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Land Grabs & Food Security: The International Community Should Adopt a Code of Conduct to Protect Local Communities and Improve Global Food Security

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Land Grabs & Food Security: The International Community Should Adopt a Code of Conduct to Protect Local Communities and Improve Global Food Security

Alyssa Titche*

Land acquisition by foreign countries and corporations has increased since the 2008 economic crisis. If land grabs continue at the current pace and with the same disregard to local host country populations, the food security of host countries will be put at great risk. In order to prevent future land grabs and make land grabs that do occur more equitable for host country nationals, an International Code of Conduct on Land Grabs and Food Security (Code of Conduct) should be adopted by the United Nations and managed by the Special Rapporteur on Food Security. The former Special Rapporteur, Olivier de Schutter, connected landownership, the right to food, and human rights in his work as Special Rapporteur. A Code of Conduct would further his ideas. By codifying these ideas in a Code of Conduct, perpetrating countries can be held responsible for bad actions on the world stage and host countries will have documentation and guidelines on how to contract proactively in land grab deals.

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INTRODUCTION

The most recent land grab rush began with the 2007–2008 economic and food crisis, and has only grown since.¹ In the past decade, foreign investors bought up an area the size of Kenya.² As opposed to ordinary large-scale land purchases, land grabs refer to large-scale land purchases that violate human rights.³ These include

1. *World Bank Report on Land Grabbing: Beyond the Smoke and Mirrors*, GRAIN (Sept. 8, 2010), <https://www.grain.org/article/entries/4021-world-bank-report-on-land-grabbing-beyond-the-smoke-and-mirrors> [https://perma.cc/4CLK-MCQP]; Food and Agric. Org. [FAO], *From Land Grab to Win-Win: Seizing the Opportunities of International Investments in Agriculture*, ECON. & SOC. PERSP. 1 (June 2009), <ftp://ftp.fao.org/docrep/fao/011/ak357e/ak357e00.pdf>.

2. GRAIN, *supra* note 1.

3. Jootaek Lee, *Contemporary Land Grabbing: Research Sources and Bibliography*, 107 L. LIBR. J. 259, 260 (2015).

human rights such as the right to food and the right to land.⁴ While land grabs are currently a global problem, it is unlikely that the land rush will ever truly end. Instead of trying to eradicate the purchase of land in host countries by foreign governments and corporate entities, the global community should focus its efforts on creating an International Code of Conduct on Land Grabs and Food Security (Code of Conduct) to mandate mutually beneficial contracts amongst local populations, host governments, and foreign investors.

This Code of Conduct would delineate how contracts should be negotiated, the type of feasibility studies necessary for the negotiations to continue, how to obtain informed consent from relevant parties, and what constitutes mutual benefits and just compensation. Creation of a Code of Conduct would not start from zero. Indeed, there are already international documents that touch on many of the issues surrounding land grabs and food security, such as the International Covenant on Economic, Social and Cultural Rights; the Voluntary Guidelines on the Responsible Governance of Tenure of Land; and the Voluntary Guidelines on Food Security.⁵ However, a Code of Conduct would bring all of these ideas together into one document for easy accessibility and improve upon other documents currently in existence by having an explicit procedure for how to conduct a mutually beneficial land deal.

Food security is a global problem; the Food and Agriculture Organization (FAO) found that 795 million people are hungry.⁶ Over the past several decades, many countries have tried agribusiness as a solution to food security.⁷ However, smallholder farmers grow more than seventy percent of the world's food and are critical to global food security.⁸ Therefore, agroecology may be a solution. Agroecology is “an ecological approach that integrates agricultural development with relevant ecosystems. It focuses on maintaining productive agriculture that sustains yields and optimizes the use of local resources, while minimizing the negative environmental and socioeconomic impacts of modern technologies.”⁹ It supports small farmers while also focusing on increased food production through

4. Elizabeth R. Gorman, *When the Poor Have Nothing Left to Eat: The United States' Obligation to Regulate American Investment in the African Land Grab*, 75 OHIO ST. L.J. 199, 234 (2014).

5. Lee, *supra* note 3, at 266–69.

6. FAO, Int'l Fund for Agric. Dev. [IFAD] & World Food Programme [WFP], *The State of Food Insecurity in the World: Meeting the 2015 International Hunger Targets: Taking Stock of Uneven Progress* 8 (2015), <http://www.fao.org/3/a-i4646e.pdf> [<https://perma.cc/9GHA-C4J5>].

7. See MICHAEL GORDY, DISASTER RISK REDUCTION AND THE GLOBAL SYSTEM: RUMINATIONS ON A WAY FORWARD 51 (2016); Philip McMichael & Mindi Schneider, *Food Security Politics and the Millennium Development Goals*, 32 THIRD WORLD Q. 119, 122 (2011); Kojo Sebastian Amanor, *Global Resource Grabs, Agribusiness Concentration and the Smallholder: Two West African Case Studies*, 39 J. PEASANT STUD. 731, 732 (2012).

8. Hilal Elver (Special Rapporteur on the Right to Food), *Interim Rep. of the Special Rapporteur on the Right to Food*, U.N. Doc. A/70/287 (Aug. 5, 2015), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/287 [<https://perma.cc/9JCF-PWBW>].

9. *Id.* at 20.

environmental sustainability with an eye toward climate change.¹⁰ Any potential solution to land grabs, whether it involves agroecology or not, must have increased research and production of information. Currently, there is a dearth of information on land grabs and their consequences even though the World Bank is the largest reporter of land grab information. Additional data is needed on the pattern, scale, and impacts of land grabs.¹¹ Publication by many countries of their land deals and land laws is also necessary.¹² A Code of Conduct would include provisions for increased research and transparency, which would help parties reach mutually beneficial deals.

A Code of Conduct would have a human rights foundation and would include a roadmap to mutually beneficial land deals. Investor countries would have to meet with local communities, obtain their informed consent for the project, conduct feasibility studies on the project, and provide just compensation to the local population. Many of these requirements are already codified in other international documents,¹³ but a Code of Conduct would make these requirements more accessible by putting them all in one place. A Code of Conduct would likely be effective for this reason because states, entities, and nongovernmental organizations (NGOs) are likely familiar with many of the concepts from other documents.¹⁴ They are also familiar with the concept of a Code of Conduct as there are examples of such codes at the national and international levels as well as in public and private settings.¹⁵

A Code of Conduct would be overseen by the Special Rapporteur on Food Security. The Special Rapporteur already reports to the Human Rights Council annually on his special projects and could add a report on a Code of Conduct.¹⁶ A Code of Conduct would likely be effective because it would build upon what already exists and create a roadmap for easy implementation. Additionally, a Code of Conduct would not demand the end of land grabs and the end to foreign investment. In fact, the opposite is true. Foreign investment in agriculture is

10. Office of U.N. High Comm'r for Human Rights [OHCHR], *Climate Change Poses Major Threat to Food Security, Warns U.N. Expert* (Nov. 3, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16702#sthash.VuolzSzj.dpuf> [<https://perma.cc/K4CY-EKDJ>].

11. Michael Kugelman, *Introduction, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND* 1, 19–20 (Michael Kugelman & Susan L. Levenstein eds., 2009), https://www.wilsoncenter.org/sites/default/files/ASIA_090629_Land%20Grab_rpt.pdf [<https://perma.cc/PK5D-X879>].

12. GRAIN, *supra* note 1.

13. *See infra* Part D.

14. *See, e.g.*, FAO, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (2010).

15. *See, e.g.*, Kugelman, *supra* note 11, at 9.

16. *Special Rapporteur on the Right to Food*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R [hereinafter U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R], <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx> [<https://perma.cc/ERV4-J85Q>] (last visited Sept. 9, 2016).

necessary throughout much of the developing world, and a Code of Conduct would be merely an instrument the world community could use to benefit all parties.

I. BACKGROUND ON THE WORLD'S CURRENT LAND GRAB RUSH

A. What Are Land Grabs and How Do They Affect Local Communities?

The International Land Coalition defines a large-scale land purchase or lease as an “acquisition of any tract of land larger than 200 hectares (ha), or twice the median,” which is ten times the size of the average small farm.¹⁷ However, there are differences between land acquisitions and land grabs. A land acquisition becomes a land grab when at least one of the following occurs: a violation of human rights, such as making the local population food insecure or violating equal rights of women; the principles of free, prior, and informed consent are disregarded; the deal is not based on a thorough assessment of social, economic, and environmental impacts; the contract is not clear and transparent with binding commitments on employment and benefit-sharing; or the plan ignores democratic planning, independent oversight, and meaningful participation of local communities.¹⁸ Land grabs have an additional negative component missing from a normal land acquisition and that negative externality is what the global community needs to address through better oversight and a Code of Conduct.

