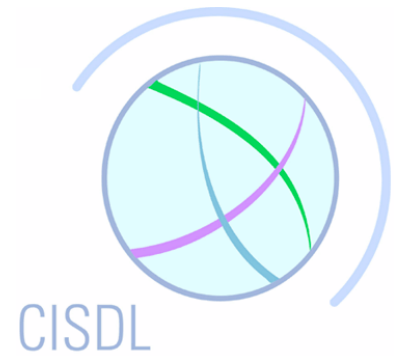


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Centre for International Sustainable Development Law

The CISDL should exist to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.¹

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¹ In this context, sustainable development is defined as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs', as stated in 'Our Common Future: The Report of the World Commission on Environment and Development' (Oxford: Oxford University Press, 1987). Furthermore, sustainable development is seen as an open and participatory process of environmental, social, economic, cultural and political change. Sustainable development can be achieved through, *inter alia*, protecting and enhancing ecosystems, transforming the direction of investments and the orientation of technology, and re-designing institutions to ensure current and future potential to meet the needs and aspirations of communities.

Sustainable International Natural Resources Law: A Future Research Agenda

*with Carolyn Deere*²

Protecting and managing the natural resource base of economic and social development is a fundamental priority for sustainable development, especially human livelihoods. Put simply, life depends on natural resources. As noted at the recent World Summit on Sustainable Development, held in Johannesburg 2002: “Human activities are having an increasing impact on the integrity of ecosystems that provide essential resources and services for human well-being and economic activities. Managing the natural resources base in a sustainable and integrated manner is essential for sustainable development. In this regard, to reverse the current trend in natural resource degradation as soon as possible, it is necessary to implement strategies which should include targets adopted at the national and, where appropriate, regional levels to protect ecosystems and to achieve integrated management of land, water and living resources, while strengthening regional, national and local capacities.”³

Despite their importance, the world’s natural resources—unlike the climate or biodiversity—escape the reach of any single, overarching international legal framework. Instead, they are covered by a patchwork of different rules. These include a range of sector- and resource-specific laws at the global, regional and national level. In addition to legal instruments, governments, non-governmental organizations (NGOs) and businesses have expanded the corpus of guidelines, best practices, principles and voluntary codes of conduct related to the management of natural resources. The scope of these hard and soft law efforts is vast.⁴ They address both renewable (fisheries, oceans, marine resources and seas, freshwater resources, soils and desertification, forests, plant biodiversity, wetlands) and non-renewable resource issues (mineral and energy resources, and world heritage sites).⁵ Given the complexity of issues specific to each particular resource, this chapter focuses its attention primarily on crosscutting issues and on the international level.

While the challenges and issues vary from sector to sector, certain general observations can be made about laws concerning natural resources. Natural resources laws commonly include provisions to regulate: the distribution and ownership of natural resources among nations or groups within them; access to common lands and resources; and the allocation of rights to natural resource use. Many laws contain provisions on dispute resolution, enforcement, sustainable management of natural resources, and the joint financing of conservation. Natural

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³ Johannesburg Plan of Implementation (JPOI), in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, August 26 to Sept 4, 2002, A/CONF.199/L.1 (New York, United Nations, 2002). The JPOI can be found online: http://www.johannesburgsummit.org/html/documents/summit_docs.html.

⁴ Priority areas of natural resources law include: laws related to fresh water, oceans, seas, islands and coastal areas -especially fisheries; agriculture and soils; plant biodiversity; wetlands; deserts and drylands; forestry; energy resources and mining and minerals development. These issues were highlighted in the JPOI, *ibid.*, at Chapter IV.

⁵ Examples include the *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N. Doc. A/CONF.62/122 21 I.L.M. 1245 (entered into force 16 November 1994) [hereinafter *UNCLOS*], *Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995, UN Doc A/CONF.164/38 (1995) 34 I.L.M. 1542 [hereinafter *Straddling Stocks Agreement*], the *Ramsar Convention*, *supra* note 131, *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*, 17 June 1994, 33 I.L.M. 1328 [hereinafter *Desertification Convention*], drafts of Freshwater and Forest Conventions, and various international commodity agreements (e.g., the international copper agreement and OPEC). Regional and resource specific environmental agreements include the *International Convention for the Conservation of Atlantic Tunas*, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63 [hereinafter *Atlantic Tuna Convention*], the Commission on the Conservation of Southern Bluefin Tuna (CCSBT), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); and EU-West Africa fisheries agreements.

resources laws also generally assert the need to protect and manage the natural resource base of economic and social development and to balance economic, social and environmental objectives. Given that many natural resources are considered “global public goods” and the impacts of their use extend across national borders, most international agreements emphasize the importance of international cooperation.

