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**FOOD SECURITY, FOREIGN DIRECT INVESTMENT AND
MULTILEVEL GOVERNANCE IN WEAK STATES**

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Food Security, Foreign Direct Investment and Multilevel Governance in Weak States

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1. Introduction

On the face of it all is clear and simple. In order to feed over 9 billion people by the year 2050 much more research and technological development (R&D) and investment will be necessary.¹ As late as 2008, the World Bank lamented a decade-old neglect of under-investment and a decreasing relative share of technical assistance, including in its own projects, and encouraged greater investment to address food security concerns.² Attracting such investment is important in food deficit countries that experience low relative yields for their agricultural production. Foreign direct investment (FDI)³ can play a crucial role because it can mean that the right quantities reach food deficit areas at the right moment.⁴ Unsurprisingly, such governments are interested in more investment. A plethora of guarantees and incentives for FDI are offered, often going far beyond what states' own nationals can expect. However, FDI is not always the answer to food security problems. In reality it can be very much a two-edge

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¹ Also considering the implications of climate change on food security, and increased demand for meat in emerging economies – such investments are required on an unprecedented level. The Food and Agriculture Organisation (FAO) has calculated a necessary increase of 70% in food, feed and bioenergy production, and annual (mostly private) investment needs for agriculture and rural development reaching \$30.5bn. Cf. Concept Note to the High-Level Forum of Experts on “How to Feed the World in 2050” (Rome, 12-13 October 2009).

² Food security goes beyond food production and consumption. See generally World Bank, *The World Bank Annual Report 2008, Year in Review*, (2008).

³ Note not all foreign investments qualify as FDI: only those where a foreign actor invests in assets for the purposes of production: Jägerskog, Cascão, Härsmar & Kim: *Land Acquisitions: How Will They Impact Transboundary Waters*, (2012) Stockholm International Water Institute (SIWI Report), 14. In this article we use the term FDI in a large sense.

⁴ Committee on World Food Security: *Policy Roundtable: Land Tenure and International Investment in Africa*, (September 2010) FAO, CFS:2010/7, para 9; Colen, Maertens & Swinnen: “Foreign Direct Investment as an Engine for Growth and Human Development: A Review of the Arguments and Empirical Evidence: (2009) 3 *Hum.Rts. & Int'l Legal Discourse* 177.

sword, especially for weak states.⁵ The key is therefore to obtain the maximum positive effects from FDI, whilst simultaneously mitigating the negative effects. The best way to achieve this is by ensuring there is an adequate system of governance in place.

This paper will argue that FDI in agriculture is governed by a series of overlapping international and regional treaty obligations that interact with the terms of the various bilateral investment treaties (BITs) and the national law of the host state (the state in which the investment occurs). This creates a multilevel system of governance for FDI in agriculture that creates obligations and responsibilities for the host state, the investor and the investor's home state (the state in which the investor is incorporated).⁶

We will argue that this system of obligations and responsibilities is unevenly distributed, in such a way that it impacts adversely on the host state's food security. We will show that this uneven distribution can be attributed to the lack of legally enforceable 'hard rules' in the international and regional treaties that could potentially protect the host state's food security, and the plethora of hard rules that can be enforced to protect the investor. We will argue that this over protection and under regulation of agriculture FDI is particularly problematic in weak states. This is because such states need to attract FDI to supplement their insufficient and underperforming agricultural production, but they often lack the institutional capacity to monitor the investor's behaviour, and also the capacity to ensure that their food security is not undermined by the investment.⁷ We will show that, in some cases, inadequate control of agricultural FDI can even result in the host state violating its other international legal obligations, especially the right to food.⁸ This situation is unlikely to be ameliorated by separate action taken by individuals enforcing their human rights within the host state because weak states often have information dissemination problems that mean affected citizens frequently cannot

⁵ The general human rights implications of these problems for weak states is discussed by Telesetsky: "Resource Conflicts over Arable Land in Food Insecure States: creating a United Nations Ombudsman to review Foreign Agricultural Land Leases" (2011) 1 Goettingen J.Int'l.L. 283.

⁶ It is difficult in a short piece to delve deeply into every possible facet of this argument. Instead we chart the main arguments and leave more specific reflections for later research. On multi-level governance see Marks & Hooghe: "Unraveling the central state, but how? Types of multi-level governance" (2003) 97 American Political Science Review 233.

⁷ There is even a question whether traditional farming methods produce yields sufficient to feed the national population in weak states anyway. See Häberli: "Foreign Direct Investment in Agriculture: Land Grab or Investment Opportunity?" *Paper prepared for 2012 Annual Conference of the Society of International Economic Law, 12-14 July 2012.*

⁸ De Schutter, *The Right to Food*, A/65/281, 11 August 2010, United Nations.

be made aware of their rights.⁹ Likewise, although the investor's home state may act extra-territorially to regulate the investor's behaviour within the host state, this intervention is only undertaken under specific conditions and is never automatic.¹⁰ Such action will also not necessarily promote the host state's food security obligations, but may be undertaken to promote different objectives important to the investor's home state, like the enforcement of stronger labour rights, for example.¹¹

The paper is in three sections. First we will set out the positive effects agricultural FDI can have even in weak states together with a determination of how such FDI might also adversely affect their food security. Second, we will analyse the system of multilevel governance covering agricultural FDI at both the pre-investment and post-establishment stage, in particular highlighting that the different hard and soft law rights and duties on the investor, the host state and (where relevant) the investor's home state.¹² In this section, we will show how this multi-level governance leads to over protection and under regulation of the investor to the detriment of the host state's food security. In the final section we will set out a proposal for a 'public interest' clause to be inserted into the BIT to benefit the host state. It is our belief that this clause will help to ameliorate the imbalance between the over protection and under regulation of agricultural FDI that we identify in the second section.

2. The Effects of Agricultural FDI in Weak States

FDI can promote global food security directly if it leads to a net-increase in productivity and/or the production of food crops. It is certainly true that in many countries there is ample land available for such cultivation. According to World Bank estimates, in Mozambique, Tanzania and Zambia only 12 % of arable land is currently cultivated.¹³ Rather surprisingly, this

⁹ World Bank, *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* (2011), 15 & Fisseha: *A Case Study of the Berchera agricultural development project, Ethiopia*, (2011) International Land Coalition. There is also a real question about capacity to enforce some of the obligations anyway: Fisseha *ibid*.

¹⁰ Narula: "The Right to Food: Holding Global Actors Accountable under International Law" (2005-6) 44 *Colum.J.Transnat'l.L.* 691, 728-738.

¹¹ See below section 3 *infra*.

¹² Our focus is on regional and international regulation and so the host state's domestic legal system will only be discussed to the extent that it is relevant to this analysis. For more detail on problems in domestic legal systems see generally *Rising Global Interest in Farmland* above n9. In this article we argue that the soft law obligations are weaker instruments. For a contrary view see Kaufmann-Kohler: "Soft Law and International Arbitration: Codification and Normativity" (2010) 1 *J. Int'l. Dispute Settlement* 83.

¹³ Cf. Vera Songwe and Klaus Deininger, *Foreign Investment in Agricultural Production: Opportunities and Challenges. Agricultural and Rural Development Notes*, The World Bank, Washington, (January 2009), 2.

is the case even in China.¹⁴ The consequences for the host state (the state in which the investment is made) on its food security of FDI are varied however.

Some studies show that the host state is unlikely to be able to rely on the food produced by the investor to meet its own direct domestic food security needs, as most of the food is exported.¹⁵ For example, Saudi Star Agricultural Development plc acquired 200,000 thousand hectares of prime arable land in Ethiopia in 2009 on which to grow cereals. All cereals grown on the land were intended for export to Saudi Arabia. Whilst this will no doubt support Saudi Arabia's food security requirements, inevitably the food itself will not reach the citizens of Ethiopia.¹⁶

The impact on a host state's food security can even be negative, as cash crop exports can substitute local food production. This happens if local farmers are illegally displaced as a result of the purchase (or expropriation), or long-term lease of large portions of their agricultural land on which they previously grew crops, or where their cattle previously grazed. These are the so-called 'land grab' cases.¹⁷ Domestic agricultural production then can cease completely, or may be substantially reduced.¹⁸ The remaining portions of land following acquisition may be so small that it is no longer economic for the local producers to cultivate the land even if they are permitted to do so by the investor.¹⁹ Displacement may also occur because the local producer can earn more money as, for example, a security guard, than he could as a farmer.²⁰ Former (individual or communal) landowners themselves will be more food insecure if they can no longer work their (leased) land, or get adequate compensation or new jobs.²¹

Some commentators also argue that further negative pressure on food security for the host state also occurs as large-scale FDI in food exports and fuel crops increases pressure on water supplies for neighbouring food croppers with the consequence that the investment is in reality

¹⁴ The Economist, 3 December 2011.

