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### Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights- Consistent Outcomes

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# CORPORATE AGRICULTURAL INVESTMENT AND THE RIGHT TO FOOD: ADDRESSING DISPARATE PROTECTIONS AND PROMOTING RIGHTS-CONSISTENT OUTCOMES

*Kaitlin Y. Cordes and Anna Bulman\**

## ABSTRACT

*Over the past decade, the world has witnessed heightened corporate interest in large-scale land-based agricultural investment. While such investments can potentially have positive effects for local communities, they also can have wide-ranging negative impacts on human rights, including through forced displacement and the loss of livelihoods. This Article examines the impact of large-scale corporate agricultural investment on the right to food, as well as on human rights more generally. It considers the protections offered by the investment and human rights legal regimes to both corporations and individuals, including recent international developments relating to transnational corporate accountability and efforts to integrate human rights considerations into investment treaties and arbitration. The current legal regimes, however, offer imbalanced protections, and emphasize remedial solutions for human rights abuses rather than pre-emptive protection of rights. While improving redress mechanisms is important, governments must also place greater emphasis on ensuring the*

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*sustainability and rights-compatibility of investments from the outset. This Article thus explores measures that could be taken by both host and home states to prevent right-to-food abuses in the context of large-scale agricultural investment. Greater efforts by host and home states to regulate and monitor investors could improve the design and implementation of such investments. Better investments, in turn, could result in more rights-consistent outcomes that promote, rather than harm, the right to food.*

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## INTRODUCTION

Food insecurity is not the result of global food scarcity. There is enough food in the world to feed every person on this planet.<sup>1</sup> Instead, poverty is one of the main causes of chronic hunger and food insecurity.<sup>2</sup> One frequently suggested solution to combat both poverty and hunger is to increase private sector investment in agriculture.<sup>3</sup> Yet this approach, which relies on corporate agricultural investment serving as a catalyst for economic growth, often fails to directly address the layers of poverty that lead to hunger. This generalized approach is particularly deficient when the legal environment in which such investment operates is not designed to foster the realization of human rights or developmental outcomes.

Over the last decade, a variety of factors have led to a heightened private sector interest in agricultural investment, particularly large-scale land-based investment (LSLBI).<sup>4</sup> While it may be too soon to quantify the

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<sup>1</sup> *What Causes Hunger?*, WORLD FOOD PROGRAMME, <http://www.wfp.org/HUNGER/CAUSES> (last visited Apr. 5, 2016).

<sup>2</sup> See generally AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981); see also JEAN DRÈZE & AMARTYA SEN, *HUNGER AND PUBLIC ACTION* (1991).

<sup>3</sup> See, e.g., Laura German, George Schoneveld & Esther Mwangi, *Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa* (Ctr. for Int'l Forestry Res., Occasional Paper No. 68, 2011), [http://www.cifor.org/publications/pdf\\_files/OccPapers/OP-68.pdf](http://www.cifor.org/publications/pdf_files/OccPapers/OP-68.pdf) (explaining that governments and local (customary) entities are “often bolstered by an unwavering faith in the role of foreign private sector investment to drive national and local economic development and by new opportunities for extracting rents from the land alienation process.”).

<sup>4</sup> See, e.g., LORENZO COTULA, DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, *ADDRESSING THE HUMAN RIGHTS IMPACTS OF ‘LAND GRABBING’* 8 (Dec. 2014), [www.europarl.europa.eu/RegData/etudes/STUD/2014/534984/EXPO\\_STU%282014%29534984\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534984/EXPO_STU%282014%29534984_EN.pdf); see also KLAUS DEININGER ET AL., *THE INT’L BANK FOR RECONSTRUCTION & DEV. & WBG, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS?* (2011), <http://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf>.

economic impacts of this increased investment,<sup>5</sup> it is clear that in many cases such investments cause serious human rights violations rather than benefit the communities in which they operate. The human rights abuses resulting from LSLBI are facilitated by legal and institutional factors that permit the entrenchment of local poverty and hunger through problematic investments.

Two of the major stakeholder groups concerned with LSLBI are investors and the individuals in the communities where investment occurs. In this Article, we focus on these two groups, examine the primary legal regimes surrounding LSLBI, and explain why many of these investments are failing local communities. In particular, we look at the impact of LSLBI on the human right to food.

In Part I, we analyze the impacts that LSLBI can have on the right to food. In Part II, we assess the protections afforded by the investment and human rights regimes to both corporate investors and communities. Viewed together, these legal regimes, particularly at the international level, offer significantly imbalanced protections to corporations and individuals. The regimes also fail to incentivize equitably designed investments that benefit both investors and the communities in which they operate. Within Part II, we set out some of the recent international human rights and investment law developments that seek to address these weaknesses. The developments include efforts to more effectively address the impacts of transnational corporations on human rights, as well as efforts to more fully incorporate human rights considerations into the international investment law regime. While some of these developments show promise in improving human rights protections through increasing the accountability of corporate actors, we note that the international investment and the human rights legal regimes are still far from affording comparable protections. Finally, in Part III, we argue that greater efforts can be made by both host and home states to ensure the rights-compatibility of agricultural investments from the outset. In this context, we discuss host and home state human rights obligations and explore measures that should be taken by governments to prevent right-to-food and other human rights abuses in the context of LSLBI. More inclusive business approaches, combined with an increased emphasis on host and home state measures to regulate and monitor investors, could improve the design and implementation of agricultural investment, resulting in more rights-consistent outcomes that promote, rather than harm, the right to food.

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<sup>5</sup> COTULA, *supra* note 4, at 15.

## I. THE IMPACT OF LARGE-SCALE LAND-BASED INVESTMENT ON THE RIGHT TO FOOD

Agricultural investment has a variety of sources, including public investment, official development assistance, private investment (both on-farm investment and foreign direct investment), and public-private partnerships.<sup>6</sup> Private investment, in turn, is undertaken both by individuals and by corporate enterprises and may be driven by local or transnational actors.<sup>7</sup> In this Article, we focus on transnational corporate investment. In particular, we look at investment that is directed at the acquisition of large parcels of land for agricultural purposes—that is, large-scale land-based investment. LSLBI can have positive effects for local communities, such as providing employment opportunities and technology transfer. However, LSLBI can also create negative impacts on human rights, such as through forced displacement and the loss of livelihood. The right to property, the right to adequate housing, the right to water, labor rights, political rights, and the right to a remedy may all be negatively affected by LSLBI.<sup>8</sup> While the human rights impacts of LSLBI are wide-ranging, this Article focuses on the implications for the human right to food. In this Part, we provide background on both LSLBI and the international human right to food. We also explain the difficulties of measuring the impacts of LSLBI, before turning to consider both the positive and negative impacts of LSLBI, as well as how such investment may either contribute to or undermine the realization of the right to food.

### A. *Large-Scale Land-Based Investment and the Right to Food: The Basics*

#### 1. Large-Scale Land-Based Investment

LSLBI commonly involves the transfer of large tracts of land from governments to investors. There is no single accepted definition of what constitutes a “large-scale” agricultural investment. The Land Matrix, a land monitoring initiative that maps land deals around the world, defines a “land

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<sup>6</sup> Sarah K. Lowder, Brian Carisma & Jakob Skoet, *Who Invests in Agriculture and How Much?* 4-5 (FAO Agric. Dev. Econ. Division Working Paper No. 12-09, Dec. 2012), <http://www.fao.org/3/a-ap854e.pdf>.

<sup>7</sup> See, e.g., COTULA, *supra* note 4, at 11, 13 (“While much international attention has focused on transnational land deals, systematic national inventories of deals in selected countries point to an important role being played by local nationals. This primarily involves national elites – politicians, civil servants, entrepreneurs. But it can also involve parastatals.”) (citation omitted).

<sup>8</sup> *Id.* at 16-22.

deal” as a successful or failed attempt to acquire land that covers an area of 200 hectares or more.<sup>9</sup> The scale of such deals can vary dramatically, however, with many land investments covering more than 100,000 hectares each.<sup>10</sup> Under these deals, land use rights are transferred through either the sale or lease of land. Leases are often of long duration, with some in the range of 50 to 99 years. In many places, the transfer of land commonly occurs between the national government and the investor in situations where local communities possess weak, informal, or customary land tenure rights.<sup>11</sup>

Land investments have been undertaken by a diverse group of actors. These actors include private companies, institutional investors (e.g. pension funds, hedge funds, and private equity funds), state-owned enterprises, and sovereign wealth funds.<sup>12</sup> Many investments have been undertaken by, or in partnership with, national investors, including through public-private partnerships.<sup>13</sup> Although media attention has frequently focused on state-affiliated entities investing in other countries, private companies have driven

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<sup>9</sup> *What Is a Land Deal?*, LAND MATRIX, <http://www.landmatrix.org/en/about/#what-is-a-land-deal> (last visited Jan. 20, 2016).

<sup>10</sup> For a list of deals, see LAND MATRIX, <http://www.landmatrix.org/en/> (last visited Jan. 20, 2016).

<sup>11</sup> When land users possess only weak, informal, or customary land rights, and the government retains formal ownership of the land (such as in much of Africa), the government may feel free to transfer the land parcel to the investor. Even in situations in which land users have more defined and protected land rights, however, a government may use its power of eminent domain to make way for agricultural investment. LORENZO COTULA, FAO, LAND TENURE ISSUES IN AGRICULTURAL INVESTMENT: SOLAW BACKGROUND THEMATIC REPORT – TR05B 7-8,

[http://www.fao.org/fileadmin/templates/solaw/files/thematic\\_reports/TR\\_05B\\_web.pdf](http://www.fao.org/fileadmin/templates/solaw/files/thematic_reports/TR_05B_web.pdf) (last visited Jan. 20, 2016). For an overview of the participants and process in land deals in Africa, see LORENZO COTULA, SONJA VERMEULEN, REBECA LEONARD & JAMES KEELEY, FAO, INT’L INST. FOR ENVTL AND DEV. (IIED) & IFAD, LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 65-8 (2009), <http://www.fao.org/3/a-ak241e.pdf>.

<sup>12</sup> See Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STAN. J. INT’L L. 101, 110-112 (2013); Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 503, 516-17 (2011); WARD ANSEEUW ET AL., INT’L LAND COALITION, LAND RIGHTS AND THE RUSH FOR LAND: FINDINGS OF THE GLOBAL COMMERCIAL PRESSURES ON LAND RESEARCH PROJECT (2012), [http://www.landcoalition.org/sites/default/files/documents/resources/ILC%20GSR%20report\\_ENG.pdf](http://www.landcoalition.org/sites/default/files/documents/resources/ILC%20GSR%20report_ENG.pdf).

<sup>13</sup> See *Moral Hazard? ‘Mega’ Public–Private Partnerships in African Agriculture* (Oxfam, Oxfam Briefing Paper No. 188, Sept. 1, 2014), <http://www.oxfam.de/sites/www.oxfam.de/files/bp188-public-private-partnerships-agriculture-africa-010914-en.pdf>.

much of the recent investment.<sup>14</sup> Still, it is difficult to measure how much total foreign direct investment (FDI) in land acquisitions is occurring. Aside from the opacity of many deals, which renders accurate measurements difficult, FDI estimates do not count investments undertaken by institutional investors.<sup>15</sup>

Investors choose to acquire land for a number of reasons. A 2012 study by the International Land Coalition found that the increased interest in LSLBI arose from a combination of population growth, increased consumption, and more immediate factors such as “market demand for food, biofuels, raw materials and carbon sequestration.”<sup>16</sup> Investments may be made to produce food for export, to produce biofuels or cash crops, to obtain carbon emissions credits for clean development mechanism projects, or even for speculative purposes.<sup>17</sup> Within these objectives, an important distinction lies between land that is acquired but not used productively (i.e., mere acquisitions) and acquired land that is used productively.<sup>18</sup> In this Article, we focus on LSLBI that involves productive investment. For production purposes, the underlying value of the land often derives from the water resources that make the land arable.<sup>19</sup> In fact, it is often prime land—irrigable and well situated—that is acquired through LSLBI.<sup>20</sup>

The latest wave of LSLBI is occurring across the globe, although the largest recipients of investments appear to be countries in Africa and Asia.<sup>21</sup> The Land Matrix lists the top 10 target countries where investments are made as Papua New Guinea, Indonesia, South Sudan, the Democratic Republic of Congo, Mozambique, Congo, the Russian Federation, Ukraine, Liberia, and Sudan.<sup>22</sup> Many of these target countries are home to weak or

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<sup>14</sup> For example, Western companies have been significant players in recent investment in biofuels in Africa. COTULA, *supra* note 4, at 13.

<sup>15</sup> Pascal Liu, Trade & Markets Division of FAO, *Part One: Introduction, in* TRENDS AND IMPACTS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRY AGRICULTURE: EVIDENCE FROM CASE STUDIES 4 (Pedros Arias et al. eds., 2012), [http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/Trends\\_publication\\_12\\_November\\_2012.pdf](http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/Trends_publication_12_November_2012.pdf).

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*; Narula, *supra* note 12, at 107.

<sup>18</sup> ANSEEUEW ET AL., *supra* note 122, at 21.

<sup>19</sup> See Howard Mann, *Foreign Investment in Agriculture: Some Critical Contract Issues*, 17 UNIFORM L. REV. 129, 129-30 (2012).

<sup>20</sup> ANSEEUEW ET AL., *supra* note 122, at 4.

<sup>21</sup> *Id.* For current Land Matrix statistics by target region, see *By Target Region*, LAND MATRIX, <http://www.landmatrix.org/en/get-the-detail/by-target-region/> (last visited Jan. 20, 2016).

<sup>22</sup> *Web of Transnational Deals*, LAND MATRIX, <http://www.landmatrix.org/en/get-the->



transitioning land tenure systems.<sup>23</sup> The Land Matrix further reveals some interesting regional trends. For example, of the 83 deals listed for the United States, the largest outward investor country, roughly 53 percent are in Africa, 29 percent are in South America, 12 percent are in Asia, and only 6 percent are in the European continent.<sup>24</sup> Meanwhile, the vast majority of land deals originating from Malaysia, which is the second largest investor country, occur in Indonesia and Cambodia.<sup>25</sup> LSLBI occurs on both a global and an intra-regional basis.<sup>26</sup> More broadly, the trend might be understood as one of entities from stronger industrialized countries acquiring land, whether through private or state-owned entities, in less developed countries. Although there are difficulties in quantifying the extent of global LSLBI, the data that is known and the documented effects of LSLBI reveal that this investment has local, regional, and global implications.

Such implications are shaped in part by the form of the investment. Indeed, the impact on local communities may vary considerably depending on how the investment is designed and structured. For example, a standard production-based scheme commonly entails large-scale monocropped plantations. In such a scheme, the investor either owns the land or possesses sole land use rights and rarely produces diversified food crops for local consumption. While local community members may benefit from such schemes, they also confront significant risks, particularly with respect to potential displacement. Yet there exist other types of investment that do not involve the transfer of land use rights to the investor, instead permitting smallholder farmers to continue working their land. These more “inclusive” agricultural investments include outgrower schemes and contract farming arrangements.<sup>27</sup> At their most basic, these investments involve agreements between a company and smallholder farmers, under which the farmers

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idea/web-transnational-deals/ (last visited Jan. 20, 2016).

<sup>23</sup> See, e.g., De Schutter, *supra* note 12, at 504; DEININGER ET AL., *supra* note 4, at 55.

<sup>24</sup> *United States of America*, LAND MATRIX, [http://www.landmatrix.org/en/get-the-detail/by-investor-country/united-states-of-america/?order\\_by=target\\_country&more=70](http://www.landmatrix.org/en/get-the-detail/by-investor-country/united-states-of-america/?order_by=target_country&more=70) (last visited Jan. 20, 2016).

<sup>25</sup> *Malaysia*, LAND MATRIX, <http://www.landmatrix.org/en/get-the-detail/by-investor-country/malaysia/> (last visited Jan. 20, 2016).

<sup>26</sup> See, e.g., ANSEEUW ET AL., *supra* note 12, at 4 (“Foreign direct investment (FDI) is also largely intra-regional.”).

<sup>27</sup> For a broader overview of the range of inclusive business models available, see SONJA VERMEULEN & LORENZO COTULA, FAO & INT’L INST. FOR ENVTL AND DEV. (IIED), MAKING THE MOST OF AGRICULTURAL INVESTMENT: A SURVEY OF BUSINESS MODELS THAT PROVIDE OPPORTUNITIES FOR SMALLHOLDERS 3-4 (2010), [http://www.ifad.org/pub/land/agri\\_investment.pdf](http://www.ifad.org/pub/land/agri_investment.pdf).

supply agricultural products to the company, usually at a specified quantity and quality, and the company guarantees to purchase those products, often at a specific price. Agreements may also include other benefits for farmers, such as increased access to inputs or credit. Such inclusive business approaches support livelihoods through the guaranteed purchase of farmers' crops, and, by not requiring the transfer of land use rights, can minimize concerns tied to the potential displacement of land users.<sup>28</sup>

Some corporate agricultural investments incorporate more inclusive business approaches into standard LSLBI. Under this model, an investor not only may receive land use rights over a large parcel of land, but may also develop a supplemental scheme that involves outgrower farmers. For example, a number of oil palm contracts between the government of Liberia and investors both provide large concessions of leased land and incentivize the development of outgrower schemes.<sup>29</sup> Understanding the various forms that LSLBI can take is particularly important when considering the positive and negative impacts that LSLBI, whether in its standard or "improved" form, can have.

## 2. The Right to Food

The right to be free from hunger is the only human right specifically identified as a "fundamental right" in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>30</sup> Yet codification of the right to food, and the special urgency assigned to the right to be free from hunger, has not been fully realized. Indeed, in the mid-1980s, Philip Alston, the current UN Special Rapporteur on extreme poverty and human rights, wrote, "[T]he right to food has been endorsed more often and with greater unanimity and urgency than most other human rights, while at the same time being violated more comprehensively and systematically than probably any other right."<sup>31</sup> Measuring global progress 30 years later, the statement still carries great weight, with an estimated 795 million chronically undernourished people in the world today.<sup>32</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> For access to Liberian agricultural contracts, see *Agriculture*, SCRIBD., <https://www.scribd.com/collections/4297678/Agriculture> (last visited Jan. 20, 2016).

<sup>30</sup> G.A. Res. 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, art. 11, ¶ 2 (Dec. 16, 1966) [hereinafter ICESCR].

<sup>31</sup> Philip Alston, *International Law and the Human Right to Food* in *THE RIGHT TO FOOD* 9 (Philip Alston & Katarina Tomaševski eds., 1984).

<sup>32</sup> FAO, IFAD & WORLD FOOD PROGRAMME, *THE STATE OF FOOD INSECURITY IN THE WORLD – MEETING THE 2015 INTERNATIONAL HUNGER TARGETS: TAKING STOCK OF UNEVEN*

The right to food is espoused in a number of international covenants, declarations, and comments.<sup>33</sup> Article 25 of the Universal Declaration of Human Rights (UDHR) first articulated the right to food as the right of everyone to “a standard of living adequate for the health and well-being of himself and of his family, including food.” The right to food was subsequently enshrined in the ICESCR, a legally binding multilateral treaty.<sup>34</sup> Article 11 of the ICESCR recognizes the right of everyone to an adequate standard of living, including adequate food. It requires State Parties to take “appropriate steps” to realize this right. Article 11 further recognizes the “fundamental right of everyone to be free from hunger,” requiring State Parties to take measures to “improve methods of production, conservation and distribution of food” and “to ensure an equitable distribution of world food supplies in relation to need.”<sup>35</sup>

The Committee on Economic, Social and Cultural Rights explains in its General Comment No. 12 that the right to food is realized “when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”<sup>36</sup> The Committee describes the core content of the right as the sufficient availability of culturally acceptable food, with sustainable and rights-consistent access.<sup>37</sup> As the Committee suggests, this accessibility includes both physical and economic access.<sup>38</sup>

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PROGRESS 8 (2015), <http://www.fao.org/3/a-i4646e.pdf>. This figure may, however, be even higher, depending on how the hungry are counted. See Frances Moore Lappé et al., *How We Count Hunger Matters*, 27 ETHICS & INT'L AFF. 251 (2013).

<sup>33</sup> For a discussion of the normative evolution of the right to food, see Smita Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 YALE HUM. RTS. & DEV. L.J. 403 (2010).

<sup>34</sup> ICESCR, *supra* note 30, at art. 11, ¶ 2(a).

<sup>35</sup> *Id.* art. 11, ¶ 2(b).

<sup>36</sup> U.N. Econ. & Soc. Council, Committee on Econ. Soc. & Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11), ¶ 6, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter General Comment No. 12].

<sup>37</sup> *Id.* ¶¶ 7-8.

<sup>38</sup> *Id.* ¶ 13. See also Olivier De Schutter (Special Rapporteur on the Right to Food), *Final Report: The Transformative Potential of the Right to Food*, ¶ 2, U.N. Doc. A/HRC/25/57 at 3 (Jan. 24, 2014),

[http://www.srfood.org/images/stories/pdf/officialreports/20140310\\_finalreport\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20140310_finalreport_en.pdf). For other discussions on the right to food, see Narula, *supra* note 33; Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691 (2006); Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT'L L. 131 (2006); Lily Endean Nierenberg, Note, *Reconciling the Right to Food and Trade Liberalization: Developing Country*

Aside from the ICESCR, the right to food has been codified in other legally binding instruments. At the international level, for example, the right to food is protected in the Convention on the Rights of the Child and in the Convention on the Rights of Persons with Disabilities. The closely related right to adequate nutrition is protected in the Convention on the Elimination of All Forms of Discrimination against Women.<sup>39</sup> The right to food is also recognized in regional agreements.<sup>40</sup> In addition, aspects of the right to food are protected through other codified human rights. For example, article 6(1) of the International Covenant on Civil and Political Rights recognizes the right to life.<sup>41</sup> This has been interpreted by the Human Rights Council as involving a state obligation to adopt affirmative measures to eliminate malnutrition.<sup>42</sup>

Human rights obligations impose tripartite duties on states to respect, protect, and fulfill human rights. In the case of the right to food, the Committee on Economic, Social and Cultural Rights explains that under the obligation to respect the right to food, states should not take any measures that prevent access to adequate food.<sup>43</sup> Under the obligation to protect the right to food, states must ensure that third parties do not deprive individuals of access to adequate food. This obligation means that states must protect persons from right-to-food abuses that might arise from corporate LSLBI.

