

Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid 'Land Grab'

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Food security is important. A rising world population coupled with climate change creates growing pressure on global world food supplies. States alleviate this pressure domestically by attracting agri-foreign direct investment (agri-FDI). This is a high-risk strategy for weak states: the state may gain valuable foreign currency, technology and debt-free growth; but equally, investors may fail to deliver on their commitments and exploit weak domestic legal infrastructure to 'grab' large areas of prime agricultural land, leaving only marginal land for domestic production. A net loss to local food security and to the national economy results. This is problematic because the state must continue to guarantee its citizens' right to food and property. Agri-FDI needs close regulation to maximise its benefit. This article maps the multilevel system of governance covering agri-FDI. We show how this system creates asymmetric rights in favour of the investor to the detriment of the host state's food security and how these problems might be alleviated.

INTRODUCTION

Food security is an important policy objective in every country. The World Bank advocates that states alleviate pressure on their national food security by attracting foreign direct investment targeted at agriculture (agri-FDI) to address chronic problems of under investment in agricultural production.¹ States may get tax income, new technologies and higher land productivity as well as foreign

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1 World Bank, *The World Bank Annual Report 2008 Year in Review* (2008), glossary. Note, not all foreign investments qualify as FDI: only those where a foreign actor invests in assets for the purposes of production: A. Jägerskog, A. Cascão, M. Härsmar and K. Kim, *Land Acquisitions: How Will They Impact Transboundary Waters* (Stockholm: Stockholm International Water Institute, 2012) 14 (SIWI Report).

currency from the investment;² but, especially in weak states, investors may, for example, refuse to honour investment commitments³ and to abide by domestic legislation to 'grab' large areas of prime agricultural land, evicting farmers without enforceable tenure rights and leaving only marginal land for domestic production.⁴ The consequence is a net loss to the state's food security. This is problematic when host states lack alternatives and are unable to constrain the activities of the investor domestically; yet they must continue to meet national food security policy commitments,⁵ guarantee their citizens' right to food and property⁶ and protect the rights of the investor during the course of the investment.⁷

Many commentators approach the adverse impact of agri-FDI on the weak state's food security from a human rights perspective: that is, they argue that the weak state, as host state of the investment and primary duty bearer, must provide, *inter alia*, for the human right to food (and/or property) of its food insecure citizens (the rights' holders).⁸ This approach frames solutions in terms of the duty of the state to provide appropriate domestic governance structures to guarantee

2 Committee on World Food Security, *Policy Roundtable: Land Tenure and International Investment in Africa* (September 2010) FAO, CFS, 2010/7, para 9; L. Colen, M. Maertens and J. Swinnen, 'Foreign Direct Investment as an Engine for Growth and Human Development: A Review of the Arguments and Empirical Evidence' (2009) 3 *Human Rights & International Legal Discourse* 177. Some agreements also commit the investor, sometimes with financial assistance from donor agencies in its home country, to provide local facilities like schools and hospitals, or generally available infrastructure like roads: Ibrahim Foundation, *African Agriculture-From Meeting Needs to Creating Wealth* (Ibrahim Forum, 2011) 20.

3 For example, in the case of 'tree farms' in South Sudan. Center for Human Rights and Global Justice, *Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment* (New York: NYU School of Law, 2010) 16.

4 K. Deininger and G. Feder, 'Land Registration, Governance, and Development: Evidence and Implications for Policy' (2009) 24 *The World Bank Observer* 233, 238. Other adverse consequences from the investment may include pressure on available water resources, undermining standards of living, as well as loss of indigenous land rights when previously occupied land is 'grabbed' by the investor: for an overview of these issues see L. Cotula, S. Vermeulen, R. Leonard and J. Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa* (London/Rome: FAO, IFAD & IIED, 2009). These issues are discussed in detail in the next section.

5 World Food Summit, Plan of Action, Rome, 13 November 1996, para 1. Amended by the 2009 Declaration of the World Summit on Food Security, 16–18 November 2009, WFS 2009/2, para 2.

6 O. De Schutter, *The Right to Food* (A/65/281) United Nations, 11 August 2010. C. Häberli, 'Do WTO Rules Secure or Impair the Right to Food?' in M. Desta and J. A. McMahon (eds), *Research Handbook on International Agricultural Trade* (Cheltenham: Edward Elgar, 2012) 70.

7 eg, US Model Bilateral Investment Treaty 2012, Article 5:1 guarantees a minimum standard of treatment for the investor by the host state.

8 eg, see K. Mechlem, 'Food Security and the Right to Food Discourse of the United Nations' (2004) 10 *European Law Journal* 631; H. Gonzalez, 'Debates on Food Security and Agrofood World Governance' (2010) 45 *International Journal of Food Science and Technology* 1345; L. Cotula, M. Djiré and R. W. Tenga, *The Right to Food and Access to Natural Resources: Using Human Rights Arguments and Mechanisms to Improve Resource Access for the Rural Poor* (Rome: Right to Food Studies, FAO & H, 2009). H. Liversage, *Responding to 'Land Grabbing' and Promoting Responsible Investment in Agriculture* (Rome: IFAD, 2011); V. Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2010–11) 42 *Columbia Human Rights Law Review* 797.

citizens' human rights. The investor and its home state (where the investor was incorporated) are neither duty bearers nor rights holders in such analyses and so solutions are not understood as a duty of the investor/investor home state to the individual not to infringe their human rights per se.⁹ Instead such solutions commonly emphasise the responsibility of the investor, *inter alia*, to undertake food security impact assessments prior to investing in the host state, or exhort the home state to exercise its best efforts to restrict companies incorporated in the state from violating the human rights of the host state's citizens.¹⁰

This rights-based analysis is important, but there is a danger that it can conflate an analysis of the obligation on the host state to guarantee the individual's right to food with the host state's ability to meet that obligation.¹¹ In other words, a rights based analysis may address the issue from the perspective of the duty on the state to food insecure individuals, which can underplay the importance of the many constraints on the state that impede achieving food security more broadly. A neat line may also be drawn between the legal obligations of the state, the investor and the investor's home state, while the reality in practice is much more blurred.

Approaching the issue from the perspective of food security allows a consideration of the wider web of policy constraints, legally binding obligations (hard law) and voluntary (soft law) commitments and guidelines that include, but are not solely restricted to, the rights to food and property that rest on the host state vis-à-vis its citizens, the investor and the investor's home state.¹² A fuller picture emerges of the problems created by agri-FDI on the weak host state encompassing the commitments of all stakeholders. This picture reveals that some problems are, in part at least, a product of an imbalanced legal order that works on the assumption that the most vulnerable party is the investor,

9 Note the 'Ruggie' Guiding Principles are predicated on such an analysis: J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework*, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises A/HRC/17/31 21 March 2011; and United Nations, *Human Rights and Transnational Corporations and Other Business Enterprises* Resolution A/HRC/RES/17/4 6 July 2011, Recital 3 (emphasising the 'duty' of the state) and Recital 4 (emphasising the 'responsibility' of the corporation). Note that a more radical view of the extraterritorial obligations of states in the context of economic, social and cultural rights was taken in the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* 29 February 2012; on the Maastricht Principles see: O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, 'Commentary on the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084. In this article we follow Ruggie's interpretation and assume the conservative view that home states do not have extra-territorial duties.

10 eg, Vadi, n 8 above, 873–877.

11 Clearly some institutions recognise the constraints on states. Notably the United Nations Food and Agriculture Organization (FAO) recognises that some states lack the capacity to fully realise the right to food: see FAO: *The State of Food Insecurity in the World: Assessing Food Insecurity in Protracted Crises* (Rome: FAO, 2010) 16–17.

12 The focus on the difficulties that the weak state has in achieving food security means the human rights analysis will be addressed through this lens. As a result, a more detailed discussion of the extra-territorial application of human rights is beyond the scope of this analysis. On this point see Vadi, n 8 above.

and are not simply the result of a power imbalance between the host state and the investor.¹³

Starting from this broader perspective, this article will show that governance of agri-FDI at regional and international level unevenly distributes obligations and responsibilities between the weak host state, the investor and the investor's home state in such a way that there is over protection of the investor and under regulation of the investment. This governance gap means the weak state's food security is adversely affected.

The article is in two sections. First, it sets out the trade-offs the weak host state must balance when using agri-FDI to address its domestic food security problems. Second, the discussion maps the system of governance at international and regional level covering agri-FDI both before and after the investment occurs. In particular, it highlights the different policy constraints, legally binding obligations and voluntary commitments on the host state, the investor and the investor's home state to reveal the governance gap.¹⁴ The annex to the article sets out a suggestion for a proposed 'public interest' clause that could be inserted into bilateral investment treaties (BIT) or economic partnerships agreements (EPA) as a way to start alleviating the power balance between the investor and the home state for the benefit of the weak host state. This clause is designed to generate discussion between stakeholders about how to best address the imbalance between the over protection and under regulation of agri-FDI identified in the article.

THE EFFECTS OF AGRIFDI IN WEAK STATES

For the purposes of this analysis, weak states are states that find it difficult to carry out adequate macroeconomic or fiscal policies that effectively manage, *inter alia* their natural resources, including land and water, or private enterprise activity carried on within the state.¹⁵ This is because such states often lack legitimate political institutions and/or effective administration to undertake these tasks. As a result of this lack of capacity, the fundamental needs of weak states' citizens in

13 A discussion of general governance gaps created by the increasingly fragmented international legal order is beyond the scope of this article, but note: Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* A/CN.4/L.682 13 April 2006 (Report finalised by Martii Koskenniemi). For a recent *tour de force* see P. S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (New York: Cambridge University Press, 2012).

14 Our focus is on international and regional 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 World Bank, *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* (Washington DC: World Bank, 2011) 15. In this article we argue that the soft law obligations are weaker instruments. For a contrary view see G. Kaufmann-Kohler, 'Soft Law and International Arbitration: Codification and Normativity' (2010) 1 *Journal of International Dispute Settlement* 83.

