Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision

Michael C. Blumm[†*] *& Rachel D. Guthrie*[**]

The public trust doctrine, an ancient doctrine emanating from Roman law and inherited from England by the American states has been extended in recent years beyond its traditional role in protecting public uses of navigable waters to include new resources, like groundwater, and for new purposes, like preserving ecological function. But those state-law developments, coming slowly and haphazardly, have failed to fulfill the vision that Professor Joseph Sax sketched in his landmark article forty years ago. However, in the last two decades, several countries in South Asia, Africa, and the Western Hemisphere have discovered that the public trust doctrine is fundamental to their jurisprudence, due to natural law or to constitutional or statutory interpretation. In these twelve countries, the doctrine is likely to supply environmental protection for all natural resources, not just public access to navigable waters. This international public trust case law also incorporates principles of precaution, sustainable development, and intergenerational equity; accords plaintiffs liberalized public standing; and reflects a judicial willingness to oversee complex remedies. These developments make the non-U.S. public trust

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. Some of the spelling and punctuation from foreign constitutions and statutes has been edited for clarity. This Article is dedicated to Professor Joe Sax, who has been an inspiration in and out of the legal academy for generations of teachers, students, and lawmakers; and to Professor Hap Dunning, whose 1980 symposium this one commemorates, and who probably saved Mono Lake from ecological destruction. Please direct comments to blumm@lclark.edu.

** J.D. Candidate 2012, Lewis and Clark Law School.

case law a much better reflection of Professor Sax's vision of the doctrine than the case law of the American states.

TABLE OF CONTENTS

***

INTRODUCTION

Thirty years ago, at the predecessor to this conference,[1] the attendees celebrated the public trust doctrine, which Professor Sax had exhumed,[2] and which the California Supreme Court soon extended in its famous *Mono Lake* decision of 1983.[3] Some contributors to that conference saw in the public trust doctrine the seeds of a new basic principle for environmental decision making beyond the trust doctrine's traditional scope of tidelands and navigable waters.[4] Although the scope of the public trust doctrine in the United States has significantly expanded over the last three decades,[5] more remarkable decisions have come from abroad, from what might seem to be unlikely venues.

This Article outlines the development of the public trust doctrine in ten diverse countries on four continents: India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada. In these countries, the doctrine has become equated with environmental protection and is frequently entrenched in constitutional and statutory provisions. Even more surprising is that the two countries with the most substantial public trust doctrine jurisprudence — India and the Philippines — have located the

[1] Symposium, *The Public Trust Doctrine in Natural Resource Law and Management*, 14 UC DAVIS L. REV. 181 (1980).

[2] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970); *see infra* Part II.

[3] Nat'l Audubon Soc'y v. Superior Court (*Mono Lake*), 33 Cal. 3d 419 (1983); *see infra* Part II.

[4] *See, e.g.*, Harrison C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 UC DAVIS L. REV. 357 (1980) (anticipating the *Mono Lake* decision); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, UC DAVIS L. REV. 195 (1980) (writing that we grow closer to the civil law in expanding public rights to waters); Charles F. Wilkinson, *The Public Trust in Public Land Law*, 14 UC DAVIS L. REV. 269 (1980) (extending public trust doctrine principles traditionally rooted in waters to federal public lands).

[5] *See, e.g.*, *In re* Water Use Permit Applications (*Waiahole Ditch I*), 9 P.3d 409, 445 (Haw. 2000) (reaffirming that the public trust doctrine applies to all water resources, including groundwater); Bos. Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 363, 367 (Mass. 1979) (stating right to wharf out over tidal land does not confer title, referring to *Commercial Wharf Co. v. Windsor*, 16 N.E. 560, 563 (Mass. 1888), and holding that even fee title over tidal lands is subject to public trust and must be used for legislatively-approved public use); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (holding that upland sands of privately owned beach must be available for public access); State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1133 (Vt. 1990) (concluding that the state's fee simple grant of littoral land to private owner did not extinguish *jus publicum*).

doctrine in natural law.[6] Courts, legislatures, and voters in the countries considered in this study have expanded the public trust doctrine significantly beyond the reach of the traditional doctrine as established in the *Mono Lake* decision, and perhaps even beyond the Saxion vision articulated over four decades ago.[7] The public trust doctrine is, in short, leading a vibrant and significant life abroad.

When Professor Sax wrote his first public trust article[8] — an enterprise that now is almost reflexively referred to as "seminal"[9] — the public trust doctrine was hardly a coherent doctrine. But Sax explained that the U.S. Supreme Court's nineteenth century decision in *Illinois Central Railroad v. Illinois*[10] had been employed by courts in Wisconsin, Massachusetts, and California to guard against the privatization of important public resources, like parks, submerged lands, and wetlands.[11] For Sax, the public trust was a vehicle to ensure the democratization of natural resources decision making.[12] This goal subsequently was extended into a full-fledged public property doctrine that now provides protection to public natural resources in a manner

[6] See *infra* Part III.A.1.a, 3.a.

[7] *See infra* Part II.

[8] Sax's Michigan article was followed by a book, JOSEPH L. SAX, DEFENDING THE ENVIRONMENT (1971), and an article on the Michigan Environmental Protection Act, Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974). He also wrote a contribution to the 1980 conference, *see infra* note 57, and a pair of articles on the relationship between the public trust doctrine and water rights, *infra* note 62, among many other publications.

[9] In a Westlaw Terms and Connectors search of All Law Reviews, Texts & Bar Journals, 105 results contained "sax" and "seminal" within the same paragraph, 92 results contained "public trust," "sax," and "seminal" within the same paragraph, and 49 results contained "public trust," "sax," "seminal," and "mich!" within the same paragraph (searched on February 25, 2011). *See, e.g.*, Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 55 (2010) (hailing how Professor Sax's article revitalized the Public Trust Doctrine).

[10] 146 U.S. 387 (1892).

[11] *See* Sax, *supra* note 2, at 491-95 (discussing parks in the context of Mount Greylock in Massachusetts (citing Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 117-19 (Mass. 1966)); *id.* at 509-10 (discussing submerged lands in Wisconsin (citing Priewe v. Wis. State Land & Improvement Co., 67 N.W. 918 (Wis. 1896)); *id.* at 528-30 (discussing development of tidelands protections in California).

[12] *Id.* at 558-61 (maintaining that administrative decision making may often be subject to the will of a "concerted minority" to the detriment of a "diffuse majority" when public resources are involved, such that the judiciary has room to democratize the political process by forcing the legislature to uphold its fiduciary duties).

similar to which the takings clause provides protection to private property.[13]

It is not too strong a claim to suggest that the *Mono Lake* decision, handed down three years after the 1980 conference, was inspired by that conference.[14] *Mono Lake* has been a leading public trust doctrine decision ever since.[15] The California Supreme Court's opinion made several enduring contributions to public trust jurisprudence. Notably, the court expanded the scope of the doctrine to include water rights, explaining that no water right was vested against the public trust.[16] The California court also ruled that the scope of the doctrine extended to all actions affecting navigable waters, and that the state had a continuing supervisory duty to protect public trust resources.[17]

Some U.S. courts, however, have been unwilling to accept the expanded geographical scope of the doctrine,[18] while others have gone

[13] *See, e.g.*, Richard Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987) (providing a surprising libertarian endorsement of doctrine over concerns about rent-seeking from interest groups able to capture legislatures).

[14] The *Mono Lake* decision cited articles from the 1980 conference no fewer than eight times. *See Mono Lake*, 658 P.2d 709, 712, 720, 728 (Cal. 1983) (citing Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 UC DAVIS L. REV. 233, 256-58 (1980)); *id.* at 719 & nn.15-16 (citing Stevens, *supra* note 8 at 197, 201); *id.* at 721-22 n.18, 729 (citing Harrison C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 UC DAVIS L. REV. 357 (1980)). The decision also cited Professor Sax's first public trust article twice. *Id.* at 719, n.15, 723-24 (citing Sax, *supra* note 2).

[15] For example, Westlaw's Citing References listed 94 cases that cite or mention *Mono Lake* as of April 9, 2011. Arguably, the *Mono Lake* decision was eclipsed by the *Waiahole I* decision in 2000, which extended the public trust doctrine to groundwater and expressly incorporated the precautionary principle into the public trust doctrine; Westlaw's Citing References lists 84 cases that cite or mention *Waiahole I* as of April 9, 2011, although it antedates *Mono Lake* by 17 years. *See In re* Water Use Permit Applications (*Waiahole Ditch I*), 9 P.3d 409, 445, 466-68 (Haw. 2000) (refusing to differentiate trust based on "categories of water" and reaffirming that the public trust applies to all waters, citing an earlier case, *Robinson v. Ariyoshi*, 658 P.2d 287 (Haw. 1982), which upheld the Water Commission's use of precautionary principle and recommending its use in future decisions).

[16] *Mono Lake*, 658 P.2d at 721.

[17] *Id.* (declaring non-navigable tributaries to navigable streams are subject to public trust, stating that "the dominant theme [of the public trust] is the state's sovereign power and duty to exercise continued supervision over the trust").

[18] *See, e.g.*, Mich. Citizens for Water Conservation v. Nestle Waters, N.A., 709 N.W.2d 174, 221 (Mich. 2006) ("[W]ater, while a resource common to all Michigan citizens, is neither owned by the state nor subject to the public trust doctrine absent a determination that the body of water in question is navigable."); *In re* Town of Nottingham, 904 A.2d 590 (N.H. 2006) (refusing to interpret the common law public trust doctrine to apply to groundwater); R.D. Merrill v. Wash. Pollution Control Hearings Bd., 969 P.2d 458, 467 (Wash. 1999) (stating that state statutes, not the

beyond the scope recognized by the *Mono Lake* court. For example, the Hawaii, Montana, and New Jersey Supreme Courts extended the doctrine to all non-navigable waters, groundwater, and beaches, respectively.[19] The Hawaiian court also interpreted the public trust to embrace the precautionary principle in order to encourage resource protection in the absence of conclusive scientific proof.[20]

However innovative the above decisions are, they have been outpaced by developments abroad. Somewhat surprisingly, the public trust doctrine has become internationalized and, in the process, moved to the forefront of environmental protection in several countries. In India, which has given the public trust doctrine the most detailed judicial consideration of any jurisdiction outside the United States, the doctrine has natural law origins and an extremely broad scope.[21] In Pakistan, the public trust is constitutionally entrenched.[22] In the Philippines, the doctrine was at the center of efforts to clean up Manila Bay.[23] In Uganda, the public trust was the vehicle to prevent

public trust doctrine, provide authority to regulate groundwater and other non-navigable waters).

[19] *See, e.g.*, *Waiahole Ditch I*, 9 P.3d at 445 (groundwater); Mont. Coal. for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1091-92 (Mont. 1984) (non-navigable streams); Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) (all recreational, even non-navigable, streams); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (beaches).

[20] *See Waiahole Ditch I*, 9 P.3d at 467 (stating "at minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest"). The precautionary principle states that if an action could potentially harm the public or the environment, in the absence of scientific consensus that the action is harmful, then the burden of proof that the action is harmful falls on those undertaking the action. *See generally* ARIE TROUWBORST, EVOLUTION AND STATUS OF THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW (2003) (discussing the international legal development and application of the precautionary principle).

[21] *See infra* Part III.A.1. Australia and Sri Lanka also likely have recognized the public trust doctrine in their jurisprudence. *See* Hon. Brian J. Preston, *Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia*, paper presented to the Law Society of New South Wales Regional Presidents' Meeting, Sydney, NSW, (July 21, 2006), http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Jul06_Preston.pdf/$file/Speech_21Jul06_Preston.pdf (citing *Willoughby City Council v. Minister Administering the Nat'l Parks and Wildlife Act* (1992) 78 LGRA (NSW) 19, 38 (Austl.), where the Land and Environment Court of New South Wales declared that national parks are held in trust by the state, and *Bulankulama v. Sec'y Ministry of Indus. Dev.*, App. No. 884/99, [2000] L.K.S.C. 243, 247 (Sri Lanka) where the Court struck a proposed contract between private mineral developer and government because the government failed to act properly as "trustee").

[22] *See infra* Part III.A.2.

[23] *See infra* Part III.A.3.

the transformation of the Butamira Forest Reserve into a sugar plantation.[24] In Kenya, the doctrine provided a remedy for the discharge of raw sewage into the Kiserian River,[25] while in Nigeria the public trust has yet to be the subject of case law.[26] In South Africa, the doctrine is of constitutional dimension and at the center of the country's statutes concerning environmental, water resources, minerals, and coastal zone management.[27] Brazil also has a wealth of constitutional provisions embracing the public trust,[28] while in Ecuador, the voters passed a constitutional initiative that entrenched the public trust doctrine into that country's basic governing document.[29] Finally, in Canada, the public trust supported the federal government's claim to damages from a forest fire — allegedly due to a licensee's negligence — and allowed a suit against the federal government for failing to maintain a common right to fish in Atlantic waters.[30]

This Article explores the internationalization of the public trust doctrine. Part I explains Professor Sax's vision of the public trust doctrine. Part II discusses the *Mono Lake* decision and its contributions to the doctrine. Part III examines the adoption and development of the public trust doctrine in twelve countries across four continents. The discussion begins in Southeast Asia with an assessment of the natural law-based Indian public trust doctrine that has substantially affected its natural resources decision making. The analysis then turns to Pakistan, where the Supreme Court has used original jurisdiction to interpret the public trust doctrine to protect coastal land from waste disposal, a residential area from an electric facility, and a township from mining that threatened water supplies. The next section considers the Philippines, whose natural law origin of the public trust doctrine has been endorsed not only by its Supreme Court but also by other branches of government and is now embedded in the Filipino Constitution.

The Article proceeds to analyze the public trust doctrine in Africa, first considering the Ugandan public trust doctrine, which has both constitutional and statutory bases. An investigation of the Nigeria public trust doctrine follows, where the doctrine is implicit in the

[24] *See infra* Part III.B.1.
[25] *See infra* Part III.B.2.
[26] *See infra* Parts III.B.2 (Kenya), III.C.3 (Nigeria).
[27] *See infra* Part III.C.4.
[28] *See infra* Part III.D.1.
[29] *See infra* Part III.D.2 (Ecuador).
[30] *See infra* Part III.D.3.

constitutional right to life. The discussion then turns to the public trust doctrine in Kenya, which has been incorporated into several provisions of the 2010 constitution, and to South Africa, which has embedded the public trust doctrine in that country's constitution and environmental statutes.

The study then moves to consider South and North America, looking first at Brazil, which has no judicial interpretation of the public trust doctrine but has public trust principles throughout its constitution. The ensuing section examines the initiative that led to the establishment of the Ecuador public trust doctrine. The final section turns to Canada and suggests that, despite its adherence to parliamentary supremacy, that country has considerable potential to adopt a viable public trust doctrine. The Article concludes that the rapid embracing of the public trust doctrine in these diverse countries evidences an evolution of the doctrine towards becoming a general principle of international law — a development perhaps beyond what Professor Sax envisioned in his pioneering article four decades ago.[31]

I. PROFESSOR SAX'S VISION OF THE PUBLIC TRUST DOCTRINE

When Professor Sax penned his influential article in 1970, the public trust doctrine was a fragmented collection of case law. In the best academic tradition, Sax collected those decisions,[32] rationalized them, and explained how they fit with the U.S. Supreme Court's rather mysterious decision in *Illinois Central Railroad v. Illinois*.[33] In that case, Justice Field, for a 4-3 Court, invalidated the state legislature's express grant to the railroad of most of Chicago Harbor lakebed.[34] For Sax,

[31] *See* Sax, *supra* note 2, at 556-57 (suggesting that the public trust doctrine could be applied to "controversies involving air pollution, the dissemination of pesticides, the location of rights-of-way, and strip mining or wetland filling on private lands in a state where governmental permits are required").

[32] Sax traced the origins of the doctrine to Roman and English law. *Id.* at 475-76.

[33] 146 U.S. 387 (1892).

[34] *Id.* at 452-53 (ruling that the public trust doctrine prevented the state legislature from granting over to a railroad — over the governor's veto and under suspicious circumstances — most of the lakebed of Chicago Harbor). Justice Shiras, writing for a three-member dissent, thought that the state had not violated the doctrine because it retained regulatory and revenue rights. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004) (providing a comprehensive review of the details of the railroad grant and the Court's decision and concluding that corruption probably explains the grant, but noting that downstate interests supported it because it promised to share revenues outside the city of Chicago).

who thought the public trust doctrine could be a "useful tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems,"[35] *Illinois Central* was the public trust's lodestar, a case that introduced a needed judicial skepticism in reviewing government giveaways of public resources.[36] However, Sax was clear that the doctrine did not prohibit all privatization of public resources; it was not "a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use."[37] Instead, the public trust prevented only substantial losses of public resources.[38]

Sax proceeded to show how the legacy of *Illinois Central* had affected judicial decision making in Massachusetts, Wisconsin, and California.[39] Massachusetts's Supreme Judicial Court rejected a ski resort for Mount Greylock, a state park,[40] because a state agency's authorization of a commercial resort on public lands conflicted with a judicial presumption that the state would not ordinarily privatize public resources without a clear statutory directive to do so.[41] Sax considered this result, requiring clear legislative authorization for the privatization of public resources, to foster democratization of decision

[35] Sax, *supra* note 2, at 474. To fulfill this role, Sax maintained that the doctrine had to meet three criteria: (1) it had to contain a legal right in the public; (2) it had to be enforceable against the government (he did not specify which government); and (3) it had to advance contemporary environmental quality concerns. *Id.*

[36] *Id.* at 489-91. Sax raised the issue of whether the courts, through the public trust doctrine, could restrain the excesses of the democratic process through this judicial skepticism of public resource giveaways. *Id.* at 491. He responded that courts can play a useful role in elevating low visibility decision-making by demanding explicit authorizing legislation and encouraging public awareness and participation in the administrative process by imposing proof burdens on agencies allocating trust resources. *Id.* at 497-99, 502, 508, 514, 558-61. A related point was that the trust doctrine could encourage greater democratization of decision-making by prohibiting the delegation to local entities of trust issues that are of statewide significance. *Id.* at 528, 531-34.

