 customary and collective rights as an alternative to individual titling.³³⁸ Because land titling can have a particularly detrimental impact on women, regardless of its form,³³⁹ the Special Rapporteur cautions that customary forms of tenure should not be idealized and should also be reformed.³⁴⁰

Most significantly, the rights-based approach promotes land redistribution through a state-led process of agrarian reform. Although redistribution arguments rest primarily on the need to strengthen rural populations' access to land as a primary rights-supporting asset, these arguments are also promoted by referencing productivity and economic growth. 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."³⁴¹ The Special Rapporteur interprets article 11(2)(a) "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."³⁴² Equitable land distribution, the rights-based

³³⁵ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 20.

³³⁶ *Id.*

³³⁷ *Id.* ¶ 40(a); *Large-scale Land Acquisitions and Leases*, *supra* note 70, princ. 3; De Schutter, *The Green Rush*, *supra* note 68, at 552; *supra* Part II.B.1.

³³⁸ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶¶ 20–21; De Schutter, *The Green Rush*, *supra* note 68, at 538.

³³⁹ Because formal title to land is often solely listed with and held by the male head of household, women are often effectively excluded from decision-making processes relating to family property. Vermeulen & Cotula, *supra* note 91, 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, 1322 (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).

³⁴⁰ See *infra* note 383; see also De Schutter, *The Green Rush*, *supra* note 68, at 538.

³⁴¹ ICESCR, *supra* note 201, art. 11(2)(a).

³⁴² *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 27. See also *Special Rapporteur on the Right to Food* (Dec. 2010), *supra* note 218, at ¶¶ 16–20 (citing studies that show that small-scale agro-ecological farming practices can significantly improve yields, in a sustainable manner).

approach argues, 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.”³⁴³

These arguments linking equitable land distribution with economic growth find robust support in World Bank studies.³⁴⁴ One such study analyzed land policies in 73 countries between 1960 and 2000 and showed that the growth rates achieved were two to three times higher in countries where land distribution was initially more equitable.³⁴⁵ Land reforms also proved successful in East Asia: Following World War II, Japan, South Korea, and Taiwan instituted redistributive land reform that created highly egalitarian access to land.³⁴⁶ These reforms equalized land assets and income distribution among rural society, which in turn contributed to the “democratization and social and political stability in the postwar era.”³⁴⁷ Collectively, these examples evidence 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.³⁴⁸ 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.³⁴⁹

Ultimately, plausible empirical evidence suggests that it is possible to pursue the market-plus approach’s goals of stimulating economic growth and increasing the productivity of agricultural land, while also improving local populations’ access to land and its resources. As such, the rights-based approach is not only viable, but in some cases may be preferable, both for its means and its

³⁴³ *Id.* ¶¶ 24, 37. The Special Rapporteur offers that such policies could, among other benefits, enable smallholders to become more competitive against larger farms and improve smallholders’ access to credit. *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 38. On this point, Robert Smith comments, “[i]f 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 174, at 216. Elizabeth Fortin adds that, “[r]ather 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 305, at 162.

³⁴⁴ See DEININGER, *supra* note 173, at 18.

³⁴⁵ *Id.* at 18.

³⁴⁶ Keith Griffin et al., *Poverty and the Distribution of Land*, 2 J. AGRARIAN CHANGE 279, 302 (2002); Cristobal Kay, *Why East Asia Overtook Latin America: Agrarian Reform, Industrialisation and Development*, 23 THIRD WORLD Q. 1073, 1076 (2002).

³⁴⁷ Toshihiko Kawagoe, *Agricultural Land Reform in Postwar Japan: Experiences and Issues* 35 (World Bank Pol’y Res., Working Paper No. 2111, 1999). The Special Rapporteur notes that “[t]he 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.” *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, at 18 (citing DEININGER, *supra* note 173, at 146).

³⁴⁸ 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, *supra* note 186, at 593. The frequency of this issue is exacerbated by the World Bank’s strong emphasis on mathematical modeling and the fact that the World Bank has to “understand and act in the *entire* world.” *Id.* at 594–95.

³⁴⁹ De Schutter, *The Green Rush*, *supra* note 68, at 545–46 (arguing that “competitiveness should not be confused with resource efficiency. While large industrialized plantations are more competitive, they are less efficient per hectare than are small farms.”).

ends: It allows states to respect crucial individual and community interests, as required under international human rights law, while arguably offering better results in efficiency terms.

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, the principles put forward by each approach similarly rely 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 point 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 of large-scale land transfers.³⁵⁰ 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.”³⁵¹ 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.”³⁵²

Greater transparency and accountability are indeed goals worth pursuing, especially as so many deals are characterized by a lack of transparency and rights abuse.³⁵³ 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 directly serving the rights of host populations. Rather, it serves to facilitate greater investment,³⁵⁴ which in turn, the

³⁵⁰ See *supra* Part II.A.

³⁵¹ RAI PRINCIPLES, *supra* note 31, at princ. 1.

³⁵² *Id.* at princ. 3.

³⁵³ See *supra* Part I.B.

³⁵⁴ See Land Research Action Network, *supra* note 129, at 9 (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”) (citing LAND RESEARCH ACTION NETWORK, WHY WE OPPOSE THE PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT (RAI) (2010), http://www.landaction.org/IMG/pdf/FINAL_Engl_Why_we_oppose_RAI.pdf). In similar fashion, the World Bank Group’s “Investment Across Borders” [IAB] benchmarking initiative—

market-plus approach argues, can benefit host populations if properly regulated.³⁵⁵ 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 surrounding project legitimacy unaddressed. In other words, 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 these 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.”³⁵⁶ RAI Principle 4 thus attempts to remedy this problem by calling for better consultations and procedural safeguards.³⁵⁷ As considered below, these solutions fall short in three key respects.

First, although RAI Principle 4 notes that the “consultative process should allow communities to turn down investors if they so desire,”³⁵⁸ it does not include a requirement of consent, and instead focuses on the mechanics of the consultative process.³⁵⁹ 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. Otherwise, consultations may

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, at 1, 41 (2010), available at <http://iab.worldbank.org/~media/FPDKM/IAB/Documents/IAB-report.pdf>.

³⁵⁵ See *supra* note 47 and accompanying text.

³⁵⁶ RAI PRINCIPLES, *supra* note 31, at 11. For more on problematic consultations, see *supra* Part I.B.

³⁵⁷ See RAI PRINCIPLES, *supra* note 31, at 11.

³⁵⁸ *Id.*

³⁵⁹ 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 stipulating that “[d]isplaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.” WORLD BANK, OPERATIONS MANUAL 4.12 (2011), <http://go.worldbank.org/96LQB2JT50>.

simply be reduced to box-checking measures, rather than delivering outcomes that are chosen by affected communities.³⁶⁰

The second problem with the RAI Principles' approach to consultations is that they do not envision community input 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,"³⁶¹ and calls for the linking of land transfers to "local land use and overall development plans,"³⁶² the Principles, however, are silent on the need for macro decisions around "overall development plans" to undergo a meaningful, consultative process. Indeed there is 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.³⁶³

The intimate connection to land—and its life-sustaining and identity-forming qualities—certainly calls 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 come into play sufficiently early in the policymaking process such that there is ample opportunity for policies and institutions that might be inherently weighted against marginalized communities to be scrutinized and recalibrated before their implementation.