15 The World Bank refers to these states as 'fragile', but this term denotes a complete lack of capacity, whereas this article includes states that do have some form of capacity. On fragile states see World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington DC: World Bank, 2011) xvi.

terms of their physical security and social welfare frequently are not provided for.¹⁶ The concept of the 'weak state' has two dimensions therefore: it is both a descriptive term which refers to what the state is able (or, more accurately, unable) to do in terms of implementing measures that address local food insecurity and regulate agri-FDI; and also a normative term which denotes how well (or how badly) the state is alleviating local food insecurity and controlling the problems created by agri-FDI in reality.¹⁷

Net food importing weak states are particularly vulnerable to national food insecurity. For example, Mozambique mainly relies on imports for all its cereals requirements; rice imports account for 75 per cent of consumption and maize imports for 13 per cent.¹⁸ Over 54 per cent of Mozambique's population, particularly in the cities, live below the poverty line and spend up to 66 per cent of their income on food.¹⁹ During the 2008 food crisis, rising global food prices for wheat, rice and maize, fuelled by export bans and commodity speculation, contributed to higher prices for basic commodities and exacerbated chronic food shortages meaning local people were unable to afford basic foodstuffs.²⁰

Well-designed agri-FDI can mitigate this national food insecurity for net-food importers by reducing their reliance on volatile global food markets in several ways. Some food insecure weak states have abundant natural resources and could focus on increasing their agricultural productivity from existing low levels. Mozambique, for example, has abundant fertile land, good soil diversity and climactic conditions, which, when coupled with its fertile land's proximity to major rivers like the Zambezi for irrigation, means the potential to increase foodstuff production is significant.²¹

16 S. Patrick, 'Weak States and Global Threats: Fact or Fiction?' (2006) 29 *The Washington Quarterly* 27, 29.

17 Note the concept of 'weak state' is very difficult to define. For a useful typology see S. E. Rice and S. Patrick, *Index of State Weakness in the Developing World* (Washington, DC: The Brookings Institution, 2008) 3. Different issues arise where a weak state displays all these vulnerabilities and yet refuses to address its national food insecurity. This problem falls outside the scope of the discussion as the solution suggested in the annex to this article is predicated on the willingness of the state to implement it: eg Zimbabwe would be a 'weak and unwilling' state for the purposes of the distinction made in this article: Amnesty International, *Zimbabwe: Power and Hunger-Violations of the Right to Food* (2004) 4, 10–11 and generally, P. Gwatirisa and L. Manderson, 'Living From Day to Day: Food Insecurity, Complexity and Coping in Mutare, Zimbabwe' (2012) 51 *Ecology of Food & Nutrition* 97.

18 Note these examples may not yield positive effects for food security and further empirical research must be undertaken to verify the precise effects of all examples used in this discussion. On Mozambique, see G. Biacuana, *Food Production in Mozambique and Rising Food Prices* (Winnipeg: IISD, Trade Knowledge Network, 2009) 5. Mozambique emerged from civil war in 1992. Despite strong economic growth from 1996 onwards, Mozambique still experiences chronic child malnutrition and corruption among officials. For the World Bank's critique of Mozambique see <http://www.worldbank.org/en/country/mozambique/overview> (last visited 2 April 2013.)

19 Biacuana, *ibid.*, 1.

20 D. Headey and S. Fan, *Reflections on the Global Food Crisis* (Washington, DC: International Food Policy Research Institute, 2010) 43–53.

21 Biacuana, n 18 above, 1–2.

The United Nations Food and Agriculture Organization (FAO) estimates that Mozambique only cultivates approximately 12.5 per cent of its available land, leaving approximately 3.3 million acres for further cultivation.²² Mozambique is itself part of the larger Guinea Savannah region in Africa.²³ In 2009, the World Bank estimated that this region, which stretches across a number of African states, is one of the largest undercultivated agriculture regions in the world with only 200 million of the 600 million acres currently utilised effectively for agricultural production.²⁴ Agri-FDI from multinational enterprises or sovereign wealth funds can be in the form of a lease of that uncultivated agricultural land for food production which potentially results in an increase in food available for domestic consumption and in food, feed, fibre or fuel for export, thereby contributing to both national and global food security at the same time.

Carefully managed agri-FDI can substantially alleviate weak states' food insecurity, but by their very nature, such states often lack strong domestic governance structures to manage the FDI, thereby restricting the ability of the state and its citizens to fully benefit. The result can be a net reduction in national food security within the weak state. Several problems arise. The impact on a weak state's food security can be negative where the agri-FDI supports the growth of cash crop exports that substitute local food production. This occurs where such cash crop exports do not generate sufficient jobs and foreign exchange to enable the state to buy food to offset the loss of its domestic food production. For example, the crop *Jatropha* has the potential to grow in dry arid conditions where many other crops will not grow. Its seedpods are poisonous, but the seeds can be crushed for oil that can be made into biofuel. Initial projections estimated *Jatropha* was an ideal cash crop for small farmers in countries like Tanzania and Mali.²⁵

Whilst *Jatropha* is promoted as a crop that will grow on arid land, in fact yields sufficient for biofuel only occur when the crop is planted on fertile soil.²⁶ Large-scale *Jatropha* production in Mozambique supported by private agri-FDI led to farmers switching their agricultural production away from food crops to *Jatropha* for export, supported by global supply networks created by the private investors. Problems arose after the 2008 financial crisis when the oil price dropped from previous record high levels and farmers (and as a consequence, the state) did not obtain the financial gains originally expected.²⁷ Local food production in Mozambique also declined because local food producers earned more money as, for example, a security guard at the biofuel processing plant, than as

22 Biacuana, *ibid*, 2.

23 World Bank, *Awakening Africa's Sleeping Giant: Prospects for Commercial Agriculture in the Guinea Savannah Zone and Beyond* (Washington, DC: World Bank, 2009) 2, 27, Figure 1.1, showing the map of the Guinea Savannah zone.

24 *Awakening Africa's Sleeping Giant*, *ibid*, 2.

25 FAO, *Jatropha: A Smallholder Bioenergy Crop* (Rome: FAO, 2010) ch 6.

26 Ministry of Economic Affairs, Agriculture and Innovation, NL, *Jatropha Assessment: Agronomy, Socio-Economic Issues and Ecology* (Utrecht: Utrecht University, Copernicus Institute, 2010) 35 (*Jatropha Assessment*).

27 *Jatropha Assessment* *ibid*, 52.

a farmer.²⁸ Roads and hospitals promised by large foreign investors in return for the agri-FDI were not completed before the investor pulled out of *Jatropha* production and left the country.²⁹

Despite the FAO's and World Bank's assertions that agri-FDI is an essential component in a weak state's food security strategy, this is predicated on the assumption that such countries, like Ethiopia, have large tracts of land that are uncultivated. In fact, land may be uncultivated precisely because it is unsuitable for cultivation, rather than because it has yet to be appropriately exploited by the weak state's agricultural producers.³⁰ More importantly, 'uncultivated' is often used as a synonym for 'unoccupied' in these analyses. Such an assumption can be false and arises because it is often difficult for people using the land to assert their right to it. This may be because the land is used collectively for the benefit of local communities where ownership was not historically delineated between users, like, for example, where land is used by nomads for livestock grazing or hunting and gathering; or, as in the case of Mozambique, the land is owned by the state and only leased back to the producer.³¹ Even then, the system of land lease is subject to corruption when private investors are able to circumvent the rights of the tenants to whom the lease had been granted by bribing planning officials.³²

Negative impacts on local food security are especially deleterious when nomads or local farmers are displaced as a result of the acquisition of large portions of their agricultural land on which previously they grew crops, or where their cattle grazed.³³ These are the so-called 'land grab' cases.³⁴ Agricultural production for family consumption then ceases completely, or at best may be

28 M. Fisseha, *A Case Study of the Berchera Agricultural Development Project, Ethiopia* (Ethiopia: International Land Coalition, 2011) 20.

29 *Jatropha Assessment* n 26 above, 52.

30 For an interesting historic critique see A. Young, 'Is There Really Any Spare Land? A Critique of Estimates of Available Cultivable Land in Developing Countries' (1999) 1 *Environment, Development and Sustainability* 3.

31 S. M. Borras, P. McMichael and I. Scoones, 'The Politics of Biofuels, Land and Agrarian Change: Editors' Introduction' (2010) 37 *Journal of Peasant Studies* 575, 581. Deininger and Feder, n 4 above. On Mozambique see Biacuana, n 18 above, 7–8.

32 Borras, McMichael and Scoones, *ibid*, 581.

33 Vermeulen, Leonard and Keeley, n 4 above, 41; also L. Cruz, *Responsible Governance of Land Tenure: An Essential Factor for the Realization of the Right to Food Land Tenure Working Paper No 15* (FAO, 2010) 4.

34 For a 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 at <http://www.landcoalition.org/about-us/aom2011/tirana-declaration> (last visited 1 December 2013). Note that Borras, Franco and Wang sub-divide 'land grabbing' into 3 categories: (1) Land grabbing for the purposes of using the land as a 'factor of production' ie for food, feed and biofuel; (2) 'Green Grabbing' to use land for the purposes of more pro-environmental policies ie growing trees and (3) Water grabbing where it is the water resource available with the land which is crucial: S. Borras, J. Franco and C. Wang, 'The Challenge of Global Governance of Land Grabbing: Changing International Agricultural Context and Competing Political Views' (2013) 10 *Globalizations* 161, 162. Note the extensive showcasing of the 'land grab' issue in the *Journal of Peasant Studies*: for example, K. Deininger, 'Challenges Posed by the New Wave of Farmland Investment' (2011) 38 *Journal of Peasant Studies* 217 and S. Borras, R. Hall, I. Scoones, B. White and W. Wolford, 'Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction' (2011) 38 *Journal of Peasant Studies* 209.

substantially reduced.³⁵ This is because the remaining portions of land following acquisition by the investor may be so small, or remote and without access to water, 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.³⁶ Viable alternatives for these farmer families might be available only through additional employment guarantees in the vicinity of their old or new farms.

For example, as part of a land acquisition programme to lease to Saudi Star Cultural Development plc for rice production and to Karuturi Global Ltd for sugarcane production and processing for biofuel, the Ethiopian government planned to relocate over 45,000 households between 2010–2013 from Ethiopia's fertile Gambella region.³⁷ The Oakland Institute reported in 2011 that local farmers were forced to relocate to areas with poor or no farming potential even though the move was said to be voluntary. Food was to be provided by the Ethiopian government if there was no food at the new locations.³⁸ Moreover, the terms of the Saudi Star Development plc's agreement with the Ethiopian government indicated that Saudi Star was granted 'special development privileges', the ability to import capital machinery at minimum tariff levels and the right to repatriate profits from the investment.³⁹ At least for the duration of this tax holiday granted to the foreign investor, Ethiopia will experience greater food insecurity as a consequence of the investment. This is because its displaced farmers will produce much less, or no food at all and the state must provide food for the dispossessed producers without obtaining income from the investment which would either enable it to buy that food, or to reinvest the money in other sectors to enable its citizens to buy their own food instead.

Some commentators argue that further negative pressure on food security for weak states also occurs as large-scale agri-FDI in food exports and fuel crops increases pressure on water supplies for neighbouring staple food crops, with the consequence that the investment is in reality a 'virtual water export'.⁴⁰ As the Stockholm Institute noted, 'a land investment is very much a water investment, though water is rarely in the contract'.⁴¹ Traditional agricultural production in

35 Fisseha, n 28 above, 34.

36 Fisseha, *ibid.*, 21. Note that so-called 'water grab' may be a collateral consequence of land grab: see P. Baumgartner, 'Change in Trends and New Types of Large-Scale Investments in Ethiopia' in T. Allan, M. Keulertz, S. Sojamo and J. Warner (eds), *Handbook of Land and Water Grabs in Africa: Foreign Direct Investment and Food and Water Security* (Oxford: Routledge, 2013) ch 2.7.

