

## ***A Fiduciary Perspective on the State's Duty to Protect the Environment***

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*Modern environmental law has made little progress in scaling back manifest environmental destruction. By reason of sovereignty, states are ultimately free to ignore international environmental regulation. This article proposes that the legitimacy of state legal authority be reconceptualised on a fiduciary basis. It argues that because every state action has the power to affect the interests of its vulnerable citizens, a duty akin to the common law fiduciary duty requires the state to act with utmost loyalty and in the best interests of its vulnerable subjects. Because environmental harms extend beyond boundaries and generations, this duty must also be cosmopolitan and intergenerational. It requires states to balance the interests of present and future generations of humanity, which is a higher duty than one that is only owed to the current generation within a state's domestic borders. Discharging this fiduciary duty requires strong engagement with and commitment to ecological sustainability.*

### **I INTRODUCTION**

Environmental degradation is rapidly becoming irreversible.<sup>1</sup> Yet modern environmental law and its institutions have been unable to make the environment a primary consideration in states' decision-making. As a result, it is imperative to reframe the nature of state legal authority to justify subjecting state sovereignty to environmental interests. The premise is that if someone with discretionary power owes a fiduciary duty to vulnerable parties, then such a duty should also attach to the sovereignty that states wield over their citizens. A state can hardly satisfy a fiduciary duty to act in its citizens' best interests when it continues to neglect environmental degradation. Therefore, such a duty would provide a strong incentive to strengthen environmental protection policies.

To develop this premise, this article will first identify the flaws in current ideas of state sovereignty. It will explore the concept of fiduciary relationships from a legal perspective through definitions found in case law

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1 There is plenty of literature on the imminent dangers that humanity face due to environmental destruction. See, for example, Mary Christina Wood "You Can't Negotiate with a Beetle": Environmental Law for a New Ecological Age" (2010) 50 Nat Resources J 167.

and from a philosophical basis, with a focus on Kant's Theory of Rights. It will then argue that the legal and moral bases for imposing fiduciary obligations could extend to the state–citizen relationship. Such a duty may be cosmopolitan in nature rather than limited to the nationals of a state. The article will then attempt to expand this duty to future generations, which is the most robust way to consider environmental concerns. After establishing that the duty should be imposed, the article will consider its content, concluding that a fiduciary duty to present and future generations — in an environmental context — requires that sustainability be the starting point for state decision-making. Finally, the article will consider the duty's potential domestic and international implications.

## II TRADITIONAL JUSTIFICATIONS OF STATE AUTHORITY

The orthodox understanding of the legitimacy of state actions derives from the concept of state sovereignty, or “the recognition by internal and external actors that the state has the exclusive authority to intervene coercively in activities within its own territory”.<sup>2</sup> Internally, philosophers have justified state sovereignty on the basis of popular consent.<sup>3</sup> Externally, the international community justifies sovereignty by recognising state authority within territorial borders. It is doubtful whether these theories reflect the modern understanding of state sovereignty.

### Popular Consent Theory of Legitimacy

A traditional philosophical explanation for the legitimacy of state action is the social contract theory of consent.<sup>4</sup> According to this theory, state actions have internal legitimacy because citizens have consented to those powers being exercised over them. In *Leviathan*, Hobbes recognises that state authority exists because a society where all individuals are free to act in their own interests will inevitably lead to misery and war.<sup>5</sup> In order for society to function peacefully, citizens enter into a social contract, transferring their autonomy and prerogatives to the state. In exchange, citizens receive the peace, security and personal well-being that come from living in an organised society.<sup>6</sup>

The common thread within the traditional consent theory seems to be that citizens give the state legitimacy by consenting to state actions done for their own protection. As such, “the internal legitimacy of state authorities

2 Janice E Thomson “State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research” (1995) 39 *International Studies Quarterly* 213 at 219.

3 Although the function of popular consent differs throughout different theories, many philosophers tend to agree that popular consent is the foundation of state sovereignty. See generally Thomas Hobbes *Leviathan* (Broadview Press, Peterborough (Ont), 2002) at 125; and John Locke *An Essay Concerning the True Original Extent and End of Civil Government* (George Bonham, Dublin, 1798).

4 Karen T Litfin “Environment, Wealth, and Authority: Global Climate Change and Emerging Modes of Legitimation” (2000) 2 *International Studies Review* 119 at 128–129.

5 Hobbes, above n 3, at chs 13 and 17.

6 At ch 16.

varies according to their citizens' assessment of their performance".<sup>7</sup> Because legitimacy is founded on the state's responsibility to ensure citizens' security, it ends when the state no longer fulfils its protective function. As Hobbes describes it:<sup>8</sup>

The obligation of subjects to the sovereign is understood to last as long [as] and no longer than the power lasteth by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no covenant be relinquished.

The theory of popular consent and its limitations on state power may appear sound. However, the theory does not reflect the reality of modern democracy. It is founded on the fiction that citizens have full power to give and withdraw their consent as they see fit. In reality, citizens may only exercise their right to vote within a constitutional framework. It is not possible, nor desirable, for citizens to vote at every election to alter the constitutional powers of the state. Because sovereignty is already established, continuity of law does not allow those powers to be abrogated short of a revolution. Therefore, while citizens have a say in who governs them, they do not actively consent to the state's limiting their freedom. Despite this, state actions that citizens disagree with are not necessarily illegitimate. Consequently, popular consent does not provide a convincing explanation for legitimacy in our contemporary age.

### **State Consent Theory of Legitimacy**

The popular consent theory attempts to explain the legitimacy of a state's actions towards its citizens. But because environmental issues are generally trans-border and require global governance, the legitimacy of state action in the international sphere becomes important. As Macklem notes:<sup>9</sup>

International law provides that a state whose government represents the whole of its population within its territory consistent with principles of equality, non-discrimination, and self-determination is entitled to maintain its territorial integrity under international law and to have its territorial integrity respected by other states. ... [I]nternational law also confers legal validity on a claim of sovereignty by a collectivity if a sufficient number of states recognize its sovereign status as an empirical fact.