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.³⁶⁴ 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 cases, the problem is 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,

³⁶⁰ See LAND RESEARCH ACTION NETWORK, *supra* note 129, at 9 (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").

³⁶¹ RAI PRINCIPLES, *supra* note 31, at 10.

³⁶² *Id.*

³⁶³ See, e.g., Borrás et al., *supra* note 98, 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").

³⁶⁴ See *infra* Part III.B.2.

[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.³⁶⁵

Even attuned to these problems, the solution the Bank 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.³⁶⁶

The RAI Principles note that “consultation should ultimately lead to proper contractual arrangements.”³⁶⁷ 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.³⁶⁸ But the power dynamics inherent in the very consultations that give rise to these contracts suggest that agreements will rarely articulate terms that equitably share the benefits.³⁶⁹ Even if such terms are articulated and specified in human rights terms,³⁷⁰ their enforcement remains a significant concern.

For the market-plus approach at least, the current ineffectiveness of these measures has not led to a reassessment of strategy; rather, it has simply given rise to calls for more good governance measures³⁷¹ 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;³⁷² (3) When these rules are not implemented or appropriately enforced, more rules are needed to correct for the initial failings of reform.

³⁶⁵ RISING GLOBAL INTEREST, *supra* note 30, at 106.

³⁶⁶ *Id.*

³⁶⁷ RAI PRINCIPLES, *supra* note 31, at 12.

³⁶⁸ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, princ. 7; RAI PRINCIPLES, *supra* note 31, princ. 4.

³⁶⁹ See *supra* text accompanying notes 101–16.

³⁷⁰ See *Large-scale Land Acquisitions and Leases*, *supra* note 70, princ. 7 (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”).

³⁷¹ As a case in point, on the issue of lack of enforcement capacity, the RAI 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 31, at 12–13.

³⁷² See Shihata, *supra* note 186, at 85.

Yet the deeper problems associated with land deals cannot be resolved by rulemaking 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. Formalistic measures are often hampered by significant power interests working to achieve competing goals. Moreover, adherence to formally approved processes without sufficient attention to outcomes may help sanitize problematic transactions, as investors and host states can claim that they have abided by the rules and are therefore not responsible for any shortcomings in the project's success. In the end, the market-plus approach fails to consider the fact that procedural fixes, on their own, may fail to improve substantive outcomes.³⁷³

2. The Eleven Principles: Procedural Means for Substantive Ends

The Eleven Principles offer a number of advantages over the RAI Principles. They set a substantive baseline that must at least be met, if not exceeded, in order for investments to move forward. The Eleven Principles' focus on distributive concerns also makes them 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.”³⁷⁴ This framework puts the rights and needs of affected communities at the forefront of the discussion about development policy—rather than leaving the 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,”³⁷⁵ 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.³⁷⁶ Like the RAI Principles, they emphasize the need for transparent negotiations, community consultations, and binding agreements³⁷⁷—

³⁷³ See Borrás & Franco, *supra* note 46, at 520 (commenting that an “uncritical belief in the basic beneficence of formalistic and legalistic measures” raises significant concerns).

³⁷⁴ *Large-scale Land Acquisitions and Leases*, *supra* note 70, princ. 1.

³⁷⁵ *Id.* at princ. 2 (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 210; see also Antoanella-Iulia Motoc et al., *Standard Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent* ¶ 45 (U.N. 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”).

³⁷⁶ The Eleven Principles are explicit about the procedural nature of their contribution: 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 70, at 1.

³⁷⁷ See *id.* princs. 1, 2, and 7.

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 multitude of legislative reforms. Whereas the RAI Principles call on host states to create a proper business and legal environment to help facilitate land transfers,³⁷⁸ the Eleven Principles seek the enactment and enforcement of legislation to safeguard host communities' rights as ends unto themselves.³⁷⁹ Principle 3 of the Eleven Principles 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."³⁸⁰ 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."³⁸¹ In practice, 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, because land is both a primary source of wealth and a primary site for power struggles. The three examples below consider whether procedural safeguards can overcome these complex power dynamics to recognize customary land rights; to secure community consent; and to circumscribe forced evictions.

First, with respect to 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 disenfranchise some community members, particularly women.³⁸² The Special Rapporteur then proposes that such problems "should be addressed through the inclusion of strict safeguards in the *process* of such recognition."³⁸³ But this proposal does not answer how such a process might be managed and implemented. It also does not address whether a top-down process can successfully navigate entrenched power dynamics. As argued by Robert Smith, a scholar on African land reforms:

[T]he 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.³⁸⁴

³⁷⁸ See RAI PRINCIPLES, *supra* note 31, princ. 3.

³⁷⁹ *Large-scale Land Acquisitions and Leases*, *supra* note 70, princ. 3 ("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.")

³⁸⁰ See RAI PRINCIPLES, *supra* note 31, princ. 3.

³⁸¹ See *supra* note 305 and accompanying text.

³⁸² See *supra* notes 296–98 and accompanying text.

³⁸³ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 22 (emphasis added); see *supra* note 298 and accompanying text.

³⁸⁴ Smith, *supra* note 174, at 219.

Second, with respect to consent, although the Eleven Principles set a much higher bar by requiring the free, prior and informed consent of affected communities, the Principles do not fully specify what community governance structures would be necessary to ensure that consent is secured through a robust and collective decision-making process. In fact, this remains a central question that is left unaddressed by either approach. Land investments deeply affect communal resources and often occur through traditional governance structures that may sideline marginalized groups. 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.

Third, with respect to circumscribing forced evictions, the Eleven Principles reflect the human rights principle that forced evictions may only occur under extremely limited circumstances.³⁸⁵ States must ensure that evictions serve a legitimate public purpose; are not discriminatory; meet the requirements of due process; and provide communities with fair compensation.³⁸⁶ In other words, the right to be free from forced evictions sets forth procedural standards that bar evictions in some circumstances and permit them in others. Procedural safeguards, however, can all too easily be co-opted by a state because its claims about what constitutes a public purpose may not be easy to contest. Particularly within the context of land investments, states could use the very general and under-scrutinized language of “economic development” to justify takings in the public interest.³⁸⁷ 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.

3. A Critical Challenge: Generating Political Will

Given the dynamics described above, it should come as no surprise that neither set of principles has been effectively implemented in practice—a conclusion

³⁸⁵ *Large-scale Land Acquisitions and Leases*, *supra* note 70, princ. 2. These conditions are spelled out in the ESCR Committee’s comment on the right to adequate housing. 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://www.unhcr.ch/tbs/doc.nsf/0/959f71e476284596802564c3005d8d50> (noting in General Comment No. 7 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,” must take legal measures against its agents or third parties who carry out forced evictions, and must “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 bodies”); see also Special Rapporteur on Adequate Housing, *supra* note 313 (providing, among others, 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. See RAI PRINCIPLES, *supra* note 31, princ. 2.

³⁸⁶ See *supra* note 385.

