

SYMPOSIUM ON INTERNATIONAL ECONOMIC LAW AND ITS OTHERS

ENVIRONMENTAL JUSTICE CHALLENGES TO INTERNATIONAL ECONOMIC ORDERING

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The relationship between trade, investment, and environmental protection is complex, and environmental activists have engaged with international economic law in a wide variety of ways. Some environmental activists have sought to use trade systems as leverage to advance environmental protection aims, while others have been concerned about how international economic law constrains unilateral national environmental action.¹ The dominant account of the harmonization of economic and environmental norms and the promotion of sustainable development through trade and investment is challenged by sobering statistics of ecological decline.² In the face of intersecting ecological, economic, and social crises facing the global community, the often-marginalized critique developed by environmental justice activists of neoliberal globalization and the legal regimes that enable it is more urgent than ever. These perspectives and voices—which sometimes align with other environmental activists and sometimes directly oppose market-orientated environmental agendas—have been marginalized in the scholarship on international economic law, but offer an indispensable resource for imagining more equitable and ecologically just forms of global economic cooperation. This essay shows how environmental justice activists have enacted a powerful politics of refusal, resisting international economic law as well as articulating visions of how to achieve systemic change and sustainable societies based on environmental, social, economic, and gender justice and peoples' sovereignty.³

The essay unfolds in four parts. First, the essay maps different environmentalist engagements with trade and investment law; then, it describes how environmental activists involved in the “alter-globalization” movement have contested international economic law, and details environmental activists' critique of investment arbitration. Finally, the essay considers how climate change presents opportunities to radically transform international economic ordering, and offers alternative visions for global economic cooperation.

Diverse Perspectives on Trade, Investment, and the Environment

The relationship between liberalized trade, investment rules, and environmental protection has long been contentious. The rise of international cooperation on environmental protections in the 1960s and 1970s led to

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¹ [TRADE AND ENVIRONMENTAL LAW](#) (Panagiotis Delimatsis & Leonie Reins eds., 2021).

² SUMUDU A. ATAPATTU, CARMEN G. GONZALEZ & SARA L. SECK, [THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT](#) (2020).

³ Natalia Carrau & Sam Cossar-Gilbert, [Transforming our Economy: Scaling Up the Solutions](#), FRIENDS OF THE EARTH INT'L (2018).

concerns by countries of the Global South that these environmental norms might prevent them from pursuing industrial development pathways, that environmental considerations might create new restrictions on trade, or that stricter environmental standards might have a negative impact on exports.⁴

The 1991 *Tuna/Dolphin* case brought to public consciousness the potential conflict between trade and environmental law and sparked a decade of debate on environmental impacts of liberalized trade, and strategies for integrating environmental considerations in the international trading regime. Environmental activists from the Global North and the Global South often disagreed on the desirability of such integration: while Northern environmental groups sought to integrate environmental protection within the international economic regimes, many environmentalists from the Global South saw this as “an imposition of Northern values and preferences on less powerful nations,”⁵ disguised protectionism, or ecological imperialism.

Paradigm shifts in both international environmental governance and international economic ordering enabled a growing convergence between these fields.⁶ The concept of “sustainable development” legitimated the institutionalization of the “compromise of liberal environmentalism.”⁷ This assumes that the promotion of an open international economic system will lead to economic growth and sustainable development,⁸ and that “an enabling environment for investment” is the “basis for sustainable development.”⁹ Conversely, the trade regime recognized the objective of sustainable development,¹⁰ it committed to making trade and the environment “mutually supportive,”¹¹ adopted institutional reforms,¹² and incorporated environmental considerations in its jurisprudence.¹³ Since the 1990s and 2000s, free trade agreements and international investment agreements increasingly incorporated environmental chapters or language on environmental concerns.¹⁴

Environmental justice activists have opposed both the precepts of market-oriented environmentalism as well as the assumption that liberalized trade and investment can lead to ecologically just futures. They have mounted a structural critique of how the international economic regime entrenches the power of multinational corporations and enables the expansion of an uneven, extractive, capitalist economy that is ecologically destructive and produces drastic inequalities in wealth alongside poverty and precarity.¹⁵ Transnational environmental justice

⁴ See, e.g., GATT Secretariat, *Industrial Pollution Control and International Trade*, L/3538 (June 9, 1971).