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*Opportunities*, 20 MINN. J. INT'L L. 619 (2011).

<sup>39</sup> Convention on the Rights of the Child, art. 24, ¶ 2(c), (e), Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Feb. 9, 1990); Convention on the Rights of Persons with Disabilities, art. 27, ¶ 3, 25(f), 28, ¶ 1, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008); Convention on the Elimination of All Forms of Discrimination against Women, art. 12, ¶ 2, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). *See also The Right to Adequate Food: Fact Sheet No. 34*, 7-8, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (Apr. 2010), <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>.

<sup>40</sup> *See, e.g.*, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 12, Nov. 17, 1988, O.A.S.T.S. No. A-52; African Charter on the Rights and Welfare of the Child, Art. 14, ¶ 2(c), (d), (h), July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1990); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14 ¶ 2(b), 15, July 11, 2003, [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf). *See also The Right to Adequate Food*, *supra* note 39, at 7-8.

<sup>41</sup> G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights, (Dec. 16, 1966), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR].

<sup>42</sup> Hum. Rts. Comm., General Comment No. 6: Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

<sup>43</sup> General Comment No. 12, *supra* note 36, ¶ 15. *See also* Narula, *supra* note 38, at 707-08.

Finally, under the obligation to fulfill the right to food, states must, *inter alia*, work to strengthen individuals' access to food, which can include their utilization of resources and the means to ensure their livelihood. Importantly, as currently conceptualized in international human rights law, human rights obligations are owed by states to individuals.<sup>44</sup> As such, although private companies have responsibilities to respect the right to food, governments are central to ensuring the realization of the individuals' right to food.<sup>45</sup>

As Olivier De Schutter, the former UN Special Rapporteur on the right to food, explains, individuals can secure access to food through three channels: "(a) by earning incomes from employment or self-employment; (b) through social transfers; or (c) by producing their own food, for those who have access to land and other productive resources."<sup>46</sup> These three channels provide a useful framework for analyzing the positive and negative impacts of LSLBI on the right to food. The remainder of Part I examines such impacts.

#### *B. Measuring the Impacts of Large-Scale Land-Based Investment*

Accurately measuring the impacts of LSLBI is difficult. Aside from the question regarding which framework to use when assessing the investments, difficulties range from the limited amount of available information to the reliability of researchers' conclusions on impact. In addition, assessing the right-to-food implications of LSLBI adds another level of complexity, as investments can generate mixed right-to-food outcomes. We now address the primary difficulties of measuring impacts and, in doing so, explain the perspective we adopt in assessing LSLBI.

As Smita Narula has argued, there are two main frameworks that can be used when assessing the impacts of LSLBI: the market-plus approach and the rights-based approach.<sup>47</sup> Broadly speaking, the market-plus approach "balances the harms arising from land deals against the benefits of generating greater agricultural investment."<sup>48</sup> The rights-based approach is

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<sup>44</sup> For a summary of corporate human rights responsibilities, see *EQUITABLE CAMBODIA & INCLUSIVE DEV. INT'L, BITTERSWEET HARVEST: A HUMAN RIGHTS IMPACT ASSESSMENT OF THE EUROPEAN UNION'S EVERYTHING BUT ARMS INITIATIVE IN CAMBODIA* 45 (2013), [http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet\\_Harvest\\_web-version.pdf](http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet_Harvest_web-version.pdf).

<sup>45</sup> See Narula, *supra* note 33, at 406-07.

<sup>46</sup> De Schutter, *supra* note 38, ¶ 2.

<sup>47</sup> For a comprehensive discussion of each approach, see Narula, *supra* note 12.

<sup>48</sup> *Id.* at 107.

based upon international human rights obligations and focuses on states' legal obligations to prevent negative human rights impacts that might otherwise be balanced away as "risks" under the market-plus approach.<sup>49</sup> In this Article, to fully address the right-to-food implications of LSLBI, we adopt the rights-based framework in assessing corporate LSLBI impacts, the relevant governmental obligations, and the surrounding legal frameworks.

Features specific to the recent wave of LSLBI render it difficult to evaluate the full impacts of this type of investment. As Lorenzo Cotula observes, "assessing the socio-economic outcomes of large land deals is riddled with difficulties."<sup>50</sup> To start, both data availability and data access pose particular challenges for measuring the socio-economic impacts of LSLBI. Government capacity to record land deals and to effectively manage related data varies, with low levels of capacity affecting data availability.<sup>51</sup> Even if data is kept, it may not be publicly available, thus posing issues of accessibility.<sup>52</sup> Moreover, it is simply too early in the life of many of these investments to draw definitive conclusions about socio-economic outcomes.<sup>53</sup> Investments take time to become fully operational, and the full impacts of investments may take a while to unfold.<sup>54</sup> This creates particular difficulties in assessing impacts for those taking a market-plus approach. For example, Cotula emphasizes that looking at short-term effects may skew impressions, given that "negative impacts – loss of land, for instance – are often felt first, while jobs, opportunities for local businesses and government revenues may only fully materialise at a later stage."<sup>55</sup> Although a rights-based perspective does not engage in such a balancing calculation, it too is stymied by the lack of clarity resulting from the evolving nature of such investments and their impacts. This flux, combined with obstacles to data accessibility and availability, presents undeniable difficulties for drawing robust conclusions regarding investment impacts.

Other limitations relate to the methodology used by researchers studying LSLBI. In a 2013 scoping review of the epistemological and methodological literature on the impacts of land grabs in Africa, Carlos Oya

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<sup>49</sup> *Id.* at 135-36.

<sup>50</sup> Lorenzo Cotula et al., *Testing Claims About Large Land Deals in Africa: Findings from a Multi-Country Study*, 50 J. DEV. STUD. 903, 919 (July 2014); see also COTULA, *supra* note 4, at 15.

<sup>51</sup> Cotula et al., *supra* note 500, at 904-05.

<sup>52</sup> *Id.*

<sup>53</sup> COTULA, *supra* note 4, at 15.

<sup>54</sup> *Id.*

<sup>55</sup> Cotula et al., *supra* note 50, at 919.

revealed that “there are still major thematic and analytical gaps and methodological problems with what is being published, particularly with regard to evidence on socio-economic impacts, a central issue in debates on ‘land grabs.’”<sup>56</sup> A primary problem, according to Oya, was the universal lack of a rigorous baseline that allowed before-and-after comparisons.<sup>57</sup> He argues that this problem has led to “very limited and often biased evidence on impacts.”<sup>58</sup> Further, the available literature often fails to disaggregate information on the standard form of LSLBI—that is, land acquisition and a plantation—from information on more inclusive business models. This complicates efforts to measure investment impacts. Whether using the market-plus approach or the rights-based approach, these methodological limitations can affect conclusions regarding the impacts of LSLBI.

Measuring the true positive and negative right-to-food impacts of LSLBI presents its own set of challenges. There are two specific tensions that arise. First, LSLBI, depending on the type of investment and the markets for which the products are destined, may increase food availability in one place and decrease it in another. To the extent that this correlates with increased or decreased access, an investment could have implications for food security and the realization of the right to food. That is, an investment could have positive implications where food availability and access is increased and negative impacts where it is decreased. Second, LSLBI may have positive impacts for some individuals but negative impacts for others in the same community. For example, some individuals may benefit from the investment by being hired as employees, while smallholder farmers may be harmed by the same investment if they are displaced from their land. These disparate impacts have their own set of mixed implications for food security and the realization of the right to food. Measured on the regional level or community level, the net effect of the investment, as measured in individuals whose food security has been affected, may end up being neutral, or even slightly positive in favor of increased food security, even though some individuals’ right to food may have been seriously impeded by the investment. A rights-based assessment, however, is not satisfied with a net positive impact, even when measuring the number of individuals whose right to food was positively affected as compared with those whose right to food was negatively affected. The right to food is a

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<sup>56</sup> Carlos Oya, *The Land Rush and Classic Agrarian Questions of Capital and Labour: A Systematic Scoping Review of the Socioeconomic Impact of Land Grabs in Africa*, 34 *THIRD WORLD Q.* 1532, 1533 (Oct. 2013).

<sup>57</sup> *Id.* at 1541.

<sup>58</sup> *Id.* at 1553.

right guaranteed to all human beings. Thus, a rights-based approach to assessing LSLBI impacts focuses on the right-to-food impacts at the individual level. Investments that have increased food security for some individuals but interfered with the ability of others to access food may point to governmental failures to protect or respect the right to food.

*C. Positive Impacts of Large-Scale Land-Based Investment on the Right to Food*

If managed appropriately, LSLBI can have positive impacts on the right to food. Beneficial effects may be more likely when investments are structured in certain ways—for example, by including an outgrower scheme. This potential for benefit is emphasized by the findings of one recent study undertaken by the World Bank and United Nations Conference on Trade and Development (UNCTAD), which examined 39 large-scale, mature agribusiness investments in sub-Saharan Africa and Southeast Asia and their approaches to social, economic, and environmental responsibility.<sup>59</sup> The study covered investments that involved land acquisition as well as those with no land acquisition<sup>60</sup> and concluded that, in general, “private sector investments, including those that involve land acquisition, can generate positive outcomes if conducted in a socially and environmentally responsible manner.”<sup>61</sup>

The study did not distinguish between types of investments involving land acquisition, complicating efforts to draw conclusions about the impacts of LSLBI with outgrower schemes versus those without. Nevertheless, the study found that the top five positive impacts mentioned by stakeholders<sup>62</sup> regarding investments that involved land acquisition (both pure estates and estates with outgrower schemes) were employment, infrastructure, access to markets, food security, and education.<sup>63</sup> In addition to these benefits, stakeholders mentioned technology transfer, working conditions, outgrower

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<sup>59</sup> HAFIZ MIRZA, WILLIAM SPELLER & GRAHAME DIXIE, WORLD BANK & UNCTAD, THE PRACTICE OF RESPONSIBLE INVESTMENT PRINCIPLES IN LARGER-SCALE AGRICULTURAL INVESTMENTS: IMPLICATIONS FOR CORPORATE PERFORMANCE AND IMPACT ON LOCAL COMMUNITIES (Apr. 2014), [http://unctad.org/en/PublicationsLibrary/wb\\_unctad\\_2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wb_unctad_2014_en.pdf).

<sup>60</sup> The study examined the following types of investments: 17 estates, 14 estates combined with outgrower schemes, 7 processing factories, and 7 trading companies. *Id.* at 3-4.

<sup>61</sup> *Id.* at xix.

<sup>62</sup> Over 550 stakeholders’ views were considered. Those stakeholders included the following: resident near investment, employee, outgrower/contract farmer, government official, cooperative, community leader, previous land user, migrant, supplier/customer, NGO, and resettled person. *Id.* at xiii, 5.

<sup>63</sup> *Id.* at xiv.



schemes, access to water, and access to finance. The study also found that outgrower schemes had particular advantages over pure estates, due largely to the fact that such schemes allowed farmers to retain control over their land and generated higher numbers of jobs.<sup>64</sup> However, the study found that in many cases outgrower schemes were only accessible to farmers who were relatively well-off, as the schemes often require a minimum acreage to participate as well as access to transportation.<sup>65</sup> In short, while LSLBI has the potential to generate socio-economic benefits for communities and host countries, the specific nature and extent of the benefits depend, at least in part, on the investment approach used. Further, even more inclusive approaches may not benefit all smallholder farmers.

The positive impacts that LSLBI in its various forms can generate may, in turn, have positive impacts on the realization of the right to food. Recalling the three channels of food accessibility described by Olivier De Schutter,<sup>66</sup> individuals can secure access to food, first, through employment, second, through social transfers, or third, by producing their own food. The positive economic effects described by stakeholders in the above study—employment generation, market access, and access to finance—may improve a person's purchasing power and ability to meet his or her daily food needs. To the extent that an investor creates employment opportunities for local community members, either through direct employment or by creating demand for ancillary inputs or services, an investment can help individuals realize their right to food through the first channel. Outgrower schemes attached to LSLBI may also create market access or provide access to finance, both of which can help smallholder farmers increase their household income and ability to secure access to food. In addition, non-outgrower farmers might also benefit from investments by taking advantage of new road infrastructure that help them get their own products to markets, assuming that they retain access to arable land.

In some cases, LSLBI generates improved water infrastructure that other parties can access.<sup>67</sup> Smallholder farmers who gain greater access to

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<sup>64</sup> MIRZA, SPELLER & DIXIE, *supra* note 59, at 26-7.

<sup>65</sup> *Id.* at 27.

<sup>66</sup> *See* Part I.A.2.

<sup>67</sup> *See, e.g.,* Hafiz Mirza & William Speller, *The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments*, INT'L INST. FOR SUSTAINABLE DEV. (May 14, 2014), <http://www.iisd.org/itn/2014/05/14/the-practice-of-responsible-investment-principles-in-larger-scale-agricultural-investments/> (discussing local water provision schemes associated with financially-inclusive business models). Access to water is, however, a contested point. For example, access to water was listed as both a positive and a negative impact for all investments and investments involving land acquisitions in the World Bank

water through such infrastructure may improve their ability to produce their own food. This, in turn, can increase food access through the third channel of self-production. Of course, this potential right-to-food benefit assumes that people are not displaced from their productive resources in the first place. Outgrowers may also receive third-channel support from investments in situations in which they are allowed to keep a percentage of food crops for their own use. This is fairly rare in practice, especially because most outgrower schemes entail the production of just one crop—which often is for purposes other than food—such as jatropha or oil palm. Finally, in cases where the investment is producing food for local markets, there is the potential for more general positive food security benefits for net-food purchasers, including both urban consumers and other smallholder farmers. Still, this is a complicated proposition that is difficult to measure. In general, in situations in which LSLBI does generate the positive benefits discussed above, these benefits can support the realization of the right to food.

The above discussion demonstrates that while LSLBI has the potential to bring significant positive developments to local communities and improve the realization of the right to food, these benefits are contingent upon a number of factors. The type of business model, the extent of employment opportunities generated, and the accessibility of project-related developments, such as water or road infrastructure, shape an investment's impact on the right to food. Moreover, what an investment does not do is equally important, as LSLBI that interrupts individuals' access to resources will detrimentally affect their right to food. On this note, we turn to consider some of the negative impacts that have been attributed to LSLBI, including how these impacts can violate the right to food.

#### *D. Negative Impacts of Large-Scale Land-Based Investment on the Right to Food*

While long-term developmental impacts of LSLBI may be hard to measure, shorter-term negative impacts are easier to assess and have been documented in a number of reports. One of the most pressing issues associated with LSLBI is its impact on access to land and productive resources. In many of the low- and middle-income countries in which LSLBI occurs, land is often held by local people on an informal basis. In some countries, the government may lease land that it technically owns, regardless of whether existing land users can claim legitimate tenure rights

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report. It was only listed as a negative in interviews on investments not involving land acquisition. See MIRZA, SPELLER & DIXIE, *supra* note 59.

over the land.<sup>68</sup> Land issues may also arise in the context of LSLBI when investors or governments do not fully understand the land's productive use. Whereas an investor lacking knowledge of the local context may believe some land is unoccupied, this land may in fact be relied on, such as in a fallow season or for intermittent livestock grazing. In addition to a lack of formal recognition of existing land rights, which places land users in a precarious position, other legal and institutional factors can also negatively affect the ability of land users to protect their rights. For example, in many places, the conditions and process for land acquisition are unclear, resettlement processes—including consultation and compensation—are inadequate, and communities are neither involved in decision-making processes over land acquisitions nor afforded sufficient grievance mechanisms once they occur.<sup>69</sup>

In the context of insecure land rights and an institutional framework that does not support land users, a significant negative impact that commonly results from LSLBI is the taking of smallholder farmers' land, as well as common lands, with inadequate or no compensation.<sup>70</sup> The results can be quite devastating for individuals and communities. If land is acquired without proper compensation for former land users, the acquisition can lead to their loss of livelihood opportunities. This, in turn, can cause increased food insecurity.<sup>71</sup> In addition, as large land deals are often more prevalent in specific regions, they can lead to increased competition for land<sup>72</sup> and even conflict over access to land.

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<sup>68</sup> There is a distinction between documented tenure rights and legitimate tenure rights. See, e.g., FAO, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY, § 3.1, ¶ 1 (2012), <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> [hereinafter VOLUNTARY GUIDELINES] (urging states to “take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not.”).

<sup>69</sup> See Mirza & Speller, *supra* note 67.

<sup>70</sup> See, e.g., Daniel Fitzpatrick, *The Legal Design of Land Grabs: Possession and the State in Post-Conflict Cambodia*, in LAND GRABS IN ASIA WHAT ROLE FOR THE LAW? (Connie Carter & Andrew Harding eds., 2015).

<sup>71</sup> See Mirza & Speller, *supra* note 67; *Private Investment in Agriculture: Why It's Essential and What's Needed*, OXFAM, <http://www.oxfam.org/en/research/private-investment-agriculture-why-its-essential-and-whats-needed> (last visited Jan. 20, 2016); TECH. COMM. ON LAND TENURE & DEV., LARGE-SCALE LAND ACQUISITION AND RESPONSIBLE AGRICULTURAL INVESTMENT: FOR AN APPROACH RESPECTING HUMAN RIGHTS, FOOD SECURITY AND SUSTAINABLE DEVELOPMENT 3-4 (June 2010), <http://www.agter.asso.fr/IMG/pdf/french-position-paper.pdf>; Jared Wigginton, *Large-Scale Land Investment in Africa: An Issue of Self-Help and Self-Determination*, 20 U.C. DAVIS J. INT'L L. & POL'Y 105, 112-14 (2013).

<sup>72</sup> See, e.g., COTULA, *supra* note 4, at 8, 10.

Even when LSLBI does not directly displace land users, investments can still negatively affect livelihoods through their impact on the environment. The environmental impact assessments undertaken for LSLBI are often inadequate, especially with regard to water.<sup>73</sup> This can lead to the implementation of projects that negatively affect nearby communities. These impacts can extend downstream, resulting in individuals' loss of access to water either because it has been diverted or because it has been polluted by run-off from the chemical inputs used in farming.<sup>74</sup> In addition, LSLBI may cause environmental destruction through deforestation, the overexploitation of water resources, and soil degradation from monocropping.<sup>75</sup> Such environmental damage can affect individuals' livelihood strategies.

The livelihood impacts for local communities, including from reduced land access, can be significant. One recent study attempted to estimate the effects of LSLBI<sup>76</sup> on local communities' incomes in the 28 countries most targeted by such investments.<sup>77</sup> This study found that land investment can potentially negatively affect the incomes of approximately 12 million people globally.<sup>78</sup> While this type of measurement may be inherently difficult to make for the reasons discussed above, it does show the potential magnitude of the livelihood impacts of displacement caused by LSLBI.

While the benefits of LSLBI are commonly touted in economic gains for the local economy, LSLBI is often not the optimal approach to reduce poverty. As De Schutter has observed, the acceptance of such investment

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<sup>73</sup> Mirza & Speller, *supra* note 67.

<sup>74</sup> See, e.g., MICHAEL RICHARDS, RIGHTS & RESOURCES INITIATIVE, SOCIAL AND ENVIRONMENTAL IMPACTS OF AGRICULTURAL LARGE-SCALE LAND ACQUISITIONS IN AFRICA—WITH A FOCUS ON WEST AND CENTRAL AFRICA 24-27 (Mar. 2013), [http://www.rightsandresources.org/documents/files/doc\\_5797.pdf](http://www.rightsandresources.org/documents/files/doc_5797.pdf).

<sup>75</sup> See *id.* at 7, 24-27.

<sup>76</sup> Termed “land grabbing” in this Article.

<sup>77</sup> See Kyle F. Davis, Paolo D’Odorico, & Maria Cristina Rulli, *Land Grabbing: A Preliminary Quantification of Economic Impacts on Rural Livelihoods*, 36 *POPUL. ENVIRON.* 180 (2014), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4223572/>.

<sup>78</sup> The authors of the study concluded that:

Our conservative estimate of over 12 million people losing their incomes is more than one-third of the number of internally displaced people due to conflict (29 million people) (IDMC 2013a) and one quarter of the number of migrations induced by natural hazards in 2012 (32 millions) (IDMC 2013b). This relatively large number of people may contribute to issues of food insecurity and poverty in rural areas while challenging the sustainability of urban growth as affected people seek to diversify household income (UN DESA 2011).

*Id.* at 190.

“implies huge opportunity costs, as it will result in a type of farming that will have much less powerful poverty-reducing impacts, than if access to land and water were improved for the local farming communities.”<sup>79</sup> A country working to reduce poverty through its agricultural sector may be more successful if it does not rely on LSLBI. For example, a 2012 United Nations Development Program working paper examining recent large-scale land acquisitions in Mozambique concluded that “the country’s demographic and sociopolitical characteristics suggest that a labor intensive rural development strategy may be more suitable than the attraction of large-scale investments in farmland.”<sup>80</sup>

As discussed in Part I.C above, more inclusive business approaches may result in greater community benefits. For instance, by integrating outgrower schemes into LSLBI, investments can better support farmers’ livelihood opportunities and help improve their household food security. Although these approaches have the potential to be more beneficial than LSLBI that have not incorporated a more inclusive approach, such investments, if structured poorly, can be deeply problematic and disempowering for the farmers involved. In some contexts, such as if the farmers put up their land as collateral because their original bargaining ability was weak, these schemes can even lead to the farmers’ eventual loss of resources.<sup>81</sup>

Each of these negative effects of LSLBI can impede the realization of the right to food. An investment that displaces farmers or individuals from land without proper compensation, or that otherwise impedes their livelihood strategies, can render them more food insecure than before the investment occurred. If there is no income from employment, no social transfers set up to aid the transition, and no ability to produce food for themselves, then none of the three channels for securing food will be available to those harmed by LSLBI. Further, if the government has permitted an investment that

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<sup>79</sup> Olivier De Schutter, *How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland*, 38 J. PEASANT STUD. 249, 249 (Mar. 2011).

