

Natural Resources and the Green Economy

Redefining the Challenges for People,
States and Corporations

Edited by

Elena Blanco

Jona Razzaque



Queen Mary Studies in International Law

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Queen Mary Studies in International Law

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INTRODUCTION

Elena Blanco and Jona Razzaque

There is finally a 'growing recognition that achieving sustainability rests almost entirely on getting the economy right' and as such the paradigm of a 'green economy'¹ is one set to dominate the policy and research agenda in the next decade.² Chosen as one of the main themes of Rio +20,³ major UN agencies, think-tanks and policy makers worldwide have concentrated their efforts in signalling the changes that are needed in order to ensure sustainable trade and investment that will lead to growth worldwide. This will require considerable changes in the legal structures underpinning trade, investment and, more generally, a new understanding of the drivers of globalisation.

The green economy is set to be 'one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities'.⁴ In its simplest expression, a green economy can be thought of as one which is low carbon, resource efficient and socially inclusive. For many, the term 'green economy' is embedded in the broader sustainable development concept described as 'an economy in which economic growth and environmental sustainability work together

¹ Although there is no consensus on what the 'green economy' is as recognized by the UN See Para. 60, at p.18 of the Synthesis report of the United Nations Conference on Sustainable Development, (A/CONF.216/PC/6) UNEP has developed a working definition of a green economy 'as one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities. In its simplest expression, a green economy can be thought of as one which is low carbon, resource efficient and socially inclusive' [www.unep.org/greeneconomy/about GEI/what is GEI/](http://www.unep.org/greeneconomy/about%20GEI/what%20is%20GEI/) See, in general: *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, UNEP, 2011. Available at: www.unep.org/greeneconomy (accessed on 14 March 2012).

² Literature on 'greening' the economy is not new. See, among others, Brian Milani, *Designing the Green Economy: The Post-industrial Alternative to Corporate Globalization* (Rowman & Littlefield Publishers, Lanham, MD, 2000) Chapter 11 generally, and especially at 186–193. Current literature on the 'Green Economy' includes R. Hahnel, *Green Economics: Confronting the Ecological Crisis* (New York: M.E. Sharpe, 2010).

³ The UN Conference on Sustainable Development (4–6 June 2012), available at: <http://www.uncsd2012.org/rio20/index.html> (accessed on 14 March 2012).

⁴ UNEP 'What is the Green Economy? Working definition' [www.unep.org/greeneconomy/about GEI/what is GEI/](http://www.unep.org/greeneconomy/about%20GEI/what%20is%20GEI/).

in a mutually reinforcing fashion while supporting progress on social development'.⁵

Thus, we have an institutional endorsement of a proposition that aims to translate the 'environment vs. development' dichotomy into a so called 'win-win' solution. A solution where business and industry will play a crucial and willing role in delivering the economically viable products, processes, technologies, services, and solutions required for the transition to a 'green economy'.⁶ But before we all embrace this solution, it is important to look at the conceptual underpinnings of this idea and its institutional and practical ramifications.

Natural resources or green capital are the drivers of globalisation.⁷ Despite the current age of technological innovation, it is natural capital which constitutes the physical basis for wealth. This little explored relationship between green capital and globalisation rest upon complex legal principles of sovereignty over resources, access and benefit sharing and cooperative solutions sought by principles such as common but differentiated responsibility. Global problems and concerns⁸ and national and sectoral interests need to be articulated in forums where the typical power structures do not get replicated and the *status quo* can be challenged. Globalisation has contributed to this new understanding of regulatory powers and responsibilities and has, largely, facilitated new initiatives where business and civil society via organised non-governmental organisations mostly, voice their interests and work alongside the traditional governmental structures to propose regulatory solutions for sectors, groups or industries.⁹ It is also argued that, in today's world, globalisation acts both as an amplifier and a limit for the regulatory choices of states. Regulatory choices no longer have only state or regional effects but can have extraterritorial effects alongside industry self-regulation affecting

⁵ ICC comments on Harnessing Freedom of Investment for Green Growth, 11 March 2011. Available at www.iccwbo.org (accessed on 14 March 2012).

