Introduction

The relationship between globalisation, natural resources and economic growth is undeniably complex. The process of globalisation, with its increased volume of world trade, transport and communications and the growing affluence it creates, depends on the Earth’s resources for its very existence.

Globalisation opens up the natural resource market and promotes economic liberalisation. Consequently, globalisation has an important role in determining the way a state manages and implements laws and regulations to protect and preserve natural resources. While the global recession of 2008 has illustrated the intertwining nature of the global economy and the lack of sufficient and adequate institutions of governance to deal with global concerns, it has also highlighted that much of the economy rests upon unsustainable factors. For example, consumption patterns in developed and developing countries alike show a dependence on non-renewable resources such as coal, gas and oil. While the energy sector is one of the most profitable sectors advancing economic growth, it also adds to the growing greenhouse gas (GHG) emissions which in turn contribute to climate change.

There is a tension between the North and the South\(^1\) regarding the ways to manage natural resources sustainably. Some resource rich developing countries push an unsustainable development path causing adverse environmental, socio-economic and related transboundary impacts. However, it is easier for the developed countries to call for a restricted approach to exploring natural resources when they have attained a certain level of economic development. The inability of the developed countries to reduce over-consumption of resources, regulate multinational enterprises causing destruction in the resource sector and control effectively their carbon footprints suggests a double standard. The distrust between the North and the South was evident during the negotiations of the Climate Change Convention and the Biodiversity Convention in 1992\(^2\) and has remained

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1. The term ‘North’ refers to the developed countries and ‘South’ refers to the developing or least developed countries of Asia, Africa and Latin America.
largely unaltered. This is exemplified in the failed efforts at Copenhagen to agree on a multilateral regime to curb carbon emissions which would be fair and acceptable to both developed and developing countries. In addition, developed countries have more political leverage to shape international agendas on natural resource management conducive to their needs, whereas most developing countries play a less active role. As developing countries such as China, India and Brazil take over the leading role of driving the world economy new tensions over traditional principles such as the scope of the right of permanent sovereignty over natural resources arise.

Free trade promoted by globalisation has a spill-over effect. Thus, problems occurring at the national level are no longer purely national – be it GHG from factories or financial meltdown at the banking sector. This requires initiatives at the global and regional scales. Many of the problems afflicting the world today, such as poverty, environmental pollution and economic crises, are increasingly transnational in nature and cannot be dealt with only at the national level. A combination of inclusive decisionmaking at the national level allowing public participation along with an effective international legal framework can lead to sustainable management of natural resources. Focusing only on a country specific management of resources can pose several problems including the overemphasis of the sovereignty over natural resources and raises questions such as whether the state shares benefits arising from resource use with the resource holders, whether the state follows sustainable practices to manage natural resources and whether the state expropriates foreign investments with appropriate compensation. A global mechanism to protect natural resources provides guidance to states and, by providing cooperative approaches to managing natural resources, makes globalisation part of the solution.

In this book we argue that, along with an effective legal framework for economic activities, strong institutions of governance, rule of law and independent judicial institutions are important to managing natural resources. Sustainable resource management requires national mechanisms which facilitate inclusive multilayered governance complemented by an international legal framework where state and non-state actors adopt cooperative approaches to managing natural resources. Several points arise out of this proposition.

First, the role of law is crucial to integrating economic and natural resource governance within the context of globalisation. Global legal

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3 Discussed in chapters 1, 2 and 3.
Introduction

Frameworks promoting sustainable use, e.g. biodiversity conservation or the reduction of GHGs, limit the way natural resources are explored and managed at the domestic level. The formulation of sovereignty and ownership of natural resources needs to be appraised if global approaches are to work. While countries like China and India challenge the traditional division between developed and developing countries and their unprecedented growth has created a surge in demand for natural resources, it is important that their development does not lead to unsustainable use of natural resources. Some of the fast growing developing countries are formulating economic and environmental legal instruments to protect their natural resources (e.g. biodiversity laws in India) and investing in clean energy (e.g. wind farms in China). Along with these positive steps, there is an urgent need for a widely shared agreement and understanding of sustainable resource use.

Second, rights-based approaches, including the existence of a right to natural resources, can provide a tool of empowerment for the people and impose a duty on the government to utilise natural resources for the benefit of the entire population. Moreover, adequate access to information, participation in the decision-making process and access to justice remain crucial for individuals. At the national level, there are tensions between the different levels of government (national, regional, local) and citizens over the control and management of natural resources. This tension is demonstrated in the confrontation between indigenous peoples and national governments over natural resource ownership, use and enjoyment. While permanent sovereignty equates to the exclusive right of states to extract or exploit natural resources and legislate in the resource sector, that does not always ensure the overall sustainable management of the resource sector. Both privatisation, e.g. water, and benefit-sharing agreements, e.g. biological resources, of natural resources largely depend on the strength of the contractual arrangement between the state and the non-state actors. Weak consultation and public participation mechanisms generally lead to poor management of natural resources. Governments as custodians or trustees of natural resources need to act for the common good of all the people in the country.

Third, transnational social and economic actors (e.g. multinational corporations, non-governmental organisations) have become forceful in the global context and play a crucial role in natural resource management, sometimes even more powerful than that of an individual state. Weak

4 Discussed in chapters 3, 7 and 9.
5 Discussed in chapters 4 and 5.
regulation or exclusion from relevant governance institutions of non-state actors needs to be superseded by an inclusive system of participation and responsibility. Both state and non-state actors can and should work together.

