

# The Green Rush: The Global Race for Farmland and the Rights of Land Users

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## The Green Rush: The Global Race for Farmland and the Rights of Land Users

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*The increased volatility of prices of agricultural commodities on international markets and the merger between the energy and food commodities markets have led to a sudden surge of interest in the acquisition or lease of farmland in developing countries. The result is “land-grabbing”: a global enclosure movement in which large areas of arable land change hands through deals often negotiated between host governments and foreign investors with little or no participation from the local communities who depend on access to those lands for their livelihoods. While recognizing that these transactions should be more closely scrutinized, some commentators see opportunities in this development, either because it means more investment in agriculture and thus productivity gains, or because it will accelerate the development of a market for land rights that could benefit current land users, provided their property rights are recognized through titling schemes. This Article questions these views. Based on an analysis of the relationship to property rights of different categories of land users in the rural areas in developing countries, this Article argues that the poorest farmers will be priced out from these emerging markets for land rights, and that the interests of those depending on the commons will be ignored. I suggest that there are other ways to protect security of tenure: anti-eviction laws, tenancy statutes, and policies aimed at ensuring more equitable access to land. Although measures such as these require a disaggregation of property rights and an abandonment of the Western understanding of property as necessarily implying transferability, they may offer more promising solutions to the rural poor.*

### INTRODUCTION

This Article explores the global phenomenon of “land-grabbing”: the buying or leasing of large tracts of farmland, particularly in Sub-Saharan Africa, by governments or private investors. While this phenomenon is not entirely unprecedented, it has been developing at an accelerated pace since the 2007–2008 global food price crisis and has considerable implications for local communities in target countries.

Since the governments in many target countries are generally weak and provide minimal protection of property rights, many fear the recent wave of large-scale investments in land will lead to further marginalization and pov-

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erty in rural areas of the developing world and result in a net transfer of wealth from the poor to the rich. In light of this fast-changing situation, the author considered it necessary, in his official capacity as the U.N. Special Rapporteur on the Right to Food, to clarify the human rights implications of land-related investments in order to make it clear that governments have obligations that they cannot simply ignore in the name of attracting capital.<sup>1</sup> In parallel, the World Bank, teaming with three U.N. agencies, has proposed a set of seven principles aimed at ensuring that these investments do not negatively affect local communities and improving the transparency and accountability of the process of negotiation between investors and the target state governments.<sup>2</sup>

The Principles on Responsible Agricultural Investment proposed by the World Bank and others provide a useful checklist of the main problems that could result from large-scale investments in land. But they have attracted criticism from two separate sides. Some of the governments most directly concerned, whether as buyers of land or as sellers, complained that the Principles were developed following a non-inclusive process.<sup>3</sup> On the other side, many grassroots organizations, particularly those representing small farmers, denounced the principles as legitimizing deals that should be unacceptable in principle, and argued that they would merely constitute a checklist, unable, by itself, to slow down a trend they saw as destroying peasantry in the

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1. See 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*, Human Rights Council, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 28, 2009) (by Olivier De Schutter).

2. The World Bank et al., *Principles for Responsible Agricultural Development (RAI) that Respect Rights, Livelihoods and Resources*, KNOWLEDGE EXCHANGE PLATFORM FOR RESPONSIBLE AGRO-INVESTMENT (RAI), available at <http://www.responsibleagroinvestment.org/rai/node/256> (last visited Mar. 6, 2011). These principles are that: (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 making associated investments are transparent, monitored, and ensure accountability by all stakeholders, thereby improving the business, legal, and regulatory environment"; (4) "all those materially affected by such investments are consulted and agreements resulting from consultations are recorded and enforced"; (5) "projects are economically viable, respect the rule of law, reflect industry best practice, and result in durable shared value"; (6) "investments generate desirable social and distributional impacts and do not increase vulnerability"; and (7) "environmental impacts are quantified and measures are taken to encourage sustainable resource use while minimizing and mitigating negative impacts." These principles were developed jointly by the World Bank, Food and Agriculture Organization ("FAO"), the International Fund for Agricultural Development ("IFAD"), and the U.N. Conference on Trade and Development ("UNCTAD").

3. In his official capacity as Special Rapporteur, the author chaired the roundtable of investments in land at the 36th session of the Committee of World Food Security which convened in Rome from October 12–16, 2010. The positions referred to are those that were expressed publicly in this forum, as well as in other international meetings on this issue. For an overview of the positions adopted, see Comm. on World Food Sec., Policy Roundtable Land Tenure and International Investment in Agriculture, Thirty-Sixth Sess. at ¶¶ 55–57, Doc. CFS:2010/7 (Oct. 11–14, 16, 2010), available at <http://www.fao.org/docrep/meeting/019/k8929e.pdf>. For the result of the discussions, see Comm. on World Food Sec., Final Report, Thirty-Sixth Session, Doc. CFS:2010/ FINAL REPORT (Oct. 2010), available at <http://www.fao.org/docrep/meeting/020/k9551e.pdf>.

Global South.<sup>4</sup> At the time of writing, the stalemate had been continuing for over a year. At its thirty-sixth annual session held in Rome in October 2010, the Committee on World Food Security (“CFS”)—a recently reformed forum in which governments, international agencies, civil society organizations, and the private sector work towards achieving a consensus on the measures needed to achieve global food security<sup>5</sup>—decided “to start an inclusive process of consideration of the [Principles on Responsible Agricultural Investment] within the CFS.”<sup>6</sup> Whether agreement will be found on how to address the question of large-scale acquisitions or leases of land remains to be seen.

This Article seeks to contribute to this discussion by linking 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 Global South. For, contrary to what the Principles on Responsible Agricultural Investment would seem to suggest, the issue is not only one of regulation that calls for improved governance and more transparency in the “land deals” that are developing; it is also one of agricultural development. Indeed, how we protect the rights of current land users will determine the type of agriculture that will be promoted. This Article argues that, if the current challenge of large-scale land acquisitions leads to the globalization of Western-style property rights, the ultimate result will be a more capitalized form of agriculture and more land concentration, when what we need instead is to democratize access to land and to support reforms that will benefit small-scale farmers and thus favor broad-based rural development.

The expansion of a classic understanding of property rights that results in a market for land rights should not be seen as the only way to achieve effective security of tenure. Instead, this Article argues, there are other ways of

4. See, e.g., THE GLOBAL CAMPAIGN FOR AGRARIAN REFORM, WHY WE OPPOSE THE PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT (2010), available at [http://www.landaction.org/spip/IMG/pdf/FINAL\\_Engl\\_Why\\_we\\_oppose\\_RAI.pdf](http://www.landaction.org/spip/IMG/pdf/FINAL_Engl_Why_we_oppose_RAI.pdf). In addition, both constituencies may have reasons to find suspect the presentation by the World Bank of such a set of principles when the International Finance Corporation, part of the World Bank Group, and the Foreign Investment Advisory Service have a consistent record of encouraging developing countries to favor inward foreign investment by cutting down administrative requirements and consultations that might slow down or restrict investments. See SHEPARD DANIEL WITH ANURADHA MITTAL, THE OAKLAND INST., (MIS)INVESTMENT IN AGRICULTURE: THE ROLE OF THE INTERNATIONAL FINANCE CORPORATION IN GLOBAL LAND GRABS 6 (2010), available at [http://oaklandinstitute.org/pdfs/misinvestment\\_web.pdf](http://oaklandinstitute.org/pdfs/misinvestment_web.pdf).

5. CFS is a FAO intergovernmental committee that was transformed at the end of 2009 into an inclusive forum. Although governments are the only voting members on any decisions to be adopted, U.N. agencies working in the area of food security, international financial institutions including the World Trade Organization, civil society organizations, and the private sector participate in reaching an international consensus on the measures that are desirable in order to improve global food security. Comm. on World Food Sec., Reform of the Committee on World Food Security, Doc. CFS:2009/2Rev. 2 (Oct. 2009), available at <ftp://ftp.fao.org/docrep/fao/meeting/018/k7197e.pdf>. It has been described as “the foremost inclusive international and intergovernmental platform for a broad range of committed stakeholders to work together in a coordinated manner and in support of country-led processes towards the elimination of hunger and ensuring food security and nutrition for all human beings.” *Id.* at ¶ 4.

6. Comm. on World Food Sec., Final Report, Thirty-Sixth Session, Doc. CFS:2010/FINAL REPORT (Oct. 2010), available at <http://www.fao.org/docrep/meeting/020/k9551e.pdf>.

protecting land users that may better correspond to their needs and that may fit better with the legal traditions of many developing countries, particularly in Africa. It is by exploring these alternative arrangements by which land users can be protected that we can avoid situations in which, in the absence of adequate support, small-scale farmers will lose their land after having mortgaged it or as a result of distress sales. And it is through such arrangements that the rights of land users that depend on communal lands for their livelihoods—including herders, fishers, and forest-dwellers—can be better taken into account.

Part I of this Article discusses the background relationship between states and markets in agriculture, specifically why there has been too little investment in agriculture in the past and why both private and public investors are now scrambling to acquire farmland. Part II identifies other drivers of the process of large-scale acquisitions of land and summarizes the existing commercial pressures on farmland, describing the terms of the current competition between various uses of land.

Parts III and IV then provide an assessment of the dynamics created by this “green rush.” Part III examines the threat the current race for farmland represents for members of local communities, whose livelihoods depend on their access to land and water. It considers the lack of security of tenure of small farmers and asks whether individual titling schemes are the most appropriate way to address this. It then turns to the situation of indigenous peoples, whose land rights have been recognized explicitly under international law, and to the situation of pastoralists and fishers, who depend on their access to commons for their subsistence. The section concludes with a discussion of the dangers of importing a Western concept of property rights to developing regions where customary forms of tenure are accorded a high degree of legitimacy, and where communal rights play an important role as safety nets for many rural poor.

Part IV describes the choices that the governments of target countries are facing. The “transition scenario” sees the development of large-scale plantations by the arrival of foreign investors as an opportunity to accelerate the industrialization of farming and the exit from agriculture of small farmers, who are unable to move beyond subsistence agriculture into commercial farming. The “coexistence scenario” sees large-scale agro-industrial farming and small-scale farming as complementary. The “reform scenario” prioritizes small-scale farming and proposes that foreign investment be channeled towards making that type of farming more viable and increasing its levels of productivity. While not denying that the “coexistence scenario” might work in certain cases, this Article advocates in favor of the “reform scenario,” noting the benefits that could result from expanding support to small-scale farmers, in particular by strengthening their access to land and water.

Part V concludes. It proposes to broaden the discussion beyond the current focus on how local communities should be consulted and their rights

respected. It argues that just as there is far more to security of tenure than property rights as understood in the Western legal tradition, there is far more to investment in agriculture than large-scale plantations; and just as the concept of property needs to be disaggregated into its various components to define the status of tenants and the users of the commons, investors and host governments need to explore with the local communities the full range of business models available to link producers to buyers and consumers.

## I. THE RELATIONSHIP BETWEEN STATES AND MARKETS IN AGRICULTURE: A BRIEF HISTORY

The relationship of the state to the agricultural sector has followed a similar pattern in many countries, especially those located in Sub-Saharan Africa where the current wave of land-grabbing is taking place. The 1960s and 1970s were characterized by a strong state-led type of agricultural development. Governments were eager to provide urban populations with affordable food, or to export raw commodities in order to finance import substitution policies.<sup>7</sup> Farmers were grouped into state-led cooperatives; they were often told what to grow, and how to do it; and they were obliged, or strongly encouraged, to sell at prices fixed by the state. In exchange, the producers were supported by (sometimes erratic) extension services. They were provided with certain basic inputs, and publicly funded agricultural research gave them access to quality seeds.<sup>8</sup> But these farmers and producers were also often the captives of a predatory state that used them for its own purposes. In order to buy political support from the cities and to build its nascent industries—what Lipton famously described as the “urban bias”<sup>9</sup>—governments typically paid very low prices for the crops produced, thus producing massive rural poverty and accelerating rural migration.<sup>10</sup> Many state

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7. Import substitution policies refer to policies that largely underdeveloped countries pursued in order to increase production of industrial products and decrease imports. They typically included high tariffs and quotas against imports as well as subsidies for domestic producers. For agricultural producers in these countries, it often meant having to sell at low prices (as a form of subsidy to the urban populations), or having to export in order for the government to have access to foreign currencies, while at the same time, raising the costs to farmers of the inputs they needed to import (machinery and fertilizers). See, e.g., HA-JOON CHANG, *BAD SAMARITANS: RICH NATIONS, POOR POLICIES, AND THE THREAT TO THE DEVELOPING WORLD SECRETS* 22–23 (2007).

8. See Johan F.M. Swinnen, Anneleen Vandeplass & Miet Maertens, *Liberalization, Endogenous Institutions, and Growth: A Comparative Analysis of Agricultural Reforms in Africa, Asia and Europe*, 24 *THE WORLD BANK ECON. REV.* 412, 418–19 (2010). On seeds specifically, see, e.g., Jagtar S. Dhiman et al., *Improved Seeds and Green Revolution*, *J. OF NEW SEEDS*, 2010, at 65, 65 (describing the role of the Punjab Agricultural University in the development of improved varieties/hybrids of crops, and in the supply of these varieties to farmers).

9. MICHAEL LIPTON, *WHY POOR PEOPLE STAY POOR: A STUDY OF URBAN BIAS IN WORLD DEVELOPMENT* (1977).

10. See, e.g., MARTIN MEREDITH, *THE STATE OF AFRICA: A HISTORY OF FIFTY YEARS OF INDEPENDENCE* 279–80 (2005). The author notes that, following independence, governments in Africa

institutions were characterized by corruption, political clientelism, and mismanagement.<sup>11</sup>

It is against this background that we can understand the nature of the changes that took place in the 1980s, with the introduction of structural adjustment policies in a number of developing countries. These policies aimed, in general, to improve the macro-economic conditions in heavily indebted poor countries and to achieve a better balance of public budgets. In the agricultural sector, they were premised on the idea that the farmers henceforth should respond to the price signals from the market. Public interventions, like the establishment of commodity boards buying the crops at certain predefined prices, were seen as market distortions. Agriculture should be freed from state interference; the private sector, it was hoped, would take over, investing where investments were needed, and encouraging the production of crops that markets wanted.<sup>12</sup>

The impacts on agriculture of adjustment policies were mixed at best.<sup>13</sup> Certain assessments of adjustment lending concluded that the rural poor benefited. Summers and Pritchett, for instance, note:

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. . . were determined to keep down urban costs for fear of political protest. Governments thus paid low prices for food crops to provide urban consumers with cheap food. They also maintained overvalued exchange rates to reduce both the cost of food imports, like wheat, corn and rice favoured by the urban elite, and the cost of other goods they cherished—like cars, household appliances and fashionable attire. The effect was to penalise farmers at every turn. Farm exporters lost income; food producers found it difficult to compete against subsidised imports. Many farmers obtained less than half of the real value of their crops. In some cases, farmers were not paid enough even to cover their costs of production; cocoa producers in Ghana and sisal growers in Tanzania were two examples. . . . [R]ice growers in Mali were paid by the government 63 francs for a kilo of rice that cost them 80 francs to produce.

*Id.*

11. For a strong indictment of these policies, see ROBERT H. BATES, *MARKETS AND STATES IN TROPICAL AFRICA* (1981); see also ANNE O. KRUEGER, MAURICE SCHIFF & ALBERTO VALDÉS, *THE POLITICAL ECONOMY OF AGRICULTURAL PRICING POLICY* (1991); WORLD BANK, *WORLD DEVELOPMENT REPORT 1983* (1983); Anne O. Krueger, Maurice Schiff & Alberto Valdés, *Agricultural Incentives in Developing Countries: Measuring the Effect of Sectoral and Economywide Policies*, 2 *WORLD BANK ECON. REV.* 255–72 (1988); Anne O. Krueger, *Government Failures in Development*, 4 *J. ECON. PERSP.* 9–23 (1990) (denouncing the naïveté of the often idealized view of the State among development economists). The comparative studies coordinated by Krueger, Schiff, and Valdés review the distortions in agricultural subsidies that, in many developing countries, negatively impacted farmers in the 1960s and 1970s, until into the mid-1980s.

12. For a detailed study of this liberalization process, see, e.g., Swinnen et al., *supra* note 8, at 9–11. The price and market liberalization followed prescriptions of the World Bank. See, e.g., WORLD BANK, *SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH* 91, 96 (1989) (noting that flexible prices will incentivize farmers to follow the signals of the market and switch to crops for which there is a demand and which will fetch higher prices; and advocating the removal of subsidies on inputs, which ‘only encourages waste’).

13. For assessments, see *BEYOND ECONOMIC LIBERALIZATION IN AFRICA: STRUCTURAL ADJUSTMENTS AND THE ALTERNATIVES* (Kidane Mengisteab & B. Ikubolajeh Logan eds., 1995); *THE IMPACT OF STRUCTURAL ADJUSTMENT ON THE POPULATION OF AFRICA* (Aderanti Adepoju ed., 1989); *STRUCTURAL ADJUSTMENT & AGRICULTURE: THEORY & PRACTICE IN AFRICA & LATIN AMERICA* (Simon Commander ed., 1989); Jane Harrigan & Paul Mosley, *Evaluating the Impact of World Bank Structural Adjustment Lending: 1980–1987*, 27 *J. DEV. STUD.* 63 (1991).

Elimination of the bias against tradables, agricultural products in particular, raises output prices and rural wages which benefits the rural poor. Elimination of the bias in favor of capital-intensive import substitutes moves the economy onto a more labor-intensive development path, raising unskilled wages. The relative price changes help the poor generally, though they lower incomes of relatively more concentrated and visible groups.<sup>14</sup>

However, the removal of subsidies to agricultural producers and the dismantling of extension services were shocks with which many smaller farmers were unable to cope.<sup>15</sup> In addition, the lowering of import tariffs led to the dumping of agricultural products from Organization for Economic Cooperation and Development (“OECD”) countries, at often highly subsidized prices, on the local markets, in many instances directly competing with the local farmers.<sup>16</sup> Since, in contrast to the larger, more capitalized producers, the small-scale farmers were unable to adapt—and in particular, to shift to the production of crops aligned with the price signals of the market—the net result of the policies of the 1980s was that inequality and poverty in the rural areas further increased.<sup>17</sup> Many small farmers were relegated to subsistence agriculture, with neither the incentives nor the possibility to produce beyond what was needed to feed their families. Some took up work on large plantations. Many others migrated to cities, on a seasonal or more permanent basis, in search of better opportunities.<sup>18</sup>

Part of the problem of the 1980s and 1990s was that neither the private sector nor governments invested much in agriculture. Under adjustment

14. Lawrence H. Summers & Lant H. Pritchett, *The Structural-Adjustment Debate*, 83 AM. ECON. REV. 383, 385 (1993) (citing MAURICE SCHIFF & ALBERTO VALDES, *THE PLUNDERING OF AGRICULTURE IN DEVELOPING COUNTRIES* (1992)). In this well-known paper, Summers and Pritchett summarize and debate the findings of the World Bank Review of Adjustment Lending. See WORLD BANK, COUNTRY ECON. DEP'T, POLICY AND RESEARCH SERIES NO. 22, *ADJUSTMENT LENDING AND MOBILIZATION OF PRIVATE AND PUBLIC RESOURCES FOR GROWTH* (1992).

15. See Howard Stein, *World Bank Agricultural Policies, Poverty and Income Inequality in Sub-Saharan Africa*, CAMBRIDGE J. REGIONS ECON. & SOC'Y, Aug. 23, 2010, at 1, 9. Stein concludes that:

The market approach to agriculture has exacerbated poverty in rural areas and likely contributed to worsening income equality. . . . Richer farmers have access to credit, storage, and transportation. In contrast, poor farmers were penalized in the new system due to the removal of fertilizer subsidy, a lack of infrastructural support and access to extension and few marketing and storage options. Poor farmers are also less able to bargain effectively with private traders or use transportation or storage capacities to improve the timing and location of their sales.

