

# Comment

## From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing

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### I. INTRODUCTION

The past decades have seen the emergence of a “corporate social responsibility agenda” in response to public and activist criticism of “the impact of transnational corporations (TNCs) in developing countries and on the environment.”<sup>1</sup> This agenda has emerged against the backdrop of shifting perceptions of how the market, the state, and civil society function and ought to function.<sup>2</sup> One prominent version of this agenda has been the World Bank’s advocacy of “good governance” as a “persuasive ethical power that allows for [corporate] self-regulation, making it possible for governments to intervene less intrusively and more efficiently in society.”<sup>3</sup> Voluntary adherence by corporations to good business practices and ethical behavior is a cornerstone of this advocacy, and its most recent incarnation arises in the arena of rural development, focusing on access to land and taking the form of proposals for a Code of Conduct for land deals.<sup>4</sup>

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1. Peter Utting, *The Struggle for Corporate Accountability*, 39 DEV. & CHANGE 959, 959 (2008).

2. Bridget O’Laughlin, *Governing Capital? Corporate Social Responsibility and the Limits of Regulation*, 39 DEV. & CHANGE 945, 946 (2008).

3. *Id.* at 946.

4. See, e.g., FOOD & AGRIC. ORG. OF THE U.N. (FAO) ET AL., PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT THAT RESPECTS RIGHTS, LIVELIHOODS AND RESOURCES (2010), available at [http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles\\_Extended.pdf](http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf); Joachim von Braun & Ruth Meinzen-Dick, “Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities,

A convergence of global crises (financial, environmental, energy, food) in recent years has been contributing to a dramatic reevaluation of and rush to control land, especially land located in the Global South. Transnational and national economic actors from various business sectors (oil and auto, mining and forestry, food and chemical, bioenergy, etc.) are eagerly acquiring (or declaring their intention to acquire) large swaths of land on which to build, maintain, or extend large-scale extractive and agri-industrial enterprises. National governments (and private investors) in “finance-rich, resource-poor” countries are looking to “finance-poor, resource-rich” countries to help secure their own food and energy needs into the future.<sup>5</sup> To be sure, land in the Global South has been coveted for multiple reasons, historically. But today, there is momentum building behind an apparently newer idea: that long-term control of large landholdings beyond one’s own national borders is necessary to supply the food and energy needed to sustain one’s own population and society into the future.

By all accounts, transnational transactions involving large volumes of land in the Global South are on the rise. Various estimates place the total lands already transacted at upwards of twenty and even thirty million hectares between 2005 and mid-2009.<sup>6</sup> Although just how much land has actually changed hands remains unclear, initial evidence suggests a trend that is likely to continue, propelled by “public-private partnerships.” Many of the reported transactions are real; others as yet remain only paper allocations, while still others are more speculative in nature at this point in time.<sup>7</sup> Many are TNC-driven; others are (foreign) government-driven. But,

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IFPRI POLICY BRIEF 13, at 2-3 (2009).

5. See von Braun & Meinzen-Dick, *supra* note 4; see also The Special Rapporteur on the right to food, *Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 22, 2009); Andrew Rice, *Is There Such a Thing as Agro-Imperialism?*, N.Y. TIMES, Nov. 16, 2009, <http://www.nytimes.com/2009/11/22/magazine/22land-t.html> (last visited Apr. 12, 2010).

6. John Vidal, *Fears for the World’s Poor Countries as the Rich Grab Land to Grow Food*, THE GUARDIAN, July 3, 2009, <http://www.guardian.co.uk/environment/2009/jul/03/land-grabbing-food-environment> (last visited Apr. 12, 2010); *Asia: Land Grabs Threaten Food Security*, IrinNews.org, June 10, 2009, <http://www.irinnews.org/Report.aspx?ReportId=84785> (last visited Apr. 13, 2010); see also LORENZO COTULA ET AL., *LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENTS AND INTERNATIONAL LAND DEALS IN AFRICA* (2009), available at [http://www.ifad.org/pub/land/land\\_grab.pdf](http://www.ifad.org/pub/land/land_grab.pdf); GRAIN, *SEIZED! THE 2008 LAND GRAB FOR FOOD AND FINANCIAL SECURITY* (2008), available at [http://www.grain.org/briefings\\_files/landgrab-2008-en.pdf](http://www.grain.org/briefings_files/landgrab-2008-en.pdf).

7. In Mozambique, for example, the government leased thirty thousand hectares of land to Procana for sugarcane (ethanol) production for a ninety-nine year term. The land was already long occupied by subsistence farmers and pastoralists and had also been named the resettlement site for families that were displaced by the expansion of the Limpopo National Park. DANIEL RIBEIRO & NILZA MATAVEL, *JATROPHA! A SOCIO-ECONOMIC PITFALL FOR MOZAMBIQUE* 10 (2009); Jennifer Franco et al., *Assumptions in the European Union Biofuels Policy: Frictions with Experiences in Germany, Brazil and Mozambique*, 37 J. PEASANT STUD. (forthcoming 2010) (manuscript at 24, on file with authors). Other examples can be found in the Cerrado region of Brazil, an extremely high biodiversity area that has seen massive expansion of sugarcane monocropping for ethanol in recent years. See Franco et al., *supra* (manuscript at 18, on file with authors). Many more examples can be found in the online industry news outlet

