

When the Poor Have Nothing Left To Eat: The United States' Obligation To Regulate American Investment in the African Land Grab

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I. INTRODUCTION: GRABBING ALL THE LAND

Land is an increasingly precious commodity.¹ Indeed, George Soros is “convinced [that] farmland is going to be one of the best investments of our time.”² Many Western investors, including American hedge funds and universities, view direct investment in non-renewable assets such as land a safe choice in an otherwise unstable financial climate.³ In response, land grabbing, defined as a global enclosure movement in which large areas of arable land change hands through deals often negotiated between host governments⁴ and foreign investors in the Global South,⁵ has sky-rocketed in frequency over the

¹ This is not to say that land has not long been valued. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (regarding the importance of protection and regulation of property). Control over land has long been the source of struggle as well. In fact, scholars have frequently contextualized land grabs as an extension of colonialism. Ashwin Parulkar, *African Land, Up for Grabs*, 28 WORLD POL’Y J., Spring 2011, at 103, 107.

² FRED PEARCE, THE LAND GRABBERS: THE NEW FIGHT OVER WHO OWNS THE EARTH 96 (2012). Soros’s investment group was the top shareholder in Adecoagro, a Brazil-based farm operator, which had an internal rate of return of 31.8%. *Soros-Backed Adecoagro Sells Farm at 14 Times Cost*, AGRIMONEY.COM (Aug. 15, 2012, 3:13 PM), <http://www.agrimoney.com/news/soros-backed-adecoagro-sells-farm-at-14-times-cost--4875.html>.

³ Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STAN. J. INT’L L. 101, 111 (2013); see also Elisa Da Vià, *The Politics of “Win-Win” Narratives: Land Grabs as Development Opportunity?* (unpublished conference paper, presented at the International Global Land Grabbing Conference at the Institute for Development Studies, University of Sussex, Apr. 6–8, 2011), available at http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Conference_papers/LDPI/63_Elisa_Da_Via_2.pdf (“[M]any private-sector financiers are turning towards land and agriculture as strategic assets poised to produce significant returns in an otherwise shaky financial climate.”).

⁴ Nationally prominent government officials often negotiate their countries’ land away with little or no participation from the local communities who depend on access to those lands for their livelihoods. Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L. L.J. 503, 504 (2011).

⁵ The term “Global South” describes “societies that seemed to face difficulties in achieving the economic and political goals of either capitalist or socialist modernity,” and is infused with (arguably) less ideological and political connotation than “developing world” or “third world.” For a discussion of the terminology and development theory in the aftermath

past decade. Private companies, state-owned enterprises, investment funds, and public-private partnerships from emerging countries, Gulf States, and the “Global North”⁶ are turning to farmland in developing nations to farm food and biofuels to the tune of \$14 billion thus far.⁷ Experts expect this amount to double by 2015.⁸ Africa is the most targeted region, with 754 deals covering 56.2 million hectares—the equivalent of 4.8% of Africa’s total agricultural area.⁹

of World War II, see Arif Dirlik, *Global South: Predicament and Promise*, 1 GLOBAL SOUTH, Winter 2007, at 12, 13.

⁶The “Global North” includes the United States, where many Americans are implicated in land grabs. For example, Jose Minaya, the Managing Director of New York-based TIAA-CREF, the biggest fund manager of retirement schemes for U.S. teachers and professors, invested hundreds of millions of dollars into a sugar cane plantation project in Brazil, which has since divested its holdings in Darfur. *Who’s Behind the Land Grabs?*, FARMLANDGRAB.ORG (Oct. 2012), <http://farmlandgrab.org/post/view/21173#>. Calvin Burgess endeavored to build Africa’s largest rice farm on a 7000-hectare plot of land he acquired under a 25-year renewable lease. *Id.* On his land is a large swamp that Burgess irrigated his rice fields with, cutting off the supply of potable water to local communities. *Id.* Those who decided to leave were compensated with \$60 USD. *Id.*; see also PEARCE, *supra* note 2, at 54 (“Many locals I spoke to . . . don’t like the reservoir that floods their pastures. Most of all, they don’t like losing their swamp. For Burgess the swamp is useless, empty boggy land; for them it is a valuable resource.”).

⁷WARD ANSEEUW ET AL., THE LAND MATRIX P’SHIP, TRANSNATIONAL LAND DEALS FOR AGRICULTURE IN THE GLOBAL SOUTH 11 (2012), available at <http://www.landcoalition.org/sites/default/files/publication/1254/Analytical%20Report%20Web.pdf>; see also De Schutter, *supra* note 4. Though this Note focuses on land grabs on the African continent, land grabbing is spreading at an alarming rate worldwide. In Southeast Asia, countries including Cambodia, East Timor, Laos, Philippines, and Indonesia are targets of extensive land grabs. See SATURNINO M. BORRAS, JR. & JENNIFER C. FRANCO, TRANSNAT’L INST., POLITICAL DYNAMICS OF LAND-GRABBING IN SOUTHEAST ASIA: UNDERSTANDING EUROPE’S ROLE 14–15 (Kathy Cumming ed., 2011), available at <http://www.tni.org/sites/www.tni.org/files/download/Political%20Dynamics%20of%20Land-grabbing%20in%20Southeast%20Asia.pdf> (“While the total quantity of land implicated in Southeast Asian land-grabbing is relatively less than Africa, Latin America or the former Soviet Eurasia . . . it represents a major development problem.”). Latin America, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, Mexico, Nicaragua, Dominican Republic, and Guyana have all been the target of aggressive land acquisitions. See Saturnino M. Borras, Jr. et al., *Land Grabbing in Latin America and the Caribbean*, 39 J. PEASANT STUD. 845, 848 (2012), available at <http://r1.ufrj.br/geac/portal/wp-content/uploads/2012/11/BORRAS-et-al-Land-grabbing-in-Latin-America-2012.pdf>.

⁸De Schutter, *supra* note 4. Demand for land in 2009 alone was equivalent to more than twenty years of previous land expansion. See FLEUR WOUTERSE ET AL., INT’L FOOD POL’Y RESEARCH INST., FOREIGN DIRECT INVESTMENT IN LAND IN WEST AFRICA 1 (2012), available at <http://www.ifpri.org/sites/default/files/publications/wcaotn01.pdf>.

⁹ANSEEUW ET AL., *supra* note 7, at 7. Eleven target countries comprise seventy percent of the reported acquisitions, seven of which are African: Sudan, Ethiopia, Mozambique, Tanzania, Madagascar, Zambia, and Democratic Republic of the Congo. *Id.* at 9.

Investors are attracted to land grabs based on a combination of weak land tenure and strong investor protections.¹⁰ In much of Africa, the vast majority of small landholders do not hold title to their land in a way that would be formally recognized by investors or even their own government.¹¹ In fact, around ninety percent of African land is untitled, so although small landholders have farmed the land dating back generations, lack of westernized legal title means that regional governments can legally dispose of the land to investors, leaving small farmers susceptible to eviction.¹² By claiming this land for industrial-scale farming, investors imperil many of the continent's sixty million small farms that are responsible for producing eighty percent of sub-Saharan Africa's produce.¹³ As such, land grabbing results in the systematic eviction of small landholders from land they have farmed for generations because they cannot effectively vindicate their rights.¹⁴

Even if local smallholders' land rights are legally recognized, they may not be protected in practice, especially when faced with the economic and political

¹⁰ *Id.* at 11; *see also infra* Part III.B.2.a, note 151 and accompanying text (discussion of rent-seeking in which "strong investor protections" may resemble monopolistic behavior and not benefit local populations at all).

¹¹ There is a wealth of literature on the various customary law systems in Africa, which when in conflict with pluralistic or European systems of law can leave indigenous people disenfranchised. *See, e.g.*, T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 12, 13 (1956); *THE FUTURE OF AFRICAN CUSTOMARY LAW* (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., Cambridge Univ. Press 2011); Irina Sinitsina, *African Legal Tradition: J.M. Sarbah, J.B. Danquah, N.A. Ollennu*, 31 *J. AFR. LAW* 44 (1987). Although beyond the scope of this Note, securing indigenous peoples' land tenure will be an important policy objective for African nations faced with prospective foreign investors. For an analysis of how to construct a framework of land tenure upon existing customary rights, see Blaise Kuemlangan, *Foreword to RACHAEL S. KNIGHT, STATUTORY RECOGNITION OF CUSTOMARY LAND RIGHTS IN AFRICA*, at vi (2010) ("[P]rotecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims."); LIZ ALDEN WILY, *REVIEWING THE FATE OF CUSTOMARY TENURE IN AFRICA* 2 (Jan. 2012), available at <http://www.rightsandresources.org/documents/quarantined/turningpoint.php>.

¹² The *Guardian* has extensively documented eviction cases and their human impacts across the continent. *See* John Vidal, *Ugandan Farmer: "My Land Gave Me Everything. Now I'm One of the Poorest,"* *GUARDIAN*, Sept. 22, 2011, <http://www.guardian.co.uk/environment/2011/sep/22/uganda-farmer-land-gave-me-everything>; Liz Alden Wily, *How African Governments Allow Farmers To Be Pushed Off Their Land*, *GUARDIAN*, Mar. 2, 2012, <http://www.guardian.co.uk/global-development/poverty-matters/2012/mar/02/african-governments-land-deals>.

¹³ PEARCE, *supra* note 2, at ix.

¹⁴ Country-specific scholarship abounds. *See, e.g.*, Fred Nelson et al., *Land Grabbing and Political Transformation in Tanzania* (unpublished conference paper, presented at the International Conference on Global Land Grabbing II, Cornell University, Oct. 17–19, 2012), available at <http://www.cornell-landproject.org/download/landgrab2012papers/nelson.pdf>.

leverage of large commercial investors.¹⁵ Large-scale land acquisitions are negotiated only in theory; investors have such leverage in choosing whether to purchase or lease the land, the time period of the lease, the conditions of the contract, and the amount of land to be acquired that there is rarely any bargaining on behalf of local populations.¹⁶ Especially in Africa, land transactions predominantly involve the distribution of government-allocated land leases or land-use rights to investors in lieu of land sales.¹⁷ Although many investors claim that the land was either “virgin” or “underutilized” prior to acquisition, they often misleadingly equate unused land with fallow land.¹⁸ These land grabs therefore displace small landholders and take from them their means of food production and livelihood, as appropriated lands are often run by an expatriate management and labor force.¹⁹ Landholders are left with no effective access to legal or other remedies, and often develop physical and psychological injuries associated with eviction.²⁰ Within the geopolitical

¹⁵Narula, *supra* note 3, at 114. In fact, many investors negotiate directly with national-level political leaders, a discussion facilitated by the likes of the World Bank and IMF, even if these leaders do not have support of their local residents. Sarina Bhandari, *Gimme, Gimme More*, COLUM. POL. REV. (Dec. 16, 2012, 9:01 PM), <http://cpreview.org/2012/12/gimme-gimme-more/>.

¹⁶Bhandari, *supra* note 15. In fact, local populations rarely have a seat at the table. Jon Abbink, “Land to the Foreigners”: *Economic, Legal, and Socio-cultural Aspects of New Land Acquisition Schemes in Ethiopia*, 29 J. CONTEMP. AFR. STUD. 513, 514 (2011); Org. for Econ. Co-operation & Dev. [OECD], *Private Financial Sector Investment in Farmland and Agricultural Infrastructure*, at 7, TAD/CA/APM/WP (2010) 11/FINAL; *see also* Bhandari, *supra* note 15 (Because finding local seats of power is often inconvenient, foreign investors instead deal with political figures at the national level, who often prioritize their country’s financial concerns over the rights of small farmers.).

¹⁷Ernest Aryeetey & Zenia Lewis, *African Land Grabbing: Whose Interests Are Served?*, BROOKINGS (June 25, 2010), <http://www.brookings.edu/research/articles/2010/06/25-africa-land-aryeetey>.

¹⁸PEARCE, *supra* note 2, at 12. In fact, fallowing is essential in a system of mixed farming in order to maintain the integrity of the soil. *See* ERIC SHEPPARD ET AL., *A WORLD OF DIFFERENCE: ENCOUNTERING & CONTESTING DEVELOPMENT* 249 (2d ed. 2009) (“When farming systems expand into areas unsuited to them, or when farmers use the same system more heavily without meliorating actions to preserve soil fertility, the system becomes stressed and environmental deterioration results. Full recovery of former soil fertility at the end of fallow before the next planting is crucial.”). Nonetheless, the World Bank has conflated tracts of fallow land with unused or underused land, “declaring the existence of a vast ‘reserve’ of potentially ‘suitable’ land.” *THE GLOBAL LAND GRAB: A PRIMER* 5 (TNI Agrarian Justice Programme rev. ed. 2013), *available at* <http://www.tni.org/files/download/landgrabbingprimer-feb2013.pdf>; *see also* John Vidal, *How Food and Water Are Driving a 21st-Century African Land Grab*, *GUARDIAN*, Mar. 6, 2010, <http://www.theguardian.com/environment/2010/mar/07/food-water-africa-land-grab/> (“It is a myth propagated by the government and investors to say that there is waste[d] land or land that is not utilised in Gambella.”).

