



Wolfram Laube, Aline R. B. Pereira (Eds.)

# ‘Civilizing’ Resource Investments and Extractivism

Societal negotiations and the role of law

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edited by

Wolfram Laube and Aline R. B. Pereira

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## INTRODUCTION

Wolfram Laube and Aline R. B. Pereira

The accelerating global scramble for natural resources, sparked by a rising demand for industrial raw materials, water for domestic, agricultural, industrial purposes and hydropower generation, as well as arable land for the production of foods and biofuels has continued to push the accumulation of land and other natural resources to ever new frontiers, especially in the ‘global south’.

Increasing investments in the ‘global south’ are driven by the availability of resources and the augmented profitability of investments in ‘risky’ environments during periods of raw material price hikes. High prices for raw materials in the 1990s and 2000s sparked a wave of worldwide prospection and acquisition of resources that led to new discoveries (or the revaluation of old discoveries) of natural resources and to new resource investments.

Furthermore, the rather weak institutional and regulatory context of ‘developing’ countries attracts some investors. Socially and ecologically problematic projects seem to be easier to implement and more profitable there than under the highly regulated conditions in the ‘developed’ world. Affected are marginal areas in remote locations that were formerly controlled by peasants or pastoralists, peri-urban spaces where farmlands are converted into real estate, and even natural resources such as seeds and biological properties of plants that are turned into intellectual property.

The tendency to ignore the environmental and social externalities of large investments in resources in the global south has long been criticized and opposed by activists (see, inter alia: HRW, 2019; MAM, 2015; Wroblewski, 2014; DW, 2017). Local activism and international campaigns have raised public awareness in the ‘global north’ and political advocacy, as well as consumer pressure, have contributed to the generation of – albeit largely

voluntary – international standards (EITI, 2003, 2019; PWYP, 2019), but also national laws meant to curb the most devastating consequences of resource investments and extraction. Many countries – which often already had mixed experiences with the impact of extractive industries and large-scale investors – were faced with the need to come up with legislation that could successfully regulate newly upcoming resource investments. This process was also influenced by bilateral donors or international donor agencies, such as the World Bank, providing regulatory blueprints and trying to promote societal negotiations of new legislation by supporting NGOs and other stakeholders.

However, public concern has not led to a thorough revision of the legal and contractual basis that reign in international investments. Hundreds of bilateral investment treaties (BIT) as well as the protection of foreign direct investment in international law and through arbitration courts such as the International Centre for Settlement of Investment Disputes (ICSID) continue to favour investors rather than national governments and the environmental, economic, social and/or cultural interests they might try to promote.

Resource accumulation and extraction have given rise to a vivid academic debate about the macro- and micro- environmental, socio-economic, and political impact of investments, as well as effective strategies to oppose, control and steer investments in order to prevent or mitigate negative impacts (Acosta, 2013; Alonso-Fradejas, 2015; Bebbington, 2010; Brand et al., 2016; Deonandan & Dougherty, 2016; Engels & Dietz, 2016; Feichtner et al., 2019; Gudynas, 2015; Svampa, 2012; Veltmeyer & Petras, 2014).

We have discussed these and other issues in a workshop that gathered researchers from different countries and disciplinary backgrounds in 2016 at the Center for Development Research (ZEF). We wanted to contribute to this debate in two ways: on the one hand, discussing and understanding a set of international measures aimed at regulating international investments in general, and extractive business in particular, in ways that are less detrimental to local communities and environment. In international arenas, we could see relevant efforts to pass binding regulations on resource investments (e.g. business and human rights discussion groups) emerging amidst the broadly hegemonic defence of deregulation, liberalization and soft-law. Yet, these efforts still face considerable resistance to radical (and incre-

mental) changes in business as usual, changes that are necessary if we care about building a more socially and environmentally equitable society now and for future generations (see Diaby-Pentzlin and Bonet, this volume).

On the other hand, we also wanted to understand how investments, resource extraction and allocation, as well as environmental laws and regulations, are negotiated in societies in the ‘global south’. Therefore, a number of contributors focus on the often complicated linkages between global, national and local environmental and resource management regulations and the political economy of their implementation. Looking at the national level, we see that some companies (often with the support of public authorities) have developed and often successfully deployed strategies that circumvent existing national environmental and/or social laws. Nevertheless, the way legislation is ignored, undermined, or re-read depends on negotiation processes – often outright conflicts – in which different actors such as companies, governments, international agencies, international, national and local NGOs, CBOs<sup>1</sup>, and a broad variety of local stakeholders engage with varying and changing strategies and in varying and changing networks and coalitions. These dynamics often create environmental injustices, which consist of imbalanced distributional outcomes with regard to environmental risks and the benefits of resource extraction. These injustices are the result of side-lining the interest of disadvantaged members of the society, which are excluded from effective political participation.

