Transnational Agricultural Investments and Host State's Export Restriction Flexibilities under International Economic Law

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I. INTRODUCTION

This article explores agricultural export restriction disciplines under international economic law, mainly international trade and investment laws, in the particular context of the recent translational race for farmland. A number of reasons justify this undertaking. Firstly, the use of export restrictions of various sorts by a number of countries in response to the food price spikes in 2007-2008 exacerbated the food crisis. Part of the explanation for this pervasive use of export restrictions is that the World Trade Organization ("WTO") law discipline on export restrictions is too weak to restrain exporting countries from introducing and maintaining these measures. As such, agricultural export restrictions have gained some attention in various regional and global fora that have been calling for tighter disciplines, although to date there is little progress to this effect. Secondly, agricultural export restriction measures have also been one of the push factors for increasing acquisition of farmland abroad in recent years. Indeed, many of these land deals target either food security of home states (export back home), or generating stable profit through, among others, secure access to international markets. Hence, possible export restriction measures by host states, even when dictated by local necessities, would be a counter move to these goals, and likely lead to tensions between the competing interests of foreign investors and host states (local communities). This is particularly so in the context of sub-Saharan African host countries, which are often themselves facing frequent food insecurity (hunger) challenges.

Admittedly, export restrictions may not be a panacea to ensure food availability in local markets, let alone access at household level. Thus, it may be argued that so long as there are alternative sources of food supply, mainly the international market, the emphasis on export restrictions is a misplaced concern.2

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1. See AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981) (demonstrating that nationwide food availability does not necessarily translate into household food access).

2. See Siddhartha Mitra & Tim Josling, Agricultural Export Restrictions: Welfare Implications
But, given that it is the lack of confidence on the international market that has in
the first place propelled importing (investor) countries to acquire land abroad, there
would hardly be an overriding logic that assures the reliability of this same market
for host states. Indeed, at times, export restriction maybe one of the only few
policy options available to host states.

Despite the increasing attention agricultural export restrictions have gained in
recent years, and the complex issues the potential application of these measures to
foreign agricultural investments may involve, the existing literature tends to focus
more on WTO law and less on how WTO law interact with the disciplines existing
under other strands of international economic law, notably international investment
law. This work is an attempt to address this gap in the existing body of literature.
The article makes a claim that despite the relatively loose WTO discipline on
export restrictions and hence the increasing call for tighter disciplines in recent
years, transnational national agricultural investments, which are further subject to
international investment law, are already subject to tighter export restriction
disciplines in a manner that inhibits hosts states policy space to respond even to
local hunger.

The article is organized as follows. Following this introductory section, part
II will provide for the general context in which these farmland acquisitions are
happening; noting that food security (food demand) in home states is a
significant—if not necessarily the principal—driver of these investments, and
highlighting the relevance of export restrictions measures to foreign agricultural
investments in sub-Saharan Africa host states often facing hunger challenges such
as Ethiopia. Part III will explore this ability of host (exporting) states under the
WTO laws, particularly the General Agreement on Tariffs and Trade (“GATT
1994”) and the WTO Agreement on Agriculture) and jurisprudence. This paper
will demonstrate that in the light of indeterminate and subjective nature of the key
terms defining the conditions that might justify recourse to export restriction
measures, weak procedural requirements that can easily be eschewed, and the
absence of limit to the use of export taxes (that otherwise have similar effect to
quantitative restrictions), the WTO leaves member states with adequate room to
introduce agricultural export restriction measures. Part IV will analyse how WTO
law interacts with international investment law in disciplining export restrictions.
The article concludes, in part V, that in the context of transnational agricultural
investments, WTO law flexibilities on export restrictions on ground of food
security would be diminished when read in the light of relevant disciplines under
international investment law and practice, inhibiting host states ability to respond

3. See, e.g., ROBERT HOWSE & TIM JOSLING, AGRICULTURAL EXPORT RESTRICTIONS AND
INTERNATIONAL TRADE LAW: A WAY FORWARD 21–22 (Int'l Food & Agricultural Trade Pol'y Council
ed., 2012) (“[C]onsideration also needs to be given to the disciplines [on agricultural export restrictions]
that currently exist in regional trade agreements and bilateral investment treaties.”).
to even local hunger.

I. TRANSNATIONAL AGRICULTURAL INVESTMENTS: THE CONTEXT

A spike in food prices of 2007 (which escalated even further in 2008) made food unaffordable in many countries, and sparked a wave of ‘food riots’ in over forty countries. In response, some importing countries engaged in ‘panic purchasing’ of grains while others attempted to negotiate long-term grain supply agreements with exporting countries. On the other hand, a number of grain exporting countries began introducing export restriction measures partly to limit food prices inflation at home—producing a growing realisation that the global market was no longer reliable source of food. This propelled relatively rich countries with shortage of arable land and water to outsource food production through purchase or lease of farmland abroad. In addition, the rise in the price of oil during the same period and policy responses to climate change imperatives resulted in considerable demand for alternative and renewable sources of energy, such as biofuel, which further contributed to the increasing demand of arable land. Also, as a result of the global financial crisis, investments in land (agriculture) were ‘rediscovered’ as ‘safer’ ventures. Thus, the convergence of global food, energy (fuel) and financial crises—so called “the triple-F crisis”—of recent years triggered the increasing acquisitions of farmland mainly in the global South and most notably in sub-Saharan Africa by both foreign private investors and

6. See Howard Mann & Carin Smaller, Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?, SUSTAINABLE DEV. INNOVATION BRIEFS 2, Jan. 2010, http://sustainabledevelopment.un.org/content/documents/no8.pdf (nothing that “at least 25 countries imposed export bans or restrictions in 2008”); see MCMAHON, supra note 5 (explaining that “as a number of countries resorted to such measures, no one country was on the ‘high moral ground’ to challenge the legality of the measures”). Arguably such measures could be justified under GATT and the Agreement on Agriculture of the WTO. Later sections of this article will argue that the situation will most likely be different if the food (grain) belongs to foreign investors as in the case of transnational agricultural investments.
9. See KLAUS DEININGER ET AL., WORLD BANK, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? xxv (2011) (“[T]ogether with the reduced attractiveness of other assets due to the financial crisis, the boom led to a ‘rediscovery’ of the agricultural sector by different types of investors and a wave of interest in land acquisitions in developing countries.’”).
11. DEININGER ET AL., supra note 9, at 51 (noting that out of the 56.6 million hectares of land deals reported between 2008 and 2009, two-thirds of the total area, 39.7 million hectares, involves sub-Saharan Africa). The Land Matrix, on the other hand, reported that out of the 33.9 million hectares of
sovereign wealth funds, a phenomenon often infamously referred to as ‘land grabs.’

At the receiving end too, host states are not passive partners. Indeed, they have long been courting for large scale investment in agriculture through a series of measures ranging from the waves of land law reforms to incentives of various sorts, although it now appears that only the recent global ‘crises’ induced such investments than those incentives. The often-claimed potential benefits of these investments to host states include enhanced food security, employment opportunity, and access to new farm technologies, export earnings, and development goals in general. Yet, whether these investments deliver on those counts, or even, whether host governments are ‘neutral’ agents promoting the interest of their people in this process is quite contentious. Indeed, it appears that the discontents against these land deals in different parts of the world speak to

land deals between 2008 and 2011, 60% happened in sub-Sub-Saharan Africa. See The Online Public Database on Land Deals, LAND MATRIX, http://www.landmatrix.org/en/ (last updated Nov. 25, 2014). While the emerging literature on the recent farmland deals generally point to an increasing trend, the actual size of land transferred to investors, however, is far from certainty. The computation of the scale of land deals draws heavily on official documents, which reveal only a small percentage of such deals and/or media reports, which tend to overstate the deals; as such creating a sense of “false precision.” See generally Ian Scoones et al., The Politics of Evidence: Methodologies for Understanding the Global Land Rush, 40 J. PEASANT STUD. 469 (2013), and Carlos Oya, Methodological Reflections on “Land Grab” Databases and the “Land Grab” Literature “Rush”, 40(3) J. PEASANT STUD. 503, 506 (2013).

12. LAND MATRIX, supra note 11. According to the latest report by the Land Matrix, a partnership of civil society and intergovernmental organizations, the top ten investor countries are: United States, Malaysia, Singapore, Arab Emirates, United Kingdom, India, Netherlands, Saudi Arabia, Brazil, and China. Id.


