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# CONTENTS

## VOLUME 2, ISSUE 1, 2014

II First Part. Spanish

201 Second Part. English

205 Introduction to Volume 2, 2014

### SECTION ON INTERNATIONAL ECONOMIC LAW

#### A. GENERAL ARTICLES

- |  |     |  |
|--|-----|--|
| Inu Barbee & Simon Lester                                    | 207 | The TPP and the Future of Trade Agreements   |
| Elisabeth Bürgi Bonanomi                                     | 227 | An enabling regulatory environment for sustainable investment: the example of trade law                |
| Luciana Dutra de Oliveira Silveira & Ricardo Inglez de Souza | 245 | The public interest analysis in trade remedies investigations in Brazil                                |
| Eduardo Márquez Certucha                                     | 263 | Social Entrepreneurship: bringing together impact investment, trade facilitation and regulatory reform |
| Ricardo García de la Rosa                                    | 281 | Dichotomous evolution, regionalism and multilateralism: plurilateralism as a missing link              |

### SECTION ON INTERNATIONAL ARBITRATION

#### A. GENERAL ARTICLES

- |                   |     |   |
|-------------------|-----|---|
| Carlo Scheiternig | 305 | Sovereign bonds as investments under the ICSID convention   |
| Pedro Arcoverde   | 327 | Public policy and the recognition and enforcement of foreign arbitral awards in Brazil: an analysis against the backdrop of global governance |
| David Khachvani   | 349 | Exclusion of right to challenge the arbitral award  |

**B. CASE-LAW REVIEWS**

Carlos H. Reyes Díaz 365 BG GROUP v. Argentina. Investor state arbitration. Decision of the Supreme Court of the United States of America

## INTRODUCTION TO VOLUME 2, 2014

With this number, the *Latin American Journal of International Trade Law (LATAM Journal)* proudly launches its 2<sup>nd</sup> volume. After one year of great experiences and tough work to achieve first volume standards, we release this second volume with the commitment to continue creating a space where young academics can express their ideas along with the always sharp point of views from renowned academics and practitioners in arbitration and international economic law areas.

Under this commitment, we present the first number of the 2<sup>nd</sup> volume of *LATAM Journal*, in which readers will find the opening essay embodying some personal perspectives of a leading scholar. This year, Simon Lester, Trade Policy Analyst at the Cato Institute and President of WorldTradeLaw.net, co-authoring with Inu Barbee, Graduate Associate at the Center for North American Studies at the American University, honor us with a manuscript reflecting on the current TPP negotiations and the future of trade agreements in a multilateral context.

A number of stimulating articles on varied subjects follow the opening article. In the section of International Economic Law, these articles include four extraordinary scholarly works. The first one from Elisabeth Bürgi Bonanomi, Professor at the Centre for Development and Environment and the World Trade Institute of the University of Berne, presents an overview on the regulatory framework for sustainable investment elaborating on the international agricultural trade regime. The second article by Ricardo Inglez de Souza and Luciana Dutra de Oliveira Silveira, Partner and Associate, respectively, of the international trade practice at DeVivo Whitaker e Castro Advogados, discusses on the public interest analysis in trade remedies investigations in Brazil. The third article by Eduardo Márquez Certucha, Foreign Associate in the Dallas office of Haynes and Boone, LLP, analyses the way that the investment climate of a country affects investors perception and how improving trade facilitation may enhance impact investment. Finally, the fourth article by Ricardo García De la Rosa, Professor and Researcher at the Instituto Tecnológico Autónomo de México, explains the dichotomous evolution of international trade relations in its two forms: regionalism and multilateralism, including plurilateralism as the missing link.

Following to the section of International Arbitration, we have three remarkable academic papers and a review about a trendy court's case. Firstly we will find the work

from Carlo Sheitering, an Associate in Munich office of Milbank, Tweed, Hadley & McCloy LLP, who analyses the treatment that sovereign bonds may have under the ICSID and how recent case law has impacted such treatment. Secondly, Pedro Arcoverde, a Brazilian lawyer and currently assistant professor at the L'Institut d'études politiques de Paris, examines the international standards for the recognition and enforcement of foreign awards towards public policy issues, setting-out special attention to Brazilian court's decision over the last years and its learning points thereto. Thirdly, David Khachvani, Hans Wilsdorf Scholar at the Master in International Dispute Settlement of the Université de Genève and Graduate Institute of International and Development Studies, exposes a general overview of several important jurisdictions' attitudes before the agreements to waive the right to challenge an arbitral award, giving some brightfull conclusions in such regard. At last but not least, an "in-house" work from Carlos Reyes, Co-editor-in-chief and Lecturer at the School of Law of the Universidad National Autonoma de México, summarizes the recent ruling of the Supreme Court of the United States of America in the case *BG Group v. Argentina*, concluding on the questions that the mentioned ruling raised in regard to some arbitration matters involve therein.

We hope that our readers enjoy this new issue as much as we have enjoy it during the edition process, but more important, that it contributes highlighting some important topics and opinions for its discussion at this or other academic spaces or *fora*. *LATAM Journal* welcomes comments on the features included in this number as well as any suggestions for improvements. Comments should be sent to <[journalit@derecho.unam.mx](mailto:journalit@derecho.unam.mx)>.

Thank you for your interest in and support to *LATAM Journal*.

Ciudad Universitaria, Mexico City, May 2014

Carlos H. Reyes Díaz  
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The Editors

# INTERNATIONAL ECONOMIC LAW



## AN ENABLING REGULATORY ENVIRONMENT FOR SUSTAINABLE INVESTMENT: THE EXAMPLE OF TRADE LAW

Elisabeth Bürgi Bonanomi\*

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**Abstract.** There is broad international agreement that investment flows to the agricultural sector in developing countries need to be increased. But there is also agreement that such investments need to be sustainable. For being sustainable, they must not only be beneficial to the public economy, but also to rural households and to the environment in the short and the long run. Whether sustainable investments take place, not least depends on the legal framework within which these investments are situated. This is true for the domestic legal frameworks of both the home country and of the host country of the investment. But also the international legal frameworks in which home and host states are embedded set either positive or negative incentives for investments to be sustainable. The paper presents an overview on regulatory frameworks which come to focus in this regard. It then elaborates on international agricultural trade regulation, by assuming that sustainable investments in agriculture presume a 'sustainable trade regime'. By doing so, the paper presents parts of the debate about a sustainable agricultural trade regime, as it has been resumed and further developed by the author in recent years.

