



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

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Where is the Environment? Locating Nature in International Law

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Climate change, mass extinction, deforestation, desertification, and increasing pollution and toxicity of the air, water, and land: Uncontainable by national borders, these are quintessentially global concerns for which peoples and states have turned to international law for solutions. How have international lawyers understood the environment? What exactly is it and how do we purport to govern it? These seemingly straightforward questions have the potential to unmake our discipline through destabilizing formative assumptions about the separation between subjects and objects of governance, between the social and the natural, and between the human and non-human. Reexamining these assumptions is not mere theoretical speculation but an urgent necessary step towards adequately addressing pressing contemporary challenges.

So far, international lawyers have not provided solutions to environmental problems. We have brought to bear our treaties, principles, institutions, research, and teaching to create an increasingly specialized expertise in international environmental law. Yet each of the abovementioned environmental crises continues to steadily deteriorate. To take the best known examples of climate change and biodiversity loss, half of all greenhouse gases currently in the atmosphere were emitted [in the last 30 years](#) and [one million species](#) are now at risk of extinction, despite these two crises being the focus of sustained international law attention since the 1990s. Why? The two most frequented critiques are that, when it comes to environmental protection, there is a North-South divide (the rich and poor cannot agree on how to protect the environment) and a lack of political will (people have other priorities that override environmental protection). While such observations tellingly point to the important connection between economic equality and environmental health, they

provide no clear pathways to a more equal world that prioritizes environmental stability over short-term economic gain. International lawyers remain trapped in the seemingly inescapable orbit of globalized capitalism and myths of progress, unable to produce viable solutions to increasing inequality and environmental destruction.

Do unequal economies and fickle electoral politics mean lawyers can be let off-the-hook? We do not usually blame ourselves for the failures of international environmental law, pointing instead to politicians and the private sector for either preventing us from making good laws with enforcement mechanisms or, when such laws are made, failing to abide by them. Such an approach allows our disciplinary expertise to proliferate despite extant failures. For example, our inability to regulate climate change on the global level has only spurred a flourishing of climate law-related job opportunities. Since the advent of international environmental law in the 1970s, we may have struggled to achieve sustainable development, but have enjoyed unmitigated success in sustaining the relevance of our expertise. It may be the case that past failures stimulate the search for better legal solutions but, after five decades, we also need to consider whether international lawyers are in fact contributing to the problems we claim to solve.

Regulating Waste instead of Consumption: Nature might be Public but Natural Resources are Private

International law has a particular understanding of the environment stemming from Western environmentalism in the 1960s and 1970s. The stirrings of environmental consciousness in the West, primarily in the United States, is attributable to two factors. First, Western populations began feeling the impact of rapid industrialization: higher levels of air and water pollution, more oil spills, fears of nuclear pollution, and so on. Second, advances in Western science increased public awareness about the complexity, interconnectedness, uniqueness, and fragility of our planet. The first pictures of Earth from space became symbolic of this newfound knowledge and were deployed as such by Western environmental movements. In the United States, these decades witnessed the passage of the *1963 Clean Air Act*, *1972 Clean Water Act* and the establishment of the Environmental Protection Agency in 1970.

From these domestic developments stemmed international law's engagement with environmentalism with the *1972 Stockholm Conference on the Human Environment*, which is usually identified as the genesis of international environmental law. In the wake of Stockholm came several other summits (notably the *1992 Rio Earth Summit*, the *2002 Johannesburg Summit*, and *2012 Rio +20*), treaties (including Conventions on Climate Change and Biodiversity, as well as treaties on hazardous wastes, endangered

species, and protecting the Ozone layer, among others), and legal principles (common but differentiated responsibilities, the precautionary principle, and so on), through which the specialization evolved and constituted itself.

In this origin story, the 'environment' first appears within international law in the 1970s as the object of our stewardship, when international lawyers assumed such protection to be both desirable and possible. Standard disciplinary textbooks tell of how humanity's understanding of nature changed in the 1960s. In the past, states and peoples were exhorted to control nature through science, industry, and modernity. But, with the advent of Western environmentalism, humanity turned away from mere mastery and towards protecting and cherishing nature. Thus, the environment was created as an object of and for international regulation.

While conventionally narrated as a global paradigm shift, this type of environmentalism is the product of a particular Western history and culture. As a result, this conceptualization of the 'environment' is not necessarily self-evident to, or shared by, most of the world. Through centuries of colonialism, genocide, slavery, apartheid, and racial discrimination, [the global North systemically looted the natural resources of the global South](#) to fuel Northern wealth accumulation. Northern understandings of economic development were eventually universalized through the decolonization process, by [conditioning Southern independence upon a commitment to industrial development](#). While postcolonial states adopted varied stances on the spectrum between capitalism and communism, including non-alignment, any society that dared to disavow industrial development altogether was denied sovereignty, as evidenced most clearly by the ongoing struggles of many tribal and Indigenous peoples for self-determination. Against this historical background, the onset of international environmental law was greeted with ambivalence by many in the South: Northern desire to globally regulate the harmful consequences of industrial development came too close upon the heels of the South finally achieving a degree of economic independence, raising fears of '[environmental colonialism](#)'. Southern responses to environmental change included attempts to articulate different [visions](#) of development that promoted a more just international economic order, including forms of self-reliance that accounted for both the 'inner limit' of satisfying human needs as well as the 'outer limit' of planetary boundaries.

