

GLOBAL ENVIRONMENTAL LAW: COMMON INTERESTS AND THE (RE)CONSTITUTION OF PUBLIC SPACE*

ELLEN HEY

Professor of Public International Law (Erasmus University Rotterdam)

1. Introduction

International environmental law, as Alexandre Kiss so aptly illustrated in his writings, concerns issues that are of common interest.¹ That is, it deals with issues that are of concern to all of humanity and that any one state cannot address on its own. Addressing such issues challenges the inter-state paradigm, central to classical international law, hence the term ‘global environmental law’.

This essay examines the nature of global environmental law and asserts that the transition from international to global environmental law has resulted in a reconstitution of public space, understood as the space in which society interactively (re)constitutes itself through, amongst other things, law.² Normatively, public space in this essay is regarded as the space in which public power should be exercised in the common

* Paragraphs 2 and 3 of this essay are reproduced with slight adaptations from ELLEN HEY: *Global Environmental Law and Global Institutions. A system lacking good process.* In ROLAND PIERIK–WOUTER WERNER (eds.): *Global Justice, Sovereign Power and International Law Bridging the Gap between Global Political Theory and International Legal Discourse.* Cambridge: Cambridge University Press, 2009, forthcoming

¹ See for example ‘The Common Heritage of Mankind: Utopia or Reality?’ *XL International Journal* 1985, 423.; ‘The Common Concern of Mankind.’ *27 Environmental Policy and Law* 1997, 244.; ‘Economic Globalization and the Common Concern of Humanity.’ In ALEXANDRE KISS–DINAH SHELTON–KANAMI ISHIBASHI (eds.): *Economic Globalization and Compliance with International Environmental Agreements.* The Hague: Kluwer Law International, 2003, 3.; ‘Réflexions sur l’intérêt general de l’humanité.’ In RENATO ZERBINI RIBEIRO LEÃO (ed.): *Studies in Honour of Antônio Augusto Cançado Trindade.* Vol. 1. Porto Alegre: Fabris, 2005, 79.; and ALEXANDRE KISS–DINAH SHELTON: *Guide to International Environmental Law.* The Hague: Martinus Nijhoff Publishers, 2007.

² The ideas about public space reflected in this essay are informed by Phillip Allot’s ideas regarding constitutionalism, social power and international law as expressed in *Eunomia. A New Order for a New World.* Oxford: Oxford University Press, 1990. and ‘The Concept of International Law.’ *10 European Journal of International Law* 1999, 31. The ideas about society and law interactively reconstituting each

interest and subject to standards of accountability, associated with the rule of law. This essay asserts that global environmental law in addressing issues that are of common interest has moved away from the inter-state paradigm in terms of both substantive law and decision-making patterns, and that in the process public space has been reconstituted in a manner that raises questions regarding the legitimacy of global environmental law and the accountability of the entities exercising public power in particular. This essay, moreover, makes the point that national public law offers a discourse in which these changes can be conceptualized and a normative basis for a further interactive reconstitution of public space and global environmental law and thus for establishing a more just system of law.

Below I will first analyze the nature of global environmental law, both in terms of substance and decision-making patterns. I assert that the transformation from international to global environmental law can be characterized by two developments: substantive law marks a shift from the discretionary to the functional role of states; decision-making patterns mark a shift from the discretionary role of states to the discretionary role of global institutions, particularly in the South-North context. Finally and by way of conclusion, I address the nature of public space as shaped by global environmental law and suggest that national public law discourse offers concepts which may serve to further reconstitute public space so that it may more legitimately serve the common interest.

2. Substantive elements of global environmental law: from a discretionary to a functional role of states

Substantive elements in global environmental law reflect concerns associated with the well being of individuals and groups and seek to further distributive justice. Principle 1 of the 1992 Rio Declaration on Environment and Development (Rio Declaration), for example, provides that

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Moreover, Judge Weeramantry in his separate opinion in *Gabčíkovo–Nagymaros*, contemplated “[w]e have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.”³

These quotes illustrate two concerns that increasingly are reflected in global environmental law: the interests of human beings and the interests of humanity as a whole. Global environmental law conceptualizes states as the protectors of these concerns by focusing on their functional role. It defines this functional role by formulating the responsibilities of states in terms of common interests, considerations

other are informed by Allot’s writings and by Jutta Brunnée and Stephen Toope’s work on an interactional theory of international law as expressed in ‘International Law and Constructivism: An Interactional Theory of International Law.’ 39 *Columbia Journal of Transnational Law* 2000, 19.

³ *Case Concerning the Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, 1977 ICJ Rep. 7, separate opinion of Vice-President Weeramantry, at para. C(c).

of equity and the substantive interests and rights of individuals and groups in society. Each of these elements highlighting the functional role of states will be discussed below.

2.1 Common interests

Common interests are reflected in global environmental law by the concept of ‘common concern’. This concept does not address the thorny issue of state sovereignty, or lack thereof, over a certain space or resource. Instead, it qualifies a certain issue or problem as being of concern to humankind.⁴ The 1992 Convention on Biological Diversity (Biodiversity Convention) in its preamble provides “that the conservation of biological diversity is a common concern of humankind” and the 1992 United Nations Framework Convention on Climate Change (Climate Change Convention), also in its preamble, provides “that change in the Earth’s climate and its adverse effects are a common concern of humankind”. While other multilateral environmental agreements (MEAs) do not explicitly declare an issue or problem to be of common concern, they reflect an approach similar to that employed in the Biodiversity and Climate Change conventions. This approach is characterized by state’s parties to an MEA sharing responsibility for addressing the detrimental consequences of environmental deterioration for developing states, for the well being of individuals in general and certain groups in particular and for areas beyond national jurisdiction, and by identifying the need for common but differentiated action by states and action by the private sector.⁵

The concept of common concern is distinct from concepts such as ‘common area’ and ‘common heritage of mankind’, which, treat certain areas and their resources as common property resources subject, respectively, to formal equal access (Antarctica, the high seas and outer space) and material equal access (the Area). The concept of common concern instead leaves existing jurisdictional regimes intact, be it sovereignty over territory and the territorial sea, sovereign rights in the exclusive economic zone, or flag state or state of registry jurisdiction in the global commons. It requires that states within their territory and over activities subject to their jurisdiction adopt measures to curtail environmental degradation and that states assist each other in addressing these problems.