15. See generally THE GLOBAL FARM RACE: LAND GRABS, AGRICULTURAL INVESTMENT, AND THE SCRAMBLE FOR FOOD SECURITY (Michael Kugelman & Susan L. Levenstein eds. 2013); Olivier De Schutter, How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland, 38 J. PEASANT STUD. 249 (2011); Narula, supra note 8.

16. E.g., DEININGER ET AL., supra note 9. The World Bank’s report, for example, while noting the potential opportunities farmland investment presents for both investors and host states (even local people) found that “in many cases, potential benefits from such [large scale farmland] transfers are not realized or outweighed by negative impacts.” Id. at 5. FAO’s report also notes that, “While a number of studies document the negative impacts of large-scale land acquisition in developing countries, there is much less evidence of its benefits to the host country, especially in the short term and at local level.” FAO, TRENDS AND IMPACTS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRY AGRICULTURE: EVIDENCE FROM CASE STUDIES 336 (2012), http://www.fao.org/docrep/017/i3112e/i3112e.pdf.
these doubts. In 2008, for instance, the South Korean business group Daewoo Logistics attempted to lease for ninety-nine years 1.3 million hectares of land (roughly a quarter of the country’s arable land) from the Malagasy government to produce rice to be exported back to Korea, despite Madagascar’s dependence on U.N. food aid. A popular riot against the deal culminated in the overthrow of Madagascar’s President Marc Ravalomanana—the new government axed the deal in March 2009. Similar discontents have been reported in many other countries, including those in sub-Saharan Africa region.

While land acquisitions abroad have historical roots in imperial expansions and colonial plantations, in contrast to their historical antecedents, the recent transnational land acquisitions are occurring at scale and pace not seen before, and center on production of staple foods and biofuels or simply speculation. While food and biofuel are regarded as significant drivers of the recent transnational land acquisitions, their respective share is far from clear. Indeed, food and biofuel production are competing drivers. Whereas the early ‘land grabs’ reports presented food as a major driver, some recent works point to biofuels as the major driver. For example, the World Bank’s Policy Research Working Paper, titled What Drives the Global “Land Rush”? documents “[d]ependence on food imports emerges as a strong driver of demand for land acquisition.”


Land Matrix database, only about fourteen percent of the land acquisitions in sub-Saharan Africa are for food production, while non-food production, multipurpose (several crops in different categories), and flex crops (crops with multiple uses across food, feed, fuel and industrial purposes) constitute forty-three, thirty, and thirteen percent respectively. As long as the share in the ‘multipurpose’ and ‘flex crops’ is not provided, it is difficult to tell the absolute share of food and biofuel from the database. The share of the driving factors also differs from country to country. What makes the food-fuel distinction further blurred is also the fact that some crops officially proposed for biofuel production (non-food category) can easily be shifted to food (animal feed) depending on the dynamics of demand and profit—maize and soybean are apt examples here. The converse may not, however, be the case, since a shift from food to biofuel requires more investment in processing facilities. At any rate, the more arable land is used for biofuel than food production, the more pressure and competition over the ‘remaining’ arable land for production of food.

Reportedly, the pace of farmland acquisitions has slowed over the last two years; yet the growing demand for food and biofuel point to further demand for farmland. The World Bank, for instance, predicts that 18 to 44 million hectares of land will be required for biofuel production by 2030. The U.N. Food and Agriculture Organization (“FAO”) also reports that surging global population and growing demand for food pose major challenges for agriculture as world food production will need to increase by sixty percent by 2050 while at the same time coping with a changing climate. Thus, these land deals largely derive their justificatory power from food security although “[t]here is still a lack of systematic evidence on the food security impacts of agricultural FDI.” It is


23. LAND MATRIX, supra note 11.

24. In the case of Ethiopia, for instance, out of thirty-eight farmland deals publicly available, four land deals (constituting 2/3 of the large scale land acquisitions by foreign investors) are exclusively for food crops production, while the remaining thirty-four land deals are for the production of either agricultural raw materials such as cotton or a mix of food and non-food crops. Ministry of Agriculture, Land Leased Information, FED. DEM. REP. OF ETHIOPIA, http://www.moa.gov.et/web/pages/land-leased (last visited Apr. 9, 2015). The crops mentioned under the column ‘investment type’ are the main areas of investment; but often, the contracts mention for the possibility of growing additional crops which makes the food vs. non-food distinction difficult. Id.

25. DEININGER ET AL., supra note 9, at 15.


27. See, e.g., Maria Cristina Rulli & Paolo D’Odorico, Food Appropriation Through Large Scale Land Acquisitions 9 ENT’L RES. LETTERS 1 (2014), http://iopscience.iop.org/1748-9326/9/6/064030/article (noting that “It is expected that in the long run large scale land acquisitions (LSLAs) for commercial farming will bring the technology required to close the existing crops yield gaps. . . and [that up] to 300–550 million people could be fed by crops grown in the acquired land, should these investments in agriculture improve crop production and close the yield gap.”).

therefore imperative to explore the effect of these land deals on host countries and their communities, particularly those in sub-Saharan Africa, a region which hosts the highest proportion of hungry people.29 One aspect of such undertaking could be a closer look at the terms on which these land deals take place including what happens to the produce. This article therefore explores the leverage host states may have over food produced through transnational agricultural investments by analysing how international trade and investment laws interact in ordering potential export restriction measures applicable to these investments.

III. FLEXIBILITIES AND LIMITS OF WTO LAW ON AGRICULTURAL EXPORT RESTRICTIONS

A. WTO law and jurisprudence

Within international trade law—mainly WTO law—framework, agricultural export restrictions are disciplined under the GATT 1994,30 the Agreement on Agriculture (“AoA”),31 and the Agreement on Trade Related Investment Measures (“TRIPS”).32 The GATT generally prohibits quantitative import and export restrictions but, by way of exception, allows members to introduce export restriction measures, among others, to address critical local food shortages.33 The AoA provides for procedural requirements that a member introducing export restriction measures shall comply with.34 The TRIPs Agreement, on the other hand, prohibits trade related investment measure that is inconsistent with GATT Article III (national treatment) or Article XI (quantitative restrictions).35

Thus, Article XI:1 of the GATT 1994, which provides for a general elimination of quantitative restrictions in relevant parts, states: “[n]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party on the importation . . . or on the exportation or sale for export of any product . . . .”36 The scope of “prohibitions or restrictions” envisaged under Article XI is very broad. As the panel in India-Quantitative Restrictions set out:

[T]he text of Article XI:1 is very broad in scope, providing for a general

29. See FOOD & AGRIC. ORG. UNITED NATIONS, THE STATE OF FOOD INSECURITY IN THE WORLD: THE MULTIPLE DIMENSIONS OF FOOD SECURITY 8 (2013), http://www.fao.org/docrep/018/i3434e/i3434e.pdf (noting that from 2011-2013, sub-Sahara Africa hosted 222.7 million chronically hungry people (24.8 percent of the total population, which is the largest proportion in the world)).
33. See GATT, supra note 30, at art. XI(1), XI(2)(a).
34. See AoA, supra note 31, at art. 12.
35. See TRIPS Agreement, supra note 32, at art. 2.
36. GATT, supra note 30, at art. XI(I).
ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges.' As was noted by the panel in Japan—Trade in Semiconductors, the wording of Article XI:1 is comprehensive: it applies ‘to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes, or other charges.’ The scope of the term ‘restriction’ is also broad, as seen in its ordinary meaning, which is ‘a limitation on action, a limiting condition or regulation.’

In principle, therefore, a WTO member may not introduce or maintain any export (and import) restriction nor prohibition measures (other than duties, taxes or other charges), even on grounds of food security. By way of exception, however, as provided under Article XI:2(a), a WTO member is allowed to take “[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.” Also, at least arguably, the general exception provisions of the GATT—Article XX, notably paragraph (j) which allows restrictions that are “essential to the acquisition or distribution of products in general or local short supply”—could also be invoked to justify restriction of exports of products, especially products which can be used as food or raw material (for example, for production of biofuel), such as maize and soybean.

In order to justify export “prohibition or restriction” measure on ground of food security, the measure needs to meet both the substantive requirements of GATT Article XI:2(a)—including the existence of “critical shortage” of foodstuffs and the “temporary” application of the measure—and the procedural requirements of notification and consultation under AoA Article 12. An export restriction measure that is justified under GATT Article XI:2(a) indiscriminately applied to both domestic and foreign producers (exporters) in compliance with the AoA Article 12 shall be deemed to be consistent with the TRIPs, as the latter only prohibits TRIPs that are inconsistent with the GATT Article III (national treatment) or Article XI (quantitative restrictions).