almost always, the transactions involve close partnerships (or collusion) between foreign investors and the national governments that rule over the lands in question, with the latter playing a key facilitative role in instituting the enabling environment to make the transactions possible or brokering the deals themselves. The phenomenon first came to light in the global food-versus-fuel controversy that exploded when basic food prices spiked in 2007-2008 amidst a global boom in biofuels production.<sup>8</sup> Initiated by government-business alliances in the Global North through the setting of mandatory biofuel blending quotas in the transport sector, the biofuel boom has proceeded with the active participation of national governments in the South in anticipation of increased demand for energy crops.<sup>9</sup> Governments in Latin America, Africa, and Asia have been brokering international biofuel-related agreements and facilitating land deals to enable TNCs to gain access to land needed to produce biofuel feedstocks for export. In many cases, the land in question is formally classified as state-owned public land and leased by the state to corporate biofuels producers. The alarm was raised by civil society groups and transnational networks, many already mobilized against the corporate-led biofuel boom, who then linked the biofuel boom to the threat it posed to rural communities and ecosystems.<sup>10</sup> The term “global land grab” came into use and the by-now-familiar, iconic image of (Northern) companies and governments enclosing the commons, dispossessing peasants, and ruining environments (in the South) gained new traction.

Today, however, the main narrative shaping this trend is undergoing its own great transformation as it gets absorbed into mainstream development-policy currents. The dominant storyline of land-grabbing as a threat is slowly ceding ground to a new story line—that of the new land deals as a potential opportunity for rural development, if they can be harnessed properly so as to minimize or avoid possible negative social and environmental effects. Prominent players promoting this emerging narrative are the World Bank and the International Food Policy Research Institute (IFPRI). Part and parcel of the shift in perspective is a growing emphasis on bringing “multiple stakeholders” together to institute an

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BIOFUELS DIGEST, <http://www.biofuelsdigest.com> (last visited Apr. 8, 2010), as well as in reports produced by transnational activist networks such as Friends of the Earth and GRAIN. See, e.g., the Food Crisis and the Global Land Grab Blog, <http://farmlandgrab.org> (last visited Apr. 12, 2010).

8. On the biofuel boom controversy, see, e.g., SOFIA MONSALVE SUÁREZ ET AL., AGROFUELS IN BRAZIL: REPORT OF THE FACT-FINDING MISSION ON THE IMPACTS OF PUBLIC POLICIES ENCOURAGING THE PRODUCTION OF AGROFUELS ON THE ENJOYMENT OF THE HUMAN RIGHTS TO FOOD, WORK AND THE ENVIRONMENT AMONG THE PEASANT AND INDIGENOUS COMMUNITIES AND RURAL WORKERS IN BRAZIL (2008); Eric Holt-Giménez & Annie Shattuck, *The Agrofuels Transition: Restructuring Places and Spaces in the Global Food System*, 29 BULL. SCI., TECH. & SOC'Y 180 (2009).

9. Perhaps the most aggressive mandatory targeting has been by the European Union, which legislated in early 2009 that twenty percent of all energy used in the EU and ten percent of each Member State's transport fuel must come from renewable sources by the year 2020, with most of this expected to come from biofuels. See Franco et al., *supra* note 7.

10. See, e.g., GRAIN, *supra* note 6.

international “code of conduct” (CoC) for transnational land transactions, as a key step toward crafting broader “win-win” development outcomes, although the discourse itself continues to evolve.<sup>11</sup> In this paper, we offer a preliminary critique of this emerging attempt to reframe the phenomenon of land-grabbing, with some emphasis on the proposal for an international CoC in particular, and in the process, offer an alternative perspective on some of the key underlying issues at stake.

Although an international CoC may be a worthy idea in principle, this does not necessarily mean that it is a worthy idea in practice. In this instance, our basic objection to the proposed CoC is not simply that it is not sufficiently pro-poor in orientation. Rather, our objection is that the proposed CoC is not essentially pro-poor in the sense of proceeding from a social-justice driven analysis of the causes of (rural) poverty and the need to protect and advance (rural) poor people’s land access and property interests. A social-justice-driven analysis would link the causes of rural poverty to the current TNC-controlled global system of food-feed-fuel production, distribution, and consumption, and its negative social and environmental impacts. It would then ground the search for solutions in the fundamental aim of protecting and advancing the land access and property interests of working poor people. In our view, any effort to link high standards of business practice with ethical behavior in (trans)national land deals is unlikely to produce truly pro-poor outcomes if the primary aim of the land transfer is not categorically to protect and advance the land-access and property interests of working poor people.<sup>12</sup> Unfortunately, the primary aims of the proposed CoC for land deals lie elsewhere.

## II. “MAKING A VIRTUE OUT OF NECESSITY”: THE NEW NARRATIVE OF LAND-GRABBING

For the advocates of a CoC, the starting point for analysis of contemporary land-grabbing or land deals is not the complex political economy question of “who has [or ought to have] what rights, to which land, for how long, and for what purposes.”<sup>13</sup> Nor is their starting point the variable kinds of “development” that may be envisioned by communities linked to the lands targeted by investors. Instead, the starting point of advocates of the proposed CoC is a certain vision of successful

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11. Alongside “code of conduct,” the phrase “principles of responsible large-scale land acquisition” is also being deployed. But even if the term used by its proponents is not always (or even any longer) “code of conduct” per se, the basic idea is essentially the same. The core notion that this kind of approach offers a “win-win solution” continues to characterize the endeavor, as it has from the start.

12. Our understanding of a truly pro-poor land policy is discussed in more detail elsewhere. See Saturnino Borras, Jr. & Jennifer C. Franco, *Contemporary Discourses and Contestations Around Pro-Poor Land Policies and Land Governance*, 10 J. AGRARIAN CHANGE 1 (2010).

