Fordham International Law Journal

Volume 35, *Issue* 6 2012 *Article* 2

A Step in the Wrong Direction- Increasing Restrictions on Foreign Rural Land and Acquisition in Brazil

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A STEP IN THE WRONG DIRECTION: INCREASING RESTRICTIONS ON FOREIGN RURAL LAND ACQUISITION IN BRAZIL

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INTRODUCTION

There are seven billion people in the world, and they all need food.[1] But, despite a swiftly growing population, the land available for crop production and animal grazing is finite.[2] As the amount of open land decreases and demand for crops increases, rural, fertile land is becoming an increasingly rare asset.[3] Rising global demand and a lack of domestic capital from private and governmental sources make foreign direct investment ("FDI") necessary to sufficiently cultivate rural areas in developing nations.[4] Additionally, these foreign investments have the potential to reap high returns for investors.[5] Currently, the most attractive areas for agricultural land investment are in South America and sub-Saharan Africa.[6] Countries such as

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1. *See U.S. & World Population Clocks*, U.S. CENSUS BUREAU (Mar. 18, 2012, 5:15 PM), http://www.census.gov/main/www/popclock.html (indicating that the current world population is over seven billion people).

2. *See id.*; *see also* Michael Kugelman, *Introduction*, *in* LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 1, 14 (Michael Kugelman & Susan L. Levenstein eds., 2009) (noting that the world's population is estimated to rise to nine billion by 2050); Press Release, U.N. Population Div., World Population Will Increase by 2.5 Billion by 2050; People over 60 to Increase by More than 1 Billion, U.N. Press Release POP/952 (Mar. 13, 2007) (estimating world population to reach 9.2 billion by 2050).

3. *See* Kugelman, *supra* note 2, at 14 (establishing that while demand for food is rising, the supply of land is limited).

4. *See* Alexandra Spieldoch & Sophia Murphy, *Agricultural Land Acquisitions: Implications for Food Security and Poverty Alleviation*, *in* LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 39 (Michael Kugelman & Susan L. Levenstein eds., 2009) (noting a "strong agreement among policymakers that more investment in agriculture is urgently needed"); *see also* Howard Mann & Carin Smaller, *Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?*, SUSTAINABLE DEV. INNOVATION BRIEFS, no. 8, Jan. 2010, at 7 (discussing how more foreign investment is needed to develop and support the global agricultural industry).

5. *See* Horand Knaup & Juliane von Mittelstaedt, *The New Colonialism: Foreign Investors Snap Up African Farmland*, SPIEGEL ONLINE INT'L (July 30, 2009), http://www.spiegel.de/international/world/0,1518,639224,00.html (reasoning that a "combination of more people and less land makes food a safe investment," and that investors are looking at annual returns of twenty to thirty percent); Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 503, 516 (2011) (discussing how, due to recent supply and demand ratios, agricultural investments have the potential to be highly profitable).

6. *See* MATTIAS GÖRGEN ET AL., FED. MINISTRY FOR ECON. COOPERATION & DEV., FOREIGN DIRECT INVESTMENT (FDI) IN LAND IN DEVELOPING COUNTRIES 8, 11 (2009) (discussing how an increasing number of investors are acquiring rural land in Africa, South and Central America, and Southeast Asia); *see also* David Hallam, *International Investments in Agricultural Production*, *in* LAND GRAB? THE RACE FOR THE WORLD'S

Angola, Argentina, Brazil, the Democratic Republic of the Congo, and Sudan have immense tracks of undeveloped, arable soil capable of supporting large-scale agriculture.[7] While the sub-Saharan region remains almost entirely unregulated, some South American countries have started to place restrictions on foreign access to rural lands.[8]

This Note analyzes various factors affecting foreign investment in Brazilian rural lands, focusing specifically on an opinion recently issued by the Brazilian Attorney General ("AGU"), the individual charged with interpreting Brazilian law, concerning restrictions on foreign land acquisition.[9] Part I provides an overview of the structure of international land agreements and the public and private actors involved in these deals, highlighting the factors that affect Brazil's investment climate. Part II introduces Brazilian Law 5.709 ("Law 5.709"), which governs all rural land acquisitions in Brazil by non-nationals. Part II then considers a 2010 AGU opinion that re-interprets Law 5.709, extending restrictions on foreign acquisition of rural lands to Brazilian companies owned by a

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FARMLAND 27, 30 (Michael Kugelman & Susan L. Levenstein eds., 2009) (listing Africa and Brazil as two "main targets of investment").

7. *See* GÖRGEN ET AL., *supra* note 6, at 11 (establishing that ninety percent of the global land potentially available for cultivation is located in South America and sub-Saharan Africa, with fifty percent of this land spread across just seven countries, including Brazil).

8. *See, e.g.*, Kugelman, *supra* note 2, at 10 (pointing out the eagerness of the Ethiopian government to transfer land to developers, based on the mere promise they will improve agricultural productivity and development); GÖRGEN ET AL., *supra* note 6, at 15 (classifying sub-Saharan Africa as a region with little information about the availability and ownership of land, weak governance, and a tendency for political disturbance and corruption). *Cf.* Jeremy Bowden, *Farmland—Tightening of Foreign Ownership Rules*, WORLDCROPS.COM (Sept. 21, 2011), http://www.worldcrops.com/8704-farmland—tightening-of-foreign-ownership-rules (discussing the new legal limits on foreign ownership and leasing being developed and implemented in Argentina, Brazil, and Uruguay).

9. The Brazilian Attorney General ("AGU") is responsible for providing an official interpretation of the Brazilian Constitution, laws, statutes, and administrative acts. *See* Walter Stuber & Adriana Maria Godel Stuber, *The Acquisition of Brazilian Rural Land by Foreigners*, J. INT'L BANKING L. & REG. N131, N132 (2010); *see also Big Crackdown on Foreign Firms' Land Ownership*, MORNING STAR (London) (Aug. 25, 2010), http://www.morningstaronline.co.uk/news/content/view/full/94474 (noting that Brazilian Attorney General Luís Inácio Lucena Adams issued the 2010 opinion).

majority nondomestic capital.[10] Part III considers this interpretation and outlines the negative effects of a general ban on land acquisitions by non-Brazilian nationals. This Part argues that Law 5.709 should be repealed in its entirety and replaced with new legislation that allows for large-scale foreign land acquisitions, while increasing transactional transparency and party accountability. Finally, Part III contends that new legislation will address Brazil's primary concerns, namely national security and economic viability, while fostering needed international participation in the rural land markets.

I. *THE RECENT RISE OF AGRICULTURAL INVESTMENT AND BRAZIL'S POTENTIAL AS AN INDUSTRY LEADER*

Agricultural land and food-producing resources have recently become important assets, triggering a surge in both private and public investment. This Part examines the sudden interest in agriculture and explains why Brazil is a particularly important case study. It begins by exploring the recent trends in rural land investment and explains why investors are increasingly receptive to the prospect of overseas land acquisition. Part I.A considers the various forms these acquisitions can take and the frequent preference for titled ownership over looser arrangements, such as short-term leasing or contract growing. Part I.B scrutinizes different sources of investment, from private sector involvement, to investment by sovereign wealth funds. Next, Part I.C describes the particular climate in Brazil for FDI, taking into consideration the country's transition to a democratic form of government, its movement away from protectionism, and its increased openness to international investment. Finally, Part I.D outlines the geopolitical risk factors that figure most prominently in large Brazilian land deals, describing considerations for both host countries and investors.

10. *See* Lei No. 5.709, art. 5(1), de 7 de Outubro de 1971, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.10.1971 (Braz.) (governing foreign land acquisition and leasing in Brazil).

The recent increase in demand for food and biofuels has put a strain on the international supply of crops.[11] In 2008, world food prices rose dramatically, and the high cost of food staples, such as grain and edible oils, caused riots across the globe.[12] The price spikes hit developing and food-importing countries especially hard, leading many of these countries to reconsider their food security policies.[13] The UN Food and Agriculture Organization recently estimated that an additional 120 million hectares of land must be allocated for agricultural production worldwide in order to support the required additional growth in food production by 2030.[14]

Currently, the global community is only using around thirty-six percent of available land for crop production, leaving over 2.7 billion hectares undeveloped.[15] There is consensus in

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11. *See* SHEPARD DANIEL & ANURADHA MITTAL, THE OAKLAND INST., THE GREAT LAND GRAB: RUSH FOR WORLD'S FARMLAND THREATENS FOOD SECURITY FOR THE POOR 4 (2009) (discussing the United States' goal to "increase ethanol use by 3.5 billion gallons between 2005 and 2012," and the European Union's goal to use biofuels in ten percent of land transportation by 2020); *see also* Spieldoch & Murphy, *supra* note 4, at 39 (positing that the increased global interest in biofuels feedstock makes investing in agricultural land a good choice).

12. *See* Kugelman, *supra* note 2, at 2 (citing the 2008 peak in world food prices); Editorial, *The World Food Crisis*, N.Y. TIMES, Apr. 10, 2008, at A26 (recognizing the record high prices of corn and wheat, and the potential for thirty-three countries to experience social unrest as a result).

13. *See* Mann & Smaller, *supra* note 4, at 2 (discussing how countries that depend on food imports were heavily impacted by the export bans imposed by at least twenty-five food-exporting countries in 2008); *see also* GÖRGEN ET AL., *supra* note 6, at 13 (citing the 2008 food crisis as the impetus for countries that rely heavily on food imports to diversify their food sources and begin producing their own food abroad).

14. *See About FAO*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, http://www.fao.org/about/en (last visited May 8, 2012) (noting the Food and Agriculture Organization is a UN specialized agency with a mandate to promote worldwide food security); *see also* FOOD & AGRIC. ORG., WORLD AGRICULTURE: TOWARDS 2015/2030 3 (Jelle Bruinsma ed., 2002) (predicting that 120 million hectares of arable land will be put to use in developing countries by 2030); De Schutter, *supra* note 5, at 519 (citing the Food and Agriculture Organization's finding that 120 million hectares must be put into production to support future food needs). *Cf. How to Feed 2 Billion More Mouths in 2030? Here Are Some Answers*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, http://www.fao.org/english/newsroom/news/2002/8280-en.html (last visited Oct. 21, 2012) (outlining obstacles and solutions for feeding a growing population).

15. *See* GÖRGEN ET AL., *supra* note 6, at 10 (noting that of a total land surface of 13.4 billion hectares, 4.5 billion hectares is potentially appropriate for crop production). *But cf.* Gary R. Blumenthal, *Investors' Perspectives on Farmland*, *in* LAND

the international community that public investment alone is insufficient, and that private investment is necessary to meet future food demands.[16] The percentage of public funds dedicated to agriculture in most developing countries has remained consistently low because of a lack of available capital.[17] In the past, private investors often chose not to invest in agriculture because of the social and political sensitivities roused by rural land use and food production policies.[18] Recently however, certain economic factors have made agricultural investment more appealing, and many investors are choosing to overlook these historical concerns to acquire rural lands.[19]

GRAB? THE RACE FOR THE WORLD'S FARMLAND 55, 59–60 (Michael Kugelman & Susan L. Levenstein eds., 2009) (discussing how only ten to thirteen percent of the world's land is considered arable).

