The Rise of Public Trusteeship in International Environmental Law

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This essay is a tribute to five old friends and distinguished Haub Prize laureates: Joseph Sax, Russell Train, Alexander Kiss, Cyril de Klemm, and Edith Brown Weiss. All five of them, each in their own way, have made major scholarly contributions to the recognition of an ancient legal concept which experienced a phenomenal comeback in modern environmental law over the past forty years: viz., public trusteeship for the Earth’s natural resources.

Let me start out by explaining where the “public trust doctrine” (PTD) comes from, what it is, – and what it is not. I will then try to summarize the distinct contributions of our five ICEL colleagues to the development and elaboration of the doctrine, and conclude with a few observations on its prospects in the current context of international legal theory and practice.

I.

The origins of the public trust can be traced back to Roman law, and to a famous maxim in the Corpus Iuris Civilis of Emperor Justinian I. (533 AD), based in turn on the earlier writings of a learned jurist, Aelius Marcianus (c. 220 AD): “So surely by the law of nature, the atmosphere, watercourses, the sea and hence the seashores, are common to all.”

From the 18th century onwards, English courts interpreted this text as not only excluding private property rights in tidelands and navigable waters, but also as conferring fiduciary (trusteeship) rights and duties on the sovereign so as to ensure public access for the benefit of “the people”. US courts in the 19th century took the British Crown’s trusteeship title to

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seashore areas as having been transmitted to the American colonies upon statehood, thereby designating the state governments as the “public trustees” to ensure beneficial uses of navigable territorial and internal waters as well as subjacent lands. Subsequent US jurisprudence gradually extended the scope of public trusteeship to a broader range of natural/environmental resources, including living resources (fisheries, forests, and wildlife), while seeking to balance state and federal competences in this field. A 19th century Supreme Court decision, confirming a state’s power to regulate the common property in game “as a trust for the benefit of the people,” was thus partly overruled in favour of federal regulation, even though overall public trusteeship for wildlife now seems firmly established.

Interpretation of the public trust doctrine differs from state to state; and has also been codified in state legislative and constitutional provisions. The idea of a state’s fiduciary...
rights over certain natural resources – “a sort of guardianship for social purposes”, in the words of Roscoe Pound,\(^9\) – has since been taken up by a number of courts and legislatures outside the United States, including a series of landmark decisions by the Indian Supreme Court,\(^10\) environmental legislation in South Africa,\(^11\) and the Constitution of Uganda.\(^12\)

\(^9\) E.g., see Article 1(27) of the Pennsylvanian Constitution (as amended in 1971): “Pennsylvania’s natural resources are the common property of all the people, including generations yet to come; as trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people;” *Purdon’s Pennsylvania Statutes and Consolidated Statutes Annotated* (St. Paul, MN: West, 2012), vol. 1. On subsequent restrictive interpretations of that article by Pennsylvanian state courts, see M.T. Kirsch, “Upholding the Public Trust in State Constitutions”, *Duke Law Journal* 46 (1997), pp. 1169-1210.


At this point, however, it is important to dispel some myths and misunderstandings about the nature of public trusteeship in the context of comparative environmental law. To begin with, the public trust over natural resources is a concept that belongs to the field of public law (including constitutional and administrative law and institutions), and should not be confused with classic legal analogues in the field of private property law – such as the Anglo-Saxon common law of private trusts, and corresponding contractual institutions in continental Europe (fiducie, Treuhand). Since most contemporary civil law systems have no direct equivalent of the trust in either private or public law, references to trusteeship thus

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13 Constitution of Uganda (8 October 1995), Article 237(2): Government “shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens”; applied to forest conservation by decision of the Kampala High Court in Advocates Coalition for Development and Environment (ACODE) v. Attorney General (2005), Misc. Cause No. 0100 of 2004, p. 10. For further examples from other legal systems, see M.C. Blumm and R.D. Guthrie, “Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision”, University of California Davis Law Review 45 (2012), pp. 741-808.


tend to be either mistranslated,\textsuperscript{18} or else discarded as “inappropriate private-law analogies” by lawyers outside the common-law family.\textsuperscript{19}