2.2 Considerations of equity

Considerations of equity are reflected in global environmental law most pertinently in the concepts of inter- and intra-generational equity.⁶ Inter-generational equity concerns equity between generations while intra-generational equity concerns equity

⁴ Also see, JUTTA BRUNNÉE: Common Areas, Common Heritage, and Common Concern. In DANIEL BODANSKY–JUTTA BRUNNÉE–ELLEN HEY (eds.): *Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2007, 550.

⁵ See, e.g. the 2001 Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention), which in its preamble reflects these concerns.

⁶ Also see DINAH SHELTON: Equity. In BODANSKY–BRUNNÉE–HEY (eds.) op. cit. 639.

within a generation. Both concepts are intimately related to the concept of sustainable development as conceptualized by the Brundtland Commission. I reproduce the oft quoted words.

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁷

The Commission emphasizes that “the concept of needs” refers to “in particular the essential needs of the world’s poor, to which overriding priority should be given”.⁸

Noteworthy is the fact that the International Court of Justice (ICJ) in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*⁹ and again in *Gabčíkovo–Nagymaros*¹⁰ determined that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”. The court thereby clarified who are to be the beneficiaries of the activities of states: individuals and groups, including those belonging to future generations.

Protection of the interests of future generations is among the explicit goals of most MEAs. Inter-generational equity, furthermore, is reflected in global environmental law through the obligations to prevent and redress environmental damage, to use natural resources sustainably and to adopt a precautionary approach in the development and implementation of environmental policy and law.

Intra-generational equity is intimately related to the South-North, or developing-developed state, controversy. This controversy concerns issues of distributive justice and echoes the legacies of colonialism and the continued unequal relations of power between developing and developed states.¹¹ Intra-generational equity finds its clearest expression, at the level of principles, in the principle of ‘common but differentiated responsibilities’.¹² This principle entails that developed states, given their past contribution to the deterioration of the environment, their concomitant accumulation of wealth and their present financial and technological capabilities have an obligation to take on larger burdens when it comes to protecting the environment and to transfer financial resources and technology to developing states, which are obliged to take steps to protect the environment that are within their means. The principle of common but differentiated responsibilities manifests itself through grace periods for developing

⁷ The World Commission on Environment and Development. *Our Common Future*. Oxford: Oxford University Press, 1987, at 43.

⁸ *Id.*

⁹ *ICJ Reports* 1999, para.29.

¹⁰ *Supra* note 3, judgement, para. 112.

¹¹ See, ANTHONY ANGHIE: Colonialism and the Birth of International Institutions. 34 *NYU Journal of International Law and Politics* 2002, 513; THOMAS POGGE: The Influence of the Global Order on the Prospects for Genuine Democracy in Developing Countries. 14 *Ratio Juris* 2001, 326.

¹² See, SIMON CANEY: Cosmopolitan Justice, Responsibility and Global Climate Change. 18 *Leiden Journal of International Law* 2005, 747. For a critical analysis see, CHRISTOPHER D. STONE: Common but Differentiated Responsibilities in International Law. 98 *American Journal of International Law* 2004, 276.

states,¹³ instruments that impose obligations only on developed states¹⁴ and provisions that make the implementation of the obligations resting upon developing states conditional on the transfer of funds, know-how and technology from developed states.¹⁵

While sustainable development as conceptualized by the Brundtland Commission addresses the interests of generations,¹⁶ i.e. individuals and groups belonging to those generations, and the ICJ refers to “human beings, including generations unborn”,¹⁷ the principle of common but differentiated responsibilities as incorporated in MEAs addresses the duties of states vis-à-vis each other. These treaties, then, should be understood as emphasizing the functional role of states in attaining sustainable development for individuals and groups belonging to present and future generations, including those located in other states. While individuals and groups thus are identified as the beneficiaries of state action, they are not, as such, the addressees of the treaty provisions concerned.

2.3 Substantive rights and interests

Individual and group substantive interests and, even if sparsely, rights are addressed in global environmental instruments, either indirectly as interests that are to be the object of the policies pursued by states or as rights per se. Admittedly legally binding instruments generally do not refer to environmental rights, while legally non-binding instruments do express such rights. Moreover, human rights bodies have interpreted civil and political rights so as to include environmental considerations in their scope of application.

The right to an adequate environment has been incorporated into binding legal instruments at the regional level only.¹⁸ It forms part of both the 1981 African Charter on Human and Peoples’ Rights, which provides that “[a]ll peoples shall have the right to a generally satisfactory environment favorable to their development”¹⁹ and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) which provides that “everyone shall have the right to live in a healthy environment and to have access to public services”.²⁰ The African Charter thus conceptualizes the right to a healthy environment as a peoples right, while the Protocol of San Salvador conceptualizes it in terms of a social and economic right. Albeit indirectly, the Committee on Economic, Social and Cultural Rights (Committee on ESCR) in 2000 also addressed the right to adequate environmental conditions as part of the right to health as expressed in article

¹³ Art. 5, 1990 Montreal Protocol on the Depletion of the Ozone Layer (Montreal Protocol).