[37] *Id.* at 488.

[38] *See, e.g.*, *Ill. Cent. R.R.*, 146 U.S. at 452 (ruling that the state could grant some portions of the *jus publicum*, so long as the grant does not "substantially impair" the public interest in remaining portions).

[39] *Id.* at 491-546.

[40] Mount Greylock is the highest summit of the Berkshire Mountains, which surround Williams College, the senior author's alma mater.

[41] Sax, *supra* note 2, at 494-96. Sax went on to describe several ensuing Massachusetts cases that employed the *Greylock* reasoning to prevent filling of a great pond for a highway project and acquiring wetlands for another highway project. *See id.* at 499-502.

making by ensuring that public resources would not be lost in low visibility administrative decisions.[42]

Sax's study of Wisconsin cases produced similar conclusions: the public trust doctrine required explicit legislative directives to ensure that the public is informed when public resources are conveyed to private hands or more restrictive uses.[43] Proponents of such uses must bear the burden of demonstrating the consequent public benefits, and traditional notions of judicial deference to legislative choices and administrative discretion are not applicable.[44] Thus, the public trust doctrine was, according to Sax, "an ensurer of the efficacy of the democratic process."[45]

Sax's study of California cases led to different conclusions, as that state had conveyed much of its shorelands to private individuals and municipalities.[46] Concerning the former, Sax criticized the lower court decision in *Marks v. Whitney*, which ruled that the owner of a private tideland could fill the land because the owner had an unrestricted, vested title.[47] Sax argued that protecting the public interest in trust resources like tidelands required an open and visible public determination.[48] He anticipated the California Supreme Court's ensuing decision in the case, which reversed the lower court and held that the private landowner had no right to destroy the tidelands, drawing a sharp conceptual severance in the property rights of trust land held by private grantees.[49] According to the California Supreme Court, the landowner held only the *jus privatum,* which was cabined by the state's *jus publicum* in the tidelands.[50] As for municipal grantees,[51] Sax argued that California case law and statutes restricted

[42] *Id.* at 498-99.

[43] *See, e.g.*, *id.* at 514 (requiring "an open and explicit legislative decision").

[44] *Id.* ("[W]hen the public interest of a project is unclear, its proponents will have the burden of justifying the project and will not be allowed to rely on traditional presumptions of legislative propriety or administrative discretion.").

[45] *Id.* at 523.

[46] *Id.* at 524.

[47] *Id.* at 530-31 (discussing Marks v. Whitney, 80 Cal. Rptr. 606 (Ct. App. 1969)(enjoining the filling of a trust tideland by a private landowner)).

[48] *Id.*

[49] *Compare id.*, *with* Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971).

[50] *Marks*, 491 P.2d at 380, 381; *see* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 658-59 (2010) [hereinafter *Accommodation Principle*] (discussing the court's division of tidelands' title into two conceptually distinct estates).

[51] Sax, *supra* note 2, at 534 (discussing the tragedy of the commons in which there is a "disjunction between the perceived benefit to the local entity and the total impact of such local choices on the community of users as a whole").

municipal discretion and required that trust resources remain available for public use, analogizing the localism of municipalities to the profit motive of private landowners.[52] Similarly, both the state legislature and state agencies had an obligation to maintain public uses of trust resources, and courts would view commercial or private-use projects with skepticism.[53]

Sax acknowledged that not all states had recognized the judicial skepticism he observed in his principal case studies,[54] but he thought that the public trust doctrine had considerable potential to expand beyond the traditional cases, which had concentrated on submerged lands and, to a lesser extent, parklands. Sax specifically mentioned air pollution, pesticide use, utility rights-of-way, strip mining, and wetland fills on private lands as promising areas for public trust doctrine growth.[55] He encouraged courts to see the public trust doctrine as a useful vehicle of judicial oversight to promote democratization of legislative or administrative decision making when (1) diffuse public uses are threatened with resource alienation at below market value, (2) the government invests private interests with the power to make resource decisions, or (3) the government proposes to reallocate public uses to private uses.[56] Sax was certainly prescient in predicting growth of the public trust doctrine.

At the predecessor to this conference in 1980, Professor Sax revisited the public trust doctrine a decade after his influential 1970 article. Sax argued that the doctrine should be "liberated from its historical shackles" because it was "unreasonable to view the public trust as simply a problem of alienation of publicly owned property into private hands[,]" since most of the threat to public resources

[52] *Id.* at 538 (discussing a nominal restriction of trust property to water-related activities, but deciding that the restriction was better interpreted as part of a larger requirement of maintaining public use of trust resources); *see also id.* at 542.

[53] *Id.* at 543-44. However, Sax thought that there was no principle of California law that would prevent the legislature from subordinating traditional public uses to offshore oil and gas development, although he did suggest that the trust doctrine would require adequate inquiry into safeguards to protect other public uses and use of the state revenues from oil and gas leasing to be devoted to uses of statewide interest. *Id.* at 545-46.

[54] *Id.* at 551-55 (discussing Rogers v. City of Mobile, 169 So. 2d 222 (Ala. 1964), and Tex. Oyster Growers Ass'n v. Odom, 385 S.W.2d 899 (Tex. Civ. App. 1965)).

[55] *Id.* at 557 ("[C]ertainly the principle of the public trust is broader than its traditional application indicates."). Sax even posited that the public trust doctrine could apply beyond the natural resources field, mentioning "issues affecting the poor and consumer groups" as other examples of "problems of equality in the political and administrative process . . ." *Id.*

[56] *Id.* at 561-63.

came not from privatization but from poor public decision making.[57] Sax now identified the trust doctrine as a public property concept that guarded against destabilizing changes that frustrate reasonable public expectations.[58] Under this view, the doctrine did not protect against all change, but instead was a commitment to evolutionary, not revolutionary change.[59] For example, Sax explained *City of Berkeley v. Superior Court of Alameda County*, where the California Supreme Court upheld a denial of fills proposed by the landowner because the public trust doctrine still burdened tidelands after they were privatized, as judicial protection of longstanding public uses of tidelands.[60] Thus, in addition to encouraging democratization of decision making, the public trust doctrine equipped courts with the ability to balance proposed developments based on record title against longstanding public uses grounded on reasonable public expectations.[61]

In 1990, nearly a decade after Sax's second public trust article,[62] Carol Rose assessed Sax's contributions to the public trust doctrine through a pair of articles Sax wrote on the takings clause.[63] Rose

[57] Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles,* 14 UC DAVIS L. REV. 185, 186 (1980).

[58] *Id.* at 188 ("[T]he central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.").

[59] *Id.* (identifying "the protection of stable relationships" as "one of the most basic and persistent concerns of the legal system"). Sax gave a brief history of common lands in medieval Europe to support his claim of largely protecting customary public uses even in the absence of formal public land title. *Id.* at 189-92.

[60] *Id.* at 192 (discussing City of Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980) (recognizing public standing to enforce the *jus publicum* in the tidelands to which the landowner owned in fee and describing the public trust doctrine as a flexible doctrine capable of adjusting to accommodate changing public needs). Sax also mentioned the *Mono Lake* case, then in the lower courts. *Id.*

[61] *Id.* at 194 (". . . mere unutilized title, however ancient, does not generated the sort of expectations central to the justness of property claims, and . . . long-standing public uses have an important place in the analysis."). The *City of Berkeley* decision was the subject of a casenote in the 1980 symposium, Craig Labadie, Note, *Increased Public Trust Protection for California's Tidelands* — City of Berkeley v. Superior Court, 14 UC DAVIS L. REV. 399 (1980).

[62] Sax also evaluated the public trust's effect on Western water rights in the wake of the *Mono Lake* decision in a pair of articles. *See* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law,* 61 U. COLO. L. REV. 257, 260-67 (1990) (discussing how constitutional law may address the perceived need for protection of instream flows in the context of prior appropriation scheme); Joseph L. Sax, *The Limits of Private Rights in Public Waters,* 19 ENVTL. L. 473, 479-82 (1989) (maintaining that private rights in water have always been subordinate to public rights, dating back to the mill dams of the Industrial Revolution).

[63] Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351,

traced Sax's public trust thinking to a pair of articles he wrote on the takings clause. The first article was premised on distinguishing between government regulation settling disputes between landowners (no taking) and government acting in an enterprise capacity, pursuing its own projects (more likely to be a taking).[64] The second article reflected Sax's growing skepticism about the capability of majority rule to successfully handle environmental problems, perhaps a reflection of the contemporaneous ascension of "public choice" political theory and the "capture" theory of administrative decision making.[65] Rose proceeded to consider various manifestations of the public trust doctrine,[66] but she emphasized the property characteristics of the doctrine, the most telling of which was its relationship to riparian water rights.[67] Riparianism's inherent balancing and allowance of small privatizations of public rights, in fact, fits quite nicely with the public trust doctrine's overriding accommodation principle.[68] That principle would be the basis of one of the leading decisions of public trust law of the late twentieth century — a case that signaled the movement of the doctrine beyond its traditional navigation moorings to mediate between rights to divert water from streams and instream claims.

352-53 (1998).

[64] *Id.* at 352-53 (discussing Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964)). Rose thought the dichotomy resembled the nuisance-prevention versus public-good providing distinction, which "always had a residuum of common-sense appeal." *Id.* at 353.

[65] *Id.* at 353-54 (discussing Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971), and citing JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1965), PHILLIP O. FOSS, THE POLITICS OF GRASS (1960), MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965), and Daniel A. Farber, *Positive Theory as a Normative Critique*, 68 SO. CAL. L. REV. 1565 (1995)); *see also* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. 405, 415-22 (1994) (applying public choice theory to public land decision making).

[66] Rose, *supra* note 63, at 355-59 (discussing the public trust's iterations as the "hard look" doctrine and as a public property right); *see also* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 580-94, 597-604 (1989) (discussing the public trust doctrine as a rule of construction and a defense to takings claims as well as its "hard look" and public property manifestations, predicting the growth of the doctrine as part of state constitutional interpretation, and responding to Professor Lazarus and Professor Huffman, critics of the public trust doctrine).

[67] Rose, *supra* note 63, at 360-62 (crediting Sax's scholarship).

[68] *See* Blumm, *Accommodation Principle*, *supra* note 50.

II. THE PIONEERING *MONO LAKE* DECISION

In 1983, three years after the predecessor of this symposium, the California Supreme Court decided the famous *Mono Lake* case.[69] The court ruled that California's public trust doctrine protected the state's system of water rights.[70] Thus, the state water board's 1940 issuance of water rights to the Los Angeles Department of Water and Power to divert water from the Mono Lake Basin without evaluating the effects of the diversions on public trust resources created no vested rights against the public trust.[71] Consequently, the court concluded that the state had to reconsider the effects of the diversions on the Mono Basin ecosystem.[72] That reconsideration, which was also required by ancillary litigation in which the California Court of Appeal ruled that the state Fish and Game Code required post-1953 water diversions to be conditioned to protect existing fish life,[73] produced a 1994 water board decision that established interim measures for lake and stream restoration.[74] An ensuring final plan in 1998 set flow regimes for the lake's feeder streams; established a lake-level goal, and monitoring regimes for water flows, waterfowl, and habitat; and promised an adaptive management program.[75] By 2010, this program raised Mono

[69] *Mono Lake*, 658 P.2d 709, 728 (Cal. 1983).

[70] The lower court had issued summary judgment in favor of the Los Angeles Department of Water and Power, ruling that the public trust doctrine was "subsumed in the water rights system of the state." *Id.* at 718 (quoting the trial court). *See generally* Michael C. Blumm & Thea Schwatz, Mono Lake *and the Evolving Public Trust in Western Water,* 37 ARIZ. L. REV. 701 (1995) (discussing the case and its progeny).

[71] *Mono Lake*, 658 P.2d at 728 ("The state accordingly has the power to reconsider allocation decision even though those decisions were made after due consideration of the effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses. In the case before us, the salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct . . .").

[72] *Id.* at 729 ("It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Lake Basin. No vested rights bar such reconsideration.").

[73] Cal. Trout v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 599-604 (1989) (interpreting sections 5937 and 5946 of the California Fish and Game Code).

[74] Cal. State Water Res. Ctrl. Bd., *Mono Lake Basin Water Right Decision 1631* (Sept. 28, 1994) [hereinafter *Decision 1631*], *available at* http://www.monobasinresearch.org/images/legal/d1631text.htm.

[75] The orders of the state water board, along with a number of other legal documents are collected by the Mono Basin Clearinghouse, available at http://www.monobasinresearch.org/timelines/polchr.htm.

Lake's water level roughly ten feet from the low of the early 1980s, about halfway to the restoration goal.[76]

The *Mono Lake* decision began the modern era of public trust law as envisioned by Professor Sax. The opinion expanded the scope of the doctrine beyond submerged lands to water rights administration, and beyond navigable waters to all tributaries affecting navigable waters.[77] Although the extension of the public trust to water rights has generated a mountain of legal commentary,[78] enlarging the geographic scope of the doctrine beyond navigable waters was arguably *Mono Lake's* larger legacy. Several states have expanded their public trust doctrines beyond traditionally navigable waters since 1983,[79] but only

[76] The pre-diversion Mono Lake had an elevation in excess of 6,417 feet above sea level in most years until 1947, when the lake level began a steady decline until it reached 6,372 feet in the early 1980s, a decline of some 45 feet in elevation. In October 2010, the lake level was 6,381.6 feet, about 9.5 feet below the target. *See* MONO LAKE COMMITTEE, *Mono Lake Levels 1850-Present* (Oct. 10, 2010), http://www.monobasinresearch.org/data/levelyearly.htm (providing annual Mono Lake levels, dating back to 1850).

[77] Mono Lake, the second largest lake in California, is navigable water under state law. City of Los Angeles v. Aitken, 52 P.2d 585, 588 (Cal. Ct. App. 1935). The tributary streams feeding Mono Lake are Mill, Lee Vining, Walker, Parker, and Rush Creeks. *See Decision 1631*, *supra* note 74.

[78] *See, e.g.*, DAVID C. SLADE, THE PUBLIC TRUST DOCTRINE IN MOTION: THE EVOLUTION OF THE DOCTRINE 1997-2008 (2008) (reviewing the 284 state and federal cases involving the Public Trust Doctrine from 1997 to the present); Blumm & Schwartz, *supra* note 70 (reviewing the history, posture, and legacy of the *Mono* Lake decision); Carol Necole Brown, *Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1 (2006) (advocating for a more liberal interpretation of the Public Trust Doctrine); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989) (tracing the origins and legitimacy of the Public Trust Doctrine); Alexandra B. Klass & Ling-Yee Huang, *Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates* (Ctr. for Progressive Reform, White Paper No. 908, 2009), *available at* http://www.progressivereform.org/articles/CPR_Public_Trust_Doctrine_Manual.pdf (priming advocates and interest groups on how to use the Public Trust Doctrine to protect surface and groundwater resources).

[79] *See, e.g.*, Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738 (Ark. Ct. App. 2003) (noting navigable waters may change with construction of improvements, like locks and dams); *Waiahole Ditch I*, 9 P.3d 409 (Haw. 2000) (groundwater); Fencl v. Harpers Ferry, 620 N.W.2d 808, 813 (Iowa 2001) (recreation waters); Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984) (all recreational streams); Fish House v. Clarke, 693 S.E.2d 208, 212 (N.C. Ct. App. 2010) (privately-owned, man-made canals); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (private beaches); Parks v. Cooper, 676 N.W.2d 823, 838-39 (S.D. 2004) (all waters in state); State v. Cent. Vt. Ry., 571 A.2d 1128 (Vt. 1989) (private shorelands). *See generally* Mackenzie Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark,* 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 165 (2009) (collecting cases).

the Hawaiian Supreme Court expressly subjected water rights to the doctrine.[80]

Beyond *Mono Lake's* expanded scope of the public trust doctrine, the decision's legacy includes the court's declaration that no vested private rights impede the application of the public trust.[81] Thus, the doctrine limits the development rights of private landowners.[82] However, those rights are not disregarded, as the court made clear that the public trust doctrine required a balancing between public and private rights, and that the former was to be accommodated only so far as feasible.[83] This "feasible accommodation" principle may be the *Mono Lake* decision's chief contribution to the public trust doctrine,[84] a proposition Professor Sax endorsed in his first public trust doctrine article.[85]

A related legacy of *Mono Lake* concerns the court's imposition of a "continuous supervisory duty" on the part of the state to consider the public trust doctrine in the planning and allocation of trust resources.[86] In carrying out this duty, the state was not confined by past erroneous decisions,[87] even if it had considered the public trust in an earlier allocation decision.[88] Instead, the state was to continuously

[80] *Waiahole Ditch I*, 9 P.3d at 443-44.

[81] *Mono Lake*, 658 P.2d 709, 729, 732 (Cal. 1983) (the public trust doctrine "precludes anyone from acquiring a right to harm the public trust"). Thus, the water rights at issue in the case were effectively usufructuary licenses. *Id.* at 724, 727.

