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Locating Nature: Making and Unmaking International Law

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Abstract

This article explores the relationship between international law and the natural environment. We contend that international environmental law and general international law are structured in ways that systemically reinforce ecological harm. Through exploring the cultural milieu from which international environmental law emerged, we argue it produced an impoverished understanding of nature that is incapable of responding adequately to ecological crises. We maintain that environmental issues should not be confined to a disciplinary specialization because humanity's relationship with nature has been central to making international law. Foundational concepts such as sovereignty, development, property, economy, human rights, and so on, have evolved through understanding nature in ways that are unsuited to perceiving or observing ecological limits. International law primarily sees nature as a resource for wealth generation to enable societies to continually develop, and environmental degradation is treated as an economic externality to be managed by special regimes. Through tracing the co-evolution of these assumptions about nature alongside seminal disciplinary concepts, it becomes evident that such understandings are central to shaping international law and that the discipline helps universalize and normalize them. By comprehending more broadly the relationship between nature and international law, it is possible to see beyond law's potential to correct environmental harm and identify the disciplinary role in driving ecological degradation. Venturing beyond the purview of international environmental lawyers, this article considers the role of all international lawyers in augmenting and mitigating ecological crises. It concludes that disciplinary solutions to environmental problems require radical departures from existing disciplinary tenets, necessitating new formulations that encapsulate rich and diverse understandings of nature.

Key words

development; environment; international environmental law; sovereignty, sustainable development

1. Introduction

Scholars, scientists, policymakers, and public opinion increasingly perceive human-made ecological change as capable of posing an existential threat to humanity. In

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recent decades, many of our planet's ecosystem functions have rapidly deteriorated.[1] As population and consumption levels increase, and pressures on natural assets continue unabated, the future may be dire, especially for communities on the front lines of ecological change. Societies all over the world have sought solutions to environmental challenges and one of the places they have turned to is international law, as a corrective force for harmful environmental trends, and a means of forging global compacts for action.

A series of multilateral environmental agreements emerged in recent decades on issues such as stemming climate change and desertification,[2] and protecting biodiversity and the ozone layer.[3] They aim for more equitable and sustainable patterns of resource use. However, progress has been either limited or non-existent.[4] Ecosystems continue to deteriorate, with particularly critical consequences for the poor who face mounting pressures on their everyday well-being as access to clean air, water, food, and sustainable livelihoods becomes more precarious. International lawyers have sought to increase the effectiveness of international environmental law through measures such as enhanced financing, market-based instruments, and technology transfer.[5] This article argues that such efforts, well intentioned as they are, are incapable of creating the type of transformational change needed to move towards greater equity and sustainability.

This article identifies structures in international environmental law and general international law that are barriers to changing harmful patterns in humanity's relationship with the natural world. Many of international law's fundamental concepts, such as sovereignty, development, property, economy, human rights, and so on, have gradually evolved over the centuries in trajectories unsuited to perceiving

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1 See generally *Millennium Ecosystems Assessment* <www.unep.org/maweb/en/Reports.aspx#>.

2 1992 UN Framework Convention on Climate Change, 31 ILM 849 (1992); 1998 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 ILM 22 (1998); 1994 UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 33 ILM 1328 (1994).

3 1992 UN Convention on Biological Diversity, 31 ILM 818 (1992); 2000 Cartagena Protocol on Biosafety, 39 ILM 1027 (2000); 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (not in force); 1985 Vienna Convention for the Protection of the Ozone Layer, 26 ILM 1529 (1987); 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, 26 ILM 1550 (1987). Other seminal environmental treaties include the 1973 Convention on International Trade in Endangered Species, 12 ILM 1088 (1973); 1979 Convention on Long-Range Transboundary Air Pollution, 18 ILM 1442 (1979); 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 28 ILM 657 (1989); 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 38 ILM 517 (1999); and most recently the 2013 Minamata Convention on Mercury (not in force).

4 See, e.g., B. Metz et al, (eds.), *Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007); United Nations Convention on Combating Desertification Secretariat, *Land and Soil in the Context of a Green Economy for Sustainable Development, Food Security and Poverty Eradication* (2011); United Nations Convention on Biodiversity Secretariat, *Third Global Biodiversity Outlook* (2010); A. Ajavon et al., Synthesis Report of the 2010 Assessments of the Montreal Protocol Assessment Panels, UN Doc. UNEP/OzL.Pro.WG.1/31/3 (2011).

5 See, e.g., Kyoto Protocol's three market-based instruments: joint implementation, clean development mechanism, and emissions trading; Nagoya Protocol's regulation of equitable access to genetic resources and benefit sharing among multinationals and communities; governing instrument of the Green Climate Fund approved by the Climate Change Convention's Seventeenth Conference of the Parties, UN Doc. FCCC/CP/2011/9/Add.1; and the pursuit of the 'green economy' exhorted most recently in the Outcome Document of the 2012 UN Conference on Sustainable Development. See further N. Hallstrom et al. (eds.), *Carbon Trading: A Critical Conversation on Climate Change, Privatization and Power* (2006).

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or observing ecological limits. For the most part, international law explicitly or implicitly treats nature as a resource for wealth generation in order for societies to continually develop, and environmental degradation is dealt with as an economic externality to be managed by special regimes of technology and finance. This article traces the co-evolution of these assumptions about nature alongside seminal disciplinary concepts, arguing that such understandings are central to making international law, and that the discipline helps universalize and normalize them. Thus, to engage with environmental challenges, disciplinary tenets would have to evolve in directions that radically transform the nature of the discipline.

That is to say, in endeavouring to locate the role of nature within international law,[6] it becomes evident that certain harmful understandings of nature were central to shaping the discipline, and an unmaking is required for international lawyers to adequately respond to ecological crises. Such an unmaking need not end in nihilist abandonment of the discipline as irredeemable. Just as international co-operation has created and maintained some environmental problems, it may play a part in solving them. This faith drives our endeavour, and the deconstructive move is a necessary precursor to a reconstructive one. This article along with others in this symposium issue takes the initial steps in a longer journey we have tentatively labelled the Locating Nature project.

We commence, in section two of this article, by examining the discipline's most overt engagement with the natural environment, international environmental law (IEL). We identify why, despite the prolific growth of this specialization, it has failed to deliver on its promise to stem ecological harm, often serving as a barrier to, rather than a driver of, change. We offer a two-part critique of IEL on different analytical planes. First, we consider the persistent narrative in the global south that IEL is manifestly unfair to developing states and peoples. We are sympathetic to this, albeit advocating for a more nuanced understanding of north–south dynamics. The politics of IEL go some way towards explaining its failures but critique on a theoretical and philosophical level uncovers more fundamental impediments to success. Thus, second, we deconstruct the mainstream disciplinary narrative that IEL evolved as a rational response to humanity's increasing knowledge of the complexities of nature. We trace this characterization to the modern philosophical underpinnings and cultural milieu from which IEL emerged, arguing that modernity has produced an impoverished disciplinary conceptualization of the 'environment' – one incapable of responding adequately to ecological crises.