¹⁴ Art. 3, 1997 Kyoto Protocol only imposes emission reduction obligations on developed and economy in transition states.

¹⁵ E.g. art. 4(7), Climate Change Convention; art. 20(4), Biodiversity Convention.

¹⁶ See text at *supra* note 7.

¹⁷ See text at *supra* note 10.

¹⁸ See, JOHN G. MERRILLS: Environmental Rights. In BODANSKY–BRUNNÉE–HEY op. cit. 661.

¹⁹ Art. 24, African Charter on Human and Peoples’ Rights

²⁰ Art. 11(1), Protocol of San Salvador.

12(1) of the Covenant on Economic, Social and Cultural Rights.²¹ In addition, human rights courts and human rights bodies have interpreted various civil and political rights, such as the right to life, the right to physical integrity, the right to private life as well as procedural rights such as the right to fair trial, to be relevant in an environmental context.²²

Many legally non-binding instruments, such as Agenda 21,²³ the Rio Declaration,²⁴ 2002 the Millennium Development Goals,²⁵ the 2002 Johannesburg Declaration²⁶ and the 2005 World Summit Outcome²⁷ address the interest of individuals and of particular groups in a healthy environment and emphasize the functional role of states, as well as the private sector, in protecting these interests. These documents and especially the more recent ones, however, remain far from formulating such concerns in terms of human rights.

Some MEAs in their preambles incorporate public health concerns, including those of special groups such as women, among the *raison d'être* of the regime.²⁸ Such provisions in some cases are developed further in the body of the instrument by way of provisions on public information, awareness and education.²⁹

An example of a treaty that addresses the interests of individuals and groups and the functional role of states somewhat more elaborately, but in a very specific context and in an instrumental manner, is the Biodiversity Convention. It, for example, requires states to promote the wide application of the knowledge of indigenous and local communities “with the approval and involvement of the holders of such knowledge [...] and encourage the equitable sharing of the benefits arising from the utilization of such knowledge...”,³⁰ to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices compatible with conservation or sustainable use requirements”,³¹ and to “[s]upport local populations to develop and implement remedial action in degraded areas where biological diversity

²¹ Paragraphs 4, 11, 15, 16, 22 and 36, General Comment 14(2000), Doc. E/C.12/2000/4, 11 August 2000, for the text of general comments by the Committee on ECSR see <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed October 11, 2008).

²² See, the contributions by DINAH SHELTON on ‘Human Rights and the Environment’ in the successive editions of the *Yearbook of International Environmental Law* (Oxford: Oxford University Press) and DANIEL GARCÍA SAN JOSÉ: *Environmental Protection and the European Convention on Human Rights*. Human Rights Files, No.21, Council of Europe (Strasbourg, 2005).

²³ In particular its section 3.

²⁴ Principle 1, quoted above, as well as principles 20 through 22.

²⁵ See <http://www.un.org/millenniumgoals/> (accessed October 11, 2008).

²⁶ Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002, Doc. A/CONF.199/20, at 1, <http://www.un.org/jsummit/html/documents/documents.html> (accessed October 11, 2008).

²⁷ General Assembly Resolution, 2005 World Summit Outcome, A/Res/60/1, 24 October 2005, see paragraph 48 for commitments related to the environment.

²⁸ Second paragraph, preambles of the Stockholm Convention and the Montreal Protocol; 2nd, 3rd and 15th paragraphs, preamble, 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

²⁹ Art. 10, Stockholm Convention.

³⁰ Art. 8(j), Biodiversity Convention.

³¹ Art. 10(c), Biodiversity Convention.

has been reduced".³² In evaluating these provisions one must take into account the fact that they are imbedded in an instrument that generally addresses the rights and duties of states, seeks to secure access to the benefits that derive from the use of biological resources and conditions the interests of individuals and groups with provision that emphasize the discretion of states.³³

A pertinent example of an environmental right included in both legally binding and legally non-binding instruments is the right to water, which concerns a fundamental aspect of both the human right to life and the human right to a healthy environment.³⁴ The right to water is part of the right to enjoy adequate living conditions for women living in rural areas under article 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women and of the right to health under article 24(2) of the 1989 Convention on the Rights of the Child, it, however, has not been included in a binding legal instrument as a free standing right.

The right to water is addressed comprehensively in a legally non-binding document: General Comment 15, adopted by the Committee on ESCR in 2002.³⁵ Other instruments, albeit in terms of interests, address the need to secure access to water in adequate amounts and of adequate quality to cover basic human needs, including drinking water and water for sanitation. An example of such an instrument is the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention), adopted within the framework of the United Nations Economic Commission for Europe (UNECE). While the protocol does not in a geographical sense have global coverage, it, as the Helsinki Convention,³⁶ harbors traits of global environmental law. The most prominent among these traits is that states are to undertake specified actions both individually and in cooperation in order to secure proper access to water for drinking and sanitation purposes with the aim of protecting human health, and, for sanitation, also the environment. Thus, while remaining short of formulating a right to water, the Protocol on Water and Health clearly indicates that the objectives of state action are to be the interests of individual human beings living within the parties to the protocol, including individuals living in other states parties.

Water related instruments, thus, to various degrees illustrate a move away from the discretionary role that classical international law attributes to states towards emphasizing a functional role of states. That is, states are to undertake action to protect

³² Art. 10(d), Biodiversity Convention.