¹⁹*See* Abbink, *supra* note 16, at 519.

²⁰Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Basic Principles and Guidelines on Development-Based*

community at large, leaving small landholders with no legal recourse, large-scale land acquisitions can spark political instability.²¹

This Note will argue that to effectively vindicate the human rights of small landholders, the United States must regulate American investment through legislation that mandates disclosure. Part II discusses the drivers of African land grabs and the United States' interest in regulating disclosure of American investment in large-scale land acquisitions. Part III outlines the current state of small landholders' rights under international and U.S. law, including recent Dodd–Frank enactments mandating disclosure of Congolese conflict diamonds and mineral extraction. Part IV advances this Note's solution, comprising legislation similar to provisions in Dodd–Frank that would mandate disclosure for American investment in large-scale land acquisitions. Part V concludes that in order to effectively vindicate the human rights of Africa's small landholders, as well as support the interests of the United States, Congress must adopt legislation promulgating disclosure of large-scale land acquisitions.

II. SPECULATION, BIOFUELS & AGRIBUSINESS: HOW INCREASED FOOD INSECURITY HAS SPURRED AFRICAN LAND GRABS

Food security is one of the largest problems in the globalized world today. In 2011, the United Nations (U.N.) estimated that the number of “food-insecure” people totaled 861 million across seventy-seven developing

Evictions and Displacement, ¶ 21, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari) [hereinafter *Basic Principles*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement>. Francis Longoli says that he lost his livelihood and his societal status when the Ugandan government evicted him to make way for UK-based New Forests Company:

I remember my land, three acres of coffee, many trees—mangoes and avocados. I had five acres of bananas . . . two beautiful permanent houses. My land gave me everything. People used to call me “omataka”—someone who owns land. Now that is no more. I am one of the poorest now.

Vidal, *supra* note 12; see also Kevin Kelley, *Ethiopia: Locals Displaced in Flower Firm Land Grab*, ALLAFRICA (Jan. 29, 2012), <http://allafrica.com/stories/201201290051.html> (stating that state security forces, in enforcing displacements for an India-based flower exporter, were implicated in at least twenty rapes).

²¹ See Douglas Borer & Jason J. Morrisette, *Land Grabs, Radicalization, and Political Violence: Lessons from Mali and Beyond*, GLOBAL ECCO (Feb. 2013), <https://globalecco.org/ctx-vol.-3-no.-1-article-2#All> (“[G]overnments that choose to displace their citizens from their lands by the tens of thousands run the risk of creating aggrieved—and potentially volatile—populations . . .”); Samuel B. Mabikke, *Escalating Land Grabbing in Post-conflict Regions of Northern Uganda*, at ii (conference paper presented at the Land Deal Politics Initiative International Conference on Global Land Grabbing, Apr. 6–8, 2011) (“[G]iven the centrality of land to livelihoods and poverty reduction in post war torn areas, it is inevitable . . . that land may become a centre of disputes and controversy in post conflict [regions] . . .”).

countries.²² By 2050, the U.N. estimates that number will reach nine billion.²³ To ensure food security for the long term, the U.N. has proposed that small landholder farmer-led food availability be sustained.²⁴ However, for the reasons discussed below, it seems less and less likely that small farmers in Africa may continue to provide food domestically, as their land is increasingly bought out from under them, or otherwise expropriated.

Like many phenomena, the 2008 food crisis that led to a renewed interest in investment in foreign agriculture cannot be explained by a single factor. Underlying causes may include long-term underinvestment in agriculture, higher fuel prices, and increased demand for more resource-intensive food in emerging market countries.²⁵ Nevertheless, experts have pointed to four main forces that contributed to the food crisis, led to riots in over thirty countries, and brought land grabbing into the limelight.²⁶ First, trends such as those mentioned above may have led to excessive speculation in a newly growing commodities futures market, exacerbating shocks already placed on the market. Second, the developed world's newfound initiatives for renewable energy may have significantly contributed to an increased demand for biofuels. Third, corporations have responded to the First World's demand for "environmentally sustainable" policies with a phenomenon dubbed "green grabbing." Fourth, fear of rising prices may have led many resource-limited countries, as well as enterprising corporations in the United States, to acquire African farmland to grow additional food for export and profit.

²² U.N. ENV'T PROGRAMME, 21 ISSUES FOR THE 21ST CENTURY, at 17 (Feb. 2012) [hereinafter 21 ISSUES], available at http://www.unep.org/publications/ebooks/foresightreport/Portals/24175/pdfs/Foresight_Report-21_Issues_for_the_21st_Century.pdf. The U.S. Department of Agriculture, in its July 2012 assessment, puts the number of food-insecure people at 802 million worldwide in 2012, and at 839 million worldwide in 2022. U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD SECURITY ASSESSMENT, 2012-22, at 59 app. tbl.2 (2012), available at <http://www.ers.usda.gov/media/849266/gfa23.pdf>.

²³ 21 ISSUES, *supra* note 22. In 2010, the World Bank's conservative estimate was that six million hectares of additional land will be brought into production each year until 2030. See Olivier De Schutter, *Foreword* to FOREIGN LAND DEALS AND HUMAN RIGHTS, at iii (NYU Sch. of Law Ctr. for Human Rights & Global Justice 2010), available at <http://chrgj.org/wp-content/uploads/2012/07/landreport.pdf>.

²⁴ 21 ISSUES, *supra* note 22, at 18.

²⁵ Narula, *supra* note 3, at 109.

²⁶ United Nations Conference on Trade and Development, June 2009, *The 2008 Food Price Crisis: Rethinking Food Security Policies*, 15, U.N. Doc. UNCTAD/GDS/MDP/G24/2009/3 (by Anuradha Mittal); see also Frederick Kaufman, *The Food Bubble: How Wall Street Starved Millions and Got Away with It*, HARPER'S MAG., July 2010, at 28.

A. Excessive Speculation, by Artificially Inflating the Price of Food, Spurs Investment in African Land Acquisitions

For the better part of the last decade, excessive speculation²⁷ in agricultural commodities has been at least partly responsible for pushing food prices to thirty-year highs and causing sharp price fluctuations that have little to do with the actual supply of food.²⁸ In fact, speculative investment in agricultural commodities in 2011 amounted to twenty times more than the total spent on agricultural aid by all countries combined.²⁹ The ability of financial institutions to invest and speculate in agricultural commodities is in large part due to the United States' deregulation of commodity markets.

President Clinton signed the Commodity Futures Modernization Act of 2000 (CFMA), which allowed financial derivatives to be traded between financial institutions completely without government oversight.³⁰ Prior to

²⁷“Excessive speculation” is a condition of derivatives markets for consumable commodities where speculators become more dominant in the marketplace than physical commodity producers (such as farmers) and consumers (such as food manufacturers) themselves. *Regulatory Reform and the Derivatives Markets: Hearing Before the S. Comm. on Agric., Nutrition & Forestry*, 111th Cong. 12 (2009) [hereinafter Testimony of Masters] (statement of Michael W. Masters, Managing Member/Portfolio Manager, Masters Capital Mgmt., LLC).

²⁸A conservative estimate calculates an increase from \$65 billion to \$126 billion in “soft” agricultural commodities markets from 2007 to 2012. Grace Livingstone, *The Real Hunger Games: How Banks Gamble on Food Prices—And the Poor Lose Out*, INDEPENDENT (Apr. 1, 2012), <http://www.independent.co.uk/news/world/politics/the-real-hunger-games-how-banks-gamble-on-food-prices--and-the-poor-lose-out-7606263.html>. However, another calculation estimated that financial corporations and investors speculated around \$317 billion in crop prices in July 2008, compared with \$13 billion in 2003. See MOLLY D. ANDERSON, A QUESTION OF GOVERNANCE: TO PROTECT AGRIBUSINESS PROFITS OR THE RIGHT TO FOOD? 9 (2009), available at http://www.iatp.org/files/258_2_107086.pdf. The recent push for soft commodities has come from increased demand from emerging economies such as China and India, as well as increased demand for bioenergy. See *infra* Part II; see also Shepard Daniel, *Land Grabbing and Potential Implications for World Food Security*, in SUSTAINABLE AGRICULTURAL DEVELOPMENT 25, 28–29 (Mohamed Behnassi, Shabbir A. Shahid & Joyce D’Silva eds., 2011).

²⁹Kharunya Paramaguru, *Betting on Hunger: Is Financial Speculation To Blame for High Food Prices?*, TIME (Dec. 17, 2012), <http://science.time.com/2012/12/17/betting-on-hunger-is-financial-speculation-to-blame-for-high-food-prices/>. However, there are conflicting theories as to what extent speculation of agricultural commodities futures contributed to the food bubble. See, e.g., Scott H. Irwin et al., *Devil or Angel? The Role of Speculation in the Recent Commodity Price Boom (and Bust)*, 41 J. AGRIC. & APPLIED ECON. 377, 377 (2009).

³⁰See *The Regulation of OTC Derivatives: Hearing Before the H. Comm. on Banking & Fin. Servs.*, 105th Cong. (1998) (statement of Alan Greenspan, Chairman, Fed. Reserve), available at <http://www.federalreserve.gov/boarddocs/testimony/1998/19980724.htm> (“[T]he Board continues to believe that, aside from safety and soundness regulation of derivatives dealers under the banking or securities laws, regulation of derivatives transactions that are privately negotiated by professionals in unnecessary.”). For a

passage, the commodities markets were composed of actual commodities consumers, such as airlines and gasoline marketers seeking to buy futures to insure themselves against changes in the prices of agricultural products.³¹ However, after the CFMA passed, financial institutions constituted over sixty percent of the market,³² and from 2006 to 2010, seventy percent of the Chicago Board of Trade's wheat contracts were controlled by financial speculators.³³ Requirements such as speculative position limits, large trader reporting, and exchange recordkeeping were no longer monitored.³⁴ The influx of buying pressure from the financial institutions that now dominated the market led to increased prices.³⁵ Hyper-speculation sent the price of food skyrocketing—so much so, in fact, that the future price of wheat came to *equal* the spot price of wheat, and kept rising, a phenomenon referred to as “contango”³⁶—without speculators ever buying the underlying product. To quote Paul Krugman, “[T]he signature of large-scale speculation is clearly visible.”³⁷

The repercussions of excessive speculation continue to be felt around the world. Here in the United States, consumers feel effects of speculative activity

comprehensive analysis of “the transformation of derivatives markets and the legislative response,” see MARK JICKLING, CONG. RESEARCH SERV., RL30434, THE COMMODITY FUTURES MODERNIZATION ACT OF 2000: DERIVATIVES REGULATION RECONSIDERED (2003).

³¹ Paramaguru, *supra* note 29. Goldman Sachs was at the forefront of this seemingly brilliant but disastrous speculation in commodities. In 1991, Goldman Sachs created the “Goldman Sachs Commodity Index” (GSCI), a basket of goods including cattle, cocoa, hogs, coffee, and wheat, and offered it as an investment. See Frederick Kaufman, *How Goldman Sachs Created the Food Crisis*, FOREIGN POL’Y (Apr. 27, 2011), http://www.foreignpolicy.com/articles/2011/04/27/how_goldman_sachs_created_the_food_crisis. However, Goldman Sachs was far from the only large player speculating in agricultural commodities. Barclay’s and Morgan Stanley were also heavily involved. See Tom Bawden, *Barclays Makes £500m Betting on Food Crisis*, INDEPENDENT (Sept. 1, 2012), <http://www.independent.co.uk/news/business/news/barclays-makes-500m-betting-on-food-crisis-8100011.html>.

³² Paramaguru, *supra* note 29.

³³ Steve Suppan, *Dodd–Frank Position Limits on Commodity Contracts: Round 2*, INST. FOR AGRIC. & TRADE POL’Y (Nov. 14, 2013), <http://www.iatp.org/blog/201311/Dodd-Frank-position-limits-on-commodity-contracts-round-2> (citing DAVID FRENK & WALLACE TURBEVILLE, COMMODITY INDEX TRADERS AND BOOM/BUST CYCLE IN COMMODITIES PRICES 7, 8 chart 2 (2011)).

³⁴ *Reform of the Commodity Exchange Act: Hearing Before the S. Comm. on Agric., Nutrition & Forestry*, 105th Cong. 7 (1997) (statement of Brooksley Born, Chairperson, Commodity Future Trading Comm’n) (“The bill would eliminate all the protections of the act that Congress has adopted over the years, except for its prohibitions on fraud and manipulation. Indeed, the Commission that it would lose virtually all the regulatory tools necessary for effective enforcement of even those protections.”).

³⁵ See Testimony of Masters, *supra* note 27.