On both political and philosophical planes, the sociocultural context from which IEL has emerged also shapes knowledge about the correlation between nature and

6 This article uses 'nature', 'environment', and 'natural environment' interchangeably as, although the terminological distinctions are interesting, they are unnecessary for the purposes of this article. We adopt the ordinary usage of these terms in the mainstream discipline to reference our physical surroundings in a general sense. The term 'environmental law' to some extent assumes that the environment can be identified, and that problems in the environment 'out there' can be addressed by applying law to human activity. This article argues the impossibility of such an endeavour as law is itself situated within the broader constitutive context of how humans collectively self-organize their relationship with their physical surroundings.

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international law in misleading ways. It systemically emphasizes the discipline's protective potential and conceals its destructive role. To uncover the latter, section three of this article advocates escaping the confines of IEL and exploring the role of nature in shaping some of international law's foundational concepts. Deep analysis of such concepts is beyond the scope of a single article so we merely posit that such research is necessary and touch upon two areas that may reward future inquiry. First, we explore the notions of control and productive use of nature that underpin the idea of sovereignty, and the resultant ecological consequences. Second, we consider the formative role of the concepts of development and economy in international law. In their modern manifestations, these concepts transform nature into natural resources in limitless commodification processes. They wed the discipline to a faith in infinite economic growth and technocratic and market-based solutions to ecological problems.

In section four, we conclude that the natural environment is not incidental to international law. It did not emerge as a concern in the 1970s as humanity became increasingly enlightened and ecologically aware. Rather, nature is a fundamental driver of disciplinary evolution, shaping legal concepts in seminal ways. As such, understandings of nature underpin the generalist discipline and indeed all other specializations. We broaden the narrative about the relationship between international law and nature beyond the purview of international environmental lawyers and consider the role that all international lawyers play in augmenting and mitigating ecological crises. A more expansive awareness sees beyond law as a corrective tool for environmental harm, revealing the disciplinary role in persistently driving ecological degradation. In this light, the sequestering of environmental issues to the ambit of IEL is not only misleading but the specialization's inability to stem environmental harm becomes explicable and inevitable.

The seeds of this article began with the authors wondering why international lawyers working in fields such as economic, trade, labour, or investment law, or law and development, do not feel an imperative to consider the environmental aspects of their work. While few would deny that the natural environment is fundamental to economic development, or that natural resources are a form of capital, this has not translated into lawyers (or economists) engaging with the role of nature in their work. While some may choose to consider environment issues, there is no compulsion to do so in order to be taken seriously. What drives the gap between the fundamental importance of ecological issues to the global community and its resignation to the peripheries of the discipline? These concerns drove our interest to locate nature within international law and brought us to a realization of the need for a disciplinary unmaking.

2. Why has international environmental law failed?

International environmental law (IEL) is the intuitive place to start exploring the relationship between nature and international law. The IEL specialization emerged as a result of changes within Western states, particularly the United States, in the

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1960s.[7] Communities and activists were concerned about the negative consequences of postwar industrialization and risks to social well-being from toxic pollution, leading to domestic environmental legislation, which was followed by the first international agreements in the 1970s.[8] Increased environmental concern in Western states at this time was attributed not only to the effects of mass industrialization, but to advances in science offering a new world-view of the planetary whole and a greater appreciation of environmental risk.[9] Scientific development was credited with increasing awareness about the complexity, interconnectedness, uniqueness, and fragility of the planet, while the first pictures of Earth from space became symbolic of this newfound knowledge.[10]

New perspectives on the relationship between humans and nature in western societies translated into international laws. Seeing the planet as a unitary whole and a shared home led to visions of common responsibility and co-operation on global environmental problems, as reflected in the 1972 Stockholm Declaration on the Human Environment that is conventionally cited as the beginning of modern IEL.[11] From the 1972 Stockholm Conference to the 1992 UN Conference on Environment and Development (Rio Earth Summit), followed by the 2002 World Summit on Sustainable Development and most recently the 2012 UN Conference on Sustainable Development (Rio+20), the history of IEL has been a gradual evolution of regimes to govern issues such as mitigating climate change, protecting and renewing the ozone layer, preserving biodiversity, and preventing desertification and deforestation.[12] IEL gradually constituted itself as a specialization through these and other summits, with state and non-state actors, scholars, experts, and other stakeholders building up a body of treaties, legal principles, and concepts to guide international action.[13]

One such concept was sustainable development and it has been canonical for IEL since the 1992 Rio Earth Summit where states reached a strong consensus in its

7 While the IEL specialization arose in the 1970s, transnational public concern for and regulation of natural resources and the environment predate this. It includes, among other things, ancient forms of regulation for nature reserves, and rules governing access to and control of natural resources during the colonial era. See, e.g., M. Cioc, *The Game of Conservation* (2009), chap. 1.

8 Domestic legislation in the US included the 1963 Clean Air Act, 42 USC 7401; 1972 Clean Water Act, 33 USC 1251; and the Environmental Protection Authority was established in 1970 through executive order. Internationally, this decade saw the 1972 Stockholm Declaration on the Human Environment, UN Doc. A/Conf48/14/Rev 1 (1973); the 1971 Ramsar Convention on the Protection of Wetlands, 11 ILM 963 (1972); the 1972 World Heritage Convention, 11 ILM 1358 (1972); the 1973 Convention on International Trade in Endangered Species, 12 ILM 1088 (1973); the 1979 Bonn Convention on the Protection of Migratory Species 19 ILM 15 (1980); and the 1979 Bern Convention on Protection of Species and Habitats in Europe, 1 SMTE 509 (1979).

9 This narrative is put forward in most standard IEL texts. See, e.g., P. Sands and J. Peel, *Principles of International Environmental Law* (2012), chap. 2; D. Hunter et al., *International Environmental Law and Policy* (2007), chap. 6; and P. Birnie et al., *International Law and the Environment* (2009), chap. 1. We unpack this narrative at section 2.2.

10 For layered readings of these images, see S. Jasanoff, 'Heaven and Earth: The Politics of Environmental Images', in S. Jasanoff and M. S. Martello (eds.), *Earthly Politics: Local and Global in Environmental Governance* (2004), 31; V. Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality* (2005), 102; and section 2.2.

11 See *supra* note 9.

12 See *supra* notes 2 and 3.

13 IEL is notable for its heavy reliance on general principles of law, including the precautionary principle, the polluter pays principle, the principle of the common heritage of mankind, the principle of intergenerational equity, the principle of common but differentiated responsibilities, and the overarching principle of sustainable development.