[82] This point was evident a dozen years before the *Mono Lake* decision in *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971) (noting that owner of *jus privatum* may not fill and develop property subject to public trust). And, it actually was laid down by the California Supreme Court as early as 1884 in *People v. Gold Run Co.*, 4 P. 1152, 1159 (Cal. 1884) (enjoining gold mining operations that impaired navigation and polluting American and Sacramento Rivers, the beds of which, the court ruled, are owned by the state in trust for the people, and that state cannot relinquish "the rights of the people to the use of the navigable waters flowing over [them]"). *See also* People v. Cal. Fish Co., 138 P. 79, 88 (Cal. 1913) (finding that state tidelands grantees had title subject to a public easement for trust purposes of navigation and commerce "and to the right of the state, as administrator and controller of these public uses and the public trust therefor[e], to enter upon and possess the same for the preservation and advancement of the public uses . . .").

[83] *Mono Lake,* 658 P.2d at 728. The court specifically anticipated that the doctrine could authorize trans-basin water diversions that harmed public trust uses "[a]s a matter of current and historical necessity." *Id.* at 727.

[84] *See* Blumm, *Accommodation Principle*, *supra* note 50, at 665-66.

[85] Sax, *supra* note 2, at 486-88, 509-11, 514-15, 539.

[86] *Mono Lake,* 658 P.2d at 728, 732 (noting that the public trust doctrine "imposes a continuing duty on the state to take such uses into account in allocating water resources").

[87] *Id.* at 728 ("[T]he state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.").

[88] *See supra* note 71 and accompanying text.

seek to preserve trust assets subject, of course, to the feasible accommodation principle.[89] Finally, although the decision did not originate these ideas, it reinforced the propositions that the public trust was: (1) enforceable by the public,[90] and (2) an evolving concept, consonant with changing public values.[91]

In sum, the *Mono Lake* decision was truly a remarkable one. It not only rescued the lake from what seemed to be ecological destruction,[92] but it also initiated the modern era of the American public trust doctrine, extending the doctrine consistent with — and perhaps beyond — Professor Sax's vision.[93] Some American decisions have eclipsed the innovations of *Mono Lake*, extending the doctrine to beaches and groundwater, for example, and including within it the precautionary principle.[94] But, by far the biggest advances since *Mono Lake* have occurred outside the United States. The following sections explain some of the most significant of these developments.

---

[89] *Mono Lake*, 658 P.2d at 728 ("[P]reserve, so far as consistent with the public interest, the uses protected by the trust."); *id.* ("protect public trust uses whenever feasible.").

[90] *Id.* at 716 n.1. Public standing under the public trust doctrine was expressly recognized by the California Supreme Court in *Marks v. Whitney*, 491 P.2d 374, 381-82 (Cal. 1971) (involving an adjacent landowner). In California, public standing to enforce the doctrine seems irrespective of any statutory grant of standing to challenge an administrative decision, which is not the case in some other states. *See* Meredith Armstrong, *Citizen Standing and the Public Trust Doctrine: An Untold Story* (2010) (unpublished comment) (on file with author). Other states deny members of the public standing by importing the "special injury" rule of public nuisance law (requiring injury "different in kind" than suffered by the general public). *See id.*

[91] *Mono Lake,* 658 P.2d at 719, quoting from *Marks*, 491 P.2d at 259-60 (discussing importance of preserving tidelands "in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.").

[92] *See* MONO LAKE COMMITTEE, *supra* note 76 and accompanying text.

[93] For example, *Mono Lake*'s continuous supervisory duty, the feasible accommodation doctrine, and its disclaimer of vested rights were at least more specific than Professor Sax's prescriptions, although they may have been applications of the principles he articulated. *See supra* note 86 (supervision); note 83 (feasibility); note 81 (rights), and accompanying text.

[94] *See Waiahole Ditch I*, 9 P.3d 409, 467 (Haw. 2000) (adopting the precautionary principle, which authorizes measures to protect trust resources in absence of conclusive scientific proof); *id.* at 443-44 (beaches and groundwater). For an argument that the doctrine can protect the atmosphere against excessive greenhouse gas emissions, see generally Mary C. Wood, *Atmospheric Trust and Fiduciary Duty, in* FIDUCIARY DUTY AND THE ATMOSPHERIC COMMONS (Ken Coghill ed., 2010), and Mary C. Wood, *Atmospheric Trust Litigation*, *in* CLIMATE CHANGE READER (Wm. H. Rodgers & M. Robinson-Dorn eds., 2010).

III. THE INTERNATIONALIZATION OF THE PUBLIC TRUST DOCTRINE

A. The Public Trust Doctrine in Southeast Asia and the Pacific

1. India: Natural Law Origins and Constitutional Entrenchment

The public trust doctrine has had its most persistent and profound effect in India, where the Indian Supreme Court has fully embraced the doctrine over a substantial period of time. In fact, the public trust is now much more fundamental to Indian jurisprudence than it is in the United States.[95]

a. Origins and Basis

The Indian public trust doctrine originated in the Supreme Court of India's 1997 decision in *M.C. Mehta v. Kamal Nath*, which involved Span Resort's proposal to dredge, blast, and reconstruct the riverbed of the Beas River to redirect the river to avoid flooding that threatened its resort.[96] The resort had a ninety-nine year lease of government land in a protected forest to build a motel and ancillary facilities along the river, as well as approval of the redirection project from the Minister of the Environment and the local government.[97] M.C. Mehta, an activist lawyer, sued the Minister,[98] alleging that the project required

[95] For example, in the United States the public trust doctrine apparently does not apply to the federal government, although there are suggestions that it should; *see also* Crystal Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 113, 137-43 (2010) (interpreting the landmark *Illinois Central* case to be a product of federal, not state, law); *see generally* Mary Turnipseed et al., *The Silver Anniversary of the United States Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1 (2009) (suggesting that the doctrine should apply to ocean management); Wilkinson, *supra* note 4 (arguing that the doctrine should apply to federal public land law).

[96] M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 388 (1996) (India), *in* 1 UNITED NATIONS ENVIRONMENT PROJECT COMPENDIUM OF JUDICIAL DECISIONS IN MATTERS RELATED TO THE ENVIRONMENT, NATIONAL DECISIONS 259 (1998) [hereinafter UN COMPENDIUM], *available at* http://unep.org/padelia/publications/Jud.Dec.Nat.pre.pdf.

[97] *See id.* at 3 (describing the 99-year lease to resort); *id.* at 6 (discussing federal and local approval of the redirection project).

[98] Professor Sairam Bhat indicated that it is not unusual for the Indian Supreme Court to encourage litigants to take up issues of interest to the Court, which seems to be what happened in this case. Interview by Rachel Guthrie with Sairam Bhat, Professor, National Law School of India at Bangalore, in Portland, Or. (Oct. 21, 2010) [hereinafter Interview with Professor Bhat]. The Court indicated twice that it was taking judicial notice of a February 25, 1996 article that appeared in the *Indian Express*, which discussed the timber sale issue. *M.C. Mehta*, *in* UN COMPENDIUM, *supra*

major excavation of public land, encroached on a protected forest, and threatened neighbors with landslides and flooding.[99]

The Indian Supreme Court ruled that the lease violated the public trust doctrine. The court said the doctrine was part of Indian law because Indian jurisprudence was inherited from English common law, and which prevented the "aesthetic use and the pristine glory of the natural resources, the environment, and the ecosystems of our country . . . [from being] eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in the public interest to encroach upon the said resources."[100] In a sweeping opinion, the court also adopted wholesale the entirety of American public trust jurisprudence, citing both the *Illinois Central Railroad* decision and Professor Sax's article, and ultimately declaring the public trust doctrine to be "the law of the land."[101] Moreover, the court inferred that the basis of the trust doctrine lay in natural law, opining that the "laws of nature . . . are imposed on us by the natural world" and must "inform all of our social institutions."[102]

note 96, at 261, 264. There is no mention of a lower court decision in the Supreme Court's opinion. On the role of public interest litigation in protecting environmental human rights, see generally JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN, AND BANGLADESH (2004). For surveys of the Indian public trust doctrine cases, see David Takacs, *The Public Trust Doctrine, Environ. Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 735-40 (2008), and James L. Wescoat, Jr., *Submerged Landscape: The Public Trust in Urban Environmental Design, From Chicago to Karachi and Back Again*, 10 VT. J. ENVTL. L 435, 465-69 (2009).

[99] *M.C. Mehta*, *in* UN COMPENDIUM, *supra* note 96, at 268. The forest was state-owned. *See id.*

[100] *Id.* at 273.

[101] *Id.* at 269, 270. Reminiscent of the language employed by the *Mono Lake* court, the Indian Supreme Court described the case as a "classic struggle between those members of the public who would preserve our rivers, forests, and parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change." *Id.* at 272; *cf. Mono Lake* (Cal. 1983) (describing the meeting of appropriation system of water law and the public trust doctrine "in a unique and dramatic setting which highlights the clash of values"). On the precedential value of U.S. case law in Indian courts, see Rajeev Dhavan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 AM. J. COMP. LAW 505, 513-16 (1985), Adam M. Smith, *Making Itself At Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 239 (2006).

[102] *M.C. Mehta*, *in* UN COMPENDIUM, *supra* note 96, at 269 (relying on David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection,* 12 HARV. ENVTL. L. REV. 311 (1988)).

Three years later, the Indian Supreme Court located the public trust doctrine in the Indian Constitution. In *M.I. Builders Private Ltd. v. Radhey Shayam Sahu,* the court invoked the doctrine in enjoining the construction of an underground shopping complex within a public park that a local development authority approved.[103] The court further ordered restoration of the park by the builder.[104] The court agreed with a state high court that the public trust doctrine protected the park because of its "historical importance and environmental necessity" and was entrenched in Article 21 of the Constitution, which declares that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."[105] Thus, over a decade ago, the Indian Supreme Court found that the public trust doctrine was part of fundamental Indian jurisprudence due to its inherited English common law tradition, natural law, and the Indian constitution's right to life.

In 2009, the Indian Supreme Court made clear that although the trust doctrine was constitutionally required, its common law and natural law origins have not been superseded:

> The Indian society has, since time immemorial, been conscious of the necessity of protecting the environment and ecology. The main moto [sic] of social life has been "to live in harmony with nature." [The] preachings [of sages and saints of India] . . . are ample evidence of the society's respect for plants, trees, earth, sky, air, water and every form of life. It

[103] M.I. Builders Private Ltd. v. Radhey Shyam Sahu, (1999) 6 S.C.C. 464, 466 (India), *available at* http://www.indiankanoon.org/doc/1937304/.

[104] The court's restoration directive reflected the fact that the public trust doctrine in India burdens not only government agencies but private parties as well. *Id.* at 530.

[105] *Id.* at 466 (interpreting article 21 of the Indian Constitution). Citing Professor Sax, the court noted that "a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate [a resource available for free public use] to more restricted uses or to subject public uses to the self-interest of private parties." *Id.* at 518.

A year before the *M.I. Builders* decision, the High Court of Jammu and Kashmir declared that the public trust doctrine "is now considered as part and parcel of Article 21 of the Constitution of India." Th. Majra Singh v. Indian Oil Corp., 1999 A.I.R. 81 (J.K.) 82, para. 6 (Jammu & Kashmir H.C.) (India), *available at* http://indiankanoon.org/doc/201603/. Earlier, the High Court of Kerala interpreted Article 21 to include the right to a healthy environment, stating: "The right to life is much more than the right to animal existence and its attributes are many fold, as life itself. A prioritisation of human needs and a new value system has been recognised in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for these are the basic elements which sustain life itself." Attakoya Thangal v. Union of India, 1990 A.I.R. 1 (K.L.T.) 580, 583 (Kerala H.C.) (India).

> was . . . a sacred duty of every one to protect them . . . people worshipped trees, rivers and sea which were treated as belonging to all living creatures. The children were educated . . . about the necessity of keeping the environment clean and protecting earth, rivers, sea, forests, trees, flora[,] fona [sic] and every species of life.[106]

The "time immemorial" natural law origin of the public trust doctrine suggests that the doctrine is not subject to political reversal, and Indian courts continue to reference its Roman roots.[107] In fact, the India Supreme Court has even located its foundation in the Chen Dynasty.[108]

b. Scope

The scope of the Indian public trust doctrine is vast: it covers all natural resources. In the foundational case of *Kamal Nath*, which first recognized the doctrine, the Indian Supreme Court declared that the state government is trustee of "all natural resources," and the public is the beneficiary of the "sea-shore, running waters, airs [sic], forests, and ecologically fragile lands."[109] The court then applied the doctrine to parklands in the *M.I. Builders* case,[110] and a state court recognized the doctrine's application to groundwater.[111] Clearly, the Indian doctrine is not cabined by the navigable waters limits recognized in some American states.[112]

Recent decisions confirm the extensive scope of the Indian public trust. In 2009, in *Fomento Resorts & Hotels v. Minguel Martins*, the

---

[106] Fomento Resorts & Hotels v. Minguel Martins, (2009) I.N.S.C. 100, para. 36 (India), *available at* http://www.indiankanoon.org/doc/1238478/.

[107] *M.I Builders*, 6 S.C.C. at 466; Reliance Natural Res., Ltd. v. Reliance Indus., Ltd., (2010) I.N.S.C. 374, pt. IV, paras. 97-98 (India), *available at* http://www.indiankanoon.org/doc/1070490 (quoting Professor Sax); *Fomento Resorts*, I.N.S.C. 100 para. 35 (quoting *Mono Lake*); Perumatty Grama Panchayat v. State, (2004) 1 K.L.T. 731, 742 (2003) (Kerala H.C.), *available at* http://www.indiankanoon.org/doc/1161084/; *Th. Marja Singh*, 1999 A.I.R. (J.K.) at 82.

[108] *Reliance Natural Res., Ltd.*, (2010) I.N.S.C. 374 at pt. IV, para. 98.

[109] *M.C. Mehta*, *in* UN COMPENDIUM, *supra* note 96, at 272.

[110] *M.I. Builders*, 6 S.C.C. at 466.

[111] *Perumatty Grama Panchayat*, 1 K.L.T. at para. 34. The court upheld a municipality's right to not renew a water license to Coca-Cola because "underground water belongs to the public," and "the State has got a duty to protect groundwater against excessive exploitation and the inaction of the State in this regard will tantamount to infringement of the right to life . . . guaranteed under Article 21 of the Constitution of India." *Id.*

[112] *See supra* note 18 and accompanying text.

Indian Supreme Court ruled that the resort violated the public trust by constructing recreational facilities on a traditional footpath and obstructing public beach access.[113] As the facilities were located some two hundred meters from high tide,[114] the scope of the trust's application to shorelands is considerable. One year later, in *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.,* the same court struck down an offshore natural gas contract between companies because the gas in India's territorial waters was publicly owned and subject to public trust balancing to ensure fairness to future generations.[115]

c. Purposes

The purposes of the Indian public trust doctrine are as encompassing as its scope. The *Kamal Nath* decision expressly ruled that the purposes were not limited to the traditional purposes of navigation, commerce, and fishing, but also included ecological purposes.[116] The court declared the public to be the beneficiary of "ecologically sensitive lands."[117] In *Fomento Resorts*, the Indian

[113] Fomento Resorts & Hotels v. Minguel Martins, (2009) I.N.S.C. 100, paras. 40-41 (India), *available at* http://www.indiankanoon.org/doc/1238478/.

[114] *Id.* para. 10(xxv).

[115] Reliance Natural Res., Ltd. v. Reliance Indus., Ltd., (2010) I.N.S.C. 374, pt. IV, paras. 97-98 (India), *available at* http://www.indiankanoon.org/doc/1070490. The Court interpreted article 297 of the Indian Constitution, which provides that all lands, minerals, resources, and things of value under the ocean within territorial waters "shall vest in the Union and be held for the purposes of the Union" to mean that the "people as a nation" are the "true owners" of the natural gas. *Id.* paras. 87-88 (citing INDIA CONST. art. 297). The Court also relied on article 39, which calls for an equitable distribution of India's material resources to "best subserve the common good," and the principle of equality in Article 14 of the Constitution to require balancing intergenerational equity in future contract negotiations. *See id.* pt. IV, para. 84-100 (citing INDIA CONST. art. 39, 14). Finally, the court ordered a renegotiation of the natural gas contract, with government participation, to conform to these provisions and the public trust doctrine. *Id.* pt. IV, para. 163.

[116] *M.C. Mehta*, *in* UN COMPENDIUM, *supra* note 96, at 272.

[117] *Id.* ("It is no doubt correct that the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine . . . . We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources."). Ecological purposes are also evident in articles 48A ("The State shall endeavour [sic] to protect and improve the environment and to safeguard the forests and wild life of the country.") and 51A ("It shall be the duty of every citizen of India — (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.") of the Indian Constitution. INDIA CONST. arts. 48A, 51A.

Supreme Court upheld the public's continued use of a footpath for beach access against a resort development because it was a "time immemorial" public use of "common properties," at least in part for recreation.[118]

Public trust purposes also extend to ensuring a fair distribution of the revenues produced from publicly owned resources, such as natural gas leases.[119] This fair distribution includes concerns for intergenerational equity.[120] According to a state court, the purposes also include regulating resources according to the precautionary principle.[121]

d. Public Standing

Indian case law indicates widespread recognition of the right of citizens to enforce the public trust doctrine, regardless of personal injury, so long as the individual or group is not economically self-interested.[122] Citizens may sue any level of government, as well as private entities, since the Indian public trust doctrine appears to burden private parties and the government.[123] However, in 2002, the Indian Supreme Court curtailed standing somewhat by requiring citizens to seek out a non-profit or other organization as a proxy, although they can still file a public trust doctrine suit if there is no willing organization.[124]

e. Remedies

Indian courts have awarded injunctive relief, ordered restitution and money damages, and rescinded private contracts for violations of the public trust doctrine.[125] These remedies may be enforced against both government agencies and private parties.[126]

---

[118] *Fomento Resorts*, I.N.S.C. 100, para. 40.