On this view, states within the international community consent to minimum standards established by international law. At the same time, they are free to

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7 Litfin, above n 4, at 129.

8 Hobbes, above n 3, at 166. See also Locke, above n 3, at ch 13.

9 Patrick Macklem "What is International Human Rights Law? Three Applications of a Distributive Account" (2007) 52 McGill LJ 575 at 586–587.

exercise their legal authority within those limits.<sup>10</sup> The legality of a state's actions therefore rests on other states validating — and consenting to — that state's assertion of sovereignty. With the state being the “sole repository of sovereign authority”, the traditional understanding is that “international order can be best maintained if states respect each other's sovereignty by adhering to the norms of non-intervention in the internal affairs of other states”.<sup>11</sup> States' actions cannot be limited unless they consent to such limitations.

Realistically, several reasons suggest that state consent does not actually legitimise state actions. First, weaker states may reluctantly consent because stronger states have the power to sanction weaker states that do not comply with their expectations.<sup>12</sup> Although there may be formal international equality,<sup>13</sup> the political and economic reality means that less powerful states submit to the wishes of more powerful states to avoid disadvantage. As a result, states with the strongest bargaining positions dictate many of the norms agreed upon by the international community. Accordingly, international law may still be considered legitimate even though some states have not consented, as true consent cannot be obtained from coercion.

Secondly, international law is not limited to rules that states have consented to. State consent only makes sense where states have explicitly agreed to the boundaries of their authority. But according to art 38 of the Statute of the International Court of Justice, customary international law and *jus cogens* may also limit state powers.<sup>14</sup> One explanation for the existence of these limitations is that they arise within the traditional framework of state consent, implied through state practice and *opinio juris*.<sup>15</sup> This explanation creates a problem. If state practice provides the implied consent that transforms an international custom into a binding norm, what of a state that has never respected a particular custom? International law will not accept that a state can depart from a custom simply because it never intended to be bound by that custom. *Jus cogens* would be deprived of any effect if it only regulated the behaviour of states that conformed to its principles, as those principles are principally invoked against states that consistently violate them.

Linked to that argument, it is increasingly clear that international law is becoming more concerned with protecting human rights.<sup>16</sup> In recent

10 Christian Hillgruber “The Admission of New States to the International Community” (1998) 9 EJIL 491 at 500.

11 Mohammed Ayoob “Humanitarian Intervention and State Sovereignty” (2002) 6 IJHR 81 at 81.

12 See generally Benedict Kingsbury “Sovereignty and Inequality” (1998) 9 EJIL 599.

13 See, for example, Charter of the United Nations, art 18, which confers one vote on each member of the General Assembly.

14 Statute of the International Court of Justice, art 38. The concept of *jus cogens* refers to peremptory norms of international law — such as crimes against humanity, genocide or torture — from which “no derogation is permitted”: see Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 53.

15 Michael Byers “Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes* Rules” (1997) 66 Nordic J Intl L 211 at 212. *Opinio juris* is the state's belief that a particular activity is legally obligatory.

16 Kofi A Annan *We the Peoples: The Role of the United Nations in the 21st Century* (United Nations, New York, 2000) at 48, as cited in Jennifer Welsh, Carolin Thielking and S Neil MacFarlane “The

years, the United Nations Security Council has authorised military interventions in sovereign states. It is impossible to legitimise military intervention on the basis of state consent. By its very nature, an intrusion on state sovereignty will lack the consent of the state concerned. Rather, military intervention is legitimate to the international community because it acts as a vehicle for addressing gross human rights abuses. This legitimacy derives from the growing recognition that modern sovereignty involves responsibilities, unlike the traditional understanding of sovereignty where states have complete volition within their territories.<sup>17</sup> If a state violates its responsibilities by permitting human rights abuses, then the state loses legitimacy, giving other states the authority to intervene in that state's internal affairs.

The flaws of the state consent theory suggest that another, more fundamental principle underlies a state's right to govern its citizens. Sovereignty limited by state responsibilities indicates that the legitimacy of state action may be constrained by certain minimum standards. Characterising a state's obligations towards its citizens as a fiduciary duty may help to explain what those limiting conditions are.

### III THE STATE'S FIDUCIARY DUTY TO ITS CITIZENS

#### What is a Fiduciary Relationship?

It is useful to first define the concept of a fiduciary relationship.<sup>18</sup> Fiduciary relationships are imposed when there is a power imbalance between a fiduciary and a beneficiary such that the fiduciary has power to affect a beneficiary's legal or practical interests.<sup>19</sup> In *Frame v Smith*, Wilson J proposed three indicia to assess whether a relationship could be characterised as fiduciary:<sup>20</sup>

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

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responsibility to protect: Assessing the report of the International Commission on Intervention and State Sovereignty" (2002) 57 Intl J 489 at 489.

17 See generally International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001).

18 For the purposes of this article, the definition and scope of a fiduciary relationship is that which has been developed by the common law.

19 Evan J Criddle and Evan Fox-Decent "A Fiduciary Theory of Jus Cogens" (2009) 34 Yale J Intl L 331 at 349.

20 *Frame v Smith* [1987] 2 SCR 99 at 136.

Beneficiaries are peculiarly vulnerable, as they cannot protect their own interests against an abuse of fiduciary power. As a result, the law has expanded fiduciary duties based on these criteria instead of adhering to a fixed set of relationships.<sup>21</sup> Fiduciary duties have been applied to solicitor–client,<sup>22</sup> trustee–beneficiary,<sup>23</sup> director–company,<sup>24</sup> and even parent–child relationships.<sup>25</sup>

### Moral Basis of Fiduciary Relationships

In traditional jurisprudence, when the law states that someone owes a duty to protect the interests of another, the other person is considered to hold a correlative right.<sup>26</sup> A right-holder is legally protected against another party’s interference with that right when vulnerable to that party’s power.<sup>27</sup> Accordingly, “the justification for imposing a fiduciary duty relies on the beneficiary having a right to the duty in the circumstances of its application”.<sup>28</sup> It is the right that informs the content of the duty. To take this argument further, it is necessary to examine the nature of such a right.