13. John F. Richards, *Introduction to LAND, PROPERTY, AND THE ENVIRONMENT* 1 (John F. Richards ed., 2002).

national capitalist economic development, along with an implicit belief that rural poverty is the result of poor developing countries' failure to follow this particular path. From this perspective, the main issue to be grappled with is not a land problem, but an investment problem—finance-poor countries saddled with anemic rural economies that need, but have not been able to attract, more investment in their agricultural sectors. According to proponents of a CoC, more investments in this sector would create new farm and off-farm jobs, boost smallholder incomes (through contract-growing schemes), facilitate transfers of new technologies in production and processing (including biotechnology), increase production of food crops for both domestic and overseas consumption, build up infrastructure and improve access to basic services (e.g., health and education) in rural areas, and open up new export opportunities to earn foreign exchange. Given this view of the “problem,” the phenomenon of land-grabbing takes on the character of an opportunity, rather than a threat. This argument clearly frames the CoC proposal put forward by IFPRI in April 2009, for example: “Because of the urgent need for greater development in rural areas and the fiscal inability of the developing-country governments to provide the necessary infusion of capital, large-scale land acquisitions can be seen as an opportunity for increased investment in agriculture.”<sup>14</sup>

One of the explanations most often given for why there are not enough investments coming into these rural economies is the lack of clear land property rights, which discourages potential investors. In recent decades, mainstream development institutions have become increasingly oriented toward the promotion of (usually individual) private property rights in land through mechanisms deemed to be financially and administratively efficient.<sup>15</sup> Driven in part by this orientation's obsession with technical land mapping, new satellite imagery has revealed the existence of a large supply of “reserve agricultural land” in many of the same regions where rural poverty is most concentrated, especially Africa, but also parts of South America and Asia.<sup>16</sup> This “reserve” land in particular, it is believed, could be tapped to attract more investments in the agricultural sector, and, indeed, some of it is already being tapped through the new land deals. Meanwhile, during the debates over the controversial issue of the promotion of biofuels through mandatory targeting policies, the notion of the existence of much “reserve agricultural land” (located mainly in the Global South) gained unprecedented prominence in biofuels policymaking in the European Union, for example.<sup>17</sup> This notion refers to land considered by investors (or potential investors) and their allies (in government, business, and the scientific-academic community in both the North and the South) to be idle, marginal, or degraded.<sup>18</sup> Such characterizations have

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14. Von Braun & Meinzen-Dick, *supra* note 5, at 2.

15. Borras & Franco, *supra* note 12, at 3.

16. COTULA ET AL., *supra* note 6, at 59-60.

17. Commission Directive 2009/28/EC, 2009 O.J. (L 140) 16 (EU).

18. See COTULA ET AL., *supra* note 6, at 62.

profound policy significance because they appear to lessen the possible conflicts between local food production and other land uses, especially those involving agricultural exports. There is a growing belief that such land could be rehabilitated if brought under cultivation, especially in ways that make use of recent biotechnological innovations that are already (or soon will be) available for both food and energy crop production and processing.<sup>19</sup> This idea in particular serves to make these land deals seem less predatory and more beneficial for local communities and environments in the host nations.<sup>20</sup>

While it has been in the past (and often still is) taken for granted by governments and investors alike that the lands involved in these deals are empty and/or unused, many academic research papers, policy studies, and activist reports have shown that this is not the case. The notion of “reserve agricultural land” appears to be broad and ambiguous enough to accommodate all those who see its economic potential, even if they hold diverse interpretations of its social and environmental importance. In this context, ironically, the current proposal of a CoC for land deals reflects the increasing political weight of recognizing the continuing and actual social and environmental significance of land that may be labeled as marginal, idle, or degraded.

One of the most distinctive features of the new narrative is precisely its insistence upon the need to recognize the potential impacts of new investments on vulnerable segments of the rural population and on fragile ecosystems. This is clear in IFPRI’s proposal:

In some cases, the land leases are justified on the basis that the land being acquired by the foreign investor is “unproductive” or “underutilized.” In most instances, however, there is some form of land use, often by the poor for purposes such as grazing animals and gathering fuel wood or medicinal plants. These uses tend to be undervalued in official assessments because they are not marketed, but they can provide valuable livelihood sources to the poor. Large-scale land acquisitions may further jeopardize the welfare of the poor by depriving them of the safety-net function that this type of land and water use fulfills.<sup>21</sup>

Such problems can be managed on this view, however. Foreign direct investment through large-scale land acquisitions is still seen as the answer despite the “risks”; in fact, on this view, it is *because* of the risks that some kind of management mechanism is needed. What is important to note here is that the implications of the new land deals for people and environments are (re)framed as side effects of an essentially beneficial cure—they are risks that can be managed in order to make possible a larger good. They

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19. RENEWABLE FUELS AGENCY, THE GALLAGHER REVIEW OF THE INDIRECT EFFECTS OF BIOFUELS PRODUCTION 66 (2008).

20. See Franco et al., *supra* note 7.

21. Von Braun & Meinzen-Dick, *supra* note 5, at 2.

are not taken as direct impacts that are so severe and unjust that they call into question the very validity of the cure—e.g., the land deals themselves or the development model being pursued through this type of foreign direct investment.

