Introduction

Central to the question of how we live is how we share the earth. From conflict over territory, to passage over the high seas, to the quest for raw materials, to wars waged over water and oil, to dams and development, to methods of agriculture, food security and to negotiations over climate change, the question of resources lies at the heart of many international events. Indeed, the struggle for the use, control and distribution of the earth and her riches has been the impelling force behind a great deal of international legal doctrine, including much which might, at first glance seem unrelated to that issue. From the River Oder Case at the Permanent Court of Justice in 1929, to the judgments of the successor the International Court of Justice in Corfu Channel in 1949, and the more recent Gabčíkovo-Nagymaros Project Case, many landmark decisions of international courts and tribunals, cited for a range of legal principles involving sources, jurisdiction, nationality, obligations *erga omnes* or norms of *jus cogens* involve at base, disputes over scarce resources.

But if the struggle for control over resources lurks under the surface of international law, international law lies not only in the foreground of how we manage our resources, but in the background of how we understand and define them in the first place. The idea of background reiterates the importance, highlighted by other chapters in this volume, of an appreciation of historical context in understanding international law. In this instance, the ‘background’ is closely connected to international law’s imperial origins (Anghie 2004; Chimni 1987).
International law backgrounds the way we share the earth in two key ways; first as land appropriation, and second as the way in which the conceptual transformation of nature, and some kinds of knowledge, into ‘resources’ is institutionalised. Land is amongst the most basic of all resources. It represents the name we give to the utility function of the earth itself. When a community takes the land as its own, it is creating the conditions for ‘property’ to exist. That act, which makes property rights possible, is also in a sense, the ‘ground’ of law. Land appropriation is what German jurist Carl Schmitt called ‘the primeval act in founding law’ (Schmitt 2003: 45).

For international lawyers, this appropriation is neither myth nor ‘mere’ jurisprudence, but history and doctrine. As key Enlightenment philosophers Immanuel Kant and John Locke would remind us, externally sovereignty is the jurisdictional consequence of the appropriation of land (Crawford, this volume). The Enlightenment also brought the idea of man’s mastery over nature; the use of nature ‘in the services of humane life’ was one of its central ideas (Porter, 2001: 305). Indeed, according to Locke, a key function, and source of internal legitimacy of the state is to ratify that god-given link between man and nature through a system of property rights. Property rights, whether public or private, are the institutional form of the transformation of nature into a resource for human use. The division of the world into nation-states is thus both an apportionment of the earth, and the foundation of property rights.

In the foreground of the use and regulation of resources, international law has long been an arena for the struggle between the imperative to harness and exploit the earth’s resources in the service of mankind, with the equally ancient ethical duty of stewardship to conserve and protect the earth. This essay will focus largely on tracing the way this tension has taken shape in international law over the last half-century.

In general, we will see that the formal structure of international law and its regulatory baseline of the unconstrained sovereign state,¹ has meant that the tension between the exploitation and conservation of the earth has largely been translated into a jurisdictional dispute; namely the sovereign nation’s right to exploit its own resources, versus an internationally defined responsibility not to cause harm to other

¹ The Lotus Case (France v Turkey), PCIJ Reports, Series A, No.10 (1927).
The legacy of imperialism and its historical intimacy with international law has overwritten these jurisdictional battle lines, transforming the tension between the competing imperatives of the earth’s exploitation and conservation into a contest between promoting ‘development’ and protecting the environment. This opposition has tended to revolve around the metaphorical axis of ‘North’ and ‘South’.

These formal oppositions have been complicated by the permeability of the sovereignty of states in the South to developmental interventions, and by the rhetorical deployments of a notion of the ‘common interest’ by both North and South. The sovereign ‘right’ to exploit resources is thus sometimes merely the form of argumentation taken by a different set of international imperatives. So while the terrain of negotiation over resources certainly includes those fields that derive overtly from the contest between the right to exploit one’s resources and the responsibility to protect the environment, in the regulatory foreground of the resource question is also the flipside of those rules and claims. On the ‘verso’ side of the rules that might immediately spring to mind, are the international law of development, foreign investment law, trade rules and intellectual property. Indeed, the way we share the earth and its ‘resources’ is encapsulated in many different ways in international legal theory and doctrine, some of which do not appear to be about resources at all. And the resources themselves can look quite different, depending on where you are speaking from.

Notwithstanding this regulatory variety, the way the opposition between exploitation and conservation plays out in international law makes it seem difficult to reconcile a desire for greater equity between North and South with a concern for the environment. In international law and institutions, ‘sustainable development’ has become the received way to square the circle of development and environment, but has been shown by many commentators to hold out little promise in ecological terms, especially when confronted by contemporary resource challenges such as climate change.