⁵ Andrea C. Durbin, *Trade and the Environment*, 37 ENV'T. SCI. & POL'Y FOR SUSTAINABLE DEV. 16 (1995); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DEN. U. L. REV. 979 (2000).

⁶ Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 515 (Daniel Bethlehem, Isabelle Van Damme, Donald McRae & Rodney Neufeld eds., 2012); Aik Hoe Lim, *History of the Trade and Environment Debate at the WTO*, in *TRADE AND ENVIRONMENTAL LAW*, supra note 1. (Panagiotis Delimatsis & Leonie Reins eds., 2021).

⁷ STEVEN BERNSTEIN, *THE COMPROMISE OF LIBERAL ENVIRONMENTALISM* (2001).

⁸ See *Rio Declaration*, prin. 12, UN Doc. A/CONF.151/26 (1992).

⁹ See *Plan of Implementation of the World Summit on Sustainable Development* (2002).

¹⁰ *Marrakesh Agreement Establishing the World Trade Organization*, pmbl. para. 1, Apr. 15, 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

¹¹ *Ministerial Declaration*, WTO Doc. WT/MIN(01)DEC/1 (Nov. 14, 2001); *Ministerial Declaration*, WTO Doc. WT/MIN(05)DEC (Dec. 18, 2005).

¹² Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. REV. 1 (2001).

¹³ John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1 (2004).

¹⁴ Edward Gresser, *Labor and Environment in Trade Since NAFTA: Activists Have Achieved Less, and More, Than They Realize*, 45 WAKE FOREST L. REV. 491 (2010); Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* (OECD Working Papers on International Investment, 2011/01, 2011).

¹⁵ Joan Martinez-Alier, Leah Temper, Daniela Del Bene & Arnim Schneidel, *Is There a Global Environmental Justice Movement?*, 43 J. PEASANT STUD. 731 (2016).

movements have sought to build solidarity with, and amplify, local struggles of grassroots environmental defenders to protect their lands and livelihoods from extractive and polluting projects. This “environmentalism of the poor”¹⁶ has closely aligned with peasant and Indigenous movements engaged in distributive struggles over access to land and resources, and has, at times, resisted externally imposed environmental measures that risk dispossession or harming local communities, such as coercive conservation, carbon offsets, or large hydro or wind projects.¹⁷ For many environmental defenders and their communities, international trade and investment agreements have appeared as external impositions that strengthen the power of the corporations and governments who are seeking to exploit their lands and resources.¹⁸ The sections below show how environmental justice activists have contested the authority and legitimacy of international economic regimes, and have articulated radically different visions of socially embedded, ecologically sustainable economic activity.

Disrupting Negotiations

The “alter-globalization” movement of the late 1990s and early 2000s identified capitalism, not just “free” trade, as “the root cause” of social and ecological problems.¹⁹ However, the movement directed much of its energy and anger at the international trade and investment regimes, especially the World Trade Organization (WTO), for creating the “extra-economic conditions for safeguarding capitalism at the scale of the entire world.”²⁰ In contrast to some environmental organizations who sought greater participation within the WTO,²¹ more radical environmental justice groups used tactics such as summit protests to raise awareness about the environmental consequences of international economic law and to delegitimize international economic norms and institutions. In open letters, the movement called not for reform, but for limiting and curtailing the growing power of international trade institutions through a “moratorium on any new issues or further negotiations that expand the scope and power of the WTO,”²² demanding to “roll[] back the power and authority of the WTO.”²³ The so-called “Battle of Seattle,” outside the third WTO Ministerial Conference, in November 1999, challenged the “centralization and concentration of power under corporate control in neoliberal globalization,”²⁴ while inside the Summit representatives from Africa and the Caribbean refused to agree to a proposed new round of trade liberalization.²⁵