³⁶ *Contango Definition*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/c/contango.asp> (last visited Mar. 17, 2013).

³⁷ Paul Krugman, *Oil Speculation*, posting to *The Conscience of a Liberal*, N.Y. TIMES (July 8, 2009, 9:01 AM), <http://krugman.blogs.nytimes.com/2009/07/08/oil-speculation/comment-page-2/>.

in commodities markets by paying more for essentials such as electricity³⁸ and gasoline.³⁹ But as investors—just hit with the subprime-mortgage crisis— withdrew funds from bond markets, many invested in agricultural commodities futures.⁴⁰ As a result, food riots took place in over thirty countries between 2007 and 2008.⁴¹ The disruption of the U.S. grain market was so acute that the Senate Committee on Homeland Security and Governmental Affairs conducted an investigation into whether speculation in the wheat markets may have posed a threat to interstate commerce and national security.⁴² At these hearings, experts testified that as a result of this speculation, food and energy prices had doubled or even tripled, leading to starvation and social unrest around the world.⁴³ To ensure that “asset allocation decisions by institutional investors

³⁸The U.S. Federal Regulatory Commission (FERC) investigated JPMorgan through May 2013 for possible market manipulation of electricity markets in Michigan and California in 2010 and 2011. Scott Disavino, *U.S. May Charge JPMorgan for Power Market Manipulation: Analysts*, REUTERS (May 3, 2013), <http://www.reuters.com/article/2013/05/03/us-utilities-ferc-jpmorgan-idUSBRE94210120130503>. They settled the next month for 410 million dollars. Ryan Tracy & Dan Fitzpatrick, *J.P. Morgan Settles Electricity-Market Case, Bank To Pay \$410 Million over Allegations of Manipulating Prices*, WALL ST. J. (July 30, 2013), <http://online.wsj.com/news/articles/SB10001424127887324170004578637662037547582>.

³⁹The CFMA had the effect of linking gas prices to the stock market. This relationship caused gas prices to spiral up when financial investors infused money into oil futures, which decreased the supply of oil currently being brought to market, increasing the price, and vindicating the investors who had bought futures. John T. Harvey, *Why Gas Prices Are Rising . . . Again!*, FORBES (Mar. 9, 2013, 11:03 AM), <http://www.forbes.com/sites/johntharvey/2013/03/09/why-gas-prices-are-rising/>. Bart Chilton, Commissioner of the CFTC, acknowledged that “[s]peculators . . . certainly have an effect on prices . . . and American consumers and taxpayers are shouldering that burden.” Bart Chilton, Comm’r, U.S. Commodity Futures Trading Comm’n, *Speculators and Commodity Prices—Redux* (Feb. 24, 2012), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement022412>. Off of a Goldman Sachs study that estimated speculation drove up the price of a barrel of crude oil eight to ten cents, Chilton calculated a “speculative premium” of \$7.39 for a tank of gas for a Honda Civic, a \$10.46 premium to fill up a Ford Explorer’s gas tank, and a \$14.56 premium for a Ford F-150. *Id.*

⁴⁰See Jaya Ramachandran, *How European Banks Fuel Hunger*, INDEPTHNEWS (Jan. 11, 2012), <http://www.indepthnews.info/index.php/global-issues/665-how-european-banks-fuel-hunger>. The U.N. Food and Agricultural Organization and the World Bank monitor worldwide food prices, and reported a price increase of fifty-six percent between January 2007 and June 2008. *Id.*

⁴¹Yaneer Bar-Yam & Greg Lindsay, *The Real Reason for Spikes in Food Prices*, REUTERS (Oct. 25, 2012, 3:00 AM), <http://blogs.reuters.com/great-debate/2012/10/25/the-real-reason-for-spikes-in-food-prices/>.

⁴²See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS & S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 111TH CONG., *EXCESSIVE SPECULATION IN THE WHEAT MARKET* (2009), available at <http://www.hsgac.senate.gov/imo/media/doc/REPORTExcessiveSpeculationintheWheatMarketwoexhibitchartsJune2409.pdf?attempt=2>.

⁴³Rising food prices are felt acutely in the very places where land grabs occur. Poor consumers in the Global South spend typically upwards of sixty percent of their household budget on food. Livingstone, *supra* note 28.

[would] never [again] trump human rights,”⁴⁴ experts argued that the commodities derivatives market needed additional regulations, including aggregate speculation position limits.⁴⁵ Indeed, “[t]here is strong evidence that speculation exacerbated the last oil and food bubble. Speculation will fuel the next one too, unless meaningful speculative position limits are established.”⁴⁶ The CFTC has just recently initiated the rulemaking process with respect to position limits under Dodd–Frank,⁴⁷ which will undoubtedly spur a contentious debate among interest groups. Whatever the regulatory outcome, since agricultural commodities speculation contributes to volatile and, on average, higher food prices, investors have turned to large-scale land acquisitions in Africa to either ensure a supply of food security, or to hedge against increasing food prices.

B. *New Regulations Mandating Biofuels Increase Demand for African Land Acquisitions*

Over half of all large-scale land acquisitions in the hands of international investors are utilized to harvest biofuels.⁴⁸ By some accounts, biofuels are the

⁴⁴ Testimony of Masters, *supra* note 27, at 19.

⁴⁵ *Id.* at 18–19.

⁴⁶ Letter, Sir Richard Branson, Michael Masters & David Frenk, *Swaps, Spots and Bubbles*, *ECONOMIST*, July 29, 2010, <http://www.economist.com/node/16690679>.

⁴⁷ See Position Limits for Derivatives, 78 Fed. Reg. 75680 (Dec. 12, 2013).

⁴⁸ See *Land Grabs in Africa—A Double-Edged Sword*, *AFRICANGLOBE* (Nov. 9, 2013), <http://www.africanglobe.net/business/land-grabs-africa-double-edged-sword/>. But to say that fifty percent of all large-scale land acquisitions are used to farm biofuels, is probably a conservative estimate. Laurie Tuffrey, *Biofuels Not Food the Biggest Driver of “Land Grabbing” Deals, Says Report*, *ECOLOGIST* (Dec. 18, 2011), http://www.theecologist.org/News/news_analysis/1169447/biofuels_not_food_the_biggest_driver_of_land_grabbing_deals_says_report.html. However, it is hard to account for crops used for biofuels since many crops are dubbed “flex crops” (for either biofuel or food consumption) or “multiple use” crops. When added to a calculation of “non-food” crops, this number may reach as high as seventy-six percent. See ANSEEUW ET AL., *supra* note 7, at 28. For the policy behind the United States’ role in developing biofuels, see Harry de Gorter & David R. Just, *The Social Cost and Benefits of US Biofuel Policies*, in NATIONAL AGRICULTURAL BIOTECHNOLOGY COUNCIL REPORT 20: RESHAPING AMERICAN AGRICULTURE TO MEET ITS BIOFUEL AND BIOPOLYMER ROLES 157, 158 (Allan Eaglesham, Steven A. Slack & Ralph W.F. Hardy eds., 2008), available at http://nabc.cals.cornell.edu/pubs/nabc_20/NABC20_Part_3_4b-DeGorter.pdf. Biofuels have three policy objectives: to reduce dependence on oil, to improve the environment, and to improve farm incomes. *Id.* To that end, tax credits, mandates, import tariffs, and production subsidies for ethanol and corn incentivize this behavior. *Id.*; see also Sophia Murphy & Timothy A. Wise, *A Year of Squandered Opportunities To Resolve the Food Crisis*, *INST. FOR AGRIC. & TRADE POL’Y* 2 (Jan. 31, 2013), http://www.iatp.org/files/2013_03_05_EPWFoodCrisis_SM_TW.pdf (“At the end of 2011, the United States ended two important biofuel support programs: the tariff on imported ethanol and the blender tax credit that subsidized the use of ethanol from maize. These were positive reforms, but the Renewable Fuel Standard (RFS) mandates remain in place.”). However, as a general matter, the United States produces much of its biofuel

major driver behind large-scale land acquisitions in the developing world, including Africa, accounting for almost sixty-six percent of the acreage.⁴⁹ Biofuels are processed fuels derived from living matter, including plants, animals, fungi, and bacteria.⁵⁰ Of the crops planted for biofuels, “flex” crops, which can be used for either biofuels or food, including soya, palm oil, and sugar cane, are especially popular.⁵¹ In a volatile energy market, these crops can be sold as whichever commodity yields the most profit.⁵² These biofuels may be consumed by the European Union (E.U.), which resolved that biofuel will comprise ten percent of all transportation fuels.⁵³ To date, European biofuel companies have acquired or are in negotiations to acquire ten million acres in Africa.⁵⁴ Even so, the E.U. will need to quadruple its acquisitions to meet its 2015 goal, estimated to require forty-three million acres of land.⁵⁵

Sovereigns outside of the E.U. are also investing in large tracts of land to farm biofuels. China executed a contract with the Democratic Republic of Congo to grow seven million acres of palm oil for biofuels.⁵⁶ South Korea sought a deal with Madagascar to acquire nearly half of the country’s arable land, but the negotiations fell apart due to heavy rioting.⁵⁷ At the present rate, it seems that investment of biofuels is in “the vogue” and will continue to play a

domestically, largely from corn. *See generally* U.S. ENERGY INFO. ADMIN., BIOFUELS ISSUES AND TRENDS (2012), available at <http://www.eia.gov/biofuels/issuestrends/pdf/bit.pdf>.

⁴⁹ Tuffrey, *supra* note 48.

⁵⁰ Sonja Vermeulen & Lorenzo Cotula, *Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa*, 37 J. PEASANT STUD. 899, 899 (2010).

⁵¹ *See* Tuffrey, *supra* note 48.

⁵² *Id.* For example, the African palm is primarily used to produce cooking oil, but it can be used in processed food manufacturing, biodiesel refineries, and cosmetics. Adrian Sinkler, Accumulation by Reconversion in Southern Mexico 11 (unpublished conference paper, presented at the International Conference on Global Land Grabbing II, Cornell University, Oct. 17–19, 2012), available at <http://www.cornell-landproject.org/download/landgrab2012papers/sinkler.pdf>.

⁵³ Council Directive 2003/30/EC, art. 1, 2003 O.J. (L 123) 42, 44; EUROPEAN BIODIESEL BD., EBB POSITION PAPER ON THE COMMISSION PROPOSAL FOR A NEW DIRECTIVE ON RENEWABLE ENERGIES REVISING DIRECTIVE 2003/30 ON THE PROMOTION OF BIOFUELS (2008); Robert Wielaard, *Report: EU’s Biofuel Drive Causes Africa Land Grab*, BLOOMBERG BUSINESSWEEK (Aug. 30, 2010, 12:50 PM), <http://www.businessweek.com/ap/financialnews/D9HTU2IG0.htm> (“The [E.U.’s] target of ensuring that 10 percent of its transport fuel come from renewable sources in the next decade is at the heart of the drive to turn tracts of African land into plantations for production of crops for such fuels . . .”).

⁵⁴ John Vidal, *Billionaires and Mega-corporations Behind Immense Land Grab in Africa*, ALTERNET (Mar. 9, 2010), <http://www.alternet.org/story/145970/>.

⁵⁵ *Id.* The United States has a similar, if somewhat less ambitious goal to increase use of biofuels. The U.S. Renewable Fuel Standard aims to increase ethanol use by 3.5 billion gallons between 2005 and 2012 (much of it U.S.-produced corn). Daniel, *supra* note 28, at 27.

⁵⁶ Vidal, *supra* note 54; *see also* LESTER R. BROWN, WORLD ON THE EDGE: HOW TO PREVENT ENVIRONMENTAL AND ECONOMIC COLLAPSE 65 (2011).

⁵⁷ Vidal, *supra* note 54.

prominent role in African land grabs.⁵⁸ Because more land allocated to the production of biofuels means less land left for food production (no less domestic food production for Africans), an unchecked market for African-made biofuels will be disastrous for African small farmers.⁵⁹ If investors continue to negotiate with state governments without first acknowledging and providing for the human rights of the local landholders, these landholders will continue to be marginalized and exploited.

C. “Green Grabbing” Appropriates Land and Resources for “Environmental” Ends

In addition to promoting efficiency in harvesting biofuels, international investors covet large-scale land acquisitions “to alleviate pressure on forests”⁶⁰ or otherwise carry out “sustainable” environmental policies. This subset of land grabbing, dubbed “green grabbing” by experts in the field, involves the appropriation of land and resources for Western-conceived and defined “environmental ends,”⁶¹ in which “environmental agendas are the core drivers.”⁶² “Green grabbing” may include biocarbon sequestration, biodiversity conservation, the protection of ecosystem services, and ecotourism.⁶³

Key actors in the “green grabbing” market include business entrepreneurs seeking to profit from “waves of green capitalism.”⁶⁴ For example, the Kyoto Protocols, adopted in 1997 and enforced beginning in 2005, created a multibillion-dollar market for the trade of carbon credits,⁶⁵ which in turn created “mechanisms for outsourcing environmental protection to developing

⁵⁸ Kaufman, *supra* note 26, at 34.