<sup>80</sup> ELLEN AABØ & THOMAS KRING, THE POLITICAL ECONOMY OF LARGE-SCALE AGRICULTURAL LAND ACQUISITIONS: IMPLICATIONS FOR FOOD SECURITY AND LIVELIHOODS/EMPLOYMENT CREATION IN RURAL MOZAMBIQUE 6 (UNDP Working Paper No. 2012-004, Jan. 2012), <http://www.undp.org/content/dam/rba/docs/Working%20Papers/Agriculture%20Rural%20Mozambique.pdf>.

<sup>81</sup> On the potential risks and benefits of alternative business models, including on the right to food, see Olivier De Schutter (Special Rapporteur on the Right to Food), Report Presented at the 66th Session of the U.N. General Assembly, *Towards More Equitable Value Chains: Alternative Business Models in Support of the Right to Food*, U.N. Doc. A/66/262 (2011), [http://www.srfood.org/images/stories/pdf/officialreports/srrtf\\_contractfarming\\_a-66-262.pdf](http://www.srfood.org/images/stories/pdf/officialreports/srrtf_contractfarming_a-66-262.pdf).

interferes with existing access to food, and has failed to mitigate this impact in a way that supports continued access to food, such investment facilitation would constitute a violation of its obligation to protect the right to food. Thus, while greater investment in food crops for local markets could theoretically help improve local food security, investment directed at food crops for export or non-food agricultural crops could actually decrease local food supply, as productive land is tied up in export-oriented or non-food production.

The negative right-to-food impacts that LSLBI can have are illustrated in a Cambodian case that has garnered substantial international attention. Cambodia has been host to some particularly negative land grabs,<sup>82</sup> fueled by an inadequate land ownership system, conflict-caused displacement, and elite control over land rights allocation.<sup>83</sup>

In 2006, the Cambodian Government granted economic land concessions to the Cambodian sugar companies Koh Kong Plantation and Koh Kong Sugar Industry (together “Koh Kong companies”) over land to which local villagers also held claims.<sup>84</sup> Both companies are jointly owned by the Thai company Khon Kaen Sugar Industry, Taiwanese Ve Wong Corporation, and Cambodian Senator Ly Yong Phat. The concessions were granted for 90 years over 9,400 ha and 9,700 ha, respectively.<sup>85</sup> These concessions, which were to be used for sugar plantations, were the site of a violent eviction and involuntary relocation of some 4,000 Koh Kong villagers from their lands. In 2007, the Community Legal Education Center of Cambodia, on behalf of community members, filed civil and criminal claims in the Koh Kong Provincial Court, alleging that the community members had not been consulted prior to the grant of the concessions and that the transfer of the land was illegal.<sup>86</sup> They sought cancellation of the

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<sup>82</sup> See, e.g., Fitzpatrick, *supra* note 70.

<sup>83</sup> *Id.*

<sup>84</sup> *Koh Kong Sugar Plantation Lawsuits (re Cambodia)*, BUS. & HUM. RTS. RESOURCE CTR., <http://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia#c86294> (last visited Jan. 20, 2016); see also *The Sre Ambel Communities and the Koh Kong Sugar Plantation*, EARTHRIGHTS INT’L, <http://www.earthrights.org/legal/sre-ambel-communities-and-koh-kong-sugar-plantation> (last visited Jan. 20, 2016).

<sup>85</sup> BITTERSWEET HARVEST, *supra* note 44, at 25.

<sup>86</sup> The criminal case was dismissed. See Bureau of Econ. & Bus. Aff., *Community Legal Education Center of Cambodia (CLEC)/EarthRights International (ERI) and American Sugar Refining Inc. (ASR)*, U.S. DEP’T OF ST. (June 20, 2013), <http://www.state.gov/e/eb/oeed/usncp/links/rls/210970.htm>. For a discussion of the procedural history of the case, see Mahdev Mohan, *The Road to Song Mao: Transnational Litigation from Southeast Asia to the United Kingdom*, 107 AM. J. INT’L L. UNBOUND e-30, e-33 (2014),

concession contract. In 2009, the Koh Kong companies entered into a five-year contract for the sale of sugar from Cambodian plantations with the United Kingdom company Tate & Lyle.<sup>87</sup> In 2013, after local judicial and administrative inaction, 200 of the villagers filed a complaint in the UK Commercial Court against Tate & Lyle and T&L Sugars Limited, claiming legal ownership of the plantation land from which the company was sourcing sugar. This legal ownership of the land, they argued, constituted legal ownership of the crops grown on the land.<sup>88</sup> Nine years after the concessions were granted, the litigation is still ongoing.

The villagers' evictions from the land to make way for the concessions decreased their food security and impeded the realization of their right to food. This was documented in a 2013 human rights impact assessment, which sought to examine the human rights implications of the European Commission's "Everything But Arms" initiative in the sugar sector in Cambodia.<sup>89</sup> One of the three provinces surveyed in the human rights impact assessment was Koh Kong. The assessment examined the state of community members' human rights prior to evictions, during evictions, and after evictions. Post-eviction findings on the right to food included the following:

In each research area, the majority of households reported increased food insecurity after the sugar concessions, as a result of reduced access to land and natural resources that affected communities previously depended upon to realize their right to food.<sup>90</sup>

The outcomes were particularly grim for some of the evicted villagers. The assessment goes on to find that "[t]he forced evictions have in some cases led to extreme hunger and possibly even starvation."<sup>91</sup> The assessment documents the villagers' reliance on the land to access food in two ways prior to the evictions and LSLBI: either through the third channel of producing their own food or through the first channel of earning incomes from self-employment. Their loss of access to productive land rendered them unable to produce rice for food stocks and for sale in exchange for other goods. The Cambodian government has failed to meet its obligations to respect and protect the right to food by facilitating the evictions and

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<http://www.asil.org/sites/default/files/AGORA/201401/Mohan%20AJIL%20Unbound%20e-30%20%282014%29.pdf>.

<sup>87</sup> *Koh Kong Sugar Plantation Lawsuits*, *supra* note 84.

<sup>88</sup> *Id.*

<sup>89</sup> BITTERSWEET HARVEST, *supra* note 444.

<sup>90</sup> *Id.* at 70.

<sup>91</sup> *Id.*

subsequent concessions, and by not providing proper compensation, which has led to decreased food security and increased hunger. In addition, this particular LSLBI has proved inadequate in helping individuals to access food through the first channel of employment, due to the precarious nature of contract labor at the sugar plantation. Contractors report that rain can impede their ability to work, leaving them without money for food.<sup>92</sup>

The example from Koh Kong shows how large-scale agricultural investment can result in violations of the right to food of local people, leaving them far worse off than before, despite the promise of development for the country. Moreover, the protracted litigation surrounding the Koh Kong sugar plantation illustrates the problems that can arise for investors and the companies they supply when care is not taken to avoid human rights abuses. Conversely, investments structured in a way that safeguard human rights can reduce the risk of social conflict with communities.<sup>93</sup>

Some of the criticisms levied at LSLBI relate to the fundamental nature of the investment itself, with arguments that this type of investment is never appropriate. Other critiques, however, concern the structure, implementation, and subsequent impacts of the investment. One significant way to shape investments, and thus their impacts, is through law and regulation. Part II explores the investment and human rights legal regimes in which LSLBI operates.

## **II. GOVERNANCE AND PROTECTIONS UNDER INVESTMENT LAW AND HUMAN RIGHTS LAW**

International and domestic legal frameworks shape corporate agricultural investment and its impacts on human rights, including the right to food. Treaties, national laws and policies, and contracts create a complex governance structure that has implications for how such investment is undertaken, as well as how the interests of stakeholders—in particular, corporate investors and individuals affected by the investment—are protected. Specific legal rules and agreements can influence the potential right-to-food impacts of agricultural investment by encouraging or prohibiting certain actions tied to an investment. Less obvious, but perhaps of greater significance, is the effect rendered by overlapping investment and

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<sup>92</sup> *Id.*

<sup>93</sup> For an interesting discussion of the risks for companies of undertaking investments without addressing insecure land rights within the local community, see MUNDEN PROJECT & RTS. & RESOURCES INITIATIVE, *THE FINANCIAL RISKS OF INSECURE LAND TENURE: AN INVESTMENT VIEW* (Dec. 2012),

[http://www.rightsandresources.org/documents/files/doc\\_5715.pdf](http://www.rightsandresources.org/documents/files/doc_5715.pdf).



human rights legal frameworks. Particularly at the international level, this fractured legal system provides deeply imbalanced legal protections for corporations and individuals. This imbalance, in turn, provides reasons for governments to favor certain legal obligations over others, fails to incentivize corporations to undertake rights-respectful investment, and leaves individuals whose rights are affected by investments without robust means of redress.

Part II provides an overview of relevant international and human rights legal regimes. We consider the structure and roles of international and domestic investment law and contracts, as well as international, regional, and domestic human rights law. In addition, Part II describes some of the recent international human rights and investment law developments that seek to address current weaknesses in the systems. Examining these investment and human rights regimes can help shed light on the rules governing foreign agricultural investment, the implications for the right to food and other human rights in the context of such investment, and the ways that host and home states can seek to address current regime deficiencies.

#### *A. Investment Law*

Both international and domestic investment law play an important role in shaping LSLBI and its corresponding impacts. These laws determine investor protections and state obligations towards investors. This can dictate how governments regulate LSLBI as well as the limitations that governments may confront when seeking to change the parameters of such regulation. Further, investment law is instrumental in determining how investment disputes are settled. In addition to international and domestic law, investment contracts negotiated primarily between states and investors play a pivotal role in some jurisdictions in setting the terms of an investment. These legal rules and agreements may have implications for a government's ability or willingness to meet its right-to-food obligations in the context of LSLBI. In particular, if a LSLBI limits individuals' access to food—whether through loss of livelihood or loss of subsistence farming—without providing an adequate alternative means of access, the investment may affect the right to food. In such situations, the investment regime may constrain a state's response regarding redress of the negative right-to-food impacts.

##### 1. International Investment Law and Arbitration

International investment law is governed by a complex regime of

international investment agreements (IIAs).<sup>94</sup> IIAs primarily take the form of bilateral investment treaties (BITs), or investment chapters within broader economic agreements.<sup>95</sup> Unlike the international trade law regime, there is no single multilateral agreement that regulates international investment.<sup>96</sup> The original impetus behind the development of IIAs was the protection of developed nations' investors abroad.<sup>97</sup> By the end of 2013, the number of IIAs had reached over 3000.<sup>98</sup>

A primary rationale for IIAs is that they protect and promote investment, which leads to increased capital and technology flows into recipient countries, as well as overall economic development.<sup>99</sup> The treaties offer a number of substantive protections for investors but generally do not impose obligations on them.<sup>100</sup> Of note, these treaties generally do not provide protections to governments, nor do they provide any protections to individuals whose rights are affected by investments. The rights afforded to investors have significant ramifications, and at times limit the ability of

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<sup>94</sup> Also known as investment treaties.

<sup>95</sup> See JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 1-3 (2010); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 428-29 (2010) [hereinafter *Emerging Global Regime*].

<sup>96</sup> See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 11 (2d ed., 2012); Freya Baetens, Gerard Kreijen & Andrea Varga, *Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47 VAND. J. TRANSNAT'L L. 1203, 1207-208 (2014).

<sup>97</sup> BITs began to emerge in the late 1950s and early 1960s. See DOLZER & SCHREUER, *supra* note 966, at 6-11; Baetens, Kreijen & Varga, *supra* note 966, at 1207-08; LUKE ERIC PETERSON, *RIGHTS & DEMOCRACY, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION* 12 (2009), [http://publications.gc.ca/collections/collection\\_2012/dd-rd/E84-36-2009-eng.pdf](http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf). For a discussion that suggests that the purpose of investment treaties is to protect and promote investment, see Salacuse, *Emerging Global Regime*, *supra* note 95, at 427-28.

<sup>98</sup> As reported in the UNCTAD, 2014 UNCTAD WORLD INVESTMENT REPORT 201 – INVESTING IN THE SDGS: AN ACTION PLAN 19 (2014), [http://unctad.org/en/PublicationsLibrary/wir2014\\_overview\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_overview_en.pdf).

<sup>99</sup> Baetens, Kreijen & Varga, *supra* note 96, at 1209 (referencing the U.S., Netherlands, German, and French Model BITs); *Emerging Global Regime*, *supra* note 95, at 441.

<sup>100</sup> Mann, *supra* note 19, 132-33. Some of the most common rights afforded to investors include protection on the basis of the principles of national treatment, most-favored-nation treatment, no expropriation without compensation, and fair and equitable treatment—an elastic concept depending on the interpreter. *Id.*; *Emerging Global Regime*, *supra* note 955, at 445; Baetens, Kreijen & Varga, *supra* note 966, at 1209-10. For a discussion on the application of each of these principles, see DOLZER & SCHREUER, *supra* note 966; PETERSON, *supra* note 97, at 13.

governments to legislate or create policy.<sup>101</sup> Limitations on public policymaking space can present a significant problem in terms of governments meeting their right-to-food obligations. As the Committee on Economic, Social and Cultural Rights (CESCR) explains in its General Comment No. 12, “violations of the right to food can occur through the direct action of . . . entities insufficiently regulated by States.” This can include through “the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.”<sup>102</sup> When investment treaties do not carve out investor-protection exceptions for state action taken to address the right to food or other human rights, the right to food is violated to the extent that such treaties prevent the state from sufficiently regulating investors to prevent right-to-food abuses.

IAs are concluded between states, but usually include a provision for investor-state arbitration, through which investors are able to initiate arbitral proceedings against the host state for alleged treaty breaches.<sup>103</sup> The dispute settlement mechanism provided by investor-state arbitration is grounded in ad hoc arbitration panels, rather than a standing dispute settlement body, with no general appellate mechanism. As such, inconsistency in arbitral awards can result.<sup>104</sup> Inconsistency may be exacerbated by the lack of transparency around many dispute proceedings.<sup>105</sup> And because these ad

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<sup>101</sup> See, e.g., CARIN SMALLER, INT'L INST. FOR SUSTAINABLE DEV. (IISD), THE IISD GUIDE TO NEGOTIATING INVESTMENT CONTRACTS FOR FARMLAND AND WATER 6 (Nov. 2014), [https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water\\_1.pdf](https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf) (referring to NATHALIE BERNASCONI-OSTERWALDER, AARON COSBEY, LISE JOHNSON & DAMON VIS-DUNBAR, IISD, INVESTMENT TREATIES AND WHY THEY MATTER TO SUSTAINABLE DEVELOPMENT: QUESTIONS AND ANSWERS (2011), [http://www.iisd.org/pdf/2011/investment\\_treaties\\_why\\_they\\_matter\\_sd.pdf](http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf); also referring to Carin Smaller & Howard Mann, *Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?* (U.N., Sustainable Development Innovation Briefs No. 8, Jan. 2010), [http://www.un.org/esa/dsd/resources/res\\_pdfs/publications/ib/no8.pdf](http://www.un.org/esa/dsd/resources/res_pdfs/publications/ib/no8.pdf)).

<sup>102</sup> General Comment No. 12, *supra* note 36, ¶ 19.

<sup>103</sup> This is arguably the most important of the various decision-making procedures as it is the primary mechanism for enforcement. See *Emerging Global Regime*, *supra* note 95, at 459-64 (discussing investor-state arbitration). See also Baetens, Kreijen & Varga, *supra* note 966, at 1210. For a recent media article outlining the controversies surrounding investor-state dispute settlement, see *Investor-State Dispute Settlement: The Arbitration Game*, ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.

<sup>104</sup> Baetens, Kreijen & Varga, *supra* note 966, at 1209-11.

<sup>105</sup> Rules are generally silent on whether confidentiality is required. The United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, which became effective in April 2014, seek to generate

hoc tribunals arise in a fragmented international investment system comprised of BITs, regional cooperation arrangements, and multilateral conventions, application of the investment system's rules can lead to "confusion, legal conflict, and uncertainty."<sup>106</sup>

Investment treaty arbitration has exploded in recent years as a favored avenue of recourse for investors.<sup>107</sup> The costs of running arbitration proceedings are significant and are commonly born by the parties irrespective of outcome, which can impose significant burdens on states.<sup>108</sup> In addition to the procedural costs, compensation awards can be extremely high.<sup>109</sup> Aside from the potential high awards, investors may also favor investment treaty arbitration for other reasons. Investment treaty arbitration

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greater transparency over investment arbitration. However, the applicability of these rules is limited; they only apply to disputes arising out of treaties concluded after the rules came into force when the arbitration is initiated under UNCITRAL Arbitration Rules or when parties agree to their application. *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, U.N. COMMISSION ON INT'L TRADE L., [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html) (last visited Jan. 20, 2016).

<sup>106</sup> Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C. J. INT'L L. & COM. REG. 33, 124 (2009) (citation omitted).

<sup>107</sup> International Centre for Settlement of Investment Disputes (ICSID) currently has 209 cases pending and records a total number of 349 concluded cases. *Cases*, INT'L CTR. FOR SETTLEMENT OF INV. DISP., <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27> (last visited Jan. 20, 2016).

<sup>108</sup> A 2014 Allen & Overy study of arbitration cases calculated that the average party costs for claimants was US\$4,437,000 and US\$4,559,000 for respondents (states). The median costs were, however, lower at US\$3,145,000 for claimants and US\$2,286,000 for respondents. Tribunal costs came to just over US\$373,200 for each party. Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, GLOBAL ARB. REV. NEWS (Mar. 24, 2014), [http://www.allenoverly.com/SiteCollectionDocuments/Counting\\_the\\_costs\\_of\\_investment\\_treaty.pdf](http://www.allenoverly.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf).

<sup>109</sup> The Allen & Overy study found an average award amount of US\$76,331,000 in cases where the claimant (investor) was successful. This amount was substantially distorted by the combined value of particularly high awards in four cases, which together totaled approximately US\$3.12 billion. Yet even the median amount awarded was US\$10,694,000. *Id.* After that study was published, the largest award to date, some \$50 billion, was made against Russia in favor of OAO Yukos Oil Company in three UNCITRAL arbitral tribunal awards. Martin Dietrich Brauch, *Yukos v. Russia: Issues and Legal Reasoning Behind US\$50 Billion Awards*, INT'L INST. FOR SUSTAINABLE DEV. (Sept. 4, 2014), <https://www.iisd.org/itn/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards/>.

enables investors to circumvent domestic courts.<sup>110</sup> This may be preferable for investors who have more confidence in arbitral panels than in the national court system of the host state, even though investment arbitration has none of the checks and balances frequently found in domestic jurisdictions. Further, unlike most domestic courts, proceedings and awards can be kept confidential. Moreover, the fragmented international investment system creates room for investors to take advantage of current system weaknesses, including by treaty shopping to find a more favorable forum,<sup>111</sup> or by bringing simultaneous claims in more than one forum.<sup>112</sup> In addition, investment treaty arbitration affords investors the opportunity to bring claims—a unique right that is not provided to host governments or to individuals whose rights may be affected by the investor’s actions—in a forum generally uninterested in the human rights dimensions of a situation. Indeed, arbitral tribunals have shown little interest in considering the human rights implications of an investor’s operations or the human rights defenses asserted by the state. The relevance of human rights in investor-state dispute settlement is considered in greater detail in Part II.C.2 of this Article.

With respect to agricultural investment and the right to food, the main risk presented by this system is that host governments may feel constrained in addressing the negative right-to-food impacts of foreign LSLBI. Regulatory or other action that aims to counter negative consequences could potentially give rise to a treaty-based claim if it affects a protected investor’s rights. This “regulatory chill”<sup>113</sup> may render a government less willing to take necessary steps to prevent or mitigate an investment’s negative impact on the right to food.

When a concession has been granted for land that individuals rely on for their food production or livelihoods, investment operations may push land users off the land, with detrimental impacts on their right to food. A

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<sup>110</sup> See PETERSON, *supra* note 97, at 17 (describing how investors may avoid taking disputes to a host state’s national courts and contrasting this with the international human rights law system that requires exhaustion of national remedies). The international human rights law section is discussed in Part II.B.1 below. On page 18 of PETERSON, there is a useful table setting out the main difference between investor-state arbitration proceedings and regional human rights mechanisms. *Id.* at 18.

<sup>111</sup> Leal-Arcas, *supra* note 106, at 37; see also PETERSON, *supra* note 97, at 15.

<sup>112</sup> See FIONA MARSHALL, INST. FOR SUSTAINABLE DEV., RISKS FOR HOST STATES OF THE ENTWINING OF INVESTMENT TREATY AND CONTRACT CLAIMS: DISPUTE RESOLUTION CLAUSES, UMBRELLA CLAUSES, AND FORKS-IN-THE-ROAD (Aug. 2009), [http://www.iisd.org/pdf/2009/best\\_practices\\_bulletin\\_4.pdf](http://www.iisd.org/pdf/2009/best_practices_bulletin_4.pdf).