The WTO’s failure to conclude any agreement between 1999 and 2013 was due to many factors. However, the mass resistance from social movements brought greater scrutiny to these negotiations and helped shape international norms by catalyzing reforms, generating a climate in which it was more possible for countries of the Global South to block consensus.²⁶

¹⁶ JOAN MARTÍNEZ-ALIER, [THE ENVIRONMENTALISM OF THE POOR: A STUDY OF ECOLOGICAL CONFLICTS AND VALUATION](#) (2003).

¹⁷ Roger Merino, *Between the Environment and the Economy: Foreign Investments, Global Conservation, and Indigenous Nations in the Amazon*, GLOBALIZATIONS (forthcoming); [UPSETTING THE OFFSET: THE POLITICAL ECONOMY OF CARBON MARKETS](#) (Steffen Böhm & Siddhartha Dabhi eds., 2009).

¹⁸ See Berta Cáceres in “2015 Óscar Romero Award Ceremony and Celebration” (2015).

¹⁹ [WE ARE EVERYWHERE: THE IRRESISTIBLE RISE OF GLOBAL ANTICAPITALISM](#) 184 (Notes from Nowhere ed., 2003).

²⁰ QUINN SLOBODIAN, [GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM](#) 2 (2018).

²¹ Daniel C. Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT’L ECON. L. 123 (1998).

²² [No New Round, Instead Turnaround!](#), THIRD WORLD NETWORK (1999).

²³ Grain, [“WTO Sink or Shrink!” Sign-on Statement](#) (Apr. 6, 2000).

²⁴ Stephen Gill, *Toward a Postmodern Prince? The Battle in Seattle as a Moment in the New Politics of Globalization*, 29 MILLENNIUM 131, 133 (2000).

²⁵ [WE ARE EVERYWHERE](#), *supra* note 19, at 204–07.

²⁶ On social movement and international law, see Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT’L L. 397, 400 (2002).

In response to stalling multilateral negotiations, there was a proliferation of bilateral and subregional trade and investment agreements, arguably a tactical maneuver²⁷ to weaken the power of developing countries to negotiate collectively.²⁸ The resulting fragmentation of international economic law made it more challenging for environmental activists to organize internationally. While some environmental activists continued to engage with the WTO,²⁹ generally environmental activism addressing the impact of the global trade regime became more nationally focused.

De-legitimizing Investment Arbitration

Environmental activists became increasingly aware of how international investment law and the process of investor-state dispute resolution were constraining national governments' ability to regulate in the environmental interest and undermining local environmental victories.³⁰ These concerns are particularly acute in the extractive sector—now the second most disputed industry³¹—given how international arbitrations have been launched in response to environmental movements' successful campaigns to have permits withdrawn or cancelled.³² In contrast to trade questions, there has been greater alignment between the perspectives and interests of environmental organizations from the Global South and the Global North, with the latter using their platform to document how international arbitration has undermined local environmental struggles, and decry investor-state dispute resolution as “corporate weapons against the public interest.”³³

In the aftermath of the Global Financial Crisis, there was a sense that the international investment regime was “in flux.”³⁴ Building on the 2012 Rio+20 Summit and the subsequent Sustainable Development Goals,³⁵ were renewed efforts to develop “new generation” investment policies that purported to “place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.”³⁶ While some environmentalists supported such integration, many pointed to the limited practical effect of environmental exception clauses in investment treaties, and stressed the need to radically rethink the underlying structure of investment treaties.³⁷ Generally, international environmental groups have been skeptical about the possibility or desirability of reforming investor-state dispute resolution processes, concerned that “further ‘legitimiz[ing]’ this inherently

²⁷ Aoife O'Donoghue & Ntina Tzouvala, *TTIP: The Rise of Mega-Market Trade Agreements and Its Potential Implications for the Global South*, 8 TRADE L. & DEV. 210, 230 (2016).