⁵⁹ For a colorful, if hyperbolic, perspective on biofuel policy in the face of societal inequality, see George Monbiot, *Must the Poor Go Hungry Just so the Rich Can Drive?* GUARDIAN (Aug. 13, 2012, 3:50 PM), <http://www.guardian.co.uk/commentisfree/2012/aug/13/poor-hungry-rich-drive-mo-farah-biofuels> (in which the West exchanges its overconsumption of oil for similar overconsumption in crop-based fuels, and in which the “result is a competition between the world’s richest and poorest consumers, a contest between overconsumption and survival”).

⁶⁰ James Fairhead et al., *Green Grabbing: A New Appropriation of Nature?*, 39 J. PEASANT STUD. 237, 237 (2012).

⁶¹ *Id.* at 238.

⁶² *Id.* at 239.

⁶³ *Id.*

⁶⁴ *Id.* at 250.

⁶⁵ Essentially, “[p]rojects involving the establishment of carbon ‘sinks,’ or natural reservoirs for carbon dioxide such as trees, soil, and the ocean, are eligible for generating credits under the CDM [Clean Development Mechanism]” *Kyoto Protocol: Clean Development Mechanism (CDM) and Joint Implementation (JI)*, ECOSYSTEM MARKETPLACE, http://www.ecosystemmarketplace.com/pages/dynamic/web.page.php?section=carbon_market&page_name=kyoto_market (last visited Mar. 17, 2014).

nations.”⁶⁶ To assist Kyoto-bound countries to cut their net emissions, corporations sell carbon credits generated from large-scale land acquisitions to transnational “polluters.” But these large-scale land acquisitions, even when in the name of “environmentalism,” often displace small landholders from their livelihoods. For example, in an effort to curb (and profit from) perceived harmful effects of climate change, England-based New Forests Company (NFC) grows pine and eucalyptus forests in Uganda, selling off its carbon credits at a premium.⁶⁷ NFC enjoys prominent investors, such as the World Bank, HSBC, and the European Investment Bank (EIB), the E.U.’s financing institution.⁶⁸ Over a thousand villagers from the forested area have filed suit against the corporation, alleging that armed troops, on behalf of NFC, forcibly evicted some 22,500 villagers, burning their homes, destroying their crops, butchering their livestock, and killing an 8-year-old boy in the process.⁶⁹ Oxfam corroborates these reports.⁷⁰ For its part, NFC says that the villagers were illegal squatters who were moved off the land in a “peaceful” and “voluntary” manner.⁷¹

The commoditization of land to further “environmental” purposes displaces villagers who rely on the land, and disrupts the ecosystem. Ecotourism schemes in Tanzania have displaced Masai pastoralists, while private companies market “the wildlife values of ecotourism.”⁷² And forest carbon schemes prohibit local access to land use, since projected carbon outputs must remain unaltered.⁷³ As such, the United States should not condone or be persuaded by the “moral weight of a discursively-constructed global green agenda [to] legitimize[] the appropriation of land” from the world’s poorest communities to enterprising international investors.⁷⁴ The international community should not advocate for carbon credits to remedy air pollution when it comes at the expense of

⁶⁶ Josh Kron, *In Scramble for Land, Group Says, Company Pushed Ugandans Out*, N.Y. TIMES, Sept. 21, 2011, http://www.nytimes.com/2011/09/22/world/africa/in-scramble-for-land-oxfam-says-ugandans-were-pushed-out.html?_r=0.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See MATT GRAINGER & KATE GEARY, *THE NEW FORESTS COMPANY AND ITS UGANDA PLANTATIONS* 2–3 (2011), available at <http://www.oxfam.org/en/grow/policy/new-forests-company-uganda-plantations-oxfam-case-study>. The villagers “say they were not properly consulted, have been offered no adequate compensation, and have received no alternative land.” *Id.* at 3.

⁷¹ Kron, *supra* note 66. Some Ugandan villagers, with nowhere to go and no way to make a living, have since taken jobs with the NFC. Although they were promised \$100 per month, they receive only \$30 a month. *Id.*

⁷² Joanna M. Foster, *Q.&A.: The Underside of “Green” Transactions*, N.Y. TIMES GREEN BLOG (June 20, 2012), <http://green.blogs.nytimes.com/2012/06/20/q-and-a-the-dark-side-to-green-transactions/> (interviewing Melissa Leach, director of the Social, Technological and Environmental Pathways to Sustainability Center).

⁷³ *Id.*

⁷⁴ Fairhead et al., *supra* note 60, at 251.

systematically displacing thousands of small landholders. To do so is unacceptable, and those countries concerned with human rights as well as their respective environmental footprints, including the United States, need “to put limits on the extent to which money comes to drive the ways we are thinking about people and ecosystems . . . [T]here are some things we need to recapture from the market’s grasp.”⁷⁵ To solve international climate issues and create a sustainable environment for both Kyoto-adherents and the poorest of the poor, the United States must recognize and champion local knowledge, stewardship, and cultural practices, instead of marginalizing and replacing rural landholders.⁷⁶

D. Food Security and Possibility of Large Profits Lead to a Boom in African Agribusiness

With the advent of the globalization of the food market in the early twenty-first century, investors in agribusiness started looking to the Global South to lower costs and ensure long-term viability of supplies through direct investment in “unused” farmland.⁷⁷ Even universities such as Harvard and Vanderbilt invested endowment funds in agribusiness.⁷⁸ But until 2009, investment in agricultural production remained a negligible share of total direct investment in developing countries.⁷⁹

With the food crisis of 2008, increased volatility of agricultural commodities prices on international markets and the merger between energy and food commodities markets led to a sudden surge of interest in the acquisition of farmland in developing countries as the world became more food insecure than ever before.⁸⁰ Between 2005 and 2008, the price of food worldwide rose by eighty percent.⁸¹ Although consumers felt the rise in food prices most acutely in the Global South, including Africa,⁸² the food crisis

⁷⁵ Foster, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ De Schutter, *supra* note 4, at 512.

⁷⁸ Both Vanderbilt University and Harvard University invested in EMVest, an agricultural corporation with farms in Mozambique, South Africa, Swaziland, Zambia, and Zimbabwe. However, Vanderbilt’s student body protested the \$26 million investment after reports that villagers at one of the farms directly operated by EMVest did not consent to the land transfer nor received any legal written notice. Vanderbilt soon divested its funds. See *Vanderbilt University Divests from “Land Grab” in Africa*, RESPONSIBLE ENDOWMENTS COALITION (Feb. 15, 2013), <http://www.endowmentethics.org/vanderbilt-university-divests-from-land-grab-in-africa/>; see also John Vidal & Claire Provost, *US Universities in Africa “Land Grab,”* GUARDIAN, June 8, 2011, <http://www.guardian.co.uk/world/2011/jun/08/us-universities-africa-land-grab>.

⁷⁹ De Schutter, *supra* note 4, at 512.

⁸⁰ *Id.* at 504.

⁸¹ Kaufman, *supra* note 26, at 34.

⁸² De Schutter, *supra* note 4, at 514.

touched the United States as well, where forty-nine million Americans were deemed “food insecure.”⁸³

The food crisis changed the fundamental purpose of foreign investment in African farmland. Since 2008, investment strategy has been shaped more and more by food, water, and energy production. “The current land purchase and lease arrangements are largely about shifting land and water users from local farming to essentially long-distance farming to meet home state food and energy needs. It is, in practice, purchasing food production facilities.”⁸⁴

The most prominent actors acquiring land in Africa for purposes of food production come from the Gulf States.⁸⁵ Nonetheless, American agribusiness is implicated in large-scale land acquisitions as well. A Saudi hedge fund, Pharos Finance Group, is paying \$100 million to Texan Bruce Rastetter of Agrisol to turn a ninety-nine-year lease on three refugee camps in Tanzania “into a replica of the American Midwest.”⁸⁶ As countries seek out “food-production facilities” for export to their home country, local populations in Africa are left with less and less farmland on which to grow their own food. As a matter of human rights, it is unconscionable that American investors are buying land out from under small landholders.⁸⁷

E. The Harmful Effects of Land Grabbing Necessitate U.S. Intervention

Proponents of large-scale land acquisitions argue that they have the potential to produce a “win-win-win” solution vis-à-vis local communities, host governments, and foreign investors.⁸⁸ Local communities, the argument goes,

⁸³ Kaufman, *supra* note 26, at 28.

⁸⁴ De Schutter, *supra* note 4, at 517 (quoting Howard Mann & Carin Smaller, *Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?*, SUSTAINABLE DEV. INNOVATION BRIEFS, Jan. 2010, at 1, 1–2); *see also* ANSEEUW ET AL., *supra* note 7, at 10.

⁸⁵ The Saudi Agricultural Investment Board, initiated by King Abdullah, announced in 2008 that the Saudi Industrial Development Fund had granted credit to numerous sheikhs to buy farmland valued at \$800 million. PEARCE, *supra* note 2, at 32. Much of this investment went to Africa. Prince Sultan Al Kabeer bought a 48-year lease to grow wheat on 22,000 irrigated acres on the banks of the Nile in Southern Sudan. *Id.* In Senegal, to the protest of local herders, the Saudis acquired 400,000 hectares of land along the River Senegal. *Id.* at 33. It is rumored that the contract provides that seventy percent of the rice yield is exclusively for Saudi Arabia. *Id.* Upstream, the President of Mauritania promised the Saudis 100,000 acres of farmland on the River Senegal. *Id.* at 34.

⁸⁶ *Id.* at 37–38.

⁸⁷ And as a matter of international diplomacy, American investment in land grabs may be equally unwise. *See* Susan Rice’s analysis of poverty-borne threats to national security, *infra* note 104.

⁸⁸ De Schutter, *supra* note 4, at 520; *see also* Joachim von Braun & Ruth Meinzen-Dick, “Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities, IFPRI POL’Y BRIEF, Apr. 2009, at 1, available at <http://www.ifpri.org/sites/default/files/publications/bp013all.pdf> (outlining the potential benefits of land grabs, such as agricultural investment and capital development in rural areas, as well as concerns about the

could benefit from newly created employment opportunities and improved food security.⁸⁹ The host government could benefit from greater certainty in revenue collection from investor taxes and export tariffs.⁹⁰ Investors could benefit from a stable supply of agricultural commodities, whether this serves the global markets, or food security at home.⁹¹

But, as illustrated above,⁹² the effects of land grabbing on small landholders as it exists currently are virtually never advantageous. Take the well-documented example of Saudi Star's land investments in Ethiopia. In 2011, Saudi Star PLC acquired 25,000 acres of fertile farmland over a sixty-year lease from the government for rice export to the Middle East.⁹³ Though Saudi Star promised to use "specialized techniques" to minimize the amount of water required for farming and allocate some rice for sale on domestic markets, fulfillment of these promises has proven to be tenuous.⁹⁴ Even worse, though the Ethiopian government claimed that no farmers were displaced as a result of the transaction, investigations reveal that government actors actively worked to remove communities from land prime for commercial agriculture.⁹⁵ In all, approximately 135,000 households were relocated as a result of land acquisitions in Ethiopia.⁹⁶

The present state of large-scale land acquisitions almost always entails taking land away from small landholders. Land classified as "available" by states and investors is rarely unused, and land that is deemed "underutilized" probably provides sustenance to the surrounding population.⁹⁷ So although there is a possibility of mutual benefit from investment in African land, the

poor's continuing access and control of the land); *cf.* Da Vià, *supra* note 3, at 19 ("The politics of win-win narratives on land grabs reflects the attempt to re-legitimize a specific model of agricultural development brought about by three decades of neoliberalism. . . . In this respect, what is being promoted is . . . simply agribusiness development." (internal quotations omitted)).

⁸⁹ De Schutter, *supra* note 4, at 520.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *supra* Parts II.A–C.

⁹³ OAKLAND INST., UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA: SAUDI STAR IN ETHIOPIA 1 (2011), available at http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_SaudiStar_Brief.pdf; see also William Davison, *Saudi Billionaire's Company Will Invest \$2.5 Billion in Ethiopia Rice Farm*, BLOOMBERG (Mar. 23, 2011), <http://www.bloomberg.com/news/2011-03-23/saudi-billionaire-s-company-will-invest-2-5-billion-in-ethiopia-rice-farm.html>.

⁹⁴ OAKLAND INST., *supra* note 93.

⁹⁵ Narula, *supra* note 3, at 113; see also Taflin Laylin, *Saudi Star Among Firms Behind Thousands of Forced Relocations in Ethiopia*, GREEN PROPHET (Jan. 24, 2012), <http://www.greenprophet.com/2012/01/saudi-star-ethiopia/> ("American resident Magn Nyang told the BBC that his mother was forcibly re-settled from a village . . . to a camp. When the investors came in they took over the land and they [the villagers] were kicked out . . .") (internal quotations omitted).

