Preface

Elisa Morgera and Kati Kulovesi

This book focuses on the role of international law in regulating natural resources. Global economic and population growth are increasing demand in natural resources, such as water and land. At the same time, various natural resources are threatened by unsustainable use and depletion resulting from, among other factors, climate change, biodiversity loss and other environmental crises; this is certainly the case of fisheries. Technological advances are making it possible to explore and exploit new resources, such as genetic resources located in the deep seas. Climate change and other environmental changes are making it possible to exploit resources in new areas, such as oil in the Arctic. Recent approaches to environmental challenges have also led to new uses of natural resources, such as the production of renewable energy and biofuels or eco-tourism, which have in turn given rise to international concerns (biodiversity loss, increased greenhouse gas emissions, negative impacts on human rights). Meanwhile, the exploitation of more traditional natural resources, such as oil, minerals and timber, continues to pose challenges for international law in its bid to effectively prevent and minimize negative impacts on the environment and local communities.

While there is no commonly accepted definition of natural resources in international law, this book starts from the understanding that natural resources are materials and processes that exist in nature and that are considered of actual or potential use or value to humans.¹ This understanding is an anthropocentric one, but we are not arguing that it is the appropriate or preferable approach to reflect on the role of international law, or law more generally, vis-à-vis nature.² Equally, it is not our intention to suggest that the ‘international law of natural resources’ has emerged or is emerging as a separate, specialized branch of international law.³ On the contrary, focusing on the international regulation of natural resources serves to identify significant areas of overlap between existing specialized areas of international law, as well as tensions among them. In other words, the concept of ‘international law and natural resources’ is an analytical tool to identify these connections and frictions, which can help assess to what extent and with

¹ Eg, Organisation for Economic Co-operation and Development, ‘Glossary of Statistical Terms’ <<https://stats.oecd.org/glossary/detail.asp?ID=1740>> accessed 23 January 2015; World Trade Organization, ‘World Trade Report 2010 B. Natural Resources: Definitions, Trade Patterns and Globalization’, available at <www.wto.org/english/res_e/booksp_e/anrep_e/wtr10-2b_e.pdf> accessed 27 June 2015.

² Eg, Prue Taylor, *An Ecological Approach to International Law: Responding to the Challenges of Climate Change* (Routledge, 1998); Vito de Luca, ‘Towards an Ecological Philosophy of Law: A Comparative Discussion’ (2013) 4 *Journal of Human Rights and the Environment* 167.

³ Eg, Richard Bilder, ‘International Law and Natural Resource Policies’ (1980) 20 *Natural Resources Journal* 451.

what consequences international law is forged (or even dominated) by an anthropocentric view of nature. While only some of the contributions in this volume reflect on the need for an ecocentric approach it is hoped that the overall findings of this volume can provide an important evidence base for those interested in the in-depth discussion of the opportunities and constraints for an ecocentric approach in international law.

Against this background, the understanding of international law and natural resources that emerges from this volume is a complex, ever-evolving and uneven web of international legal norms that have different aims in regulating natural resource exploration, exploitation and conservation. These norms include international environmental, economic and human rights law, and, in the cases of marine resources, also the law of the sea. Such an understanding calls for a comprehensive and holistic approach that eschews privileging a particular perspective, such as the environmental or economic one. And yet, specialized areas of international law continue to be taught and researched in significant isolation one from the other. While overlaps between different specialized areas of international law are clearly reflected in legal scholarship,⁴ they have not necessarily been studied comprehensively in the past (either in the sense of covering all actual and potential natural resources, or all relevant areas of international law). In this sense, the present volume constitutes an attempt to go beyond the state of the art, by analysing systematically the development of international law related to natural resources from a holistic international legal perspective and identifying outstanding research questions to make further progress in that direction.

In addition, it cannot be over-emphasized that international law and natural resources cover an extremely heterogeneous area. In the words of Professor Higgins,

To study the international law of natural resources is rapidly to discover that it is not a single, monolithic topic. Almost everything depends, if not on the specific resource, on the category

⁴ Gerald Blake et al. (eds), *The Peaceful Management of Transboundary Resources* (Graham & Trotman, 1995); Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997); Donald Zillman, Alistair Lucas and George Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002); Eyal Benvenisti, *Sharing Transboundary Resources* (Cambridge University Press, 2002); Malgosia Fitzmaurice and Milena Szuniewicz (eds), *Exploitation of Natural Resources in the 21st Century* (Kluwer Law International, 2004); Richard Barnes, *Property Rights and Natural Resources* (Hart Publishing, 2009); Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden, *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010); Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011); Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of Law* (Routledge, 2012); Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-conflict Situations* (Cambridge University Press, 2015); Francesco Romanin Jacur, Angela Bonfanti and Francesco Seatzu (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill, 2015); Alam Shawkat, Jona Razzaque and Jahid Bhuiyan, *International Natural Resources Law, Investment and Sustainability* (Routledge, 2016).