16. *See* Blumenthal, *supra* note 15, at 58 (discussing a 2009 meeting where the Group of Eight ("G8") agriculture ministers called for both public and private investment in agriculture); *see also* Hallam, *supra* note 6, at 28 (discussing how a lack of investment led to inefficient, under-producing agricultural areas and contributed to the 2008 food crisis); GÖRGEN ET AL., *supra* note 6, at 8 (observing that longstanding low investment in agriculture in developing countries has dampened productivity and production levels across that sector).

17. *See* U.N. World Summit on Food Sec., Rome, It., Nov. 16–18, 2009, *Foreign Direct Investment—Win-Win or Land Grab?* [hereinafter *Win-Win or Land Grab?*] (observing that on average, developing countries have decreased their level of public spending in agriculture to around seven percent); *see also* GÖRGEN ET AL., *supra* note 6, at 8 (discussing the inadequacy of public funds and developmental aid in the agricultural sector).

18. *See* Carl Atkin, *Investment in Farmland and Farming in Central and Eastern Europe and the Former Soviet Union—Current Trends and Issues*, *in* LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 109, 110 (Michael Kugelman & Susan L. Levenstein eds., 2009) (classifying land as an "emotive asset class," one that has historically evoked strong emotions from people); Blumenthal, *supra* note 15, at 55 (discussing how investors have traditionally shied away from the agricultural sector because the vast agricultural labor force makes it a socially and politically sensitive issue). *But cf.* Anastasia Telesetsky, *Resource Conflicts over Arable Land in Food Insecure States: Creating an United Nations Ombudsman Institution to Review Foreign Agricultural Land Leases*, 3 GOETTINGEN J. INT'L L. 283, 287 (2011) (drawing an unflattering parallel between large modern land purchases and the oppressive colonial plantations of the eighteenth and nineteenth centuries).

19. *See* Kay McDonald, *Why Investing in International Farmland Can be Perilous*, BUS. INSIDER (June 14, 2011), http://articles.businessinsider.com/2011-06-14/markets/30028372_1_farmland-sovereign-wealth-funds-foreign-ownership (assessing that the amount of private capital in agricultural farmland is expected to rise from US$2.5–3 billion to US$5–7 billion over the next several years); Himani Sarkar, *Agriculture Private Investment Seen Doubling in Two Years*, REUTERS, Apr. 24, 2011, *available at* http://www.reuters.com/article/2011/04/25/us-agriculture-investment-interview-

A number of factors are currently creating a favorable environment for investment in agriculture. First, domestic governments cannot sufficiently fund adequate development of the agricultural sector, creating a greater need and opportunity for private investment.[20] Second, investment in agricultural land, unlike other sectors, has been considered "recession proof" because food expenditures are relatively inelastic and are thus insulated from market fluctuations.[21] Third, a growing global population and recent biofuel innovations are together creating increased demand for food crops.[22] These factors ensure that the crop market will continue to expand.[23] Fourth, due to the gradual removal of trade barriers, individuals can more easily manipulate production and supply bases to benefit from tariff and trade incentives.[24] Finally, as a commodity, land has unique attributes that make it attractive for investors: it acts as an

idUSTRE73O0H320110425 (discussing how private investment in agriculture is predicted to double in two years). *But cf.* McDonald, *supra* note 19, at 2 (discussing estimates that peg the total value of investment funds in agriculture at fifteen to twenty billion dollars).

20. *See Win-Win or Land Grab?*, *supra* note 17, at 1 (finding that developing countries' abilities to sufficiently fund their own agricultural programs are limited); *see also* GÖRGEN ET AL., *supra* note 6, at 8 (highlighting that underinvestment in the agricultural sector stretches back decades). *But cf.* DANIEL & MITTAL, *supra* note 11, at 6–7 (discussing the goal of the International Financial Corporation to meet growing food needs by facilitating private entry into foreign land markets).

21. *See* Kugelman, *supra* note 2, at 14 (noting that investors see agriculture as a safe investment, largely because staple products such as food are not greatly affected in economic downturns). *But cf.* GÖRGEN ET AL., *supra* note 6, at 15 (listing the factors that make land investment an attractive investment for state-backed and private enterprises).

22. GÖRGEN ET AL., *supra* note 6, at 6 (identifying that the increased desire for land stems from a rising demand for food and a simultaneous need for biomass for industrial and energy purposes); DANIEL & MITTAL, *supra* note 11, at 5 (outlining some of the sources for investor interest in agriculture, including a strong food demand in emerging countries and the new demand for bioproducts).

23. *See* DANIEL & MITTAL, *supra* note 11, at 5 (attributing the 2007 shift from "soft" commodities to "hard" ones to the growing desire for bioproducts and the high demand in emerging economies); *see also* Knaup & von Mittelstaedt, *supra* note 5 (noting that the "combination of more people and less land" will always make food a "safe investment").

24. *See* Raul Q. Montemayor, *Overseas Farmland Investments—Boon or Bane for Farmers in Asia?*, *in* LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 95, 96 (Michael Kugelman & Susan L. Levenstein eds., 2009) (discussing how the removal of international trade and investment barriers permits a company to choose its supply and production bases strategically).

inflation hedge, provides income, and is not hindered by a correlation to other investments.[25]

A. *Different Structures of International Land Deals*

Foreign investment in agricultural land can take various forms.[26] One of the most common forms involves an overseas investor leasing land from a private or public entity in the host country.[27] Leasing creates greater flexibility for both parties because there is no permanent commitment, and both parties can address specific concerns contractually.[28] Leases often afford a host country more control over the land than it would have if the investor had made an outright purchase.[29] Leases, however, do not provide the investor with the same security as ownership, since the lessor does not hold legal title.[30] Additionally, short-term leases rarely align the lessor's interests with the long-term sustainability of the land.[31]

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25. *See* Atkin, *supra* note 18, at 109 (describing factors common to both agricultural land and generic real estate); *see also* Mamta Badkar, *5 Reasons Investors Are Going Crazy for Farmland*, BUS. INSIDER (Feb. 14, 2011), http://www.businessinsider.com/invest-in-farmland-2011-2? (describing how farmland investment requires a long-term commitment). *But cf.* Atkin, *supra* note 18, at 110 (positing that land investments are illiquid in nature, often requiring a minimum commitment of ten years, and that the lack of transparency and wealth of restrictions on ownership and occupation often make rural land in developing countries difficult to valuate).

26. *See Win-Win or Land Grab?*, *supra* note 17, at 2–3 (discussing the various means of capital investment in agriculture, including leasing, purchasing, contract farming, and out-grower schemes).

27. *See id.* at 1 (noting that leasing is one of the main vehicles for investing in agricultural land).

28. *See* 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, *supra* 69, 78 (Michael Kugelman & Susan L. Levenstein eds., 2009) (describing leases as "reversible," as opposed to sales, which are permanent).

29. *See id.* (discussing how leases allow for potential changes to the agreement, while a sale is definitive); *see also* Telesetsky, *supra* note 18, at 288 (recognizing that foreign investors can insert specific guarantees in land agreements to counteract the power of the host countries).

30. *See* Hallam, *supra* note 6, at 31 (asserting that titled ownership is considered the most secure form of ownership).

31. *See* Meinzen-Dick & Markelova, *supra* note 28, at 78; *see also* Najma Sadeque, *Giving Away the Family Silver*, NEWSLINE (Oct. 26, 2009), http://www.newslinemagazine.com/2009/10/giving-away-the-family-silver (analyzing

Host countries have taken various approaches to leasing—from incentivizing investors with attractive guarantees to controlling the specific areas of land available to international investors. On one end of the spectrum, Pakistan recently offered ninety-nine year leases with full rights of repatriation and no special conditions should a food shortage occur. In addition, it included a 100,000-person security force to protect the international investment.[32] In contrast, some Asian governments have chosen to exert more oversight over the investments by preselecting the land they wished to make available to foreigners and then requiring investors to go through state agencies to formulate the land agreements.[33] Some countries have adopted leasing as the sole means by which a foreign entity can obtain rural agricultural lands.[34]

Alternatively, investors that purchase land gain a greater degree of certainty and stability in the asset. Acquiring land affixes the investor's name on the deed and garners her substantial protections based in property ownership laws.[35] A titled owner has greater control over how she elects to use the land, and retains alienability rights for purposes of future asset transfers.[36] Moreover, land purchase incentivizes the owner to

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how value of the leased land can decrease substantially because of overuse or improper use, rendering "ownership" virtually meaningless).

32. *See* Sadeque, *supra* note 31 (discussing how Pakistan is offering attractive rural land packages to lure investors); Telesetsky, *supra* note 18, at 288–89 (examining Pakistan's ninety-nine year leases).

33. *See* Montemayor, *supra* note 24, at 99 (discussing the trend among Asian governments to transfer ownership of large plots of public land to state agencies, which in turn lease the land to foreign entities); *see also Economic Land Concessions*, OPEN DEV., http://www.opendevelopmentcambodia.net/briefings/economic-land-concessions (last visited Aug. 25, 2012) (explaining the system in Cambodia whereby a government agency issues economic land concessions, essentially long term leases, for agricultural production of specific areas).

34. *See* Xiaojing Qin, *Foreigners' Right to Acquire Land Under International Economic Agreements*, 8 MANCHESTER J. INT'L ECON. L. 57, 66 (2011) (listing the seven countries that require foreign entities and persons to acquire land through leasing alone: Cambodia, Cape Verde, China, Hong Kong, Madagascar, Oman, and Tonga).

35. *See* Hallam, *supra* note 6, at 31 (positing that the current interest in land acquisition stems from the association of asset ownership with security).

36. *See* GÖRGEN ET AL., *supra* note 6, at 12 (suggesting that private investors will benefit from increasing land prices by purchasing land now, rather than having to lease it in the future); *see also* Hallam, *supra* note 6, at 35 (examining how purchasing is most

take care of the property and maintain the value of the investment, brings needed revenue to the underfunded area of agriculture, and enables technology transfer by introducing new methods and means of production.[37]

Agricultural investments can also take the form of a joint venture or contract grower scheme, which are looser contractual arrangements than leasing and ownership.[38] Because a joint venture involves aligning with a local partner, it can facilitate land access and open the doors to possible domestic benefits for the partnership.[39] A joint venture agreement, however, requires the investor to share control and profits from the leased land with the local partner, which can detract from the arrangement's overall appeal.[40] In a contract grower scenario, the investor enters into a series of individual contracts with local farmers who then agree to farm the land and turn over crops according to the investor's specifications.[41] This type of agreement allows the investor to avoid labor costs and does not require her to commit to a non-liquid asset; however, the investor forfeits a degree of control over the crops and does not

appealing where economies of scale are significant or the investment requires large infrastructure commitments).