[119] *Reliance Natural Res., Ltd.*, I.N.S.C. 374, pt. IV, para. 99.

[120] *Id.* pt. IV, paras. 94, 99.

[121] Th. Majra Singh v. Indian Oil Corp., 1999 A.I.R. 81 (J.K.) 82–83 (Jammu & Kashmir H.C.) (India) (involving a liquefied natural gas plant, whose continued operation was conditioned on regulation under the precautionary principle).

[122] Interview with Professor Bhat, *supra* note 98.

[123] *Id.*; *see, e.g.*, *Fomento Resorts*, I.N.S.C. 100 (concerning a suit against a private resort); *M.C. Mehta*, *in* UN COMPENDIUM, *supra* note 96 (involving a suit against the Union of India's Minister of Environment and Forests, as well as the Himachal Pradesh provincial Pollution Control Board and a privately owned motel).

[124] Interview with Professor Bhat, *supra* note 98.

[125] *See, e.g.*, M.I. Builders Private Ltd. v. Radhey Shyam Sahu, (1999) 6 S.C.C. 470 (India), *available at* http://www.indiankanoon.org/doc/1937304/ (enjoining

2. Pakistan: Original Jurisdiction in the Supreme Court

a. Origins and Basis

Pakistan's public trust doctrine seems embedded in article 9 of the constitution, which declares that "[n]o person shall be deprived of life or liberty save in accordance with law."[127] Although neither the constitution nor Pakistan statutes expressly mention the public trust, the Supreme Court of Pakistan has concluded that the article 9 guarantee of life includes environmental health and has issued protective orders to both private and government entities.

The first case to establish the public trust doctrine was the 1992 Supreme Court decision in *In Re Human Rights Case* (*Environmental Pollution in Balochistan*).[128] This case involved proposed industrial and nuclear waste dumping on coastal land in the southern province of Balochistan.[129] Responding to a newspaper article alleging violations of fundamental rights, the Supreme Court took original jurisdiction of the case.[130] The Court ruled that any such dumping would "create environmental hazard and pollution" in violation of article 9,[131] thus assuming without explanation the constitutional right to life implicitly included environmental health as well.

The court proceeded to request reports from the provincial head as to whether the local development authority had granted any coastal land for these purposes and, upon receiving assurances of no dumping, ordered the provincial government and the development

construction of a shopping complex); *Fomento Resorts*, I.N.S.C. 100, 58 (India) (upholding the enjoining of a resort's construction of recreational facilities); Perumatty Grama Panchayat v. State, (2004) 1 K.L.T. 731, 742 (2003) (Kerala H.C.), *available at* http://www.indiankanoon.org/doc/1161084/ (enjoining Coca-Cola from groundwater pumping); *M.C. Mehta*, *in* UN COMPENDIUM, *supra* note 96, at 273-74 (requiring a resort to pay for the government cost of restoring a riverbed); *Reliance Natural Res., Ltd.* I.N.S.C. 374 at 199-209 (rescinding a natural gas pricing agreement and requiring the contracting parties to renegotiate the contract, with governmental participation, to ensure equitable revenue sharing).

[126] Interview with Professor Bhat, *supra* note 98. *See* description of cases and defendants *supra* note 125.

[127] PAKISTAN CONST. art. 9.

[128] (1994) 46 PLD (SC) 102 (1992) (Pak.), *in* UN COMPENDIUM, *supra* note 96, at 280-81.

[129] *Id.* at 280.

[130] *Id.* Under article 184(3) of the constitution, the supreme court has original jurisdiction over fundamental rights, such as the right to life. *See* PAKISTAN CONST. art. 184(3).

[131] *In re* Human Rights, 46 PLD (SC) 102, *in* UN COMPENDIUM, *supra* note 96, at 280.

authority to condition any grants of coastal land on no-dumping.[132] The court also directed the authorities to stop any dumping or discharging from vessels off the coast.[133]

Two years after the *Environmental Pollution in Balochistan* case, the Supreme Court decided *Zia v. WAPDA*.[134] In response to a letter criticizing the Water and Power Development Authority by four residents opposing a government proposal to install an electric grid in a residential area, the Court again assumed original jurisdiction over the case.[135] Citing Indian cases that interpreted the right to life to include environmental health, the Court observed that:

> [T]hese judgments go a long way to show that in cases where the life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Court in exercise of its [constitutional] jurisdiction . . . may grant relief to the extent of stopping the functions of factories which create pollution and environmental degradation.[136]

Embracing the precautionary principle, the Court directed the government to conduct research on the potential harmful effects of electromagnetic energy and required that any future siting of electricity facilities be preceded by public notice and an opportunity for public comment.[137] The *Zia* decision made clear that the right to life included the right to environmental health:

> The word 'life' is very significant as it covers all facts of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death . . . A wide meaning should be given to enable a man not only to sustain life but to enjoy it . . . The Constitution guarantees dignity of man and also right to 'life' under Article 9 and if both are read together, questions will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food,

---

[132] *Id.* at 281.

[133] *Id.*

[134] Shehla Zia v. WAPDA, (1994) 46 PLD (SC) 693 (Pak.), *in* UN COMPENDIUM, *supra* note 96, at 323.

[135] *See id.* (abstract).

[136] *Id.* at 334.

[137] *Id.*

> clothing, shelter, education, health care, clean atmosphere and unpolluted environment . . .[138]

A third Pakistani case, *General Secretary, West Pakistan Salt Miners Labor Union v. The Director, Industries and Mineral Development* was another original jurisdiction case brought under article 9 by residents of Khewra township in the province of Jhelum, who sought cancellation of mining leases in a water catchment area reserved for domestic and municipal purposes.[139] The granting of the mining leases coincided with a reduction in the local water supply of six- to eight-fold.[140]

Quoting extensively from the *Zia* decision's discussion of article 9's right to life, the Pakistan Supreme Court issued several orders to protect Khewra township's water supply. First, the court directed the Punjab Coal Company to move the mouth of its mine away from the township's water catchment area. Second, the court ordered the Pakistan Mineral Development Corporation to install an additional pipeline and to construct a containment well, the cost of which would be paid by the mining companies. Third, the court required the establishment of a government commission to investigate the mining operations and determine whether the mining should proceed.[141] Finally, the Court ordered the government to refrain from granting or renewing any mining license within the township's water catchment basin, requiring renewal of any other mining leases only with the permission of the court.[142] Because of the these affirmative obligations imposed on the government to protect public resources at the request of public petitioners, the *Salt Miners* decision was categorized as a public trust doctrine case by both the United Nations Environment Programme and the High Court of Kenya.[143]

b. Scope

Since the government of Pakistan has affirmative obligations to protect the constitutionally entrenched right to life, and because the

---

[138] *Id.* at 333-34.

[139] Gen. Sec'y W. Pak. Salt Miners Union v. Dir. of Indus. & Mineral Dev. (*Salt Miners*) (1994) SCMR (SC) 2061 (1993) (Pak.), *in* UN COMPENDIUM, *supra* note 96, at 282-84. The Court cited its authority under article 184(3) for its jurisdiction. *Id.* at 284.

[140] *Id.* at 283-84.

[141] *Id.* at 288.

[142] *Id.*

[143] *See* UN COMPENDIUM, s*upra* note 96, at iv (classifying *Salt Miners* case as a public trust doctrine case).

right to life includes environmental health, the public trust doctrine appears to protect against actions that threaten a "clean atmosphere and unpolluted environment."[144] But because the case law is sparse and the Pakistan Supreme Court has discussed the government's duties only in the context of the constitutional right to life, it is hard to see any limits on the scope of the Pakistan public trust doctrine. Apparently the government has a trust duty to prevent harm to all natural resources where the public interest is involved.

c. Purposes

The case law has made clear that the public trust doctrine protects water resources, especially drinking water, from pollution.[145] But, the doctrine seems co-extensive with any environmental resources protected by the constitutional right to life.[146]

d. Public Standing

The public has standing to sue in the Pakistani Supreme Court to prevent harm to the environment, which arises from an implicit fundamental right under article 184(3) of the constitution. The article declares that "the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any Fundamental Rights [like article 9's right to life]" have the power to issue orders to protect those rights.[147] The court has interpreted its article 184(3) jurisdiction broadly, stating that no individual injury is a necessary trigger: "It is well settled that in human rights cases/public interest litigation . . . the procedural trappings and restrictions of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court."[148] Thus, no standing barriers fetter the public's right to enforce the Pakistan public trust doctrine.

e. Remedies

Injunctive relief is available in cases involving fundamental rights. Discussing its original jurisdiction over fundamental rights cases, the Pakistan Supreme Court noted its power to "grant relief to the extent

---

[144] *See Zia*, 46 PLD (SC) 693, *in* UN COMPENDIUM, *supra* note 96, at 333-34.

[145] *See, e.g.*, *Salt Miners*, SCMR (SC) 2061, *in* UN COMPENDIUM, *supra* note 96, at 286 (describing right of every person to have unpolluted water).

[146] PAKISTAN CONST. art. 9.

[147] *Id.* art. 184(3).

[148] *Salt Miners*, SCMR (SC) 2061, *in* UN COMPENDIUM, *supra* note 96, at 287.

of stopping the functioning of factories which create pollution and environmental degradation."[149] The court also granted affirmative injunctive relief in several cases,[150] although it has yet to award money damages. Article 199 of the constitution, which authorizes courts hearing public interest cases to make orders "as may be appropriate for the enforcement of any of the Fundamental Rights . . . [,]"[151] suggests that courts have broad discretion as to remedies.

3. Philippines: Cleaning Up Manila Bay

a. Origins and Basis

The earliest manifestation of the Filipino public trust doctrine was in the Water Code of 1976, which declared that all waters belong to the State.[152] The code also recognized a public easement on the banks of rivers and streams, as well as the shores of seas and lakes, for "recreation, navigation, floatage, fishing, and salvage."[153] A year later, the 1977 Environmental Policy echoed the language of the U.S. National Environmental Policy Act in declaring that the nation would "recognize, discharge and fulfill the responsibilities of each generation as trustee and guardian of the environment for succeeding generations."[154]

[149] *Zia*, 46 PLD (SC) 693, *in* UN COMPENDIUM, *supra* note 96, at 334.

[150] *See supra* notes 132-33, 136-37, 141-42 and accompanying text.

[151] PAKISTAN CONST. art. 199(1)(c).

[152] The Water Code of the Philippines, A Decree Instituting a Water Code, Thereby Revising and Consolidating Laws Governing the Ownership, Appropriation, Utilization, Exploitation, Development, Conservation and Protection of Water Resources, Pres. Dec. No. 1067 art. 3 (Dec. 31, 1976) (Phil.), *available at* http://www.lawphil.net/statutes/presdecs/pd1976/pd_1067_1976.html [hereinafter Water Code of the Philippines]. The code defines waters broadly to include surface water, groundwater, atmospheric water, and sea water. *Id.* art. 4.

[153] *Id.* art. 51.

[154] Philippine Environmental Policy, Pres. Dec. No. 1151, § 2 (June 6, 1977) (Phil.); *see also id.* § 1 (U.S. NEPA-like language: "It is hereby declared a continuing policy of the State (a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other, (b) to fulfill the social, economic and other requirements of present and future generations of Filipinos, and (c) to insure the attainments of an environmental quality that is conducive to a life of dignity and well-being"); *cf.* 42 U.S.C. § 4331 (NEPA's language). The Filipino policy also emphasizes that each citizen owed a duty to future generations to protect the environment, and that each was entitled to a healthful environment. Philippine Environmental Policy, § 3. An ensuing Environmental Code which, like the Environmental Policy and the Water Code, was issued by Presidential decree — the equivalent of statutes in those pre-constitutional days declared that natural resource

The Filipino Constitution of 1987 then entrenched the right to a healthy environment recognized in the 1977 Environmental Policy, announcing that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[155] The Filipino Supreme Court would later interpret this language to codify public trust principles.[156]

In 1993, the Supreme Court decided *Oposa v. Factoran*, a case in which schoolchildren filed a class action challenging timber license agreements issued by the Department of Environment and Natural Resources.[157] The license authorized harvesting virtually all of the trees in the country.[158] After a lower court dismissed the case, the Supreme Court reversed, ruling that: (1) the children were sufficiently numerous to constitute a class; (2) they had standing under the constitution to raise future generations' concern for a healthy environment and intergenerational equity; (3) the issues the case raised were not unreviewable political questions; and (4) the licenses

policy would "obtain optimum benefits" and preserve natural resources for future generations. Philippine Environmental Code, Pres. Doc. No. 1152, § 25 (June 6, 1977) (Phil.), *available at* http://lawphil.net/statutes/presdecs/pd1977pd_1152_1977.html. *See generally* THELAWPHILPROJECT, http://www/lawphil.net (last visited Sept. 27, 2011) (providing equivalent of statutes in pre-constitutional days).

[155] CONST. (1987), art. II, sec. 16, (Phil.), *available at* http://lawphil.net/consti/cons1987.html. Two 1987 executive orders implemented the Constitution's right to a healthy environment, the first of which called for "equitable sharing" of the benefits of natural resource management among present and future generations of Filipinos under a policies of sustained and use equitable access to natural resources, thereby reorganizing the Department of Environment and Natural Resources. Department of Environmental and Natural Resources; Renaming It As the Department of Environmental and Natural Resources and for Other Purposes, Exec. Ord. No. 192, §§ 3, 4 (June 10, 1987) (Phil.), *available at* http://www.lawphil.net/executive/execord/eo1987/eo_192_1987.html (providing perambulatory language only). The second 1987 executive order substantially restated the first order's policies in an administrative code, directing the department to manage the development and conservation of the Filipino "forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources," maintaining "a sound ecological balance" and making such resources "equitably accessible" to present and future generations, including accounting for the "social and environmental cost implications" of development and conservation of natural resources. Instituting the "Administrative Code of 1987," Exec. Ord. No. 292, § 1 (1987) (Phil.), *available at* http://www.lawphil.net/executive/execord/eo1987/eo_292_1987.html.

[156] *See infra* notes 161-62, 169 and accompanying text.

[157] Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792, 797-98 (Aug. 9, 1993) (Phil.), *in* UN COMPENDIUM, *supra* note 96, at 25.

[158] The Secretary granted licenses to harvest some 3.89 million hectares of forest. At the time, there were approximately 850,000 hectares of virgin old-growth forest and 3.0 million hectares of secondary-growth forests on the Phillipine archipelago. *Id.* at 26.

were not constitutionally protected contracts under the Filipino Constitution.[159] Without reaching the merits of the children's claims,[160] the court used sweeping language to interpret the right to healthy environment, suggesting it was more basic than other rights because "it concerns nothing less than self-preservation and self-perpetuation," which "need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[161] This declaration of the natural law foundations of the environmental right imposed "a solemn obligation" to preserve a healthy ecology and protect public health not only for the present, but also for future generations; otherwise, they would "stand to inherit nothing but the parched earth incapable of sustaining life."[162]

Despite the Court's ringing endorsement of the public trust doctrine in *Oposa*, the case turned out to have remarkably little effect on timber harvesting in the Philippines. The Court did not cancel the timber licenses or enjoin the issuance of new licenses as the children requested; instead, it ruled only that lower court improperly dismissed the case for failing to state a cause of action.[163] Since the children failed to pursue the case, no timber license was ever cancelled, and commercial logging continued largely unabated.[164]

Fifteen years after *Oposa*, the Philippines Supreme Court revisited the right to a healthy environment and clarified that the government had a trust obligation. In *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay,* fourteen residents alleged in a class action suit that ten government agencies failed to prevent pollution of Manila Bay, violating numerous statutory duties as well as the public trust doctrine.[165] A lower court issued a comprehensive injunction,

---

[159] *Id.* at 28 (class size); *id.* at 28-29 (standing); *id.* at 31-32 (political question); *id.* at 32-33 (non-contract). On the political question issue, the court ruled that the Filipino Constitution bolstered the judiciary's authority to review abuses of discretion in any branch of government. *Id.* at 31.

[160] *See infra* note 163 and accompanying text.

[161] *Oposa*, 224 S.C.R.A. 792, *in* UN COMPENDIUM, *supra* note 96, at 29.

[162] *Id.*

[163] *See* Dante B. Gatmaylan, *The Illusion of Intergenerational Equity:* Oposa v. Factoran *as a Pyrrhic Victory*, 15 GEO. INT'L ENVTL. L. REV. 457, 467 (2003).

[164] *See id.* at 467-68 (noting that at the end of 2001, there were still a total of 1.34 million hectares of forestland under license; the only reductions apparently occurring due to failure of timber companies to comply with government regulations).

[165] Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay (*Metro Manila*), G.R. No. 171947-48, 574 S.C.R.A. 661 (S.C., Dec. 18, 2008) (Phil.) *available at* http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm; *see* Presbitero J. Velasco, Jr., *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection*, 11 OR. REV. INT'L L. 441, 442 (2009) (describing the

and the Supreme Court affirmed.[166] The injunction required various government agencies to fulfill their trust duty through a variety of actions, from constructing sewage treatment facilities, to restocking Manila Bay with indigenous fish, to "inculcat[ing] in the minds and hearts of the people" the importance of the environment through education.[167] The court concluded that the pollution of the bay was so severe that it required the trial court's continuing jurisdiction to monitor cleanup efforts.[168]

At the end of its *Manila Bay* opinion, the Filipino Supreme Court made clear that that the basis of its decision was the public trust doctrine, and that its origins lay in natural law:

> So it was in *Oposa v. Factora,* the Court stated that the right to a balanced and healthful ecology need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications. Even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and women representing them cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible. Anything less would be a betrayal of the trust reposed in them.[169]

pollution as coming from "uncaring factory and other business owners operating without waste management facilities; around 70,000 families of illegal settlers along six major rivers and numerous waterways which empty into the bay; unabated and unlawful dumping of waste from Metro Manila residents, as the metro area does not have a sanitary landfill; the unauthorized dumping of wastes from ships; and the abject indifference of people and government institutions that could have otherwise turned things around"). The journal article's author is an Associate Justice of the Supreme Court of the Phillipines. *Id.*

[166] *Metro Manila*, 574 S.C.R.A. The trial court of Imus, Cavite's injunction called for the government to draw up a cleanup plan, including a timetable and a budget. The court of appeals affirmed. *See* Rita Linda V. Jimeno, *Who Will Clean Up Manila Bay?,* MANILA STANDARD TODAY, (Aug. 18, 2008), http://www.manilastandardtoday.com/2008/aug/18/ritaLindaJimeno.htm.