This chapter offers a forward-looking legal research agenda for the next decade using an international sustainable development law (ISDL) approach—one that works to integrate economic, social (including human rights and cultural), and environmental dynamics and laws. This ISDL agenda focuses on development and implementation of laws relevant to natural resources—targeting accountability as a thematic focus to which lawyers are particularly well positioned to devote attention, applied analysis and action. In developing such an agenda, this chapter does not attempt to tackle the myriad natural resource issues that warrant analysis nor the spectrum of all worthy legal questions. Rather, the emphasis is on critical gaps in analysis and effort which escape attention, despite urgent need, and which the legal community has a particular comparative advantage or niche to address.

To set the context, this chapter begins by reviewing why natural resources law and legal analysis is important *now*, highlighting the emphasis on natural resources at the 2002 World Summit on Sustainable Development (WSSD), the constraints to implementation of natural resources law and persistent trends of natural resource degradation. Then, the foundations for the proposed ISDL research agenda are further developed, by emphasizing the intersection of economics, society and the environment and the need to consider, in an integrated fashion, the dynamics and laws in these three realms. In the final part, four key areas are proposed for the attention, analysis and action of the legal research community.

Why is Natural Resources Law Important Now?

The area of natural resources law is important *now* for several reasons:

First, the WSSD provided an agenda for action that features many commitments and targets specific to natural resources (see Table). The continuing, rapid degradation, often irreversible, of the world’s renewable and non-renewable natural resource base has dire social and economic consequences for many countries, and particularly the most vulnerable or impoverished communities within them. This persistent trend serves as a timely reminder that more effort is required on all fronts.

Table

Natural Resource WSSD Commitments

Energy	<ul style="list-style-type: none"> • Increase eco-efficiency, with financial support for capacity building, technology transfer and exchange of technology with developing countries and countries with economies in transition; • promote the internalization of environmental costs and the use of economic instruments; • establish domestic programmes for energy efficiency; • accelerate the development, dissemination and deployment of affordable and cleaner energy efficiency and energy conservation technologies; • recommend that international financial institutions and other agencies’ policies support countries to establish policy and regulatory frameworks that create a level playing field; • support efforts to improve the functioning, transparency and information about energy markets with respect to both supply and demand; • strengthen and facilitate, as appropriate, regional cooperation arrangements for promoting cross-border energy trade; • implement transport strategies for sustainable development; and • promote investment and partnerships for the development of sustainable, energy efficient
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multi-modal transportation systems.

Biodiversity	<ul style="list-style-type: none">• achieve by 2010 a significant reduction in the current rate of biodiversity loss;• negotiate an international regime to promote and safeguard the fair and equitable sharing of benefits arising from the utilization of genetic resources.
Mining	<ul style="list-style-type: none">• support efforts to address the environmental, economic, health and social impacts of mining, minerals and metals and calls for fostering sustainable mining practices.
Soils and Desertification	<ul style="list-style-type: none">• calls on the GEF to designate land degradation as a focal area of GEF and to consider making GEF a financial mechanism for the CCD.
Water	<ul style="list-style-type: none">• halve the proportion of people without access to sanitation by 2015 (linked to the Millennium Declaration Goal to halve the proportion without access to safe drinking water by 2015).• mobilize international and domestic financial resources, transfer technology, promote best practices and support capacity building;• promote and provide new and additional financial resources and innovative technologies to implement Chapter 18 of Agenda 21;• develop integrated water resource management and water efficiency plans by 2005;
Oceans/Fisheries	<ul style="list-style-type: none">• maintain or restore depleted fish stocks, where possible, to maximum sustainable yield levels not later than 2015;• eliminate subsidies contributing to illegal, unreported and unregulated fishing and to over-capacity;• implement the Ramsar Convention;• establish a regular process under the UN for global reporting and assessment for the state of the marine environment by 2004.• establish a representative network of marine protected areas by 2012;• undertake initiatives by 2004 to implement the Global Programme of Action for the protection of the Marine Environment from Land Based Sources.
Air	<ul style="list-style-type: none">• improve access by developing countries to alternatives to ozone-depleting substances by 2010.
Forests	<ul style="list-style-type: none">• take immediate action on domestic forest law enforcement and illegal international trade in forest production.
Consumption	<ul style="list-style-type: none">• development of production and consumption policies using where appropriate, science based approaches such as life-cycle analysis, and for the development and adoption, on a voluntary basis, consumer information tools to provide information relating to sustainable consumption and production.