Land grabs most often happen in the world's poorest countries because those countries do not have formal land rights and most do not have a government willing or able to advocate for local populations at the expense of losing a large contract.¹⁹ It is important to improve and expand the formal land rights of local communities because land grabs do occur in areas where local persons and communities are actively using the land.²⁰ Governments often award contracts to foreign businesses for land the government claims is “underutilized” or “unused.”²¹ However, such land is usually under the dominion of local communities and contributes to household income through the sale and trade of natural resources such as water, minerals, and grazing lands for animals.²² Critics argue that a Code of Conduct would not encompass the idea that land not being used for farming may still have

17. Oxfam International, “Our Land, Our Lives”: Time Out on the Global Land Rush, OXFAM BRIEFING NOTE 5 (Oct. 2012), https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf [<https://perma.cc/MYY3-LYWF>].

18. *Id.*

19. *See id.* at 13.

20. ALISON GRAHAM ET AL., CSO MONITORING 2009–2010 “ADVANCING AFRICAN AGRICULTURE” (AAA): THE IMPACT OF EUROPE’S POLICIES AND PRACTICES ON AFRICAN AGRICULTURE AND FOOD SECURITY: LAND GRAB STUDY 24–25 (2010), http://afrique-europe-interact.net/files/anglais_-_10_fianetal_land_grab_study_europeaninvolvement.pdf [<https://perma.cc/8UXZ-P4RS>].

21. *Id.*

22. *Id.*

value to the local population.²³ However, in a Code of Conduct based on a human rights approach, it is imperative that a Code of Conduct recognizes the different uses of local populations.

Undocumented land rights often result in unmapped land, which makes negotiations difficult because there are no legal boundaries between different plots of land.²⁴ Therefore, it can be extremely difficult for local populations to advocate for their land because they have no legal standing.²⁵ Host countries must better protect local populations through land right documentation and education in order to level the playing field during land acquisition negotiations. These obligations should be codified in a Code of Conduct.

Some countries with low population density recognize rural land rights independently of whether these land rights are formally registered.²⁶ This can protect locally recognized landowners and cultivators from a slow-moving and potentially ineffectual government bureaucracy.²⁷ However, even if countries consider property rights of those who have not formally registered, it can be difficult to defend such claims to outsiders or the state if there is no documented land right. This is especially true since those without formal property rights may be unsophisticated and far removed from interaction with the government or large corporations.²⁸ Therefore, part of the solution to the negative externalities of land grabs lies with the host government to better politically enable and protect local people through land registration.

When possible, all land cultivators should attempt to have their rights formally recognized.²⁹ There are low-cost mechanisms that countries could adopt to help their citizens formalize land use rights.³⁰ For example, formalization of rights could occur through registering groups of persons to parcels of land so that the community is responsible for its management as well as the administrative process of updating registries.³¹ Boundaries must also be demarcated and recorded.³² Additionally, a governance structure could be created to deal with the government and interaction with outsiders.³³ Importantly, any records that exist at the local level should be integrated with the regular land administration system so that land is not

23. Saturnino Borrás Jr. & Jennifer Franco, *From Threat to Opportunity? Problems with the Idea of a "Code of Conduct" for Land-Grabbing*, 13 YALE HUM. RTS. & DEV. L.J. 507, 516 (2010).

24. Klaus Deininger et al., 'The World Bank, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?*, in AGRIC. & RURAL DEV. 98 (The Int'l Bank for Reconstruction and Dev./The World Bank, Washington D.C. 2011), http://siteresources.worldbank.org/INT/ARD/Resources/ESW_Sept7_final_final.pdf [<https://perma.cc/VP8C-9ACW>].

25. *See id.*

26. *Id.* at 100.

27. *Id.*

28. *Id.*

29. *Id.* at 98.

30. *Id.* at 101.

31. *Id.*

32. *Id.*

33. *Id.*

doubly allocated.³⁴ It is also crucial to register land users' secondary rights such as those associated with natural resources like watering sources and grazing areas.³⁵ Finally, NGOs could help local populations with many of these tasks if governments were more transparent with their needs and made land-use laws accessible to local communities.

Although these mechanisms to have land rights formally recognized would be helpful first steps in diminishing the negative consequences of land grabs, many citizens in Sub-Saharan Africa have not been the beneficiaries of any legal reforms because local populations are largely unaware that property laws exist and apply to their communities.³⁶ For example, in Tanzania, ten years after the passage of the country's Land Acts, only 753, or seven percent, of the country's 10,397 registered villages have a certificate of village land.³⁷ Similarly, in Mozambique, only twelve percent of 70 million hectares of land are mapped and NGOs completed the vast majority of that mapping.³⁸ These examples illustrate the need for better systems and protocols to educate local communities and record rural property rights.³⁹ Governments need to step in and help their citizens protect themselves, even though governments could benefit, at least in the short term, from selling the land to the highest bidder. Host governments' participation and transparency would be a key component of a Code of Conduct because without host-country help, many communities lack the resources or knowledge to help themselves.

Not only do communities lack legal knowledge in a land grab, there is also no consultation with local populations about the land deal. Although many countries do legally require purchasers of land to consult with local populations before the deal is made, the laws are often not specific enough to ensure that rural landowners understand the transaction.⁴⁰ The laws are often vague about who must participate in the meetings, whether there needs to be information distributed beforehand, and whether the communities' concerns will be conveyed to the potential purchaser.⁴¹ In order to improve the opportunity local communities have at making mutually beneficial land deals, local stakeholders need to know their legal rights, the rules of engagement, and what they stand to lose and gain.⁴² Often, the local stakeholder's biggest constraint is a lack of knowledge of their legal rights.⁴³ In many countries, access to the texts of laws and regulations is very difficult to obtain.⁴⁴ Even attorneys can have difficulty finding the applicable laws.⁴⁵ Therefore, access to, and

34. *Id.*

35. *Id.*

36. *Id.* at 102.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 106.

41. *Id.*

42. *Id.*

43. *Id.* at 107.

44. *Id.*

45. *Id.*

transparency of, national laws must be codified in a Code of Conduct so that countries are held accountable to vulnerable local communities.

Compensation to local communities also needs improvement. Low valuation is typical in land grabs and communities, and individuals should be adequately compensated whether this is through other pieces of land; if they earn their livelihood through the land; access to secondary resources; or money.⁴⁶ Not only does undervaluation immediately hurt local individuals and the community, but it also encourages projects that may not be viable, which can be a scourge on the land and the community for years.⁴⁷ As a result, there could be fewer benefits derived from the land than when the local users had control.⁴⁸ For large land acquisitions to take place, feasibility studies should be completed in order to better assess viability of the project and how communities should be compensated for their loss. By creating a Code of Conduct that connects land grabs with human rights, the international community, as well as host countries, could better protect local communities by ensuring that only viable projects are considered and transparency and mutual benefits in negotiations and contracts are upheld.

B. The Current Land Grab

While there have been land grabs throughout history, the current land grab happening in Africa, Asia, and Latin American has steadily grown since its inception.⁴⁹ This most recent land grab rush originated with the 2007–2008 commodity crisis, which started a period of high and volatile prices.⁵⁰ The crisis “reminded many import-dependent countries of their vulnerability in food security and prompted them to secure their food supplies overseas,” by looking for investment properties in other countries.⁵¹ The financial crisis caused many developed countries to rediscover agriculture and realize that they were vulnerable to a food crisis because they import a large percentage of their food.⁵² While many of these land grabs have reaped rewards for the purchasing country, the impacts of the land grabs on local communities are not as clearly positive.⁵³

As food prices continue to rise, interest in purchasing land abroad could also continue to increase as rich foreign countries attempt to secure their own food supplies.⁵⁴ Since the beginning of the food and economic crisis, mainly poorer, developing countries have sold farmland eight times the size of the United Kingdom

46. *Id.* at 107–08.

47. *Id.* at 109.

48. *Id.*

49. GRAIN, *supra* note 1, at 2; FAO, *supra* note 1, at 1.

50. GRAIN, *supra* note 1, at 2; FAO, *supra* note 1, at 1.

51. Deininger et al., *supra* note 24, at 1.

52. *Id.*

53. See David Hallam, *International Investments in Agricultural Production, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND* 27, 31–34 (Michael Kugelman & Susan L. Levenstein eds., 2009).

54. See Elver, *supra* note 8.

to developed, wealthy, investing countries.⁵⁵ As noted above, “the poorest countries with the weakest protection of people’s land rights” are subject to land grabs, not necessarily the countries that have the most available arable land.⁵⁶ Weak laws are obviously attractive to investors who want to exploit the host country and make a profit, especially when there is no incentive to invest the right way and make sure the contract is mutually beneficial to the local community. While these weak laws are attractive, exporting food when local populations are hungry could cause unrest that could undermine the land deal.⁵⁷ A Code of Conduct would incentivize investor countries to contract with greater respect for host countries so they are not embarrassed on the international stage for not following the terms of the Code. Better data collection is a necessary component of a Code’s success so the world community can better monitor land deals.