¹⁵ Note that we mean the food *itself* is exported. However, there may be *indirect* benefit to food security. This is discussed below *infra*.

¹⁶ Fisseha, above n 9, 9.

¹⁷ For the definition of 'land grab' see International Land Coalition: '*Securing Land Access for the Poor in Times of Intensified Natural Resources Competition*' (27 May 2011), 'Tirana Declaration,' para 4: <http://www.landcoalition.org/about-us/aom2011/tirana-declaration>. Stevens: "The Global Land Grab" (2011) XX(1) International Affairs Review, 1.

¹⁸ Fisseha above n 9,34

¹⁹ Fisseha above n 9, 21.

²⁰ Fisseha above n 9, 20.

²¹ Land grab clearly has a negative impact on these former landowners' 'right to food.' This is an issue we will return to in the next section: On the right to food generally see De Schutter, above n 8.

a "virtual water export."²² As the Stockholm Institute noted in 2012, "a land investment is very much a water investment, though water is rarely in the contract."²³ Traditional agricultural production in much of Sub-Saharan Africa is rain-fed and relies on access to rivers and aquifers when the rains fail.²⁴ However, large-scale FDI tends to rely more on irrigation which draws water straight from those rivers and aquifers, which in turn may lead to a reduction in the water available for traditional domestic production in the host state, and, potentially a loss of water downstream for other states' agricultural production when the river is part of a shared water basin *and* the FDI is located in an area with inadequate rainfall.²⁵ For example, many large FDI projects in Sudan, South Sudan and Ethiopia are located at transboundary water basins on the Nile river delta.²⁶

The host state's food security may in fact derive some indirect benefit from the investment.²⁷ In general, FDI helps reverse the trend towards chronic underinvestment in agriculture in many sub-Saharan African states that was highlighted by the World Bank.²⁸ Countries like Tanzania, Sudan and Zambia, for example, tried to kick-start their own domestic agricultural production in order to support their citizens' food security needs. A lack of public funding, coupled with poor technology and management of the large farms, saw these initiatives fail.²⁹ Carefully managed foreign investment could enable up to 6 million hectares of additional agricultural land to be cultivated by 2030.³⁰ This rise in agricultural FDI is also important for the host state, as the investor will at least provide foreign exchange and tax revenues (like any traditional cash crop exports such as coffee and bananas, or biofuels), which that state can use to buy food on the global market, or, in some cases re-invest in increasing food crop produc-

²² Chartres: "Water and Food Security" in R. Rafuse & N. Weisfelt (eds), *The Challenge of Food Security: International Policy and Regulatory Frameworks*, (2012) Edward Elgar, 162.

²³ SIWI Report above n 3, 8.

²⁴ SIWI Report *ibid.*, 10.

²⁵ Note that biofuel production, especially of sugarcane, uses an estimated 1% of global irrigated water: SIWI report *ibid.*, 14.

²⁶ SIWI Report *ibid.*, 9.

²⁷ "Indirect" in this context is used to denote the fact that the host state will not acquire any agricultural production directly from the investor under the terms of the investment itself.

²⁸ *Rising Global Interest in Farmland* above n 9, xxv.

²⁹ *Ibid.*, xxx.

³⁰ *Ibid.*, 16. Note that this is this is land that could be brought into cultivation with careful investment. This is not the same as the large-scale increase in FDI which involves large-scale acquisition of land. This acquisition can be virgin land, but can also be existing land where some form of land tenure rights exist: see W. Anseeuw, L. Alden Wily, L. Cotula & M. Taylor: *Land Rights and the Rush for Land*, (2012) International Land Coalition, 4. This report argues that and deals between 2000-2011 amounted to a total of 203 million hectares.

tion.³¹ Local producers may also enter into partnership agreements or production contracts with an investor, for instance for crops like sugar cane and oilseeds. Production of these crops, in particular, benefit from the local producers' cultivation knowledge together with capital and technology from the investor.³²

The key to gaining these positive benefits from FDI in agriculture is good management of the various projects to ensure the host state derives maximum benefit for all their development needs, without the detrimental effects on their food security. Such management will be greatly facilitated if robust 'hard' law underpins it. Although this would be the ideal position, the reality is less optimistic for weak states.

3. How are the key FDI challenges to Food Security currently regulated?

A complex web of over 3,000 bilateral investment treaties (BIT) and regional trade agreements (RTA) promote and protect agricultural FDI against a number of risks, including expropriation. This system of regulation often offers greater guarantees for foreign investors against expropriation, easier access to courts and enhanced compensation possibilities than domestic investors enjoy.³³ At first glance it appears that this regulation provides comprehensive control over agricultural FDI. In reality that regulation places stringent obligations on the host state vis-à-vis the investor through international and regional treaties, as well as the BIT, but under-regulates the investor in two ways: first, it can prevent policy reforms, for instance for better labour or environmental protection ("regulatory chill").³⁴ Secondly, as will be seen below it may even undermine the host state's food security obligations. This over-protection and under-regulation of agricultural FDI manifests itself in different ways at the pre- investment and post- establishment stages.

a. Pre-Investment Stage

Food Security, FDI and the Host State

³¹ Re-investment may be problematic for weak states where the investment takes the form of 'land grab' of the prime agricultural land: Liversage: *Responding to 'Land Grabbing' and Promoting Responsible Investment in Agriculture*, (2011) IFAD.

³² E.g. Senegal, *Rising Global Interest in Farmland* above n 9, 34.

³³ Large-scale investment in weak states is not necessarily confined to foreign investors: World Bank, *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* (2011), xxxii.

³⁴ This point is addressed in more detail below in 'post-investment' See generally on regulatory chill: Matua & Howse: "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation" (2001) *Human Rights in Development Yearbook* 51.

According to multilaterally agreed definitions, food security exists when “all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”³⁵ All states must “halt immediately the increase in- and to significantly reduce- the number of people suffering from hunger, malnutrition and food insecurity.”³⁶ To this end, states must “adopt a strategy consistent with [their] resources and capacities” that alleviates hunger in the short term and enables “all people to attain sustainable food security” in the long term.

Food security is understood here mainly through a national lens. It is the responsibility of *each* state to determine its food security needs, to consult with various stakeholders regarding what policies may be appropriate for that state and how those policy objectives might be implemented. It is then up to the state to design and implement that policy effectively within its own jurisdiction.³⁷ The policy must at least guarantee *access* to food, or the means to provide it, as a minimum obligation; it is, however, not incumbent on the state to directly feed people per se, nor to ‘do no harm’ generally to its citizens with its other policies.³⁸ Clearly, the state can exceed the minimum commitment to the extent that it is appropriate for it to do so as part of its national food security strategy.³⁹

Encouraging responsible agricultural FDI is not merely an aspirational part of the obligation to realise food security within the host state, it is instead regarded as a critical part of that state’s food security strategy.⁴⁰ As the World Food Summit Plan of Action itself points out, FDI in agriculture actively contributes to food security when it enables access to factors of agricultural production, new technology that results in increased yields, more effective processing and better storage post harvest in a “sustained,” “timely and reliable” way over the

³⁵ World Food Summit, Plan of Action, Rome, 13 November 1996, para 1. “Social” was added in the 2009 Declaration of the World Summit on Food Security, 16-18 November 2009, para 2, WFS 2009/2.

³⁶ Declaration of the World Summit on Food Security *ibid.*, para 1.

³⁷ Five Rome Principles for Sustainable Global Food Security 2009 above n 35, Principle 1.

³⁸ It is clear that a state’s trade policies, especially its use of domestic and export subsidies, can harm food security: see Häberli: “Food Security and the WTO Rules” in B. Karapinar and C. Häberli (eds): *Food Crises and the WTO: World Trade Forum* (2010) Cambridge University Press, 297-322 The Rome Principles do not place any wider obligation on the state to consider the impact of all its policies on food security.