⁹⁶ OAKLAND INST., *supra* note 93, at 2.

⁹⁷ Narula, *supra* note 3, at 145.

benefits very rarely accrue to the small landholders, who are often displaced without means for a livelihood. Understanding why, even when executed in good faith, these land deals hurt indigenous farmers requires analysis of a few faulty assumptions.

First, host governments rarely enter into land acquisition deals with a long-term view of economic sustainability, instead basing transfers on investor demands without development strategies.⁹⁸ Governments often do not have the bargaining power, or otherwise choose not to tax foreign investors, so especially when mechanized machinery excludes locals from retaining employment, local communities rarely reap any economic benefit from the investment.⁹⁹ Even worse, host governments often fail to secure a portion of the produce for their citizens so that the investor has full discretion as to where and how he sells the food, with the international market virtually always offering a higher price.¹⁰⁰ Ultimately, the mutually beneficial scenario assumes that foreign investors can make more efficient, and therefore better, use of the land than can small landholders, and therefore schemes supporting small farmers should be sacrificed in the name of bigger business. Making these assumptions may prove to be costly to African states. However, through regulating and disclosing large-scale land acquisitions in which U.S. corporations are implicated, U.S. companies will have to answer to their shareholders and the American public about the mechanisms by which they acquire and maintain their agricultural investments, including any potential human rights violations.

F. The United States Has an Interest in Vindicating Human Rights and Securing Political Stability Worldwide

Although at first glance land grabbing may look like an isolated problem, the United States is implicated in both its causes and effects. Many acquisitions resulting in the eviction and displacement of small landholders are the result of American corporate investment.¹⁰¹ Many evictions violate internationally recognized human rights, and the United States has on numerous occasions pledged to uphold the human rights of international peoples.¹⁰² Therefore, the

⁹⁸ De Schutter, *supra* note 4, at 556–57; *see also* Aryeetey & Lewis, *supra* note 17 (“Unfortunately, many land lease contract provisions tend to lack substantive details for enforcement. Thus, the anticipated benefits may not necessarily be provided.”).

⁹⁹ De Schutter, *supra* note 4, at 520.

¹⁰⁰ *Id.*

¹⁰¹ The Land Matrix web portal maps international investments in large-scale land acquisitions worldwide. As of April 1, 2014, American individuals or companies have invested in acquisitions in Cameroon, Democratic Republic of Congo, Ethiopia, Ghana, Guyana, Kenya, Mali, Mozambique, Rwanda, South Sudan, Sierra Leone, and United Republic of Tanzania. *See Global Max of Investments, LAND MATRIX*, <http://landmatrix.org> (last visited Mar. 18, 2014). This, however, is not to say that any particular transaction resulted in the eviction or displacement of small landholders—it is merely to illustrate the extent to which the United States is involved in the epidemic.

¹⁰² *See infra* Part III.B.

United States has a moral obligation to regulate its investors' African land acquisitions, just as we have recognized similar human rights-based obligations in the past, such as regulating conflict diamonds and mineral extraction.¹⁰³

In addition, the United States has an interest in securing political stability worldwide—stability that is directly threatened by large-scale land acquisitions. Systematic evictions and widespread poverty can create an environment in which security threats are more likely to develop.¹⁰⁴ Although riots and upheavals have been largely local to date,¹⁰⁵ “developing country governments that fail to protect the rights of those using communally held land could spark civil unrest.”¹⁰⁶ The current U.S. Ambassador to the U.N., Susan Rice, has concluded, “In the twenty-first century, poverty is an important driver of transnational threats.”¹⁰⁷ As such, it is imperative that the United States acknowledges its role in African land grabs, and takes measures to regulate American investment in the region.

III. THE PRESENT STATE OF SMALL LANDHOLDERS' RIGHTS

A. International Provisions Call for Vindication of Small Landholders' Human Rights

Large-scale land acquisitions by Western entities, including American corporations, can violate small landholders' human rights, as recognized by international law.¹⁰⁸ Through greater security in land holdings and just compensation for any transfer, local smallholders have a greater capacity to achieve human rights such as the right to food and the right to shelter.¹⁰⁹ The

¹⁰³ See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502, 1504, 124 Stat. 1386 (2010); see also *infra* Part V.C.

¹⁰⁴ SUSAN E. RICE, CORINNE GRAFF & CARLOS PASCUAL, *CONFRONTING POVERTY: WEAK STATES AND U.S. NATIONAL SECURITY* 5–6 (2010) (“[G]lobal poverty is not solely a humanitarian concern. Over the long term, it can threaten U.S. national security It creates conditions conducive to transnational criminal and terrorist activity [and] can also give rise to tensions that can erupt into full-blown civil conflict”).

¹⁰⁵ See *supra* note 26 and accompanying text; see also James Pomfret, *Thousands Riot in South China over Land Grabs: Report*, REUTERS (Sept. 22, 2011), <http://www.reuters.com/article/2011/09/23/oukwd-uk-china-guangdong-riot-idAFTRE78M06820110923>; *India Can Expect Rising Civil Unrest as Result of Massive Land Grab by Investors for Commercial Projects*, NEW KARALA (Dec. 18, 2012), http://www.newkerala.com/news/news_plus/worldnews-118410.html#.UUS92rRDn6k.

¹⁰⁶ Claire Provost, *Global Land Grab Could Trigger Conflict, Report Says*, GUARDIAN, Feb. 2, 2012, <http://www.theguardian.com/global-development/2012/feb/02/global-land-grab-trigger-conflict-report>. In addition to land acquisitions being a key factor in triggering civil war in Sudan, Liberia, and Sierra Leone, “there is every reason to be concerned that conditions are ripe for new conflicts to occur in many other places.” *Id.*

¹⁰⁷ RICE ET AL., *supra* note 104, at 6.

¹⁰⁸ Narula, *supra* note 3, at 111.

¹⁰⁹ Vermeulen & Cotula, *supra* note 50, at 900.

U.N. has set forth principles that promulgate recognition of smallholders' right to land based in solid international law in which "[f]orced evictions constitute prima facie violations of a wide range of internationally recognized human rights."¹¹⁰ Displacements included in the definition may be linked to development and infrastructure projects or land acquisition measures.¹¹¹ More broadly, the right to shelter and the freedom from forced evictions implicates rights to adequate housing, food, livelihood, work self-determination, and security of the person and home and the sustenance of common property resources.¹¹² Since evictions disenfranchise local people in such widespread ways, there are numerous corresponding human rights provisions that disallow the government's ability to evict populations of peoples.

In addition, the International Covenant on Economic, Social, and Cultural Rights mandates that party states "recognize the right of everyone to an adequate standard of living...including adequate food, clothing and housing."¹¹³ Similarly, the African Charter on Human and Peoples' Rights protects the right to property under Article 14, that the right to property shall be "guaranteed," and may "only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."¹¹⁴

The World Bank and the U.N. have enacted provisions specifically regarding the human rights violations directly associated with land grabs. The World Bank's proposal, the Principles for Responsible Agricultural Investment (RAIs), comprises a list of seven principles that investors may adhere to when acquiring farmland on a large scale.¹¹⁵ These principles purportedly lead to a

¹¹⁰ U.N. Secretary-General, *The Realization of Economic, Social and Cultural Rights*, ¶ 2, U.N. Doc. E/CN.4/Sub.2/1997/7 (July 2, 1997), available at [http://www.unhchr.ch/huridoca/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1997.7.En?Opendocument](http://www.unhchr.ch/huridoca/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1997.7.En?Opendocument). An eviction, as defined in the Basic Principles and Guidelines on Development-Based Evictions and Displacement, applies to any acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal and other protection. *Basic Principles*, *supra* note 20, art. I ¶ 4.

¹¹¹ *Basic Principles*, *supra* note 20, ¶ 8.

¹¹² *Id.* ¶ 30.

¹¹³ International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), ¶ 4, U.N. Doc. A./RES/2200A/XXI (Dec. 16, 1966).

¹¹⁴ Org. of African Unity, African Charter on Human and Peoples' Rights art. 14, OAU Doc. CAB/LEG/67/3, 21 I.L.M. 58 (1982).

¹¹⁵ *It's Time To Outlaw Landgrabbing, Not Make It "Responsible"!*, GRAIN (Apr. 17, 2011) [hereinafter *It's Time*], <http://www.grain.org/article/entries/4227-it-s-time-to-outlaw-land-grabbing-not-to-make-it-responsible>. They include provisions for land tenure (existing rights to land and associated natural resources are recognized and respected); food security (investments do not jeopardize food security but rather strengthen it); transparency, good governance and enabling environment (processes for accessing land and making associated investments are transparent, monitored, and ensure accountability); consultation and

mutually beneficial exchange between small landholders and investors. However, these principles are advisory, operating in a framework of social responsibility, where noncompliance may rarely be addressed.¹¹⁶ Moreover, the principles were never submitted for approval to the World Bank, the International Fund for Agricultural Development, or the U.N. Conference on Trade and Development.¹¹⁷ As a result, many organizations advocating on behalf of the smallholder farmer denounce the RAI initiative, saying that instead of helping small landholders, the policy legitimizes land grabbing, and the takeover of smallholder farmlands is per se unacceptable.¹¹⁸ Indeed, the RAIs, by their very precatory nature may normalize a set of policies that hurt African smallholders through precatory regulations on the policies themselves. The U.N. conceded that the principles were “woefully inadequate” in ensuring an equitable outcome for small landholders.¹¹⁹ After conducting an empirical study of the land grabs to date, the World Bank came to a similar conclusion, determining that virtually all reported land acquisitions in Africa had resulted in a “loss” for the local populations.¹²⁰

In contrast, the U.N. Special Rapporteur on the right to food argued that focusing on how much is invested in agriculture “matters less than the *type of* agriculture that we support.”¹²¹ His office put forward Eleven Principles specifically enumerating human rights applicable to large-scale land acquisitions and leases.¹²² The Eleven Principles, as compared to the RAIs, are

participation (all those materially affected are consulted and agreements from consultations are recorded and enforced); economic viability and responsible agro-enterprise investing (investors ensure that projects respect the rule of law, reflect industry best practice, and result in durable shared value); social sustainability (investments generate desirable social and distributional impacts and do not increase vulnerability); and environmental sustainability (environmental impacts are quantified and measures taken to encourage sustainable resource use, while minimizing and mitigating the negative impact). *The Principles for Responsible Agricultural Investment*, UNITED NATIONS CONF. ON TRADE & DEV., <http://unctad.org/en/Pages/DIAE/G-20/PRAI.aspx> (last visited Mar. 17, 2014).

¹¹⁶ Narula, *supra* note 3, at 116.

¹¹⁷ *It's Time*, *supra* note 115.

¹¹⁸ *Id.*; see also THE GLOBAL CAMPAIGN FOR AGRARIAN REFORM LAND RESEARCH ACTION NETWORK, WHY WE OPPOSE THE PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT (RAI) 2 (2010), available at <http://focusweb.org/sites/www.focusweb.org/files/Why%20we%20oppose%20RAI-EN.pdf> (“The seven principles are constructed to look reasonable and persuasive, even though they are not. It is particularly problematic to advance principles supposedly meant to guide certain policy measures knowing very well that [they] are utterly inadequate as regulation of policies that violate human rights and international law.”).

¹¹⁹ Olivier De Schutter, *Responsibly Destroying the World's Peasantry*, PROJECT SYNDICATE (June 4, 2010), <http://www.project-syndicate.org/commentary/responsibly-destroying-the-world-s-peasantry> (emphasis added).

¹²⁰ *It's Time*, *supra* note 115.

¹²¹ De Schutter, *supra* note 119 (emphasis added).

¹²² The principles call for involved parties to: conduct investment negotiations in full transparency with the participation of host communities; consult with local populations prior

not optional. From these principles, the U.N. has derived special duties of investors and states. The Principles encompass commercial activity and place an obligation on investors, as “specialized organs of society performing specialized functions,”¹²³ to “respect, protect and fulfill human rights and fundamental freedoms”¹²⁴ and provide “appropriate and effective remedies when breached.”¹²⁵ Additionally, states have a duty to “protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.”¹²⁶ Although states are not per se responsible for human rights abuse by private actors, they may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to “prevent, investigate, punish and redress” abuse.¹²⁷

The Eleven Principles touch on the rights enumerated in the U.N. Declaration on the Rights of Indigenous Peoples and the International Covenant on Economic, Social, and Cultural Rights. These provisions indicate the need for universal recognition of small landholders’ rights in the advent of increased agricultural commercialization spurred by land grabs. They place duties on government and business to assume a duty of protection of small landholders’ basic rights. However, the provisions’ operational principles remain normative. States should enforce laws that are aimed at requiring business enterprises to respect human rights and ensure that other laws and policies governing the creation and ongoing operation of business enterprises enable human rights and

to any shifts in land use, with a view towards obtaining their free, prior, and informed consent for the investment project; enact and enforce legislation that safeguards the rights of host communities; ensure that investment revenues are used for the benefit of local populations; adopt labor-intensive farming systems that maximize employment creation; adopt modes of agricultural production that respect the environment; ensure that investment agreements include clear obligations and predefined sanctions, with non-compliance determined by independent and participatory ex post impact assessments; ensure that investment agreements require that a minimum percentage of food crops produced be sold locally; conduct participatory impact assessments prior to the completion of negotiations; comply with indigenous peoples’ rights under international law; and provide agricultural waged workers with adequate protection for their fundamental human and labor rights. Special Rapporteur on the Right to Food, *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures To Address the Human Rights Challenge*, Human Rights Council, 16–18, U.N. Doc. A/HRC/13/Add. 2 (Dec. 28, 2009) (by Olivier De Schutter), available at http://www.srfood.org/images/stories/pdf/officialreports/20100305_a-hrc-13-33-add2_land-principles_en.pdf.