Second, the WSSD emphasized the importance of international cooperation and the urgent need for more focused engagement by the international legal research community. In particular, the WSSD Declaration and Plan of Implementation placed natural resources management clearly on the international agenda. Indeed, heads of state in Johannesburg recognised that among other priorities, "...managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development." In many areas, sound law exist on paper to manage these resources, but implementation, including compliance, enforcement and monitoring, is sadly lacking. While existing natural resources laws have played a crucial role in identifying environmental challenges, setting out steps for mitigation, and articulating the collective and individual duties of governments to act, the international community will rely on input from the legal research community, amongst others, to address the challenges for implementation, including:

- Inadequate political will and financial commitments to promote compliance and enforcement (particularly with respect to non-Parties of agreements);

- Technical constraints due to inadequate data and incomplete understanding of the complex interactions of ecological, political and social systems that impact natural resources;
- Confusion about the plethora of overlapping agreements, fora and obligations, and the compatibility of the objectives of economic and environmental legal regimes;
- Lack of appropriate means for the resolution of natural resource-related disputes; and
- Seemingly endless negotiations on technical issues in lieu of concrete progress on the ground.

Not all of these are challenges can be addressed by the legal community alone. However, the legal community does have much to offer in several significant areas—including interpretation of laws, clarifications of obligations, new thinking on dispute resolution, and creative, cost-effective legal approaches to compliance, monitoring and enforcement (particularly for developing countries with limited budgets).

Third, a series of “neglected” challenges—such as the six listed below—must urgently be brought into the mainstream of legal analysis. A vanguard of legal advocacy groups and other NGOs have led the way with innovative legal advocacy and action. Yet in much of the world’s mainstream legal scholarship and teaching, analysis of these issues remains marginal.⁶ Future legal research must address this deficit.

Legal approaches to improving the credibility of scientific evidence.

The provision of scientific evidence and analysis — vital to the lawmaking process — has often become a profit-driven activity. Efforts to improve compliance with principles regarding conflict of interest and funding-disclosure among scientists in academia, research foundations and in the private sector is vital if laws and policies are to maintain the public’s confidence.⁷

The relationship between human rights violations and natural resource use.

The human rights community and media have drawn increasing attention to human rights violations and civil conflict that can accompany natural resource use. Many hundreds of tense, local stand-offs exist—particularly in the minerals and forestry sectors—where local communities raise a range of concerns about the extraction activities of companies on the lands upon which they rely for their livelihoods. Common complaints related to problems of erosion, increased vulnerability to natural disasters, and contamination of groundwater and rivers. A growing movement of NGOs focused on the intersection of human rights and environment also calls for greater attention to the protection of natural resource companies by national military or other security forces.⁸

⁶ Center for International Environmental Law <www.ciel.org>, The Foundation for International Environmental Law and Development <www.field.org>, EarthJustice <www.earthjustice.org> and EarthRights International <www.earthrights.org> are some of the NGOs that have pioneered the field of advocacy and action on international natural resource issues. The Centre for International Sustainable Development Law <www.cisd.org> is not an advocacy organisation, but is working to advance the cutting edge of sustainable development law through research, legal advice and capacity building, along with organizations such as the Centre for Human Rights and Environment (CEDHA) in Argentina <www.cedha.org> and the new ESCRnet <www.fordfoundation.org> which focus on the intersection of human rights, social and environmental matters.

⁷ The Journal of Philosophy, Science and Law regularly includes articles addressing the intersection of the scientific community, public policy and the law, including many articles relevant to the areas of human health, environment and social policy. A critical review of the implementation of environmental assessments by Sierra Club Canada highlights a range of problems associated with the challenge of gathering and reviewing scientific evidence on natural resource issues. See A. Nikiforuk, *The Nasty Game: The Failure of Environmental Assessment in Canada* (Canada: Sierra Club, 1997). The Center for Science and the Public Interest <www.cspinet.org> also provides ongoing analysis targeting policymakers of critical issues related to science and public regulation in natural resources, health, consumer safety, and the environment.

⁸ Examples include: The Centre for Human Rights and Environment (CEDHA) in Argentina; the new Economic, Social and Cultural Rights Network; Project Underground - an advocacy/activist NGO which challenges the conduct of resource extraction companies, particularly mining companies, whose activities threaten the human rights of indigenous communities. Their website contains numerous reports detailing links between natural resource companies and security forces. Also, Human Rights Watch - an international human rights organization, has recently expanded the scope of its work to include consideration of the

Corporate responsibility and accountability.

