



Commercial Pressures on Land Worldwide.

Issues and Conceptual Framework for ILC study.

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FOREWORD

- 1. INTRODUCTION 5**
- 2. WHAT ARE “COMMERCIAL PRESSURES ON LAND”? 5**
 - 2.1. THE MARKETS FOR CERTAIN GOODS AND SERVICES DRIVING THE PHENOMENON.....6
 - 2.2. DIFFERENT MOTIVATIONS FOR DIFFERENT ACTORS7
 - 2.2.1. *Private Actors, Entrepreneurs, Investors*..... 7
 - 2.2.2. *“Investor” States*..... 7
 - 2.2.3. *“Host” States*..... 8
 - 2.2.4. *Local Political Authorities*..... 8
 - 2.2.5. *Inhabitants of the Zones in Question*..... 8
 - 2.2.6. *Development Partners* 9
 - 2.3. GOVERNANCE AND THE NATURE OF SYSTEMS OF RIGHTS TO LAND AND RESOURCES9
 - 2.3.1. *Two Distinct Situations: Privatization and Concentration* 9
 - a. Situation 1. The Sale or Cession via Emphyteutic Lease of Land Subject to What Can, to Simplify, Be Called a “Customary” System.....9
 - b. Situation 2. The Sale or Cession via Emphyteutic Lease of Land that Is Already Subject to a Land System Based on Private Ownership 10
 - 2.3.2. *Rights Systems and Societal Control and Management Mechanisms* 10
 - a. Review of the Major Historical Processes Establishing Rights to Land and Natural Resources 10
 - b. It Takes Time to Build Sustainable Governance Mechanisms..... 11
 - 2.4. CAPTURING RENTS IS CENTRAL TO THE STAKES 12
 - 2.5. INHABITANTS’ LOSS OF CONTROL OVER TERRITORIES, LAND AND RESOURCES 13
 - 2.5.1. *Conditions Conducive to Losing Control of Land and Resources*..... 13
 - 2.5.2. *The Various Mechanisms* 14
 - a. Brief Review of Major Legal Systems 14
 - b. Obtaining Property Rights..... 15
 - c. Long-Term Concession Systems, Land Trusts 15
 - d. Mechanisms that Do Not Cover Land Directly 16
 - 2.6. WHAT LANDS AND WHAT POPULATIONS? 17
- 3. WHAT ARE THE PRINCIPAL RISKS FOR SOCIETY AND WHAT OPPORTUNITIES COULD EMERGE? 18**
 - 3.1. OPPORTUNITIES 18
 - 3.1.1. *Developing Unutilized Resources*..... 18
 - 3.1.2. *Alleviating Poverty*..... 19
 - 3.1.3. *Mitigating Harm to Natural Biodiversity*..... 19
 - 3.2. RISKS..... 20
 - 3.2.1. *Risks Due to Strong Price Fluctuation* 20
 - 3.2.2. *Risks of New Conflicts*..... 20
 - 3.2.3. *Risks for Food Security*..... 21
 - 3.2.4. *Environmental Risks*..... 21
 - 3.2.5. *Risk of Massive Destruction of Smallholder Farming*..... 21

4. HOW CAN MAJOR ECONOMIC, SOCIAL AND ECOLOGIC CRISES BE AVOIDED AND HOW CAN WE BEGIN TO OPTIMIZE THE USE OF THE PLANET’S LAND AND RESOURCES?	23
4.1. HOW CAN THE “INHABITANTS” OF THE CONCERNED ZONES BENEFIT FROM NEW COMMERCIAL OPPORTUNITIES? CLARIFYING THE STAKES	23
4.2. THE MINIMUM NECESSARY CONDITIONS IN THE SHORT TERM	24
4.3. POTENTIAL AREAS OF WORK IN THE MEDIUM TERM	25
4.4. PLANETARY REQUIREMENTS.....	25

FOREWORD

At the 11th Session of the Coalition Council in April 2008, ILC's Council, highly concerned by the potential consequences of the increasing commercial interest on land for poor and vulnerable land users all over the world, decided that this should be a focus area for collaborative action as a coalition.

That was the starting point of an ILC global initiative articulated around different components, one of which is a global study seeking to understand the current and anticipated impacts on poverty of commercial pressures on land, and to explore possible policy and operational solutions both to mitigate negative impacts and to enable poor land users to benefit from possible opportunities.

The present work is part of the *ILC Collaborative Research Project on Commercial Pressures on Land* scoping study for which ILC member AGTER was contracted on behalf of ILC members. This work is a background analysis in order to identify priority issues and a conceptual framework for a Global Report by ILC members and partners to be released in the second half of 2010.

ILC Secretariat

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1. INTRODUCTION

For several months, information has been circulating in the press and on Internet about instances of companies, usually foreign companies, taking control of very large amounts of farmable land in numerous countries.

The NGO GRAIN's October 2008 briefing¹ lists a certain number of instances based on information gathered from Internet and the press. It rightly insists that the phenomenon of land grabbing is not new, and analyzes its specificities and implications. Several large-scale studies² are underway or being prepared to better define the phenomenon.

Our goal here is to present a relatively detailed look at the issues based on coherent and operational concepts. Prior work of this type is crucial in order to elaborate a specific proposed working program based on the International Land Coalition's (ILC) human and material resources.

We have excluded the field of urban land tenure from the scope of reflections as it does not at this time fall under the International Land Coalition's attributions.³

We shall begin by clarifying the meaning of the phrase "commercial pressures on land." To do so, we will start with a review of the motives of the various actors concerned. We will then address two areas that are crucial to understanding the phenomena—the various systems of rights to land and resources, and rents⁴. We will then see how the inhabitants of the areas in question lose control of territories, land and natural resources; and we will examine the magnitude of surface areas and populations concerned.

We will then examine the principal risks that these processes imply for the societies concerned and sometimes for humanity as a whole: social and political risks of conflict, exclusion and increased inequality, risks of imperiled food security, ecological risks, and the risk of the consolidation of agribusiness (large agricultural companies with salaried staff) and the disappearance of household-based production systems that seem best able to meet humanity's various needs.

Finally, we will begin to explore the conditions under which the inhabitants of the concerned zones, the poor, could have "new commercial opportunities" by distinguishing the minimal short-term conditions to avoid the worst, medium-term possibilities, and longer-term requirements on the planetary scale.

2. WHAT ARE "COMMERCIAL PRESSURES ON LAND"?

Commercial pressures, land grabs, investments, etc.—the words vary according to the positions of those who use them. What are they? Who are the principal actors and what motivates them? What is new in all this? Are they a flash in the pan or structural

¹ See: GRAIN. Seized! The 2008 land grab for food and financial security. October 2008. www.grain.org

² See the Proposals of the scoping study.

