

The Public Trust Doctrine and Rio+20

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Setting humanity on a sustainable course will require striking a balance between the use of natural resources and their conservation. A widespread but often overlooked doctrine called the Public Trust Doctrine (PTD) provides a legal foundation and implementation framework for achieving sustainable resource use. Two key topics at Rio+20 in particular could be clarified by applying the PTD: 1) protecting the rights of future generations to functioning ecosystems and 2) governing resources beyond national jurisdiction. We recommend that the notion of the “Public Trust” be incorporated into the conversations regarding institutional frameworks for sustainable development at Rio+20.

We know the Earth's resilience and resource base cannot be stretched infinitely and we are uncomfortably aware that we are heading in the wrong direction. The question that remains is how we can better manage our relationship with nature.

– Third Nobel Laureate Symposium on Global Sustainability¹

The Public Trust Doctrine – An Introduction

The Public Trust Doctrine (PTD) provides a simple mandate that governments must manage common natural resources in the sole interest of their citizens. Traced to the Institutes of Justinian in 533 AD,² the notion of the Public Trust has a long and storied history and is particularly germane to the ongoing Earth-wide discussion in preparation for Rio+20 about achieving sustainable development. Improving national and international governance of marine and fresh waters, terrestrial and aquatic wildlife,

¹ Third Nobel Laureate Symposium on Global Sustainability. 2011. Executive Summary of Scientific Background Reports, p.11.

² "By the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea." Institutes and Digest of Emperor Justinian I, II.1.1.

and the atmosphere is critical to achieving a successful transition to global sustainability.³

The PTD states that 1) certain common natural resources cannot be subject to private ownership and instead are held within a Public Trust; 2) governmental authorities are trustees of the Trust; and 3) the beneficiaries of the trust – which include current *and* future citizens – may hold the trustees accountable for degradation of the Trust resources.⁴ The PTD has been incorporated into numerous States' constitutions and laws, including important judicial opinions, and manifests in some well-known international instruments.

The PTD in National Law

The PTD appears in the laws of many States, including Australia, Brazil, Canada, Ecuador, Eritrea, India, Kenya, Nigeria, Pakistan, Philippines, South Africa, Sri Lanka, Tanzania, Uganda, and the United States. These States' courts and legislative bodies have invoked the PTD to, *inter alia*, protect forests and fresh water and assert citizens' ownership of gas and oil resources against impinging private claims.⁵ For example, in 1996, the Supreme Court of India declared:

The State is the trustee of all natural resources which are by nature meant for public use and enjoyment, and the public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.⁶

The PTD in International Law

Though the concept of public trusteeship has mainly been developed at the national level, a number of treaties and proceedings of international bodies incorporate PTD principles. The World Heritage Convention⁷ and the 2001 FAO International Treaty on Plant Genetic Resources for Food and Agriculture⁸ include notions of trusteeship for global beneficiaries, both current and future. Additionally, the UN Convention on the Law of the Sea declares that the international seabed area (i.e., the global seabed beyond national jurisdiction) and its mineral resources are the common heritage of

³ Ostrom, E., J. Burger, C.B. Field, R.B. Norgaard, D. Policansky. 1999. Revisiting the Commons: Local Lessons, Global Challenges. *Science* 284: 278-82. See also the Foundation for the Good Governance of International Spaces, www.ourspace.org.uk.

⁴ Sand, P.H. 2007. Public Trusteeship for the Oceans. In: Ndiaye and Wolfrum (eds.), *Liber Amicorum Judge Thomas A. Mensah*, pp. 521–544.

⁵ Blumm, M.C. and R.D. Guthrie. 2012. Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision. *U.C. Davis Law Review* 44: *tbd*.

⁶ M.C. Mehta v. Kamal Nath et al., 1997 1 S.C.C. 388.

⁷ 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage. Article 4 establishes a duty for each State to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage in its territory.

⁸ The Treaty notes in its preamble that parties are aware of their responsibility to past and future generations to conserve the World's diversity of plant genetic resources for food and agriculture.

mankind,⁹ vests all rights in the resources in “mankind as a whole,”¹⁰ and requires activities in the high seas seabed to be carried out “for the benefit of mankind.”¹¹

The PTD at Rio+20

This brief is intended to bring the notion of Public Trusteeship to the ongoing global conversation about sustainable development in anticipation of “Rio+20,” the 2012 United Nations Conference on Sustainable Development. Improving the stewardship of natural resources will be a vital part of transitioning to a sustainable future for humanity. The “trust” aspect of the PTD is vital to its utility: a large body of law concerning private and charitable trusts, particularly concerning intergenerational trusts, provides clear, tested directives to trustees and beneficiaries.¹² In providing rights to citizen beneficiaries and corresponding responsibilities to governmental and intergovernmental bodies, the PTD converts stewardship principles to substantive stewardship requirements.

How would a mandate to protect the interests of current and future citizens actually map onto complex decision-making regarding sustainable development?

