Introduction and overview

For more than two decades, the concept of sustainable development has surrounded international decision and law making. Since the initial appearance of the concept in the late 1980s – claiming the integration of the social, economic, environmental and future dimension of development – international public law has been recognized as fragmented. As a result, the discourse of multilateral treaties has gradually evolved to include the following imperatives: the treaties should, henceforth, be legally coherent, mutually supportive and provide for an enabling environment.

Two decades later, these imperatives have yet to be put into action. The outcome document of the Rio+20 conferences, *The Future We Want*, rightly reiterates the still prevalent ‘need for an enabling environment at the national and international level’. While this document indeed includes a list of necessary measures for each dimension of development and even contains innovative proposals for the alternative measuring of progress, it does not provide guidance on how to interrelate the various dimensions systematically and on how to approach ‘legal coherence’ in a structured way.

Indeed, systematic approaches towards the above-mentioned imperatives have been rare, and as a result, the concept of sustainable development continues to be criticized for not being operational, despite an increasing amount of literature on sustainable development governance. This has a lot to do with the fact that the concept of sustainable development has not yet been adequately translated into legal theory, including the theory of international law making. Hence, this volume includes suggestions on how to move forward in international law by activating the normative potential of sustainable development, deriving from history and both legal and non-legal practice.

The WTO Agreement on Agriculture (AoA) is an example of a multilateral treaty which has often been criticized as fragmentary. While

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1 Simma, Bruno, ‘Self-contained Regimes’ (1985) 16 NYIL 111.
negotiations have come to a halt, many civil society critics argue that the tabled proposals are unbalanced and that the AoA should be shaped in a more coherent way. However, proposals on how to get there are scarce, and suggestions only scratch the surface. For example, critics request the integration of the Agreement on Agriculture into the structure of the United Nations, without further outlining what this would imply. Or, they call for an approach to trade in agriculture from a fundamentally different perspective; by focusing, for instance, on the sovereignty of states, but without adequately exposing and balancing the pros and cons. More nuanced proposals have been introduced into the debate by representatives of the human rights community, but they do not refer to all dimensions of development.

Hence, this volume is based on the assumption that formulating a coherent Agreement on Agriculture – being an important element of effective and coherent food governance – must be approached systematically, by making use of the concept of sustainable development. The overall purpose is to shed some light on how to establish a ‘universal, rules-based, open, non-discriminatory and equitable multilateral trading system’ in the field of agriculture, thereby ‘benefiting all countries at all stages of development, as they advance towards sustainable development’. The standstill of the Doha negotiations – which is still ongoing despite some minor advances – implies less activism in the trade debate. The time gained should be used for more in-depth reflections and a change to a lower pitch. And these reflections – to which this book contributes – should pave the way for a comprehensive, deliberative and evidence-based process of defining a sustainable, coherent AoA option, for which the need is great.

The use of the concept of sustainable development as a guiding, overarching concept for policy making is, in itself, a major achievement. The indeed, simple, but ingenious multi-dimensional concept should bridge gaps at both the international and the domestic level of governance. However, the international community is struggling to make it operational and to provide the concept with its full shape. Even after 20 years of sustainable development-related work at UN institutions, it has been stated: ‘While sustainable development is a widely recognized framework to balance economic, social and environmental objectives in the formulation of national development strategies, the framework has yet
to be translated into comprehensive, integrated approaches leading to sustainable development.\(^4\) This is still valid after Rio+20.

Also, international sustainable development law is struggling to define its full shape and potential. Characterized as a new branch of law, the normative contours of the concept of sustainable development are not yet sufficiently developed. The International Law Association (ILA), together with prominent legal scholars in the field, continue with the idea that the concept of sustainable development is a political concept, bringing together a number of legal principles, but without itself amounting to a principle of law. A more recent school of thought has made first attempts to show how a ‘principle of sustainable development’ as such could be normatively conceived, entailing a set of interrelated duties.

Most of the literature dealing with international sustainable development law and coherence theory has so far focused on the interpretation of law. However, this literature has basically by-passed international law making. Law making is often neglected by legal scientists who give the floor to political scientists, governance experts and policy makers, despite the legal principles governing the process. But since law making is of equal importance to law interpretation when establishing coherence in public international law, this volume will particularly focus on questions related to ‘coherent law making’ at the international level. In continuing the work of that legal school which affirms the existence of a normative principle of sustainable development, it examines how law making processes could be shaped in order to arrive at coherent outcomes. This examination goes beyond issues of participation, deliberation and cooperation among institutions to work towards structuring decision making in a way which copes with ‘whole-of-government’ theory. Such structuring aids in the de-construction of stiff policy debates by bringing apparent conflicts to the table for a new perspective on alternative policy options.

However, as a still under-developed field of law, this undertaking can only be carried out from both present and past contexts. Historical circumstances must be taken into account alongside existing institutional practice, providing shape and contour to the concept of sustainable development. Also, the concept of sustainable development has already been reflected from various disciplinary perspectives. While history, conceptualization and institutionalization of the concept are interrelated, historical circumstances must be taken into account alongside existing institutional practice.

they all nurture the adoption of sustainable development into law. It is time, therefore, to consolidate knowledge of sustainable development, in order to inspire the adoption of a framework for coherent law making.