³ There are numerous analogies between urban land grabbing and rural land grabbing, but this is not our focus here.

⁴ In this paper, the world rent is used to refer to unearned income from land and natural resources, as it was used by classical economists of the 19th century.

phenomena? What is the magnitude of the phenomena and what do they cover in terms of land and the populations directly concerned by its potential development?

Let us first look at what drives these phenomena and the motives of the principal actors that hold key roles in the processes of purchasing or long-term leasing of large quantities of land in Africa, Asia, Latin America, and Eastern Europe.

2.1. The Markets for Certain Goods and Services Driving the Phenomenon

The rapid changes in prices on certain markets and anticipation of probable estimated price rises are at the root of the taking control of large amounts of land and manifestations of interest in the purchase or long-term rental of land that we have been seeing for several months. These goods are essentially the following:

- **Agrofuels**

An increasingly large global market has emerged around agrofuels, as a substitutes for fossil energy. The demand for and price of agrofuels still depend heavily on the public policies of certain states that make it mandatory to include a percentage of these products in the fuel used for transport, or that grant them tax advantages and subsidies. Otherwise, the development of agrofuels is directly linked to the price of oil.⁵

- **Staple Foods**

The prices of the principal food products rose sharply in 2007 and early 2008 for various reasons including notably the growth of agrofuels, weather problems in previous years, a reduction in security stores, and an increase in demand among the middle classes of some emerging countries. This rise reverses a 100-year-long downward trend that had been interrupted in the mid-1970s by a fleeting period of rising prices.⁶

- **Forest Resources**

Here, we must distinguish between two types of goods of very different natures: (1) timber and non-wood forest products, the demand for which has increased with the growth of emerging countries, as has the demand for mineral commodities; and (2) environmental services, with the establishment of markets for pollution rights, carbon credits, that make it possible to obtain resources in exchange for planting trees or through mechanisms—which are for now still voluntary—based on promises not to cut down forests (REDD mechanisms).

What is more, for a more or less long time, a certain number of other markets have generated pressures on land.

- **Tourism**

⁵ The 2008 drop in the price of a barrel of oil caused the closure of, and stopped the construction of, agrofuel factories in the USA and Europe.

⁶ One must keep the orders of magnitude in mind. In constant currency, the price of wheat has dropped 7 fold in 120 years. These long-term trends are punctuated by sometimes very sharp short-term variations. While prices certainly did double in 2007-08, they had fallen back to their July 2007 level by October 2008. The real question is whether or not structural increases can form because of the rising world population and new conditions in competition for land.

Already, the growth of tourism has long generated increasing interest in coastal zones and all areas of particular interest because of the beauty of the landscape, the wealth of flora and fauna, and/or the possibility of engaging in specific leisure activities.

- Mining and Energy Resources

This is not new, but the sharp rise in demand from emerging countries has increased pressure on regions and countries that have mineral or oil wealth.

- Urbanization

The large increase in the percentage of the population living in cities is causing urban zones to expand, usually spilling over onto farm land. This can create conflicts and very strong pressures.

We must also mention the stakes relating to water and its distribution, as well as the challenges that arise in regard to the use of fishing resources.

In every case, the specific dynamics of certain markets for goods and services put pressure on the resources that allow them to be produced and sold.⁷

2.2. Different Motivations for Different Actors

2.2.1. *Private Actors, Entrepreneurs, Investors*

The motives of private actors, investors and entrepreneurs are clear: maximize profits and remunerate their shareholders, or in other words, “do business”.⁸ For this, it matters little whether they are producing agrofuel or food, exploiting forests, mines or other resources (water, biodiversity, etc.), or elaborating tourism projects. The best options are chosen according to available opportunities and the current situation. Since capital is in its essence mobile, the long term is not a relevant concern provided that the investor can recover his or her investment along with the hoped-for profit. As GRAIN⁹ indicates, investment companies are now looking for investment opportunities in relation to agrifood or agrofuel production, and are ready to take control of the land if it seems necessary to do so to protect these operations.

The classical real estate investments that also interest financial institutions are a specific case of profit seeking. They bet on the market value that the asset could acquire in function of changes in the markets connected to its uses. Based on information that they have but that others do not have, or on analysis of predictable evolutions, they anticipate the emergence of real estate capital gains.

2.2.2. *“Investor” States*

The motives of the “investor” states that often carry or assist these private businesses abroad are of a different nature. They claim that they seek to ensure their own populations’ food security through the foreign production of food and/or agricultural

⁷ Let us point out one process that is not directly linked to markets: the conservation policies that make sanctuaries out of protected areas, and sometimes have significant local impact on populations’ access to land.

⁸ See the reference study produced each year by the World Bank on this major objective.

⁹ Op. cit.

commodities for their livestock farms, or the production of agrofuels to improve their energy self-sufficiency (GRAIN, 2008). With little farm land per inhabitant, they say they want to find supply methods that are safer than the classical mechanisms of the global market. To do so, they establish “cooperation policies” and intergovernmental agreements that provide for the signature of contracts with large national or multinational private companies with which they have close ties. This practice is not new in and of itself; it is similar to long-standing practices with oil concessions and water treatment. What is fairly new is that the field of intervention deals with food and energy agriculture, and the possible conflicts between historical users and new farmers.

2.2.3. *“Host” States*

The motives of “host” states that welcome these projects are different. They start with the observation that they “need foreign investments” to develop. Their analysis is based on the postulate that traditional national producers do not know how to use resources in an optimal manner and/or that neither farmers nor themselves have sufficient financial and/or technical resources to succeed.¹⁰ They note the under-utilization or non-utilization of a large share of cultivable lands, water resources, etc. They try to reach agreements that they present as being “win-win” agreements in order to develop. They often rely on the fact that they are “sovereign” and can do what they want with the country’s land resources that they often formally “own” (state property). As their governments are generally elected, their decisions are supposed to reflect majority opinion.

However, these decisions may also sometimes be motivated by specific interests other than the general interest: short-term electoral stakes, leaders’ private interests (with or without corruption).

2.2.4. *Local Political Authorities*

Local political bodies may also have reason to support and take part in these phenomena. Intermediary political bodies (states, regions, provinces, etc.), local chieftaincies or local governments (municipalities, etc.) may, when they exist and are able to do so, behave in the same manner as host country governments.

2.2.5. *Inhabitants of the Zones in Question*

Other private actors, the occupants of or right holders to the land in question, the “poor” can in some cases have an interest or think they have an interest in supporting the installation of companies because they receive what seems to them to be considerable compensation for the sale or rental of their land, because they hope to be given jobs, because the company promises to build a road to make their village more accessible, etc.