<sup>113</sup> OLIVIER DE SCHUTTER, A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES 14 (Nov. 2008), [http://www.iatp.org/files/451\\_2\\_104504.pdf](http://www.iatp.org/files/451_2_104504.pdf).

government seeking to remedy these negative impacts may conclude that additional procedural protections should be implemented before an investor expands its operations within the concession area.<sup>114</sup> Yet such a step could potentially violate its obligations under an investment treaty, paving the way for the investor to seek recourse through arbitration. The possibility of arbitration could dissuade the government from taking steps to protect the land users.

## 2. Domestic Law

Domestic law that relates to investment is “exceptionally diverse” and jurisdiction-specific.<sup>115</sup> It comprises all laws, regulations, administrative decrees, and judicial decisions of a state that concern topics connected to investment, including tax, land governance, water rights, and environmental laws.<sup>116</sup> For example, how a country defines property rights and contractual rights through its law is critically relevant for investment.<sup>117</sup> In addition, many countries have a specific investment law, which usually plays the dual role of both encouraging and controlling foreign investment.<sup>118</sup> For example, a common investment promotion strategy is to offer investors financial incentives and tax breaks through laws and regulations.<sup>119</sup> In some countries the investment law may be more developed than environmental or human rights laws, affording investors stronger rights and protections than those provided to individuals affected by investment.<sup>120</sup> If there is inconsistency or conflict between international investment law and domestic law, the international law prevails.<sup>121</sup>

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<sup>114</sup> This example is currently playing out in Liberia, as the government grapples with how to address community concerns related to their customary rights to land over which agricultural concessions have already been awarded. Kaitlin Cordes, *Making Agricultural Investments Work for Land Users & Communities*, FOCUS ON LAND IN AFRICA, <http://www.focusonland.com/fola/en/for-comment/making-agricultural-investments-work-for-communities/> (last visited Jan. 20, 2016).

<sup>115</sup> JESWALD W. SALACUSE, *THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL* 35 (2013).

<sup>116</sup> *Id.*; SMALLER, *supra* note 101, at 5; *Investment Law*, INT’L INST. FOR SUSTAINABLE DEV., <https://www.iisd.org/investment/law/> (last visited Jan. 20, 2016).

<sup>117</sup> SALACUSE, *supra* note 115, at 37.

<sup>118</sup> *Id.* at 36.

<sup>119</sup> CARIN SMALLER, INT’L INST. FOR SUSTAINABLE DEV., *INVESTMENT CONTRACTS FOR FARMLAND AND WATER: TEN STEPS ¶ 5* (Apr. 2013), [http://www.iisd.org/pdf/2013/investment\\_contracts\\_farmland\\_en.pdf](http://www.iisd.org/pdf/2013/investment_contracts_farmland_en.pdf).

<sup>120</sup> SMALLER, *supra* note 1011, at 5.

<sup>121</sup> Howard Mann, *Foreign Investment in Agriculture: Some Critical Contract Issues*, 17

The balance struck between encouraging and controlling foreign investment varies from country to country and may change over time within a given jurisdiction, depending on a country's current priorities.<sup>122</sup> To promote investment, countries often create state obligations and investor rights under domestic law, similar to international investment law. In some cases, domestic law may go even further than investment treaties by providing greater investor protections than those offered in treaties. One example is the draft Investment Law in Myanmar. If enacted, the new law would consolidate and replace the existing Foreign Investment Law and the Myanmar Citizens Investment Law.<sup>123</sup> As currently drafted, the law would likely provide even greater investor protections, including more opportunities for investment dispute procedures, than existing applicable investment treaties. These strong investor rights are bolstered by weak protections for communities, raising serious concerns about the rights of local individuals versus investors. In this respect, the International Commission of Jurists has expressed that it "remains concerned that the Draft Investment Law establishes significant rights for investors without protecting the rights of those affected by business activity."<sup>124</sup> Indeed, the draft law fails to provide local people with a means for redress if an investment goes wrong, and would potentially limit the government's ability to regulate to protect human rights, such as the right to food.<sup>125</sup> The international debate over the draft law highlights the significant role that domestic investment laws may play in contributing to the imbalance of protections between investors and communities whose human rights are affected by LSLBI.

### 3. Investment Contracts

In the case of state-owned land, investment contracts are entered into

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UNIF. L. REV. 129, 133 (2012).

<sup>122</sup> SALACUSE, *supra* note 115, at 36.

<sup>123</sup> See Myanmar The Investment Law of 2015, Consolidating and Replacing The Myanmar Citizens Investment Law, Pyidaungsu Htluttaw Law No. 18 of 29 July 2013 and The Foreign Investment Law, Pyidaungsu Htluttaw Law No. 21, 2012, 2 November 2012 and Associated Regulations (MIC/DICA Draft V.2 Feb. 24, 2015), <http://www.burmalibrary.org/docs21/2015-Myanmar-Investment-Bill-V2-24-02-2015.pdf>; *Burma: Address Rights Impact of New Investment Law*, HUM. RTS. WATCH (Mar. 26, 2015), <http://www.hrw.org/news/2015/03/25/burma-address-rights-impact-new-investment-law>.

<sup>124</sup> *Myanmar's Investment Law Drafting Process at Critical Phase*, INT'L COMM'N JURISTS (Feb. 9, 2015), <http://www.icj.org/myanmars-investment-law-drafting-process-at-critical-phase/>.

<sup>125</sup> *See id.*

directly between the state and the investor. In addition to the protections afforded to foreign investors by IIAs and domestic investment law, most investment contracts also offer investors a number of rights and protections. As opposed to most IIAs, such contracts also impose obligations on the investor, as well as provide rights for the government as a contracting party. Investment contracts can either be written to be subject to or to override domestic law.<sup>126</sup> Within the context of the international investment legal regime, contractual content is quite important, as some arbitral tribunals have held that investors can bring investment treaty claims against host states based solely on an alleged breach of an investment contract, rather than a breach of the investment treaty.<sup>127</sup>

The negotiation and design of investment contracts can have a number of human rights implications.<sup>128</sup> Some contractual provisions help ensure that states are better able to protect against potential human rights abuses, while other provisions instead potentially limit a state's ability to meet its human rights obligations. An example of the latter is the stabilization clause.<sup>129</sup> At their most extreme, stabilization clauses can effectively freeze the regulatory framework that applies to the investment.<sup>130</sup> Overly broad stabilization clauses can therefore render subsequent changes to the domestic legal framework, including improved human rights or labor regulations, inapplicable to the investment. This may lead an investor to informally rely on the stabilization clause to ignore a new law or may give the investor a formal claim for compensation if forced to comply.<sup>131</sup> For example, an investor that has signed a contract with a "full freezing" stabilization clause might refuse to abide by a new minimum wage law imposed by the state, even if the increased minimum wage was designed in part to help workers realize their right to food.<sup>132</sup> If forced to comply, the investor theoretically

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<sup>126</sup> *Investment Law*, *supra* note 116.

<sup>127</sup> MARSHALL, *supra* note 112, at 9-11.

<sup>128</sup> See, e.g., John Ruggie (Special Representative of the Secretary General), *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011), <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>.

<sup>129</sup> *Id.* ¶¶ 31-9.

<sup>130</sup> This would be a "full freezing clause." See INT'L FIN. CORP. (IFC), STABILIZATION CLAUSES AND HUMAN RIGHTS 6 (May 27, 2009), <http://www.ifc.org/wps/wcm/connect/9feb5b00488555cab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>.

<sup>131</sup> *Id.* at 33-36.

<sup>132</sup> The IFC report provides the following example of a full freezing stabilization clause from a Sub-Saharan extractive agreement concluded in the 2000s:



might have an arbitration claim against the state under an applicable investment treaty, arguing breach of the umbrella clause, fair and equitable treatment, or the prohibition against expropriation. Whether an arbitral panel would accept this argument is unclear. Yet, “a number of arbitral decisions have pointed to the relevance of stabilization clauses” in such circumstances.<sup>133</sup>

The current international investment law regime, coupled with domestic investment laws and investor-state contracts that afford additional rights to investors, can result in an unbalanced playing field for investors and those affected by investments, including LSLBI. This web of investor rights provides very strong protections to investors, particularly foreign investors, who are protected by IIAs and may receive additional rights and protections under domestic investment laws or investor-state contracts.<sup>134</sup> At the same time, the investment regime in some cases can limit the ability of states to adequately protect human rights, including in situations where land investments impede the realization of individuals’ right to food. And where there are weak domestic laws and poor institutional enforcement capacity, the rights of foreign investors derived from IIAs and investment contracts

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The GOVERNMENT hereby undertakes and affirms that at no time shall the rights (and the full and peaceful enjoyment thereof) granted by it under this Agreement be derogated from or otherwise prejudiced by any Law or by the action or inaction of the GOVERNMENT, or any official thereof, or any other Person whose actions or inactions are subject to the control of the GOVERNMENT. In particular, any modifications that could be made in the future to the Law as an effect on the Effective Date shall not apply to the CONCESSIONAIRE and its Associates without their prior written consent, but the CONCESSIONAIRE and its Associates may at any time elect to be governed by the legal and regulatory provisions resulting from changes made at any time in the Law as in effect on the Effective Date.

In the event of any conflict between this Agreement or the rights, obligations and duties of a Party under this Agreement, and any other Law, including administrative rules and procedures and matters relating to procedure, and applicable international law, then this Agreement shall govern the rights, obligations, and duties of the Parties.

*Id.* at 6.

<sup>133</sup> *Id.* at 36.

<sup>134</sup> See, e.g., CARIN SMALLER & HOWARD MANN, INT’L INST. FOR SUSTAINABLE DEV., A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER 14 (May 2009), [http://www.iisd.org/pdf/2009/thirst\\_for\\_distant\\_land.pdf](http://www.iisd.org/pdf/2009/thirst_for_distant_land.pdf) (noting that investment contracts may provide “additional rights not set out in domestic law relating to water use, land tenure rights, the right to export all products of the investment, etc. In addition, a foreign investor may obtain favourable taxation terms and other economic incentives available under domestic law to foreign investors.”).

can easily take precedence over the rights of local communities.<sup>135</sup> This is exacerbated by the investment regime's failure to offer individuals affected by investment any avenue for recourse, leaving their claims to the human rights legal regime.

### *B. Human Rights Law*

Human rights legal obligations exist at three different levels: international, regional, and domestic. The international human rights law regime has been instrumental in developing the normative framework surrounding the right to food, and placing obligations on states to respect, protect, and fulfill this right. However, these obligations can be difficult to enforce, and the international human rights system does not always offer adequate mechanisms for redress. This is especially true in the case of socio-economic rights, including the right to food. Regional systems create additional or overlapping obligations and provide another redress opportunity for victims of right-to-food abuses but similarly can be limited in their functionality. In some jurisdictions domestic human rights law offers the strongest mode of rights protection, however, only a minority of countries have enshrined the right to food as a justiciable right. All three levels of human rights law create governmental obligations, as well as redress mechanisms available to victims. These rights regimes are relevant when considering what governments can and should do to ensure that LSLBI does not violate human rights, including the right to food.

#### 1. International Human Rights Law

The international human rights legal regime comprises customary international law, international conventions, international declarations, and Human Rights Council decisions and resolutions.<sup>136</sup> Of these, international covenants and treaties are legally binding upon those states that ratify them,<sup>137</sup> while customary international law automatically binds all states. Other sources of international law, such as declarations and treaty body comments and resolutions, though not legally binding, still provide authoritative interpretations of binding obligations. The international legal status of the right to food is set out above in Part II.A.

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<sup>135</sup> See *id.* at 8.

<sup>136</sup> See *Human Rights Council*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx> (last visited Jan. 20, 2016).

<sup>137</sup> Ratification and accession have the same legal effect. Ratification simply occurs before the Covenant has come into force, whereas accession occurs once the Covenant already obtains the requisite number of signatures and has come into force.

While international human rights law is vital for the development of human rights norms, it is limited in the protections it offers to those affected by LSLBI, especially for violations of socio-economic rights like the right to food.<sup>138</sup> When a violation of international human rights law occurs, the remedy available to the individual whose right has been violated depends on the source of the obligation. For example, the geopolitical context in which the modern international human rights regime developed led to two distinct international treaties, one covering civil and political rights, the other covering economic, social and cultural rights. These treaties, in turn, have their own remedial instruments. An individual alleging the breach of a civil or political right may, after having exhausted all domestic avenues, appeal to the Human Rights Committee if the violating state has ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR Optional Protocol).<sup>139</sup> An individual claiming a breach of an economic, social or cultural right, such as the right to food, may instead lodge a communication with the Committee on Economic, Social and Cultural Rights (CESCR) against the relevant state, so long as the state has ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR Optional Protocol).<sup>140</sup>

The ICESCR Optional Protocol is relatively new, having opened for signature in 2009<sup>141</sup> and entered into force on May 5, 2013<sup>142</sup>—nearly 40 years after the ICCPR Optional Protocol. It currently has 45 signatories and 20 parties.<sup>143</sup> Under the protocol, all rights set out in the ICESCR can be

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<sup>138</sup> ANSEEUW ET AL., *supra* note 12, at 8, 64.

<sup>139</sup> Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>. [hereinafter ICCPR Optional Protocol].

<sup>140</sup> For an explanation of how the ICESCR Optional Protocol works, see Irene Biglino & Christophe Golay, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Geneva Academy, Academy In-Brief No. 2, July 2013), <http://www.geneva-academy.ch/docs/publications/The%20optional%20protocol%20In%20brief%20.pdf>.

<sup>141</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Sept. 24, 2009, U.N. Doc. A/63/435 (entered into force May 5, 2013), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>. [hereinafter ICESCR Optional Protocol].

<sup>142</sup> *Id.* at art. 18, ¶ 1.

<sup>143</sup> See 3.a *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en) (last visited Jan. 20, 2016).

invoked before the CESCR,<sup>144</sup> including the right to food. Similar to other UN treaty bodies, recommendations of the CESCR in relation to the communication are not binding judgments,<sup>145</sup> although the ratified ICESCR remains binding upon states. Thus, while this mechanism possesses important international normative value, its ability to provide enforceable remedies for violations of the right to food in the context of LSLBI may be limited. As a result, although individuals could use the ICESCR Optional Protocol in certain situations to raise complaints about a violation of the right to food resulting from a LSLBI, there is no guarantee that doing so would lead to adequate redress.

Another international human rights process meant to increase accountability is the Human Rights Council's Universal Periodic Review (UPR).<sup>146</sup> Under the UPR process, member states systematically review every state's human rights record.<sup>147</sup> Each state first declares its efforts to fulfill its rights obligations,<sup>148</sup> which is then reviewed by other member states. NGOs are also permitted to submit information through an "other stakeholders" report,<sup>149</sup> and so may report on situations where communities are going hungry due to a LSLBI that cut off means to access food.<sup>150</sup> While the UPR enables greater scrutiny of a country's human rights record, the process has no legal effect and is not an avenue of redress for individuals whose right to food has been breached in the context of LSLBI.

## 2. Regional Human Rights Law

In certain regions, individuals whose right to food has been violated may have recourse to regional human rights bodies. Each regional human rights system has its own set of treaties, complaints mechanisms (including

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<sup>144</sup> ICESCR Optional Protocol, *supra* note 141, art. 2.

<sup>145</sup> Biglino & Golay, *supra* note 140, at 35.

<sup>146</sup> *Universal Periodic Review*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Jan. 20, 2016).

<sup>147</sup> *See Basic Facts About the UPR*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (last visited Jan. 20, 2016).

<sup>148</sup> *Universal Periodic Review*, *supra* note 146.

<sup>149</sup> *See Basic Facts About the UPR*, *supra* note 147.

<sup>150</sup> *See, e.g.*, INT'L FED. HUM. RTS. & LAO MOVEMENT FOR HUMAN RIGHTS, JOINT UPR SUBMISSION LAO PEOPLE'S DEMOCRATIC REPUBLIC 21ST SESSION (Jan.-Feb. 2015), [https://www.fidh.org/IMG/pdf/20140615\\_lao\\_pdr\\_upr\\_submission\\_en.pdf](https://www.fidh.org/IMG/pdf/20140615_lao_pdr_upr_submission_en.pdf); *see also* INDONESIA: UNIVERSAL PERIODIC REVIEW (UPR) STAKEHOLDERS' SUBMISSION TO THE 13<sup>TH</sup> SESSION OF THE UPR WORKING GROUP (21<sup>ST</sup> MAY – 1<sup>ST</sup> JUNE 2012) (Nov. 21, 2011), <http://www.downtoearth-indonesia.org/sites/downtoearth-indonesia.org/files/Submission%20Report%20to%20Human%20Rights%20Council1.pdf>.

courts and commissions) and rules of procedure.<sup>151</sup> Some of these regions—for example, Africa and the Americas—have protected the right to food, or closely related rights, in legally binding regional instruments.<sup>152</sup> When the right to food has been either codified in a relevant regional treaty or interpreted into a treaty, the corresponding complaints mechanism can be used to raise allegations of a violation of the right. These complaints mechanisms offer justice and reparation for individuals who have suffered human rights violations by a state party.<sup>153</sup> As with the international human rights system, regional human rights systems can only hold states accountable for human rights violations.<sup>154</sup>

These regional commissions and courts function as a supplement, rather than an alternative, to national courts, generally requiring individuals to exhaust domestic remedies before proceeding. To take the Inter-American

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<sup>151</sup> For the treaties, see *Regional Human Rights Treaties*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/ESCR/Pages/RegionalHRTreaties.aspx> (last visited Jan. 20, 2016).

<sup>152</sup> In Africa, the right to food is reflected in articles 14 and 15 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and article 14 of the African Charter on the Rights and Welfare of the Child. See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *supra* note 40. The African Commission on Human and Peoples' Rights has also recognized the right to food as implicitly guaranteed in the African Charter on Human and Peoples' Rights through various interdependent rights, such as the rights to health and education. See *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CSR) v. Nigeria*, 155/96, ¶¶ 64-66 (Oct. 27, 2001) (referring to African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights (Banjul Charter), ¶ 4, 16, 22, *adopted* June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986), <http://www.achpr.org/instruments/achpr/>). In the Americas, the right to food is recognized in article 12 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and has been indirectly recognized in the American Convention on Human Rights through interdependent rights, such as the rights to life and recognition of dignity. See Organization of American States, *American Convention on Human Rights (San Jose Pact)*, Nov. 22 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm). The right to food is not yet enshrined in the European system. See CHRISTOPHE GOLAY, FAO, *THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS* 37-38 (2009), <http://www.fao.org/docrep/016/k7286e/k7286e.pdf>; Narula, *supra* note 38, at 789-90; Irene Biglino & Christophe Golay, *Human Rights Responses to Land Grabbing: A Right to Food Perspective*, 34 *THIRD WORLD Q.* 1630, 1643-44 (2013).

<sup>153</sup> *Regional Systems*, INT'L JUSTICE RESOURCE CTR., <http://www.ijrcenter.org/regional/> (last visited Jan. 20, 2016).

<sup>154</sup> GOLAY, *supra* note 152.

system as an example, the Inter-American Commission on Human Rights can decide complaints alleging a violation of the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights (American Convention) against member states of the Organization of American States. This jurisdiction exists when the state that is the subject of the complaint has ratified the Convention;<sup>155</sup> domestic remedies must have been exhausted and the subject cannot be pending in another international proceeding.<sup>156</sup> Cases decided by the Commission may also be referred to the Inter-American Court of Human Rights, but only where the state against which the violation is claimed has recognized the Court's jurisdiction.

Like the international human rights system, regional rights systems help drive the development of human rights norms and provide some recourse for victims of rights abuses. However, the recourse provided by the regional rights systems and the enforceability of decisions can be limited. Thus, although individuals who have suffered right-to-food or other abuses due to LSLBI can seek redress through available regional mechanisms, there are no guarantees that such mechanisms will provide adequate redress. Aside from the domestic exhaustion requirements, which can be onerous and time-consuming, the decisions of regional commissions are not always enforced, relying primarily on a country's willingness to comply with an unfavorable ruling. Compared to international investment law, which generally does not require domestic exhaustion and has a stronger enforcement mechanism, the international and regional human rights regimes offer much weaker protections for victims of right-to-food abuses than those provided by the investment regime to investors.

### 3. Domestic Human Rights Law

Domestic systems are the third level of law at which human rights are protected. In some countries, the right to food is protected in a constitution or through a framework law. Constitutional recognition of the right to food may take various forms, including direct recognition, inclusion as a directive principle, and recognition through judicial interpretation of other human

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<sup>155</sup> *Id.*

<sup>156</sup> An exception to the requirement of domestic exhaustion is made when "(a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." American Convention on Human Rights, *supra* note 152, art. 46, ¶ 2.

rights.<sup>157</sup> In the first category, countries explicitly recognize the right to food for all people or for specified groups, such as children, or refer to the right to food as part of another human right, such as the right to an adequate standard of living.<sup>158</sup> As an example of the former, the South African Constitution provides, “[e]veryone has the right to have access to . . . sufficient food.”<sup>159</sup> Although codification of the right to food in the substantive part of a constitution facilitates review of state activity affecting the right,<sup>160</sup> explicit constitutional enshrinement of the right to food is not yet the norm.<sup>161</sup> Another type of constitutional recognition is inclusion as a directive principle that is aspirational in nature and intended to guide governmental action.<sup>162</sup> For example, article 15(a) of the Bangladesh Constitution provides that it is the “fundamental responsibility of the State to attain . . . a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens . . . the provision of the basic necessities of life, including food.”<sup>163</sup> However, directive principles are rarely justiciable. Finally, the right to food may be recognized through judicial interpretation of other constitutionally recognized human rights, such as the right to life.<sup>164</sup> An example of this is found in India, which is discussed below. Aside from where the right is placed in the constitutional text, local factors—such as the independence of the judiciary, the nature of judicial review, and whether a country has a civil or common law legal tradition—help determine the legal nature of a constitutionally enshrined right.<sup>165</sup>

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<sup>157</sup> LIDIJA KNUTH & MARGRET VIDAR, FAO, CONSTITUTIONAL AND LEGAL PROTECTION OF THE RIGHT TO FOOD AROUND THE WORLD 14 (2011), <http://www.fao.org/docrep/016/ap554e/ap554e.pdf>. For a breakdown of the countries that recognized the right to food in the four categories in 2011, see *id.* at 21-22.