**Key words.** Agricultural sector, sustainable investment, regulatory environment, sustainable trade regime.

\* The author lectures at both the Centre for Development and Environment (CDE) and the World Trade Institute (WTI) of the University of Bern. This paper follows up on the author's paper published with International Land Coalition ILC: Bürgi Bonanomi Elisabeth, Trade Law and Responsible Investment, in: ILC, Oxfam, Somo, WTI, International Instruments Influencing the Rights of People facing Investment in Agricultural Lands, 2011, p. 68-88. Some parts of the text have already been published in this paper.

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### I. SUSTAINABLE INVESTMENT IN AGRICULTURE: ENABLING DOMESTIC AND INTERNATIONAL REGULATORY ENVIRONMENT?

There is broad international agreement that investment flows to the agricultural sector in developing countries need to be increased.<sup>1</sup> But there is also agreement that such investments need to be sustainable. For being sustainable, they must not only be beneficial to the public economy, but also to (poor) rural households and to the environment in

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<sup>1</sup> FAO, IFAD, UNCTAD, World Bank, *Roundtable. 2009: Promoting Responsible International Investment in Agriculture*. Chair's Summary.

the short and the long run. The discussion about which agricultural investments can be deemed sustainable is ongoing.<sup>2</sup>

In this context, whether sustainable investment are promoted or not, not least depends on the legal framework within which these investments take place. This is true for the domestic legal frameworks of both the home country and of the host country of the investment. But also the international legal frameworks in which home and host states are embedded set either positive or negative incentives for investments to be sustainable.

## A. DOMESTIC REGULATION

Both the home country of the investment – the country in which the investment originates – and the host country – the country in which it is invested – influence kind and shape of the investment which is undertaken by their regulatory environment. This includes the way local land rights regarding ownership and use of land are protected or not protected, the way environmental and labour standards are implemented or not implemented, whether procedural rights are effectively ensured or not, and to what extent the investor is protected or bound to comply with economic, social and environmental duties both at home or abroad.<sup>3</sup> The authors of the Land Matrix, one of the most prominent databases on large scale land acquisitions (LSLAs) in the global south (whose sustainability is often questioned), have concluded from their assessment that governance structures are a determining factor for foreign direct investment in agricultural production at a large scale. While in those countries, which are most targeted by LSLAs, investor protection is rather well established, land governance is rather weak. As a result, the authors have advanced the following hypothesis which still needs closer examination: “Investors are interested in countries that combine a strong general institutional framework, that protects their investment and allows them to smoothly operate their business, with low tenure security that gives them easy and possibly cheap access to land”.<sup>4</sup> Such lopsided protection of the investor’s rights may occur both at the home and the host country level, primarily by failing to provide a comprehensive regulatory framework of balanced rights and duties which apply to the investor respectively to the investment.

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<sup>2</sup> Committee on World Food Security, 2013. *Principles for responsible agricultural investment (RAI) in the food security and nutrition, Zero Draft*.

<sup>3</sup> UN Guiding Principles on Business and Human Rights by John Ruggie, 2011: *Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31.

<sup>4</sup> Anseeuw, W., Breu T., Giger, M., Lay, J., Messerli, P., Nolte, K., 2012. *Transnational Land Deals for Agriculture in the Global South, Analytical Report Based on the Land Matrix Database*. CDE/CIRAD/GIGA, Bern/Montpellier/Hamburg. 2012, p. 11.

## B. INTERNATIONAL REGULATION

In addition, policy space of both home and host countries – i.e. the space within which domestic regulation is located - is limited and shaped by international law. A range of human rights and environmental treaties, which most countries have ratified and to which they are bound, assist in ensuring a socially and environmentally careful treatment of land and land rights. Of particular relevance is the right to adequate food which is enshrined in Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>5</sup> According to human rights theory, the right to food includes, *inter alia*, the obligation of the State to respect the ability of individuals and groups to feed themselves by access to land. According to the UN Special Rapporteur on the right to food, Olivier de Schutter:

...the State is obliged to refrain from infringing on the ability of individuals and groups to feed themselves where such an ability exists (respect), and to prevent others - in particular private actors such as firms - from encroaching on that ability (protect). Finally, the state is called upon to actively strengthen the ability of individuals to feed themselves...<sup>6</sup>

Also related to the protection of land is Art. 17 of the International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup> which specifically protects against ‘forced eviction’, while claiming that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”.<sup>8</sup> The respective “Eviction Guidelines”<sup>9</sup> drafted by the UN Special Rapporteur on Adequate Housing Miloon Kothari, establish strong criteria. Accordingly, evictions shall only occur in exceptional circumstances and require full justification:

Any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.<sup>10</sup>

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<sup>5</sup> International Covenant on Economic, Social and Cultural Rights of December 16, 1966, A/RES/2200 A (XXI) (ICESCR).

<sup>6</sup> *UN Guiding Principles on human rights impact assessments of trade and investment agreements*, report of the Special Rapporteur on the right to food, Olivier de Schutter, 19 December 2011, A/HRC/19/59/Add.5., para 1(1).

<sup>7</sup> International Covenant on Civil and Political Rights of December 16, 1966, A/RES/2200A (XXI). (cited: ICCPR)

<sup>8</sup> Art. 17 of the ICCPR.

<sup>9</sup> UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, *Basic Principles and Guidelines on Development-Based Evictions and Displacement* of February 5, 2007, A/HRC/4/18. (Eviction Guidelines).

<sup>10</sup> Para 21 of the Eviction Guidelines.