Fourth, an open and competitive sustainable resource management needs to be supported by the regulatory and enforcement capacity of the state. The recent economic and financial crisis and its aftermath have thrown a new perspective on the importance of strong regulatory mechanisms and institutions alongside market mechanisms. Yet, the development of these mechanisms and institutions on resource governance lags behind in relation to the development of the institutions of economic governance. A renewed role for the state in the regulation of resources within and outside the realm of permanent sovereignty needs to be delineated. In the context of shared natural resources, existing global, regional or bilateral arrangements do not always provide adequate protection. For resources within one state, over-emphasis of sovereignty over natural resources may provide weak protection to the resource holders. Examples from water, biodiversity or energy resources show that global or regional management can offer better protection than private management of natural resources.

The discussion in this chapter shows that the concept of globalisation is intrinsically linked to resource management and that a shift from economic globalisation to sustainable globalisation is one of the consequences of the globalisation process itself. The changing pattern of resource management can be observed in the way resources are regulated nationally and at the transboundary level. International actors and institutions bring their own values and priorities into resource management, and legal instruments promote cooperative approaches allowing local people to play a more active role. This chapter also shows that international and regional laws restrict the absolute nature of sovereignty. Moreover, the rights of states to exercise permanent sovereignty over natural resources are limited by certain duties towards their own people. These duties have led some countries to opt for better conservation and regulatory practices, and efficient use of natural resources. Together, these external and internal dynamisms of sovereignty have contributed to the way globalisation influences natural resource management.

6 Discussed in chapter 6.
7 See chapters 1 and 4.
8 Discussed in chapters 2 and 4.
9 Discussed in chapters 7, 8 and 9.
Introduction

1. RECENT TRENDS OF GLOBALISATION AND NATURAL RESOURCE MANAGEMENT

The present form of globalisation has a long history. To understand the meaning of contemporary globalisation requires us to look back. The 1944 Bretton Woods Agreement showed the true nature of pure economic globalisation between 1945 and 1970 with the development of a global finance mechanism through institutionalised entities such as the International Monetary Fund (IMF) and the World Bank. The effect of globalisation of mass production/consumption and investment was seen across boundaries. By the late 1960s, multilateral development aid increased in the developing countries as part of redistribution of wealth from the North to the South.10 During the 1970s, the world went through economic turbulences in the form of a rise in oil price, export stagnation and increased national debts.11 With the unequal bargaining power of the South in the world trading system (i.e. General Agreement on Tariffs and Trade – GATT), there was a recognition that a fundamental change was required at the global economic system.12 At the same time, the UN agencies called for a ‘New International Economic Order’ (NIEO) which included proposals for South–South cooperation, transfer of technology, global regulation of multilateral corporations and increased multilateral aid.13 Several UN declarations also reinforced states’ right to regulate foreign commerce and investment and to permanent sovereignty over their natural resources.14 NIEO drew resistance from the North, which was evident when the initiatives to control corporate bodies ended up as voluntary codes of conduct.15

The Washington Consensus shaped the global economic agenda during the late 1980s and 1990s. At the international level, the financial

11 Ibid. 111.
12 Ibid. 114.
Globalisation and natural resources law

institutions – the IMF, GATT and the World Bank – encouraged the developing countries to promote corporate law reform, establish more open and efficient financial markets, and support local enterprises. Their idea of neoliberalism (e.g. privatisation, market liberalisation) can be summarised in one word: reform. Implementation of neoliberal policies was one of the conditions attached to the IMF funds, and GATT’s non-tariff barriers to trade had their implications on developing countries in the form of progressive elimination of national regulatory barriers to trade. Joseph Stiglitz, a staunch critic of ‘Washington Consensus’ summarised the impact of neoliberal policies on the developing countries:16

...In many parts of the world, global institutions such as the International Monetary Fund and the World Bank came to be seen as instruments of post-colonial control. These institutions pushed market fundamentalism (‘neoliberalism,’ it was often called), a notion idealized by Americans as ‘free and unfettered markets.’ They pressed for financial-sector deregulation, privatization, and trade liberalization.

The World Bank and the I.M.F. said they were doing all this for the benefit of the developing world. They were backed up by teams of free-market economists, many from that cathedral of free-market economics, the University of Chicago. In the end, the programs of ‘the Chicago boys’ didn’t bring the promised results. Incomes stagnated. Where there was growth, the wealth went to those at the top. Economic crises in individual countries became ever more frequent – there have been more than a hundred severe ones in the past 30 years alone.

Not surprisingly, people in developing countries became less and less convinced that Western help was motivated by altruism. They suspected that the free-market rhetoric – ‘the Washington consensus,’ as it is known in shorthand – was just a cover for the old commercial interests. Suspicions were reinforced by the West’s own hypocrisy. Europe and America didn’t open up their own markets to the agricultural produce of the Third World, which was often all these poor countries had to offer. They forced developing countries to eliminate subsidies aimed at creating new industries, even as they provided massive subsidies to their own farmers.

Free-market ideology turned out to be an excuse for new forms of exploitation. ‘Privatization’ meant that foreigners could buy mines and oil fields in developing countries at low prices. It meant they could reap large profits from monopolies and quasi-monopolies, such as in telecommunications. ‘Liberalization’ meant that they could get high returns on their loans – and when loans went bad, the I.M.F. forced the socialization of the losses, meaning that the screws were put on entire populations to pay the banks back. It meant, too, that

foreign firms could wipe out nascent industries, suppressing the development of entrepreneurial talent. While capital flowed freely, labor did not – except in the case of the most talented individuals, who found good jobs in a global marketplace.