37. *See* Meinzen-Dick & Markelova, *supra* note 28, at 72 (citing evidence that foreign investment allows for introduction of new technologies, increased capital to the host country, and possible infrastructure overhauls); *see also Win-Win or Land Grab?*, *supra* note 17, at 3 (outlining the benefits that foreign investment can have on a country's development).

38. *See Win-Win or Land Grab?*, *supra* note 17, at 3 (discussing contract farming, out-grower schemes, and joint ventures as alternatives to land purchase); *see also* Hallam, *supra* note 6, at 34 (explaining that the recent trend in agriculture is asset acquisition, while general trends in foreign direct investment ("FDI") lean towards more flexible contractual agreements).

39. *See* Montemayor, *supra* note 24, at 99 (indicating that a joint venture where the domestic partner acts as the contracting party on the land agreement allows the partnership to benefit from domestic treatment); *see also* Paulo Sergio Franco & Scheila Santos, *Sending the Wrong Message: Land Rights: New Legislation for Foreign Land Ownership in Brazil*, KROLL TENDENCIAS (Dec. 2010), http://www.krolltendencias.com/site/browse-archives/general-interest-and-trends/208-sending-the-wrong-message.html (articulating how the Brazilian Attorney General suggested foreign companies form a partnership with domestic partners to avoid restrictions that are placed on non-Brazilian entities).

40. *See* Montemayor, *supra* note 24, at 99 (discussing the potential benefits and drawbacks of entering into a joint venture in international agriculture).

41. *See id.* at 100 (describing the process whereby a foreign entity partners with hundreds or thousands of small-scale farmers who then serve as contract growers).

retain a legal interest in the land.[42] Leasing, purchasing, and contract growing, while not the exclusive means of agreement, are the primary modes through which individuals and corporations structure land deals.

B. *International Actors*

Experts find it difficult to accurately analyze both the statistics and actors involved in large rural land deals due to a widespread lack of transparency.[43] Much of the recent publicity involving overseas land deals stem from the entrance of sovereign wealth funds and state actors into the international rural land market.[44] In 2008, a spike in food prices caused some of the top food-exporting countries to impose bans on food exports to prevent domestic price increases and public unrest at home.[45] In effectuating the bans, these countries made it harder for food-importing nations to get the food and supplies they needed.[46] Following this market turbulence, many food-importing countries decided to alter their food security policies

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42. *See id.* (discussing investors' abilities to use contract growers to avoid the labor costs that arise from employer-employee relationships and collective bargaining agreements). *But see* Knaup & von Mittelstaedt, *supra* note 5 (asserting that contract farming does not provide the same "control, ownership, high returns and, most of all, security" that comes with titled ownership).

43. *See* DANIEL & MITTAL, *supra* note 11, at 17 (noting that large land deals involving foreign investors "often lack transparency"); *see also* Knaup & von Mittelstaedt, *supra* note 5 (discussing the difficulty experts face in assessing the amount of land involved, when, "even [a] United Nations organization[] has to resort to citing newspaper reports").

44. *See* LORENZO COTULA ET AL., FOOD & AGRIC. ORG., LAND GRAB OR DEVELOPMENT OPPORTUNITY?: AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 33–34 (2009) (describing the increase in media reports regarding international land deals and the various combinations of state and private financing that facilitate the deals); *see also* De Schutter, *supra* note 5, at 516 (positing that most government investment occurs through a sovereign wealth fund or public enterprise).

45. *See* Mann & Smaller, *supra* note 4, at 2 (highlighting that at least twenty-five countries imposed bans or restrictions on exporting food crops in 2008); *see also Win-Win or Land Grab?*, *supra* note 17, at 2 (discussing recent global high food prices and the implementation of export controls).

46. *See* Kugelman, *supra* note 2, at 2 (articulating the tenuous relationship of food-exporting and food-importing nations in times of scarcity).

so that they would be less affected by market disturbances in the future.[47]

As an alternative to relying on the world food market, some countries have made it a matter of policy to acquire large tracts of land overseas—these lands are then developed, farmed, and the crops are shipped back to the home country.[48] Producing crops in this manner permits a country to avoid the immediate problems associated with market shortages and price volatility.[49] As a further incentive to acquiring these farmlands, countries that invest in land are not only getting crops, but are also securing valuable land and water resources.[50] Acquisition of these resources is important in view of a growing concern among countries with rapidly depleting freshwater supplies that these resources will soon be scarce in their own countries.[51] Countries are thus looking overseas to acquire water and soil resources, in addition to farmland, as a guard against future shortages.[52]

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47. *See id.* at 2–3 (citing the food crisis—along with eroding topsoil, lack of water, spreading urbanization, and crop diseases—as the motivation behind countries' desires to acquire land overseas for agriculture); Mann & Smaller, *supra* note 4, at 2 (articulating the 2008 food crisis as the most visible reason for countries' increased interest in land acquisition).

48. *See* Kugelman, *supra* note 2, at 2–3 (describing efforts to bypass the world food market); *see also* Alexei Barrionuevo, *China's Farming Pursuits Make Brazil Uneasy*, N.Y. TIMES, May 27, 2011, at A1 (elaborating on China's strategy to farm land overseas and ship crops back home in order to decrease reliance on crops from the United States and other countries).

49. *See* Kugelman, *supra* note 2, at 2–3 (discussing countries' tendencies to invest in land overseas to avoid the "high costs, supply shortages, and general volatility plaguing global food imports"); *see also* DANIEL & MITTAL, *supra* note 11, at 2 (citing food security at home as the primary reason countries are looking to acquire foreign lands for food production).

50. *See Buying Farmland Abroad: Outsourcing's Third Wave*, ECONOMIST, May 23, 2009, at 61 [hereinafter *Outsourcing's Third Wave*] (explaining how acquiring land means acquiring the right to withdraw any water tied to it); *see also* Sadeque, *supra* note 31 (identifying that acquiring land often means acquiring water rights, whereby the International Institute for Sustainable Developments has described the recent surge in sovereign land acquisition as a "water grab").

51. *See* De Schutter, *supra* note 5, at 516 (discussing how farmland and fresh water may soon become scarce commodities); *see, e.g.*, Sadeque, *supra* note 31 (observing that the water beneath the Arab countries is "depleting rapidly," with Saudi Arabia's water resources expected to dry up in the next fifty years).

52. *See* De Schutter, *supra* note 5, at 516; *see also* Mann & Smaller, *supra* note 4, at 1–2 (examining the new outlook that agricultural land purchases are no longer solely

International land deals have begun to garner greater global attention as a result of the large amount of land involved in some of the agreements.[53] One of the most publicized deals was a lease proposed by the Daewoo Logistics Corporation in 2008.[54] Backed by the South Korean government, the corporation proposed a lease of 1.3 million hectares of farmland in Madagascar—nearly half of all arable land in the country—for US$6 billion.[55] However, public outcry over the scope of the lease resulted in a political coup, and the deal never went through.[56]

Despite the fanfare surrounding large government acquisitions, the majority of investment still comes from the private sector.[57] Since 2008, there has been a spate of large land acquisitions by investment funds, mainly involving land in

about food, but are instead about securing land and water themselves to ensure future access to food production facilities); *Outsourcing's Third Wave*, supra note 50 (articulating a desire to secure water resources as the "hidden impulse" behind many countries' renewed desires for land).

53. *See, e.g.*, Spieldoch & Murphy, *supra* note 4, at 42 (discussing a plan by the Gulf Cooperation Council, a trading bloc of six Persian Gulf states, to outsource food production to Sudan and Pakistan as well as to countries in Southeast Asia, Africa, Eastern Europe, and Latin America); *see also* Neil MacFarquhar, *African Farmers Displaced as Investors Move In*, N.Y. TIMES, Dec. 22, 2010, at A1; DANIEL & MITTAL, *supra* note 11, at 3 (analyzing large purchases of farmland by the United Arab Emirates, which imports eighty-five percent of its food). *But cf.* Mann & Smaller, *supra* note 4, at 3 (outlining Saudi Arabia's establishment of the "King Abdullah initiative for Saudi agricultural investment abroad,"a program aimed at providing credit to Saudi investors who invest in agriculture abroad).

54. GÖRGEN ET AL., *supra* note 6, at 13–14 (describing the Daewoo Logistic Corporation as a private vehicle acting in concert with the South Korean government to substantially increase the country's access to overseas rural land holdings); *see also* DANIEL & MITTAL, *supra* note 11, at 3 (highlighting the Daewoo Logistic proposal in Madagascar as an extreme example of South Korea's strategy to acquire farmland abroad in order to stabilize food production and prices at home).

55. *See* DANIEL & MITTAL, *supra* note 11, at 3, 13 (discussing the Daewoo Logistics proposal and noting that the corporation hoped to grow half of South Korea's corn on the land and thus reduce the country's dependence on corn, as South Korea is the world's third-largest corn importer); Kugelman, *supra* note 2, at 1 (citing the proposal by Daewoo Logistics as one of the "largest and most notorious [land] deals").

56. *See* DANIEL & MITTAL, *supra* note 11, at 3, 13 (examining the national outrage over the government's decision to lease over a million hectares to a foreign corporation); Kugelman, *supra* note 2, at 1 (remarking on the eventual collapse of the deal).

57. *See Win-Win or Land Grab?*, *supra* note 17, at 1 (finding that investment is primarily in the private sector); Mann & Smaller, *supra* note 4, at 3.

Eastern Europe and sub-Saharan Africa.[58] Investment funds are the most significant actors in agricultural land acquisition, but interest is increasing among smaller and more conservative investors as well.[59] The lack of transparency in many of these deals, however, often makes it difficult to discern true private investors from those with a private front supported by government funds.[60]

Increased interest from both private and public investors in overseas agricultural acquisitions has raised concerns over a lack of international standards for land investment and the potential for abuse, prompting the international community to propose some guidelines.[61] At a meeting in July 2009, the Group of Eight ("G8") agreed to create a "best practices" proposal to govern foreign land transactions.[62] The World Bank and the United

58. *See, e.g.*, DANIEL & MITTAL, *supra* note 11, at 4 (reporting that BlackRock, a New York-based investment management company, had established a two hundred million dollar agricultural fund, thirty million dollars of which will go directly to buying farmland, and further that US investor Philippe Heilberg leased 4,000 square kilometers in Southern Sudan). *But cf.* Alan Katz & Peter Robison, *Morgan Stanley Bet the Farm in Ukraine Before Taxpayer's Bailout*, BLOOMBERG MKTS. MAG. (Oct. 4, 2011), http://www.bloomberg.com/news/2011-10-04/morgan-stanley-bet-the-farm-in-ukraine-before-fed-bailout-by-u-s-taxpayer.html (discussing Morgan Stanley's failed agricultural project in the Ukraine).

59. *See* Knaup & von Mittelstaedt, *supra* note 5 (describing the Global AgInvesting Conference 2009 as, "the first investors' conference on the emerging worldwide market in farmland," and noting the presence of diverse investors—from hedge fund managers to representatives of large pension funds to the CFO of Harvard).