³⁹ Principle 1 above n 35. The problems of regulating FDI within specific weak states themselves has been discussed extensively elsewhere and will not form part of this article: see Cotula: “‘Land Grabbing’ in the shadow of the law: legal frameworks regulating the global land rush” in Rayfuse & Weisfelt (eds) above n 22, 272.

⁴⁰ An approach that was reiterated by the G8 in the L’Aquila Joint Statement on Global Food Security, 2009 G8 Summit, <http://www.ifad.org/events/g8/statement.pdf>.

short, medium and long term.⁴¹ It is also positive when it leads to greater employment opportunities for households that would otherwise be food insecure.⁴²

At the pre-investment stage therefore, the host state should only welcome agricultural FDI that actively reduces the negative externalities and boosts its positive effects.⁴³ Principle 2 of the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (PRAI) also strongly supports this position and suggests only FDI that “generate[s] desirable social and distributional impacts and does not increase vulnerability” will meet states’ food security obligations.⁴⁴

FDI with a positive impact on national food security is therefore investment that *actually* gives the domestic producers access to those factors of production and new technology, and increases domestic employment.⁴⁵ The host state must focus on encouraging FDI that is based on innovative business models like contract farming, outgrower schemes and joint ventures with local producers.⁴⁶ On the negative side there are cases of FDI that result in the creation of the ‘mega farms’ that can displace domestic production and lead to the widespread eviction of indigenous peoples.⁴⁷ The Action Plan for the implementation of the PRAI even advocates field-testing FDI before rolling out large-scale projects that could impact adversely on the food security goals. Similarly, the Action Plan also supports continually modifying the thinking on what the most positive form of FDI for food security is for the specific state.⁴⁸

In one sense, the obligation only to encourage FDI that has a positive effect expressly on food security is an aspirational goal for the host state.⁴⁹ The obligation is contained in the Rome Declaration on World Food Security 1996 and further underpinned by the later 2009 Declaration. As Declarations, they are not binding instruments in international law as such and there-

⁴¹ World Food Summit Plan for Action 1996 above n. 35, Objectives 2.1(b), (c) & 2.3(d). Five Rome Principles for Sustainable Global Food Security, Principle 5.

⁴² World Food Summit Plan for Action 1996 above n. 35, Objectives 2.(c).

⁴³ Report of the High Level Development Working Group: *Options for Promoting Responsible Investment in Agriculture*, (2011) FAO, IFAD, UNCTAD & UN G-20 Joint Report, 4.

⁴⁴ FAO, IFAD, UN & World Bank, *Principles for Responsible Agricultural Investment that Respect Rights, Livelihoods and Resources*, March 2010, TD/B/C.II/CRP.3, Principle 6.

⁴⁵ Note the reality is definitely different. See section 2 above *infra*.

⁴⁶ These options are only if they reduce food insecurity in fact. The International Land Coalition notes that not all contract farming is positive for the local producer: *Land Rights and the Rush for Land*, above n 30, 42-44.

⁴⁷ *Options for Promoting Responsible Investment in Agriculture*, above n 43, 4. On the problems of displacement within specific weak states see Finnesha above n 9.

⁴⁸ Report of the High Level Development Working Group: *Options for Promoting Responsible Investment in Agriculture* above n 43, Action Plan point 4.

⁴⁹ For the relationship between food security and the right to food, see below section 3 *infra*.

fore cannot be regarded as ‘hard law’ whereby the state’s obligation could be enforced in proceedings before domestic courts and/or the International Court of Justice.⁵⁰ They can only provide moral force and general guidance to the state to shape the FDI it attracts.

The PRAI too were described in the Discussion Note prepared by the FAO, IFAD, the United Nations and the World Bank as, at best, “a toolkit of best practices, guidelines, governance frameworks and possibly codes of practice.”⁵¹ There is a move towards creating a model law, in which the PRAI would be enshrined, but this is only outlined in the third project under the Action Plan, and even then, it is only scheduled to be a discussion point.⁵² Even if the PRAI were contained in a model law, the normative power of such instruments is inevitably limited.

The 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land and Natural Resources also advocate that the host state should take “reasonable measures” to catalogue “all legitimate tenure rights holders” prior to agreeing to any FDI.⁵³ These rights should then be guaranteed in domestic law, and individuals adversely affected by any expropriation of land or any other forms of interference with their rights should have access to justice and adequate compensation.⁵⁴ The host state is required to acknowledge land tenure rights of local producers, including customary tenure rights of indigenous peoples, even when all the land is actually owned by the state.⁵⁵

The Guidelines indicate that at the pre-investment stage, it is incumbent on the host state only to “promote and support” responsible investments that acknowledge the land tenure rights (in all their forms) and actively contribute to food security goals of the host state.⁵⁶ Like the PRAI, the Voluntary Guidelines on the Responsible Governance of the Tenure of Land and Natural Resources are not mandatory for the host state and can only, at best, act as series of moral obligations which the state takes into consideration when seeking to attract FDI. They

⁵⁰ See Olleson, *The Draft ICL Articles on Responsibility of States for Internationally Wrongful Acts*, (2007) BIICL 10 on the scope of what will be “an internationally wrongful act” in Article 1.

⁵¹ TD/B/C.II/CRP.3 above n 43, 4.

⁵² Project 3: Action Plan for Responsible Agricultural Investment and Proposed G-20 Actions, in *ibid.*, 9.

⁵³ FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* 11 May 2012 (Voluntary Guidelines on Responsible Governance of Tenure of Land and Natural Resources).

⁵⁴ Voluntary Guidelines on Responsible Governance of Land and Natural Resources above n 55, Article 3.1.1-4 & 14 on restitution.

⁵⁵ *Ibid.* Articles 8 & 9.

⁵⁶ *Ibid.* Article 12.1. The state should also actively encourage small-scale FDI: Article 12.2.

clearly do not create rights that the individual can enforce, nor obligations on the investor, or the investor's home state.

Although it appears that the obligation on the host state to invite agro-FDI that improves, or at least does not impinge on food security is only enshrined in soft law, it is underpinned by duties that states owe to their *citizens* in international and regional human rights law: specifically, the right to food and the right of indigenous peoples to use their land and exploit natural resources on that land for the purposes of feeding themselves.⁵⁷ Whilst some commentators have questioned the precise nature of these rights' normativity, it is clear that they are much closer to 'hard law' for the purposes of this analysis.⁵⁸

The right to food in international human rights law requires that "each individual alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement."⁵⁹ The Committee on Economic, Social and Cultural Rights in General Comment 12, has further interpreted Article 11 to mean that food must be *available* in sufficient quantities and be of sufficient quality that it satisfies the dietary needs of individuals. So, the food available must be culturally appropriate and sufficiently nutritious, in terms of adequate calorie content and safety, so that the individual thrives both medically and physically.⁶⁰

In addition, food must be *accessible* in ways that are sustainable and yet do not interfere with other human rights.⁶¹ Accessibility is understood in terms of both physical and economic accessibility. In other words, it must be possible either for the individual to feed themselves directly by working on productive land, (understood as an *individual* right to invest and produce food);⁶² or for the individual to gain access to food directly through adequate distribution,

⁵⁷ UN Declaration on Human Rights 1948, Article 25 & specifically, Article 11 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976 on the right to food & Article 8 UN Declaration in the Rights of Indigenous Peoples, United Nations General Assembly Resolution 61/295, 13 September 2007 (A/61/53) & Article 2 UN ICESCR. Indigenous People's rights to land are inextricably linked generally with cultural rights: see Weissner: "The Cultural Rights of Indigenous Peoples: Achievements and Challenges" (2011) 22(1) EJIL 121.

⁵⁸ For example see Plant: "Social and Economic Rights Revisited" (2003) 14 Kings L.J. 1.

⁵⁹ Article 25 Universal Declaration on Human Rights, & Article 11 International Covenant on Economic, Social and Cultural Rights: de Schutter, *The Right to Food*, above n 8, para 2. On the right to food, see Narula above n 10, & Breining-Kaufmann: "The Right to Food and Trade in Agriculture" in T. Cottier, J. Pauwelyn & E. Bürgi-Bonanomi (eds.), *Human Rights in International Trade*, (2005) OUP, 341.