*Id.*

16. See DAVID HALLAM, FOOD AND AGRICULTURAL ORGANIZATION, *THE STATE OF AGRICULTURAL COMMODITY MARKETS: 2009* (2009).

17. Comparing the data available for nineteen Sub-Saharan African countries for the period 1980–2000, Stein concludes that “nearly 75% of all countries witnessed a worsening of income distribution with an overall mean decline for the total sample of 14% to around 50.” Stein, *supra* note 15, at 2. He notes that the increase in inequality particularly affected the rural poor—small-scale farmers who suffer structural disadvantages in the agricultural markets. *Id.*

18. The major study on rural-urban migration is KEITH GRIFFIN, *THE POLITICAL ECONOMY OF AGRARIAN CHANGE: AN ESSAY ON THE GREEN REVOLUTION* (1974).

policies, the public sector in developing countries was simply incapable of intervening; by the late 1980s, the state had been so drastically downsized that, in the rural areas, it had become almost irrelevant.<sup>19</sup> Official development assistance (“ODA”) also moved away from agriculture, which donors did not see as offering a strong potential for development: in 2008, the World Bank reported that the share of ODA resources devoted to agriculture declined from 18% in 1979 to 3.5% in 2004, and that it declined in absolute terms from \$8 billion (in 2004 dollars) in 1984 to \$3.4 billion in 2004.<sup>20</sup> It was hoped that private investors would enter the stage, filling in the gaps. They did not. As a result of the huge subsidies provided to their producers by the governments of the OECD countries<sup>21</sup> and of the growth of highly competitive types of agriculture in certain developing countries, there was massive overproduction, and the prices of raw agricultural commodities on the international markets faced a structural decline since they had last peaked in 1973 and 1979.<sup>22</sup> In addition, despite the entry into force in 1995 of the Agreement on Agriculture as part of the agreements establishing the World Trade Organization, producers in many developing countries still faced high barriers impeding access to the high-value markets of OECD countries, related both to the tariffs imposed by these countries and

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19. As an indicator of this lack of investment, public spending on agriculture in fourteen agriculture-based countries, including twelve countries of Sub-Saharan Africa, decreased on average from 6.9% of GDP in 1980 to four percent in 2004. WORLD BANK, *WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT* 41 Table 1.3 (2007) [hereinafter WDR 2008: AGRICULTURE FOR DEVELOPMENT]. The table also indicates that this lack of investment occurred despite the fact that in agriculture-based countries, where seventy to eighty percent of the population typically depends on this sector, the share of agriculture in total GDP remained stable throughout the period, at an average of 28.9% for the fourteen countries concerned. *Id.* On the declining public support to agriculture, see SHENGGEN FAN, TEWODAJ MOGUES & SAMUEL BENIN, *INT’L FOOD POL’Y RES. INST., POLICY BRIEF NO 12, SETTING PRIORITIES FOR PUBLIC SPENDING IN AGRICULTURE AND RURAL DEVELOPMENT IN AFRICA* (2009).

20. WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 41.

21. Government support to farmers in OECD countries was \$258 billion in 2007, representing twenty-three percent of total farm receipts in these countries. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *AGRICULTURAL POLICIES IN OECD COUNTRIES: AT A GLANCE* 9 (2008). This is the lowest level of support since 1986 (when the estimates first were available) in proportion of the production value. But it still represents a very high level of support, against which developing countries are unable to compete. Kym Anderson & Dominique van der Mensbrugge, *Doha Merchandise Trade Reform: What is at Stake for Developing Countries?*, 20 *WORLD BANK ECON. REV.* 169–95 (2006) (estimating that developed-country agricultural policies cost developing countries \$17 billion per year, a cost equivalent to five times the recent levels of ODA to agriculture).

22. See HALLAM, *supra* note 16, at 12. Hallam states:

Up until 2006, the real cost of the global food basket had fallen by almost one-half in the previous 30 years, with prices of many foodstuffs falling on average by 2–3 percent per year in real terms. Technological advances greatly reduced the cost of producing foodstuffs and this, together with widespread subsidies in countries of the Organisation for Economic Cooperation and Development (OECD) that rendered more efficient and cheaper production elsewhere unprofitable, entrenched the role of a few countries in supplying the world with food. This supply-driven agricultural paradigm sent real prices spiralling downward on a trend lasting for decades.

*Id.*

to non-tariff barriers, including both public and private standards.<sup>23</sup> Why would private-sector businesses invest in agriculture in developing countries, where they would face highly unequal competition from producers located elsewhere, and where access to markets was so limited?<sup>24</sup> At the turn of the century, the result of these developments was massive rural poverty and the ruin of small-scale farmers. Disempowered politically, small farmers had been marginalized economically in a development process that was intended to reward competitiveness in the agricultural sector and that had never truly invested in them. In what had become a vicious cycle of self-fulfilling prophecies, the prejudice of the elites against the viability of small-scale farming was further reinforced as a result.

The lack of interest in agriculture began changing, slowly at first, in the early 2000s. As the globalization of the food supply chains accelerated, agri-food companies saw increasing direct investment at the production end as a means to lower their costs and ensure the long-term viability of their supplies.<sup>25</sup> Commodity buyers grew larger and more concentrated, and they sought to respond to the requirements of their food industry clients with increased vertical coordination, tightening their control over suppliers. While this mostly took the form of the use of explicit contracts (long-term arrangements with producers) or techniques such as preferred supplier lists, the acquisition of land for the development of large-scale plantations became increasingly popular, particularly in Asia.<sup>26</sup> Until 2009, investment in agricultural production remained negligible as a share of total inward foreign direct investment in developing countries. It began to rise significantly by 2005: according to the U.N. Conference on Trade and Development (“UNCTAD”), it increased from an average of \$600 million annually in 1990 to an average of \$3 billion in 2005–2007.<sup>27</sup>

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23. For a review of these obstacles and what would be required to overcome them, see 1 REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES, KEY ISSUES FOR A PRO-DEVELOPMENT OUTCOME OF THE DOHA ROUND (Alex F. McCalla & John Nash eds., 2007); see also Special Rapporteur on the Right to Food, *Mission to the World Trade Organisation*, U.N. Doc. A/HRC/10/005/Add.2 (Dec. 22, 2008) (by Olivier de Schutter).

24. As Hafez Ghanem notes:

Because global production levels are technically sufficient and because world food prices have long been low and stable, investment in agriculture has been steadily declining since the 1970s. As a result, the rate of growth of agricultural capital stock (ACS) in the world fell from 1.1 percent in 1975–1990 to 0.50 percent in 1991–2007.

Hafez Ghanem, *World Food Security and Investment in Agriculture*, INT’L ECON. BULL., Sept. 2009, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=23850>.

25. See generally, THOMAS REARDON ET AL., MICHIGAN STATE UNIVERSITY, SUPERMARKETS AND HORTICULTURAL DEVELOPMENT IN MEXICO: SYNTHESIS OF FINDINGS AND RECOMMENDATIONS TO USAID AND GOM (2007); Thomas Reardon et al., *Agri-food Industry Transformation and Small Farmers in Developing Countries*, 37 WORLD DEV. 1717 (2009); Thomas Reardon & Julio A. Berdegué, *The Rapid Rise of Supermarkets in Latin America: Challenges and Opportunities for Development*, 20 DEV. POL. REV. 317 (2002).

26. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2009: TRANSNATIONAL CORPORATIONS, AGRICULTURAL PRODUCTION AND DEVELOPMENT, ch. III (2009).

27. *Id.* at 111.

It was against this changing background that, in 2007–2008, the prices of agricultural commodities suddenly surged on international markets.<sup>28</sup> Various factors came into play, but because many interact with one another, they are difficult to disaggregate.<sup>29</sup> On the supply side, weather-related events in 2005 and 2006 led to worse-than-expected harvests in certain major cereal-exporting countries, although the overall level of production remained stable.<sup>30</sup> One might have expected the resulting price increases to lead to a rise in agricultural production, but agriculture needs time to adapt to price signals, because it requires new investments, the absorption of new technologies, or the switch to higher-priced crops. Moreover, in 2007–2008, the high cost of energy, both for production of food and for freight, hampered the ability of producers to respond to demand.<sup>31</sup> And in many regions, sudden increases in productivity were difficult to achieve. While important productivity gains still could be made in a number of developing countries, the ability of the agricultural sector to rebound is handicapped by farmers' insufficient access to credit and infrastructure, depleted soils, and, as mentioned above, a system of international trade in agricultural products that has largely decimated agricultural production in those countries since the 1980s.<sup>32</sup> Finally, the increase in the price of oil led to a corresponding rise in

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28. These evolutions are reflected in the real value of the FAO's extended Food Price Index, which the FAO has updated since 1990 (base 100) based on the weighted average of a total of 55 commodity price quotations falling into six groups (meat, dairy, cereals, oils and fats, and sugar). Between 2000 and 2005, the Food Price Index increased moderately at a rate of 1.3% per year. The rate of increase then reached 15% in 2006, and continued to climb in 2007 and 2008, resulting in a peak in June 2008 (224); the average price level in 2008 was 200. For the latest food price indexes, see FAO, *FAO Food Price Index*, available at <http://www.fao.org/worldfoodsituation/wfs-home/foodpricesindex/en/> (last visited Mar. 24, 2011).

29. See generally INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, HIGH FOOD PRICES: THE WHAT, WHO, AND HOW OF PROPOSED POLICY ACTIONS (2008); OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, BACKGROUND NOTE, GLOBAL FOOD CHALLENGES (2008); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RISING FOOD PRICES: CAUSES AND CONSEQUENCES (2008); JOACHIM VON BRAUN, THE WORLD FOOD SITUATION: NEW DRIVING FORCES AND REQUIRED ACTIONS (2007); JOACHIM VON BRAUN, IFPRI POLICY BRIEF, RISING FOOD PRICES: WHAT SHOULD BE DONE? (April 2008); WORLD BANK, RISING FOOD PRICES: POLICY OPTIONS AND WORLD BANK RESPONSE (2008); Donald Mitchell, *A Note on Rising Food Prices* (World Bank, Policy Research Working Paper No. 4682, 2008).

30. See KENNETH BALTZER, HENRIK HANSEN AND KIM MARTIN LIND, A NOTE ON THE CAUSES AND CONSEQUENCES OF THE RAPIDLY INCREASING INTERNATIONAL FOOD PRICES 2 (2008) (noting in 2008 that "the current high wheat prices are mainly caused by three consecutive years (2005–2007) of weather-induced harvest shortfalls in some of the most important exporting regions, Australia, Europe, Former Soviet Union and North America, at a time where wheat stocks are historically low").

31. In the United States for instance, "[p]roduction costs per acre for . . . corn, soybeans and wheat increased 32.3, 25.6 and 31.4 percent, respectively, from 2002 to 2007, according to the USDA's cost-of-production surveys." Mitchell, *supra* note 29, at 5. This increase was only partially offset by the increase in yields and is primarily the result of rising energy costs: Mitchell reports that, taken together, "fertilizer, chemicals, fuel, lubricants and electricity" contributed during this period to 13.4% of the production costs "for corn, 6.7 percent for soybeans and 9.4 percent for wheat per bushel." *Id.* at 5–6. In addition, transport costs mean that the wedge between domestic and export prices (at the port of departure) increase. *Id.*

32. For the impacts on producers in developing countries of distortions resulting from subsidies in OECD countries, see OLIVIER DE SCHUTTER, INTERNATIONAL TRADE IN AGRICULTURE AND THE

the cost of producing food, as the energy needs of fertilizers, pesticides, transportation, packaging, and processing, widened the wedge between farmgate prices and prices on international markets.<sup>33</sup> On the demand side, increased oil prices also led to a higher demand for agrofuel feedstock—particularly maize, soybean, and palm oil—creating a surge in the demand for grain and more competition for cropland between food, feed for livestock, and fuel.<sup>34</sup> The resulting tension between supply and demand was exploited by speculators in both the physical and derivatives markets, worsening the price impacts.<sup>35</sup>

The price increases of 2007–2008 were felt most dramatically by poor consumers in developing, net-food-importing countries, whose governments had little ability to cushion the impact of the higher prices of imports of commodities such as rice or wheat. The initial estimates were that the higher food and oil prices in 2007–2008 may have led to an increase in the number of people living in extreme poverty of between 130 and 150 million.<sup>36</sup> Beyond the humanitarian dimension of the crisis, however, certain important policy lessons emerged. The countries most severely impacted by the high prices, particularly from the Sub-Saharan African region, pledged to limit their dependence on international markets in order to feed them-

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RIGHT TO FOOD 25–26 (2009) (documenting the import surges that have affected local producers in developing countries); Malcolm D. Bale and Ernst Lutz, *Price Distortions in Agriculture and Their Effects: An International Comparison*, AM. J. AGRIC. ECON., Feb. 1981, at 8–22.

33. Research from the World Bank indicates that a ten percent rise in crude oil prices translates into a 1.7% increase in agricultural commodity prices. See John Baffes, *Oil Spills on Other Commodities* 6 (World Bank, Policy Research Working Paper No. 4333, Aug. 2007).

34. See, e.g., Mitchell, *supra* note 29, at 16. Mitchell notes:

The increase in internationally traded food prices from January 2002 to June 2008 was caused by a confluence of factors, but the most important was the large increase in biofuels production from grains and oilseeds in the U.S. and EU. Without these increases, global wheat and maize stocks would not have declined appreciably and price increases due to other factors would have been moderate. Land use changes in wheat exporting countries in response to increased plantings of oilseeds for biodiesel production limited expansion of wheat production that could have otherwise prevented the large declines in global wheat stocks and the resulting rise in wheat prices.

*Id.* Mitchell estimates that, because mandates and subsidies encouraging biofuels production and consumption in the United States and in the European Union have increased competition for land and water between energy and food (thereby encouraging speculation and export bans as stocks declined), up to seventy-five percent of the food price rise of 2007–2008 can in fact be traced back to these policies. *Id.* at 17.

35. See generally Briefing Note of the Special Rapporteur on the Right to Food, Briefing Note, *Food Commodities Speculation and Food Price Crises: Regulation to Reduce the Risks of Price Volatility* (Sept. 23, 2010), available at <http://www.srfood.org/index.php/en/documents-issued/other-documents-issued>.

36. WORLD BANK, GLOBAL ECONOMIC PROSPECTS: COMMODITIES AT THE CROSSROADS 96 (Int'l Bank for Reconstruction and Dev. ed., 2009) (based on evidence available November 30, 2008). On the impact on poor households of price spikes, see Maros Ivanic & Will Martin, *Implications of Higher Global Food Prices for Poverty in Low Income Countries* (World Bank, Policy Research Working Paper No. 4594, Apr. 2008).

selves.<sup>37</sup> As the result of demographic growth, low import tariffs, and the lack of investment in agriculture, a number of poor countries that previously were self-sufficient in food had become net-food-importing in the 1980s.<sup>38</sup> The crisis revealed to them that their position was unsustainable, subjecting them to price shocks that, in the future—particularly as a result of weather events related to climate change—would be more frequent, more severe, and less predictable.

But major food-importing, capital-exporting countries drew different conclusions from the increased price volatility in international markets. While they too had lost confidence in global markets as a stable and reliable source of food, for many, the outsourcing of food production appeared to be the most desirable option. In 2008, for example, Saudi Arabia, until then “one of the Middle East’s largest wheat-growers, announced it was to reduce its domestic cereal production by twelve percent a year to conserve water,” and decided to earmark \$5 billion for the “King Abdullah Initiative for Saudi agricultural investment abroad” to provide loans at preferential rates to Saudi companies that wanted to invest in countries with strong agricultural potential.<sup>39</sup> With sixty percent of its funding coming from the government, a Saudi company, Hail Agricultural Development Corporation, invested in Sudan.<sup>40</sup> Another Saudi investment company, Foras, with support from the Islamic Development Bank, reportedly plans to spend \$1 billion buying land in Mali, Senegal, Sudan, and Uganda in order to grow rice for the Saudi population; the announced target is to achieve seven million tons of rice within seven years.<sup>41</sup> Other Gulf countries, China, and South Korea, have undertaken similar initiatives.<sup>42</sup>

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37. For a review of the reactions of states following the 2007–08 food price crisis, see Special Rapporteur on the Right to Food, *Crisis into Opportunity: Reinforcing Multilateralism*, Human Rights Council, ¶ 15, U.N. Doc. A/HRC/12/31 (Jul. 21, 2009) (by Olivier De Schutter).

38. See Statement of the FAO, Ministerial Conference of 10–14 September 2003, WT/MIN(03)/ST/61 (2003), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/statements\\_e/st61.pdf](http://www.wto.org/english/thewto_e/minist_e/min03_e/statements_e/st61.pdf). The FAO also noted that “[o]ver the last two decades the share of Least-Developed Countries and Net Food Importing Developing Countries (NFIDCs) in global agricultural exports has declined and their share in global food imports has increased. LDCs moved from net agricultural export surpluses of US\$1–2 billion in the late 1970s to net deficits of US\$4.4 billion in 1999. NFIDCs similarly moved from surpluses of US\$2–3 billion in the late 1970s to deficits of more than US\$4 billion in the late 1990s.” *Id.* at 1–2. The cereal import bill for Low Income Food Deficit Countries peaked at over \$38 billion in 2007–2008. FOOD AND AGRICULTURAL ORGANIZATION, CROP PROSPECTS AND FOOD SITUATION (April 2009), available at <http://www.fao.org/docrep/011/ai481e/ai481e05.htm>. See Comm. on Sustainable Dev., Rep. on the Seventeenth Session, May 16, 2008, and May 4–15, 2009, ¶ 148, U.N. Doc. E/CN.17/2009/19, Supp. No. 9 (2009), available at <http://www.scp-knowledge.eu/sites/default/files/knowledge/attachments/N0935572.pdf>.

39. John Vidal, *Billionaires and Mega-Corporations Behind Immense Land Deal in Africa*, ALTERNET (March 10, 2010), <http://www.alternet.org/story/145970/>; see also Howard Mann & Carin Smaller, *Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?*, 8 SUSTAINABLE DEV. INNOVATION BRIEFS 3 (2010).

40. *Id.*

41. Vidal, *supra* note 39.

42. See *infra* notes 49–56.

Finally, private investors came to realize that the era of low and decreasing prices for agricultural commodities may be coming to an end; that suitable farmland and fresh water might in the future become scarce commodities; and that, as the growth in demand for agricultural commodities was outpacing the ability for the supply side to respond, investing in agriculture might be highly profitable. In a context in which the stock markets remained unreliable and were providing at best low returns on investment, and in which many non-tangible assets were losing their value in real terms, the acquisition of farmland soon became a favorite way for private investors to hedge against inflation.<sup>43</sup>

The stage was thus set for the “farm race”—a scramble for the acquisition of farmland, particularly where land suitable for cultivation and water are abundant, labor cheap, and access to the global markets relatively easy. Of course, large-scale leases or acquisitions of farmland are not unprecedented. But the crisis of 2007–2008 accelerated the phenomenon, creating a new sense of urgency among the actors involved.<sup>44</sup> In addition, while investments taking the form of large-scale acquisitions of land were in the past almost exclusively undertaken by the private sector, governments—directly or through sovereign wealth funds or public enterprises—were now entering the race, with a view to ensuring food security at home.<sup>45</sup> This not only explains the visibility “land-grabbing” has had in the media; it also changes the definition of the issue in significant ways. As Mann and Smaller note,

[T]he new investment strategy is more strongly driven by food, water and energy security than a notion of comparative advantage

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43. There are various drivers behind the race towards the acquisition or lease of farmland. *See generally* LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? (2009) (offering a detailed examination of land deals in Sudan, Ethiopia, Madagascar, Mozambique and Tanzania); WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND (Michael Kugelman & Susan L. Levenstein eds., 2009); Ann-Christin Gerlach & Pascal Liu, *Resource-seeking Foreign Direct Investment in African Agriculture: A Review of Country Case Studies* (FAO Commodity and Trade Policy Research Working Paper No. 31, Sept. 2010), available at [http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm\\_Working\\_Papers/EST-WP31.pdf](http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm_Working_Papers/EST-WP31.pdf); KLAUS DEININGER ET AL., WORLD BANK, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? (2011), available at [http://siteresources.worldbank.org/INTARD/Resources/ESW\\_Sept7\\_final\\_final.pdf](http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf); DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT [hereinafter GTZ], FOREIGN DIRECT INVESTMENT IN LAND IN DEVELOPING COUNTRIES (2009); IFAD, THE GROWING DEMAND FOR LAND: RISKS AND OPPORTUNITIES FOR SMALLHOLDER FARMERS (2009), available at <http://www.ifad.org/events/gc/32/roundtables/2.pdf>.

44. One of the first organizations to draw the media's attention to this accelerating phenomenon was GRAIN. *See* GRAIN, SEIZED! THE 2008 LAND GRAB FOR FOOD AND FINANCIAL SECURITY (2008). But this NGO had already flagged the dangers involved in this development before the global food price crisis. *See* GRAIN, THE NEW SCRAMBLE FOR AFRICA (2007).

45. This is not an entirely new phenomenon: Japan has been outsourcing the production of food for many years, and its overseas holdings are estimated to represent three times the size of its domestic arable land; China, which must feed twenty-two percent of the Earth's population with only eight percent of its arable land, has been leasing or buying land abroad since the 1990s, in countries such as Cuba or Mexico. By 2000, investments in cash and food crops had become an integral part of China's development policy. *See* JOACHIM VON BRAUN & RUTH MEINZEN-DICK, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, POLICY BRIEF NO. 13 (2009); GTZ, *supra* note 43, at 13.

in the large scale production of indigenous crops for global markets, which has been more characteristic of foreign-owned plantations since the end of the colonial era. The current land purchase and lease arrangements are largely about shifting land and water uses from local farming to essentially long-distance farming to meet home state food and energy needs. It is, in practice, purchasing food production facilities.<sup>46</sup>

Thus, rather than to link local production to the global markets, the goal of these new investments is to ensure a stable supply of food for investors, whether public or private; they aim not to serve the international markets, but rather to circumvent them, by tightening the control of investors from the place of production to the end consumer. “[T]he growing scale of this practice today,” these commentators note,

combined with the increasing economic and environmental concerns that are motivating this surge, are creating a new dynamic of global importance. It is no longer just the crops that are commodities: rather it is the land and water for agriculture themselves that are increasingly becoming commodified, with a global market in land and water rights being created.<sup>47</sup>

How significant is the phenomenon? Since most of the investments arise from deals both parties have an incentive to remove from public scrutiny, there is no reliable figure available. However, the World Bank notes that “investors expressed interest in around 56 million hectares of land globally in less than a year [between October 1, 2008 and August 31, 2009].”<sup>48</sup> This area is twice the size of France’s farmland and two-fifths of all the farmland of the European Union (“EU”). The Bank also notes that of this total, “around two-thirds (29 million ha) were in Sub-Saharan Africa. Among the main target countries in that region are Cameroon, Ethiopia, the Democratic

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46. Mann & Smaller, *supra* note 39, at 1–2; see also Gerlach & Liu, *supra* note 43, at 5 (“[T]his new trend differs from more traditional forms of international investment in the agro-food sector which were mainly targeting markets. Through the new investment forms, investors seek to gain access to natural resources, in particular land and water.”).