Instead, activists and grass-roots social movements are increasingly mobilising (again?) around a reconceived notion of the ‘global commons’ as a way to think simultaneously about both economic and environmental ‘justice’. The commons as a

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2 Corfu Channel Case (UK v Albania) (ICJ 1949); Trail Smelter (United States v Canada) (Arbitral Award 1941).
resurgent political and philosophical concept is a broad idea, denoting at its most expansive, ‘the common wealth we share’ (Hardt 2009). This wealth would encompass the ‘resources’ shared by a common law, custom or necessity. In descriptive understandings of the commons, it usually denotes that which has not (yet) been brought within a regime of private property. But in more radical normative versions the commons includes everything we share a priori, and the creation of property rights is understood as the conceptual removal of goods from the commons.

In contrast to richer understandings, in international law doctrine the ‘global commons’ is a residual category denoting territory or resources beyond the limits of national jurisdiction. As we shall see, in itself this has not precluded collective action in all common areas, though the record is mixed at best. The key problem of the vestigial status of the commons is that it encourages us to forget the way international law ‘backgrounds’ our relationship to resources through property rights. One effect of this is arguably to encourage a certain complicity of international lawyers in a new wave of ‘enclosures’ of the commons and the dispossession and destruction that entails, particularly in relation to cultural ‘resources’ such as indigenous knowledge and the laws of indigenous peoples. On the other hand, the emergent idea of the ‘common concern’, though different again from activists’ understandings of the global commons, is an attempt within the framework of international law and institutions to overcome some of the limitations of a jurisdictional understanding of the commons, and may hold some promise for the creative function of international law.

**Conservation versus Exploitation**

International environmental law is, almost by definition, concerned with the global interest in a way that transcends the nation-state. Tracking the environment as their subject matter, international environmental lawyers are obliged to think more in terms of ecosystems and watercourses than state boundaries and sovereign territories. Because of this global imperative, chronologies of international environmental law are often produced to evince the emergence of a more genuine international community, demonstrating that we are finally finding some values we can share and learning to live together on one small planet (Brunnée 2007: 552). Particularly during the optimistic 1990s, the rapid expansion of international environmental law was said by more than one commentator to evidence ‘the international community’s learning
curve’ (Brown-Weiss 1992: 684), the vertiginous gradient of which should give us hope that we can address global environmental challenges in the future.

Indeed, if sheer volume is indicative, there is cause for some optimism on that score, with over 480 international agreements, amendments and protocols concluded in the twenty years between 1990 and 2009 alone. This is a far cry from the position before the 1970s, in which there were just a handful of treaties protecting, for example, species of commercial value such as fur seals (North Pacific Fur Seal Convention, 1911) and birds useful to agriculture (Convention for the Protection of Birds Useful to Agriculture, 1906) as well as a handful of colonial conservation treaties (such as the Convention for the Preservation of Wild Animals, Birds and Fish in Africa, 1900 and the Forest Regulations of British India, starting in 1865 (Ribbentrop 1989)).

International environmental lawyers themselves also tend to be cosmopolitan in orientation, seeing the international as the necessary level of governance for the issues at hand, and themselves as critics of the classical emphasis on sovereignty. Within the idiom of international law, the dramatic expansion of international environmental law in the 1970s emerged precisely as a critique of what many would call ‘traditional’ international law with its emphasis on the right of states to exercise unfettered sovereignty within territorial boundaries.

The particular assertion of sovereignty to which the nascent field of international environmental law was responding was the claim to Permanent Sovereignty Over Natural Resources (PSNR). This claim was launched by the Non-Aligned Movement in the 1950s and 1960s as part of a broader attempt to renew the international economic order after the end of imperialism; it took institutional form in the claim to a New International Economic Order (NIEO). Demands for the NIEO briefly took flight on the international stage due to a moment of Third World unity arising from a jump in commodity prices (brought on by an economic boom in the North) and the oil crisis of 1973 precipitated by the Yom Kippur War fought between Israel and a coalition of Arab states backing Egypt and Syria from October 6-26 of that year. These factors gave rise to a certain sense of vulnerability in the North, particularly in Europe.

4 Resolution on Permanent Sovereignty Over Natural Resources (19 December 1962, A/RES/1803 (XVII)).
Within that movement, the claim to PSNR was an attempt to mobilise sovereignty in the name of economic and political independence. In a world in which international law had successfully universalised itself as ‘law’ during the imperial period, and consequently acquired a ‘monopoly of process’ (Crawford, this volume), becoming a state was the only way for a decolonizing entity to claim legal personality. The barely complete struggle for decolonisation therefore took the form of self-determination as a nation-state almost by necessity. Because sovereignty, and the attendant principle of formal legal equality (Simma & Müller, this volume), were hard won prizes, and for some quite newly acquired, it made sense to try use international law and all its post-war promise to begin to redress the perceived injustices of the imperial era. In the quest for more substantive equality, the combination of sovereignty and natural resources seemed to hold the key (see generally, Bedjaoui, 1979).