Importantly, the ‘forced eviction framework’ applies to all persons, “irrespective of whether they hold title to home and property under domestic law.”<sup>11</sup>

Similarly, the ‘Guiding Principles on Internal Displacement’ which were drafted by the UN Office for the Coordination of Humanitarian Affairs OCHA, point in the same direction.<sup>12</sup> Based upon international humanitarian and human rights law, these principles aim at protecting every human being from “being arbitrarily displaced from his or her home or place of habitual residence”.<sup>13</sup> Thereby, the prohibition of arbitrary displacement includes displacement “in cases of large-scale development projects, which are not justified by compelling and overriding public interests”.<sup>14</sup> Thus, the Guiding Principles on Internal Displacement present a further framework for protection of land owners, while promoting responsible investment.<sup>15</sup>

Environmental treaties, on their side, set environmental standards to which the investors should be bound, such as standards of biological resp. bio-cultural and landscape diversity protection, including the protection of soil quality.<sup>16</sup> An interesting entry point, in this respect, provides for instance Art. 6 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)<sup>17</sup> which calls for well-targeted agricultural policies which promotes “diverse farming systems”. The ITPGRFA upholds the duty to pursue

fair agricultural policies that promote, as appropriate, the development and maintenance of diverse farming systems that enhance the sustainable use of agricultural biological diversity and other natural resources.<sup>18</sup>

The climate regime sets different and to some extent contradictory incentives for agricultural investments. On the one hand, it promotes mitigation measures which

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<sup>11</sup> *Idem.*

<sup>12</sup> UN Special Rapporteur on the Human Rights of Internally Displaced Persons (former), Francis M. Deng, Guiding Principles on Internal Displacement of February 11, 1998, E/CN.4/1998/53/Add. (Guiding Principles on Internal Displacement).

<sup>13</sup> Principle 6(1) of the Guiding Principles on Internal Displacement.

<sup>14</sup> *Ibidem* 6(2)(2).

<sup>15</sup> For a nuanced interpretation of the Guiding Principles on Internal Displacement, see UN Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (former), Walter Kälin, Annotations to the Guiding Principles on Internal Displacement, The Brookings Institution – University of Bern Project on Internal Displacement, The American Society of International Law, Studies in Transnational Legal Policy, No. 38, 2nd edition (Washington, 2008).

<sup>16</sup> Buergi Bonanomi Elisabeth, forthcoming 2014, *Sustainable Development in International Law Making History, Concept, Processes, Normativity. The example of trade in agriculture.*

<sup>17</sup> International Treaty on Plant Genetic Resources for Food and Agriculture of 3rd November 2001 (ITPGRFA; Seed Treaty)

<sup>18</sup> Art. 6 of the ITPGRFA.

would assist in reducing on-farm greenhouse gas emissions and, hence, calls for climate friendly agricultural practices and hence promotes “the art of doing agriculture” by socially, economically and environmentally practices which are not only science, but also traditional knowledge based. On the other hand, it promotes reduction of greenhouse gas emissions, which implies remunerated tree planting through emission trading and the use of biofuels, both drivers of large scale land acquisitions.<sup>19</sup>

Further, the international economic regime, particularly trade and investment treaties and tax agreements, build the “channel through which investments flow” by providing an enabling environment for foreign direct investment in land which are mostly commodity export-oriented.<sup>20</sup> Since the lopsided nature of investment treaties has already been discussed in this context to some extent<sup>21</sup> (whereby in-depth human rights resp. sustainability impact assessments have not yet been conducted), the trade angle has been neglected so far. As a consequence, this paper will have a closer look at the trade regime. It will be asked what kind of trade regime would best ensure that domestic and foreign direct investments in agriculture assist in promoting a sustainable development of the agricultural sector. Thereby, it will be derived from the ‘coherent trade regime’ debate.

#### IS A GIVEN INVESTMENT SUSTAINABLE? SWISS CASE ANALYSED BY CDE AND WTI OF THE UNIVERSITY OF BERN

In order to examine whether a given large scale investment is sustainable or not, it needs to be assessed how the investment impacts on the public economy, the environment and the society, including both individual and communal livelihoods. This is true for both short-term and long-term impacts. Such analysis, if being conducted systematically, includes an examination of the domestic and international legal settings in which the investment is embedded. This implies an assessment of whether accepted legal standards have been implemented during the investment phase and of whether those settings complement or contradict each other. The author is currently involved in an inter- and trans-disciplinary research project, hosted by both the Centre for Development and Environment CDE and the World Trade Institute WTI and supported by the Swiss National Fund, which seeks to capture the sustainability record of a large scale land investment which originates in Switzerland, and to define most optimal policy responses concerning the different

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<sup>19</sup> Bürgi forthcoming 2014.

<sup>20</sup> Anseeuw 2012, p. 12.

<sup>21</sup> E.g. Smaller, Carin, Mann, Howard. 2009. *A Thirst for Distant Lands: Foreign investment in agricultural land and water*. IISD. 2009.

levels of governance, including the trade regime. Hence, this study will assess the legal embedding of the investment from a multi-layered governance perspective,<sup>1</sup> and analyse the settings by deriving from coherence theory.<sup>2</sup> It will then compare the identified benchmarks and deficits with the findings of the involved sociologists, geographers and agronomists.

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<sup>1</sup> Cottier, Thomas, Hertig, Maya, *The Prospects of 21st Century Constitutionalism*, in: Max Planck UNYB, Band (2003), p. 261-328.

<sup>2</sup> See section 2.3.

## II. THE EXAMPLE OF TRADE IN AGRICULTURE

### A. SUSTAINABLE TRADE POLICY AS PRECONDITION FOR SUSTAINABLE INVESTMENT

As explained, international legal frameworks promote or discourage sustainable investments in agriculture, depending on their design. If it is assumed that sustainable agricultural investments presume a sustainable development of the agricultural sector, the respective legal frameworks should be shaped so as to most optimally promote such sustainable development. Regarding trade, it is assumed that sustainable investments in agriculture - and hence a sustainable development of the agricultural sector - presume a 'sustainable trade regime'. Hence, parts of the debate about a sustainable agricultural trade regime will be presented here, as it has been resumed and further developed by the author in recent years.<sup>22</sup> This focus on the agricultural trade regime and related incoherencies shall assist in indicating trade related research questions which future interdisciplinary studies should examine.