Nonetheless, what constitutes ‘critical,’ ‘shortage,’ as well as ‘temporarily’ application under GATT 1994, Article XI: 2(a) is far from straightforward. Apart

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38. GATT, supra note 30, at art. XI(2)(a).
39. Id. at art. XX.
40. Id. at art. XI:2(a).
41. AoA, supra note 31, at art. 12(1)(b).
42. GATT, supra note 30, at arts. III, XI. Note also that Article 2 of the TRIPS Agreement, which prohibits trade measures is inconsistent with the provisions of Article III and Article XI of GATT 1994. This is further qualified by the introductory phrase explaining that such acts must be taken “[w]ithout prejudice to other rights and obligations under GATT 1994.” This is indicative of the fact that a taken measure which is justified under the exception clauses under GATT must not be inconsistent with the provisions of the TRIPS Agreement.
from a mere reference to the term “food security,” neither does the AoA, which sets the procedural requirements for the application of GATT, nor Article XI:2(a) provide for precise definition of the conditions that justify the invocation of this provision. And this omission seems intentional; as for example Smith observes: “[t]he omission of a definition of food security appears [to be] deliberate and implies that food security is not a matter for the rules per se, but is something separate which is to be determined by other international agreements and/or by the WTO Member.”

There is also no adequate GATT/WTO jurisprudence guiding the interpretation of GATT Article XI:2(a)—to date, the GATT/WTO Dispute Settlement Body considered only few cases relating to export restrictions. Among these cases, it is in the China-Raw Materials case that the panel has directly dealt with some of the key terms under GATT Article XI:2(a), albeit in the context of raw materials, as opposed to foodstuff. Thus, with regard to what constitutes ‘critical shortage’, the Panel ruled that:

The meaning of ‘shortage’ as a deficiency in the quantity of goods appears to be common ground with the parties and the Panel also considers this to be its meaning as used in Article XI:2(a). In the Panel’s view, the term ‘critical’ indicates that a shortage must be of ‘decisive importance’ or ‘grave,’ or even rising to the level of a “crisis” or catastrophe. Article XI:2(a) states that measures in the form of restrictions or bans may be used on a temporary basis to either outright

43. Fiona Smith, Food Security and International Agricultural Trade Regulation: Old Problems, New Perspectives, in Research Handbook on the WTO Agriculture on the WTO Agriculture Agreement 31, 40 (Joseph A. McMahon & Melaku Geboye Desta eds., 2012), http://discovery.ucl.ac.uk/1307200/1/1307200_FoodSecurityartFinal.pdf. In her article, the author further notes that “it is then for the Member to decide what is most appropriate for the needs of its domestic population in food security terms. Whether the policies work and the Members’ population benefits are not relevant considerations for the current international agricultural trade rules.” Id.

prevent' or otherwise 'relieve' such a shortage.\textsuperscript{45}

The Panel is persuaded by the complainants' argument that the requirement that measures be applied 'temporarily' contextually informs the notion of 'critical shortage.' In this sense, as noted by the European Union, if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis. If a measure were imposed to address a limited reserve of an exhaustible natural resource, such measure would be imposed until the point when the resource is fully depleted. This temporal focus seems consistent with the notion of 'critical,' defined as 'of the nature of, or constituting, a crisis.'\textsuperscript{46}

Thus, from the reading of \textit{China-Raw Materials} Panel's report, it transpires that "critical shortage" refers to a shortage that is of "decisive importance," "grave," or of such a nature that amounts to "crisis" although what constitutes "decisive importance," "grave," or "crisis" begs for further interpretation of whoever invoking (or challenging) the measure in question.

With regard to the temporality of the measure the panel noted that:

\begin{quote}
\textit{[T]he ordinary meaning of 'temporarily' is 'for a time only' and 'during a limited time.' The term 'limited time' means 'appointed, fixed' and 'circumscribed within definite limits, bounded, restricted.' These definitions suggest a fixed time-limit for the application of a measure. Thus, on its face, Article XI:2(a) would appear to justify measures that are applied for a limited timeframe to address 'critical shortages' of 'foodstuffs or other products essential to the exporting contracting party.'}\textsuperscript{47}
\end{quote}

In the Panel's view, on the basis of textual interpretation, "temporarily" means "limited timeframe," implying that members' export restriction measures under Article XI:2(a) shall specify the duration of the measure, precluding indefinite and long-term export restriction measures. The Panel further strengthened this textual interpretation with contextual interpretation, maintaining that otherwise interpretation of "temporarily" under Article XI:2(a) would undermine the import of GATT Article XX(g).\textsuperscript{48} But in response to China's appeal, the Appellate Body, while generally upholding the Panel's report, reversed the Panel's interpretation of the term "temporarily" as "limited time frame,"\textsuperscript{49}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{45} China Rare Earths Report, \textit{supra} note 44, \textsection 7.296.
\item\textsuperscript{46} Id. \textsection 7.297.
\item\textsuperscript{47} Id. \textsection 7.255.
\item\textsuperscript{48} Id. \textsection 7.298.
\end{itemize}
\end{footnotesize}
implying that even long-term export restriction measures could be justified under GATT Article XI:2(a).

As with most WTO disputes, the taint of protectionism\(^{50}\) seems to have influenced the Panel's strong legal approach to this case. Although a WTO adjudicator faced with a true food security crisis may not necessarily approach Article XI(2) in the same way as the Panel in \textit{Raw Materials}, given the fact that this is the first case in which this provision is seriously engaged in the WTO dispute settlement, it may have important implications for understanding potential export restriction measures applicable to transnational farmland investments (produces). As noted before, in most of the sub-Saharan African countries, which are the principal destinations of the recent farmland investments, food shortage is rather a perpetual problem.\(^{51}\) Thus, in the light of the Panel's report, such shortages may defy the qualification of 'critical shortage' which draws its strength from the \textit{temporality} of the problem (that can be prevented or alleviated by temporarily restricting food exports), making the justification under GATT Article XI:2(a) difficult, if not impossible. But given the Appellate Body's broad interpretation of the term "temporarily," it can be contemplated\(^{52}\) that even long-term export restriction measures taken in response to the type of incessant food shortages faced by most of sub-Saharan African countries could be justified under GATT 1994.

Even when an export restriction measure is prima facie justified under Article XI:2(a), as noted before, compliance with further procedural requirements under the AoA is still necessary. Thus, AoA Article 12 requires any Member instituting new export prohibition or restriction on foodstuffs to "give due consideration to the effects of such prohibition or restriction on importing Members' food security."\(^{53}\) Moreover, before instituting such measure, the member shall also notify, in writing, the Committee on Agriculture as to the nature and duration of the measure, and shall, upon request, consult with and provide necessary information to any other member having a substantial interest as an importer with respect to any matter related to the measure in question.\(^{54}\) A developing country member, however, is exempted from these requirements unless it is a net-food exporter of

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50. For example, although China had pleaded for environmental justification (that raw materials were an exhaustible natural resource and thus restrictions on production/consumption were required), its measures were not even-handed—it has not reduced levels of domestic consumption of those essential industrial inputs whose price had dropped significantly with the export restraints. \textit{Id.} at \textit{¶}5-6.
52. Although the WTO Dispute Settlement Body does not follow the principle of \textit{stare decisis} per se, the practice suggests that panels to some extent, and the Appellate Body to a greater extent, draw on their prior rulings. WTO, \textit{Chapter 7: Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings} in \textbf{DISPUTE SETTLEMENT SYSTEM TRAINING MODULE} \textit{¶}7.2, \url{https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm} (last visted Sept. 23, 2015).
53. AoA, \textit{supra} note 31, art. 12(1)(a) (emphasis added).
54. \textit{Id.} at art. 12(1)(b).
the specific foodstuff concerned. The requirements under AoA Article 12 are, however, akin to 'soft law' for eschewing these rules does not carry an express penalty on the concerned exporting country. The experience to date also suggests that these provisions have not effectively restrained members from using export restrictions and hence, unlikely will do in the future.