As national governments and international bodies around the world increasingly engage in processes to achieve sustainable development, the PTD would 1) ensure these efforts are bounded by the overarching duty to make these decisions for current and future citizens; 2) provide a backstop to policymakers and resource managers seeking to make decisions in the interest of long-term sustainability against the wishes of short-term interests; and 3) support the creation of mechanisms and tribunals, which citizen beneficiaries could engage to ensure that their interests are protected.

We propose using the notion of public trusteeship to frame the conversation about managing natural resources for current and future generations at the Rio+20 conference. To this end, we focus on elucidating how the PTD particularly informs the principle of intergenerational equity and the governance of international common resources.

The PTD as Foundational Legal Principle for Intergenerational Equity and Sustainable Development

The notion of intergenerational equity springs from the idea that it is unfair for the current generation to limit the choices of future generations by destroying natural resources, and it appears throughout international environmental law.¹³ Echoing this idea is the very definition of sustainable development, “development that meets the needs of the present without compromising the ability of future generations to meet

⁹ 1982 United Nations Convention on the Law of the Sea (UNCLOS), Article 136.

¹⁰ UNCLOS, Article 137.

¹¹ UNCLOS, Article 140.

¹² Scott, A. 1999. Trust law, sustainability, and responsible action. *Ecological Economics* 31: 139-154.

¹³ E.g., The preamble of the 1946 International Whaling Convention (“recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks.”), as well as treaties cited in footnotes 7 and 8.

their own needs.”¹⁴ Since the 1972 Stockholm Declaration,¹⁵ international environmental instruments have repeatedly invoked the need to protect the interests of future generations.¹⁶ However, doing so has proven difficult.

Consequently, one of the key recommendations of the 2011 Nobel Laureate Symposium on Global Sustainability was to explore new institutions to “address the legitimate interests of future generations.”¹⁷ The UN Secretary-General’s High-level Panel on Global Sustainability also concluded that bolstering the accountability of governments to current and future citizens is crucial to achieving sustainable development:

Sustainable development demands substantially increased levels of accountability – not only for results in the short term, but also for the long-term consequences of our actions, both for today’s generation and for those who will inherit the world we have left for them.¹⁸

Previously, Principle 10 of the 1992 Rio Principles had also emphasized the role of accountability in achieving sustainable development by citing the importance of public participation, information sharing, and access to judicial remedy.¹⁹

The “Zero draft” of the Outcome Document at Rio+20 includes mention of both the need to protect the interests of future generations and Principle 10.²⁰ Because the PTD encompasses both the imperative of intergenerational equity and the need for greater governmental accountability to achieve it, the PTD could supply a strong legal basis to the proposed establishment of an “Ombudsperson, or High Commissioner for Future Generations,” as well as underlie “steps to give further effect to Rio Principle 10 at the global regional and national level.”²¹

By requiring governmental trustees to treat the interests of current and future citizens equally in their decision-making about common natural resources, the PTD provides a philosophical framework for structuring the relationship among generations of citizens, governmental bodies, and natural resources. Additionally, in States with

¹⁴ World Commission on Environment and Development. 1987. *Our Common Future*.

¹⁵ Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1972).

¹⁶ *E.g.*, “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” The Rio Declaration on Environment and Development, Principle 3. 13 June 1992. UN Document A/COF.151/5/Rev.1; Johannesburg Declaration on Sustainable Development. 4 September 2002. UN Document A/CONF.199/20.

¹⁷ Third Nobel Laureate Symposium on Global Sustainability. 2011. *The Stockholm Memorandum: Tipping the Scales towards Sustainability*, p. 5.

¹⁸ United Nations Secretary-General’s High-level Panel on Global Sustainability. 2012. *Resilient People, Resilient Planet: A future worth choosing*. New York: United Nations, p. 28.

¹⁹ The Rio Declaration on Environment and Development 1992 *supra* note 16. *See also*, Van Dyke, J.M. 1996. The Rio Principles and Our Responsibilities of Ocean Stewardship. *Ocean and Coastal Management* 31(1): 1-23.

²⁰ Bureau of the UNCSD Prepcom. January 10, 2012. *The Future We Want*, p. 10.

²¹ *Id.*

strong PTDs, the doctrine affords citizens a broad suite of rights, including the right to access information about the status of trust resources and the right to seek judicial relief when trustees alienate their duties.²² Therefore, a clear Public Trust framework could contribute key accountability mechanisms to institutions charged with protecting the rights of future generations to functioning ecosystems.

Bringing Clarity to the Governance of International Spaces and Resources

Despite some well-documented successes, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, international environmental governance has proved to be inadequate to address the threats from uncapped greenhouse gas emissions, overfishing, and pollution of the global commons. The philosophical and legal framework provided by the PTD could greatly clarify the governance of common resources that exist outside of national jurisdiction.