³⁸⁷ In the United States, for example, the Supreme Court has defined “public use” as “public purpose” and has found 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. See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

that is confirmed by several recent case studies.³⁸⁸ Both sets of principles are admittedly new. 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 that arises is 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.³⁸⁹ The RAI Principles are voluntary in nature, and there is currently no mechanism set up to monitor investor compliance.³⁹⁰ These Principles operate in a corporate social responsibility framework, problematically relying on the self-regulation of the private sector.³⁹¹ The Eleven Principles help overcome some of the concerns associated with self-regulation by adopting an accountability framework in which states are called upon to fulfill their obligations under international human rights law. But as discussed throughout this Article, host states often lack the political will to follow through on their human rights obligations in practice.

Indeed, 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 recommended measures. These approaches further assume a self-executing, trickle-down quality of the law wherein top-down processes can effectively navigate entrenched power dynamics. The problem raised by this assumption 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.³⁹² But the state and its ruling elite are not neutral agents of social change.³⁹³ To the contrary, state actors and domestic elites may actually benefit from investors' unregulated behavior and as such have little incentive to protect existing land users' rights. This may especially be the

³⁸⁸ See, e.g., OAKLAND INST., UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: COUNTRY REPORT: SIERRA LEONE 2 (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).

³⁸⁹ 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 65, 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 30, at 3.

³⁹⁰ 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 voluntary codes of conduct do not adequately regulate the leasing process and calling for the creation of a U.N. Ombudsman to provide legal and technical oversight and support for host states).

³⁹¹ For problems with such an approach, see Graham and Woods, *supra* note 288 and accompanying text.

³⁹² See Makau Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 67 (1997) (citing Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917 (1991)) (arguing this point in the context of human rights law).

³⁹³ 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) (discussing non-implementation of rights protections for India's “untouchables”).

case where land users belong to different ethnic, religious, or caste groups or are members of indigenous communities.³⁹⁴

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 that legal strategies for social change are insufficient, because they “underestimate the ability of political actors to ignore, bypass, or selectively implement judicial recommendations and verdicts.”³⁹⁵ Instead, “[b]oth in principle and in the development experience, legal empowerment is much more a matter of civil society and bottom-up initiatives.”³⁹⁶ Studies of land reform initiatives 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 landholders.³⁹⁷ 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,” which must be taken into account.³⁹⁸ 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.³⁹⁹ 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.”⁴⁰⁰ Recent case studies of large-scale land transfers also provide support for the “critique . . . that legal empowerment through legislative reform, while effective in

³⁹⁴ Privileges accorded to investors also may be the result of government corruption and the bribery of government officials. See FRED PEARCE, *THE LAND GRABBERS: THE NEW FIGHT OVER WHO OWNS THE EARTH* 43–47 (2012) (detailing the accounts of U.S. investors who have targeted land deals in South Sudan because of lax investment oversight and the prevalence of local corruption); see also Borrás & Franco, *supra* note 46, 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”).

³⁹⁵ Dan Banik, *Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication*, 1 HAGUE J. ON RULE OF L. 117, 128 (2009).

³⁹⁶ *Id.* at 129.

³⁹⁷ Ben Cousins, *How Do Rights Become Real? Formal and Informal Institutions in South Africa’s Land Reform*, 28 INT’L DEV. STUD. BULL. 59 (1997) (discussing South Africa’s formal and informal land reform institutions).

³⁹⁸ *Id.* at 60. See also Ryan Bubb, *States, Law, and Property Rights in West Africa* (2011) (unpublished draft), available at http://www.econ.yale.edu/conference/neudc11/papers/paper_250.pdf (showing that even though property laws were very different in Ghana and Cote d’Ivoire, the contours of de facto property rights were nearly identical, reflecting the minimal influence of formal laws on shaping community property rights). See generally Kennedy, *supra* note 268, at 117 (arguing that human rights promote the idea that justice is better served by securing rights on paper failing to recognize the role of people making political decisions, and thus human rights ultimately fail to bridge the gap between “law in the books and law in action [and], between legal institutions and the rest of life”); Frank Upham, *The Man Who Would Import: A Cautionary Tale About Bucking the System in Japan*, 17 J. JAPANESE STUD. 323 (1991) (demonstrating that government policy can be enforced just as effectively through informal community norms of obedience as it can be through formal legal power, citing a case study in which the Japanese bureaucracy effectively regulated business even without legal power).

³⁹⁹ Jennifer C. Franco, *Making Land Rights Accessible: Social Movements and Political-Legal Innovation in the Rural Philippines*, 44 J. DEV. STUD. 991 (2008) (examining how access to political-legal mobilization and “rights-advocacy” outreach networks assist rural poor claimants, and the limitations of such strategies).

⁴⁰⁰ Borrás & Franco, *supra* note 46, at 518 (citing Vermeulen & Cotula, *supra* note 91).

certain important regards, is intrinsically limited by the quality of laws and institutions, and more fundamentally by the milieu of the political economy.³⁹⁴⁰¹

In the end, one cannot rely solely on the political will of the host state or rest on legal platforms alone.⁴⁰² Although legal guarantees and transparent consultative processes are critical, these approaches must be accompanied by a process of political and social mobilization that compels host states to restrict large-scale land transfers and undertake essential agrarian reforms. Part IV provides examples of such bottom-up initiatives but 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 calls for essential institutional reforms at the international level to help empower affected communities and secure rights guarantees.

IV. EMPOWERING AFFECTED COMMUNITIES

This Part proposes a range of measures and reforms to help empower communities most affected by large-scale land deals. I argue that both international and domestic pressure must be brought to bear on host states and investors to help close accountability gaps and secure rights protections.⁴⁰³ Part IV.A looks at resistance strategies to contest the global rush for agricultural land and argues that these strategies must be complemented and supported by international actors and reforms. Part IV.B proposes potential regulatory measures for host states, investor home states, and international financial institutions alike. Part IV.C concludes with consideration of key agrarian reforms and normative developments to help support substantive rights and achieve broader development goals.

A. *Resistance Strategies and the Need for Structural Support*

Opposition to large-scale land transfers occurs in a range of forms, from popular protests and political opposition, to broad-based social movements comprising peasants and small-scale farmers most affected by these deals. Popular protests have successfully derailed, or at least forestalled, some large-scale land deals. In 2009, for instance, widespread protests against the leasing 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

⁴⁰¹ Vermeulen & Cotula, *supra* note 91, at 913. Similarly, Kevin Davis argues that all causal claims about the relationship between "any specific feature of the legal system" and development "are inherently suspect Universal claims about the role of law in development necessarily deny the significance of local variations." Kevin E. Davis, *Legal Universalism: Persistent Objections*, 60 U. TORONTO L.J. 537, 538 (2010). For example, there may be important differences in how a given society measures development, *id.* at 539–40; societies may differ in "ways that alter the causal connections between law and social or economic outcomes." *Id.* at 540.

⁴⁰² See DAVID KINLEY, *CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY* 108 (2009) (arguing that "[i]t 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 to try to do battle on the narrow ledge of definitive legal interpretation alone" and citing with approval Kennedy, *supra* note 268, at 108–09).