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favour as articulated in the Rio Declaration on Environment and Development.[14] It calls for development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[15] Sustainable development places economic development within the context of the absorptive capacity of natural ecosystems, thus recognizing the limits of such systems. It places emphasis on intergenerational equity but also intra-generational equity by basing itself on three interdependent pillars – economic, social, and environmental sustainability – cognizant of the links between economic and environmental injustice.[16]

While global consciousness of environmental issues has grown over the years, many of the problems that IEL aimed to address have worsened.[17] IEL's failures were most apparent at large climate change summits such as those hosted at Copenhagen in 2009 and Doha in 2012 where, despite being under the gaze of an attentive public, states failed to reach significant co-operation agreements. What are the reasons for IEL's lack of progress? Public media, lawyers, and practitioners at the aforementioned summits paid particular attention to the so-called north–south divide, focusing particularly on divisions between China and the United States.

Since IEL's early days, the north–south divide has been identified as the primary barrier to global co-operation,[18] making this the *de rigueur* place to commence our critique of IEL, with an exploration of its politics. The second subsection offers a theoretical critique of IEL. This area of international law is inadequately theorized in comparison with other areas, and critique tends to stop at the aforementioned political plane. We situate IEL in the context of the broader modern project of international law and argue that it puts forth a vision of an all-encompassing universal system of governance – a particular type of 'environmentality'. We posit that such an understanding of the environment precludes the discipline from stemming ecological crises.

2.1. The politics of international environmental law: The north–south divide

Modern IEL owes its origins to the scientific assessment of global ecological risk and international environment lawyers have responded primarily through crafting technocratic responses and engineered solutions.[19] As Argyrou states

> the science of global environmental change can only point to facts, but facts themselves are not enough to explain effective engagement with the world. What is needed above science is something that captivates people's full being – a system of values, a moral story, an ontological master narrative within which the ecological crisis becomes not only visible but also relevant and meaningful.[20]

14 Rio Declaration on Environment and Development, UN Doc. A/Conf151/26 (1992).
15 In 1987, the United Nations released the Brundtland Report, *Our Common Future*, which propounded the most widely recognized definition of sustainable development.
16 See Agenda 21, UN Doc. A/Conf151/26 (1992). This global action plan for sustainable development was a main outcome of the 1992 Rio Summit.
17 See *supra* note 4. International co-operation on deforestation has been particularly unsuccessful, with even a framework treaty remaining elusive, and states reaching only a Non-legally Binding Instrument on Sustainable Forest Management of all Types of Forests, UN Doc. GA/Res/62/98 (2007).
18 See *supra* note 9.
19 See *supra* note 5.
20 See Argyrou, *supra* note 10, at 48.

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The path from the 1972 Stockholm Conference to the 1992 Rio Earth Summit and the 2012 Rio+20 Conference tells a grand narrative about global environmental threats, humanity's common concern, and the need for concerted response. The implications of such a narrative are considered in the next subsection. The focus of this subsection is on another IEL narrative that co-exists in much of the developing world, where the rise of IEL is placed in the context of the developing world's struggle to transition from the colonial to post-colonial eras towards equality, justice, and prosperity.

Since independence, post-colonial states have sought development in the Western sense, perceiving it to be the only available path out of poverty, dependency, and disempowerment. At the same time, the developed world has gradually realized that its development trajectory is unsustainable and causes grave environmental harm. Thus, IEL is characterized by a tension between experts from the affluent north urgently calling for greater environmental protection everywhere, and advocates from the south insisting that poverty eradication is their priority and the north should take responsibility for environmental problems the north leaves in the wake of its well-trodden path to continuing affluence. Experts from the north preach the scientific truths and necessities of compliance, and the south is 'expected, cajoled, encouraged, assisted, threatened to take a stance ... It acts suspiciously ... doubts, questions, rejects, negotiates ... co-opts, recognizes, endorses'.[21]

Perceptions of injustice and inequity have always been at the heart of IEL, shaping many of its legal principles. The principle of common but differentiated responsibilities and the concept of sustainable development address developing world concerns by insisting that, first, environment and development concerns are inextricably intertwined; second, states that cause environmental harm should bear the primary responsibility for solutions; and third, richer states should take the lead and bear a greater burden because of their greater economic and technological capacity.[22]

While these concepts articulate what is needed, the north has either not formulated or not adhered to a corresponding body of norms or actions. On a range of issues from climate change to biodiversity, IEL is characterized by a deepening gap between the scientific narrative for urgent action put forward by some in the north and the social justice narrative advocated by the south. But contemporary IEL no longer directly addresses this issue, focusing instead on enhancing market mechanisms, technology transfer, and green finance as indirect means of making progress. While such techniques have a role to play, they barely scratch the surface of the developing world's longstanding conviction that IEL is essentially unfair to them.

In the 1960s and 1970s, alongside the rise of environmentalism and the move towards IEL in the developed world, international lawyers in the developing world were putting forward new legal frameworks for fair and equitable access to, and benefit sharing from, their own natural resources in an effort to stem centuries of colonial exploitation. The doctrine of permanent sovereignty over natural resources (PSNR) and the principle of common heritage of humankind were at the heart of

21 Ibid., at xi.

22 See further M. Prost and A. T. Camprubí, 'Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice', (2012) 25 LJIL 379, at 386–8.

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post-colonial law reform efforts. These legal concepts were crafted in the context of a broader political movement to inaugurate a New International Economic Order (NIEO) so that the developing world could gain a more equal footing in the global economy.

Schrijver describes the important role of natural resource sovereignty in struggles for independence, where peoples equated sovereign statehood with the ability to stop the long-standing plundering of the south's natural assets.[23] PSNR was meant to provide the south with a 'legal shield against infringement of their economic sovereignty' to counter past inequity and exploitation at the hands of colonial powers.[24] Bedjaoui states that PSNR was driven by the fact that in the post-colonial era many developing countries continued to be 'dispossessed of their sovereignty for the benefit of foreign economic coteries',[25] and he believed that PSNR would serve as a defence against the 'violent reaction of the imperialists to counter their [the developing world's] demands for a new international economic order'.[26]

While local experiences with natural resource exploitation vary on the basis of various factors including geography, resource sector, social class, and historical time, patterns in the history of relations between north and south can be detected. As Mitchell points out, 'the switch in one part of the world to modes of life that consumed energy at a geometric rate of growth required changes in ways of living in many other places'.[27] Resource and energy-intensive lifestyles in the global north are intimately linked with and fuelled by economies in the global south through transnational chains of labour, production, and waste. The path towards post-industrial cultures of mass consumption in imperial centres also transformed aspects of everyday life in the colonies, affecting available choices with regard to clean air, water and food, health, shelter, employment, and politics, among many other things, and this dynamic continues to play out in many parts of the global south today.[28]

In the 1960s and 1970s, legal practitioners and scholars from the global south attempted to bring about more just outcomes for post-colonial states through international law, professing concepts such as PSNR. But efforts to inaugurate a NIEO ultimately failed despite its basis on equality and the rule of law. NIEO's failure occurred alongside the gradual evolution of a young IEL, augmenting the south's suspicions about IEL. Despite IEL's unpropitious aspects, and the ongoing north–south impasse, in recent years legal scholarship and activism in the south has increasingly embraced environmental issues in a trend that is likely to continue. Advocates for the poor have re-engaged with IEL because, just as the wealthy receive a disproportionate benefit from resource development, the poor bear a disproportionate burden of resource insecurity, toxic impacts, and other environmental crises. Thus IEL is an increasingly strategic site from which vulnerable peoples, and the movements,

23 N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997), 21–2.
24 Ibid., at 1.
25 M. Bedjaoui, *Towards a New International Economic Order* (1979), 99.
26 Ibid., at 153.
27 T. Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (2011), 16.
28 See, e.g.,T. Mitchell, 'America's Egypt: Discourse of the Development Industry', (1991) 169 *Middle East Report* 18.