On the other hand, there are some striking similarities to the German constitutional law concept of social restrictions on property rights (\textit{Sozialpflichtigkeit}),\textsuperscript{20} and on the use of certain natural resources dedicated as public goods (\textit{öffentliche Sachen}),\textsuperscript{21} often by way of servitudes or easements ensuring public access,\textsuperscript{22} facilitated by procedural instruments such as “fiduciary” rights of action for non-governmental organizations (NGOs).\textsuperscript{23} Along the same lines, the concept of \textit{domaine public} in French public/administrative law has been identified...
as a parallel to the Anglo-American public trust, investing the state with custodianship (droit de garde, rather than ownership) over inalienable natural resources such as the seashore, which must remain accessible for everybody. In Italy, state authorities designated as trustees for the community interest may take judicial recourse for damage to the nation’s environmental resources. In Sweden, the Nature Conservation Board has since 1964 served as public trustee for protected natural areas; and as in other Scandinavian countries (Denmark, Finland, Iceland, Norway), customary law (allemansrätt) guarantees access to wilderness areas and wildlife resources regardless of ownership. A further parallel is the charitable habûs or waqf in Islamic legal systems, where nature conservation is considered one of the legitimate dedication purposes.

While these examples will hardly suffice to elevate the public trust doctrine to a mutually recognized general principle of law, they furnish empirical evidence of the growing transnational/transcultural convergence of environment-driven legal institutions.

II.

Most of the credit for the revival of the public trust in US environmental law is due to the work of Joseph L. Sax. His seminal article in the Michigan Law Review established the doctrinal basis for the 1970 Michigan Environmental Protection Act which he drafted, and which in turn has served as a template for subsequent legislation at both state and federal level, as well as an authoritative reference source for courts and jurists in the United States and abroad. The “Saxion vision” broadened the scope of public trusteeship from its narrower historical origins to the full spectrum of environmental resources, while at the same time empowering the ultimate beneficiaries of the trust (i.e., civil society) to enforce the


36 E.g, see the Indian Supreme Court case of Mehta v. Kamal Nath (note 11 supra), at p. 260.

37 Blumm and Guthrie (note 13 supra).

terms of the trust against the trustees by way of citizen suits, on a par with traditional private property owners, “simply by virtue of their status as members of the public”.40

In 1972, Russell E. Train (at the time head of the US Council on Environmental Quality) submitted a draft entitled World Heritage Trust Convention to UNESCO.41 Although the term “trust” was subsequently deleted from the draft, – apparently because the word was considered untranslatable into French, – the world heritage treaty regime as it subsequently evolved may well qualify as the first instance of transnational public trusteeship:43

(a) world heritage sites are dedicated [as corpus of the trust] through nomination by a host state and acceptance of the nomination by the World Heritage Committee (WHC) representing the community of all member states [as collective trustor/settlor];


(b) the host state of a site [as trustee] incurs fiduciary duties to protect and conserve the site so dedicated for the benefit of present and future generations of “all the peoples of the world” [as beneficiaries], and to report to the trustor [and the co-trustees] through the WHC on the conservation status of the site (so-called active monitoring); and

c) the beneficiaries, represented by civil society organizations, 44 may invoke the terms of the trust to hold the host/trustee state accountable for non-compliance with the terms of the trust, either through their national courts, 45 or through the WHC by requesting the down-listing of a site as “world heritage in danger”, or eventual de-listing (reactive monitoring). 46 In view of its wide transnational media attention in particular, the WHC down-listing/de-listing practice thus evolved into an effective participatory instrument to induce compliance with the trusteeship regime. 47

In 1982, the prospect of globalizing public trusteeship for environmental protection was seized upon in the memorable Hague lectures of Alexandre-Charles Kiss, on “The Concept of Common Patrimony of Humankind”. 48 Relating the American public trust doctrine to the

45 Several WHC cases brought by NGOs in Australian courts are reviewed in B. Boer and G. Wiffen, Heritage Law in Australia (Oxford: Oxford University Press, 2006). See also the South African High Court decision in Hout Bay Residents’ Association et al. v. Entillini Concession Ltd., Case No. 7648/12, Western Cape High Court (Cape Town, 6 June 2012).
French legal doctrine of domaine public international, and expanding Arvid Pardo’s contemporaneous proposal of an “ocean trust”, he highlighted parallels to the trusteeship regimes instituted by the League of Nations and the United Nations, for purposes of fiduciary territorial administration entrusted/mandated to states on behalf of the international community. In his view, common environmental heritage “implied a form of trust”, illustrated not only by the World Heritage Convention but also by the Antarctic regime and the seabed regime of the Convention on the Law of the Sea.