Examples in this book show how environmental legislation, as well as land, oil, or mining law in the global south – often promoted by international development agencies – fail to effectively address environmental protection and local concerns, or become undermined by international investment and trade regulations from the onset (Chapters 1, 2, 3). In other cases, land reforms and environmental legislation – but also the promotion of commercial forestry and agriculture – become vehicles for the expropriation of indigenous and local communities as resources such as land and forests are captured by elites (Chapters 4, 5, 6, and 7). Furthermore, the lack of political will, and the lack of resources, staff and capacities on the side of implementing agencies is leading to flaws in reform implementation, and therefore to the deprivation of disadvantaged local resource users, workers and/or people affected by pollution (Chapters 6 and 7). Last, but

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<sup>1</sup> Community based organizations

not least, Chapters 8 and 9 show how different actors within the national and local political economy engage in conflicts over resource extraction and potential local benefits. These chapters focus on actors' strategies and the building of alliances in which official rules and legislation become used rather instrumentally and can be easily bypassed, as strong political as well as economic interests prevail.

In the following, the structure of the book and the core arguments of the individual chapters are introduced.

### **Part I: Lopsided (De-)Regulation: Controlling International Investment?**

This part of the book provides an overview of the lacking binding legal control of transnational investments in the international arena, an absence that favours international investors, particularly transnational corporations (TNCs), rather than national governments – let alone local actors. Furthermore, these chapters discuss how the efforts of international agencies to engage national governments to influence the drafting of environmental, land and mining legislation, as well as other laws regulating extractive industries, often work in ways that favour the interest of international investors. This comes to the detriment of local environmental protection and local livelihoods, undermining what these same international agencies claim to promote under the banner of sustainable development.

In chapter 1, Friederike Diaby-Pentzlin shows how nation states' and local actors' abilities to regulate international investments become increasingly difficult in the context of neoliberal globalization. Large companies play a growingly important role in creating, influencing and defining global governance, law-making and legal enforcement. Instead of "civilizing" investments, she argues, international economic law has been rather promoting the rights of investors. In a historical process, TNCs managed to strengthen investors' rights and the possibility to enforce these rights in different national and international arenas (e.g. the World Trade Organization Investor-State dispute settlement mechanism). While internationally, investment law has become enforceable *hard law*, regulations meant to control investors' activities are formulated in the form of non-binding obligations (*soft law*). International economic law thus perpetuates global imbalances, in which rights of investors supersede national – and particularly

local – interests. In the face of global environmental and social crises (e.g. climate change; the extreme exploitation of – often non-renewable – natural resources with little social or environmental concern; growing inequality), and using as an example investors’ streamlining of Ghana’s seed law to the disadvantage of local smallholders, the author makes the case for international ‘hard’ laws that pave the way for radical changes towards social justice, the decommodification of nature, and environmental protection also in the global south.

In chapter 2, Jordi Bonnet discusses the challenges that these developments in international economic law pose to international legal theory and practice. The author analyses the status of legal obligations of TNCs, especially their responsibility for human rights violations in the context of international capitalist investment – focusing on economic, social and cultural human rights – and provides an overview of the attempts to render transnational companies accountable through measures that encompass and go beyond soft law.

Both chapters discuss the challenges of regulating TNCs through binding laws and the limitations of soft law (e.g. voluntary exercise of corporate social responsibility), indicating potential solutions, some of which are already in the making despite resistance from the corporate sector.

Providing an example in national law, in chapter 3, Antoinette Tsiboe-Darko and Gyasi Agyeman, discuss regulatory changes in the Ghanaian mining sector, from the post-independence period until today. Especially since the adoption of Structural Adjustment Programs promoted by the IMF and the World Bank in the 1980s, changes in mining regulation led to the privatization of mines and helped to attract foreign investments into the mining sector. However, the internationally promoted legislation did not address essential political, social and environmental development challenges, which are already well known with regard to the mining industry (see, *inter alia*, Cameron & Stanley, 2017 especially chapter 2). Thereby, the authors confirm previous studies’ (Campbell, 2003) findings about the influence of World Bank-led mining legislation reforms in Sub-Saharan Africa. While they may be effective in attracting foreign direct investment for large-scale projects, they fail to effectively promote poverty reduction and local sustainable development.