²⁸ Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

²⁹ See, e.g., Jacqueline Peel, Rebecca Nelson & Lee Godden, *GMO Trade War: The Submissions in the EC – GMO Dispute in the WTO*, 6 MELB. J. INT'L L. (2005).

³⁰ KYLA SUSANNE TIENHAARA, *THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY* (2009); JORGE E. VIÑUALES, *FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW* (2012).

³¹ Lise Johnson & Jesse Coleman, *Briefing Note: International Investment Law and the Extractive Industries Sector*, COLUM. CTR. SUSTAINABLE INV. (2016).

³² Lorenzo Cotula, *Rethinking Investment Law from the Ground Up: Extractivism, Human Rights and Investment Treaties*, INV. TREATY NEWS (Mar. 23, 2021).

³³ See, e.g., Lora Verheecke, Pia Eberhardt, Cecilia Olivet & Sam Cossar-Gilbert, *Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice*, FRIENDS OF THE EARTH EUR., FRIENDS OF THE EARTH INT'L, TRANSNAT'L INST. & CORP. EUR. OBSERVATORY (2019).

³⁴ UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012).

³⁵ See United Nations, *Sustainable Development Goals*.

³⁶ UNCTAD, *supra* note 34.

³⁷ J. Benton Heath, *Eco Oro and the Twilight of Policy Exceptionalism*, INV. TREATY NEWS (Dec. 20, 2021).

flawed system would only perpetuate inequality and corporate impunity,”³⁸ and calling for “dismantling the mechanism/system in its entirety.”³⁹ International environmental organizations have also played a key role in internationally coordinated campaigns against the inclusion of investor-state dispute resolution provisions in new “mega-regional” agreements.⁴⁰

Climate Change and Decarbonization

The global nature of the climate crisis has resurfaced tensions between the different tactics environmental activists use to engage with international economic regimes, but also presents a unique opportunity to build North/South solidarities and radically transform international economic ordering. Some Northern environmentalists have sought to leverage international trade rules to discourage trade in polluting goods and promote sustainable industries, for example, through targeted tariff reductions on “green goods,” border carbon adjustment mechanisms, and banning fossil fuel subsidies.⁴¹ In response, some environmentalists from the Global South have warned that technical trade solutions may reinforce existing power differentials,⁴² while others have criticized policies, such as border carbon adjustments, for failing to recognize how international institutions and corporations are implicated in the financing of, and are key beneficiaries of, investments in mining, oil, and gas in the Global South.⁴³ There has been growing attention to how investor-state dispute resolution processes may threaten decarbonization efforts.⁴⁴ By 2020, climate activists were describing the Energy Charter Treaty as the “biggest climate action killer nobody has ever heard of,” and calling on governments to exit or jointly terminate the agreement.⁴⁵

More radically, activists have highlighted the incompatibility of a continuously expanding global economy and the need to rapidly reduce greenhouse gas emissions.⁴⁶ The recognition that international economic law enables the extraction, combustion, and global circulation of fossil fuels driving the climate crisis has led to growing calls for “reimagining the laws and regulations that have been implicated in years of extraction of natural resources.”⁴⁷ Climate justice activists have shown how the globalized neoliberal economic system has created “extreme carbon inequality,” and called for systemic change and new economic models.⁴⁸ Finally, demands for historical and contemporary polluters to repay their “carbon debt” offer ways to radically reconfigure the global political economy,

³⁸ Layla Hughes, *A World Court for Corporations: How the EU Plans to Entrench and Institutionalize Investor-State Dispute Resolution*, CTR. INT’L ENVTL. L., SEATTLE TO BRUSSELS NETWORK & ROSA-LUXEMBURG STIFTUNG (2017).

³⁹ Friends of the Earth International, *Friends of the Earth International Positions on Key Trade and Investment Issues* (May 25, 2016).