To identify the right, it is useful to consider Kant’s refined conception of rights in his *Doctrine of Right*.<sup>29</sup> From a Kantian perspective, two types of rights exemplify a person’s moral capacity to impose obligations on another: acquired rights and innate rights.<sup>30</sup> Acquired rights arise by a consensual juridical act. The right-holder agrees to acquire a set of rights, while the other party acquires corresponding duties. Those duties are acquired because the right-holder has the moral capacity to delegate decision-making powers to someone entrusted to care for his or her interests.<sup>31</sup>

An innate right, on the other hand, “is that which belongs to everyone by nature, independently of any act that would establish a right”.<sup>32</sup> Kant posits that every person has only one innate right — the right to as much freedom as can coexist with everyone else’s freedom. By freedom, Kant means “independence from being constrained by another’s choice”, so that every person is his or her own master by right.<sup>33</sup> On this view, the person who wields power over another cannot use that power for his or her

21 See, for example, *Liggett v Kensington* [1993] 1 NZLR 257 (CA).

22 *Sims v Craig Bell & Bond* [1991] 3 NZLR 535 (CA).

23 *Keech v Sandford* [1558–1774] All ER Rep 230 (Ch).

24 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL).

25 *M(K) v M(H)* [1992] 3 SCR 6.

26 Wesley Newcomb Hohfeld “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16 at 32.

27 Matthew H Kramer, NE Simmonds and Hillel Steiner *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, New York, 1998) at 9.

28 Evan Fox-Decent “The Fiduciary Nature of State Legal Authority” (2005) 31 Queen’s LJ 259 at 276.

29 This fiduciary argument, based on Kantian rights, is derived from Fox-Decent, above n 28.

30 Immanuel Kant *The Metaphysics of Morals* (Cambridge University Press, Cambridge, 1996) at 29–30.

31 At 47.

32 At 30.

33 At 30.

own benefit, as that would involve exercising freedom inconsistently with the beneficiary's freedom.<sup>34</sup> Consequently, a person's innate moral personhood constrains relationships where one party has more power than another.

According to Kant's principles of innate freedom and equality, no party can unilaterally impose constraints on another's freedom without a corresponding duty. That duty preserves the other party's freedom as much as possible. According to Fox-Decent, this Kantian view of rights corresponds with the constraints between a fiduciary and a beneficiary:<sup>35</sup>

The beneficiary has the innate moral capacity to possess rights which can be entrusted to the care of others. When those rights are so entrusted ... the fiduciary acquires discretionary authority to act on behalf of her principal. However ... [t]he fiduciary cannot unilaterally set the terms of her interaction with the beneficiary. The law sets those terms, and it requires the fiduciary to exercise power on the basis of the beneficiary's trust, which in turn authorizes and obligates the fiduciary to pursue loyally the interests of the beneficiary.

In order to perform his or her function, the fiduciary is entrusted with power over the legal rights of the beneficiary. The fiduciary's possession of that power creates a risk that the power will be misused and that the beneficiary will be injured, thus limiting the beneficiary's freedom.<sup>36</sup> This vulnerability justifies imposing stringent obligations on the fiduciary.

### **Extending the Fiduciary Theory to States**

In light of the Kantian and fiduciary principles discussed, the state–citizen relationship is ideally suited for the imposition of a fiduciary duty.<sup>37</sup> Citizens, by virtue of living in a state, surrender many of their legal and political rights to the state. The rights that citizens have against the state can be viewed as both acquired rights and innate rights. In a modern democracy, citizens have a choice, through their vote, as to who forms their government, the body that governs their legal and political rights. It follows that citizens entrust their rights to elected members of government, expecting that members will use their powers in the citizens' best interests. As such, the fiduciary duty could arise by entrusting acquired rights in elected government members.

Yet, while citizens may choose who to elect into government, citizens do not actually choose the political institution that governs them. As citizens have no control over the state's exercise of power, it is difficult to see that relationship as consensual. Here, Kant's theory provides a more satisfactory explanation of state power. On a Kantian view, the state's failure

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34 Criddle and Fox-Decent, above n 19, at 369.

35 Fox-Decent, above n 28, at 302.

36 Tamar Frankel "Fiduciary Law" (1983) 71 Cal L Rev 795 at 810.

37 See Fox-Decent, above n 28, at 308.

to assume duties to its citizens expressly and voluntarily is not an obstacle to imposing a fiduciary duty. Nor is it an obstacle that citizens have not individually and expressly reposed trust in the state to discharge its functions. The fiduciary duty arises by virtue of the state's immense discretionary power to affect citizens' interests. Therefore, the state is justified in using those powers only in its citizens' best interests.

### **Fiduciary Justification of State Legitimacy**

If a state's authority is reconceptualised as fiduciary, it might be less open to criticism than the consent theory of state legitimacy.<sup>38</sup> From a fiduciary perspective, citizens accept state power as legitimate because the state protects their interests. If a state breaches its fiduciary duty, its legitimacy is threatened. As a result, a breach diminishes the obedience the state can expect from its citizens.<sup>39</sup>

Through a fiduciary lens, citizens do not necessarily have to accept that the legitimacy of state decision-making derives from consent through elections. Elections certainly allow citizens to contribute to domestic decision-making. Nevertheless, citizens still accept that their elected representatives might sometimes make decisions with which they do not agree. A better view is to remove the illusion of direct consent. Instead, state legitimacy stems from citizens' acceptance that the state only exercises discretionary power in their best interests. State actions that violate fundamental rights are illegitimate.

A fiduciary theory also better explains the legitimacy of state actions internationally. As discussed above, the fiduciary duty constitutes the power that states wield over their subjects. When a state breaches its fiduciary duty, its legitimacy is eroded. This explains the reality of international relations, particularly when the principle of non-intervention is violated.<sup>40</sup> When states conform to human rights norms, their power is seldom questioned and their sovereignty is legitimate; other states should not intervene in their domestic affairs. However, when human rights abuses occur, the state's sovereignty is no longer justified. It has breached its duty to act in its citizens' best interests. As the state has compromised the foundation of its sovereignty, other states can justifiably intervene to restore balance to the state-citizen relationship. What appears to be a violation of state sovereignty is instead a way of ensuring that the foundation of the state — the duty to act in citizens' best interests — is upheld.