⁶⁰ UN Doc. E/C.12/1999/5 above n 58, para 9 & 10.

⁶¹ UN Doc.E/C12/1999/5, *ibid.*, para 8, 9 & 11.

⁶² UN Doc. E/C.12/1999/5 *ibid.*, para 12.

processing and market systems at a price which ensures that the food available is not prohibitively expensive for the more vulnerable individuals in the state (understood as the *collective* right to eat food).⁶³

The status of the right to food as a human right places specific obligations on the host state therefore.⁶⁴ This is understood as both a positive and negative obligation: if the host state has ratified the International Convention on Social and Cultural Rights, it must provide food for its citizens if they are “unable, for some reasons beyond their control, to enjoy the right to adequate food by the means at their disposal;” but primarily, it must refrain from taking measures, (duty to respect) or allowing third party encroachment (duty to protect) in such a way that would prevent its citizens from gaining access to “productive resources” they have previously utilised in order to provide food for themselves, and actively seek to “strengthen people’s access to and utilization of resources and means to ensure their livelihoods” (duty to facilitate).⁶⁵

This obligation would require the state not to encourage or enter into agreements for agro-FDI involving forced expropriation of land owned by local agricultural producers. Similarly, it would also require the host state to implement domestic legislation that guarantees the rights for its citizens (and their representatives) and provides remedies where those rights are violated by allowing the establishment of agro-FDI that violated those rights.⁶⁶ Information asymmetries in weak states mean that it is often difficult for individuals to exercise those rights anyway. To the extent that guaranteeing the right to food and protection of property are both duties on the host state, failure to adhere to that duty would be regarded potentially as an “internationally wrongful act” by the state under the International Law Commission’s Articles on State Responsibility.⁶⁷ Although there is a real question about the political (and legal) viability of such proceedings based on the difficult link between the right to food and property and

⁶³ UN Doc. E/C.12/1995/5 *ibid.*, para 13.

⁶⁴ HJ Steiner, P Alston & R Gooman, *International Human Rights in Context: Law, Politics and Morals*, 3rd ed. (2008) OUP, Ch 4, 313-347. See also FAO: *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of Food Security 2004*, (2005), Article 17.

⁶⁵ Over 160 states have ratified the Convention, so it is widely accepted:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en. De Schutter, above n 8, para 2. See generally: Narula above n 10, 692.

⁶⁶ Whether affected individuals would be able to access those rights in weak states is questionable, although these difficulties are ameliorated by NGO activities: see section 2 above *infra*. Note that NGO activities are not without their problems in this area, but a discussion is beyond the scope of this paper. See Brakman-Reisner & Kelly: “Linking NGO Accountability and the Legitimacy of Global Governance” (2010-11) 36 *Brook.J.Int’l.L.* 1011.

⁶⁷ Article 28 International Law Commission, Draft Articles on State Responsibility above n 50.

agro-FDI before the investment has occurred when there may be little damage to individuals at this stage.

The right to food has also been incorporated into regional initiatives. As most weak states we refer to in this paper are located in Sub-Saharan Africa, the most important regional initiative is the African Charter on Human and Peoples' Rights (ACHPR) adopted by the Organisation of African Unity (OAU).⁶⁸ The unique nature of the Charter means that an individual's human rights are to be fully realised only in the context of their community as a whole.⁶⁹ Non-discrimination between individuals and peoples is therefore central to the ACHPR's concept of economic, social and political rights.⁷⁰

Moving the focus to the community and away from the individual means that the right to food is understood to be a collective right for the host state's population as a whole as part of its overall economic development strategy.⁷¹ Article 14 also specifically recognises the "right to property" which would potentially protect any local producers that did have some form of land tenure. However, it is possible for the state to encroach on this right if it is in the interest of the wider community, although such encroachment must be undertaken in accordance with national law and provided affected citizens would be effectively compensated for their loss.⁷² Article 17 equally provides for respect for cultural ways of life and traditional ways of life, including agricultural production methods.⁷³

The Draft Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights places further general obligations on the OAU states "to take measures to ensure enjoyment of economic, social and cultural rights" including the

⁶⁸ OAU Doc. CAB/LEG/67/3 rev.5 (1982) 21 ILM 58. Note land grab is not only confined to sub-Saharan Africa, it also is found in other weak states, including Cambodia and Lao: L. Cotula: *The Outlook on Farmland Acquisitions*, (2011), International Land Coalition, IIED & CIRAD, 2.

⁶⁹ Article 29(7) Draft Charter on Human and Peoples' Rights *ibid.*

⁷⁰ See generally Okere: "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 Hum.Rts.Q. 141, 145. Note that the African Court on Human and Peoples' Rights has jurisdiction over some matters, but only to the extent that the state has ratified the African Court Protocol.

⁷¹ Okere *ibid.*, 148.

⁷² Articles 14 & 21 African Charter on Human and Peoples' Rights above n 69

⁷³ African Charter on Human and Peoples' Rights *ibid.*. Note it is not possible for individuals to enforce their human rights via this route unless the state specifically allows this in their domestic legislation: *Nigeria's 4th Periodic Country Report: 2008-2010 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria*, Federal Republic of Nigeria, (2011) 11.

right to food and the right to property.⁷⁴ Such measures must be fully supported by effective domestic remedies.⁷⁵ At the pre-investment stage, therefore, the host state must take “concrete and targeted steps” to ensure that the agro-FDI does not impede these individual and collective rights. The Draft Guidelines suggest that such steps must include the protection of indigenous peoples against expropriation of their land, as well as eviction. It is a key element of the Draft Guidelines that the most vulnerable and disadvantaged groups’ rights are protected.⁷⁶ Although the guidelines are in draft form, it is clear that they are an extension of human rights obligations already on the state.

In essence, the instruments discussed so far suggest that the host state has an active obligation to only encourage agro-FDI that will actively add to that state’s food security. This obligation is not enforceable as ‘hard law’ in its own right, but is supported by human rights obligations in international law and regional initiatives that map on to at least some elements of the obligation to promote food security in the context of agro-FDI, which *are* enforceable.⁷⁷ Consequently, the host state could be held accountable by its citizens and other states should it condone agro-FDI that does violate these rights. This places a heavy burden on the host state at the pre-investment stage in terms of the type of FDI it should attract, or refuse. The question to which we now turn is whether the same burden also falls on the investor’s home state and the investor itself.

Food Security, FDI and the Investor

At the pre-investment stage, there is very little hard law governing the behaviour of the investor. To the extent that the investor is a wholly private entity with its own commercial strategy, international investment law has nothing to say about the way it chooses how and where to invest. Even the concept of good faith only works *against* the host state. For example, if the investor has been promised inducements to invest, it will be held to deliver on those inducements. This appears to be the case irrespective of the behaviour of the investor.⁷⁸ International

⁷⁴ Section II.A, Article 2, Draft Principles and Guidelines in Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 24 October 2011: available at www.achpr.org/instruments/economic-social-cultural/.

⁷⁵ Draft Principles *ibid.*, Article 36.

⁷⁶ Draft Principles *ibid.*, Article 17.

⁷⁷ A detailed exploration of precisely how the human rights to food and property map on to the host state’s food security obligation is beyond the scope of this paper.

⁷⁸ Although this does depend on the precise terms of the investment contract: *Thunderbird v Mexico*, Arbitral Award, 26 January 2006, para 47 & *Nuclear Tests (New Zealand v France)*, [1974] ICJ Rep. 253, 268. See generally Reisman & Arsajani: “The Question of Unilateral Government Statements as Applicable Law in Investment Disputes,” (2004) 19 ICSID Review FILJ 328.

investment law is certainly not designed to compel the investor to consider the impact of its investment on the host state's food security *before* it makes the investment decision.

The underlying assumption in foreign investment law is rather that all parties are able to freely negotiate the terms of the investment. The resulting investment therefore represents the compromise between the competing pros and cons of the investment.⁷⁹ In other words, the very nature of FDI is thought to be positive for all parties and the law is merely the legal underpinning of this mutual benefit. The only hard law limitation may be that the investor cannot invest in a way that breaches domestic law.⁸⁰ The extent to which this helps weak states combat the problems of agro-FDI at the pre-investment stage is questionable.⁸¹

The only potential constraint on the investor to invest in ways that do not undermine the host state's food security is through soft law. Principle 2 of the PRAI states that any investment should not jeopardise the host state's food security.⁸² This principle is primarily aimed at the host state, but it is also implicit in Principle 2 that the investor acts in a way that does not undermine the food security of the host state. Principle 5 places a specific commitment on the investor to ensure any project it is about to enter into respects the host state's "rule of law, industry best practice" and results in "durable shared value."⁸³ Clearly this is a commitment that is meant to cross into the post-investment stage too, but inevitably the investor is supposed to be under a minimum obligation to check that its *planned* investment does not violate this commitment.