## **Part II: Political Economy of Reform Implementation at National and Local Levels**

The chapters that form the second part of the book provide analyses of how and with which outcomes, reforms and policies trying to promote investments, regulate the use of resources, control the activities of extractive industries, or promote environmental protection are being implemented. The chapters shed light not only on the dynamics and conflicts, but also on consequences resulting from the opening of ever-new extractive frontiers by international and local investors. Policies subduing resources to supposedly rational management and economic exploitation are often promoted to attract investors and to enhance economic development. In the last two decades, in Latin America (neo-)extractivist policies were pursued to finance public policies meant to enhance inclusionary forms of development, i.e. so-called social transfer schemes. However, since colonial times, such reforms or policies often result in the commodification and expropriation of locally controlled resources by transnational companies, national governments or internal investors. Weak national regulatory frameworks, a lack of political will to enforce regulations, and/or implementing agencies, which in many countries lack adequate staff, capacities and resources, contribute to a situation in which the (potential) benefits, as well as compensations for negative externalities of investments and resource appropriation become subject to negotiation. While legal frameworks and administrative procedures may provide guidelines, they also become resources in unequal struggles between locally affected people, grassroots movements, intermediaries (such as traditional authorities, NGOs and local politicians), government (agencies), and transnational companies.

In chapter 4, Alejandro Mora Motta and Till Stellmacher provide a historical overview of the development of land tenure regimes in Chile. They show how the promulgation and reform of land tenure regimes, as well as environmental regulations and land use planning, served as means to misappropriate resources such as land, forests and water from the indigenous Mapuche. In a process of 'territorialisation' (Van der Geest et al., 1995), first colonial regimes and later the national government expanded their control over the land and resources formerly owned and managed by the Mapuche, by establishing regulations that facilitated individual land titling and the private appropriation of territories that had been communally used since

before colonization. Reforms not only provided the legal framework for investments, land appropriation and resource exploitation, but also led to extreme land concentration and the consolidation of an extractivist economy, which was mainly benefitting national elites and, later on, international investors. This development has had terrible social and environmental consequences.

Land commodification in Ghana and in other African countries have been object of intense debate in the last decades. It has also brought about civil society mobilization around “land grabbing” in Sub-Saharan African countries (Cotula et al., 2014; Cotula & Tienhaara, 2013). While the focus so far was mainly on international investors such as TNCs and state funds, in chapter 5, Laube and Ayamga argue that in this important debate, land appropriation by powerful local actors has fallen under the radar. In Ghana, for instance, reforms promoting modern land tenure, as well as policies driving agricultural commercialisation, have only resulted in limited international investment. The areas appropriated by local commercial investors are, in total, larger than those grabbed by transnational agribusiness. Also in Ayamga and Laube’s study area, local medium-scale commercial investors are behind most of the land deals. Although there the area grabbed by transnational agribusiness is larger, the authors argue that the total land acquired by domestic medium-scale investors is not only significant, but also generates more impacts on local peasants’ access to farmland and other natural resources. Medium-scale domestic investors have strong links to local politicians and elites, which gives them access to land farmed by smallholders and to forest reserves not targeted by transnational investors. Their political influence also makes resistance against them less likely. Thus, these internal investments have also proven problematic, arguably more than international ones.

In chapter 6, Darius Mwingyine, Millicent Akaateba and Wolfram Laube discuss the impact Ghanaian land reforms, which target the formalization of land tenure, the generation of land markets, and the implementation of rational land use planning, have for peri-urban land relations between local landowners and users in the regional capitals of Wa and Tamale. They show how in the context of urban population growth and high demand for land for residential and commercial development, traditionally controlled land becomes commodified and sold out by traditional

landowners and family heads. While this development deprives smallholders of access to land for agricultural production and endangers the generational contact in farming families, as limited farmland will be available for future generations of farmers, the chapter focuses on the dynamics of reform implementation. The reform aims at promoting the formalization of land relations and rational land use planning. Therefore, land surveying and the development of officially approved land use plans are now obligatory before land can be subdivided into plots for sale. However, the relationship between land technocrats and traditional landowners is ridden by power and knowledge imbalances. This, and the relatively high cost of surveying and plan development, allows technocrats from the government land sector agencies to take advantage and demand significant parts of the land being commodified as compensation for their services. On demand, they also redesign original land use plans so that land set aside for public uses can be sold to private investors – again for an in-kind compensation. The land technocrats' demands force landowners to sell additional land to finance the bureaucratic processes, thus increasing also the negative impact on farmers and the youth. Furthermore, their behaviour undermines the very objective of the reform, as rational land use planning becomes corrupted.