The way the claim to PSNR tried to leverage a state’s resource endowment to bring about greater economic equality, largely involved the nationalisation of various natural resource interests (usually known then as ‘concessions’) that had been sold to foreign investors, either under imperial occupation, or by more or less coercive means (Anghie 2005: 211-44). The resources in question were varied, including tin (Bolivia), farmland (Guatemala), copper (Chile) and oil (Iran, Argentina and Sri Lanka). The nationalisations were an overt reaction to the experience of colonialism in the form of a rejection of what was perceived as ongoing domination by foreign interests. A series of UN resolutions accompanied the nationalisations during the 1950s and early ‘60s, evincing the sense of promise the new international institutions seemed to engender. But the issue was highly contested by the North, and when commodity prices came down, the solidarity between oil producers and non-oil producers dissolved. The North began to feel less vulnerable, and the shouts of discontent from the South became commensurately less audible. Once the debt crisis broke out in Latin America by the 1980s, the last few voices were drowned out altogether.

But although flurry and failure is one way of understanding the resolution of that story, another is that the claims were deflected by the principle of compensation. Once mandatory compensation was agreed upon in principle, the private ownership of natural resources was normalised on the international plane. This normalisation meant that even though the measure of compensation to be paid upon nationalisation remains doctrinally unresolved (Sornarajah 2004: 336), in practice the question is resolved by
reference to functional jurisdictions dealing with the protection of foreign investors (Ratner 2008). In particular, this includes arbitrations, investment treaties, and through conditionalities imposed by the International Financial Institutions (Pahuja, forthcoming).

But if some feel that in the environmental sphere, the international is more likely to be generative of the right values than national governments, others might suggest that like the ‘export theory’ of human rights, faith in the international is rather more tenacious when ‘domestic’ means states in the South, rather than the North (Simpson 2001: 347-8). And in one version of the story, notwithstanding their anti-imperial impetus, these ‘sovereigntyist’ claims catalysed the expansion of international environmental law (Rajagopal 2007; Schrijver 2008). The background to this was an increased sensitivity to the environment in the rich countries of the North, and particularly within the United States (Brown-Weiss 1992). The nascent field was particularly critical of claims that states have a right to exploit resources without regard for the environmental consequences. Several international environmental institutions arose in this period including the UN Environment Programme (UNEP) (1972), the International Tropical Timber Organization (1987), and the Basel hazardous waste regime (1989). UNEP was set up to help coordinate the international response to environmental concerns, particularly, and perhaps predictably, in developing countries. It has been instrumental to the evolution of many environmental law conventions, as well as a great deal of ‘soft law’, such as declarations, recommendations, guidelines, codes and other non-binding instruments. Amongst the best known examples are; the Convention on International Trade in Endangered Species (CITES) (1973), the Vienna Convention for the Protection of the Ozone Layer (1985), the Intergovernmental Panel on Climate Change (IPCC) (1988), and the Convention on Biological Diversity (1992).

Before this time, environmental problems were dealt with on a bilateral basis. Whilst the Trail-Smelter arbitration is the paradigmatic example of this, bilateralism did facilitate a cooperative approach to many trans-boundary issues, such as boundary rivers and the protection of frontier areas. But once the environment was ‘internationalised’, environmental problems translated into international law only by virtue of being a sovereignty problem.

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By the late 1970’s, international attempts to regulate the environment were focused in part on common resources, but significant attempts were also being made within the emergent field to inscribe limits around the right of states to exploit resources which were avowedly within their respective sovereign territories, but which touched on what we would now think of as the common interest. In terms of customary international law, this attempt consolidated the ‘no harm’ principle (Bastmeijer & Koivurova 2008: 1-26). Under this principle, a state’s right to use its territory is limited by the obligation to avoid causing serious trans-boundary damage. On the flipside, a state affected by another state’s use of its territory can only complain in law about damage that is defined as ‘serious’. Widely regarded as a foundational principle of international environmental law, this principle is a good example of the way international legal doctrine is frequently balanced at the fulcrum of competing sovereign interests. The origins of the no harm principle lie in the Corfu Channel Case of 1949. It was consolidated in the Stockholm Declaration of 1972. Principle 21 of that Declaration captures this delicate balance of tensions, between abstract sovereign interests, but also the political balance between North and South, with its qualification of ‘the sovereign right to exploit [a state’s] own resources … and the responsibility to ensure that activities within [the state’s] jurisdiction and control do not cause damage to …other states.’ The Rio Declaration updated the principle in terms of precaution. Principle 15 states: ‘[w]here there are threats of serious or irreversible damage, lack of full scientific evidence shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ In treaty terms, a multitude of conventions relevant to resources were concluded during this time, including the Ramsar Convention on Wetlands of International Importance (1971), the Convention for the Conservation of Antarctic Seals (1972) and the Convention on Long-range Transboundary Air Pollution (1979).