Nevertheless, it seems that they are not at this time the principal actors in the processes underway.

¹⁰ See the caricatural but instructive analysis of the President of Peru, Mr. Alan Garcia, *El perro del hortelano*.

2.2.6. *Development Partners*

Some (state and non-state) development partners have long stated that more must be invested in agriculture. Others look for investors to support: this is true of a large number of financial institutions for development.

They sometimes doubt whether the mechanisms seen today are well-founded, but many would like to be able to support “best practices” or help establish codes of “good conduct” (World Bank, but also the FAO, IFAD, etc.).

2.3. Governance and the Nature of Systems of Rights to Land and Resources

Investors’ strategies exist within highly diverse national and local, social and legal contexts.

2.3.1. *Two Distinct Situations: Privatization and Concentration*

Simply put, it is useful to differentiate between two different situations in the large-scale taking control of land and natural resources by companies, processes that are usually but not always connected to dynamics outside the region concerned.¹¹

a. Situation 1. The Sale or Cession via Emphyteutic Lease of Land Subject to What Can, to Simplify, Be Called a “Customary” System

Such lands are in this case frequently seen as “state-owned” or “national”. They were usually retroceded by the colonial powers to the states at their independence. These lands have been occupied for generations but the inhabitants do not have formally recognized documents attesting to their rights. They are seen as squatters, “illegal” occupants, in the pure colonial tradition. The situation may be slightly more complex and more nuanced because of the balance of power.

Some use rights are acknowledged but poorly protected, and the state believes it can—or in fact legally can—recover the land in exchange for compensation.¹² Numerous “property rights” are, however, socially acknowledged to belong to individuals and/or local communities in these territories, and there are multiple and diverse governance mechanisms. Even when the land is occupied in a more or less privative manner, there is always a local system of collective management of resources. But neither the rights nor the governance mechanisms are truly recognized in practice when one is no longer within proximity social relations, regardless of whether they are formally taken into account by national “substantive” law.

In these conditions, the sale or cession via long-term lease is a profound change in the land tenure system.¹³ It is a privatization and a massive and rapid commercialization of land and resources that takes place on “common lands”. The term “land grab” (which can be assimilated with theft) is in this case relevant.

¹¹ And often also to international dynamics.

¹² There is usually a legal possibility of expropriation, irrespective of the nature of the rights acquired by occupants. The poor organization of right holders frequently prevents them from asserting their rights, and the merits of these decisions are rarely challenged in relation to the general interest.

¹³ We call any combination of different types of rights to land that coexist in a given territory and belong to individual and/or collective right holders a *land tenure system*.

These situations provide great opportunities for outside “investments”. They allow for massive and rapid interventions. They also comport considerable political risks for both the companies and governments concerned, and can provoke sharp protests and violence. The case of Madagascar, with Korea and Daewoo, illustrates this.

b. Situation 2. The Sale or Cession via Emphyteutic Lease of Land that Is Already Subject to a Land System Based on Private Ownership

When formalized land rights exist and are recognized both locally and in national substantive law, the situation is different. Those who hold these rights agree to cede them, either voluntarily or after being pressured to do so, sometimes even after acts of violence. They may be small owners of rights or large owners of rights to land and resources.

The issue of how land markets operate arises in this case. The various actors have totally disproportionate means to intervene in these markets: the inhabitants and local right holders cannot “compete with” large national entrepreneurs and foreign “investors”.

In this case, one must ask the following question: Are there local or national mechanisms to control or regulate these rights transfers, such as for instance forbidding foreign people or institutions from buying land?

Accelerated land concentration processes can easily happen, either in the form of creating large estates or large-scale land rental. In this case, the term “commercial pressure” is entirely appropriate.

This second situation has both advantages and disadvantages for the investors and governments concerned. It is much less politically risky because the right holders are consenting, at least in appearance. But, it is slower to implement and can require one to establish expropriation procedures if one cannot force the uncooperative to sell, with it understood that they must in this case be compensated.

2.3.2. *Rights Systems and Societal Control and Management Mechanisms*

a. Review of the Major Historical Processes Establishing Rights to Land and Natural Resources

We often hear talk of neocolonialism when speaking of the land grabbing that is spreading at the moment. For greater clarity, a rapid review of how the systems of land rights were formed historically around the world is useful.

Generally speaking, these systems are often very different depending on whether one is in the center or outskirts of large empires. In the center, rights are generally built from the bottom up, through a process of social validation over time based on the balance of power and with legal acquisitive prescription mechanisms¹⁴. In the outskirts, in colonized countries, rights are usually built from the top down, through “deeds” attributed by the colonial power. This was the case in all of Latin America. The Torrens system, set up in Australia by the English colonial administration in a context of total negation of the Aborigines’ rights, is another more modern version of this.

¹⁴ "Adverse possession", or usucapion.

Different systems were set up in function of different colonization processes (colonies of settlement, trading posts or plantations in the form of enclaves), and political systems (protectorate or annexation). During the acquisition of independence, the new independent states inherited the rights that the colonial powers had given themselves: land became “state-owned” by default in Africa¹⁵ and “national” or “federal” in Latin America before being assigned or sold to private appointees. But, the land in question was never empty of people. Colonization had consisted of denying the indigenous populations’ land rights.

Latin America provides us with an extreme form of these evolutions that is interesting to remember in our reflections here. Today, it is by far the continent with the sharpest inequalities in access to land. Legalized top-down attributions have remained in the minority. Extra-legality has become the norm, and illegal appropriation processes of all sorts have emerged, allowing the most powerful to appropriate immense tracts of land for themselves (*grilagem de terras* in Brazil, for example). Plantation economies have also developed based on long-term concessions in exchange for obligations to build infrastructures (e.g. the Standard Fruit Company in Central America). Finally, colonies of settlement in the Southern Cone¹⁶ emerged with different dynamics and as the corollary to the decimation of the scattered local populations that occupied these savanna territories. Land concentration and massive land purchases by foreigners in Argentina over the past decades are not foreign to this specific history as no mechanisms for territorial management by the population were created to control or guide property right transfers in the general interest.

Indeed, one can see a goodly number of previous characteristics in the current phenomena in relation to commercial pressures on land, which partially justifies calling them neocolonial. However, the phenomena that we evoke are not exclusively limited to colonial situations. The evolution of the countryside in the former Soviet Union and in a certain number of other countries that had massively collectivized agricultural production produced fairly similar situations. It is not an accident that today Ukraine and Russia are also arenas for massive land grabs.

b. It Takes Time to Build Sustainable Governance Mechanisms

One important difference between long-known phenomena and the current situation comes, however, from the pace of the changes. What had taken decades, even centuries, to put in place now only seems to require a few years. The magnitude of the phenomena to which we refer is truly impressive.