Agro-FDI projects should be assessed by the investor for their technical and economic viability, prior to the investment.⁸⁴ Due diligence all along the supply chain from the investment to the consumer should be undertaken by the investor before the investment takes place to check for possible impact on the hosts state's food security, its citizens' right to food and violations

⁷⁹ World Bank: "Guidelines on the Treatment of Foreign Direct Investment" (1992) 2 Legal Framework for the Treatment of Foreign Direct Investment 35.

⁸⁰ E.g. UK Model BIT 2005, Article 2(1). See generally R. Dolzer & C. Schreuer: *Principles of International Investment Law*, 6-7.

⁸¹ See section 2 above *infra*.

⁸² PRAI above n 44.

⁸³ *Ibid*.

⁸⁴ FAO, IFAD, UN & World Bank Joint Report, *Principles for Responsible Agricultural Investments that Respect Rights, Livelihoods and Resources*, (Extended Version) above n 44, 13.

of land tenure rights.⁸⁵ Whilst there is great hope that these Principles will embed into national law at some later point, they are currently unenforceable against the investor.⁸⁶

Food Security, FDI and the Investor's Home State

For the investor's home state, an interesting picture emerges at the pre-investment stage. Although the obligation to provide food security is "nationally articulated," this does not necessarily mean that the state must focus solely on its own population's food security needs. Rather, the obligation has two dimensions: a state must be inward-looking to ensure its policy meets the needs of its own citizens; but, equally, it must be outward-looking. The precise nature of this outward-looking dimension to food security is uncertain. It is clear from the Rome Principles for Sustainable Global Food Security, as well as the Camp David Declaration, that the G8 feel an obligation to weak states to provide financial assistance and capacity building and support to enable those weak states to realise their food security commitments.⁸⁷ However, what is less clear is whether there is an over-arching, deeper commitment for states (not just the G8) to ensure activities within their own jurisdiction (including the activities of some of their corporations investing in weak states) do not impinge on the food security of third states.⁸⁸

The definition of food security in the 1996 Rome Declaration on World Food Security does appear to support some outward obligation beyond that of providing development aid and assistance. It clearly states that food security is when "*all people*" at "*all times*" have access to nutritiously appropriate food, and not merely when the state's own population have that access. This interpretation is further substantiated by the Rome Principles for Sustainable Global Food Security, which specifically recognise that resolving food security requires "mutual re-

⁸⁵ Ibid. 15; also see examples of private initiatives like GlobalGAP: *ibid.*, 15.

⁸⁶ The OECD Guidelines for Multinational Corporations does require the investor to behave in a way that is 'ethical' and complies with the domestic laws of the state in which the FDI takes place. Although the Guidelines exhort a general standard of behavior by the MNC, they only really 'bite' once the FDI has taken place: OECD: *Declaration on International Investment and Multinational Enterprises* 25 May 2011: Annex 1 *Guidelines for Multinational Enterprises* (2011) OECD, Principle I:3. The obligation on the investor and the investor's home state to monitor compliance with human rights obligation through the National Contact Points only starts after the FDI is made: Principle IV generally.

⁸⁷ May 2012, para 16.

⁸⁸ This argument is predicated on the view that the obligation to guarantee food security is not always synonymous with the right to food: the two concepts are not always linked in the international declarations e.g. The Rome Declaration on World Food Security assumes a distinction, above n 35, para 1. A deeper discussion of this issue is beyond this paper, but on the general content of food security see Smith: "Food Security and International Agricultural Trade Regulation: Old Problems, New Perspectives," in JA McMahon & M. Desta (eds): *Handbook on International Agricultural* (2012) Edward Elgar, 31

sponsibility” and “accountability” of all states. For the investor state, this could be read to mean that it only has an obligation to provide financial assistance and development for weak states to implement their own effective agro-FDI investment strategy that does not infringe the right to food and adversely impact on their own food security. But, equally, this statement could be read to imply the deeper obligation. Just because state practice has evolved to think of this as an obligation as a duty for capacity building, does not mean that it cannot also sustain a different interpretation.

The OECD Guidelines on Multinational Enterprises (MNCs) do require the investor’s home state to “encourage the positive contributions” MNCs can make towards the right to food, the right to property and the rights of indigenous peoples in host states.⁸⁹ At the pre-investment stage, this is a mere general exhortation that the investor’s home state encourage investors to have an ethical investment policy, rather than requiring them to have a role in controlling how they make their FDI decisions per se.⁹⁰ The investor’s home state’s behaviour is monitored by the Investment Committee as part of its general obligation to monitor the effectiveness of the Guidelines overall.⁹¹ The OECD Guidelines are not enforceable vis-à-vis the investor’s home state, although there will be moral pressure to comply with them.⁹²

Whether these commitments in the Rome Declaration and the OECD Guidelines on MNCs to expressly preserve the food security of third states have reached the status of customary international law is debatable. However, some investor home states, like the European Union (EU), have entered into specific agreements with some host states to carefully monitor FDI from investors incorporated in EU states. Article 40 the Interim Economic Partnership Agreement between the Eastern and Southern Africa States and the EU places an obligation on the (EU) investor state to “create an environment for sustainable and equitable economic investment... including Foreign Direct Investment...from the EC Party.”⁹³ The EPA creates an asymmetric obligation on EU investor home states to generally support the encouragement of FDI therefore, and also to actively promote positive co-operation between the investor and the local indigenous population.⁹⁴ There is also an express recognition of the need to support

⁸⁹ OECD *Guidelines for Multinational Corporations* above n 87, Principle II:2.

⁹⁰ OECD *Guidelines for Multinational Corporations* *ibid.*, Principle I:2.

⁹¹ OECD, *Decision of the OECD Council on the OECD Guidelines on Multinational Enterprises*, June 2000 C(2000)96/Final, 19 July 2000, Principle II:1.

⁹² OECD: *Guidelines for Multinational Enterprises: Text and Commentary*, (2011) 13, para 1.

⁹³ 2012/196/EC, 24 April 2012, OJ(2012) L111/1,17.

⁹⁴ *Ibid.*, Article 40(1)(d).

protection of host state natural resources, like water.⁹⁵ Unlike the OECD Guidelines for MNCs, these obligations can be ‘enforced’ through dispute settlement proceedings in the EPA.⁹⁶ There are detailed provisions in the EPA for the possibility of consultations in the event of a dispute, arbitration and, ultimately, the withdrawal of any offending measure.⁹⁷ Whilst this is clearly an important breakthrough in the creation of ‘hard law’ to ensure FDI does not undermine food security, in reality, the EPA does not specifically address the key concerns of agro-FDI that we set out in section 2 above. Instead, there is a general commitment to address agriculture in later negotiations.⁹⁸

b. Post-Establishment Stage

It is clear from the discussion in section 2 above that many of the problems associated with agro-FDI mainly occur after the investment contract has been concluded and the investment project is being implemented. This is often the point where local producers are displaced and local land tenure rights ignored as land is cleared for the investor, water rights are being violated, and promises to strengthen infrastructure by the investor fail to materialise and the activities of the investor start to impact adversely on the host state’s food security and the human rights of its citizens.

Obligations on the Host State

At the post-establishment stage, the host state is still under an ‘obligation’ to pursue a food security policy that supports the right to food, land tenure rights and the rights of its indigenous peoples despite the activities of the investor.⁹⁹ The problem is that the host state’s ability to force the investor to run its investment in ways that do not violate those rights is greatly weakened by the under regulation and over protection of the investor. All the obligations on the *investor* to undertake the investment in accordance with the host state’s food security (and human right to food, property and indigenous peoples’ rights) are contained in soft law; whereas all the obligations on the *host state* to protect the investor are contained in hard law in the BIT, regional and international investment law.