According to the International Monetary Fund (IMF), “there has been 33 percent more land acquisition in countries ranked near the bottom of the Worldwide Governance Indicators (like Angola) than in countries ranked around the middle (like Brazil).”⁵⁸ Countries that purchase land in host countries to help their own country become more food secure often do not show high regard for the challenges facing the host country. For example, foreign governments are currently purchasing land in South Sudan at the same time as the World Food Programme is trying to feed 5.6 million refugees in the country.⁵⁹ The current land rush will continue and land grabs will likely follow, but the global community can better protect local populations by adopting a Code of Conduct that delineates best practices in land purchasing and creates some oversight and transparency regarding the land deals.

C. Major Players in Land Grabs

The major players in land grabs focused on food security are China, India, Japan, Malaysia, South Korea, Egypt, Libya, Bahrain, Jordan, Kuwait, Qatar, Saudi Arabia, and the United Arab Emirates.⁶⁰ Many of these countries are cash rich, but water and arable land poor.⁶¹ They have also clearly expressed their intentions to “(a) secure food supplies through direct ownership or control of foreign farmland, and (b) exclude traders and other middlemen as much as possible in order to cut

55. *Id.*

56. See IMF, *What Drives the Global Land Rush?*, Working Report No. 11/251 (2011), <http://www.imf.org/external/pubs/ft/wp/2011/wp11251.pdf> [<https://perma.cc/T9KP-FVP7>].

57. Ruth Meinzen-Dick & Helen Markelova, *Necessary Nuance: Toward a Code of Conduct in Foreign Land Deals*, in LAND GRAB? THE RACE FOR THE WORLD’S FARMLAND 69, 77 (Michael Kugelman & Susan L. Levenstein eds., 2009).

58. Oxfam International, *supra* note 17, at 20 n.10.

59. *Seized: The 2008 Landgrab for Food and Financial Security*, GRAIN 2 (Oct. 24, 2008), <https://www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security> [<https://perma.cc/T9SJ-82YH>].

60. *Id.* at 3.

61. *Id.* at 4.

their food import bills by 20–25%.⁶² Their goal is to secure their own food supply in the most economical and efficient way—which means taking land from less-developed countries.

While the Gulf States and China receive much of the attention for land grabs around the world and especially in Africa, the rest of the developed world is not immune to the land rush. Italy, Norway, Germany, Denmark, the United Kingdom, and France are all amongst the largest foreign direct investors in agriculture.⁶³ This is not necessarily a bad thing, as investment in agriculture has lagged the past several decades, but the investment must also benefit the host country. Countries in the European Union (EU), unlike the countries mentioned above, are not interested in arable land to stabilize their own food supply, but to promote their energy policies.⁶⁴ EU energy policies are creating heightened demand for agrofuels and countries are looking overseas to fill this demand.⁶⁵ Although these policies are not creating large-scale food farms in Africa for the benefit of countries elsewhere, they still harm the African host country's own food security goals by decreasing the amount of arable land available to local communities. Land grabs that are expressly for food security and those for biofuels can be equally harmful to local communities and their food security goals. Therefore, any and all land-purchasing contracts should be scrutinized under a Code of Conduct.

D. Scale of Current Investment in Land in Host Countries and Type of Investment Needed

Although land grabs occur throughout the world, Africa has seen the most land grabbed. In the past ten years, Africa has sold an area the size of Kenya to foreign investors.⁶⁶ Land acquisitions are a “new form of colonialism that threatens food security of the poor,” unless seller and purchaser countries and the international community can work together to create land-purchasing agreements that also improve the status quo of developing countries.⁶⁷ Currently, many of the benefits seen by purchasing countries or even seller countries' governments are not trickling down to the common citizen.⁶⁸ This means that the agreements and oversight of these agreements need to change by incorporating more inclusive strategies and obligations of mutual benefit.⁶⁹ A Code of Conduct would standardize and codify this process.

While land grabs that feature foreign investors using African land to promote food security in their home country often do not help the local communities, this does not mean that investment in agriculture is not needed in Africa. The low levels of investment in agriculture in Africa and throughout the developing world has been

62. *Id.* at 9.

63. GRAHAM ET AL., *supra* note 20, at 5.

64. *See id.*

65. *Id.*

66. *Id.*

67. *See* FAO, *supra* note 1, at 1.

68. *Id.*

69. *See id.* at 2.

a cause for concern for the past couple of decades and may be one of the causes of the latest food crisis.⁷⁰ Africa has received little financing to help it develop its arable land, and although the African Union urged countries to pledge at least ten percent of their spending for agriculture, few countries have actually done so.⁷¹

The 2008 World Development Report noted the need for more agriculture development in Africa and that such investment is necessary in order to achieve the Millennium Development Goals, one of which is to ensure food security around the world.⁷² Investment in agriculture is not merely a sustenance tool either. The World Bank contends that in less-developed countries, under the right conditions, “agriculture is at least twice as effective in reducing poverty as compared to GDP growth originating outside agriculture”⁷³ Therefore, while land grabs have many negative connotations, some of which are well deserved, investment in agriculture throughout the developing world is still a necessary and worthwhile practice.⁷⁴

Many NGOs, including Genetic Resources Action International (GRAIN), promote the idea of foreign investment in agriculture in developing countries, when done correctly. GRAIN notes that investment in agriculture has “become the rallying cry of virtually all authorities and experts charged with solving the global food crisis.”⁷⁵ This type of investment is not occurring through many of the land grabs happening today because investing countries are largely only uninterested in ameliorating their own food crisis, rather than the global food crisis. What makes this clear is that foreign investment in arable land did not boom in 2004 when it became apparent that the food security goal under the Millennium Development Goals would not be achieved.⁷⁶ Rather, the land rush started in 2008 after the economic collapse when developed nations wanted to secure their own food and energy sources.⁷⁷ There is evidence that small African farmers could increase their crop yields two or three times what they currently produce with the correct type of funding.⁷⁸ To do this, farmers not only need international support, but also their traditional lands to cultivate the crops.⁷⁹ However, often with foreign investment, large agribusinesses undermine smaller farmers who either lose their land and their

70. GRAHAM ET AL., *supra* note 20, at 21.

71. Roy Laishley, U.N. Dep’t of Pub. Info., *Is Africa’s Land Up for Grabs?*, AFR. RENEWAL 28–29 (Special Ed. on Agriculture 2014), http://www.un.org/africarenewal/sites/www.un.org.africarenewal/files/Africa_Renewal_Special_Edition_2014_en.pdf [<https://perma.cc/Z347-MC8R>].

72. *See* THE WORLD BANK, WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT 26, 40 (The Int’l Bank for Reconstruction and Dev./The World Bank, Washington D.C. 2008), http://siteresources.worldbank.org/INTWDR2008/Resources/WDR_00_book.pdf [<https://perma.cc/CH5K-2RZH>].

73. *Id.* at 6.

74. *See* GRAHAM ET AL., *supra* note 20, at 21.

75. GRAIN, *supra* note 1, at 6.

76. *See* GRAHAM ET AL., *supra* note 20, at 22.

77. *See id.*

78. *See id.*

79. *See id.*

jobs or are forced to work on large industrialized farms.⁸⁰ A Code of Conduct would help balance these competing interests and force parties to sit down together to create land-purchasing agreements that are mutually beneficial.

E. Pros and Cons of Land Grabs

The promise of foreign countries or international corporations seeking to purchase land are the opportunities for technology transfer, the stimulation of innovation, increased productivity, quality improvements, employment opportunities, and multiplier effects by tapping the local community for many of its needs.⁸¹ Foreign direct investments have a history of “low importance of land fees and other financial transfers compared to expected benefits such as employment generation and infrastructure development.”⁸² A Code of Conduct with a human rights focus could help enforce mutual benefits contract clauses, creating better deals for local populations. A Code of Conduct could help empower local governments to demand the use of “specific technologies or behaviours; or by specifying outcomes to be achieved or avoided by firms; or by making firms responsible for putting in place internal planning and management processes.”⁸³

Foreign investment could also lead to food security in the host country through increased production and diversification.⁸⁴ And much of the developing world has needed development dollars in the agricultural sector for decades. However, the many benefits foreign investment promises generally do not come to fruition. Instead of delivering on their promises, land grabs lead to land expropriation, the unsustainable use of resources, and the destruction of the livelihoods of local populations.⁸⁵ Host countries can become food insecure due to a foreign country’s attempt to become food secure itself. Land grabs also bring a host of other issues that can prove a menace to the host country such as human rights problems and sovereignty and environmental issues.⁸⁶ However, the biggest fear of land grab opponents is that “if left unchecked, this global land grab could spell the end of small-scale farming, and rural livelihoods, in numerous places around the world.”⁸⁷ Small farming could still be a key to global food security.