Also in 1982, Cyril de Klemm presented a ground-breaking report to the Third World Congress on National Parks in Bali, entitled “Protecting Wild Genetic Resources for the Future: The Need for a World Treaty”, which prompted IUCN to initiate the drafting of a global convention on biological diversity. His basic proposition – the inspiration for which he attributed to an earlier proposal by Norman Myers – was to apply elements of public

49 Ibid., pp. 128/fn. 59 and 131/fn. 82, specifically referring to the writings of Joseph Sax and comparing them to theories developed by Georges Scelle, in his Droit international public: Manuel élémentaire (Paris: Domat-Montchrestien, 1944), yet considered to be “too closely linked to a national legal system to be universally acceptable”.


51 Kiss (note 48 supra), at 132-134.


trusteeship to the governance of global biological resources,\textsuperscript{57} distinguishing the conservation of \textit{genotypic} wildlife species (viewed in abstract terms as humankind’s non-renewable genetic capital)\textsuperscript{58} from traditional conservation regimes for existing \textit{phenotypic} wildlife specimens and populations (viewed in concrete terms as renewable natural resources under national sovereignty or in areas beyond national jurisdiction).\textsuperscript{59}

It was \textbf{Edith Brown Weiss} who injected a distinct inter-generational emphasis into the international legal debate on environmental trusteeship, first formulated in 1984 in an essay on “The Planetary Trust: Conservation and Intergenerational Equity”,\textsuperscript{60} and elaborated in the context of a project on “innovation in international law” sponsored by the United Nations University under the general editorship of Richard Falk.\textsuperscript{61} Casting her net over a wide range of historical sources from different cultural traditions,\textsuperscript{62} she identified three principles of intergenerational trusteeship with regard to the Earth’s natural and cultural resource base: “conservation of options” available to future generations; “conservation of quality” comparable to that enjoyed by previous generations; and “conservation of access” for all

\begin{itemize}
\item \textsuperscript{60}\textit{Ecology Law Quarterly} 11 (University of California at Berkeley, 1984), pp. 495-581.
\item \textsuperscript{62}Including (at p. 20/fn. 13) a famous quote from Karl Marx, \textit{Das Kapital} (1865, F. Engels ed. 1884), vol. 3 ch. 46; “Ökonomische Manuskripte 1863-1867”, reprinted in \textit{Marx-Engels-Gesamtausgabe} part II vol. 4 (Berlin: Dietz, 1992), p. 718: “Even society as a whole, a nation, or all contemporary societies taken together, are not owners of the Earth. They are merely its occupants, its users; and as diligent guardians [\textit{boni patres familias}], must hand it down improved to subsequent generations.”
\end{itemize}
members of the present generation. The rights and obligations deriving from these principles thus provide a normative framework for implementing the global goal of environmentally sustainable development, as expressed in the 1987 Report of the Brundtland Commission.63

III.

So where do the pioneering efforts of these five ICEL scholars leave us in the discourse on contemporary international environmental law? There has indeed been a number of proposals to “internationalize” the public trust doctrine,64 by applying it more broadly – to Antarctica;65 to the Amazon rainforest;66 to all genetic resources, or to designated endangered


species, protected areas or biological resources; to shared water resources; to regional seas; to ocean resources in general; to the atmosphere as a whole; to the global seas; to ocean resources in general; to the atmosphere as a whole; to the global


commons; or the entire global environment. In a few cases, the concept of trusteeship arose in the context of international adjudicatory proceedings – from the 1893 Pacific Fur Seal Arbitration to several judgments by the Court of Justice of the European Union and a much-quoted separate opinion by Judge Weeramantry in the International Court of Justice.