37 'Billionaire's Company will invest \$2.5billion in Ethiopia Rice Farm' *Bloomberg* 23 March 2011 at <http://www.bloomberg.com/news/2011-03-23/saudi-billionaire-s-company-will-invest-2-5-billion-in-ethiopia-rice-farm.html> (last visited 20 November 2013).

38 Oakland Institute, *Understanding Land Investment Deals in Africa: Saudi Star in Ethiopia Land Deal Brief* June 2011.

39 Land Rental Contractual Agreement Made Between the Ministry of Agriculture and Saudi Star Agricultural Development plc, 12/02/2003, Article 6:2. The Agreement is effective from 29 September 2009 till 29 September 2059 (Article 20). The agreement is available from the Oakland Institute at <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/SaudiStar-Agreement.pdf> (last visited 2 April 2013).

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

41 SIWI Report, n 1 above, 8.

much of Sub-Saharan Africa is rain-fed and relies on access to rivers and aquifers when the rains fail.⁴² 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 agri-FDI is located in an area with overall inadequate rainfall.⁴³ For example, many large agri-FDI projects in Sudan, South Sudan and Ethiopia are located at transboundary water basins on the Nile river delta taking water away from producers downriver.⁴⁴

The key to gaining positive benefits from agri-FDI is good project management to ensure the weak state derives maximum benefits for their development needs, without experiencing the detrimental effects on national and local food security. The current literature shows that weak states often lack the capacity and appropriate governance structures to negotiate effectively prior to the establishment of the investment to obtain the most appropriate terms from the investor and are unable to police the investment once it has been made. A solution that alleviates such problems is an important element in any agri-FDI policy for food insecure states.

Yet, agri-FDI regulation at the international and regional level exacerbates domestic governance problems by over protecting the investor and under regulating the investment to the detriment of the weak state's national food security. The governance gap is more complex than it is often portrayed in the current literature therefore, with the result that devising an appropriate solution is more difficult than it at first appears.⁴⁵ It is this international and regional dimension of the governance gap that this article seeks to reveal. The discussion will now move on to map out the governance gap in agri-FDI regulation at the international and regional level by looking at the position first before and then after the investment occurs.

AGRI-FDI REGULATION AT INTERNATIONAL AND REGIONAL LEVEL

Pre-investment stage

The Responsibilities of the Host State

According to the internationally agreed definition, 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

42 *ibid.*, 10.

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

44 SIWI Report, *ibid.*, 9.

45 Note one solution that we develop further at the end of this article may be to incorporate a public interest clause in the bilateral investment treaty (BIT). See annex below.

and healthy life'.⁴⁶ All states are committed to 'halt immediately the increase in- and to significantly reduce- the number of people suffering from hunger, malnutrition and food insecurity.'⁴⁷ To this end, states will '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.⁴⁸

Food security in these declarations is understood through a national lens. It is the responsibility of each state to determine its food security needs and consult with various stakeholders regarding what policies may be appropriate 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.⁴⁹ The policy must at least guarantee access to food, or the means to provide it. And, it 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, but without undermining the national food security of other states, for instance by dumping their surplus production on markets with the consequence that local farmer production is displaced.⁵⁰

Encouraging responsible agri-FDI is not merely a tangential part of all food security policies; it is a critical component thereof.⁵¹ As the World Food Summit Plan of Action points out, agri-FDI 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 short, medium and long term.⁵² It is positive too when it leads to greater employment opportunities for households that would otherwise be food insecure.⁵³ The weak host state therefore commits to focus on encouraging agri-FDI that is based on innovative business models like contract farming, outgrower schemes and joint ventures with local producers.⁵⁴

46 World Food Summit, Plan of Action, n 5 above, para 1. 'Social' was added in the 2009 Declaration of the World Summit on Food Security, *ibid*, para 2.

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

48 *ibid*.

49 *Five Rome Principles for Sustainable Global Food Security* World Summit on Food Security, WSFS 2009/2, 16–18 November 2009, Principle 1. Some commentators argue this definition also implies an international dimension to a state's national food security policy ie it must also not undermine global food security by its domestic policies. This aspect of the definition is explored in a limited way below, but for further detail see C. Häberli, 'What's wrong with WTO rules applying to food security?' in Rayfuse and Weisfelt (eds), n 40 above, 163.

50 n 46 above, Principle 1. The problem of regulating agri-FDI within specific weak states themselves has been discussed extensively elsewhere and will not form part of this article: see L. Cotula, "'Land Grabbing" in the shadow of the law: legal frameworks regulating the global land rush' in Rayfuse and Weisfelt (eds), n 40 above, 272.

51 An approach that was reiterated by the G8 in the L'Aquila *Joint Statement on Global Food Security* (G8 Summit, 2009).

52 World Food Summit Plan for Action 1996, n 5 above, Objectives 2.1(b), (c) & 2.3(d). *Five Rome Principles for Sustainable Global Food Security* n 49 above, Principle 5.

53 World Food Summit Plan for Action 1996, *ibid*, objectives 2(c).

54 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: W. Anseeuw, L. Alden Wily, L. Cotula & M. Taylor, *Land Rights and the Global Rush for Land: Findings of the Global Commercial Pressures on Land Research Project* (International Land Coalition, 2011)

On the negative side and as pointed out above, there are cases of agri-FDI that result in the creation of the ‘mega farms’ that can displace domestic production and lead to the widespread eviction of indigenous peoples.⁵⁵ The Action Plan for the Implementation of the Principles for Responsible Agriculture Investment (PRAI), which is expressly aimed at shaping states’ agri-FDI policies to minimise the adverse effect of agri-FDI on states’ national food security, advocates field-testing the FDI before rolling out large-scale projects. It also suggests states identify and demarcate any existing ‘land rights,’ however legally tenuous, so that the investor is able to negotiate directly with the land ‘owner’ prior to the investment taking place.⁵⁶ Similarly, the PRAI supports the need for states to continually modify their thinking on what the most positive forms of FDI are that can maximise their food security.⁵⁷ At the pre-investment stage, the host state is committed to implementing a policy encouraging agri-FDI that actively reduces the negative externalities and boosts positive effects on the state’s food security.⁵⁸ Principle 2 of the PRAI strongly supports this position and suggests only agri-FDI that ‘generate[s] desirable social and distributional impacts and does not increase vulnerability’ will positively impact on the state’s food security.⁵⁹ For example, a state could suggest slight, low cost modifications to the planned investment that would improve the ability of particularly vulnerable rural communities to cope with unexpected bad weather conditions: so, an investor could be required to support local community storage programmes to offset future poor harvests and price volatility.⁶⁰

In one sense, encouraging agri-FDI that has a positive effect on food security is only a policy goal, or soft law obligation, for the weak host state.⁶¹ It is contained in the Rome Declaration on World Food Security 1996 and further underpinned by the later 2009 Declaration.⁶² As Declarations, they are not binding instruments and do not impose legally binding duties on the weak host state to pursue agri-FDI that has a demonstratively positive effect on its national food security. Similarly, the PRAI is also ‘a toolkit of best practices, guidelines, governance frameworks and possibly codes of practice’ that helps the weak host state determine what forms of agri-FDI will have positive effects on their food security.⁶³ There is a move towards creating a model law in which the PRAI

55 Inter-Agency Working Group on the Food Security Pillar of the G-20 Multi-Year Action Plan on Development: *Options for Promoting Responsible Investment in Agriculture* 3 June 2011, 4. On the problems of displacement within specific weak states see Fisseha, n 28 above.

56 FAO, IFAD, UNCTAD and World Bank, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (Synoptic Version) 22 February 2010, Principle 1, 2. Note the demarcation of land in this way was undertaken in Mexico in the late 1990s, see PRAI, *ibid*, 4.

57 PRAI, *ibid* and Report of the High Level Development Working Group, *Options for Promoting Responsible Investment in Agriculture* *ibid*, Action Plan point 4. Further consultations to develop the PRAI were started at the 39th Session of the FAO Committee on World Food Security 15–20 October 2012, CFS/2012/39 FINAL, paras 22–23. The outcome is expected in 2014.

58 *Options for Promoting Responsible Investment in Agriculture*, *ibid*, 4.

59 PRAI, n 56 above, Principle 6.

60 PRAI, *ibid*, 7.

61 For the relationship between food security and the right to food, see below.

62 n 2 above.

63 PRAI, n 56 above, 4.

would be enshrined, but this is outlined in the third project under the Action Plan, and even then, it is only scheduled to be a discussion point.⁶⁴ Yet, it should be noted that despite their non-binding status, the Declarations and PRAI do contain language of compulsion like the words 'shall' and 'must' and the state does make a very public commitment to their terms when it signs up to them.⁶⁵

A state's national food security policy may be operationalised through human rights law however, specifically the right to food and the right of producers to use their land and exploit natural resources on that land for the purposes of feeding themselves.⁶⁶ In this case, the state will owe legally binding duties to its citizens to attract agri-FDI that do not impinge on their economic, social and cultural rights.⁶⁷

The right to food in international human rights law imposes a duty on the state to ensure 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'.⁶⁸ This duty is understood as both a positive and negative obligation: the state 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

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

65 Pariotti makes this point in the context of transitional corporations' non-binding obligations, but a similar point can be made for states: E. Pariotti, 'International Soft Law, Human Rights and Non-State Actors: Towards the Accountability of Transnational Corporations' (2009) 10 *Human Rights Review* 139, 148.

66 Universal Declaration on Human Rights 1948, Art 25 and specifically, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976, Art 11 on the right to food and UN Declaration on the Rights of Indigenous Peoples, United Nations General Assembly Resolution 61/295, 13 September 2007 (A/61/53), Article 8 and UN ICESCR, Article 2. Indigenous People's rights to land are inextricably linked generally with cultural rights: see S. Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Challenges' (2011) 22 *European Journal of International Law* 121. Some commentators have questioned the precise nature of these rights' normativity: for example see R. Plant, 'Social and Economic Rights Revisited' (2003) 14 *Kings Law Journal* 1.

67 H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics and Morals* (Oxford: OUP, 3rd ed, 2008) 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* (Rome: FAO, 2005) Art 17. Note too that not all states are bound by the ICESCR. A notable exception is the United States: M. D. Anderson, 'Beyond Food Security to Realizing Rights in the US' (2013) 29 *Journal of Rural Studies* 113.