What are the “risks” of land grabs according to proponents of the new narrative?<sup>22</sup>

World Bank risks	IFPRI risks
<ul style="list-style-type: none"> <li>• Neglect of land users</li> <li>• Short-term speculation</li> <li>• Corruption</li> <li>• Environmental harm</li> <li>• Polarization and instability</li> <li>• Undermining food security</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of livelihoods</li> <li>• Failure to keep promises (local jobs, facilities, compensation)</li> <li>• Absence of consultation (with affected communities)</li> <li>• Violent conflict over rights</li> <li>• Loss of subsistence and safety-net functions of existing land uses</li> <li>• Loss of biodiversity, carbon stocks</li> <li>• Long-term ecological sustainability problems</li> </ul>

How then can these “risks” be managed or even avoided? For those who recognize them but still see the need to encourage foreign direct investment in the form of big land deals, one element of successful risk avoidance or management involves ensuring the proper policy environment in the host countries. Both the World Bank and IFPRI give attention to the larger policy environment, and in similar ways. A beneficial policy environment would include: well-defined land rights and authorities, with an emphasis on a private property rights system; clear identification of land that is available and clear mechanisms for transfer of public land rights; improved investment climates through rule of law and contract security; evidence-based agricultural policies in relation to incentives, markets, technologies, and rural infrastructure; facilitation of contract-growing and out-grower schemes; enhanced market information systems; improved knowledge and extension services (including rural banking); and decentralized (community-based) negotiation. None of these items is new; many have been on the agenda of mainstream development institutions for years.

What is new is the other element of the proposed risk management: an international CoC that would govern the making and keeping of transnational land deals in ways that protect local people and environments, while still allowing them to be profitable in the conventional sense. This is the “magic bullet” in the new narrative on land-grabbing: the inauguration of an international “code of conduct” mechanism, whereby all “stakeholders” can come together and make agreements based on

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22. See *id.*; Klaus Deininger, Land Grabbing: International Community Response, Presentation at Utrecht University (July 2009) (notes on file with author).

predefined principles of acceptable behavior and outcomes. Here, the proposal put forward by IFPRI, captured in the table below, is illustrative.

IFPRI's proposal for a CoC in land deals<sup>23</sup>

Transparency in negotiations	Existing local landholders must be informed and involved in negotiations over land deals. Free, prior, and informed consent is the standard to be upheld. Particular efforts are required to protect the rights of indigenous and other marginalized ethnic groups. The media and civil society can play a key role in making information available to the public.
Respect for existing rights	Those who lose land should be compensated and rehabilitated to an equivalent livelihood. The standards of the World Commission on Dams provide an example of such policies.
Sharing of benefits	The local community should benefit, not lose, from foreign investment in agriculture. Leases are preferable to lump-sum compensation because they provide an ongoing revenue stream when land is taken away for other uses. Contract farming or out-grower schemes are even better because they leave smallholders in control of their land but still deliver output to the outside investor. Explicit measures are needed for enforcement if agreed-upon investment or compensation is not forthcoming.
Environmental sustainability	Careful environmental impact assessment and monitoring are required to ensure sound and sustainable agricultural production practices that guard against depletion of soils, loss of critical biodiversity, increased greenhouse gas emissions, or significant diversion of water from other human or environmental uses.
Adherence to national trade policies	When national food security is at risk (for instance, in case of an acute drought), domestic supplies should have priority. Foreign investors should not have the right to export during an acute national food crisis.

This type of two-pronged approach (favorable policy environment plus an international CoC), it is declared, offers the best chance for the big land deals to lead to “win-win” outcomes for all concerned. A win-win outcome is one in which the development needs of both the resource-poor countries and resource-rich countries are met, while at the same time the investors’ needs and interests (i.e. profits) are served and poor people’s incomes and livelihoods are enhanced. What the resource-poor countries need are secure supplies of food and fuel in order to sustain their current patterns of

23. VON BRAUN & MEINZEN-DICK, *supra* note 5, at 3-4.

food consumption and production. What the resource-rich countries need are new investments in agriculture that would create jobs, support small farmers, and bolster exports. What investors need is an improved, clear, stable, and secure investment climate (indeed, clear property rights to secure investments). In this way, as IFPRI puts it, “virtue” can be made out of “necessity.”<sup>24</sup>

In theory, the application of a CoC in this context might seem to be relevant and beneficial, or at the very least, harmless. One might expect that applying the technique in this case would not do any further harm than is already being done by the illicit land grabs themselves. Would it not be beneficial for society to bring untapped (or under-tapped) land under cultivation if it could be done in ways that do not undermine local rights, threaten local food security, or harm the environment? Would it not be useful to have clarification on land ownership and use rights? And would it not be useful to have agreement on different stakeholders’ responsibilities (and not just their rights)? If the essential value of institutions is that they establish rules where previously there were none, thus making it possible to regulate behavior and outcomes, thereby establishing order out of chaos, then would not the current global land rush be just the kind of situation where instituting a CoC would be especially appropriate?

We now turn to some of the problematic aspects of this proposed win-win formula as a response to the global land rush and offer some of our preliminary doubts and concerns.

### III. PROBLEMS, DOUBTS, AND CONCERNS

First, proposals for a CoC for land deals necessarily operate within and seek to sustain or extend the existing global industrial agro-food and energy complex. Positing a CoC as an overarching framework in response to globalized land-grabbing therefore does not address serious problems associated with the extractive mining of land (and water) in the Global South to meet the food and energy demands of industrialized countries and to sustain corporate profits. It explicitly or implicitly assumes that there is no fundamental problem with existing industrial food and energy production and consumption patterns tightly controlled by TNCs. It ignores the possibility that the food and energy investments brought about by the recent mega land deals will not solve the food and energy crises in the world and might even worsen them. At the same time, it a priori dismisses the possibility of other development pathway options and ignores the clamor of those who believe that other pathways are possible—and better—and are either working toward or attempting to actualize them.<sup>25</sup>

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24. See von Braun & Meinzen-Dick, *supra* note 5, at 3.