⁴⁰³ See KINLEY, *supra* note 402, 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").

subsequently cancelled the Daewoo deal.⁴⁰⁴ In the Philippines, public protests halted a 2009 deal between China and the Philippine government involving 1,240,000 hectares of land.⁴⁰⁵ A \$4.3 billion deal for 500,000 hectares of rice paddies was stalled in Indonesia in 2009 as a result of local opposition.⁴⁰⁶ The largest land deal in South Sudan also stalled 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.⁴⁰⁷ Civil society actors in investor home states have also proved influential. In February 2012, for example, Iowa State University withdrew its involvement in a controversial land deal in Tanzania after growing public pressure from a number of U.S.-based civil society actors.⁴⁰⁸

These examples, however, are few and far between, especially when compared to the number of deals that have moved forward. This suggests that the success of local protests may be short-lived and may depend on the extent to which civil society goals align with those of political or foreign actors.⁴⁰⁹ But social

⁴⁰⁴ See Javier Blas, *South Koreans to Lease Farmland in Madagascar*, FIN. TIMES (Nov. 19, 2008), <http://www.ft.com/cms/s/0/ea8de830-b5d9-11dd-ab71-0000779fd18c.html#axzz2FbULSU5N> (announcing the deal between Daewoo and Madagascar); see also Paul Vallely, *Wish You Weren't Here: the Devastating Effects of the New Colonialists*, INDEP. (London) (Aug. 9, 2009), <http://www.independent.co.uk/environment/nature/wish-you-werent-here-the-devastating-effects-of-the-new-colonialists-1767725.html> (describing how the Daewoo deal contributed to the overthrow of President Ravalomanana's government).

⁴⁰⁵ Vallely, *supra* note 404 (using the Philippines as an example of public outcry over governmental land deals).

⁴⁰⁶ *Buying Farmland Abroad: Outsourcing's Third Wave*, ECONOMIST (May 21, 2009), <http://www.economist.com/node/13692889>.

⁴⁰⁷ John Vidal, *Indian Agribusiness Sets Sights on Land in East Africa*, GUARDIAN (London) (Aug. 24, 2011), <http://www.guardian.co.uk/global-development/2011/aug/24/indian-agribusiness-land-east-africa>.

⁴⁰⁸ Led by Iowa-based Agrisol Energy LLC (“AgriSol”), the deal involves leasing over 800,000 acres, threatens eviction for more than 160,000 people, and 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), <http://www.oaklandinstitute.org/press-release-lives-hold-agrisols-land-deal-tanzania-creates-uncertain-future-more-160000-people>. The deal is contested by a number of actors, including the Oakland Institute, Sierra Club U.S., Sierra Club Canada, Iowa Citizens for Community Improvement, and the national consumer advocacy non-profit Food & Water Watch. Letter from Sierra Club U.S. and Sierra Club Canada, to AgriSol, *Do Not Displace 162,000 People in Tanzania* (Oct. 20, 2011), <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), <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), http://www.northcentralpa.com/feeditem/2012-07-19_national-nonprofit-food-water-watch-joins-complaint-against-rastetter-exposes-an. 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*, DAILY IOWAN (July 9, 2012), <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), <http://www.oaklandinstitute.org/iowa-state-university-withdraws-completely-agrisol-energy%E2%80%99s-investment-deal-tanzania>.

⁴⁰⁹ In Madagascar, for example, there were other factors at play: The urban poor were already angered at the high prices of food, and some have characterized the land deal as a spark that ignited already simmering national discontent. See Vallely, *supra* note 404 (discussing protest motivations in Madagascar); Sebastien Berger, *Madagascar's New Leader Cancels Korean Land Deal*, TELEGRAPH

movements, both national and transnational in scope, are growing. Some frame their grievances in human rights terms; others frame their opposition using a food sovereignty paradigm.⁴¹⁰ Collectively, these movements give 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 give greater voice and agency to the 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.”⁴¹¹ Member organizations⁴¹² 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 key policy reforms.⁴¹³

Both global and local campaigns—some connected to La Via Campesina and others that have evolved separately—claim multiple successes, but they also face significant resistance. In some countries, individuals and groups mobilizing in opposition to large-scale land transfers have endured considerable backlash. Local opposition has been met with brute force;⁴¹⁴ social activism by peasant movements

(London) (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”). In some countries, domestic opposition has also led to legislation imposing moratoria on land deals or limiting the purchase of land by foreigners, though as considered below, these initiatives, too, may be short-lived. See *infra* notes 437–38 and accompanying text.

⁴¹⁰ See, e.g., Peter Rosset, *Food Sovereignty and Alternative Paradigms to Confront Land Grabbing and the Food and Climate Crisis*, 54 DEV. 21, 28 (2011), available at <http://www.palgrave-journals.com/development/journal/v54/n1/pdf/dev2010102a.pdf> (arguing that “[o]nly 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 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, 665 (2009). For more on La Via Campesina see *infra* notes 411–12 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).

⁴¹¹ La Via Campesina, *What is La Via Campesina? The International Peasant's Voice* (Feb. 11, 2011), <http://www.viacampesina.org/en/index.php/organisation-mainmenu-44/what-is-la-via-campesina-mainmenu-45>. 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!*, 3 LA VIA CAMPESINA NOTEBOOK 1, 13 (2012), <http://viacampesina.org/downloads/pdf/en/mali-report-2012-en1.pdf> [hereinafter *Stop Land Grabbing*].

⁴¹² La Via Campesina is comprised of 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 411; 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).

⁴¹³ *Stop Land Grabbing*, *supra* note 411, at 6.

⁴¹⁴ See Transnational Inst., *supra* note 250 (noting that countries such as Cambodia, Ethiopia, and Ghana “are using legal and brute force to suppress local contestation”).

and other civil society actors has been criminalized.⁴¹⁵ 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.⁴¹⁶ The market-plus approach continues to enjoy far greater institutional and state backing and thus tends to prevail over these movements' calls for a more dramatic shift in the status quo.⁴¹⁷ This asymmetry tests assumptions about the roles that "strategies of disavowal and resistance" can play in "opening the spaces for constructive participatory engagement under current conditions of globalisation."⁴¹⁸ To be effective, resistance strategies must have structural support.

To empower host communities and support social movements, both normative and regulatory frameworks at the international level must cohere and evolve with the backing of established institutions. Specifically, investor home states and international financial institutions (IFIs) must be more involved in protecting rights through regulation,⁴¹⁹ as relying solely on the political will of host

⁴¹⁵ In Sierra Leone, for example, forty local landowners were reportedly arrested in October 2011 for blockading Socfin Agricultural Company Sierra Leone Ltd.'s plantation project in Pujehun district. *Sierra Leone: Popular Resistance and Corporate Landgrabbing in Sierra Leone*, ALL AFRICA (May 3, 2012), <http://allafrica.com/stories/201205031196.html> (interviewing Oakland Institute's policy director about the organization's report on Sierra Leone land deals). At least fifteen local community activists have also been imprisoned for voicing their dissent to Socfin's land deal. See *supra* notes 10–11 and accompanying text (discussing the Ethiopian government's crackdown against those resisting forced relocations).