68 De Schutter, n 6 above, para 2. The right to food is found in Universal Declaration on Human Rights, Art 25 and ICESCR, Art 11. On the right to food, see S. Narula, 'The Right to Food: Holding Global Actors Accountable under International Law' (2005–6) 44 *Columbia Journal of Transnational Law* 691 and C. Breining-Kaufmann, 'The Right to Food and Trade in Agriculture' in T. Cottier, J. Pauwelyn and E. Bürgi-Bonanomi (eds), *Human Rights and International Trade* (Oxford: OUP, 2005) 341.

seek to ‘strengthen people’s access to and utilisation of resources and means to ensure their livelihoods’ (duty to facilitate).⁶⁹

The Committee on Economic, Social and Cultural Rights in General Comment 12, has further interpreted Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to mean that the state, as duty bearer, must ensure food is available in sufficient quantities and is 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.⁷⁰

In addition, food must be accessible to the individual in ways that are sustainable and yet do not interfere with other human rights.⁷¹ Accessibility is understood in terms of both physical and economic accessibility. In other words, the state must guarantee that it is possible either for individuals to feed themselves directly by working on productive land (understood as an individual right to invest and produce food);⁷² or for the individual to gain access to food directly through adequate distribution, 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).⁷³

The right to food has also been incorporated into regional initiatives. In the context of the American Convention on Human Rights, the Inter-American Court of Human Rights found that where large-scale investment projects affected indigenous peoples’ economic, social and cultural rights, this duty extended to an obligation to consult with the peoples concerned and obtain their consent prior to agreeing to the investment project.⁷⁴ The African Charter on Human and Peoples’ Rights (the Banjul Charter) adopted by the Organisation of African Unity (later, the African Union)⁷⁵ specifies that an individual’s human rights are fully realised only in the context of their community as a whole.⁷⁶ Non-discrimination between individuals and peoples is central to the Banjul Charter’s concept of economic, social and political rights.⁷⁷

69 Over 160 states have ratified the Convention, so it is widely accepted, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited 1 December 2013). De Schutter, n 6 above, para 2. See generally, Narula, *ibid*, 692.

70 UN Doc E/C.12/1999/5, paras 9 and 10.

71 *ibid*, para 8, 9 & 11.

72 *ibid*, para 12.

73 UN Doc. E/C.12/1999/5 *ibid*, para 13.

74 *Case of the Saramaka People v Suriname* Judgment 28 November 2007 at [134] (*Saramaka*).

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

76 Draft Charter on Human and Peoples’ Rights, *ibid*, Art 29(7).

77 See generally B. O. 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 *Human Rights Quarterly* 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.

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 weak host state's population as a whole which is in turn part of its overall economic development strategy.⁷⁸ Article 14 of the Banjul Charter specifically recognises the 'right to property' which would potentially protect any local producers that did have some form of land tenure from investor 'land grab.' 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.⁷⁹ Article 17 equally requires states to respect cultural and traditional ways of life, including the use of certain agricultural production methods.⁸⁰

The non-legally binding Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights encourage weak host states 'to take measures to ensure enjoyment of economic, social and cultural rights' including the right to food and the right to property.⁸¹ Such measures should be fully supported by effective domestic remedies.⁸² At the pre-investment stage, therefore, the weak host state makes a commitment to take 'concrete and targeted steps' to ensure the agri-FDI does not impede these individual and collective rights. The Principles and Guidelines suggest that such steps should include the protection of indigenous peoples against expropriation of their land, as well as eviction. It is a key element of the Principles and Guidelines that the most vulnerable and disadvantaged groups' rights are protected.⁸³

In addition, in seeking to meet these human rights obligations in their food security policies all states should also draw on the non-legally binding Ruggie Guiding Principles on Business and Human Rights (the Ruggie Guiding Principles) and encourage each investor to adopt human rights policies appropriate for the state's food security.⁸⁴ Specifically, the state commits not to encourage or enter into agreements for agri-FDI involving expropriation of land owned by local agricultural producers if the project adversely impacts on its citizens' right

78 Okere, *ibid*, 148.

79 African Charter on Human and Peoples' Rights, n 75 above, Arts 14 and 21.

80 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.

81 Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 24 October 2011, Part II, Article 2 at www.achpr.org/instruments/economic-social-cultural/ (last visited 1 December 2013). Note too the Heads of State and governments of the African Union's commitment to resolving food insecurity in Africa more generally in the Maputo Declaration, *Declaration on Agriculture and Food Security in Africa* Assembly/AU/Decl.7(II) 10–12 July 2003.

82 Principles and Guidelines, *ibid*, Art 36.

83 *ibid*, Art 17.

84 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* n 9 above, Principle I (B) 3(c) and I(B)5 & 6. On the normativity of the Ruggie agenda, see J. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819.

to food, nor implement domestic legislation that threatens those rights.⁸⁵ It must also provide remedies if those rights are violated.⁸⁶

In essence, the instruments discussed so far suggest that the host state makes a commitment to allow only agri-FDI that will add to (or at least not diminish) its national food security. This general objective is not legally binding on the state, meaning there is no duty on the state to encourage agri-FDI that is likely to increase national food security. However, if the state's food security policy is operationalised through the right to food and/or the right of indigenous peoples to their land, either on the basis of international and/or regional treaty commitments, then the state owes a legally binding duty to its citizens to ensure any agri-FDI does not infringe their human rights. Here, the host state can be held accountable by its citizens should it condone agri-FDI that does infringe these rights. This places a heavy burden on the weak host state at the pre-investment stage in terms of the type of agri-FDI it should attract, or refuse. (Although it should be pointed out here that there is a real question about the political (and legal) viability of human rights proceedings which are based on the difficult link between the right to food and property and agri-FDI before the investment has occurred because there may be little damage to individuals at this time.)⁸⁷

The question to which we now turn is what responsibilities the investor has at the pre-investment stage to ensure its activities do not impinge on the host state's food security.

The Responsibilities of the Investor

At the pre-investment stage there is no legally binding obligation on the investor not to undermine the host state's food security in international investment law, or in international human rights law.⁸⁸

To the extent that the investor is a wholly private entity with its own commercial strategy, international investment law has little to say about the way the investor 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, the state will be legally bound to deliver on those incentives. This appears to be the case irrespective of the behaviour of the investor, although this does depend on the precise terms of the investment contract.⁸⁹

85 Ruggie Guiding Principles, Principles I(B)5.

86 *ibid*, Principle I(B) 6.

87 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. For an analysis in the context of land grab see E. Polack, L. Cotula and M. Cole, *Accountability in Africa's Land Rush: What Role for Legal Empowerment?* (London: IIED, 2013).

88 This is the classic position in human rights law, but is not uncontroversial, see John Ruggie as UN Special Representative on Human Rights and Transnational Corporations: *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights including the Right to Development* A/HRC/8/5, 7 April 2008, paras 51, 69; Ruggie, n 9 above, para 14 where Ruggie expressly states the 'Protect, Respect, Remedy' framework does not impose liability for breaches of human rights obligations on the corporation.

89 *Thunderbird v Mexico* Arbitral Award 26 January 2006, para 47. See generally W. M. Reisman and M. H. Arsanjani, 'The Question of Unilateral Government Statements as Applicable Law in Investment Disputes' (2004) 19 ICSID Review 328.

International investment law instead operates on the general assumption that the investor need not consider the impact of its investment on the host state's food security before it makes the investment decision. The underlying assumption is rather that all parties possess the power to freely negotiate the terms of the investment. The resulting investment contract is said to be a compromise between the different, but not mutually exclusive, interests.⁹⁰ In other words, the very nature of agri-FDI is thought to be positive for all parties and the law is merely the legal underpinning of this mutual benefit. Often, the only legally binding limitation is that the investor cannot invest in a way that breaches existing domestic law; the assumption being that the state already has adequate, enforceable domestic laws in place that would protect the human rights and general well-being of its citizens which the investor, as a legal entity operating within the state, would be bound by anyway.⁹¹ The extent to which this negotiating freedom helps weak host states combat the problems of agri-FDI at the pre-investment stage is questionable, especially as such states are often so keen to encourage agri-FDI that they enter into investment agreements that undermine their food security.⁹²

The investor is only expressly encouraged to invest in ways that do not undermine the host state's food security through a number of non-legally binding, soft law principles that cover the problems created by agri-FDI in weak host states and which the weak state has committed itself to uphold. Specifically, as we have seen, Principle 2 of the PRAI requires that agri-FDI should not jeopardise the weak host state's food security.⁹³ This principle is primarily aimed at the weak host state, but it is equally implicit from the non-specific wording of Principle 2 that the investor too should act in a way that does not undermine the food security of the host state.

Principle 5 of the PRAI places a commitment on the investor to ensure that 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'.⁹⁴ Clearly this is a commitment that is meant to cross into the post-establishment stage, but inevitably the investor is supposed to check that its planned investment meets this commitment. The investor should also always assess the technical and economic viability of the investment project before the agri-FDI is made.⁹⁵ This includes undertaking due diligence all along the supply chain from the investment to the

90 World Bank, *Legal Framework for the Treatment of Foreign Direct Investment, Vol II Guidelines* (World Bank, 1992) 35.

91 eg, German-Philippines Bilateral Investment Treaty, 24 July 1998, Art 1(1) where 'investment' is only understood in terms of an 'asset accepted in accordance with the respective law and regulations of either Contract State' (emphasis added), at http://unctad.org/sections/dite/ia/docs/bits/germany_philippines.pdf (last visited 31 October 2013). See generally R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: OUP, 2nd ed, 2012) 92–93.

92 eg, Saudi Star's Investments in Ethiopia are highly controversial. See the first section above and n 38 above.

93 PRAI, n 56 above.

94 *ibid.*

95 *ibid.*, 13.

consumer to check for possible adverse impacts on the host state's food security, its citizens' right to food and violations of any land tenure rights.⁹⁶

In terms of general principles governing corporate behaviour, the United Nations Global Compact commits investors to 'support and respect' human rights in general as part of their corporate social responsibility policies. The investor need only abide by the terms of the Global Compact if it expressly signs up to its Ten Principles, and it does not impose any legally binding obligation on the investor even when it has signed up to it.⁹⁷

Likewise, the Ruggie Guiding Principles encourage investors to respect human rights and prevent human rights abuses during the investor's interaction with the state. This 'due diligence' commitment covers the pre-investment stage as the investor must undertake an impact assessment of its business activities' effect on the human rights of the host state 'as early as possible in the development of the new activity'.⁹⁸ As Bittle and Snider note, however, even when the Guiding Principles were 'road-tested' in five pilot studies, it was difficult for researchers to obtain information about some key aspects of those corporations' implementation, and even when they did, the information available did not specify whether these pre-investment impact assessments were always undertaken, or even whether or not they were effective.⁹⁹ The OECD Guidelines for Multinational Enterprises (MNCs) also state that the investor must refrain from seeking any exemptions from the weak host state's national laws such that the investor can operate in a way that undermines the host state's human rights commitments.¹⁰⁰

In addition to their non-binding character, each of these instruments is not specifically tailored to ameliorate agri-FDI's potential damaging effect on the weak host state's food security. Only the PRAI expressly cover the responsibilities of the agri-FDI investor. Whilst there is great hope that the PRAI will eventually embed into national law and therefore be legally binding, they are currently unenforceable against the investor.

The Responsibilities of the Investor's Home State

For the investor's home state, that is the state where the investor is incorporated, an interesting picture emerges at the pre-investment stage. Although food security as a policy objective is 'nationally articulated' to the extent that the

96 *ibid.*, 15; also see examples of private initiatives like GLOBALGAP: *ibid.* L. Botterill and C. Daugbjerg, 'Engaging with Private Sector Standards: a Case Study of GLOBALG.A.P.' (2011) 65 *Australian Journal of International Affairs* 488.