The disappointment with the economic as well as the political and social results of the neoliberal approach became apparent in the growing popular opposition to ‘structural adjustment’ policies across the South, and a widespread vulnerability in the North to globalisation. As faith in neoliberalism waned, states and non-state actors pushed the agenda of strengthening of national institutions and legal systems, procedural arrangements for decision-making and legal frameworks to accommodate a robust and active ‘civil society’. There are growing signs of South–South cooperation, e.g. in the agenda setting for global trade talks targeting agricultural subsidies and non-tariff barriers, supporting one another in resisting the intellectual property rules within the WTO, and formulating adaptation funds under the Climate Change Convention. The unsustainable nature of contemporary globalisation has led to a fairness deficit and opened a space for new thinking about globalisation. The discussion below focuses on some of the trends which are explored further in the book. This discussion underscores several points: first, various international agreements (e.g. trade and environmental agreements) and institutions (e.g. UN, WTO) influence the shift of economic globalisation towards sustainability. Second, the sovereign rights of states over natural resources can be limited by international agreements. Third, states have a duty to share sovereign rights with their citizens in order to manage their natural resources efficiently. Fourth, empowering and involving people in the formulation and implementation of decisions on resource use can lead to sustainable resource governance.

1.1. From Economic Globalisation to Sustainable Globalisation

Economic globalisation, by removing trade barriers, liberalisation of world capital markets and rapid technological progress, has vastly accelerated the movement of people, commodities and capital. For developing countries, economic globalisation has provided opportunities as it expands the size of their markets for export and attracts foreign capital which aids development. The effects of globalisation are not the same on every country, and some countries suffer more than others because they lack adequate legal frameworks and financial capacity to minimise the negative effects of economic globalisation.

Economic globalisation, promoted by the Bretton Woods institutions
and followed globally, came at a price: environmental degradation and social inequality. The imbalances of the global economy are ‘ethically unacceptable and politically unsustainable’ and ‘[t]he benefits of globalization have been unequally distributed, both within and between countries’.17

The environmental and social dimensions of sustainability were the focus of the Brundtland Commission’s18 definition of sustainable development:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.19

This definition highlights that environmental degradation and inequality are interdependent obstacles to sustainability. Moreover, the principle of equity in the distribution of income and wealth and control of resources between generations must be extended to the distribution within each generation.20 Sustainable globalisation means respecting the natural diversity of life on Earth and ensuring equity between present and future generations. Managing globalisation in a sustainable fashion has also been part of the ethos behind the commitments in the Millennium Development Goals (MDGs).21

These international instruments clearly show that the growth of the global market depends on the equitable distribution of wealth and sustainable exploration of natural resources. Some of the changes are already demonstrated in the governance practices:22 strengthening of local

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21 Especially, MDG Goal 7 (ensure environmental sustainability), Target 1. Goal 8 (develop a global partnership for development), Target 2.

governments in managing natural resources and involving people at the lowest level of decision-making processes, integration of sustainable development principles into national policy frameworks, and creation of new incentives for linking sustainability to growth. Multinational companies are adopting sustainable practices via internal and external actions, and international institutions (e.g. The World Bank) have reformed strategies related to natural resources – this shift in attitude is crucial to secure a fair and sustainable globalisation.

1.2. Calibrating Resource Sovereignty

The state, with its sovereignty over natural resources, remains central to the well-being of its citizens and is responsible for adopting legal policies which are conducive to greater economic integration and sustainable development. The sovereignty of a state is an integral part of its existence along with three other elements – a permanent population, a defined territory and government. Sovereignty includes the power to impose authority over the population, freely use or dispose of territory under the jurisdiction (i.e. internal sovereignty), and no other state can intrude into the state’s territory (i.e. external sovereignty). Permanent sovereignty over natural resources is a legal concept and closely linked to political and economic aspects of sovereignty. Sovereignty over natural resources also includes a bundle of rights – e.g. the right to possess, the right to use, and the right to manage. With the exclusive control and use of the natural resources within the territory, the state has the right to profits gained from the resources, and to conserve, explore and exploit these resources.

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27 Schriijver (1997), supra, chapters 2 and 3.
29 Ibid.
To ensure that states respect the public goods there are certain limitations imposed on their sovereignty over natural resources. First, ‘permanent sovereignty over natural resources has to be exercised for national development and the well being of the people’. With the wide discretion to interpret, states’ exercise of this duty may not always be beneficial to the people or natural resources. Second, the duty of a state is to compensate foreign investors whose property has been expropriated and provide due legal process. States should enter into foreign investment agreements in good faith and respect the ‘sovereignty of peoples and nations over their natural wealth and resources’. Third, the state has a duty to protect the interest of indigenous peoples. Fourth, the state has a duty to cooperate in respect of shared natural resources to notify and consult people in activities linked to resource use.

The non-absolute form of sovereignty suggests that states, by accepting the authority of international law, entering into international agreements and agreeing to abide by the rules of international institutions, have imposed restrictions on their resource sovereignty. This positive limitation on sovereignty includes ratification of international treaties (e.g. UN Charter, human rights and environmental treaties) and membership of regional organisations (e.g. European Union, ASEAN, NAFTA) and international institutions (e.g. WTO). The European Union (EU) provides a unique example because the membership of this regional body limits the power of the Member States to adopt decisions in certain areas. This surrender of absolute sovereignty means the supremacy of the EU law. The EU jurisprudence and legislation apply between the supranational level

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30 Public goods are non-rivalrous (available for all to consume) and non-excludable (no one can be effectively excluded from using the good). Wijen, F., K. Zoetman and J. Pieters (eds) (2005), A Handbook of Globalisation and Environmental Policy: National Government Intervention in a Global Arena, Cheltenham: Edward Elgar, UK and Northampton, MA, USA, 89–91.
32 Ibid., 339–364. Several conditions have to be fulfilled by the state in order to exercise the right to expropriation or nationalisation. Any expropriation has to be for a public purpose and be non-discriminatory. The state has to pay compensation, follow due process and provide a right to appeal. See also the discussion in chapter 1 of this book.
33 Paragraphs 4 and 8 of GA Res. 1803 (XVII), 14 December 1962.
34 Discussed in chapter 2.
35 Discussed in chapter 3.
36 Costa v. ENEL (case 6/64) [1964] ECR 585.
Introduction

and the Member States, and at the level of Union citizens. However, the EU should only act where ‘the objectives of the proposed action cannot be achieved sufficiently by the Member States’ and ‘by reason of the scale or effects of the proposed action’, the EU could achieve better result. Applying the principle of subsidiarity, the EU has the power to adopt measures to achieve its environmental objectives. As nature does not have any boundary, there is a clear case for protecting habitats, migratory species or water at the regional level.