<sup>158</sup> *Id.* at 14-16; JOSÉ MARÍA MEDINA REY & MARIA TERESA DE FEBRER, FAO, THE RIGHT TO FOOD WITHIN THE INTERNATIONAL FRAMEWORK OF HUMAN RIGHTS AND COUNTRY CONSTITUTIONS 11 (2014), <http://www.fao.org/3/a-i3448e.pdf>.

<sup>159</sup> Constitution of the Republic of South Africa, 1996, art. 27, <http://www.gov.za/documents/constitution-republic-south-africa-1996>.

<sup>160</sup> REY & FEBRER, *supra* note 158, at 11.

<sup>161</sup> Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1088, 1053-4 (2014) (finding that “[t]he rights to land and to food and water are . . . relatively rare, present in less than one-quarter, and justiciable in about one-tenth, of the world’s constitutions.”).

<sup>162</sup> *Id.* at 18.

<sup>163</sup> Constitution of the People’s Republic of Bangladesh, 1972 (reinst. 1986), art. 15, <http://www1.umn.edu/humanrts/research/bangladesh-constitution.pdf>.

<sup>164</sup> KNUTH & VIDAR, *supra* note 157, at 19-20.

<sup>165</sup> For a discussion of the impact of legal traditions, as well as a discussion of the

In addition to or instead of codifying the right to food in a constitution, some countries enact legislation focused specifically on the right to food or food security. In certain cases, this may open up avenues for those affected by LSLBI to seek redress. FAO advocates the implementation of a framework law<sup>166</sup> to, among other things, define the right to food, and provide means for enforcement of the right.<sup>167</sup> Countries such as Nicaragua, Brazil, and Guatemala have enacted this type of law.<sup>168</sup> Other variations include relevant sector-specific legislation, such as in the areas of fishing or the environment.<sup>169</sup> Framework laws have numerous benefits, including making governmental actors accountable for right-to-food violations, placing the right to food at the center of development strategies, and clarifying and strengthening countries' negotiating positions relating to trade and investment.<sup>170</sup> When legislation is implemented and enforced, each of these benefits may lead to more rights-consistent investment. As with constitutional protection, however, framework legislation is not yet common, and the impact of such a law relies on a country's ability and willingness to consistently enforce it.

Domestic legal frameworks combining constitutional guarantees with specific legislation related to the right to food can be particularly powerful. One example where the right to food was interpreted as flowing from another constitutional right, and where legislation was enacted in response, is found in India. In *People's Union for Civil Liberties v. Union of India*, a writ petition was filed with the Supreme Court of India seeking a direction that the State and Central Governments meet their obligations to release stored foodgrains to India's starving people.<sup>171</sup> The Supreme Court heard the petition on the basis of public interest law and found that the right to life,

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justiciability of economic and social rights more broadly, see Jung, Hirschl & Rosevear, *supra* note 161.

<sup>166</sup> Framework law meaning "a legislative technique used to address cross-sectoral issues." KNUTH & VIDAR, *supra* note 157, at 30. See also JOSÉ MARÍA MEDINA REY & MARIA TERESA DE FEBRER, FAO, DEVELOPMENT OF SPECIFIC RIGHT TO FOOD LEGISLATION 3 (2014), <http://www.fao.org/3/a-i3449e.pdf>.

<sup>167</sup> *Id.* at 2.

<sup>168</sup> Olivier De Schutter (Special Rapporteur on the Right to Food), *Countries Tackling Hunger with a Right to Food Approach* 5 (U.N. Briefing Note No. 1, May 2010), [http://www2.ohchr.org/english/issues/food/docs/Briefing\\_Note\\_01\\_May\\_2010\\_EN.pdf](http://www2.ohchr.org/english/issues/food/docs/Briefing_Note_01_May_2010_EN.pdf).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 5-6.

<sup>171</sup> Writ Petition (C) No.196/2001, *People's Union for Civil Liberties (Rajasthan) v. Union of India & Others* (S.C. 2001),

<http://www.hrln.org/hrln/images/stories/pdf/Order%20of%2017%20September%202012-Public%20Distribution%20System.pdf>.



which was protected under the Constitution, entailed a minimum obligation of adequate nutrition.<sup>172</sup> The Court ordered the distribution of the foodgrains and followed up with a series of interim orders, through which it “gradually defined the right to food in terms of what policies are required of the state and central governments in order for them to adequately fulfill their constitutional obligations under Article 21.”<sup>173</sup> The Indian Government responded to the Court rulings with the enactment of the National Food Security Act of 2013.<sup>174</sup> While the Act has been subject to criticism,<sup>175</sup> and the expansive exercise of judicial power was somewhat unique,<sup>176</sup> these efforts nonetheless demonstrate how domestic courts and legislatures are grappling with efforts to realize the right to food. The Indian example also shows the power of domestic avenues for seeking remedies that are not available at the international or regional level.

The right to food, however, is rarely justiciable.<sup>177</sup> To date, most countries have not provided judicial avenues for individuals to allege a

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<sup>172</sup> For a discussion of the case, see Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 696 (2010).

<sup>173</sup> *Id.* at 700.

<sup>174</sup> This is also known as the Right to Food Act. This is not the type of framework law that is discussed in this section; rather, it is a scheme directed at the provision of food to certain members of society.

<sup>175</sup> For a discussion of the proposed Bill prior to enactment, see Lauren Birchfield & Jessica Corsi, *The Right to Life Is the Right to Food: People's Union for Civil Liberties v. Union of India & Others*, 17 HUM. RTS. BRIEF 15-18 (2010), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1128&context=hrbrief>; Ravi S. Jha, *India's Food Security Bill: An Inadequate Remedy?*, GUARDIAN (July 15, 2013), <http://www.theguardian.com/global-development-professionals-network/2013/jul/15/india-food-security-bill>.

<sup>176</sup> For a discussion of the expansive role of India's Supreme Court, see Manoj Mate, *The Rise Of Judicial Governance in the Supreme Court of India*, 33 BOSTON UNIV. INT'L L.J. 102 (2015).

<sup>177</sup> For a discussion on justiciability and of the particular challenges regarding the right to food, see Christian Courtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, 11 MAX PLANCK Y.B. U.N. L. 317, 318, 321-6 (2007), [http://www.mpil.de/files/pdf/mpunyb\\_12\\_courtis\\_11.pdf](http://www.mpil.de/files/pdf/mpunyb_12_courtis_11.pdf). For a discussion on the varying levels of justiciability of economic and social rights more broadly, see Jung, Hirschl & Rosevear, *supra* note 161. For further discussion on the justiciability of economic and social rights, see Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (June 2004); Varun Gauri & Daniel M. Brinks, *The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, in *COURTING SOCIAL JUSTICE* 1-37 (Varun Gauri & Daniel M. Brinks eds., 2008); SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES*, 65-91 (2008); JEFF KING, *JUDGING SOCIAL RIGHTS*, 17-58 (2012).

violation of the right and request a remedy. In South Africa, for example, the right to food is enshrined in the nation's Constitution but there is not yet a legislative framework to implement it. Further, there has been no successful litigation of the right. Thus, even at the domestic level, there may be limited or no protection offered to individuals whose right to food is affected by LSLBI.

Although some avenues of redress for right-to-food violations exist at the international, regional, and domestic levels, they generally face specific limitations or weaknesses. None match the protections provided to investors under investment laws. This imbalance between the protections provided to investors and to individuals whose rights have been violated is of particular concern to the extent that it could persuade states to prioritize their obligations to investors over those to protect and respect human rights. In light of this imbalance and the general gaps in corporate accountability some developments have emerged recently at the international level in both human rights and investment law.

### *C. Recent International Developments*

Efforts to ensure that investment occurs in a sustainable and rights-responsive manner are being undertaken at the international level in both the human rights law and investment law fields. With respect to international human rights law, interested parties have focused on the responsibilities and obligations of corporate actors, including through the development of guiding principles, a proposal for a new business and human rights treaty, and advocacy for a new business and human rights arbitration tribunal. Whether these last two options would cover violations of the right to food, however, remains to be seen. In addition, specific guidance has been created to ensure that agricultural investment is more responsible and compatible with human rights, including the right to food. In the field of international investment law, efforts to incorporate greater human rights protections have focused on treaty negotiations and on investment arbitration. These efforts seek to give states greater regulatory capacity to deal with issues, such as violations of the right to food, as they arise in connection with investments. These recent developments, though varying in their legal effect, reflect important international will to bring corporate actions, investment, and human rights into greater alignment.

#### 1. Developments in International Investment Law

There has been some momentum in recent years to incorporate human rights considerations into international investment law. While the bulk of

existing IIAs do not mention human rights, some newer IIAs are starting to incorporate human rights provisions. However, these newer IIAs remain a distinct minority. In addition, efforts are being made to raise human rights considerations in investor-state arbitration. Likewise, this approach has not yet gained much traction; it is also a remedial solution as opposed to a forward-looking approach to guiding human rights-consistent investment. We now discuss each development in turn.

It is extremely rare for an IIA to refer explicitly to human rights, let alone the right to food. A 2014 Organisation for Economic Co-operation and Development (OECD) study of 2,107 investment treaties revealed that a mere 0.5 percent contained express reference to human rights.<sup>178</sup> This was compared to just over 10 percent that referenced the environment and 5 percent that mentioned labor conditions and standards.<sup>179</sup> This lacuna is evident in the vast majority of country model BITs, most of which fail to explicitly reference human rights.<sup>180</sup> Consistent with the OECD findings, the current 2012 US Model BIT mentions in the preamble the desire to “achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights,” without expressly referencing any other human rights that may be affected in the course of an investment, such as the right to food.<sup>181</sup> The absence of human rights provisions in most existing treaties directly affects the scope of arbitration, since a tribunal’s jurisdiction is granted by the treaty, and a tribunal generally will only decide on disputes arising from alleged breaches of a treaty provision.<sup>182</sup>

Questions of scope notwithstanding, there has been an increase in

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<sup>178</sup> Kathryn Gordon, Joachim Pohl & Marie Bouchard, *Investors Rights and Human Rights – Interactions Under Investment Treaty*, LSE - LABORATORY FOR ADVANCED RES. ON THE GLOBAL ECON. – INV. & HUM. RTS. PROJECT (Sept. 22, 2014), <http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/investors-rights-and-human-rights-interactions-under-investment-treaty-law-by-kathryn-gordon-joachim-pohl-and-marie-bouchard/>.

<sup>179</sup> *Id.*

<sup>180</sup> See MARC JACOB, INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS 9 (2010), [http://www.humanrights-business.org/files/international\\_investment\\_agreements\\_and\\_human\\_rights.pdf](http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf); C. Reiner & C. Schreuer, *Human Rights and International Investment Arbitration*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82 (P.M. Dupuy, F. Francioni & E.U. Petersmann eds., 2009).

<sup>181</sup> 2012 US MODEL BILATERAL TREATY, <http://www.state.gov/documents/organization/188371.pdf>.

<sup>182</sup> Patrick Dumbery, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13 J. WORLD INVEST. & TRADE 349, 359 (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2082016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2082016).

interest recently regarding the incorporation of human rights considerations into investor-state dispute resolution. A LSLBI's human rights implications for non-parties may arise in arbitration in two ways: (1) as a defense for state action taken in furtherance of human rights obligations that breaches an IIA obligation owed to an investor, and (2) as an allegation that an investor has caused human rights abuses, potentially limiting their ability to claim IIA protections or even be held directly liable for such breaches.<sup>183</sup>

The two main stakeholders who may raise the human rights impacts on non-parties in investment arbitration are states and affected communities (or their representatives, such as NGOs).<sup>184</sup> While the former is involved in the arbitration as a respondent party, the latter is considered a "non-investor" and may only submit *amicus curiae* briefs, if permitted.<sup>185</sup> Some treaties expressly permit submissions from non-disputing parties. Aside from

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<sup>183</sup> See, e.g., UNCTAD, Selected Recent Developments in IIA: Arbitration and Human Rights: IIA MONITOR No. 2 (2009) International Investment Agreements, UNCTAD/WEB/DIAE/IA/2009/7 at 2-3 (2009), [http://unctad.org/en/Docs/webdiaeia20097\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20097_en.pdf) (referencing John Ruggie (Special Representative of the Secretary General), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (2008), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf> on the second point). The second type of argument, an allegation that an investor has caused human rights abuses, is currently being made by respondent Bolivia in the ongoing South American Silver Limited v. Bolivia arbitration. In its counter-memorial, Bolivia argues that the relevant company "ignored and even violated human, social and collective rights of the Indigenous Communities that live in the area" and that the Arbitral Tribunal "cannot allow that an international dispute resolution system be used by a claimant that has no 'clean hands.'" Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, South American Silver Limited (Claimant) v. Plurinational State of Bolivia (Respondent), PCA Case No. 2013-15, ¶ 4 (Mar. 31, 2015), [http://www.italaw.com/sites/default/files/case-documents/italaw4262\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw4262_0.pdf) (unofficial English translation).

<sup>184</sup> While investors have raised arguments claiming that they are owed human rights, such as the right to property, and tribunals have looked to human rights norms in interpreting international law, these situations are outside the scope of this Article; we focus on the human rights of people within host states. For more on how tribunals have considered human rights law, see PETERSON, *supra* note 97, at 7 ("In a number of instances, adjudicators of treaty disputes have invoked human rights law as a guide or an analogy when interpreting the legal protections owed to foreign investors. For example, human rights norms related to due process or property rights are studied by adjudicators in order to help interpret and elucidate the investment treaty protections owed to foreign investors."). See also UNCTAD, *supra* note 183, at 4.

<sup>185</sup> See Dumbery, *supra* note 182, at 370-71; J. Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 419 (P.M. Dupuy, F. Francioni & E.U. Petersmann eds., 2009).

disputes arising under such treaties, this amicus option has gained limited traction with arbitral proceedings to date, with “non-investors” only rarely able to submit briefs.<sup>186</sup> Even if permitted, tribunals retain discretion to decide whether to take such interventions into account.<sup>187</sup>

Whether a tribunal will incorporate human rights considerations into its decision-making depends, first, on whether it is afforded jurisdiction by the IIA to decide on human rights issues, and, second, on whether it is able or willing to decide on such matters.<sup>188</sup> The willingness of a tribunal to decide on human rights issues sometimes depends on the content of the treaty, which limits the subject matter over which they can rule.<sup>189</sup> So far, the scope for considering human rights during the arbitration stage has been limited. Arbitral panels are generally uninterested in addressing issues not explicitly included in the investment treaty or in finding specific conflicts between a state’s human rights and investment obligations.

The European Center for Constitutional and Human Rights (ECCHR), in chronicling a panel’s rejection of an amicus brief, has questioned whether

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<sup>186</sup> See, e.g., EUR. CTR. CONST. & HUM. RTS. (ECCHR), HUMAN RIGHTS INAPPLICABLE IN INTERNATIONAL INVESTMENT ARBITRATION? (2012),

[http://www.ecchr.eu/en/our\\_work/business-and-human-rights/worldbank.html?file=tl\\_files/Dokumente/Wirtschaft%20und%20Menschenrechte/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable\\_A%20Commentary.pdf](http://www.ecchr.eu/en/our_work/business-and-human-rights/worldbank.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable_A%20Commentary.pdf) (chronicling the rejection by ICSID of an amicus submission by Chiefs of four indigenous communities in an area in Zimbabwe affected by a timber plantation operation).

<sup>187</sup> For example, under Rule 37(2) of the International Centre for Settlement of Investment Disputes (ICSID) Convention’s Rules of Procedure for Arbitration Proceedings, a tribunal may permit a non-disputing party to file a written submission on a matter within the scope of the dispute. ICSID, *Rules of Procedure for Arbitration Proceedings*, in ICSID CONVENTION: REGULATIONS & RULES Rule 117 (Apr. 2006), [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf). In determining whether to allow the submission, the tribunal must consider the extent to which the submission would assist in determining a factual or legal issue, the extent to which it addresses a matter within the scope of the dispute, and the extent of the non-disputing party’s interest in the proceeding. *Id.*; see also, e.g., Sarah Schadendorf, *Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations*, 10 TRANSNAT’L DISPUTE MGMT. (Jan. 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2206812](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206812) (questioning the extent to which amicus briefs are taken into account by tribunals).

<sup>188</sup> For an argument that there is scope for human rights considerations in investment arbitration, see Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox*, 37 N.C. J. INT’L L. & COM. REG. 1107 (2012).

<sup>189</sup> *Id.* at 1112 (“Investment arbitration cannot rule over claims other than those related to investment law.”).

amicus submissions have ever had a determinative impact on the award rendered,<sup>190</sup> or if they simply are permitted in order to lend public legitimacy to the proceedings.<sup>191</sup> As the ECCHR noted after an International Centre for Settlement of Investment Disputes (ICSID) tribunal rejected an amicus submission by the Chiefs of four indigenous communities in an area of Zimbabwe affected by a timber plantation operation:

Despite acknowledging that the proceedings may well impact upon the rights of the affected indigenous communities, in their decision the tribunal asserts that international human rights law has no relevance to the dispute.

This decision demonstrates a failure of the current international investment arbitration system to ensure human rights compatibility of decisions. It also highlights the deficit of human rights provisions in bilaterally-negotiated trade and investment treaties. . . .<sup>192</sup>

When an amicus curiae brief is permitted, it may raise similar human rights arguments as those raised by the respondent state. An example of an investor-state arbitration in which a human rights defense to state action was raised by both an amicus curiae brief and the host state is the *Suez et al. v. Argentina* matter.<sup>193</sup> The matter concerned the privatization of water services in Argentina and the expenses that private companies encountered as a result of measures taken by the government during the country's financial crisis.<sup>194</sup> Specifically, the state had prohibited the investors from increasing their water tariffs in order to mitigate increased operating costs that resulted from the measures. Defending itself from claims that its measures had effectively pushed the investors' operations into bankruptcy, Argentina argued that the measures were necessary for safeguarding

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<sup>190</sup> ECCHR, *supra* note 186, at 3.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 2.

<sup>193</sup> Decision on Liability, *Suez, Sociedad General de Aguas de Barcelona S.A. (InterAguas) v. Arg. Republic*, ICSID Case No. ARB/03/17, ¶¶ 256, 262 (July 30, 2010), <http://ita.law.uvic.ca/documents/SuezInterAguaDecisiononLiability.pdf>; *see also* Decision on Liability, *Suez, Sociedad General de Aguas de Barcelona, S.A. (Vivendi) v. Arg. Republic*, ICSID Case No. ARB/03/19 (July 30, 2010), <http://ita.law.uvic.ca/documents/SuezVivendiAWGDecisiononLiability.pdf>.

<sup>194</sup> The above fact scenario is based off the summary provided in both footnote 46 of Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670, n.46 (2011), and in Luke Eric Peterson, *Argentina Liable for Denying Fair and Equitable Treatment to Suez-Led Consortia of Foreign Investors in Buenos Aires and Santa Fe Water Concessions*, INV. ARB. REP. (Aug. 5, 2010), [http://www.iareporter.com/articles/20100818\\_9](http://www.iareporter.com/articles/20100818_9).

inhabitants' right to water. The state, as well as the amici curiae brief submitted by a group of NGOs, claimed that the human right to water trumped the investment obligations.<sup>195</sup> In its 2010 decisions, the Tribunal did not resolve the question of investment versus human rights hierarchy. Instead, it stated that Argentina had to respect both types of obligations equally and could indeed have respected both.<sup>196</sup> These arbitration proceedings demonstrate how unwilling tribunals are to find specific conflicts between a state's human rights and investment obligations, thus limiting human rights defenses under the current legal regime. As such, while the potential of such intervention remains, the success of amicus curiae submissions in raising human rights concerns at the arbitration level has so far been limited.<sup>197</sup>

Mechanisms to remedy these arbitral limitations include providing jurisdiction to arbitral panels within treaties to consider human rights and granting standing to affected parties to join and participate in dispute proceedings in which they have an interest. While these steps would be a welcome positive development, such mechanisms would be remedial by nature. While they may have some deterrent effect in the context of LSLBI, they would not necessarily encourage more human rights-consistent investments. Conversely, proposals have been made for how IIAs could be reworked to provide a more enabling framework for rights-consistent investments; a small number of newer IIAs have already integrated human rights in some way.

IIAs can incorporate human rights considerations in various ways, including by referencing rights in the preamble to aid with treaty interpretation, by expressly providing that human rights treaties prevail in the event of a conflict with the IIA, or by clarifying that certain substantive provisions will not be breached if measures are taken in the interest of human rights.<sup>198</sup> For example, the North American Free Trade Agreement includes a clause that allows host states to enact measures aimed at

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<sup>195</sup> See JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW, 180 (2012).

<sup>196</sup> See *id.*

<sup>197</sup> Harrison, *supra* note 185.