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scholars, and states that represent them, can articulate their positions, and contest, negotiate, and resist the status quo. Grassroots social movements across the north and south are harnessing transnational and global environmental harm as a means of challenging fundamental assumptions that underpin the global economy.[29]

In the wake of the breakdown in climate negotiations and frustrating deadlocks, actors from the south can help counteract a dominant but misleading perception that the south is disengaged with global sustainability concerns. Widespread assumptions about the south's role in IEL – that they are disinterested and reluctant participants in sustainable development, always prioritizing development over environment, and dragging their feet behind more progressive actors from the north – are deceptive. Prost and Camprubí point out that in recent years there have been references to the global south 'not merely as a reluctant and hesitant participant in multilateral negotiations, but one that is *perverting* environmental diplomacy'.[30] While many states in the south have remained suspicious of IEL, the environmental strategies of different developing countries and peoples have been complex, nuanced, and variable.[31] Indeed, many states in the south have made more progress than those in the north, necessitated by being on the front lines of climate change, deforestation, desertification, and other environmental crises. The so-called 'emerging' economies are becoming increasingly attentive to environmental concerns which, if ignored, may undermine their hard-won economic gains.

While the ecological challenges posed by the economic re-emergence of the south have received scholarly attention, less emphasis is placed on the potential for the south to shape international legal principles in response to such challenges. In a more multi-polar world, advocates from the south may be able to infuse the normative IEL framework with different values, experiences, and solutions. By engaging the mosaic of different environmental ethics across the world, IEL could synthesize global and local norms towards a fairer IEL.[32]

The politics of IEL are a useful lens for understanding its shortcomings in as much as they reveal the two very different narratives about IEL that co-exist in the north and south. But, by themselves, north–south dynamics provide an incomplete explanation of why IEL has failed to stem global environmental harm. International negotiations on the environment often do result in developed and developing states taking opposing sides, but in actuality chains of resource extraction, production, consumption, and waste stretch between and across regions in the north and south in a complex network of mutually reinforcing interests. That is to say, the seemingly intractable north–south divide is more porous than it appears to be. Thus, the following subsection considers whether there may also be other more fundamental

29 See further U. Natarajan, 'TWAIL and the Environment: The State of Nature, The Nature of the State and the Arab Spring', (2012) 14 *Oregon Review of International Law* 177.

30 See Prost and Camprubí, *supra* note 22, at 385.

31 Ibid. See further K. Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers', (2000) 11 *Yearbook of International Environmental Law* 52; and A. Najam, 'Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement', (2005) 5 *International Environmental Agreements* 303.

32 See further K. Khoday and U. Natarajan, 'Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India', (2012) 25 LJIL 415.

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reasons for IEL's lack of success, through analysing the philosophical underpinnings of the dominant IEL narrative that emerged from the global north's experience with environmentalism.

2.2. The philosophy of international environmental law: Constructing the modern environment

Standard international law texts tell a consistent story of the discipline's encounter with environmentalism.[33] The conventional narrative begins in the 1960s and 1970s with the stirrings of environmental consciousness in the West, primarily in the United States, when significant numbers of Americans began to feel the impact of rapid industrialization, noticing higher levels of air and water pollution, more oil spills off their coastlines, and so on. Rachel Carson's 1962 book *Silent Spring* warned that the uncontrolled use of pesticides was killing birds and would eventually harm animals and humans. Paul Ehrlich's 1968 bestseller, *The Population Bomb*, predicted an amplification of environmental problems due to rapid population growth. Space travel and advances in Western science were credited with increasing public awareness about the uniqueness, beauty, and fragility of our planet's ecosystems.

Previously, states and peoples in both the global north and south were exhorted to efficiently exploit nature so as to industrialize, modernize, and develop as quickly as possible, but the Stockholm Declaration proclaimed for the first time that '[f]or the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment.'[34] Rather than seeing nature as something to be mastered, it became something to be protected and cherished. The earth was no longer solely a storehouse of resources to meet human needs and desires. It was also a web of crucial but fragile ecosystems, and humans were not only part of this web, but were its stewards. Thus mainstream accounts describe a major transformation in the modern understanding of nature that had driven Western industrialization.[35] In this subsection, we interrogate this theoretical and philosophical shift so as to better understand international law's creation of 'the environment', and we identify some conceptual limitations.

Unlike other areas of international law, theoretical studies of the history and philosophy of IEL are rare. There is some scholarship in the domestic environmental law context,[36] and a few scholars have advocated for alternative environmental law paradigms.[37] For the most part, legal theory and critical legal studies have ignored this

33 See *supra* note 9.
34 Stockholm Declaration on the Human Environment, UN Doc. A/Conf48/14/Rev 1 (1973), at 6.
35 See *supra* note 9.
36 See, e.g., M. M'Gonigle and P. Ramsay, 'Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation', (2004) 14 *Journal of Environmental Law and Practice* 333; S. Coyle and K. Morrow, *Philosophical Foundations of Environmental Law* (2004); and J. Holder, 'New Age: Rediscovering Natural Law', (2000) 53 *Current Legal Problems* 151.
37 An early classic is L. Tribe, 'Ways Not to Think about Plastic Trees: New Foundations for Environmental Law', (1974) 83 *Yale Law Journal* 1315. See also J. B. Ruhl, 'Thinking of Environmental law as Complex Adaptive System: How to Clean up the Environment by Making a Mess of Environmental Law', (1997) 34 *Houston Law Review* 933; E. L. Hughes, 'Fishwives and Other Tails: Ecofeminism and Environmental Law', (1995) 8 *Canadian Journal of Women and the Law* 502; and D. P. Emond, 'Co-operation in Nature: A New Foundation for Environmental Law', (1984) 22 *Osgoode Hall Law Journal* 323.

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area,[38] and the 'Locating Nature' project aims to rectify this. The political economist James O'Connor once called environmentalists 'sub-theoretical'.[39] While such a critique may still be levelled within the discipline of law, this has not been the case in other fields. Considerable scholarship has developed in philosophy through the study of environmental ethics,[40] critical geography explores the meaning of space and place in the natural world and law's constructive role,[41] political ecologists have made considerable inroads into the field of political economy,[42] and in history there is a growing body of work on environmental history[43] as well as the origins of environmentalism.[44]

From the latter we draw an insightful counter-narrative to the conventional IEL account. Argyrou's anthropological work challenges the conventional IEL assumption that environmentalism reflects a departure from modernity.[45] He argues that, while our perception of nature may have changed with the advent of environmentalism, environmentalism remains at heart a modern project. Indeed, in some ways it is the ultimate modern project.