25. Several transnational and global-regional networks of poor peasants and small farmers have embraced the alternative vision of food sovereignty, with their member organizations working toward achieving this vision, albeit with varying degrees of progress

Second, the CoC is being promoted in tandem with the notion of the existence of “reserve agricultural land,” combined with images of agri-industrial systems playing a beneficial role in restoring degraded land to health, utilizing marginal land more fully, and reinvigorating idle land. In addition to new satellite imagery (which does not picture people or their historical land-based social relations and livelihood practices), the assumption of “reserve land” is often based on standard nation-state claims derived from official census data about land use and land property relations, which are notoriously unreliable in many countries, for a variety of reasons. The very notion of “reserve” more or less automatically renders such land, by definition, “available,” amenable to, and appropriate for transformation into global granaries or new oil wells. And in the process, other possible or actual uses are rendered “illegible”—a term we borrow from James Scott, who examined how state officials reinterpret diverse local societies in order to facilitate central state regulation and administration.<sup>26</sup> Historically, “seeing like a state” has involved simplifying observed (local) social practices:

[L]ocal practices of measurement and landholding were “illegible” to the state in their raw form. They exhibited a diversity and intricacy that reflected a great variety of purely local, not state, interests. That is to say, *they could not be assimilated into an administrative grid without either being transformed or reduced to a convenient, if partly fictional, shorthand.*<sup>27</sup>

Accepting the notion of reserve agricultural land necessarily consigns existing local land-based social relations and practices that are diverse and distinct to being vestiges of the past—to be acknowledged, but in the end, not worthy of being taken seriously enough to protect and advance into the future. They simply do not “fit” the economic development grid envisioned by today’s proponents of a CoC; they are not the beneficiaries of the “responsible agricultural investment” that is envisioned.

Instead, based on past experience, what we can expect from this kind of framing of land is more dispossession in the name of transforming “marginal” land into economically productive spaces. When the Philippine

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and success to date. The most prominent agrarian justice movement working along these lines is La Via Campesina. See La Via Campesina, <http://www.viacampesina.org> (last visited Apr. 8, 2010). Meanwhile, similar trends can be seen in other kinds of networks, especially those working with an environmental justice orientation, such as the African Biodiversity Network and Friends of the Earth. Some of these same groups have also begun discussing the notion of “energy sovereignty” in response to the fact that many areas where rural poverty is most concentrated often suffer from lack of access to national electricity grids as well. This is the case even in countries where energy produced through mega-dams, coal-mining, or large-scale monocropping is mostly exported or diverted to cities for industrial use, as in Mozambique, for example.

26. See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 24 (1998).

27. *Id.* (emphasis added).

government promised 1.4 million hectares of “marginal” lands to China, they were referring to areas officially catalogued as “public” (and therefore considered marginal), but in fact populated by both indigenous and non-indigenous communities engaged in a variety of land-based livelihoods. Elsewhere, it is traditional land-extensive pastoralist livelihoods that tend to be subsumed under the category of “marginal” land, as in the case of the Procana sugarcane ethanol project in Mozambique.<sup>28</sup> The expansion into the already fragile Amazon frontier by soya monocropping is also being justified partly in the name of making “marginal” lands economically “productive,” as if no other use or purpose could be considered productive or sufficiently productive.<sup>29</sup> Moreover, the rehabilitation of so-called “degraded” lands often comes in the form of industrial monocropping that is portrayed as environmentally friendly, but actually undermines the lands ecologically (e.g., industrial tree monocropping, including palm oil and eucalyptus plantations, is now often referred to as “reforestation”).

Third, advocates of a CoC argue that without clear land property rights (usually taken as individual and private), the “risk” of dispossession is high. Implicit here is a belief that having formal land property rights (usually individual and private land rights) removes this risk and serves as a guarantee that people will not be displaced and dispossessed by these large-scale land deals. Such a view converges with years of mainstream advocacy for the privatization of the remaining commons and formalization of land rights, targeting public lands worldwide.

Yet this view is deeply flawed. There is much evidence to show that formal land property rights are no guarantee against dispossession, and they even often appear at the leading edge of it. The introduction of formal land property rights first requires answering in practice (in power-differentiated settings marked by conflicting interests) the complex series of questions posed earlier in this discussion—*who has (or should have) what rights to which land for how long and for what purposes.*<sup>30</sup> Formal land property rights are contested terrain, since they involve decisions about who counts and who does not. Introducing formal rights for

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28. See Borras & Franco, *supra* note 12, at 19.

29. For general comment on this transformation, see Saturnino M. Borras, Jr. & Jennifer C. Franco, *The Politics of Contemporary (Trans)national Commercial Land Deals: Competing Views, Strategies and Alternatives*, 13, 17-20 (Oct. 30, 2009), (unpublished manuscript prepared for Agrarian Studies Colloquium Series, Yale University), available at <http://www.yale.edu/agrarianstudies/papers/08borras.pdf>. It is difficult in the current policy climate to find specific examples, since many companies have begun “green-washing” their public statements. For example, Cargill, which has been quite controversial for its expansion of soy monocropping into the Amazon rainforest, has stated that it is “supporting cutting-edge research on how to rehabilitate degraded lands for agricultural use to increase production and reduce habitat loss.” CARGILL, 2007 CORPORATE CITIZENSHIP REVIEW: FINDING THE RIGHT BALANCE 12 (2007). Elsewhere in that report, the company implies that expansion is occurring in areas that were already deforested and that, in light of Brazil’s “strict” Forest Code, it is working with small farmers by supplying them with soybean for crushing to restore old pasture to forest. *Id.* Although this not an explicit justification of expansion by working to make the marginal more productive, it comes as close as one might expect from a company that is under fire from social and environmental justice activists.