³³ E.g. article 8(j) of the Biodiversity Convention stipulates that the obligation expressed is '[S]ubject to its national legislation', while article 10 contains the proviso 'as far as possible and as appropriate'.

³⁴ Also see, ELLEN HEY: Distributive Justice and Procedural Fairness in Global Water Law. In JONAS EBBESSON–PHOEBE OKOWA (eds.): *Environmental Law and Justice*. Cambridge: Cambridge University Press, 2009.

³⁵ General Comment 15, UN Doc. E/C.12/2002/11, 20 January 2003.

³⁶ Both the Helsinki Convention and the Protocol on Water and Health in principle apply within the UNECE region. The parties to the Helsinki Convention in 2003, however, adopted a decision that, when it enters into force, will open the convention (not the protocol) to participation by states outside the UNECE region, upon approval of the Meeting of the Parties (Decision III/1, Amendment to the Water Convention, 28 November 2003, Doc.ECE/MP.WAT/14, 12 January 2004).

the environment, water in particular, in the interest of individuals and groups. General Comment 15, moreover, also addresses the role of non-state actors and global institutions in securing the right to water. Non-state actors are addressed indirectly by requiring that states take steps, both legal and political, “to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries”.³⁷ Global institutions are addressed indirectly, by requiring that states in their activities within such institutions cooperate to realize the right to water,³⁸ and directly, by requiring that such institutions themselves incorporate the right to water in their policies.³⁹

2.4 From discretionary to a functional role of states

The notion that states are to act in the interest of individuals and groups in society and in the common interest thus has been explicitly incorporated into global environmental law. Also included in these instruments is the notion that states, in particular developed states, are to assist developing states in protecting the interests of the individuals and groups living in the latter. States, however, remain wary of formulating environmental rights in legally binding instruments and such rights have been included in legally non-binding instruments only sparingly and in case of the right to water in a document, General Comment 15, developed by a committee of experts, rather than state representatives. Moreover, the strong manifestation of the functional role of states, even if not expressed in terms of individual rights, contained in the Protocol on Water and Health to the Helsinki Convention, lacks world-wide coverage.⁴⁰

Universal principles such as the principle of common concern, the principle of sustainable development and the principles of inter- and intra-generational equity provide the basis for conceptualizing the functional role of states in terms of law, both *vis-à-vis* each other and individuals and groups. The functional role of states *vis-à-vis* each other becomes concrete in particular in the South-North context where it has been translated into more demanding obligations for developed, as opposed to developing, states and obligations that require developed states to assist developing states. The functional role of states *vis-à-vis* individuals and groups in society manifests itself in the obligations that limit the discretion of states to treat the environment within their territory or jurisdiction as they see fit. These developments mark a departure from the classical international legal system in which law is conceptualized as inter-state law that is reciprocal and contractual in nature. Instead, global environmental law harbors traits of national public law, in which entities, in case of national public law the state, are constructed that, through the exercise of public powers, are meant to act in the common interest while protecting the rights and interests of individuals and groups. As will be illustrated in the next section of this essay, global environmental law

³⁷ Para. 33, General Comment 15.

³⁸ Para. 36, General Comment 15.

³⁹ Para. 60, General Comment 15.

⁴⁰ See *supra* note 36.

allocates public powers to global institutions, the World Bank in particular, but it does so in a manner that is from a normative point of view deficient. It, as it were, transfers public powers that in classical international law are attributed to states to global institutions, but does not transfer or incompletely transfers to the global level of decision-making the checks and balances associated with the exercise of public powers at the national level. This development, moreover, is particularly noteworthy in the South-North context, because it is in this context that the World Bank exercises powers that can be conceptualized as of a public nature.

3. Institutional and decision-making patterns in global environmental law: from the discretion of states to the discretion of global institutions

Besides states, a variety of global institutions participate in decision-making in global environmental law. These institutions both engage in normative development and in decision-making in individual situations. The former takes place especially through the development of rules and standards that seek to implement the provisions of MEAs. Relevant institutions are the conferences of the parties to MEAs, but also specialized agencies, such as the World Bank,⁴¹ other institutions that are part of the United Nations system, such as the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP), and cooperative endeavors among these institutions, such as the Global Environment Facility (GEF). Decision-making in individual situations takes place especially, but not only, by way of institutions, such as the World Bank and the GEF, deciding on the allocation of funds to projects that seek to implement MEAs in developing states and economy in transition states. Two elements are noteworthy in these processes. First, most of the decisions taken in the case of normative development are of a legally non-binding character, in terms of classical international law. Secondly, most of the decisions taken in individual situations relate to developing states.⁴²

3.1 The structure of decision-making

At the basis of most of contemporary global environmental law are various MEAs. Most of these agreements, such as the Biodiversity Convention and Climate Change Convention, are concluded in the form of a framework agreement, which provides the basic principles and institutions that form the basis for the further development of the regime. Protocols, such as the 1997 Kyoto Protocol and the 2000 Cartagena Protocol on Biosafety,⁴³ and decisions adopted by the conference of the parties to the framework

⁴¹ The term World Bank refers to the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA), when reference is to one of these specific institutions their acronym will be used. Other institutions such as the International Financial Corporation (IFC) are affiliated to the World Bank.

⁴² Also see, ELLEN HEY: *International Institutions*. In BODANSKY–BRUNNÉE–HEY op. cit. 749.