Though, to date, none has come to fruition, proposals for public trusteeship over international natural resources (e.g., Antarctica, living ocean resources in areas beyond national jurisdiction, and even for all global commons) are not new.²³ For example, in 1997, Secretary-General Kofi Annan proposed to re-establish the UN Trusteeship Council “as the forum through which member states exercise their collective trusteeship for the integrity of the global environment and common areas such as the oceans, atmosphere and outer space.”²⁴ Additionally, Judge Weeramantry has referred to a principle of trusteeship for earth resources,²⁵ and the UNEP Governing Council debated the idea in 2001.²⁶

To demonstrate the potential utility of explicitly applying the PTD to the governance of international common resources, we focus on the policy regimes regarding living ocean resources in marine areas beyond national jurisdiction, often called the “high seas.” To date, inadequately developed jurisprudence has led to lack of precision in dealing with international ocean governance. For instance, as States assert claims to their extended continental shelf seabeds in the Arctic, what are their responsibilities to the international community with regard to protecting the water column and ecosystems above their shelves? What is to be done about the differing rights to and responsibilities over continental shelves and seabed underlying the Arctic

²² Blumm and Guthrie 2012 *supra* note 5.

²³ Sand 2007, *supra* note 4.

²⁴ Report of the Secretary-General to the General Assembly, *Renewing the United Nations: A Programme for Reform*, UN Doc. A/51/950 (14 July 1997). This proposal was based on suggestions by Maurice Strong in 1988, Foreign Minister Guido de Marco in 1991, and the Commission on Global Governance in 1995 and was made moot by UN General Assembly Resolution 60/1 in 2005, which shuttered the Trusteeship Council (*Ibid.*).

²⁵ Judgment in the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep. 1. See also C.G. Weeramantry. 1992. *Nauru: Environmental Damage under International Trusteeship*. Oxford, UK: Oxford University Press.

²⁶ R. Estrada Oyuela. 2001. *Expert Consultations on International Environmental Governance*. UNEP IEG Working Document.

high seas, and how are they to be harmonized?²⁷ Lastly, how can the international community ensure fair and equitable sharing of benefits derived from marine genetic resources in areas beyond national jurisdiction?

The time seems ripe for States and international bodies to recognize that their proper role in governing high seas waters and resources (including those above their extended continental shelf) is that of public trustees. A coherent global oceans governance regime will require explication of this point, as well as mechanisms to enforce the responsibilities of State trustees by allowing beneficiaries or their appointed representatives²⁸ to seek judicial redress via international tribunals or mechanisms. We suggest that the trusteeship model can bridge the divide between the common heritage and common property principles. Additionally, under a clear public trusteeship framework, part of the revenues generated from the trust could be reinvested back into the high seas trust property for the purpose of managing the trust more effectively or for remediating damaged trust resources.

The Zero draft of the Rio+20 Outcome Document acknowledges the importance of “the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction”²⁹ and, in general, “integrated decision making to fill the implementation gap and promote coherence across institutions.”³⁰ By encompassing the key principles of resource stewardship, accountability, and intergenerational equity, the PTD provides a sufficiently flexible concept to help achieve coherence in high seas governance.

While trust is in essence a common law concept, the fundamental precepts of the PTD are broad enough to accommodate all the world’s legal systems and support integrated decision making with regards to international spaces and resources. Essential elements could include:

- 1) International areas and common natural resources, including the high seas and the wildlife therein, are held within a Public Trust;
- 2) All citizens, both current and future, are beneficiaries of the Trust; States are trustees; and designated international institutions, such as the United Nations General Assembly, are charged with overseeing the execution of the Trust by States; and
- 3) States and the beneficiaries of the Trust – the current and future citizens – are entitled to access information about the status of Trust resources; participate in decisions regarding Trust management; and seek justice to ensure the performance of the Trust.

²⁷ Berkman, P.A. and O.R. Young. 2009. Governance and Environmental Change in the Arctic Ocean. *Science* 324: 339-340.

²⁸ For discussion of proposals for an Ocean Guardian or High Commissioner for the Environment, see Sand 2007, *supra* note 4.

²⁹ Bureau of the UNCSD Prepcom 2012, *supra* note 20, p. 13.

³⁰ *Id.*, p. 5.

Conclusion

The big question is how we can become planetary stewards . . . and strike a long-term balance between human well-being and sustainable use of the Earth's ecosystems.
– Third Nobel Laureate Symposium on Global Sustainability³¹

In preparation for the 2012 UN Conference on Sustainable Development, the United Nations, State governments, and civil society organizations around the world are engaging in processes to deliberately plan how to transition to a sustainable global society. Improved stewardship of natural resources – for the benefit of current and future generations – is an oft-cited component of this transition. Despite the discussion of the public trusteeship concept in some international instruments, to date the surface of the Public Trust Doctrine has been scarcely scratched. We argue that an expanded, fully reinvigorated PTD should be applied to help clarify responsibilities and rights in the stewardship of natural resources to achieve equitable and just environmental governance regimes in the twenty-first century.

Further Reading

Blumm, M.C. and R.D. Guthrie. 2012. Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision. *U.C. Davis Law Review* 44: *tbd*.

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In Honor Of

This brief and all future work of this coalition of scholars are contributed in recognition of the life and work of Jon M. Van Dyke.

³¹ Third Nobel Laureate Symposium on Global Sustainability, *supra* note 1, p. 8.