of natural resource that one is studying. Not only the answers, but indeed the questions that it is necessary to ask, will depend upon that initial matter.⁵

Not only do different natural resources present different regulatory challenges due to their physical characteristics, but also the appreciation of their value to human beings changes over time. International law thus evolves with our understanding of which natural objects or processes have potential economic value or can otherwise support human life.⁶ Our changing attitudes towards different natural resources, together with technological innovations and scientific advances, have thus had an impact on the status of various natural resources under international law. As a result, international law takes diverse forms and calls for varying degrees of international cooperation vis-à-vis different natural resources over time. Classically, international law is concerned with shared resources, such as transboundary watercourses and migratory species, or resources located beyond areas of national jurisdiction, such as high-seas fisheries and minerals in the deep sea-bed. Increasingly, however, international law is also concerned with natural resources within national jurisdiction due to the international community's common concern over global environmental challenges, such as the conservation of biodiversity, due to the international or transnational dimensions of the use of certain resources, such as international land acquisitions, or due to human rights violations associated with natural resource use. Indeed, closely related to the regulation of natural resources are the international community's commitment to sustainable development and poverty eradication.⁷

Finally, many general trends in international law are reflected in the international law concerning natural resources. These include the growing importance of various non-State actors, such as indigenous peoples, local communities, multinational companies, as stakeholders in multilateral negotiations, as investors launching judicial proceedings against host States under international investment law and as beneficiaries of local benefit-sharing and other arrangements, etc. Other noteworthy general trends include the increasing reliance by the international community on transnational cooperation and soft law.⁸

The book is structured as follows. Part I investigates key concepts and approaches in different areas of international law that are relevant for different natural resources: national sovereignty over natural resources, international environmental law and sustainable development, the protection of foreign investment and of human rights, the

⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), at 129.

⁶ Lilian del Castillo-Laborde, 'Equitable Utilization of Shared Resources' in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online edition) para 2.

⁷ 'Transforming Our World: the 2030 Agenda for Sustainable Development', UNGA Res 70/1 (21 October 2015).

⁸ Eg, Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003); Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007); Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing, 2015).

liberalization of international trade, international questions arising from corruption and conflict, and the relevance for private companies of international law. Each of these overarching chapters focuses on the historical and conceptual evolution of key concepts in international law, their current status (key norms and legal instruments, including a discussion of the nature of these instruments, and key institutions), and present and future challenges (such as controversial issues, areas under development, new and emerging themes and tensions with other areas of international law). Part I therefore provides the necessary understanding of different areas of international law that will come into play in variable geometries in relation to specific natural resources or specific uses of natural resources that are explored individually in Part II.

The discussion of specific natural resources, or specific uses of natural resources, distinguishes between resources within national jurisdiction (Part II) and those beyond (Part III). The former include biological resources (such as land, forests, fisheries, landscape and wildlife, and genetic resources), energy-related resources (oil and gas, renewables and biofuels) and other resources (water, minerals and Arctic resources). The latter covers fishing on the high seas, mining in the seabed, ocean floor and subsoil in areas beyond national jurisdiction (the Area), marine genetic resources of areas beyond national jurisdiction, and Antarctic resources. In both Parts, each chapter reflects on the historic evolution of the use of a certain natural resource, including succinct data on its economic and environmental importance globally, and the evolving role of international law in the regulation of the resource. The chapters then aim at offering analysis of the substance and form of relevant international norms and standards, which pays particular attention to the interaction between hard and soft law, the relevance of international adjudication, and the interface between bilateral, regional, transnational and multilateral instruments, including multi-stakeholder ones. Each of the chapters concludes by identifying present and future challenges for international law and natural resources, and corresponding questions for further legal research.

Part IV of the book provides an over-arching reflection on actors and institutions that contribute to the making of international law, the governance of natural resources, and the settlement of disputes, with a view to providing a comparative perspective across different approaches to the international regulation of natural resources. In line with the volume's nature of a research handbook, the Conclusions piece together an overarching agenda for future legal research, reflecting on and systematizing the gaps in legal scholarship that have been identified by all the contributors.