Alas, the somewhat inflationary invocation of trusteeship as an ethical equivalent of “stewardship”, “custodianship” or “guardianship”, is often purely metaphoric/rhetoric and


74 Bering Sea Fur Seals Fisheries Arbitration (Great Britain v. United States, 15 August 1893); J.B. Moore (ed.), History and Digest of the International Arbitrations to which the United States has been a Party (Washington, DC: GPO, 1898), vol. 1, pp. 755-951, at 814 and 853 (US Government claiming to act as “trustee for the benefit of mankind”).


78 E.g., Canada’s “custodial” justification for extending coastal jurisdiction to 100 miles under the 1970 Arctic Waters Pollution Prevention Act; see J.A. Beesley, “The Canadian Approach to International Environmental Law”, Canadian Yearbook of International Law 11 (1973), pp.
Moreover, the concept of environmental public trust should be distinguished from the multitude of “international trust funds” established over the past 40 years for a variety of purposes, including environmental conservation. The “trustees” designated under those arrangements usually are international organizations – such as the United Nations and its specialized agencies, the World Bank and other multilateral financial institutions, as well as NGOs (such as the World Wildlife Fund). Prominent examples are the World Heritage Fund set up in 1972 as “a trust fund in conformity with the financial regulations of UNESCO”; the special Environment Fund of UNEP, with over 90 “trust funds for specified purposes” established within its framework since 1973; and the


83 Although WWF International was established (in 1961) as a foundation under Article 80 of the Swiss Civil Code (considered the closest analogy to a charitable trust in Switzerland), its international board even today is referred to as the “board of trustees”.

84 See note 42 supra.

85 Established by UN General Assembly Resolution 2997 (XXVII) III (15 December 1972), “to provide for additional financing of environment programmes”; see UNEP, Compendium of Legislative Authority (Oxford: Pergamon, 1978), p. 42.

86 Including 47 “general trust funds” to support UNEP-sponsored environmental conventions and protocols, and a similar number of technical cooperation funds to support participation by developing countries; see the Report of the Executive Director on Management of Trust Funds and Earmarked Contributions, Doc. UNEP/GC.27/11/Rev.1 (15 February 2013), p. 2.
environmental funds established under World Bank auspices, including the 1991/1994 “Global Environment Trust Fund” (basic resource of the Global Environment Facility, GEF), the 1992 Rain Forest Trust Fund, and the 1999 Prototype Carbon Fund (PCF), along with related implementing national trust funds. However, even though the application of general fiduciary principles to these innovative financial mechanisms has long been postulated, they must not be confused with public trusteeship in the sense of Joseph Sax or Cyril de Klemm. The corpus/asset of these so-called trust funds is not the “natural capital” (i.e., the environmental resources) for the conservation of which the trustee state under a true public trust would be responsible to the beneficiaries, but merely the financial assets raised from contributions to those funds, for the administration of which the trustee organization is accountable to the donors.

Yet, genuine public trusteeship has also begun to manifest itself in global environmental governance. True enough, an early proposal by UN Secretary-General U Thant to include the concept in the 1972 Stockholm Declaration was unsuccessful at the time; and a later proposal by Secretary-General Kofi Annan in 1997 (to reconstitute the UN Trusteeship

90 Notes 34 and 57 supra.
91 Bantekas 2009 (note 81 supra), p. 170, questioning whether some of these funds (such as the PCF) even qualify as trusts (pp. 189-190); see also Bantekas 2010 (note 81 supra), p. 279 (PCF as “an abuse of the trusteeship model envisaged under the international law of trusts”). – Most UNEP “trust funds” (n. 86 supra) are actually little more than special accounts for earmarked (voluntary or assessed) contributions; Sand (note 80 supra) p. 174, and Bantekas 2009 (note 81 supra) p. 252.
Council as a global environmental forum) suffered an inglorious death by committee. There are, however, at least two existing multilateral treaties which – like the World Heritage Convention – may indeed be considered as incorporating new public trusteeship regimes:

(1) Ten years after the Stockholm Conference, the UN Convention on the Law of the Sea (UNCLOS) designated certain resources of the high seas area under the jurisdiction of the International Sea-Bed Authority (ISA) as “common heritage of mankind”, thereby establishing what has been labelled “one of the most developed applications of trusteeship or fiduciary relationship in an environmental context”. It should be kept in mind, though, that UNCLOS/ISA trusteeship is limited to the mineral resources of the area, and – contrary to Arvid Pardo’s original common heritage vision – does not extend to marine living resources.