30. See Richards, *supra* note 13 and accompanying text.

indigenous landholders is not necessarily pro-poor in and of itself; but it does “recalibrate the arena of struggle.”<sup>31</sup> Gaining legal recognition of poor people’s land rights has never alone guaranteed that they will actually be respected and protected in the courts or on the ground; for the rural poor, there remains a difficult and contested process involving struggles to actually claim those rights and “make them real” in fact.<sup>32</sup>

In short, formal-legal land rights are formulated, interpreted, disputed, and implemented by numerous state and non-state actors with their own interests and embedded in power structures at multiple levels, and thus can (and more often than not do) lead to outcomes that cannot be considered pro-poor.<sup>33</sup> Neither categorically pro-poor outcomes, nor even “win-win” outcomes, are ever guaranteed.

Clear land property rights (private or otherwise) have certainly not guaranteed win-win outcomes in many of the land deals, nor have they automatically protected the rural poor from various forms of dispossession or “adverse incorporation” into the food-fuel production enclaves. In Mozambique, the rural poor have very clear land rights based on Land Law 1997, but as the Procana case shows, they can still be expelled from their land.<sup>34</sup> In Brazil, the expansion of sugarcane ethanol production has swallowed many land reform settlements, specifically in the São Paulo. In Indonesia, clearer property rights requirements in contract farming schemes do not always lead to the bright promise of oil palm plantation expansion.

As Cotula and Vermeulen argue, using empirical material from Africa, clear and secure land property rights are necessary but not sufficient to guarantee protection of rural poor land rights.<sup>35</sup> We agree. But we would also add another critical point: *secure* property rights should not a priori, only or always, mean *private* property rights; in many parts of the world, an inductive approach is needed that is based on a deep understanding of the societies where intervention is targeted and “makes socially legitimate occupation and use rights, as they are currently held and practiced, the point of departure for both their recognition in law and for the design of institutional frameworks for mediating competing claims and administering land.”<sup>36</sup>

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31. SUZANA SAWYER & EDMUND TERENCE GOMEZ, U.N. RES. INST. SOC. DEV., TRANSNATIONAL GOVERNMENTALITY AND RESOURCE EXTRACTION: INDIGENOUS PEOPLES, MULTINATIONAL CORPORATIONS, MULTILATERAL INSTITUTIONS AND THE STATE 3 (2008).

32. There is a growing literature on the difficult challenges of “making rights real” in the case of land. See, e.g., Ben Cousins, *How Do Rights Become Real? Formal and Informal Institutions in South Africa’s Land Reform*, 28 INT’L DEV. STUD. BULL., Oct. 1997, at 59 (discussing land reform in South Africa); Jennifer C. Franco, *Making Land Rights Accessible: Social Movements and Political-Legal Innovation in the Rural Philippines*, 44 J. DEV. STUD. 991 (2008) (discussing land reform in the Philippines).

33. See Borrás & Franco, *supra* note 12.

34. See *supra* note 7.

35. Lorenzo Cotula & Sonja Vermeulen, *Over the Heads of Local People: Consultation, Consent and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa*, 37 J. PEASANT STUD. (forthcoming July 2010).

36. Ben Cousins, *More Than Socially Embedded: The Distinctive Character of “Communal*

Fourth, the assumption that land transactions among “multi-stakeholders” that are formal and transparent, and, to the extent possible, decentralized-localized, are the solution to avoid negative consequences of current mega land deals is only partly correct. Certainly, any land deal should at least be transparent, but transparency does not necessarily guarantee pro-poor outcomes. Transparency is not the same as accountability, and transparent transactions do not necessarily guarantee accountability, especially to poor “stakeholders”.<sup>37</sup> This insight partly helps to explain the rise of a (trans)national accountability movement in recent years.<sup>38</sup>

Moreover, the question of representation of social groups, especially in rural communities in the Global South, is problematic, uneven, and politically contested—whether negotiations are transparent or not.<sup>39</sup> In many places, a minority elite section of a community often claims to represent the poor even when it does not. On many occasions in many countries, local elites forge formal contracts with investors in the name of their communities despite having no real consultative process and mandate. Often in such situations, the rural poor have little opportunity to set the record straight, while other, more powerful, stakeholders have little interest in ensuring that oppositional voices are even heard, much less taken into consideration, if doing so could mean scuttling the deal altogether. Different social groups join the negotiation table with different degrees of political power. The power of unorganized pastoralists with no organized mobilization and negotiation experience is likely to be no match for transnational companies and government bureaucrats.

Finally, the World Bank has a special bias towards decentralized-localized negotiations, as explained by Klaus Deininger.<sup>40</sup> But it is at the local level that local elites and bureaucrats who stand to gain in new investments can easily manipulate negotiation processes and where local communities of the poor can easily be isolated from their potential national allies. The persistence of widespread chronic rural poverty points to the need to make social justice-driven rural democratization a major focus of inquiry, advocacy, and policy intervention.<sup>41</sup> The proposed CoC makes an

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*Tenure” Regimes in South Africa and Its Implications for Land Policy*, 7 J. AGRARIAN CHANGE 281 (2007).