Any such exercise remains abstract without implementation, and given the pressing need to make progress in the AoA debate, which is still governed by irreconcilable positions relating to trade and non-trade concerns, the newly devised framework for coherent law making will be applied to the AoA. Such detachment from the rigid debate may result in a step forward.

Part I of this volume presents the foundations of sustainable development. Chapter 1 examines the origin of the concept. During the course of the UN development decades, it soon became apparent that sectoral approaches towards development remained limited and, consequently, in the late 1980s, a blockade culminated in the formulation of the concept of sustainable development. This chapter reveals how international actors have been struggling to implement the concept ever since. The second chapter reveals conceptual and institutional approaches to sustainable development. It illustrates how various disciplines – such as political science, law, economy, anthropology, and the natural sciences – have dealt with the concept of sustainable development in different ways. While most agree that sustainable development is about the balancing of divergent interests, the tools and perspectives differ. Parallel to the formulation of conceptual approaches, the institutionalization of sustainable development has gone ahead. Efforts to mainstream sustainable development in international and national public institutions – which continue to draw from diverse conceptual approaches – are outlined and reflected upon.

Part II builds the core of this volume by reflecting on the adoption of sustainable development into international law. History, conceptual approaches and institutional experience have each influenced – and should continue to influence – the reception of sustainable development into law, and in particular, international law making. Chapter 3 presents key elements of this new branch of law. They include important international judiciary cases which refer to sustainable development, as well as the most relevant legal schools dealing with sustainable development law. It is argued that a legal principle of sustainable development can indeed be affirmed. As such, it constitutes a multi-dimensional methodological norm which requires integration and reconciliation. The norm includes both procedural and substantive aspects and can be divided into three legal duties. Deriving from this, a framework of sustainable, coherent law making is developed which will allow a range of optimal options, not otherwise tabled, to feed into the policy process. In addition,
Chapter 4 approaches the specific notion of ‘legal coherence’ from a sustainable development perspective. While sustainable development law theory shapes coherence theory, it is, in turn, influenced by coherence theory. The argument will be made that only those legal settings which comply with both the criteria of formal and substantive coherence constitute a coherent, optimal option, which implies a constant search for evidence. Chapter 5, in addition, examines the status of the legal principle of sustainable development in international law. Even though sustainable development is accessible to law, there is no implication that it is also constituted as law in a specific case. Whether or not sustainable development has become part of binding international law has been controversially debated among those scholars who affirm some normativity. It will be explained why much depends on which normative elements are focused upon.

Part III, finally, applies the framework for sustainable, coherent law making – including the three duties – to international food governance and trade. Despite many international agreements being of relevance in this respect, remaining illustrative, the examination will be limited to the AoA. Chapter 6 explores the legal foundations of the assessment, by confronting the constitutional principles of the WTO with the principle of sustainable development. Chapter 7 applies the legal principle of sustainable development to the AoA. Thereby, the basic questions are: What objectives should an AoA be geared to? Is there an ‘optimal’, enabling agricultural trade framework, which does not negatively impact upon, but rather positively promotes the identified objectives to their greatest possible extent? Also, is the current AoA already ‘optimal’, and if not, which elements would need to be re-assessed? While a ‘sustainability assessment’ of the AoA would presume a comprehensive, broadly based policy process, some suggestions will be made, though limited to pointing out directions for further research and practice.

The concept of the principle of sustainable development compels involved stakeholders to not lose sight of the whole picture, and to always take into account ‘the other sides of the cube’. Thereby, taking a broad perspective will always and inevitably be accompanied by simplifications. This requires closing the gap to focus on the most essential aspects and, accordingly, this volume has had to renounce the building of scientific depth in order to build width in certain cases. However, such compromises are generally made in sustainability science, where the viewing of an issue from different perspectives and across the various disciplines must be taken seriously. Simplifications also enable a broad discussion amongst disciplines and in society. Hence, a distance from classical scientific methods is necessary and new ways of scientific work
need to be explored which do not necessarily lay claim to completeness. Furthermore, in some cases, terminology is inevitably simplistic. This becomes most apparent when using the terms ‘developed’ and ‘developing’ countries, since this distinction has become vague and disputable, particularly when measuring society’s performance against sustainable development indicators. From a sustainable development perspective, all countries are ‘developing’ countries, or even ‘wrongly developed’ countries, and various categories of developing countries may be distinguished, depending on their state of social, environmental or economic capital. Nevertheless, this volume has deliberately chosen to employ already agreed-upon terminology, given that the WTO framework continues to build on these terms.

This volume addresses, on the one hand, legal scholars and policy makers who meet the concept of sustainable development with curiosity, and who use the concept for teaching, in research or in practice. It may well serve as a handbook for introducing students and practitioners to this exciting new branch of law or for discovering new areas for research. It may also assist in finding new ways of law making, particularly at the international, but also at the domestic level. On the other hand, the volume is directed towards trade lawyers, policy makers and activists, with a particular interest in trade in agriculture, who have long wondered how to provide the AoA with more legitimacy for the future.

And finally, if some readers consider the path presented in this volume as too wishful, they should not forget ‘that positive law has always been and will always be a product of wishful thinking’.5

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