We can thus see that on one level the tension between the imperative to exploit, develop and grow, and the counter-imperative to preserve and protect the earth was jurisdictionalised into a contest between the right of a sovereign state to exploit its resources on one hand, and the interests of the ‘international community’ in the protection of the global environment on the other. But it is here that ‘locating the

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7 (UK v Albania) ICJ Reports, 4 (1949).
international’ (Orford 1997) becomes perhaps less straightforward. Because if the right being asserted by states in the South to control their own resources could be said to have catalysed the expansion of international environmental law from one perspective, it was attended by an equally fertile regime on the other - the international law of foreign investment. Just as the ‘sovereigntist’ claims of the ‘Third World’ were met on one side by those who favoured the ‘common interest’ of the world understood in terms of the earth, so were those claims met on the other side by those who favoured the common interests of the world understood in terms of the ‘world economy’.

Foreign investment rules are a significant element in the political economy of global resource regulation in the same way that private law, and not only public law, structures economic relations between parties in domestic legal systems. Efforts to regulate foreign investment have produced a network of multilateral and, increasingly, bilateral investment treaties (BITs), of which there are now more than 2,400 in force (UNCTAD 2006). These treaties aim to structure North-South investment relations on the basis of mutual trade and sovereign concessions, though the South in fact gives most concessions.10 Such treaties usually establish the principle of fair and equitable treatment for investors, protection from expropriation (in contrast to the sovereign right to nationalise resources asserted in the ‘public’ sphere), free transfer of capital and full protection and security of investment. They also establish dispute resolution procedures that dramatically restrict the jurisdiction of national courts. Creating a separate normative and jurisdictional environment for the effective operation of foreign investment, these treaties rearticulate the natural and human resources of the host nation in terms of their availability for trade. Importantly, this rearticulation takes form in the language of comparative advantage: namely the investor state’s superior technological capacity to exploit the excess of resources of the receiving (developing) country (Vandevelde 2000). In this context, resource-rich states in the South thus approach their forests, seas, earth and lands as commodities. The nature of the functional jurisdiction of foreign investment means that this rearticulation takes place in a regulatory frame removed from public attention at both the international and domestic levels.

10 Although an increasing number of BITs are South-South agreements (UNCTAD 2005).
In one account, the combined flourishing of environmental law and foreign investment law is read as the ‘progressive development’ of international law, in which international law expands because of an increasing sense of global interconnectedness. In this story, signs of convergence between different fields, such as the economic and the environmental, are taken as positive indications of international law’s increasing coherence, if not ‘constitutionalisation’. And as mentioned above, international environmental law itself is often held up as an example of the way in which shared global values and a new focus on ‘people’ are softening what was once a purely inter-state system. But even if the two fields of environment and investment are seen as operating in parallel yet touching the same subject matter, the diagnosis of progressive development is usually robust enough to survive some symptomatic ‘fragmentation’ into different regulatory regimes.

A powerful counter-narrative to this optimistic story of progress, is that the expansion of both the environmental and investment regimes could be read as a version of what Rajagopal has diagnosed, following Foucault, as the ‘instrument effect’ of international law (Rajagopal 2003: 76). According to that account, since the post-war settlement and the establishment of contemporary international law, claims for global justice made by states in the South have more often than not resulted in the incorporation of uncomfortable claims into the body of international law, usually through the proliferation of institutions. This incorporation and proliferation has been a ‘success’ of sorts, expanding the domain of international law, and ostensibly increasing its responsiveness to the concerns of ‘the people’. But it has also de-radicalised the respective claims, and resulted in the subjection of the South to ever more international institutional scrutiny and intervention.

A key site of institutional expansion in this regard is the World Bank. Although the Bank is not a typical character in treatises about public international law, a discussion of the international regulation of resources would not be complete without mention of it. Through the conditions attached to loans by both the Bank and its sister organisation the International Monetary Fund, and in keeping with colonial formulations of land use states in the South are obliged to exploit the natural resources within their territory to their fullest extent, and usually to privatise their ownership and extraction, in order to foster economic growth (Bayliss & Cramer 2001). Resources which straddle the line of public utilities, such as water, are also often
subject to the orthodoxy of privatisation to effect distribution, frequently causing social activism in response, such as occurred in La Paz and Cochabamba, Bolivia in 2008 (Perrault 2008; Shiva 2002: 102). These obligations may not be unwelcome to the ruling elites of borrower states, who often grow rich in the process of exploitation and privatisation. Instead, it is the poorest people who pay the price for the environmental damage, dislocations, forced migrations and violence that such ‘development’ causes.