97 *United Nations Global Compact: Corporate Sustainability in the World Economy* (2000) United Nations, Global Compact Governance (2008) at http://www.unglobalcompact.org/docs/about_the_gc/governance_update2008.pdf (last visited 31 October 2013). On the challenges of implementing the Global Compact, see S. Soederberg, 'Taming Corporations or Buttressing Market-Led Development? A Critical Assessment of the Global Compact' (2007) 4 *Globalizations* 500.

98 Ruggie, n 9 above, Principle II (B)17 commentary para 4.

99 S. Bittle and L. Snider, 'Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?' (2013) 21 *Critical Criminology* 177, 183–185.

100 OECD, *Declaration on International Investment and Multinational Enterprises* 25 May 2011; Annex1 *Guidelines for Multinational Enterprises* (2011) OECD II:2 and Commentary, 39.

parameters and content of the policy are formulated by the state itself, this does not mean that the investor's home state commits to focus solely on its national food security needs. Rather, the commitment has two dimensions: each state must be inward-looking to ensure its policy meets the needs of its own citizens; but, equally, it must be outward-looking too. The precise nature of the home state's outward-looking responsibility to the weak host state's food security is uncertain.¹⁰¹

The definition of food security from the 1996 Rome Declaration on World Food Security does appear to support some outward, global dimension to the home state's food security policy going beyond that of providing development aid and assistance to other weak states. The Rome Declaration 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 substantiated by the Rome Principles for Sustainable Global Food Security, which specifically recognise that resolving food security involves 'mutual responsibility' and 'accountability' on the part of all states.¹⁰²

For the investor's home state, this could be read to mean that it will provide financial assistance and development to weak states to implement their own agri-FDI strategy. But, equally, this statement could be read to imply a deeper responsibility not to implement policies or uphold laws protecting corporate activity within the home state that mean overall global food security including food security in the weak host state is undermined. Such an interpretation appears to be in line with the general obligation on all state parties to the Covenant to 'take steps, *individually* and . . . with a view to achieving progressively the full realisation of rights recognised in the present Covenant *by all appropriate means, including . . . the adoption of legislative measures.*'¹⁰³

More constraining obligations for the investor's home state may be seen in Articles 11(1) and 11(2)(b) ICESCR which, respectively, oblige all states to take measures to realise the right to an adequate standard of living, 'including adequate food', and 'to ensure an equitable distribution of world food supplies in relation to need'. The wording of these obligations is unqualified in respect of the country of implementation. Likewise, in the context of the American Convention on Human Rights, the Inter-American Court of Human Rights stated that 'states' (not just the host state) must respect the special relationship indigenous peoples have with their territory and take 'special measures' to guarantee that right.¹⁰⁴ Consequently, a home state condoning, or at least not trying to prevent, right to food violations by its investors could be understood as

101 cf the position under the United Nations', *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* which imposed a legally binding obligation on corporate investors not to infringe human rights of the host state and a mandatory monitoring obligation on the investor's home state: C. Jochnick and N. Rabaeus, 'Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon' (2010) 33 *Suffolk Transnational Law Review*, Symposium 413.

102 *Five Rome Principles for Sustainable Global Food Security*, n 49 above.

103 ICESCR, Art 2.1 (emphasis added).

104 *Saramaka* n 74 above, para 91. See also *Case of The Mayagna (Sumo) Awas Tingni Community v Nicaragua* Judgment of 31 August 31 2001 of the Inter American Court of Human Rights at [149].

violating its own commitments under international human rights law.¹⁰⁵ Such a commitment would appear to be particularly strong where a home state actively supports agri-investments through accompanying infrastructure, hospitals and schools, or concessional project finance, either directly or indirectly, through international financial institutions where it is represented on the Board of Directors.

The OECD Guidelines on MNCs, together with the Ruggie Guiding Principles, reiterate too that the home state is not under any legally binding obligation to ‘police’ the agri-FDI activities of its investors.¹⁰⁶ However, they do require that the home state encourage the positive contributions MNCs make towards the right to food, the right to property and the rights of indigenous peoples in host states.¹⁰⁷ At the pre-investment stage, this is a general exhortation to the investor’s home state, but does not extend to interrogating how MNCs make their agri-FDI decisions per se.¹⁰⁸

Some investor home states, like the European Union (EU), have entered into specific, legally binding agreements with some weak host states to carefully monitor agri-FDI from investors incorporated in EU states.¹⁰⁹ For example, Article 40 of the Interim Economic Partnership Agreement between the Eastern and Southern Africa States and the EU (EPA) places a legally enforceable obligation on the (EU) investor’s home state to ‘create an environment for sustainable and equitable economic investment . . . including Foreign Direct Investment . . . from the EC Party.’¹¹⁰ EU investor home states must generally support the encouragement of FDI and actively promote positive co-operation between the investor and the local indigenous population.¹¹¹ There is also an express recognition of the need to support protection of host state natural resources, like water.¹¹²

Unlike the OECD Guidelines for MNCs and the Ruggie Guiding Principles, these obligations can be enforced through dispute settlement proceedings in the EPA.¹¹³ 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.¹¹⁴ Whilst this is an important breakthrough in the creation of binding obligations to ensure agri-FDI does not undermine national food security, in reality, the EPA does not specifically address the key concerns of agri-FDI that we set out in the first section above. Instead, there is a general commitment to address agriculture only in later negotiations.¹¹⁵

105 C. Häberli, ‘God, the WTO – and hunger’ in K. Nadakavukaren Scheffer (ed), *Poverty and the International Economic Law System: Duties to the Poor* (Cambridge: CUP, 2013) 80.

106 Although there may be moral pressure to comply with them: OECD, *Guidelines for Multinational Enterprises: Text and Commentary* (2011), n 100 above, 13, para 1.

107 OECD, *ibid*, Principle II:2. Ruggie, n 9 above, Principle I(A)2.

108 OECD, *ibid*, Principle I:2. Ruggie, *ibid*, Principle B(3)(c).

109 2012/196/EC, 24 April 2012, OJ(2012) L111/1,17.

110 *ibid*.

111 *ibid*, Art 40(1)(d).

112 *ibid*, Art 49(2)

113 *ibid*, Chapter IV. There is as yet no reported case under this provision.

114 *ibid*.

115 *ibid*, Art 53(f).

On the traditional view, the home state is not under a legally binding obligation to the host state to uphold the right to food, property and indigenous peoples' rights of its citizens, although this position may be changing especially in regional human rights initiatives discussed above. Even then, such liability only goes to the human rights of the weak host state's citizens and would not require the home state to support the weak host state's food security in general. One interpretation of the agreed definition of food security suggests a broader commitment on the part of the home state, although such a commitment would not be legally binding.

Post-establishment stage

It is clear from the discussion above that many of the problems associated with agri-FDI occur after the investment has been made. This is the point where, despite the hope that the agri-FDI will make a positive contribution to the host state's food security, in reality local producers may be displaced and their land tenure rights ignored. Land may also have been cleared for the investor, water rights violated, and commitments to strengthen infrastructure made by the investor fail to materialise. It will be argued below that at this stage the strength of the investor's rights under international investment law exacerbates weak domestic governance of the investment at the host state level: this occurs because although the host state cannot derive positive effects from the investment in its food security and GDP, and may even be experiencing a worsening of its food security situation as a result of the investment, it must still guarantee the rights of the investor and, *inter alia*, its own citizens' right to food.¹¹⁶ Paradoxically, constraints on the investor's behaviour and attribution of responsibility to the investor's home state for the investor's conduct during the course of the agri-FDI are weak as they are only contained in non-legally binding, soft law, instruments.

This interlinked map of agri-FDI governance at the international and regional level works to over-protect the investor and under-regulate the investment so a governance gap occurs with the consequence that the weak host state's food security is undermined.¹¹⁷ The discussion that follows reveals this gap through an analysis of the responsibilities of the host state, the investor, and finally, the investor's home state.

116 The rights of the investor may be contained in an investment contract between the investor and the state enforceable in domestic law of the host state, and/or the investor's rights may be guaranteed through bilateral investment treaties (BITs) between states or through regional agreements like NAFTA. BITs and regional arrangements often provide for international investment arbitration between the investor and the state. It is in this investment arbitration that the over-protection of the investor and under-regulation of the investment is most stark. See discussion above.

117 This article concentrates on the governance gap created at the international level by the failure to adequately regulate agri-FDI. How poor agri-FDI regulation plays out in individual weak states is beyond the scope of this article, but see eg Fisseha, n 28 above.

The Responsibilities of the Host State

The host state is already committed to pursue a food security policy that enables it to fulfil the human rights of its citizens (where food security is operationalised through the ICESCR).¹¹⁸ The problem is that the weak host state's ability to force the investor to run its investment in ways that do not violate those rights is greatly undermined by the under regulation and over protection of the investor at international level. All the obligations on the weak host state to protect the investor are contained in legally binding rules in Bilateral Investment Treaties (BITs), regional and international investment law that can be enforced by the investor in domestic courts and international arbitration tribunals. Such violations entail financial compensation. The situation is worse in cases of corruption in the weak state: put simply, in this case the investor has a legally signed contract allowing it to undertake the investment, whether or not that investment is in accordance with the host state's food security.

Post establishment, international investment law assumes that the balance of power shifts from the 'vulnerable' investor to the host state because the host state has the sovereign right to change its laws, or act in such a way that the investment becomes economically non-viable for the investor.¹¹⁹ Investment arbitration tribunals adjudicating disputes between the state and investor also work on the assumption that it is critical that the investor be protected from such violations.¹²⁰ This means that if the host state wishes to act post-establishment to reinstate land tenure rights, perhaps given away by a previous (even corrupt) government, or promote greater use of partnerships between the investor and local producers, or impose caps on groundwater pollution or river water usage for irrigation, then any of these actions might be regarded as a violation of the investor's rights.¹²¹ More recent case law does seem to be showing an amelioration of this investor-bias, but the legally binding rules in this field still make it very difficult for the host state to require the investor to respect its food security post-establishment if this requirement was not in the original investment contract.¹²² 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"'

118 eg, FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012), para 4.