¹²³ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Human Rights Council, at 6, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 7.

provide effective guidance to business enterprises.¹²⁸ They should also encourage, and where appropriate, require, business enterprises to communicate how they address their human rights impacts.¹²⁹ Businesses should express their commitment to adhering to human rights norms through a public statement in which they detail a policy stipulating the enterprise's human rights expectations.¹³⁰

While these international principles are a step in the right direction, to mean anything, they must be respected by governments and investors pursuant to their obligations under the provisions—the United States has ratified neither the Declaration on the Rights of Indigenous Peoples¹³¹ nor the International Covenant on Economic, Social, and Cultural Rights.¹³² Otherwise, although small landholders may have a claim to their land *de jure*, they may nevertheless be evicted by investors working in concert with their own government. Therefore, to ensure that small landholders are not forcibly evicted from their land without compensation, or otherwise subject to human rights violations, the United States needs to enact regulations that prohibit American investors from taking part in these abuses.

¹²⁸ *Id.* at 8.

¹²⁹ *Guiding Principles on Business and Human Rights*, *supra* note 123, at 8.

¹³⁰ *Id.* at 15.

¹³¹ The current U.S. stance is to support the premise of the Declaration. See *UN Declaration on the Rights of Indigenous Peoples Review*, U.S. DEP'T STATE <http://www.state.gov/s/tribalconsultation/declaration> (last visited Mar. 18, 2014) (“The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force.”). But see *United Nations Adopts Declaration on Rights of Indigenous Peoples*, UNITED NATIONS NEWS CENTRE (Sept. 13, 2007), <http://www.un.org/apps/news/story.asp?NewsID=23794#.USovd7RDn6k> (“The United Nations Declaration on the Rights of Indigenous Peoples has been approved after 143 Member States voted in favour, 11 abstained and four—Australia, Canada, New Zealand and the United States—voted against the text.”).

¹³² See generally Ann M. Piccard, *The United States' Failure To Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR 231 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1794303 (“The United States remains one of only half a dozen U.N. member states that have yet to ratify the International Covenant. . . . The United States is historically suspicious of even recognizing economic, social and cultural rights as ‘rights’ that might be amenable to any method of enforcement.”).

B. Under U.S. Human Rights Law, African Land Grabs Violate Smallholders' Rights

1. Human Rights Generally

The United States has recognized the importance of vindicating human rights ever since the Founders signed the Declaration of Independence¹³³ and drafted the Constitution. Internationally, the United States has ratified human rights treaties, including the International Covenant on Civil and Political Rights,¹³⁴ an optional protocol on the involvement of children in armed conflict, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment, a Protocol Relating to the Status of Refugees, and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.¹³⁵

Pursuant to the implementation of the U.N. Guiding Principles on Business and Human Rights, additional initiatives aim at protecting international human rights through sector-specific regulation. For example, the International Code of Conduct for Private Security Service Providers (ICoC) provides for conduct of personnel in security management practices. The United States has also addressed trafficking in persons in federal contracting practices through an executive order.¹³⁶ With regard to the manufacturing sector, the United States provides guidance regarding best practices in creating a corporate compliance system to eradicate child and forced labor through a program called "Reducing Child Labor and Forced Labor: A Toolkit for Responsible Businesses."¹³⁷ Section 3205 of the Food, Conservation, and Energy Act of 2008 also calls for recommendations of a "consultative group" to eliminate the use of child labor and forced labor in imported agricultural products, and the United States supports these recommendations.¹³⁸

¹³³ "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹³⁴ See Jimmy Carter, *US Finally Ratifies Human Rights Covenant*, CHRISTIAN SCI. MONITOR (June 29, 1992), <http://www.csmonitor.com/1992/0629/29191.html>.

¹³⁵ See HUMAN RIGHTS WATCH, UNITED STATES RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES (July 2009), available at http://www.hrw.org/sites/default/files/related_material/Treaty%20Ratification%20Advocacy%20document%20-%20final%20-%20Aug%202009.pdf.

¹³⁶ Exec. Order No. 13627, 77 Fed. Reg. 60029 (2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-10-02/pdf/2012-24374.pdf>.

¹³⁷ See *Reducing Child Labor & Forced Labor Toolkit*, U.S. DEP'T LABOR, <http://www.dol.gov/ilab/child-forced-labor/> (last visited Mar. 18, 2014).

¹³⁸ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651; see also *Food, Conservation, and Energy Act of 2008 (Farm Bill)*, U.S. DEP'T LABOR, <http://www.dol.gov/ilab/programs/ocft/farmbill.htm> (last visited Mar. 18, 2014).

2. Dodd–Frank: A New Beginning

The Dodd–Frank Wall Street Reform and Consumer Protection Act is the most comprehensive piece of legislation to tackle financial reform in the past decade. Sections 1502 and 1504, in which Congress invoked its rulemaking authority under Section 13(p) of the Securities Exchange Act of 1934, provide for financial disclosure of two humanitarian issues and were passed with bipartisan support.¹³⁹ First, Section 1502 requires companies that file reports with the Securities and Exchange Commission (SEC) (those that trade on an American stock exchange) to provide disclosure regarding use of defined “conflict diamonds” in the manufacture of products or in products they contract to manufacture out of the Democratic Republic of the Congo.¹⁴⁰ This provision was adopted to promote transparency and consumer awareness regarding the use of certain minerals mined in the Congo and adjoining regions that may benefit the armed militias engaged in regional conflict, who have perpetrated countless human rights violations.¹⁴¹ Second, Section 1504 requires publicly traded oil, gas, and mining companies to file project-level disclosures of payments made to governments around the world for the purpose of commercial development of natural resources.¹⁴² The mandate to file under 1504 gives investors standing to sue for false reporting under Section 10(b) of the Securities and Exchange Act.

¹³⁹ Securities Exchange Act of 1934, 15 U.S.C. § 78m(b)(1) (Dodd–Frank §§ 1502, 1504) (2012).

¹⁴⁰ Securities Exchange Act of 1934, 15 U.S.C. § 78m(b)(1)(A)(i) (Dodd–Frank § 1502) (2012). Under the Act, disclosure includes an independent private sector audit. *Id.*

¹⁴¹ David M. Lynn, *The Dodd–Frank Act’s Specialized Corporate Disclosure: Using the Securities Laws To Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 331 (2011) (citing Dodd–Frank Act, § 1502, 124 Stat. 2213–2218 (2010)); U.N. Chair of the S.C., Letter dated Nov. 15, 2010 from the Chair of the Security Council Committee established pursuant to Resolution 1533 Concerning the Democratic Republic of the Congo addressed to the President of the Security Council, U.N. Doc. S/2010/596 (Nov. 29, 2010). Human rights atrocities perpetrated by militias funded with Congolese conflict diamonds are well-documented. See Lydia Polgreen, *Congo’s Riches, Looted by Renegade Troops*, N.Y. TIMES (Nov. 15, 2008), <http://www.nytimes.com/2008/11/16/world/africa/16congo.html> (“The ore these fighters control is central to the chaos that plagues Congo, helping to perpetuate a conflict in which as many as five million people have died since the mid-1990s The proceeds of mines like this one . . . help bankroll virtually every armed group in the region.”); Dominique Soguel, *Rape Crisis in East Congo Tied to Mining Activity*, WENews (June 1, 2009), <http://womensenews.org/print/7126>.

¹⁴² 15 U.S.C. § 78m(q)(2)(A). For a quick analysis on what the passage of 1502 and 1504 means to those involved, see Daniel Kaufmann & Veronika Penciakova, *SEC Passes Natural Resource Transparency and Conflict Minerals Rules: The Glass Is Fuller than Expected*, BROOKINGS (Aug. 28, 2012), <http://www.brookings.edu/research/opinions/2012/08/28-sec-transparency-kaufmann>.

a. *United States' Interests Are Supported Through Dodd–Frank's 1502 & 1504*

Senator Ben Cardin was among the leaders advocating for 1502 and 1504's passage.¹⁴³ He characterized the bill's objective to regulate disclosure of conflict diamonds and mineral extraction as a “self-interest[ed]” one, implicating interests in foreign relations and national security.¹⁴⁴ Financial transparency, he argued, leads to good governance and political stability, enriching the welfare of the target countries' people and increasing the likelihood that they will view the United States as an ally and become a market for U.S. products.¹⁴⁵ The theory that transparency leads to good governance, which in turn leads to better welfare measures for citizens, is supported by empirical data. Daniel Kaufmann, a fellow at the Brookings Institute and President of Revenue Watch Institute, concluded, in a study of over two hundred countries, that an increase in good governance could lead to as much as a 300% increase in development indicators, including local incomes.¹⁴⁶ Such positive developments, in decreasing poverty and political instability, will also likely eradicate the environment in which threats to U.S. security often emerge.¹⁴⁷

Separate from issues of foreign relations and national security, the United States benefits from Sections 1502 and 1504 through a posture of corporate due diligence. Many firms seek to uphold their corporate reputation through Dodd–Frank's mandated disclosure. For example, investment firms use disclosure to

¹⁴³ See Senator Benjamin Cardin, Remarks at the Brookings Institute's Transparency, Conflict Minerals and Natural Resources: What You Don't Know About Dodd–Frank 139, (Dec. 13, 2011) [hereinafter Cardin Remarks] (transcript available at <http://www.brookings.edu/events/2011/12/13-transparency-resources>). Other influential people advocating 1502 and 1504 include former Secretary of State Hillary Clinton, Bill Gates, and even large-scale land investor George Soros. See Parulkar, *supra* note 1; Steve Coll, *ExxonMobil v. Dodd–Frank*, BLOOMBERG BUSINESSWEEK (May 10, 2012), <http://www.businessweek.com/articles/2012-05-10/exxonmobil-vs-dot-dodd-frank>.

¹⁴⁴ Cardin Remarks, *supra* note 143, at 139.

¹⁴⁵ *Id.*

¹⁴⁶ Kaufmann and his colleagues at the World Bank collected data from over 200 countries during a fifteen-year period. The countries were given scores on six governance measures, including voice and accountability; political stability and absence of violence/terrorism; government effectiveness; regulatory quality; rule of law; and control of corruption. Within a short period of time (between two to five years), citizens could see up to a 300% development dividend from improved governance. Daniel Kaufmann, *SEC's Day of Reckoning on Transparency: Dodd–Frank Section 1504 on Disclosure of Natural Resource Revenues*, BROOKINGS (Aug. 21, 2012), <http://www.brookings.edu/research/opinions/2012/08/21-dodd-frank-kaufmann> (citing Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues* (Pol'y Research Working Paper No. 5430, Sept. 2010)).

¹⁴⁷ See *supra* Part III.E.

fully understand risks associated with investments.¹⁴⁸ In contrast, companies covered by the legislation view disclosure as a way to prove transparency and corporate best practices.¹⁴⁹ Those who enacted the provisions also had the wellbeing of shareholders in mind: “Investors should have the right to know what the company that they’re investing in is doing in another country. . . . If I’m going to invest my money, I should be able to know what contracts that company has entered into.”¹⁵⁰

At the macroeconomic level, mandatory disclosure under Sections 1502 and 1504 will ensure market efficiency by prohibiting companies covered by the Act from engaging in rent-seeking behaviors.¹⁵¹ Those that have the best

¹⁴⁸ Calvert, along with other large institutional investors such as TIAA-CREF, CalPERS, and CalSTRS, who together invest hundreds of billions of dollars, advocate disclosure under Sections 1502 and 1504 to “understand the materiality of [the] risks.” Bennett Freeman, Vice President, Calvert Investments, Statement at Transparency, Conflict Minerals and Natural Resources: What You Don’t Know About Dodd–Frank 18–19 (Dec. 13, 2011) [hereinafter Statement of Freeman] (transcript available at <http://www.brookings.edu/events/2011/12/13-transparency-resources>). “Specifically, when we look at oil, gas and mining[’s] tax and regulatory risks . . . [w]e want to make sure that companies are taking those into sufficient account. This kind of disclosure will help us do that.” *Id.* at 17.