The need for greater corporate responsibility and accountability has gained increasing recognition in international policymaking, including in the WSSD itself. Large corporations form incredibly powerful and influential forces. In many areas of natural resource exploitation and management, they are the only law-makers, and enforcers, operating in ways that enable them to control resource sectors and dominate markets. Some companies bring to developing countries higher corporate social and environmental standards than local companies, but they also bring the power to negotiate the terms of their investment in the country—sometimes putting them at odds with the interests of local communities. As the legal community helps promulgate voluntary principles, standards and codes, there is also a need to address directly the power of the corporate sector in the natural resources arena—harnessing it for good where possible and ensuring adequate regulation where potential damage looms.⁹

Consumption law and policy.

Since before the Earth Summit, the question of how to change unsustainable patterns of consumption have been among the most contentious in the international arena. There is no doubt that developed countries must take the lead in formulating more sustainable approaches to consumption. The reality, however, is that, while their record of success is steadily improving, voluntary and mandatory initiatives to promote sustainable consumption of the world's minerals, oil, gas and other energy resources, forests and fisheries remain the exception rather than the rule.¹⁰

Where powerful economic interests are absent.

The problems that can emerge from the absence of powerful international economic interests warrant attention from lawmakers. The inter-related challenges of desertification and sustainable livelihoods in dryland areas provide a case in point. Both issues suffer overwhelming neglect by the international community and are prime candidates for assistance from the legal community in terms of ways to ensure the delivery of capacity building, technical assistance, and financial aid (promised, for example, by the UN Convention to Combat Desertification), even in instances where the economic or political stakes for the international community, especially developed countries, appear low.¹¹

Rogue government behaviour.

Three kinds of behaviour warrant are of particular concern in the natural resources field. First, corruption is a concern.¹² Second, the widespread practice of non-compliance of Parties to

connections between human rights abuse and natural resource use, see <www.hrw.org>. In the human rights community, public campaigning to restrict the marketing of “blood” diamonds - where profits are used to finance civil wars - has generated new industry-wide standards for the diamond sector, see <www.conflictdiamonds.ca>.

⁹ See e.g. M.C. Cordonier Segger “Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda” (2003) *RECIEL* 12 3.

¹⁰ A 10 Year Programme of Action on Promoting Sustainable Consumption Patterns was recently approved at the WSSD. This programme is being led by the United Nations Environment Programme <www.unep.org>, The Organisation of Economic Cooperation and Development <www.oecd.org> and the International Trade Center <www.itc.org> have each conducted considerable research evaluating the effectiveness and economic viability of environmental and social labelling schemes as ways to promote more sustainable consumption and production.

¹¹ Desertification issues are generally discussed under the auspices of the Desertification Convention <www.unccd.int>, and through partnerships such as the Drylands Development Centre's Global Drylands Imperative <www.undp.org/dpa/frontpagearchive/2002/february/25feb02/>.

¹² Struggles over natural resources often lie at the heart of corruption and civil strife. NGOs like Global Witness have documented the clandestine ties between large resource companies often and shadowy resource traders, smugglers, corrupt local

international agreements, particularly in terms of provision of capacity building and financial support, causes consternation.¹³ Third, there must be ways to address the impacts of non-Party actions, when these threaten the very goals of a treaty that seeks to manage global public goods.¹⁴

Each of these six challenges provides an example of how the failure to address underlying tensions can frustrate either international negotiation or progress with implementation. Even where these issues are acknowledged as important, they tend to lack concerted attention and focused resources by governments or international agencies. Instead, they are often left to “languish” in the “too hard” basket—only to receive a fleeting nod of acknowledgement at inter-governmental conferences. At best, allusions to these problems are usually discretely hidden between the lines of upbeat preambles, declarations and legal texts. On the one hand, this tendency to “paper over” difficult points is sometimes necessary to make any progress at all in international meetings. On the other hand, the problems often simply re-emerge later to frustrate the implementation and monitoring of law.

Law and Integration: People, Planet and Prosperity

Past efforts to promote conservation and sustainable of natural resources instruct us that law alone is not enough. Too often, legal scholars and advocates focus on interpreting and evaluating laws without sufficient consideration of the broader economic framework or the real-world social and political dynamics that lie at the heart of natural resource issues.