On the other hand, as the China–Raw Materials case suggests, the WTO discipline on export restriction may not be completely ineffective. As, for example, Robert Howse and Tim Josling contend on the basis of the outcome of this case, food exporting countries may not respond to local food crisis in a manner that is indifferent to the food security impacts on import-dependent countries. They further suggest that there is a room for the WTO to collaborate with another international organization, which is primarily focused on questions pertaining to international and national food security to assess the existence of a ground that justifies export restriction as provided under WTO laws. Given the sensitive nature of hunger (food security) and the protection the agricultural sector has been accorded historically, however, it may not be easy to conceive that WTO members would entrust the mandate to determine the existence of "critical shortage of foodstuff" in their territory to an external body.

Thus, notwithstanding the fact that few countries that have recently acceded to the WTO accepted stricter export restriction commitments, so called “WTO plus” commitments, the WTO disciplines on export restrictions, including on ground of food security, remain very loose. This is manifested partly in the interpretive difficulty of the key, yet indeterminate and subjective, terms—including “critical,” “shortage,” and “temporarily”—envisaged under GATT Article XI:2(a) compounded by the AoA’s essentially hortatory procedural requirements.

But what explains the ‘under-regulation’ of export restrictions? One explanation is that, WTO members “did not feel at the time [of the negotiation of the AoA] there were good reasons to be concerned about the possibility of countries finding it convenient to restrict their exports.” Another explanation has to do with the prevailing asymmetry of bargaining power among countries during the Uruguay Round–agricultural trade negotiation remained largely, and firmly, in the hands of net food exporting developed countries for whom high international

55. Id. at art. 12(2).
56. See, for example, GIOVANNI ANANIA, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, AGRICULTURAL EXPORT RESTRICTIONS AND THE WTO: WHAT OPTIONS DO POLICY-MAKERS HAVE FOR PROMOTING FOOD SECURITY?, ISSUE PAPER NO. 50 (2013).
57. Id. at 17.
59. Id. at 3.
60. Id.
61. The countries that had to accept obligations which go beyond, to different extents, existing WTO rules (and hence ‘WTO-plus’ commitments) include: China, Mongolia, Russia, Saudi Arabia, Ukraine and Vietnam. For more on this see ANANIA, supra note 56, at 1.
62. Id. at 18.
prices and their impact on food security is a low priority compared to making markets more open and profitable for their exports.\textsuperscript{63} It is thus worth considering what, if any, has changed under the current Doha Round of trade negotiations.

\textbf{B. The Doha Round Negotiations}

Agricultural, and hence food, export restrictions have been the subject of discussions under Doha Round of Trade Negotiations ("Doha Development Agenda Round") launched in November 2001.\textsuperscript{64} Indeed, even before the launch of the round, several countries, and groups of countries, suggested the need to introduce more stringent regulations of export restrictions in their initial proposal on the basis of the AoA inbuilt negotiation agenda (Article 12).\textsuperscript{65} It is, however, the food crisis of 2007-2008 which was arguably exacerbated by export restriction measures of some major exporters that revived the issue in the context of the agricultural negotiations.

For example, in April 2008, as part of the ongoing effort to find an agreement which could purportedly bring the Doha Round to an end in later months, Japan and Switzerland jointly circulated an informal paper calling for stricter WTO rules on the introduction of export restrictions for food products and on the consultation and notification procedures.\textsuperscript{66} The paper, among other things, proposes that any new export prohibition or restriction [to] be limited to the extent strictly necessary for the country imposing it... [taking into account] production, stocks, and domestic consumption.\textsuperscript{67} The proposed rules [also require] countries seeking to restrict exports to give 'due consideration' to importers' food security, and look at how trade would have flowed in the absence of restrictions.\textsuperscript{68}

Moreover, members need to show how the measure may affect "food aid for net food-importing developing countries would be affected."\textsuperscript{69} Procedurally, the proposal requires members to a member taking export restriction measure needs to notify the WTO Committee on Agriculture before instituting export restrictions, explaining the nature, duration, and reasons for the measures.\textsuperscript{70} Further, governments would be required to consult with importers about 'any

\textsuperscript{63} Id. at 17-8.
\textsuperscript{64} Id. at 3.
\textsuperscript{65} See, for instance, the proposal by the Cairns Group (including Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand, and Uruguay), Special Session of the Committee on Agriculture, \textit{WTO Negotiations on Agriculture -- CAIRNS Group Negotiating Proposal}, G/AG/NG/W/93 (Dec. 21, 2000). Other countries which tabled initial proposal on export restriction are: Japan, Switzerland, Rep. Korea, Democratic Republic of Congo, and Jordan.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
matter related to the proposed export restriction, and delay the implementation of the planned measure pending the consultations, and if the differences cannot be resolved within a certain period of time, the proposed export restriction would be referred to binding arbitration by a “standing committee of experts.”

This proposal was not, however, accepted by WTO members. On the other hand, the Doha Draft Modalities of 2008 also provides for a modest proposal on disciplining agricultural export restrictions. The Draft Modalities text would require members to notify the WTO about the export restrictions, including the reasons for taking the measure, within ninety days after the imposition of the measures, and “shall consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the proposed measure... and provide, upon request, the interested importing Member with necessary information, including relevant economic indicators.” Export restrictions would “not normally be longer than [twelve] months” unless otherwise agreed by “affected importing Members.” Nonetheless, despite the increasing calls for tighter disciplines on export restrictions even within other multilateral settings—in the face of the impasse of the Doha Round as a whole—there has not been further progress at the WTO as yet.

Relatedly, a few WTO Members, such as India, have recently embarked on public stockpiling of grains as a food security strategy which has sparked a huge debate among WTO members—and has almost risked the collapse of the already shaky Doha Round trade talks. The Indian National Food Security Bill, which was introduced in 2013, allows the government to buy food, including grains, from farmers and stockpile it for a public distribution system, where it is sold at government-run stores at subsidized prices—the subsidy is estimated to be “available to seventy-five percent of India’s rural population and fifty percent of the urban population.” However, some WTO Members, including the United States and Pakistan, have expressed fears that the scheme runs the risk of exceeding the ten percent domestic support allowed under the WTO rules, resented that “India was accumulating too much grain, and that [India] might eventually release the surplus on the world market, lowering prices for other producers.”

71. Id.
72. Id.
73. Special Session of the Committee on Agriculture, Revised Draft Modalities for Agriculture, TN/AG/W/Rev.4 (Dec. 6, 2008).
74. Id. ¶ 174. The modalities also include an exemption from these requirements for least-developed and net food-importing countries.
75. Id. ¶ 179.
76. As part of food security discussions since 2007, different levels of stricter export restriction disciplines have been suggested in multilateral settings such as G-8, G-20, and FAO.
77. USING PUBLIC FOOD GRAIN STOCKS TO ENHANCE FOOD SECURITY, WORLD BANK REPORT NO. 71280-GLB, 2 (Sep. 2012) [hereinafter USING PUBLIC FOOD].
78. Neha Bagri, U.S.-India Agreement on Stockpiles of Food Revives a Trade Deal, N.Y. TIMES, Nov. 13, 2014.
79. Id.
the face of India’s insistence in defending its policy, even threatening to veto the multilateral agreement on trade facilitation which was part of the Bali Package, “WTO [M]embers had agreed to a temporary solution in which developing countries would not be penalized for breaching their subsidy levels until a permanent solution was found by 2017.” If the eventual ‘permanent’ deal ensures further tolerance for public stockpiling tied to domestic support, and thereby extends the level of domestic support currently allowed under the WTO, it can also in effect allow further export restriction flexibility without the need to resort to the justification under GATT Article XI:2(a).

IV. THE INTERACTION OF WTO LAW AND INTERNATIONAL INVESTMENT LAW IN DISCIPLINING AGRICULTURAL EXPORT RESTRICTIONS

As explained in the preceding section, international trade law offers more flexibility to exporting states, and hence host states, should they choose to address local hunger (food security) through export restrictions; and that despite the increasing attention the disciplining of export restrictions received, no real agreement towards stricter discipline of export restrictions has been reached in the current negotiations under the Doha Round either. But, one of the outstanding issues in the context of the current race for farmland in sub-Saharan Africa is that, where the food produced in the country of export belongs to a foreign investor’s home state, an export restriction measure which is, arguably, legitimate under WTO law may nonetheless amount to a breach of host state’s obligation under international investment law, including BITs. In other words, in the context of transnational farmland investments, host states’ export restriction measures, even those taken in response to local hunger, cannot be seen isolated from investors’ property rights protected under international investment law, another layer of law applicable to these investments. The following sub-sections seek to explore this interface between international trade and investment laws in disciplining export restrictions relating to foreign farmland investment.