<sup>198</sup> Choudhury, *supra* note 194, at 714. In addition, some commentators even argue that BITs should impose human rights obligations on corporations. However, this approach has yet to take hold in practice. See, e.g., Patrick Dumberry & Gabrielle Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations Under Investment Treaties?*, 2011-2012 Y.B. INT'L INV. L. & POL'Y (Karl P. Sauvant ed., 2013), 569-600, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404054](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404054).

protecting human rights to the extent they are consistent with the IIA.<sup>199</sup> Somewhat similarly, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), a recently negotiated free trade agreement (FTA) between Canada and the European Union (EU) that is awaiting EU approval,<sup>200</sup> incorporates human rights considerations in both the preamble and the investment chapter. The preamble recognizes the “importance of . . . human rights . . . for the development of international trade and economic cooperation” and reaffirms the parties’ “strong attachment” to the UDHR.<sup>201</sup> Article X.15 in the investment chapter provides for a very limited denial of benefits on grounds of the protection of human rights in the case of non-party control of an investor.<sup>202</sup>

An agreement can also impose obligations on states to assess the human rights impacts of the agreement. This assessment could include the socio-economic rights, such as the right to food, of communities whose subsistence farming and livelihoods will be affected by LSLBI. The Canada-Colombia Free Trade Agreement is an interesting example of a free trade agreement with an investment chapter that imposes obligations on states to assess human rights impacts.<sup>203</sup> An ancillary agreement to the

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<sup>199</sup> Radi, *supra* note 188, at 1110-1 (citing art. 1114(1) of the North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) as an example).

<sup>200</sup> *Countries and Regions: Canada*, EUR. COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/> (last visited Jan. 20, 2016).

<sup>201</sup> Comprehensive Economic and Trade Act (CETA), pmb., Art. X, Can.-E.U., Aug. 5, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

<sup>202</sup> The text’s joint declaration notes, “With respect to Article X.15 (Denial of Benefits - Investment), Article Y (Denial of Benefits - CBTS) and Article XX (National Security Exception - Exceptions), the Parties confirm their understanding that measures that are ‘related to the maintenance of international peace and security’ include the protection of human rights.” *Id.* art. X.

<sup>203</sup> Chapter 8 of the Agreement is on investment. Article 816 on Corporate Social Responsibility provides:

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.

Canada-Colombia Free Trade Agreement, art. VIII, Can.-Colum., Nov. 21, 2008, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia->



Canada-Colombia FTA requires the two states to produce annual reports on the effect of the measures taken under the FTA on human rights in both territories.<sup>204</sup> This requirement to produce country-level human rights impact assessments (HRIAs) holds interesting potential to assist governments and other stakeholders in better understanding the impacts of trade and FDI. In the case of LSLBI, assessments of this nature could help reveal situations where communities have been removed from their land and whether or not alternative access to food has been provided following their removal. This information could help state parties assess whether their trade and investment commitments conflict with their human rights obligations and, if so, whether any adjustments could be made to ensure that they do not violate their existing rights obligations.<sup>205</sup> In addition, information from the assessments could theoretically be raised during dispute proceedings under the agreement, perhaps serving as a partial defense for a respondent state.<sup>206</sup> Although a promising effort to incorporate human rights issues at the treaty level, the assessments issued by Canada and Colombia to date have been of limited utility. Nevertheless, future administrations, with more political will to use these assessments, could help develop them into a stronger and more robust tool. Alternatively, governments can require HRIAs of trade or investment agreements before such agreements are concluded. Such *ex ante* assessments, however, can be difficult in practice because the future impacts of a draft agreement are not always clear.<sup>207</sup> Still, they are important for

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colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=eng. However, this language of “encourages” as opposed to obligatory language such as “must” or “shall” waters down the effect of the provision in not making it legally binding.

<sup>204</sup> Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia, art 1, Can.-Colum., May 27, 2010, <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105278>.

<sup>205</sup> For a discussion on HRIAs, see EITAN FELNER, NORDIC TRUST FUND & WORLD BANK, HUMAN RIGHTS IMPACT ASSESSMENTS: A REVIEW OF THE LITERATURE, DIFFERENCES WITH OTHER FORMS OF ASSESSMENTS AND RELEVANCE FOR DEVELOPMENT (Feb. 2013), [http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA\\_Web.pdf](http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf).

<sup>206</sup> The former UN Special Rapporteur on the right to food argues, “Where an inconsistency between the human rights obligations of a State and its obligations under a trade or investment agreement becomes apparent only after the entry into force of the said agreement, the pre-existing human rights obligations must prevail.” Olivier De Schutter (Special Rapporteur on the Right to Food), Addendum, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, ¶ 1.3, A/HRC/19/59/Add.5 at 5 (Dec. 19, 2011),

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf).

<sup>207</sup> See, e.g., CARIN SMALLER, HUMAN RIGHTS IMPACT ASSESSMENTS FOR TRADE AND

alerting negotiating parties to the potential impacts of such agreements, thereby allowing them to revise their design accordingly to ensure that rights are adequately protected.<sup>208</sup>

Finally, the Southern African Development Community model BIT (SADC Model BIT) shows how human rights can be incorporated into BITs in a substantive way.<sup>209</sup> In addition to language in the Preamble recognizing the importance of furthering human rights, the SADC Model BIT includes minimum standards for human rights, environment, and labor in a section focused on the “Rights and Obligations of Investors and State Parties.”<sup>210</sup> Those minimum standards require investors to respect human rights and not to undertake investments that will breach human rights.<sup>211</sup> Importantly, these are binding obligations. The SADC Model BIT also requires environmental and social impact assessments that include “assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realization of human rights in those areas.”<sup>212</sup> This goes beyond the human rights assessment requirement imposed in the Canada-Colombia agreement, as it requires ex ante assessments at the investment-project level, rather than ex post country-level reviews of the agreement as a whole. In the case of LSLBI and the right to food, such assessments could help identify where an investment might negatively affect the right to food, such as through the removal of communities from their traditional land, particularly if an alternative means of access to food has not been demonstrated. Identifying possible negative impacts before a project is undertaken could thus provide the opportunity to modify or halt the investment project to avoid such harms.

While these new treaties and proposals have great potential to change IIAs moving forward, they do not answer the question of what to do with the more than 3000 existing IIAs that potentially constrain the protection of the right to food in the context of LSLBI. In this respect, states have three options available to them. First, they can take steps to clarify their intentions

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INVESTMENT AGREEMENTS 6-8 (Ann Simpson ed., June 2010), [http://www2.ohchr.org/english/issues/food/docs/report\\_hria-seminar\\_2010.pdf](http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf).

<sup>208</sup> See, e.g., Olivier De Schutter & Kaitlin Cordes, *Trading Away Human Rights*, PROJECT SYNDICATE (Jan. 7, 2014), [http://ccsi.columbia.edu/files/2013/10/Project\\_Syndicate\\_-\\_Trading\\_Away\\_Human\\_Rights\\_-\\_Jan\\_7\\_2014.pdf](http://ccsi.columbia.edu/files/2013/10/Project_Syndicate_-_Trading_Away_Human_Rights_-_Jan_7_2014.pdf).

<sup>209</sup> SOUTH AFRICAN DEV. COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (July 2012), <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

<sup>210</sup> *Id.* part 3.

<sup>211</sup> *Id.* art. 15.1.

<sup>212</sup> *Id.* art. 13.2.

regarding texts of investment treaties.<sup>213</sup> States can do this in several ways: by “issuing joint interpretations with their other treaty parties, exchanging diplomatic notes, making unilateral declarations, and submitting briefs as non-disputing parties or respondents.”<sup>214</sup> States can also clarify jurisdictional, procedural, and substantive ambiguities in treaty texts,<sup>215</sup> thereby assisting any future investment arbitration with treaty interpretation. This, in turn, can potentially open up space for host governments to undertake the actions they believe are necessary to meet their human rights obligations while minimizing their concerns about potential liability under investment dispute proceedings. Second, states can seek to negotiate amendments to existing treaties. Pursuant to Article 30 of the Vienna Convention on the Law of Treaties, this would occur by agreement between the parties in accordance with the Convention.<sup>216</sup> Third, states can terminate existing IIAs and either renegotiate new treaties that are more rights-consistent, or choose to not sign new IIAs.<sup>217</sup> This latter option may be increasingly attractive, as there is growing doubt regarding whether BITs actually stimulate greater investment than would occur without an investment treaty.<sup>218</sup> South Africa, for instance, is in the process of cancelling its BITs and replacing them instead with a comprehensive and rights-consistent investment law.<sup>219</sup> This option requires states to have a

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<sup>213</sup> See LISE JOHNSON & MERIM RAZBAEVA, COLUM. CTR. SUSTAINABLE INV., STATE CONTROL OVER INVESTMENT TREATIES 2 (Apr. 2014), <http://ccsi.columbia.edu/files/2014/04/State-Control-over-Interpretation-of-Investment-FINAL-8.13.14.pdf>; Wolfgang Alschner et al., *Interpretation of IIAs: What States Can Do* (UNCTAD, IIA Issue Note No. 3, Dec. 2011), [http://unctad.org/en/Docs/webdiaeia2011d10\\_en.pdf](http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf).

<sup>214</sup> For more detail on context and timing, see JOHNSON & RAZBAEVA, *supra* note 213, at 2.

<sup>215</sup> *Id.*

<sup>216</sup> For a discussion on how to amend treaties, see James D. Fry & Odysseas G. Repousis, *Intertemporality and International Investment Arbitration: Protecting the Jurisdiction of Established Tribunals*, 31 ARB. INT'L 213, 217-19 (May 4, 2015).

<sup>217</sup> See *id.* at 219-23 for an explanation on the process of termination.

<sup>218</sup> See, e.g., Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. & SOC'Y REV. 805, 805-12 (2008); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011).

<sup>219</sup> See JOHNSON & RAZBAEVA, *supra* note 213, at 2; Jackwell Feris, *Challenging the Status Quo – South Africa's Termination of its Bilateral Trade Agreements*, DLA PIPER INT'L ARB. NEWSL. (Dec. 10, 2014),

<https://www.dlapiper.com/en/us/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo/>; Adam Green, *South Africa: BITS in Pieces*, FIN. TIMES (Oct. 19, 2012), <http://blogs.ft.com/beyond-brics/2012/10/19/south-africa-bits-in->

strong domestic investment law, which is discussed further in Part III.B.1.

The two distinct approaches to integrating human rights in international investment law, at the negotiations stage and during arbitration, are in some ways complementary. Although incorporating human rights into treaties at the negotiations stage possesses some clear advantages, efforts to include human rights in investment treaties are inherently focused on future treaties. Inserting human rights considerations into investment arbitration, on the other hand, allows stakeholders to raise human rights concerns with respect to existing investment treaties and the disputes under them. Currently, the scope for considering human rights during the arbitration stage is limited, and tribunals' competence in addressing human rights law may be questionable.<sup>220</sup>

Neither approach to incorporating human rights considerations into investment law will, on its own, lead to the realization of the right to food or of other human rights. Nor would either approach necessarily resolve right-to-food issues that result from LSLBI. At best, these efforts would help create the space that governments need to meet their human rights obligations, while limiting the factors that might persuade them to instead favor the commitments they have made under investment treaties. These efforts are thus important steps towards creating a more balanced and rights-supportive international legal regime. They should not, however, be viewed as solutions for fully realizing the right to food or other rights in the context of LSLBI.

## 2. Developments in International Human Rights Law

Significant multilateral effort has been directed at addressing the responsibilities and obligations of corporate actors to ensure greater corporate accountability for human rights abuses. These efforts cover corporate actors engaging in LSLBI. The most prominent endeavor to date is the United Nations Guiding Principles on Business and Human Rights (Guiding Principles), endorsed by the Human Rights Council in June 2011.<sup>221</sup> The Guiding Principles are non-binding principles that set out how

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pieces/. For an overview of the current public debate surrounding ISDS, see *Investor-State Dispute Settlement: The Arbitration Game*, *supra* note 103.

<sup>220</sup> See, e.g., PETERSON, *supra* note 97, at 8.

<sup>221</sup> U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, HR/PUB/11/04 at iv (2011), [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [hereinafter GPBHR] ("The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction

states and businesses should implement the UN ‘Protect, Respect and Remedy’ Framework in order to “better manage business and human rights challenges.”<sup>222</sup> Under this Framework, governments have a duty to protect human rights, which includes protection from the actions of business enterprises. Business enterprises, in turn, have a responsibility to respect human rights. This responsibility requires not “causing or contributing to adverse human rights impacts through their own activities, and address[ing] such impacts when they occur.”<sup>223</sup> This includes avoiding investments that cause individuals to lose their access to subsistence or livelihood farming without adequate compensation. Access may be lost due to their removal from the land or due to large-scale operations that negatively affect watercourses, which harms farmers’ ability to grow food crops. In addition, both governments and business enterprises must ensure adequate access to remedies for those whose rights have been harmed by corporate activity.<sup>224</sup> In the case of LSLBI, this might include project-level grievance mechanisms that can provide redress for negative impacts on the right to food or other human rights.

The Guiding Principles have been criticized by some commentators for their lack of binding force<sup>225</sup> and for not creating adequate corporate accountability for human rights abuses.<sup>226</sup> The international human rights community is currently debating whether to develop a binding treaty on transnational corporations and human rights.<sup>227</sup> In June 2014, the Human Rights Council issued a resolution establishing an intergovernmental working group to explore and develop such a treaty.<sup>228</sup> This is a promising

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to the Guiding Principles and an overview of the process that led to their development.”).

<sup>222</sup> *New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E#sthash.ehJDMqdO.dpuf>.

<sup>223</sup> GPBHR, *supra* note 221, ¶ 13(a).

<sup>224</sup> *New Guiding Principles on Business and Human Rights*, *supra* note 222.

<sup>225</sup> *See, e.g.*, David Bilchitz, *The Necessity for a Business and Human Rights Treaty* (Nov. 30, 2014), <http://ssrn.com/abstract=2562760>.

<sup>226</sup> *Id.* at 7-8, 15-19.

<sup>227</sup> For commentary on the proposed treaty by the drafter of the Guiding Principles, see John Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (Jan. 23, 2015), <http://ssrn.com/abstract=2554726>.

<sup>228</sup> *See* Human Rights Council, *Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014), <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement>. For relevant

development, although the current opposition of key home states for corporate investors, such as the United States and the United Kingdom, may be a difficult challenge to overcome. Even if the treaty proceeds, however, it remains to be seen whether it will make sufficient provision for socio-economic rights, such as the right to food.

Another area of development relates to the pursuit of new avenues for redress. This was prompted in part by a 2013 United States Supreme Court decision that severely limited the use of a domestic law to pursue corporate accountability. Prior to that decision, the Alien Tort Statute (ATS) had been growing in prevalence as a mechanism in the United States by which non-U.S. citizens could seek relief for certain human rights abuses committed abroad by corporate actors.<sup>229</sup> In 2013, however, the Supreme Court narrowed the law's scope in *Kiobel v. Royal Dutch Petroleum*,<sup>230</sup> finding that the ATS presumptively does not apply extraterritorially.<sup>231</sup> In response to *Kiobel*, a Working Group was established to develop the idea of an International Arbitration Tribunal on Business and Human Rights to provide a new forum for human rights abuse victims to seek access to justice.<sup>232</sup> As currently conceptualized, the Tribunal would handle human rights disputes and offer both mediation and arbitration.<sup>233</sup> Its proceedings would ideally be faster than traditional litigation and could be held around the world.<sup>234</sup> Arbitration awards made by the Tribunal would be enforceable under the

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HRC resolutions, see *Resolutions and Decisions*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/Business/Pages/ResolutionsDecisions.aspx> (last visited Jan. 20, 2016); *In Controversial Landmark Resolution Human Rights Council Takes First Step Toward Treaty On Transnational Corporations' Human Rights Obligations*, INT'L JUST. RESOURCE CTR. (July 15, 2014), <http://www.ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations/>.

<sup>229</sup> Lise Johnson, Sophie Thomashausen, & Kaitlin Cordes, Background Note to the Ninth Annual Columbia International Investment Conference at Columbia University, *Raising the Bar: Home Country Efforts to Regulate Foreign Investment for Sustainable Development*, (Nov. 12-13, 2014), <http://ccsi.columbia.edu/files/2014/01/CIIC-Background-Paper-Nov-6.pdf>.

<sup>230</sup> *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013).

<sup>231</sup> *US Supreme Court Greatly Restricts Scope of Alien Tort Claims; Holds Statute Does Not Apply Extraterritorially*, SKADDEN (Apr. 23, 2013), <http://www.skadden.com/insights/us-supreme-court-bars-extraterritorial-application-alien-tort-statute-rejects-claims-allege>.

<sup>232</sup> Claes Cronstedt, Remarks delivered at U.N. Annual Forum on Business and Human Rights, *International Arbitration Tribunal on Business and Human Rights Enhancing Access to Remedy* 1 (Dec. 20, 2014), <http://business-humanrights.org/sites/default/files/documents/CC%20Geneve%203%20Dec%202014A.pdf>.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

1958 New York Convention.<sup>235</sup> If established, such a tribunal may help level the imbalance in protections afforded under the human rights and investment regimes, but the tribunal is still in the very early stages of conceptualization.<sup>236</sup> As such, its current utility to a person who has lost access to food due to a LSLBI is nil.

Aside from these general international efforts to increase corporate accountability and improve redress mechanisms, there have also been specific international actions seeking to improve agricultural investment. These actions have been driven by a range of actors and processes with diverse agendas. A first group of efforts includes guidelines and principles developed by the international community, involving either multilateral or multi-stakeholder negotiations. The most recent and relevant is the Principles for Responsible Investment in Agriculture and Food Systems,<sup>237</sup> approved by the Committee on World Food Security (CFS) in October 2014.<sup>238</sup> This voluntary, non-binding instrument provides ten overarching principles regarding responsible agricultural investment and elucidates the roles and responsibilities of various stakeholders. The Principles set out a framework for stakeholders in “developing national policies, programmes, regulatory frameworks, corporate social responsibility programmes, individual agreements and contracts.”<sup>239</sup>

The depth of the Principles’ human rights commitments is debatable. Because the Principles were developed after lengthy multi-stakeholder negotiations, they are the product of compromise. How the Principles would address human rights was a central point of tension between civil society groups, private sector representatives, and governments.<sup>240</sup> At first glance, their treatment of human rights appears sufficient. Human rights are

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<sup>235</sup> *Id.*

<sup>236</sup> For a discussion of the proposed benefits and disadvantages of the Tribunal, see Donald E. Childress III, *Is an International Arbitral Tribunal the Answer to the Challenges of Litigating Transnational Human Rights Cases in a Post-Kiobel World?* 19 UCLA J. INT’L L. FOREIGN AFF. 31 (2015).

<sup>237</sup> COMMITTEE ON WORLD FOOD SECURITY (CFS), PRINCIPLES FOR RESPONSIBLE INVESTMENT IN AGRICULTURE AND FOOD SYSTEMS (Oct. 15, 2014), <http://www.fao.org/3/a-au866e.pdf>.

<sup>238</sup> *Id.*

<sup>239</sup> *Principles for Responsible Investment in Agriculture and Food Systems*, COMMITTEE ON WORLD FOOD SECURITY, <http://www.fao.org/cfs/cfs-home/activities/resaginv/en/> (last visited Apr. 16, 2016).

<sup>240</sup> TRANSNAT’L INST., POLITICAL BRIEF ON THE PRINCIPLES ON RESPONSIBLE INVESTMENT IN AGRICULTURE AND FOOD SYSTEMS 2 (Mar. 2015), [http://www.tni.org/sites/www.tni.org/files/download/political\\_brief\\_rai\\_principles\\_1.pdf](http://www.tni.org/sites/www.tni.org/files/download/political_brief_rai_principles_1.pdf).

mentioned multiple times in the Principles, including Principle 1, which states, “responsible investment in agriculture and food systems supports states’ obligations regarding the progressive realization of the right to adequate food in the context of national food security, and all intended users’ responsibility to respect human rights.”<sup>241</sup> In addition, the Principles specifically assert that states “should maintain adequate domestic policy space to meet their human rights obligations . . . [including] through investment treaties or contracts”<sup>242</sup> and note that business enterprises must “act with due diligence to avoid infringing on human rights.”<sup>243</sup> However, one civil society organization involved in the negotiations has argued that the Principles are problematic from a human rights perspective for several reasons, including their attempt to balance human rights with, or subordinate them to, the international trade regime and their relatively weak language on the regulatory role of the state.<sup>244</sup> Other civil society organizations have raised concerns about the Principles’ treatment of free, prior and informed consent, and their failure to condemn “land grabbing.”<sup>245</sup> From a right-to-food perspective, the Principles could have gone deeper, drawing more explicit links between human rights norms and the types and parameters of investments that would promote them.

Another significant instrument is the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), which were also endorsed by the CFS in May 2012. The VGGT aim to “promote secure tenure rights and equitable access to land, fisheries and forests as a means of eradicating hunger and poverty, supporting sustainable development and enhancing the environment.”<sup>246</sup> Section 12 of the VGGT focuses on investments.<sup>247</sup> Among other points, the VGGT note, “responsible investments should do no

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<sup>241</sup> CFS, *supra* note 237, ¶ 21.

<sup>242</sup> *Id.* ¶ 33.

<sup>243</sup> *Id.* ¶ 50.

<sup>244</sup> TRANSNAT’L INST., *supra* note 240, at 7-9.

<sup>245</sup> See, e.g., *Oxfam Response to UN Committee on World Food Security Endorsement of Principles*, OXFAM, <https://www.oxfam.org/en/grow/pressroom/reactions/oxfam-response-un-committee-world-food-security-endorsement-principles> (last visited Jan. 20, 2016); *CFS Agri Investment Principles Don’t Uphold Food, Land Rights*, PAN ASIA PACIFIC (Oct. 15, 2014), <http://www.panap.net/campaigns/land-food-rights/international-advocacy-and-instruments/2497>.

<sup>246</sup> *About the Voluntary Guidelines on the Responsible Governance of Tenure*, FOOD & AGRIC. ORG. U.N., <http://www.fao.org/nr/tenure/voluntary-guidelines/en/> (last visited Jan. 20, 2016).