47. Mann & Smaller, *supra* note 39, at 2. Others have noted this novel dimension of the recent surge of investments in the acquisition of farmland. See WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, *supra* note 43, at 4 (noting of the recent investments in farmland that “their scale is much larger; they emphasize staples instead of cash crops; they are concluded on the basis of agreements instead of through the barrel of a gun; and they are spearheaded by more government-led investment than in the past”).

48. DEININGER ET AL., *supra* note 43, at xxxii. It is important to note that this figure refers to the projects reported, but the actual implementation lags behind quite significantly: according to the Bank, almost “30 percent are still in an exploratory stage” (that is, they have not obtained government approval); “18 percent have been approved but have not started yet; more than 30 percent are at initial development stages; and only 21 percent have initiated begun actual farming, often on a scale much smaller than intended.” *Id.* at 52.

Republic of Congo,<sup>49</sup> Madagascar,<sup>50</sup> Mali,<sup>51</sup> Mozambique,<sup>52</sup> Somalia, Sudan,<sup>53</sup> Tanzania,<sup>54</sup> Uganda,<sup>55</sup> and Zambia.<sup>56</sup> But there are also target countries in Central Europe, Asia, and Latin America, including Brazil, Cambodia, Indonesia, Kazakhstan, Pakistan, Russia, and Ukraine.<sup>57</sup> Devel-

49. China is alleged to have acquired 2.8 million hectares in the Democratic Republic of Congo ("DRC") to create the world's largest oil-palm plantation. Gwynne Dyer, *African Land Grabbers on Shaky Ground*, NEW ZEALAND HERALD, May 14, 2009, available at [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=10571697](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10571697). Agri SA, a South African agriculture union, has also leased 200,000 hectares of land in the DRC for agricultural production for a period of thirty years. BBC, *SA Farmers to Rent Land in Congo*, Oct. 20, 2009, available at <http://news.bbc.co.uk/2/hi/africa/8317186.stm>.

50. 465,000 hectares of land in Madagascar have been leased to an Indian company, Varun Agriculture SARM, to grow rice for consumption in India as well as corn, maize, wheat, pulses, fruits, vegetables and other local produce for domestic use, import to India, and for export. This was secured both by an agreement between the company concerned and the government, and by agreements secured with local landlords for other parts of the area concerned. Rahul Bedi, *Investors See Growing Fields of Opportunity Across Africa*, NEW ZEALAND HERALD, Jul. 23, 2009, available at [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=10586114](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10586114).

51. Working through a Bamako-based company called Malibya, which is owned by the Libya Africa Investment Portfolio, an emanation of the Libyan sovereign wealth fund, Libya has leased 100,000 hectares in Mali for rice production in the zone managed through the Office du Niger, situated north east of Bamako. The zone currently comprises 100,000 hectares of irrigated land, but the plan is to increase the irrigated surface to 220,000 ha. Currently, 500,000 people living off small-scale farming inhabit the region, each household cultivating an average area of 4 ha. The terms of the deal concluded with Mali have not been made public. It is unclear how much irrigated land will be made available to the local farmers after the current investments of Malibya (specifically, a forty kilometer-long irrigation canal) will have expanded the areas cultivated. See Fondation pour l'agriculture et la ruralité dans le monde (FARM), *Office du Niger: quelles réalités entre accaparement des terres et développement agricole?*, Aug. 2010, available at <http://farmlandgrab.org/15741>.

52. ProCana Limitada, a Mozambican company ninety-four percent owned by BioEnergy Africa Ltd., has acquired 30,000 hectares in Mozambique for the production of ethanol from sugarcane. *Bioenergy Africa Lists on LSE*, <http://www.thebioenergysite.com/news/1590/bioenergy-africa-lists-on-lse> (last visited Nov. 29, 2010). BioEnergy has since cancelled its ethanol operations in Mozambique without ever planting any sugarcane. *Mozambique: Investors Decided to Pull Out of Procana Months Ago* (Dec. 23, 2009), <http://allafrica.com/stories/200912230711.html>. Subsequently, the company changed its name to Sable Mining Africa Ltd. to reflect its strategic operational shift from bioenergy to mining. *Sable Mining Africa Ltd.*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ticker=SBLM:PZ> (last visited March 19, 2011). Mauritius has also reportedly secured 20,000 hectares of land in Mozambique to produce rice in the district of Marracuene in the southern province of Maputo. *Mauritius Leads Land Grabs for Rice in Mozambique*, <http://farmlandgrab.org/7231> (last visited Nov. 29, 2010).

53. South Korea has acquired 690,000 hectares of land in Sudan to grow wheat. The United Arab Emirates have acquired in excess of 400,000 hectares to grow corn, alfalfa, wheat, potatoes, and beans. Egypt has secured a similar surface to grow wheat. See Dyer, *supra* note 49, at 16; *Outsourcing's Third Wave*, ECONOMIST, May 21, 2009, at 60; Xan Rice, *Abu Dhabi Develops Food Farms in Sudan*, GUARDIAN, July 2, 2008, available at <http://www.guardian.co.uk/environment/2008/jul/02/food.sudan>.

54. Saudi Arabia is seeking to lease 500,000 hectares in Tanzania, according to press reports. See Dyer, *supra* note 49, at 16.

55. Egypt plans to develop over 840,000 hectares in Uganda. For this statistic as well as a broad assessment of this foreign investment trend in Africa, see Horand Knaup & Juliane von Mittelstaedt, *The New Colonialism: Foreign Investors Snap Up African Farmland*, SPIEGEL ONLINE (July 30, 2009), <http://www.spiegel.de/international/world/0,1518,639224,00.html>.

56. See *id.* (highlighting the example of the largest land investment fund in Southern Africa, which has bought large tracts of land in Zambia).

57. The World Bank provides the following summary of where the "target countries" are located:

Putative demand focuses on Sudan, Ethiopia, Nigeria, Ghana and Mozambique in Sub-Saharan Africa, which together account for more than 23 percent of projects worldwide. Twenty-one

oping countries in general, especially in Sub-Saharan Africa, are targeted in particular because of the perception that land is plentifully available.<sup>58</sup> Additional motivations for this developing country focus include favorable climates for the production of crops, inexpensive local labor, and relatively cheap land.

This trend is likely to continue. In 2003, the Food and Agriculture Organization (“FAO”) estimated that an additional 120 million hectares—an area twice the size of France or one-third that of India—will be needed to support the additional growth in food production by 2030.<sup>59</sup> The price spikes of basic agricultural commodities at the end of 2010, combined with higher oil prices,<sup>60</sup> are further accelerating this global land grab.<sup>61</sup>

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percent of projects are in Latin America and the Caribbean (mainly in Brazil and Argentina), 11 percent in Europe and Central Asia (mainly in Kazakhstan, the Russian Federation, and Ukraine), and 10 percent in Southeast Asia (the Philippines, Cambodia, Indonesia, and the Lao People’s Democratic Republic) . . . .

DEININGER ET AL., *supra* note 43, at 52. Altogether eighty-one countries are concerned. *Id.* at 51. The most serious concerns are raised in Sub-Saharan Africa, both because most of the foreign investments focus on this region and because governance structures are particularly weak there, raising the fear that the rights of land users will not be adequately protected.

58. See Günther Fischer, et al., *Global Agro-ecological Assessment for Agriculture in the 21st Century*, Executive Summary (2002), <http://www.iiasa.ac.at/Research/LUC/SAEZ/index.html> (“Over 80% of potentially cultivable land reserves are located in just two regions, South America and sub-Saharan Africa. In contrast, most of the cultivable land in Asia is already in use, and the population increase expected by 2050 will reduce per capita availability of cultivable land to below the critical level of 0.1 ha per person.”).

59. Note that this estimate does not consider the compensation required for certain losses resulting from unsustainable forms of agricultural production. FAO, *WORLD AGRICULTURE TOWARDS 2015/2030: AN FAO PERSPECTIVE* 15, 132 (2003).

60. Higher oil prices have increased competition for land through three channels: (1) they make the production of biofuels, a major driver of land-grabbing, more attractive to investors; (2) they increase the volatility of prices of agricultural commodities on the international markets (because the costs of food production and transport are closely correlated to energy costs; and (3) they increase the amount of cash at the disposal of oil-producing countries which, when they are dependent on food imports, have an interest in outsourcing food production.

61. For instance, as this Article was being finalized in January 2011, it was reported that Jenaan Investment, a privately owned company based in Abu Dhabi, which already owned property and had thirty-year leases in Egypt, Sudan, Tanzania, Ethiopia, and the United States, with total investments in land worth \$500 million, planned to invest an additional \$500 million producing food in Africa. Most of this production was shipped back to the Gulf Arab States, which imported ninety percent of their food consumption needs. Jenaan acquired 20,000 hectares of farmland in Egypt to produce animal feed (alfalfa), dill, wheat, maize and potatoes. About half of these crops are sold in Egypt. Considering that Egypt is one of the most important wheat importers in the world and that its malnutrition rate is estimated at eighteen percent, observers have criticized the fact that only part of what is produced on its territory remains in the country. However, the company insists that it is developing arid land not used by the local population, and that, in addition to new on-farm employment opportunities, its investments included the construction of houses, clinics, and schools nearby the farms, from which the host communities benefit. See Megan Detrie, *Jenaan to plant \$500m venture*, *THE NATIONAL*, Nov. 25, 2010, <http://www.thenational.ae/business/retail/jenaan-to-plant-500m-venture>; Susan Kraemer, *Arab States Buy Up Vast Tracts of African Farmland as Food Prices Skyrocket*, *GREEN PROPHET* (Jan. 17, 2011), <http://www.greenprophet.com/2011/01/arab-states-buy-african-farmland-as-food-prices-skyrocket/>.

## II. THE NEW COMPETITION FOR LAND

Some observers see opportunities in this new wave of direct investments in agricultural production. After all, investment in agriculture has been too low for too many years, particularly in Sub-Saharan Africa, where average yields have suffered as a result.<sup>62</sup> And if the local governments are cash-strapped, should not investors from abroad, whether private or public, be welcomed? Such investment, so the argument goes, can create employment on-farm and sometimes even off-farm (for instance, in processing, packaging, and transporting of crops). Investment may also allow for beneficial technological transfer (for example, modern machinery design, irrigation techniques, or improved seed varieties). Infrastructure improvements may then follow as investors build roads and storage facilities. Investor ties to foreign economies may also provide better access for local farmers to global markets. In addition, where farmland is underutilized—for example due to a lack of irrigation or adequate machinery—the arrival of foreign investment can improve its productivity. Productivity gains, in turn, will increase food availability and, therefore, food security for all, as supply will more closely track the rise in demand.

Thus, provided these investments are well-managed, “win-win-win” solutions could emerge. First, the local communities could benefit from newly created employment opportunities and improved food security. Second, the host government could benefit from greater certainty in revenue collection. Investors pay taxes and, insofar as commodities are exported, export tariffs. Third, the investor could benefit from a stable supply of agricultural commodities, whether this serves food security at home or the global markets.<sup>63</sup>

Opportunities are not solutions, however. This “win-win-win” scenario is premised on a number of assumptions. One of them is the ability of the host governments to ensure that significant benefits from the investment will accrue to local communities. Another is the viability of finding a balance between local food security needs, which may require that part of the produce remains within the country, and the interest of the investor in shipping the produce abroad, whether to sell on higher-value markets or to ensure food security in the home country of the investor. In order to ensure that this optimistic scenario materializes, the World Bank, along with the FAO, International Fund for Agricultural Development (“IFAD”) and UNCTAD,

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62. Average cereal yields in Africa have stagnated at 1.3 tons per hectare, whereas in East Asia, the figure is 4.7 tons per hectare. Luc Christiaensen & Lionel Demery, U.N. University World Inst. For Dev. Econ. Research, *Are African Countries Paying Too Much Attention to Agriculture?*, WIDERANGLE NEWSL. (Apr. 2010), available at [http://www.wider.unu.edu/publications/newsletter/articles-2010/en\\_GB/04-2010-Christiaensen-Demery/](http://www.wider.unu.edu/publications/newsletter/articles-2010/en_GB/04-2010-Christiaensen-Demery/).

63. For the most detailed review of these economic advantages, see Gerlach & Liu, *supra* note 43, at 8–12.

has proposed the Principles on Responsible Agricultural Investment to guide investors and ensure that they behave “responsibly.”<sup>64</sup>

However, in this approach, the World Bank and united organizations betray a misunderstanding of what is at stake. The question is not simply how to regulate investment in order to ensure that its benefits will be shared equitably. The primary question is how to best use land that is available or “underutilized.” Large-scale shifts in land use raise important questions about inherent opportunity costs. Local governments should first consider redistribution schemes to support small landholding farmers as an alternative to building large landholding estates through foreign investment. Only when foreign investment is indeed the more favorable option should investment regulation strategy become policymakers’ focus.<sup>65</sup>

The opportunity costs of ceding land to foreign investors can be high because land availability is not infinite. On the contrary, it is shrinking. As I have documented elsewhere,<sup>66</sup> cultivated plots become smaller per capita or per household as rural populations grow. In South and Southeast Asian countries such as India, Bangladesh, Cambodia, the Philippines and Thailand, landlessness or quasi-landlessness is increasing, because of both demographic growth and acquisition of land by local elites and foreign investors.<sup>67</sup> A similar trend has affected Eastern and Southern Africa, where cultivated land per capita has fallen by half over the last generation. In fact, in a number of countries in the region, the average cultivated area now amounts to less than 0.3 hectares per capita.<sup>68</sup> The growth of cities and industrial sites, including special economic zones,<sup>69</sup> further contributes to this accelerating competition for land.

Indeed, the pressure on farmland is such that experts now warn that the land available to produce food may become insufficient to meet the growth in demand. A recent study concludes that the additional total land demand

64. See *supra* notes 2, 4 and accompanying text.

65. The World Bank notes that, in many cases, contract farming or outgrower schemes can be more beneficial to small-scale farmers than selling their land for the creation of large estates, despite the alternative employment opportunities that result from the development of large-scale plantations. “Smallholders’ income is 2–10 times what they could obtain from wage employment only. This does not imply that there may not be opportunities for productive partnerships between investors and smallholders (in gaining access to technology, for example, as illustrated by the poor performance of some smallholders without such access). Such opportunities would not require the transfer of land but would be based on more traditional contracting and outgrower schemes.” DEININGER ET AL., *supra* note 43, at 26. But one reason why smallholders’ incomes are often too low to allow them to live decently from farming is because they cultivate too-small plots, and because they have not been supported by the local governments: it therefore is questionable whether the choice of these governments to cede land to foreign investors, even if this can be combined with outgrower schemes, is indeed the best option.

66. See Olivier De Schutter, *The Emerging Human Right to Land*, 12 INT’L COMMUNITY. L. REV. 303, 306–07 (2010).

67. See WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 118–19.

68. INT’L FUND FOR AGRIC. DEV., DOC. EB 2008/94/R.2, POLICY ON IMPROVING ACCESS TO LAND AND TENURE SECURITY ¶ 17 (2008).

69. See generally Wei Ge, *Special Economic Zones and the Opening of the Chinese Economy: Some Lessons for Economic Liberalization*, 27 WORLD DEV. 1267 (1999).

is currently 9.5 to 26.4 million hectares per year on average for the period 2000–2030.<sup>70</sup> It is highly doubtful that global supply can meet this demand. Although areas of underutilized farmland exist in certain regions of the world, particularly Central Europe and certain parts of Latin America and Sub-Saharan Africa,<sup>71</sup> in most of the regions that matter—where rural poverty is widespread and plots are too small to allow farmers to rise out of poverty—the opposite is true. That is, the norm is overexploitation of land, accelerating land erosion and degradation.<sup>72</sup> The World Bank notes that “in the more densely populated parts of the world, the land frontier has closed,” meaning that no further land is available for cultivation.<sup>73</sup> And because of the major role of forests in the stocking of carbon, the clearing of forests to expand cultivated areas or pastures is not a realistic option.<sup>74</sup>

Many of the contributors to shrinking land availability are long-term trends. Recent events, however, have added to the phenomenon. Major advanced economies, including the United States and the EU, have relied on blending mandates and subsidies to promote the use of biofuels for transport.<sup>75</sup> At the beginning of the biofuels boom, a number of experts identified risks that the resulting increased competition for land would lead to large-scale evictions or displacement of poor farmers.<sup>76</sup> Recent data indicate that these fears may have been well-founded. An inventory, presented by the

70. See Eric F. Lambin & Patrick Meyfroidt, *Global Land Use Change, Economic Globalization, and the Looming Land Scarcity*, 108 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES 3465, 3466 (2011), available at <http://www.pnas.org/content/108/9/3465.full?sid=631acacb-17da-44b5-b54c-bba28047da37>. This calculation takes into account a number of factors, including (1) the expansion of cultivated land required to keep up with population growth and changing diets (which accounts for an increase of 2.7 to 4.9 million hectares annually), (2) the expansion of energy crops (at least 1.5 to 3.9 million hectares per year), (3) a limited expansion of pasture land (from 0 to 5 million hectares per year), (4) the loss of prime agricultural land due to urbanization (from 1.6 to 3.3 million hectares per year), (5) the development of industrial forestries (1.9 to 3.6 million hectares per year) and protected areas (from 0.9 to 2.7 million hectares per year), and (6) cropland abandonment due to soil degradation.

71. The World Bank thus estimates that “in developing countries, 6 million ha of additional land will be brought into production each year to 2030.” DEININGER ET AL., *supra* note 43, at xi.

72. The IFAD estimates that “globally, 5–10 million hectares of agricultural land are being lost annually to severe degradation.” INT'L FUND FOR AGRIC. DEV., *supra* note 68, at ¶ 17.

73. See WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 63.

74. See INTERGOVERNMENTAL PANEL OF EXPERTS ON CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 105 (Bert Metz, Ogunlade Davidson, et al. eds., 2007). It is estimated that forests store forty-five percent of terrestrial carbon. See Gordon B. Bonan, *Forests and Climate Change: Forcings, Feedbacks, and the Climate Benefits of Forests*, 320 SCIENCE 1444, 1444 (2008).

75. It should be noted, however, that energy from biomass can serve a number of uses, of which transport is only a minor part. See FAO, THE STATE OF FOOD AND AGRICULTURE 2008, BIOFUELS: PROSPECTS, RISKS AND OPPORTUNITIES 11 (2008).

76. See LORENZO COTULA, NAT DYER, & SONJA VERMEULEN, INT'L INST. FOR ENV'T & DEV. & FAO, FUELLING EXCLUSION? THE BIOFUEL BOOM AND POOR PEOPLE'S ACCESS TO LAND 32–58 (2009), available at [www.iied.org/pubs/pdfs/12551IIED.pdf](http://www.iied.org/pubs/pdfs/12551IIED.pdf); FAO, *supra* note 75, at 83 (“Expansion of biofuel production will, in many cases, lead to greater competition for land. For smallholder farmers, women farmers and/or pastoralists, who may have weak land-tenure rights, this could lead to displacement.”); RACHEL SMOLKER ET AL., GLOBAL FOREST COAL. & GLOBAL JUSTICE ECOLOGY PROJECT, THE REAL COST OF AGROFUELS: IMPACTS ON FOOD, FORESTS, PEOPLES AND THE CLIMATE 4, 57 (2008); UN-ENERGY, SUSTAINABLE BIOENERGY: A FRAMEWORK FOR DECISIONMAKERS 24 (2007).

World Bank in 2010, noted that, of 389 large-scale investment acquisitions studied, thirty-five percent focused upon development of agrofuels compared to thirty-seven percent on conventional uses (crops and livestock).<sup>77</sup> More recently, the World Bank reviewed 405 investment acquisitions and found that thirty-seven percent focus on food crops, twenty-one percent on industrial or cash crops, and twenty-one percent on biofuels.<sup>78</sup> Energy crops, then, represent a significant driver in the overall trend of large-scale acquisition or lease of farmland.

Measures adopted to mitigate climate change or for environmental conservation have created further pressures on land. Under the Kyoto Protocol to the U.N. Framework Convention on Climate Change (“UNFCCC”), industrialized countries (the “Annex I countries”) have committed to reducing greenhouse gas emissions. These countries receive additional emission credits if they help to implement emission-reducing projects in developing countries, under the Clean Development Mechanism (“CDM”) provided for in Article 12 of the Kyoto Protocol.<sup>79</sup> But this emission-reduction effort may produce unintended consequences. The planting of forests to benefit from the CDM may be easiest in vulnerable communities where eviction can open up space for new forest growth.<sup>80</sup> The Reduced Emissions from Deforestation and Forest Degradation (“REDD”) scheme—launched in 2005 and further strengthened at the Twelfth Conference of parties to the UNFCCC (COP-12) convened in Bali in December 2007—may represent a threat to the forest-dwellers, who have only weakly recognized customary rights over the forests they depend on for their livelihoods, if the state or other actors are tempted to appropriate the benefits from carbon sequestration.<sup>81</sup> Gov-

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77. At the time of writing, this study had not yet been made public. The figures are from presentations made by the World Bank, most recently at its annual conference held in Washington, D.C., on April 24–25, 2010. GRAIN, *The World Bank in the hot seat*, AGAINST THE GRAIN (May 4, 2010), <http://www.grain.org/articles/?id=64>.