60. *See* Mann & Smaller, *supra* note 4, at 3 (stating that the private sector is the main actor in foreign land acquisitions, taking the form of agribusinesses, investment banks, hedge funds, and commodity traders). *But see Win-Win or Land Grab?*, *supra* note 17, at 1 (discussing how although investment primarily comes from the private sector, governments are often involved in providing finance and support in a direct or indirect manner); *cf.* Hallam, *supra* note 6, at 30 (noting that the private sector is often funded by government or sovereign wealth funds, making it difficult to separate public from private sector involvement).

61. *See* Kugelman, *supra* note 2, at 9 (recognizing that various international organizations are drafting such codes); *see also Win-Win or Land Grab?*, *supra* note 17, at 1 (documenting how the increase in investment has caused "substantial international concern").

62. *See* Silvia Aloisi, *G8 Backs Farmland Code of Conduct, Details Sketchy*, REUTERS, July 9, 2009, *available at* http://www.reuters.com/article/2009/07/09/us-g8-summit-agriculture-landgrabs-sb-idUSTRE5683C420090709 (reporting G8's commitment to formulate a joint proposal on best practices for international land investments); Kugelman, *supra* note 2, at 9 (describing the creation of the G8 proposal).

Nations ("UN") are currently also drafting codes of conduct.[63] These codes focus largely on securing the host country's national food supply and protecting local livelihoods in the face of large foreign investment.[64] Factors under consideration in developing these codes include current land use, land tenure arrangements, proposed land use and livelihoods, food security, ecological conditions, transparency, terms of agreement, and enforceability.[65]

C. *Investment Climate in Brazil*

The combination of natural resources and political and economic stability makes Brazil one of the most promising countries for agricultural development and investment.[66] Brazil has large tracts of arable land suitable for farming, as well as a bounty of the natural resources necessary to grow crops: fresh water, varied soil types, and a temperate climate that permits two

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63. *See* Kugelman, *supra* note 2, at 9 (discussing the various international organizations that are drafting codes of conduct and best practices documents regarding foreign land transactions); United Nations Conference on Trade and Development, Geneva, Switz., Apr. 26–30, 2010, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, U.N. Doc. TD/B/C.II/CRP.3 (Apr. 16, 2010) [hereinafter *Principles for Responsible Agricultural Investment*] (outlining fundamental principles such as environmental and social sustainability, local participation, food security, and transparency, as important considerations in international land investment); *see also* Javier Blas, *UN Set to Regulate 'Farmland Grabs,'* FIN. TIMES (London), Nov. 18, 2009, at 4 (reporting that these guidelines are voluntary).

64. *See* De Schutter, *supra* note 5, at 505 (discussing the World Bank's development of the *Principles on Responsible Agricultural Investment*). *But cf. Win-Win or Land Grab?*, *supra* note 17, at 4 (examining the need for an international code of conduct for countries without legal and procedural vehicles substantial enough to protect the rights of owners or sellers).

65. *See* Meinzen-Dick & Markelova, *supra* note 28, at 79 (outlining the elements that should be included in an international code of conduct for international acquisitions of agricultural land); *Principles for Responsible Agricultural Investment*, *supra* note 63, at 5 (articulating the importance of assuring food security and transparency as fundamental principles in land agreements).

66. *See* Reese Ewing, *Brazil Ups Stakes for Foreign Investors in Farmland*, REUTERS, Aug. 24, 2010, http://www.reuters.com/article/2010/08/24/idUSN24252886 (declaring that "there are simply no large-scale alternatives to Brazil's unique agricultural potential"); Blumenthal, *supra* note 15, at 64–65 (reproducing data that shows Brazil is rated as the second best opportunity for capital appreciation in real estate and first among emerging countries for real estate acquisitions).

or more harvests a year.[67] It is the fourth-largest food exporter in the world, and the leading supplier of sugar, coffee, orange juice, ethanol, tobacco, and chicken.[68] In addition to its natural bounty, Brazil has a stable democracy and has taken great strides to improve its socioeconomic situation, placing it ahead of other developing nations with comparable, or lesser, land prices.[69] As of 2008, 572 million hectares of rural land were officially registered to foreign owners.[70]

In the last decade, Brazil has opened its industries to both domestic and international private capital.[71] In 1993, the

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67. *See* KIERAN GARTLAN, ECONOMIST INTELLIGENCE UNIT, THE GLOBAL POWER OF BRAZILIAN AGRIBUISNESS 4 (Katherine Dorr Abreu ed., 2010) (discussing Brazil's large tracts of cheap, arable land, and fresh water supply, which is almost three times that of the United States); *see also* Julia E. Sweig, *A New Global Player: Brazil's Far-Flung Agenda*, FOREIGN AFF., Nov.–Dec. 2010, at 173, 179 (noting that Brazil possesses eighteen percent of the world's available freshwater resources and nearly a quarter of the land is suitable for grazing); GÖRGEN ET AL., *supra* note 6, at 11 (listing Brazil as one of the seven countries that comprise fifty percent of the total available arable land worldwide).

68. *See* GARTLAN, *supra* note 67, at 2 (discussing Brazil's natural resources, its already abundant food production, and the country's potential to be "the largest agribusiness superpower"); *see also* Sweig, *supra* note 67, at 179 (citing Brazil as the fourth-largest food exporter, with agricultural Gross Domestic Product growth between 2000 and 2007 surpassing China, India, and the global average).

69. *See* Sweig, *supra* note 67, at 175 (laying out how in the past two decades, "[w]ith neither blood spilled nor territory annexed, Brazil consolidated a multiethnic and multiracial democracy, stabilized a strong market economy, and lifted millions into a growing middle class," while expanding its international presence); Spieldoch & Murphy, *supra* note 4, at 44 (finding that most other countries with comparable agricultural opportunities to Brazil are much less stable—whether they are politically volatile like Madagascar, Pakistan, and Zimbabwe, or involved in wars like Ethiopia and the Sudan); *see also* Blumenthal, *supra* note 15, at 63 (discussing how countries with stable legal structures provide investors with more certainty, but countries with less stability have the potential for a larger payoff).

70. *See* Franco & Santos, *supra* note 39 (analyzing the amount of land officially registered to foreigners, while noting that the number could be inaccurate due to reporting inefficiencies).

71. *See, e.g.*, Steven P. Otillar et al., *Recent Developments in Brazil's Oil & Gas Industry: Brazil Appears to Be Stemming the Tide of Resource Nationalism*, 30 HOUS. J. INT'L L. 259, 262 (2008) (observing that in 1995, the Brazilian Congress passed a constitutional amendment to allow private entities to invest in the oil and gas sector); Juliette Kerr, *Brazilian President Signs Law Lifting Restrictions on Foreign Ownership of Cable Companies*, GLOBAL INSIGHT, Sept. 15, 2011 (reporting the passage of a law removing restrictions on foreign ownership of cable companies); *Brazil to Boost Foreign Ownership in Airlines Through Decree*, AE BRAZIL NEWSWIRE, Apr. 20, 2011 (reporting the issuance

Brazilian government revised its constitution to eliminate any distinction between domestic and foreign capital, putting foreign investors on more even footing with their Brazilian counterparts.[72] Subsequently, there was a corresponding increase in the amount of FDI channeled into Brazil.[73] In 2010, the Brazilian agricultural industry received US$26 million in FDI—a 225% increase from 2009.[74] Additionally, non-Brazilian companies have become large, important players in the country's economy.[75] In 2000, sales by companies where the majority of capital was owned by foreign investors accounted for 19.7% of Brazil's total output, while those companies were responsible for 41.3% of exports and 49.3% of imports.[76]

Additionally, high domestic interest rates prevent any serious competition to foreign investors from domestic capital.[77] Brazil's base domestic interest rate is currently 10.7%, making it difficult for any business considered "high risk" to attract domestic capital.[78] Agriculture is perceived to be a high-risk

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of a provisional decree permitting foreign investors to increase their ownership stakes in local airlines).

72. *See* CELIO HIRATUKA, FOREIGN DIRECT INVESTMENT AND TRANSNATIONAL CORPORATIONS IN BRAZIL: RECENT TRENDS AND IMPACTS ON ECONOMIC DEVELOPMENT 14 (2008) (analyzing how the elimination of the capital distinction was part of the Brazilian government's policy to "create a "freer" environment" for transnational corporations and foreign investment); *see also* U.S. COMMERCIAL SERV., DOING BUSINESS IN BRAZIL: 2011 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 58 (2011), *available at* http://export.gov/brazil/static/CC_BR_CCG_FullDocument_Latest_eg_br_034878.pdf (documenting how Brazil does not currently distinguish between foreign and domestic capital).

73. *See* HIRATUKA, *supra* note 72, at 1 (describing the surge in FDI entering Brazil in the 1990's); *see also* U.S. COMMERCIAL SERV., *supra* note 72, at 58 (pointing out that Brazil is the largest recipient of FDI in South and Central America, with a predicted intake of US$33 billion in FDI in 2010).

74. *See* Ewing, *supra* note 66 at 5 (presenting the increased interest from foreign investors in Brazilian agriculture); *see also* U.S. COMMERCIAL SERV., *supra* note 72 (citing FDI in Brazil at $US33 million in 2010 and $US25.9 million in 2009).

75. *See* HIRATUKA, *supra* note 72, at 5–6 (showing that in 2003, 51.7% of the 500 largest private Brazilian companies were under foreign control).

76. *Id.* (outlining the increasingly important role that foreign companies play in the Brazilian economy).

77. *See* GARTLAN, *supra* note 67, at 8 (discussing how Brazil's high domestic interest rate leaves little incentive for investors to put their money elsewhere).

78. *See id.* (analyzing how Brazil's 10.7% domestic interest rate makes obtaining capital from domestic investors difficult for high risk sectors since significant, safe

sector, giving domestic investors little incentive to bet their capital in agriculture, and creating more opportunity for foreign capital.[79]

D. *Investor Risk in Brazil*

Investment in Brazilian agricultural land presents many opportunities; however, there are also certain geopolitical risks associated with these cross-border land transactions.[80] The risks can be envisioned in terms of two competing "land deal" narratives.[81] The first narrative casts the land deal as a "beneficial investment," where outsiders view the transaction as a helpful injection of capital that brings new technology to undeveloped areas, contributes funds to infrastructure projects, and provides an influx of capital and tax revenue to the host country.[82] Conversely, a parallel narrative portrays the land sale as a "neo-colonial land grab"—an usurpation of the traditional small farmer and a dangerous precedent for the future of land sustainability.[83] Public perception of a land deal can impact the way the deal is structured, as well as the long-term viability of the investment.[84]

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returns can be made elsewhere); *see generally* Alex Segura-Ubiergo, *The Puzzle of Brazil's High Interest Rates,* (Int'l Monetary Fund, Working Paper No. 12/62, 2012).