80. *See id.*

81. *See* GRAIN, *supra* note 1, at 2.

82. Nadia Cuffaro & David Hallam, “Land Grabbing” in *Developing Countries: Foreign Investors, Regulation and Codes of Conduct* 7 (Dipartimento di Scienze Economiche, Università di Cassino, Working Paper No. 2038-6087, 2011).

83. *Id.* at 8.

84. David Hallam, *International Investments in Agricultural Production*, FOOD & AGRIC. ORG. THE U.N. 7, <http://www.fao.org/economic/es-policybriefs/multimedia0/presentation-from-land-grab-to-win-win/en/> [https://perma.cc/3K77-JWD9] (last visited Oct. 3, 2016).

85. *See* GRAIN, *supra* note 1, at 2.

86. Logan Cochrane, *Food Security or Food Sovereignty: The Case of Land Grabs*, J. HUMANITARIAN ASSISTANCE (July 5, 2011), <https://sites.tufts.edu/jha/archives/1241> [https://perma.cc/8QTH-P7AE].

87. *See* GRAIN, *supra* note 1.

Land grabs can change the local culture of a community by replacing traditional farming jobs with other jobs (hopefully). Land grabs also

further entrench export-oriented agriculture. This is simply not appropriate in most of the countries being targeted. The heavy push over recent decades towards producing food for external markets rather than internal ones is what made the impact of the 2007–8 food crisis so hard on so many people, particularly in Asia and Africa.⁸⁸

Countries such as Sudan and Madagascar have leased large amounts of arable lands while receiving food aid from the World Food Programme.⁸⁹ Even those countries that are not receiving international food aid may not be able to afford to purchase food from the global market.⁹⁰ Although these leased lands may not have been being cultivated for food at the time “because of increasing populations and urbanization, and decreasing availability of fertile land due to climate change, the seemingly abundance of land will eventually/shortly be reduced,” and host countries will not have been adequately compensated for the loss of land.⁹¹

Although some jobs may materialize from land grab deals, many of the jobs are of poor quality, require employees to work in poor conditions, pay poorly, and target mainly low-skilled seasonal agricultural workers, which means that people may be unemployed for long stretches during the year.⁹² Many developing countries hope that foreign investment will bring them more jobs and technology, but the technological improvements can also decrease the amount of required manual labor, which was a traditional form of employment in the host country.⁹³ Even when small farms are converted into large-scale farms, there are often few jobs for locals who are mainly unskilled laborers.⁹⁴ Adopting a Code of Conduct would not only allow the international community to better protect the livelihoods of the world’s most vulnerable people, but it would also provide a platform to discuss how developed countries can still invest ethically and beneficially in agriculture in the developing world.

F. The Present State of Land Grab Research

There is little empirical data available about the reach of land grabs.⁹⁵ Additional data is needed on the pattern, scale, and impacts of land grabs.⁹⁶ Having available, reliable, and plentiful information is important for all land grab

88. *Id.* at 10.

89. Shepard Daniel, *Land Grabbing and Potential Implications for World Food Security*, in *SUSTAINABLE AGRICULTURAL DEVELOPMENT: RECENT APPROACHES IN RESOURCES MANAGEMENT AND ENVIRONMENTALLY-BALANCED PRODUCTION ENHANCEMENT* 25, 33–34 (M. Behnassi et al. eds., 2011).

90. *See* GRAIN, *supra* note 1, at 10.

91. *See* GRAHAM ET AL., *supra* note 20, at 30.

92. *Id.* at 28.

93. *Id.*

94. *Id.*

95. *See* Deininger et al., *supra* note 24, at xxv.

96. Kugelman, *supra* note 11.

stakeholders.⁹⁷ Good public information can have a variety of effects. It “can help governments formulate policies, identify gaps in implementation, and perform essential regulatory functions. . . . [It can] help civil society educate local communities about their rights and the potential uses and value of their land, assist in specific negotiations, and monitor agreements so they are indeed adhered to.”⁹⁸ It can also “help investors effectively design and implement projects that respect local rights, are profitable, and generate local benefits.”⁹⁹ Not only is information not available to the public, it is also not available to key stakeholders, which makes risk assessment extremely difficult.¹⁰⁰

The World Bank found that:

[E]ven for data that should not be subject to any restrictions of confidentiality . . . limited data sharing and gaps and inconsistencies in record keeping implied an astonishing lack of awareness of what is happening on the ground even by the public sector institutions mandated to control this phenomenon. This lack or dispersion of information makes it difficult to exercise due diligence and to responsibly manage a valuable asset.¹⁰¹

If the World Bank is having difficulty finding data, then smaller NGOs and especially interested local communities will likely be at a loss of how to proceed.

The data that is available comes from a variety of sources including questionably reliable anecdotal data from media sources, some investor-released information, host countries, and the World Bank, who conducts case studies through the FAO and the United Nations Conference on Trade and Development (UNCTAD).¹⁰² Additionally, much of the data that does exist focuses on land grabs greater than 1000 hectares, with most focusing on deals of greater than 5000 hectares.¹⁰³ Therefore, researchers ignore many slightly smaller land grabs, even though those deals can also be highly disruptive and destructive to local communities.¹⁰⁴ Tracking and releasing land grab data and pertinent host country land laws is crucial to forcing mutually beneficial land contracts and should be an essential component of a Code of Conduct.

II. PREVIOUS INTERNATIONAL ACTION ON LAND TENURE AND LAND GRABS

Although land grabs remain a problem, there has been some international action on land grabs and related issues. At the World Food Summit in 1996, the attendees affirmed “the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to

97. See Deininger et al., *supra* note 24, at xxv.

98. *Id.* at xv.

99. *Id.*

100. *Id.* at xxv.

101. *Id.* at 4.

102. See Hallam, *supra* note 53, at 28.

103. *Id.*

104. *Id.*

be free from hunger.”¹⁰⁵ Countries reaffirmed this pledge in 2002 when World Food Summit attendees asked “the FAO Council to establish an Intergovernmental Working Group to develop a set of Voluntary Guidelines to support Member States’ efforts to achieve the progressive realization of the right to adequate food in the context of national food security.”¹⁰⁶ Objective 15 of the Voluntary Guidelines states that “[f]ood security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”¹⁰⁷ Food security has four pillars—availability, stability of supply, access, and utilization—all of which are threatened by land grabs. Availability of food decreases when countries sell arable land to foreign or private investors, which decreases the stability of the food supply because there is less land to feed the same amount of people. Access will be limited unless the country can import food, which is unlikely because the countries selling land are some of the world’s poorest. Utilization is impacted because some purchaser countries hold the land as security and do not farm the land. Action on the international stage has been taken to protect the four pillars of food security, but efforts have been ineffectual against land grabs because the policies in place in so many countries have little oversight. This is one of the reasons why a Code of Conduct is necessary—to have a document that combines land grab and food security measures with oversight, instead of having policies spread throughout many international documents.

A. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (CESCR) was the first international document recognizing the human right to adequate and nutritious food.¹⁰⁸ The former Special Rapporteur for Food Security interpreted the Covenant to mean:

The obligations of the State are threefold: to respect, protect and fulfil the human right to food. The State is obliged to refrain from infringing on the ability of individuals and groups to feed themselves where such an ability exists (respect), and to prevent others . . . from encroaching on that ability (protect). Finally, the State is called upon to actively strengthen the ability of individuals to feed themselves (fulfil).¹⁰⁹

105. FAO, VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY iii (2004), <http://www.fao.org/3/a-y7937e.pdf> [<https://perma.cc/2FS2-EGR2>].

106. *Id.*

107. *Id.* at 5.

108. Comm. on Econ., Soc., & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 12 on its Twentieth Session, ¶¶1, 14, U.N. DOC. E/C.12/1999/5 (May 12, 1999).

109. Oliver De Schutter (Special Rapporteur on the Right to Food), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 3, U.N. DOC. A/HCR/13/33/Add.2 (Dec. 28, 2009).

The CESCR is the first international document to recognize food security, and although it did well to lay out a definition for what makes a nation food secure, it did not address how a nation may become food insecure through land grabs. The Voluntary Guidelines get closer to linking land grabs and food security—a necessary component of a Code of Conduct.