78. The remainder is distributed among conservation and game reserves, livestock, and plantation forestry, often in order to capture carbon credits. See DEININGER ET AL., *supra* note 43, at 51.

79. Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22 (entered into force Feb. 16, 2005).

80. See Joyotee Smith, *Afforestation and Reforestation in the Clean Development Mechanism of the Kyoto Protocol: Implications for Forests and Forest People*, 2 INT’L J. OF GLOBAL ENVTL. ISSUES 322, 322 (2002); Stephen Bass et al., *Rural Livelihoods and Carbon Management* 72 (Int’l Inst. for Env’t. and Dev., IIED Natural Resource Issues Paper No. 1, 2000) (noting that in the absence of security of land tenure, difficulties for local communities may be exacerbated “as land is acquired for carbon management by more organised interests with resources and knowledge to access carbon offset financing. In this way, the local land production base or natural capital can be eroded”); see also CENTRE FOR INT’L FORESTRY RESEARCH & U. OF MD., *CAPTURING THE VALUE OF FOREST CARBON FOR LOCAL LIVELIHOODS: OPPORTUNITIES UNDER THE CLEAN DEVELOPMENT MECHANISM OF THE KYOTO PROTOCOL* 8 (2000) (“In some cases, forest carbon projects involving large-scale land use change may lead to restricted access to land that previously made an important contribution to local livelihoods . . . [W]here forestland is converted from production to conservation use, jobs formerly held by local people in forest harvesting or processing might be lost.”).

81. See generally SIMONE LOVERA, *GLOBAL FOREST COAL. & IUCN COMM’N ON ENVTL., ECON. AND SOCIAL POLICY, THE HOTTEST REDD ISSUES: RIGHTS, EQUITY, DEVELOPMENT, DEFORESTATION AND GOVERNANCE BY INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* 2–3, 9–12 (2008); David J. Kelly,

ernments are also working to protect natural environments by creating wild-life reserves, national parks, and other protected areas. These ecosystems render vital services to agriculture, including soil retention and structural support, nutrient cycling, dung burial and pest control, pollination, water provision and purification, biodiversity, and atmospheric regulation.<sup>82</sup> Nonetheless, the implementation of such conservation measures also further exacerbates the competition for land.

### III. THE THREATS TO THE RIGHTS OF LAND USERS

The wave of large-scale acquisition or leasing of land poses a number of pressing questions, including whether such investment will contribute to local food security or instead make at-risk groups less secure, whether the type of agriculture to which these investments lead is environmentally sustainable, and how governments should regulate this phenomenon. But this Article focuses on what is perhaps the most immediate concern raised by the pressures on land: protection of access to land for those whose livelihoods depend on it. In many developing countries, and particularly in Sub-Saharan Africa, the rights of land users are not properly secured. Much of the land in rural areas is formally owned by the government, leaving land users without property titles to the land they cultivate.<sup>83</sup> Furthermore, in many cases, a complex combination of property rights and users' rights leads to situations in which cultivators do not own the land they farm despite paying rent in cash or kind and at times having a formal agreement with the nominal owner. This situation is a source of legal uncertainty and worse, a bar to land user access to legal remedies or adequate compensation in the case of eviction. Local governments, then, may face little resistance after agreeing to allow foreign investors to take possession of land from cultivators. But the simple solutions to this problem—such as titling schemes to secure property

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*The Case for Social Safeguards in a Post-2012 Agreement on REDD*, 6 L. ENV'T & DEV. J. 63, 63–81 (2010), available at <http://www.lead-journal.org/content/10061.pdf>; TOM GRIFFITHS, FOREST PEOPLES PROGRAMME SEEING 'RED': 'AVOIDED DEFORESTATION' AND THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 3–8 (2007), available at <http://www.forestpeoples.org/topics/un-redd/publication/2010/seeing-red-avoided-deforestation-and-rights-indigenous-peoples-and-l>. For a more detailed exposition of this issue, see De Schutter, *supra* note 66, at 308–09.

82. Wei Zhang et al., *Ecosystem Services and Dis-services to Agriculture*, 64 ECOLOGICAL ECON. 253, 257 (2007).

83. See DEININGER ET AL., *supra* note 43, at 99 (“Historically, many countries have considered land and associated natural resources not formally registered as property of the state, which government could dispose of at will, often without considering the actual status of occupation. The tendency to neglect existing rights often derives from a legal framework inherited from colonial days . . . that presumes any unclaimed or unregistered land to be ‘empty’ and thus available for transfer with few safeguards.”); see also LORENZO COTULA, INT’L INST. FOR ENV’T. & DEV., LAND DEALS IN AFRICA: WHAT IS IN THE CONTRACTS? 15 (2010) (noting that even where titling is available, many land users do not register their land as they feel that customary tenure provides them with the security they require, resulting in a situation in which, “as in many jurisdictions all untitled land is owned by the state, governments end up controlling much rural land even where the statute books devote numerous provisions to regulating private ownership”).

rights over land—may not be adequate once we take into account the specific context of developing countries and the comparative situations of different groups of land users.

The following sections explore this context-based inadequacy. Section A explains why titling schemes, based on Western-style property rights, serve increasingly dubious purposes in a number of contexts in which such schemes do not in fact benefit the rural poor. Section B describes the contours of an emerging notion of communal rights over land. This new understanding of land rights is based partly on the paradigm of the rights of indigenous peoples over their lands and territories. But it now extends beyond the context of indigenous peoples to other groups that rely on communal notions of property rights. The formal recognition of such communal property rights, this Article argues, matters in particular for the protection of access to land and water for the members of the community that rely on the commons. Finally, in Section C, I refer briefly to a further argument in favor of overcoming the dichotomy between state-owned land and privately-held land and moving towards the formalization of communal forms of property. Such an approach, I note, would allow for decentralized management of natural resources such as land and water, which in turn may promote more sustainable use of such resources.

#### A. *The Protection of Land Users from Eviction: Two Approaches to Security of Tenure*

The standards developed under international human rights law to protect land users from eviction primarily benefit those who permanently use the land, especially smallholders lacking legal title.<sup>84</sup> In particular, the Basic Principles and Guidelines on Development-Based Evictions and Displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing reflect this goal to secure legal tenure:

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84. In particular, see U.N. Office of the High Commissioner for Human Rights, Gen. Comm. No. 7 of the Committee on Econ., Social and Cultural Rights on the Right to Adequate Housing, U.N. Doc E/1998/22, Annex IV (May 27, 1997); Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, U.N. Doc. A/HRC/4/18, Annex I (2007). These guidelines provide a practical tool to assist states and agencies in developing policies, legislation, procedures, and preventive measures to ensure that forced evictions do not take place, and to provide effective remedies to those whose human rights have been violated, should prevention fail. As stipulated in the *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, the guidelines are based on the principle that evictions shall take place on only the following basis:

- (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the [guidelines].

*Id.* at ¶ 21. They provide detailed assistance to states and agencies about which steps need to be taken prior to evictions, during evictions, and after evictions, in order to minimize the negative impacts of evictions on human rights.

In order to secure a maximum degree of effective legal protection against the practice of forced evictions for all persons under their jurisdiction, States should take immediate measures aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land.<sup>85</sup>

However, while there is general agreement on the need to improve security of tenure, both as a protection from evictions and in order to encourage land-related investments and thus productivity,<sup>86</sup> how to do so remains contested. Since the launch of structural adjustment policies in the 1980s, the World Bank and particularly its private sector lending arm, the International Finance Corporation, have advocated titling as a means to improve the business climate and to attract investors.<sup>87</sup> In *Doing Business 2005: Removing Obstacles to Growth*, the World Bank summarizes an argument made popular by the writings of the Peruvian economist Hernando de Soto<sup>88</sup>:

With fewer assets in the formal sector, more entrepreneurs are excluded from using property as a collateral, and less credit is allocated. The possibility of getting loans is the only reason to take on the daunting task of registering in some countries. Banks in Rwanda will even assign staff to assist in the registration process so that they can take property as a collateral. But when it is too difficult, few bother. Entrepreneurs will invest less if their property rights are less secure. Inefficient registration is associated

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85. *Id.* at ¶ 25.

86. Most authors note that, because security of tenure encourages land-related investments, it improves productivity at field level. *See, e.g.*, Klaus Deininger & Songqing Jin, *Tenure Security and Land-Related Investment: Evidence from Ethiopia*, 50 EUR. ECON. REV. 1245, 1265–70 (2006); KLAUS DEININGER, LAND POLICES FOR GROWTH AND POVERTY REDUCTION, 115–16 (2003); WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 138. However, skeptical views also have been expressed about the automaticity of this link. *See, e.g.*, Frank Place & S.E. Migot-Adholla, *The Economic Effects of Land Registration on Smallholder Farms in Kenya*, 74 LAND ECON. 360, 368–69 (1998) (noting that, based on household and plot data for four Kenyan sites, titling was pursued to improve security of tenure, but the impacts on productivity were minimal compared to the potential productivity gains from infrastructure and improvement of market opportunities for farming); Robert S. Ouedraogo, et. al., *Tenure, Agricultural Practices and Land Productivity in Burkina Faso: Some Recent Results*, 13 LAND USE POL., 229, 231–32 (1996) (concluding that differences in productivity depend on factors other than property rights).

87. *See, e.g.*, RUSSEL MUIR AND XIAOFANG SHEN, THE WORLD BANK GROUP, PUBLIC POLICY FOR THE PRIVATE SECTOR NOTE NO. 300, LAND MARKETS. PROMOTING THE PRIVATE SECTOR BY IMPROVING ACCESS TO LAND 2, 4 (2005). Both authors are executives within the Foreign Investment Advisory Services, a joint facility of the WB and the IFC that aims to improve the investment climate for the private sector. On the promotion of titling schemes by the international financial institutions, see Manpreet Sethi, *Land Reform in India: Issues and Challenges*, in PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM 73, 79 (Peter Rosset, Raj Patel & Michael Courville eds., 2006).

88. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 35 (2000) (estimating that the total value of unregistered property in developing countries amounts to 9.3 trillion USD, a figure obtained by extrapolating from Egypt, Peru, Haiti and the Philippines). De Soto refers to unregistered property as “dead capital,” because unregistered property limits the financing opportunities for new businesses and expansion opportunities for existing ones. *Id.* at 40.

with lower rates of private investment. And it leads to lower productivity, since it is harder for property to be transferred from less to more productive uses. The result is slower growth. One study estimates that restrictive land market regulations cost 1.3% of annual economic growth in India.<sup>89</sup>

It is important, however, not to conflate ensuring security of tenure with individual titling or with the promotion of a market for land rights. Insofar as it implies the alienability of land, individual titling goes beyond security of tenure and the associated productivity gains that are expected to result from increased investment in land.<sup>90</sup> It is in fact a means to facilitate and secure transactions related to land. This is linked to the idea that security of tenure is primarily a means to favor integration into the market: once property is legally recognized, it can be alienated or mortgaged to allow the beneficiaries to leave agriculture or obtain cash to make the necessary investments in the land. Under such conditions, it is supposed, land would go to those who can use it most productively, and economic growth would therefore be promoted by the emergence of a market for land rights.<sup>91</sup> Based on the view that such growth is key to addressing rural poverty and food insecurity, the World Bank has recommended formal titling as a precondition for the modernization of agriculture, and it has in the past engaged in widespread promotion of land markets. At the same time, it has abandoned support for systems of communal and collective tenure on the theory that they are less compatible with a market-based system.<sup>92</sup>

However, it is now increasingly acknowledged, including by the Bank itself,<sup>93</sup> that this transplantation of Western property rights may be a suboptimal solution. This is particularly so in weakly governed countries, where little support is provided to small-scale farmers and customary forms of tenure enjoy a degree of legitimacy. Problems associated with titling schemes

89. WORLD BANK, *DOING BUSINESS 2005: REMOVING OBSTACLES TO GROWTH 40* (2004) (referring to the study, MCKINSEY GLOBAL INSTITUTE, *INDIA: THE GROWTH IMPERATIVE* (2001)); see also WORLD BANK, *WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 78* (2004) ("Secure property rights link effort with reward, assuring all firms—small and large, informal and formal, rural and urban—that they will be able to reap the fruits of their investments. The better protected these rights, the stronger the link between effort and reward and hence the greater the incentives to open new businesses, to invest more in existing ones, and simply to work harder.")

90. The impacts of security of tenure on productivity have sometimes been overestimated, however. See Ouedraogo, *supra* note 86, at 231–32; Place & Migot-Adholla, *supra* note 86, at 368–69.

91. See WDR 2008: *AGRICULTURE FOR DEVELOPMENT*, *supra* note 19, at 138 ("Secure and unambiguous property rights also allow markets to transfer land to more productive uses and users. Cost-effective systems of land administration facilitate agricultural investment and lower the cost of credit by increasing the use of land as collateral, thus reducing risk for financial institutions.")

92. See *EVOLVING LAND RIGHTS, TENURE AND POLICY IN SUB-SAHARAN AFRICA 38* (Camila Toulmin & Julian Quan eds., 2000).

93. See WDR 2008: *AGRICULTURE FOR DEVELOPMENT*, *supra* note 19, at 139 ("Earlier interventions to improve tenure security focused almost exclusively on individual titling, but this can weaken or leave out communal, secondary, or women's rights. Moreover, the process of titling can be used for land-grabbing by local elites and bureaucrats. So, although individual titling is still appropriate in many cases, it needs to be complemented by new approaches to securing tenure.")

fall into three categories: capture, unrepresentativeness, and social inequity.<sup>94</sup> The process of titling itself, in the absence of adequate monitoring and transparency, can fall victim to capture by local elites or become tainted by corruption.<sup>95</sup> Other problems stem from the fact that titling, although perhaps an adequate solution for sedentary agriculturalists, who have an obvious interest in the delimitation of their land, may underestimate or ignore the interests of herders, fishers, or other groups that depend on communal lands. For these groups, as argued in Part III, it may be more appropriate to secure access to land by recognizing existing land use rights and giving the local community a greater role in the recognition process as well as the settlement of land-related disputes. Indeed, this is one reason why, instead of increasing legal certainty, individual titling could in fact become a source of conflict and legal insecurity if it conflicts with customary rules regarding tenure, including the communal ownership of land.

The social equity of titling has been at the forefront of recent controversy. First, titling does not in itself address the problem of unequal access to land in regions with high degrees of land concentration. In these regions, titling may in fact reinforce existing inequalities.<sup>96</sup> This problem is especially troubling where unequal agrarian structures inherited from the colonial era remain intact and the local landed elite has, in essence, replaced the colonial settlers and benefited from the past violations of the rights of the indigenous populations.<sup>97</sup> More generally, privatization of land benefits community leaders and men, rather than ethnic minorities and women, whose position in the community is more marginal and who face difficulty in proving their ownership of land.<sup>98</sup> Second, when titling requires the payment of fees to the administration, it may be unaffordable for cash-strapped farmers, and only the relatively well-off landholders will in fact benefit from the formalization of property rights. Third, even when the fees for the mapping and registration of land are minimal, titling schemes may lead in time to a reconcentration of land in the hands of the largest landowners or of outside investors having access to capital.

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94. For a fuller exposition of these problems, see De Schutter, *supra* note 66, at 316–18.

95. Rebeca Leonard & Kingorn Narintarakul Na Ayuttahaya, *Thailand's Land Titling Program: Securing Land for the Poor?*, in PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM 129, 134–35 (Peter Rosset et. al. eds., 2006).

96. On the manipulation of titling schemes in favor of the elites and the risk of replication of existing inequalities, see Saturnino M. Borrás Jr. & Jennifer C. Franco, *Contemporary Discourses and Contestations around Pro-Poor Land Policies and Land Governance*, 10 J. AGRARIAN CHANGE 1, 19 (2010).

97. See AFRICAN MINISTERIAL CONFERENCE ON HOUSING AND URBAN DEVELOPMENT, INNOVATIONS IN AFRICA: PRO-POOR LAND APPROACHES 2 (2005) (recognizing the colonial legacy on agrarian structures).

98. See Susana Lastarria-Cornhiel, *Impact of Privatization on Gender and Property Rights in Africa*, 25 WORLD DEV. 1317, 1318 (1997) (noting that, although privatization and the formalization of property rights should in principle be gender-blind and benefit women who are often excluded under customary forms of tenure, in reality, “in the privatization process, certain groups (e.g., community leaders and house-hold heads) are able to strengthen their control over land to the detriment of woman [sic] and some minority groups”).

The proposition that titling schemes may in fact increase inequality and land concentration rather than reduce them seems counter-intuitive. The general perception of titling, after all, is that the process recognizes existing land use rights, and thus protects those who risk losing their property for lack of formal recognition of their ownership. But the reason for this apparent paradox appears upon further exploration of the postulate according to which land goes to the most productive users following the establishment of markets for land rights.<sup>99</sup> This postulate is the basis of both Hernando de Soto's advocacy of established property rights and the Coase theorem, which views markets as ensuring the most efficient allocation of resources.<sup>100</sup> In fact, who can use the land most productively depends on who has access to capital and support from the state to develop the land through necessary investments. As markets for land rights develop, land does not go to those who need it most. Rather, land goes to those who can afford it because of their superior purchasing power and ability to make it "profitable."<sup>101</sup> Therefore, unless the creation of a market for land rights is preceded by measures that support the ability of small-scale farmers to make a living from farming, which requires that they have access to sufficiently large plots of land, the process can lead to increased exclusion and inequality. It provides an exit route from agriculture for the rural households who are unable to survive on their land and results in more land concentration, rather than democratization of access to land.

Another reason why the introduction of titling schemes may increase social inequality is that small farmers face structural disadvantages in land markets, particularly in developing countries. Land speculation routinely prices small farmers out of these markets. Of course, following titling, small farmers can in principle use their land as collateral and borrow what they need to expand the plots they cultivate. But small-scale farmers typically borrow at a higher cost than large landowners do because small farmers have worse credit ratings and depend on local money-lenders, who charge high

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99. See, e.g., WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 138 ("Secure and unambiguous property rights . . . allow markets to transfer land to more productive uses and users").

100. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). There may be risk that a market for property rights over land will reward a class of capitalist entrepreneurs rather than serve the rural poor. See, e.g., Celestine Nyamu Musembi, *De Soto and Land Relations in Africa: Breathing Life into Dead Theories about Property Rights*, 28 THIRD WORLD Q. 1457, 1469-70 (2007); Leonard & Ayuttahaya, *supra* note 95, at 134.

101. There is a link between making land "profitable" and "improving" the land by appropriate investments that require access to capital and inputs (upstream) and to markets (downstream). The link is also etymological: the original meaning of "improve" was to "make a monetary profit" off something—"especially," Ellen Meiksins Wood notes, "cultivating land for profit." Ellen Meiksins Wood, *The Agrarian Origins of Capitalism*, in HUNGRY FOR PROFIT: THE AGRIBUSINESS THREAT TO FARMERS, FOOD AND THE ENVIRONMENT 23, 30 (Fred Magdoff et al. eds., 2000).

interest rates.<sup>102</sup> Large landowners also generally pay less per unit of land than small producers, who face high transaction costs.<sup>103</sup>

In fact, a number of historical examples show that the creation of a market facilitating sales of land leads to reconcentration of land unless small-scale farmers receive strong support, particularly access to capital. In Mexico and Guatemala, titling schemes have benefited wealthy investors and disfavored indigenous communities and smallholders.<sup>104</sup> In other Latin American countries, titling schemes have primarily led to development of the agro-export sector, often in the hands of well-financed investors often new to agriculture, combined with the marginalization of small-scale farmers producing food for the local communities.<sup>105</sup> Examining these cases, Klaus Deininger, a lead economist at the World Bank, draws a similar conclusion. He notes that, in the absence of strong support schemes benefiting small-scale farmers who have little access to credit or have access to credit only at high interest rates, these farmers will be excluded from the market for land rights.<sup>106</sup>

Even where small farmers manage to borrow in order to gradually acquire enough land to earn a decent living from farming, the resulting high levels of indebtedness can have dramatic consequences. The occasional bad harvest or economic shock, such as a fall in farmgate prices for cash-crop dependent farmers, may force farmers to sell their land or lose their mortgaged property.<sup>107</sup> Even less extreme situations, like increased pressure on land, can lure small farmers to sell off their land. In so doing, they lose an essential lifeline and, with very few qualifications, often find no opportunities outside farm-

102. Some authors have shown that where private lenders have extended credit to small farmers based on grants of title, they have done so at terms highly unfavorable to smallholders, or they have simply ignored smallholders in favor of commercial farmers. See, e.g., Tom Lebert, *An Introduction to Land and Agrarian Reform in Zimbabwe*, in PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM 3, 46–49 (Peter Rosset et al. eds., 2006).

103. See Giovanni Andrea Cornia, *Farm Size, Land Yields and the Agricultural Production Function: An Analysis for Fifteen Developing Countries*, 13 WORLD DEV. 513, 515 (1985).