⁴³ Protocols respectively to the Climate Change Convention and the Biodiversity Convention.

agreement further develop the regime.⁴⁴ All MEAs contain provisions committing developed states to transfer funds and technology to developing states.⁴⁵ Within MEAs each state has one vote and while most decisions within MEAs are taken by consensus, some decisions may be taken by qualified majority vote.⁴⁶ Particularly noteworthy from a classical legal point of view, however, is the fact that most of the decisions taken within the framework of MEAs are legally non-binding even if they may affect the rights of states and of individuals and groups within the contours of the regime in question. A relevant example is the body of rules adopted within the framework of the Kyoto Protocol that determine whether a state party and its nationals are entitled to participate in the flexible mechanisms of the Kyoto Protocol, including trade in emission reduction units.⁴⁷ This development entails a significant departure from classical international law, in which a state is assumed to be bound by a rule or set of rules in the form of a treaty only if that state formally has consented to that rule or treaty or if a constituent treaty expressly attributes the competence to adopt legally binding rules to a global institution, such as the United Nations Charter to the Security Council.⁴⁸ It is this manner of decision-making, in particular, that has given rise to questions regarding the legitimacy of global environmental law.⁴⁹

The manner in which global environmental law constructs the relationship between developed states and global institutions, on the one hand, and developing states, on the other hand, in particular gives rise to questions regarding the legitimacy of decision-making in this area of law. This is because an important element of MEA-based regimes, the transfer of funds and technology from developed to developing states, is implemented via institutions located outside the MEA-regime as such. With this institutional relocation a shift in the decision making patterns takes place to the detriment of developing states: the one-state, one vote system of MEAs is replaced by system of weighted voting used in the World Bank and related institutions and by the considerable power of the bank itself.

The World Bank and the GEF, administered by the World Bank, even if established jointly by the World Bank, UNEP and UNDP, and other funds administered by the bank are particularly relevant in this context. The World Bank, for example, is the largest financier of biodiversity projects that serve, among other things, to implement the Biodiversity Convention in developing states.⁵⁰ The GEF functions as the financial

⁴⁴ E.g. *The CBD Handbook*, <http://www.cbd.int/convention/refrhandbook.shtml> (accessed October 11, 2008), which contains all decisions taken by the parties to implement the Biodiversity Convention and Cartagena Protocol. Similar handbooks are available for other MEAs.

⁴⁵ See *supra* note 15.

⁴⁶ E.g. article 9(2) of the Montreal Protocol allows parties to amend certain aspects of the annexes to the protocol by a two-thirds majority vote.

⁴⁷ E.g. Decision 2/CMP.1 on the Principles, Nature and Scope of the Mechanisms Pursuant to Articles 16, 12 and 17, adopted by the parties to the Kyoto Protocol in 2005.

⁴⁸ Also see, ELLEN HEY: *Teaching International Law. State-Consent as Consent to a Process of Normative Development and Ensuing Problems*. Inaugural lecture. The Hague etc.: Kluwer Law International, 2003.

⁴⁹ Also see, DANIEL BODANSKY: *Legitimacy*. In BODANSKY–BRUNÉE–HEY op. cit. 704 at 712.

⁵⁰ See <http://web.worldbank.org> (topics, environment, topics) (accessed October 11, 2008).

mechanism of most MEAs and is subject to the guidance of the conferences of the parties of MEAs and the guidelines adopted by the GEF itself. However, the GEF in its pilot phase was subject solely to the decision-making processes and procedures of the World Bank, in which developed states have a major say. It was during this phase that some of the basic rules of the game governing the operation of the GEF were fleshed out. Due to political pressure from developing states in the early 1990s, the GEF has been restructured, with developing and developed states now sharing decision-making power more equally.⁵¹

Similar to the GEF, the Prototype Carbon Fund (PCF), established by the World Bank in 1999, to a large extent fleshed out the rules of the game for the implementation of the Kyoto Protocol and in particular the clean development mechanism (CDM) and joint implementation (JI), two of the flexible mechanisms of the Kyoto Protocol. The CDM seeks to implement the Kyoto Protocol through projects financed by developed states in developing states; JI seeks to implement the protocol through projects amongst developed states and by developed states in economy in transition states. However, in the context of the World Bank JI is relevant in particular for the latter type of projects. In the PCF both developed states and private companies from developed states, participate in decision-making relative to their financial input into the fund.⁵² The PCF, and similar funds,⁵³ has played a decisive role in developing the global carbon market. However, developing states, the providers of the raw product (greenhouse gas emissions), only have a marginal say in the decision-making processes of the PCF, while developed states and private companies from developed states, the providers of the financial means to realize the reductions, hold decision-making power and obtain valuable emission reduction units that they can use to meet their commitments under the Kyoto Protocol or trade on the global carbon market, established on the basis of the protocol. Moreover, the reductions in greenhouse gases achieved through these funds besides benefiting the states in which the projects are executed also benefit the wider global community, including developed states.

The World Bank as such and through the various funds that it administers, thus, has become a central player in global environmental law and exercises considerable power vis-à-vis developing states and the manner in which they implement their MEA-based commitments.⁵⁴ Such powers, if conceived in terms of the substantive principles discussed in the previous section, serve to protect common interests, e.g. in the conservation of biodiversity and the protection of the climate system. They, moreover, implement considerations of equity, i.e. the principle of common but differentiated responsibilities, and merit the qualification 'public powers' that serve

⁵¹ See, NELE MATZ: Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environmental Facility and the Prototype Carbon Fund. *5 International Environmental Agreements* 2005, 265.

⁵² *Id.*

⁵³ See <http://carbonfinance.org/> (accessed 11 October 2008).