79. *See id.* (noting that Brazilian banks classify agriculture as a "high risk sector" and that as a result, many Brazilian corporate farms have sought backing from foreign investors).

80. *See, e.g.*, Blumenthal, *supra* note 15, at 63 (articulating that countries with a poorly developed rule of law have increased investment risks but also the opportunity for the highest long-term earnings).

81. *See* Atkin, *supra* note 18, at 110 (examining the emotional ties people often have to land issues); *see also* Meinzen-Dick & Markelova, *supra* note 28, at 75 (describing the "two major competing narratives" that define foreign land acquisition); *Win-Win or Land Grab?*, *supra* note 17, at 3 (discussing the benefits and drawbacks of international investment in agriculture).

82. *See* Meinzen-Dick & Markelova, *supra* note 28, at 75 (delineating the elements considered in various public perceptions of large, rural land deals); *see also* De Schutter, *supra* note 5, at 520 (outlining potential benefits host countries receive from an influx of foreign capital).

83. *See* Meinzen-Dick & Markelova, *supra* note 28, at 75 (denoting how local populations may view large land deals as a corporate usurpation of a traditional way of life).

84. *See* Blumenthal, *supra* note 15, at 67 (explaining that public perception can play a large role in a host country's reception of foreign investors, and that foreign land purchases can be politically unstable for the host government).

A primary concern for investors in this situation is the risk of a regulatory taking. Blatantly political takings, such as the large-scale nationalizations that Venezuelan President Hugo Chavez oversaw in his country, are unlikely to occur in Brazil.[85] Brazilian law is rigorous in its protection of real property ownership, and the government has no recent history of expropriation actions against foreign companies.[86] Further, nationalization does not align with the trend of privatization embraced by the Brazilian government since the 1990s. [87]

Another possibility is that a regulatory taking could manifest as an agrarian land reform project, acting to redistribute land and expropriate large farms.[88] Land ownership in Brazil is highly concentrated—a small and wealthy social elite controls large areas, while many others are left landless.[89] The

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85. *See* Nathan Crooks & Corina Rodriguez Pons, *Chavez Orders Gold Repatriation, Will Nationalize Industry*, BLOOMBERG BUSINESSWEEK (Aug. 17, 2011), http://www.businessweek.com/news/2011-08-17/chavez-orders-gold-repatriation-will-nationalize-industry.html (discussing how Hugo Chavez's decision to nationalize many of the country's primary industries has established Venezuela as a "brutal place to do business" for foreign investors); *see also Venezuela's Nationalizations Under Chavez*, REUTERS (Dec. 2011), *available at* http://www.reuters.com/article/2011/12/01/venezuela-nationalizations-idUSN1E7910Z520111201 (detailing the various nationalizations Chavez enacted across Venezuela).

86. *See* Lei No. 10406 of Jan 10, 2002, No. 10406, Book II, tit. I, chs.II & III, CÓDIGO CIVIL [C.C.] [Civil Code] (Braz.) (providing an expansive definition of private property); U.S. COMMERCIAL SERV., *supra* note 72, at 62 (noting no recent expropriations against foreign entities); *see also* Sean Geary, *Is it Finally Time to Buy Vale*, EMERGING MONEY (May 2012), http://emergingmoney.com/stocks/finally-time-buy-vale-pbr (indicating that the current Brazilian President, Dilma Rousseff, recognizes the harm that nationalization will have on foreign direct investment and that she has no intention of embarking on that path).

87. *See supra* note 71 and accompanying text (outlining Brazil's increasing acceptance of private domestic and foreign capital in key industries).

88. *See* Kristen Mitchell, *Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 557, 564-68 (2003) (identifying the Estatuto da Terra (Land Statute) as the primary vehicle for expropriative land reform and discussing how land reform played a large role in Brazil's transition democracy); *see also Agrarian Reform in Brazil*, FOOD FIRST INFO. & ACTION NETWORK ("FIAN") (May 2000), *available at* http://www.fao.org/righttofood/KC/downloads/vl/docs/AH264.pdf (outlining the way in which expropriation can be implicated in Brazilian agrarian reform initiatives).

89. *See* Mitchell, *supra* note 88, at 563–66 (reporting that the largest two percent of Brazil's landholdings occupy fifty-seven percent of all agricultural land, while 4.8 million Brazilian families own no land); *see also* Assentamento Manoel Neto, *This Land is Anti-Capitalist Land*, ECONOMIST (Apr. 2007), http://www.economist.com/node/

inequitable distribution of land has caused periods of popular unrest and made land reform a hot-button political issue.[90] Despite this on-going struggle, reform measures that consider expropriation or significant infringement on existing owners' property rights are likely to be met with substantial economic opposition and constitutional challenges.[91]

The Brazilian Civil Code is highly protective of private property rights and treats most infringements as a compensable taking of property.[92] Further, Brazilian courts have interpreted the constitutional "fair compensation" provision as requiring the government to pay market value for property.[93] Providing full compensation for land is extremely expensive, making mass expropriation an unlikely vehicle for land reform.[94] Moreover,

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9079861 (providing a brief history of Brazil's inequitable land distribution and noting that the last Brazilian census indicated one percent of owners controlled forty-five percent of the farmland).

90. *See* Spieldoch & Murphy, *supra* note 4, at 45 (examining how disputes over landownership "have a long and violent history in much of the developing world, where the legacy of land dispossession carries a powerful political charge relating to national identity, reconciliation, justice, and the legitimacy of the state"); *see also* Mitchell, *supra* note 88, at 557, 564–71 (summarizing the recent history behind Brazil's inequitable land ownership and the physical and political conflicts that have resulted).

91. *See* Mitchell, *supra* note 88, at 568, 580 (assessing the extensive constitutional protections extended to property rights, and how the practice of Brazilian courts to award full market value to expropriated lands makes land reform via expropriation infeasible); *see also* Angeline Thomas, *Killing Two Birds with One Stone: Implementing Land Reform and Combating Climate Change in Brazil's Amazon Under Law 11.952.09*, 9 SEATTLE J. FOR SOC. JUST. 1107, 1113–14 (2011) (explaining how the constitutional requirement that the government provide fair market value for land made land reform via expropriation a practical impossibility).

92. *See* Lei No. 10406 of Jan 10, 2002, No. 10406, Book II, tit. I, chs.II & III, CÓDIGO CIVIL [C.C.] [Civil Code] (Braz.) (defining private property and creating a default whereby everything that is not specifically designated as public property is private property); *see also* Mitchell, *supra* note 88, at 568 (discussing the Brazilian Civil Code's staunch protections for property owners and how an infringement will likely be considered a compensable taking).

93. *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(24) (Braz.) (requiring fair compensation for any expropriation); Mitchell, *supra* note 88, at 569 (noting that the Brazilian Constitution requires the government pay "fair compensation" for expropriated properties).

94. Mitchell, *supra* note 88, at 580 (explaining that land reform based on large-scale expropriation would be a "tough sell" because it would require a change in the legal structure that provides full, costly compensation for expropriated land); *see also* Thomas, *supra* note 91, at 1113-14 (outlining the economic impossibilities of paying fair market value for land in an agrarian reform initiative).

Article 185 of the constitution specifically prohibits expropriating private lands for agrarian reform, declaring that "expropriation of the following for agrarian reform purposes is not permitted: (i) small and medium-size rural property, as determined by law, provided its owners do not own other property; (ii) productive property."[95] "Productive property" has traditionally been interpreted broadly, giving this article the effect of substantially narrowing the avenues for expropriation.[96]

A final risk associated with regulatory taking stems from a possible change in the law itself, which is the type of risk that investors faced after the AGU's 2010 opinion limiting land ownership by foreign-controlled entities.[97] The Brazilian government has maintained that the new interpretation does not apply retroactively to existing land deals.[98] However, any deals that were in the process of being drafted but were not finalized before the 2010 opinion must now take the restrictions into account.[99]

Although investors seeking remedies can rely on international law as a default set of best practices, addressing issues as they arise in individual contracts can provide a more secure investment platform.[100] Contract provisions can address

95. *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 185 (Braz.).

96. *See* Mitchell, *supra* note 88, at 568–69 (specifying that the "productive use" requirement is easily met and generally does not provide grounds for expropriation).

97. *See* Jose Paulo Bueno et al., *New Rules—Restrictions on the Acquisition of Rural Real Properties by Foreigners in Brazil*, AP INT'L NEWSLETTER (Araújo e Policastro Advogados, São Paulo, Brazil) (Sept. 2010), http://www.araujopolicastro.com.br/boletimaep/News_Year1_N6_Sep2010.html (explaining that prior to the AGU's 2010 opinion, Brazilian corporations were entitled to own rural land, regardless of shareholder composition, but now majority foreign-owned corporations are subject to severe restrictions); *see also Big Crackdown on Foreign Firms' Land Ownership*, *supra* note 9 (reporting that foreign and Brazilian subsidiaries of foreign companies are subject to the restrictions outlined in Brazilian Law 5.709, as discussed in Part II).

98. *See* Stuber & Stuber, *supra* note 9 at N132 (clarifying that the AGU opinion does not affect transactions closed before its publication); *see also* Ewing, *supra* note 66 (reporting that the Brazilian government did not mention the possibility of a retroactive application of the law or annulling any previous purchases).

99. *See Protectionism in Brazil: A Self-Made Siege*, ECONOMIST, Sept. 24, 2011, at 48 (reporting that as a result of the change in the law, some sellers now have deals that are "as good as garbage"); *see also* Franco & Santos, *supra* note 39 (discussing the possibility that land purchases may be annulled if they conflict with the new legal limits).

100. *See* GÖRGEN ET AL., *supra* note 6, at 16–17 (enumerating various forms of international law that can apply to international land deals, and suggesting that

various issues critical to international land investment, from choice of law questions to detailing the right to export.[101] While an investor is usually assumed to possess the right to export the crops produced on her land, provisions can be included to expand or curtail this right.[102] Further, contracts can specifically outline the steps each party can take in the case of a food shortage in the host country, ensuring protection of the fundamental human right to food while also safeguarding the investment.[103] Finally, risks generally associated with agricultural investments—including the volatility of commodities prices and the risk of depreciation of land values—can also be addressed through contracts.[104]

These investor precautions are important to structuring smart and sustainable international land deals. An increasing global population and the limited amount of land available to feed it has created a market that will not diminish but only grow.[105] Brazil's relative political stability and sound rule of law, combined with the country's bountiful natural resources, render it an attractive target for this type of investment, and make the

specifying particular requirements in the contract is the best way to "set[] legal standards"); *see also* Mann & Smaller, *supra* note 4, at 4, Box 2 (outlining three sources of law that govern foreign investments in agricultural land: domestic law, international investment contracts, and international investment agreements).

101. *See* Timothy Hansen, *The Legal Effect Given Stabilization Clauses in Economic Development Agreements*, 28 VA. J. INT'L L. 1015, 1016 (1988) (describing how foreign investors traditionally seek stabilization clauses to prevent the host from altering or terminating the agreement with new legislation).