104. See William Assies, *Land Tenure and Tenure Regimes in Mexico*, 8 J. AGRARIAN CHANGE 33, 55 (2008) (examining the case of Mexico); Susana Gauster & Ryan Isakson, *Eliminating Market Distortions, Perpetuating Rural Inequality: An Evaluation of Market-Assisted Land Reform in Guatemala*, 28 THIRD WORLD Q. 1519, 1524–29 (2007) (examining the case of Guatemala).

105. See generally Lovell S. Jarvis, *The Unraveling of Chile's Agrarian Reform, 1973–1986*, in SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA 240 (W. Thiesenhusen ed., 1989); Michael R. Carter et al., *Agricultural Export Booms and the Rural Poor in Chile, Guatemala, and Paraguay*, 31 LATIN AM. RES. REV. 33 (1996).

106. DEININGER, *supra* note 86, at 114 (“[T]he purchase market does not operate as a mechanism of land access for labor-abundant, capital-constrained households . . .”).

107. See Ruerd Duben & Eduardo Masset, *Land Markets, Risks and Distress Sales in Nicaragua: The Impact of Income Shocks on Rural Differentiation*, 3 J. AGRARIAN CHANGE 481 (2003) (showing, on the basis of panel data from 1995–2000, how income shocks increase inequality in rural areas, as the poorest farmers are pressured to sell land in the absence of other alternatives); WORLD BANK, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT 166 (2006) (noting, on the basis of a study of India and Bangladesh from 1960–1980, that while poor farmers with access to safety net programmes “used the land market to augment their landholdings and undertook productivity-enhancing investment,” “[d]istress sales to obtain food and medicine predominated when safety nets were absent”).

ing. The World Bank identified this scenario, for instance, in many Eastern European states, where the development of a market for land rights led poor rural households to sell their land to larger landowners, often on unfavorable terms.<sup>108</sup> This risk is the reason why the poorest households appear reluctant to mortgage their land in order to gain access to credit. For these families, land is an essential social safety net where none other is available.

This behavior raises serious doubts about the plausibility of de Soto's view that insufficiently delineated property rights explain why many poor households are caught in a poverty trap.<sup>109</sup> De Soto's view is premised on the idea that property, once legally formalized in the market for land rights, will be used as a collateral, giving access to credit and leading in turn to higher incomes.<sup>110</sup> But if the poor do not want to mortgage their property because they fear that they will lose it, the scheme fails. And it also fails if private financial institutions refuse to lend or lend only at high and unaffordable rates because the poor are not trusted as borrowers for lack of qualifications, management skills, or social capital. Therefore, even if the poor receive legal title to land, it does not follow that they will be able to overcome the obstacles they face in market integration.<sup>111</sup>

In the context of increased commercial pressures on land and the risk of large-scale evictions as a result of the current tide of land investments, it is critical to improve the security of land users' tenure and recognize their rights over land. But it is far less clear whether such recognition should take the form of individual titling. In certain circumstances, especially in regions with a legacy of neglecting small-scale farming, placing constraints on land sales can in fact protect smallholders from pressure to cede their land or its loss to a borrower after using it as a collateral. These constraints on investment sales can also protect use rights over communal land and preserve communal forms of land management.<sup>112</sup> Indeed, certain examples show that the rural poor themselves may favor the preservation of this essential safety net, and the maintenance of communal relations, over the privatization of property rights.<sup>113</sup>

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108. WORLD BANK, *supra* note 107, at 166 (noting that "the unrestricted transferability of land led to a concentration of landholdings in the hands of a small number of farm bosses, as poorer rural households were enticed to sell their land in conditions of uncertainty and incomplete markets and information").

109. See De Schutter, *supra* note 66, at 321–22, for a more detailed exposition of the limits of titling schemes.

110. Christopher Woodruff, *Review of De Soto's "The Mystery of Capital"*, 39 J. ECON. LIT. 1215, 1218 (2001).

111. See Ana Palacio, *Legal Empowerment of the Poor: An Action Agenda for the World Bank 18–19* (revised Mar. 2006) (unpublished manuscript, on file with author).

112. JOHN W. BRUCE ET AL., *LAND LAW REFORM: ACHIEVING DEVELOPMENT POLICY OBJECTIVES* 126–28 (2008).

113. The evolutions of Mexico's *ejido* system provide an illustration. See De Schutter, *supra* note 66, at 321–33; see also ANA DE ITA, *MEXICO: IMPACTS OF DEMARCATION AND TITLING BY PROCEDURE ON AGRARIAN CONFLICTS AND LAND CONCENTRATION*, CECCAM/LAND INVESTIGATION ACTION NETWORK (2003). Based on Article 27 of the 1917 Mexican Constitution, the *ejido* system guaranteed inalienable use-rights on parcels of land to regional or village-based groups, which they farmed collectively

The mounting skepticism towards titling schemes,<sup>114</sup> at least when the background conditions are not created that ensure that they will encourage small-scale producers to invest in their land and increase its productivity, calls for alternative ways of protecting security of tenure. Protecting land users from eviction is of course essential. But we must first recognize that encroachment by the state is not the only way in which their access to land can be threatened. Unequal market relationships, the shift towards capitalized forms of agriculture that will oblige small-scale producers to mortgage their land in order to acquire the inputs they need to produce, or the lack of protection against economic shocks, can have equally detrimental effects. And while titling can protect against the first threat, it can in fact increase the vulnerability of small farmers to other negative impacts.<sup>115</sup> Considerations of equity—or what might be called a democratization of access to land—therefore may weigh in favor of separating titling from improving security of tenure: to the rural poor, the priority is to be protected from the risk of losing their land. And it is doubtful whether there is a trade-off between such considerations and considerations of efficiency. Once security of tenure is effectively ensured, land users will have an incentive to make the required investments in the land. Instead, if, following titling, land is taken out of production in order to be held as an investment by speculators, this results in decreased productivity as well as in an increase in landlessness among the rural poor.<sup>116</sup>

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or individually. This kept land within the community and out of the hands of speculators and large-scale producers. For a description, see Kaja Finkler, *From Sharecroppers to Entrepreneurs: Peasant Household Production Strategies under the Ejido System of Mexico*, 27 *ECON. DEV. AND CULTURAL CHANGE* 103, 103–20 (1978). The 1992 PROCEDE formalization program launched under President Carlos Salinas de Gortari transformed this into an aggregation of alienable, individual ownership rights: the *ejidatarios* henceforth were allowed to privatize and sell land, and to develop partnerships with the private sector, thus facilitating the efforts of *ejidatarios* to make improvements on their lands. See WAYNE A. CORNELIUS & DAVID MYHRE, *Introduction*, in *THE TRANSFORMATION OF RURAL MEXICO: REFORMING THE Ejido Sector*, 1, 1–20 (U.S.-Mex. Contemporary Perspectives Series, No. 12, 1998). However, only approximately one tenth of the *ejidos* chose in favor of privatization and separation into individual plots. COMM'N ON LEGAL EMPOWERMENT OF THE POOR, *MAKING THE LAW WORK FOR EVERYONE* 117 n.109 (2008), available at [http://www.undp.org/legalempowerment/report/Making\\_the\\_Law\\_Work\\_for\\_Everyone.pdf](http://www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf). As recognized by the Commission on Legal Empowerment of the Poor, this “illustrates that, even at high levels of per capita income, many users see benefits from maintaining communal relations to be greater than those from full individualization of rights.” *Id.*

114. The 2004 EU Land Policy Guidelines, for instance, conclude that “land titling is not always the best way of increasing tenure security, and nor does it automatically lead to greater investment and productivity.” *EU Land Policy Guidelines: Guidelines for Support to Land Policy Design and Land Policy Reform Processes in Developing Countries* 3.4.3 (Nov. 2004), available at [http://ec.europa.eu/europeaid/what/development-policies/intervention-areas/ruraldev/rural\\_landpolicy\\_en.htm](http://ec.europa.eu/europeaid/what/development-policies/intervention-areas/ruraldev/rural_landpolicy_en.htm). See also Palacio, *supra* note 111, at 18 (“Formal land titles in some African countries did not bring the expected benefits of higher income and investment because indigenous tenure was already sufficiently secure under customary law.”).

115. This is the key insight of Willem Assies, *Land Tenure, Land Law and Development: Some Thoughts on Recent Debates*, 36 *J. PEASANT STUD.* 573 (2009).

116. See, e.g., David A. Atwood, *Land Registration in Africa: The Impact on Agricultural Production*, 18 *WORLD DEV.* 659, 663–64 (1990) (“[I]f potential purchasers tend to see land as an investment with a high potential for appreciation or as a hedge against inflation, rather than as a factor of production, reducing their transaction costs and risks may lead to poorer land use and reduced production as land is

What are the alternatives to individual titling? The adoption of anti-eviction laws, combined with the registration of use rights allowing for the emergence of a market for rental rights, might be a more pro-poor option. In recent years, a number of countries, particularly in Africa, have also provided formal legal recognition to existing customary rights, including collective rights.<sup>117</sup> The resulting security of tenure is crucial in order to protect the beneficiaries from encroachment on their lands and the natural resources concerned, and it is seen as highly legitimate in the eyes of the beneficiaries. But there exists a marked difference between that approach and individual titling. Typically, the registration of customary use rights allows neither the individual members of households nor the communities, to dispose of the land by selling it. But the protection from eviction that such registration ensures otherwise presents a number of advantages that are usually associated with titling schemes. Long-term investments in the land are encouraged. Access to credit is facilitated because lenders can be assured of the long term viability of the investments they help to finance, even though they will not be able to take possession of the land in cases of default. Rental markets can also emerge, improving access to land, particularly for land-scarce and labor-abundant households with little education.<sup>118</sup>

A shift away from a focus on individual titling and the creation of a market for land rights, and towards the recognition of customary forms of tenure over communal lands and common property resources, is particularly important in light of the vulnerability of certain groups that are dependent on the commons for their livelihoods. The Section below explains why.

### B. *Protecting Communal Rights*

Another major argument for encouraging the registration of land users' rights based on customary forms of tenure is that individual titling fails to adequately protect access to natural resources for groups who depend on communal ownership of land for their livelihoods. The case of indigenous

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held idle or used in a non-intensive way after its transfer.”) (citing John Bruce, *Land Tenure Issues in Project Design and Strategies for Agricultural Development in Sub-Saharan Africa* (Land Tenure Center, University of Wisconsin-Madison, Working Paper No. 128, 1986)). This reportedly has occurred, for instance, in Thailand. See Leonard & Ayuttahaya, *supra* note 95, at 139–41.

117. See WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 139 (“Over the last decade, a large number of African countries adopted a wave of new land laws to recognize customary tenure, make lesser (oral) forms of evidence on land rights admissible, strengthen women’s land rights, and establish decentralized land institutions.”); *id.* at 100 (noting that the legal recognition of indigenous land rights and customary land tenure systems was part of legal reforms in Benin, Indonesia, Mali, Mozambique, Niger, Tanzania, and Uganda that “recognize[d] that a community’s relationship with land [was] more than just an aggregation of individual plots but extends to land-based resources used in common, such as pastures, forests, and water”).

118. For the example of India, see Klaus Deininger, Songqing Jin, and Hari K. Nagarajan, *Efficiency and Equity Impacts of Rural Land Rental Restrictions: Evidence from India*, 52 EUR. ECON. REV. 892 (2008).

peoples is paradigmatic in this regard.<sup>119</sup> Whether under the International Labour Organization (“ILO”) Convention Concerning Indigenous and Tribal Peoples in Independent Countries<sup>120</sup> or under the Declaration on the Rights of Indigenous Peoples proclaimed by General Assembly Resolution 61/295 on 13 September 2007,<sup>121</sup> international law recognizes the right of indigenous peoples over the lands and territories that they have traditionally occupied. Indigenous peoples have the right to have their lands demarcated, and relocation is only allowed under narrowly defined circumstances and, in principle, with the free and informed consent of the groups concerned. These instruments in principle should protect indigenous peoples from encroachments on their land, such as for the development of industrial projects or for large-scale investments in agricultural production.<sup>122</sup> Regional human rights courts have also contributed to the strengthening of the rights of indigenous peoples to their lands and territories. The Inter-American Court of Human Rights, for instance, required Nicaragua to set up a procedure for the demarcation of the property of indigenous communities, noting that “[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain

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119. For an exhaustive treatment of the subject, see De Schutter, *supra* note 66, at 310–14. While I draw here on some of the materials already discussed in that earlier article, the interpretation I provide here differs in significant ways from that discussion.

120. ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169 (Sept. 5, 1991), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>. Only 22 states had ratified the convention at the time of this writing. The list includes only one African state (the Central African Republic ratified the convention in 2010), and only one country from Asia (Nepal ratified the convention in 2007). For the table of ratifications, see List of Ratifying States, <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169> (last visited Apr. 11, 2011).

121. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); see Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Hum. Rts. Council, ¶ 41, U.N. Doc. A/HRC/9/9 (Aug. 1, 2008) (by S. James Anaya) (“Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of states, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and state practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law. In any event, as a resolution adopted by the General Assembly with the approval of an overwhelming majority of Member states, the Declaration represents a commitment on the part of the United Nations and Member states to its provisions, within the framework of the obligations established by the United Nations Charter to promote and protect human rights on a non-discriminatory basis.”).

122. Of particular relevance in this context are Articles 28 and 32 of the 2007 Declaration. Declaration on the Rights of Indigenous Peoples, *supra* note 121, at arts. 28, 32. Article 28 defines the scope and content of the right to redress of indigenous peoples for “the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” *Id.* at art. 28. Article 32 ¶ 2 provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” *Id.* at art. 32.

official recognition of that property, and for consequent registration.”<sup>123</sup> In highly publicized cases decided during the last decade, both the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights have taken the view that where “the members of indigenous peoples have unwillingly lost possession of their lands after a lawful transfer to innocent third parties, they are entitled to the restitution thereof or to obtain other lands of equal extension and quality.”<sup>124</sup>

There are a number of indications that new forms of protection of access to natural resources are now emerging, that are reducible neither to the protection of the individual’s right to property nor to the specific protection granted to the lands and territories of indigenous peoples. This expanded protection of the right of access to resources is proceeding through two channels. A first channel is the right to self-determination of peoples and, specifically, the right of all peoples to freely dispose of their natural wealth and resources, as stipulated under Article 1 of both 1966 Covenants implementing the Universal Declaration of Human Rights.<sup>125</sup> The Human Rights Committee has read this norm to prohibit depriving any people of traditional uses of the land and resources on which they rely.<sup>126</sup> Another channel is the right to property, as protected in particular under Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination and under Article 21 of the American Convention on Human Rights.<sup>127</sup> The right to property, indeed, is not limited to the right to *indi-*

123. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 151, 164 (Aug. 31, 2001) [hereinafter *Mayagna*]. For a discussion of the case-law of the Inter-American bodies in this area, see generally Fergus MacKay, *From ‘Sacred Commitment’ to Justiciable Norms: Indigenous Peoples’ Rights in the Inter-American System*, in *CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS* 371 (Margot E. Salomon, Arne Tostensen & Wouter Vandenhoele eds., 2007).

124. *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146 ¶ 128 (Mar. 29, 2006) [hereinafter *Sawhoyamaxa*]; see also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Afr. Comm’n on Hum. & Peoples’ Rts., Communication No. 276/2003, ¶ 209 (Feb. 2, 2010).

125. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966).

126. See *Apirana Mahuika et al. v. New Zealand*, Hum. Rts. Comm., Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993, ¶ 9.7 (2000), in which the Committee reads Article 1(2) of the International Covenant on Civil and Political Rights as allowing an arrangement concerning the management of fishing resources, emphasizing that the Maori people “were given access to a great percentage of the quota, and thus effective possession of fisheries was returned to them,” and that the new control structure put in place ensures not only a role for the Maori in safeguarding their interests in fisheries but, in addition, their “effective control.” The Human Rights Committee observed that “minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture[, which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.” *General Comment No. 23: The Rights of Minorities (Art. 27)*, Hum. Rts. Comm., U.N. Doc. CCPR/C/21Rev.1/Add.5, ¶¶ 1, 3.2 (Aug. 4, 1994).

127. Article 21 establishes, *inter alia*, that: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social

*vidual* property. According to the Committee on the Elimination of Racial Discrimination, it includes the “rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources”;<sup>128</sup> and the Inter-American Court of Human Rights has been explicit in noting that property should not be understood in a restrictive sense but can be an attribute of the group or the community.<sup>129</sup> The international courts and treaty bodies are not isolated in this regard; indeed, certain domestic courts have adopted decisions that point in the same direction.<sup>130</sup>

These developments primarily illustrate that provisions of international human rights law that make no reference to indigenous peoples and that were not adopted with indigenous peoples in mind are being interpreted in order to extend their protection of such peoples. But their significance goes beyond that. For there is no reason why the indigenous peoples or assimilated groups<sup>131</sup> should be the only beneficiaries of this recognition of communal forms of ownership. There are in fact a number of arguments in favor of recognizing the relevance to other groups of this renewed recognition of communal notions of property, which questions the privileged position that individual property in land enjoys in Western capitalist legal systems.<sup>132</sup>

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interest, and in the cases and according to the forms established by law.” American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36; *see also* International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, U.N. Doc. A/RES/2106A, art. 5(d)(v) (Dec. 21, 1965).

128. CERD, *Concluding Observations: Guyana*, CERD/C/GUY/14, ¶ 16 (Apr. 4, 2006).

129. *See* Mayagna, *supra* note 123, at ¶ 148 (“indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land ‘is not centered on an individual, but rather on the group and its community’”); Sawhoyamaya, *supra* note 124, at ¶ 120.

130. National courts have occasionally held that, by virtue of traditional occupation and use, the ownership of natural resources is vested collectively in an indigenous people. *See, e.g.*, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶¶ 194, 199, 201 (Dec. 11, 1997) [Supreme Court of Canada]; *Alexkor Ltd. and the Republic of South Africa v. The Richtersveld Cmty. and Others*, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC), ¶ 62 (Oct. 14, 2003) [South African Constitutional Court].

131. *See* *Case of the Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 132–33 (June 15, 2005) (extending the protection recognized to indigenous peoples to all groups who entertain a similar “profound and all-encompassing relationship to their ancestral lands” centered on “the community as a whole” rather than on the individual, such as the Maroon communities living in Suriname, which are not indigenous to the region, but are tribal communities of former slaves that settled in Suriname in the 17th and 18th centuries); *see also* *Saramaka People v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 ¶ 86 (Nov. 28, 2007) (finding that “the Court’s jurisprudence regarding indigenous peoples’ right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival”).

132. As noted as early as 1921 by the Privy Council in *Amodu Tijani v. The Secretary, Southern Nigeria*, “in interpreting the native title to land [in the British Empire], much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. . . . The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. . . . To ascertain how far this latter develop-

The urgency of moving in this direction becomes clear once we acknowledge that among the groups that are most directly threatened by the current global enclosure movement are those who depend on the commons. Fisherfolk need access to fishing grounds; for them, the strengthening of individual property rights may mean that they will be fenced off from the land that gives them access to the sea or to rivers. Pastoralists also form a particularly important group in Sub-Saharan Africa, where almost half of the 120 million pastoralists or agro-pastoralists worldwide reside.<sup>133</sup> They need grazing grounds for the animals they rear; for them, too, enclosure—the privatization of the commons that results from the generalization of a Western notion of individual property rights over land—may represent a significant threat. In addition, across the developing world, many rural households still depend on the gathering of firewood for their cooking energy, and on commonly owned wells or water sources for their access to water. The formalization of property rights and the establishment of land registries may further worsen the situation of all these groups, for this phenomenon may lead to cutting them off from the resources on which they depend.<sup>134</sup>

As clearly illustrated by the current wave of large-scale investments in farmland, the threats these groups are facing are made more serious as a result of economic growth and globalization. Economic growth increases the gains to be had from dismantling the commons, as land comes to be seen as an economic asset, the productivity of which should be maximized.<sup>135</sup> And globalization means that these gains are now being evaluated, not only in relation to the various uses of land that could be made locally, but also in relation to uses of land that could serve demand in remote locations; thus, the opportunity costs of not using land in the ways that are most profitable

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ment of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.” [1921] 2 AC 399 (PC), 402–4.

133. The largest pastoral/agro-pastoral populations (of seven million each) are in Sudan and Somalia, followed by Ethiopia with four million. See Nikola Rass, *Policies and Strategies to Address the Vulnerability of Pastoralists in Sub-Saharan Africa* (Pro-Poor Livestock Policy Initiative, FAO, Working Paper No. 37, 2006), available at [www.fao.org/ag/AGAinfo/programmes/en/pplpi/docarc/execsumm\\_wp37.pdf](http://www.fao.org/ag/AGAinfo/programmes/en/pplpi/docarc/execsumm_wp37.pdf).

134. WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 139 (noting that individual titling could “weaken or leave out communal, secondary or women’s rights”); see also Jim Igoe, *Scaling Up Civil Society: Donor Money, NGOs and the Pastoralist Land Rights Movement in Tanzania*, 34 DEVELOPMENT AND CHANGE 863 (2003) (describing the resistance from pastoralist movements following the alienation of traditional grazing lands in Maasai and Barabaig communities in Tanzania); Klaus Deininger & Gershon Feder, *Land Institutions and Land Markets* 2–6 (World Bank Development Research Group, Policy Research Working Paper No. 2014, 1998). For a good summary of the threats faced by pastoralists, see Tinyade Kachika, *Land Grabbing in Africa: A Review of the Impacts and the Possible Policy Responses* ch. 4 (Oct. 2010), available at <http://www.landcoalition.org/cpl-blog/?p=8408#more-8408>.