119 A. Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 *Journal of International Economic Law* 469, 470.

120 On the general incidence of BITs in Sub-Saharan Africa and a detailed study of their terms see Cotula, n 75 above.

121 On the scope of these problems see the second section, above.

122 *Lemire v Ukraine*, Decision on Jurisdiction and Liability, Award, 28 March 2011. Note there is an interesting restriction on the scope of the fair and equitable treatment standard when a state regulates in the 'public interest' summarised at [40], but then rejected by the Tribunal at [43]. This move away from investor-bias is also apparent in the terms of the 2012 revision of the US Model BIT, eg Annex B:4(b) defines the scope of an indirect expropriation. However, it is difficult to suggest any pro-human rights or host state 'turn' in the law as such, as there is still a lack of consistency in the way tribunals address these issues. This disparity arises from the fact that international investment law is still emerging as a distinct subject. For a thoughtful treatment of these issues see S. W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) *European Journal of International Law* 875.

of the reciprocating host state'.¹²³ 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 agri-FDI post-investment, the specific fair and equitable treatment standard and the national treatment obligation are the most important.¹²⁴ These standards have been developed through individual investment arbitration tribunal decisions (not national law), although questions remain whether these standards are sufficiently ingrained to reach the status of customary international law.¹²⁵ 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 treaties like NAFTA covering the investment because tribunals often follow decisions of previous tribunals.¹²⁶

The weak host state is legally bound (by the BIT or regional agreement) not to act in a way which impedes the investor's specific right to fair and equitable treatment of its investment. In BITs, this can be 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.¹²⁷ For example, the 2012 US Model BIT states this to be a 'minimum standard of treatment of aliens' consistent with the US's obligations in relation to diplomatic protection in general public international law.¹²⁸ Such a 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

123 C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: OUP, 2008) para 7.02.

124 MFN can mean that more favourable terms in other BITs that the host state has signed up to 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 agri-investment that forms the subject-matter of the dispute: see McLachlan, Shore and Weiniger, *ibid*, paras 7.161–7.169. Similar 'ratchet clauses' also appear in national treatment provisions for sub-federal entities, for example in NAFTA, Art 301(2). For a general discussion of the ratchet clause see P. Messerlin, 'Economic Partnership Agreements: How to Rebound?' and C. Häberli, 'EPAs: From an Ugly Duckling to a Beautiful Swan?' in E. Jones and D. F. Marti (eds), *Updating Economic Partnership Agreements to Today's Global Challenges – Essays on the Future of Economic Partnership Agreements* GMF Economic Policy Program, Global Trade Governance Project, University of Oxford and UNCTAD, 19 November 2009.

125 *SD Myers v Canada* (NAFTA Arbitration under UNCITRAL arbitration rules) First Partial Award, 13 November 2000 at [263] and [265]. See generally, R. Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 *International Lawyer* 87. The precise nature of the doctrine of precedent in investment arbitration and the interpretation of the scope of obligations over time is controversial: A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *American Journal of International Law* 179.

126 See *Azurix v Argentina* Award 14 July 2006 ICSID Arbitration No ARB/01/12, at [350] citing the scope of the NAFTA 'fair and equitable treatment' standard as developed through arbitration proceedings. See generally S. W. Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law' in S. W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford: OUP, 2010) ch 5.

127 Sri Lankan BIT, Art 2, cited in McLachlan, Shore and Weiniger, n 123 above, 208.

128 US Model BIT 2012, Art 5: 2 at <http://www.state.gov/e/eb/ift/bit/index.htm> (last visited 31 October 2013).

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.¹²⁹

The concept of what is 'fair and equitable treatment' is constantly evolving and is 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 is legally bound to protect the 'legitimate expectations' of the investor and not act in a way that could be regarded as arbitrary or discriminatory.¹³⁰ 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.¹³¹ 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.¹³²

A tribunal's focus will be on whether there is a stable regulatory environment for the investor in the host state, and not whether the investor's behaviour is or is not impinging on essential, but unspecified, public interests, such as the food security, of the host state.¹³³ BITs also often contain umbrella and stabilisation clauses that work together both to stabilise the regulatory environment once the investor has located in the host state and bind the investor and the host state to the domestic law as it stands at the time of the investment, thereby making subsequent changes to the investment difficult (so-called 'regulatory chill').¹³⁴

As part of the overall obligation to accord the investor 'fair and equitable' treatment of their investment in general, many BITs include specific national

129 US Model BIT 2012, Annex A & B. *Teemed v Mexico* ICSID arbitration, Case ARB(AF)/00/2, Award 20 May 2003 at [154]; *Azurix v Argentina* n 120 above at [327]–[330] on the general controversy surrounding the interpretation of 'fair and equitable treatment', and at [360]–[361].

130 *Azurix v Argentina* *ibid* at [320]. See the comprehensive review in *Waste Management v Mexico* Final Award 30 April 2004 at [98]–[99]. But note that the *Glamis Gold* NAFTA arbitration panel supported an earlier panel's finding in *Neer* whereby a state would only violate its 'fair and equitable treatment' obligation towards the investor if its actions amounted to *inter alia*, 'an outrage, to bad faith, to willful neglect of duty': *Glamis Gold Ltd v United States* Award 8 June 2003 at [598], citing *Neer v Mexico* Opinion, US-Mexico Claims Commission, 15 October 1926 (2006) *Reports of International Arbitration Awards* Vol IV, 60, para 4. This finding was confined to NAFTA: *Glamis Gold* *ibid* at [600]–[601], but has since been discredited: *Merrill & Ring Forestry LP v Canada* Award, 31 March 2010 at [213].

131 *TECMED v Mexico* n 129 above.

132 *Saluka v Czech Republic* 13 November 2000 (2001) 40 *International Legal Materials* 1408, 1438 and *Metaclad Corp v Mexico* Award 30 August 2000 (2002) 5 *ICSID Reports* 209.

133 *Occidental v Ecuador* Award 1 July 2004, 12 *ICSID Reports* 59 at [191].

134 On stabilisation clauses see *Amoco International Finance v Iran* (1987) 15 *Iran-US Claims Tribunal* 189, 239 and *LETCO v Liberia* Award 31 March 2006 (1987) 26 *ILM* 647, 667. On umbrella clauses see *Noble Ventures Inc v Romania* Award 12 October 2005 at [54], but see *SGS v Pakistan* Decision on Jurisdiction 6 August 2003 at [167]–[168] and [171]. The broad scope of *SGS v Pakistan* has been doubted: see *El Paso Energy v Argentina* Decision on Jurisdiction 27 April 2006 at [70] and *Pan America/BP v Argentina* Decision on Preliminary Objection, 27 July 2006 at [108]. Human rights lawyers have criticised such stabilisation clauses because of the 'regulatory chill' they represent for the host state: see R. Howse and R. G. Teitel, 'Beyond the Divide: The International Covenant on Economic, Social and Political Rights and the World Trade Organization' in S. Joseph, D. Kinley and J. Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham: Edward Elgar 2009) 45.

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'.¹³⁵ The requirement is therefore not to discriminate between foreign agri-investors and the state's own investors. The national treatment obligation only applies once the agri-FDI is established.

This provision is difficult for weak host states in the context of food security. Our discussion in the first section shows that agri-FDI may cause problems for national food security that can be traced to the sheer scale of the investment being made. Weak states, with a poor domestic investment climate, may not have a plethora of choices among many 'good' investors. This means that the basis of comparison for the purposes of assessing whether the investor is accorded national treatment can be difficult as there are very few 'national' equivalent investors whose treatment can act as a true comparator to that of the investor. Nevertheless, tribunals have taken an expansive approach to precisely who the equivalent 'national' comparator investor is, with the consequence that a violation of the national treatment obligation has been found.¹³⁶

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 foreign investor had been treated differently.¹³⁷ The panel pointed to the fact that NAFTA contains clauses that require that investment should not be undertaken in a way that violates social (ie labour standards), environmental and broader public interest concerns. Should the host state take action against the foreign investor in those cases, the panel thought this would be sufficient to push the investor into a different category to that of the domestic investor for the purposes of determining whether there had been a violation of the national treatment requirement.¹³⁸ 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 differential treatment between the foreign investor and any local investor, but only if the subsequent tribunal is minded to follow the same arguments as the NAFTA panel. The precise circumstances where this differentiation can be justified still remain uncertain.¹³⁹

Whilst the host state might consider changing the terms of the investment (to the extent it has the negotiating power and the will to do so) to fit in with its evolving national food security policy once the investment has been made, such changes can amount to an expropriation if it involves interference with

135 See 1989 Ghana-China BIT cited in L. Cotula, *Human Rights, Natural Resource and Investment Law in a Globalized World* (Abingdon: Routledge, 2012) 68.

136 *UPS v Canada* Award, 27 August 2009 at [388].

137 *SD v Myers* n 125 above at [250]. Our suggestion for a public interest clause in the BIT arises as a response to this trend in the case law: see annex below.

138 *ibid* at [250].

139 See generally Cotula, n 135 above, 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 remains controversial: *Pope & Talbot Inc v Canada* Award on Merits 10 April 2001 (2002) 122 *International Legal Materials* 352 at [45]–[63] and [68]–[69]. cf *Occidental v Ecuador* n 127 above at [176]; *Methanex v United States* 3 August 2005, Part IV Ch B at [30]–[37]. See our proposal for a Public Interest Clause, annex below.

the investor's property rights.¹⁴⁰ Expropriation can be made directly, like, for example, where the host state takes back specific land tenure rights given to the investor by a predecessor government and without compensating the former landowners; or, in cases of a poor local harvest, or during a global food crisis, where a government applies an export prohibition to a foreign-owned biofuels or cash crop project in breach of the investment contract. Expropriation can also occur indirectly when, for example, the state decides to require the investor to enter into new producer partnerships, insurance schemes, or local content purchasing requirements of the type endorsed by PRAI, after the investment has been made, even though such agreements were not part of the original investment agreement between the state and the investor.¹⁴¹ Indirect expropriation can be found therefore when gradual accretion of legalisation works to remove the rights of the investor over time to the point where the investor's control over the investment is effectively neutralised.¹⁴² It is the effect of the relevant government measure on the investment that is important.¹⁴³ The critical point where the tribunal regards legislative accretion as expropriation occurs when the investor has been 'substantially deprived' of the economic value of the investment, taking into account the duration and level of the deprivation.¹⁴⁴

Direct and indirect expropriation of the investment is a sovereign right of the host state, but it must exercise that right 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.¹⁴⁵ These criteria are cumulative. It is clear that the state has very wide discretion regarding what is deemed to be a 'public purpose,' which would arguably include expropriation in cases of serious violations of human rights, or preventing the investor exporting food commodities that are crucial for national food security.

In such cases, compensating the investor at prevailing export prices when selling the harvested food on the local market would arguably cure the violation. In any case, the host state must show that the expropriation is for that public purpose only and that it is handled in a non-discriminatory manner; it is not enough merely for the state to say that it is.¹⁴⁶ 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. Rather, it must have some objective

140 Such readjustment may occur if the host state's government is a successor to the original one, or if the problem occurred at the sub-federal level.

141 See discussion above of pre-investment stage.

142 eg *Metalclad v Mexico* n 132 above at [103] defined direct and indirect expropriation in the context of NAFTA, Art 1110.

143 *Azurix v Argentina* n 126 above at [309].

144 *CMS v Argentina* 12 May 2005 (2005) 44 *International Legal Materials* 1205; *Middle East Cement Shipping v Egypt* 12 April 2002 (2005) 7 *ICSID Reports* 178 at [107] and *Teenor v Hungary* 13 September 2006 at [70].