37. See Jonathan Fox, *Introduction to THE CHALLENGES OF RURAL DEMOCRATISATION: PERSPECTIVES FROM LATIN AMERICA AND THE PHILIPPINES* (Jonathan Fox ed., 1990).

38. Utting, *supra* note 1, at 960.

39. See generally *THE CHALLENGES OF RURAL DEMOCRATISATION*, *supra* note 37.

40. Deininger, *supra* note 22.

41. See JENNIFER FRANCO, TRANSNATIONAL INST., *RURAL DEMOCRATISATION: (RE)FRAMING RURAL POOR POLITICAL ACTION* (2008), available at <http://tni.org/paper/rural-democratisation-reframing-rural-poor-political-action> (building on the work of *THE CHALLENGES OF RURAL DEMOCRACY*, *supra* note 37, and John Gaventa, *Exploring Citizenship, Participation and Accountability*, 33 IDS BULL. 1 (2002), among others). Here, rural democratization is understood as a long and difficult process that involves struggles to build social and political organizations capable of representing the diverse interests of the rural poor and amplifying their voices in public policy processes, including development-related decision making that affects their lives. It involves struggles to increase state accountability to excluded or marginalized members of the rural working poor population. This includes struggles to

end run around the much deeper issue of democratizing the rural political arena, including development-related decision-making that profoundly affects people's lives, by imposing one particular view of appropriate economic development as the end goal.

Fifth, inherent in a CoC is the *voluntary* nature of agreements. Violations are difficult to pin down; violators are impossible to make accountable. Even where there is formal adherence by the parties concerned to the principles of free, prior, and informed consent (FPIC), these principles are rarely observed and enforced in practice, and it would take much political power, time, and resources to ensure that they were. Sawyer and Gomez have observed the paradox that, simultaneously with an increase in and institutionalization of international treaties, voluntary guidelines, and FPIC principles intended to protect indigenous peoples, there have been unprecedented violations of the rights of indigenous peoples and the penetration of their territories worldwide.<sup>42</sup>

Sixth, "partnership" is also a key concept in a CoC. It comes in many component forms, including state/private-sector/civil-society partnerships, which are assumed to promote transparency and build win-win outcomes into any land deals. But such a notion of partnership is usually based on a depoliticized and unrealistic vision of engagement between various actors that strips them of possibly conflicting interests and attempts to place them on equal footing. Imagining equal footing and complementary interests where none exist is more likely than not to lead to the poor losing out. Another type of partnership is the "TNC-farmer" partnership, also known as contract farming, where peasant producers are incorporated into the global agri-industrial food/energy complex through a variety of contractual arrangements. It is perhaps the most commonly cited type of incorporation of poor peasants and small farmers into large-scale agri-industrial schemes and is thought to result in win-win scenarios. Over time and in many diverse settings, however, this has proved not to be the case. Instead, such arrangements generally result in processes and outcomes that mainly favor the transnational companies, while, in some instances, they have even become an excuse to engage in forest clearing and monocropping.

In short, part and parcel of CoC proposals is an uncritical belief in the basic beneficence of formalistic and legalistic measures such as clearer contracts, clearer and more secure property rights (usually interpreted as private and individual rights), transparent contracting, FPIC, and state-civil society partnership. Each of these, in itself, is not necessarily bad; each could have merit depending on a particular context. But none is inherently good in that none can guarantee truly pro-poor outcomes. In the absence of a clear framework and process that insists on prioritizing truly pro-poor

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effectively claim their rights and the right to decide what kind of development is to be pursued in their name. From this perspective, "development" may still be the answer to rural poverty, but it is equally important who defines what kind of development and for what purposes development is pursued.

42. SAWYER & GOMEZ, *supra* note 31, at 17.

outcomes, the weaknesses of these various elements are more likely to be reinforced when framed within a win-win, voluntary CoC as *the* response to the global land grab.

#### IV. CONCLUDING REMARKS

The proposed CoC-framed response to the global land grab veers away from questioning the fundamental roots of land-grabbing, i.e., the existing industrial pattern of food and energy production and consumption controlled by TNCs, while engaging in the problematic notion of win-win scenarios. In our view, for all the reasons outlined above, a CoC-framed response to land-grabbing is likely to facilitate, not block, further land-grabbing and thus should not be considered, even as a second-best approach. Some may argue that the proposed CoC, despite its inherent weaknesses, should still be considered as a possible second-best, pragmatic approach on the grounds that large-scale land-grabbing is inevitable in the current economic climate and political-institutional context. Yet we contend that land-grabbing is not inevitable, that it can be prevented, and that concerted efforts should be undertaken to stop it. Doing so, however, will require an appropriate (re)alignment of political forces at the international, national, and local levels, mobilized within a human rights framework.

Prioritizing truly pro-poor outcomes would require adopting a human rights-based approach, including taking seriously the right to food and the right to land.<sup>43</sup> Elsewhere we have elaborated on the need to specify the

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43. There is no explicit human right to land in international human rights law, and consequently the obligations related to access to land have not yet been fully determined. The "right to property" was established in international human rights law in Article 17 of the Universal Declaration of Human Rights (UDHR), G.A. Res. 217A, art. 17, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N.Doc A/810 (Dec. 12, 1948), but it was not codified in the subsequent (legally binding) international conventions on economic, social, and cultural rights and on civil and political rights. This was because of a lack of consensus at the time and during the deliberations over the conventions. However, according to Sofia Monsalve of the human rights organization Foodfirst Information and Action Network (FIAN-Int'l):

Even though there is no human right to land, the right to land of rural communities is implied in other human rights recognized in international covenants, such as the right to property, the right to self-determination, the right of ethnic minorities to enjoy and develop their own culture, as well as the right to an adequate standard of living.