First, the legal community has much work to do, to systematically incorporate the root causes of natural resource degradation into international legal research. Economic policies and dynamics are key drivers impacting both the pace of natural resource use and the effectiveness of laws. The world’s macro-economic policies—on trade, investment, exchange rate, interest rates, developing country debt—have a critical influence on prices and incentives for natural resources.¹⁵

Where countries find themselves under intense pressure for debt servicing, the urge to generate foreign exchange through natural resource extraction drives overexploitation. Similarly, where governments lack the financing for effective management or tenure controls, the expansion of trade through liberalization policies can exacerbate overuse of resources, or result in the granting of concessions at fire-sale prices. International trade rules—such as rules to limit subsidies and tariffs—could also serve as a force of good for more sustainable natural resource use.¹⁶ In

officials, arms dealers and mercenary companies. The Global Policy Forum website contains a range of documents with respect to corruption, conflict and natural resources (including to oil and natural gas, water, timber, minerals). See online: <<http://www.globalpolicy.org/security/docs/minindx.htm>>

¹³ See “Making International Environmental Law Work: Improving Compliance and Resolving Disputes” in D. Hunter, J. Salzman, & D. Zaelke, *International Environmental Law and Policy* (Foundation Press, 1998). For an example of recommendations for change see E. Dannenmeier & I. Cohen. “Promoting Meaningful Compliance with Climate Change Commitments” (Prepared for the Pew Center on Global Climate Change, 2000).

¹⁴ The recent FAO Agreement on Illegal, Unreported and Unregulated Fishing, for example, is one recent step in the right direction. See C. de Fontaubert, *Achieving Sustainable Fisheries: Implementing the New International Regime* (Washington: IUCN - Gland, 2003).

¹⁵ The terms of international debt relief and trends in the world’s commodity markets, for example, are two examples of dynamics that can have a crucial influence on the pace and pattern of natural resource extraction in developing countries. See e.g. C. Tan. “Tackling the Commodity Price Crisis Should be WSSD’s Priority” (2002) Third World Network, Malaysia. See also P. Collier. “The Market for Civil War” *Foreign Policy* (May-June 2003). Collier argues that poverty and trade in natural resources, not historic ethnic tensions, are often the real culprits of civil wars.

¹⁶ The stronger enforcement of trade rules on subsidies could, for example, force countries to reduce perverse government subsidies that contribute to environmental degradation (i.e. as subsidies to the fishing industry contribute to the overcapacity of fishing fleets and thus to overexploitation of fisheries). C. Deere, *Net Gains: International Trade, Sustainable Development and Fisheries* (Washington: IUCN - World Conservation, 1999). The elimination of tariff escalation could enable countries to export higher-value added processed natural resource products with the potential to reduce the amount of natural resource exploitation. See e.g. M. Gehring, “Sustainable International Trade, Investment and Competition Law”, in this volume. Policies with respect to foreign direct investment, competition and privatization all impact the effectiveness of laws, availability of government resources for natural resource management and conservation purposes, resources, policy constraints/options.

addition, it is well-established that poverty levels and income inequality are a major factor affecting the pace of natural resource use.¹⁷ Most importantly, macro-economic policies incorporate a series of legal obligations with which governments must comply.¹⁸ The legal obligations can either support sustainable management of natural resources, or do the opposite, and policies are only just beginning to be set in place to address this situation.¹⁹ These topics need to be placed at the center of the purview of lawyers interested in natural resources. These obligations often determine the economic incentives and policy framework for natural resource use.

Second, in the natural resources arena, economic and social tensions frequently arise where different stakeholders have different priorities and interests with respect to the conservation, access, and use of particular resources. Indeed, natural resources generate significant economic returns to governments, local communities and to the private sector. For governments, natural resources are a source of export earnings, national income, tax revenue and employment generation. Some natural resources also have high strategic value (e.g., oil and minerals to meet security, energy and industrial manufacturing needs). And, in countries with abundant natural resources, officials who control access to natural resources often occupy positions of great power and influence (and at worst are susceptible to corruption).²⁰

For local communities, natural resources can be a central source of income, food security and livelihoods, particularly in developing countries. National economic and political debates over issues such as land rights and land reforms thus have significant influence over natural resources. Similarly, cultural and ethical norms also complicate the task for lawyers. Traditional communities—on whose land significant natural resources reside—often consider themselves stewards of natural resources with spiritual and cultural responsibilities related to their use.²¹ Tensions between different value-systems add to the complexity resulting from the range of possible short and long-term end-uses for natural resources.

Finally, many laws reinforce rather than address this disconnect between economic, social and environmental dynamics and laws relevant to sustainable development. It is not enough, for example, that international “economic” or “environmental” treaties incorporate deceptively simple assurances that their provisions will not contradict each other. An integrated approach is needed, which actually considers and *responds* to intersecting issues. This will be vital to ensure sustainable management and protection of natural resources.