Several acts of sovereign states may also limit sovereignty, e.g. by allowing market access to foreign investors (e.g. under BITs), sharing the benefits of genetic resources (e.g. Biodiversity Convention) or settling disputes (e.g. by use of ICSID, ITLOS). By accepting funds from international financial institutions, the states accept conditions which may have an adverse social and environmental impact (e.g. structural adjustment funds). Apart from these external restrictions, states may also limit their sovereignty by allowing human rights bodies to determine the quality of life of citizens and to ascertain the property and ownership rights of indigenous people, and implementing international standards for export products.

Sovereignty of states is closely linked to two issues: transboundary nature and ownership of natural resources. Management of transboundary resources requires the participation of states in the joint management of shared resources through treaties at the international, regional or bilateral level. The discussion on ownership of natural resources shows that government, as custodian or trustee of the natural resources, should manage natural resources.

40 There is also the issue of spill-over effect which suggests the need for community-based nature protection. Physical spill-over effect deals with the transboundary nature of global warming, water or air pollution. Economic spill-over effect deals with product and process standards affecting trade and competition, and psychic spill-over effect deals with concerns linked to the ‘integrity of nature and the well-being of various living creatures’. Wils, W.P.J. (1994), ‘Subsidiarity and EC Environmental policy: Taking People’s Concerns Seriously’, Journal of Environmental Law 6, 88–89.
1.2.1. Transboundary natural resources

Natural resources can be under the sovereignty of a state like land for agricultural production, tropical forests, national rivers or gas and oil reserves.\(^{41}\) The most challenging to regulate are those resources that are shared between states and are of relevance and importance to the whole of humanity, like biodiversity, oil and gas, marine resources, international watercourses.

While each state has permanent sovereignty over its natural resources, each state also has an obligation, under customary international law, not to cause transboundary environmental damage.\(^{42}\) There is an obligation on the source state not to cause harm to other states and the source state is ‘not permitted to use its territory for purposes injurious to the interests of other states’.\(^{43}\) This is a limit on sovereignty itself in the sense that the state is required to respect the sovereignty of other states. This limitation is apparent from customary international law,\(^{44}\) international conventions,\(^{45}\) regional conventions\(^{46}\) and bilateral agreements as well as non-binding

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\(^{41}\) Even then there are some unresolved issues of resource ownership between minorities, groups or indigenous peoples at the national level. See the discussion in chapters 1, 2 and 9.


instruments.\textsuperscript{47} These instruments set out an obligation to inform and consult one another prior to undertaking any activity likely to cause transboundary harm. For some shared resources, such as non-navigational uses of international watercourses, absolute sovereignty may lead to denial of access to water of the riparian states. Thus, in the \textit{Gabcikovo-Nagymaros} case,\textsuperscript{48} the ICJ applied the concept of ‘community of interest’ instead of sovereignty. A similar approach is found in the UN Convention on Non-Navigational Watercourses which applies on equitable utilisation and cooperation principle.\textsuperscript{49}

International law does not provide any forum with compulsory jurisdiction to bring a transboundary environmental dispute. There is an ‘uncertainty of the law of state responsibility as regards environmental damage and absence of clarity concerning the remedies available to states and their scope’.\textsuperscript{50} Using national law to remedy transboundary damage to natural resources may not be satisfactory for a number of reasons: lack of effective remedy, problem of jurisdiction, unequal access to remedies, and lack of enforcement mechanisms.\textsuperscript{51}

\subsection*{1.2.2. Ownership of natural resources}

While the limits of sovereignty are still being debated at the academic level,\textsuperscript{52} it is difficult to find a balance between the sovereignty of the state

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\textsuperscript{51} Ibid. 304.

and the ownership\textsuperscript{53} of natural resources. GA Resolution 1803 (XVII) in 1962 declared, inter alia:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their \textit{national development} and of the \textit{well-being of the people} of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations \textit{freely consider} to be \textit{necessary or desirable} with regard to the authorization, restriction or prohibition of such activities.\textsuperscript{54}

UN Resolution 1803 creates a right of sovereignty of peoples and nations. It shows that internal sovereignty is shared between peoples and the state, and implies that peoples have some control over the management and development of natural resources and have a right to be consulted. Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provides:

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources \textit{without prejudice to} any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

These Covenants further add:

\begin{quote}
Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.\textsuperscript{55}
\end{quote}

\textsuperscript{53} Ownership provides exclusive right and control over property. It gives the right to possess, use and enjoy the benefits and dispose of the natural resource to the exclusion of others. Natural resources which are considered as public properties do not fall under this definition. This chapter does not deal with ownership of the global commons.