[167] *Metro Manila,* 574 S.C.R.A. The details of the injunction are set forth in Velasco, *supra* note 165, at 446-48 n.19.

[168] *Metro Manila*, 574 S.C.R.A. (requiring quarterly progress reports); *see* Juan Arturo Iluminado C. de Castro, *Clean Up Manila Bay: Mandamus as a Tool for Environmental Protection*, 37 ECOLOGY L.Q. 797, 801 (2010) (describing the "continuing mandamus" invoked by the court as "unheard of in the country before").

[169] *Metro Manila*, 574 S.C.R.A.

Thus, although the primary basis of the Filipino public trust doctrine jurisprudence lies in the constitutional right balanced and healthful ecology, the Court has ruled that the constitutional right merely reflects the public trust doctrine. The doctrine in turn is part of natural law rights to self-preservation and self-perpetuation that have existed from time immemorial.

b. Scope

The scope of the Filipino public trust doctrine is expansive, encompassing terrestrial, aquatic, and marine resources, and providing public access for recreational and ecological purposes, as well as traditional public trust purposes. For example, the 1976 Water Code recognized a public easement on the banks of rivers and streams, and the shores of the seas and lakes, "throughout their entire length" of varying scope depending on the location.[170] The Water Code also declared public ownership of all waters,[171] indicating that the trust may apply to water rights administration.

In *Oposa*, the Supreme Court applied the trust to forests and opined that it burdens all natural resources, including minerals, lands, waters, fisheries, wildlife, off-shore areas, and other natural resources in addition to forests.[172] This comprehensive scope is obviously not tied to traditional notions of navigability that continue to limit the public trust doctrine in some American states.[173]

c. Purposes

The purposes of the Filipino public trust doctrine are as extensive as its scope. They encompass recreational and ecological purposes, as well as traditional purposes of navigation and fishing. For example, the Water Code's upland easement is ancillary to "recreation, navigation, floatage, fishing, and salvage" purposes.[174] The code also contemplates the preservation of swamps and marshes for waterfowl and wildlife.[175] The court in *Metro Manila* recognized that "[t]he

[170] *See* Water Code of the Philippines, *supra* note 152, art. 51. The scope of this upland easement varies from three meters in urban areas to twenty meters in agricultural areas to 40 meters in forest areas, although no one may stay longer than necessary for recreation, navigation, floatage, fishing, or salvage purposes, nor build any structures. *Id.*

[171] *Id.* art. 3(a).

[172] *Oposa*, 224 S.C.R.A. 792, *in* UN COMPENDIUM, *supra* note 96, at 28-29.

[173] *See supra* note 18 and accompanying text.

[174] Water Code of the Philippines, *supra* note 152, art. 51.

[175] *Id.* art. 74.

importance of Manila Bay as a sea resource, playground, and as a historical landmark cannot be overemphasized."[176] Furthermore, the *Oposa* court advocated for not only considering ecological integrity when interpreting the constitutional right to a balanced and healthy ecology, but also considering intergenerational equity as well:

> Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploitation, development and utilization be equitably accessible to the present as well as future generations.[177]

Thus, the purposes of the public trust doctrine in the Philippines extend not only to the management and conservation of natural resources, but also to their equitable distribution among generations.

d. Public Standing

The public has standing to enforce the Philippines public trust doctrine. In *Oposa*, the Supreme Court recognized the right of a class of school children to file suit to protect the country's virgin rainforests. The Court characterized the issue as one "of common and general interest . . . to all citizens of the Philippines."[178] The Court also upheld the right of the children to sue based on intergenerational equity:

> We find no difficulty in ruling that they can, for themselves, for others of their generation and for succeeding generations, file a class suit. Their personality to suit in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned . . . . Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their rights to a sound environment constitutes, as the same time, the performance of their

[176] *Metro Manila,* 574 S.C.R.A.

[177] *Oposa*, *in* UN COMPENDIUM, *supra* note 96, at 28-29.

[178] *Id.* at 796, 802.

> obligation to ensure the protection of that right for the generations to come.[179]

The *Metro Manila* court assumed without discussion the standing of the Concerned Residents of Manila Bay, an organization of fourteen residents.[180]

e. Remedies

Equitable relief, including continuing judicial oversight, is available to enforce the Filipino public trust doctrine. In *Metro Manila*, the Filipino Supreme Court directed the lower court to maintain continuing judicial oversight over the cleanup of Manila Bay.[181] The court approved far-reaching injunctive relief requiring both affirmative duties and imposing negative restrictions on governmental agencies.[182] An Associate Justice of the Filipino Supreme Court has suggested continuing mandamus in the context of Manila Bay "might as well be viewed as a perpetual mandamus."[183] To oversee the implementation of the injunction, the court created an advisory committee chaired by a justice of the court and three experts.[184]

---

[179] *Id.* at 802-03. The *Oposa* court reversed the lower court's dismissal based on political question grounds, ruling that "the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review" because the 1987 Constitution expanded the judicial power. *Id.* at 810.

[180] *See* Velasco, *supra* note 165, at 444-45 (noting that had the court considered the standing issue it would have allowed the suit to proceed on the ground that the issues were of "paramount interest to the public" or were "of transcendental significance to the people," even though Filipino jurisprudence is patterned after the American standing rule of requiring a "personal and sufficient stake in the outcome of the controversy" and direct individual harm that is "greater than an inconvenience suffered by the general public").

[181] *Metro Manila*, 574 S.C.R.A.

[182] *Id.*; *see* de Castro, *supra* note 168, at 802-04 (comparing mandamus in the Philippines with that in the U.S.); Velasco, *supra* note 165, at 446-48 n.19 (clarifying scope of the injunction), 453 (observing that although continuing mandamus was not expressly authorized by the Supreme Court's procedural rules, it was not prohibited either, and citing precedent from Indian courts).

[183] Velasco, *supra* note 165, at 454.

[184] *See id.* at 455. To "enhance environmental justice," on January 28, 2008, the Court issued an administrative order designating 117 environmental courts, the judges of which would be trained in environmental law at the Philippine Judicial Academy. The Court also promised to approve special rules of procedure in environmental cases, which would, among other measures, allow citizen suits, call for forfeiture of objects seized in breach of environmental laws, dismiss strategic lawsuits against public participation, exempt bonding requirements, call for the Philippines Legal Aid program to provide pro bono representation in environmental cases, and

B. The Public Trust Doctrine in Africa

1. Uganda: Preventing Deforestation Through Local Consent

a. Origins and Basics

The Ugandan public trust doctrine first appeared in a 2004 decision of a trial court — the High Court of Uganda at Kampala — in *Advocates Coalition for Development and Environment (ACODE) v. Attorney General*.[185] In this case, Kakira Sugar Works had a longstanding lease to take firewood from the Butamira Forest Reserve for its sugar refinery. Kakira applied for a fifty year permit from the National Environmental Management Authority to transform the forest reserve into plantation lands.[186] The government granted the permit, and *ACODE* challenged the permit on public trust and statutory grounds.[187] The High Court concluded that management authority breached its public trust duty under both the Ugandan Constitution and statutes by not obtaining the consent of the local community and not performing an environmental impact assessment.[188] The court observed that although the government had no authority to alienate the *jus publicum* in trust lands, it could issue permits or licenses only with local consent, which was not evident in the case of the Kakira permit.[189]

The High Court located the public trust doctrine in the 1995 Constitution's objectives and principles of state policy, which

require the bar to appoint special counsels in environmental cases. *See id.* at 457-58.

[185] Advocates Coal. for Dev. & Env't v. Att'y Gen. (*ACODE*), Misc. Cause No. 0100 of 2004 (July 11, 2005) (Uganda), *available at* http://www.greenwatch.or.ug/pdf/judgements/ACODEvsAttorneyGeneral.pdf.

[186] *Id.* at 2. The Busoga Kingdom Government issued the original firewood lease in 1939 for a period of 32 years. *Id.* at 3. The Forestry Department granted the permit at issue in 1997 for "general purposes," after which time Kakira Sugar Works began clearing forested land. *Id.* at 4.

[187] *Id.* at 1-2.

[188] *Id.* at 11. The National Environment Act of 1995 requires "prior environmental assessments of proposed projects which may significantly affect the environment or use of natural resources." National Environment Act (Ch. 153(2)(i)/1995) (Uganda), *available at* http://www.ulii.org/ug/legis/consol_act/nea1995237/. The plaintiffs also alleged that the public trust doctrine was "enshrined under the National objectives and directive principles of intergenerational equity as enshrined in the convention on Biological Diversity, 1992 and the Rio Declaration, 1992 which Uganda has either ratified and signed or subscribed to," implicating international treaties. *ACODE*, Misc. Cause No. 0100 of 2004, at 2.

[189] *ACODE*, Misc. Cause No. 0100 of 2004, at 8. The court noted that 1,500 local residents protested the license. *Id.*

announce that "[t]he shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda."[190] This constitutional public trust doctrine is restated in article 237 of the constitution, clarifying that both federal and local governments "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 . . . ."[191] In addition, the constitution proclaims that "[e]very Uganda has a right to a clean and healthy environment."[192]

These constitutional provisions have been substantially restated in statutes, such as in the Land Act, which expands upon the constitutional list of trust resources to include "ground water, natural ponds, natural streams."[193] The statute also authorizes the government "from time to time [to] review any land held in trust by the Government or any local government whenever the community in the area or district where the reserved land is situated so demands."[194] The Land Act's requirement of local consent for the alienation of trust resources, which the court attributed to the public trust doctrine, appeared to be a decisive factor in the *ACODE* decision.[195]

The National Environment Act also incorporates the constitutional notions of public health and the public trust doctrine.[196] The statute promises "all people living in the country the fundamental right to an

[190] CONSTITUTION OF THE REPUBLIC OF UGANDA [CRU] art. 13, *available at* http://www.ugandaemb.org/Constitution_of_Uganda.pdf; *see also id.* art. 27 (directing the state to "promote sustainable development and public awareness of the need to manage land, air, and water resources in a balanced and sustainable manner of the present and future generations," and that the natural resources of Uganda "shall be managed in such a way as to meet the development and environmental needs of present and future generations and . . . to take all possible measures to prevent or minimize damage or and destruction to land, air and water resources resulting from pollution or other causes.").

[191] *Id.* art. 237(2)(b).

[192] *Id.* art. 39.

[193] The Land Act (Act. No. 16, § 45 1988) (Uganda), *available at* http://faolex.fao.org/docs/pdf/uga19682.pdf.

[194] *Id.* § 45(6).

[195] *ACODE*, Misc. Cause No. 0100 of 2004, 10 (July 11, 2005) (Uganda), *available at* http://www.greenwatch.or.ug/pdf/judgements/ACODEvsAttorneyGeneral.pdf ("If it is true that land in Uganda belongs to the people as provided in the laws, it should be equally true that the local community in Butamira should have been consulted as a matter of transparency, accountability, and good governance as demanded by the public trust doctrine.").

[196] *See id.* at 8 (discussing the National Environment Act, which was unavailable from WorldLii and other databases).

environment adequate for their health and well being . . . use and conser[vation of] the environment and natural resources of Uganda equitably and for the benefit and both present and future generations . . . ."[197] The language calling for conservation for future generations implicitly invokes public trust principles. For example, the *ACODE* court ruled that the government violated the National Environment Act by failing to perform an environmental impact assessment on the effect of Kakira's planned transformation of the Butamira Forest into a sugar cane plantation.[198]

b. Scope

The scope of the Ugandan public trust doctrine parallels that of India's and the Philippines's in its comprehensiveness,[199] extending far upland from navigable waters. The doctrine includes all surface water, including wetlands; groundwater; and substantially all public lands, including forest and game reserves, national parks, and "other land reserved for ecological and touristic purposes for the common good."[200] Wildlife, plant life, and mineral resources are also constitutionally protected trust resources.[201]

c. Purposes

Uganda's public trust doctrine reaches considerably beyond traditional purposes of navigation, fishing, and commerce. Both the Constitution and the Land Act call for ecological and recreational protection.[202] The *ACODE* decision recognized far-reaching public trust purposes, stating that "[t]he right to health does not . . . stop at physical health. It covers intellectual, moral cultural, spiritual, political, and social wellbeing."[203] Thus, the Ugandan doctrine encompasses religious and medicinal purposes, in addition to ecological, recreational, and traditional purposes.

---

[197] *See id.* Compare this statutory language with the Philippines' right to a "balanced and healthful ecology." *See supra* note 155 and accompanying text.

[198] *ACODE*, Misc. Cause No. 0100 of 2004, at 8.

[199] *See M.C. Mehta*, *in* UN COMPENDIUM, *supra* note 96, at 272 (India); *Oposa*, 224 S.C.R.A. 792, *in* UN COMPENDIUM, *supra* note 96, at 29 (Philippines).

[200] CONSTITUTION OF THE REPUBLIC OF UGANDA [CRU] art. 237(2)(b); The Land Act, Act (No. 16, § 45(1) 1988) (Uganda), *available at* http://faolex.fao.org/docs/pdf/uga19682.pdf.

[201] CRU art. XIII.

[202] *Id.*; The Land Act § 45(1).

[203] *ACODE*, Misc. Cause No. 0100 of 2004, at 11.

d. Public Standing

Any member of the public may sue to enforce the Ugandan public trust doctrine. Article 50 of the Ugandan Constitution stipulates that "any person who claims that a fundamental or other right or freedom guaranteed under this constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation."[204] The same provision also authorizes "any person or organization" to file suit to vindicate "another person's or group's rights."[205] The constitution also makes clear that "[f]undamental rights and freedoms of the individual are inherent and not granted by the State."[206]

Since the public trust doctrine is clearly entrenched in article 237 of the constitution,[207] the doctrine is "a right or freedom" which the public may enforce in court. Moreover, a plaintiff need not be injured to have a case heard, a fact which the *ACODE* court emphasized: "The importance of [article 50] is that it allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of or does not know that he is suffering from the alleged injury."[208] The court elaborated:

> To put it in the biblical sense the Article makes all of us our brother['s] keeper." In that sense it gives all the power to speak for those who cannot speak for their rights due to ignorance, poverty or apathy. In that regard I cannot hide any pride to say that our constitution is among the best the [world] over because it emphasizes the point that violation of any human right or fundamental right of one person is a violation of the right of all.[209]

e. Remedies

Violations of the public trust doctrine are subject to injunctive relief, revocation of the *jus privatum* granted in trust resources, and possibly damages and restitution. The *ACODE* court granted the plaintiffs injunctive relief by voiding the permit issued to Kakira Sugar

---

[204] CRU art. 50.

[205] *Id.*

[206] *Id.* art. 20(1).

[207] *See supra* note 191 and accompanying text.

[208] *ACODE*, Misc. Cause No. 0100 of 2004, at 6.

[209] *Id.*

Works.[210] But, the court rejected ACODE's claim for "restoration orders" — essentially a request that the government restore the forest to its pre-permit condition — because the court concluded that "[s]uch orders are only relevant to the party who is guilty of the environmental damage."[211] Thus, ACODE apparently should have asked for restoration by Kakira, not the government.

Although the Ugandan Constitution expressly provides for compensation for violations of constitutional rights, ACODE did not seek money damages in the Butamira Forest case. Moreover, although the plaintiffs did not seek to recover litigation costs, the court addressed the issue on its own motion although it stated that since the case involved public interest litigation, it would not award costs to the plaintiffs because "[p]ublic interest litigation usually involves the interest of the poor, ignorant, deprived, ill-informed, desperate and marginalized society where justice is always high horse. The courts of law should always be slow at awarding costs in such matters in order to enhance access to justice."[212] Perhaps the court meant to suggest that litigation costs would not be awarded to defendants in unsuccessful public interest cases, since such awards would certainly discourage plaintiffs from bringing such cases.

2. Kenya: Remedying Water Pollution Through the Public Trust Doctrine

a. Origins and Basics

The earliest recognition of the public trust doctrine in Kenya occurred in the High Court at Nairobi's 2006 decision in *Waweru v. Republic*. This case involved an appeal of the imposition of criminal sanctions on residents of Kiserian Township for discharging raw sewage into the Kiserian River.[213] Because the government sought sanctions against only twenty-three of approximately 100 dischargers, the court decided that the proceedings violated due process, but it

[210] *Id.* at 11.

