

NECESSITAS EST LEX TEMPORARIS ET LOCI:

AN ARGUMENT FOR THE *LEGAL NECESSITY* OF TRUSTEESHIP IN INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL PACT FOR THE ENVIRONMENT

Along with all the other species on Planet Earth, the preceding, present and pending generations of human beings have, do or will fundamentally rely upon a healthy and sustainable global environment in order to simply exist. So, this basic biological fact concerning the absolute necessity of a global environment capable of sustaining and replicating life, as the inescapable reality of continuing life on this planet, must be recognized as the normative cornerstone of international environmental law.

Necessitas est lex temporis et naturae prima. (To paraphrase Hale, “Necessity is the first law of time and nature—1 Hale P.C. 54.)¹ The law must recognize and protect what is absolutely necessary to sustain basic human survival. So, this is a **basic biological fact** concerning the absolute necessity of a global environment capable of sustaining and replicating life, as the inescapable reality of current and continuing life on this planet. In legal terms, the global environment is a **sacred and living trust** whose preservation and perpetuation is absolutely necessary to the continuance of life on this planet; this is a basic biological fact that we ignore at our growing peril.

So, the inescapable reality of our absolute dependence on a healthy and sustainable global environment simply to exist and endure is not based—by any stretch of the imagination-- on subsequent state consent or recognition. As such, this basic biological necessity of a sustainable life must be recognized as the normative cornerstone of international environmental law. This can be immeasurable advanced by recognizing the global environment, in toto, as a **fiduciary trust** established by necessity by past, present and pending generations for the benefit of all of current and pending life on the planet; the governments of each state, in their individual and collective capacities, are the trustees of this necessary legal trust of the global environment.²

The recent December 2018 Report by the UN Secretary General is very helpful in this regard in that the report notes: “Among its conclusions, it finds that: there is no single ‘*overarching normative framework*’ that sets out rules and principles of general application in international environmental law [Emphasis added];and the articulation between multilateral environmental agreements and

¹ (To paraphrase Hale, “Necessity is the first law of time and nature—1 Hale P.C. 54.). See: Sir Matthew Hale (1800), *The History of the Pleas of the Crown: In Two Volumes* (Vol. 2). Payne. “Necessity” is, of course, a two edged sword to argue in law. So, the argument here for the international legal recognition of the *a priori* necessity of the global ecology to sustaining and perpetuating life on Earth as a biological fact is **not** the same legal argument concerning the legal “necessity,” say, to obey or justify absolute monarchy, which is among the first time it seems to appear in the Anglo-american legal tradition; for An in depth discussion of this latter issue see the excellent volume by Glenn Burgess (1997) *Absolute Monarchy and the Stuart Constitution*, Yale University Press, New Haven and London; see also the book review entitled: Davis, J. C. (1997). GLEN BURGESS, "Absolute Monarchy and the Stuart Constitution"(Book Review). *Parliamentary History*, 16(2), 234.

² This is borrowing from John Locke’ argument in his *Second Treatise*, concerning the origins of government as a trust; see Boudreau, T. (2012). The Law of Nations and John Locke's Second Treatise: The Emergence of the Fiduciary Legal Order during World War II. *J. Juris*, 15, 285.

environment-related instruments remains problematic due to a lack of clarity, 'content-wise and status-wise,' of many environmental principles."³

In view of this insightful observation, international environmental law must first and foremost reflect, recognize and respect the global environment as a living and legal trust capable of preserving and perpetuating life on this planet; thus, failure to do this by states or other entities implies its own legal set of duties and obligations to correct or overcome the threats to the global trust. According to the latest report by the IPCC, we are simply running out of time, especially in view of the growing fury and destruction caused by human abuse of the global climate, which we are now told will rapidly accelerate to the point in 7-12 years, if not sooner, into runaway catastrophic climate change.⁴

In particular, the legal doctrine of "common yet differentiated responsibilities" noted in the UNSG 2018 Report includes, or should include, the legal principle of "proportionate responsibility" that exists in many jurisdictions around the globe concerning the proportionate fiduciary duties of trustees; ever since the *Smelter* case, the doctrine of state responsibility for damages that occur to other arising from acts within their own territory is an already established principle of international law.⁵ In view of this, a separate yet related argument to the global trust proposal discussed above is that states are specifically responsible for the damages to the Earth climate and ability to sustain life in proportion to their contribution of continuing greenhouse gases, especially CO₂ into the global atmosphere.⁶ One way to make this proposed legal regulation an immediate practical restraint is to include specific language concerning such proportionate legal duties as part of common yet differentiated responsibilities in the pending Global Pact for the Environment

In short, the current and precarious climatic status quo on the planet Earth is unsustainable. If international environmental law is silent on this threat, or unable to establish an "overarching normative framework" of global environmental trusteeship that implies its own set of legal duties or obligations by states and other entities, then we will most likely disappear, or be greatly diminished, by the coming storms and ravages of rapidly accelerating climate change.⁷

³ For both articles, see: <https://sdg.iisd.org/news/un-secretary-general-issues-report-on-global-pact-for-the-environment/> (Hereafter the first is referred to as the UNSG 2018 Report.)

⁴ <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>

⁵ See: Rebecca M. and Russell A. Miller eds., (2006) "The Trail Smelter Dispute [Abridged]," 'Transboundary Harm in International Law: Lessons from the *Trail Smelter* Arbitration,' (Cambridge University Press.; Also See: Wirth, J. D. (2000). *Smelter smoke in North America: The Politics of Trans-border pollution*. Lawrence, Kan.: University Press of Kansas.

⁶ See: Boudreau, Thomas Ph.D. (2017) "The Earth's Atmosphere As A Global Trust: Establishing Proportionate State Responsibility To Maintain, Restore And Sustain The Global Atmosphere," *Environmental and Earth Law Journal (EELJ)*: Vol. 7 : Iss. 1 at: <https://lawpublications.barry.edu/ejejj/vol7/iss1/2/>

⁷ See: Ibid., Andrei. <https://lawpublications.barry.edu/ejejj/vol7/iss1/2/>.