⁵⁴ Also see ANTHONY ANGHIE: International Financial Institutions. In CHRISTIAN REUS-SMIT (ed.): *The Politics of International Law*. Cambridge: Cambridge University Press, 2004, 217.

to construct public space and that should be subject to standards of accountability. Such standards, when conceptualized in terms of public law, involve a set of checks and balances in order avoid their abuse and entail participatory rights for those that may be affected by the powers exercised.⁵⁵ While the World Bank has not been oblivious to demands for the introduction of accountability mechanisms, its safeguard policies and other internal rules and regulations and the World Bank Inspection Panel (Inspection Panel), discussed below, only partly serve to address the concerns expressed.

The position of the World Bank as an entity that exercises public powers in global environmental law challenges the inter-state paradigm, as do the mechanisms employed by the bank, e.g. the GEF and the PCF, also due to the manner in which they involve the private sector. The private sector not only executes World Bank projects, but participates directly in institutions such as the PCF in which it exercises decision-making powers on a par with states, as investors in the fund.

3.2 Participatory rights

Participatory rights involve transparency of decision-making, participation in decision-making and access to accountability mechanisms.⁵⁶ While many environmental instruments attest to the importance of such participatory rights, few actually include the duty to establish such rights at the national level and the examples of instruments that refer to the realization of such rights in a transboundary context or within global institutions are few and far between.

Principle 10 of the Rio Declaration provides an example of a provision stressing the importance of participatory rights at the national level, the declaration, however, does not address such rights in a transboundary context or with respect to global institutions. The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention) provides an example of the manner in which classical international law addresses participatory rights in a transnational context. It provides for inter-state consultation,⁵⁷ leaving it up to the states concerned whether they involve individuals and groups, and requires non-discriminatory access (instead of minimum standards of access) for individuals and groups to judicial and other procedures in case of transboundary harm or serious threat thereof.⁵⁸ The Watercourse Convention, then, does not establish minimum standards regarding participatory rights of individuals and groups, neither in a national nor in a transnational context. Other instruments refer to the importance of involving the public in general or particular groups, such as indigenous peoples or women, in the development of policies regarding the environment, but they remain short of establishing participatory rights for individuals and groups.⁵⁹

⁵⁵ Also see, Allot, *supra* note 2.

⁵⁶ Also see, JONAS EBBESON: Public Participation. In BODANSKY–BRUNNÉE–HEY op. cit. 681.

⁵⁷ Artt. 11–19, Watercourses Convention.

⁵⁸ Art. 32, *id.*

⁵⁹ E.g. Art. 6(a)(ii) and (iii), Climate Change Convention; Para. 12 and 13, preamble, and art. 8(j), Convention on Biodiversity; Art. 10, Stockholm Convention.

Relevant in this context are the World Bank's safeguard policies. These policies consist of Bank Operational Policies and Bank Procedures (OP/BP) and are internally binding on bank personnel in the execution of projects, entailing that bank personnel has to ensure that states implement these policies. Relevant examples are the bank's safeguard policies on environmental assessment, indigenous peoples and international waterways. The bank's safeguard policy on environmental assessment requires the state concerned to consult with project affected groups and local NGOs and requires that relevant information be made available in a timely manner and in a form and language relevant to those consulted.⁶⁰ The safeguard policy on indigenous peoples formulates the duty of the borrower state to engage in "a process of free, prior and informed consultation with the affected Indigenous Peoples' communities"⁶¹ and determines that the bank shall only engage in projects where such consultations "result in broad community support to the project by the affected Indigenous Peoples."⁶² The bank's safeguard policy on international waterways provides for interstate consultation by way of a process similar to that contained in the Watercourses Convention.⁶³

World Bank safeguard policies as well as other OP/BPs constitute the policies against which the World Bank Inspection Panel assess complaints submitted to it by two or more individuals alleging that they have or are likely to suffer harm due to failure of the bank to meet its own internal rules in the execution of projects supported by the bank. The Inspection Panel, established in 1993, considers complaints submitted in regard of projects executed by the IBRD and IDA. It thus does not cover all projects financed through the GEF since these are not necessarily executed by these institutions,⁶⁴ nor does it consider complaints regarding projects financed by the International Financial Corporation (IFC) or the PCF and similar funds. The Inspection Panel can be characterized as providing access to an administrative or quasi-judicial procedure.⁶⁵

The most comprehensive approach to participatory rights is contained in instruments adopted within the ambit of the UNECE.⁶⁶ These instruments incorporate participatory rights, also in a transboundary context, both in treaties dealing with specific topics,

⁶⁰ Paras. 14–18, Operational Policy 4.01: Environmental Assessment, 1999. All World Bank safeguard policies, http://www.worldbank.org/projects_and_operations/safeguard_policies (accessed October 11, 2008).

⁶¹ Para. 6, Operational Policies 4.10. World Bank Safeguard policies are contained in Bank Procedures/Bank Operational Policies, so called OP/BP, OP/BP 4.10, July 2005, contains the safeguard policy on Indigenous Peoples. OB/BP 4.10 replaced OP/BP 4.20 on the same topic, adopted in September 1991.

⁶² Para. 1, Operational Policy 4.10: Indigenous Peoples, 2005. Also see Bank Procedure 4:10: Indigenous Peoples, paragraph 2 further specifies the notion of 'free, prior and informed consultation'.

⁶³ Operational Policy 7.50; Projects on International Waterways, 2001. Also see Bank Procedure 7.50, Projects on International Waterways, 2001.

⁶⁴ The GEF has adopted its own set of guidelines on participation, see http://www.gefweb.org/Operational_Policies/Public_Involvement/public_involvement.html (accessed October 11, 2008).