102. *See* GÖRGEN ET AL., *supra* note 6, at 16 (outlining an investor's "right to export," but indicating that the right can potentially be limited by multilateral agreements in instances of food shortages); *see also* Mann & Smaller, *supra* note 4, at 4 (commenting that the right to export all or almost all production is a default provision in most agricultural land contracts, but that it is possible to contract around this assumption).

103. *See* Meinzen-Dick & Markelova, *supra* note 28, at 77 (identifying potential risks—including local unrest—investors face if they continue to export crops during a host country food shortage); *see also* Mann & Smaller, *supra* note 4, at 2 (pointing out that at least twenty five countries imposed export bans or restrictions in 2008).

104. *See* Blumenthal, *supra* note 15, at 67–68 (analyzing the historical volatility of commodities prices and the risks associated with depreciation in land value).

105. *See* DANIEL & MITTAL, *supra* note 11, at 2 (explaining how the increasing scarcity of land and water resources, combined with a growing population, has led many countries to search out overseas land); *see also* GÖRGEN ET AL., *supra* note 6, at 6 (evaluating the growing competition for agricultural land as a result of the growth in demand for food and deterioration of over-used land).

formation of a stable, transparent investment platform a high priority.

II. *LAW 5.709 AND RECENT CHANGES IN THE FRAMEWORK GOVERNING FOREIGN ACQUISITION OF RURAL LANDS IN BRAZIL*

Market forces and an appealing venue tell only half the story of rural land investment. This Part considers the other half by reviewing applicable Brazilian legislation and the general policies motivating changes in the law. Part II.A examines Law 5.709 and the restrictions it places on foreign acquisition of rural lands in Brazil. Part II.B then analyzes the AGU's 2010 re-interpretation of Law 5.709, the extension of its restrictions to Brazilian businesses, and its impact on the foreign acquisition of rural lands.

A. *Law 5.709*

In 1971, the Brazilian military government passed Law 5.709 amidst a larger protectionist policy.[106] Law 5.709 currently governs rural property acquisition by non-citizens.[107] The law pertains to land acquisitions by both non-Brazilian individuals who have residency in Brazil and foreign legal entities authorized to operate in Brazil.[108] It limits these individuals and legal entities in a variety of ways.[109] One of these limitations is an area restriction that caps foreign acquisition of rural property at

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106. *See* Franco & Santos, *supra* note 39 (explaining how Law 5.709 was passed by a military government concerned with national security); *see also* David Roberto R. Soares da Silva, *Foreign Ownership of Brazilian Rural Lands: Rules, Restrictions and Opportunities* (Sept. 2007), http://lexuniversal.com/pt/articles/3366 (establishing historical context for the passage of Law 5.709 in 1971, emphasizing that the Cold War was underway and Brazil was under a military government that prioritized control over rural and border lands as a matter of national defense).

107. *See* Lei No. 5.709, art. 5(1), de 7 de Outubro de 1971, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.10.1971, art. 1 (Braz.).

108. *See id.* art. 1 (outlining the scope of the law). But *cf.* Stuber & Stuber, *supra* note 9, at N131 (observing that foreign individuals who do not have permanent residence in Brazil cannot acquire rural land unless they inherit it).

109. *See* Lei No. 5.709, art. 5(1), de 7 de Outubro de 1971, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.10.1971, arts. 3–5, 7–10, 12 (outlining restrictions on the size, use, and manner in which foreigners can acquire land).

a maximum of fifty modules in any continuous or discontinuous area.[110] The Brazilian Institute for Agrarian Reform (Instituto Nacional de Colonização e Reforma Agrária ("INCRA") is responsible for determing the size of a land module, which can vary from two to ten hectares depending on the nature and composition of the region.[111] The Brazilian president is the only individual with the authority to increase the number of hectares, and she can only do so after consulting with the National Security Council.[112] Additionally, strict Brazilian nationality provisions further constrain ownership, such that foreign ownership of rural land in any given municipality cannot exceed twenty-five percent of the total land area, and no single nationality can own more than forty percent of the quarter allowed.[113]

The law also contains a usage requirement whereby a foreign entity may only purchase rural properties for implementation of agricultural, industrial, or colonial projects that are linked to its corporate purposes.[114] A regional land agency and the national ministry of agriculture must approve each proposed project.[115] Further, all land sales must be registered in state registries, and a real estate registration official must send quarterly reports of lands acquired by foreigners to

110. *See id.* art. 3 (describing the parameters of land ownership permitted for foreigners).

111. *See* Mitchell, *supra* note 88, at 564 (outlining the size of a land module); *see also* Bueno et al., *supra* note 97, at 2 (indicating that Instituto Nacional de Colonização e Reforma Agrária ("INCRA") determines the size of a module for each municipality); Mitchell, *supra* note 88, at 564 (explaining that the size of a "'module'" varies depending on land productivity and regional use). *But cf.* Law 5.709, art. 3(1), de 7 de Outubro de 1971, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.10.1971 (Braz.) (specifying that acquisition of property under three modules is not subject to regulation). Instituto Nacional de Colonização e Reforma Agrária ("INCRA") is an organization established in 1971 to implement land reform. *See* Paolo Groppo, *Agrarian Reform and Land Settlement Policy in Brazil: Historical Background*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS (June 1996) http://www.fao.org/sd/Ltdirect/Ltan0006.htm.

112. *See* Lei No. 5.709, art. 5(1), de 7 de Outubro de 1971, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.10.1971, art. 3(3) (describing the process by which only the President can allow a non-Brazilian entity to exceed the statutory limitations).

113. *See id.* art. 12(1) (outlining nationality limitations).

114. *See id.* art. 5 (listing the approved uses for land).

115. *See id.* art. 5(1) (describing the process by which corporations must get their land purchases approved).

the ministry of agriculture.[116] The registry entry must include the identity of the purchaser and proof of residence or authorization to purchase.[117] There is also a provision requiring special government consent for areas that are considered a national security concern.[118] Any acquisition of property in violation of the outlined restrictions is void, and both the notary public who prepared the deed and the real estate registration official who registered it can be held civilly and criminally liable.[119]

B. *The AGU's 2010 Legal Opinion*

Article 1(1) of Law 5.709 defines the legal persons and entities subject to the provisions of the law as "foreign persons or entities that have most of their capital and residence or headquarters abroad."[120] Until August 2010, Brazilian authorities did not consider companies incorporated in Brazil to constitute "foreign entities" for purposes of Law 5.709, even if the companies were majority-owned by foreigners.[121] Thus, foreign companies based in Brazil and established under Brazilian law were not subject to the restrictions outlined in Law 5.709 and could purchase rural land without restriction.[122]

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116. *See id.* arts. 9–11 (outlining the registration requirements); *see also* Franco & Santos, *supra* note 39, at 2 (describing the process foreign entities must go through to acquire rural land).

117. *See* Law 5.709, arts. 9–10 (requiring corporations filing for registration to also include documentation of the corporation's charter, a license to operate in Brazil, and details about the identity of the shareholders).

118. *See id.* arts. 7, 11 (requiring that the General Secretary of the National Security Council provide prior consent if the property in question is located in an area considered vital to national security).

119. *See id.* art. 15; *see also* Stuber & Stuber, *supra* note 9, at 131 (illustrating the legal ramifications should officials not comply with the new registration requirements for foreign land acquisitions).

120. *See* Law 5.709, art. 1(1).

121. *See* Bueno et al., *supra* note 97, at 1–2 (outlining the AGU's previous decisions not to classify Brazilian corporations with a majority foreign ownership as "foreign entities" for the purposes of Law 5.709); *see also* Franco & Santos, *supra* note 39 (articulating how prior to the AGU's 2010 opinion, all companies based in Brazil could buy land without constraint, regardless of the origin of their capital ownership).

122. *See* Franco & Santos, *supra* note 39 (discussing how all companies established under Brazilian law could acquire land without restriction before the 2010 AGU opinion).

Prior to August 2010, the AGU had consistently held that Article 1(1) of Law 5.709 did not encompass foreign-controlled Brazilian businesses.[123] In 1994, the AGU opined on the constitutionality of applying Article 1(1) to foreign-controlled Brazilian businesses based on Article 171 of the 1988 Brazilian Constitution, which distinguished between Brazilian companies operating with national capital and those operating with foreign capital.[124] In this unpublished opinion, the AGU determined that the purpose behind the capital distinction in Article 171 was to confer benefits on businesses operating with national capital, and not to place greater restrictions on those operating without national capital.[125] The AGU opined that it was unconstitutional to apply Article 1(1) to Brazilian companies operating with foreign capital because harsher restrictions would penalize the company for operating without national capital.[126]

The constitution was amended in 1995, and Article 171 was revoked, eliminating the legal distinction between foreign and

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123. *See* Parecer CGU/AGU No. LA-01/2008-RVJ, art. 2 ¶ 26, de 3 Setembro de 2008, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.08.2010 (Braz.) (outlining how the AGU is responsible for interpreting laws and constitutional provisions when legal questions or controversies arise).

124. *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 171 (Braz.) (repealed 1995) (creating a distinction between domestic and foreign capital); *see also* Parecer AGU No. 22/1994 (declining to extend the restrictions to Brazilian companies that have a majority foreign ownership); Bueno et al., *supra* note 97 (analyzing the 1994 AGU opinion not to extend the limitations in Law 5.709 to Brazilian companies with a majority foreign ownership).

125. *See* Parecer AGU No. 22/1994 (examining the policy reasons behind the capital distinctions); *see also* Bueno et al., *supra* note 97 (discussing the factors behind the changes in the new constitution with regard to Brazilian companies); HIRATUKA, *supra* note 72, at 13–14 (discussing the implementation of foreign versus domestic capital distinctions and the government's use of the differentiation to limit foreign involvement in certain sectors).

126. *See* Parecer AGU No. 22/1994 (declining to extend the restrictions, based on constitutional interpretation); *see also* Bueno et al., *supra* note 97 (finding the reasoning behind the AGU's refusal to extend restrictions to Brazilian companies with a majority foreign capital was based on policy intentions in the new Constitution); Parecer CGU/AGU No. LA-01/2008-RVJ ¶ 34, de 3 Setembro de 2008, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.08.2010 (Braz.) (specifying that the AGU's decision not to extend the restrictions outlined in Law 5.709 to Brazilian companies with a foreign controlling interest).

domestic capital.[127] The amendments also changed the definition of a Brazilian firm to encompass any company established under Brazilian law, regardless of its source of capital.[128] In 1998 the Brazilian government requested a second opinion from the AGU on the applicability of Article 1(1) to Brazilian firms operating with a majority of foreign capital.[129] The AGU reaffirmed the stance taken in the 1994 opinion. He again opined that the restrictions in Law 5.709 should not apply to Brazilian companies, even if a majority of the capital was held by foreign legal entities because the company was a "Brazilian firm," regardless of its source of capital.[130]

Twelve years later, however, the AGU took a different stance. On August 23, 2010 the General Counselor of the Republic published legal opinion CGU/AGU 01/2008, previously approved by the AGU and the president, which extended the restrictions outlined in Law 5.709 to Brazilian companies with majority foreign capital.[131] The legal opinion established that any Brazilian company in which a majority of

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127. *See* SERGIO SAMPAIO CONTREIRAS DE ALMEIDA, GEO. WASH. U. INST. OF BRAZILIAN BUS. & PUB. MGMT ISSUES, RECENT CHANGES IN THE BRAZILIAN CONSTITUTION: FROM REFORM TO GROWTH 18, 29 (2000), http://www.gwu.edu/~ibi/minerva/Spring2000/Almeida.pdf (examining how the elimination of capital distinctions was part of the Brazilian government's attempt to decrease intervention in the economic sector); *see also* Bueno et al., *supra* note 97 (describing how the revocation of Article 171 eliminated the definition of a Brazilian company that separated it from foreign companies).