⁹⁵ Ibid., Article 49(2)

⁹⁶ Ibid. Chapter IV.

⁹⁷ Ibid.

⁹⁸ Ibid. Article 53(f).

⁹⁹ The hard law/soft law nature of these commitments is discussed above in section 3 *infra*. E.g. *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, above n 55, para 4.

After investment, foreign investment law assumes that the balance of power shifts from the investor to the host state because the host state retains the sovereign right to change the law, or act in such a way that the investment becomes economically non-viable for the investor.¹⁰⁰ Model BITs, regional and international investment law work on the assumption that it is critical that the investor is protected from such violations.¹⁰¹ If the host state wishes to act post-investment to re-instate some limited land tenure rights, promote greater use of partnerships between the investor and local producers, or impose caps on ‘blue’ water usage for irrigation, this will be regarded as a violation of the investor’s rights.¹⁰² Some case law, especially in NAFTA and the 2012 revision of the US Model BIT, does seem to be showing some amelioration of this investor-bias, but the ‘hard law’ in this field will still make it very difficult for the host state to require the investor to respect its food security post-investment. Several problems arise.

On investment, the investor has the right to ‘fair and equitable’ treatment of its investment: that is, “investments shall ‘at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory’ of the reciprocating host state.”¹⁰³ This obligation on the host state is divided into two main categories: a general obligation to fair and equitable treatment and full protection throughout the period of the investment; and a general right to non-discrimination both in terms of national treatment and most favoured nation (MFN) treatment. For agro-FDI post-investment, the specific fair and equitable treatment standard and the national treatment obligation are the most important.¹⁰⁴ These standards have been developed through individual arbitration decisions in BIT and regional arbitration proceedings, although questions remain whether these standards are sufficiently ingrained to reach the status of customary international law.¹⁰⁵ The consequence is that the full scope of these obligations is decided on a case-by-case basis, usually under the relevant BIT or regional treaty

¹⁰⁰ L. Cotula: *Human Rights, Natural Resources and Investment in a Globalized World*, (2012) Routledge, 62-73.

¹⁰¹ On the general incidence of BITs in Sub-Saharan Africa and a detailed study of their terms see Cotula *ibid.*

¹⁰² On the scope of these problems see section 2 above *infra*.

¹⁰³ C. McLachan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles*, (2008) OUP, para 7.02.

¹⁰⁴ MFN can mean that more favourable terms in other BITs that the host state has signed up to can operate in favour of the investor too. This can ratchet up the positive commitment to protect the investment beyond that in the BIT covering the specific agro-investment that forms the subject-matter of the dispute: see McLachlan, Shore & Weiniger *ibid.*, paras 7.161-7.169.

¹⁰⁵ See generally, Dolzer: “Fair and Equitable Treatment: A Key Standard in Investment Treaties” (2005) 39 *Int. J. Law* 87. The precise nature of the doctrine of precedent in investment arbitration and the interpretation of the scope obligations over time is controversial: Roberts: “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States” (2010) 104 *AJIL* 179.

covering the investment, although tribunals often follow previous decisions from various tribunals.

The host state cannot act in a way which impedes the investor's specific right to fair and equitable treatment of its investment. In model BITs, this is often expressed as a duty not to "in any way impair by unreasonable or discriminatory measures the management, maintenance, use or enjoyment or disposal of investments in its territory of nationals or companies" of the investor.¹⁰⁶ The 2012 US model BIT states this to be a "minimum standard of treatment of aliens" consistent with the US' obligations in relation to diplomatic protection in general public international law.¹⁰⁷ For the US therefore, this provision is one of due process only: the investor should expect to have access to civil, criminal and administrative proceedings if the terms of its investment are altered post-investment, but the duty does not extend further than that. Other arbitral tribunals have interpreted it to be a higher standard in the context of other BITs.¹⁰⁸

What is "fair and equitable treatment" must be addressed on a case-by-case basis, but in essence, when the host state is trying to re-orient the investment back towards its own food security goals, it must not act in a way that could be regarded as arbitrary.¹⁰⁹ This is understood to be an overall obligation to act in good faith in a way that "does not affect the basic expectations" that the investor could legitimately have when making the investment.¹¹⁰ It encompasses not going back on any contractual or regulatory promises made to the investor at the pre-investment stage; a duty to fully reveal any rules and obligations in national law before the investment takes place and also an obligation on the host state to guarantee the contractual rights of the investor.¹¹¹ The tribunals' focus is on whether there is a stable environment *for the investor* in the host state, and not whether the investor is, or is not complying with human rights per se.¹¹²

¹⁰⁶ Sri Lankan BIT Article 2 cited in McLachlan, Shore & Weiniger above n 104, 208.

¹⁰⁷ Article 5: 2 US Model BIT 2012: <http://www.state.gov/e/eb/ift/bit/index.htm>

¹⁰⁸ US Model BIT 2012 Annex A & B. *Azurix v Argentina* Award 14 July 2006.

¹⁰⁹ *Mondev v The United States*, 11 October 2002, (2005) 42 ILM 85 & *ELSI (United States v Italy)* (1989) ICJ Rep. 15

¹¹⁰ *TECMED v Mexico* 29 May 2003, (2004) 43 ILM 133.

¹¹¹ *Saluka v Czech Republic*, 13 November 2000, (2001) 40 ILM 1408, 1438 & *Metaclad Corp v Mexico*, Award 30 August 2000 (2002) 5 ICSID Reps 209.

¹¹² *Occidental v Ecuador* Award, 1 July 2004, 12 ICSID Rep 59 para 191.

Whilst the host state might think about readjusting its BIT (to the extent it has the negotiating power to do so) to insist the investor comply with human rights, the difficulty is that if the state has not done this *before* the investment (or simply been unable to do this), then *after* investment, this may be regarded as a breach of the BIT possibly entitling the investor to compensation.¹¹³ BITs often contain umbrella clauses which guarantee the rights in the BIT and stabilisation clauses too that bind the investor and the host state to the domestic law as it stands *at the time of the investment*.¹¹⁴ Unless the right to food and land tenure rights are fully enshrined in national law therefore, this will be problematic for the host state. Displaced local producers cannot bring the claim themselves. The tribunal too is not under an obligation to consider other areas of law, like the International Covenant on Economic and Social Rights—arguably with the possible exception of *jus cogens*. In this case, the tribunal could find a (narrow or broad) conflict between the host state’s human rights obligations to its local producers and indigenous land rights’ holders with the terms of the BIT, and then allow the human rights obligations as *jus cogens* to trump the host state’s obligations to the investor under the BIT. To the extent of the conflict, the terms of the BIT would be void.¹¹⁵

As part of the overall obligation to accord the investor ‘fair and equitable’ treatment of their investment in general, many BITs include specific national treatment provisions. Under these terms, the host state is required to “accord treatment no less favourable than that which the host state accords to its own investors.”¹¹⁶ The requirement is therefore not to treat agro-investors any differently to the state’s own investors. The national treatment obligation only applies once the FDI is established.

This provision is difficult for weak states in the context of food security. Our discussion above in section 2 shows that FDI may cause problems for food security that can be traced to the sheer size of the investment being made. There is no hard and fast rule here, but in weak states it may be that there are very few local sources of investment that can even make a contribution to the state’s food security. This means that the basis of comparison for the purposes

¹¹³ *Ibid.*, para 184.

¹¹⁴ On stabilisation & umbrella clauses see generally McLachan, Shore and Weiniger above n 104, ch 4.

¹¹⁵ Article 53 and 64 Vienna Convention on the Law of Treaties. Conflict may be difficult to find: see A. Orakhelashvili: *Peremptory Norms in International Law*, (2008) OUP, Ch. 6. On the specific interaction of investment norms and human rights norms see Karamanian: “Human Rights Dimensions of Investment Law” in E. de Wet & J. Vidmar (eds): *Hierarchy in International Law: The Place of Human Rights*, (2012) OUP, 236, 237. The tribunal may instead try to argue there is no conflict, and then read the BIT and human rights obligations in a way that reconciles the two.