⁴¹⁶ 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." *Stop Land Grabbing*, *supra* note 411, at 13. According to La Via Campesina, the Conference declaration, signed by ninety-two 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. *Id.* 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." *Id.*

⁴¹⁷ This was made evident in a public statement issued by the Director General of the FAO and the President of the European Bank for Reconstruction and Development. The statement called on the private sector to double its investment in land and become the "main engine" of agricultural growth and food production. La Via Campesina and others issued a strident response accusing the statement's authors of presenting biased claims that obscure widely available data showing that small-scale farming is more productive and efficient than large-scale agribusiness. The response stated that "it is unacceptable and even incomprehensible for a Director General of the FAO to be promoting the destruction of peasant farming and an increase in land grabbing" instead of validating "the importance of peasant agriculture and the critical role small farmers must play in food production," especially in light of "three years of careful, hard work by La Via Campesina and other organizations" in constructing the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Common Statement, La Via Campesina et al., *Why are the FAO and the EBRD Promoting the Destruction of Peasant and Family Farming?* (Sept. 14, 2012), <http://viacampesina.org/en/index.php/main-issues-mainmenu-27/agrarian-reform-mainmenu-36/1295-why-are-the-fao-and-the-ebrd-promoting-the-destruction-of-peasant-and-family-farming>. But see Suma Chakrabarti & Jose Graziano Da Silva, Op-Ed., *Hungry for Investment: The Private Sector Can Drive Agricultural Development in Countries That Need It Most.*, WALL ST. J. (Sep. 6, 2012), <http://online.wsj.com/article/SB10000872396390443686004577633080190871456.html> (discussing the role of the private sector in global food production).

⁴¹⁸ Lustig & Kingsbury, *supra* note 244, at 405.

⁴¹⁹ Powerful global actors are increasingly being urged to take cognizance of their human rights obligations. See *supra* note 236 and accompanying text. I have elsewhere argued that investor home state obligations should extend to respecting and protecting human rights extraterritorially, including through regulation of the activities of private investors operating abroad. Narula, *supra* note 46, at 745; see also THE MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHT (2011), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Maastricht-Principles-analysis-brief-2011.pdf>. The Maastricht

states and investors has proven to be ineffective. Even more fundamentally, the World Bank must reform its approach to land markets and land distribution. Human rights law, too, must normatively evolve to develop a substantive right to land for rural communities who depend on it for their survival. These essential reforms are considered in Parts IV.B–C.

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 be subject to far greater substantive restrictions and regulation. This Part proposes a range of regulatory measures for host states, home states, and IFIs alike.

Host states possess the power and responsibility to mitigate—if not eliminate—many of the harms associated with large-scale land transfers. Most importantly, host states have the authority to determine whether problematic land deals may proceed at all. States could, for instance, impose moratoria on large-scale land deals. This would allow states to evaluate the rights impacts of these deals⁴²⁰ and would give 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.⁴²¹ It is also possible to impose conditional moratoria; Argentina, for example, recently passed legislation stipulating that no more than 15% of the country's land may be foreign-owned.⁴²² Here, it is important to consider the potentially deleterious role played by domestic investors rather than simply limiting land transfers involving foreigners. Moratoria could be especially useful in states that possess weak governance structures or underdeveloped regulatory frameworks such as the nascent Republic

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." *Id.* at Preamble. The Principles note that, at minimum, states have an obligation to avoid causing harm in foreign countries; as such, states should assess the potential impacts of their policies and practices on the enjoyment of economic, social and cultural rights abroad. *Id.* at princs. 13, 14. International financial institutions, too, are bound by international human rights law, as part of general international law. *Large-scale Land Acquisitions and Leases*, *supra* note 70, ¶ 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). I have also 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. Narula, *supra* note 46, at 41.

⁴²⁰ See LAND RIGHTS AND THE RUSH FOR LAND, *supra* note 37, at 65 (advocating moratoria to allow time for democratic debate about the merits and demerits of permitting land deals).

⁴²¹ In Mozambique, for instance, in order to give the government sufficient time to complete a map of formal land tenure in the country, no new concessions of more than 10,000 hectares were publicly agreed to between October 2007 and October 2011. OXFAM, *supra* note 153, at 16; see David K. Deng, NORWEGIAN PEOPLE'S AID, *The New Frontier: A Baseline Survey of Large-Scale Land-Based Investment in Southern Sudan* 1, 37 (2011), http://www.npaid.org/filestore/NPA_New_Frontier.pdf (advocating moratoria to allow domestic institutions a chance to establish themselves).

⁴²² Shane Romig, *Argentina Fences Off Land to Foreign Buyers*, WALL ST. J. (Dec. 23, 2011), <http://farmlandgrab.org/post/view/19829>.

of South Sudan.⁴²³ Under some circumstances, states may wish to do more than simply forestall the possibility of future deals; states may wish to cancel existing deals that fail to live up to their productive promises or fail to comply with domestic legislation.⁴²⁴

States may also pass legislation aimed directly at the content of land transfer contracts. Here there is wide latitude for creativity. Some of the most straightforward measures cap the size of land transfers⁴²⁵ or the length of land leases.⁴²⁶ Such caps can help limit the risks of large-scale land transfers, which are often compounded by their immense scale and duration.⁴²⁷ States may also restrict purely speculative investments. For example, states may require that land transfer contracts impose development conditions that must be satisfied for investors to retain control of the land.⁴²⁸ States could also restrict the use of freezing clauses, which lock in a state's applicable domestic legislation, in perpetuity, from the moment that a land transfer contract is finalized.⁴²⁹ Such clauses are inherently inflexible and can preclude upgraded regulations.⁴³⁰

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 play—and has played—a critical role.⁴³¹ In countries such as Brazil,⁴³² Argentina,⁴³³ and Ukraine,⁴³⁴ failed

⁴²³ See, e.g., Deng, *supra* note 421, at 37 (arguing for a moratorium on land deals in the Republic of South Sudan due to its fragile state).

⁴²⁴ RISING GLOBAL INTEREST, *supra* note 30, 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, among other things, the public trust and sovereign acts doctrines on efficiency grounds).

⁴²⁵ See, e.g., Romig, *supra* note 422 (describing legislation in Argentina that caps land ownership by foreign individuals or companies at 1,000 hectares, thus creating a *de facto* cap on the size of any deal featuring a foreign buyer).

⁴²⁶ See, e.g., Land Union of Ukr., *Ukraine's Parliament Passes Law on Land Market*, FOOD CRISIS & GLOBAL LAND GRAB (July 20, 2011), <http://farmlandgrab.org/post/view/18960> (describing legislation in Ukraine that limits land leases to a period of no longer than fifty years).

⁴²⁷ See *supra* text accompanying notes 77–80.

⁴²⁸ See LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 62, at 107 (recommending monitoring mechanisms and transparent government contracting as methods of discouraging land speculation).

⁴²⁹ INVESTMENT CONTRACTS, *supra* note 102, at 72 (advocating against the use of freezing clauses “under all circumstances” and also adding that such clauses may be found unenforceable in many jurisdictions).

⁴³⁰ *Id.*

⁴³¹ See *supra* Part IV.A.