¹⁷ See e.g. the Overseas Development Institute Rural Policy and the Environment Group website on natural resources <<http://www.odi.org.uk/RPEG/NR.html>>. The website contains a series of working papers on intersections between various aspects of poverty, sustainable livelihoods and natural resources management in different sectors and countries.

¹⁸ In developing countries, for example, project and sectoral loans, policy advice and debt relief arrangements from international financial institutions (such as the World Bank and IMF) and bilateral donors all involve some form of legal obligation. See G.K. Helleiner, “Developing Countries in Global Economic Governance and Negotiation Process”, in D. Nayyar, ed., *The New Role and Functions for the United Nations and the Bretton Woods Institutions* (Tokyo: World Institute for Development Economics Research, University of the United Nations, 2000).

¹⁹ The World Bank has, for example, put in place policies and monitoring mechanisms to ensure that social and environmental effects are considered in their loan agreements and other programmes. These policies are complemented by an Inspection Panel to promote accountability. See World Bank <www.worldbank.org>. For ongoing critical appraisals of the effectiveness and implementation of these policies see the Bank Information Centre <www.bicusa.org>. One example is “The World Bank Inspection Panel: A Three Year Review” (1997) L. Udall, BIC: Washington. More generally, see J. Fox & L. Brown, *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (Cambridge, MA: MIT Press, 1998). The International Development Law Organisation trains developing country lawyers in sustainable development law, so that they can also take these issues into account from their national interests when negotiating agreements with international economic institutions or complying with their obligations <www.idlo.int>.

²⁰ Tan *supra* note 51. Collier *supra* note 51.

²¹ The Journal *Cultural Survival* presents an ongoing series of articles on related topics <www.culturalsurvival.org>.

Improving Implementation through Accountability: A Forward Looking ISDL Research Agenda for Natural Resources Law

Using a sustainable development law approach, this section proposes a natural resources law research agenda that focuses principally on improving *implementation* of laws through increased *accountability*.

Legal analysis is needed to help advance many aspects of law relevant to natural resources. In several areas, studies are already underway. Some currently popular areas for investigation include studies of the implications of the precautionary principle in different areas of natural resources management, multi-stakeholder processes and instruments,²² impact assessment, and ways to cost-effectively implement international laws on a domestic level (from marine resources to forestry and mining). In addition, the implementation of the natural resources priorities set forth by the WSSD will demand considerable input from the legal community (see Table 1). The focus of this ISDL research agenda is, however, to go beyond what is already on the table to draw together a creative, forward-looking agenda.²³

Accountability should become a core element of a sustainable development law research agenda for natural resources. The struggle to improve accountability lies at the heart of international efforts for more effective implementation. Accountability is about compliance by State, citizens and private sector with the many rights, privileges, obligations, and duties they acquire voluntarily and through binding agreements. Accountability also requires transparency (about evidence, successes, failure), provision of explanations in times of failures, and commitments to improve performance where it has not fulfilled expectations. The challenge for managing the links between “people, planet and prosperity” is not so much to make new agreements but to hold groups accountable to existing ones. Improved accountability requires direct engagement with the many tensions and competing interests at stake. The call to accountability is a call for holding groups to account for derogation of social duties, moral responsibilities, and legal obligations and to reward them for constructive behaviour. The legal community is well-positioned to help make lasting improvements in the accountability of four core groups critical to sustainable development: business, citizens, government and scientists.

In terms of methodology, legal analysts have the opportunity to realize a more vibrant engagement in collaborative and participatory research, working more closely with policy analysts, economists, and sociologists. How can the work of leading scholars and analysts be linked more closely with efforts on the ground to change behaviour? What are the opportunities for different communities working on natural resource conservation and management coalesce more effectively around analysis and advocacy?

In the discussion below, it is argued that the focus of analysis should not be simply the production of legal journal articles, but legal briefs for vulnerable communities, information useful to advocacy campaigns, legal monitoring of environmental compliance, contributions to court proceedings, and case studies presented in a form that is accessible to policymakers and to local community organizations.

²² Multi-stakeholder processes are an important objective of ISDL. Potential research questions for this area include: What kinds of legal frameworks or processes best draw together the multiple stakeholders to deliberate upon appropriate natural resource management strategies and laws? What kinds of instruments can be developed to ensure that the voices of local communities, minority groups, and the poor are adequately heard in existing and future efforts to create new ground rules for corporations? How can the human rights, peace, indigenous peoples, labour rights and environmental communities share lessons?