¹¹⁶ Dolzer & Stevens above n 81, 63-65. See 1989 Ghana-China BIT cited in Cotula: *Human Rights, Natural Resource and Investment Law in a Globalized World* above n 101, 68.

of assessing whether the investor is accorded national treatment can be difficult. Tribunals have taken an expansive approach too to precisely who the equivalent ‘national’ comparator investor is.¹¹⁷

In *Occidental v Ecuador*, the equivalent ‘national’ investor was held to be all local producers of the similar product; a potentially very wide category for agricultural production. This interpretation clearly creates problems too if most local production is undertaken by small-scale production and/or by indigenous peoples, and it is precisely their collective right to invest in food production as part of their right to food that the host state is trying to protect. Inevitably, the investor will be treated differently in such circumstances, even if the legislation designed to protect the human rights of its citizens might be phrased in a non-discriminatory way on its face.¹¹⁸

In *SD Myers v Canada*, a NAFTA panel stated that it might be possible to take the overall objectives of the treaty into consideration when determining whether the investor had been treated differently.¹¹⁹ The panel pointed to the fact that NAFTA contains clauses that require that investment should not be undertaken in a way that violates social (i.e. labour standards) and environmental concerns. Should the host state take action against the investor in those cases, the panel thought this would be sufficient to push the investor into a different category to that of the domestic producer for the purposes of determining national treatment.¹²⁰ It could follow that if there is a clause in the BIT that provides specifically for different levels of protection on the basis of ‘public interest,’ this may be sufficient to justify the different treatment, but only if the tribunal is minded to follow the same line as the NAFTA panel. However, the precise circumstances where this differentiation can be justified, is as yet uncertain.¹²¹

Changes to the terms of the investment once it has been made are likely to amount to an expropriation of the investors’ assets. Expropriation can be made directly, like, for example, where the host state takes back specific land tenure rights given to the investor for their biofu-

¹¹⁷ See generally Dolzer & C. Schreuer above n 81, 178-186.

¹¹⁸ See Cotula, *Human Rights, Natural Resources and Investment in a Globalized World* above n 101, 60-61.

¹¹⁹ First Partial Award, 13 November 2000, (2001) 40 ILM 1408, para 250.

¹²⁰ *Ibid.* para 250.

¹²¹ Dolzer & Schreuer above n 81, 181-183 for a detailed analysis of the tribunal findings on this area. For the specific instances in developing country (i.e. capital importing host states) see Cotula: *Human Rights, Natural Resources and Investment in a Globalized World*, above n 101, 68-69. The degree to which the panel and Appellate Body findings on national treatment in WTO law are used to interpret national treatment obligations in investment treaties remain controversial: *Pope & Talbot*, Award on Merits, 10 April 2001, (2002) 122 ILL 352 paras 45-63 & 68-69 c/f *Occidental v Ecuador* above n 113, para 176.

el production. Alternatively, expropriation can occur indirectly when, for example, the state decides to require the investor to enter into producer partnerships, insurance schemes, or local content purchasing requirements of the type endorsed by PRAI, after the investment has been made.¹²² Indirect expropriation can be found through gradual accretion of legalisation that works to remove the rights of the investor over time to the point where the investor's control over the investment is effectively neutralised.¹²³ The critical point seems to be when the investor has been "substantially deprived" of the economic value of the investment as a matter of fact, taking into account the duration and level of the deprivation.¹²⁴

In direct and indirect expropriation, the host state has the sovereign right to expropriate the investment, but it must do so in a way that accords with general rules of international law and any specific terms of the regional treaty or the BIT. In general, any expropriation must be non-discriminatory, for a public purpose and be undertaken in accordance with due process.¹²⁵ These criteria are cumulative.¹²⁶ It is clear that the state has very wide discretion regarding what is deemed to be a 'public purpose,' which could include expropriation on human rights grounds, or even, preventing the investor exporting crucial biofuel on food security grounds. However, the host state must actually show that the expropriation is for that public purpose; it is not enough merely for them to say that it is.¹²⁷

The expropriation also cannot be for purely political reasons because the host state has now decided to protect some groups of producers and not others, but instead needs to have some legal (objective) justification.¹²⁸ If the tribunal finds that expropriation has occurred, then the host state is required to pay compensation to the investor that is 'prompt, effective and adequate.'¹²⁹ Under BITs, it is still uncertain whether a "full" compensation is due for both legitimate and illegitimate expropriation, or whether only illegitimate expropriation requires greater compensation.¹³⁰

¹²² See discussion above of pre-investment stage *infra*.

¹²³ See Dolzer & Schreuer above n 81, 107.

¹²⁴ *CMS v Argentina*, 12 May 2005, (2005) 44 ILM 1205, *Middle East Cement Shipping v Egypt*, 12 April 2002, (2005) 7 ICSID Reps 178, para 107 & *Teenor v Hungary*, 13 September 2006, para 70.

¹²⁵ On expropriation generally see Dolzer & Schreuer above n 81, Ch.6.

¹²⁶ *Ibid.*, 91.

¹²⁷ *Amoco International Finance Corp v Iran* (1987) 15 Iran-USCTR 189 & *ADC Affiliate Limited and ADC Management Limited v The Republic of Hungary*, 2 October 2006, 432-33.

¹²⁸ *British Petroleum Exploration Company (Libya) Ltd v Libya*, (1973) 53 ILR 297.

¹²⁹ The 'Hull' Formula: (1936) 55 AJIL Supp. 181.

¹³⁰ See discussion by Cotula, *Human Rights, Natural Resources and Investment in a Globalized World* above n 101, 64.

There is a sense that if the hosts state's activities can be said to "regulatory," then it will not amount to expropriation.¹³¹ The key considerations appear to be the degree to which the investor's rights are interfered with. Taking back tracks of land from the investor to give back to local producers would fall into the category of expropriation as it completely neutralises the value of the investment. Adjusting the terms of the investment to take into consideration some of the issues in the PRAI may be said to be regulatory, especially if the readjustment does not 'enrich' the producer, but neutralises the balance of power between the investor and those producers.

Regulation is something that an investor is said to be able to "reasonably expect" when deciding whether or not to invest.¹³² Arguably, a host state deciding to implement international human rights obligations within its territory should be something that any legitimate investor would, or at least, *should* expect. Interestingly, the 2012 US Model BIT specifically states, "non-discriminatory actions...that are designed and applied to protect *legitimate public welfare objectives*...do not constitute indirect expropriations."¹³³ It is unclear how tribunals will interpret the scope of this obligation, but it does at least appear to cover the instance where the host state legislates to further guarantee the human rights of its citizens.

The Investor's Rights and Obligations

Even with the gradual easing of the strictures on what constitutes a breach of the BIT requiring the host state to compensate the investor, it is still clear that there is a heavy bias in favour of protecting the investor's rights in hard law. By contrast, the obligations on the investor to not undermine the host state's citizens' right to food, and land tenure rights, and the host state's food security generally is all contained in soft law.

For example, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security specifically requires non-state actors, like large-scale investors, to "respect human rights and legitimate tenure rights."¹³⁴ This is fulfilled if the investor conducts appropriate management assessments during the course of the investment to continuously check its activities are not infringing these rights and if the investor puts in place grievance procedures for any local land tenure right holders to

¹³¹ Dr B Schwartz separate opinion in *SD Myers v Canada* under Article 110 NAFTA, 8 ICSID Reports 4

¹³² *SD Myers v Canada* above n 120, 109.

¹³³ 2012 US Model BIT above n 108, Annex B 4(b) emphasis added.

¹³⁴ Above n 55, para 3.2.

make a complaint.¹³⁵ Under paragraph 3.2 of the Guidelines, the investor's behaviour should also be monitored by the investor's home state, and, in case of violation of the human rights, the investor's home state should bring proceedings against the investor.¹³⁶ The PRAI too call for investor participation in the continued monitoring of the positive (and negative) effects of their investment within the host state. Both instruments only contain general exhortations about the behaviour of the investor at best, although clearly there could be a degree of moral pressure exerted when violations of these principles are revealed.¹³⁷

The OECD Guidelines for Multinational Enterprises also places positive obligations on agro-investors who are also multinational corporations (MNCs) to respect the human rights of any local producers and indigenous peoples affected by their activities.¹³⁸ Agro-investor MNCs should also "encourage local capacity building," by working closely with the local community; should maximise local employment opportunities; should not push for loopholes in the BIT to protect themselves from domestic human rights legislation and should introduce their own monitoring systems to check they are adhering to the guidelines.¹³⁹ All of which mirror the general exhortation on all investors in the PRAI. MNCs should also have their own policy on human rights, which should include how they plan to address human rights violations and how they carry out their activities in ways which does not infringe human rights. MNCs must also carry out "human rights due diligence" along the entire supply chain.¹⁴⁰

The MNC's human rights policy should go beyond the *legal* duty to respect the human rights of the local producers that may be contained in the domestic law of the host state, and instead ensure the MNC fully complies with internationally recognised human rights' obligations.¹⁴¹ The policy should be approved at the highest level of the organisation; made public; 'operationalized' throughout all the MNC's policies and specifically stipulate that all the MNC's employees will respect the human rights of those affected by the investment.¹⁴² One of the difficulties for local agricultural producers is often access to new technology, for example, to increase crop yields. Principle IX of the Guidelines further recognises that MNCs should

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ NGO campaigns can be very successful in highlighting abuses by MNCs in other areas of human rights: e.g. Boycott NIKE campaign for abuses of labour rights: http://clrlabor.org/alerts/DateUnknown/sarah_cox.html.