135. Jean Esminger & Andrew Rutten, *The Political Economy of Changing Property Rights: Dismantling a Pastoral Commons*, 18 AMER. ETHNOLOGIST 683, 683 (1991) (noting also an increased diversification within pastoral societies, leading to the emergence of groups with diverging interests as regards the organization of property rights); Ronald Johnson & Gary Libecap, *Contracting Problems and Regulation: The Case of the Fishery*, 72 AMER. ECON. REV. 1005, 1006 (1982).

are becoming unaffordable for poor populations,<sup>136</sup> and those who are at risk of losing most are those who depend on a continued access to the commons. These are the concerns that have led the U.N. High Level Commission for the Legal Empowerment of the Poor to note:

In some legal cultures community-based ownership in natural resources such as grazing lands, forests, water, fisheries, and surface minerals are traditional and effective ways to grant control and proprietary rights to persons who have little or no other property. These systems should be both recognised and fully protected against arbitrary seizure.<sup>137</sup>

At the same time however, customary forms of tenure should not be idealized. Local customs are often discriminatory against female-headed households or against certain groups, such as newly arrived members of the community.<sup>138</sup> The decentralized registration of land use rights should therefore be carefully monitored in order to ensure that it is done in a transparent and non-discriminatory manner, and certain ground rules should be established that ensure that the definition of the rights governing communal lands and the dispute settlement processes will not be captured by the local chiefs. Easy access to a complaints mechanism for those whose rights have not been recognized is essential in this regard.<sup>139</sup>

### *C. The Decentralized Management of Natural Resources*

As an alternative to both state ownership (implying the lack of any security of tenure for the local land users) and classic property rights over land, the registration of land use rights and the formalization of communal property rights present one additional advantage. They facilitate decentralized management of natural resources (land and water), which can ensure that

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136. This is why Eric Lambin and Patrick Meyfroidt can note, perhaps paradoxically, that agricultural intensification (i.e. the increases achieved in the productivity of land) can increase demand for land and thus cropland expansion. Since, in a globalized world, there will always be a demand to be satisfied, the more land can be made productive, the more it will be in high demand. See Lambin & Meyfroidt, *supra* note 70, at 8 (“Economic globalization combined with the looming global land scarcity increases the complexity of future pathways of land use change. Predictions of the expected land use impact of national policies have become more uncertain. In a more interconnected world, agricultural intensification may cause more rather than less cropland expansion.”).

137. COMM’N ON LEGAL EMPOWERMENT OF THE POOR, *supra* note 113, at 65.

138. See, e.g., Julia Behrman et al., *The Gender Implications of Large-Scale Land Deals* 6 (IFPRI Discussion Paper No. 01056, 2011) (noting that “[w]ithin customary systems, men typically hold the land rights, and women access land through relations to men as wives, mothers, or daughters.”). Note, however, that privatization processes, for instance through titling, do not remove this discrimination per definition. See Lastarria-Cornhiel, *supra* note 98, at 1326, 1329 (noting that only a gender-conscious process taking into account the specific position of women may bring about such improvement, and that the same is true for outsiders to the community or ethnic minorities, that are discriminated against in customary forms of tenure but also are less well equipped to benefit from privatization schemes).

139. I explore below the broader background against which such a registration process could take place and how it could best serve the protection of the rights of land users. See *infra* Part IV.C.

such resources will be used sustainably. As demonstrated in the pioneering work of Elinor Ostrom,<sup>140</sup> communities in a variety of contexts have been able to devise institutions that have managed common resources in ways that are both highly productive and sustainable, ensuring that current uses do not jeopardize future uses. This is the case, for example, of irrigation systems using local water resources.<sup>141</sup>

The management of common pool resources, this line of research shows, may be most effective when done through local governance structures in which there is a reasonable fit between those who benefit from the common resource and those who are in charge of defining use rights, limiting the risk of negative externalities being ignored in the exercise of such rights. Such governance structures are generally more appropriate than either top-down regulations imposed from the center or solutions based on the privatization of the commons. Because of the decentralized monitoring that they allow and because of the higher degree of legitimacy that they present in the eyes of the members of the community, they are better designed to avoid “traged[ies] of the commons”<sup>142</sup>—such as overgrazing in the absence of appropriate supervision of the use of the common pastures. When use rights are defined at the local level, they are based on the best information available, particularly as regards the carrying capacity of the common resource. Such decentralized solutions, of course, require a certain degree of formalization.<sup>143</sup> But that is precisely what a registration of land use rights at the level of the local community, and the recognition of communal property rights to the community itself, should allow.

The arguments in favor of decentralized governance of common pool resources further strengthen the conclusion reached above: that security of tenure should certainly be strengthened in order to protect local land users from land-grabbing, but that it should not necessarily take the form of individual titling. Rather, the registration of existing forms of tenure, including communal rights and the rights of pastoralists, fishers, or other groups depending on access to common resources, should be sufficient. Insofar as such forms of tenure are already recognized under local customs, they are highly legitimate, which should facilitate enforcement and contribute to legal security.

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140. See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990). But see B. McCAY & J. M. ACHESON, *THE QUESTION OF THE COMMONS: THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES* (1987); Robert Wade, *The Management of Irrigation Systems: How to Evoke Trust and Avoid the Prisoners' Dilemma*, 16 *WORLD DEV.* 489 (1988).

141. See, e.g., W. F. LAM, *GOVERNING IRRIGATION SYSTEMS IN NEPAL: INSTITUTIONS, INFRASTRUCTURE, AND COLLECTIVE ACTION* (1998); W. F. Lam, *Foundation of a Robust Social-Ecological System: Irrigation Systems in Taiwan*, 2 *J. OF INSTITUTIONAL ECON.* 203 (2006).

142. The expression has its source in the work of Garrett Hardin. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1243–48 (1968). But see H. Scott Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 *J. POL. ECON.* 124, 124–42 (1954).

143. See OSTROM, *supra* note 140, at ch. 5.

#### IV. CHOICES FACING GOVERNMENTS: THREE SCENARIOS

There is now substantial agreement on the need to recognize the rights of local communities over the land that they use. At the same time, many commentators and agencies acknowledge the need for more investment in agriculture, in order to make up for many years during which this sector was neglected. These two objectives seem at first to be perfectly compatible; it should be possible, after all, to encourage such investments, provided that the rights of local communities be fully respected, and to thus combine economic development with improved governance.

Unfortunately, this framing of the challenge underestimates the potential impacts of the development of large-scale, highly capitalized plantations on the small farmers selling on the same markets, even when such farmers do not lose access to the natural resources on which they depend. It also ignores the reality of the trade-off that is at work here: selling land to well-financed investors means that access to land for small-scale farmers will be more difficult to achieve, although the small size of the parcels they cultivate is often the single largest obstacle to their ability to escape from poverty. Whether they connect through the markets for agricultural products or through the markets for land and water, or both, the worlds of large plantations and of small-scale farming are not independent from one another. The shape of their coexistence shall to a large extent determine the future of farming in developing countries and the sustainability of current trends.

Governments therefore face hard choices—harder choices, perhaps, than they would like to recognize. Even investments that are sustainable and equitable—“win-win-win” deals, that benefit the foreign investor, the local government, and the local communities at the same time—can have impacts on the structure of revenues in the rural areas that can increase inequality and poverty, and thus food insecurity, if they are not correctly anticipated. And maintaining an appropriate balance between the promotion of large-scale plantations and the development of smaller production units, owned by those who work on the land, constitutes a serious challenge for the governments in target countries. Faced with this new wave of investments in agriculture, these governments shall have to choose between three broad scenarios.

##### A. *The Transition Scenario*

There is one influential view that sees the arrival of investors intent on buying or leasing large tracts of land in order to develop large estates as an opportunity to effectuate a shift away from small-scale, family farming, and towards industrial types of agricultural production. Such industrial types of farming are highly mechanized and capital intensive. They can produce large volumes through monocropping schemes. And they are the most competitive on regional and international markets, whether they choose to serve

these markets or to serve instead the needs of one investor seeking to secure a stable supply of raw commodities. This scenario has its supporters among those who do not believe that small-scale farming has a future and believe instead, as one commentator put it, that all countries should focus on developing large agro-industrial estates following the model of the Brazilian farm.<sup>144</sup>

This scenario is a product of textbook economics and is entirely unrealistic in practice. Because industrial farming is much less labor-intensive than small-scale farming on family farms, its expansion would result in the massive displacement of small-scale farmers from the lands they depend on. This represents approximately 1.5 billion people worldwide,<sup>145</sup> many of whom are already marginalized, and includes up to half of the people who are too poor to feed themselves.<sup>146</sup> Of course, it could be argued that these small-scale farmers, currently often relegated to subsistence farming that hardly suffices to make a decent living, could seek employment in the cities, or that they could become waged agricultural workers on the larger plantations. But the first possibility is still highly unrealistic in the current context; in most poor, agriculture-based countries, the manufacturing and services sectors have not been able to absorb the surplus workforce exiting from agriculture, and those who have migrated from the rural areas to the cities live in slums in sub-standard conditions, with no or only highly precarious types of employment.<sup>147</sup> More than one in six people—forty-three percent of the population in developing countries—already live in slums, and by 2030,<sup>148</sup> that figure will have increased to one in three individuals.<sup>149</sup> The vast majority of these urban poor have no access to social protection of any kind. Accel-

144. For a characteristic exposition of that view, see Paul Collier, *The Politics of Hunger: How Illusion and Greed Fan the Food Crisis*, 87 FOREIGN AFF. 67 (2008).

145. See WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 3 (“Of the developing world’s 5.5 billion people, 3 billion live in rural areas . . . Of these rural inhabitants an estimated 2.5 billion are in households involved in agriculture, and 1.5 billion are in smallholder households.”).

146. It has been estimated that about half of those who are food insecure in the world live in smallholder farming households; two tenths are landless; one tenth are pastoralists, fisherfolk, and forest users; and the remaining two tenths are the urban poor. U.N. MILLENNIUM PROJECT, HALVING HUNGER: IT CAN BE DONE, SUMMARY VERSION OF THE REPORT OF THE TASK FORCE ON HUNGER 6 (2005), available at [http://www.unmillenniumproject.org/documents/HTF-SumVers\\_FINAL.pdf](http://www.unmillenniumproject.org/documents/HTF-SumVers_FINAL.pdf).

147. On the situation of slum-dwellers, see PIETRO GARAU AND ELLIOTT D. SCLAR, U.N. MILLENNIUM PROJECT, IMPROVING THE LIVES OF SLUM DWELLERS: A HOME IN THE CITY (2005), available at <http://www.unmillenniumproject.org/documents/Slumdwellers-complete.pdf>.

148. During the twentieth century, world population increased from 1.65 billion to 6 billion, and experienced the highest rate of population growth (averaging 2.04% per year) during the late 1960s. The largest annual increase in world population (eighty-six million) took place in the late 1980s. The rate of population growth is currently around 1.2% per year, and the annual increase is now approximately seventy million. Over the next generation, the fastest increases in population will take place in Africa: the population of the continent, now at one billion, increases by about twenty-four million people each year, and it will have doubled by 2050. See U.N. Population Division, *The World at Six Billion*, U.N. Doc. ESA/P/WP.154 (Oct. 12, 1999), available at <http://www.un.org/esa/population/publications/sixbillion/sixbilpart1.pdf>.

149. See U.N. HABITAT, THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS xxv (2003).

erating the ruin of the peasantry in the global South would further worsen this situation.

The other possibility, that of small-scale farmers becoming waged agricultural workers, may seem attractive at first, particularly as many already work on plantations on a seasonal basis, since farming the small family plot does not generate sufficient incomes. Yet, that is hardly a solution either. Because large plantations are much less labor-intensive than smaller farms, it is very unlikely that the jobs they would create would compensate for the losses of employment on the smaller farms they would replace. Indeed, small farms in developing countries typically compensate for the high cost of access to credit and inputs, as well as the scarcity of land, by using substantially more man-days per unit of land than the larger production units. This is especially the case since there is a good deal of surplus labor in rural areas, meaning that in the absence of opportunities for off-farm employment, the opportunity costs of excess labor are close to zero.<sup>150</sup>

In addition, waged work on a large plantation does not generally translate into improved livelihoods for those exiting agriculture as independent small-scale farmers. One cross-country study concludes that incomes of smallholders is two to ten times higher than what they could obtain from wage employment only.<sup>151</sup> Today, there are more than 450 million agricultural workers globally.<sup>152</sup> Most agricultural workers are in the informal sector, and only a fraction of them have access to some form of social protection. A large number of them, estimated at 170,000 annually by the ILO, are injured as a result of the use of agricultural machinery or contact with agrochemicals.<sup>153</sup> Since work is often paid on a “piece-rate” basis, it is not uncommon for agricultural workers to have their children work with them in the fields. The result is that about seventy percent of child labor in the world is in agriculture, representing approximately 132 million girls and boys aged 5–14.<sup>154</sup> Bonded labor practices are perpetuated from one generation to the next, maintained through the use of systems of advances on wages, stores located in camps that charge excessive prices compared to market prices, or compulsory deductions from wages for savings schemes. Since much waged employment is in the informal sector, national labor legislation is unable to ensure the right to a minimum wage or to protect women from discrimination. Even where the agricultural sector is not formally excluded from the effective scope of labor legislation, labor inspector-

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150. Giovanni Andrea Cornia, *Farm Size, Land Yields and the Agricultural Production Function: An Analysis for Fifteen Developing Countries*, 13 *WORLD DEV.* 513, 515 (1985). This is, of course, a regrettable reality, the result of a lack of investment in rural development; but it is also one that cannot be ignored.

151. DEININGER ET AL., *supra* note 43, at 26.

152. PETER HURST, FAO-ILO-IUF, *AGRICULTURAL WORKERS AND THEIR CONTRIBUTION TO SUSTAINABLE AGRICULTURE AND RURAL DEVELOPMENT 2* (2005), available at <http://ftp.fao.org/docrep/fao/008/af164e/af164e00.pdf>.

153. INTERNATIONAL LABOR OFFICE (ILO), *PROMOTION OF RURAL EMPLOYMENT FOR POVERTY REDUCTION* ¶¶ 165, 195 (2008).

154. *Id.* at ¶ 235.

ates are in practice unable to enforce such legislation effectively in rural areas.<sup>155</sup>

### B. *The Coexistence Scenario*

Because they are convinced of the need to support smallholders in order to combat rural poverty, most commentators favor combining the arrival of investors and large-scale plantations developed by these investors with protections for existing land users, including in particular small-scale farmers. It is this scenario that is at least implicitly envisaged by current attempts to “discipline” large-scale investments in land.<sup>156</sup> It is therefore worth exploring in greater detail.

This “coexistence” scenario takes as its departure point the apparently uncontroversial position that while the existing rights of land users should be fully respected, which requires that they be clearly delineated, there remain large areas of “underutilized” land that could be put into cultivation without infringing on these rights. In a number of regions, particularly in Sub-Saharan Africa, there is room for expansion of cultivated areas, because the ratio of land that is potentially suitable for rainfed agriculture to what is in fact cultivated is large, and because the population density is low. For instance, in a study it released in September 2010, the World Bank uses a twenty-five persons/km<sup>2</sup> cutoff (a level at which there are twenty hectares available for each household),<sup>157</sup> to draw the conclusion that “the seven countries with the largest amount of land available (Sudan, Brazil, Australia, Russia, Argentina, Mozambique, and Democratic Republic of the Congo, in that order) account for 224 million ha, or more than half of global availability.”<sup>158</sup> The suggestion here is that at low levels of population density, large-scale investments in land are appropriate, and “voluntary land transfers that make everybody better off are possible.”<sup>159</sup>

This raises a number of questions. First, it has been noted that concepts such as “underutilized” or “available” land “tend to reflect an assessment of the productivity rather than existence of resource uses,” and are therefore “often applied not to unoccupied lands, but to lands used in ways that are not perceived as ‘productive’ by government.”<sup>160</sup> They are also notions that are easily manipulated in contexts where the rights of the local land users are unclear, and where the administration of land management is weak or non-

155. See Special Rapporteur on the Right to Food, *Agribusiness and the Right to Food*, ¶¶ 10–20, U.N. Doc. A/HRC/13/33 (Dec. 22, 2009).

156. See *supra* text accompanying notes 4–6.

157. DEININGER ET AL., *supra* note 43, at vi.

158. *Id.* at 55. The reference to global availability is to the calculation in the same report that, on a worldwide basis, there are 445 million hectares of land available for cultivation of at least one of the major crops. The currently cultivated area is just over 1,500 million ha; therefore, an increase of one third in cultivated areas would be theoretically possible.

159. *Id.*

160. COTULA ET AL., *supra* note 43, at 62.

existent. Recent reports have provided ample demonstration of the dangers involved, particularly since many of the new investments in land take place in weak governance countries.<sup>161</sup> Where there is every incentive for investors and host governments alike to circumvent the rights of land users, consultations with the local communities are not a substitute for rigorous monitoring of the impacts of the arrival of investors on those communities. It is not unusual for vulnerable groups, such as pastoralists and internally displaced people, to be excluded from consultations<sup>162</sup> and for their claims to be subsequently ignored when, often at a very late stage, they discover the impacts on their livelihoods of shifts in land use. Furthermore, the consultations typically involve men and the chiefs of the local communities, excluding women and ignoring the gender impacts of such changes—for example, the increase in the time required of women to gather water or firewood and take care of household food security.<sup>163</sup> On the basis of a detailed study of large-scale investments in land in fourteen countries, the World Bank concludes that in many cases consultations with local right holders have been “superficial, with a lack of prior information and no written agreements that would clearly specify different parties’ responsibilities and thus could be used to provide a basis for redress in case agreements are not adhered to”; in addition, the ability of governments to monitor the process effectively is limited.<sup>164</sup> Others have noted a number of factors that “may induce the rural poor to enter into sale or lease contracts at prices that significantly undervalue both the speculative and productive value of their land,” including lack of capital availability, asymmetries of information between the parties, or sheer intimidation and fraud.<sup>165</sup> Therefore, even where there would appear to be “available” land, which local communities seem willing to give away to investors, there is every reason to take a hard look at the deals that are concluded.

A second difficulty of the coexistence scenario is widely overlooked. The development of large estates may lead to increased competition between

161. See, e.g., CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, FOREIGN LAND DEALS AND HUMAN RIGHTS: CASE STUDIES ON AGRICULTURAL AND BIOFUEL INVESTMENT (2010) (providing an in-depth study of three cases respectively in Tanzania, Southern Sudan, and Pakistan, where the lack of transparency and weak consultation processes with the local communities raise serious doubts about whether the rights of these communities were adequately taken into account); DEININGER ET AL., *supra* note 43.

162. See, e.g., Lasterria-Cornhiel, *supra* note 98, at 1326.

163. See Behrman et al., *supra* note 138, at 6 (“Because female farmers and household heads are less likely than their male counterparts to have formal land titles, they will likely be in a weaker position to bargain with governmental authorities or investors on potential land deals in their communities . . . [S]ome authors [also] report the use of intimidation in the acquisition process. Female heads of households who do not have access to their husbands’ social networks are especially at risk, especially where, as is often the case, women lack confidence to voice their concerns about ownership, access and use of land.”) (internal citations and quotation marks omitted).

164. DEININGER ET AL., *supra* note 43, at 51.

165. Michael Taylor and Tim Bending, *Increasing Commercial Pressure on Land: Building a Coordinated Response* 11–12 (International Land Coalition Secretariat Discussion Paper, 2009).

large-scale plantations and small-scale farmers if they target the same markets. Due to their lack of access to credit, small-scale farmers generally possess less capital. They therefore tend to substitute family labor for capital and rely on labor-intensive techniques to make the maximum use of the little land available.<sup>166</sup> They are typically much more productive per hectare.<sup>167</sup> But they only manage to survive because family labor is not remunerated and because the incomes of the farmers are very low. Indeed, the labor-intensity of the family farm is in part due to the fact that labor is cheap or available almost for free, with very low opportunity costs in the absence of alternative employment in the rural areas.

In contrast, large-scale plantations rely on machinery and, more generally, on a more highly capitalized system of production. This allows them to produce large volumes at a relatively low cost, thanks to economies of scale. In general, they are more productive per active laborer, although their productivity per hectare is lower.<sup>168</sup> These plantations are champions of the low-cost food economy that is developing today. They are often highly competitive, and they may provide a source of revenue for the state in income taxes or in export duties, which in turn can be used by the government to provide public services to the population.

However, 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. Therefore, the contribution large industrialized plantations can make to economic growth should be compared not with the status quo, but with the contribution to growth and

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166. See Cornia, *supra* note 103, at 51 (“[Labor] may be more abundant and cheaper for small farmers; indeed, given the scarcity of available land, poor farmers have, in principle, a large excess of labor. The possibility of utilizing this excess labor in off-farm jobs is limited due to the narrowness of the labor market. Thus the opportunity cost of employing members of the family on one’s own farm is expected to be very low (equal to the disutility of the effort). This implies that a much larger amount of labor, even with a low and rapidly decreasing marginal productivity (probably below the market wage rate), is imputed into small holding farming.”).