B. The Voluntary Guidelines

The Voluntary Guidelines' objective is to "provide practical guidance to States in their implementation of the progressive realization of the right to adequate food in the context of national food security."¹¹⁰ The Voluntary Guidelines are a human rights-based approach to food security that do not legally bind participating countries or infringe upon any other national or international laws.¹¹¹ States are invited to apply the Voluntary Guidelines for their own benefit and there are few consequences for countries that fail to perform their obligations.¹¹² The FAO believes that these Guidelines "represent a step towards integrating human rights into the work of agencies dealing with food and agriculture" and "provide an additional instrument to combat hunger and poverty and to accelerate attainment of the Millennium Development Goals." However, the FAO also believes that much more needs to be done to make sure that the world's poorest are food secure and that wealthy countries are not the cause of food insecurity.¹¹³ If countries around the world acknowledge that food security is a human right and one that needs to be protected and addressed, those countries should also acknowledge that land grabs pose a serious threat to that goal.

C. World Food Summit Plan of Action

Guideline 7.4 of the World Food Summit Plan of Action established the task "to clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger, as stated in the International Covenant on Economic, Social and Cultural Rights and other relevant international and regional instruments," which was interpreted as the goal of global food security.¹¹⁴ In Guideline 2.1, countries are urged to "promote broad-based economic development that is supportive of their food security policies. States should establish policy goals and benchmarks based on the food security needs of their population," in order to achieve food security.¹¹⁵ Guideline 2.3 states that in our modern, global economy, "[s]tates should promote adequate and stable supplies of safe food through a combination of domestic production, trade, storage and distribution."¹¹⁶ Guideline

110. See FAO, *supra* note 105, at iii.

111. *Id.* at 2.

112. See *id.*

113. *Id.* at iii.

114. *Id.* at 1.

115. *Id.* at 10.

116. See *id.*

7.1 invites states “to consider, in accordance with their domestic legal and policy frameworks, whether to include provisions in their domestic law, possibly including constitutional or legislative review that facilitates the progressive realization of the right to adequate food in the context of national food security.” However, this objective only looks inward at the individual country—making sure it can become food secure.¹¹⁷ It does not look outward at how that state is becoming food secure and that it is potentially doing so to the detriment of another state’s food security. While Objective 8.1 recognizes that “[s]tates should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination,” this often does not happen because money talks. Creating a land-purchasing process in a Code of Conduct would better define the process and protect locals.

D. World Summit on Food Security in Rome

At the World Summit on Food Security in Rome in 2009, member nations pledged in Commitment 30 to “continue to address the challenges and opportunities posed by biofuels, in view of the world’s food security, energy and sustainable development needs,” through continued scientific studies and research.¹¹⁸ Additionally, members at the World Summit called for “intensified coordination among all United Nations (UN) agencies, especially among FAO, IFAD and WFP, and the international financial institutions (IFIs),” in order to increase effectiveness.¹¹⁹ Special importance was placed on the UN High-Level Task Force on the Global Food Security Crisis (HLTF). However, one of the problems with the food security and land grab guidelines put in place on the international stage is that the rules and concepts are spread out through so many documents. A Code of Conduct would bring all the previous ideas and hard work together into one document that would outline the steps to draft land-purchasing agreements that would abide by human rights and be mutually beneficial.

E. Voluntary Guidelines on the Responsible Governance of Tenure of Land

The UN created the Voluntary Guidelines on the Responsible Governance of Tenure of Land (Land Tenure Guidelines) in May 2012.¹²⁰ The Land Tenure Guidelines sought to apply governance to “all forms of tenure, including public, private, communal, collective, indigenous and customary” properties.¹²¹ The Land Tenure Guidelines were intended to help the effort to eradicate global hunger

117. *Id.* at 15.

118. FAO, *World Summit on Food Security: Declaration of the World Summit on Food Security*, ¶ 30, U.N. Doc. WSFS 2009/2 E (Nov. 16–18, 2009).

119. *Id.* ¶ 34.

120. FAO, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY 1 (2012), <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> [<https://perma.cc/27DQ-H45Z>].

121. *Id.* at 2.

through sustainable development with special recognition to the central role that land plays in that goal, with additional focus on securing tenure rights and equitable access to land.¹²² Through access to land, the Land Tenure Guidelines aspire to achieve “food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development.”¹²³

Section 3 of the Land Tenure Guidelines focuses on principles of responsible tenure governance, which suggests that followers should recognize and respect legitimate tenure right holders.¹²⁴ General principle 3.1 advises member countries to work to recognize and record all legitimate tenure rights whether those interests are formally recorded or not in order to protect interest holders against the arbitrary loss of their rights, and to promote the enjoyment and tenure of those rights, all while preventing corruption in any and all land transfers.¹²⁵ Objective 3.2 explicitly states, “non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others,” and that states should take all steps necessary to make sure foreign entities abide by these Guidelines.¹²⁶ In order to do this, the Land Tenure Guidelines set out a group of ten “Principles of Implementation,” which include: human dignity, non-discrimination, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, rule of law, transparency, accountability, and continuous improvement.¹²⁷ Although these are worthwhile goals, they are ideals with little, if any, concrete steps on how to implement action.

The overall goal of the Land Tenure Guidelines is for states to set up “multi-stakeholder platforms and frameworks at local, national and regional levels or use such existing platforms and frameworks to collaborate on the implementation of” the Land Tenure Guidelines.¹²⁸ The Land Tenure Guidelines name the World Committee on Food Security as the governing body where members should seek advice, help, and implement ideas.¹²⁹ The Land Tenure Guidelines also advise member nations that their efforts should be consistent with other national and international law obligations, including the Universal Declaration of Human Rights.¹³⁰ However, being consistent with other legal instruments put in place for the protection of land rights as well as human rights does not necessarily protect those rights. These instruments do not do enough for local individuals and

122. *Id.* at iv.

123. *Id.* at 1.

124. *See id.* at 3–5.

125. *Id.* at 3–4.

126. *Id.* at 4.

127. *Id.* at 3–5.

128. *Id.* at 39.

129. *See id.*

130. *Id.* at 1.

communities because they are mostly filled with lofty goals instead of detailed plans for how to protect local land rights. A Code of Conduct could be the document needed to solidify a concrete plan of action regarding land-purchasing deals. Countries' first step in promoting informed consent should be to make local and national laws easily accessible.

F. Committee on World Food Security's High Level Panel of Experts on Food Security

The Committee on World Food Security's High Level Panel of Experts on Food Security (World Food Security Panel) stated that, "the different actors – investor, government, local people – enter the negotiations with highly asymmetric information and power. Consequently, local people usually loose [sic] out, and governments loose [sic] both revenue and opportunities to achieve long term benefits for their populations."¹³¹ Communities that are targeted for land grabs need support in order to know what kind of information they are entitled to and how to access and use that information.¹³² The African Commission on Human and People's Rights (ACHPR) echoed the World Food Security Panel's sentiment by saying that "all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance."¹³³ Free and direct access to pertinent land laws would be a necessary component of a Code of Conduct regarding land deals. Having an agreed upon, formalized process would increase the likelihood of adherence and enforcement.

G. Analyzing Current Status of International Law on Land Grabs and Food Security

Voluntary guidelines are often a double-edged sword. Although experience on the international scale has shown that mandatory regulations and documents "are more difficult to negotiate; take longer to agree; are sometimes diluted as a result; and are often more difficult to enforce,"¹³⁴ it is also recognized that complete lack of compliance and subversion can result when guidelines are voluntary.¹³⁵ Although it is likely a Code of Conduct would also be voluntary, a Code of Conduct would have the benefit of being all-inclusive instead of making a myriad references to other international documents. A Code of Conduct would explicitly set out a process for land deals that will make it more difficult for countries to knowingly subvert the

131. HIGH LEVEL PANEL OF EXPERTS ON FOOD SEC. AND NUTRITION, COMM. ON WORLD FOOD SEC., LAND TENURE AND INTERNATIONAL INVESTMENTS IN AGRICULTURE 10 (2011), http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE-Land-tenure-and-international-investments-in-agriculture-2011.pdf [<https://perma.cc/SK2W-KNSC>].

132. *See id.*

133. African Comm'n on Human and Peoples' Rights, *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, Res. 224 (2012).

134. HAROLD LIVERSAGE, INT'L FUND FOR AGRIC. DEV., RESPONDING TO "LAND GRABBING" AND PROMOTING RESPONSIBLE INVESTMENT IN AGRICULTURE 6 (2010).

135. *See* FAO, *supra* note 119, at 32.

document. Having an agreed upon, formalized process increases the likelihood of adherence and enforcement.