⁴³² 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. At the time of this writing, the Attorney General's legal opinion had not been enforced, though the recommendations had been moving through congressional committees. See Raymond Colitt & Reese Ewing, *Brazil Curtails Land Sales to Foreigners*, REUTERS, Aug. 24, 2010, available at <http://www.reuters.com/article/2010/08/24/brazil-land-idUSN2425631120100824>; Gabriel Elizondo, *US Farmers Scramble to Buy Brazil's Farmland*,

investments have resulted in domestic pressure and even legislation to limit the purchase of land by foreigners.⁴³⁵ 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. The World Bank, for instance, has strongly cautioned against state implementation of protectionist measures aimed at restricting or exerting various forms of control over land deals.⁴³⁶ Yet the point of considering such measures is to expand the host state's arsenal for combating forces that have disproportionately large and 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 pushback on moratoria in countries such as Tanzania and Ukraine further suggests that domestic movements must be complemented and supported by international reforms.⁴³⁷ Otherwise, the success of these movements will continue to be piecemeal and short lived.⁴³⁸ Here, the World Bank Group 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.⁴³⁹ 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

AL JAZEERA (Sep. 29, 2012), <http://www.aljazeera.com/indepth/features/2012/09/2012913112137744956.html>.

⁴³⁵ 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 to its resources. See *Declaration of the Argentinean Government Regarding the Legislative Proposal for the Rural Land Law* (Apr. 27, 2011), <http://www1.hcdn.gov.ar/dependencias/dsecretaria/Periodo2011/PDF2011/TP2011/0001-PE-11.pdf>.

⁴³⁴ The Ukrainian bill prohibits the purchase of farmland by foreigners, but continues to permit leasing. Land Union of Ukraine, *supra* note 426. Recent developments, including legislation allowing foreigners to purchase nonfarmland, threaten to jeopardize the moratorium; at the time of this writing, however, the moratorium remained 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>; Rada Allows Foreigners to Buy Non-agricultural Land, KYIV POST (Oct. 3, 2012), <http://www.kyivpost.com/content/ukraine/rada-allows-foreigners-to-buy-non-agricultural-land-313853.html>; see also *infra* note 437.

⁴³⁵ *What Drives the Global “Land Rush”?*, *supra* note 251, at 17.

⁴³⁶ The World Bank favors an approach that 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.” *Id.* at 17. The Bank adds that because a number of land deals involve nationals and not foreigners, excluding foreigners “may exacerbate rather than resolve governance challenges by, for example, limiting competition.” *Id.*

⁴³⁷ 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, *Investors Run Fingers Through Ukraine's Black Earth*, BUSINESS NEW EUROPE (Apr. 15, 2011), http://www.bne.eu/story2630/Foreign_investors_run_fingers_through_Ukraines_black_earth.

⁴³⁸ 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 biofuels 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.

⁴³⁹ Lustig & Kingsbury, *supra* note 244, at 411 (discussing the importance of the World Bank because of “the scale of its influence on projects and on laws in developing countries”).

have given rise to the problems that their RAI Principles now seek to address. Yet even as the Bank calls for investors to respect human rights in the context of land deals, it does not consistently apply these same standards to its own policies and programming.⁴⁴⁰ To more effectively address the risks and mitigate the harms of land deals, the World Bank should 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.⁴⁴¹

Investor home states, too, can play an important regulatory role. Home states provide extensive political and financial support to investors⁴⁴² and in that capacity can require investors to disclose standardized information on the environmental, labor, and human rights impacts of their investments.⁴⁴³ These regulations would allow for direct monitoring of investors by home states and would increase investors' accountability to civil society in both home and host states.⁴⁴⁴ Studies have shown that mandatory disclosure policies can improve environmental outcomes, though the results have been mixed.⁴⁴⁵ Efforts must also be made to address the factors that drive large-scale land transfers, such as biofuel subsidies and mandates,⁴⁴⁶ and speculative investments in agricultural

⁴⁴⁰ Galit Sarfaty explains the dissonance between rhetoric and reality as symptomatic of the World Bank's organizational culture. Although rhetorically the World Bank has been more mindful of the need to consider human rights in its operations, these concerns are not systematically incorporated in staff decision-making or consistently considered in lending operations. Sarfaty, *supra* note 419.

⁴⁴¹ In October 2012, Oxfam International called on the World Bank to institute a six-month freeze on investments involving large-scale land acquisitions on the reasoning that it would "create space to develop policy and institutional protections to help ensure that no Bank-supported project resulted in land-grabbing." OXFAM, *supra* note 153, at 3. Citing food production concerns, the World Bank Group rejected the call for a moratorium, arguing that the best way to approach the issue was to work with relevant stakeholders, "while continuing to offer advice and assistance to governments and investors to ensure positive outcomes and encouraging responsible investments." Press Release, World Bank, World Bank Group Statement on Oxfam Report, "Our Land, Our Lives" (Oct. 4, 2012), <http://www.worldbank.org/en/news/2012/10/04/world-bank-group-statement-oxfam-report-our-land-our-lives>. The Bank asserted that it does not support "acquisitions which take advantage of weak institutions in developing countries or which disregard principles of responsible agricultural investment," World Bank Group Statement on Oxfam Report, *supra*, but case studies and reports cited throughout this Article suggest otherwise. Moreover, since 2008 alone, no less than "21 formal complaints have been brought by communities affected by Bank investments that they say violated their land rights." OXFAM, *supra* note 153, at 4 (citing case files on the IFC's Compliance Advisor/Ombudsman site and the World Bank's Inspectional Panel site).

⁴⁴² See *supra* text accompanying notes 62–63.

⁴⁴³ 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, *supra* note 288, at 881.

⁴⁴⁴ Others have called for greater transparency in land investment contracts, suggesting that home states could introduce disclosure requirements for agricultural investors. Such a provision could mirror the Disclosure of Payments by Resource Extraction Issuers in the U.S. Dodd-Frank Act, which requires oil, gas, and mineral companies listed on the U.S. Securities and Exchange Commission to publicly disclose their payments to the U.S. and foreign governments. See Oakland Inst. 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>.

⁴⁴⁵ 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).

⁴⁴⁶ 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

commodities,⁴⁴⁷ farmland, and related infrastructure.⁴⁴⁸

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 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.⁴⁴⁹ Even further, additional chapters could be included to outline the obligations of investors, home states, and host states alike.⁴⁵⁰ If heeded, these recommendations could begin to remedy accountability gaps in the investment framework on the international plane, in service of protecting rights on the domestic plane.⁴⁵¹

29, 2012). In October 2012, the European Union announced that it planned to cut its biofuel mandate for 2020 in half (from ten percent of total European Union transport energy demand to five percent). While the Special Rapporteur noted that the plans were "a major turning point," he emphasized that they did not "go far enough," adding that governments should put "food security first" and should support small-scale models where "biofuel production strengthens local food producers and food systems, rather than uprooting them." *In a World Hungry for Biofuels, Food Security Must Come First*, GUARDIAN (London) (Oct. 17, 2012), <http://www.guardian.co.uk/global-development/poverty-matters/2012/oct/17/world-hungry-biofuels-food-security>.

⁴⁴⁷ In the United States, for example, 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); see also U.N. Special Rapporteur on the Right to Food, *Food Commodities Speculation and Food Price Crises: Regulation to Reduce the Risks of Price Volatility*, 7 (Briefing Note No. 2, Sept. 2010), available at http://www.kontextwochenzeitung.de/fileadmin/user_upload/2012/5/23052012/UN-Nahrungsmittelspekulation.pdf (calling for higher regulation of commodities, including the separation of markets for commodity derivatives and financial derivatives).

⁴⁴⁸ Home states could consider creating incentives for investment 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 IIED, FARMS AND FUNDS, *supra* note 67, at 4.