This acceleration radically changes the game. Massive investments make large changes in technical production systems possible. The ways that these new systems are set up are connected to the investors’ interests. While legal systems are still in an awkward situation in relation to local social systems and do not take into account populations’ true interests, they allow appropriation on a much larger scale than in the past.

This change is due to the fact that establishing new governance mechanisms, new institutions and new forms of social organization necessarily takes a long time.

¹⁵ Especially in France’s and Belgium’s former colonies.

¹⁶ As was the case with the land that would become the United States of America further north.

In many cases—and this is a strong hypothesis in our work—the destruction of pre-existing regulation and social systems quite probably predated land grab processes to a large extent. Colonial and/or collectivization processes seem to have contributed heavily to this.

The last essential aspect to recall is the existence of different levels of governance. Here again, the phenomenon is not new. However, the processes of wealth concentration or land and resource appropriation no longer take place under the colonial yoke. Now, sovereign states (often born from decolonization) decide what degree of autonomy to grant their populations over territories, and chose what to do with the land; in principle, market rules freely determine the nature and intensity of land trade, purchase and sale. This is clearly also a large change in nature compared to colonial situations: the legitimacy of the processes becomes more difficult to question.

2.4. Capturing Rents Is Central to the Stakes

How do entrepreneurs and investors go about maximizing their profits when taking control of these vast tracts of land?

For the moment, let us limit our reasoning to economic terms. It would be necessary to go further because there are numerous important elements to take into account both to meet peoples' needs and to maintain the major equilibriums that we do not know how to quantify in terms of value. However, that would run the risk of making the analysis more complex, too qualitative, and our point would become less easily understandable.

In fact, economic mechanisms of the same nature are found in the two major situations cited above. To grasp them, one must return to the foundations of political economy and the *land rent* concept, a fundamental notion developed by classic economists.¹⁷ It comes from the observation that the same quantities of work and capital used in two different lands do not produce the same quantities of goods. The difference—the rent—cannot therefore be attributed to the producer and can be taken by the landowner. The price of land arises primarily from capitalization of the rent.

We hypothesize that capturing rents is the primary objective of the private actors involved in the phenomena we are studying. This elementary observation has important consequences for how to tackle the economic analysis and how to evaluate the interest of investments for society as a whole.

Indeed, it is appropriate to clearly differentiate between rents and the economic efficiency of the production set up thanks to investments. If one is unable or unwilling to do so, one attributes unearned merits to the investors. The distinction is more easily visible when examining tourism infrastructures in coastal zones, for instance, than when examining agricultural production but the phenomena are of the same nature. Indeed, land-related rents deal with very different potentials: soil fertility, water, mineral or energy resources, presence of plants or animals able to be collected (hunting, fishing) or usable biodiversity

¹⁷ Land rent was central to the economic analyses of the 18th and 19th centuries. Analysis of it was fine-tuned and gave rise to diverse theoretical constructs with Quesnay and the Physiocrats, Adam Smith (*An Inquiry into the Nature and Causes of the Wealth of Nations*. London, 1776), David Ricardo (*On the Principles of Political Economy and Taxation*. 1817. Ed. London, J. Murray), and Karl Marx who emphasized the existence of a type of rent not taken into consideration by Ricardo, the *absolute rent* (*Capital*).

(privatization of living organisms), building potential, optimization of environmental services, wind, etc.

While some kinds of rents are natural, others are not, and, even those which are mostly natural, never are completely natural. It is because there is a market and favorable prices for this or that product, and because this market is accessible that it becomes possible to produce in an advantageous way on a plot of land and is possible for the person who holds this plot to collect the corresponding rent.

In this way, one can speak of “commercial pressures” that allow previously inexistent rents to appear. But here too, it is not the investment itself that is in play; it is the investor’s position on markets that makes access to the rent possible.

2.5. Inhabitants’ Loss of Control Over Territories, Land and Resources

2.5.1. Conditions Conducive to Losing Control of Land and Resources

For massive land grabs to happen, a certain number of conditions must be met. For now, let us set aside the deficiencies that can exist in the democratic operation of states. We shall discuss them later. Let us concentrate on the structural aspects that facilitate land and resource grabbing by national or foreign groups or interests in situation where an immediate rent can be generated or when one can anticipate the emergence of a potential rent.

According to our analysis, three situations seem to be particularly conducive to the development of massive land grab processes.

- The existence of weakened property rights systems. They are generally weakened by various internal and external factors. These factors include colonization processes of course but also the ways in which production units with very inadequate technical or financial production means are integrated without protection in the global market.
- The top-down “collectivization” of production systems, as was the case in the Soviet Union, resulting in a profound de-structuring of local management institutions and the loss of control of all production processes.
- The existence of more or less longstanding private property systems with formal absolute property rights without any true recognition of the rights of collective bodies and without institutions and social control mechanisms having been created to steer transfers of property rights toward meeting the interests of the population. Argentina provides us with a flagrant example of this. It is also illustrated by post-agrarian reform situations when access to ownership took place after a fairly long period of state guardianship and when this protection abruptly ended.

One cannot assimilate the existence of secured rights to land in the form of absolute property rights with situations that would allow populations to keep these over the long haul. In developed countries, there are numerous mechanisms that allow social management of land that are local, administered by the state or by mixed structures (civil society and state) that are not seen in most developing or emerging countries.

2.5.2. *The Various Mechanisms*

a. Brief Review of Major Legal Systems

Now let us examine the various mechanisms through which rents can be captured. To do so, we must refer to the two major legal systems that currently dominate the “modern” world in regard to describing and managing land rights: the common law and equity spread by the British Empire, and the civil code born from the French Revolution that has since spread throughout the world.¹⁸ Their basic principles are different. The first is based on a pluralistic concept of rights, founded on acknowledgement of possession (several right holders with different rights). The second is built on an absolutist concept of ownership in which only one right holder has all the rights. In common law systems, rights are relative and the different types of estates (freehold estate, leasehold estate, etc.) refer to rights whose durations can be indefinite or limited, transmissible or not, etc. In civilist legal systems, on the contrary, the starting point is perpetual spatial mastery (domain, *dominium*).

These systems cannot, however, be reduced to these founding principles, as often happens when they are exported.