H. The World Bank's Role in Land Grabs Around the World

Even though it is one of the largest producers of land grab data and is an opponent of one-sided land deals, the World Bank actually encourages those practices by helping developing countries make it easier for foreign investors to acquire the land and proposing that developing countries also offer tax holidays to the investors.¹³⁶ In fact, the World Bank itself is the largest investor in land around the world.¹³⁷ Between 2002 and 2010, the World Bank tripled its global investments in agriculture.¹³⁸ Although much of the investment was welcome, there were also twenty-one formal complaints lodged by local communities against the World Bank between 2008 and 2012 where they alleged that World Bank investments violated their land rights.¹³⁹ Considering many local communities' difficulties in accessing information, this statistic is probably low. The difference between the World Bank and other foreign investors is that the World Bank plays an integral role in most land acquisitions. The World Bank is a source of financial support for land investments, is a policy advisor to developing nations, and acts as a standard setter for global investments.¹⁴⁰ Therefore, the World Bank is playing both sides, and the motivations behind its policies and research may be suspect.

Organizations such as Oxfam are calling for the World Bank to stop its own land investments and review policy to prevent land grabs.¹⁴¹ Oxfam's goal is to have the World Bank freeze lending, as it has done in the past, when lack of oversight and poor administration have caused negative externalities in developing countries.¹⁴² The World Bank's policies of "promoting market-based approaches to land management through its lending practices and policy advocacy," have also led to the privatization of land rights through the conversion of customary land rights.¹⁴³ Although the World Bank has been promoting land deals to developing countries for years as a way to increase revenues, "the Bank now says that many countries, especially in Africa, are 'ill-equipped' to deal with the 'sudden influx of interest' from farmland investors."¹⁴⁴ This illustrates the dangerous game the World Bank is playing and should rouse other countries and NGOs to stand with Oxfam in requesting that the World Bank cease its investment practices until it has created a transparent research and investment strategy.

136. Deininger et al., *supra* note 24, at xliii–xliv.

137. See Oxfam International, *supra* note 17, at 1.

138. *Id.* at 4.

139. *Id.*

140. *Id.*

141. *Id.* at 1.

142. *Id.* at 1–2.

143. See GRAIN, *supra* note 1, at 4.

144. *Id.*

When there is a worldwide rush for land, it is important that respected global actors such as the World Bank ensure that the world's most vulnerable peoples' rights are secure.¹⁴⁵ Freezing investments would allow “space to develop policy and institutional protections to ensure that no Bank-supported project resulted in land-grabbing.”¹⁴⁶ Oxfam proposed that new policies have required protections, including that local communities be informed about their ability to consent or refuse land projects, compensated for any loss of land or livelihoods, guaranteed that the project is completely transparent so that investors can be held accountable, and that World Bank encourage governments to improve their land tenure governance by helping local communities secure land tenure.¹⁴⁷ By creating a Code of Conduct, land grab and food security policy and best practices can be put in one place where they will hopefully be followed. The World Bank is not alone in its practices. Governments and NGOs have also pushed developing countries to make their nations look good to foreign investors by promoting different land policies.¹⁴⁸ These types of policies could result in a Code of Conduct that has a human rights foundation. Focusing on how land and food are essential human rights through adopting a Code of Conduct will protect millions of small farmers and villages.

III. RECOMMENDATIONS FOR FOREIGN INVESTMENT IN LAND GOING FORWARD

There are currently 500 million small farmers throughout the world who feed one-third of all persons and eighty percent of individuals in the developing world.¹⁴⁹ These farmers are the people who desperately need international development aid to increase production.¹⁵⁰ Conservative estimates project six million hectares of land will be brought into production each year until 2030 and that most of the land will be developed in Africa and Latin America.¹⁵¹ In much of this area, land productivity is only a fraction of what it could be.¹⁵² The World Bank believes that “concerted efforts to allow existing cultivators to close yield gaps and make more effective use of the resources at their disposal could thus slow land expansion sharply while creating huge benefits for existing farmers.”¹⁵³

The fact that land grabs are currently hurting many of the developing countries that have struck such deals does not mean that foreign investment in agriculture in the developing world is wrong. There should be investment in agriculture throughout the developing world because there are hungry people due to stagnant

145. See Oxfam International, *supra* note 17, at 3.

146. *Id.*

147. *Id.*

148. See Deininger et al., *supra* note 24, at 6–7.

149. See LIVERSAGE, *supra* note 134.

150. *Id.*

151. See Deininger et al., *supra* note 24, at xliii.

152. *Id.*

153. *Id.*

farm yields.¹⁵⁴ Foreign investment in land could bring about better crop production and reduce hunger in African nations, but not how those deals are currently structured and carried out.¹⁵⁵ Although much of foreign investment currently does not adequately protect host country nationals, investment should continue, but with changes. World leaders must develop a framework that will protect host countries from losing their land without just compensation, while still allowing different types of investment to take place. Making sure locals understand the deal and their rights is essential.

Land transfers must be based on voluntary and informed consent, and host countries must be justly compensated.¹⁵⁶ Before any transfers take place, feasibility studies should be conducted to ensure that the projects are technically and economically viable.¹⁵⁷ Viability entails consistency with local land use plans.¹⁵⁸ The process must also be open and impartial where information on prices, contracts, rights and land use are publicly available and understood by the local communities.¹⁵⁹ Additionally, there should also be environmental and social sustainability stopgaps to ensure that the area—and therefore the culture of the local people—is not destroyed by the land deal.¹⁶⁰ There are many risks associated with land grabs because disassociating people from their land includes economic and social deterioration of the local population and implicates sovereignty issues. Because these issues are so great, there are calls for a binding Code of Conduct.¹⁶¹ This Code of Conduct must protect local populations while also being mutually beneficial to foreign corporations and governments because if a Code of Conduct lacks all incentives for purchasers, it will not be a viable solution to the current imbalance in positive outcomes in international land deals.¹⁶²

A. An International Code of Conduct as a Solution to the Disparate Codification of Land Grabs and Food Security in International Law

During a speech to UNCTAD, the former Special Rapporteur on Food Security addressed farmers' concerns with a Code of Conduct. He proposed that a Code of Conduct will acknowledge that land grabbing is a problem that is unlikely to go away, but one that needs to be regulated so that it also benefits local communities, rather than just big agribusiness or foreign governments.¹⁶³

154. See Oxfam International, *supra* note 17, at 3 n.20.

155. *Id.*

156. See Deininger et al., *supra* note 24, at 96.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. See Kugelman, *supra* note 11, at 19.

162. Cuffaro & Hallam, *supra* note 82, at 8.

163. See generally Olivier De Schutter, Special Rapporteur on the Right to Food, Remarks to the United Nations Conference on Trade and Development Commission on Investment, Enterprise, and Development at the High-Level Session on Item 5 (Apr. 26, 2010), <http://farmlandgrab.org/wp-content/uploads/2010/04/UNCTAD26AprilDeSchutter.pdf> [<https://perma.cc/6HV2-EYC8>].

The Special Rapporteur on the Right to Food “is an independent expert appointed by the Human Rights Council to examine and report back on a country situation or a specific human rights theme.”¹⁶⁴ The Special Rapporteur is not a UN staff member and is not paid for his or her work.¹⁶⁵ Although the current Special Rapporteur, Hilal Elver, believes that agroecology that supports “the local food movement, protect[s] small holder farmers, respect[s] human rights, food democracy and cultural traditions, and at the same time maintain[s] environmental sustainability and facilitate a healthy diet,” her interest in food security is more from a climate change perspective.¹⁶⁶

The former Special Rapporteur, Olivier de Schutter, defined the right to food as

the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.¹⁶⁷

Special Rapporteur De Schutter connected landownership, the right to food, and human rights.¹⁶⁸ This trifecta of ideas is necessary for a Code of Conduct. De Schutter believes “[l]arge-scale investments in farmland can work to the benefit of all parties concerned, but that presupposes that an appropriate institutional framework is in place.” This framework would be a Code of Conduct, which must create “procedural requirements ensuring informed participation of the local communities and therefore adequate benefit-sharing,” and respect for human right by both the host country and foreign investor.¹⁶⁹

Although there is consensus amongst international institutions that investment in agriculture in developing nations is necessary, many farmers’ organizations denounce investment as land grabbing and argue that investment legitimizes what “should not be allowed: depriving the poorest from their access to land, and increasing concentration of resources in the hands of a minority.”¹⁷⁰ This is because these farmers live on the frontline, do not trust their governments, and have seen investment equate eviction and loss of livelihood and customs too often. Therefore, many farmers oppose a Code of Conduct because they do not believe it would improve the situation on the ground.¹⁷¹

Critics of a Code of Conduct agree with farmers that it is not the correct solution largely because they view a Code of Conduct as a way to “sustain or extend

164. U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *supra* note 16.

165. *Id.*

166. Elver, *supra* note 8, at 24.

167. See U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *supra* note 16.

168. See Olivier De Schutter, *Land Rights*, U.N. SPECIAL RAPPORTEUR 2008–2014, <http://www.srfood.org/en/land-rights> [<https://perma.cc/22E5-RUNJ>].