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38 See these criticisms in Part II above.

39 Fox-Decent, above n 28, at 272.

40 See Part II above.



## **A Cosmopolitan Fiduciary Duty**

If a fiduciary duty requires those with power over more vulnerable parties not to abuse that power, there is no reason why a state's fiduciary duty should be restricted to its own citizens. As Criddle and Fox-Decent state:<sup>41</sup>

[T]he fiduciary principle has no capacity to discriminate arbitrarily between agents who, in virtue of the state–subject fiduciary relationship, enjoy equal status vis-à-vis the state as co-beneficiaries of the fiduciary principle's authorization of public authority.

As a fiduciary duty prohibits undue interference with another's freedom, distinguishing between a state's protection of its own citizens and another state's citizens is unjustified if a state's actions will affect both. The state's responsibility of protection "extends across international borders and involves safeguarding people in whatever country they happen to live".<sup>42</sup> For example, if a state cannot arbitrarily detain its own citizens, then the fiduciary principle also prevents the state arbitrarily detaining another state's citizens. Accordingly, a more precisely defined fiduciary duty suggests that the state owes a duty to act in the best interests of all citizens within its sphere of influence.

International law shows the propriety of a cosmopolitan fiduciary duty, given that it already recognises such a duty in some areas. For example, ch 12 of the Charter of the United Nations creates an international trusteeship system where one state agrees to look after another state's interests, that other state being a "trust territory".<sup>43</sup> The duties include, amongst other things, a duty to promote "the political, economic, social, and educational advancement of the inhabitants of the trust territories".<sup>44</sup> Further, art 73 provides that "the interests of the inhabitants of these territories are paramount".<sup>45</sup> The trusteeship system is based upon "a widespread belief that a nation overseeing the development of a non-self-governing territory should maintain a fiduciary relationship with the territory's inhabitants", not merely with the state's leaders.<sup>46</sup> This reflects the acquired fiduciary principle. Where a beneficiary entrusts its rights to a more powerful party, the stronger party is obliged to act in the beneficiary's best interests. This example indicates that the international community has recognised that the fiduciary duty can extend to cross-border relations. Hence, if states owe a

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41 Criddle and Fox-Decent, above n 19, at 356.

42 Robert Jackson "Human Rights Protection in a World of Sovereign States" in Ronald Tinnevelt and Gert Verschraegen (eds) *Between Cosmopolitan Ideals and State Sovereignty: Studies in Global Justice* (Palgrave Macmillan, New York, 2006) 135 at 143.

43 Charter of the United Nations, ch 12.

44 Article 76.

45 Article 73.

46 Ramon E Reyes Jr "*Nauru v Australia: The International Fiduciary Duty and the Settlement of Nauru's Claims for Rehabilitation of Its Phosphate Lands*" (1996) 16 NY Sch J Intl & Comp L 1 at 42.

fiduciary duty to their own citizens, they should also owe this duty to other states' citizens affected by their actions.

## Extending the Fiduciary Duty to Future Generations

The problem with the state–citizen fiduciary relationship is that environmental damage may not always affect the rights of the present generation. It may be that in the short-term, fairly balancing public interests, immediate economic growth better discharges the fiduciary duty than long-term environmental protection. To make the fiduciary duty more robust in targeting long-term environmental harm, it is useful to explore whether this duty can be extended to future generations.

### *1 Moral Basis of the Duty to Future Generations*

There is a moral argument that present generations owe a duty to future generations.<sup>47</sup> Consider John Rawls's *A Theory of Justice*, which suggests that just choices must be made behind a veil of ignorance because ignorance prevents the making of self-interested decisions.<sup>48</sup> An ignorant decision-maker does not know to which generation he or she belongs; whether he or she is wealthy or poor; and whether he or she lives in an agricultural or industrialised world. When considered in this way, Rawls posits that:<sup>49</sup>

We can now see that persons in different generations have duties and obligations to one another just as contemporaries do. The present generation cannot do as it pleases but is bound by the principles that would be chosen in the original position to define justice between persons at different moments of time.

*A Theory of Justice* lays the foundation for a duty owed to future generations. Callahan suggests that although future generations may be indeterminate and potential, rather than actual, our current actions will have consequences for them.<sup>50</sup> To proceed in our decision-making as if there will be no relationship between present and future generations presumes a disconnection between those generations that is highly unlikely.<sup>51</sup> Current generations have a moral imperative to consider future generations. It is our actions that cause environmental degradation, which will leave a legacy of

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47 One of the most influential works on this issue is Edith Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University, Tokyo, 1989), whose theory has been discussed widely in the literature. See generally: Laura Westra *Environmental Justice and the Rights of Unborn and Future Generations: Law, Environmental Harm and the Right to Health* (Earthscan, London, 2006); and Paul A Barresi "Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena" (1997) 11 *Tul Env'tl LJ* 59.

48 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge (Mass), 1971).

49 At 293.

50 Daniel Callahan "What Obligations Do We Have to Future Generations?" in Ernest Partridge (ed) *Responsibilities to Future Generations: Environmental Ethics* (Prometheus Books, New York, 1981) 73 at 73.

51 At 74.

unclean rivers, barren trees and polluted air.<sup>52</sup> Weiss has said, in an environmental context, that:<sup>53</sup>

We, as a species, hold the natural and cultural environment of our planet in common, both with other members of the present generation and with other generations, past and future. At any given time, each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits. This imposes obligations upon us to care for the planet and gives us certain rights to use it.