Of modernity, Argyrou observes that [46]

> inherent in the modernist paradigm is a tendency for metaphysical totalizations of an *epistemic* nature – a tendency imposed by the need to make a decision about what exists in its entirety. The modernist subjectivity ventures beyond the world because it is only from such an external position that the boundaries of the world can be drawn and knowledge of what exists guaranteed. Once 'there', it visualizes the world synoptically, as a unity of different beings with the same substance.

By this measure, international law is in essence a modern discipline, as it continually adopts such postures. In order to exist, international law depends on an assertion of unity based on a fundamental sameness between all states and between all people. The effect of this position is a negation of any differences between states and between people that may seem apparent to the layperson in their experience of everyday life.

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38 See, e.g., R. W. Bauman, *Critical Legal Studies: A Guide to the Literature* (1996), 125, which includes only one page on environmental law. See further K. Hirokawa, 'Some Pragmatic Observations about Radical Critique in Environmental Law', (2002) 21 *Stanford Environmental Law Journal* 225. A recent exception is A. Philippopoulos-Mihalopoulos (ed.), *Law and Ecology: New Environmental Foundations* (2011).

39 J. O'Connor, 'Capitalism, Nature, Socialism: A Theoretical Introduction', (1988) 1 *Capitalism, Nature and Socialism* 11, argues that, by failing to consider how capitalism operates, US environmental lawyers in the 1970s and 1980s drove polluting industries to the developing world, where the damage they caused was more severe locally and globally.

40 See, e.g., B. Swimme and M. Tucker, *Journey of the Universe* (2011); M. Smith, *Against Ecological Sovereignty* (2011); and T. Morton, *Ecology without Nature* (2007).

41 See, e.g., N. Castree, *Making Sense of Nature* (2014); D. Harvey, *Justice, Nature, and the Geography of Difference* (1996); and N. Blomley, *Law, Space, and the Geographies of Power* (1994).

42 See, e.g., J. Bennett, *Vibrant Matter: A Political Ecology of Things* (2010); J. Foster, *Ecological Revolution* (2009); and R. Peet and M. Watts, *Liberation Ecologies* (2002).

43 See, e.g., R. Marks, *Origins of the Modern World* (2007); W. Beinart and L. Hughes (eds.), *Environment and Empire* (2007); R. Guha, *How Much Should a Person Consume?* (2006); R. Grove, *Green Imperialism* (1995); A. Crosby, *Ecological Imperialism* (1986).

44 See, e.g., Argyrou, *supra* note 10; G. Garrard, *Ecocriticism* (2012); G. Barton, *Empire, Forestry and the Origins of Environmentalism* (2002); and R. Guha, *Environmentalism: A Global History* (2000).

45 See Argyrou, *supra* note 10.

46 Ibid., at 102 (original emphasis).

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Argyrou observes that although many cultures imagine the idea of human unity, it is only Western modernity that valorizes the human being by according it the status of the ultimate universal subject and object. Before such an understanding of the human being, particularities of sex, race, class, and culture dissolve. Argyrou states,

> the modernist subjectivity does not deny that these divisions exist in practice. On the contrary, it constantly draws attention to them. What it does deny is that they are intrinsic to social reality, an inevitable part of the human condition.[47]

Thus modern culture makes every effort to reform those ignorant or arrogant enough to assert difference, as it assumes such reform to be both necessary and possible. In international law, while this logic is most apparent in the field of human rights, it permeates the entire discipline. Some critical international law scholars have observed that the discipline is justified and dynamized by the continuous assertion of universal values, followed by the identification of those places and people that remain unaware of such values, thus necessitating the creation of international laws to enlighten them.[48]

Argyrou links environmentalism to modern logic by problematizing the facts conventionally understood as explaining the rise of environmentalism. If scientific facts about the complexity and fragility of the natural environment are transparent and self-evident, why is it that everyone does not hear them in the same way? Alternative readings of the same facts can be explained through 'cultural categories of perception and evaluation'.[49] Environmentalism as it arose in 1960s America assumed a specific cultural form. It took a conceptual posture external to Earth, allowing it sufficient distance to look back and see a single globe, culminating in an assertion that on a fundamental level everything encompassed by Earth is unified. As Argyrou observes, this position of externality 'is to say, in effect, that it is we who surround the environment, not the other way round'.[50]

Environmentalism reproduces the cultural logic of modernity, which finds meaning only in unity and is thus compelled to efface difference. Indeed, Argyrou argues that environmentalism takes the logic of modernity to its ontological extreme:

> In a social universe whose cultural logic is to strive constantly for ultimate universalisms … the last grand division of the Whole – the division between humanity and nature – has finally been brought "into the focus of European thought" and serious efforts are being made to efface it.'[51]

The first images of the earth from space, that became symbols of the Western environmental movement, also aptly denote the making of this ultimate modern

47 Ibid., at 115.
48 See, e.g., P. Fitzpatrick, *Modernism and the Grounds of Law* (2001), and A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2003).
49 See Argyrou, *supra* note 10, at 81.
50 Ibid., at 95.
51 Ibid., at 50.

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move. The construction of a new field for international regulation – the global environment – asserts an intellectual comprehension and capture of the planet as a totality.

The creation of the global environment as a regulatory sphere brings with it the creation of new subject identities. Agrawal identifies the ways in which emerging technologies of environmental governance produce new environmental identities for people, places, and things, and new types of relationships between localities and states. He calls this 'environmentality', in a gesture to Foucault's later works on governmentality, as it aims to 'understand and describe how modern forms of power and regulation achieve their full effects not by forcing people toward state-mandated goals but by turning them into accomplices'.[52]

Western culture in the 1960s produced a typically modern environmentalism, which created mechanisms of environmentality such as IEL to rapidly universalize this world-view and obscure alternative understandings. The construction of the environment in a modern way, and the resultant type of environmentality that IEL represents, is troubling because of the type of issues that IEL aims to tackle. As discussed in the following section, modern understandings of human nature and progress have driven ecological degradation. As such the same mentality may be incapable of thinking its way out of ecological crises. The logic of environmentalism as it exists today ensures that the power to define meaning in the world remains in the same hands that oversaw the degradation of global ecosystems. IEL reconfirms the position of the global north as the source of all acceptable meaning, giving it the ability to construct the environment and environmentality in particular ways. There are many other ways of imagining the environment, environmentalism, and environmentality, including those where the world is understood as something that surrounds us – our literal environs – rather than something that we are capable of subjecting to capture, construction, and control.

IEL asserts that international lawyers can help protect the environment; that we can devise effective legal instruments that will contribute to maintaining healthy ecosystems. Yet, despite the proliferation of IEL instruments over the past four decades, IEL has been unable to stem serious ecological harm. Whether because of its politics or because of its philosophical underpinnings or, as we argue, for both these reasons, IEL in its current form has set itself up for failure. The following section argues that, in order to think our way out of ecological crises, we need to go beyond IEL and understand the role of the natural environment in constructing core disciplinary concepts.