169. See FAO, *supra* note 1, at 2.

170. See *generally* De Schutter, *supra* note 163.

171. *Id.*

the existing global industrial agro-food and energy complex.”¹⁷² Critics do not believe that a Code of Conduct would address what they see as land grabbing’s most serious problem: “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.”¹⁷³ In their view, a Code of Conduct “explicitly or implicitly assumes that there is no fundamental problem with existing industrial food and energy production and consumption patterns.”¹⁷⁴ Thus, a Code of Conduct must take farmers’ and critics’ concerns seriously if it is to work and make sure investments benefit the poor, reduce hunger, and be a coordinated and transparent effort.¹⁷⁵ Therefore, although a Code of Conduct will not be a perfect solution, it is still a first step because “not only would such a code provide guidelines to develop land projects, but also its widespread dissemination would help to equip local people, host governments, and investors for constructive negotiations.”¹⁷⁶

Although there are Voluntary Guidelines on food security and land tenure, and although food security is a part of human rights provisions and the Millennium Development Goals, a Code of Conduct would help align and clarify all of these international agreements into a single reference for host governments and foreign investors.¹⁷⁷ A Code of Conduct must emphasize “transparency in negotiations; indigenous food security and rural development needs; respect for existing land rights; benefits-sharing; environmental sustainability; and adherence to national trade policies, including export bans during crises.”¹⁷⁸ Critics of a Code of Conduct allege that, “transparency does not necessarily guarantee pro-poor outcomes,” because “transparency is not the same as accountability, and transparent transactions do not necessarily guarantee accountability.”¹⁷⁹ However, a Code of Conduct is the first step, and transparency created by that Code of Conduct is an admirable goal because if land deals remain opaque, there is no reason why there would be accountability of land purchasers to host country nationals.

These myriad topics must be addressed together because land grabbing and food security are complex and interrelated issues. Through such a Code of Conduct, host countries could also increase their monitoring and oversight of such deals in order to make sure the contracts are being followed and local interests are being protected.¹⁸⁰

A Code of Conduct could act as a best practices guideline for governments, investors, and local communities working as a set of minimum standards.¹⁸¹ All

172. Borras & Franco, *supra* note 23, at 515.

173. *Id.*

174. *Id.*

175. *See generally* De Schutter, *supra* note 163.

176. Meinen-Dick & Markelova, *supra* note 57, at 159.

177. *See* Deininger et al., *supra* note 24, at 135–36.

178. Kugelman, *supra* note 11, at 20.

179. Borras & Franco, *supra* note 23, at 519.

180. *See* Deininger et al., *supra* note 24, at xliii–xliv.

181. *Id.* at xliv.

relevant stakeholders need to work together for foreign land investment to help local communities. Governments must promote responsible investment in agriculture, local communities need to mobilize in order to advocate for themselves (which means countries must provide them the tools to do so—mainly making laws accessible to local communities), NGOs must continue research into the effects of land grabs and monitor deals around the world, and socially responsible investors need to positively influence host country governments and other global investors.¹⁸²

1. Code of Conduct Contents

Protecting host countries from the negative externalities of land grabs should be the main goal of a Code of Conduct. One way to achieve this goal could be through agroecology which is labor intensive and therefore will employ many of the locals experienced in farming, while leaving room for innovation and technology with projects such as crop diversification and implementing new irrigation techniques.¹⁸³

Agribusiness is not the only way to achieve food security; a combination of small-scale farmers, technology, and investment can also be successful.¹⁸⁴ Climate change is also a key and a potential driver behind the recent land grab as water and soil poor countries look for resources elsewhere. Technology can help improve “adaptation policies that sustainably increase productivity and resilience, while reducing greenhouse gas emissions and enhancing the achievement of national food security and development goals.”¹⁸⁵ However, many question whether there is any link between agriculture and climate change, and small farmers do not want to pay for a problem caused by developed nations. That being said, productivity and resilience of crops cannot be a bad thing for small farmers.¹⁸⁶ Foreign investments in agriculture should be “to the extent that investments can improve local food security by increasing productivity and serving local markets, while avoiding an increase in inequalities of incomes in rural areas, that they are justified.”¹⁸⁷

Special Rapporteur De Schutter proposed eleven minimum principles on land grabs and food security in large-scale land acquisitions and leases. He proposed a set of core principles and measures to address the human rights challenge to the UN Human Rights Counsel.¹⁸⁸ The Special Rapporteur’s recommendations should form the base of a Code of Conduct. His eleven core principles are:

Investment agreement negotiations should be transparent and include participation from the host community who will be affected. During these

182. See LIVERSAGE, *supra* note 134, at 7.

183. *Id.* at 21.

184. *Id.* at 22.

185. *Id.*

186. *Id.*

187. Special Rapporteur on the Right to Food, *Addendum to Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, ¶ 8, UN DOC. A/HRC/13/33/Add.2 (Dec. 28, 2009).

188. *Id.* annex at 16.

negotiations, the host nation must always weigh the economic benefit against the costs to the host community, including their human rights.¹⁸⁹

The free, prior, and informed consent of host communities must be obtained before any land deal is signed. This means that evictions should be incredibly rare and only occur when in accordance with international and national law.¹⁹⁰

States must protect local communities by implementing a detailed procedure for how transfers of land occur. To make this process effective, governments must also help local communities register their land.¹⁹¹

Investment contracts should prioritize the development needs of the local population and seek to achieve solutions that represent an adequate balance between the parties.¹⁹²

Contracts should seek to promote processes such as agroecology, which are labor intensive, but which still allow for technological advances so that local populations and investors can reap benefits.¹⁹³

The environment and climate change must be considered during contract creation.¹⁹⁴

Obligations of the investor must be clear and enforceable. Enforceability could come from “pre-defined sanctions in cases of non-compliance.” Assessments at pre-defined intervals should be made to determine compliance.¹⁹⁵

Food security of the host nation should be secured through a provision mandating a percentage of food produced will remain in local markets.¹⁹⁶

Impact assessments on the local community should be completed before negotiations are finished; this should include research on the equitable distribution of benefits.¹⁹⁷

Contracting states will abide by international law regarding Indigenous peoples when contracting on land.¹⁹⁸

Protecting the wages of agricultural workers should be legislatively enforced by the host country and followed by the investing country.¹⁹⁹

These principles have already been presented on the international level and should become the foundation for a Code of Conduct. The principles encompass a human rights-based approach to contracting on large land deals and would allow for ideas and policy to be pulled from many of the international documents already at work.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* annex at 17.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* annex at 18.

B. *An International Code of Conduct, International Law, and Human Rights*

Food is tied to so many different aspects of life and intertwined with so many other issues plaguing the world today that it is and should be interconnected with international protocols. Although the UN Framework Convention acknowledges that there is a link between food security and climate change, the link has not been made into a distinct policy under climate change protocols.²⁰⁰ One reason for this is the inherent vagueness of documents like the Kyoto Protocol, which focus on monitoring and assessing emissions rather than holding countries accountable for human rights violations.²⁰¹ Many of the policies implemented under the United Nations Framework Convention on Climate Change (UNFCCC) do not specifically address vulnerable populations who are people dealing with food insecurity.²⁰²

At the 2015 United Nations Conference on Climate Change, a day was dedicated to the discussion of agriculture and related issues.²⁰³ In Paris, the World Food Program launched an interactive mapping tool designed to show how future climate change could impact food security in individual countries.²⁰⁴ Food security is also tied to food waste. Approximately 1.3 billion tons of food is lost each year.²⁰⁵ The FAO and the International Food Policy Research Institute launched the G20 Technical Platform on the Measurement and Reduction of Food Loss and Waste, a new program that will promote “G20 member countries, the private sector, and NGOs pool their resources toward the goal of fighting food waste.”²⁰⁶ The Technical Platform is supposed to “provide up to date information on policy, strategy and actions for food loss and waste reduction, and share best practices across countries,” in order to decrease waste.²⁰⁷ COP15 took important first steps in acknowledging the interconnectedness of land, food, and other important global issues such as climate change.

Critics who find a Code of Conduct lacking a human rights-based approach want to see a policy framework that includes: (1) class consciousness so that landless persons also benefit, (2) a historical perspective to achieve social justice, (3) gender sensitivity, (4) ethnic sensitivity, (5) productivity support, (6) livelihood enhancements, and (7) which secures the rights of poor persons use the land as they see fit.²⁰⁸

200. See Elver, *supra* note 8, at 13.

201. See *id.* at 3.

202. *Id.*

203. See Emma Bryce, *Food at COP21: Three New Initiatives Spotlight Food Insecurity, Soils, Waste*, THE GUARDIAN: ENV'T (Dec. 4, 2015, 8:42 AM), <http://www.theguardian.com/environment/world-on-a-plate/2015/dec/04/food-at-cop21-three-new-initiatives-spotlight-food-insecurity-soils-waste> [<https://perma.cc/Q6H2-YY6G>].