⁴⁴⁹ 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 its interpretation); HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATORS' HANDBOOK 2 (2005), 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).

⁴⁵⁰ See COSBEY ET AL., *supra* note 449, at 34 (noting that inclusion of a chapter that references human rights obligations makes these rights concrete rather than illusory).

⁴⁵¹ 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. See JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 375–77 (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). In practice, these conflicts are often resolved in favor of the investor as states try to incentivize greater investment. 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).

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

In May 2012, following years of negotiations and deliberations that involved the active participation of social movements and civil society groups, the 125 member countries of the Committee on World Food Security endorsed the “Voluntary Guidelines on Governance of Tenure of Land, Fisheries and Forests in the context of national food security.”⁴⁵² The Guidelines call on states to “improve the governance of tenure of land, fisheries and forests,” “with an emphasis on vulnerable and marginalized populations” and with the “goals of food security and progressive realization of the right to adequate food.”⁴⁵³ Addressing the specific issue of large-scale land transactions, the Guidelines call on states to:

[P]rovide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards could include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval. States should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure right holders.⁴⁵⁴

The Guidelines additionally call on states to consider redistributive reforms as a means of facilitating “broad and equitable access to land and inclusive rural development.”⁴⁵⁵

The adoption of the Voluntary Guidelines represents a strong endorsement of the agrarian reforms promoted by the rights-based approach. They also represent a clear repudiation of the philosophy that land distribution should be purely market-driven, or that large-scale industrialized agricultural production can ensure the developmental and food security needs of the planet in a sustainable and equitable way. In order for these important Guidelines to take hold, however, the World Bank Group must first reform its own approach to land. The development of land markets and the facilitation of large-scale land transfers can no longer remain the default policy option, and should not be imposed automatically without an understanding of how these policies affect the human rights and development needs of a range of stakeholders, in both the immediate and long term.⁴⁵⁶

In many respects, the use of satellite imagery to identify investment-worthy sites stands as a metaphor for the Bank’s current approach. Technocrats, physically

⁴⁵² See VGGT, *supra* note 51.

⁴⁵³ *Id.* ¶ 1.1.

⁴⁵⁴ VGGT, *supra* note 51, ¶ 12.6.

⁴⁵⁵ VGGT, *supra* note 51, ¶ 15.1. The Guidelines add that states should “ensure that the reforms are consistent with their obligations under national and international law,” and that “redistributive land reform programmes [should] provide the full measure of support required by beneficiaries, such as access to credit, crop insurance, inputs, markets, technical assistance in rural extension, farm development and housing.” *Id.* ¶¶ 15.4, 15.8.

⁴⁵⁶ See Trzcinski & Upham, *supra* note 311, at 1 (using the experience of Cambodia to illustrate the practical problems of instituting a one-size-fits-all model of land reform).

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.

The Bank additionally assumes that the trade-offs inherent in large-scale land transfers are necessary to service agricultural productivity and efficiency goals. But on this point, and as analyzed in Part III.A.2.b, rights and productivity goals can be seen to converge: Specifically, more secure, sustainable, and equitable access to land for rural communities can help ensure local communities' rights while also supporting broader economic growth and food security goals.⁴⁵⁷ Moreover, supporting agrarian policies that favor small-scale farmers, including those that redistribute land to benefit small farmers, directly serves the World Bank's food security efforts: Of the nearly 1 billion people hungry in the world today, approximately 500 million depend on small-scale agriculture. Small-scale farmers are struggling both because "the price they receive for their crops is too low and they are less competitive than larger production units"⁴⁵⁸ and because they "cultivate plots that are often very small—which makes the vast majority of them net food buyers . . ."⁴⁵⁹

International human rights law, too, must evolve. Although the international human rights framework offers many important tools for addressing the problems with land investments, further normative developments are needed to strengthen the ability of human rights law to support land users' rights. Specifically, international human rights law must evolve from an instrumentalist approach toward the development of a substantive right to land for those whose very survival depends on it.⁴⁶⁰

International human rights law guarantees only limited land rights. States cannot arbitrarily deprive people of property⁴⁶¹ and cannot evict settled communities

⁴⁵⁷ See *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 38; *supra* Part III.A.2.b. 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 162, at 46; see also WORLD BANK, AGRICULTURAL LAND REDISTRIBUTION: TOWARD GREATER CONSENSUS, Foreword (Hans P. Binswanger-Mkhize, Camille Bourguignon, & Rogier van der Brink eds., 2009), available at http://siteresources.worldbank.org/INTARD/Resources/Ag_Land_Redistribution.pdf (noting that land redistribution "holds the promise of significantly reducing poverty and increasing broad-based agricultural growth"). Still, the Bank prefers to support "market-led approaches that seek to match willing buyers and sellers," EVALUATIVE LESSONS, *supra* note 162, at 46, which may have some of the same pitfalls as land titling for poor communities.

⁴⁵⁸ *Special Rapporteur on the Right to Food* (Aug. 2010), *supra* note 146, ¶ 1.

⁴⁵⁹ *Id.*

⁴⁶⁰ See *Special Rapporteur on Adequate Housing*, *supra* note 385, ¶ 31 (calling on the U.N. Human Rights Council to "ensure the recognition in international human rights law of land as a human rights").

⁴⁶¹ The Universal Declaration of Human Rights guarantees the right to own property and prohibits the arbitrary deprivation of property. Universal Declaration of Human Rights, *supra* note 201. 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.

that rely on a piece of land but lack legal title to it, without first meeting certain conditions.⁴⁶² The right to property, however, protects the rights of existing property owners. It does not protect the majority of those who are affected by land deals: those who are landless and those whose relationship to land is difficult to formalize in legal terms.⁴⁶³ And even the general bar against eviction can easily be circumvented. States have broad discretion to expropriate land in the public interest, as explored in Part III.B.⁴⁶⁴

In sum, international human rights law does not provide sufficient normative support to individuals and communities affected by land deals suggesting that greater normative development is needed. Moreover, if access to land continues to be given primarily instrumental consideration—as an asset that serves as a gateway to the realization of other rights—then states can continue to undermine land access by claiming that there are other means to satisfy these corollary rights.⁴⁶⁵

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.⁴⁶⁶ In this view, the value of land arises out of the relationship 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. 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 particular histories, cultures, and self-limited identities that are not necessarily

5(d)(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), Sept. 3, 1981, 1249 U.N.T.S. 513, 19 I.L.M. 33 (1980).

⁴⁶² *Large-scale Land Acquisitions and Leases*, *supra* note 70, at 9. See also *supra* note 385.

⁴⁶³ See Borras & Franco, *supra* note 76, at 25 (explaining how land reforms should be implemented to benefit the landless and rural poor); Jennifer Franco, *Making Land Rights Accessible: Potentials and Challenges of a Human Rights Approach to Land Issues*, TRANSNAT’L INST., Apr. 2006, at 4, available at www.tni.org/archives/docs/200702051733154350.pdf (quoting an argument by Sofia Monsalve 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”) (citation omitted).

⁴⁶⁴ See *supra* notes 385–87 and accompanying text.

⁴⁶⁵ See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384–85 (1984) (arguing that rights suffer from political disutility, in the sense that “[i]f 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”).