145 These provisions are often listed in the BIT see *ADC v Hungary* Award 2 October 2006 at [426]–[443].

146 *Amoco International Finance Corp v Iran* (1987) 15 *Iran-United States Claims Tribunals Cases* 189 and *ADC Affiliate Limited and ADC Management Limited v The Republic of Hungary* 2 October 2006, 432–433.

justification.¹⁴⁷ 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'.¹⁴⁸

There is a sense that if the host state's activities can be said to be 'regulatory', then the state's action will not amount to expropriation.¹⁴⁹ Regulation is something that an investor has to 'reasonably expect' when deciding whether or not to invest.¹⁵⁰ The key consideration appears to be the degree to which the investor's rights are interfered with.¹⁵¹ Taking back tracts 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 state's commitments under the PRAI may be said to be regulatory though, especially if the readjustment does not 'enrich' the producer, but instead neutralises the balance of power between the investor and those producers. Arguably, a host state deciding to implement international human rights obligations within its territory should be something that any investor would, or at least, should also 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.'¹⁵² 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 increase the human rights protection of its citizens.¹⁵³ States trying to enforce general food security policies are unlikely to be covered by this lacuna in international investment law however. Strong protection of the investor's rights remains at the core of international and regional investment law with little room for manoeuvre for the weak home state to adjust the investment to meet its food security needs.

The Responsibilities of the Investor

There is no legally binding obligation in international investment law on the investor not to undermine the host state's food security either. However, there are a series of non-binding guidelines and principles governing the behaviour of the investor. Some are aimed explicitly at the challenges agri-FDI pose for national food security, whereas others are more generic in nature.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (the Voluntary Guidelines) specifically require non-state actors, like large-scale investors, to 'respect human rights and legitimate tenure rights', that is, the right to

147 *British Petroleum Exploration Company (Libya) Ltd v Libya* (1973) 53 *International Law Reports* 297.

148 The 'Hull' Formula (1936) 55 *American Journal of International Law Supplement* 181.

149 Dr B. Schwartz's separate opinion in *SD Myers v Canada* n 125 above.

150 *SD Myers v Canada* *ibid* at [109].

151 *ibid*.

152 2012 US Model BIT n 128 above, Annex B 4(b). Note Clause 1(3) of the proposed Public Interest Clause, see annex below.

153 For a more detailed exposition of this argument see W. Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15 *Journal of International Economic Law* 481.

food and indigenous peoples' rights.¹⁵⁴ They require the investor to conduct appropriate management assessments during the course of the investment to continuously check its activities are not infringing these rights.¹⁵⁵ They also oblige the investor to put in place grievance procedures for any local land tenure right holders so they can make a complaint.¹⁵⁶ 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 if the investor ignores these principles especially in the 'land grab' cases.¹⁵⁷

Other, more generic instruments also shape the investor's behaviour. For example, the Global Compact requires that, in addition to implementing its ten principles discussed above, its (investor) signatories should work towards fulfilling other broader UN goals.¹⁵⁸ Such goals are couched in general terms, but they arguably include the wider food security agenda beyond the right to food, indigenous peoples' rights and property rights, as this is included within the UN FAO's remit.¹⁵⁹

The Ruggie Guiding Principles, too, place responsibility on investors not to harm human rights and to address any adverse impact when it occurs once the investment has taken place.¹⁶⁰ The agri-investor must 'embed' this responsibility at the highest management level and ensure there is adequate training in place so all its employees are fully aware of their obligations.¹⁶¹ The Ruggie Guiding Principles also make it clear that this responsibility would encompass avoiding any adverse impact on human rights before it occurs, as well as rectifying any problems afterwards. The Ruggie Guiding Principles' scope means that, for example, Saudi Star's acquisition of land in Ethiopia may be undertaken with the express intention of alleviating food security problems in the country, but when reports emerge that the investment adversely affects the right to food and the rights of indigenous landowners, it is Saudi Star's responsibility to undertake a review of that investment and stop the corporate activities causing the problems.¹⁶² This may even mean a withdrawal of the investment.

154 n 118 above para 3.2.

155 *ibid.*

156 *ibid.*

157 NGO campaigns can be very successful in highlighting abuses by MNCs in other areas of human rights: eg the 'Boycott NIKE' campaign for alleged abuses of labour rights, see S. Birch, 'How Activism Forced NIKE to Change its Ethical Game' *The Guardian* 6 July 2012 at <http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike> (last visited 20 November 2013).

158 UN, *Blueprint for Corporate Sustainability Leadership* (United Nations, 2010) Leadership Blueprint, 4 put in place as part of the Global Compact's LEAD strategy, January 2011.

159 eg FAO, *The State of Food Security in the World 2012* (Rome: FAO, 2012).

160 Ruggie Guiding Principles, n 9 above, Principle 13.

161 *ibid.*, Principle 16.

162 On Saudi Star's Investment see n 38 above. The International Land Coalition's crowdsourcing database, the Land Matrix, reports that following the conclusion of the Saudi Star deal, the land has been cleared and production has started as at 2012. The Land Matrix also lists other major land deals relating to agri-FDI by MIDROC plc, parent company of Saudi Star at http://www.landmatrix.org/get-the-detail/by-target-country/ethiopia/?order_by=&starts_with=E (last

The OECD Guidelines for MNCs also recommend that agri-investors who are also multinational corporations (MNCs) respect the human rights of any local producers and indigenous peoples affected by their activities.¹⁶³ Agri-investor MNCs should '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.¹⁶⁴ All of which mirror the general exhortation on all investors in the PRAI.

MNCs should have their own corporate policy on human rights, which specifies how they plan to address human rights violations and how they carry out their day-to-day activities in ways that do not infringe human rights. MNCs must also carry out 'human rights due diligence' along the entire supply chain.¹⁶⁵ 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 ensure the MNC fully complies with internationally recognised human rights' obligations.¹⁶⁶ The policy should be approved at the highest level of the organisation; made public; 'operationalised' 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.¹⁶⁷

One of the difficulties for local agricultural producers is often access to new technology, for example, to increase crop yields. Principle IX of the OECD Guidelines for MNCs further recognises that MNCs should 'where practicable . . . permit the transfer and rapid diffusion of technologies and know-how . . .' to local producers in ways that support the weak host state's food security.¹⁶⁸

Despite the considerable breadth of all these instruments and their impact on the behaviour of the investor, none impose legally binding obligations on the investor to conduct their investment in a way which does not adversely impact on the host state's food security, although some, like the Global Compact, do require the investor to make a very public commitment to the pro-human rights/corporate social responsibility agenda.

The Responsibilities of the Investor's Home State

It was argued above in the pre-investment analysis, that the home state may owe a limited, non-legally binding responsibility not to undermine the host state's

visited 28 November 2013): Some reports in 2013 indicate that pro-conservation measures were later negotiated on the Saudi Star land deal after consultation with stakeholders, although specific details are limited see: T. Blomley, F. Flintan, F. Nelson and D. Row, *Conservation and Land Grabbing* (London: IIED, 2013) 12. For a detailed, but emotive, treatment of the Saudi Star deal see F. Pearce, *The Landgrabbers* (London: Transworld Publishers, 2012) ch 1.

163 OECD, *Guidelines on Multinational Corporations* n 100 above, II:2.

164 *ibid*, II: 3, II:4, II:5 & II:7.

165 *ibid*, Chapter IV: paras IV:1–6. This mirrors the requirement of the Ruggie Guiding Principles, n 79 above.

166 OECD, *Guidelines on Multinational Corporations* n 95 above, Commentary paras 38–39.

167 *ibid*, paras 44 and 46.

168 *ibid*, IX:3. For a discussion of the difficulties local producers have getting access to technology see the first section above.

food security. Clearly, this is a responsibility that could also extend to the post-establishment phase. The Inter-American Court of Human Rights' findings in the *Saramaka* case¹⁶⁹ do hint at some limited extra-territorial application of economic, social and cultural rights of indigenous peoples at least, but this finding remains controversial. Principle 1 of the Ruggie Guiding Principles commits states firmly to protect against human rights abuses by third parties, including corporations. Yet, the commentary to the Guiding Principles makes it clear that Ruggie believed this was not an issue of extra-territorial application of human rights law as there was no direct 'legal' relationship between the home state and the investor at all. Rather it meant that the home state would be addressing its own domestic corporations' behaviour, even where that behaviour occurred in a third state.¹⁷⁰

While the extra-territorial application of the right to food, right to property and rights of indigenous peoples remains controversial, the only commitments on the home state towards the weak host state's food security during the course of the investment are contained in non-legally binding, soft law instruments. For example, under paragraph 3.2 of the Voluntary Guidelines, the home state makes a commitment to monitor the behaviour of its investors and, in case of violation of the right to food and indigenous peoples' rights, bring proceedings against the investor.¹⁷¹ Under the Ruggie Guiding Principles, the home state is also responsible for clearly setting out how investors should behave by providing guidelines where relevant and encouraging a dialogue between itself and the investor.¹⁷²

In the case of the OECD Guidelines on MNCs, the investor's home state commits to setting up National Contact Points (NCPs) to monitor the activities of its MNCs.¹⁷³ This monitoring requirement encompasses advertising the existence of the Guidelines and promoting their objectives.¹⁷⁴ More importantly, it also requires the NCPs to share information about activities of MNCs located in other states.¹⁷⁵ The success of NCPs has been patchy however.¹⁷⁶ One possible reason is the NCPs are often affiliated to Economy Ministries that lack human rights knowledge and who are reluctant to engage in inter-agency participation or NGO/media consultations.¹⁷⁷ Whilst there is some indication that companies

169 n 74 above.

170 Ruggie Guiding Principles, n 9 above, Principle A.1.

171 *ibid.*

172 *ibid.*, Principle A:2 and Principle B(c) and (d).

173 Amendment of the Decision of the Council on OECD Guidelines for Multinational Corporations, n 100 above, 68, paras 1–4.

174 *ibid.*

175 *ibid.*, I:1.

176 OECD Watch, 'Quarterly Case Update' June 2013 including the cases before the various NCPs and also the outcomes at http://oecdwatch.org/publications-en/Publication_3963 (last visited 20 November 2013). On the varied strength of the NCPs, see 'Statement of Arvind Ganesan, Human Rights Watch, before the US Bureau of Economic, Energy and Business Affairs' 3 November 2010 comparing the limited effectiveness of the US NCP to other more effective NCPs including the UK, Belgium, The Netherlands and France at <http://www.hrw.org/news/2010/11/08/us-review-us-national-contact-point-oecd-guidelines-multinational-enterprises> (last visited 20 November 2013).

177 Notably the Swiss are moving towards an academic-governmental hybrid regulatory model with the appointment of Professor Christine Kaufmann, together with the Head of the State Secretariat

may be subject to moral pressure to operate ethically abroad, so far countries like the UK for example, have confined their extra-territorial control of investors to anti-bribery legislation and a series of soft law codes of conduct;¹⁷⁸ although there are plans to ensure that all UK and EU companies incorporate the Ruggie agenda into their investment agreements and do not operate so as to undermine the host state's ability to meet its international human rights commitments.¹⁷⁹

It seems that adherence to the recommendations of the NCP will occur only if it is in the interests of the MNC to comply. This may actually be the case, for example, where an agri-investor sees that its royalties or land lease payments never reach the villages around the farm from where it hires workers or buys water rights. However, there is little the NCP can do if the MNC decides not to comply in the long term, and it is probably satisfied if the MNC finds alternative ways to support the local communities directly.