So although the tension between exploitation and conservation plays out on one level in formal terms as a divide between the national and the international, this jurisdictional divide is belied by the internationalization of the development project (Nesiah 2006). In other words, the ‘international’ penetrates the ‘developing’ state in a way which traditional public international law cannot account for, ‘internationalising’ state actions in that context. The development imperative also seems to create a problem for the international lawyer who wishes to combine a concern for ‘justice’ between North and South with a concern for the environment (see also Pogge, this volume). For how can poor countries rise up from poverty unless they are allowed to develop? But how can we protect the environment from the poor countries’ desire for development?

This seeming tension – between a desire for economic justice between North and South and a concern for the environment – arises in large measure because within international law and institutions, we treat development as a proxy for questions of inequality. In other words within international law, issues of global justice and the distribution of wealth are framed, whether explicitly or implicitly, in terms of development. This equivalence is problematic for several reasons. The development construct remains tied to ideologies of progress (Beard 2007), and comes at the cost of broader political conceptions of ‘justice’ which international law might otherwise facilitate (Pahuja, forthcoming). But crucially in this context, despite the many and varied attempts to reinvent it, development also remains centred on the notion of economic growth as the only way to improve material well-being.

Economic growth is of course, the classic discourse of the extrinsic use value for resources. It is true that Gross Domestic Product (‘GDP’) growth and technological change (including the ‘green revolution’) have enabled many to improve their living standards and especially to have better nutrition. In this sense the Malthusian argument has proved too limited, unable to factor in human ingenuity and
adaptability. However, this time around we are arguably facing real biophysical limits and disrupting the earth’s capacity to act as both ‘source’ and ‘sink’. In the face of estimates that we are already using around one-and-a-half planets worth of resources (Millenium Ecosystem Assessment 2005; WWF 2008), there are clearly physical limits to growth. The dominant model of growth as the means to bring about development therefore becomes unconvincing. Absent unprecedented technological change able to completely de-link economic growth from ‘throughput’ growth (that is to increase output by using less input in absolute terms, and generating little or no waste) then more growth and a sustainable biosphere are incompatible (Jackson, 2009). There is simply not world enough. Translated into the idiom of international law, this means that on the face of it, there would seem to be no compatible way to be both for the environment – understood as the preservation of the biosphere – and for global justice – understood as increased (economic) development in the South. Or would there?

Within a significant section of the international legal community (and beyond), ‘sustainable development’ is seen as the way to square this particular circle. As expressed in the 1987 Report of the World Commission on Environment and Development (the Brundtland Commission), sustainable development is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’

Sustainable development was understood even at the time as a political compromise between North and South, rather than a genuine ‘balance’ between ecological conservation and capitalist development. It has been criticised most harshly as being concerned primarily with sustaining capitalism, rather than emphasising ecological sustainability. However, despite the problems, and perhaps because of its capaciousness as a concept and its place in North-South diplomacy, international institutions have embraced the concept of sustainable development. In this embrace, the inherent contradiction between an awareness of the limits of the biosphere, and an approach to alleviating poverty that relies primarily on unlimited growth, continues to haunt attempts to make good the promise of the globalization of prosperity. A good example of the way the spectre of limit stalks the development promise is contained in the World Bank, World Development Report 2010: Development and Climate Change. With a certainty about its means and authority, the World Bank declares in the initial page of the Report:
High-income countries can and must reduce their carbon footprints. They cannot continue to fill up an unfair and unsustainable share of the atmospheric commons. But developing countries – whose average per capita emissions are a third those of high-income countries – need massive expansions in energy, transport, urban systems, and agricultural production. If pursued using traditional technologies and carbon intensities, these much-needed expansions will produce more greenhouse gases and, hence, more climate change. The question, then, is not just how to make development more resilient to climate change. It is how to pursue growth and prosperity without causing “dangerous” climate change. (World Bank 2009: 1)

The Commons

But if the international environmental lawyer’s fantasy is cosmopolitan in orientation, including understanding a move beyond the nation-state as crucial to the preservation, protection and regulation of the environment, she is yet bound to nation-states if only to transcend them. This is the triumph and tragedy of international law. If you do not like the national sphere, there is nowhere else to go but the inter-national. But at least that is somewhere. The limitations and possibilities of this constitutive feature of international law are evident in the approach of international law to the idea of the global commons.

In keeping with international law’s formal structure, and its earthly attachment, ‘the commons’ as a category in international law is defined by where it is; the ‘global commons’ in international law denotes what many have called ‘common areas’ (Brunnée 2007: 552). These are areas located beyond the jurisdiction of nation-states. Given that the earth is now blanketed with nation-states, there are very few (but admittedly very vast) areas left which are usually said to fall into this category: outer space, the high seas and Antarctica. Some people would include the atmosphere in this category, though it is arguably preferable to think of it as a ‘common concern’ to which we shall turn shortly.