The agricultural trade regime strongly contributes in shaping the markets within which farmers operate. Regarding these markets and the rush towards farmland in developing countries, the UN Special Rapporteur on the Right to Food Olivier de Schutter commented:

We have failed in the past to adequately invest into agriculture and rural development in developing countries [...]. We have failed to promote means of agricultural production which do not deplete soils and do not exhaust groundwater resources. And we are failing

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<sup>22</sup> Bürgi forthcoming 2014; Bürgi Bonanomi, Elisabeth, 2012, *Right to Food, Sustainable Development and Trade: All Faces of the Same Cube*, in: Rayfuse, Rosemary, Weisfelt, Nicole (eds.), *The Challenge of Food Security* (Cheltenham: Edward Elgar Publishing), pp. 70-91.

today to establish well-functioning and more reliable global markets for agricultural commodities.<sup>23</sup>

But what would a well-functioning, more reliable global and local market for agricultural commodities look like? What instruments would contribute to a more equitable, reliable global market? Taking into account that international trade rules shape agricultural markets and influence investment practices, the following chapter will discuss how trade rules could provide an enabling environment for sustainable investment in agriculture.

## **B. SUSTAINABLE TRADE POLICY PROMOTES SUSTAINABLE DEVELOPMENT OF THE AGRICULTURAL SECTOR IN DEVELOPING COUNTRIES: SOME BASIC ASSUMPTIONS**

A sustainable trade policy is a trade policy which promotes rather than hinders a sustainable development of the agricultural sector in developing countries. Such sustainable development of the agricultural sector requires that its economic viability is not undermined, that environmental assets are carefully dealt with, and that human needs are respected and fulfilled. The reflections in section 2.4. emanate from the following experience-based assumptions:

### *1. Need to include the small-scale sector and to take account of the care sector*

As experience shows, sustainable agricultural development in developing countries necessitates that the small-scale farming sector is not left out, but is appropriately included in the process of raising agricultural productivity. Indeed, the process of development necessarily entails the movement of workers from low-productivity, low-income subsistence farming to higher-productivity, small- or large-scale agriculture, and requires an increase in work opportunities in sectors such as manufacturing and services in order to absorb excess agricultural labour.<sup>24</sup> However, “even under the most favourable domestic and international conditions, [...] moving large numbers of people from low-productivity farming to higher-productivity agriculture, manufacturing, and other occupations has taken decades”.<sup>25</sup> Taking account of this large employment effect of small-scale agriculture is a key element of poverty reduction.<sup>26</sup> As a result, adequate policies need to be in place to ensure that upgrading and inclusion of the small-scale

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<sup>23</sup> De Schutter, 2009, p. 15.

<sup>24</sup> Polaski, Sandra., 2005. *Agricultural Negotiations at the WTO: First, Do No Harm*. Carnegie Endowment for International Peace (2005), p. 4.

<sup>25</sup> Idem.

<sup>26</sup> World Bank. 2008. *World Development Report 2008: Agriculture for Development*. World Bank.; ILC, Bürgi, 2012.

sector happens in a decent way. Hence, in order for investments to be sustainable, they should support small-scale farmers in their ability to produce and to gain weight in political processes by strengthening their economic weight and by improving knowledge about their contribution to society.<sup>27</sup>

In this context, the phenomenon of feminisation of small-scale agriculture in poorer countries needs to be considered.<sup>28</sup> As a result of marginalisation of the sector, men tend to migrate in search of more lucrative jobs, while women stay with the family on the farm. This not only implicates more income opportunities, but also an increased workload for women who continue to provide most care work. Strategies that target economic efficiency of the agricultural sector therefore need to include an analysis of the sharing of the burden of work, in order to ensure that time poverty is not increased (as this constitutes an important element of individual wellbeing).<sup>29</sup>

*2. Engagement in international trade in agriculture is associated with less hunger (only) if the institutional environment is adequate*

Engagement in trade in agriculture generally leads to higher rates of economic growth and is associated with less hunger: “The proportions of undernourished people and underweight children tend to be lower in countries where agricultural trade is large in proportion to agricultural production”.<sup>30</sup> However, there are many disparities, as not all developing countries with similar levels of trade experience the same amounts of hunger and poverty. This depends not least on the institutional environment upon which the trade policy is based: “If trade policy is to contribute to food security, it needs to be embedded in a coherent and well-sequenced national development strategy and complemented by appropriate pro-poor companion policies”.<sup>31</sup> Thereby, sequencing is of particular importance, in the sense that trade reforms should only be implemented once the appropriate domestic policies are in place.

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<sup>27</sup> De Schutter, 2012.

<sup>28</sup> Zammit, Ann, et al. 2008. *Social Justice and Gender Equality, Rethinking Development Strategies and Macroeconomic Policies*. UNRISD (2008); UNCTAD. 2004. *Trade and Gender. Opportunities and Challenges for Developing Countries*. UNCTAD: p. 77-117.

<sup>29</sup> Bieri, Sabin, Sancar, Annemarie, 2009. *Power and Poverty. Reducing Gender Inequality by ways of Rural Employment?* Paper presented at the FAO-IFAD-ILO Workshop on Gaps, trends and current research in gender dimensions of agricultural and rural employment: differentiated pathways out of poverty, Rome 2009; Razavi, Shakra. 2007. *The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options*. UNRISD; UN Special Rapporteur on the Right to Food, 2012, Olivier de Schutter, *Women’s rights and the right to food*, Report to the Human Rights Council of 24 December 2012 (A/HRC/22/50).

<sup>30</sup> Mechlem, Kerstin. 2006. *Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture*. Max Planck Yearbook of United Nations Law, Volume 10. p. 132.

<sup>31</sup> Idem.

*3. Local markets need to be maintained since too intensive export orientation may increase vulnerability*

This trade-friendly starting point is put into perspective by the recognition that intensive export orientation might increase vulnerability as a result of price volatility, and that reliable local or regional food markets are a key prerequisite of a viable small-scale farming sector.<sup>32</sup> Such reasoning is prominently defended, for example, by the UN Special Rapporteur on the Right to Food who claims that states should avoid excessive reliance on international trade: “Their short-term interest in procuring from the international market the food which they cannot produce at lower prices should not lead them to sacrifice their long-term interest in building their capacity to produce the food they need to meet their consumption needs”.<sup>33</sup> This implies that local markets need to be strengthened since they provide for an important fall back option for small-scale farmers.