Southern states reacted to the emergence of international environmental law by insisting on legal recognition that the rich contribute unequally to causing global environmental harm and should do most of the work to protect the global environment. Indeed, legal principles such as sustainable development and common but differentiated responsibilities articulate precisely these requirements. But international environmental law has been less successful in turning such principles

into action and getting the rich to change their behavior. Laws that allocated differential responsibilities were [not followed by all rich states](#), the classic example being the Kyoto Protocol on Climate Change that the United States refused to join despite at the time being the biggest contributor to climate change. Instead, rich states have ensured that differential responsibilities remain [voluntary, vague, or aspirational, rather than required](#), the best-known example being the Paris Agreement on Climate Change that replaced the Kyoto Protocol. While the law exonerates the poor from responsibility for global environmental degradation, it has not been able to modify the harmful practices of the rich. Despite sustained efforts since the 1990s, lucrative extractive industries are today responsible for [80 percent of biodiversity loss and 50 percent of greenhouse gas emissions](#). Compounding this injustice, the poor are on the frontlines of environmental catastrophes they did not cause, whereas the rich are better able to escape many of the harmful consequences of their actions. This situation, usually called the North-South divide, is the product of a deeper mischaracterization of where the environment is actually located within international law.

Notwithstanding the notions of stewardship that gave rise to international environmental law, the environment is more than the object of our protection. It is the foundation of all human life and endeavor, including among other things the basis for all economic activity. International law characterizes the latter aspect as [natural resources](#), which are the objects not of protection but of free commerce. The exploitation of natural resources on the global, transnational, and international levels is regulated by a mixture of private international law (international business transactions) and public international law (international economic, trade, and investment law). While the environment is regulated with the aim of stewardship and protection, natural resources are governed with the goal of enabling efficient exploitation. International environmental law focuses on mitigating the harmful consequences of development through managing pollution and waste. At the same time, public and private economic law urge increasing consumption of natural resources to fuel development. When competing governance objectives are directed at an identical object, the result is regulatory dysfunction. When the two legal regimes collide, economic law inevitably prevails. Economic law has a deep disciplinary history. The very [origins of international law](#) lie in doctrines put forward to allow private actors from the North to exploit natural resources in the South, whether in the arguments of Vitoria for free commerce in the Americas or Grotius' defense of the liberties of the Dutch East India Company in its untrammled pursuit of exploiting colonial labor and resources. The drive to economically develop in this exploitative vein has remained [a propelling force](#) of our disciplinary evolution ever

since. International law has long-functioned to protect the private economic sphere in ways that promote accumulation and thereby benefit the rich, whether in the global South or North, and further globalized capitalism.

Today, the powers of private law over the public imagination overshadow international environmental law itself, which utilizes economic incentives for environmental solutions. Environmental lawyers have increasingly turned to the [green economy and green growth](#) to solve environmental crises, with blind faith that capitalism can simultaneously solve the problems it creates. This contradiction is epitomized in ostensibly virtuous environmentalist calls for more efficient use of natural resources, instead of directly tackling the problem of overconsumption. Such approaches ultimately exacerbate environmental crises through enabling even greater consumption by making more resources available for unlimited (albeit more efficient) usage. Indeed, many so-called green solutions, from biofuels to electric vehicles, from carbon offsets to carbon trading, are creative ways to fuel economic growth but do not stand up to scrutiny when it comes to environmental protection. Whether we like it or not, economy and ecology are inextricable, as are the chains that link consumption and waste, as are natural resources and the environment. International lawyers' ability to compartmentalize them produces convenient regulatory schizophrenia that allows environmentalism itself to be captured in the untrammelled pursuit of economic growth.

Capturing the Environment within Modern Law

Over and above regulatory dysfunction and ineffectualness, conceptualizing the environment as the object of international legal regulation broaches more fundamental problems of scientific inaccuracy and disciplinary hubris. The foundational role of the natural environment in international economic law (and of course international environmental law) should be understood by way of illustrating a broader point: The natural environment underlies every area of international law as it provides the basis for life. International lawyers cannot physically separate ourselves from the environment. Yet we occupy a conceptual position outside it from which we putatively observe and govern. Such a standpoint can only be understood by tracing its cultural evolution within Western modern thought. Argyrou in *The Logic of Environmentalism* characterizes Western modernity as having a tendency towards 'metaphysical totalizations' stemming from 'the need to make a decision about what exists in its entirety'.¹ The Western modern subject is compelled to venture beyond the world because 'it is only from such an external position that