52 A. Agrawal, *Environmentality: Technologies of Government and the Making of Subjects* (2005), 217. He traces the dynamics of environmentality through examining local experiences and interactions of governance in the Kumaon region of India. See further T. McCreary and V. Lamb, 'The Political Ecology of Sovereignty' in this issue for analysis of how polities and ecologies are integrated into the sovereign territory through the processes and effects of natural resource governance, and how the role of local actors can both reinforce existing governance relationships and create new ones.

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3. Looking beyond international environmental law: Nature in the foundations of law

IEL asserts the disciplinary commitment to co-ordinated global action for safeguarding the environment, but this promise of protection is a comparatively recent and specialized disciplinary phenomenon. International law has played an important role in universalizing certain dogmas that are barriers to imagining sustainable ways of life. Through particular disciplinary conceptualizations of sovereignty, development, property, economy, human rights, and other central disciplinary tenets, international lawyers have helped normalize a world-view where nature is understood predominantly as a natural resource, where humanity is at the centre of the environment and privileged above all else, where progress is defined by our degree of control over nature, and where this capacity to control is believed to be limitless. Identifying disciplinary assumptions about nature is a large undertaking beyond the scope of a single article. Thus, we herein merely lay the groundwork for the broader 'Locating Nature' project, and initiate it by touching upon two seminal disciplinary concepts – sovereignty and development – in the following two sections, aspects of which are subject to deeper analysis within other articles in this symposium.

3.1. The co-production of states of nature and the nature of states

Sovereignty is the constituent element of international law, the building block of disciplinary evolution. Understandings of nature have had an important role to play in giving sovereignty meaning. This subsection traces that role with regard to the construction of the modern sovereign state.[53] During the European Enlightenment, 'the transformation of nature came to be seen as a primordial act, transforming chaos into order, imbuing the environment with human form – a divine-like act to craft a new world and a new reality'.[54] The capacity of societies to shape and control their environment was understood to indicate their level of progress, distinguishing between the civilized and those close to 'a state of nature'.[55] As modern international law is of European origin, its foundational concept of sovereignty has evolved in ways that mirror these Enlightenment understandings of nature.[56]

Sovereign status is sought after for the authority it confers. Among other things, the sovereign is the foremost disciplinary entity with the capacity to make international law. For this and other reasons, powerful are those who get to define sovereignty. European sovereigns denied sovereignty to much of the non-European world for centuries and conditioned their eventual entry into sovereignty in particular ways. As Anghie describes, sovereignty only came to acquire clear meaning and definition when the first sovereigns began to give reasons for denying others entry into their club.[57] Sovereignty was conditioned, among other things, on a society's

53 The ideas in this subsection are explored more extensively in Natarajan, *supra* note 29, at 177–8, 190–201.
54 M. Eliade, *The Myth of the Eternal Return, or Cosmos and History* (1965), 10–11.
55 See Argyrou, *supra* note 10, at 7–16.
56 P. Hulme, 'The Spontaneous Hand of Nature: Savagery, Colonialism and the Enlightenment', in P. Hulme and L. Jordanova (eds.), *The Enlightenment And Its Shadows* (1990), 30.
57 See, generally, Anghie, *supra* note 48.

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capacity to make productive use of nature to meet an increasing variety of human needs and desires.[58]

Non-European societies were categorized in terms of their differing degrees of control over nature. Nomadic societies were seen to be the furthest from sovereignty as they did not utilize nature's productive capacity through consistent agriculture and farming. International laws of title to territory designate as *terra nullius* land that is either empty or belonging to no one.[59] The territory of nomadic cultures has at times been treated as *terra nullius* because such peoples were not seen to assert the requisite degree of control over territory.[60]

Non-European industrial and agricultural societies were perceived to be more civilized due to their greater productive capacity. This is reflected for instance in the League of Nations Mandate System's classification into A, B, and C mandates. The system oversaw a process of tutelage whereby certain European states would assist non-European territories to evolve towards sovereignty. Class A mandates had the shortest evolutionary leap, whereas Class C mandates would have to undertake significant societal transformation to be sovereign. An indispensable part of this transformation was taking steps to control and productively use the natural environment.

Understanding sovereignty through, among other things, a culture's relationship with nature, allowed European empires to justify colonization.[61] The imperial centres of industry could claim to be benefiting the colonies by instructing them to make optimal use of their surroundings. At the same time, industrialization of the imperial heartlands could be fuelled by natural resources from colonial possessions. Indeed, the quest for these resources was a driving force of colonization.[62] Assumptions about nature that shaped sovereignty in the colonial era continued to shape not only the League of Nations Mandate System but the decolonization process more generally. In their quest to gain equal footing under international law, non-European states had to considerably transform their domestic spheres to enable the increasingly efficient exploitation of nature through instituting appropriate European systems of land tenure, private property, contracts, torts, and so on.[63]

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58 See Argyrou, *supra* note 10, at 7–16.

59 See further K. Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classifications of Territory' in this issue for an analysis of the Eurocentric and anthropocentric aspects of *terra nullius*, alongside other doctrines of title to territory.

60 See, e.g., the Australian case of *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 where aboriginal title was rejected in favor of *terra nullius*. This was overruled by the High Court of Australia in *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1. In both cases, the nature of indigenous peoples' relationship with land and their ability to productively use it was of central importance.

61 We do not argue that a society's productive capacity was the sole factor in determining its sovereign status but rather that this was a primary factor, alongside others such as race, religion, language, and forms of social organization.

62 See further I. Porras, 'Appropriating Nature: Commerce, Property and the Commodification of Nature in the Law of Nations', in this issue for an analysis of the role of nature in the process of colonization in the work of early international law scholars, observing that the visibility of nature in these early works was primarily through the desire for increasing commerce and property.

63 See section 3.2, *infra*. See also J. Holder, 'New Age: Rediscovering Natural Law', (2000) 53 *Current Legal Problems* 151, at 159–65, mapping the relationship between classical science and the development of law, and showing that just as the scientific method separates humans from nature so too does the legal system.

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In the process of colonization and decolonization, all the continental land masses and some of the oceans came under sovereign control. Some international regimes, such as those for fishing, explicitly require states to exploit the ocean's maximum sustainable yield in the areas they control. If they are unable to do so they must allow others to farm these areas so as to achieve such yields.[64] Gross overfishing and the depletion of fish stocks is the inevitable outcome in a system that demands that in order to be modern, sovereign, and independent, a society must, among other things, demonstrate its ability to assert productive control over its environment. The modern state is a powerful mechanism for converting increasing aspects of the natural environment into commodities because, as discussed in the following subsection, a sovereign state is inescapably also a developmental state.[65]

3.2. Development and economy in international law: Uncreative solutions for unprecedented problems

In international law, the concept of sustainable development has largely remained the purview of international environmental lawyers, who have grappled with the considerable challenges that it poses for more than two decades to little avail.[66] International law generalists rarely engage with the concept despite the attention that the discipline gives to development issues such as trade, economy, labour, intellectual property, finance, investment, and so on. This subsection explores the role of development in international law, arguing that the formative role of development in the discipline is one of the reasons why sustainable development has not lived up to its promise to stem ecological harm.