<sup>247</sup> See VOLUNTARY GUIDELINES, *supra* note 68, § 12.



harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights.”<sup>248</sup> The widely embraced VGGT arguably constitute soft law.<sup>249</sup> As such, they provide important guidance for understanding how governments can meet their international legal obligations in relation to LSLBI. A number of countries and other stakeholders are now attempting to ascertain how to operationalize the guidelines.

A second group of efforts stems directly from the human rights community. For example, in 2009 the UN Special Rapporteur on the right to food released “Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge.” This document included 11 core principles and measures for host States and investors, applying existing human rights law and obligations to the issue of large-scale land transactions.<sup>250</sup> These principles demonstrate how international human rights law should be used to guide investment so that it contributes to the realization of the right to food. For example, Principle 1 urges a host state to weigh a proposed investment against other land uses that “could be better conducive of the long-term needs of the local population concerned and with the full realization of their human rights.” Following the guidance of these principles is an important step that host states can take towards satisfying their human rights obligations while remaining open to investment opportunities.

Another set of efforts to guide more responsible agricultural investment, including LSLBI, arises from actors not explicitly focused on human rights. One early example from 2010 is the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (PRAI), a document developed collaboratively by the World Bank, the FAO, the International Fund for Agricultural Development, and the United Nations Conference on Trade and Development. The PRAI are voluntary, and aim to encourage corporate social responsibility in respect to LSLBI.<sup>251</sup> They only mention human rights in one paragraph and neglect the right to food entirely. This lack of emphasis on human rights, combined with the perception that

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<sup>248</sup> *Id.* § 12.4.

<sup>249</sup> *The Right to Adequate Food*, *supra* note 39, at 8-9.

<sup>250</sup> Oliver De Schutter (Special Rapporteur on the Right to Food), Addendum, *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, U.N. Doc. A/HRC/13/33/add.2 (Dec. 28, 2009), <http://www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf>.

<sup>251</sup> Narula, *supra* note 122, at 124. For an in-depth comparison of the Minimum Principles and the PRAI, see this Article.

the PRAI were developed without sufficient multi-stakeholder collaboration, was one impetus for the subsequent development of the Principles for Responsible Investment in Agriculture and Food Systems, discussed above. In recent years, the PRAI have been joined by a multitude of other guidelines, principles, and guidance documents. Some of the newest efforts include a guidance document developed jointly by the FAO and the OECD on responsible business conduct along agricultural supply chains and guidelines issued by the U.S. Agency for International Development on responsible land-based investment. Although intended to illuminate best practices, one frequent critique of these combined efforts is that the rapid proliferation of such documents has simply rendered it more difficult for companies and governments to assess the agricultural investments with which they are involved.<sup>252</sup>

The high level of activity at the international level shows a wide recognition of the need to address gaps in corporate accountability, as well as the desire to ensure better outcomes from agricultural investments. Although most of these developments are too nascent to judge, some of them hold significant potential to positively affect the realization of the right to food in the context of LSLBI or to provide greater avenues of redress for those whose rights were violated by such investments.

The substantial developments in both the international investment and international human rights legal regimes discussed in this section hold promise in helping to increase corporate accountability and to re-balance investment and human rights protections. In the future, such developments could provide new avenues of redress for those whose right to food was violated in the context of LSLBI. While providing recourse for human rights abuses and defenses for state action in the interest of human rights is important, the effects of amending remedial mechanisms are limited insofar as they only address problems once they have arisen. Although these changes could potentially create greater incentives for governments and investors to ensure that LSLBI do not violate the right to food in the first place, whether such results would occur is unclear.

Finally, most of these changes are neither imminent nor guaranteed. Given the current limitations with the international human rights and

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<sup>252</sup> See, e.g., Stella Dawson, *Coke's Zero Tolerance for Land Grabs Proves Difficult to Fulfil*, REUTERS (Mar. 25, 2015), <http://www.reuters.com/article/2015/03/25/us-landgrab-coke-idUSKBN0ML0LE20150325> (“Additionally, the guidance documents issued by human rights groups are multiplying, leaving no clear standards or measurements for declaring that supply chains are “clean”— let alone helping corporate boards decide when to pull out of supplier relationships . . .”).

investment regimes, we now turn to consider other ways of addressing human rights abuses related to LSLBI. In particular, we examine host and home state measures to prevent such abuses before they arise.

### **III. PREVENTING RIGHT-TO-FOOD ABUSES IN AGRICULTURAL INVESTMENT: HOST AND HOME STATE OBLIGATIONS AND MEASURES**

While the international investment and human rights developments outlined above show promise for the future protection of human rights in the context of LSLBI, the question remains of what actions can be taken now. In Part III, we suggest options for both host and home states. As noted above, governments bear the primary duty of respecting human rights. In the context of international investment, this means that host states, as recipients of investment, must protect and respect rights that may be affected by investment activity. In addition, home states arguably have extraterritorial obligations to protect rights from the impacts of outward investment in certain situations. Pursuant to these obligations, both host and home states should seek to prevent LSLBI from negatively affecting human rights, including the right to food. Host states can preemptively improve LSLBI to avoid and mitigate human rights abuses in two main ways: strengthening domestic laws and ensuring rights protections in land investment contracts. As noted above, they can also bolster these reforms by issuing interpretations, re-negotiating, or terminating IIAs to address the limitations of existing IIAs with respect to human rights. Measures that home states can undertake include conditioning support to outward investors engaging in LSLBI, establishing various disclosure requirements, and otherwise regulating investments in an effort to influence better outcomes.

#### *A. Host and Home State Human Rights Obligations Related to the Right to Food*

The vast majority of states have right-to-food obligations. The ICESCR, the main, legally binding instrument that codifies the right to food, has been ratified by 164 countries, with no reservations to Article 11 (the right to food).<sup>253</sup> Countries that have signed but not ratified the ICESCR, such as the United States, do not have the same legal obligations under the treaty, but they should not take steps to undermine the rights codified

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<sup>253</sup> See 3. *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtmsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtmsg_no=iv-3&src=treaty) (last visited Jan. 20, 2016).

within.<sup>254</sup> And many of the 40-odd countries that have not signed or ratified the ICESCR have ratified at least one of the other treaties that protect aspects of the right to food.<sup>255</sup> Moreover, to the extent that the right to food constitutes customary international law, it creates obligations for all states, regardless of which treaties they have signed.<sup>256</sup> As discussed in Part I.A.2, government obligations regarding the right to food extend beyond progressive realization. In addition to progressively realizing the right, governments must respect and protect the right to food by not interfering with existing access to food and by preventing third parties from interfering with such access.

The right to food—and human rights generally—has traditionally been discussed with respect to government obligations towards people within their territories or under their jurisdiction. Yet in some situations, governments’ human rights obligations may extend extraterritorially. Multiple legally binding instruments either imply or have been interpreted to include an extraterritorial component. This includes the ICESCR.<sup>257</sup> Moreover, legal scholars have increasingly asserted that such extraterritorial application means that in certain cases governments must respect, protect, and fulfill human rights obligations beyond their own borders. This was most explicitly articulated in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles), which were adopted by a group of international law experts in 2011.<sup>258</sup> According to the Maastricht Principles, which seek to

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<sup>254</sup> See Narula, *supra* note 38, at 742.

<sup>255</sup> These arguably include the ICCPR, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and even the Convention on the Elimination of All Forms of Discrimination against Women, as well as regional instruments. See *supra* note 39. Part I.A.2 of this Article discusses right-to-food obligations more generally.

<sup>256</sup> Narula, *supra* note 38, at 695 (In considering the international legal status of the right to food, Narula argues that “the minimum core component of the right to food - the right to be free from hunger - may have already achieved customary status.”).

<sup>257</sup> For example, Article 2 of the International Covenant on Economic, Social and Cultural Rights includes a requirement to undertake international cooperation. See ICESCR, *supra* note 30, at art. 2, ¶ 1. In addition, the UN Committee on Economic, Social and Cultural Rights (CESCR) has, in concluding observations, addressed possible government failure with regards to extraterritorial government obligations over the right to food. See, e.g., CESCR, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶ 9, U.N. Doc. E/C.12/DEU/CO/5 at 3 (May 20, 2011); CESCR, Concluding Observations Concerning the Fourth Periodic Report of Belgium, ¶ 22, U.N. Doc. E/C.12/BEL/CO/4 at 6 (Dec. 23, 2013).

<sup>258</sup> ETOS CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF

illuminate existing international human rights law, the extraterritorial human rights obligations of governments exist in three situations: first, when a government exercises authority or effective control; second, when the government's acts or omissions cause foreseeable effects on the enjoyment of rights outside its territory; and third, when the government is capable of taking measures through its executive, legislative, or judicial branches to realize rights in other territories, in accordance with international law.<sup>259</sup>

These extraterritorial dimensions apply to all three types of governments' human rights obligations: respecting, protecting, and fulfilling human rights. Thus, for example, to protect the right to food extraterritorially, governments must undertake measures to ensure that third parties regulated or influenced by the governments do not interfere with the realization of this right in other territories.<sup>260</sup> With respect to corporate activity, the Principles note that this duty exists when a "corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned."<sup>261</sup>

In the context of LSLBI, host and home states with right-to-food obligations must not take any action that violates the right to food and must work to prevent third parties from doing so. At a minimum, host states should not enter into land investment contracts without ensuring that these agreements will not result in right-to-food abuses. Home states, meanwhile, should take steps to ensure that their outward investors engaging in LSLBI do not negatively affect the right to food. Both host and home states have a number of options at their disposal to help prevent negative impacts from LSLBI.

### *B. Host State Measures*

Host states have an important role to play in pursuing solutions that prevent right-to-food and other human rights abuses from occurring as a result of LSLBI. In addition to reviewing their position in relation to IIAs, host states can take action to protect human rights from the impacts of LSLBI by improving domestic laws and policies, as well as when negotiating land investment contracts. None of these options, however, will

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STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Sept. 2011), [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) [hereinafter Maastricht Principles].

<sup>259</sup> *Id.* ¶ 9(c).

<sup>260</sup> *Id.* ¶¶ 19-27.

<sup>261</sup> *Id.* ¶ 25(c).

suffice independently. As such, host governments should simultaneously develop each of the three areas to afford greater human rights protections in the context of LSLBI.

### 1. Domestic Laws and Policies

The domestic law of host states is the primary source of law used to regulate agricultural investments.<sup>262</sup> Strengthening the domestic legal regime in an effort to shape investment has distinct advantages over other approaches. Governments can more easily develop robust domestic laws than they can negotiate a good IIA or investment contract, given that treaty and contract negotiations always require compromise. Investor obligations related to compliance with human rights or environmental standards are therefore more easily imposed by incorporating the obligations into domestic law, rather than attempting to insert them into a negotiated agreement. Domestic laws, as opposed to individually negotiated contracts, also help to ensure that all investors have the same obligations. This, in turn, can assure a sufficient minimum standard of operations, while also facilitating monitoring and enforcement. In addition, imposing investor obligations through domestic laws rather than contracts renders those obligations more transparent, as domestic laws are usually accessible to the general public, while contracts are often undisclosed to non-contracting parties.

To the extent possible, host governments seeking to strengthen their domestic investment setting in favor of human rights should address FDI in land and agriculture holistically in their domestic laws or policies. For example, host states can start by identifying desired types of agricultural investment. This would include a number of factors. First, states should consider the implications of the underlying structures of agricultural investment, such as land-based investment versus investment that does not require land transfer. Second, states could explore the most appropriate types of crops for investment. Given that labor intensity differs dramatically among crops, a state's choice of crops will affect its ability to realize the right to food. Third, states should consider other types of relevant investment that may be beneficial from a right-to-food perspective. For example, states should consider investments in agricultural infrastructure that could have beneficial spillover effects for small farmers and could lead to general improvements in food availability. Host states could then ensure that investment laws and policies, including any incentives to attract investment, promote these types of desired investments and are aligned with

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<sup>262</sup> SMALLER & MANN, *supra* note 13434, at 9.

national food strategies or right-to-food framework laws. Any laws or policies that allow LSLBI must also incorporate sufficient safeguards to protect the rights of all legitimate tenure rights holders, including accessible procedures for raising tenure claims.

Host governments that continue to accept LSLBI can seek to improve the processes by which such investments are undertaken and monitored. For example, governments can assess their land contract negotiation processes, including how negotiations occur and who is consulted before and during negotiations. After concluding any land investment contracts, host states could disclose such contracts and other relevant documents to make the underlying deals more transparent. Such transparency is extremely rare, with very few governments providing these contracts to the public.<sup>263</sup> Yet public disclosure of contracts helps citizens and other stakeholders assess the implications of deals and enables them to assist in monitoring the implementation of the deals to ensure that they do not violate human rights. Although implementing these various measures may be difficult for under-resourced governments, framework laws and policies that define key agricultural investment objectives and incorporate some of the abovementioned options can help states attract and benefit from more rights-supportive investments. States can seek to align such laws and policies with the guidance on responsible agricultural investment discussed above in the designing stage.

Host states can also establish a clear and sufficiently detailed framework policy for human rights impact assessments (HRIA). This should not be too difficult for most host states, many of which already require environmental impact assessments (EIAs) before certain investments are approved or licenses granted. HRIAs are similar to EIAs and social impact assessments (SIAs), yet are grounded in human rights norms and designed to assess a project's actual or potential impacts on human rights.<sup>264</sup> While HRIAs can be initiated by companies, communities, or government entities, a host state

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<sup>263</sup> At the time of writing, only two countries have disclosed at least most of their agricultural investment contracts: Liberia and Ethiopia. In addition, Sierra Leone has committed to disclosing 70 percent of its agricultural contracts, but has not yet done so.

<sup>264</sup> HRIAs have different objectives depending on which type of stakeholder is undertaking them. For companies, the purpose is to simplify company human rights management by providing companies with a "consistent, efficient, and systematic way to identify, prioritize, and address human rights risks and opportunities at a corporate, country, site, or product level." FARIS NATOUR & JESSICA DAVIS PLUESS, BUSINESS FOR SOCIAL RESPONSIBILITY (BSR), CONDUCTING AN EFFECTIVE HUMAN RIGHTS IMPACT ASSESSMENT: GUIDELINES, STEPS, AND EXAMPLES 5 (Mar. 2013),

[http://www.bsr.org/reports/BSR\\_Human\\_Rights\\_Impact\\_Assessments.pdf](http://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf).

requirement to undertake an HRIA tied to an investment should place the burden on the investor. Approval of the investment could be made contingent on undertaking the HRIA, as well as on an investor's ability to redesign a project to address any potential negative impacts that are uncovered. Investors unable to adequately address such impacts would not be allowed to proceed.

Of course, whether a host state is able to adequately evaluate and act on company-submitted HRIAs is also a question of resources and capacity. As the UN Guiding Principles recommend in respect of EIAs and SIAs, if such provisions are included, the state "must ensure that it has the capacity to effectively review, evaluate and to take appropriate and timely action on these assessments."<sup>265</sup> The Guiding Principles further advise that where the state lacks such capacity, "the contract should provide for alternatives, at least on a temporary basis, such as self-reporting or other external credible verification."<sup>266</sup> External verification could benefit a host state by assuring that projects meet a minimum standard of environmental and social impacts. This, in turn, could serve as a useful starting point until greater capacity is available to assess specific HRIAs.

Addressing LSLBI in a holistic manner means striving to improve all laws that are relevant to such investment. These may include human rights, tax, environmental, and investment laws, among others.<sup>267</sup> When a state is already a party to IIAs, investment laws in particular should be carefully drafted so as to not provide even greater investor protections than what is already provided for under investment treaties.<sup>268</sup> Strengthening domestic laws is, however, a long-term and complicated effort for host states. Even more difficult than writing good law is undertaking institutional reform to ensure adequate monitoring and enforcement capacity. Although the ability to undertake such reform depends on the context and relevant capacity, governments and their donor partners can still prioritize efforts to do so. To the extent that gaps remain in the short-term, good contracts can help, as discussed below. However, contracts are not a panacea, and likewise require monitoring and enforcement.

Finally, host states can ensure that appropriate redress mechanisms are available to individuals whose right to food has been violated in pursuit of LSLBI. Although this is more of a remedial measure than a preemptive one, enabling remedies is important for minimizing the potential negative impacts

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<sup>265</sup> Ruggie, *supra* note 128, ¶ 30.

<sup>266</sup> *Id.*

<sup>267</sup> See SMALLER & MANN, *supra* note 134, at 9.

<sup>268</sup> For an example currently being proposed in Myanmar, see Part II.B.2 above.



of such investments. Redress mechanisms, both judicial and non-judicial, can be provided by the state. In addition, the state can also require investors to establish grievance mechanisms at the project level.<sup>269</sup> Such a requirement could be incorporated in domestic law or in contracts.<sup>270</sup> Project-level grievance mechanisms allow complaints to be brought by both community members and project employees. Redress mechanisms provided by the investor or the state are particularly important for individuals who have been harmed, given the lack of similar opportunities at the international level.<sup>271</sup>

Domestic law is arguably the most important vehicle through which host states can seek to protect human rights, including in the context of LSLBI. However, gaps in the legal regime can be addressed by the terms of investment contracts. As such, it is relevant to next consider which actions host states can take in negotiating land contracts to ensure greater human rights protections.

## 2. Investment Contracts

The terms of investment contracts can be exceedingly important when they are used to fill gaps in domestic law. They are therefore particularly significant where the domestic law in the host state is weak.<sup>272</sup> Contracts determine a number of rights and obligations of investors, as well as of the host government. In some cases, they also can help influence the outcomes of arbitral proceedings. LSLBI contracts are commonly negotiated between host states and investors over state-owned land. This means that, when the state negotiates land contracts, there are a number of measures it can take to provide greater human rights protections to individuals potentially affected by the investment.

Certain contractual terms can be included in investment contracts to ensure better right-to-food protections. For example, host states should ensure that water allocation is carefully addressed in contracts if it is not covered by a more comprehensive domestic law. The right to water and the

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<sup>269</sup> See GPBHR, *supra* note 221, ¶ 29 and accompanying commentary.

<sup>270</sup> See, e.g., *Grievance Mechanisms*, NEGOTIATIONS PORTAL FOR HOST COUNTRY GOVERNMENTS, <http://negotiationsupport.org/roadmap/grievance-mechanisms-0> (last visited Jan. 20, 2016).

<sup>271</sup> In some situations, there is the slight possibility that an investment agreement and arbitration under it can undermine state redress mechanisms. For example, Chevron initiated arbitration against Ecuador after plaintiffs from a community harmed by Chevron's predecessor's operations won a massive judgment in Ecuadorian courts.

<sup>272</sup> Mann, *supra* note 19, at 136.

right to food are closely interrelated human rights.<sup>273</sup> Water is a productive resource that is necessary for people who grow their own food, as well as for people who undertake farming as a livelihood source. Through these means, water access can affect both the first and third channels of food accessibility. In this context, it is important that an investment contract recognizes the rights of other users and enables equitable water access between the investor's operations and the local community needs. This may include a contractual provision that prohibits interference with the existing water rights of users when the LSLBI commences or, alternatively, a provision that facilitates appropriate changes in water use and allocation during the life of the contract.<sup>274</sup>

Host states can also better fulfill their right-to-food obligations by using the contract to encourage local content and employment. Increased employment opportunities, either directly or indirectly, can support individuals in realizing their right to food through the first channel of earning incomes from employment or self-employment.<sup>275</sup> Governments negotiating contracts can seek to establish certain goals or requirements for locally sourcing services and supplies, as well as encouraging local labor at all skill levels and training for nationals to take up higher managerial positions.<sup>276</sup>

In addition to provisions that could be included in contracts, there are also provisions that host states should avoid when negotiating investment contracts. For example, host states should avoid the use of stabilization clauses, which can restrict the applicability of legal reforms.<sup>277</sup> To the extent that stabilization clauses are included, they should explicitly carve out human rights legislation exceptions, as well as other social, environmental, and public policy legislation exceptions. This would ensure that states are able to undertake legislative or policy reforms to fulfill human rights that

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<sup>273</sup> See, e.g., SURABHI CHOPRA, INST. BUS. & HUM. RTS., THE RIGHT TO FOOD AND WATER: DEPENDENCIES AND DILEMMAS 11 (2011), [http://www.ihrb.org/pdf/Right\\_to\\_Food\\_and\\_Water\\_Dependencies\\_and\\_Dilemmas.pdf](http://www.ihrb.org/pdf/Right_to_Food_and_Water_Dependencies_and_Dilemmas.pdf).

<sup>274</sup> Mann, *supra* note 19, at 138.

<sup>275</sup> *Id.* at 139.

<sup>276</sup> WTO national treatment obligations create some prohibitions on local content requirements, but these prohibitions do not currently apply to the least developed countries. Countries subject to such prohibitions can still encourage local content, however, and can require investors to not discriminate against local suppliers. They may also be able to require investors to favor local suppliers so long as their prices and quality are comparable to that of other suppliers.

<sup>277</sup> Stabilization clauses are discussed in greater detail in Part II.A.3 above. See Mann, *supra* note 19, at 136.

would apply to the underlying investment. Another provision that should be avoided is a requirement that all food products produced through the LSLBI be exported to the home state. Such a requirement could be particularly problematic for host states in times of high global commodity prices, subjecting the state to expensive imports while simultaneously exporting food products. Although it is unclear how frequently contracts actually include such clauses, host states should avoid them if suggested.<sup>278</sup> Avoiding these types of provisions will enhance host states' ability to fulfill their right-to-food obligations in the context of LSLBI.

As noted above, host governments may encounter difficulties in their ability to negotiate satisfactory contracts that address all of their concerns. At the negotiating table, host governments are often out-lawyered and under-resourced, compared to their negotiating partner. In addition, governments do not always possess the capacity to fully monitor and enforce contractual investor obligations. Thus, host governments should not focus all of their efforts on negotiating strong contractual terms. Investment contracts can serve an important purpose, however, and are one tool that host states can employ to ensure that LSLBI respect the right to food.