⁶⁵ See, Laurence Boisson de Chazournes: The World Bank Inspection Panel: about Public Participation and Dispute Settlement. In TULLIO TREVES *ET AL.* (eds): *Civil Society, International Courts and Compliance Bodies*. The Hague: T.M.C. Asser Press, 2005, 187.

⁶⁶ For environmental instruments adopted within the UNECE see <http://www.unece.org/env> (accessed October 11, 2008).

such as water management⁶⁷ and environmental impact assessment,⁶⁸ and provide a comprehensive regime in the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The Aarhus Convention provides minimum standards on access to information,⁶⁹ participation in decision-making⁷⁰ and access to justice⁷¹ and requires that these be applied without discrimination in a transboundary context.⁷² The Aarhus Convention also requires its parties to promote the application of the principles contained in the convention “in international environmental decision-making processes and within the framework of international organizations in matters related to the environment.”⁷³ This provision was further elaborated in 2005 Almaty Guidelines, which sets out standards on how access to information and public participation can be improved in international forums.⁷⁴ A further salient element of the Aarhus Convention is its compliance committee, which is entitled to hear claims of non-compliance submitted by individuals or groups against a party.⁷⁵ The Aarhus Convention, moreover, is open to states outside the UNECE-region, subject to the approval of the meeting of the parties.⁷⁶

3.3 The discretion of global institutions

What the analysis in this section illustrates is that while global institutions, especially the World Bank and associated institutions, exercise considerable decision-making, or public powers in global environmental law, the availability of instruments to check and balance those powers is extremely limited. In order to change that situation, I suggest, procedural fairness, in particular participatory rights, needs to be introduced in decision-making processes of those institutions.

First, I suggest that a much more balanced approach to the participation in decision-making by developing states needs to be adopted. I see no valid reason why those who ‘pay taxes’ should be fully represented in an institution, such as the World Bank and the PCF, that deal with common interest problems and why those who provide the other part of the solution, ‘the raw product’, should be under-represented. This is even more so if the returns obtained by those who pay taxes are valuable assets (green-

⁶⁷ Art. 16 Helsinki Convention; Artt. 5(1), 6(2), 8(1)(a)(iii), 9 and 10, Protocol on Water and Health.

⁶⁸ Art. 2(6), 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

⁶⁹ Artt. 4 and 5, Aarhus Convention.

⁷⁰ Artt. 6–8, Aarhus Convention.

⁷¹ Art. 9, Aarhus Convention.

⁷² Art. 3(9), Aarhus Convention.

⁷³ Art. 3(7), Aarhus Convention.

⁷⁴ Almaty Guidelines in Promoting the Application of the Principles of the Aarhus Convention in International Forums, Annex to Decision II/4, *Report of the Second Meeting of the Parties*, Doc. ECE/MP.PP/2005/2/Add.5 (20 June 2005).

⁷⁵ Decision I/7, Doc ECE/MP.PP/2/Add.8, 1 April 2004.

⁷⁶ Art. 19(3), Aarhus Convention. The parties to the Espoo Convention, as those to the Helsinki Convention (see *supra* note 36), adopted a decision opening the convention to states outside the UNECE-region, subject to the approval of the meeting of the parties (Decision II/4, 27 February 2001, Doc. not yet in force).

house gas emission reductions) on the global carbon market. The result seems to be that the substantive principle of common but differentiated obligations incorporated in the Climate Change Convention is being used to facilitate lucrative trade, with developed states and their companies reaping the financial benefits. Such a system is unlikely to be regarded as legitimate.

Increased participation by developing states, however, is unlikely to be sufficient to commit institutions, such as the World Bank, to a functional role. In order to enhance that role, I suggest, the participatory rights of individuals and groups vis-à-vis the bank also need to be enhanced. Ideally, such solutions should be provided in the context of the localities where projects are being implemented and where their effects are most likely to be experienced. While this is relatively easier where transparency and participation in decision-making are concerned, as evidenced by World Bank safeguard policies,⁷⁷ international law poses a formidable obstacle to the realization of accountability mechanisms vis-à-vis global institutions at that level due to the immunity that global institutions enjoy under national law for activities related to their policies.⁷⁸ This doctrine, I suggest, should be revisited. If global institutions exercise public powers as outlined in this essay, powers that are not commensurate with the manner in which international institutions are regarded in classical international law, which assumes they act at the inter-state level only, it would seem appropriate to limit those powers in accordance with legal concepts associated with national public law.

Given that global institutions are unlikely to relinquish the immunities that they enjoy under national law, it is at present most likely that any accountability mechanisms that may be established will be launched by these institutions themselves. In the case of the World Bank this could be done, for example, through the further development of the operational and bank policies and the expansion of the mandate of the Inspection Panel to include the competence to review the bank's practices against human rights standards. Other institutions might take similar steps⁷⁹ or introduce an ombudsperson, as has been done for the IFC and the Multilateral Investment Guarantee Agency (MIGA)⁸⁰ and was proposed for the GEF in 2006.⁸¹

This manner of proceeding, however, requires critical consideration as it does not take into account the multi-faceted nature (diversity of loci of decision-making and of actors) of decision-making in global environmental law. Instead, it reproduces at the global level, albeit incompletely, structures familiar from national public law in states

⁷⁷ See text following *supra* note 59.

⁷⁸ See generally, HENRY G. SCHERMERS–NIELS BLOKKER: *International Institutional Law*. Boston–Leiden: Martinus Nijhoff, 2003, paras. 1591–1616. Note, moreover, that the project documents governing projects executed by the World Bank and agreed to by the state where the project is executed generally provide for the immunity of the bank under the national legal system of developing state in question.