\textsuperscript{55} Article 47 of the Covenant on Civil and Political Rights and Article 25 of the Covenant on Economic, Social and Cultural Rights. Also, Article 21 of the African Charter on Human and Peoples’ Rights.
The UN Resolutions and Human Rights Covenants emphasise that peoples are free to consider how they want to utilise their natural resources. They proclaim peoples' sovereignty over their natural resources, and include people who are under colonial rule as well as the entire population of a state. These international documents do not make any clear distinction between territorial sovereignty and the ownership of natural resources. At the domestic level, the issue of ownership is largely guided by the constitutional right to natural resources, and is a combination of private, community and state ownership often requiring balancing of competing claims. States may hold ownership of many resources important to the national economy in the name of ‘people’. Natural resources can be privately owned by individuals or companies, or they may be part of community ownership whereby people have the collective right to enjoy and utilise the natural resources. Even where the natural resources are under private or community ownership, the state by virtue of territorial sovereignty retains the right to regulate the way individuals or community exercise their property rights, and people will have the right to be compensated if the resources are expropriated.

For indigenous peoples, the right to own their property and natural resources is acknowledged in UN Declarations, Conventions, regional human rights instruments and case law. These documents positively acknowledge the rights of indigenous peoples to own and control their natural resources. The International Labour Organization Indigenous and Tribal Peoples Convention No. 169/1989 explicitly recognises indigenous peoples’ rights to own and control their natural resources.

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56 ‘Peoples’ may include those who are under colonial occupation, indigenous people, or the whole of the population. Duruigbo, E. (2006), ‘Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law’, 38 George Washington International Law Review 52.

57 Anghie (2004), supra, 217. Anghie discusses the issue of people who are under colonial rule.

58 Duruigbo (2006), supra, 52.


recognise a broad range of human rights held by indigenous peoples, most notably the right to own property, the right of ownership of the lands they historically or traditionally use and occupy, the rights to self-determination and autonomy, the right to development, the right to be free from discrimination, and a host of other human rights. However, Article 46(1) of the UN Declaration states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

According to Schrijver,

States are under an obligation to exercise permanent sovereignty on behalf of and in the interests of their (indigenous) peoples. This implies that states are increasingly accountable, also at an international level, for the way they manage their natural wealth and resources, but also that for the time being (indigenous) peoples . . . are objects rather than subjects of international law.

This leads to the conclusion that indigenous peoples will continue to be deprived of their resources through mineral extraction, environmental contamination, expropriation of land, bioprospecting, patents and other intellectual property rights. While it can be argued that governments are the custodians or trustees of the natural resources for the benefit of present and future generations, it is difficult to ensure that the governments are discharging their responsibilities in good faith.

1.3. Improved Resource Efficiency and Sustainable Development

Economic growth stemming from globalisation continues to put pressures on scarce resources, particularly energy sources, and on the environment.
Introduction

As emerging economies’ and developing countries’ energy needs grow, competition for scarce resources will intensify. To ensure that globalisation is sustainable, countries face the challenge of becoming more energy- and resource-efficient. An inadequate balance between the utilisation of natural capital, human capital and economic capital will be a move away from sustainable development with a huge cost to the environment, human well-being and ecosystems. With 60 per cent of the world’s ecosystems degraded or exploited unsustainably, the Millennium Ecosystem Assessment concluded that over the past half-century ‘humans have changed ecosystems more rapidly and extensively than in any comparable period of time in human history, largely to meet rapidly growing demands for food, fresh water, timber, fiber, and fuel’.  

Contemporary international legal development suggests that there is an obligation, albeit non-binding, on the state to regulate the resource sector to maintain its efficiency and productivity, e.g. through life cycle assessment (LCA), exploitation and extraction through clean technology, better market instruments such as emission trading, eco-tax, and voluntary approaches. Resource efficiency is a global concern – it means reducing the environmental impact of the consumption (demand) and production (supply) of goods and services over their full life cycle. Resource efficiency can contribute to poverty reduction through more cost-efficient products and processes, and help promote economic growth while ensuring environmental sustainability. Examples of various methods of resource efficiency from mining and the energy sector show that market-based instruments can help consumers to choose environment-friendly products leading to a better consumption pattern.

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70 An analogy can be drawn from the human rights instruments, such as the International Covenants, International Criminal Court, which limit the internal sovereignty of states. See chapters 4 and 6 of this book.
72 Discussed in chapter 2 of this book. Cleaner production strategies include using different and less environmentally damaging materials and using less material to achieve the same result to reduce the environmental impact of products. Better consumption strategies include using goods to the end of their life and reducing food waste.
The World Summit on Sustainable Development (2002) stressed the need to attain the MDGs and the importance of decoupling economic growth from resource use:

Encourage and promote the development of a 10-year framework of programmes in support of regional and national initiatives to accelerate the shift towards sustainable consumption and production to promote social and economic development within the carrying capacity of ecosystems by addressing and, where appropriate, delinking economic growth and environmental degradation through improving efficiency and sustainability in the use of resources and production processes and reducing resource degradation, pollution and waste. All countries should take action, with developed countries taking the lead, taking into account the development needs and capabilities of developing countries, through mobilization, from all sources, of financial and technical assistance and capacity-building for developing countries.

The WSSD Johannesburg Plan of Implementation urged the international community to support regional and national initiatives to accelerate the shift towards sustainable consumption and production (SCP) – known as the Marrakech Process. This Process is being supported by the scientific evidence provided by the International Panel for Sustainable Resource Management. This Panel aims at decoupling economic growth from resource use and from environmental degradation, and in particular developing a better understanding of the ways to increase resource-efficient economic growth.