⁶ Un Conference on Sustainable Development, The Future we want: outcome document adopted at Rio+20 (19 June 2012, Rio de Janeiro, Brazil), UN Doc A/CONF.216/L.1*. Available at: <http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>.

⁷ We have studied and analysed the complex relationship between globalisation and natural resources in E. Blanco and J. Razzaque, *Globalisation and Natural Resources Law: Perspectives, Themes and Key Issues* (Cheltenham: Edward Elgar, 2011).

⁸ Such as climate change or the destruction of biodiversity.

⁹ See Blanco and Razzaque, n 7, pp 111–114. Examples of multi-stakeholder initiatives include the Kimberley Process, the Extractives Industries Transparency Initiative (EITI) discussed by Carr and Konstantinidou in this book, and the Ruggie Principles on Business and Human Rights 2011.

trade and market actors' behaviour well beyond the territorial scope originally intended.¹⁰ This provides an opportunity for greater sustainability as states can regulate the behaviour of economic actors beyond their borders and create a 'race to the top' driving environmental or social standards up. But it has already been denounced as a dangerous and potentially covert form of protectionism that risks alienating developing countries further from a level playing field in world trade markets.¹¹

The much trumpeted 'green economy' needs an institutional framework that understands the shifting paradigms of world economic forces and the multiple actors that interact in the legal sphere is certainly required in one form or another. In the discussions and preparatory works that fed into Rio+20, a large number of non-state actors have consolidated their strategic strength in the debate and foster the belief and readiness to take the lead in the deployment of this new economic era.¹²

The importance of this edited collection cannot be overstated as the new patterns of economic growth currently emerging in countries such as China, India, Brazil or South Africa with large natural resource reserves and growing populations impatient to join into the consumption patterns of the developed world may conflict with the now proposed 'green economy' and sustainable development model favoured by developed countries. How should we – the international, trade and environmental legal community – react to this green economic transformation and strategic repositioning of sustainable development? Are we just witnessing an economic transition that can be accommodated within our current regulatory agenda or do we need a new legal structure that reduces the current power imbalances?

While it is important to reformulate economic theories that put exclusive emphasis on growth and industrial development, it is also crucial

¹⁰ A good example of this is the Bribery Act 2010 that came into force in July 2011 and have significant extra-territorial effects as a foreign company which carries on any 'part of a business' in the UK could be prosecuted under the Bribery Act for failing to prevent bribery committed by any of its employees, agents or other representatives, even if the bribery takes place outside the UK and involves non-UK citizens. This issue of bribery is explored further in Carr and Konstantinidou's chapter in this book. Also see Razzaque's chapter in this book.

¹¹ Especially by M Khor. See: Jose Antonio Ocampo, Aaron Crosby and Martin Khor, 'The Transition to a Green Economy: Benefits, Challenges and Risks from a Sustainable Development Perspective. Report by a Panel of Experts' to Second Preparatory Committee Meeting for United Nations Conference on Sustainable Development UN-DESA, UNEP, UNCTAD (2011). Available at: http://www.uncsd2012.org/rio20/content/documents/Green%20Economy_full%20report%20final%20for%20posting%20clean.pdf.

¹² See, for example, the ICC Initial Comments on UNEP draft report of the Green Economy. Document No. 213-18/4, 6 May 2011.

to address social inequality and participation in order to ensure that communities engage with and benefit from current technological development and are able to reap the benefits of carefully planned sustainable investment and trade regimes. At the same time interdependence of countries requires cooperative solutions for governance that incorporate the multiplicity of actors and define power and control in the inter-related economic and natural resource management spheres.