Development has become the ubiquitous goal of all states and peoples. While the pursuit of development seems a natural and inevitable human desire, it has not always been so. Rist argues that the modern idea of development is a uniquely Western one, stating that the notion that 'growth or progress should be able to continue indefinitely – that is an idea that radically distinguishes Western culture from all others'.[67] He observes that even in Western societies the idea of limitless societal growth, encompassing an infinite capacity for economic, scientific, and cultural progress, originated only during the European Enlightenment.[68] Before this, societal change was assumed to be cyclical, with advances in knowledge, economy, and culture followed by stabilization and eventual decline. Examples include the Aristotelian perception of rising and falling civilizations, or the Augustinian notion

64 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3 (1982), Arts. 61–72. For the regulation of fishing on the high seas, or fishing stocks that cover more than one territory or that migrate, see further Mickelson, *supra* note 59.

65 The term 'developmental state' is sometimes used to refer to states that heavily intervene into their economies through planning and regulation, and in international political economy frequently refers to East Asian economies in the late twentieth century. We use the term in a broader sense to refer to states that are focused on economic development and that make policy decisions primarily on this basis.

66 For a definition of sustainable development, see Rio Declaration, *supra* note 14 and Brundtland Report, *supra* note 15, and accompanying text.

67 G. Rist, *The History of Development: From Western Origins to Global Faith* (2002), 238.

68 Ibid., at 35–40.

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of humanity's journey from creation to revelation with the rise of mankind followed by the inevitable descent into the apocalypse.[69]

The contemporary understanding of development, that everyone everywhere, rich and poor, can economically grow all the time, is challenged by the concept of sustainable development as it raises the prospect of finite natural limits to economic growth. Ecological change 'calls into question the Enlightenment principle that human progress will make the future look better than the past'.[70] Yet, international reports on sustainable development seldom dare to call for less development anywhere, environmental treaties are loathe to hint at economic limits, and international organizations continue making policy as though development is possible everywhere all the time. Such behaviour renders the concept of sustainable development a mere 'hope that the necessary will become possible'.[71]

Why are international environmental lawyers hesitant to discuss potential limits to growth, preferring rather to focus on the infinite potential of the 'green economy'? Rist argues that the idea of development helps the economically and culturally dominant remain thus. That is to say, the most developed are the real beneficiaries of development, and therefore they have an interest in ensuring that the concept remains an entrenched focus of contemporary thought. The concept of development helps naturalize and obfuscate the process whereby some people systemically under-develop others. As discussed in the previous subsection, during European colonization, societal progress was assumed to move in a civilizational hierarchy from nomadic through to pastoral ways of life, towards agricultural systems, and culminating eventually in industrial and post-industrial production modes. Such ideas of social evolutionism legitimized European conquest of non-European societies as the practice of empire ostensibly developed both the imperial centre and the colonies: the former through exploiting colonial labour and resources, the latter by learning to aspire to European levels of progress. In the post-colonial era, with the acquisition of sovereign statehood came the idea of the developmental state.[72] Non-Western sovereigns entered the family of nations by taking their allotted place in the spectrum from least-developed, to developing, to emerging, to developed states. In mimicry of colonial dogma, development is ostensibly good for both developed and developing worlds, giving the former access to resources and markets and the latter access to knowledge and capital. The legal, political, economic, and social transformation that developing states have to undergo enables powerful interests and ideas to penetrate into post-colonial societies in ways that ensure that the gap between the rich and poor within and between states continues widening.

International law and organizations have advocated the pursuit of development for more than six decades. In these decades, while certain post-colonial states are perceived to be 'emerging' and others even declared 'developed', development experts agree that inequalities of wealth between rich and poor states and within states have

69 Ibid., at 24–34.
70 UNDP, *Human Development Report: Fighting Climate Change: Human Solidarity in a Divided World* (2007), 1.
71 See Rist, *supra* note 67, at 183.
72 See *supra* note 65.

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consistently widened.[73] Increasing inequality is not understood as invalidating the development quest, nor is it perceived to be an inevitable result of such a quest. Instead inequality acts as a spur for a more vigorous pursuit of development.

One of the ways that development survives its contradictions is through its ability to periodically reinvent itself.[74] In the 1970s, development aimed to provide everyone with at the very least their basic needs. When this proved out of reach, the more holistic concept of human development was put forward in the 1990s, so as to promote an understanding of development that goes beyond economic factors.[75] This eventually led to the setting of eight Millennium Development Goals (MDGs) and as the deadline for these goals approaches in 2015 and many of these goals go unmet, the MDGs will be replaced with another reinvention that promises to rectify past mistakes with a new set of goalposts and indicators.

What is troubling about this pattern is that reasons for past failure are consistently identified in ways that justify the pursuit of economic growth everywhere. The development practitioner's refrain is the incontrovertible assertion that the poor need economic growth, but this mantra distracts from the fact that the principal beneficiaries of current patterns of economic growth are the rich. Each reconfiguration of development serves to distract from broad trends about the link between such growth, increasing inequality, and environmental degradation. Rist situates sustainable development as a recent reincarnation in the continuum of the conceptual evolution of development.[76] From this perspective it is unsurprising that, rather than a legal concept that asserts natural limits to growth, sustainable development has instead resulted in both rich and poor engaging in an ever more sustained pursuit of development, with international lawyers lauding the economic growth potential provided by investing in green technology and innovating financial instruments that enable emissions trading, carbon offsetting, and so on.

In theory, modifiers such as 'human' development and 'sustainable' development qualify the meaning of development in valuable ways. In actuality, the centrality and dominance of the pursuit of economic growth has nullified transformative potential. To some extent this is because the economy is not a concept conducive to creative solutions to environmental crises.[77] Mitchell describes how, instead of counting a nation's material wealth, economists instead count its aggregate income – the sum of every instance of money changing hands – because each such instance represents income to the recipient. The waste incurred as income is generated – the exhaustion of natural resources, labour and machinery – is not counted.[78]

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73 UN Women and UNICEF, *Addressing Inequalities: Synthesis Report of Global Consultation* (2013), 15–17: <www.worldwewant2015.org/inequalities>.

74 See Rist, *supra* note 67, at 5.

75 Ibid., at 162–92.

76 Ibid., at 178–92. See further A. Giddens, *The Politics of Climate Change* (2009), 59–63; R. Kates et al., 'What is Sustainable Development: Goals, Indicators, Values and Practice', (2005) 47 *Environment: Science and Policy for Sustainable Development* 8.

77 The following analysis of the economy is an abridged version of a more extensive discussion in L. Eslava, U. Natarajan, and R. Parfitt, '(Post)Revolutionary Internlinkages: Labour, Environment and Accumulation' (2013) 4 *Transnational Legal Theory* 108, 117–18.