Resource efficiency maximises the use of goods and services from the natural resources and minimises the depletion of natural capital and any pollution associated with that resource use. Improved resource efficiency and sustained economic growth can play a crucial role in achieving the MDGs. International assessments, such as the Millennium Ecosystem Assessment, the Global Environmental Outlook and the

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73 Chapter III on Changing unsustainable patterns of consumption and production, paras 14–23.
74 Para. 15, Johannesburg Plan of Implementation (2002).
75 To support Chapter III of the Johannesburg Plan of Implementation, the Marrakech Process was launched in 2003. It is a global informal multi-stakeholder expert process to accelerate the shift towards sustainable consumption and production patterns and to support the elaboration of a 10-year framework of programmes on SCP (10YFP).
76 Hosted by UNEP, the Panel was officially launched in November 2007.
4th Assessment Report of the Intergovernmental Panel on Climate Change, make it increasingly evident that economic growth needs to decouple from the environmental impact of resource exploitation. These documents emphasise that sustainable use of resources involves sustainable production and consumption, and efficient use of resources contributes to growth. While the North is highly dependent on resources coming from the South, and some of the developing countries (e.g. Brazil, Russia, India, China) of the South are using natural resources at an accelerating pace, the environmental impact of such resource use is felt globally. Improved resource efficiency can reduce negative environmental impacts of resource exploitation, use and disposal, while at the same time securing adequate supplies of materials to sustain economic growth and reduce poverty.

There are several approaches to reducing environmental impacts from material extraction and use. One approach is the 3R initiative which is linked to the ‘reduce, reuse, recycle’ of products. Japan provides a successful example of a 3R initiative while China adopted the ‘circular economy’ approach. Another approach is the Life Cycle Initiative which enables resource users to reduce a product’s resource use and environmental emissions, while improving its socio-economic performance throughout the life cycle. Better technology and innovation as well as managing selected materials (e.g. hazardous materials, recyclable metals) can reduce negative impacts from materials extraction and use.

One example of resource efficiency is found in the mining sector. Increasing global demand for materials associated with limited reserves

80 Different approaches include: 3Rs (reducing, reusing, recycling waste), sound material-cycle society, circular economy, integrated or sustainable waste management, sustainable consumption and production, life cycle management and sustainable materials or resource management.
82 Circular economy is an economy which balances economic development with environmental and resources protection. It puts emphasis on the most efficient use and recycling of its resources and environmental protection. Circular Economy Promotion Law of the People’s Republic of China, adopted June 2008, in force January 2009.
83 Launched by the UNEP and the Society for Environmental Toxicology and Chemistry (SETAC), this initiative responds to the call for a life cycle economy in the Malmö Ministerial Declaration (UNEP, 2000).
and adverse social and environmental impacts necessitates the need to use resources efficiently. A number of tools such as the Kimberley Process Certification Scheme, the OECD Guidelines for Multinational Enterprises, and the Extractive Industries Transparency Initiatives are available to strengthen the governance of the mining sector in the host countries. Following the 3R approach, it is possible to increase resource efficiency by reducing the consumption of material, reusing a product and recycling. End-of-life regulation could increase the recycling rate and protect the environment. Recycling can also recover metals and materials from waste which would have ended in landfills.

In the energy sector, energy efficiency improvements and energy conservation are a high priority for many developing countries. While high efficiency along with clean technology are needed to achieve a low emission development, most of the clean energy sources (e.g. wind, solar, geothermal) remain sidelined. A number of measures are available to address energy efficiency: e.g. international emission trading is a market mechanism which allows developed countries to supplement domestic reduction. In addition, the Clean Development Mechanism provides an opportunity for developing countries to undertake emission reduction projects, with financial and technological assistance from developed countries. These market-based instruments are crucial for resource efficiency in the energy sector since a high level of GHG emissions are from the energy sector.

1.4. Inclusive and Participatory Governance of Natural Resources

The challenge for sustainable development is to ensure how best to conserve natural resources for future generations. This largely depends on the governance mechanism of the natural resources. The governance structure needs to minimise the exploitation of natural resources, promote their sustainable use and consumption, and maximise long-term profits. In addition, an inclusive and participatory governance structure prioritises the well-being of the people by including them in the structures of

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84 See the further discussion in chapters 2, 5 and 6 of this book.
86 UNEP (2007), supra, 49.
87 Ibid. See the discussion in chapter 8.
participation and consultation. The importance of inclusive governance is found in the definition of governance offered by international institutions. For example, the UN Development Programme considers five basic dimensions of good governance: transparency, accountability, rule of law, efficiency and effectiveness, and participation.

Natural resources have a global dimension, and encompass a shared sense of responsibility, but they also have a local dimension, and this local dimension is as important as the global. Globalisation with its expansion on communications technology and the worldwide sharing of information can offer opportunities for communities and activists to reach over national borders and unite peoples, organisations and institutions in a common cause and to make their voices heard. These opportunities have certainly been capitalised on by business, non-state actors and corporations to promote alternative regulations in the form of voluntary codes of conduct and self-regulation and by powerful think-tanks and NGOs in the developed countries which have acquired an increasingly active role in policy-making.

Participatory governance includes opportunity to participate in the decision-making process, ability to gather information and access to legal redress. The conceptual development of participatory governance can be assessed from the opportunity for people to involve themselves in a decision-making process and the process itself which allows the people to participate in the decision-making. While the final decision is important, the process through which the decision is achieved is also crucial. Issues related to natural resource management are often complex, with multiple conflicting and competing interests within and between communities.

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Globalisation and natural resources law

Public participation may provide a useful tool in assessing risks and evaluating how risks should be weighed against benefits.\(^ {95} \) The failure to consider efficiency, equity, effectiveness and legitimacy of the process could adversely affect the decision leading to an unsustainable outcome.\(^ {96} \)

Undoubtedly, international law plays a significant role in developing the concept of participation and internalising participatory processes in administrative decision-making and access to justice. The 1998 Aarhus Convention brought about one of the unique developments of procedural rights to protect the environment and natural resources.\(^ {97} \) The Convention adopts a right-based approach to information, participation and justice, makes reference to a substantive right to a healthy environment and allows people to enforce their procedural and substantive environmental rights in court. The Aarhus Convention plays a crucial role in developing laws which include rules on individual or community participation into the land-use planning procedures, plan and policy evaluation.