⁴⁰ Seattle to Brussels Network, Corporate Europe Observatory & the Transnational Institute, *A Transatlantic Corporate Bill of Rights: Investor Privileges in EU-US Trade Deal Threaten Public Interest and Democracy* (2013).

⁴¹ Bart-Jaap Verbeek & Freek Bersch, *Setting Course for Sustainable Trade: A New Trade Agenda that Serves People and the Environment*, FRIENDS OF THE EARTH EUR., 17 (2018).

⁴² Tomaso Ferrando, Nicolás Perrone, Olabisi D. Akinkugbe & Kangping Du, *Pathways to Just, Equitable and Sustainable Trade and Investment Regimes* (2021).

⁴³ Arvind P. Ravikumar, *Carbon Border Taxes Are Unjust*, MIT TECH. REV. (July 27, 2020).

⁴⁴ Kyla Tienhaara & Lorenzo Cotula, *Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets*, INT’L INST. ENV’T & DEV. (2020).

⁴⁵ Thomas Dauphin, *An Axe to Climate Action: 10 Reasons the EU and Governments Must Quit the Energy Charter Treaty*, FRIENDS OF THE EARTH EUR. (2020).

⁴⁶ Jason Hickel & Giorgos Kallis, *Is Green Growth Possible?*, 25 NEW POL. ECON. 469 (2020).

⁴⁷ Nicolás M. Perrone, *Oil Companies Don’t Deserve Reparations for Fossil Fuel Bans. They’ll Still Want Them*, GUARDIAN (Apr. 19, 2021).

⁴⁸ Tim Gore, *Confronting Carbon Inequality: Putting Climate Justice at the Heart of the COVID-19 Recovery*, OXFAM (Sept. 21, 2020).

through debt cancellation, the facilitation of technology transfers, or the remaking the global financial architecture.⁴⁹

Articulating Alternative Visions

Environmental justice movements and grassroots environmental defenders offer compelling visions of more equitable and ecologically just forms of global economic cooperation. Their critique of the dependencies created by the neoliberal global economy and the “mono-cultures associated with the supremacy of corporate rule” is intertwined with a commitment “to preserve ecological and cultural diversity,”⁵⁰ by fostering diversified economies, the capacity for local self-reliance, and participatory democracy.⁵¹ Such visions are frequently grounded in the “epistemologies of the South,”⁵² and seek to create space for diverse cosmologies expressed in concepts such as *buen vivir* or *sumak kawsay* (“good living”), or the “commons.”⁵³ Pointing to how economies based on social ownership and global fair-trade networks already exist, some environmental activists suggest that a key challenge is “scaling up” economic justice solutions in order to reshape the global economy toward sustainable societies.⁵⁴ Yet enacting this would require structurally rebalancing global inequalities of wealth and power, including through tax justice, corporate accountability, and reparations for ecological harms. How such visions could be achieved concretely, and particularly how they could be shaped and enabled by law, remains underexplored. Yet in this time of intersecting social, economic and ecological crisis where the need for systemic change is acutely evident, the need for international economic law scholars and practitioners to listen to and learn from these marginalized voices is more urgent than ever.

⁴⁹ Michael Franczak & Olúfẹ̀mí O Táíwò, [Here's How to Repay Developing Nations for Colonialism – and Fight the Climate Crisis](#), GUARDIAN (Jan. 14, 2022).

⁵⁰ Gill, *supra* note 24.

⁵¹ See, e.g., Friends of the Earth International, [Towards Sustainable Economies: Challenging Neoliberal Economic Globalisation](#) (2003); [Friends of the Earth International](#), *supra* note 39.

⁵² BOAVENTURA DE SOUSA SANTOS, [EPISTEMOLOGIES OF THE SOUTH: JUSTICE AGAINST EPISTEMICIDE](#) (2015).

⁵³ See [LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW](#) (Usha Natarajan & Julia Dehm eds., forthcoming).

⁵⁴ [Carrau & Cossar-Gilbert](#), *supra* note 3.