ISSUES AND THEMES

In this edited collection, we explore several issues. The first one is that of the drivers of sustainable investment. We have witnessed over the last decades the progressive greening or 'sustainabilisation' of the economic discourse mostly advanced within the corporate social responsibility (CSR) agendas of major multinational corporations. The much criticised CSR agenda¹³ has permeated not only to traditional industries but moved into portfolio investors, banks¹⁴ and pretty much every economic actor playing in the global markets.¹⁵ Yet, many would argue that very little has improved. Indeed, companies with perfect green CSR agendas are still among the worst polluters¹⁶ and many of the instruments adopted lack not only enforcement mechanisms but even the most basic level of monitoring that would make them effective. This takes us to the second of our issues that of the regulatory potential of the different actors, especially state regulation vs self-regulation. The third one considers the related issue of whether corporate control over natural resources creates conflicts between access and sustainability or has the potential to facilitate this.

There are three inter-related themes that are crystallised in this edited collection: the link between investment, trade and natural resource

¹³ For survey and critical discussion of the main positions on the Corporate Social Responsibility debate see B. Horrigan, *Corporate Social Responsibility in the 21st Century* (Cheltenham: Edward Elgar, 2010). N. Boeger, R. Murray, C. Villiers (eds) *Perspectives on Corporate Social Responsibility* (Cheltenham: Edward Elgar, 2008).

¹⁴ A good example is provided by The Equator Principles (EPs) now adopted by 73 financial institutions and which provide the framework by which banks can manage environmental and social issues in project financing. Available at: www.Equator-principles.com (Accessed on 12 March 2012).

¹⁵ B. Richardson, *Socially Responsible Investment. Regulating the Unseen Polluters*. (Oxford: OUP, 2008).

¹⁶ For example: BP, one of the worst polluters in the world, endorses principles of human rights and sustainable and green development in its corporate social responsibility page.

management in the context of the growing economic inequalities between states; the environmental and social conflicts arising out of economic globalisation; and the response of regulatory and institutional mechanisms to the challenges of rapid resource depletion.

The first theme of corporate control over natural resources brings us to the important questions of whether sustainability is really informing market and government decisions, or are we instead witnessing a process where market forces are driving the 'sustainability' agenda. If so, one may ask, what is needed for 'sustainability' to drive the market? Cotula's contribution looks at investment contracts and their potential to contribute towards, or undermine, an overall objective of sustainable development. Within a conceptual framework that looks not only at the extent to which a balance between social, economic and environmental considerations has been struck but also at the contracting process where public voices and accountability are often missing. Economic liberalisation, improved transport and communication systems, and the global demand for energy, minerals and agricultural commodities have fostered natural resource investment in many lower- and middle-income countries. Undoubtedly, increased investment may create opportunities to improve living standards – but it also creates risks such as environmental damage and loss of key livelihood assets like land, water and grazing. For host countries, attracting investment is not an end in itself, but a means to an end. The ultimate goal is to improve living conditions and enable people to have greater control over their lives, whilst protecting the environment. This goal can be described as sustainable development – the careful and evolving balancing of social, environmental and economic considerations. Investment contracts define the terms of an investment project, and the way risks, costs and benefits are distributed. They are therefore crucial in determining the extent to which the investment advances – or undermines – sustainable development goals.

Gonzalez's contribution typically looks at China's involvement in Latin America's natural resource sector investment and attempts to bridge the contentious debate over China's role in Latin America by interrogating the dominant narratives that portray China as either a menace to Latin America's development or as a model worthy of emulation. China's growing economic ties with Latin America have sparked both optimism and alarm. With titles such as "The Coming China Wars" and "The Dragon in the Backyard," recent books and articles depict China as a rising imperial power scouring the globe for natural resources and as a competitive threat to Latin America. According to Gonzalez, other studies applaud China's