In chapter 7, Melissa R. Quispe-Zuniga, Daniel Callo-Concha, Rommel Plasencia and Klaus Greve discuss the effects of the promulgation of environmental laws and regulations in Peru. Peru is highly dependent on resource extraction revenues. This dependence and a series of neoliberal reforms have created an extremely favourable environment for mining projects, while the potential impacts of mining activities on local communities and their livelihoods were widely neglected. This has been met with local, national and international criticism. As a response to this opposition, the government of Peru has introduced comprehensive environmental reforms meant to curb the existing problems. The authors focus on reform implementation in remote areas of Peru, where mining-related conflicts are building up. Based on data collected in 14 mining-affected campesino communities where there is no active conflict, the authors present communities' perceptions of environmental institutions and laws and inquire which factors contribute to the unleashing of conflicts. They argue that in their research area the environmental legislation, which itself is in danger of being watered down, is being implemented by weak environmental agencies,

which seriously lack adequate staff, capacities, resources and coordination with other state institutions. The authors show that the official environmental agencies fail to be present in mining-affected communities and resolve mining-related disputes regarding water and land before they escalate into conflicts, with very negative impacts for campesino livelihoods and the perceived legitimacy of state institutions itself.

### **PART III: Regulation or Negotiation? Actors' Strategies in Local Conflicts Surrounding Extractive Industries**

Two more chapters address the way in which the potential benefits of resource investments as well as the (spatial) extent of mining activities are negotiated across local and national levels.

In chapter 8, Rodrigo Salles Pereira dos Santos and Bruno Milanez, inspired by the 'global production network' approach (GPN) – a framework conceived to study corporations that coordinate their activities transnationally – discuss how different actors involved in the mining sector of Minas Gerais, Brazil, strategize in conflicts over environmental degradation, pollution, and the rights of workers. They analyse three mining conflicts – each during a different stage of the mining cycle – examining political strategies various actors employ to promote their respective interests. Underlying static, dynamic, structural and relational aspects of power vary according to the context. In some of the studied conflicts, actors take conflicts to court, to be decided according to official laws and regulations, in others they rely on political networking, public awareness raising or even illegal action. Other conflicts do not even unfold publically, as companies and bureaucrats are sometimes able to inhibit the problematization of relevant socio-environmental issues in the public domain. Despite huge power imbalances, however, the outcomes of conflicts are not predetermined. Less powerful actors, such as mining-affected communities or mine workers, are at times also able to succeed. Therefore, in a quest to contribute to GPN theory development, the authors argue, that instead of focusing on structural aspects of power only, researchers need to consider the fluid power relations and political strategies that unfold in concrete conflict contexts.

In chapter 9, Mohammed Asaah and Wolfram Laube discuss how in the Western region of Ghana, following the start of oil and gas extraction in the early 2010s, the siting and construction of a large gas-processing plant led

to inter-communal conflict and prolonged negotiations between local youth groups, traditional authorities, NGOs, government agencies, and regional and national politicians. In a situation where the production of oil and gas had not generated significant benefits for the local population, the siting of the gas plant – and its potential benefits in terms of infrastructure enhancement as well as employment and business opportunities – became a bone of contention. For opaque political and/or technical reasons, the location of the plant was moved from one community to a neighbouring one. The decision to relocate the plant aroused extreme anger in the original host community. Feeling deprived of opportunities, a youth group, with the help of traditional authorities and local politicians, started lobbying to relocate the factory back to the originally planned site. They did so by trying to raise public awareness, informing the press, cooperating with NGOs, and by petitioning the president of the country. They tried to argue based on official policies and regulations, but as politicians from the new host community held important positions in the government hierarchy, their protests seemed to be futile. When they were about to upscale their protest, local representatives were invited to meet the president of Ghana, nevertheless without tangible results. They were warned to end the protests and promised to be considered in case future development opportunities would materialize. Empty-handed, but happy that their voices had been heard by the president, local actors discontinued their opposition and the gas plant was built in the neighbouring community. Despite being unsuccessful, the example shows which strategies less powerful actors can try to employ in contexts in which legal provisions and regulations are seemingly less important than political power.

Moving from grand international legal engineering to the nitty gritty of local conflicts surrounding extractive industry projects, this book provides an array of studies from scientists of diverse academic backgrounds, from natural sciences, ecology and engineering to law, economics, political sciences, sociology, development studies and anthropology. The common interest was to understand how far international law, national regulations, as well as political activism and social movements are able to ‘civilize’ extractive industries, i.e. to reduce the negative social, political, economic and environmental impacts that many extractive investments have. While the global economy, nation states and local communities continue to depend

to some extent on the resources and profits provided by extractive investments, attempts to make these investments truly inclusive and sustainable often fail. This is not to say that legal reforms, legal action, environmental assessments, political activism and skilful political negotiation cannot have any ‘civilizing’ effects. However, as these studies show, still much needs to be done.

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