¹ Vassos Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality* (Berghahn Books, 2005) 102.

the boundaries of the world can be drawn and knowledge of what exists guaranteed'.²

As with other modern disciplines, international law continually adopts such external postures. [Peter Fitzpatrick](#) and [Antony Anghie](#), among others, have observed how law is justified and dynamized by the continuous assertion of universal values from a professed position of external objectivity. This is followed by the identification of those places and people that remain unaware of such values despite their ostensive universality, thus necessitating the creation of laws to enlighten them whether they like it or not. In the context of a discipline that continually makes such governance moves, international environmental law can be better understood. It is the necessary culmination of the Western legal enterprise, enabling the ultimate modern move of casting international law around everything (ie. 'the environment'). Aptly symbolized by the first photograph of Earth from space, environmentalism as it arose in the United States in the 1960s assumed a conceptual posture external to Earth, allowing it sufficient distance to look back and see a single globe. Argyrou observes that this position of externality 'is to say, in effect, that it is we who surround the environment, not the other way around'.³

The environment cannot be accurately understood as an object of governance because exiting it is as much a conceptual impossibility as a scientific one. As scientific knowledge about the complex web of natural interactions that create and sustain life accumulates, it reveals how far we are from fully understanding nature and ourselves as part of it. Instead of producing regulatory solutions, the law's ability to physically and conceptually isolate itself from the natural world has helped create and foment environmental catastrophes. Law plays a crucial role in transforming a unified planet into discrete sovereign territories, in converting nature into exchangeable property, in turning interconnected ecosystems into realms of infinite commodification and exchange, and in extracting and conceptually separating an atomized human individual from the intertwined mesh of life. Law not only enables environmental destruction but understands the natural environment in a manner that ensures the impossibility of remedy. To remedy this conceptual dislocation of nature requires an exit from the confines of Western modernity.

From Control to Interconnection

Environmentalism as it exists today within international law reconfirms the position of the West as the source of all acceptable meaning. But the extant failures of international environmental law demand alternatives. A genuinely international

² Ibid.

³ Ibid, 95.

solution to environmental problems requires an openness to diverse philosophical and theoretical understandings of the relationship between nature and law. Disciplinary willingness to embrace those understandings of nature that gauge more accurately the parameters of our ability to govern it offers us a pathway to address environmental crises and towards more sustainable ways of life. Environmental change on a planetary scale, such as we are witnessing today amid the sixth mass extinction and a changing climate, seriously challenges knowledge production within social sciences because many of these disciplines heretofore assumed the stability of natural systems. When nature is destabilized, the foundations of economics, politics, and law may also need to change; and an openness to elementary transformation increases the likelihood of disciplinary responses being more useful, adequate, and relevant to a time of environmental change.

The environment cannot be the subject of a discrete disciplinary specialization. Understandings about the natural world underpin and organize the entire international legal order and these assumptions need to be identified, unpacked, and radically reworked if we are to think our way out of destructive development patterns and ecological crises. This is the premise of the [Locating Nature Project](#), an ongoing effort to unite international lawyers from all continents to unpack together the central constructs of international law and remake them in a more inclusive and sustainable vein. What role have international law concepts such as sovereignty, jurisdiction, territory, human rights, property, and so on, played in destroying the natural environment? How can we reconfigure these concepts to promote sustainable living? What are the lessons we can draw from local, domestic, and transnational developments usually ignored or silenced?

Alternative understandings of the relationship between nature and law are challenging and stretching legal systems everywhere. Examples include peasant movements in [Ecuador](#) that demand the right to preserve their way of life, class actions on behalf of future generations in the [Philippines](#), transnational tribal mobilization against extractive industries across [South Asia](#), law reform recognizing the rights of Mother Earth in [Bolivia](#), recognizing the legal personality of non-human entities in [New Zealand](#), the rights of Indigenous and tribal peoples to hunt protected species in the [Arctic](#), climate justice demands of sinking [small island states](#), massive environmental protests across [China](#), international rights of nature [tribunals](#), and Mother Earth [summits](#) held alongside international environmental law summits. Targeting powerful entrenched transnational and global structures of violence that have long-maintained inequality and environmental degradation, the high stakes are evidenced most starkly in the increasing [murder of environmental defenders](#)

worldwide. Despite these risks, movements continue to grow, necessitated by environmental change looming large and inescapable.

Environmental change confronts international lawyers with the systemic injustice we help create and maintain. It demands an acceptance that we were mistaken in thinking we could construct and then govern the environment. It necessitates that we transcend the confines of Western modernity and embrace instead other narratives about our relationship with the natural world that more accurately estimate human ability to regulate it. Beyond protection and remedy, causation and responsibility, loss and damage, liability and insurance, we need to make disciplinary space for the different, uncomfortable, unknown, and unknowable. Through relinquishing our conviction that Western philosophy is the epitome of human thought, and more importantly that humans are the epitome of the natural world, we could break our illusion of separateness and notice how nature governs us as part of an intricate entwined infinite dance.