128. *See* DE ALMEIDA, *supra* note 127, at 29, 32–34 (discussing the various changes wrought by the 1995 amendments to the constitution); *see also* Bueno et al., *supra* note 97 (outlining the elimination of the distinction between a Brazilian company and a Brazilian company financed with national capital).

129. *See* Bueno et al., *supra* note 97 (indicating that the Brazilian government solicited the AGU again in 1995 to provide another opinion on whether restrictions should be applied to Brazilian companies that were majority foreign owned).

130. *See* Parecer GQ No. 181/98, 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.08.2010 (Braz.) (describing the character of a Brazilian firm); *see also* Bueno et al., *supra* note 97 (noting the AGU's decision not to distinguish between Brazilian companies of foreign capital and Brazilian companies of domestic capital). *But cf. Protectionism in Brazil: A Self-Made Siege*, *supra* note 99, at 3 (discussing how the 1971 land ownership law is "antique" and applying the restrictions selectively to businesses run with foreign capital as "incompatible with the new democratic constitution and open economy").

131. *See* Parecer CGU/AGU No. LA-01/2008-RVJ, de 3 Setembro de 2008, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.08.2010 (Braz.) (interpreting Law 5.709 to apply to Brazilian corporations with a majority foreign ownership).

the corporate capital was held by a foreign individual or legal entity was considered a foreign legal entity for purposes of Article 1(1) of Law 5.709, and subject to the law's limitations.[132] This interpretation subjected foreign corporate investors to all of the limitations of Law 5.709 and severely limited the amount of land they could purchase or lease.[133]

The AGU's choice to extend the restrictions of Law 5.709 to foreign-controlled Brazilian companies was a reversal from the previous two opinions.[134] The Brazilian government cited a range of reasons for the change in applicability, from an increase in food prices to national security.[135] The AGU found the authority to break from previous interpretations primarily in Article 172 of the constitution, which stated that "the law shall regulate, based on national interests, the foreign capital investments, shall encourage reinvestments, and shall regulate the remittance of profits."[136] Many commentators felt, however, that the most pressing factor behind the change in opinion was a concern over the increased presence of sovereign wealth funds

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132. *See id.* (outlining the new interpretation of "foreign legal entity" to apply to Brazilian companies with a majority foreign ownership); *see also* Franco & Santos, *supra* note 39 at 2 (discussing the extension of the law to foreign-controlled Brazilian companies).

133. *See* Ewing, *supra* note 66 (identifying how the 2010 legal opinion "closed a loophole" that investors were using to acquire land as domestic companies); *see also* Lei No. 8629, art. 23, de 25 de Fevereiro de 1993, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.02.1993 (Braz.) (holding that foreign leases of rural land are subject to the same restrictions and conditions under Law 5.709 as foreign purchases); ALIENS, BRAZIL LAW DIGEST: MARTINDALE-HUBBELL LAW DIGEST § 16.01 (2010) (discussing the new limitations on land acquisition).

134. *See* Bueno et al., *supra* note 97 (articulating how the AGU's opinions on the same subject in 1994 and 1998 were in direct contradiction to the 2010 opinion); *see also Rural Land in Brazil and the Foreigners*, REAL ESTATE NEWSLETTER (Barbosa, Müssnich & Aragão, Advogados, Brazil), Aug. 2010, *available at* http://www.bmalaw.com.br/nova_internet/arquivos/Imobiliário/Real%20Estate%20Newsletter_august_2010_special%20edition.html (illustrating how the 2010 AGU opinion effectively revoked the previous AGU opinions on Law 5.709).

135. *See* Stuber & Stuber, *supra* note 9 (discussing how the most recent AGU opinion was influenced by national sovereignty principles, as well as "the increase of value of agricultural commodities, the world food crisis and biofuels developments").

136. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 172 (Braz.); *see also* Bueno et al., *supra* note 97 (examining the AGU's use of Article 172 and principles of national sovereignty and independence as support for the decision).

in the land acquisition market.[137] In particular, the Brazilian government was concerned over China's increasing dominance in global markets and wanted to limit that country's influence on Brazilian soil.[138] China was Brazil's largest source of international investment and its largest export market for soy, oil, and iron.[139] China was also a frontrunner in overseas agricultural land acquisition.[140] Combined, these factors left Brazil anxious about allowing large amounts of domestic land to fall under Chinese control.[141]

Though the AGU's opinion was not the legal equivalent of an enacted law, it was binding on all federal government agencies and had a direct effect on the amount of land foreigners could acquire.[142] Following the 2010 AGU opinion, international investment in Brazilian agriculture dropped

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137. *See* Joy Leahy, *Brazil Plans Curbs on Farmland Speculation*, FIN. TIMES (U.K.), Mar. 6, 2011, http://www.ft.com/intl/cms/s/0/6333b494-4819-11e0-b323-00144feab49a.html (discussing Brazilian Agricultural Minister Wagner Rossi's desire to sort speculators and sovereign funds from foreign investors "with good projects"); *see also Protectionism in Brazil: A Self-Made Siege*, *supra* note 99 (suggesting that the AGU opinion came about because the Brazilian government was "spooked by the idea of foreign sovereign-wealth funds and state-owned firms buying up vast tracts [of rural land]").

138. *See* Sweig, *supra* note 67, at 175 (asserting that Brazil is currently very aware of the potential threat posed by the combination of China's market power and recent focus on stockpiling resources); *see also A Young Marriage on the Rocks*, REUTERS (Feb. 2011), http://www.reuters.com/article/2011/02/03/uk-brazil-china-idUKLNE71202720110203 (discussing recent attempts to level out what Brazil sees as a power imbalance).

139. *See* Sweig, *supra* note 67, at 175 (establishing China's position both as Brazil's largest foreign investor and main export market); Barrionuevo, *supra* note 48, at A1 (describing China as Brazil's largest trading partner).

140. *See* Leahy, *supra* note 137 (reporting that China, South Korea, and the Gulf states have all started buying agricultural land in Africa to increase food security). *But cf.* Ewing, *supra* note 66 (discussing Chinese companies' plans to invest in Brazilian farmland).

141. *See* Leahy, *supra* note 137 (expressing an expert's opinion that when the Brazilian government expresses wariness over the reach of sovereign funds, "'[s]overeign funds' means the Chinese"); *see also* Ewing, *supra* note 66 (positing that the Brazilian government is especially wary of allowing any companies affiliated with China to make large land purchases).

142. *See* Franco & Santos, *supra* note 39 (describing the legal effect of the 2010 opinion); *see also* Bueno et al., *supra* note 97, at 3 (discussing how the opinion binds the federal administration, including the real estate registry, which is the only body capable of issuing legal title to land in Brazil).

substantially.[143] In addition to a direct impact on land transactions, the 2010 opinion's divergence from previous government publications was also indicative of policy inconsistencies on the part of the Brazilian government, which caused uncertainty among investors.[144] The immediate and long-term ramifications of a loss of foreign capital are difficult to fully encapsulate, but will undoubtedly have negative effects on both the value of rural property and the agricultural industry in Brazil.[145] The country will have a difficult, if not impossible, time reaching its potential production capacity without foreign capital.[146]

III. *DRAFTING NEW LEGISLATION—A WORKABLE FRAMEWORK FOR NATIONAL SECURITY AND INVESTOR CONFIDENCE IN BRAZIL*

The AGU's 2010 opinion changed the equation for many investors who had previously been keen to invest funds in Brazil's agricultural industry. Restrictive and cumbersome limitations on rural land ownership made investment more difficult, more expensive, and less attractive to new investors

143. *See* Alastair Stewart, *Brazil's Congress and Foreign Land Ownership*, PROGRESSIVE FARMER (Aug. 3, 2011, 11:03 AM), http://www.dtnprogressivefarmer.com (enter "2011, Brazil's Congress and Foreign Land Ownership" into the search box) (reporting that the 2010 AGU opinion caused the suspension of US $15 billion of investments in agriculture); *see also* Bowden, *supra* note 8 (discussing how the new legal interpretation could place up to thirty-five billion dollars in potential investments at risk over the next five years).

144. *See Protectionism in Brazil: A Self-Made Siege*, *supra* note 99 (analyzing the 2010 opinion as an embrace of a protectionist mentality, in the face of an almost-certain halt in foreign investment); *see also* Stewart, *supra* note 143 (implying that the recent interpretation of the 1971 law resulted in an uncertainty that "scares off investors").

145. *See* Ewing, *supra* note 66 (asserting that rural property prices will suffer if foreign capital is unavailable); *see also Protectionism in Brazil: A Self-Made Siege*, *supra* note 99 (discussing how land registries are categorically rejecting all foreign purchasers in attempts to stave off liability). *But cf.* Franco & Santos, *supra* note 39 (discussing how the AGU voiced confidence that investors would find a way to adapt to the new regulations, possibly by partnering with Brazilian entities).

146. *See supra* notes 77–79 and accompanying text (outlining the difficulties involved in obtaining domestic capital for agriculture in an economic environment with high interest rates); *see also* GARTLAN, *supra* note 67, at 8 (examining how foreign capital not only brings a cheaper inflow of capital but also important technology and know-how to the industry, spurring greater development).

who were vital to the growth of the Brazilian agricultural industry. Further, the decision evoked long-term concerns about the commitment of the Brazilian government to foreign investment in the land sector.

This Part argues that Law 5.709 is antiquated, unclear, and should be replaced with new legislation. Part III.A examines the insufficient remedies proposed by the Brazilian government and the international community. Part III.B then sets forth a recommendation that Brazil fashion new legislation that forgoes a blanket ban on large foreign acquisitions and instead focuses on individual land agreements. Specifically, it highlights the need for transparency and an accurate recording system so that the Brazilian government can create a narrowly tailored solution that distinguishes between sovereign purchasers and private corporations while still allowing for needed international investment.

