

# Introduction: international economic law, natural resources and sustainable development

Julio Faundez<sup>1</sup> and Celine Tan<sup>2</sup>

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The papers in this special issue of the *International Journal of Law in Context* have been selected from papers presented at a Workshop on International Law, Natural held at the Warwick Law School in September 2013.<sup>3</sup> The objective of the Workshop was to consider national and international approaches to the regulation of natural resources in developing countries and the impact of such approaches on sustainable development and on the evolution of international law. The conflicting interests between importers and exporters of natural resources have been at the forefront of disputes between developing and developed countries. Meanwhile, tensions between the economic drivers of natural resource exploitation and the ecological imperatives of resource conservation have long structured international relations and relations between states and civil society. Divergent policies on natural resources have also been the source of interminable debates among international lawyers, international organisations and development specialists.

The Warwick Workshop brought together academics, policy-makers and campaigners to examine and assess the legal and regulatory regimes pertaining to the governance of natural resources in developing countries. Contributors to this special issue address an important aspect of the international law, governance and regulation of natural resources, that is, the intersection between international economic law and sustainable development, and situate the issues raised within a broader interdisciplinary framework of analyses. This emphasis on locating concerns over natural resources and sustainable development within the shifting landscape of international economic law and regulation stems from the aforementioned veritable tensions which have and continue to exist between the imperatives of transnational and national economic activity and environmental and ecological sustainability.

The current economic and ecological climate calls for a reappraisal of the international legal and political framework governing natural resources, defined broadly to include materials and organisms naturally occurring in the environment, such as water, mineral and fossil fuels, as well as cultivated resources, such as food crops, both renewable and exhaustible. This reappraisal is urgent because the governance and management of natural resources have formed a pivotal backdrop to the evolution of international economic law in the postwar period and have been critical components of the process of economic globalisation. Importantly, the burgeoning maelstrom of multiple crises – financial, food, climate and energy – facing the international community calls for a holistic review of the

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1 Emeritus Professor, Warwick Law School.

2 Associate Professor, Warwick Law School.

3 See online <<http://www2.warwick.ac.uk/fac/soc/law/research/clusters/international/devconf>> (last accessed 25 March 2015) for more details. We are grateful for the financial support of the University of Warwick's Global Research Priority on International Development, the University of Warwick's Research Development Fund, Warwick Law School's Legal Research Institute, Banco Santander and the Society for International Economic Law (SIEL) for this workshop and the accompanying outputs. Our thanks go out to all the contributors to this special issue as well as the anonymous reviewers of the papers and participants of the original Workshop for their comments and feedback on the papers selected. We would also like to thank Jane Holder and the other editors of the *International Journal of Law in Context* for their support in making this special issue a success and to Michael Webster for his editorial assistance on the special issue.

challenges and dilemmas structuring the legal, regulatory and policy framework governing natural resources.

Indeed, as the international community reels from the effects of the global financial crisis, investors seeking diversification of their portfolios are increasingly turning to natural resources as safe havens for investment and profit, with the financialisation of nature being the new frontier for conflict and instability. Further, liberal globalisation, with its emphasis on linkages, has brought about major changes to all the areas of international economic law that have a bearing on the governance of natural resources. An important feature of this process has been to transfer powers to international organisations, thus bringing about a corresponding reduction in the capacity of developing countries to design and implement coherent and sustainable policies in the natural resources sector. This autonomy over policy and regulatory space is further eroded as international organisations gain greater authority over economic affairs without corresponding reforms of the structures of governance and decision-making within such organisations to rebalance power between north and south.

All contributors in this special issue speak to the conflicts and tensions which underlie the international law and regulation of natural resources sectors and their economic drivers, and address the challenges of what has been termed the ‘fragmentation of international law’ or the difficulties arising from the diversification and expansion of international legal regimes.<sup>4</sup> Here, the overlapping and often conflicting imperatives of different legal and regulatory regimes at the international and domestic levels highlight the limitations of international and national law to manage the ecological externalities and community tensions that arise from natural resources exploitation and environmental exhaustion. At the heart of these tensions lie the aforementioned asymmetries in governance structures of international legal and political institutions that privilege the interests of powerful industrialised states and transnational economic actors that often preclude dialogue and progress towards meaningful reforms in the sustainable and equitable management of natural resources.

In the first paper, researcher and policy practitioner Lorenzo Cotula evaluates these conflicts as they arise in natural resources investment projects in developing countries. His paper considers the differing application of the notion of ‘property’ in international legal regimes and the impact of this difference on developing countries and communities affected by transnational investment projects. As Cotula argues, a rapidly “shrinking” planet and a polycentric international law regime provide the backdrop for contestation between different property concepts and claims. . . . As the frontiers of natural resource extraction expand, natural resource investments can bring different property concepts and claims directly into tension’ (p. 113). Consequently, ‘the articulation between investment law and human rights law influences the ways in which international law mediates competition for the world’s natural resources, redefining the balance between public and private interests and reshaping spaces for the lawful exercise of state sovereignty’ (p. 113).