¹³⁸ OECD *Guidelines on MNCs*, Revision, 25 May 2011 above n 87, II:2.

¹³⁹ Ibid., paras II: 3, II:4, II:5 & II:7.

¹⁴⁰ Ibid. Chapter IV: paras IV:1-6.

¹⁴¹ OECD, *Guidelines on MNCs* above n 87, Commentary paras 38-39.

¹⁴² Ibid., paras 44 & 46.

“where practicable...permit the transfer and rapid diffusion of technologies and know-how...” to local producers.¹⁴³

Obligations on the Investor’s Home State

Unlike the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and the PRAI, in the case of the OECD Guidelines on MNCs, the investor’s host state is required to set up National Contact Points to generally monitor the activities of their MNCs.¹⁴⁴ This monitoring obligation encompasses advertising the existence of the Guidelines and promoting their objectives.¹⁴⁵ More importantly, it also requires the National Contact Points to resolve any issues that arise from the activities of the MNC and share information about activities of MNCs located in other states.¹⁴⁶

The obligations on MNCs and the investor’s home state contained in the OECD Guidelines on MNCs are ultimately soft law. The success of National Contact Points has been patchy. The UK NCP found it too difficult to decide whether the alleged labour rights abuses of British American Tobacco (BAT) in Malaysia had in fact taken place. It was able to uphold the complaint by the Malaysian Trade Union Congress, however, that there was a duty to consult the Malaysian TUC on working practices prior to changing them.¹⁴⁷

In 2009, the UK National Contact Point did uphold a complaint by Survival International against Vedanta Resources plc for not consulting widely enough and in a timely fashion with the Dongria Kondh, a local indigenous community, who would have been adversely affected by the construction of a bauxite mine.¹⁴⁸ In this case, the UK National Contact Point found that the human rights of the local community had been infringed, as Verdanta Resources plc did not have a robust policy in place to address the human rights issues.¹⁴⁹

¹⁴³ Ibid., IX:3. For a discussion of the difficulties local producers have getting access to technology see section 2 above *infra*.

¹⁴⁴ Amendment of the Decision of the Council on OECD Guidelines for Multinational Enterprises, OECD 2011 revision, see OECD: *Guidelines for Multinational Enterprises: A Commentary* (2012), 68 paras 1-4.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid. I:1. We are grateful to Christine Kaufmann for alerting us to the successful activities of the National Contact Points.

¹⁴⁷ Final Statement by the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines): Complaint from the Malaysian Trade Union Congress against British American Tobacco Malaysia Berhad (Malaysia): March 2011 available from: <http://www.bis.gov.uk/nationalcontactpoint>

¹⁴⁸ Final Statement by the UK Contact Point for the OECD Guidelines for Multinational Enterprises: Compliant from Survival International against Verdanta Resources plc: September 2009.

¹⁴⁹ Ibid. 1.

The National Contact Point only makes recommendations in the first instance, but there is a facility for follow-up dialogue and an exchange of views between the affected party, the MNC and the National Contact Point, which does yield positive results in some instances. For example, in the BAT case, the company reported that it had subsequently undertaken a review of its policies and, in response to the comments made in the first report, agreed to refine the terms of those policies.¹⁵⁰ However, in the case of Verdana Resources plc, although Survival International provided evidence of repeated violations of the guidelines, together with widespread human rights abuses, Verdana Resources plc denied the allegations. As the National Contact Point rather sadly states in the Follow-Up Report: “The publication of this statement is the final stage in this Specific Instance.”¹⁵¹

It seems that adherence to the recommendations of the National Contact Point will occur if it is in the interests of the MNC to comply. The fact that there appears little that the NCP can do if the MNC decides not to comply in the long term reduces the ‘hard law’ effect of the Guidelines. As the discussion shows, the strongest control over the investor comes through the BIT and foreign investment law in general.

4. Conclusions

For one, we consider that no government can have a legitimate interest in protecting investments violating human rights, social or environmental norms, or the right to food. When such cases come to the limelight – often prompted by NGO action and local media – many governments are bound to first act on the case and, in a second step, consider regulatory changes. The changes required should have positive effects on food security and not be merely reflex reactions to the immediate problem. We argue that changes are required at both the pre-investment and post-establishment stage to minimise the adverse impact on food security of the FDI.

At the pre-investment stage, NGOs and the international community should support host states in their efforts to entrench the PRAIs and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security into national law. Host states do owe obligations to their own citizens not to violate their

¹⁵⁰ Follow-Up Statement by the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines): Complaint from the Malaysian Trade Union Congress against British American Tobacco Malaysia Berhad (Malaysia): July 2011.

¹⁵¹ Ibid,1.

right to food and other land tenure rights and it is important that they not only develop capacity to meet these obligations, but also to implement them in ways that accord maximum benefit to their citizens. Equally, the investor's home state arguably is under an obligation not to allow its investors to violate the right to food of *third* states' citizens. It is critical therefore that the investor's home state also embraces its obligation to 'police' the activities of its investors abroad. Some investors' home states have already embraced this responsibility by bringing in anti-corruption legislation, but more could be done here. The investors should also see that being a 'good global citizen' by not undermining the host state's food security can have a very positive impact on the returns to their investment. Work on international corporate social responsibility is continuing, but what is clear is that NGO campaigns in the past that highlighted 'bad' corporate behaviour can have a critical adverse effect on profits.¹⁵²

In addition to general capacity building at the post-investment, the host state should be encouraged to adopt a public interest clause in its BIT and regional trade agreements. Such a clause would transform the general 'soft law' exhortation on the investor to be a 'good citizen' into 'hard law. Commitments undertaken by the investor to build roads etc. as part of the investment, as well as to ensure its investment did not violate the host state's citizens' right to food and land tenure rights could be enforced through the terms of the clause. As we showed above, it may even be that failure to adhere to the terms of this clause will not amount to an expropriation requiring the payment of appropriate compensation for the purposes of international investment law. We set out our proposal for such a 'public interest' clause below:

Public Interest

Nothing in this Agreement shall be construed

1. To prevent a Contracting Party from taking measures necessary
 - (1) For the protection of its national and local population's food security as defined by relevant international organisations.
 - (2) For the conservation of exhaustible natural resources, water, and livestock adversely impacted by the investments carried out by an investor of the other Contracting Party.
 - (3) For the fulfilment of a Contracting Party's international obligations relating to human rights as defined in relevant international treaties and standards.
 - (4) For ensuring the enjoyment of all legitimate claims to land by rightful individual or communal landowners.

¹⁵² See generally Roy: "Trends in Global Corporate Social Responsibility Practices: The Case of Sub-Saharan Africa" (2010) VIII (III) International Journal of Civil Society Law 64.

2. The international and national dispute settlement bodies foreseen in this Agreement shall hear complaints by duly interested stakeholders and on the basis, where relevant, of an independent impact assessment addressing all relevant economic, environmental and social aspects as well as taking into account the interests of all participants in the investment project. In their findings they shall ensure that
- (1) Such measures should not be applied in a manner that would constitute a disguised restriction on international trade or investment.
 - (2) Such measures shall be applied in good faith and in a non-discriminatory manner between investors.
 - (3) Adequate and fair compensation would be provided to the investors of the other Contracting Party for all actions taken in full compliance with the investment agreement entered into by the competent and duly authorised local or national authorities.