[211] *Id.*

[212] *Id.*

[213] Waweru v. Republic, (2006) 1 K.L.R. 677, 677 (H.C.K.) (Kenya), *available at* http://www.kenyalaw.org/environment/content/search_cases_index.php?SearchTerm2=Water. The government's Public Health Officer charged the residents with both the discharges and for failing to comply with notice to abate the discharges for being inconsistent with the Public Health Act, (2011) Cap. 242 §§ 118-20 (Kenya). *Waweru*, 1 K.L.R. 677 at 679.

made clear that this result did not relieve the residents of their obligations.[214]

The High Court discussed the continuing environmental obligations of both the residents and the government and took up the issue of the public trust doctrine on its own motion.[215] The court noted that section 3 of the Environmental Management and Coordination Act ("EMCA") gives the people the right to a clean and healthy environment, and that section 71 of the Kenyan Constitution entitles every person to the right to life.[216] The court elaborated:

> In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures, including man. It is inherent from the act of creation, the recent restatement in the Statutes and Constitutions of the world notwithstanding.[217]

Thus, although the High Court read the statutory right to a clean and healthy environment into the constitutional right to life, it implied that both are derived from natural law. The court proceeded to discuss principles of sustainable development: the polluter pays principle, and the precautionary principle, referencing international customary law.[218]

The High Court stated that the "essence of public trust [doctrine] is that the [S]tate, as trustee, is under a fiduciary duty to deal with trust property, being the common natural resources, in a manner that is in the interests of the general public."[219] Relying on two Pakistani cases concerning that country's right to life provision,[220] the court declared that implicit in the Kenyan constitutional right to life was the public trust doctrine.[221] The court also discussed the right to life in the

---

[214] *Waweru*, 1 K.L.R. 677 at 684-86.

[215] *Id.* at 688 (observing that the public trust doctrine was not expressly mentioned in relevant environmental laws).

[216] *Id.* at 687 (citing CONSTITUTION, art. 26 (2010) (Kenya) and Environmental Management and Coordination Act, (1999) Cap. 8 § 3, 108).

[217] *Id.* at 687.

[218] *Id.* (referring to the 1992 Rio Declaration on Environment, the 1987 Development, and the United States World Commission on Environment and Development).

[219] *Id.* at 689.

[220] *See supra* notes 134, 139 (discussing the Pakistani cases).

[221] *Waweru*, 1 K.L.R. at 689-92 (citing *Salt Miners*, S.C.M.R. (SC) 2061 & *Zia*, 46 PLD (SC) 693).

context of international treaties and intergenerational equity, declaring, "the water table and the river courses affected are held in trust by the present generation for the future generations."[222]

Although the *Waweru* opinion seemed to commingle the public trust doctrine with several environmental principles, the court distinguished the trust doctrine in its discussion of remedies. Noting that both the national government and the local county council had statutory duties under the Water Act, the Local Government Act, and the EMCA,[223] the High Court ruled that they were "also under a public trust to provide adequate land for the establishment of [water] treatment works."[224] Consequently, the court issued a mandamus requiring the construction of such a facility because the Kiserian residential development posed a "threat to life." Thus, the court appeared to reaffirm that the public trust doctrine was embedded in the constitutional right to life.[225] In its clearest annunciation of the public trust doctrine, the court declared: "In the case of land resources, forests, wetlands and waterways[,] to give some examples[,] the Government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment."[226]

Since the *Waweru* decision, Kenya adopted a new constitution in 2010, which expressly incorporated the public trust doctrine that the High Court found implicit in the constitutional right to life and the statutory right to a clean and healthy environment. Retaining the right to life in article 26, the new constitution added the right to a clean and healthy environment in article 42, including the right "to have the environment protected for the benefit of present and future generations through legislative and other measures . . . ."[227] Moreover, article 69 requires the government to "ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits" for the benefit of the people of Kenya.[228]

---

[222] *Id.* at 691, 694.

[223] *Id.* at 692 (discussing Local Government Act, (2010) Cap. 265 § 178-80; Water Act, (2002) Cap. 372 § 8 (2002); Environmental Management and Coordination Act, (1999) Cap. 8 § 3, 108).

[224] *Id.*

[225] *Id.* The right to life, located in article 71 of the Kenyan Constitution at the time of *Waweru*, is now in article 26. *See* CONSTITUTION, arts. 26, 46 (2010) (Kenya).

[226] *Waweru*, 1 K.L.R. at 692.

[227] CONSTITUTION, arts. 26, 42.

[228] *Id.* art. 69. The same article also imposes duties on every person "to cooperate with State organs and other persons to protect and conserve the environment and

The most explicit public trust language is in the 2010 constitution's public land provisions. Article 61 declares that "[a]ll land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals."[229] Article 69 also requires the state to eliminate activities that are likely to endanger the environment, protect genetic resources and biological diversity, and work to maintain tree cover on at least ten percent of the land.[230] Article 62 declares that the national government owns public lands "in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.[231] Thus, the 2010 Constitution clearly enshrines the public trust doctrine that the High Court first recognized in *Waweru* just four years before.

b. Scope

The geographic scope of the Kenyan public trust doctrine is quite broad. The *Waweru* court described "land resources, forests, wetlands and waterways, to give some examples" as trust resources for which the government owes fiduciary duties.[232] Article 62 makes clear that the doctrine extends to all public lands, including minerals, oil, forest, parks, animal sanctuaries, and other protected areas; rivers, lakes, and other water bodies; the seabed on the continental shelf and the resources in the exclusive economic zone; and all land between the high and low water marks.[233]

Thus, the Kenyan public trust doctrine includes both terrestrial and aquatic resources. Further, article 62 limits the government's ability to sell or lease the *jus publicum* in public lands without adequate justification, stating that "[p]ublic land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."[234]

ensure ecological sustainable development and use of natural resources." *Id.*

[229] *Id.* art. 61.

[230] *Id.* art. 69.

[231] *Id.* art. 62.

[232] Waweru v. Republic, (2006) 1 K.L.R. 677, 692 (H.C.K. Nairobi Mar. 2, 2006) (Kenya), *available at* http://www.kenyalaw.org/environment/content/search_cases_index.php?SearchTerm2=Water.

[233] CONSTITUTION, art. 62 (2010) (Kenya).

[234] *Id.* art. 62, sec. 4. The High Court of Kenya at Mombasa has also held that public roadways are trust property in Niaz Mohamed Jan Mohamad v. Comm'r for Lands, Civil Suit No. 423 of 1996 (H.C.K. Mombasa Oct. 9, 1996) (Kenya), *in* UN COMPENDIUM, *supra* note 96, at 290, 293 (maintaining that "since the acquisition [of private land] was done for the purpose of making a Public Road, the road thus made remained a Public Road or street and vested in the Local Authority . . . to hold in trust

c. Purposes

The Kenyan public trust doctrine incorporated ecological, recreational, and other nontraditional uses. Although the 2010 Constitution does not expressly recognize particular public uses, some provisions indicate that ecological purposes are implicit. For example, article 69 requires the government to "ensure . . . management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits . . . ."[235] Article 68 declares that the parliament must enact legislation "to protect, conserve and provide access to all public land,"[236] thus providing a constitutional guarantee of public access to trust resources.

The *Waweru* court also elaborated on public trust purposes, construing the EMCA's promise of a clean and healthy environment (now entrenched in article 42 of the 2010 Constitution[237]) to "include[] the access by any person in Kenya to the various public elements or segments of the environment[] for recreational, educational, healthy, spiritual and cultural purposes."[238] Because the High Court determined that the right to a clean and healthy environment is inherent in the constitutional right to life,[239] and because the public trust is implicit in the right to life,[240] the statutory access purposes are also likely constitutionally entrenched.

d. Public Standing

The public in Kenya has standing to sue on the basis of the public trust doctrine, as incorporated in the constitutional right to a clean and healthy environment. Article 70 of the 2010 constitution specifies that members of the public may sue if their environmental rights are "likely to be . . . threatened."[241] The constitution expressly states that

for the public in accordance with the law . . . as such trust land, neither the Local Authority nor the Government could alienate the land . . .").

[235] CONSTITUTION, art. 69 (2010) (Kenya).

[236] *Id.* art. 68.

[237] *Id.* art. 42.

[238] *See Waweru*, (2006) 1 K.L.R. at 688 (citing Environmental Management and Coordination Act, (1999) Cap. 8 § 3).

[239] *Id.* at 687.

[240] *Id.* at 690.

[241] CONSTITUTION, art. 70(1) (2010) (Kenya) ("If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.").

members of the public do not have to demonstrate they have "incurred loss or suffered injury."[242] Therefore, no standing thresholds bar members of the public from enforcing their constitutionally protected right to a clean environment.

e. Remedies

The 2010 Constitution authorizes a variety of remedies for damages to trust resources or environmental harms. Article 70 provides that courts may issue both negative and affirmative injunctive relief or may award compensation "for any victim of a violation of the right to a clean and healthy environment."[243] In *Waweru*, the High Court employed several remedies to address the water pollution in the Kiserian River. First, under the public trust doctrine, the Water Act, and the Local Government Act, the court issued a mandamus requiring the government and the local county council to construct and maintain a water treatment facility.[244] Second, the court prohibited further residential development in Kiserian Township without approval of the National Environmental Authority and directed that authority to employ the precautionary principle when considering any such approvals because the township lies on the water table.[245] The court also ruled that local authorities should order residents to pay for the cost of restoration under the polluter pays principle.[246] However, the court refused to award attorneys' fees, since the subject of the litigation was "a matter of public interest."[247]

3. Nigeria: A Constitutionally Implied Public Trust Doctrine

a. Origins and Basis

The Nigerian public trust doctrine seems implicit in the 1999 Constitution, which declares that "[t]he State shall protect and improve the environment and safeguard the water, air and land, forest

[242] *Id.* art. 70(3).

[243] *Id.* art. 70(2).

[244] *Waweru*, 1 K.L.R. at 692 (citing Local Government Act, (2010) Cap. 265 § 178-80; Water Act, (2002) Cap. 372 § 8).

[245] *Id.* at 693.

[246] *Id.*

[247] *Id.* at 696. Compare this reasoning for denying attorney fees with the similar reasoning of the Uganda High Court in the *ACODE* decision involving the Butamira Forest. *See supra* note 208.

and wildlife of Nigeria."[248] The Constitution also demands that "exploitation of human or natural resources in any form whatsoever for reasons, other than for the good of the community, shall be prevented . . . ."[249] Although lacking express public trust language, these two provisions arguably impose trust duties on the government to protect natural resources for the benefit of "the community" — the beneficiary of the trust. The 1999 Constitution also recognizes the fundamental right to life,[250] which has been regularly interpreted by developing countries to include a right to a clean and healthy environment.[251] Some evidence suggests that the Nigerian judiciary may also interpret the constitutional right to life to include environmental health.[252]

b. Scope

Since the public trust doctrine is likely to inhere in the 1999 Constitution, its scope is broad, because the constitution considers the environment, which the state must "protect, improve, and safeguard," to include air, water, land, forest, and wildlife resources.[253] Mineral resources also seem included.[254] Since the constitution limits natural resource exploitation for the "good of the community,"[255] the State's trusteeship probably requires equitable sharing of the benefits of resource development.

[248] CONSTITUTION OF NIGERIA (1999), § 20, *available at* http://www.nigeria-law.org/ConstitutionOfTheFederal RepublicOfNigeria.htm.

[249] *Id.* § 17(2)(d).

[250] *Id.* § 33(1).

[251] *See supra* note 105 (India); 127 (Pakistan); note 216 (Kenya); *infra* note 263 (South Africa); note 304 (Brazil).

[252] *See* Oluwatoyin Adejonwo-Osho, *The Evolution of Human Rights Approaches to Environmental Protection in Nigeria*, IUCN ACADEMY OF INTERNATIONAL LAW, 7 (Aug. 17, 2009), http://www.iucnael.org (discussing the environmental right to life as applied to gas flaring and suggesting that the Federal High Court's decision in *Ghemre v. Shell Petroleum Dev. Co.*, [2005] FHC/B/CS/53/05 (unreported) (Nigeria), *available at* http://www.climatelaw.org/cases, foreshadows the judiciary's reading into the right to life an environmental right).

[253] CONSTITUTION OF NIGERIA (1999), § 20.

[254] *See* Adejonwo-Osho, *supra* note 252, at 7; *see also* CONSTITUTION OF NIGERIA (1999), §§ 20, 44(3) (declaring public ownership of "minerals, mineral oils, and natural gas").

[255] CONSTITUTION OF NIGERIA (1999), § 17(2)(d).

c. Purposes

With no case law, the purposes of the public trust doctrine are not clear. But, given the likely constitutional entrenchment of an environmental right, the purposes of the trust most likely includes protecting, improving, and safeguarding a host of aquatic and terrestrial resources,[256] as well as their equitable distribution.[257]

d. Public Standing

Under the Nigerian Constitution the Nigerian Supreme Court may hear appeals "as of right" in cases involving fundamental rights, including the right to life.[258] However, environmental claims not implicating the right to life may face standing hurdles, like the special injury requirement.[259]

e. Remedies

The lack of cases makes unclear the remedies available under the Nigerian public trust doctrine.

4. South Africa: A Constitutional and Statutory Basis for the Public Trust Doctrine

a. Origins and Basis

The public trust doctrine is deeply ingrained in South Africa's Constitution as well as its statutes. The 1996 Constitution[260] laid the foundation for several statutes enacted between 1998 and 2008 that reflect trust doctrine principles.[261] Like many developing countries,[262]

[256] *See supra* notes 253-54 and accompanying text.

[257] *See supra* note 255 and accompanying text.

[258] CONSTITUTION OF NIGERIA (1999), ch. VII (referencing fundamental rights in chapter IV, which includes the right to life in section 33).

[259] *See* S. Gozie Ogbodo, *The Role of the Nigerian Judiciary in Environmental Protection and Oil Pollution: Is It Active Enough?*, NIGERIAN LAW GURU, 4 (Jan. 17, 1980), http://www.nigerianlawguru.com/articles/environmental%20law/THE%20ROLE%20THEOF%The%20NIGERIAN%20JUDICIIARY%20IN%20THE%20ENVIRONMENTAL%20PROTECTION%20AGAINST%20OIL%20POLLUTION,%20IS%20IT%20ACTIVE%20ENOUGH.pdf.

[260] S. AFR. CONST., 1996, *available at* http://www.info.gov.za/documents/constitution/1996/96cons2.htm.

[261] *See infra* notes 269, 273, 276-79 and accompanying text; *see also* Takacs, *supra* note 98, at 740-47.

[262] *See supra* note 105 (India); note 127 (Pakistan); note 216 (Kenya); note 250

the South African Constitution includes the right to life;[263] but the Constitution goes beyond most in its incorporation of trust language. For example, section 24 of the bill of rights, which recognizes environmental rights, declares:

> Everyone has the right:
>
> a. To an environment that is not harmful to their health or well-being; and
>
> b. To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —
>
> i. Prevent pollution and ecological degradation;
>
> ii. Promote conservation; and
>
> iii. Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[264]

Section 27 further announces that "[e]veryone has the right to have access to . . . sufficient food and water" and requires that "[t]he state must take responsible legislative and other measures . . . to achieve the progressive realization of . . . these rights."[265] This provision seems to establish the state's affirmative duty to provide access to food and water, the latter being part of the traditional corpus of the public trust doctrine.

Beyond the bill of rights, the South African Constitution imposes environmental duties on the national and local governments, as well as the South African Human Rights Commission. Section 146 elevates national legislation over provincial legislation when "necessary for . . . the protection of the environment."[266] Section 152 declares that "[t]he objects of local government are . . . to promote a safe and healthy environment" and that "[a] municipality must strive . . . to achieve [these] objects."[267] Finally, the Human Rights Commission must annually "require relevant organs of state to provide the Commission with information on the measures that they have taken towards the

(Nigeria); *infra* note 304 (Brazil).

[263] S. AFR. CONST., 1996, § 11.

[264] *Id.* § 24.

[265] *Id.* § 27.

[266] *Id.* § 146.

[267] *Id.* § 152.

realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."[268]

In 1998, shortly after the adoption of the 1996 Constitution and one year after the Indian Supreme Court's *M.C. Mehta* decision, the South African legislature enacted two environmental statutes incorporating the public trust doctrine even more explicitly than the language of the Constitution: the National Environmental Management Act ("NEMA")[269] and the National Water Act.[270] NEMA created a comprehensive environmental lens through which to interpret other environmental statutes, as discussed below.[271] In its statement of principles, NEMA expressly incorporated the public trust doctrine, declaring that "[t]he environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must protected as the people's common heritage."[272]

The National Water Act also devotes considerable attention to the public trust doctrine.[273] In its preamble, the Act recognizes that "water is a natural resource that belongs to all people" and acknowledges that "the National Government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters . . . ."[274] Section 3 of the Water Act, entitled "Public trusteeship of nation's water resources," established the national government as public trustee which "must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons . . . while promoting environmental values."[275] This language

[268] *Id.* § 184.

[269] National Environmental Management Act 107 of 1998 ("NEMA") § 2(4)(o) (S. Afr.), *available at* http://www.Info.gov.za/view/DownloadFileAction?id=70641.

[270] National Water Act 36 of 1998 § 3(1) (S.Afr.), *available at* http://www.info.gov.za/view/DownloadFile Action?id=70693.

[271] *See generally infra* notes 273, 276-79 and accompanying text.

[272] NEMA § 4(o).

[273] On the Water Act and its origins, which lie in a White Paper written by the Department of Water Affairs and Forestry, see Robyn Stein, *Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Water Rights System*, 83 TEX. L. REV. 2167, 2173 (2004) (discussing Dept. of Water Affairs & Forestry, SA White Paper on a National Water Policy for South Africa (1997) (S. Afr.), *available at* http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf.

[274] National Water Act 36 of 1998 pmbl.

[275] *Id.* § 3.

clearly incorporated the public trust doctrine into water management in South Africa.