Outside international legal doctrine, as a concept the ‘commons’ at its broadest means ‘the common wealth we share’ (Hardt 2009). This wealth may be both natural and man-made, though the distinction between the two is not always clear-cut. In this politically resurgent understanding, the commons comes conceptually before state and international law. The application of modern (state and international) law to the
commons is understood as a process of the progressive appropriation of that wealth in the name of the ‘nation’, through the mechanism of property rights enforced by state violence and resulting in the dispossession of the many (e.g. Witbooi 2008). This classic gesture of imperial law returns us to the way international law ‘backgrounds’ our relationship to resources. In this story, capitalist development can be read as a series of enclosures and the commodification of an ever-expanding sphere of life, aided by modern law.

Within a different tradition, the ‘commons’ is represented as an area bereft of law. This absence of law creates a potential ‘tragedy’ which only law can solve. The commons here does not relate to everything shared, but only to ‘rival’ goods, which are both finite, and ‘subtractable’ in the sense that any amount used by one person is no longer available to another person. So, for example, a pond full of fish as opposed to a book full of ideas. In this strand of thought, the tragic potential for over-exploitation looms over all rival goods for which no individual or entity has direct responsibility. The only way to avert the tragedy is by the intervention of modern law through the commodification of the resource via the creation of property rights over it, whether public or private (Hardin 1968).

The delineation of the ‘global commons’ in international law, in a sense admits of both understandings. It is usual to contrast the two meanings of ‘common’ as ‘res nullius’ subject to appropriation by anyone and ‘res communis’, that which can only be managed internationally. In doctrinal terms, the global commons denotes those areas not subject to any one state’s sovereignty. According to customary international law, the commons is not open to appropriation by any state, but may freely be used by everyone. This freedom encompasses both passage over the commons, and the exploitation of the ‘common pool resources’ found there.

The oldest recognized commons are the high seas, dating back to Grotius’ *Mare Liberum* and the assertion of the notion of the ‘freedom of the sea’ (Grotius, 1972 [1608]). On one hand, this freedom alludes to a very different kind of sharing envisaged in the apportionment of the land, and suggests an inherent form of ordering ‘natural’ to the sea (Schmitt 2003). On the other, the high seas have, like land, been subject to a logic of appropriation. The oceans too are criss-crossed with a history of progressive enclosures, both attempted and successful, in which papal and other empires and then modern nation-states have claimed more and more of the oceans via the assertion of sovereign rights over them.
But although the size of a state’s territorial sea has been a source of controversy that has impacted on the delineation of the commons for hundreds of years (Freestone & Salman 2007), for our purposes, the potential for ‘tragedy’ has increased commensurately with the technological capacity for the exploitation of the ocean’s resources. In customary international law, the combination of the emphasis on the sovereign-state and the default position of the commons as an area of ‘freedom’ in relation to the exploitation of resources has set the conditions for this tragedy, offering a very limited capacity for a ‘community’ interest to take regulatory shape. And indeed, although attempts have periodically been made to argue that in customary international law, the no harm rule implies an obligation owed ‘erga omnes’, or to the international community at large, questions of ‘standing’, or the right to bring an action before a court on that basis, remain unresolved (Fitzmaurice 2007).

Beginning with the relatively low-tech developments in whaling – which nonetheless brought almost all commercially exploited species to the brink of extinction by the 1980s (Vogler 1995: 52) – and continuing through seal hunting, the potential for a modern resource tragedy really began to take flight in the 1940s when resource exploitation in the form of both sea-bed mining and distant water fishing became technically possible (e.g. Lynch 2002). Besides fish, oil and gas, other resource dimensions of the oceans include sea-bed minerals, living marine resources, and the sea as waste dump and carbon sink.

Various attempts have been made to regulate the global oceanic commons through treaties, but with very mixed results. In the late nineteenth and early twentieth centuries a number of conventions, regional fisheries commissions and scientific bodies came into being, in part in response to changing understandings about the finitude of ocean resources and in some cases, as an expression of nascent thinking in Europe about what we would now call conservation. As Kaye points out, it was around this time that scientific knowledge emerged as an important way to ground the normative basis of management regimes over areas such as the oceanic commons, where jurisdiction based regimes were impossible (Kaye 2001: 45-7).

As it circulates within international law, science is an idiom that appears to transcend both the appropriative language of capitalism and the normative reliance on the inheritance of natural law, through its positioning as ‘technical’ or ‘expert’ knowledge. It is a significant counterpoint to enclosure and commodification as the appropriate way to forestall the tragedy of the commons, and continues to play an
important strategic role in conservation efforts more broadly, including in relation to climate. However, the enclosure of large tracts of the ocean and seabed was precisely the outcome of the torturous negotiations over the third Law of the Sea convention, which codified the removal of much of the world’s fisheries from the global commons through the adoption of the ‘exclusive economic zone.’