In order not to simply prolong the dependence of developing countries on low-productivity agriculture,<sup>34</sup> but instead to contribute to an increase in agricultural productivity, diversification of agricultural production and engagement in value adding processes are of key importance. Not only domestic, but also international economic policies must be shaped in such a way as to ensure that the rents that accrue along the value chain are distributed in an equitable way.

## C. SUSTAINABLE TRADE POLICY PRESUMES A COHERENT DOMESTIC AND INTERNATIONAL TRADE REGIME

### *1. Coherent domestic trade regime*

The trade strategy of a country or region indicates the direction in which the corresponding agricultural sector will develop. Ideally, the chosen strategy should complement the domestic food security strategy, that – according to the Rome Declaration 2009, principle 1<sup>35</sup> – should be country-owned and country-specific, and should constitute an integral part of the overall poverty reduction strategy.

Domestic trade strategies influence how investments are practiced. Ideally, they reflect the trade decisions of domestic government, by providing information about the intended degree of export orientation, the diversification and value adding policies that will be pursued, or the policy tools that will be chosen to protect and integrate the small-scale sector. The chosen approach can be more or less conducive to sustainable investment.

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<sup>32</sup> Eg. FAO. 2005. *The State of Food Insecurity in the World 2005, Eradication world hunger – key to achieving the Millennium Development Goals*.FAO, p. 27.

<sup>33</sup> UN Special Rapporteur on the Right to Food, De Schutter, Olivier. 2008. *Report on behalf of Human Rights Council, Mission to the World Trade Organization*, UN. p. 20

<sup>34</sup> Polaski, 2005, p. 9.

<sup>35</sup> FAO. 2009. *World Summit on Food Security. Declaration of the World Summit on Food Security*. FAO.

In order to find out what trade policy might best support a prudent and sustainable development of the agricultural sector, while taking the elements mentioned in section 2.2. into account, a deliberative process of decision making is needed. At the same time, this process needs to take into account the national and international social, economic and environmental legal principles and standards the country is bound to comply with.

## *2. Coherent international trade regime*

The international trade regime, on the other hand, strongly influences domestic trade choices. International trade rules set the stage of each country's policy space ("what protective policy measures are allowed?"; "what trade incentives frame the remaining policy space?"). Importantly, international trade rules define to what extent developed countries' market policies are disciplined. As such, they have a significant impact on investment flows. The WTO Agreement on Agriculture (AoA) constitutes *the* multilateral legal framework in the field of agriculture, although a proliferation of bilateral and regional trade agreements can be observed. While the following reflections will be limited to the AoA and the classical trade instruments such as tariffs and subsidies, the arguments are also valid for both bilateral and plurilateral trade agreements. The line of argument can also be drawn further to other non-tariff barriers that influence trade flows.

The preamble to the Marrakesh Agreement establishing the World Trade Organization (WTO) states that international trade law shall be:

... in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of development.

With this, the WTO is committed to the Concept of Sustainable Development that encompasses the principle of coherence. This principle requires international trade law to be coherent with international human rights and environmental legal standards.<sup>36</sup>

Such legal coherency is attained if a) the various international agreements do not formally contradict each other (formal coherence), and b) the *de facto* impact of one agreement does not undermine, but rather promotes the implementation of the other agreement (substantive coherence). Hence, in order to be "coherent", a trade agreement must not undermine but rather promote the implementation of international human rights and environmental obligations. Importantly, the dynamics that result from the implementation of a trade agreement, have to be taken into account.<sup>37</sup> This necessitates

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<sup>36</sup> Gehne, Katja, 2011, *Nachhaltige Entwicklung als Rechtsprinzip* (Tübingen: Mohr Siebeck); Gehring, Markus W., CordonierSegger, Marie-Claire (eds.). 2005. *Sustainable Development in World Trade Law*. The Hague: Kluwer Law International; Bürgi, forthcoming 2014.

<sup>37</sup> Bürgi forthcoming 2014.

in-depth assessments of trade impacts. Not least, such assessments are also required by the human rights framework and its extraterritorial coverage.

Today, *ex ante* sustainability impact assessments, which examine the likely impacts of trade measures on various stakeholders and on the relevant social, environmental and economic assets, are undertaken in only a few cases,<sup>38</sup> and still come with many conceptual deficits.<sup>39</sup> Such proceedings imply a process of negotiation that is not driven by the short-term self-interest of the negotiating parties, but by the desire (or the obligation) to look for a trade framework that will come up with the optimal results in both the short- and the long-term.

#### D. SUSTAINABLE, COHERENT INTERNATIONAL TRADE REGIME: THE FOUR DUTIES

From such a perspective of sustainable development and coherence, two of the objectives of the international trade framework should be a) to promote investments in the agricultural sector in developing countries, and b) to be conducive to sustainable investment, while discouraging unsustainable or irresponsible investment. An in-depth study conducted by the author which uncovered respective legal incoherencies, concluded that the trade regime would need to comply with four duties in order to be sustainable. The four duties will be presented in the following.

##### *1. The duty to discipline policy space, particularly for OECD countries*

###### *a) Tariffs*

The still high trade barriers in Organisation for Economic Co-operation and Development (OECD) countries are imposed to discourage foreign investments from flowing into the agricultural sector of developing markets.<sup>40</sup> All these market barriers in developed countries have contributed to years of underinvestment in the agricultural sector of developing countries.<sup>41</sup> A UNCTAD study highlights that a shift in the agricultural production towards

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<sup>38</sup> UNEP. 2002. *Integrated Assessment of Trade Liberalisation and Trade-Related Policies*, UNEP Country Projects – Round II: A Synthesis Report, (2002e). UNEP; Kirkpatrick, Colin et al. 2006. *Sustainability Impact Assessment of Proposed WTO Negotiations, Final Global Overview Trade SLA of the Doha Development Agenda. Final Report*. Manchester.