- The Napoleonic civil code affirms the absolute nature of the right of ownership but also adds the opposite by specifying that it is limited by the laws and regulations in effect.¹⁹ In fact, in developed countries, laws establish very numerous limits on ownership of land and natural resources. In regard to the relationship with time, it institutes usucapion mechanisms that consist of establishing that previous rights expire after a certain amount of time if the property was occupied and used in a peaceful way and under certain conditions during this time.
- Common law and equity systems have evolved over the centuries. Since the Property Act (1925) in England, only one type of estate in common law can be enforced vis-à-vis third parties. To a large extent, it corresponds to the absolute ownership defined by the civil code. The only way to validate different rights and to enforce them is through a trust, relying on the rules of equity that fall under the domain of ethics and morality, and were originally²⁰ independent of common law.

The discussions on legal mechanisms to appropriate land refer to schemes arising from these two major systems. However, the words and concepts are very different in the two systems and confusion and misunderstanding are very frequent.

These two concepts are not the only ones. There are other major systems of law in the world—Islamic law systems, the systems of law of India and China, etc. Historically, they were built very differently and their basic concepts remain specific even though their recent evolutions often incorporate elements from common law or civilist systems. Yet, these countries play a large role in the phenomena of taking control of land around the world.

¹⁸ Specialists in comparative law place this system in the Romano-Germanic family of law. René David and Camille Jauffret-Spinozi. *Les grands systèmes de droit contemporains*. 11th edition, 2002. Ed. Dalloz, Paris.

¹⁹ See Article 544 of the French Civil Code.

²⁰ Until the Judicature Acts (1873-75) that created Courts able to rule according to procedures of common law and equity. René David, Camille Jauffret-Spinozi, op. cit.

We can hypothesize that the implications of these specific concepts will be particularly important for interventions in Arab countries. Indeed, Islamic law is an integral part of the religion. It imposes itself on all believers, above and beyond states. Followers of other religions are subject to different rules. Islamic law, although based in large part on the Koran, accepts with much flexibility to co-exist with customs. Age-old concepts of constructing rights on “dead lands” belonging to God through their development, through the work done by individuals or collective entities which brings the land to life, could in this way facilitate operations to take control of land in Muslim countries.

These aspects of the subject that interests us are fundamental and often fairly clearly addressed. Ideological positions that can in no way reflect reality or allow sustainable development processes to be set up are often presented as self-evident. This is why this short reminder was indispensable.

b. Obtaining Property Rights

Obtaining a property right to land and resources is the first form of taking control of land and the resources it contains, and the first way to capture the associated rents.

We have seen that this can be done by buying pre-existing property rights from individual right holders. In this case, the process is “voluntary.” The scenarios will differ if there are or are not laws regulating or limiting these transfers as the “markets” bring actors with highly disparate financial capacities into competition with each other. The existence of unequal land structures, with extensive latifundios and associated minifundios is particularly conducive to the purchase of vast tracts of land.²¹

We have also said that these rights can also be ceded by states or local governments on legal bases that sometimes exist in the country but come from a simplifying ideological exportation of legal concepts from elsewhere. Since right holders stripped of their rights may in this case resist strongly, states usually prefer to opt for mechanisms that do not seem to confound national sovereignty and leave the state an eminent right to the land.

c. Long-Term Concession Systems, Land Trusts

This is another form of state cession of rights to the nation’s territories, less easily attackable on the political level. Concessions covering long periods of time via emphyteutic leases are one way to ensure the lasting utilization of the land and resources that makes it possible to develop investments and recover rents. This is not a new mechanism. It was employed, for example, in the 19th century and early 20th century for banana plantations in the English and North American enclaves in the Caribbean.

Exploitation of hydrocarbons and numerous minerals is done through forms of concessions. Similarly, logging relies more and more on these systems.

In some cases, the concessions cover rights that really were exercised by local populations, for instance use of the land and resources for gathering or hunting, farming or pastoralism. In other cases, they cover resources that were not exploited, such as oil resources, which

²¹ Changes in the way land is used can also be made by owners themselves; in this case, there is no new rights transfer process. Often, it is other companies, that have the contacts and know-how, that buy land from the latifundios. (See, for example, the establishment of eucalyptus plantations of thousands of hectares in the southern states of Brazil.)

substantially changes the nature of the issues and the demands of the populations affected by the concession.

The land trust configuration, which is linked to common law and equity systems and is unknown and practically incomprehensible in civilist legal systems, can be used either explicitly or implicitly. This merits an explanation of the principles involved here because, indeed, depending on the modalities for setting rules, the consequences for respecting or failing to respect inhabitants' rights can be radically different. Trusts make it possible to separate the functions of the trustees' administration and disposal (nominal owner, invested with all an authentic owner's administration and disposal powers) from those of the beneficiary or beneficiaries. Trusts organize ownership on behalf of others, by imposing on the nominal owner the obligation to exercise his or her prerogatives fairly in accordance with the trust granted to him or her in compliance with the wishes of the person or people who created the trust and the expectations generated among beneficiaries. The creator of a trust (settlor) can establish a trust during his or her lifetime, or on his or her death in his or her will. The current forms of trusts can designate multiple beneficiaries, who can be remunerated in different ways, immediately or after a delay.

Utilization of different trust modalities is linked, among other things, to different systems of taxation, inheritance and inter-generational transmission of assets. Trusts make it possible not to make public the terms of the agreement between the parties. Since they are very flexible, they can therefore be very useful. At the same time, they can also be a factor of opacity and legal bypassing of otherwise applicable laws.

Nevertheless, they create real possibilities of setting up systems of multiple property rights that make it possible to take into account very diverse private interests, the will to attempt to move toward the general interest, because each trust is established in function of moral principles (equity) and not only on a strictly legal basis.

d. Mechanisms that Do Not Cover Land Directly

Finally, loss of control of land and resources can take place through mechanisms that do not formally affect inhabitants' rights to these assets. Powerful subordination mechanisms can be instituted, for instance with the vertical integration of production units that formally remain family-owned, or contract-based forms of agriculture in which farmers are obliged to follow the technical itineraries imposed by the company that provides inputs and purchases all of their harvest. These phenomena are well-known in certain fields such as, for example, poultry or pig farming or certain plantations that combine factories belonging to a large company and small farmers in charge of producing the raw material (e.g. rubber tree or oil palm in Asia).

Unable to access the resources necessary to develop their land, land owners may also rent their land year after year to companies for whom they sometimes work as wage laborers. This situation is often connected to yearly large-scale crops of grains or proteaginous plants when the conditions that would have allowed for the development of household or cooperative modern production units were not met.

A caricatural version of this scenario exists when decollectivization takes the form of a distribution of "land shares"— basically "paper shares", not physical plots of land—as was the case in Russia, Ukraine, and other states in the former Soviet Union.