⁷⁹ See DANIEL BRADLOW: *Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*. 36 *Georgetown Journal of International Law* 2005, 403.

⁸⁰ See <http://www.cao-ombudsman.org/> (accessed October 11, 2008)

⁸¹ Speech delivered by Monique Barbut, CEO and Chairperson of the GEF, delivered at the GEF Council Meeting, Washington DD, December 5, 2006, <http://www.gefweb.org> (accessed October 11, 2008).

governed by the rule of law.⁸² Perhaps most importantly, such procedures, in tandem with any procedures that may be available within a state where the project is executed, do not allow for a comprehensive consideration of the decision-making involved. Instead, they compartmentalize decision-making into separate processes – the national and the international – and force complainants to present their claims in a piecemeal approach – hampering them from presenting the harm suffered or likely to be suffered as the result of a complex of but intimately interrelated decision-making processes linked to the project. The World Bank Inspection Panel exemplifies this manner of proceeding, given that the state concerned does not play a role in the complaint procedure, at least not in a formal sense. I suggest, that we need to consider how participatory rights might be realized closer to the individuals and groups that may be affected by relevant projects so that problems can be considered in their local context, perhaps in the form of ombudspersons located in developing states appointed especially to consider complaints involving projects in which global institutions exercise public powers vis-à-vis individuals and groups in those states.⁸³ More in general, we need to depart from the notion that participatory rights and in particular accountability mechanisms cannot have a hybrid character, involving global, national and local elements: hence the suggestion to revisit the doctrine regarding the immunities of global institutions under national law. This suggestion is related to the multi-faceted, as opposed to multi-layered, manner in which decision-making takes place in global law. We are not confronted with neatly distinguished layers, but rather with a host of inter-linked decision-making processes and actors whose decisions ultimately culminate at the ‘loalest’ of levels, that of individuals and groups.

4. Conclusion: (Re)constituting public space

The substantive elements of global environmental law thus hold the promise of a more just global order by emphasizing the functional role of states. The decision-making patterns employed in global environmental law, however, take away from that promise by emphasizing the discretionary power of international institutions, especially in the relationship between developing states and the World Bank and related institutions. In the transition from international to global environmental law public space thus has been reconstituted by attributing global public powers to international institutions without establishing an adequate system of checks and balances to hold those powers accountable.

⁸² But see SIMON CANEY: *Justice Beyond Border., A Global Political Theory.* Oxford: Oxford University Press, 2005, at 148–188, arguing in for the establishment of strong supra-state authorities within ‘a multi-level system of governance, in which power is removed from states to both supra-state and sub-state authorities’ (at 188).

⁸³ See SIMON CHESTE: *Justice Under International Administration: Kosovo, East Timor and Afghanistan.* New York: International Peace Academy, 2002, http://www.ipacademy.org/pdfs/JUSTICE_UNDER_INTL.pdf. (accessed October 11, 2008).

I suggest that a further reconstitution of public space is required in order to attain a more just global legal order. While undoubtedly substantive principles of (environmental) law require our attention, I submit that the procedural deficit in global environmental law requires our attention just as urgently. In so doing consideration should be given to developing and expanding the accountability mechanisms discussed above. In addition certain paradigms of international law, which provide essential building bricks of present global public space, should be reconsidered. These include the doctrine regarding the immunity of global institutions such as the World Bank and the doctrine that international institutions, as private actors, are not governed by international, i.e. inter-state, law. These doctrines enable global institutions to function in a legal vacuum and to create their own systems of rules, as illustrated by developments in the World Bank and related institutions.

If global institutions take on powers hitherto attributed only to states, such as financing, planning and implementation of projects that affect the livelihood of individuals and groups in society, then why should these institutions not be subject to the same human rights standards and accountability procedures that international law seeks to apply to states? National public law offers a language in which we can conceptualize the problems at stake.⁸⁴ However, the solutions adopted at the national level probably cannot and should not be replicated at the international level. Instead, I suggest we need to be more creative and develop solutions that enable integrated approaches to the decision-making patterns involved in global environmental law. Such approaches should engage all loci of decision-making (national, regional and global) involved in a project and should depart from the impact that such a project may have on individuals and groups in society.

The approach advocated in this essay involves a further reconstitution of public space through law and concomitantly a reconstitution of society, with society reconstituting law in an interactive process. Are these propositions idealistic, revolutionary or at least not realistic? A question often posed by Alexandre Kiss in his writings. I do not think so. Some elements are already in place, even if not perfect – think of the World Bank Inspection Panel. Other elements undoubtedly will require time to develop in a heuristic and piecemeal fashion.

Moreover, as Alexandre Kiss, with reference to Richard Strauss' choir of blind men in the *Frau ohne Schatten*, noted at the end of his inaugural lecture on the occasion of his visiting professorship at the Erasmus School of Law: "there is something and we do not know what it is, but still we must try to improve it". "This is the common destiny and the common vocation of all social sciences, which are based on the presumption that human beings can be known and that their behaviour can be foreseen and permanently oriented towards a better future."⁸⁵

⁸⁴ Also see the NYU project on global administrative law at <http://iilj.org/GAL/default.asp> (visited October 11, 2008)

⁸⁵ ALEXANDRE KISS: *Compliance with International and European Environmental Obligations*. Lecture delivered on the occasion of his inauguration as Visiting Professor at the Faculty of Law of the Erasmus University Rotterdam on 15 November 1996. The Hague: T.M.C. Asser Institute, 1997, at 11.

