POLICY BRIEF
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Trade law and responsible investment

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There is broad international agreement that investment flows to the agricultural sector in developing countries need to be increased. In addition, there is broad agreement that such investments need to be responsible, and that they will only be responsible and beneficial to poor people if they contribute to the prudent development of the agricultural sector. Less studied is the link between responsible investment and trade. In this brief, the assumption is made that responsible investment flows presume a responsible trade regime, i.e. a trade regime that contributes to the prudent development of the agricultural sector in developing countries. Such a prudent, sustainable trade regime will promote investments in the agricultural sector that are responsible to the people involved and to the environment. It builds the "channel" through which investments flow. By contrast, an unsustainable trade framework will create an investment climate that promotes problematic investment practices.

> Responsible investment flows presume a responsible trade regime, one that contributes to the prudent development of the agricultural sector in developing countries

As experience shows, a responsible trade regime that promotes responsible investment in agriculture and deters irresponsible investment is a regime that provides for inclusion and careful upgrading of the small-scale sector in developing countries; that allows developing countries to choose a prudent policy orientation towards trade in agriculture which may consist of an adequate balance between export orientation and focusing on the maintenance of lively and predictable local markets; and that enhances market access to developed countries, while focusing in particular on processed products.

Combating irresponsible investment patterns must therefore always include the promotion of a more responsible trade regime. On the domestic level, this implies claiming country-owned trade strategies that complement effective food security strategies. On the international level, this implies campaigning for trade agreements that are well balanced. When it comes to the WTO Agreement on Agriculture (AoA) – the main multilateral legal framework in the field of agriculture – campaigning should include the following postulations:[1]

- **The WTO AoA needs to be legally coherent with international human rights and environmental legal standards, in accordance with the concept of sustainable development.**

Legal coherence is attained if a) the various international agreements do not formally contradict one another (formal coherence), and b) the de facto impact of one agreement does not undermine, but rather promotes, the implementation of another 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. This implies the undertaking of sustainable impact assessment at an ex ante stage.

1 The line of argument can be drawn further to bilateral and regional trade agreements, and to other WTO agreements.

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- **The WTO AoA needs to discipline developed countries' markets.**

The still high trade barriers in OECD countries are imposed to discourage foreign investments from flowing into the agricultural sector of developing markets. These market barriers in developed countries have contributed to years of under-investment in the agricultural sector of developing countries. Hence market access to developed countries' markets for agricultural goods from developing countries remains an important issue, while particular emphasis should be laid upon improved market access for processed food. Also, subsidies provided to farmers in importing countries discourage investment flows to countries offering lower or no subsidies. In this area, transparency as to the effects of subsidies needs to be improved. Rules that regulate sanitary and phytosanitary measures and technical barriers to trade need to be assessed in terms of their negative impacts on developing countries' market access.

- **The WTO AoA needs to allow for necessary policy space.**

The international trade framework must allow policy space to member countries where such space is needed for the implementation of human rights and environmental policies. Taking the internationally recognized principle of common but differentiated responsibilities into account, the policy space that member countries are entitled to should differ between countries and should depend on their development needs. "Country-owned" development and food security strategies will often depend on the possibility of choosing reliable "country-owned" trade policies. Such flexibility would allow for export restrictions to apply safeguard mechanisms where needed. The WTO AoA already offers certain flexibilities, and some approaches that are currently being discussed would bring in more. They are, however, of limited use.

- **The WTO AoA needs to positively shape.**

While market opening promotes investment flows, the trade framework should also contribute to investments being made in a sustainable manner, by not overrunning historically grown structures. This necessitates a trade regime that includes adequate market incentives. These might consist in focusing on qualified market access; in the inclusion of procedural requirements such as the obligation to follow transparent and fair procedures while negotiating investments in agricultural assets; or in a WTO legal framework for the protection of local property rights.

Advocates of responsible investment policies should understand the linkages between trade and investment policies and should be informed about the domestic and international trade debate

It is important for advocates of responsible investment policies not to lose sight of the picture as a whole. They should understand the linkages between trade and investment policies and should be informed about the domestic and international trade debate. Advocates should know how to make use of the policy space that a particular country already has, and should reflect on the claims that should be made. The WTO regime does not include many entry points for non-state actors, as trade negotiations and the dispute settlement system are reserved for national governments. However, lobbying for adequately balanced mandates not only at the domestic level but also at the international level is pivotal, as is the supplying of *amicus curiae* briefs in dispute settlement procedures. Last but not least, thinking about new approaches needs to be promoted.

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This policy brief is derived from a wider initiative on Commercial Pressures on Land (CPL). If you would like further information on the initiative and on the collaborating partners, please contact the Secretariat of the International Land Coalition or visit **www.landcoalition.org/cpl.**

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