78 See Mitchell, *supra* note 27, at 136–7.

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Additionally, economics, like international law, uses the state as its central frame of reference as evidenced in the basic distinction between macro- and microeconomics. As with other state-based disciplines, the geopolitical construction of such spaces and the ensuing negative consequences for certain peoples, places, and things are obscured.[79] Our capacity to understand and effectively address concerns that transgress national boundaries, such as environmental issues, becomes limited.

In the contemporary world, nature is primarily understood through scientific measuring devices and tools of calculation, which in turn function with reference to the state.[80] It is then unsurprising that our solutions to environmental problems are limited by the same frame and tend to be technocratic and economic: carbon markets and emissions trading schemes, technology transfer and clean development mechanisms, and so on.[81] Indeed, the expenditure of dealing with environmental damage is seen as a spur rather than impediment to growth.[82] Such a growth-based approach to ecological crises ensures that the structures of economic privilege and subordination that created environmental problems are systemically reinforced in circumscribing potential solutions. Rather than being the means of breaking down the conceptual separation between the economy (*oikos nomos*) and the ecology (*oikos logos*),[83] IEL solutions reinforce this divide.

The idea of limitless economic growth has been so appealing and successful because it encompasses the legitimate aspirations of poor peoples to have happier lives. In contemporary development work, poverty is perceived to be humanity's ultimate shame and its eradication the supreme and overarching goal. After all, how could anyone reasonably argue against endeavours to 'make poverty history'? But the fixation with poverty eradication focuses our attention on the poor and away from the rich, when it is wealth and not poverty that is the outrage.[84] How would development practice look if we devoted less attention to the poor and more to the rich? Such an understanding may entail setting goals and timelines for the rich to transform practices of systemic under-development and ecological destruction, instead of for the poor to develop. The people and places that are classified, measured, and scrutinized, as well as those who can claim to possess expertise, may be significantly different. The link between increasing wealth, increasing inequality, and patterns of ecological harm may be rendered more visible. That is to say, the meaning of development, its directionality if any, and the identity of those who have attained it, would come undone and become open for reflection.

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79 See Section 3.1, *infra*.

80 See Mitchell, *supra* note 27, at 233.

81 See *supra* note 5. While promotion of green technologies and more efficient resource use are worthwhile endeavours, the global economy has a rapacious and infinite appetite for growth. Thus, natural resources are likely to be consumed as long as they are accessible. In such a system, proliferation of clean energy does not preclude continuing use of dirty energy, as demands for energy will grow and consume what is available. For the same reason, more efficient use of resources may not have any effect on stemming overall consumption, as consumption rates will rise with increased availability.

82 See Mitchell, *supra* note 27, at 140.

83 See Philippopoulos-Mihalopoulos, *supra* note 38, at 3; and R. Williams, 'Ideas of Nature', in R. Williams (ed.), *Problems in Materialism and Culture* (1980).

84 See further Rist, *supra* note 67, at 249–58.

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4. Conclusion

International law evidences a disciplinary double-mindedness when it comes to the natural environment. While IEL strives to protect us from serious environmental harm, the general thrust of international law remains towards economic expansion at the expense of ecological decline. International environmental lawyers desperately attempt to forge consensus on global environmental protection regimes, alongside the proliferation of parallel international regimes in trade, investment, labour, migration, and so on, that inevitably generate or contribute to ecological crises. The regulation of natural resources, whether wealth-creating fuels and minerals or essentials such as clean water and food, remain outside the purview of IEL and are governed through other areas of international law and significantly through private arrangements. From its specialized sphere of operations, IEL is not only incapable of deterring the momentum of the international system, but it serves to obfuscate the disciplinary correlation with environmental harm.

Santos observed that as

> disciplines became institutionalized and professionalized, the problems they dealt with were only the problems they themselves could formulate. The result was academic answers for academic problems that were increasingly more distant and reductive vis-à-vis the existential problems at their origin.[85]

Therefore, ironically, the more serious and relevant a problem is, the harder it is to talk about it and remain credible amongst one's peers. This process aptly describes international law's engagement with environmental crises. While IEL proffers a panoply of technical solutions, the difficulty is that the problem is not amenable to a technical solution. Hence, in this article we insist that ecological harm challenges the fundamental tenets of international law and that debate on any other level is unprofitable. Enabling fruitful dialogue necessitates, in the words of Jasanoff, 'unpick[ing] the perverse analytic mantras … taught to generations of legal and policy analysts so that they *cannot* think in other terms, even when ethics and morality call for different ways of thinking'.[86] She observes that '[t]he blocking routines of technical expertise are embedded in a variety of institutional practices',[87] and it is these routines that we endeavour to identify and dismantle in this article as well as through the broader 'Locating Nature' project.

Our disciplinary creeds tie us in overt and subtle ways to particular relationships with the natural environment. The constituent doctrine of sovereignty facilitates the process of creating finite boundaries within nature as a basis for efficient division, commodification, and consumption. Our capacity to discern and address ecological concerns that transgress the conceptual framework of the state is severely limited. International law plays an important part in making the Western lifestyle seem possible everywhere, engendering the global pursuit of development as an article

85 B. Sousa Santos, 'A Non-Occidentalist West? Learned Ignorance and the Ecology of Knowledge', (2009) 26 *Theory, Culture & Society* 103, at 110.

86 S. Jasanoff, 'A World of Experts: Science and Global Environmental Constitutionalism', (2013) 40 *Environmental Affairs* 439, at 444 (original emphasis).

87 Ibid.

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of faith in the religion of modernity. The ostensibly commonsensical notion of the economy and what it counts, and the dividing up of the common world into areas of public and private concern and their corresponding legal regimes, severely circumscribes our options for what and where we understand the environment to be. While it is beyond the scope of this article, an area for future exploration is the anthropocentricity of international law as epitomized in the powerful discourse of human rights and the ensuing environmental consequences. Deep historical and cultural roots have shaped these and other central disciplinary axioms and transformation requires both identification of the problems and viable alternatives. Just as revolutions in scientific thought during the European Enlightenment created a new paradigm about the nature of global society and order, so too can contemporary perceptions of ecological threat catalyse new world-views.

Locating the role of nature in international law is a demanding but worthwhile endeavour for the international environmental law specialist as well as the generalist international lawyer. For the former, an understanding of how the discipline engenders and maintains environmentally harmful practices helps explain IEL's inability to have more than a peripheral impact on environmental protection, and points towards more constructive future endeavours. For the latter, such an analysis offers an understanding of how our relationship with the natural world has helped make international law. Our understandings of nature shape disciplinary terms and concepts, specializations and institutions, and addictions and blind spots. If these understandings predispose international law towards certain harmful and unjust consequences, then resistance requires an unmaking of core disciplinary assumptions about what it means to be sovereign, to be human, and to be an international lawyer in an age of ecological crises, and how we measure the progress of our discipline and our world.

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