167. On the inverse farm-size productivity relationship and scale effects in agriculture, see Gershon Feder, *The Relationship Between Farm Size and Farm Productivity*, 18 J. DEVELOPMENT ECON. 297 (1985); Abhijit V. Banerjee et al., *Empowerment and Efficiency: The Economics of Agrarian Reform* 1–5, (Massachusetts Institute of Technology, Department of Economics Working Paper Series, Working Paper No. 98-22, 1998), available at <http://ssrn.com/abstract=141182>; Christopher B. Barrett, *On Price Risk and the Inverse Farm Size-Productivity Relationship* (University of Wisconsin-Mad. Economics Staff Paper Series No. 369, 1993); S.M. Borrás et al., *Agrarian Reform and Rural Development: Historical Overview and Current Issues* 1 (ISS/UNDP Land, Poverty and Public Action Policy Paper No. 1, 2007); Peter Rosset, *The Multiple Functions and Benefits of Small Farm Agriculture* (Food First Policy Brief No. 4, 1999). While this literature concludes that smaller plots are more productive per surface and thus more resource efficient, this is challenged by the report presented by the World Bank in September 2010 on large-scale acquisitions of land, which states instead that “yields on smallholder farms are lower than or equal to those on large farms, often by a large margin.” DEININGER ET AL., *supra* note 43, at 26. The methodology used to arrive at this conclusion is not explained. We can only suppose that this discrepancy is due either to a calculation of yields for one single crop (whereas small family farms typically produce various crops in combination, and have a total output that is thus larger than any single crop they produce) or to a calculation of yields produced per active laborer rather than per surface of land cultivated.

168. See *supra* note 167.

rural development that could result from investing in small-scale farming within family-owned farms. Indeed, part of the success of large plantations is attributable to the fact that the price of food does not reflect the social and environmental costs resulting from their operations, and particularly from the impacts of their modes of production on the soil and climate.<sup>169</sup> In contrast, small-scale farms are much more efficient in their use of land and water. But they are rewarded neither for the environmental benefits they provide, nor for their contribution to rural development and the reduction of rural poverty.

In this context, the “coexistence” of large-scale plantations and small farms competing in the same markets creates a risk that small farmers will either be driven out or will only subsist under conditions of extreme poverty. This outcome is not necessarily unavoidable, however. First, the two markets can remain relatively segmented. If, for instance, all the produce of the plantations developed by investors is shipped abroad, the risk of their products being dumped on the local markets and lowering the revenues of small farmers will be avoided. Where local food availability is sufficient, that may be the most appropriate solution. In contrast, in the (perhaps more typical) case where local food availability is insufficient, authorizing the investor to export all its produce could increase food insecurity for the local population and exacerbate its dependence on international markets or food aid. The two risks should be carefully balanced against each other. Where investments in large-scale plantations are authorized, flexibility clauses may have to be built into the investment agreements providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed upon in advance, if the prices of food commodities on international markets reach certain levels.<sup>170</sup>

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169. Agriculture accounts for thirteen to fifteen percent of global greenhouse emissions at the level of production alone, not counting the production of agricultural inputs and fixed capital equipment, as well as packaging, processing and distribution of agricultural products. See Travis J. Lybbert & Daniel Summer, *Agricultural Technologies for Climate Change Mitigation and Adaptation in Developing Countries: Policy Options for Innovation and Technology Diffusion* (ICSTD and International Food & Agricultural Policy Council, Issue Brief No. 6, 2010). A major part of these emissions, estimated at forty-six percent, are in the form of nitrous oxide, a particularly powerful greenhouse gas, resulting from the use of chemical fertilizers. See Alexander Kasterine & David Vanzetti, *The Effectiveness, Efficiency and Equity of Market-Based Instruments to Mitigate GHG Emissions from the Agri-Food Sector*, in U.N. TRADE AND ENVIRONMENT REVIEW 87 (2009/2010), available at <http://www.intracen.org/organics/documents/TER%20UNCTAD%20KasterineVanzetti.pdf>. The use of such fertilizers and other inputs, combined with mechanization, is more systematically associated with large production units; in contrast, the higher labor-intensity of production on smaller farms favors more sustainable types of farming. See Miguel A. Altieri & Parviz Koohafkan, *Enduring Farms: Climate Change, Smallholders and Traditional Farming Communities* (Third World Network, Environment and Development Series No. 6, 2008), available at [http://www.fao.org/nr/water/docs/Enduring\\_Farms.pdf](http://www.fao.org/nr/water/docs/Enduring_Farms.pdf).

170. The author has proposed this solution in his official capacity as Special Rapporteur on the Right to Food. See 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*, Annex, princ. 8, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 22, 2009).

Second, if competition between the two types of production units cannot be entirely avoided, the handicaps of small farms—particularly, the impossibility of achieving economies of scale for the acquisition of machinery, or in the processing, packaging and marketing stages of production—can be compensated, in part at least, by appropriate contracting schemes or institutional innovations. For instance, the development of rental markets for machinery would allow small farmers to use machinery without having to purchase it. Cooperatives would provide the possibility for them to join their efforts to build small processing facilities, or to package or sell their crops, and thus to climb up the value chain and capture a larger proportion of the end value of their produce. If well managed, contract farming can also allow some of these advantages to be captured by small farmers.<sup>171</sup>

On average, however, larger production units still retain certain competitive advantages over smaller-scale farms. Small farmers working in a highly decentralized and uncoordinated manner will experience agency problems and transaction costs that cannot be underestimated.<sup>172</sup> That also explains why the development of a market for land tends to lead to increased land concentration.<sup>173</sup> Therefore, in addition to facilitating such contracting schemes and institutional innovations, specific public policies might have to be developed to support small-scale farming. Public procurement represents one example. In Brazil, the country most clearly exhibiting successful coexistence between large- and small-scale farming units, the Brazilian Corporation for Provisioning (“CONAB”) purchases food from small farmers through the Program for the Acquisition of Food (“PAA”), under Law 11947 of 16 June 2009. This law provides that a minimum of thirty percent of all food acquired for the school-feeding program should be sourced from family farms.<sup>174</sup> Providing small-scale farms access to credit at lower interest rates, or improving the provision of public goods such as public storage facilities, extension services, and communication routes would also support small-scale farming.

The third question that arises under the coexistence scenario is opportunity costs. Land, we have noted, exists in finite quantity. It is not possible both to give land away to investors and improve access for local farmers. The reform scenario—our third scenario—takes seriously the need to confront this dilemma.

171. On these mechanisms, see *infra* text accompanying notes 185–187.

172. See Banerjee, *supra* note 167.

173. See *supra* text accompanying notes 99–106.

174. This represents a powerful incentive for family farming: for fiscal year 2009, the total value of the school-feeding program (*Programa Nacional de Alimentação Escolar* [“PNAE”]) was R\$2.2 billion (\$1.2 billion USD), ensuring that R\$733 million of food will be purchased from family farming establishments. See U.N. Human Rts. Council, Special Rapporteur on the Right to Food: Mission to Brazil (Oct. 12–18, 2009), ¶ 38, U.N. Doc. A/HRC/13/33/Add.6 (Feb. 19, 2009) (by Olivier De Schutter).

### C. *The Reform Scenario*

One last option open to governments is to channel agricultural investment into small-scale farming—what I call the “reform” scenario. This, it should be emphasized, is not equivalent to the status quo, or to preserving subsistence agriculture with its low productivity and few possibilities for escaping poverty. Nor is it a way of saying that investments in agriculture and particularly the arrival of foreign investors should be shunned. Rather, it aims to ensure that investment will be directed toward the most poverty-reducing ends.

Few would question that investment is required to support agriculture in developing countries—particularly in Sub-Saharan Africa, where, for too many years, it has been almost entirely neglected, resulting in significantly lower productivity than in other regions.<sup>175</sup> Indeed, investment in agriculture is particularly effective at alleviating poverty: cross-country comparisons show that GDP growth originating in agriculture is at least twice as effective in reducing poverty as GDP growth originating outside agriculture.<sup>176</sup> But while investment is needed, impact on the local economy varies widely depending on the kind of investment. At present, the vast majority of foreign investment in agriculture goes to the creation of large plantations.<sup>177</sup> Large estates that increase their revenue spend most of their gains on imported inputs and machinery; not much trickles down to local traders.<sup>178</sup> The multiplier effects of increased incomes for farmers and farm workers—stimulating demand for goods and services from local sellers and service-providers—are significantly higher when growth is triggered by

175. See Christiaensen & Demery, *supra* note 62.

176. WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 3; see also Julian M. Alston et al., *A Meta-Analysis of Rates of Return to Agricultural R&D: Ex Pede Herculem?*, 113 INT'L FOOD POL'Y RES. INST. (2000), available at <http://www.ifpri.org/sites/default/files/publications/tr113.pdf>. Recent reports show that if we take into account not only its own growth performance but also its indirect impact on growth in other sectors, agriculture is 3.2 times more effective at reducing the number of very poor people (defined as those living below a USD one-per-day PPP poverty line) in low-income and resource-rich countries, at least in the absence of strong inequality. See Luc Christiaensen, Lionel Demery & Jesper Kuhl, *The (Evolving) Role of Agriculture in Poverty Reduction—An Empirical Perspective*, J. DEV. ECON. (forthcoming).

177. Based on their study of large-scale land leases or acquisitions in four Sub-Saharan countries, Cotula et al. note that “the vast majority of documented projects continue to be run as large plantations based on concessions or leases. As large areas of land are commonly offered on very favourable terms, an incentive is created for establishing company-managed plantations rather than promoting contract farming approaches. Even ‘local content’ provisions requiring prioritisation of the local workforce in recruitment, common in extractive industry contracts, appear rare . . . . There is enormous scope here for governments to develop systems of incentives to promote more inclusive business models among large-scale investors.” COTULA ET AL., *supra* note 43, at 86.

178. U.N. Conference on Trade and Development, *Assuring Food Security in Developing Countries Under the Challenges of Climate Change: Key Trade and Development Issues of a Fundamental Transformation of Agriculture*, 16, UNCTAD/OSG/DP/2011/1 (Feb. 2011) (by Ulrich Hoffmann) (quoting G. RUNDGREN, GARDEN EARTH—FROM HUNTER AND GATHERER TO GLOBAL CAPITALISM AND THEREAFTER (forthcoming 2011)).

higher incomes for smallholders.<sup>179</sup> The poverty-reducing potential of investing in smallholders is considerable. Small-scale farmers can be helped by investments upstream and downstream from the production process itself: the provision of public goods can improve productivity and access to markets, and institutional innovations can strengthen the position of small-scale farmers and allow them to obtain more revenue for their produce.

Farmers' cooperatives and other producers' organizations may have a key role to play in this reform process.<sup>180</sup> Of course, cooperatives are still sometimes regarded with suspicion, including by the farmers themselves. In the 1960s and 1970s, when they were controlled by governments, cooperatives often captured value instead of ensuring fair revenues for farmers, and they were seen as inefficient.<sup>181</sup> Since the dismantling of parastatal cooperatives in the 1980s, however, multitudes of producers' organizations have emerged, established at the initiative of farmers and generally without support from governmental authorities, and even facing resistance from them.<sup>182</sup> Grouping together presents a number of advantages to small producers.<sup>183</sup> It significantly reduces transaction costs for the buyer, and it allows significant

179. The question of linkages between agriculture and other sectors of the economy has been a classic theme of economic literature since the early 1960s. See Bruce F. Johnston & John W. Mellor, *The Role of Agriculture in Economic Development*, 4 AM. ECON. REV. 566 (1961). The argument that growth in agriculture can benefit other sectors is sometimes based on the view that it will lead to growth both upstream and downstream of the production process on the farm, by increasing demand for inputs and upping agro-processing activities. Since most agricultural inputs and machinery are imported, however, and since crops can be sold abroad as raw commodities, whether such a "production" linkage occurs depends on the organization of the commodity chain in the country concerned. A more significant linkage—one that recent research estimates to be typically four to five times more important than the "production" linkage—results from the fact that increased incomes in rural areas will raise demand for locally traded goods or services. Christiaensen, Demery & Kuhl, *supra* note 176, at 8–9. This "consumption linkage"—in fact a Keynesian argument—is particularly likely where agricultural growth is widely spread across large segments of a very poor population. But it presupposes, of course, that the rural population will buy locally produced goods and locally provided services, and that supply can meet this increase in demand. See CHRISTOPHER DELGADO, JANE HOPKINS & VALERIE A. KELLY, INT'L FOOD POL'Y RES. INST., AGRICULTURAL GROWTH LINKAGES IN SUB-SAHARAN AFRICA 107 (1998), available at <http://www.ifpri.org/sites/default/files/pubs/pubs/abstract/107/tr107.pdf>. The important implication is that diversification of the economy—the strengthening of the industrial and the services sectors—must precede the growth of a market for manufactured products and services by the increase of incomes in rural areas. One cannot accelerate a process that has not been launched.

180. See Comm. on Sustainable Dev., Rep. on the Seventeenth Session, May 16, 2008, and May 4–15, 2009, ¶ 148, U.N. Doc. E/CN.17/2009/19, Supp. No. 9 (2009), available at <http://www.scp-knowledge.eu/sites/default/files/knowledge/attachments/N0935572.pdf>; Int'l Assessment of Agric. Knowledge, Sci. and Tech. for Dev., *Summary for Decision Makers of the Global Report*, 6 ¶ 12 (Apr. 7–8, 2008), available at [http://www.agassessment.org/reports/IAASTD/EN/Agriculture%20at%20a%20Crossroads\\_Global%20Summary%20for%20Decision%20Makers%20\(English\).pdf](http://www.agassessment.org/reports/IAASTD/EN/Agriculture%20at%20a%20Crossroads_Global%20Summary%20for%20Decision%20Makers%20(English).pdf); Int'l Labour Org., *Recommendation Concerning Promotion of Cooperatives*, R193 (2002), available at <http://www.ilo.org/ilolex/english/recdisp1.htm>.

181. See BATES, *supra* note 11 (explaining political motivations of governments in Africa in subordinating agriculture to industry and in using cooperatives as means of controlling farmers).

182. For instance, between 1982 and 2002 the percentage of villages having producer organizations increased from 8% to 65% in Senegal and from 21% to 91% in Burkina Faso. It is estimated that 250 million farmers in developing countries belong to such an association. WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 88, 154.

183. On the role of collective action institutions in improving market access for the rural poor, see Helen Markelova et al., *Collective Action for Smallholder Market Access*, 34 FOOD POL'Y 1 (2009).

economies of scale to reduce costs in the transfer of technologies and know-how, facilitating compliance with the food safety and quality standards that buyers increasingly demand.<sup>184</sup> Cooperatives also enhance the capacity of farmers to obtain lower prices when they buy inputs and higher prices when they seek to sell their produce. They can spread risks across their membership, provide services and organize training sessions for their members, provide infrastructure to members such as storage or transformation facilities, and disseminate price and other marketing information.

Cooperatives that function according to democratic principles, work for their members, distribute costs and benefits equitably, and design and implement clear business plans, can be extremely beneficial to their members. Cooperatives can be given tax incentives (either for the cooperatives themselves or for their customers), and they can also be given preferential treatment in public procurement schemes or in access to loans. And governments can help build the managerial capacity of cooperatives and help farmers navigate the increasing complexity of norms and requirements from buyers and public authorities regulating regional and global food markets.

The organization of farmers into cooperatives also presents advantages for investors wishing to secure a stable and reliable supply of particular commodities. Contract farming, of course, is not always an ideal solution. At its best, however, such a scheme offers buyers a reliable source of supply and farmers reliable buyers for their crops, leaving land rights untouched. The outside investor thus provides various kinds of support that allow small-scale farmers to increase their levels of productivity and manage the risks involved in the production of cash crops, and a long-term relationship develops between the parties.<sup>185</sup> At worst, such a business model can transfer all the risks to the producer. It can make the producer dependent on the buyer, weakening the producer's bargaining position vis-à-vis the buyer, or it can lead the producer into debt that she will never be able to repay. It can also have significant gender effects, as studies suggest that women lose control over decision-making when crops are produced for cash rather than for feed-

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184. Indeed, in the absence of such organization of small-scale farmers, market conditions tend to favor larger producers since compliance often requires higher levels of capitalization than many smallholders can afford, and because the high costs of monitoring compliance over a large number of units is an incentive for export companies to switch from smallholders to larger commercial farms. Andrew Graffham & Jerry Cooper, Making GLOBALGAP Smallholder Friendly 1 (2008), available at <http://www.agrifoodstandards.net/en/filemanager/active?fid=175>. The need for exporters to monitor compliance with the standards restricting access to global markets is one major reason that there is a tendency toward increased vertical concentration, as exporters tend to acquire control over their ultimate suppliers in order to retain contracts with retailers. See Catherine Dolan & John Humphrey, *Changing Governance Patterns in the Trade in Fresh Vegetables between Africa and the United Kingdom*, 36 ENV. & PLAN 491, 507 (2004).

185. Vera Songwe & Klaus Deininger, *Foreign Investment in Agricultural Production: Opportunities and Challenges*, 45 AGRI. & RURAL DEV. NOTES, Jan. 2009 (citing N. Key and D. Runsten, *Contract Farming, Smallholders, and Rural Development in Latin America: The Organization of Agro-Processing Firms and the Scale of Outgrower Production*, 27 WORLD DEV. 381 (1999)).

ing the local community.<sup>186</sup> And the shift to the production of cash crops may increase the producer's vulnerability to shocks as the farmer's household becomes dependent on market prices of food.

However, while caution is required, certain best practices illustrate the potential of such contractual schemes. In Mali, a company supported with Dutch capital, Mali Biocarburant SA ("MBSA"), has teamed up with local farmers' cooperatives for the production of biodiesel from jatropha—a shrub that contains oil—buying only the land necessary for building the small processing plant to produce the biodiesel. The cooperatives have an equity stake in the joint venture with MBSA. Since jatropha is intercropped with maize, production of food and of energy crops increase simultaneously, reducing the threat that cash crops may otherwise imply for local food security. Thus, the farmers produce the jatropha on their own land, with support from MBSA that includes technical assistance and access to inputs.<sup>187</sup>

If it is to be successful, this reform scenario should include means to enable equitable access to land. At a minimum, this requires ensuring security of tenure by the registration of land use rights and by adopting anti-eviction legislation, combined with the provision of tools—such as legal aid, legal literacy training, and paralegals—that ensure that formally recognized rights can be effectively vindicated.<sup>188</sup> It also requires strengthening the capacity of land administrations and anti-corruption measures.

Anti-eviction laws should be conceived of as the domestic implementation of two sets of international standards: the Committee on Economic, Social and Cultural Rights' work on evictions<sup>189</sup> and the *Basic Principles and Guidelines on Development-Based Evictions and Displacement*.<sup>190</sup> The main purpose of these documents is to require that public authorities or private land-

186. See Behrman et al., *supra* note 138, at 11:

[T]he notion of contract farming is predicated on a unitary model of the household controlled by a male household head, when in reality the household is made up of a diverse array of actors with different preferences and responsibilities. As a result of this assumption of the unified household, the contract is made only with a male household head, although many male and female family members, with diverse interests, will in fact be providing labor.

This is corroborated, for instance, by research done on bean contract farming in Kenya. While women performed most of the work, they received a limited portion of the revenues from the contract; in addition, where they received cash, they were expected to contribute to the expenditures of the household even where this would normally have been the husband's responsibility. See also Catherine S. Dolan, *Gender and Witchcraft in Agrarian Transition: The Case of Kenyan Horticulture*, 33 DEV. & CHANGE 659, 671 (2002).

187. For details, see CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *supra* note 161, at 83–104.

188. See generally FAO & IIED, LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA (Lorenzo Cotula & Paul Mathieu eds., 2008).

189. See U.N. CESCR, General Comment No. 7 to Art. 11.1 on the Right to Adequate Housing: Forced Evictions, U.N. Doc. E/1998/22, annex IV (May 20, 1997), available at <http://www.unhcr.ch/tbs/doc.nsf/0/959f71e476284596802564c3005d8d50?Opendocument>.