<sup>39</sup> UN Guiding Principles on human rights impact assessments of trade and investment agreements, 2011; -Bürgi Bonanomi, Elisabeth, *EU Trade Agreements and Their Impacts on Human Rights*, Study commissioned by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ) (including position paper) (Bern, 2014).

<sup>40</sup> See the Producer Support Estimates (PSE) of the OECD. *Agricultural Policies in OECD Countries: At a Glance*. OECD (OECD, 2004).

<sup>41</sup> UNCTAD. 2009. *World Investment Report : Transnational Corporations, Agricultural Production and Development*. UN. p. 183.

developing countries would be accompanied by a shift in investment flows. According to this study, strategies to promote export-oriented FDI in the field of agricultural goods will be successful only if both export tariffs in export markets and import tariffs in export markets are kept low. Thereby, preferential treatment under non-reciprocal agreements (such as the Generalized System of Preferences) are of particular interest.<sup>42</sup> For example, “investment in banana production in Angola and other African, Caribbean and Pacific (ACP) countries have been encouraged by the duty-free access of ACPs and LDCs to the EU”.<sup>43</sup> Hence, improved market access to developed countries’ markets for agricultural goods from developing countries remains an important issue. From this perspective, above all, particular emphasis should be laid upon improved market access for processed food. For the moment, investment in food processing for exports is discouraged by former or actual high tariffs<sup>44</sup> and non-tariff barriers imposed on processed products as opposed to those on raw materials. This phenomenon is known as “tariff escalation”.<sup>45</sup> Accompanying measures would have to make sure that the additional benefits are well distributed along the value chain.<sup>46</sup> Hence, to improve market access to OECD countries, import tariffs on products from developing countries need to be lowered in a reliable and well specified way.

While General Systems of Preferences (GSPs) come with important opportunities for producers from LDCs and often also other developing countries, it has not yet been sufficiently examined at what extent such GSPs promote large scale land acquisitions in the targeted countries. GSPs not only boost the development of the respective agricultural sector, but also may come with negative side effects. Much indicates that GSPs are a strong driver of LSLAs. As a result, the question arises how GSPs should be shaped in order to ensure that socially, environmentally and economically sustainable investments are promoted and unsustainable investments are hindered by them.

#### *b) Subsidies*

Also, subsidies provided to farmers in importing countries discourage investment flows to countries offering lower or no subsidies, since the subsidies provide a direct price-cost advantage for producers.<sup>47</sup> As all kinds of domestic or export subsidies may distort market prices and make market access more difficult, the distinction between distorting (e.g. export

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<sup>42</sup> *Ibidem*, p. 182.

<sup>43</sup> *Idem*.

<sup>44</sup> Even if many tariffs have been reduced in General Systems of Preferences, former tariff escalation still leaves tracks.

<sup>45</sup> UNCTAD, 2009, p. 182; Elamin, N., Khaira, H., 2003. *Tariff Escalation in Agricultural Commodity Markets*. Commodity Market Review 2003-2004. FAO: 101 – 111.

<sup>46</sup> For a new approach s. eg. the proposal of Canada: WTO Committee on Agriculture. 2006/2. Proposed Approach for Addressing Tariff Escalation. Communication from Canada. JOB(06)/166. WTO.

<sup>47</sup> UNCTAD, 2009, p. 183.

subsidies and amber box subsidies) and non-distorting subsidies (e.g. decoupled green box subsidies) is problematic.<sup>48</sup> Hence, instead of thinking in boxes, transparency could be improved. Case by case, the subsidy programmes could be tested for proportionality. There could be a careful assessment of what aim is to be achieved by a specific subsidy, whether the targeted objectives are legitimate (in view of internationally agreed social or environmental standards), what the impact on developing countries' market access is, whether there would be effective measures with minor impact, and how the negative impacts could be offset or compensated for.

An issue, which arises with the suggestion of reducing subsidies, is that many developing countries are currently net importers of subsidised food. This results in cross-subsidisation of developing countries' food bills by developed countries. In consequence, a decrease in subsidies comes with higher food bills. Effective strategies would therefore be required to mitigate the adjustment costs, inter alia particular support for increasing the countries' own agricultural productivity, and also compensation.<sup>49</sup>

## *2. The duty to allow for necessary policy space*

Besides disciplining developed countries' markets, the international trade framework must also allow policy space to member countries where such policy space is needed for the implementation of human rights and environmental policies. Only an optimal balance of limiting and enabling policy space will ensure long-term legitimacy of the international trade system.

Taking the internationally recognized principle of common but differentiated responsibilities into account,<sup>50</sup> the policy space the member countries are entitled to could differ among countries and depend on their development needs.<sup>51</sup> "Country-owned" development strategies will often not seldom depend on the possibility to choose (reliable) "country-owned" trade policies. The approaches that are currently being discussed, however, allow only for limited flexibility.

An issue that has often been raised in order to illustrate the incoherency of trade and investment regimes, is the question of export restrictions. While trade law allows for export restrictions when national food security is at risk (for instance, in the case of an

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<sup>48</sup> IATP. 2007. *Still Not Confronting the Real Challenge*. IATP.

<sup>49</sup> See the "Marrakesh Decision of 1994 on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries" that still lacks effective implementation.

<sup>50</sup> International Law Association ILA. 2002. *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*. ILA Report of the Seventieth Conference held in New Delhi 2-6 April 2002. London/Aberystwith.

<sup>51</sup> See also above: 'developed countries'.

acute drought),<sup>52</sup> investment treaties do not.<sup>53</sup> For example, the International Food Policy Research Institute IFPRI postulates that “when national food security is at risk, domestic supplies should have priority. Foreign investors should not have a right to export during an acute national food crisis”.<sup>54</sup>

The WTO AOA already offers flexibilities. For example, AoA Art. 4 limits the use of tariffs, whereby Members agreed to bind their tariffs at a specific rate. However, in many cases, countries have chosen to set the applied tariffs below the bound rate. Such leeway between applied and bound rates can be made use of. This, however, requires that the respective countries are not otherwise compelled to give up such flexibility, e.g. by bilateral trade agreements or structural adjustments obligations that come with financial assistance. Also in the field of subsidies, the AoA offers considerable flexibilities<sup>55</sup> (eg. development box).