The present generation's ability to do irreversible environmental harm will influence the lives of posterity. Logically, the present generation should owe its descendants a duty to pass on the Earth in as good a condition as we received it.<sup>54</sup> The minimum obligation would be to refrain from acting in a way harmful to posterity. The present generation cannot claim ignorance as to what might be harmful to future generations. For example, we know that nuclear testing causes harmful genetic consequences that can affect human life. It cannot be right that we anticipate this harm yet disregard future generations that will be affected by our actions.<sup>55</sup>

It is true that future generations cannot reciprocate the present generation's concern for them. Nevertheless, the present generation has a duty to reciprocate the benefits that past generations have provided for them by passing on those benefits to future generations.<sup>56</sup> If the objection is about the unfairness of conferring advantage without reciprocation, it may be argued that it is equally unfair to receive something without reciprocation. Therefore, it is equitable that present generations should owe positive duties to future generations in exchange for the benefits they have already received.

## *2 Emergence of the Duty in the International Sphere*

The idea of owing a duty to future generations is not novel, even if it is jurisprudentially perplexing. From the very beginning of the environmental movement, states have expressly accepted responsibility to protect the environment for future generations. For example, principle 1 of the Stockholm Declaration states:<sup>57</sup>

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

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52 At 75.

53 Weiss, above n 47, at 17.

54 Callahan, above n 50, at 78–79.

55 At 79.

56 For a description of this argument, known as the “stewardship model”, see Edward A Page *Climate Change, Justice and Future Generations* (Edward Elgar, Cheltenham (UK), 2006) at 121.

57 *Declaration of the United Nations Conference on the Human Environment A/CONF48/14/Rev1* (1972).

The Rio Declaration on Environment and Development similarly provides for the interests of future generations.<sup>58</sup> The World Commission on Environment and Development identified the reason why this responsibility was included:<sup>59</sup>

We borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.

Given this imperative, it is unsurprising that such a duty has been judicially considered. In *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, the Supreme Court of the Philippines had “no difficulty” finding that the minors suing the Secretary of the Department of Environment and Natural Resources had standing to sue on behalf of future generations. The Court stated:<sup>60</sup>

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 right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

International precedents also suggest the state could owe a duty to future generations despite their indeterminacy. In *Nuclear Tests II (New Zealand v France)*, New Zealand sought to prohibit France from atmospheric nuclear testing in the South Pacific. Judge Weeramantry’s dissenting opinion acknowledged that:<sup>61</sup>

New Zealand’s complaint that its rights are affected does not relate only to the rights of people presently in existence. The rights of the people of New Zealand include the rights of unborn posterity. Those are the rights which a nation is entitled, indeed obliged, to protect.

Although the International Court of Justice had never previously considered such a principle, Judge Weeramantry considered that it was “an important

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58 *Rio Declaration on Environment and Development* A/CONF151/26 (Vol I) (1992), principle 3.

59 World Commission on Environment and Development *Our Common Future* (Oxford University Press, New York, 1987) at 8.

60 *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 173 at 185. For a discussion of the background of the case, see Antonio GM La Viña “The Right to a Sound Environment in the Philippines: The Significance of the *Minors Oposa* Case” (1994) 3 RECIEL 246.

61 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in Nuclear Tests (New Zealand v France) (Order)* [1995] ICJ Rep 317 at 341 per Judge Weeramantry (dissenting).

aspect not to be ignored".<sup>62</sup> This is evidence that the obligation of environmental protection for the benefit of posterity has seeped into international law, becoming, at least, a legitimate consideration in international decision-making.

### *3 Recognising the State's Fiduciary Duty to Future Generations*

The above analysis provides the framework to establish a duty owed by the present generation to future generations. Such a duty may be conceptualised as fiduciary in nature. A fiduciary duty requires the fiduciary to be able to affect the beneficiary's interests, with that beneficiary being peculiarly vulnerable to the fiduciary's power. Because the present generation can irreparably damage environmental conditions for future generations, the present generation meets the requirement for discretionary power over a beneficiary. Future generations are peculiarly vulnerable because they cannot ensure that the present generation will exercise its power in their best interests.

How does this justify current states owing a fiduciary obligation? A fiduciary obligation owed by the present generation to future generations implies that every living individual must ensure that his or her lifestyle preserves the environment for future generations. Yet state decision-making drives and constrains many of our actions. If, for example, the state decides that fracking — at the risk of polluting waterways — is acceptable and allows it to continue, citizens can do little to stop it. Unless each state is impressed with a fiduciary duty to future generations, the present generation will be unable to meet its obligations.

## **IV NATURE AND CONTENT OF THE CORRELATIVE ENVIRONMENTAL RIGHT**

### **Nature of Human Rights**

If the concept of fiduciary duty is to apply usefully in international law, it is necessary to consider whether a correlative environmental right forms part of that duty. If so, states will have to protect the environment to satisfy their fiduciary duty. To examine this question it is necessary to define the nature of human rights. Simmons provides a succinct definition:<sup>63</sup>

Human rights are those natural rights that are innate and that cannot be lost (i.e., that cannot be given away, forfeited, or taken away). Human rights, then, will have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeatability, and imprescriptability. Only so understood will an account of human

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<sup>62</sup> At 341.

<sup>63</sup> A John Simmons *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, Cambridge, 2001) at 185.

rights capture the central idea of rights that can always be claimed by any human being.

Hence, some rights “lie so deep” that, whether legally recognised or not, the state must protect them.<sup>64</sup> A state that fails to protect human rights is considered defective. This is especially so where rights are recognised as international peremptory norms, which cannot be derogated from.<sup>65</sup> These are international legal principles that enjoy a higher rank in the international hierarchy of laws than treaty law and customary rules. If states derogate from these norms, the international community will not recognise their actions as lawful.<sup>66</sup>

According to Criddle and Fox-Decent, a fiduciary conception of state authority explains why states must uphold fundamental human rights in order to exercise their power legitimately.<sup>67</sup> Their account, briefly outlined below, shows that the fiduciary state can best protect the environment if the environment is expressed as a right.