190. See U.N. Human Rights Council, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, annex I, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement>.

owners comply with certain procedures when they seek to evict land users who have been occupying their land for at least a certain period of time. These requirements include that the occupants be given due notice, that no eviction take place without a negotiation, that the occupants have options for relocation, and that they have financial support for resettlement.<sup>191</sup> Provided adequate institutional support, anti-eviction laws can offer security of tenure without requiring the attribution of full property rights that would occur through a classic titling process. A significant limitation of such laws, however, is that, for them to be effective, the beneficiaries must have access to remedies in cases of violation. This requires access to legal aid, which is weak or non-existent in many developing countries.<sup>192</sup>

But other instruments may also be used. The adoption of tenancy laws could protect tenants from eviction and from excessive levels of rent or crop-sharing.<sup>193</sup> Such laws may also allow the heirs of the tenant to occupy the land when the tenant dies, and provide the tenant a right to preemption if the landowner wishes to sell (ideally, at lower than market prices); they may provide for joint titling as tenants of both husband and wife, in order to protect widows from the risk of eviction; and they could ensure that the tenant will be allowed to remain on the land if the property changes hands. Because tenancy laws are often circumvented by unscrupulous landowners who tend not to register the tenants in order to avoid having to recognize their rights, the mandate of the local community documenting land use rights should include registering such tenants in order to ensure that they will be protected from eviction. But, where such laws have been effectively enforced, they have been shown to increase productivity, both because they

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191. For a comparison of various anti-eviction laws and lessons learned, see U.N.-HABITAT, *HANDBOOK ON BEST PRACTICES: SECURITY OF TENURE AND ACCESS TO LAND 11–13* (2003), available at <http://ww2.unhabitat.org/publication/BPmaster.pdf>. One piece of domestic legislation that is often referred to as a model is the South African Prevention of Illegal Evictions From and Unlawful Occupation of Lands Act No. 19 of 1998. On this legislation, see S. Xaba & Roelf Beukman, *The Upgrading of Informal Tenure in South Africa*, Address at the Centre of Applied Legal Studies Conference: Tenure Security Policies in South African, Brazilian, Indian and Sub-Saharan African Cities: A Comparative Analysis (July 27–28, 1999); see also Asteya M. Santiago, *Law and Urban Change: Illegal Settlements in the Philippines*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 104 (Edésio Fernandes & Ann Varley eds., 1998); Towards an Anti-Eviction and Illegal Occupation Act: A Concept Note, KITUO CHA SHERIA (THE CENTRE FOR LEGAL EMPOWERMENT) (last visited Jan. 22, 2011), available at [http://www.kituogetheria.or.ke/index2.php?option=com\\_docman&task=doc\\_view&gid=52&Itemid=9](http://www.kituogetheria.or.ke/index2.php?option=com_docman&task=doc_view&gid=52&Itemid=9).

192. See Emmanuel Offei Akrofi, *Urbanisation and the Urban Poor in Africa*, Address at the 5th FIG Regional Conference: Promoting Land Administration and Good Governance 12 (Mar. 8–11, 2006) (citing Emmanuel Offei Akrofi, *Upgrading Security of Tenure for the peri urban poor* (2000) (unpublished MSc thesis, University of Natal, Durban)), available at [www.fig.net/pub/accra/papers/ts18/ts18\\_05\\_akrofi.pdf](http://www.fig.net/pub/accra/papers/ts18/ts18_05_akrofi.pdf).

193. For example, the tenancy laws in the Indian state of West Bengal, revived by a left-wing administration in 1977 in what was known as Operation Barga, provide that if tenants register with the Department of Land Revenue, they may gain permanent and inheritable tenure on the land they sharecropped against payment to the landlord of at least twenty-five percent of the output as rent. See Abhijit V. Banerjee, Paul J. Gertler & Maitreesh Ghatak, *Empowerment and Efficiency: Tenancy Reform in West Bengal*, 110 J. POL. ECON. 239, 240 (2002).

improve the crop-share of tenants and thus are an incentive to produce, and because they encourage productivity-enhancing investments on land, because of the increased security of tenure benefiting the tenant.<sup>194</sup>

Finally, where landlessness or near-landlessness are strongly correlated with extreme poverty, access to land should be improved by agrarian reform schemes. The international community has made pledges in this regard.<sup>195</sup> I have emphasized elsewhere the poverty-reducing potential of more equitable distribution of land, as illustrated by statistical analyses showing a strong correlation between such distribution and general measures of equality.<sup>196</sup> More equitable access to land for the rural poor also contributes to social inclusion and economic empowerment,<sup>197</sup> and is a major factor in food security: the more rural households can produce food, the less they will be affected by the price shocks of markets.<sup>198</sup>

The current wave of large-scale investments in land significantly changes the nature of governmental choices in effectuating land reform. First, where foreign investors offer to develop an area for agricultural production, the choice is not simply between more or less equality in access to land. It is between highly mechanized, capital-intensive plantations that replace workers with machines, and smaller plots cultivated in more labor-intensive ways. The question therefore is not just how to arbitrate between large landowners and smallholders. It concerns the type of production itself. It is worth noting, in this context, that small-scale farmers are generally much better positioned to practice a kind of farming that respects ecosystems, thanks to the combination of diverse plants and animals on the land. While sustainable farming can of course be practiced on larger plots, agroecological practices emphasizing diversity and complementarity of different outputs, rather than uniformity as in monocultures, are much less compatible with

194. On the example of West Bengal, see Banerjee et al., *supra* note 167, at 32; Banerjee et al., *supra* note 193, at 578 (estimating that the revival of tenancy laws in West Bengal led to a 28% increase in agricultural productivity).

195. The Final Declaration adopted at the International Conference on Agrarian Reform and Rural Development encourages holding a national and inclusive dialogue to ensure significant progress on agrarian reform and rural development and the establishment of appropriate agrarian reform “mainly in areas with strong social disparities, poverty and food insecurity, as a means to broaden sustainable access to and control over land and related resources.” International Conference on Agrarian Reform and Rural Development, March 7–10, 2006, Porto Alegre, Braz., *Final Declaration*, ¶ 29.

196. See De Schutter, *supra* note 66, at 327–29. Major studies demonstrating this include Mohamad Riad El-Ghonemy, *Land Reform Development Challenges of 1963–2003 Continue into the Twenty-First Century*, LAND REFORM, LAND SETTLEMENT & COOP., No. 2, 40 (2003), available at <ftp://ftp.fao.org/docrep/fao/006/j0415T/j0415T00.pdf>; Veronika Penciakova, *Market-Led Agrarian Reform: A Beneficiary Perspective of Cédula da Terra*, at 30 (London Sch. Econ. Dev. Stud Inst. Working Paper No. 10-100, 2010), available at <http://www2.lse.ac.uk/internationalDevelopment/pdf/WP100.pdf>.

197. Julian Quan, *Land Access in the 21st Century: Issues, Trends, Linkages and Policy Options 4* (Livelihood Support Programme, Working Paper No. 24, 2006).

198. Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experiences and Future Challenges*, 14 THE WORLD BANK RES. OBSERVER 247, 256 (1999); see also Michael R. Carter, *Designing Land and Property Rights Reform for Poverty Alleviation and Food Security*, 2003/2 LAND REFORM, LAND SETTLEMENT & COOPS. 44 (2003), available at <ftp://ftp.fao.org/docrep/fao/006/j0415T/j0415t01.pdf>.

the objectives of foreign investors, who seek to secure a reliable supply of certain basic commodities for faraway markets.<sup>199</sup> In addition, agroecological practices require diversifying tasks on the farm as diversity of species increases. They can therefore be labor-intensive, at least during the launching period,<sup>200</sup> because of the complexity of the tasks involved in managing different plants and animals, and of recycling the waste produced. Indeed, the labor-intensive nature of agroecological practices could constitute an argument in favor of their expansion. Where rural areas face high unemployment and under-employment of labor and relative scarcity of land, it is sensible both from an economic perspective and from a social justice perspective to raise land productivity rather than to try to increase labor productivity. In addition to the fact that it promotes diversity on the farm, the relative labor intensity of agroecological farming explains why small production units appear much better prepared to effect the shift toward sustainable agriculture that is currently called for.<sup>201</sup>

Second, the race for farmland that investors have now entered changes the context in which various types of land reform are being discussed. Market-led land reforms are based on the principle of a willing seller and a willing buyer negotiating transfers of land at market prices. In such reforms, the role of the state is primarily to provide a regulatory and institutional framework that ensures a fluid market for land rights and to provide the poor with access to credit in order to allow them to enter such markets. The World Bank has advocated this approach in the past, in part because of the association of state-led land reforms with authoritarian regimes and political

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199. Agroecology applies ecological science to the management of agroecosystems. It seeks to replicate natural processes, thus enhancing beneficial biological interactions and synergies among the components of agrobiodiversity and providing the most favorable soil conditions for plant growth, particularly by managing organic matter and by enhancing soil biotic activity. It also uses far fewer external inputs, particularly chemical fertilizers, thus significantly reducing the amount of nitrous oxide produced by farming. Common principles of agroecology include recycling nutrients and energy on a farm rather than increasing yields with external inputs; integrating crops and livestock; diversifying species and genetic resources in the agroecosystems over time and space; and focusing on interactions and productivity across the agricultural system rather than on individual species. See generally MIGUEL A. ALTIERI, *AGROECOLOGY: THE SCIENCE OF SUSTAINABLE AGRICULTURE* (2d ed. 1995).

200. However, recent research shows that the higher labor-intensity of agroecology in the longer term may have been exaggerated. Olu Clifford Ajayi et al., *Labour Inputs and Financial Profitability of Conventional and Agroforestry-Based Soil Fertility Management Practices in Zambia*, 48 *AGREKON* 246, 279 (2009) (arguing that agroforestry in Zambia does not support “the popular notion that agroforestry practices are more labour intensive”).

201. This is illustrated by the example of Cuba, which had to switch to low external input agriculture after the dismantling of the Soviet Union in 1990, which deprived Cuba of its cheap supply of oil. Cuba found that this transition could only be achieved by relinking the farmers to the soil since, in agroecological farming, “whoever manages the farm must be intimately familiar with the ecological heterogeneity of each individual patch of soil.” Peter M. Rosset, *Cuba: A Successful Case Study of Sustainable Agriculture*, in *HUNGRY FOR PROFIT. THE AGRIBUSINESS THREAT TO FARMERS, FOOD, AND THE ENVIRONMENT* 203, 209 (Fred Magdoff et al. eds., 2000).

instability,<sup>202</sup> and in part because of the belief that market-led reforms would favor the allocation of land to the most efficient land users.<sup>203</sup> However, where foreign investors enter the game, their purchasing power and access to capital are of such a magnitude that local smallholders are simply no match. This problem already exists to a certain extent in the absence of foreign investors, in which case large landowners compete against small producers for the acquisition of land during land reform processes. But the state is typically in a position to support access to land for smallholders in such situations by providing them with access to credit for the purchase of land at lower-than-market rates. Where foreign investors—such as investment funds or large agribusiness companies—take part in the race, even the state’s power of the purse may be insufficient to protect poor farmers from being priced out.

This disparity in purchasing power perhaps suggests a need for the state to go beyond the merely facilitative role it takes in classic market-led reforms and to assume a more active role. Indeed, once we move beyond the often heavily ideological debate between “market-led” and “state-led” land reforms,<sup>204</sup> we can identify a number of ways in which the state may promote more equitable access to land, ranging from the taxation of land left unproductive by large landowners to progressive inheritance laws, and from subsidies for smaller production units to ceiling laws that limit how much land a single individual can own.<sup>205</sup>

Finally, the debate on land reform brings to light a major dilemma that low-income developing states face when confronted with the current wave of

202. State-led land reforms generally include compulsory expropriations from large landowners in the name of social justice objectives, in principle in return for a compensation that may or may not correspond to the actual market value of the land concerned.

203. See WDR 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 19, at 142–43; Deininger & Binswanger, *supra* note 198, at 248, 267.

204. On the need to move beyond this stalemate, see generally Saturnino M. Borras, Jr. & Terry McKinley, *The Unresolved Land Reform Debate: Beyond State-Led or Market-Led Models* (UNDP, Policy Research Brief No. 2, 2006), available at <http://www.ipc-undp.org/PubSearchResultType.do?language=1&idtype=5&online=1>. Borras and others further elaborate on the inappropriateness of the market-led/state-led distinction:

[W]e are currently confronted by debate formulations such as: ‘state- versus market-led’, ‘coercive versus voluntary’, ‘centralized versus decentralized’, or ‘top-down/supply-driven versus bottom-up/demand-driven’ land reforms . . .

[However], among the ongoing land reforms diversity in approach is apparent: from ‘state-instigated’ as in Zimbabwe . . . to ‘peasant-led’ as in Brazil . . . to ‘state/society-driven’ as in the Philippines . . . to ‘market-led’, as in some pilot programs in Colombia, Brazil, South Africa and the Philippines. . . .”

Saturnino M. Borras et al., *Agrarian Reform and Rural Development: Historical Overview and Current Issues 14* (Inst. for Soc. Studies & UNDP, Land, Poverty, and Public Action Policy Paper No. 1, 2007), available at <http://www.iss.nl/content/download/3831/37212/file/ISS%20UNDP%20Overview%20paper.pdf>.

205. Although such ceiling laws are often circumvented by large landowners registering land in the name of proxies, they may increase the amount of land available for redistribution to the poorest households, and limit the risks of re-concentration of land following reform. See El-Ghonemy, *supra* note 196, at 38–39.

large-scale investment in land. A number of examples suggest that policies promoting more equitable access to land will fail unless they fit into broader schemes for rural development.<sup>206</sup> Redistributing land does not suffice by itself. In order for land reform to be sustainable, comprehensive rural development policies must support the beneficiaries; without such policies, there are strong incentives for land reform beneficiaries to sell their land to large landowners.<sup>207</sup> But improving access to credit, access to markets, and rural extension requires a large budget, “far exceed[ing] the costs of acquiring and transferring the land.”<sup>208</sup> And the reason why target countries see the arrival of foreign investors proposing development of agricultural land as attractive is precisely because they lack the financial resources to finance such development. They have no money to build roads, set up irrigation schemes, or support farmers’ access to markets. It would be paradoxical, therefore, to see the state as having to choose between promoting agrarian reform schemes that benefit landless or quasi-landless farmers and allowing foreign investors to acquire or lease farmland—the state needs foreign capital because it does not have the means to fund successful agrarian reforms. The only way to escape the dilemma is to convince would-be investors to contribute to improving the productivity of small-scale farming by financing rural infrastructures and by training farmers in return for a promise that this training will provide them with the stable supply source they are seeking.

## V. CONCLUSION

Summarizing its findings based on a review of large-scale investments in land in fourteen countries, the World Bank notes that

[I]t was surprising that in many cases the nature and location of lands transferred and the ways such transfers are implemented are rather *ad hoc*—based more on investor demands than on strategic considerations. Rarely are efforts linked to broader development strategies, careful consideration of the alternatives, or how such

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206. DEININGER ET AL., *supra* note 43, at 146; see also, e.g., Jon Jonakin, *The Impact of Structural Adjustment and Property Rights Conflicts on Nicaraguan Agrarian Reform Beneficiaries*, 24 WORLD DEV. 1179, 1179 (1996) (noting that “[f]aced with imperfect capital markets and tenure uncertainty, small-scale producers” who have benefited from land redistribution schemes “have resorted to distress sales of their parcels that could lead to a restratification of land ownership patterns”).

207. There is a danger that, due to a fear that distress sales will lead to a re-concentration of land after implementation of redistribution schemes, the beneficiaries of such redistribution policies will be chosen based on their ability to make the kinds of investments that will allow them to remain on their farms. Michael Lipton notes, for instance, that in South Africa, “the decision to favour beneficiaries who could obtain bank loans meant that a sharply increased proportion of reform land went to larger farmers in larger units, rather than to the poor.” MICHAEL LIPTON, *LAND REFORM IN DEVELOPING COUNTRIES: PROPERTY RIGHTS AND PROPERTY WRONGS* 25 (2009).

208. David Palmer et al., *Improved Land Governance* 31 (Food and Agric. Org., Land Tenure Working Paper No. 11, 2009).

transfers might positively or negatively affect broader social and economic goals.<sup>209</sup>

Indeed, this Article has argued that large-scale investments in farmland should only occur as part of a broad strategy of rural development aimed at reducing rural poverty, and therefore hunger and malnutrition. But the ad hoc, case-by-case examination of various investment projects is not sufficient to ensure this. Instead, the opportunity costs of supporting such projects rather than small-scale farmers should be carefully assessed. Before approving any such project, a more comprehensive mapping of the existing needs should be undertaken. And the merits of large-scale investments in farmland should be compared with those of other business models that could support an increase in the productivity of farmers and improve their access to markets.

Indeed, a better understanding of the full range of alternatives could improve the bargaining position of both host states and local communities vis-à-vis investors. For the moment, governments in target countries are competing to attract investment, and they are therefore unwilling and unable to impose strong performance standards on investors—such as the creation of local employment, respect for the environment, and local food security—that would allow for some of the benefits from foreign investment in farmland to materialize. Local communities are all too often unable to assert their rights over the land, either because those rights are insufficiently delineated, or because of the way they are consulted—often with too little information, in the absence of impact assessments, and through representatives that are typically self-appointed spokespersons who do not consult with all segments of the community. These imbalances could be mitigated, in part at least, by improving the capacity of those negotiating on behalf of the host country or representing local communities. These imbalances also call for greater accountability, both of governments and of the representatives of local communities, in order to ensure that they effectively reflect the views of those whom they seek to represent. And they call for institutional initiatives that can help overcome the collective action problems that arise in such situations, both between countries<sup>210</sup> and between communities in a single jurisdiction.

However, while more transparent and participatory processes of negotiation are much needed in order to effectively channel investment in agricul-

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209. DEININGER ET AL., *supra* note 43, at 4.

210. It is encouraging in this regard that the African Union has endorsed the Land Policy Initiative developed by the African Union Commission (“AUC”), the U.N. Economic Commission for Africa (“ECA”), and the African Development Bank (“AfDB”) as a set of guidelines for use by member states in formulating land policy. See African Union (AU), *Declaration on Land Issues and Challenge in Africa*, Assembly of the African Union, Thirteenth Ordinary Session, AU Doc. Assembly/AU/Decl.1 (XIII) (Jul. 1–3, 2009) (referring to LAND POLICY IN AFRICA: A FRAMEWORK TO STRENGTHEN LAND RIGHTS, ENHANCE PRODUCTIVITY AND SECURE LIVELIHOODS (March 2009), available at <http://www.pambazuka.org/aumonitor/images/uploads/Framework.pdf>).

ture towards the reduction of poverty in rural areas, it is unlikely that they will suffice. First, participatory approaches are typically caught in a dilemma. Simply registering what the poor and marginalized say about their condition and the changes which would be most important to them is not without dangers. There is a risk that their evaluation will be dependent on the existing social norms<sup>211</sup> or on the low expectations of the groups concerned.<sup>212</sup> This strategy therefore makes us hostage to the (possibly limited) range of possibilities the poor imagine for themselves. On the other hand, if we seek to ensure that the choices and preferences expressed through such participatory methods are “informed,” for instance through dialogue or collective deliberation, or through collective learning promoted by sharing information about other experiences, the (reverse) risk is to impose external values on those whose judgment about their own situation we distrust. This dilemma is replicated in the recognition of property rights over a piece of land that allows the right-holder to sell the land to the investor. In principle, such privatization of land would appear to enlarge the range of possibilities for local communities. But it entails opportunity costs. It means that a more ambitious option may not be explored—for instance, a system in which the investor supports the ability of local communities to achieve production increases without ceding their land, in return for the communities’ promises to share parts of their yield or to supply commodities to the investor with certain predefined conditions.<sup>213</sup> How, then, are we to make this choice? What does it mean for a local community to choose according to its best interests?

Second, the strength of local communities’ positions in negotiations with outside investors depends on the background conditions they face and on the second-best options they can fall back upon. This is why the reform scenario outlined above matters.<sup>214</sup> By favoring the organization of farmers into cooperatives and by improving security of tenure through the adoption of anti-eviction laws molded to customary forms of tenure and tenancy laws, governments can accomplish two objectives: they can lower the transaction costs for various forms of contract farming and they can ensure that local land users will not cede the land on which they depend for their livelihoods

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211. See generally Paulo Veira da Cunha & Maria Valeria Junho Peña, *The Limits and Merits of Participation* (The World Bank, Working Paper No. 1838, 1997), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1997/10/01/000009265\\_3980203115434/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1997/10/01/000009265_3980203115434/Rendered/PDF/multi0page.pdf).

212. Research in social psychology, for instance, has noted a tendency to adapt one’s preferences to one’s situation. See JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); Jon Elster, *Sour grapes—Utilitarianism and the Genesis of Wants*, in *UTILITARIANISM AND BEYOND* 219 (Amartya K. Sen & Bernard Williams eds., 1982).

213. Robert Lee Hale was one of the most insightful writers on this apparent paradox. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923). For an excellent comment from an institutionalist economist’s perspective, see Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 *U. MIAMI L. REV.* 261 (1973).

214. See *supra* Part IV.C.

under conditions akin to duress—under the threat of being forcibly evicted if no “consent” is reached. And by supporting rural development, governments can ensure that investors will not capture benefits from these same quasi-duress sales by farmers so lacking in support that they are prepared to cede their land at prices very low even by local standards. Only if small-scale farming is truly viable will the small farmers see it as an alternative to becoming a waged agricultural worker on a large plantation. For this reason, the renewed interest of investors in agriculture should not be seen as a substitute for strong state-led rural development policies that include support to small-scale farming; rather, both should be treated as complementary.

The coexistence scenario, as we have seen, is inherently unstable. Unless small-scale farmers receive support sufficiently strong to ensure that independent farming will be viable, there is a high risk that titling schemes, leading to the creation of a market for land rights, will result in the concentration of land in the hands of well-financed entrepreneurs that will prioritize large-scale projects for export markets. Only by improving the background conditions against which negotiations are conducted between local land users and investors can such negotiations become truly fair. Even where those conditions are present, in many developing countries that are agriculture-based and in which landlessness or quasi-landlessness are important factors of economic marginalization, there remains a case for treating land as transferrable only under relatively limited conditions, and preferably through a market for rental rights rather than full-fledged property rights. If, despite these reservations, individual titling schemes are the preferred option, they should only be developed under conditions that ensure that the creation of a market for land rights will not lead to more concentration of land. Treating land like any other commodity, when it constitutes for many poor rural households in the developing world their only productive asset and an essential safety net against economic shocks, would be a mistake of historic proportions.