As the previous discussion illustrates, host states can pursue a number of measures that would enable them to both demand higher rights standards from their corporate investors, and to defend their ability to respect, protect and fulfill human rights. In addition to these host state measures, home states can also employ measures to regulate outward investors so that their investments are more rights-consistent. These mechanisms are discussed in the next section.

### C. *Home State Measures*

Home states can undertake a range of measures to encourage more rights-supportive outward investment. For home states with right-to-food obligations, such efforts may be required under their extraterritorial obligations, as discussed above. Even setting aside questions of obligations, home countries have good reasons to encourage more rights-supportive

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<sup>278</sup> The authors have not seen any contracts that include this type of provision, but some commentators have asserted that some contracts do include such clauses. *See id.* at 136-37. Such clauses may have held increased interest for investors in the aftermath of the 2007-2008 food price crisis; they may be of less interest today. In another approach to the problem, the former UN Special Rapporteur on the right to food has argued that contracts should require local sales of a minimum percentage of crops produced under LSLBI, with the percentage of local sales increasing if global commodity prices reach certain levels. *See De Schutter, supra* note 250. The authors also have not seen any contracts with this provision.

outward investment, such as upholding their commitments under the Sustainable Development Goals.<sup>279</sup> States have also shown their willingness to enact laws with extraterritorial reach.<sup>280</sup> Options available to home states include ensuring that their policies do not inadvertently promote LSLBI with negative impacts, conditioning support to outward investors engaging in LSLBI, and establishing various disclosure requirements for outward investment. As with host state measures, no single home state effort will fully resolve the negative effects of problematic outward investment. Home states should thus seek to develop comprehensive strategies, combining multiple approaches to address the potentially negative rights impacts of outward land investment.

### 1. Assessing Home State Domestic Policies

Home state policies may inadvertently encourage outward investment in LSLBI that negatively affects human rights. One basic measure that home states can take is to assess their domestic policies for potential implications in relation to LSLBI abroad, and to take steps to remediate any policies that might pose problems. Such policies might include, for example, incentives to promote production of biofuels.

Government policies encouraging biofuel consumption have allegedly led to greater outward investment from European countries into less developed countries to establish agrofuel plantations. In some cases, this investment can have negative rights impacts, in particular by displacing smallholder farmers from the land and productive resources on which they rely.<sup>281</sup> In its concluding observations addressed to Belgium in 2013, the

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<sup>279</sup> The Sustainable Development Goals were adopted by the UN Member States in September 2015. As the Preamble notes, the goals “seek to realize the human rights of all.” *Transforming Our World: The 2030 Agenda for Sustainable Development*, SUSTAINABLE DEV., <https://sustainabledevelopment.un.org/post2015/transformingourworld> (last visited Jan. 20, 2016).

<sup>280</sup> For examples of home country measures to regulate overseas activities, see COLUM. CTR. SUSTAINABLE INV. & HERBERT SMITH FREEHILLS, HOME COUNTRY MEASURES (HCM) TAXONOMY (Nov. 7, 2014), [http://ccsi.columbia.edu/files/2014/01/CCSI-Taxonomy\\_-\\_Nov-10.pdf](http://ccsi.columbia.edu/files/2014/01/CCSI-Taxonomy_-_Nov-10.pdf). Prominent capital-exporting countries are a diverse group, and some may be more inclined than others to undertake initiatives that promote rights-supportive outward investment. While the question of how to incentivize disparate types of home countries to implement such measures is outside the scope of this Article, it is worth mentioning that even countries that are not traditionally viewed as concerned with these issues have taken some steps to shape their outward investors’ actions to have more positive impacts. For example, the Chinese government has issued some relevant CSR guidelines for publicly listed companies and state-owned enterprises.

<sup>281</sup> DEMBA DIOP ET AL., EU’S FRAMEWORK CONTRACT COMMISSION, FINAL REPORT:

UN Committee on Economic, Social and Cultural Rights focused on the government's promotion of agrofuels, noting that it was "likely to encourage large-scale cultivation of these products in third countries where Belgian firms operate and could lead to negative consequences for local farmers."<sup>282</sup> The Committee recommended that the government undertake human rights impact assessments to ensure that Belgian companies working on agrofuel projects do not negatively affect the rights of local communities in the countries in which they operate.<sup>283</sup>

Several options exist for home states that realize that certain state policies may encourage LSLBI that negatively affects the right to food. If the risks are deemed too high, they can consider rescinding such policies altogether. Alternatively, home states can attempt to modify such policies to alleviate the risks. For example, in February 2015, the European Parliament's Environment Committee backed a draft law that would cap the amount of traditional biofuels made from food crops by 2020.<sup>284</sup> This modification of existing policy could help mitigate the policy's negative right-to-food impacts; as the current UN Special Rapporteur on the right to

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ASSESSING THE IMPACT OF BIOFUELS PRODUCTION ON DEVELOPING COUNTRIES FROM THE POINT OF VIEW OF POLICY COHERENCE FOR DEVELOPMENT 1 (Feb. 2013), [http://ec.europa.eu/europeaid/sites/devco/files/study-impact-assesment-biofuels-production-on-development-pcd-201302\\_en\\_2.pdf](http://ec.europa.eu/europeaid/sites/devco/files/study-impact-assesment-biofuels-production-on-development-pcd-201302_en_2.pdf) (noting that "[e]nergy markets are a significant driver in the overall trend of large scale land acquisition. A clear link can be established between the EU bioenergy policy and the strong interest of European companies to acquire agricultural land in developing countries, especially in Africa. This also entails that the development of conventional biofuel production has an impact on access to natural resources, such as land and water and often leads to an increase in land concentration to the detriment of smallholder farming practices."); see also, e.g., Lorenzo Cotula, *'Land Grabbing' in Africa: Biofuels Are Not Off the Hook*, INT'L INST. FOR ENVTL AND DEV. (Oct. 16, 2013), <http://www.iied.org/land-grabbing-africa-biofuels-are-not-hook>.

<sup>282</sup> Concluding Observations Concerning the Fourth Periodic Report of Belgium, *supra* note 257.

<sup>283</sup> *Id.*

<sup>284</sup> See *EU Parliament Committee Backs New Limit on Food-Based Biofuels*, INT'L CTR. TRADE & SUSTAINABLE DEV. (Mar. 5, 2015), <http://www.ictsd.org/bridges-news/biores/news/eu-parliament-committee-backs-new-limit-on-food-based-biofuels>; Barbara Lewis, *EU Lawmakers Back New Limit for Food-Based Biofuel*, REUTERS (Feb. 24, 2015), <http://www.reuters.com/article/2015/02/24/us-eu-biofuels-idUSKBN0LS2D620150224>. See also DIDIER BOURGUIGNON, EUR. PARLIAMENTARY RESEARCH SERV., *EU BIOFUELS POLICY: DEALING WITH INDIRECT LAND USE CHANGE* (Feb. 2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/548993/EPRS\\_BRI\(2015\)548993\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/548993/EPRS_BRI(2015)548993_REV1_EN.pdf); Ecaterina Casinge, *Lawmakers Agree to Limit Food-Based Biofuels*, EURACTIV.COM (last updated Apr. 16, 2015), <http://www.euractiv.com/sections/sustainable-dev/meps-agree-limit-food-based-biofuels-313760>.

food, Hilal Elver, has observed, “it is clear that European biofuels policy as it stands is undermining global attempts to ensure that the world’s poorest families can feed themselves, as well as to fight climate change.”<sup>285</sup> Another option for home states is to introduce safeguards for problematic policies, such as requiring outward investors to undertake and disclose human rights impacts assessments when making investments incentivized by a state policy. This requirement could be imposed as a broader disclosure requirement, as discussed below, or could be required if outward investors seek to benefit from home state incentives tied to the policy under review. Disclosing the results of HRIAs could encourage investors to ensure more rights-consistent practices, while incentives made conditional on an HRIA could be denied when an assessment demonstrates that an investment would have a negative impact on the right to food.

## 2. Conditioning Support to Outward Investors

In addition to incentives tied to specific policies, home states frequently provide more general investment support to outward investors. They provide information to investors; offer financial measures, such as loans and insurance, or fiscal measures, such as tax exemptions; give diplomatic support; and secure protections through treaties.<sup>286</sup> Through these measures, home states often seek to advance outward investment that has domestic benefits, such as increased employment or tax revenue.<sup>287</sup> Home states that wish to encourage more rights-supportive outward investment can condition their investment support on positive impacts in the host country.<sup>288</sup> Home states concerned about the rights impacts of LSLBI could thus make any support for such investment contingent on the investor meeting certain human rights-related standards.<sup>289</sup>

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<sup>285</sup> Hilal Elver, *MEPs Take Note: Biofuels Are Synonymous with High, Volatile Food Prices*, EURACTIV.COM (Feb. 23, 2015), <http://www.euractiv.com/sections/energy/meps-take-note-biofuels-are-synonymous-high-volatile-food-prices-312347>.

<sup>286</sup> Johnson, Thomashausen & Cordes, *supra* note 229, at 2; for a discussion of home country measures, see Lise Johnson, *Absent from the Discussion: The Other Half of Investment Promotion*, (VALE COLUM. CTR. SUSTAINABLE INT’L INV., Columbia FDI Perspectives No. 79, Sept. 24, 2012), [http://ccsi.columbia.edu/files/2014/01/FDI\\_79.pdf](http://ccsi.columbia.edu/files/2014/01/FDI_79.pdf).

<sup>287</sup> Johnson, Thomashausen & Cordes, *supra* note 229, at 3.

<sup>288</sup> *Id.*

<sup>289</sup> Whether specific rules should be tailored for specific investment destinations (for example, to address particularly fraught operating environments where human rights violations are common) is outside the scope of this Article. However, if rules are designed based on international human rights instruments, or simply require compliance with certain relevant principles or guidelines, they would be aligned with agreed-upon standards and

Conditioning support to outward investors is not a new concept, and countries have taken various approaches in this regard. For example, the United States' development finance institution, the Overseas Private Investment Corporation, awards financing for outward investment but conditions such support on satisfactory environmental and social standards, which includes the "human rights dimensions of sustainable development."<sup>290</sup> Similarly, the government of the Netherlands provides financing to outward investors who invest in emerging markets, but requires that such investors comply with the OECD's Guidelines for Multinational Enterprises (OECD Guidelines), which outline responsible business practice.<sup>291</sup>

Conditions can also be placed on support for outward investment in certain sectors. For example, in mid-2014, Canada announced a new outward investor corporate social responsibility (CSR) policy in the extractive sector.<sup>292</sup> The policy, which builds on an earlier version, seeks "to help Canadian companies strengthen their CSR practices and maximize the benefits their investments can provide to those in host countries."<sup>293</sup> Among other things, the policy encourages the referral of disputes to

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equally applicable to companies operating within or outside the home country.

<sup>290</sup> The Overseas Private Investment Corporation (OPIC) Environmental and Social Policy Statement sets out the "general environmental and social requirements that OPIC applies in evaluating prospective projects seeking OPIC support and monitoring on-going OPIC-supported projects." OVERSEAS PRIV. INV. CORP., OPIC – ENVIRONMENTAL AND SOCIAL POLICY STATEMENT 1 (Oct. 15, 2010), [https://www.opic.gov/sites/default/files/consolidated\\_esp.pdf](https://www.opic.gov/sites/default/files/consolidated_esp.pdf). See also Karl P. Sauvart et al., *Trends in FDI, Home Country Measures and Competitive Neutrality*, 2012-2013 Y.B. INT'L INV. L. & POL'Y 24, n.85 (Andrea K. Bjorklund, ed.), <http://ccsi.columbia.edu/files/2014/03/Yb-12-13-ch.-1-8-Nov-13-stand-alone-final-for-website.pdf>.

<sup>291</sup> Financing is available for "companies or joint ventures in emerging markets that are majority owned or controlled by Dutch enterprises." *Fund Emerging Markets for Dutch Enterprises*, FMO ENTREPRENEURIAL DEV. BANK, <https://www.fmo.nl/fom> (last visited Jan. 20, 2016). Investors must show that they incorporate corporate social responsibility principles into their practices; fund managers check such compliance. *Background*, DUTCH GOOD GROWTH FUND, <http://english.rvo.nl/subsidies-programmes/background> (last visited Jan. 20, 2016).

<sup>292</sup> The policy is titled "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad." *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad*, GLOBAL AFF. CAN. (last updated June 8, 2015), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.

<sup>293</sup> *Id.*

Canada's National Contact Point (NCP) for the OECD Guidelines.<sup>294</sup> Compliance with the NCP review process is voluntary, but under the new policy, companies that choose not to participate in the process face withdrawal of Canadian Government advocacy support and economic diplomacy. In addition, non-participation may affect an application for financial support.<sup>295</sup> A recent request for NCP review concerned the operations of China Gold—a British Columbia-registered, Chinese-owned mining company listed on the Toronto Stock Exchange—in Tibet.<sup>296</sup> In connection with a man-made landslide that had killed 83 mine workers,<sup>297</sup> the request argued that the company had failed to adhere to the OECD Guidelines, had ignored warnings and protests about the risk of landslide, and had abused a number of human rights.<sup>298</sup> The company's failure to conduct its operations consistently with the CSR policy, as well as its refusal to engage in the NCP process, led to the loss of the Canadian Government's support.<sup>299</sup>

Just as Canada has done with respect to outward investment in the extractives sector, so other countries can do for outward investment in LSLBI. The above examples demonstrate how home states can make outward investor support conditional upon compliance with social or human rights standards. Home states can apply this type of stipulation to foreign investment in agriculture, requiring investors seeking government support to meet specified right-to-food standards, and withholding support when negative impacts exist and cannot be remedied.

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<sup>294</sup> *Id.*; see also *Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)*, GLOBAL AFF. CAN. (last updated Apr. 8, 2015), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu\\_id=1&menu=R](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R). For more on CSR, see *Corporate Social Reasonability*, GLOBAL AFF. CAN. (last updated Dec. 1, 2015), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>.

<sup>295</sup> See *Final Statement on the Request for Review Regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region*, GLOBAL AFF. CAN. (last updated Apr. 8, 2015), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* In addition, this case is notable for the Canadian NCP's determination that it had jurisdiction over a Chinese company due to its Canadian ties and the company's subsequent loss of Canadian Government support—potentially opening the doorway for future home state regulation of foreign-owned entities and their activities abroad.



### 3. Implementing Disclosure Requirements

Home states can also strive to shape outward investment indirectly, by implementing various disclosure requirements that incentivize more responsible business conduct. Such requirements may simply require transparency over aspects of existing operations, or may also impose due diligence obligations. Greater transparency over outward investment in LSLBI is a necessary prerequisite to understanding the negative rights impacts of investment. Transparency also serves as a powerful tool that encourages investors to mitigate their reputational risks by enacting stronger safeguards and advancing more responsible operations.

Home states interested in devising disclosure requirements for outward investors engaging in LSLBI can draw further lessons from efforts pertaining to the extractive industry. For example, the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 imposes disclosure obligations on extractives companies in relation to payments to governments.<sup>300</sup> Further, the legislation includes a “conflict rule” that requires publicly listed companies in the United States whose products may contain “conflict minerals” from specific countries to comply with assessment and reporting requirements, including conducting supply chain due diligence.<sup>301</sup> A similar example can be found in the European Union. A 2013 European Commission Directive requires publicly listed extractive and logging companies, as well as non-listed large companies, to report government payments.<sup>302</sup> This transparency over payments is meant to create greater accountability related to natural resource investment.<sup>303</sup> Additionally, in 2014, an EU regulation to establish a voluntary self-certification system for importers of conflict minerals was proposed.<sup>304</sup> A year later, the European Parliament voted to overturn the proposal for a voluntary plan, asking instead for a significantly more robust approach of mandatory certification covering both importers and downstream

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<sup>300</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220 (2010).

<sup>301</sup> *Id.* § 1502.

<sup>302</sup> *New Disclosure Requirements for the Extractive Industry and Loggers of Primary Forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – Frequently Asked Questions*, EUR. COMMISSION (June 12, 2013), [http://europa.eu/rapid/press-release\\_MEMO-13-541\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-541_en.htm).

<sup>303</sup> *Id.*

<sup>304</sup> *EU Proposes Responsible Trading Strategy for Minerals from Conflict Zones*, EUR. COMMISSION (Mar. 5, 2014), [http://europa.eu/rapid/press-release\\_IP-14-218\\_en.htm](http://europa.eu/rapid/press-release_IP-14-218_en.htm) (last visited Jan. 20, 2016). For more information on these disclosure requirements, see Johnson, Thomashausen & Cordes, *supra* note 22929, at 14-16.

companies.<sup>305</sup>

These disclosure measures related to extractive industry operations illustrate the actions that home states can take to catalyze greater transparency over outward investment in LSLBI. Home states that have already enacted such disclosure requirements for the extractives sector could consider expanding them to also apply to corporations engaged in LSLBI. This might be a more efficient approach, and would be a useful step towards greater transparency. It risks, however, a disclosure requirement that is not tailored to the most pressing issues related to LSLBI. Alternatively, home states can develop similar requirements of outward investors or listed companies involved with LSLBI. A more tailored approach could ask LSLBI investors for disclosure focused on the human rights impacts of their investments, including information on forced evictions, displacement, and other issues that have negative right-to-food impacts. Such requirements could also ask for the disclosure of land leases from companies that are undertaking LSLBI or whose subsidiaries are involved with LSLBI since contract transparency can help lead to greater accountability with respect to land deals.<sup>306</sup> By developing new requirements rather than adapting existing ones, home states can learn from current measures while establishing requirements that are adapted to the issues and optimized to encourage better investment.

These various measures—assessing and adapting domestic policies, conditioning support to outward investors, and implementing disclosure requirements—are all avenues through which home states can seek to influence outward investment in LSLBI. They are primarily preemptive, through incentivizing responsible investment that does not negatively affect human rights. As with the host state measures discussed above, home states should also establish redress mechanisms for right-to-food violations associated with outward investment in LSLBI. This includes allowing tort claims in domestic courts for human rights abuses.<sup>307</sup> For example, courts in

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<sup>305</sup> *Conflict Minerals: MEPs Ask for Mandatory Certification of EU Importers*, EUR. PARLIAMENT NEWS (May 20, 2015), <http://www.europarl.europa.eu/news/en/news-room/content/20150513IPR55318/html/Conflict-minerals-MEPs-ask-for-mandatory-certification-of-EU-importers>.

<sup>306</sup> *See, e.g.*, OPEN LAND CONTRACTS, <http://www.openlandcontracts.org/>; *see also* KAROL C. BOUDREAU & YULIYA NEYMAN, USAID, OPERATIONAL GUIDELINES FOR RESPONSIBLE LAND-BASED INVESTMENT 38-39 (Mar. 2015), [http://www.usaidlandtenure.net/sites/default/files/USAID\\_Operational\\_Guidelines\\_updated.pdf](http://www.usaidlandtenure.net/sites/default/files/USAID_Operational_Guidelines_updated.pdf).

<sup>307</sup> While home states can proactively ensure that such claims can be brought in domestic courts, they can also consider incorporating relevant commitments into future investment treaties that they sign. For example, clauses that enable judicial action within the home state

countries such as England and the Netherlands have begun entertaining tort claims against domiciled entities for abuses committed overseas, even though similar types of claims have been recently curtailed in the United States.<sup>308</sup> Outside of the court system, countries can support other types of redress mechanisms, such as OECD National Contact Points, that address concerns related to outward investment. A comprehensive home state strategy that incorporates preemptive and redress measures can encourage more responsible outward investment while providing remedial opportunities for individuals who, despite such measures, were harmed by investment in LSLBI. Taken together, these efforts can lead to more rights-consistent outward investment and help home states meet their extraterritorial right-to-food obligations.

### CONCLUSION

Investment in agriculture is essential for reducing poverty and combating hunger. For too long, agriculture has been neglected by governments, donors, and the private sector, resulting in detrimental impacts for food security and rural livelihoods. Yet the way in which such investment occurs determines the immediate impact on some of the world's poorest and most food insecure: rural smallholder farmers and individuals whose livelihoods depend on access to productive resources. Standard corporate approaches to land-based agricultural investment can violate human rights, while existing legal regimes are not geared towards equitable, sustainable, and rights-consistent investment. Although changes are occurring within international investment and human rights law, these

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legal system are included in the IISD Model International Agreement on Investment for Sustainable Development. Article 17 notes that "Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state." Article 31 focuses on ending *forum non conveniens* or similar rules for certain cases, noting, "Home states shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Parties." HOWARD MANN ET AL., INT'L INST. FOR SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT 11, 16 (Apr. 2005), [https://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

<sup>308</sup> See Johnson, Thomashausen & Cordes, *supra* note 229, at 18 (citing Nicola Jägers et al., *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, 107 AM. J. INT'L L. UNBOUND e-36-41 (2014), [https://www.asil.org/sites/default/files/AGORA/201401/Jagers%20et%20al%20AJIL%20Unbound%20e-36%20\(2014\).pdf](https://www.asil.org/sites/default/files/AGORA/201401/Jagers%20et%20al%20AJIL%20Unbound%20e-36%20(2014).pdf)).

regimes are presently inadequate for protecting the right to food of community members affected by large-scale land-based investment. More immediately, in order to meet their legal obligations with respect to the right to food, host and home states must take action to ensure that corporate agricultural investments are responsible. For high-income home states, the measures discussed in this Article offer a practical way to give effect to global development goals. For host states, they offer an avenue for ensuring that people do not go hungry and that investment occurs in a way that respects rights. Together, home and host state measures offer an opportunity to shape foreign direct investment in agriculture into a positive force: one that benefits both investors and communities and that promotes, rather than harms, the right to food.