But despite these enclosures, and efforts to regulate the oceanic commons, current reports on the state of the oceans suggest that the situation is grave in almost all respects. World fisheries, for instance, are in crisis (Kaye 2001). No fishery remains unexploited. Two thirds of all fisheries fall into the category of fully or over-exploited, and one quarter are said to have ‘crashed’ (Cramer 2008: 271). With this, ocean biodiversity is declining rapidly (Secretariat of the Convention on Biological Diversity 2010). Scientific studies estimate that over 90% of large predatory fish are gone (The Economist 2009: 3) and the population of jellyfish has exploded. Marine ecosystems remain virtually unprotected in the open ocean (Secretariat of the Convention on Biological Diversity 2010: 49). And pollution from both ocean and land based activities have reached critical dimensions: most human contaminants eventually end up in the sea. Added to this mix are climatically induced changes such as ocean acidification, increasing water temperatures and thermal expansion (United Nations Intergovernmental Panel on Climate Change (IPCC) 2007). The state of the oceans is indeed a contemporary tragedy, the full implications of which are yet to be felt.

The United Nations has been the site for the negotiation of three rounds of ‘Law of the Sea’ (LOSC) conferences since the 1950s (1958, 1960, 1973-82). These and many other treaty negotiations around the oceans, including those around whaling and marine pollution are in themselves important sites for a contest between competing approaches to resources, and the tension between conservation and exploitation. As well as being of direct relevance to the resource question, the negotiations may also be understood as offering object studies in the formation of contemporary international law. Indeed, much of the recent literature on the global commons from within the idiom of international law takes an empirical approach to understanding the regulatory frameworks that have emerged under the rubric of ‘regime formation’. ‘Epistemic communities’ of technocrats and experts feature large

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in these thick descriptions, as do non-governmental organisations (NGO’s) usually pulling for the protection of the environment (Spiro 2007). Reading with critically inclined scholars here, we feel the discursive weight of scientific knowledge and understandings of risk in international law (Godden 2009). Thinking with the mainstream, we learn of the relevance of ‘non-state actors’, who figure in a burgeoning literature dedicated to showing why nation-states are (analytically) no longer, nor should they (normatively) be any longer, considered the sole, or chief actors in creating international law. International negotiations over the oceans offer us a particularly rich case through which to study these empirical and reflexive concerns, and for showing how competing approaches to both resources, and to the commons have taken shape and played out in international law over a long period of time.

The rhetorical use of an idea of what should rightfully be shared was not confined to the North. Coming before the NIEO, but ultimately subsumed within it was also the principle of Common Heritage of Mankind. That principle was an attempt to assert shared control over resources beyond the jurisdiction of any one state. In accordance with Arvid Pardo’s original proposal in 1967, the deep-sea bed was where the origin of the principle lay, but the same principle was extended to the moon in the 1979 Moon Treaty. Despite the language of ‘heritage’, the thrust of the principle was the exploitation of resources and the redistribution of the proceeds, not conservation for future generations. Given that any state could freely access ‘common pool resources,’ at the time of the push for a Common Heritage principle it seemed inevitable that the states best equipped to exploit them would do so at the expense of the poorer nations. This suspicion was especially acute on the part of the large number of states just emerging from the extractive embrace of empire.

But although the principle was included in both the Law of the Sea Convention and the Moon Treaty, it has never become a principle of customary international law, and even the LOSC has since been watered down (Brunnée 2007: 563) through the removal in 1994 of the mandatory technology transfer provisions of earlier versions, and by changing the voting rules in ways which are likely to favour the exploitation of the seabed for private profit. Outer space in general remains jurisdictionally in the global commons. Like the high seas, this status brings

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12 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (5 December 1979, A/RES/34/68).
collective benefits in the shape of free passage, access to the geostationary orbit (Vogler 1995), and in preventing the appropriation (of planets for example) by any one state. On the other hand, it opens outer space to unilateral (and corporate) exploitation (Rowlands 2007) and to the problem of responsibility for damage to the commons, an issue especially likely to generate conflict as geo-engineering is added to the suite of measures engaged to tackle climate change.

It may, however, be too quick to say that the Common Heritage principle is moribund, as some rich countries have recently argued for a common heritage principle over plant knowledge and biodiversity (Mgbeoji 2003). Like the invocation of the needs of the ‘world economy’ in response to the claim to PSNR, such a construction of the ‘common heritage’ would have the effect of internationalising something that is currently within the domestic jurisdiction of states. But like the tension between international environmental law and the law regulating foreign investment, internationalisation as such would not resolve the struggle between exploitation and conservation. It simply changes the way it is played out.

Despite attempts, the Common Heritage principle has never been successfully asserted in relation to Antarctica, which although usually grouped taxonomically within the commons, operates under a sui generis, and perhaps unrepeatable treaty system. Under that system, the conflicting territorial claims of Australia, Chile, France, New Zealand, Norway and the United Kingdom have all been ‘suspended’. Attempts to bring Antarctica within the UN system have also been unsuccessful. Given the emphasis on resource exploitation of the Common Heritage principle, and the ‘development’ pressures, both political and material, which press upon the UN, avoiding both has perhaps assisted in conservation taking priority. To date, Antarctica has largely been the domain of scientists who have managed to direct the focus of collective concern to the preservation of that delicately balanced ecosystem. This has resulted in a successful mining ban, but has been less successful in preventing the decline in fish stocks.