Three additional statutes adopt the public trust doctrine. First, the Mineral and Petroleum Resources Development Act of 2002 recognized the environmental trust duties imposed by section 24 of the bill of rights. The Act announced that "the State's obligation to protect the environment for the benefit of present and future generation, [while] ensur[ing] ecologically sustainable development of mineral and petroleum resources . . . ."[276] The statute also recognized mineral and petroleum resources as "the common heritage" of the people, and the State as the "custodian" of mineral resources,[277] reflecting a sovereign trusteeship. Second, the Biodiversity Act of 2004 established the government's trust duties to "manage, conserve and sustain" biological diversity, including genetic resources.[278] Third, the Coastal Management Act of 2008 contained the most comprehensive public trust doctrine language, declaring that the government "must act as the trustee of the coastal zone" and asserting public ownership of coastal public property, which is inalienable and subject to a right of public access.[279]

b. Scope

The public trust doctrine in South Africa is expansive. Since section 24 of the bill of rights establishes trust duties in "the environment,"[280] the trust doctrine likely encompasses all natural resources. NEMA's principles establish that "[e]nvironmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated . . . [,]"[281] apparently confirming that all natural resources are subject to trust obligations. Similarly, the preamble to the Water Act recognizes that "water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle . . . [,]"[282]

[276] Mineral and Petroleum Resources Development Act 28 of 2002 pmbl. (S. Afr.), *available at* http://www.info.gov.za/view/DownloadFileAction?id=68062.

[277] *Id.* § 3.

[278] National Environmental Management: Biodiversity Act of 2004 § 3(a) (S. Afr.), *available at* http://info.gov.za/view/DownloadFileAction?id=82171.

[279] National Environment Management: Integrated Coastal Management Act 24 of 2008 §§ 11-13 (S. Afr.) [hereinafter Coastal Act], *available at* http://www.info.gov.za/view/DownloadFileAction?id=96257.

[280] S. AFR. CONST., 1996 § 24.

[281] NEMA § 4(b).

[282] National Water Act 36 of 1998 pmbl.

which seems to include all water resources within the corpus of the trust.

Even if the South African public trust doctrine does not extend to all natural resources by virtue of section 24 of the bill of rights,[283] environmental statutes provide an extensive list of resources subject to trust obligations. NEMA's principles provide that "[s]ensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention . . . ."[284] The Water Act's statement of purposes includes "protecting aquatic and associated ecosystems and their biological diversity."[285] The Mineral Act establishes the state's custodial duties over "mineral and other petroleum resources."[286]

The Biodiversity Act declares the state's duty as trustee, as part of the environmental rights in section 24 of the Constitution, to "manage, conserve and sustain South Africa's biodiversity and its components and genetic resources."[287] Finally, the Coastal Act provides an extensive list of "coastal public property" to which the trust duty attaches, including coastal waters, land submerged by coastal waters, the seashore, State-owned coastal lands, and any natural resources on or in coastal property, the exclusive economic zone, or the continental shelf.[288]

Thus, the public trust doctrine in South Africa extends to both traditional and non-traditional resources. The doctrine extends well beyond tidal waters and shorelands to include sensitive ecosystems, wetlands, biological diversity and genetic resources, and mineral and petroleum resources, among a host of expansions beyond the doctrine's traditional scope.

c. Purposes

The purposes of the South African public trust doctrine are quite broad, as indicated by the statutes. Ecological and conservation purposes are clearly within the doctrine, given the expressed concern over stressed ecosystems, biological diversity, and genetic resources.[289]

---

[283] *See supra* notes 252, 264 and accompanying text.

[284] NEMA § 4(r).

[285] National Water Act § 2(g).

[286] Mineral and Petroleum Resources Development Act 28 of 2002 § 3(1) (S. Afr.), *available at* http://www.info.gov.za/view/DownloadFileAction?id=68062.

[287] National Environmental Management: Biodiversity Act of 2004 § 3(a) (S. Afr.), *available at* http://www.info.gov.za/acts/2004/a10-04/a10-04a.pdf.

[288] Coastal Act 24, *supra* note 279, at § 7.

[289] NEMA § 3(a) (genetic resources); *id.* at 4(r) (stressed ecosystems); National

NEMA declares that "[e]nvironmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably."[290] The Coastal Act provides "a right of reasonable access to coastal public property" for the public.[291] The public access right guaranteed by the Coastal Act should incorporate a number of public cultural and societal interests, including recreational values related to water resources.

d. Public Standing

The South African public trust doctrine is deeply entrenched in the constitutional environmental right established by section 24 of the bill of rights. Thus, the public has a constitutional provision of standing under section 38 of the bill of rights, which grants "anyone" the right to sue to vindicate a bill of rights provision, including "anyone acting in the public interest."[292] As section 24's constitutional environmental rights are expressly incorporated into several statutes, a plaintiff would seem to be able to bring a suit in the Constitutional Court for statutory violations.[293] Moreover, the 1996 Constitution also provides in the bill of rights that "[e]veryone has the rights to have any dispute that can be resolved by the application of that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[294] Judicial review of administrative action is also constitutionally entrenched.[295]

In addition to these constitutional grants of public standing, the environmental statutes generally call for public participation and access to the regulatory process. For example, NEMA declares that "the participation of all interested and affected parties in environmental governance must be promoted" in "an open and transparent manner" with public access to information.[296] Similarly, the Water Act recognizes the need for "integrated management" and

Water Act § 2(g) (biological diversity).

[290] NEMA § 2(2).

[291] Coastal Act 24, *supra* note 279, at § 13(1)(a).

[292] S. AFR. CONST., 1996, § 38(d).

[293] The Constitutional Court hears only constitutional claims and claims distinct from other courts; only the Constitutional Court may decide that parliament or the president has failed to fulfill its constitutional obligations. *Id.* § 167.

[294] *Id.* § 34.

[295] *Id.* § 33 (describing a "just administrative hearing").

[296] NEMA § 2.

delegation of management "so as to enable everyone to participate" in decision making.[297] These public participation provisions amplify South Africa's citizens' environmental rights to include policy formation in addition to adjudication.

e. Remedies

As with many developing countries, South Africa incorporates the "polluter pays" principle into its environmental regulatory regime. NEMA demands that "[t]he costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment."[298] Because NEMA expressly incorporates notions of environmental trusteeship in the constitutional environmental right contained in section 24 of the bill of rights,[299] the polluter pays principle, including damages, would seem to be available under the public trust doctrine. Section 34 of the constitution declares that in a suit concerning fundamental rights, a court may "grant appropriate relief, including a declaration of rights."[300] "Appropriate relief" would seem to include both declaratory and injunction relief, as well as possibly restitution.

C. The Public Trust Doctrine in South America and North America

1. Brazil: Constitutionally Entrenching the Public Trust Doctrine

a. Origins and Basis

The public trust doctrine in Brazil is implicit in its 1993 Constitution.[301] Although Brazilian courts have yet to discuss the public trust doctrine, the principles of sovereign trusteeship, ecological purposes, public rights, and generational equity are clearly evident in article 225 of the constitution.[302] That provision states: "all persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life, it being the duty of the Government and of the community to defend

[297] National Water Act 36 of 1998 pmbl.
[298] NEMA § 2(4)(p).
[299] S. AFR. CONST., 1996 § 24; *see supra* notes 265, 279 and accompanying text.
[300] S. AFR. CONST., § 38.
[301] CONSTITUICÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).
[302] *Id.* art. 225.

and preserve it for present and future generations."[303] Moreover, like other developing nations, the Brazilian Constitution expressly protects the right to life,[304] which article 225 links to an "ecologically balanced environment," likely establishing that environmental health is also a fundamental constitutional right.[305]

Other constitutional provisions indicate that the notion of sovereign environmental trusteeship is deeply rooted in Brazilian law. Article 20 enumerates the "property of the Union," establishing numerous types of public property, including sea beaches, ocean and shore lands, natural resources on the continental shelf and the exclusive economic zone, territorial waters, tidelands, "hydraulic energy potentials," mineral resources, archaeological sites, and "lands traditionally occupied by Indians."[306] Article 23 announces the common duty of all levels of government to protect the environment and "remarkable natural scenery," as well as to preserve forests, flora, and fauna.[307] Article 24 declares the obligation to the legislative branches of government to protect the environment, natural resources, and "natural scenic beauties," and to impose liability for environmental harms.[308] The 1993 Constitution, therefore, contains a robust list of trust resources and associated trust duties.

b. Scope

The Brazilian public trust doctrine is quite broad. The Constitution declares ownership of both traditional trust property — submerged lands and tidelands — and also of caves, archaeological sites, mineral resources, and hydraulic energy sites.[309] Article 225 lists other resources for which the state has trust duties, including ecological processes, genetic wealth, flora, and fauna, describing in detail the "national wealth" of the Amazon Forest, the Atlantic Woodlands, and the coastline.[310]

---

[303] *Id.*

[304] *Id.* art. 5; *see supra* note 105 (India); note 127 (Pakistan); note 216 (Kenya); note 250 (Nigeria).

[305] *See supra* note 303 and accompanying text.

[306] C.F. art. 20 (including also as property of the Union "unoccupied government lands indispensable for . . . preservation of the environment, as defined by law").

[307] *Id.* art. 23.

[308] *Id.* art. 24.

[309] *Id.* art. 20; *see supra* text accompanying note 265.

[310] C.F. art. 225 (listing also "Serra do Mar" and the Pantanal Mato Grossense," and prohibiting the alienation of "vacant" government lands if "necessary to protect natural ecosystems").

c. Purposes

The public trust doctrine implicit in the 1993 Brazilian Constitution seems to encompass a variety of nontraditional uses. Article 24 directs legislatures to enact laws to protect the environment, provide pollution control, and protect "historic, cultural, artistic and touristic monuments, including natural scenic beauties."[311] Article 225 imposes a governmental obligation to preserve and restore "an ecologically balanced environment, which is an asset for the people's common use and is essential to a healthy life . . . for present and future generations."[312] To carry out this obligation, the constitution prescribes preservation and restoration of "essential ecological processes," genetic resources, fauna and flora, and endangered species, as well as promotion of environmental education.[313] Thus, the expansive purposes of the Brazilian public trust doctrine include not only ecological but also historic, scenic, genetic, wildlife, and educative purposes.

d. Public Standing

If the public trust doctrine and its *jus publicum* is linked to the environment and the other purposes mentioned above, the public seems likely to have standing to sue based on these rights. Article 5 of the cconstitution stipulates that "any citizen has standing to institute an action seeking to annul act to the public property or property pertaining to . . . the environment, and to historical, and cultural monuments . . . the plaintiff shall . . . be exempt from court costs and from the burden of loss of suit . . . ."[314] Citizens also have authority to sue when the government has violated its constitutional duty to "defend and preserve [the environment] for present and future generations."[315]

e. Remedies

In addition to suits to "annul an act" of the government,[316] the 1993 Constitution authorizes injunctive relief, money damages, restitution,

[311] *Id.* art. 24 (calling also for legislation on "forests, hunting, reservation of nature, defense of the soil and natural resources . . .").

[312] *Id.* art. 225.

[313] *Id.* art. 225(1).

[314] *Id.* art. 5.

[315] *Id.* art. 225.

[316] *Id.* art. 5.

and potential criminal penalties for select environmental harms.[317] The latter would presumably not be available under citizen suits, which would be reserved for governmental prosecutions.

2. Ecuador: Establishing the Public Trust Doctrine by Referendum

a. Origins and Basis

Ecuador's public trust doctrine is fully incorporated into the 2008 Constitution. In a remarkable expansion of environmental protection, the new constitution recognizes fundamental rights inherent in nature, giving all persons the right to "call upon public authorities to enforce the rights of nature."[318] Nature, according to the constitution, "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes."[319] Nature also has an express right to restoration, and individuals have a right to compensation for environmental losses.[320] The constitution declares that all "persons, communities, peoples, and nations shall have the right to benefit from the environment . . ."[321] and provides a number of directives to ensure environmental protection.[322] Thus, the central elements of the public trust doctrine — fiduciary duties over natural resources, vested in the sovereign for the benefit of the people, and enforceable by the people — seem clearly embedded in the 2008 Constitution.

In addition to the rights of nature, the Ecuador constitution protects human environmental rights, establishing the "right of the population

---

[317] *See id.* art. 225(2) (mineral developers subject to restoration requirements); *id.* art. 225(3) (those who harm the environment subject to criminal sanctions).

[318] CONSTITUCIÓN POLÍTICA DE 2008 [CP] art. 71 (Ecuador), *available at* http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

[319] *Id.*

[320] *Id.* art. 72 ("Nature has the right to be restored. This restoration right shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems . . . .").

[321] *Id.* art. 74.

[322] *Id.* art. 72 ("In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences"); *id.* art. 73 ("The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alternation of natural cycles . . . "); *id.* art. 74. ("The State shall give incentives to natural persons and legal entities and to communities to protect nature and promote respect for all elements comprising an ecosystem.").

to live in a healthy and ecologically balanced environment" and declaring that environmental protection is a matter of public interest.[323] There is also a fundamental "human right to water," which is alienable only as a "strategic asset for use by the public."[324]

Although not express, the fiduciary duties of the State are evident throughout the constitution. For example, one provision announces that among the State's "prime duties" is the protection of "the country's natural and cultural assets."[325] Another declares that all Ecuadorians have "duties and obligations" to "defend the territorial integrity of Ecuador and its natural resources[,]" and to "respect the rights of nature, preserve a healthy environment and use natural resources rationally, sustainably and durably."[326]

b. Scope

A vast number of resources are subject to the Ecuadorian public trust doctrine. All water is likely subject to the public trust, as one constitutional provision declares that the "human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is inalienable, not subject to the statute of limitations, immune from seizure and essential for life."[327] Access to beaches and riverbeds and other water bodies is always constitutionally guaranteed.[328]

But the scope of the public trust doctrine extends considerably beyond water and waterways, seemingly including all natural resources. The constitution refers to "unique and priceless assets of Ecuador, includ[ing] the physical, biological and geological formations whose value from the environmental, scientific, cultural, or landscape standpoint requires protection, conservation, recovery and promotion."[329] Nonrenewable natural resources, mineral resources, biodiversity and genetic resources, and even "the radio spectrum" are "the inalienable property of the State . . . ."[330] The State has a duty to protect "the domain of fragile and threatened ecosystems, including . . . high Andean moorlands, wetlands, cloud forests, dry and wet tropical forests and mangroves, marine ecosystems and

[323] *Id.* art. 14.
[324] *Id.* art. 12.
[325] *Id.* art. 3.
[326] *Id.* art. 83(3), (6).
[327] *Id.* art. 12.
[328] *Id.* art. 375(8).
[329] *Id.* art. 404.
[330] *Id.* art. 408.

seashore systems."[331] It seems as if virtually all natural resources have an attached fiduciary obligation.

c. Purposes

The Ecuadorian public trust doctrine includes biodiversity, ecology, and probably scenic and recreational purposes. The constitution declares that all people "shall have the right to benefit from the environment and the natural wealth, enabling them to enjoy the good way of living."[332] In pursuit of this goal, the constitution provides a "right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability . . . . Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest."[333] The constitution expressly directs the State to "exercise sovereignty over biodiversity, whose administration and management shall be conducted on the basis of responsibility between generations . . . ."[334]

Although recreation is not an express purpose, the constitution protects the right to "habitat and housing," for which the State must "guarantee and protect public access to the beaches of the sea and the banks of rivers, lakes, streams, and ponds, and the existence of perpendicular access ways."[335] Since access to waterways is often for recreation and fishing, it seems likely that recreation is an implicit purpose of the Ecuadorian public trust doctrine. Similarly, the constitution also protects "unique and priceless natural assets[,]" which are valuable from a "landscape standpoint,"[336] implying that natural and scenic beauty is a trust purpose.

d. Public Standing

The public has constitutional standing to enforce the Ecuadorian public trust doctrine. Because nature has inherent, publicly

[331] *Id.* art. 406.

[332] *Id.* art. 74. The "good way of living" is referred to as the "sumak kawsay." *Id.* pmbl.

[333] *Id.* art. 14; *see also id.* art. 399 ("The full exercise of state guardianship over the environment and joint responsibility of the citizenry for its conservation shall be articulated by means of a decentralized national environmental management system, which shall be in charge of defending the environment and nature.").

[334] *Id.* art. 400.

[335] *Id.* art. 375(8).

[336] *Id.* art. 404.

enforceable rights,[337] "[a]ll persons, communities, peoples, and nations can call upon public authorities to enforce the rights of nature,[338] including "fil[ing] legal proceedings and resort[ing] to judicial and administrative bodies without detriment to their direct interest . . . ."[339] Thus, plaintiffs pursuing environmental claims need not show individual harm. The constitution also eliminates any statute of limitation for environmental harm,[340] imposes the burden of proof on the operator of the activity,[341] and expressly endorses the precautionary principle.[342]

The constitution is unequivocal about the public's ability to enforce constitutional rights, making them "directly and immediately enforceable by and before any civil, administrative, or judicial servant . . . at the request of the party."[343] Constitutional rights are "fully actionable," with no statutory or regulatory preconditions, and "[a]bsence of a regulatory framework cannot be alleged to justify their infringement or ignorance thereof, to dismiss proceedings filed as a result of these actions or to deny their recognition."[344]

e. Remedies

Remedies for violations of the Ecuadorian public trust doctrine are comprehensive, including injunctions, restitution, money damages, and mitigation. Since the constitution adopts the precautionary principle,[345] it also endorses "preventative measures . . . for the purpose of avoiding or ceasing the violation or threat of violation of a right."[346] Restitution and compensation for environmental harms are also constitutionally authorized, including "the obligation of integrally restoring the ecosystems and compensating affected persons and communities."[347] But since "[n]ature has the right to be restored," this right is distinct and "apart from the obligation of the State and natural

[337] *Id.* arts. 71-74.
[338] *Id.* art. 71.
[339] *Id.* art. 397.
[340] *Id.* arts. 1, 396.
[341] *Id.* art. 397(1).
[342] *Id.*
[343] *Id.* art. 11(3).
[344] *Id.*
[345] *Id.* art. 397(1).
[346] *Id.* art. 87.
[347] *Id.* art. 396.

persons or legal entities to compensate individuals and communities that depend on affected natural systems."[348]

Damages to trust resources place affirmative duties on both the government and private actors. The constitution implicitly adopts the concept of vicarious liability, stating that "[e]ach one of the players in the processes of production, distribution, marketing, and use of goods or services shall accept direct responsibility for preventing any environmental impact, for mitigating and repairing the damages caused, and for maintaining an ongoing environmental monitoring system."[349] Private parties, therefore, not only have a duty to provide restitution, but also to mitigate future harms.[350] The State has an obligation to enforce against private parties causing environmental harm, as well as against public servants responsible for environmental monitoring.[351]

3. Canada: Authorizing Suits for Public Damages and Against Government Inaction

a. Origins and Basis

The public trust doctrine in Canada has roots in public access disputes, cases based on claims of public nuisance for obstructions to navigable waters and public highways, and sometimes, on dedications by grant or prescription. More recent case law has expressly discussed the public trust doctrine, although without fixing the doctrine's place in Canadian law.