pragmatic, unorthodox development strategies and portray China as a successful model for developing countries. The competing narratives about China's rise do agree on one thing: China has become a formidable force in the developing world whose influence merits careful evaluation. Seeking raw materials for its industries and markets for its finished products, China is importing primary commodities from Latin America (such as petroleum, iron ore, soybeans, and copper) and is exporting manufactured goods. Chinese companies are also investing in the Latin American mining and petroleum sector in order to secure long-term access to energy and minerals. In addition to trade and investment, China is vying with the World Bank and the Inter-American Development Bank to become a major lender in Latin America in order to cultivate good will, to secure long-term contracts for natural resources at favourable rates, and to help finance imports from China. China has also strengthened diplomatic and cultural ties to Latin America, and has forged an alliance with Brazil, India, and Russia to demand a greater voice for developing countries in international economic and political affairs. Indeed, China has successfully appealed to developing countries by emphasizing "peaceful development," "strategic partnerships," and "win-win solutions" as alternatives to western economic and political hegemony. The chapter provokes several questions: will China's engagement with Latin America produce alternative paradigms of economic development that improve the quality of life while respecting ecological limits? Or will China replicate the trade and investment regimes that reinforced the economic and political subordination of developing countries, facilitated the exploitation of their natural resources, and brought the planet's ecosystems to the brink of collapse? The chapter examines the claim that China's economic rise should be regarded as a model for Latin America and discusses the implications of China's rise for international economic law and for sustainable development.

The second theme of environmental and social conflicts arising out of economic globalisation is explored by Razzaque, Cooper and French, and West. With enormous corporate control over natural resources, the discussion in these three chapters focuses on the dynamics of relationship between individuals and the state, and the power allocation within the state. As resource dependent communities struggle to benefit from national regulatory frameworks, these chapters assess the external factors impacting on resource governance, market priorities and the cost of development from developing country perspectives. As the 'green economy' casts its upcoming shadow over existing resource conflicts, it is important

to evaluate its potential for sustainable change and development. If we fail to do that, the implementation of yet another economic driven shift will be translated into new global arrangements and structures that will further marginalise the needs of developing countries.¹⁷

Razzaque's chapter assesses the level of influence external bodies have on the environmental policy making and resource governance of a state. While states have sovereign rights to explore and develop their natural resources, quite how sovereignty is interpreted in the environmental legal regime remains less than straightforward. At the national level, there has been a growth in the number of environmental regulations over the last decade. Some of these regulations are the outcome of the international environmental development and some are the direct result of the obligations created under multilateral environmental agreements. A number of external factors have an impact on the national environmental law-making processes. These factors include the influence of international agreements, export market requirements in trade, pressure from the civil society, and requirements of multilateral lending agencies. The non-absolute form of sovereignty suggests that states, by entering into international agreements and agreeing to abide by the rules of international institutions, have imposed restrictions on its resource sovereignty. This chapter analyses these external factors, and moves on to assess the level of influence external bodies including non state actors have on the national and local environmental policy-making. Faced with increased activities of multinational corporations in developing countries, the discussion in this chapter focuses on the dynamics of relationship between individuals and state, and the power allocation within and between states.

Cooper and French's chapter focuses on commercialisation of water services in South Africa. In the general discussion on foreign direct investment (FDI) and natural resources, views of polar extreme are often taken – either FDI is inherently neglectful of local priorities or that FDI is the most effective way of promoting local development. Even where a more nuanced approach is taken, which includes contextual insights from

¹⁷ Alarm has already been raised pointing at the potential dangers that the 'green economy' once it is translated into policy and legal frameworks can have for developing countries in terms of trade restrictions, new protectionism and the facilitation of business for developed countries. See, Jose Antonio Ocampo, Aaron Crosby and Martin Khor, 'The Transition to a Green Economy: Benefits, Challenges and Risks from a Sustainable Development Perspective. Report by a Panel of Experts' to Second Preparatory Committee Meeting for United Nations Conference on Sustainable Development UN-DESA, UNEP, UNCTAD (2011).