Since signing the Aarhus Convention,\(^ {98} \) the EU, for example, has adopted new legislation and undertaken necessary measures to apply the provisions of the Convention to its own institutions and bodies.\(^ {99} \) Another example of such inclusive approach is the EU Directive dealing with the deliberate release into the environment of genetically modified organisms (GMOs).\(^ {100} \) This Directive provides that Member States are under an obligation to consult the public on the proposed deliberate release of GMOs

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\(^ {97} \) Other regional conventions dealing with participation are the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) and the Protocol on Strategic Environmental Assessment (Kiev, 2003).

\(^ {98} \) The EU approved the Convention in early 2005. See the list of parties and signatories to the Convention: www.unece.org/env/pp/ctreaty.htm (accessed 15 January 2010).

\(^ {99} \) See the discussion in chapter 3.

into the environment. In doing so, Member States need to lay down arrangements for this consultation, including a reasonable time-period to give the public or groups the opportunity to express an opinion. Another example is the EU Water Framework Directive (WFD) where public participation plays a key role in the implementation of the Directive. The WFD encourages active involvement of people in the implementation of the Directive with full access to information and requires written consultation in the river-basin management planning process.

Environmental impact assessment (EIA) and public consultation at the project making level can lead to a sustainable decision concerning natural resource use. Largely influenced by the Stockholm Declaration (1972), many developing countries in Asia, Africa and Latin America went through a phase of legal reform for better resource management during the 1970s and 1980s. Reforms in access to justice and access to information began slowly, if at all, in some countries. Globally, many countries have initiated EIA laws including the consultation procedure, but many of these laws lack enforcement and access mechanisms.

For the developing countries, Principle 10 of the Rio Declaration (1992) plays a central role in formulating legal instruments (binding and non-binding) which allow citizen participation. Principle 10 asserts that sound resource governance and effective resource management policies depend on providing people with access to information, opportunities for participation, redress for environmental harm, and mechanisms to ensure that these rights are fulfilled. This need is reflected at the national level by legislation ensuring access to information including environmental information, EIA laws and public consultation accommodating communities’ participation in the development projects. Public consultation, however,

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101 Article 9.
Globalisation and natural resources law

does come with its own risk package, as the identity and power of the consultees are crucial – consultation becomes fruitless if the ‘stakeholder’ does not represent the ‘voice’ of the local community.

In the developing countries, external actors such as international financial institutions, donor agencies and UN agencies play an important role in developing the concept of participation in these countries and in integrating participatory processes into the policies and regulations.\textsuperscript{106} The development of the participation provisions in environmental decision-making is also influenced by the participation provisions found in multilateral environmental agreements.\textsuperscript{107} Integration of international standards into national laws has also strengthened access rights.\textsuperscript{108} In addition, NGOs in the developing countries play a very critical role in promoting ‘people’s empowerment’ by supporting participation agendas at the law and policymaking level. Increasing use of participation in community-based natural resource management policy is found in forest, water and coastal resource management.

Some studies conducted in Asia show that community managed (bottom up) irrigation projects are working more efficiently than government managed (top down) projects.\textsuperscript{109} Community managed forest projects (e.g. common property resource management) are also better managed when local communities are involved. For example, the Joint Forest Management Scheme in Madhya Pradesh (India) actively involves local people in forest management and ownership of the forest products.\textsuperscript{110} A similar example is found in the Community Forestry Projects in Nepal.\textsuperscript{111} A ‘Community-Based Coastal Resource Management’ project in the Philippines\textsuperscript{112} addressed the problem of the marginalisation and exclusion


\textsuperscript{107} For example, 1992 UN Framework Convention on Climate Change, 1992 Convention on Biological Diversity. See the discussion in chapters 3 and 9.


\textsuperscript{111} Ostrom (2001), supra.

\textsuperscript{112} L. van Mulekom (2008), ‘Reflections on community based coastal resources management (CB-CRM) in the Philippines and South East Asia’,
of small fishermen within the country’s agriculture sector. Similarly, in Malaysia, the local people and local entrepreneurs worked together to manage a mangrove forest for community-based tourism purposes. Evaluations have shown that this participatory approach to resource management has been much more successful than earlier top-down approaches.

2. MAPPING THE BOOK

The ubiquitous and complex processes surrounding globalisation have created an over-abundance of theories which attempt to address the various and interconnected challenges associated with globalisation. We do not aim to add to this already crowded academic space. Instead we are trying to find a common thread of arguments and analysis which establishes the relationship between globalisation and natural resources law.

The first part presents an overview of the main theories underlying the globalisation process (e.g., economic and sustainable globalisation) and key concepts (e.g., global public goods). These theories and concepts play a crucial role in the articulation of a legal framework for the regulation of globalisation, trade, access to and management of natural resources. This part highlights that the challenges of globalisation are many: e.g., inequitable access to natural resources, increasing poverty, the degradation of the environment, lack of public participation in decision-making, good governance. This part considers the legal framework, actors and institutions of globalisation within a political, economic and social context.

- Chapter 1 examines the themes and challenges in the relationship between globalisation and natural resources which are later developed throughout the book. It outlines the different North–South perspectives on globalisation, access to natural resources, development and sustainability, and draws attention to the shared and unresolved problem of world poverty. The tensions arising out of the principle of permanent sovereignty over natural resources between developed and developing countries in the context of foreign


114 Durst et al. (2005), supra. Ostrom (2001), supra.
investment and expropriation of foreign property are considered in this chapter. Tensions around the scope of permanent sovereignty also arise internally and the claims of indigenous peoples to control over natural resources are outlined in this chapter. After considering the structures of global governance, it concludes that an unbalanced system of economic, and especially trade governance based on inequality, needs to be addressed and participatory organisations that balance trade and natural resource protection and management objectives need to be developed.