When a state has a fiduciary duty to its citizens, its fundamental obligations are to ensure the “non-instrumentalisation” and “non-domination” of its citizens.<sup>68</sup> “Non-instrumentalisation” prevents the state from using its citizens as a means to satisfy broader social policy goals.<sup>69</sup> All humans have inherent moral dignity and must be respected as an end in themselves.<sup>70</sup> So, for example, fiduciary states would outlaw slavery, as slavery entitles a master to use the slave as a means to achieve his or her own goals.<sup>71</sup> States would also criminalise corrupt public officials who use public funds for their own private goals at the expense of other citizens.<sup>72</sup>

“Non-domination” means that the state is not permitted to restrict its citizens’ agency, or their capacity to make free choices, except to the extent required to maintain the legal order.<sup>73</sup> According to this principle, states must extend equality and fairness towards all their citizens when exercising their powers; every citizen “is an equally valid subject of the fiduciary authorization of public authority”.<sup>74</sup> Ultimately, this means that “the state must forbear from adopting laws, policies, or practices that deliberately

64 To borrow the language of Cooke P in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

65 Vienna Convention on the Law of Treaties, above n 14, art 53.

66 See *Prosecutor v Anto Furundžija (Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998, at [153]–[154].

67 Criddle and Fox-Decent, above n 19.

68 Evan Fox-Decent *Sovereignty’s Promise: The State as Fiduciary* (Oxford University Press, Oxford, 2012) at 44.

69 Evan Fox-Decent “From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism” in Ken Coghill, Charles Sampford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Farnham (UK), 2012) 253 at 256.

70 At 256.

71 Criddle and Fox-Decent, above n 19, at 356.

72 At 371–372.

73 At 364–365.

74 Evan J Criddle and Evan Fox-Decent “The Fiduciary Constitution of Human Rights” (2009) 15 *Legal Theory* 301 at 318.

victimize or arbitrarily threaten persons subject to its powers".<sup>75</sup> Accordingly, when exercising its powers the fiduciary state is "subject to strict legal norms that safeguard subjects' inherent dignity as free and equal co-beneficiaries of state action".<sup>76</sup>

The fiduciary state must respect rights when three principles, derived from the above criteria, are satisfied. First, rights must satisfy the principle of "integrity": they must exist for the good of citizens rather than for the good of the state's institutions or officials.<sup>77</sup> Secondly, there must be "formal moral equality", which requires states to treat citizens subject to state power equally as co-beneficiaries.<sup>78</sup> Thirdly, rights must reflect proper "solicitude" or care and respect for citizens' legitimate interests.<sup>79</sup> Where a state treats rights fundamental to one's dignity as "human rights", these criteria are met. So if a state owes a fiduciary duty to its citizens, the strongest correlative rights it must protect are "human rights". If environmental protection acquires the same recognition, it follows that states, in discharging their fiduciary duty, would have to prevent environmental harm.

### The Right to a Healthy Environment

The emerging recognition of a right to a healthy environment may be the most appropriate correlative right to the state's fiduciary duty to protect the environment. Various terms have been used to describe the right to a "healthy environment"<sup>80</sup> that is "pollution-free",<sup>81</sup> or the right to a "balanced and healthful ecology",<sup>82</sup> this right has been implemented in a variety of forms in many national constitutions and international instruments.<sup>83</sup> The Supreme Court of the Philippines has also given judicial acceptance to the right in *Minors Oposa*.<sup>84</sup> The Court recognised that the right carried "with it the correlative duty to refrain from impairing the environment".<sup>85</sup> The Court saw the right as fundamental and as having existed since humankind's inception.<sup>86</sup>

There is certainly value in recognising a specific human right to a healthy environment. Such a right would recognise the environment as being worthy of protection in itself. This would address environmental concerns more directly, avoiding the need to establish injury before seeking a remedy

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75 Fox-Decent, above n 69, at 257.

76 At 257.

77 At 257.

78 At 257.

79 At 257.

80 The Belgian Constitution, art 23.

81 Republic of Ecuador Constitution of 2008, art 66(27).

82 The 1987 Constitution of the Republic of the Philippines, art 2, s 16.

83 See, for example, *Hague Declaration on the Environment* (1989) 28 ILM 1308 at 1309: "Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere."

84 *Minors Oposa*, above n 60.

85 *Minors Oposa*, above n 60, at 188.

86 At 187–188.

and thus allowing timely intervention.<sup>87</sup> A right to a healthy environment would also allow the explicit balancing of this right against other social and economic interests. Currently, established rights take priority; the environment is a secondary consideration. As Merrills states, once a healthy environment is recognised as a right, “not only must the right always be considered, but very good reasons will be needed for denying its effect”.<sup>88</sup>

In addition, the state’s duty to recognise a right to a healthy environment satisfies the three criteria that stem from non-domination and non-instrumentalisation. First, this right exists to serve the interests of all people on Earth today and in the future, satisfying the principle of integrity. Secondly, there is formal moral equality because people who live in a healthy environment benefit from such living conditions equally. Thirdly, the right reflects a concern for the well-being of society as a whole and also reflects the principle of solicitude. Indeed, the right to a healthy environment could prevent the state’s instrumentalisation and domination. For example, the state essentially victimises innocent parties when it allows gratuitous or negligent environmental destruction without liability. The environmental harm caused by the state, to the detriment of its citizens, is probably justified as a means to an economic goal.<sup>89</sup> Seen in this light, the right to a healthy environment is necessary to prevent the state from abusing its fiduciary position. The right requires the state to act consistently in its citizens’ best interests, which includes having a healthy environment.

The right to a healthy environment must be precise if it is to clarify state fiduciary obligations regarding the environment. States cannot be expected to fulfil an amorphous fiduciary obligation. It is worth noting that a right to the “environment” is itself ambiguous. It clearly cannot mean a right to a “pure” environment. Pre-existing environmental degradation makes that right impossible to achieve. All that is proposed is a right to a healthy environment. A “healthy” environment would mean a standard where present and future generations are not deprived of the benefits that nature could offer them. Beneficiaries could rely on the World Health Organisation’s threshold limits for international environmental standards to determine whether the right has been upheld.<sup>90</sup> These minimum standards would define the content of the right. Once established, this fiduciary duty would protect the right to a healthy environment by preventing state action that might compromise that right.