The oldest Canadian decisions address public access rights to navigable waters. In the 1866 case *Attorney-General v. Harrison*,[352] the chancery court held that despite a Crown license, a sawmill's discharge of debris was a public nuisance because it interfered with

---

[348] *Id.* art. 72.

[349] *Id.* art. 396.

[350] The state also has a duty to "adopt adequate measures to eliminate or mitigate harmful environmental consequences." *Id.* art. 72.

[351] *Id.* art. 397.

[352] Att'y Gen. v. Harrison (1866), 12 Gr. 466 (Ct. Ch. Upper Can.) (all ensuing pinpoint citations will be to Westlaw paragraph assignments). For an in-depth analysis of the Canadian public trust doctrine, see the following works, all by Andrew Gage: *Highways, Parks and the Public Trust Doctrine*, 18 J. ENVTL. L. & PRAC. 1 (2007); *Public Rights and the Lost Principle of Statutory Interpretation*, 15 J. ENVTL L. & PRAC. 107 (2005); and *Public Environmental Rights: A New Paradigm for Environmental Law?*, CONTINUING LEGAL EDUC. SOC'Y OF B.C. 1 (2007), http://wcel.org/resources/publication/public-environmental-rights-new-paradigm-environmental-law.

navigation.[353] Interpreting the concept of navigability broadly,[354] the court declared that a license to operate a sawmill cannot be construed to include the right to commit a public nuisance or to interfere with public rights.[355] In short, the court determined that the Crown could not abdicate the *jus publicum* in navigable waters, and that years of public acquiescence did not justify maintenance of a public nuisance.[356]

Some years later, in *Rhodes v. Perusse*,[357] the Supreme Court of Canada rejected a riparian landowner's right to exclude the public from a beach adjacent to the tidally influenced St. Lawrence River under theories of dedication or prescription.[358] Despite possessing a Crown grant, Rhodes had no right to exclude the public from the beach because, at the time of the grant, the public had free access to and from the river from a highway that ran along the shorelands.[359] The court determined that the beach had been dedicated to the public both from the text of the grant and by implication.[360] Even if the grant had contained no dedication to the public, the court would have concluded that the public had prescriptive rights to use the beach.[361]

---

[353] *Harrison*, 12 Gr. 466 para. 3.

[354] *Id.* para. 6 ("In a new country, especially, no narrow interpretation should be put upon the word 'navigable.' To do so would be to exclude from public use rivers and harbors highly valuable for purposes of commerce and of safety.").

[355] *Id.* para. 9 ("[T]he Crown cannot grant a license to commit a public nuisance. It would be licensing an individual to do that which interferes with a right which is the common inheritance of the people . . . such a license is not to be implied: it would be derogating from the honor of the Crown to assume an intention to do that which would be injurious to the people; and it would be assuming ignorance on the part of the Crown of its own powers and of the rights of the subject.").

[356] *Id.* para. 7 ("No length of time will legitimize a public nuisance, the soil being in the Crown, and the user the common inheritance of the public at large."). However, the chancery court did indicate that public rights could depend on whether the waterway way natural or artificial. *Id.* para. 9.

[357] Rhodes v. Perusse, [1908] 41 S.C.R. 264 (Can.).

[358] *Id.* para. 18.

[359] *See id.* para. 3.

[360] *Id.* paras. 5-6. The court discussed the limits on the Crown's ability to abdicate its trust duties concerning the *jus publicum* in the shorelands, stating "[t]he Crown, as owner of the foreshore, had undoubtedly the right to cut it up and dispose of it as deemed best; but clearly in so doing it owed a duty to the general public, irrespective of the special rights of the riparian owners, to protect them in the enjoyment of the common law right of *accés et sortie* to the river which they then had and of which they must necessarily be deprived in the contingency then foreseen that the beach might be laid out for building lots. It is not to be assumed that the Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public . . . ." *Id.* para. 6.

[361] *Id.* para. 13 (concluding that over 30 years of public use was sufficient to perfect

As early as the 1930s, Canadian courts began incorporating notions of trusteeship in public access decisions. For example, in *Vancouver v. Burchill*,[362] the Canadian Supreme Court determined that municipalities were fee simple owners of streets in a case involving the applicability of a motor vehicle licensing statute to a claim of damages for negligent vehicular homicide.[363] But the court cautioned that "[municipalities] are not, however, owners in the full sense of the word . . . hold[ing] []as a trustee for the public."[364]

The Canadian Supreme Court reaffirmed the limits on Crown ownership in *Friends of the Oldman River Society v. Canada*, a 1992 case involving whether a rule issued by the Minister of Environment complied with the Navigable Waters Protection Act.[365] After noting that public navigation rights exist regardless of whether a waterway is tidal,[366] the Court declared that the right of navigation "is paramount to the rights of the owner of the [river] bed, even when the owner is the Crown."[367] Thus, no Crown grant is sufficient to abdicate the *jus publicum* in navigable waters without clear legislation.[368]

At least three more recent decisions have explicitly endorsed public trust principles. First, in 1997, in *Labroador Inuit Ass'n v. Newfoundland,* the Newfoundland Court of Appeal, reviewed a government decision to exempt a mining project from environmental assessment requirements and indicated that trust principles would inform its review of the implementation of environmental legislation.[369] Endorsing protection of future generations, as well as the precautionary principle, the court stated:

> If the rights of future generation to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of legislation.

a prescriptive right).

[362] [1932] S.C.R. 620 (Can.).

[363] *Id.* para. 22.

[364] *Id.* The court noted that legislation can abridge the common law right of public access to public highways only through express words or clear intent. *Id.* para. 17.

[365] Friends of the Oldman River Soc'y v. Can. (Minister of Transp.), [1992] 1 S.C.R. 3, para. 8 (Can.).

[366] *Id.* para. 76 (observing that "the distinction between tidal and non-tidal waters was abandoned long ago," and citing *In re* Provincial Fisheries, [1896] 26 S.C.R. 444 (Can.)).

[367] *Id.* para. 77 (citing Flewelling v. Johnson, [1921] 59 D.L.R. 419 (Can.)).

[368] *Id.* para. 78 (citing R. v. Fisher, [1891] 2 Ex. C.R. 365 (Can.)).

[369] Labrador Inuit Ass'n v. Nfld. (Minister of Env't and Labour), [1997] 155 Nfld. & P.E.I.R. 93 (Can.).

> Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment.[370]

The Court of Appeal then overturned the trial division's determination in favor of the Minister of Environment and Labour and required environmental assessment of the ancillary mining works.[371]

Second, the Canadian Supreme Court in 2004 showed a willingness to apply the public trust doctrine in a case involving the alleged negligence of a Crown licensee for a forest fire. In *British Columbia v. Canadian Forest Products, Ltd. (CanFor)*,[372] the Crown sued for damages both in its capacity as landowner and as representative of the public interest.[373] Although it only awarded damages for the former, the court discussed both sorts of damages, referring to the Institutes of Justinian, English common law, and the French civil code, which recognized "common property in navigable rivers and streams, beaches, ports, and harbours."[374] The court also discussed the evolution of the public trust doctrine in the United States.[375] Although the court did not rule on the Crown's public trust standing because it was not fully argued on appeal, the decision indicated that there was "no barrier to the Crown suing" for damages as well as injunctive relief.[376]

Third, a Prince Edward Island trial court in 2005 refused to dismiss a claim of breach of public trust in a case involving the Minister of Fisheries and Oceans alleging a breach of fiduciary duty to maintain

---

[370] *Id.* para. 11.

[371] *Id.* paras. 28 (noting the decision of the Trial Division); *id.* para. 80 (Court of Appeal's judgment requiring an environmental assessment).

[372] British Columbia v. Canadian Forest Prods., Ltd. (*CanFor*), [2004] 2 S.C.R. 74, para. 1 (Can.).

[373] *Id.* para. 46. The issue in the case was the precise calculation of damages the Crown could receive: whether "stumpage value" or "auction value of the harvestable trees." *Id.* at para. 46. CanFor argued that since the "Crown has framed this case as an ordinary commercial law suit," damages should be calculated in the "ordinary way." *Id.* at para. 61. The trial division determined that since the trees were not going to market, the auction value was "out of accord with commercial reality," thus refusing the public interest claim. *Id.* at para. 54.

[374] *Id.* paras. 74-75.

[375] *Id.* paras. 78-80 (discussing interstate public nuisance cases and environmental enforcement cases as well as public trust cases like *Illinois Central*).

[376] *Id.* para. 81. The court expressed some reservation over "the important and novel policy positions raised" by a public trust suit by the Crown. *Id.*

the common right to fish in Atlantic fisheries.[377] Relying in part on the Canadian Supreme Court's *CanFor* decision, the court explained that if a government can sue:

> as guardian of the public interest, to claim against a party causing damage to that public interest, then it would seem in another case, a beneficiary of the public interest ought to be able to claim against the government for a failure to properly protect the public interest . . . [because] [a] right gives a corresponding duty.[378]

b. Scope

The public trust doctrine in Canada encompasses traditional trust resources, but suggests likely expansion to upland resources. Navigable waters are clearly public highways for commerce and fishing.[379] Moreover, a century ago in *Rhodes v. Perusse,* the Canadian Supreme Court extended public access rights to a privately owned beach.[380] The Crown or municipalities also generally hold public highways in trust.[381]

In its 2004 *CanFor* decision, the Canadian Supreme Court suggested it was open to entertaining public trust suits for damage to forests and the environment generally. The court recognized that "[t]he notion that there are public rights in the environment that reside in the Crown has deep roots in the common law."[382] The court also adopted a 1979 decision by the Ontario Court of Appeal, stating, "in our judgment, the municipality is, in a broad general sense, a trustee of the environment for the benefit of the residents in the area."[383] Thus, the

[377] Prince Edward Island v. Can. (Minister of Fisheries & Oceans), [2005] 256 Nfld. & P.E.I.R. 343, para. 6 (Can.).

[378] *Id.* para. 37. The court reserved judgment on the merits, requiring the plaintiffs to amend their pleadings to avoid political questions. *Id.* para. 42.

[379] *See, e.g.*, Friends of the Oldman River Soc'y v. Canada (Minister of Transp.), [1992] 1 S.C.R. 3, paras. 75-78 (Can.) (discussing common law rights of navigation and limits on the Crown's ability to interfere with these rights); *Prince Edward Island*, 256 Nfld. & P.E.I.R. para. 6 (refusing to strike a public trust claim for mismanaging Atlantic fisheries); *Harrison*, 12 Gr. 466 para. 3 (determining that debris from a sawmill which interfered with public navigation was a public nuisance).

[380] Rhodes v. Perusse, [1908] 1908 CarswellQue 96 para. 6, 41 S.C.R. 264 (Can.) (protecting public beach access along the St. Lawrence River, despite a Crown grant to private landowners).

[381] Vancouver v. Burchill, [1932] S.C.R. 620, para. 22 (Can.) (declaring that municipalities hold public access rights to public streets in trust for the public).

[382] *CanFor*, 2 S.C.R. 74 para. 74.

[383] *Id.* para. 73 (quoting Scarborough v. R.F.F. Homes, Ltd. (1979), 9 M.P.L.R. 255,

Canadian public trust doctrine may extend to all natural resources to which the Crown or municipalities have fiduciary duties.

c. Purposes

The Canadian public trust doctrine is limited primarily to traditional trust purposes, particularly public access for navigation, fishing, and commerce. Although decided primarily on public nuisance grounds, the Chancery Court of Upper Canada enjoined a sawmill operator from discharging debris and provided an environmental purpose because not only was "the navigation . . . impeded, but fish, which used formerly to frequent the harbor, have now disappeared, and their disappearances attributed by witnesses to the saw-dust deposit."[384] Trust principles also apply to protect free access to public highways.[385]

d. Public Standing

The Canadian public's ability to enforce against infringement of trust resource is limited by nuisance and other tort law principles. Traditionally, only the Attorney General could bring a public nuisance claim, unless an individual could prove special injury, meaning injury different in kind from that experienced by the general public, rather than a difference in degree.[386] In recent years, however, Canadian courts have suggested that standing rules may be broadening. In its *CanFor* decision, the Canadian Supreme Court ruled that the Attorney General had a right to sue for damages on the public's behalf, stating that the Crown's standing should not be narrowly interpreted because the Crown has "inalienable 'public rights' in the environment and certain common resources."[387] A year later, in *Labroador Inuit Ass'n*, a Prince Edward Island trial court relied on *CanFor* to conclude that if the Crown has standing to sue to vindicate the public interest, the public should have standing to sue the government when it fails to adequately protect the public interest, since a "right gives rise to a corresponding duty."[388]

257 (Can. Ont. C.A.)).

[384] *Harrison*, 12 Gr. 466 para. 1.

[385] *See, e.g.*, *Burchill*, [1932] S.C.R. paras. 17, 22 (Can.).

[386] *See, e.g.*, Stein v. Gonzales, [1984] 58 B.C.L.R. 110, para. 6 (Can.).

[387] *CanFor*, 2 S.C.R. para. 76.

[388] *See, e.g.*, Prince Edward Island v. Canada (Minister of Fisheries & Oceans), [2005] 256 Nfld. & P.E.I.R. 343, 2005 CarswellPEI 78, para. 34-37 (Can.).

e. Remedies

Canadian courts have limited remedies for infringement of trust resources to injunctive relief, largely because most cases have involved public access rights.[389] But in its *CanFor* decision, the Canadian Supreme Court stated that "there is no legal barrier to the Crown suing for compensation as well as injunctive relief . . . ."[390] Thus, it appears that the Crown may recover money damages, in addition to injunctive relief, for infringement of trust resources. However, it is less clear whether the public may seek money damages if the government does not. Although the *Labroador Inuit Ass'n* court suggested that a public trust claim could lie against the Crown for failing to protect trust resources, that case involved only declaratory relief, not money damages.[391]

CONCLUSION

This review reveals how the public trust doctrine in twelve different countries across four continents has evolved into a doctrine of ecological protection in ways unrealized in the United States. Abroad, the doctrine also incorporates the principles of precaution, sustainable development, and intergeneration equity in the process. This linkage is often due to courts' interpretation of the doctrine as a part of constitutional and statutory declarations of the public's right to a healthy environment or the right to life. In the United States, constitutional and statutory declarations of the public trust doctrine have been largely unrecognized.

Internationally, the public trust doctrine also applies to many more natural resources, both aquatic and terrestrial, as Professor Sax suggested it should over four decades ago. In most of the countries examined in this article, the public trust doctrine has equipped the public with broad standing to challenge government and private proposals that threaten the trust's environmental and public access purposes. Conversely, some American states have erected impediments to public trust suits, requiring legislative permission to challenge administrative action, personal injury, and sometimes even injury different in kind from that suffered by the general public. Far from imposing standing impediments, courts outside the United States

[389] *See, e.g.*, *Harrison*, 12 Gr. 466 para. 10.

[390] *CanFor*, 2 S.C.R. para. 81.

[391] *Compare Prince Edward Island*, 256 Nfld. & P.E.I.R. para. 1, *with* Labrador Inuit Ass'n v. Nfld. (Minister of Env't & Labour), [1997] 155 Nfld. & P.E.I.R. 93, para. 81 (Can.).

have often invited litigants to pursue public trust claims, sometimes even based on newspaper investigations, and often providing original jurisdiction in the country's supreme court. Non–U.S. courts have also used the public trust doctrine to fashion complex remedial injunctions, epitomized by the Philippines Supreme Court's order to clean up Manila Bay, which one justice of that Court referred to as a "perpetual mandamus."[392]

The basis of the public trust doctrine abroad is also distinctive. Unlike the common law origins in most American states, the doctrine in the countries examined in this Article reveals an origin that is sometimes statutory and often constitutional. The doctrine is also of natural law based in countries like India and the Philippines, the two nations whose courts have given the most sustained consideration to the public trust. A natural law origin of the trust doctrine would insulate it from statutory or constitutional change. However, statutory or constitutional attempts to eliminate the public trust doctrine seem unlikely in the early twenty-first century, as countries like Ecuador rush to adopt the doctrine by initiative. The public trust doctrine seems quite popular today beyond the borders of the United States, a development which Professor Sax may have envisioned — but which he did not explicitly predict — in his foundational Article many years ago.

[392] *See supra* note 183 and accompanying text.