*a) in particular: special products and special safeguard mechanisms*

The safeguard provision of the AoA, that allows for protection against immediate import surges (AoA Art. 5), is only of restricted use to developing countries, as its application is limited to countries that underwent a tariffication process (AoA Art. 4 para 2).<sup>56</sup> This is why a special safeguard mechanism (SSM) with a broader scope has been seriously advocated in the Doha Round by the G33, consisting of developing countries with a still significant small-scale agricultural sector, such as India, Indonesia or Kenya.<sup>57</sup>

The SSM shall be complemented by a specific ‘special product’ provision (SP) that would allow developing countries to refrain from reduction of tariffs on specific agricultural products that are particularly important for the small scale sector and rural livelihoods.

While opponents want to limit SP to only a few tariff lines and to narrow the scope of the SSM, human rights activists in particular have pointed out the necessity to keep the provisions broad in order to maintain political flexibility: “Developing countries should

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<sup>52</sup> Export restrictions have been very controversially debated in recent years, as they further increase food prices.

<sup>53</sup> Smaller, 2009, p. 12.

<sup>54</sup> Braun, Joachim von, Meinzen-Dick, Ruth. 2009. *Land Grabbing“ by Foreign Investors in Developing Countries: Risks and Opportunities*. IFPRI Policy Brief 13. p. 4; S. also Smaller, 2009, p. 18, who understands food export restrictions as a key policy tool for host states in the event of food shortages, a possibility that is limited by investment treaties: “The use of trade measures including export taxes and export restrictions, permissible under international trade law, can create problems for host governments if they negatively affect investor rights. This is particularly pertinent for contracts where agricultural production is for export to the home country only.”

<sup>55</sup> But not necessarily the most appropriate ones.

<sup>56</sup> ICTSD (International Centre for Trade and Sustainable Development). 2005. *Special Products and the Special Safeguard Mechanism. Strategic Options for Developing Countries*. Issue Paper No. 6. ICTSD.

<sup>57</sup> ICTSD (International Centre for Trade and Sustainable Development). 2008. *Implications of the July 2008 Draft Agricultural Modalities for Sensitive Products*. ICTSD.

be allowed to designate as ‘special products’ all crops that are cultivated by their small-scale farmers and farmworkers. These products should be exempted from any further reductions in tariffs or increases in import quotas. [...] There should be no numerical limit on the number of products that can be designated, provided they are cultivated by small-scale farmers and farmworkers”.<sup>58</sup>

Such safeguard instruments might be important particularly for maintaining the viability of the domestic agricultural markets, a prerequisite for sustainable development of the agricultural sector. It has been argued that “investment agreements should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets”, in order to mitigate the risk of food insecurity that might build up “as the result of increased dependence on international markets or food aid”.<sup>59</sup> Such clauses in investment agreements would, however, presume that the trade framework allows for commensurate restrictions.

However, some developing countries<sup>60</sup> have also raised objections to the inclusion of broad protective tools. They argue that such market protection would impede the ability of their small-scale farmers to export to the respective developing countries’ markets, and that it would thereby become harder for rural populations to make a livelihood in such previously exporting regions.<sup>61</sup> UNCTAD points out the danger of safeguard measures reducing predictability of market access, which again might discourage FDI.

### *3. The duty to positively shape*

#### *a) Set incentives for sustainable agricultural production*

Whereas market opening promotes investment flows, the trade framework should also contribute to investments happening in a sustainable manner, by not overrunning historically grown structures. This necessitates a trade regime that includes adequate market incentives.

Internationally, trade rules generally offer an incentive for the cheapest way of production. Much discussion has taken place on how to include sustainable incentives, whereas the debate has mainly centred on the inclusion of social and environmental standards, or on product differentiation according to the process and production methods (PPMs) concerned. Conditionalties have, so far, mainly entered the General System of

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<sup>58</sup> Polaski, 2005: p. 8.

<sup>59</sup> UN Special Rapporteur on the Right to Food, De Schutter, Olivier. 2009. *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*. A/HRC/13/33/Add.2.

<sup>60</sup> Such as Thailand and Pakistan.

<sup>61</sup> WTO Committee on Agriculture. 2006 /1. *Thailand Paper on Special Products*. JOB (06)/135. WTO; WTO Committee on Agriculture. 2007. *Modalities for the Selection and Treatment of Special Products (SPs) by Developing Countries. Communication from the Delegation of Pakistan*. JOB(07)/46. WTO.

Preferences.<sup>62</sup> Further, product differentiation has been advanced by the use of labels or the promotion of geographical indications.

For many years, developing countries have been reluctant to accept the inclusion of social and environmental incentives into the trade regime, as such incentives might reverse achievements in market opportunities. Therefore, incentives need to be shaped carefully, taking all the various contexts into account, and must in no way hamper market access to the markets of developed countries, and thus remaining a core element of a responsible agricultural trade regime. Importantly, it is not up to the trade negotiators to set their own social or environmental standards. Rather, reference has to be made to existing standards of other international regimes.<sup>63</sup> Such approaches have been discussed in recent years referring to the concept of qualified market access.<sup>64</sup>

*b) duty to positively shape domestic governance*

Trade rules may also influence state behaviour by requiring member countries to comply with certain criteria if they are participating in international trade. Such criteria may lie beyond domestic economic policy. For example, Art. VI of the WTO General Agreement on Trade in Services requires domestic policy to comply with procedural rules.<sup>65</sup> Hence, such procedural requirements could also be included in the AoA. Countries could be required to follow transparent and fair procedures while negotiating investments in agricultural assets, e.g. by promoting “alternative models of agricultural investment that do not involve transfers of land ownership”<sup>66</sup> and ensuring a fair sharing of the benefits.<sup>67</sup> One may also envisage references to International Labour Rights, or obligations to engage in responsive governance of land tenure.