⁴⁶⁶ See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 14, June 27, 1989, ILO Doc. C169, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> (requiring States Parties to guarantee to indigenous peoples the right to own and protect the lands they have traditionally occupied). For additional land and resource-related rights, see also *id.* arts. 1, 13, 15, 16; Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 26(1), U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (stating that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”). For additional land and resource-related rights, including the requirement to secure the free, prior, and informed consent of indigenous peoples, especially where relocation is concerned, see also Declaration on the Rights of Indigenous Peoples, *supra*, arts. 10, 26(2), 26(3), 28, 29, and 32. The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly but is not legally binding. See Elisabeth Wickeri & Anil Kalhan, *Land Rights Issues in International Human Rights Law*, 4 MALAY. J. HUM. RTS. 16, 18–19 (2010) (offering an overview of indigenous peoples’ land and resource-related rights under international law).

analogous to all communities and individuals affected by land investments.⁴⁶⁷ 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.⁴⁶⁸

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, implementing a substantive right to land would remain highly contested.⁴⁶⁹ Still, additional normative clarity could provide a stronger foundation to support calls for land redistribution. It could also fortify the struggles of social movements and set a benchmark for states and IFIs as they pursue essential agrarian reforms. Collectively, these developments would help empower rural communities and the social movements that support them. These developments would also help establish a more sustainable framework that addresses 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 purchase or lease. Land transfers are taking place in environments characterized by acute poverty, food insecurity, and a lack of oversight and regulation. The negative impacts on host communities are now well documented. Food, financial, and energy crises are growing and the resulting commercial pressures on agricultural land are not likely to diminish any time soon. In the face of this likely future, strategies to protect host communities' rights 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 examined both approaches.

I argued that 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. The market-plus approach reframes rights violations as risks and balances these risks against the benefits of agricultural investment—benefits that are touted with unwarranted enthusiasm. I argued that this balancing act undermines the status and vindication of rights. It 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.

⁴⁶⁷ See Lustig & Kingsbury, *supra* note 244, at 409 (noting that “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”).

⁴⁶⁸ For instance, the indigenous rights framework provides that the right to land need not be (and indeed should not be) a universal right. Instead, the right should be limited to specific communities that have a specific relationship with the land. Similarly, see text *supra* note 375, on the Special Rapporteur's suggestion that the “free, prior, and informed consent” standard that normally attaches to indigenous peoples be extended to other communities having a similarly strong relationship to land.

⁴⁶⁹ See Franco, *supra* note 463, at 12 (explaining, for example, that “the implementation of redistributive land laws . . . has proven to be complicated, messy and extremely difficult,” a result that has been attributed to competing legal frameworks and strong anti-reform elite resistance).

I argued that the grounding of the rights-based approach in international human rights law establishes a normative baseline for assessing land investments. International human rights law sets crucial standards that repudiate rights violations while addressing key concerns around the distribution of benefits and resources. When assessed against states' human rights obligations, the nebulous language of risks and benefits also gives way to more concrete assessments of whether large-scale land transfers violate rights or contribute to their realization.

Access to land is particularly important in the debate between the market-plus approach and the rights-based approach. Land is instrumentalized under both approaches, but there are key differences in each framework's approach to land distribution. The market-plus approach takes current distributions of land as the baseline and relies on the market to distribute land to the most efficient producer. In contrast, the rights-based approach, which values land as a means to promote a broad range of rights, places great value on how land is distributed and to whom.

I argued that 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. Commodification of land can also reinforce existing hierarchies and further concentrate rural land in a manner that exacerbates tenure insecurity and undermines food productivity goals. Unlike the market-plus approach, the rights-based approach seeks to address the distributional impacts of the land market. Specifically, the rights-based approach prioritizes alternatives to large-scale land transfers, calls for measures to improve tenure security, and, in cases of highly unequal land distribution, this approach promotes a state-led process of land redistribution for the benefit of small-scale farmers. These policies have been shown to have substantial benefits. With proper support, small-scale farming could strengthen food security, while more equitable land distribution could contribute to economic growth.

I also raised and rebutted salient critiques of a "rights-as-trumps" approach. Specifically, I considered whether a human rights framework could accommodate necessary trade-offs and manage increasingly complex and interdependent global processes in which the rights of multiple communities are at stake. I argued that international human rights law provides a robust normative framework that sets specific thresholds to help guide states as they manage trade-offs between various socioeconomic goals. These thresholds are notably absent from the market-plus approach, which endorses trade-offs between concrete rights and vague, uncertain gains.

The rights-based approach also attempts to address conflicts that may arise among rights-holders. 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 prioritizes the needs of the most vulnerable communities affected by land investments. The market-plus approach falls short in this regard: Its framework does not give the rights of these communities normative value; instead it emphasizes average utility gains.

This Article also considered the potential of each approach to effectively regulate land deals and protect land users' rights in light of the significant power dynamics at play in land transactions. I found that both frameworks emphasize procedural safeguards to protect land users' rights. 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 similarly struggles at the point of implementation. Like the market-plus approach, the rights-based approach offers a range of procedural safeguards that may fail to protect land users' rights when power dynamics are entrenched.

I argued that an essential problem with both the market-plus approach and the rights-based approach is that their proposed legal, and in particular procedural, reforms rely on the host state's will to implement these reforms. But as the experience of large-scale land transfers makes clear, such deference and faith in states to design and implement processes and policies that are truly responsive to land users' needs is not warranted. Also unwarranted 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 on legal reforms. 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 and between procedural safeguards and substantive outcomes.

Resistance strategies and bottom-up initiatives are developing to contest the global rush for agricultural land. Social movements are gaining ground, but protesting communities frequently struggle for greater agency over local resources and for more lasting input into decision-making around agricultural policies; policies that are increasingly being shaped by a multitude of global actors. The Article therefore concluded with consideration of essential institutional reforms to support bottom-up initiatives and help empower affected communities and secure rights guarantees. I argued that instead of relying on ineffective procedural safeguards, large-scale land transfers must be subject to far greater substantive restrictions and regulation. 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 engage in a more regulatory role; one cannot rely on investors to police themselves. International actors must also address the factors that are driving these deals, and must reform underlying investment frameworks to better incorporate human rights concerns.

More fundamentally, I argued that in order to truly empower affected communities, the World Bank Group must reform its approach to land by supporting agrarian policies that favor small-scale farmers, including redistributive reforms that facilitate more equitable access to land (i.e., the reforms promoted by the rights-based approach). I argued that these reforms can help ensure local communities' rights while also supporting broader economic growth and food security goals. International human rights law, too, must normatively evolve to develop a substantive right to land for those communities who depend on it for their very survival. I argued that collectively, these developments could help establish a more sustainable framework that addresses 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 groups across states have a particular role to play in urging domestic and global actors to undertake key reforms. Even if these actors are unmoved by a sense of legal obligation, they should be compelled to undertake these reforms as a matter of self-preservation. 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 the short term, these land deals have already had a discernible negative impact on the human rights of host communities. In the long term, how we invest in agricultural land will have enormous implications for transnational food and climate crises and for the capacity of agricultural land to serve increasingly global needs. In the end, we need to free ourselves of paradigms that preclude us from resolving the problems we face as a global community. We must change how we think about land investments, and insist on strategies that ensure sustainable and rights-protecting outcomes as we move forward.