Different business organization schemas have been used to manage long-term investment in foreign land. One must examine these schemas in detail in order to understand their nature and advantages and disadvantages for the various social groups over the short and long term.²²

2.6. What Lands and What Populations?

The rent capture mechanisms that we described are nothing new in and of themselves. It is the combination of various factors, the breaking of the international financial crisis, and the acceleration of such processes that are new. From that perspective, it is essential to assess the magnitude of the phenomena's territorial and social reach.

The previous exercise allowed us to specify what needs to be examined.

How much of the world consists of land under "customary" or "community" control that is not truly acknowledged in national formal law nor effectively respected? How much of this land is potentially farm land? How many people live there? Very rough estimates speak of 1 to 2 billion people. If the estimates are right, we would be looking at a sixth or a third of humanity! That's not nothing.

How much land is accounted for by recently decollectivized systems that are falling into the hands of a small number of very large companies?

How much land is made up of territories where formalized property rights exist but there are no mechanisms to regulate land markets?

Finally, one must compare the above results with an estimate of the amount of clearly under-exploited potential farmland. One must also ask what this means. In relation to what criteria and what needs can one speak of under-exploitation? Are the once-again fallow lands in Western Europe due to changes in the Common Agricultural Policy under-exploited? How much land is also over-exploited or poorly exploited (eroded, depleted, etc.)?²³

The same questions can be asked of water, forest resources and biodiversity.

It is obviously not possible to answer all these questions in the context of the scoping study, but the study itself should provide orders of magnitude for the various phenomena. Let us simply restate the overall figures that are available.

Today, the planet contains a little less than 4,000 million ha of forest, approximately 3,400 million ha of savanna and uncultivated pastures, 1,500 million ha of cultivated land, and 380 million ha covered by cities. From 1989 to 2006, forest acreage fell overall by 7.3 million ha per year, while cultivated zones, pastures

²² For example, let us cite the Build Operate Transfers (BOTs) used for investments in various sectors for decades.

²³ Of course, these questions should examine not only developing countries but also developed countries.

and urban land increased by 2.9, 2.4 and 2 million ha per year respectively.²⁴ These overall changes do not take into account local dynamics that can vary drastically.

According to the IIASA's estimates, potentially cultivable land available worldwide would amount to 3,325 million hectares (2,541 million ha of good quality, and 784 million hectares of land moderately suited to agricultural use). Even if the percentage of forest is not clearly identified, it is certain that there is a large margin because only 1,500 million hectares are cultivated today.

According to Fischer (IIASA), 80% of the reserves of potential farm land outside of forests — 949 million ha — are concentrated in Africa and Latin America (about half of those in Angola, Democratic Republic of Congo, Sudan, Argentina, Bolivia and Colombia) (Fischer *et al.*, 2002, according to 1995-1996 satellite imagery²⁵).

One can clearly see the magnitude of the stakes (both national and international) involved in distributing these forest resources.

To complete this conceptual clarification and illustrate its possible applications, we shall attempt to describe the principal risks for humanity of commercial pressures on land.

3. WHAT ARE THE PRINCIPAL RISKS FOR SOCIETY AND WHAT OPPORTUNITIES COULD EMERGE?

The aim here is not to answer these questions but simply to begin to ask them. Indeed, the study that the ILC will conduct cannot ignore them.

3.1. Opportunities

For the moment, let us set aside the risks, which are obviously worrying (if they were not, international organizations and NGO networks would not spend as much energy conducting emergency planet-wide studies to better understand the nature of the phenomena underway), and look at the positive aspects proclaimed by those who promote these massive investment operations or by their supporters. During the ILC's study, it will be important to be able to assess the relevance of these arguments in the field or through adequate crosscutting studies.

3.1.1. Developing Unutilized Resources

One of the major justifications put forth by partisans of setting up foreign investments consists of claiming that the citizens are incapable of developing the resources that they have because they do not have the funds to do so or have not mastered the cutting-edge techniques that they would need to do so, and also because of obstacles linked to social structures that prevent all change. They say that only foreign investors, who have large amounts of capital and better technologies, and follow an unfailing business logic, would be able to do so. The speech given by the President of Peru, Alan Garcia, in October 2007

²⁴ Source: Holmgren 2006, cited in *Global Environment Outlook (GEO-4)*, United Nations Environment Programme. 2007.

²⁵ in Lorenzo Cotula, Nat Dyer and Sonja Vermeulen, IIED, *Fuelling Exclusion ? The Biofuels Boom and Poor People's Access to Land*. FAO and IIED, 2008.

illustrates this position magnificently.²⁶ For the government of Peru, the country's development requires the suppression of property in mortmain that still persists in large quantity.

This discourse is not new. In Latin America, the liberal laws of the 19th century had affected the Church's and communities' property in mortmain equally and triggered a continental process of large property consolidation and exacerbation of inequalities. In Mexico, this process, which reached an extreme level under Porfirio Diaz, led to the Mexican Revolution.

The implementation of similar schemas in some colonies—this time colonies of settlement such as those in Zimbabwe or South Africa—also had disastrous results in the medium term, both in regard to human rights and economically.

3.1.2. *Alleviating Poverty*

An important justification by partisans of this path to development consists of affirming that it is the most effective way to alleviate poverty overall.

More or less sophisticated modeling thus claims that—based on audacious assumptions of continued rising yields thanks to scientific progress—continued liberalization of global trade is the most favorable scenario for poverty alleviation.²⁷

Critical examination of the assumptions behind such constructions is, quite obviously, simply indispensable. The historic trends that have prevailed until now when it comes to development tend to prove exactly the opposite, as famed World Bank researchers affirm, insisting that the countries that have the highest degrees of inequality in access to resources are not the ones that obtain the best results when it comes to poverty alleviation (see K. Deininger, below).

For many scientists, such as Marcel Mazoyer,²⁸ the real causes of poverty are linked to competition on the global market by agricultural systems with very different levels of productivity, which results in whole social groups, millions of farmers losing all access to land and natural resources. Therefore, they contest radically the validity of the previous assumptions.

3.1.3. *Mitigating Harm to Natural Biodiversity*

The most modern production systems make it possible to attain gross yields that are greatly superior to current systems. The amount of land needed to meet humanity's need for food and agrofuel could therefore be reduced by as much. Thus, the loss of agricultural diversity and the greater degree of artificialization of developed zones based on their comparative advantages are said to be largely offset by the possibility of preserving and

²⁶ This speech set off a violent controversy in Peru and the laws that the Peruvian government had wanted to impose to speed up the sale of Indian communities' lands were ultimately declared anti-constitutional following the large popular demonstrations that they had provoked.