Competitive pressures over natural resources and the potential for international economic law to positively shape sustainability outcomes is explored by Fiona Smith in her paper on global value chains and the World Trade Organisation (WTO). Smith argues that trade in natural resources ‘provides a valuable source of income for resource-rich states’ but over-harvesting and exploitation ‘results in exhaustion and biodiversity loss, and extraction may cause environmental damage and human rights problems’, quickly undermining ‘any positive contribution to . . . sustainable development’ (p. 135). In the paper, she considers the utilisation of WTO rules in maximising the

4 See International Law Commission (2006), ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi’, UN General Assembly Document A/CN.4/L.682, 13 April 2006.

benefits while minimising potential harm of natural resources trade, including the limitations of the international trade governance body in the effective regulation of such trade flows within global value chains, particularly in respect of corporate economic activity.

The challenge of regulating transnational corporations engaged in natural resource extraction and trade is a subject that David Ong tackles in his paper on the multinational oil industry. In this paper, Ong discusses the contradictions that exist in the international legal landscape that have enabled states to 'utilise international law to create opportunities within global markets for private transnational economic actors' to invest and operate in foreign jurisdictions but at the same time fail to create mechanisms to hold these actors to account 'when they cause environmental damage abroad' (p. 153). He considers the international and domestic law responses to this problem of multinational corporate accountability in relation to the oil industry, and explores the myriad of ad-hoc and often fragmented mechanisms that have developed over the years to balance resource exploitation and the environmental responsibility of transnational actors with varying results.

Celine Tan also questions the problematic issue of accountability in the financing of investment projects in her paper on the role of political risk insurance (PRI) in the natural resources sector. Viewing PRI as a form of government rationality that provides a framework for organising and regulating the behaviour of actors involved in natural resource investments, she explores how utilisation of this niche financial product offered by public and private providers can lead to a complex web of governance arrangements that 'can reframe the terms of engagement between these various stakeholders and redefine the host state's engagement with the broader international community' (p. 174). This is particularly acute in natural resources projects 'where tensions regularly exist between the interests of the foreign investor, the host state and local communities' (p. 174) and where the existence of a PRI arrangement can significantly alter the dynamics of international and domestic legal, economic and political relationships between different actors.

The development of novel financial instruments as responses to international environmental challenges is further taken up by our final paper on the expanded United Nations' Reducing Emissions from Deforestation and Forest Degradation (UN REDD+) framework by Sam Adelman. In his paper, Adelman critiques current approaches to the governance of tropical forests. He argues that these approaches – which he calls green governmentality – are inadequate because they rely mainly on market mechanisms that fail to take into account their role as a source of livelihood for vulnerable communities and as priceless carbon sinks in the efforts to address climate change. In the final section he considers alternative forms of governance which, in his view, might be more effective in safeguarding people's livelihood and protecting tropical forests.

All the papers in this special issue highlight the fact that the international governance and management of natural resources has become an important area for international research, law and policy-making in the coming years as the contestation and conflict over their use become more acute. The centrality of natural resources to global economic growth has meant that the ownership and control over natural resources have been at the forefront of legal, territorial and political disputes between states, particularly between the north and south.

At the same time, the links between natural resource depletion and environmental degradation, impoverishment and human rights violations mean that the governance and management of natural resources remains a critical arena for local and transnational contestation. In particular, tensions between the economic drivers of natural resource extraction and exploitation, the ecological concerns of resource conservation and the socio-economic imperatives of poverty alleviation and equity in wealth distribution have long structured international relations and relations between states and civil society. It is critical that these issues be addressed in a comprehensive and holistic manner with prominence given to voices from the south, where these tensions and conflicts are realised in the most acute and often devastating ways.

The Warwick Workshop was the beginning of what we and other participants view as an important conversation in developing intra- and inter-disciplinary research and policy collaborations among scholars, practitioners and policy-makers in this arena of international law, regulation and policy-making. The Workshop has catalysed a new network on International Law, Natural Resources and Sustainable Development<sup>5</sup> that have followed up conversations with an additional Workshop on the Rule of Law, Natural Resources and Sustainable Development in Amsterdam in January 2015. The network welcomes new ideas and proposals for furthering these conversations.

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5 For information, see online: <<http://www2.warwick.ac.uk/fac/soc/law/research/centres/ilnrtd/>> (last accessed 25 March 2015).