A. Farmland Investment Contracts

Although the notion of ‘land grabbing’ prominently featuring in the media reports seems to point to a unilateral appropriation of land by a ‘land grabber,’ it is now widely acknowledged that most of the deals are effected through contracts duly signed by relevant authority and complying with national laws. As such, these investment contracts are deemed to represent a compromise between the different, but not mutually exclusive, interests. It could thus be argued that the terms of investment contracts should not be much of a concern as host countries

80. Id.
81. As noted before, a significant number of foreign land deals for food production in Ethiopia and most of sub-Saharan Africa are specifically meant for export of food back home.
82. See generally LORENZO COTULA, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, LAND DEALS IN AFRICA: WHAT IS IN THE CONTRACTS? (2011); Wily, supra note 17.
In this respect, Raymond Vernon, from his study of U.S. multinational corporations' operations abroad in the raw materials venture in the 1960s, observes that host states often opened up the ventures for re-negotiation "repeatedly—almost predictably," a phenomenon he termed "obsolescing bargain." Nonetheless, such frequent re-opening of negotiations in the current situation when foreign investments enjoy expansive legal protection and informal backup through various channels comes only at the expense of one nature or another to host states. As such, it is worthwhile to scrutinize these contracts.

In this regard, Lorenzo Cotula, from his preliminary analysis of selected farmland investment contracts in Sub-Saharan Africa, alerts that "there are real concerns that some contracts underpinning the recent wave of land acquisitions may not be fit for purpose." A number of the contracts reviewed appear to be "short, unspecific documents that grant long-term rights to extensive areas of land." Indeed, as Smaller argues, many of the negative impacts of large scale farmland investments—such as those documented in recent World Bank report—could have been resolved through better contracts between states and foreign investors and more robust monitoring and evaluation of projects after the contract is signed.

In the context of food security, although agricultural investments can ostensibly bring yield increases that will benefit food security in both host and investor countries, if not properly managed, such investments could also have long term negative impact on food security in host states. Particularly, where host countries themselves experience frequent shortage of food, as for example in the case of Ethiopia, it is imperative to properly spell out, among others, ways of distribution of produce between domestic and international markets in the event of food shortages in the host country. This section will explore how farmland investment contracts regulate export restrictions under such circumstances.

Depending on the data source used, Ethiopia has transferred between 300,000 to 3.7 million hectares of farmland to foreign investors, often through long-term

85. COTULA, supra note 82, at 43.
86. Id.
87. The Report by and large positively appraises the practice of large scale farmland investments, but also notes some negative impacts in relation to access to: land, water, employment, environment, outgrower schemes, food security, infrastructure, technology transfer, resettlement, and markets. See generally THE WORLD BANK, THE PRACTICE OF RESPONSIBLE INVESTMENT PRINCIPLES IN LARGER-SCALE AGRICULTURAL INVESTMENTS: IMPLICATIONS FOR CORPORATE PERFORMANCE AND IMPACT ON LOCAL COMMUNITIES, REPORT No. 86175-GLB, XIV (2014).
89. For example, see De Schutter, supra note 12, at 250. See generally, COTULA, supra note 82; DEININGER ET AL., supra note 9.
lease (for a period of twenty-five to fifty years). Investment contracts for most of the farmland leased between 2009 and 2012 are publicly available. According to the terms of the contracts, the lands acquired are meant for production of food crops, mainly rice, oil seeds, soya, and maize; biofuel crops such as palm oil, Jatropha curcas, and castor beans; and industrial crops (raw materials), especially, cotton, and sugar cane. The contracts are generally short, about nine to eleven pages long, often organized under nineteen to twenty-one articles. Interestingly, the key terms of the contracts are identical, save for minor differences relating to, for example, the identity of the parties, size and location of land, and rate of lease, and still minor variation depending on whether the investor is a foreigner or local.

Apart from activities relating to the cultivation and harvest of the products, the contracts do not envisage what the investor may or may not do with the harvest. The only limitation the contracts impose on investors in this respect is that the investor shall not make unauthorized use of the leased land beyond the predetermined purpose or objective or plan without express consent of the lessor in writing. Thus, the contracts do not mention the possibility of export restrictions even under exceptional circumstance where there are local food crises. Indeed, Esayas Kebede, former Director of the Agricultural Investment Directorate at the Ethiopian Ministry of Agriculture, argues that: "[i]t’s not our task to take revenue away from investors . . . . [W]e want to increase the purchasing power of our people so that they can afford to buy corn from Karuturi. If the investors can get a good price here in this country, they will sell here.

This approach of Ethiopian government seems to emanate from export-oriented agricultural policy of the country, and contrasts with the practice in some other countries in sub-Saharan Africa region. For example, in examining selected farmland investment contracts, Cotula notes the Liberian experience of

90. See DEININGER ET AL., supra note 9, at 62 (reporting that total transfers in 2004–09 amounted to 1.2 million in Ethiopia); Dessalegn Rahmato, The Perils of Development from Above: Land Deals in Ethiopia, 12 AFR. IDENTITIES 26 (2014) (noting that ‘[i]t is estimated that the total land ceded to investors from the mid-1990s to the end of 2011 may be in the order of 3.00–3.5 million hectares.’). See also THE OAKLAND INSTITUTE, UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA COUNTRY REPORT: ETHIOPIA I (2011) (“Since early 2008, the Ethiopian government has embarked on a process to award millions of hectares (ha) of land to foreign and national agricultural investors. Our research shows that at least 3,619,509 ha of land have been transferred to investors, although the actual number may be higher.”).


92. Thus Article 3(4) of the contract(s) provides that, the lessee [investor] has the right to ‘[d]evelop and cultivate the land and harvest the crop and carry on all other activities by mechanization or such other means that the lessee shall in its own discretion deem fit and proper in the circumstances.’

93. See USING PUBLIC FOOD, supra note 77, at art. 4(10).


95. ETHIOPIAN MINISTRY OF FINANCE AND ECONOMIC DEVELOPMENT, GROWTH AND TRANSFORMATION PLAN (2009).
granting the investor the right to export rice “provided domestic consumption demands are met,” whereas, in Madagascar, a contract “determines export and domestic market quotas for specified crops (rice, wheat, and maize), though all pulses are for export and the contract allows exceptions where ‘situation or circumstances otherwise demanded.’”

While reserving the right to export restrictions in farmland contracts—or, as a matter of fact export restriction itself—may not be a panacea for addressing local food shortage (in terms of both availability and access), at times, particularly when there is local food crisis, these measures might be a necessity than optional policy responses. The fact that these contracts are silent thus evokes doubts as to whether the issue is seriously taken during the negotiations for transfer of large tracts of land to foreign investors. In the face of the silence of the investment contracts and other domestic laws on the issue, which in effect amounts to granting the investor unconditional right of export, possible export restriction measures by host states would run the risk of violating contractual commitments. Although disputes over contractual commitments, as ordinary commercial disputes, are adjudicated within the framework of domestic laws, depending on the architecture of host states commitments under other laws applicable to these investments (for example relevant BITs), the breach of contractual obligations may constitute the breach international investment law (BIT) entailing international adjudication—which is never easy to most of the host states in sub-Saharan Africa.

B. International Investment Law and Jurisprudence

Investment laws which offer expansive protection to foreign investments are assumed to facilitate the flow of foreign investment to host states and ostensibly promote economic growth and development. Perhaps, the most significant shift in the protection of foreign investments has been the introduction of BITs in the late 1950s and 1960s and their phenomenal growth in the decades to follow. BITs, which are now regarded as important source of international investment law, impose restraints on the arbitrary exercise of power of host states with

96. COTULA, supra note 82, at 38.
98. This assumption, however, has been challenged by empirical accounts. For example, see generally Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit and They Could Bite 20 (World Bank Policy Research, Working Paper no. 3121, 2003); Andrew T. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VIRG. J. INT’L L. 639, 642-43 (1997). For competing claims, see generally Eric Neumayer and Laura Spess, Do BITs increase FDI in Developing Countries 33 WORLD DEV. 1567, 3-5 (2005). For mixed claims, see generally KARL P. SAUVANT AND LISA E. SACHS EDs., THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (2009).
100. See generally JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT
respect to foreign investors. These restraints (investors’ rights) are also often enforced through an independent dispute resolution system. The introduction of BITs by countries of the global north was in large measure a counter move to the emerging claim of capital importing countries for permanent sovereignty over natural resources and more broadly the establishment of New International Economic Order (“NIEO”). The complexity and instability of modern international investment law is thus marked with the competing interests of capital exporting states or their investors and capital importing countries. Clearly, food security induced transnational farmland deals of recent years are typical examples of investments involving competing interests of home and host states that would potentially trigger the application of BITs.