²³ An overview of the current international environmental law agenda, with extensive consideration of economic, human rights, social and corporate issues, is provided by D. Hunter, J. Salzman, & D. Zaelke, *International Environmental Law and Policy* (Foundation Press, 1998).

(i) *Business*

The WSSD's call for "active promotion of corporate responsibility and accountability, based on the Rio Principles" creates an important invitation to the legal community to bring forth specific expertise and analysis.

In recent years, NGOs, government and environmentally-aware business groups have spawned many important efforts to link business decision-making to sustainable development goals. Moreover, there is a growing body of research reviewing the objectives, track record and value of different approaches to corporate responsibility from voluntary principles, guidelines and codes of conduct that exist for many products and sectors and for different goals (including human rights, labour rights, environmental protection, and conflict prevention).²⁴

The WSSD urged further progress, calling on businesses in the financial sector to incorporate sustainable development considerations into their decision-making processes. Taking up this mandate, the legal community can help to refine new legal approaches and principles that promote more sustainable practices among both individual and institutional investors (public and private) in the extraction, use and processing of natural resource extraction. Cutting edge issues for both theoretical and applied legal analysis include security commission disclosure requirements, government procurement procedures, and extending the responsibility of corporations to shareholders beyond fiduciary criteria. The legal community may also wish to forge ahead, looking beyond the priorities set by the WSSD, to fill vital gaps of analysis and action in the following areas:

- How to improve the effectiveness and feasibility of initiatives to hold companies (from the North and the South) legally liable, including in their home countries and abroad, for investment decisions in natural resources?²⁵
- What is the potential for the use of competition and anti-trust law to regulate the manner in which monopolies can influence patterns of natural resource extraction and use? (Particular issues worthy of investigation include: trends in the vertical and horizontal integration of large natural resource companies; the impact of these companies on domestic natural resource policies and legislation; and options for regulating large public subsidies for activities that influence unsustainable patterns of natural resource use);
- How can legal principles and guidelines be used to regulate the role of multinational corporations in international treaty-making processes with respect to the management and use of natural resources?; and
- What are the options for an improved international regulatory framework for corporations? How should these be linked to international treaties which grant investor rights, and provide for dispute settlement?

(ii) *Citizensry*

The WSSD encourages and promotes the development of a 10-year framework for programmes supporting regional and national efforts to accelerate the shift towards sustainable consumption and production (see Table 1). This focus on the citizen as consumer is welcome. Citizens can be a vital instrument for reducing over-consumption, and promoting compliance with and

²⁴ See, e.g., Cordonier Segger, M.C. "Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda" (2003) *RECIEL* 12 3.

²⁵ EarthRights International, for example, pursues litigation to provide remedies for earth rights abuses around the world. Working in partnership with other legal organizations and private lawyers, they are litigating several cases on behalf of victims of earth rights abuses and have filed amicus curiae ("friend of the court") briefs in several other cases. They seek to apply domestic and international law to hold corporations and others accountable for their actions, often using the *Alien Tort Claims Act (ATCA)*, which allows lawsuits in federal courts for violations of international law. EarthRights International's website contains summaries of recent ATCA cases against corporate defendants <www.earthrights.org>. See e.g R. L. Herz, "Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment" (2000) 40 *Va. J. Int'l L.* 545.

implementation of natural resources law Applied legal analysis and research has an important future role to define this agenda.

In recent years, NGOs, government agencies and the private sector have launched several initiatives to engage consumers in sustainability efforts. Examples include guidelines, principles, initiatives and national laws for certification and labelling of “sustainable” products and harvesting, extraction or production processes. Other examples include new rules on advertising rules and the use of boycotts as instruments for public awareness raising. In general, their common feature is to increase the information available to citizens hoping that they will exercise their purchasing power as a “vote” in the market place for either more sustainably produced products by: a) refraining from buying certain products; or b) selectively buying products.

The legal community can contribute to this area by exploring:

- What are the most effective ways to mitigate the regulatory burden on developing countries and low-incomes groups of certification processes?;
- What are the legal practicalities and associated costs and benefits of making some voluntary certification efforts mandatory?; and
- What are the prospects for legally-binding production and consumption targets in key areas?

(iii) Government

Governments play a key role in setting the frameworks for access to, and management of, natural resources. Transparency and accountability in government decision-making related to natural resources demands increased attention by legal researchers.

In terms of transparency, obvious issues to which legal analysts can contribute is to the promulgation of guidelines on public access to environmental information, decision-making as well as judicial and administrative proceedings. While considerable analysis of these issues takes place in developed countries, too little attention has been focused on promoting appropriate domestic laws in developing countries, and these may not be the same laws.