However, it is clear that a right to a healthy environment cannot be seen in isolation. Realistically, state decision-making involves considering, apart from the environment, two other broad interests: economic development and social welfare. Is the right to a healthy environment a

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87 Sumudu Atapattu “The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law” (2002) 16 *Tul Env’t LJ* 65 at 111.

88 JG Merrills “Environmental Protection and Human Rights: Conceptual Aspects” in Alan E Boyle and Michael R Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, New York, 1996) 25 at 26–27.

89 Fox-Decent, above n 69, at 261.

90 Atapattu, above n 87, at 111.



fundamental norm that takes precedence over those other two interests, such as to prohibit advancing those interests when the environment is in peril?

That seems an extreme position. Ultimately, the fiduciary state must act fairly and reasonably in respect of all its interests. While the right to a healthy environment is essential, it must be integrated with and not inimical to social and economic policies. Otherwise, the state risks breaching its duty to uphold social and economic interests. One way to achieve this is for states to engage in “strong sustainability” to satisfy their fiduciary obligations to their citizens. This form of sustainability takes social and economic interests into account within ecological limits.

### **Ecological Sustainability**

Although sustainability has had a long history,<sup>91</sup> modern discussions of sustainability are closely linked to the concept of “sustainable development”. This is how the present discussion will be framed. “Sustainable development” has been part of the language of environmental law since the 1980s but its meaning is still seen as ambiguous. The most commonly cited definition of sustainable development is from the Report of the World Commission on Environment and Development:<sup>92</sup>

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

Although this definition specifically considers future generations, sustainable development, at its genesis, was not understood as ecological sustainability. The traditional understanding of sustainable development sees economic development, social welfare and environmental protection as “interdependent and mutually reinforcing pillars”.<sup>93</sup> As such, they are three separate interests that coexist equally. When a particular decision brings them into conflict, they must be balanced against one another to achieve a sustainable outcome.

Such a balancing exercise might be sufficient if the state only owes a fiduciary duty to present generations. As established earlier, where a fiduciary duty involves considering the best interests of conflicting groups, the duty is one of fairness and reasonableness. Fairly balancing economic, social and environmental interests is presumably satisfactory. However, to discharge the state’s duty by trading-off the three main social interests results in a weak form of sustainability.

The three-pillar approach, which involves the state considering environmental effects when making economic and social decisions, has been more aspirational than effective. As the leaders of democratic states make decisions to improve their chances of re-election, their focus is necessarily

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91 See Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (Ashgate Publishing, Hampshire, 2008) at ch 6.

92 World Commission on Environment and Development, above n 59, at 43.

93 2005 *World Summit Outcome* GA Res 60/1, A/Res/60/1 (2005) at [48].

short-term. Economic interests provide quantifiable short-term wealth, frequently leading to their preference over social and environmental concerns.<sup>94</sup> As Winter notes, an economic focus deprives the other two interests of their fundamental long-term relevance.<sup>95</sup>

If the traditional understanding of sustainable development is problematic, how might the fiduciary theory reconceptualise the state's fundamental duty? So far it has been argued that the fiduciary duty not only be owed to the present generation, but also to future generations. It has also been asserted that the right to a healthy environment, which forms part of that duty, is at least as important as economic and social concerns. As a result, the fiduciary state's balancing exercise must be reframed to achieve intergenerational equity. This results in a model of strong sustainability where ecological concerns are fundamental. Instead of a vision in which the three interests are seen as pillars of social policy, long-term ecological concerns become the foundation on which shorter-term economic and social interests rest.

As a result, all economic and social decisions must be made within ecological boundaries.<sup>96</sup> This does not depart from the definition of sustainable development in the Brundtland Report. It gives proper effect and protection to that aspect of the definition requiring future generations to be able to meet their own needs. Instead of restricting our liberty, this gives effect to Kant's ideal that everyone has an innate right to as much freedom as can coexist with others' freedom. We must re-evaluate short-term, self-interested actions that will damage the liberty of others — in the present or in the future — in order to justify the exercise of our liberty.

Further, the idea that not all rights are equal already exists in international law. In the International Covenant on Civil and Political Rights (ICCPR), art 2 notes that state parties undertake to respect, protect and remedy the rights listed, without any limitations placed on those obligations.<sup>97</sup> In the International Covenant on Economic, Social and Cultural Rights (ICESCR), state parties need to consider the rights listed only "to the maximum of [their] available resources".<sup>98</sup> This difference exists because the rights in the ICCPR, deriving from the "inherent dignity" of the person,<sup>99</sup> are pre-requisites that must be met before the rights in the ICESCR can have any value. For example, the right to a good educational system is meaningless if a child's life is not protected.

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94 Gerd Winter "A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report" in Hans Christian Bugge and Christina Voigt (eds) *Sustainable Development in International and National Law* (Europa Law Publishing, Groningen, 2008) 23 at 28.

95 At 28.

96 At 27–28.

97 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2 [ICCPR].

98 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 2(1).

99 ICCPR, above n 97, at preamble.

The right to a healthy environment is not expressly recognised in either instrument. Relevantly, some see this right as a “third generation” human right, subordinate to other rights.<sup>100</sup> However, it is argued that this right is analogous to the right to life. There cannot be economic, social or cultural development without a healthy environment capable of sustaining future generations. As a result, this right should be treated as importantly as the rights in the ICCPR, with a higher priority than the rights in the ICESCR. Viewed in this light, prioritising ecological concerns over short-term economic and social interests is not unfairly biased towards the environment. Rather, such an ordering accounts for the needs of future generations for whom ecological concerns are more important than social and cultural interests.

Because the state owes a fiduciary duty to maintain a healthy environment, reasonable exercises of state power will subordinate economic and social policy to ecological interests. Economic and social rights may only be advanced where they do not unreasonably interfere with the right to a healthy environment.