¹⁴⁹ Rio Tinto, a large mining firm, has disclosed tax contributions made in foreign jurisdictions, averaging thirty-eight percent of revenue, on its website. “[T]ransparency benefits us because it enables us to demonstrate that we’re doing the right thing. . . . [T]ransparency enables us to demonstrate the contributions that we do make in the countries where we are operating . . . [and how, through tax contributions we spur] the economic development of those countries.” Laurel Green, Chief Policy Advisor, External Affairs, Rio Tinto, Statement at Transparency, Conflict Minerals and Natural Resources: What You Don’t Know About Dodd–Frank 20 (Dec. 13, 2011) [hereinafter Statement of Green] (transcript available at <http://www.brookings.edu/events/2011/12/13-transparency-resources>).

¹⁵⁰ Cardin Remarks, *supra* note 143, at 139; *see also* Statement of Freeman, *supra* note 148, at 18 (“We need to know exactly what these revenue payments are . . . [what] specific projects they’re tied to . . . as we decide whether to make an investment or to maintain an investment in a specific company Our half million investors in the United States want to know.”); *The Costs and Consequences of Dodd–Frank Section 1502: Impacts on America and the Congo: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 5 (2012) (statement of Rep. Moore) (arguing that disclosure and transparency in U.S. capital markets empowers investors to make sound investment decisions).

¹⁵¹ Mark Glick, *Is Monopoly Rent Seeking Compatible with Wealth Maximization?*, 1994 BYU L. REV. 499, 501 (“Rent seeking is usually defined as the political activity of persons or groups seeking monopoly rights or privileges granted by the government.”). These activities pose two types of costs: “First, the privileges themselves represent a deadweight loss to consumers. Second, the expenditure of resources on their pursuit arguably represents a rent-seeking social cost because of the more productive alternative uses for such resources.” *Id.* For developing countries, such as those in the Global South, rent-seeking has been shown to harm economic growth through two pathways: first, rent-seeking invites more rent-seeking, so that the bad practice becomes self-sustaining; second, rent-seeking reduces the rate of innovative activity (and thus overall economic growth). *See* Kevin M. Murphy et al., *Why Is Rent-Seeking So Costly to Growth?*, 83 AM. ECON. REV. 409, 413–14 (1993).

business practices and managerial skills will therefore prevail over inefficient companies who bribe foreign officials and evade taxation.¹⁵² In this way, Sections 1502 and 1504 of Dodd–Frank may contribute to more productive mining and extractive industries around the world.

b. Many Major Criticisms of Dodd–Frank Are Easily Rebuttable

Critics of Sections 1502 and 1504, comprised largely of special interest groups for mining and mineral extraction companies, have advanced a number of arguments against the implementation of these regulations. First, they argue that a bill covering comprehensive financial regulation is the inappropriate vehicle with which to advance these provisions. But proponents of the bill, including Representative Jim McDermott, argue that among the most persuasive ways to ensure the human rights of peoples such as those in the Democratic Republic of Congo and elsewhere, is through “us[ing] the lever of commerce” to align moral incentives with financial ones.¹⁵³ Therefore, federal legislation is the means through which to shape the state of play in financial markets.¹⁵⁴ As such, not only is financial legislation an appropriate vehicle through which to address business practices that potentially violate various human rights, but may be among the most effective.

Next, critics argue that promulgating rules under Dodd–Frank that are comprehensive, yet avoid vagueness, would be too difficult. To be sure, the way in which key terms are defined will in fact determine the effectiveness of the bill—but the same could be said for almost all legislation. With respect to diamond and mineral extraction, the definition of “project” sparked debate among special interests and proponents of disclosure.¹⁵⁵ Interestingly,

¹⁵²Daniel Kaufmann, Senior Fellow, Brookings Inst., Statement at Transparency, Conflict Minerals and Natural Resources: What You Don’t Know About Dodd–Frank 30–31 (Dec. 13, 2011) (transcript available at <http://www.brookings.edu/events/2011/12/13-transparency-resources>) (arguing that the companies who stand to benefit the most are those with a comparative advantage of efficiency, competitiveness, and management, while rent-seeking companies that do favors stand to lose a lot from this type of transparency legislation).

¹⁵³Representative Jim McDermott, Opening Statements at Transparency, Conflict Minerals and Natural Resources: What You Don’t Know About Dodd–Frank 7 (Dec. 13, 2011) (transcript available at <http://www.brookings.edu/events/2011/12/13-transparency-resources>).

¹⁵⁴Mark Taylor, Senior Researcher, Fafo, Statement at Transparency, Conflict Minerals and Natural Resources: What You Don’t Know About Dodd–Frank 95 (Dec. 13, 2011) (transcript available at <http://www.brookings.edu/events/2011/12/13-transparency-resources>) (“The rules structure the markets. They incorporate . . . the market’s key norms that society wants businesses to follow.”).

¹⁵⁵Special interests groups have argued for a definition of “project” that excludes investments that are not large enough. For example, coalitions such as the American Petroleum Institute (API) argued that “project” should “exclude activities that are not material to investors.” Comment from Harry M. Ng, Vice President, General Counsel & Corporate Sec’y, API to Elizabeth M. Murphy, Sec’y, SEC, at 5 (Jan. 19, 2012), *available at*

Section 13(q) neither defines “project” nor requires the SEC to do so.¹⁵⁶ Accordingly, in writing the rules under which Sections 1502 and 1504 will operate, the SEC has refrained from assigning an explicit definition to the scope of a “project” by which covered companies would have to disclose payments. While leaving “project” undefined would allow businesses flexibility in varying corporate climates,¹⁵⁷ the SEC suggested that the underlying contractual agreements with governments may determine the term’s application in cases of contextual ambiguity.¹⁵⁸ In this way, the definitional scope of “project” catches all significant payments made between companies subject to the legislation, while excluding any truly *de minimis*¹⁵⁹ or contextually irrelevant transactions.¹⁶⁰

The seemingly most compelling arguments in opposition to Dodd–Frank legislation are that the cost of complying with disclosure is overly burdensome,¹⁶¹ and that disclosure would put reporting companies at a

<http://www.sec.gov/comments/s7-42-10/s74210-121.pdf>. Similarly, critics of the legislation have argued for “project” to be relaxed so that companies may disclose at the country- or region-wide level. See Daniel Kaufmann & Veronika Penciakova, *Transparency, Conflict Minerals and Natural Resources: Debating Sections 1502 and 1504 of the Dodd–Frank Act*, BROOKINGS (Dec. 20, 2011), <http://www.brookings.edu/research/opinions/2011/12/20-debating-dodd-frank-kaufmann>.

¹⁵⁶ Brief for Respondent at 17, *Am. Petroleum Inst. v. SEC*, No. 12-1398 (D.C. Cir. 2012).

¹⁵⁷ *Id.* (citing 77 Fed. Reg. 56383–56384 (Sept. 12, 2012)) (“After carefully considering the comments, we have determined . . . to leave the term ‘project’ undefined in the final rules. We continue to believe that not adopting a definition of ‘project’ has the benefit of giving issuers flexibility in applying the term to different business contexts depending on factors such as the particular industry or business . . .”). “Although the term is used within the extractive industry in a variety of contexts and thus there does not appear to be a single agreed-upon application to support a one-size-fits-all definition . . . [individual businesses] demonstrate that they understand in any particular context what constitutes their own projects.” *Id.* at 19 (internal quotation marks omitted).

¹⁵⁸ *Id.* at 18 (“The contract defines the relationship and payment flows between the resource extraction issuer and the government, and therefore, we believe it generally provides a basis for determining the payments, and required payment disclosure, that would be associated with a particular ‘project.’” (internal citation omitted)).

¹⁵⁹ “De minimis” for purposes of this rule, are payments not more than \$100,000. 77 Fed. Reg. 56382 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240).

¹⁶⁰ See Christopher M. Matthews, *SEC Narrowly Approves Reporting Rules on Resource Extraction, Conflict Minerals*, WALL ST. J. BLOGS (Aug. 22, 2012, 12:48 PM), <http://blogs.wsj.com/corruption-currents/2012/08/22/sec-narrowly-approves-reporting-rules-for-energy-mining-firms/>.

¹⁶¹ The National Association of Manufacturers estimates the mandate to cost businesses between \$9 billion and \$16 billion, including costs to non-SEC companies. *The Costs and Consequences of Dodd–Frank Section 1502: Impacts on America and the Congo: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 2 (2012) (statement of Rep. Miller). But see *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56400 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240) (“One commentator stated that most issuers

disadvantage to their non-disclosing competitors outside of U.S. jurisdiction. Proponents of 1502 and 1504 handle these in turn. First, when discussing compliance costs, the *additional* costs of reporting, resulting from the new disclosure requirements, are likely to be less than the formal price tag of implementation, which accounts for the sum of total compliance costs.¹⁶² This is because many companies have in place extensive internal systems for recording payments, and already collect project-level information to handle present reporting requirements.¹⁶³ Second, a company is disadvantaged by mandated disclosure only to the extent that its non-listed competitors are not mandated to disclose as well.¹⁶⁴ As a result, these companies would be best benefited by petitioning other jurisdictions to implement similar regulations.¹⁶⁵ This solution, proponents argue, is much more effective in furthering Dodd–Frank’s goals of transparency and disclosure than preserving the status quo of nondisclosure.

c. Transparency and Disclosure Will Spark Discourse and Hopefully Contribute to Ending Human Rights Abuses

The most important effect of Dodd–Frank’s mandated disclosure, consistent with the animating spirit of the provisions, is to empower citizens in Africa and elsewhere to have a voice in control of their natural resources. Although disclosing payment information does not give insight into the nature of the underlying contract between investor and host government, transparency allows citizens and civil society “to begin to ask questions about the terms of those contracts”—important questions when there are limited resources and where communities suffer the negative effects of foreign investment without reaping any of the returns.¹⁶⁶ Although Dodd–Frank’s 1502 and 1504 provisions are couched in terms of financial regulation, the foundational object of the legislation is to save lives and end the United States’ complicity in human rights abuses abroad.¹⁶⁷

already have internal systems in place . . . and that many issuers currently are subject to reporting requirements at a project level.”).

¹⁶² See Kaufmann & Penciakova, *supra* note 142.

¹⁶³ See Kaufmann & Penciakova, *supra* note 155.

¹⁶⁴ Moreover, there may not be any negative effect from mandatory disclosure at all. See discussion regarding investor transparency, *supra* Part III.A.2.a.

¹⁶⁵ “Companies were also concerned that they would become less competitive relative to companies not subject to the reporting obligations under 1504.” See Kaufmann & Penciakova, *supra* note 142; see also Statement of Freeman, *supra* note 148, at 50.

¹⁶⁶ Isabel Munilla, Dir., Publish What You Pay U.S., Statement at Conflict Minerals and Natural Resources: What You Don’t Know About Dodd–Frank 70 (Dec. 13, 2011) (transcript available at <http://www.brookings.edu/events/2011/12/13-transparency-resources>).

¹⁶⁷ *The Costs and Consequences of Dodd–Frank Section 1502: Impacts on America and the Congo: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 22 (2012) (statement of Rev. Nicolas Djomo Lola) (“We urge the U.S. business community to account for the

IV. IMPLEMENTING REGULATIONS

Dodd–Frank provided a statutory gateway with which to address urgent public policy objects—objectives such as halting the land grab epidemic. Provisions such as those governing securities laws in Dodd–Frank can help ensure that the United States recognizes and protects the human rights of small African farmers in the face of the global land grab epidemic. In addition to being morally reprehensible and inciting public unrest within the continent, evictions stemming from land grabs are illegal under international law. The U.N. Declaration on the Rights of Indigenous Peoples and the International Covenant on Economic, Social, and Cultural Rights both provide for a human right to land, housing, and a standard of living. Texts such as the Eleven Principles place obligations on host governments and investors to honor these human rights. Nonetheless, real change cannot happen without adequate enforcement of protections such as those specified in the Principles. Though civil society groups have successfully placed pressure on certain governments and investors to adhere to these human rights obligations,¹⁶⁸ these groups cannot place adequate pressure on host governments and investors by themselves. The United States needs to regulate corporations within its jurisdiction to secure African landholders’ human rights.

A. The Global North Must Curb Its Consumption of Biofuels Farmed from African Land Acquisitions

Europe is the central driver of land grabs for biofuels since it imports much of the raw materials it uses. After coming under criticism for the widespread displacement of African smallholders, the European Commission published a proposal to limit the percentage of food crops allowed to contribute to renewable transportation energy. “Under the new proposal, states can only count biofuels derived from food crops for half of the total target of 10 percent; the rest of the biofuel contribution has to come from non-food sources.”¹⁶⁹ In

gruesome social costs of the illicit mining as they calculate their costs for compliance There is a social balance sheet that places value on the lives that can be saved.”)