A. *International Proposals*

After issuing the 2010 interpretation, the Brazilian government suggested that in order to avoid the harsh restrictions of the new interpretation, foreign companies should work with Brazilian partners.[147] Forming a partnership with a domestic entity would enable an investor to circumvent the newly-applicable restrictions, since the deed or lease would be in the local partner's name.[148] The foreign investor, however, would not have the same control or security over the asset as she would if she were the contracting party—she would not have a legal stake in the land and would have to share profits with the local partner.[149] In some instances, a partnership could be beneficial; however, it is not the correct solution for every

147. *See supra* note 39 (discussing the AGU's suggestion that foreign companies avoid the new restrictions by partnering with Brazilian entities).

148. *See supra* note 39 and accompanying text (suggesting that having a domestic partner's name on the contract allows the partnership to capitalize on domestic law benefits).

149. *See supra* notes 39–40 and accompanying text (discussing the ramifications of a joint venture agreement).

situation, and this option does not go far enough to secure investors' interests and meet their goals.[150]

On a broader scale, the international community has begun developing codes of conduct to govern international transactions in rural lands.[151] These codes consider the economic, social, and environmental impact of any given international land deal.[152] Although they are well intentioned, relying on them to govern commercial land transactions in Brazil has two major weaknesses. First, they are heavily skewed toward protecting access to resources and maintaining a local way of life in the host country and do not address stability for investors.[153] Second, and more importantly, these codes are closer to a set of principles than a concrete means of determining land allocation.[154] In a country with established property laws such as Brazil, a code would merely supplement, rather than govern, any land transaction. An international code may be helpful in guiding future legislation; however, as an entity in its own right, an international code will not provide the degree of clarity and legal stability Brazil needs in this area. The most viable solution is for Brazil to construct new legislation that ensures security and certainty for investors and sellers, while also promoting bureaucratic transparency and accountability.

B. *Establishing Transparency: State-Backed vs. Private Actors*

The AGU's 2010 opinion was largely the result of concerns over national sovereignty and a lack of administrative transparency. China's recent acquisition of large tracts of land in Africa spurred concern in Brazil that a food-hungry, people-rich

150. *See supra* note 40 and accompanying text (highlighting that a partnership can have limitations, including a requirement of profit sharing, and the forfeiture of one partner's titled interest in the land).

151. *See supra* notes 61–65 and accompanying text (outlining the different codes of conduct the international community is creating).

152. *See supra* note 65 and accompanying text (describing the various elements that should be considered in an international code).

153. *See supra* note 64 and accompanying text (discussing how concern over conditions in the host countries was the impetus behind drafting international codes).

154. *See supra* notes 62, 65 and accompanying text (identifying "best practices" and certain general categories that should be considered in compiling an international code).

nation would acquire a large percentage of Brazil's landmass.[155] However, the decision to react to these changing circumstances by extending Law 5.709's restrictions to all foreign-controlled Brazilian businesses was over-inclusive, as businesses incorporated in Brazil were already governed by Brazilian law.[156] Political considerations may prompt the government to closely regulate large acquisitions by sovereign-wealth funds or state agencies; however, acquisitions by private actors do not trigger the same concerns. A majority of the issues implicated in land deals can be resolved with statutory transparency requirements and contractual provisions in land agreements rather than by leveling debilitating restrictions.

The government should begin by increasing transparency in all foreign land deals in to eliminate confusion about the parties involved and ascertain the scope and purpose of the land project.[157] A mechanism must be created to obtain detailed information about the identity of the contracting parties, including any large sources of funding, government-backed aid, and the amount of land involved.[158] Setting a minimum land size for the legislation to apply will allow for administrative efficiency.[159] In order to deal with the increased administrative input, the law ought to outline parameters for constructing a well-organized registry system capable of recording and categorizing the relevant land deals.[160] Legislators can use the registry system prescribed in Law 5.709 as a baseline and expand it to require more detailed information on the parties involved

155. *See supra* notes 137–41 (discussing the emergence of sovereign wealth funds and Brazil's particular concern with China).

156. *See supra* notes 131–33 and accompanying text (analyzing the effect of the 2010 opinion on Brazilian businesses); *supra* notes 71–76 (documenting the important role of foreign investment and foreign businesses in the Brazilian economy).

157. *See supra* note 43 and accompanying text (discussing how many of the large land deals lack transparency, which makes it difficult to formulate accurate assessments and address problems).

158. *See supra* note 60 and accompanying text (discussing how it is sometimes difficult to separate sovereign wealth funds from private investors).

159. *See supra* note 111 and accompanying text (pointing out that legislation currently regulates areas over three modules).

160. *See supra* notes 116–17 and accompanying text (describing the tangible, yet limited capabilities of the current reporting system).

and the intended purpose for the land.[161] These details will give the government a more accurate overview of the country's rural land ownership.[162]

Through enhanced general transparency requirements, the government can distinguish between deals involving sovereign purchasers and private investors.[163] This separation will allow for a second level of legislation that addresses land deals on a more individualized basis, depending on the nature of the contracting parties. If the government determines that more control is needed in deals with sovereign-wealth investors, new legislation can require specific contractual provisions in future land agreements with state-backed actors.[164] Possible provisions could include an outline of the specific nature of the operation, contingencies should political relations between the two countries deteriorate, steps to follow in case of a domestic food crisis, and other specific concerns of the host country.

A number of general policy changes could also mitigate the political complications of selling or leasing to another state.[165] For instance, legislation could give preference to leasing over sale and encourage legal title to remain with Brazilian citizens—either through incentives for leasing or penalties for sales.[166] Alternatively, legislation could include more restrictive usage limitations for state-backed transactions to ensure important national interests are not being impinged. Moreover, the Brazilian government could assure increased control over the properties by limiting deals involving other states to leases rather

161. *See supra* notes 115–19 and accompanying text (outlining the reporting procedures and information required under the current law).

162. *See supra* notes 116, 117 and accompanying text (requiring parties provide certain information to regional authorities upon conclusion of a land purchase).

163. *See supra* note 60 and accompanying text (highlighting the difficulties involved in distinguishing between public and private investors).

164. *See supra* note 100 (articulating the benefits of outlining specific obligations or restrictions in contract provisions).

165. *See supra* notes 137–41 and accompanying text (identifying the Brazilian government's concern over the increased presence of sovereign states and institutions in the land market).

166. *See supra* notes 147–49 and accompanying text (articulating the Brazilian government's suggestion that foreign entities enter into partnerships with Brazilian partners, whereby the Brazilian partner's name would be on the lease or deed and thereby render the property legally under the control of a Brazilian national).

than issuing title.[167] Currently, the same law governs leases and purchases by foreign entities.[168] New legislation should consider land leases separately from land purchases, because combining the two restricts the options available to buyers and sellers and prevents both parties from realizing potential opportunities.

In regard to private investors, the Brazilian government should change the law to eliminate the size restrictions on foreign acquisition of rural lands. Investors are drawn to Brazil because the quantity of land available for development allows them to benefit from economies of scale.[169] Allowing large land purchases will increase the flow of capital into the country and allow the area to benefit from technology transfers and increased production. Both the Brazilian government and the international community recognize Brazil's need for foreign capital in the agricultural sector, and it is important to design legislation that will permit for these investor incentives.[170]

Investors should also make sure to safeguard their investments with contractual provisions of their own. To guard against future changes in a host country's law, such as that rendered in the 2010 AGU opinion, investors can negotiate for a stabilization clause that freezes the laws applicable to the agreement on a certain date.[171] This will ensure that both parties know exactly which law will apply to the investment for its duration. The risk of repercussions from a food shortage in Brazil is a contingency that should also be dealt with in the land contract itself.[172] Parties can negotiate for clauses that allow for consideration of varying degrees of crop depletion in the host

167. *See supra* notes 28–29 and accompanying text (positing that leases offer more flexibility and more control to the host country); *see e.g., supra* note 34 and accompanying text (observing that seven countries require foreign entities to acquire land solely through leases).

168. *See supra* note 133 and accompanying text (emphasizing that Law 5.709 governs all foreign land acquisition—including both leases and purchases).

169. *See supra* note 36 and accompanying text (discussing how investors consider economies of scale before deciding to invest in either a short or long-term venture).

170. *See supra* note 16 and accompanying text (citing the international consensus that private funding is necessary for the agricultural sector).

171. *See supra* note 101 and accompanying text (discussing how a stabilization clause protects an investor from unfavorable changes in the host country law).

172. *See supra* notes 101–03 and accompanying text (describing the need for consideration of contractual export provisions).

country—for instance, allowing the host country to buy back a certain percentage of the crops at market price if domestic production falls below a certain level[173].

The current law is outdated, unclear, and inefficient, and new legislation is necessary that considers both the changing profile of the international investor and the continued need for investment. The law should focus on attracting and incentivizing foreign capital and investment in the Brazilian agricultural industry in such a way that stimulates growth of unproductive areas, permits for efficient use of the land, and provides security for investors. The more transparency and certainty in the land deals, the greater Brazil's ability to attract high-caliber investors. Although this Note focused on the international investment aspect of land acquisition, there are other equally important considerations involved in formulating an agricultural land law that harnesses Brazil's potential as an agricultural super-power, while protecting its sovereignty and the rights of its citizens. This requires considering how other social and political factors will interact with large-scale land investment, factors such as national security, environmental repercussions, job preservation, land distribution and potential agrarian reform, and domestic food policy.[174] Creating a law that values transparency and a willingness to engage with new investors, while assuring a level of stability and long-term benefit for the rural population, will create a more secure environment for investment and allow the Brazilian government to utilize available global capital for the development of a more extensive and efficient agricultural industry.

CONCLUSION

The growing importance of the agricultural industry in meeting future food needs makes restrictive land-acquisition

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173. *See supra* notes 101–03 (discussing various contractual provisions important for land agreements, including clauses governing the regulation of exports).

174. *See* DANIEL & MITTAL, *supra* note 11, at 11–17 (exploring the potential negative consequences of large land acquisitions, including the impact on small farmers, land reform, and local food access); *see also* Barrionuevo, *supra* note 48 (examining Brazilian officials' concerns over an increasing Chinese presence in areas of Brazilian trade and land acquisition).

laws, like the one created by the AGU's 2010 opinion, antiquated and dangerous for prospective industry growth. Law 5.709 was written during a protectionist, military regime. Brazil is now a democratic state, open to private and foreign capital, and on the path to becoming a global power. The blatant and preferential distinction created between national and foreign capital in Law 5.709, and revived in the AGU's 2010 opinion, does not align with the trajectory of Brazilian policy, nor does it work to incentivize or retain investment. In light of these considerations, Law 5.709 should be repealed and replaced with new legislation to govern foreign rural land acquisition and leasing.

The new legislation should include heightened documentation and transparency requirements, eliminate size caps, ensure the security of investments, address national security issues, and contemplate contractual default provisions. These legislative and contractual steps will ensure protection and stability for investors as well as clarity and greater opportunity for sellers. Moreover, new legislation will provide Brazil with a stronger framework to facilitate and monitor agribusiness and eventually realize the full potential of its agricultural resources.