Despite the tendency to introduce more flexibilities to legal regimes of foreign investment protection in recent years, foreign investments (hence farmland investments) still enjoy a wide range of protection under BITs through such standards as most favored nation (“MFN”), national treatment, fair and equitable treatment, full protection and security, expropriation, as well as umbrella clauses which potentially elevate breach of contracts to the breach of BITs standards.

For example, the 2004 BIT of Ethiopia and Germany provides that: “[a] Contracting Party shall adhere to any other obligation deriving from a written commitment undertaken by it in favour of an investor of the other Contracting Party with regard to an investment in its territory.” The implication is that the violation of farmland investment contracts, which is otherwise a domestic law issue, could amount to a breach of BIT containing such clauses and hence an international investment law issue with potential international adjudication—and associated costs. Even more intriguingly, an umbrella clause in one BIT could, through the operation of MFN clauses, be extrapolated to the country’s other BITs with no such clauses. Although whether a MFN clause only covers neither substantive provisions, nor whether it “only allows an investor to invoke provisions from other investment treaties that are ‘compatible in principle’” are not clear from existing arbitral awards, the use of MFN clauses to import more


favorable substantive treatment from third country BITs is largely uncontested.\textsuperscript{107} The potency of a given BIT’s MFN clause to import more favorable conditions (treatments)—including an umbrella clause—from another BIT, however, depends on its exact wording as well as the scope of the application of the basic treaty containing the clause.\textsuperscript{108} Indeed, there are several cases in which tribunals have generally allowed investors to “import” substantive provisions from other BITs entered into by the host state \textsuperscript{109} (although there have also been cases where such requests were denied). The \textit{Bayindir v. Pakistan} tribunal, for instance, allowed the investor to invoke a fair and equitable treatment clause from another BIT via MFN clause of the BIT between Turkey and Pakistan.\textsuperscript{110} Similarly, the \textit{CME v. Czech Republic} tribunal held that the investor could rely on an expropriation provision from another BIT to determine the standard of compensation.\textsuperscript{111}

This, arguably, implies that, as long as a host country has signed at least one BIT containing an umbrella clause, all of its other BITs with MFN clauses—depending on the wording of the clause and the scope of application of the treaty containing the clause—can import this obligation. Thus, a breach of commitment for the investor (investment contract) which is otherwise adjudicated in domestic courts would become a breach of host states commitment to investor’s home state under relevant BIT. As the vast majority of existing BITs permit investors to bring arbitral claims directly against host states, the operationalization of investment contracts through BITs could thus lead to costly international adjudication that most of the host states of the recent transnational agricultural investments hardly afford. This has important ramification for host states, particularly in the face of poorly drafted transnational farmland contracts, and hence the tendency to overlook the challenges the cumulative application of various layers of laws ordering these farmland deals.

To date, no real case has emerged concerning host states’ measures, including export restrictions, relating to the recent transnational farmland investments within

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\textsuperscript{108} See Jürgen Kurtz, \textit{The MFN Standard and Foreign Investment: An Uneasy Fit?} 5 J. WORLD INV. & TRADE 861, 872-73 (2004) (noting that “The breadth of operation of a particular MFN clause will depend to some degree on its exact wording in a given investment treaty. The MFN clauses in most treaties do not use identical language and, as a result, offer potentially different interpretative options for arbitral tribunals.”); see also Schill, \textit{supra} note 107, at 523 (noting that “the scope of application of MFN clauses is regularly also restricted indirectly by the scope of application of the basic treaty itself.”).

\textsuperscript{109} Schill, \textit{supra} note 107, at 519.


the framework of international investment law—understandably because of the incipient nature of the investments. This, however, may not imply that no such case would appear in the future. Given that local food shortage is already there in many of the sub-Saharan Africa region, such cases likely arise where there is, shortage of food in investors home states which would want to have a secure access to such food, or where sales in international markets offer better returns to investor than host market (or government) offers.

In fact there are investment arbitration cases in different contexts that are emblematic of how investment arbitration tribunals may deal with host states’ export restriction measures relating to transnational agricultural produces. The Venezuela Holdings et. al v Venezuela tribunal, for example, found that Venezuela’s production and export curtailments of oil were incompatible with, among others, the fair and equitable treatment standard of The Netherlands-Venezuela BIT. In the tribunal’s words:

In the Tribunal’s opinion, this standard may be breached by frustrating the expectations that the investor may have legitimately taken into account when making the investment. Legitimate expectations may result from specific formal assurances given by the host state in order to induce investment. . . . . It thus appears that the production and export curtailments imposed from November 2006 were incompatible with the Claimants’ reasonable and legitimate expectations, and thus breached the [fair and equitable treatment] standard contained in Article 3(1) of the BIT.

It is thus evident that where the right to freely export (dispose) is recognized or where there is no reservation to this right under relevant laws or investment agreements, as is the case in Ethiopia and many other host states, possible export restriction measures relating to transnational farmland produces likely violate investment contracts and eventually breach of relevant BIT, even when such


114. Id.

115. Id. ¶ 256. The Toto v. Lebanon Tribunal, on the other hand, took a broader view when it states that legitimate expectations “may follow from explicit or implicit representations made by the host state, or from its contractual commitments.” Toto Costruzioni Generali S.P.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Award, ¶ 159 (June 7, 2012), http://www.italaw.com/sites/default/files/case-documents/ita1013.pdf.

measures could be *prima facie* justified under WTO law.

Similarly, the ICSID Tribunal in *El Paso v Argentina*,\(^{117}\) regarding Argentina’s ban on oil export following the economic crisis of 1999, noted that the investor’s right to freely export could draw either from host state’s laws or investment agreement signed by host state and foreign investor.\(^{118}\) In the Tribunal’s view, where the host state’s law provides for possibilities of export restrictions, a foreign investor may not be entitled to an absolute right of export.\(^{119}\) In the Tribunal’s words:

Concerning CAPSA [Compañías Asociadas Petroleras], in the Tribunal’s view, the right to export freely that was granted by law was not unrestricted. As any right, it was subject to reasonable restrictions decided by the Government for reasons of public interest, for example in order to satisfy the domestic market. This was provided for by Article 377 of the Mining Code . . . .\(^{120}\)

On the face of it, therefore, if the possibility of export restrictions is envisaged under relevant domestic law or investment agreement, a host state may legitimately introduce export restriction measures, provided that the conditions that dictate the introduction of the measure exist. On the other hand, this ruling also, as in *Venezuela Holdings*, suggests that where no reservation to the investor’s right to export freely is envisaged under either investment contract or other laws of the host state, a restriction of exports runs the risk of interfering with the property right of an investor often protected under both domestic laws and international investment law (BITs). The implication for transnational land deals in countries like Ethiopia is no different. Where neither domestic laws nor farmland investment contracts provide for the possibility of export restrictions, even by way of exception, and particularly where the international market offers higher price than domestic market, the introduction of export restriction measure may constitute a breach of both investment contract and—through the operation of umbrella clause—relevant BITs standards.

As the foregoing cases suggest, one of a BITs standards that the introduction of agricultural export restriction measures likely violate is the *fair and equitable treatment* (“FET”) standard which, as Rudolph Dolzer rightly observes, is “[t]he [b]roadest and [m]ost [p]rominent [s]tandard in [i]nvestment [t]reaties.”\(^{121}\) That is,
since "legitimate expectations,"—which may derive, among others, from explicit or implicit representations by the host state, or from its contractual commitments—is at the center of the fair and equitable standard,\textsuperscript{122} the introduction of export restriction measures—in the absence of reservation of this right in relevant contract or law at the time of investment—will likely constitutes a \textit{prima facie} case of denial of legitimate expectations of the investor, and hence breach of FET standard. Of course, depending on the nature and effect of export restriction measure on the investment, other BIT standards such as \textit{full protection and security}\textsuperscript{123} and \textit{(indirect) expropriation}\textsuperscript{124} may also be invoked.