However, resource struggles will undoubtedly resurface in the future. Some, including some states, continue to push for the transformation of Antarctica into a

including the Moon and Other Celestial Bodies (19 December 1966, A/RES/2222 (XXI)); and Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (5 December 1979, A/RES/34/68).

14 Although arguably part of the commons, the geostationary orbit is subject to a great deal of regulation.

15 Antarctic Treaty (1 December 1959, UNTS Vol. 402 No. 5778), article 4.
world conservation area. On the other hand, the fresh water captured in the polar ice caps (around three quarters of the world’s total supply) may become an exploitable resource, and if it does, may become the subject of conflict. And if Antarctica’s mineral resources become easier to access, the fifty-year ban will come under great pressure. But until then, Antarctica continues to be both crucial to the global climate and an important source of information about it in the form of ice cores, which reveal the secrets of one hundred thousand years of atmospheric changes.16

Climate Change and ‘common concern’

It is perhaps ironic that the most critical resource challenge facing the world today is not a shortage of any resources we take from the earth, but rather it is something we have until quite recently, taken for granted – that is the earth’s atmosphere and its capacity to absorb carbon. The crisis that confronts us is the limitation of the carbon ‘sink’. This time the challenge is not to think ‘outside the box’, but to think ‘inside the box’ of the earth’s resources, for we are nearing its limits (Baskin 2009). Although climate change presents a collective action problem par excellence, the danger is not that we are all in the same boat, but that the undoubtedly global effects of climate change will have grossly disparate outcomes. The exacerbation of inequality likely to result from climate change could encourage the wealthy to insulate themselves in fortress states, leaving others (literally in some instances) to sink. If the struggle over resources has in some ways been generative of international law, the ramifications of climate change and the resource pressures on a finite earth are likely to be another tragic catalyst for disciplinary activity as it feeds feverishly on famine, wars, migration, refugee flows and water shortages (Charlesworth 2002).

Some have little faith in international law and diplomacy as likely fora for addressing the problem of reconciling environmental and material justice. The recent Copenhagen conference was in some ways a redux of the claim to Permanent Sovereignty over Natural Resources. Many of the same old problems were thrown up, the tension between development and the environment, historical responsibility, this time for past emissions, and the idea that the South continues to pay the price for the North’s prosperity. Added to this were more and newer tensions between more and less industrialised nations in the South, an alliance of small island states, and unstable

coalitions of richer states. And it is true that international legal responses have so far continued to hold onto the apron strings of sustainable development, as well as to dealing with the equity question through notions of common and differentiated responsibility.

But others have more hope for international law. The notion of ‘common concern’, distinct from both common heritage and the jurisdictionally defined global commons, is one source of possibility. Essentially an idea which targets problems and processes rather than resources or areas, the principle has recently gained currency in relation both to climate change and the loss in biodiversity, but it is also homologous to similar principles in earlier treaties, which it may build on (Brunnée 2007: 565). Its much older roots draw on what we might call the ‘communitarian’ strain within international law. Usually manifest in utopian fields like human rights, this strain may also be thought of the ethic of the commons as community, or as ‘law-full’ space. And although the status of the principle is subject to many uncertainties, it potentially offers a vocabulary within the doctrinal idiom that offers a counterweight to the nation state and centripetal pull of the either/or logic it seems to offer.17

**Conclusion**

The crucial question which remains is what the future role of international law might be in the face of the major challenges of the coming decades, including anthropogenically induced climate change, pressure on ecosystems, ecological disasters and an unprecedented decline in biodiversity. The political battle between those who regard nature and knowledge as having inherent worth, versus those who ‘regard the earth as a collection of ‘resources’, having an intrinsic value no larger than their usefulness at the moment’ (Gore 1992: 225) will continue to be waged in international law and institutions for a long time to come. In a larger sense, the oscillations within international law that have surfaced in several chapters in this book, between its technical function and political orientation, and between its imperial urge and emancipatory dimension will not disappear, nor could we wish them gone. But for those interested in both equity and environment, or in the question of the responsibility of the international lawyer, rethinking the idea of the commons and international law’s relation to it may be useful. In particular, the recuperation from

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17 For an astute assessment of the promise and limitations of this concept, see Brunnée 2007; Cottier & Matteotti-Berkutova 2009; Toope 2007.
within international law of the commons as a political rather than jurisdictional idea may draw out the way international law is creative, though as we have seen from our exploration here, not necessarily in ways we might expect or want. In the face of that creativity, the international lawyer is vested with a responsibility to be vigilant about what she is involved in creating (and destroying) in and through international law.

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