Sofia Monsalve, *Justiciability of Economic, Social and Cultural Rights: Progresses, State of the Debate*, RIGHT TO FOOD J., Dec. 2003. There are an increasing number of relevant international legal instruments, mainly on the human right to food, which lend support to the idea of a human right to land and to other productive resources, and which emphasize vulnerable people as the main rights-holders. See, e.g., International Covenant on Economic, Social, and Cultural Rights (ICESCR, art. 11, G.A. Res 2200A (XXI), U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966); U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5 (May 12, 1999), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3d02758c707031d58025677f003b73b9?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3d02758c707031d58025677f003b73b9?Opendocument); FAO, Working Group on the Right to Adequate Food, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security 25* (Nov. 2004), available at

key features of a human-rights framed, categorically pro-poor land policy framework, which are also relevant here. Two of these key features are protection or transfer of land-based wealth in favor of the poor and transfer of land-based political power. A pro-poor land policy framework must also be: (i) class-conscious to ensure the policy (or measures) benefits the landless and near-landless working classes; (ii) historical so as to allow a “social justice” framework to be fully developed; (iii) gender-sensitive to promote the distinct right of women to their own land rights; (iv) ethnicity-sensitive to promote the distinct right of ethnic groups (and other race and caste-related groupings) to their territorial claims as peasants and as peoples; (v) productivity-increasing to support more intensive land and labor use; (vi) livelihood-enhancing to support the building of diverse and sustainable livelihoods; and finally (vii) rights-securing to advance the rights of poor people to occupy and use land for purposes and in ways of their own choosing.<sup>44</sup>

A human rights-based framework necessarily calls into question the broader pattern of food-energy production and consumption that drives the current global land grab, embeds an analysis of it within the dynamics of multi-class and group power relations in affected communities, and opposes displacement/dispossession as well as adverse incorporation of poor people into the emerging agri-industrial food-energy enclaves in the Global South. A comprehensive human rights-based framework has fundamental differences with the more corporate-controlled and profit-driven CoC framework and sets a high bar for evaluating processes and their outcomes. The position by UN Special Rapporteur on the right to food, Olivier de Schutter, is relevant. Concerned about the human rights implications of this new trend where “[p]rivate investors, including investment funds, are increasingly attracted to agriculture, and increasingly speculate on farmland,” the Special Rapporteur is “seek[ing] to provide guidance to ensure that these investment agreements do not lead to violations of the human right to adequate food.”<sup>45</sup> If human rights are taken seriously, such a position could serve as a basis for a radical critique of the CoC position and for a more powerful and truly pro-poor response to the global land grab. It could incorporate some of the

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<http://www.fao.org/righttofood/publi09/y9825e00.pdf>. According to FIAN:

State Parties to ICESCR are obligated to respect, protect and fulfill access to land, given that this forms part of the basic content of the right to food and is particularly important for peasants, indigenous peoples, fisherfolks, pastoralists, and people living in rural areas and who have no alternative options for earning a living. The Special Rapporteur on the Right to Food has already adopted this interpretation and considers it to be clear that governments should respect, protect and fulfill access to land.

SOFIA MONSALVE SUÁREZ, FIAN INT’L, ACCESS TO LAND AND PRODUCTIVE RESOURCES: TOWARDS A SYSTEMATIC INTERPRETATION OF THE FAO VOLUNTARY GUIDELINES ON THE RIGHT TO FOOD 2 (2006) (emphasis added).

44. Borrás & Franco, *supra* note 12; see also Jennifer Franco, *Pro-Poor Policy Reforms and Governance in State/Public Lands: A Critical Civil-Society Perspective*, 1 LAND REFORM 8 (2009).

45. The Special Rapporteur on the right to food, *supra* note 5, ¶ 1.1 .

individual elements in the CoC proposition, specifically, FPIC and transparent processes and contracts, and deepen their significance.

A human rights-based response to global land-grabbing can gain traction only through a concerted effort by state and non-state actors operating at international, national, and local levels. It is less useful to use categories such as “multilateral agencies,” “civil society,” or “farmers’ movements,” because these are highly differentiated entities. For multilateral and bilateral agencies, it is useful to speak of reformist factions within that can support a human rights framework. Civil society is varied; some groups are supportive of the CoC, while others are not and are pushing for a human rights framework. Farmers’ movements are also divided between those that see the biofuel boom as an opportunity (e.g., the International Federation of Agricultural Producers) and are also likely to support a CoC framework, and those, like La Via Campesina, that see the biofuel boom as a threat and oppose a CoC. These fault lines among key forces at the international level also exist at the national and local levels (for example, national ministries should be seen as politically contested arenas, rather than monolithic entities). The challenge is not to look for alliances of undifferentiated entities, but to look into divisions and fault lines within and between these groups, in order to mobilize the forces that will opt for a human rights framework rather than a CoC as a response to global land-grabbing. The key is to forge alliances between reformist initiatives from above—reformists within state and inter-governmental institutions—along with widespread, consistent mass mobilizations by affected rural poor and movements and allies among civil society from below; indeed, a multi-level “sandwich” strategy.