Nonetheless, although BITs are often drafted, and interpreted, with more pro-investor \textit{telos}, it is possible to accommodate, to some extent, host states' legitimate regulatory interests through the use of exceptions (general or special).\textsuperscript{125} Of course, the wording and hence scope of these clauses varies from one instrument to another, as does their interpretation by investment tribunals even when their formulations and the factual circumstances surrounding a given set of cases are

\begin{footnotesize}
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  \item \textsuperscript{122} Id. at 17 (noting that: “The protection of legitimate expectations by the FET standard will today properly be considered as the central pillar in the understanding and application of the FET standard.”).
  \item \textsuperscript{123} While most BITs employ the term ‘full protection and security’ or ‘adequate protection and security,’ others employs its variants, for example Ethiopia-Finland BIT of 2006 provides for ‘constant protection and security’ while Ethiopia-Austria BIT of 2004 employ ‘full and constant protection and security’. In its classical understanding, ‘full protection and security’ is understood as host state’s obligation of due diligence in relation to the physical protection of the investment, although tribunals have also construed the norm as one extending to ensuring both physical safety of and legal security for foreign investment. \textit{See} Roland Kläger, \textit{"{F}AIR AND EQUITABLE TREATMENT" IN INTERNATIONAL INVESTMENT LAW} 293-94 (2011). Kläger further notes that “a guarantee of full protection and security seems to add little to a fair and equitable treatment clause in an investment agreement.” \textit{Id.} at 295; \textit{see also} Helge Elisabeth Zeitler, \textit{Full Protection and Security, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW} 183, 212 (Stephan W. Schill ed., 2010) (noting that: “Often, the ultimate outcome may not differ strongly, as one tribunal may assess under the ‘fair and equitable treatment’ clause what another considers under an FPS clause. But the lack of consistency nevertheless risks undermining the legitimacy of investment treaty arbitration.”).
  \item \textsuperscript{124} Where export restriction measure in question potentially neutralizes the property rights of the investor, or investor’s control over his investment, the measure could arguably amount to indirect expropriation. The ‘sole effect doctrine’ as a criterion has been a dominant test in establishing the existence of indirect expropriation (as opposed to legitimate non-compensable regulatory measure). \textit{See} Rudolf Dolzer, \textit{Indirect Expropriations: New Developments?}, 11 N.Y.U. Envt’l L.J. 64, 81-81 (2002). Although some tribunals have also paid due regard to the cause (nature and context) of the measure as important criterion to determine indirect expropriation (for example, \textit{LG&E v. Argentina}), it appears that the effect of the measure (how severely the investment has been interrupted?) is still an important, although not necessarily the only, test. \textit{See also} Markus Perkams, \textit{The Concept of Indirect Expropriation in Comparative Public Law—Searching for Light in the Dark, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW} 107, 111 (Stephan W. Schill ed., 2010). Perkams identifies three general approaches (sole effect, exclusion of non-discriminatory bona fide regulations, and weighing the public interest protected against the effect of the measure) to establishing indirect expropriation and notes that: “None of these tests is currently prevailing and it is hard to predict how a tribunal will approach the issue of indirect expropriation.” \textit{Id.} at 110.
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similar. General exceptions, those applying to all of the obligations of a BIT, are often formulated in terms of "essential security interests," although some BITs also employ alternative formulations including "public security" and "public order." Special exceptions, on the other hand, apply only to a limited number of BIT obligations—most commonly national and most favored nation treatment obligations.

The question to ask is, then, to what extent can BITs’ exception clauses (measures) be employed to justify food export restrictions on ground of local food crisis (food insecurity)? Since special exceptions, as noted before, commonly pertain to most favored nation treatment (how a given foreign investor is treated vis-à-vis other comparable foreign investors) and national treatment (how a given foreign investor is treated vis-à-vis comparable domestic investors), they are more about ensuring non-discrimination in the application of a given measure than whether the introduction of the measure itself is justified in the first place. So, in the absence of any special exception on ground of, say food security (to date, not many, if any, BITs seems to have expressly envisaged this), one would only look at general exceptions for guidance. Thus, could general exceptions—commonly referring to measures aimed at protecting “national security, public security or public order,” “public security and order,” and “essential security interests” of a party—be invoked to justify host state’s export restriction

126. Id. at 449.
127. Other formulations include: measures aimed at protecting human, animal, and plant life and health; environmental measures; measures to fulfill a party’s obligations with respect to the maintenance of international peace and security; measures with respect to financial services taken for prudential reasons; measures related to monetary or exchange rate policies; measures of taxation; and measures to promote cultural or linguistic diversity. Id. at 449-50. See, ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESTMENT IN A CHANGING WORLD 99 (2007) (noting that exceptions on ground of essential security interests may at times apply to specific treaty obligations—such as expropriation/nationalization, non-discrimination, dispute settlement, and application of host-country-law to foreign investment—and in that sense become a special exception clauses as opposed to general exception).
129. See, e.g., Christian Håberli & Fiona Smith, Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid “Land Grab,” 77 MOD. L. REV. 189, 221 (2014). Håberli and Smith propose a public interest clause for food security: In view of the specific situation of weak host states, their strong international commitments under BITs and other instruments, and comparing these commitments with the soft law principles applicable to home states and investors, we conclude our analysis in this article with a proposal for a public interest clause for food security which could be incorporated into the binding commitments of the host state and the investor, either in a BIT or regional treaty.
132. See, e.g., Agreement Between the Government of the Federal Democratic Republic of
measures taken in response to local food crisis (food insecurity)?

The answer to this question is far from straightforward. One source of difficulty has to do with the interpretation of the aforementioned terms (subjects) of treaty exception. Indeed, as Arnold Wolfers cautions, “political formulas” like national security “may not mean the same thing to different people” and “may not have any precise meaning at all.” In the context of international investment law, there have been limited instances in which arbitral tribunals have grappled with the interpretation of these terms. One such instance was in the aftermath of Argentina’s financial crisis of 2000-2001 when a number of foreign investors brought arbitral claims against Argentina’s regulatory response to the crisis. In its defence, Argentina attempted to justify its measures, among others, through invocation of “public order” and “essential security interests” exceptions to its BIT obligations. Nonetheless, as for example, Jürgen Kurtz’s analysis of the first five of these awards reveals, “[the] rulings engage fundamentally different and at times conflicting methods of interpreting the relationship between the operative treaty exception and relevant customary law.”

The Continental Tribunal, which largely ruled in favour of Argentina on its invocation of treaty exception, for instance—by dismissing the claimant’s submission that public order is synonymous with public policy which more narrowly refers “to measures necessary to maintain the public policies, laws and morals that define the country’s society”—interpreted “public order” instead as a broad synonym for “public peace,” “which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace . . . [including] due to significant economic and social difficulties.” Viewed in this light, where food crisis (shortage) in host state results in, among others, riots or other disturbances that may threaten the legal order (rule of law) in a host country—as for example widely seen following the 2007-2008 food crisis—a response through export restriction could be justified through the invocation of “public order” treaty exception, provided of course that the restriction is necessary in the circumstances.


137. Id. ¶ 174. Although the Continental tribunal considers ‘public order’ exception as distinct from ‘essential security interests’ exception, as UNCTAD notes, whether ‘public order’ exception is more directed towards disturbances of the internal legal order or whether it covers any kind of threat to national security is not clear from exiting arbitral awards. See U.N. Conference on Trade & Dev., THE PROTECTION OF NATIONAL SECURITY IN IIAS 74 (2009).
This brings the discussion to the other commonly used general BIT exceptions: "national security" or "essential security interests," and particularly to the question whether host states' agricultural export restriction measures could be justified under these exceptions. As a starting point, whether "essential security interests" and "national security" refer to the same thing or whether they are significantly different is not clear from existing case law. However, as the U.N. Conference on Trade and Development ("UNCTAD") argues, given the prefix "essential", "essential security interests" could be "narrower than the more general term "national security."" However, whether Contracting Parties, by choosing one of these alternatives, actually intend to introduce such a distinction is far from obvious. Further, and perhaps more importantly, whether the notion of essential security interests is confined to its traditional understanding of a state's measures directed to counter external threats, often military, to its territorial integrity or whether it also captures the more evolving notion of human security is also not self-evident.