Unless the extra-territorial application of economic, social and cultural rights gains greater traction, these non-binding commitments by the home state are unlikely to provide any further protection to the weak host state's food security.

CONCLUSION

Food security is an important policy objective for all states. According to the internationally agreed definition, this means states should ensure that '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.'¹⁸⁰ Climate change in many countries and regions is likely to depress agricultural production of important foodstuffs like cereals, and significant population growth places even greater pressure on existing resources. Food insecurity is thus very much a matter of production uncertainty and a relative and absolute increase of local and foreign demand for food, feed, fibre and fuels.

International organisations like the World Bank advocate carefully targeted investment in agricultural production in order to maximise yields and alleviate food supply problems. For many developing states, such investment takes the form of foreign direct investment (agri-FDI) where foreign corporations invest in assets like agricultural land, mostly for the purposes of export production. Whilst some agri-FDI can have positive effects for national food security, NGOs like the Oakland Institute are reporting problems, such as disparities in the

for Economic Affairs Marie-Gabrielle Ineichen-Fleisch, to the Swiss NCP to address these problems: *Neue Zürcher Zeitung* 2 May 2013.

178 For a general overview of the codes, see Joint Committee on Human Rights, *Any of Our Business? Human Rights and the UK Private Sector* 1st Report 2009–10 House of Lords Paper 5–1, HC 64–1 (2009). Also, see the UK Bribery Act 2010. The UK government also issues a 'Business and Human Rights Toolkit' but this is not agriculture specific: UK Government: *Business and Human Rights Toolkit: How UK Overseas Missions Can Promote Good Conduct by Companies Abroad* at <http://www.fc.gov.uk/en/global-issues/human-rights/international-framework/business/> (last visited 2 December 2013).

179 *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* Cmnd 8695 (September 2013) Section 2(vii). Note the UK's Action Plan makes it clear that it regards the existing avenues for complaints by corporations of human rights as adequate: *ibid*, Section 4.

180 World Food Summit, Plan of Action, n 5 above.

negotiations expertise between the host state and the investor which may lead to the offer of tax breaks and other incentives which encourage the investor to invest yet do not deliver important revenue to the host state allowing it to purchase food for the poor, displacement of local agricultural producers in favour of the investor with a net loss to national food security as well as the investor's failure to undertake infrastructure projects agreed in the investment contract.¹⁸¹ These problems can be especially acute for weak states that lack strong domestic governance structures to maximise the benefits of FDI.

Focussing on strengthening domestic governance of agri-FDI is important, but new structures will only work if the full extent of the problems facing weak states is taken into account. In this article we have argued that domestic governance in weak states is further exacerbated by a governance gap in the international and regional regulation of agri-FDI, a gap which has been largely overlooked in the current legal literature. Fully charting the nature of this gap is a larger project, but in this article we have concentrated on uncovering the governance gap in the context of the international and regional regulation of agri-FDI by looking at the responsibilities of the host state (the state where the investment occurs), the investor, and the home state (the state where the investor is incorporated), first towards the host state's national food security and second to each of the other parties in this triangular relationship before and after the investment is made in the host state.

We have found that realising food security is a commitment for all states: while states must first maintain their own national food security, they also may not introduce or maintain policies that undermine global food security or displace vulnerable food producers in weak states. Where a state conceives its national food security policy in terms of human rights law, it will be required to introduce and maintain food security policies that guarantee, *inter alia*, the right to food, and property rights of their citizens in accordance with international and regional human rights law.¹⁸² This means that the weak host state is under a legally binding duty to only encourage agri-FDI that does not violate its human rights commitments and a duty to monitor the investor's behaviour for any human rights violations once the investment is made.

We have also identified another side to this story. Once the investment is made, the weak host state is under a legally binding obligation to the investor in the investment contract (where it exists) and in the BIT or regional investment agreement (like Chapter 11 of NAFTA) not to violate the investor's rights. Over-generous tax breaks given to incentivise the investor's location decision that result in a net reduction in the host state's food security for example, cannot be changed once the investment has been made, as this violates the investor's rights. Likewise, successor governments in the host state may wish to reverse land deals made between the state and investor where land was 'grabbed' by the investor. Even though there may be a net reduction to the state's food security as a consequence of the investor's behaviour in such a case, reversing the land purchase

181 See discussion in the first section above.

182 In particular, Universal Declaration of Human Rights, Art 25 and International Covenant on Economic, Social and Cultural Rights (ICESCR), Art 11. See n 66 above.

or lease to give property back to local producers and/or indigenous peoples is a violation of the investor's rights.¹⁸³ At the very least, a government wishing to annul an investment contract for reasons of corruption would have to show that the contract was obtained through illegal means. Moreover, the investor's rights can be enforced through investment arbitration proceedings, and where appropriate, like, for example, where the weak host state's actions amount to expropriation of the investment, the state must also pay compensation to the investor.

There are no corresponding legally enforceable duties on the investor to undertake its activities in a way that positively impacts on the host state's food security and does not infringe the human rights to food and property of its citizens, unless such obligations are expressly included in the investment agreement between the host state and the investor (or in the BIT where such terms can be expressly negotiated).¹⁸⁴ The only curbs on the investor's behaviour are contained in non-legally binding, soft law instruments. These instruments fall into two categories: those instruments specifically tailored to combatting the problems associated with agri-FDI, like for example, the PRAI and the Voluntary Guidelines on Land Tenure; and other instruments aimed more generally at preventing human rights violations by the investor, like the Global Compact, the Ruggie Guiding Principles and the OECD Guidelines for MNCs.¹⁸⁵ These agri-FDI specific and non-specific principles aim at embedding ethical corporate behaviour towards the host state's food security within the investor's own corporate social responsibility strategy, with the consequence that every aspect of its operations should be informed by the need not to undermine the host state's food security policy and respect the human rights of its citizens.

However, instruments such as the Global Compact and the Ruggie Guiding Principles are not legally binding and some commentators have already suggested that their ability to provide any real curb on corporate behaviour is more rhetorical than real.¹⁸⁶ Ironically therefore, the weak host state bears legally binding obligations in human rights law and international investment law, whereas the investor only has a non-legally binding invitation to make the decision to invest and then operate its investment in ways that do not undermine the food security of the host state and the right to food of the host state's citizens at the investment site.

There is no further curb through legally binding international and regional regulation on the home state either. Food security has a domestic and a global dimension, so in one sense a home state should not condone, let alone encourage behaviour by corporations incorporated within its jurisdiction that undermines the national food security of a third state. However, food security is only a non-binding policy commitment at the international level, and so there is little the host state can do to induce the home state to curtail its corporations' behaviour in this way.

Likewise, international investment law has nothing to say about the home state's responsibility to police the behaviour of the investor. Rather the BIT and

183 See discussion in the second section above.

184 See, for example, the terms of the Public Interest Clause in the annex below.

185 PRAI, n 56 above; the Global Compact, n 97 above; the Ruggie Guiding Principles, n 9 above.

186 eg Soederberg, n 97 above.

regional agreements do create legally binding commitments between the host state and home state, but these are designed to ensure the host state creates an appropriate and stable regulatory environment for the investor, rather than a co-operative arrangement between two states whereby the home state will monitor the investor's behaviour if the host state is unable to do so. Such commitments by the home state towards the host state are contained in non-binding, soft law agri-FDI specific instruments like the PRAI and non-specific instruments including the Ruggie Guiding Principles and the OECD Guidelines on MNCs. Under the OECD Guidelines, the home state is only required to set up National Contact Points to monitor corporate abuses of human rights in third states, but their success has been inconsistent.¹⁸⁷

The picture that emerges from this interaction between all these instruments covering food security and agri-FDI in particular at international and regional level is complex. Legally binding duties are placed on the already weak host state to protect the human rights of its citizens and the rights of the investor, whereas the corresponding duties on the investor and home state are only contained in soft law and can, as such, be disregarded except perhaps for reputational damage containment. The consequence is a governance gap where regulation over-protects the investor and under-regulates the investment in such a way that the host state's food security can be adversely affected. It is rather ironic then that current international and regional regulation exacerbates the situation in weak states when they pursue such policies.

We argue that food security is a public good requiring or justifying greater government intervention in situations where market mechanisms are failing to ensure it. While commentators see in the new US Model BIT a move away from investor-bias, we have shown that case law is yet to fully embrace legally binding rules allowing the host state to require the investor to respect food security commitments, for instance in an investment contract. The same is true for indirect expropriation where investor protection remains largely disconnected from the investors' behaviour. In view of the specific situation of weak host states, their strong international commitments under BITs and other instruments, and comparing these commitments with the soft law principles applicable to home states and investors, we conclude our analysis in this article with a proposal for a public interest clause for food security which could be incorporated into the binding commitments of the host state and the investor, either in a BIT or regional treaty. A generally formulated draft is set out in the annex. It is inspired by Model BITs, for example in Canada, Norway and the United States, which all contain a type of 'general interest' exception. We consider too that access to (international) justice, without being a guarantee for 'good' investments, would contribute to a more transparent pre- and post-investment process.

A coordinated approach may further promote integration of international human rights in the context of an investment dispute.¹⁸⁸ Food security as a

187 eg OECD Watch: 'Quarterly Case Update' June 2013 n 176 above.

188 Vienna Convention on the Law of Treaties, Art 31(3)(c). For a general discussion on the integration of human rights into investment law, see M. G. Desta, 'GATT/WTO Law and international standards: an example of soft law instruments hardening up?' in A. K. Björklund (ed),

recurrent challenge for humanity would benefit from the insertion of such a clause in current and future trade and investment agreements.

**ANNEX: A PUBLIC INTEREST CLAUSE FOR FOOD SECURITY IN
AN INTERNATIONAL TREATY ON INVESTMENT**

Public Interest (Food Security)

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 live-stock 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.
2. In cases of disputes arising from investment contracts covered by this Agreement, complaints by duly interested stakeholders shall be heard along with the parties to the dispute and on the basis, where relevant, of an independent impact assessment addressing all relevant economic, environmental and social aspects as well as the interests of all participants in the investment project. Findings 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 national and international investors.
 - (3) Adequate and fair compensation would be provided to the investors of the other Contracting Party for all actions taken and all investments and payments actually made in full compliance with an investment agreement where it had been concluded by competent and duly authorised local or national authorities.

International Investment Law and Soft Law (Cheltenham: Edward Elgar, 2012) 148, 186; B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *International and Comparative Law Quarterly*, 573 and C. Kaufmann, 'International Law in Recession? The role of international law when crisis hits: food, finance and climate change' in U. Fastenrath, R. Geiger, D-E. Khan, A. Paulus, S. von Schorlemer, & C. Vedder (eds), *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma* (New York: OUP, 2011) 1190.