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Borras & Franco, *supra* note 23, at 522.

Addressing land grabs and food insecurity in a human rights-based context will hopefully build consensus and create a multilateral approach to make land grabs more beneficial to host countries.²⁰⁹ Critics of a Code of Conduct sometimes view it as a purely economic or business document and believe that “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.”²¹⁰ However, if De Schutter’s ideas for a Code of Conduct are advanced and if host countries have consistent, thoughtful, and adequate standards for land sales, it will hopefully prevent a race to the bottom where host countries continue to lower standards and requirements in an effort to attract and sign land contracts and safeguard human rights in the process.²¹¹ Increased procedural measures could also protect investors from bad investments, loss of goodwill, and acquiring poor reputations on the international level.²¹² A human rights-based approach is a more holistic approach that takes into account not only the land at issue, but also the local people who have a unique identity that should also be preserved. A human rights-based approach can also safeguard investors by forcing them to work within the cultural mores of the community, without which the entire plan may backfire.²¹³ With De Schutter’s vision as a jumping off point in the creation of a Code of Conduct, human rights could take a front row seat while corporate and national concerns are still addressed. Because the sale of land is not going to stop, it is important to also include corporate and national viewpoints in a Code of Conduct so that at least some minimum standard for land sales is accepted at the international level.

C. Precedent to an International Code of Conduct

Many states have domestic Codes of Conduct and therefore know how Codes of Conduct operate and what type of obligations they entail.²¹⁴ There are also many examples of Codes of Conduct on the international stage. International Codes of Conduct have been adopted by other UN entities. For example, the Public Administration and Development Management Department of Economic and Social Affairs has an International Code of Conduct for Public Officials for Institution Building, which sets out the legal obligations of the parties.²¹⁵ A Code of Conduct for Public Officials is not binding on member states, although most member states have similar laws on the national level that must be followed. Therefore, any consequences for not following a Code will amount to

209. See Press Release, Special Rapporteur on the Right to Food, The UN Special Rapporteur on the Right to Food Recommends Principles and Measures to Discipline “Land Grabbing” (June 11, 2009).

210. Borrás & Franco, *supra* note 23, at 521.

211. See Press Release, Special Rapporteur on the Right to Food, *supra* note 209.

212. See *id.*

213. See *id.*

214. See U.N. Secretary-General, *Implementation of the International Code of Conduct for Public Officials*, ¶ 5, U.N. DOC. E/CN.15/2002/6/Add.1 (Feb. 12, 2002).

215. See *id.* See generally G.A. Res. 51/59, at 3–4 (Jan. 28, 1997).

embarrassment or chastising at international meetings, which may or may not be a powerful incentive to act on behalf of the Code.²¹⁶

There are also private sector examples such as an International Code of Conduct for Private Security Providers Association (ICoCA). The ICoCA is a multistakeholder initiative, which created a set of principles for private security providers.²¹⁷ The main tasks and competencies of the Association are: (1) certifying companies meet a Code's standards, (2) human rights monitoring of companies' security operations, and (3) maintaining a process to support member companies in discharging commitments.²¹⁸ There is precedent for Codes of Conduct at the national and international levels as well as private and public examples. Therefore, states and entities should be familiar with Codes of Conduct, understand their purpose, and value their use.

However, critics contend that a voluntary Code of Conduct is an unworkable solution because "even where there is formal adherence by the parties concerned to the principles of free, prior, and informed consent, these principles are rarely observed and enforced in practice, and it would take much political power, time, and resources to ensure that they were."²¹⁹ Although achieving one hundred percent compliance with a Code will be impossible, a standardized procedure has been shown to work, which is why there are governmental and private Codes on the international stage. An international Code of Conduct on land grabs will not solve all of the problems of host country nationals whose land is being bought by foreign governments and corporations, but it can serve as a start and how-to guideline for negotiations.

Having a multistakeholder approach under a Code will allow governments, NGOs, and companies to work together on a Code that will work for everyone as well as allow monitoring by a diverse group of entities. Additionally, having a Code could, on its own, create incentives for parties to at least attempt to abide by its dictates so as not to be embarrassed on the international stage. Although an International Code of Conduct would not be binding, countries have experience with nonbinding agreements and understand that agreement should mean compliance. Additionally, if a Code is all-inclusive and puts all regulations regarding land grabs and food security in one document, it should be easier for countries to understand and comply with the provisions.

216. See U.N. Secretary-General, *supra* note 214, at ¶¶ 25–28.

217. See INT'L CODE OF CONDUCT ASS'N, <http://icoca.ch/en/icoc-association> [<https://perma.cc/VU7W-JW63>] (last visited Oct. 14, 2016).

218. See *Mandate*, INT'L CODE OF CONDUCT ASS'N, <http://icoca.ch/en/mandate> [<https://perma.cc/2N8P-C4TX>] (last visited Oct. 14, 2016).

219. Borras & Franco, *supra* note 23, at 520.

*D. An International Code of Conduct Would Be Managed
by the Special Rapporteur on Food Security*

A Code of Conduct could be managed by the Special Rapporteur on Food Security. The Special Rapporteur already presents annual reports to the Human Rights Council based on his communications with states about food security issues, so he could also report on compliance with a Code of Conduct.²²⁰ The Human Rights Council is also the appropriate place to do this since a Code's foundation involves the right of local peoples to their land and food security.

The Special Rapporteur on Food Security should also report on compliance with a Code of Conduct to the Committee on World Food Security (CFS), which is the UN Governing Body that oversees food security policy.²²¹ Every year, the CFS reports to the Economic and Social Council of the United Nations.²²² The CFS uses a multistakeholder approach to making policy recommendations, which are based on reports from the High Level Panel of Experts on Food Security and Nutrition (HLPE) and issuing guidelines.²²³ Being presented with an annual report on a Code of Conduct will further inform the CFS on countries' food security statuses and any overarching problems that host and investor countries have that may be impacting food security. Additionally, even some critics on a Code of Conduct find Olivier de Schutter's position on food and human rights "relevant."²²⁴ Therefore, if De Schutter's vision of a Code is adopted by future Special Rapporteurs on Food Security, consensus among critics and proponents could grow.

E. An International Code of Conduct Would Be Effective

An International Code of Conduct would at least put everything in one place. A Code of Conduct on Land Grabs and Food Security could reframe land grabs as a human rights issue, which not only potentially puts the food security of the local community at risk, but also highlights the effects of investment in foreign countries that are not mutually beneficial to host communities. States appear willing to accept requirements from the CESCR, the Voluntary Guidelines of Food Security, and the Voluntary Guidelines on Land Tenure, among other international documents,²²⁵ so it is possible for states to accept a Code of Conduct. This is especially true because much of a Code of Conduct would be a clarification of policies and regulations that are already in place.

However, if investor countries raise objections, the recent UNFCC in Paris may help garner support for a Code of Conduct because member nations were shown maps by the World Food Program illustrating how climate change could

220. See U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, *supra* note 15.

221. See COMMITTEE ON WORLD FOOD SECURITY, <http://www.fao.org/cfs/cfs-home/en/> [https://perma.cc/5ZLP-TYEE] (last visited Sept. 15, 2016).

222. See *id.*

223. See *id.*

224. Borras & Franco, *supra* note 23, at 522.

225. See generally De Schutter, *supra* note 109; FAO, *supra* note 105; FAO, *supra* note 118.

impact food security. Continued uncertainty about how to feed the world and where that food will come from is a reason why a Code of Conduct is necessary. A Code of Conduct will outline exactly how countries should contract, so local communities, host governments, and investors should act and prepare for land deals in order to maximize benefits and hopefully the world's food supply. If there is acceptance that the world has a food security issue, states and entities should also recognize that land grabs are a major component of the problem that can be ameliorated with a Code of Conduct that can benefit all parties.

CONCLUSION

Land grabs are not going to end. However, the negative connotation associated with land grabs could be reduced. "Land grabs" could morph into "foreign land acquisition" or even "direct foreign investment in agriculture" if relevant stakeholders are willing and prepared to create a Code of Conduct that guarantees mutual benefits. The time is ripe to formally link land grabs and food security with the recent COP15 successes in Paris and the continued land rush since the 2008 crisis. Although there are documents at the international level making the right to food a human right and defining land tenure, the two concepts need to be joined in a Code of Conduct that will not only fuse these important global topics, but will also serve as a roadmap for all future land deals, making sure that the contracts are mutually beneficial.