Human Security is the latest in a long series of attempts to broaden traditional conceptions of security—other such attempts include: global security, societal security, common security, comprehensive security and cooperative security. The notion was first articulated in the 1994 United Nations Development Programme ("UNDP") Human Development Report which called for the broadening of the conception of security "from an exclusive stress on territorial security to a much greater stress on people's [human] security," which encompasses seven different dimensions: economic, food, health, environmental, personal, community, and political security. Indeed, about two decades later—building on the works of the U.N. Commission on Human Security—the U.N. General Assembly passed a Resolution that aims at creating a common understanding on the notion of human security. The Resolution conceptualizes the notion as, inter alia, "[t]he right of people to live in freedom and dignity, free from poverty and despair" and as one calling for "people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities." Further, the Resolution concedes that "Human security does not replace State security." As BIT's exception clauses often employ "national security" and "essential security interests," instead of human security, the task of interpreting these clauses either narrowly—with a focus on territorial integrity—or broadly—in line with the

138. Id. at 72-73.
139. Id. at 73.
140. See also Kurtz, supra note 134, at 361-63.
144. Id. ¶ 3(a).
145. Id. ¶ 3(b).
146. Id. ¶ 3(c).
evolving notion of human security—is left for tribunals. The Continental Tribunal, for example, seems to have taken the latter approach when it considered the effects of the economic crisis (such as near collapse of the domestic economy, the leap in unemployment, the immediate threats to the health of young children, the sick and the most vulnerable) would qualify as a situation in which the essential security of Argentina as a state and country was vitally at stake.147

Thus, arguably, a case can also be made of shortage of food as a ‘security’ matter. As Lester R. Brown argues, for example, “it is no longer possible to separate food security and security more broadly defined,”148 indeed, the security equation is simple: “by denying access to food, life can be threatened.”149 Thus, a situation in which the acuteness of local food shortage threatens lives may trigger the invocation of “essential security interests” and “national security” treaty exception to justify host state’s possible response measures such as export restrictions. For, while export restrictions may not guarantee access to food, it can by enhancing local food availability, contribute towards access. Nonetheless, current “understanding of food as a matter of security remain ad hoc.”150 Neither has this nexus, food as a matter of ‘security,’ found its way into hard international law to aid tribunals engaging with the interpretation of treaty exception. Indeed, if BITs exception clauses are to be interpreted in the light of the parties’ obligations under other international agreements—as mandated by the Vienna Convention on the Law of Treaties (“VCLT”)151—host state’s duty to realize its people’s right to adequate food under the International Covenant on Economic Social and Cultural Rights (“ICESCR”)152 could create the food “essential security interests” link.153 This approach seems appealing, if also raises a more complex issue of the interplay between international investment and human rights law, which is beyond the scope of this work; the extent to which tribunals are willing to take this road, however, is not clear from existing case law. It is also worth mentioning that, even where food shortage (insecurity) maybe understood as a threat to the essential security interests of the host state invoking a treaty exception, it is still incumbent upon that state to prove the existence of the condition (food shortage) that triggers the measure (in

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151. See Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT], which requires a treaty interpreter to take into account “[a]ny relevant rules of international law applicable in the relations between the parties.”
153. Kurtz, for example, suggests similar interpretative approach in the context of analysing tribunals’ ruling on Argentina’s invocation of ‘essential security interests’ exception to justify its regulatory responses to the economic crisis. See Kurtz, supra note 134, at 363-64.
this case, export restriction) and that the measure is a necessary response that is applied only until the condition demands so.\textsuperscript{154}

That said, in the context of sub-Saharan Africa—for example Ethiopia—though, most of the BITs do not provide for exception clauses: Ethiopia's BITs with Algeria, Austria, China, Iran, Libya, North Sudan, Kuwait, Malaysia, Spain, Russia, Sweden, Yemen, The Netherlands, and Turkey, for example do not provide for any general—public order and security—exception clause.\textsuperscript{155} And absent express exception treaty clauses, it is unlikely that tribunals would seriously engage with the task of rebalancing the interests of the investor and host state. Indeed, as for example Dolzer contends, such an engagement would even be inappropriate.\textsuperscript{156} Also, as noted before, even when the exceptions are envisaged in BITs, the interpretative approach a given tribunal takes is far from certain, although there is a general tendency for a pro-investor finding. The upshot is, potential export restriction measures applied to transnational agricultural investments in response to local food crisis—even when justified under the WTO law—can nonetheless be challenged under international investment law (BITs) which points to, \textit{inter alia}, a limited policy space of host states as well as incoherence between the two strands of international economic law (trade and investment) in addressing the competing food (security) interests of host and investor countries.

V. CONCLUSION

The convergence of global food, energy, and financial crises in recent years has triggered a surge of interest in acquisitions of farmland in many parts of the world, but most notably in sub-Saharan Africa, with important implications for, among others, access to land, food and water. It is thus very important to examine relevant laws that, at least along with other set of factors, are ordering this process and its potential outcomes. This article has analysed how international economic law—mainly WTO law and international investment laws—mediates the outcome of transnational agricultural investments with a particular focus on export restrictions which have been one of the \textit{push} factors for these investments. Although export restriction measures may not be a panacea to ensure food availability and access, under certain circumstances these measures still remain relevant policy options for host states of transnational agricultural investments, such those in sub-Saharan Africa which are often themselves facing frequent food insecurity (hunger) challenges. Nonetheless, as shown in this article, the WTO law and international investment law seem to differ in terms of constraining host states' ability to introduce and maintain export restriction measures.

\textsuperscript{154} See, e.g., Kurtz \textit{supra} note 134, at 364-65; \textit{see also} Vandevelde, \textit{supra} note 125, at 456.

\textsuperscript{155} \textit{See also} Vandevelde, \textit{supra} note 125, at 451 (noting that a "majority of BITs do not yet contain any general exceptions, albeit special exceptions applicable to the national and most-favored-nation treatment provisions are extremely common.").

\textsuperscript{156} \textit{See} Dolzer, \textit{supra} note 121, at 28 (noting that: "BITs are drafted in a one-sided manner with the aim to provide an investor-friendly climate and to attract foreign investors; absent a special treaty clause, a rebalancing of interests in the case of a dispute by a tribunal would not be appropriate.").
Although the WTO law generally prohibits quantitative restrictions, by way of exception, it allows Members to introduce "[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party"—in compliance with the consultation and notification requirements under the AoA. In the light of the indeterminate and subjective nature of the above key terms defining the conditions that trigger the operation of this exception clause, procedural requirements of consultation and notification that can easily be eschewed, and the absence of limit to the use of export taxes (that otherwise have similar effect to quantitative restrictions), the WTO law leaves Members with a considerable degree of autonomy to introduce export restriction measures. Indeed, this remains the case despite the increasing call for stricter disciplines on agricultural export restrictions in recent years, both within the WTO—Doha Round of trade negotiations—and other multilateral settings.

However, a different picture of host states' autonomy in terms of introducing export restrictions emerges in the context of transnational national agricultural investments which are further subject to international investment law. Although no case involving export restriction measures relating to the recent transnational agricultural investments has been reported yet—understandably because of the incipient nature of these investments—a closer look at WTO law disciplines in the light of international investment law and practice suggests that WTO flexibilities on export restrictions on ground of food security may not stand up to foreign investors rights under investment laws agreements. Indeed, some of the reviewed farmland investment contracts do not envisage the possibility of export restrictions. And absent such reservation, the introduction of export restriction—depending on its impact on the property right of the investor—risks the breach of relevant BITs between host and home states. This is particularly the case given the fact that most of the host states such those in sub-Saharan Africa have signed at least one BIT with an umbrella clause that potentially elevates the violation of farmland commercial contract to breach of a BIT, which entails costly international arbitration that these states hardly afford. Even more disconcertingly, this effect of umbrella clause could be imported to host state's other BITs, without umbrella clause, by virtue of the MFN clause which features in virtually every BIT. Neither does the rebalancing of the interests of host state and foreign investor through BITs exception clauses on ground of, for example, “essential security interests” of a host state seem promising either because these clauses are not there, or even when there is one, how investment tribunal interpret it is far from certainty. This suggests that, even an export restriction measure that is prima facie justified under WTO law can nonetheless be challenged under international investment law applicable to transnational agricultural investments. Thus, while there might be near-consensus on the claim that the WTO discipline on agricultural export restriction is loose, transnational agricultural investments could be subject to stricter export restriction

157. GATT, supra note 30, at art. XI(2)(a) (emphasis added).
158. See AoA, supra note 31, at art. 12.
disciplines in a manner that inhibits hosts states ability to respond even to local hunger. Apart from undermining host states policy space, this also points to international economic law's challenge to coherently mediate competing food (in)security concerns.