(2) Almost twenty years later again, the FAO Assembly adopted the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR). While retreating


94 See P.H. Sand, “Environmental Summitry and International Law”, Yearbook of International Environmental Law 13 (2002), pp. 21-41, at 34-35. The matter has since been mooted by UN General Assembly Resolution 60/1 of 16 September 2005, winding up the Trusteeship Council as defunct.


97 UNCLOS (note 95 supra) Article 133.


from the “common heritage” language of its forerunner (the 1983 International Undertaking on Plant Genetic Resources, IUPGR)\(^{100}\) in favour of a less controversial “common concern” formula,\(^{101}\) the ITPGR succeeded in striking a balance between sovereign rights, intellectual property rights and farmers’ collective rights, by consolidating a de facto trusteeship regime for twelve major international ex situ plant germplasm collections under the auspices of the Consultative Committee on Agricultural Research (CGIAR):\(^{102}\)

(a) the germplasm material listed in Annex I of the treaty (including wild predecessors of 35 cultivated food crop genera and 29 forage species) is designated as the corpus of the trust, pursuant to a model “in-trust agreement” (ITA) under which the host states and institutions [as trustees] agree to “hold the designated germplasm in trust for the benefit of the international community, in particular the developing countries;”\(^{103}\)

(b) transnational access under this multilateral system is governed by a standardized materials transfer agreement (SMTA, adopted in 2006), which also addresses benefit-sharing issues – in somewhat uneasy coexistence with the Convention on Biological

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\(^{103}\) ITPGR, Article 3; on the evolution of these agreements (since 1994), see E. Gotor et al., “The Perceived Impact of the In-Trust Agreements on CGIAR Germplasm Availability: An Assessment of Bioversity International’s Institutional Activities”, *World Development* 38 (2010), pp. 1486-1493.
Diversity, and its 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS), and compliance with the treaty is monitored and controlled by a Compliance Committee (established in 2006) reporting to the ITPGR Governing Body under procedures adopted in 2011. However, there is little or no procedural opportunity so far for the actual participation of civil society, currently represented predominantly by business stakeholders in the regime.

Admittedly, these empirical examples still are fragmentary, and a far cry from the grand design of our five Haub Prize laureates. Questions remain, in particular, as to the most appropriate and most effective representation of an international public trust’s beneficiaries (viz., present and future generations of civil society). Yet, growing practical experience with public participation in the enforcement of international environmental law, developed by innovative national jurisprudence, and by new transnational review mechanisms such as the

104 Note 55 supra; see T. Lochen, Die völkerrechtlichen Regelungen über den Zugang zu genetischen Ressourcen (Tübingen: Mohr Siebeck, 2007), pp. 228-229.
Compliance Committee of the 1998 Aarhus Convention,\textsuperscript{110} demonstrate that these procedural problems are not insurmountable. Through a creeping cross-cultural process of diffusion between legal systems (defined as “\textit{mimesis}” by historian Arnold Toynbee),\textsuperscript{111} and a parallel metamorphosis from the national to the international level (“vertical transplant”),\textsuperscript{112} the \textit{fiduciary} accountability of states for their sustainable management of the Earth’s natural resources seems well on its way to becoming a common “\textit{memetic}” reference term for the future evolution of international environmental law.\textsuperscript{113}


\textsuperscript{111} A.J. Toynbee, \textit{A Study of History: Reconsiderations} (Oxford: Oxford University Press, 1961), vol. 12, at p. 343 (“the reception and adoption of elements of culture that have been created elsewhere and have reached the recipients by a process of diffusion”); see also K. Kern et al., “Die Diffusion umweltpolitischer Innovationen: ein Beitrag zur Globalisierung von Umweltpolitik”, \textit{Zeitschrift für Umweltpolitik und Umweltrecht} 23 (2000), pp. 507-546.