- Chapter 2 considers the general principles underlying natural resource management, especially the principle of sustainable use and sustainable development. This chapter evaluates the different approaches to the management of resources (command and control, market-based instruments, voluntary and decentralised approaches) including the concept of ‘ecosystem services’. It considers how natural resources management fits within multilateral trade agreements and whether the development of trade in ecosystem goods and services has an impact on human rights. The chapter ends with an overview of the relationship between natural resources and violent conflict.

- Chapter 3 explores both the substantive and procedural aspects of decision-making in natural resource management. A brief discussion on the substantive rights to natural resources touches upon the issue of the use, enjoyment and management of natural resources. This chapter then examines access to natural resource decision-making. There are international and regional mechanisms to ensure people’s involvement in the decision-making, and various aspects of public participation (e.g. consultation, information, access to court) are linked. It considers whether the participation of communities in the decision-making process effectively contributes to the objectives of sustainable resource management.

The second part of the book considers the challenges outlined in the first chapter and focuses on the conflicting needs of human beings over natural resources. These conflicts and challenges revolved round the main themes of inequality, lack of adequate governance institutions at the global level and the need to adopt new approaches for economic valuation and sustainable resource management. The three chapters in this part consider these challenges through the perspectives of the main state and non-state actors and their role in globalisation and natural resource governance. This part also considers the constraints to effective management posed by the limitations of compliance systems.
Introduction

- Chapter 4 introduces the actors and institutions that operate in the globalised world and focuses on state actors and international organisations. It examines how international institutions such as UN agencies, the IMF, the World Bank and the WTO play a role in both global governance and natural resource management alongside states. Regional organisations such as the EU are also briefly considered. Despite the globalisation process, states remain powerful actors. The state can, together with other actors, promote the national welfare and protect the general interest and well-being of citizens. The state can, through independent courts, guarantee the respect of human rights and justice. Its role is also fundamental in operating the intricate web of multilateral arrangements and intergovernmental regimes.

- Chapter 5 focuses on the growing importance of non-state actors and their participation in global governance and natural resource management. Multinational corporations and civil society have emerged as important participants in global affairs and have developed collaborative networks in response to changes from the national to the supranational. Non-state actors share a growing sphere of power with traditional state actors and are crucial to the articulation of society’s needs.

- Chapter 6 looks at compliance and enforcement mechanisms, both nationally and globally, of natural resource management. It highlights the complex nature of the issues involved, and the problems and opportunities provided by globalisation for development, global justice and access to natural resources. Compliance of states with international norms is always hampered by the principle of state sovereignty, unless special arrangements such as those within the EU are in place whereby supranational institutions are endowed with some of the states’ powers. Compliance at the national level is addressed to non-state actors, especially MNCs, but questions arise as to suitability of national laws for the regulation of transnational actors and the reliance on channels of national enforcement through an overview of litigation against MNCs in domestic courts.

The third part of the book deals with the approaches available to manage natural resources under international, regional and national legal systems. This part gives a thorough analysis of water (chapter 7), renewable energy (chapter 8) and biological resources (chapter 9). These three resources are chosen because of their enormous importance at the international level, the use of various legal approaches to manage the resource sectors and recent legal developments. These three chapters highlight
both the increasing role of non-state actors (e.g. private actors, NGOs) as well as the growing power of international (e.g. WTO, World Bank) and regional (e.g. EU, Human Rights Courts) institutions.

- Chapter 7 deals with renewable energy. Energy is directly linked with the key global challenges that the world faces – poverty alleviation, environmental sustainability and energy security. Fossil fuels are non-renewable energy sources which cause air pollution, environmental degradation and global warming. Therefore, renewable energy is set to play a substantial role to meet energy needs and improve access to energy. The chapter focuses on renewable energy sources such as wind, solar, hydro and thermal. It discusses the trends in energy consumption, the issue of energy security, the Energy Charter Treaty, renewable energy subsidies, and the link between climate change and renewable energy. Renewable energy sources play a key role in lowering future GHG emissions and in reducing the vulnerability of energy security. Developing countries (e.g. China, India) have taken several measures to improve energy security through the promotion of energy efficiency and renewable energy. In this globalised world, the trade regime at the international level (e.g. WTO) or at the regional level (e.g. Energy Charter Treaty in Europe) to guide renewable energy needs strengthening.

- Chapter 8 outlines the approaches to water governance in human rights law, environmental law and trade law. Freshwater concerns are interlinked with health security, food security and environmental sustainability. The relevance of globalisation for water resources can be considered from two different perspectives: the first looks at water as a public good and the consequences of globalization on water resource management; the second considers water as an economic good. One of the impacts of globalisation is the influence that multinational corporations and international financial institutions (e.g. the World Bank, WTO) have on the domestic water sector and water related services. The chapter examines the effect of privatisation on marginalised communities and the issue of competing interests in relation to water use. It then examines regulatory mechanisms at the international and regional level dealing with sustainable water management. The chapter also explores water rights at the national level with judicial decisions outlining the scope of the right.

- Chapter 9 discusses the role of globalisation in accessing and sharing biological resources. Biodiversity degradation is a global problem with global consequences. The process of economic globalisation further threatens the destruction of biological diversity, with the
loss of crop and species variety and environmental pollution. The chapter concentrates on the Convention on Biological Diversity and the effect of globalisation on benefit sharing and traditional knowledge. It then considers the issues of intellectual property, traditional knowledge and human rights.