²⁷ See the Millennium Ecosystems Assessment's "Global Orchestration" scenario, cited in *Agricultures et alimentations du monde en 2050: scénarios et défis pour un développement durable*. INRA, CIRAD, February 2009. France.

²⁸ Mazoyer, Marcel. FAO, 2001. *Protecting small farmers and the rural poor in the context of globalization*.

protecting much larger tracts of land, turned into sanctuaries to preserve natural biodiversity. This justification, taken up by Alan Garcia, is also expanded upon in the Millennium Ecosystem Assessment's Global Orchestration scenario. This is not the place to discuss this justification, but it will be appropriate to keep it in mind when conducting the studies.

3.2. Risks

3.2.1. *Risks Due to Strong Price Fluctuation*

The amounts of rent and profits for investors are directly linked to the price of agricultural and energy commodities on the world market. At the same time, strategies of producing food or agrofuel directly abroad are partially linked to a desire to earn a certain degree of maneuvering room and more independence in the case of very sharp rises in the prices of strategic commodities, foods and fuels.

Will the large increases in food prices of 2006-2007 persist? Are they structural or only temporary? Prices have already begin to drop in 2008. Part of the high prices is explained by the direct and/or indirect subsidies that the agrofuel promotion policies of a few large countries imply for agrofuels. If these subsidies fall, will agrofuel production continue to grow?

3.2.2. *Risks of New Conflicts*

The processes by which companies—usually foreign companies—take control of large quantities of land and natural resources trigger deep-reaching changes in pre-existing social relations. The inevitable result is an increase in inequalities and phenomena of exclusion. Very often, this also exacerbates contradictions between various ethnic groups who had until then held complementary rights to resources, which can go so far as confrontation.²⁹

Stigmatization of *foreigners* can also degenerate into conflict. Very often, the easiest way to limit access to land is to forbid people and entities of other nationalities from becoming landowners. It is often fairly easy to get around such laws by creating national companies in which foreign companies are shareholders.

If the vital interests of host countries are affected, or if significant conflicts develop, their governments or protest movements will probably be led to challenge the rights conceded to investors or the management conditions of the productions they organize. From this could emerge international conflicts if the “investor” states wish to protect the interests of their citizens who are acting as private investors. It would not be the first time in human history!³⁰

²⁹ This is the case in Senegal, for example.

³⁰ Much has been written on these issues. The IIED has provided a detailed look at taking foreign investors' expectations on host countries' economic and political stability into account in the legal framework (treaties, contracts, notably investment contracts). See the Briefings on *Investment Law and Sustainable Development*, IIED, August 2007. These documents are very useful in strengthening citizens' vigilance on the conditions granted to foreign investors by states.

3.2.3. *Risks for Food Security*

Is there not a risk of endangering the food security of the countries that receive these investments? What is the real situation in countries that export their food production companies?

In addition to the risks evoked above, is competition around food and energy uses not likely to reduce the place given to producing food, both in countries and on the planet as a whole?

More generally speaking, does choosing crops based on highly volatile commodities prices on the world market not cause increasing uncertainty to weigh on national supply?

To these risks that concern investment-receiving countries, one must add interrogations on the specific food security problems of countries that promote policies expatriating their production. Do they always decide to invest elsewhere because of the limited potential of their territory? Some of them have always in the past had effective, inward-looking agricultural policies based on small-scale production and its modernization; are they changing their policies and if so, why?

3.2.4. *Environmental Risks*

Is there not a risk of worsening the global ecological crisis?

Will not the promise of large quantities of investments in the short term weigh more heavily than the bet that one will be able to preserve forest resources or biodiversity that is as yet unused and exploitable only in the long term?

Do the technical models that are easiest to manage on large farms and use salaried labor and the fact that capital can go elsewhere when profits fall generate a high risk of unsustainable exploitation of resources and extraction like what one sees in mining?

At a time when the threat of global warming is becoming more and more urgent and the destruction of forests cannot be stopped as it should, is it really reasonable to let practices spread when we have seen many times in the past, in other circumstances, that these practices have irreversible effects with usually negative impacts?

3.2.5. *Risk of Massive Destruction of Smallholder Farming*

What is the best strategy to sustainably develop land and natural resources in the general interest on planetary scale?

Will not land rush phenomena obligatorily accelerate the disappearance of smallholder farming and the development of vast mechanized farms using wage labor?

This is already what happened in the 1970s when the price of agricultural commodities soared. Prices dropped again a few years later but agribusiness remained firmly entrenched in developing countries. Brazil provides an enlightening illustration of this. The destruction of farming structures is irreversible on the scale of one or several generations.

In a recent paper, *Foreign Investment in Agricultural Production: Opportunities and Challenges*, Klaus Deininger and Vera Songwe³¹ explicitly mention this issue and emphasize the danger it represents.

“Large-scale land acquisitions during commodity booms can be particularly detrimental to social and economic development, as evidenced in Central America during the coffee boom of the late 19th century when privatization of previously customary lands led to rapid land concentration.”

Does the world need efficient small farmers or very large farms? This is undoubtedly one of the fundamental questions hiding behind previous debates. Deininger and Songwe were not mistaken! We shall quote a few extracts from their text here and invite everyone to read the entire paper.

“Does ‘modern’ agriculture require large farms ?

“An argument commonly used to advocate allocating large tracts of land to investors is that ‘modernized’ agriculture, especially in Africa, will by definition entail a transition from small holdings to large farms. [...] All over the world, family-operated farms have been shown to be economically much more efficient than plantations operated by wage labor. This is one reason that even large agri-business firms often rely on outgrowers, and do so almost exclusively for produce that has to meet the highest quality standards. Smallholder production moreover has a massive employment effect that is not seen in the case of large mechanized farming. This employment effect is critically important for poverty reduction in situations in which non-agricultural economic growth is insufficient to draw workers out of the agriculture sector.

“A useful illustration of this relationship between farm size, poverty, and employment can be found in the contrast between Brazil and China from 1991 to 2001. During that period, China doubled its cereal yields based on a smallholder sector with an average plot size of less than 0.2 hectares, and in so doing raised some 400 million people out of poverty. Over the same period, Brazil achieved slightly lower rates of growth based on mechanized large scale farming—but the number of rural poor actually increased.”

These authors finally conclude:

“The conclusion is that agri-business investments that require implicit subsidies in the form of unrealistically low land prices or exemptions from taxation in order to become viable are unlikely to be a good idea.”

Could the irreversible destruction of farmer know-how and ways of life, the disappearance of cultural diversity, and the reduction of agricultural biodiversity due to the development of systems based mostly on single crops not become a serious problem in the case of an economic or ecologic crisis in agribusiness?