A much understudied aspect of transparency is the relationship between governments, armed groups, private companies and investors:

- What are the processes by which governments engage in the negotiation and granting of rights of access to natural resources, warrants for exploration, and granting of concessions is clearly of great relevance, and how can these be improved?
- What are the legal guidelines in various countries for negotiating access to and use of natural resources, can cases of abuse and best practices be documented, can government misconduct be exposed, generating recommendations for reforms or legal action where appropriate?

Second, a range of government activities and laws—both in the developing and developed countries frustrate—the implementation of natural resources law. Beyond helping to articulate the positive duty of the governments to act, the legal research community can also help improve the accountability of governments by clarifying the duty of governments to abstain from measures that generate perverse economic incentives:

- What are the practical legal and economic solutions that will help governments to phase out subsidies that perversely promote overexploitation of natural resources and economic distortions in the fisheries, forests, energy and agriculture sectors?
- How can inter-governmental financial institutions (such as the World Bank and IMF) and government export credit agencies improve evaluation and provision of their advice and

loans? The goal of such analysis would be to reduce the incidence of policy advice, loan and project agreements, or export guarantees from these agencies which results in perverse economic incentives in terms of the pace of natural resource-exploitation and the government support provided to natural resource management efforts? (A case study approach might also provide some insights about the way legal obligations embedded in policy and project loans and grants shape national approaches to natural resources and the differential social impacts that can result).

Third, legal research must focus on one of the most difficult issues related to accountability, namely compliance. Two practical, legal challenges to the implementation of international sustainable development treaties warrant particular attention:

- How to influence the effects of non-parties conduct on the success of sustainable development treaties? The use of trade-related measures in several regional fisheries arrangements has challenged many assumptions about the readiness of states to consider imposing trade measures against non-members of agreements. The legal aspects and implementation of such innovative models for promoting the compliance of non-parties warrants greater documentation, monitoring and analysis to test the applicability to other areas.
- How to ensure increased levels of developed country fulfillment of international legal obligations? Many developed countries fail to fulfill obligations for capacity building, finance and technology transfer embodied in a range of environment, economic and social agreements. Developing countries and the NGO sector could benefit from conceptual assistance from lawyers regarding the design of mechanisms for monitoring and documenting non-compliance, evaluating best practices among donors (e.g., best legal approaches to the transfer of environmental technologies to developing countries and delivery of legal, technical assistance related to natural resource regulation), and devising proposals of ways to increase legal and political pressure on developed countries to comply with international obligations.)

(iv) Scientists

The availability and credibility of scientific data is critical to the implementation of natural resources law. Impact assessment and monitoring techniques similarly rely on the credibility of data and are critical to sustainable development. In practice, allegations of financial conflicts of interest and lack of scientific impartiality frequently conspire to undermine public confidence in regulations and frustrate efforts to improve both the management of natural resources (fisheries, forests, minerals, antarctic minerals, deep sea nodules) and their use (e.g., burning of fossil fuels and the climate change debate).

The legal community has been under active in this important area and can contribute a great deal in coming years:

- What to do when there are fundamental differences of opinion about whether “sound science” judges certain activities to be sustainable or not?
- What kinds of principles can promote the objectivity of scientific research regardless of funding source?
- How can the law be more useful in reducing the incidence of conflicts of interest in scientific publishing, and how can these be enforced?
- What legal processes for public participation and transparency have proven most successful in generating publicly accepted data, impact assessments and monitoring, particularly where broad international consensus is often vital to prompt action?

Conclusions

The natural resources arena provides some of the clearest examples of the interplay between social, environmental and economic stakes, needs and priorities. Legal frameworks and implementation efforts need to reflect this reality. An ISDL perspective can help meet this challenging by encouraging a conscious engagement with the web of overlapping social, environmental, cultural and economic legal frameworks, as well as with the cultural considerations, economic policies, expectations, players and interests that shape natural resource use.

While much international environmental law appears most related to natural resource protection, the most relevant, and crucial, international law in relation to the use and management of natural resources, in fact, emerges in the economic domain. It is there that significant changes need to be made, increasing integration with environmental and social laws must take place, and the future legal research agenda must focus.

Re-energizing the natural resources arena—as with so many other issues—requires that all communities—activists, policymakers, grassroots organizers, scientists and lawyers—focus their creative energy on addressing the real challenges to implementation (or, in the words of WSSD, “Making it Happen”).²⁶

²⁶ “Making it Happen” was the theme of Four Roundtables that were incorporated into the WSSD official agenda.