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<sup>62</sup> Shaffer, Gregory, Apea, Yvonne. 2005. *GSP Programmes and Their Historical-Political-Institutional Context*. In: Cottier, Thomas, Pauwelyn, Joost, Buergi, Elisabeth, Human Rights and International Trade, New York: Oxford University Press: 488-503.

<sup>63</sup> Perez, Franz 2006. *The Mutual Supportiveness of Trade and Environment*. American Society of International Law: Proceedings of the 100<sup>th</sup> Annual Meeting, 26-19.

<sup>64</sup> Ecofair Trade Dialogue, Lorenzen Hannes. 2006. *Qualified Market Access, How to include environmental and social conditions in trade agreements*. Heinrich Böll Foundation et al.; European Commission, DG Trade. 2008. *Qualified Market Access*, Final Report. EC.

<sup>65</sup> S. eg. the obligation that “each member shall maintain [...] as soon as practicable judicial, arbitral or administrative tribunals” which shall provide for the prompt review of decisions affecting trade in services.

<sup>66</sup> Taylor, Michael, Bending, Tim. 2009. *Increasing commercial pressure on land: Building a coordinated response*, International Land Coalition. para. 4.

<sup>67</sup> Such references could draw from the evolving “Roundtable Principles” on responsible investment, according to which investments are considered responsible if a) they are based on investment treaties that recognize and respect existing rights to land and natural resources; b) they do not jeopardize, but rather strengthen food security; c) processes for accessing land are transparent, monitored, and ensure accountability; d) participation of those materially affected is ensured; e) the projects are economically viable; f) they generate desirable social and distributional impacts and do not increase vulnerability; g) they ensure sustainable use of resources (FAO, 2009).

Whereas the WTO framework includes an agreement for effective protection of intellectual property rights,<sup>68</sup> no legal framework has been established so far for the protection of local land property rights. As the protection of rights and obligations over land and resources constitutes a key pillar of responsible investment policy, an effective international legal framework might be supportive. The challenge, however, would be to focus primarily on the land rights of those who are most in need of protection, and to take adequately into account all forms of property systems.<sup>69</sup>

*c) duty to regard ‘the other side of the coin’: the package approach*

The ‘duty to regard the other side of the coin’, finally, relates to the core aspect of sustainable development: the integration of interests. In the process of developing an optimal, sustainable Agreement on Agriculture, every conceivable policy which relates to the three duties mentioned above would need to be evaluated in relation to the other duties. Trade-offs would need to be made transparent, and the ‘other side of the coin’ uncovered.

Factually, there are always ‘other sides of the coin’. For example, more open trade would imply a decrease in domestic subsidies which again would lower cross-subsidisation of developing countries’ food bills by developed countries. Such would lead – at least temporarily – to higher food prices, also for poor net food consumers. Similarly, UNCTAD has pointed out that special safeguard measures risk discouraging much needed foreign direct investment. Likewise, provisions on export restrictions would come with positive and negative effects, depending on the perspective. Hence, in a sophisticated process of balancing all involved interests, middle courses as well as context based solutions must be looked for, while taking into account all existing economic interdependencies. The optimal AoA might most often be “somewhere in between”.

*4. A sustainable trade regime: further issues*

If the issue of an unbalanced agricultural trade system was approached more comprehensively, many more areas would have to be touched upon. Competition rules might be introduced to deal with the issue of a highly concentrated intermediary sector,<sup>70</sup> regulations for commodity future markets would need to be strengthened,<sup>71</sup> food

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<sup>68</sup> WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

<sup>69</sup> Razavi, Shahra. 2003. *Introduction: Agrarian Change, Gender and Land Rights*. -Razavi, Shahra (ed.), *Agrarian Change, Gender and Land Rights*. Blackwell Publishing Ltd, Oxford: 2-32.

<sup>70</sup> South Centre. 2008. *Rebalancing the Supply Chain: buyer power, commodities and competition policy*, South Centre / Traidcraft.

<sup>71</sup> E.g. Newman, Susan. 2008. *The role of international commodity exchanges in the formation and transmission of prices and price risk along international coffee chains*. NCCR Trade Regulation Working Paper No. 12/2008. World Trade Institute. Bern.

aid programmes be re-shaped,<sup>72</sup> among others. The rules that regulate sanitary and phytosanitary measures and technical barriers to trade (in particular the WTO SPS<sup>73</sup> and TBT<sup>74</sup> Agreements, as well as the standards of the Codex Alimentarius) would need to be more seriously assessed in terms of their negative impact on developing countries' market access.

Further, from a comprehensive perspective, price volatility and instruments for its prevention would have to be dealt with. Past structural adjustment programmes have weakened the role of marketing boards and commodity stabilization funds.<sup>75</sup> Alternatives would need to be discussed, such as the establishment of shared public grain stocks, and further measures to mitigate the risks associated with price volatility.<sup>76</sup>

### III. URGENT RESEARCH QUESTIONS

The mentioned duties and related measures, which would allow to re-shape the trade regime, are derived from a preliminary coherence assessment of the trade framework and related experience and debate. However, in-depth impact assessment studies which would examine which trade regime would be most supportive to social, environmental and economic legal standards, and would most optimally promote sustainable investments in agriculture, are lacking. Certainly, such assessments depend upon a clear picture of what 'sustainable investments in agriculture' could be. But such undertaking would also require that researchers of LSLAs do not lose sight of the whole picture. They should understand the linkages between trade and investment policies and should be informed about the domestic and international trade debate. As a result, they should venture to tackle the complex question of how a sustainable trade regime would look like. Such can only be done in inter- and trans-disciplinary process where all involved stakeholders have a say. However, such search must also be guided by fundamental environmental, economic and social legal standards and principles, including human rights, which are valid for all actors. The above mentioned duties and measures may guide the direction of respective future research.

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<sup>72</sup> Heri, Simone, Häberli, Christian. 2009. *Can The World Trade Organisation Ensure that Food Aid is Genuine?* NCCR Trade Regulation Working Paper No. 19/2009. World Trade Institute. Bern.

<sup>73</sup> WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

<sup>74</sup> WTO Agreement on Technical Barriers to Trade.

<sup>75</sup> UNCTAD, 2009, p. 183.

<sup>76</sup> Bürgi, 2009.