³¹ *Agriculture & Rural Development Notes, Land Policy and Administration*. Issue 45. World Bank. January 2009.

4. HOW CAN MAJOR ECONOMIC, SOCIAL AND ECOLOGIC CRISES BE AVOIDED AND HOW CAN WE BEGIN TO OPTIMIZE THE USE OF THE PLANET'S LAND AND RESOURCES?

4.1. How Can the “Inhabitants” of the Concerned Zones Benefit from New Commercial Opportunities? Clarifying the Stakes

Under what conditions and through what mechanisms can the inhabitants, farmers in the field, the “poor” benefit from the emergence of these potential rents, these “opportunities” that outside investors are able to recover?

This is certainly a central question to which there is no simple answer valid in all circumstances.

The obstacles can be of different natures, for example:

- a lack of technical or financial resources,
- inhabitants' impossibility to enter into relation with distant markets or enter begin the process of producing goods or services likely to meet their needs, and/or
- current socioeconomic systems, production systems, and modes of organization.

Examples of historic situations in which these obstacles were overcome are known. In all cases, this required a fairly long period building new resource governance capacities, a learning period, and favorable public policies.

Let us take two very different examples to illustrate this claim.

1. The European construction of modern family-owned farming involved setting up coordination mechanisms between farmers, a joint effort by farmers' organizations and states, that established agricultural policies capable of allowing farmers' potential to be actualized. This was the case in Denmark at the end of the 18th century and in France during the second half of the 20th century.
2. In Brazil, the World Bank's poverty alleviation programs in the Nordeste adopted a working method based on building rural communities' governance capacities, with the establishment of financing managed by councils of representatives of these communities at municipal scale. These actions allowed—well beyond the micro-projects that were supported—local actors to enter distant markets, and develop activities that would have been impossible a few years earlier.

One will undoubtedly need to take inspiration from this so that the opportunities and “win-win” scenarios that many speak of become realities. We can already affirm the need to reason in a way that takes into account the general interest as clearly as possible and set up mechanisms that can accelerate the conformation of balances of power favorable to the change and a more effective governance of land and natural resources.

To understand the possible long-term impacts, we cannot content ourselves with financial analysis or an analysis of business efficiency. If we want to assess what is really happening, we need to give ourselves the means to conduct an economic assessment, that is to say work from the standpoint of society as a whole, rather than only evaluate “investments” from the standpoint of entrepreneurs. This economic assessment should additionally be

completed by a qualitative assessment of possible environmental impacts, which are too frequently impossible to compute in terms of cost to society.

What is more, land rent distribution should be at the heart of the discussions. Land is bought or rented at what price? How are land rents taxed locally and nationally? Indeed, taxes are the most practical way to collectivize rents.

Finally, it will be appropriate to examine the means and methods to employ to succeed in speeding up the construction of new governance mechanisms. There are certainly the first stirrings of these new forms of governance in various regions of the world. The local reactions from societies have undoubtedly led to innovations that it will be crucial to inventory, analyze and disseminate.

This is one of the objectives we will assign to the ILC study.

4.2. The Minimum Necessary Conditions in the Short Term

We can imagine modalities in which the parties voluntarily enter into innovative processes as long as there is great transparency, and the possibility of debate, changing paths and adapting systems over time.

One immediately thinks of the modalities of so-called contract farming, which associates processing or sales companies with family-operated agricultural production units. In some cases, it can be effective in the short term but it can also often preserve only the appearance of small farm production by proletarianizing farmers in practice by having them take on a large share of the risks and by imposing technical itineraries similar to those used in agribusiness. One must therefore ask if the vertical integration in these schemas truly matches today's needs and if it is not a simple variation of the dominant model of large-scale production.

The most difficult thing will undoubtedly be ensuring that individuals' and institutions' choices will take into account the problems of future generations even when doing so implies giving up certain immediate benefits.

One of the objectives of the studies conducted by the FAO, IFAD or the World Bank is to successfully identify best practices and elaborate recommendations to help governments make good decisions, codes of good conduct, that could be offered to them.

Already, minimum conditions have been formulated:³²

1. Authorize massive land cession operations by national parliaments after public debate so that decisions of this importance are not made without consultation at the highest level of the state.
2. Inform and consult the populations that live on the land sold, ceded or rented, and possibly include their representatives in the negotiations with investors.
3. Make available to states, before they commit themselves, independent studies of the long-term environmental impacts (on soil, water reserves, ecologic balances, pesticide use), the local economy, and the expected impact on the country's

³² Alain Durand Lasserre, during a meeting of the French Cooperation's Land Committee, January 2009.

resources and jobs. These studies could be conducted by United Nations organizations.

4. Sign contracts on a set of objectives (in particular local employment and economic repercussions) and implement resources and assessments. States could receive legal advice to prepare these agreements.

4.3. Potential Areas of Work in the Medium Term

These proposals are interesting, but they are probably not the only lines of thought that should be addressed by the ILC study.

Continuing on from the analysis we have developed, it seems indispensable to us to successfully complete work with the populations concerned and the research and civil society organizations of the countries concerned so as not to rely solely on the opinions of international organizations' experts.

We also feel that it is essential to begin discussions on the modalities for distributing property rights and on the systems by which to manage and regulate them that will be needed, as well as on land rent distribution.

- How can the individual rights of people and local governments to land that may be conveyed in absolute ownership or ceded in the form of a concession be protected?
- How can one set up land market regulation mechanisms in places where property rights have long existed or have recently been attributed?
- How can one set up effective and binding regulation mechanisms to make companies operate in compliance with the general interest? What legal provisions are best suited for that in each situation?

4.4. Planetary Requirements

Optimizing resource use in each country does not equal optimizing resource use on the planetary scale. The very unequal distribution of resources per inhabitant around the world means that some regions will not be able to produce enough food to feed their populations. Furthermore, some subjects, such as the fight against global warming, necessarily require coordinated and coherent action on the planetary scale. Governance cannot therefore be confined to the national level.

- How can one establish new regulation mechanisms of international scope on the issue of land grabbing? What types of mechanisms could be envisaged?
- How could one ensure the largest possible number of small farmers that the conditions for sustainable development are met?
- How can one prevent national active policies such as biofuel subsidies from artificially creating a commercial context favorable to a minority of actors taking control of land?
- As long as no international body has the mandate and means to set and enforce rules, is it possible to think of voluntary agreements involving the various sectors of society that would seek to create a balance of power likely to bring about changes to the situation?

This list is not exhaustive. The issue of human migration was not addressed here although it is clearly crucial. While the proposed study will not be able to answer all these questions, it will be able to help enrich the discussions and formulate proposals.