¹⁶⁸ For example, grassroots opposition in Liberia sparked public meetings, attended by legislators, and appealed to the Roundtable on Sustainable Palm Oil, triggering bilateral negotiations and resulting in fines for foreign investors. RIGHTS & RESOURCES INITIATIVE, TURNING POINT: WHAT FUTURE FOR FOREST PEOPLES AND RESOURCES IN THE EMERGING WORLD ORDER? 23 (2012), available at <http://www.rightsandresources.org/documents/quarantined/files/turningpoint/Turning%20Point%20-%20Final%20PDF.pdf>. In addition, protests in Indonesia resulted in the foreign company agreeing to mediate through the International Finance Corporation’s Compliance Advisory ombudsman. *Id.* at 24.

¹⁶⁹ *Land Grabbing for Biofuels Must Stop*, GRAIN (Feb. 21, 2013), <http://www.grain.org/article/entries/4653-land-grabbing-for-biofuels-must-stop>. Even at this reduced rate, the E.U. will still need twenty-one *mtoe* (million tons oil-equivalent) of biofuels. *Id.*

the United States, critics of use of food-based biofuels advocate for amending the Renewable Fuel Standards (RFS), which, since the United States is the world's largest corn exporter, they believe to be closely tied to volatility in food markets.¹⁷⁰

B. The United States Must Take Steps To Re-implement Regulations of Agricultural Commodities Futures

Dodd-Frank¹⁷¹ has taken steps to address agricultural commodities speculation through regulating the purchase and sale of commodity derivatives, including swaps and security-based swaps. On December 12, 2013, the CFTC issued a Notice of Proposed Rulemaking,¹⁷² in which it moved to establish speculative position limits for twenty-eight exempt and agricultural commodity futures and option contracts, as well as physical commodity swaps that are economically equivalent to such contracts.¹⁷³ Through enforcement by the CFTC, Dodd-Frank's Section 712(a)(8) provision will implement new reporting and record-keeping requirements, as well as clearing many swaps to remove counterparty credit risk and mitigate system risk; require trading on regulated platforms; and register "swap dealers" and "major swap participants," as defined in the statute.¹⁷⁴ However, the effort to implement the regulatory framework is still in progress, as some of the rules have not even been proposed.¹⁷⁵ Furthermore, the CFTC has indicated that it will treat agricultural swaps the same as all other swaps,¹⁷⁶ diminishing the effectiveness of any price regulation. Though Section 712(a)(8) would help stabilize the price of food that has helped to cause the emergence of large-scale land acquisitions, the

¹⁷⁰ See Sameerah Siddiqui, *The Renewable Fuel Standard: Should US Corn Feed Mouths or Fuel Tanks?*, OXFAM AM. (Dec. 11, 2013), <http://politicsofpoverty.oxfamamerica.org/tag/biofuels/>; Timothy A. Wise, *US Corn Ethanol Fuels Food Crisis in Developing Countries*, AL JAZEERA (Oct. 10, 2012), <http://www.aljazeera.com/indepth/opinion/2012/10/201210993632838545.html>. The House of Representatives and Senate have held hearings critical of the RFS. See Zach Colman, *Renewable Fuel Standard Hits Political Divide at Energy Hearing*, HILL (July 10, 2012, 4:32 PM), <http://thehill.com/blogs/e2-wire/e2-wire/236989-renewable-fuel-standard-hits-political-divide-at-energy-hearing>; Erin Voegele, *Senate Hearing Addresses 2014 RFS Proposal*, ETHANOL PRODUCER MAG. (Dec. 11, 2013), <http://www.ethanolproducer.com/articles/10562/senate-hearing-addresses-2014-rfs-proposal>.

¹⁷¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁷² See *supra* Part II.A.

¹⁷³ See Position Limits for Derivatives, 78 Fed. Reg. 75680 (Dec. 12, 2013).

¹⁷⁴ See SKADDEN, TITLE VII OF THE DODD-FRANK ACT ONE YEAR LATER: PIECING TOGETHER THE DODD-FRANK "MOSAIC" FOR DERIVATIVES REGULATION 1 (July 21, 2011), available at http://www.skadden.com/newsletters/Title_VII_of_the_Dodd-Frank_Act_One_Year_Later.pdf.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 4.

following proposed legislation can address the problem with more direct regulation.

C. Disclosure of Large-Scale Land Acquisitions Will Vindicate Small Landholders' Human Rights

While the United States has taken measures to recognize global human rights, more can and should be done to ensure that American investors do not violate small landholders' rights abroad. Sections 1502 and 1504 of Dodd-Frank provide a model for regulating large-scale land acquisitions by American corporations. Good governance through transparency is dependent on disclosure, which motivates corporations to adhere to international law and human rights norms.¹⁷⁷ Disclosure compels "considerations about the reaction from the market and/or the reaction from the general public to disclosures . . . [to] significantly influence the business decisions that an issuer's board of directors and management will make,"¹⁷⁸ and has been advocated by African policy leaders as a way for the United States to pioneer a more just system of investment.¹⁷⁹ The text of the proposed legislation is as follows:

Proposed Amendment: Disclosure of Payments by Large-Scale Land Issuers.
Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. § 78m) as amended, is amended by adding at the end the following:

(r) Disclosure of Payments by Large-Scale Land Acquisition Issuers.—

(1) DEFINITIONS.—In this subsection—

(A) the term 'commercial development of agricultural land' includes development, farming, processing, exporting, and other significant actions relating to the products of farming agricultural products or biofuels, or the acquisition of a license for any such activity, as determined by the Commission;

(B) the term 'foreign government' means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;

¹⁷⁷ Though the theoretical foundation by which disclosure motivates behavior is not yet fully understood, the most compelling evidence points toward the societal motivators of shock and shame. Mark Stephan, *Environmental Information Disclosure Programs: They Work, but Why?*, 83 SOC. SCI. Q. 190, 190 (2002); see also Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 786.

¹⁷⁸ Lynn, *supra* note 141, at 338.

¹⁷⁹ *Africa Policy Leaders Demand a New Direction in President Obama's Policy Toward the African Continent*, IPS (June 20, 2013), http://www.ips-dc.org/articles/africa_policy_leaders_demand_a_new_direction_in_president_obamas_policy_toward_the_african_continent/ ("The United States should take the lead on international efforts to promote greater transparency in the world's financial system so that poor countries are about to retain more of the scarce capital that is currently being illegally shifted abroad," said Dr. Dev Kar of Global Financial Integrity.).

(C) the term ‘payment’—

(i) means a payment that is—

(I) made to further the commercial development of agricultural or biofuel products; and

(II) is not de minimis; and

(ii) includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of agricultural or biofuel products;

(D) the term ‘large-scale land issuer’ means an issuer that—

(i) is required to file an annual report with the Commission; and

(ii) engages in the commercial development of agricultural or biofuel products;

(E) the term ‘interactive data format’ means an electronic data format in which pieces of information are identified using an interactive data standard; and

(F) the term ‘interactive data standard’ means standardized list of electronic tags that mark information included in the annual report of a large-scale land issuer.

(2) Disclosure.—

(A) INFORMATION REQUIRED.—Not later than xxx days after the enactment of this provision, the Commission shall issue final rules that require each large-scale land issuer to include in an annual report of the large-scale land issuer information relating to any payment made by the large-scale land issuer, a subsidiary of the large-scale land issuer, or any entity under the control of the large-scale land issuer to a foreign government for the purpose of development of agricultural or biofuel products, including—

(i) the type and total amount of such payments made for each project of the large-scale land issuer relating to the commercial development of agricultural or biofuel products; and

(ii) the type and total amount of such payments made to each government.

(B) CONSULTATION IN RULEMAKING.—In issuing rules under subparagraph (A), the Commission may consult with any agency that the Commission determines is relevant.

(C) INTERACTIVE DATA FORMAT.—The rules issued under subparagraph (A) shall require that the information included in the annual report of a large-scale land issuer be submitted in an interactive data format.

(D) INTERACTIVE DATA STANDARD.—

(i) IN GENERAL.—The rules issued under subparagraph (A) shall establish an interactive data standard for the information included in the annual report of a large-scale land issuer.

(ii) ELECTRONIC TAGS.—The interactive data standard shall include electronic tags that identify, for any payments made by a large-scale land issuer to a foreign government—

(I) the total amounts of the payments, by category;

(II) the currency used to make the payments;

(III) the financial period in which the payments were made;

(IV) the business segment of the large-scale land issuer that made the payments;

(V) the government that received the payments, and the country in which the government is located;

(VI) the project of the large-scale land issuer to which the payments relate; and

(VII) such other information as the Commission may determine is necessary or appropriate in the public interest or for the protection of investors.

(E) INTERNATIONAL TRANSPARENCY EFFORTS.—To the extent practicable, the rules issued under subparagraph (A) shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of land for the development of agricultural and biofuel products.

(F) EFFECTIVE DATE.—With respect to each large-scale land issuer, the final rules issued under subparagraph (A) shall take effect on the date on which the large-scale land issuer is required to submit an annual report relating to the fiscal year of the resource extraction issuer that ends not earlier than 1 year after the date on which the Commission issues final rules under subparagraph (A).

(3) Public Availability of Information.—

(A) IN GENERAL.— To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A).

(B) OTHER INFORMATION.—Nothing in this paragraph shall require the Commission to make available online information other than the information required to be submitted under the rules issued under paragraph (2)(A).

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Commission such sums as may be necessary to carry out this subsection.

The proposed legislation's language tracks Dodd-Frank's Section 1504—but instead of applying to Congolese diamonds or mineral extraction, this legislation will mandate disclosure of large-scale land acquisitions. Adding legislation such as this to ensure disclosure of any American investment in large-scale land acquisitions would bring attention to any forcible evictions and other possible human rights violations in an effective and efficient way. Civil society, non-governmental organizations, as well as the Justice Department could all take action if information indicative of land grabs were to be disclosed, and the SEC could take enforcement measures to ensure that companies disclosed fully and accurately.

Also similar to 1502 and 1504, mandated disclosure of large-scale land acquisitions will support U.S. investment interests abroad. Drawing on Dodd-Frank's support from "a wide range of development, anti-corruption and anti-poverty organizations,"¹⁸⁰ the aim of this legislation is transparency. Under this new legislation, investors and citizens can better assess risk and evaluate

¹⁸⁰ See *Dodd-Frank*, REVENUE WATCH INST., <http://www.revenuewatch.org/issues/dodd-frank> (last visited Mar. 17, 2013).

transactions involving their natural resources—namely, agricultural land used for commercial development.¹⁸¹ And, like the policy decisions supporting 1502 and 1504, with disclosure comes good governance that will contribute to political stability.¹⁸² This will make it more likely that the United States may foster better relationships with African sovereigns.

Most importantly, though, this legislation will ensure that American business practices adhere to international human rights norms. This will go a long way towards vindicating African smallholders' human rights, especially if the United States continues to lead in this type of regulation. In adopting Section 1502, Congress argued, "the exploitation and trade of conflict minerals . . . is helping to finance conflict characterized by extreme levels of violence . . . and [is] contributing to an emergency humanitarian situation therein."¹⁸³ The same policy considerations—that a U.S.-supported or financed commodities trade may contribute to violence or "an emergency situation"—may just as easily support this proposed provision.

The scope of this legislation will ensure that any large-scale land acquisition in which an American corporation has an interest will be disclosed to the SEC. The government, civil society, and public at large may then evaluate any equity or moral considerations they find pertinent. Through this disclosure mechanism, agribusinesses may be held accountable for their dealings with small landholders on the African continent, to the end of the vindication of the landholders' human rights.

V. CONCLUSION

Large-scale land acquisitions on the African continent, or "land grabs," are an increasingly common phenomenon as the Global North seeks to ensure food security, produce biofuels, promote "green" sustainability, and profit off of the volatility in food prices. Unfortunately, land grabs displace African small landholders, violating their internationally recognized human rights to land and food production. Systematic evictions of this nature can contribute to political unrest across the region, posing potential national security threats to the United States. In addition, the current state of nondisclosure may lead to economically inefficient rent-seeking in large-scale land acquisitions. As such, the United States has three reasons to intervene where American investors are involved in land grabs: to protect human rights, to secure political stability across the African continent, and to support market efficiency through investment transparency.

Implementing legislation that mandates disclosure of any American investment in large-scale land acquisitions, in Africa and elsewhere, will bring

¹⁸¹ See *supra* Part III.B.2.a.

¹⁸² See *supra* Part III.B.2.a & note 104.

¹⁸³ Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1502(a) (2010).

attention to the epidemic. Investors will no longer be able to ignore the interests of small landholders without withstanding the scrutiny of the American public, international aid organizations, as well as the SEC and Justice Department. Most importantly, the United States can promise small landholders in Africa and around the world that any and all American investment in commercial agriculture will benefit them.



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