## V IMPLICATIONS OF THE FIDUCIARY DUTY TO PROTECT THE ENVIRONMENT

### Domestic Implications

The cosmopolitan and intergenerational fiduciary duty is most relevant to international environmental law. Nevertheless, the state's fiduciary duty to ensure a healthy environment can also guide domestic policy-making. On a human rights analysis, the state would have both negative and positive duties to meet its fiduciary obligation.<sup>101</sup> Consequently, the state would have to respect and protect the right to a healthy environment, while remedying any violations of that right.<sup>102</sup>

It is not difficult to conceive of negative duties, such as the duty not to harm the environment through state action. But in addition to any negative duties the state should also have positive duties to prevent its citizens damaging the environment. The content of these positive duties may be gleaned from state obligations to respect other important rights. Article 2(2) of the ICCPR states that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

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100 See also Theodor Meron “On a Hierarchy of International Human Rights” (1986) 80 AJIL 1 for the argument that first generation rights are the most important type of right.

101 See generally Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, New York, 2008).

102 Consider the state obligations set out in the ICCPR, above n 97, art 2.

These obligations are imposed on states because, as fiduciaries, their duty is to protect their citizens' interests by respecting their rights.<sup>103</sup> Although the right is not in the ICCPR, the obligation remains the same. In an environmental context, this obligation would require a comprehensive system of environmental regulation. The system would set safety standards regulating those activities with the potential to harm the environment. Failing to conform to these standards would lead to significant penalties. The system must also provide citizens and organisations with a remedial procedure for when the environment is unreasonably threatened. Further, it must allow civil and political participation in decisions regarding environmental risks, as these are rights expressly recognised by the ICCPR.<sup>104</sup>

### **International Implications: A World Environment Organisation?**

Domestic obligations reflect the state's fiduciary duty towards its own citizens. But this article has argued that the duty is also cosmopolitan and intergenerational. This argument is necessary because states currently have no legal or binding obligation to support less-developed regions, although some states do provide aid.<sup>105</sup> Under the proposed fiduciary duty, if a state's exercise of power threatens a region then the state must consider that region's interests.

Fox-Decent illustrates how this might apply to environmental degradation.<sup>106</sup> All states today have the power to control greenhouse gas emissions within their own territories through regulation. However, no state can prevent greenhouse gases produced within its territory from affecting the atmosphere, which is shared by everyone on Earth. In this scenario, "every inhabitant of earth is subject to every state's possession and exercise of its environmental power".<sup>107</sup> So if a state does not enact regulations consistent with every persons' cosmopolitan right to a healthy environment, the fiduciary duty has been breached and anyone affected has a claim.

Viewed in this light, a practical consequence of the duty is that states become joint fiduciaries of the Earth's atmosphere as well as other environmental resources.<sup>108</sup> All inhabitants of the Earth are the beneficiaries of this duty. Such a notion paves the way for an organisation capable of regulating state behaviour by ensuring that the fiduciary duty is implemented and breaches remedied.

One way the fiduciary theory of state environmental protection could be implemented is by creating an organisation within the current United Nations system. That organisation would oversee states' trusteeship functions, which are derived from their fiduciary obligations. This proposal

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103 Criddle and Fox-Decent, above n 74, at 317–318.

104 James W Nickel "The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification" (1993) 18 *Yale J Intl L* 281 at 286–287.

105 Fox-Decent, above n 69, at 262.

106 At 262.

107 At 263.

108 At 263.

has often been suggested in the environmental field, even though the precise function of such an organisation has not been agreed upon.<sup>109</sup> Some believe that it would be sufficient to strengthen the United Nations Environment Programme (UNEP) by giving it fully-fledged organisational status.<sup>110</sup> Some advocate that it should be given the same powers as other international regimes, such as the World Trade Organisation (WTO), which governs international trade.<sup>111</sup> An organisation that rivals the WTO might be appropriate given the imperative to consider economic interests within an ecologically sustainable framework. As it is, the weak presence of existing institutions has made the environment a lesser concern than trade.<sup>112</sup> In any event, the aim here is not to detail the advantages and disadvantages of every option; rather, it is to show how the fiduciary theory could contribute to the mandate and functioning of a global organisation.

A major obstacle to convincing states to subscribe to such a scheme is that the status quo allows states to beneficially exploit the environment. Encouraging voluntary involvement in such an international organisation could therefore be difficult. However, the fiduciary theory provides a framework requiring states to follow such an organisation. The fiduciary basis of state authority makes ecological sustainability a binding concern. States must respect ecological sustainability to protect the interests of present and future generations. As this duty requires states to promote environmentally friendly decision-making, it should also require states to adhere to the rules of an organisation that can enforce obligations against them if they perform inadequately. This would be a permissible intrusion upon state sovereignty. Adherence to such an organisation reinforces the idea that sovereignty is only meaningful when it serves citizens' interests. Failing to serve those interests renders state sovereignty illegitimate, permitting external intervention.

For such an organisation to implement effective environmental protection measures, two objectives need emphasis. First, the organisation must act impartially when mediating between parties. Secondly, it must be capable of enforcing fiduciary obligations for the environment's well-

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109 For different perspectives on the constitution and desirability of such an organisation, see Frank Biermann and Steffen Bauer (eds) *A World Environment Organization: Solution or Threat for Effective International Environmental Governance?* (Ashgate Publishing, Hants (UK), 2005).

110 Frank Biermann "Reforming Global Environmental Governance: The Case for a United Nations Environment Organisation (UNEO)" (Stakeholder Forum's Programme on Sustainable Development Governance towards the UN Conference on Sustainable Development in 2012 (UNCSD), February 2011) at 6. For example, the establishing treaty of the World Nature Organisation was entered into on 1 May 2014. The functions of this new intergovernmental organisation, dedicated to nature, have similar aspirations as the United Nations Environment Programme, but do not go so far as to create a global governance structure with which this article is concerned.

111 Magnus Lodefalk and John Whalley "Reviewing Proposals for a World Environmental Organisation" (2002) 25 *World Economy* 601 at 603.

112 Steve Charnovitz "Toward a World Environment Organization: Reflections upon a Vital Debate" in Frank Biermann and Steffen Bauer (eds) *A World Environment Organization: Solution or Threat for Effective International Environmental Governance?* (Ashgate Publishing, Hants (UK), 2005) 87 at 94.

being.<sup>113</sup> One proposal suggests that an effective organisation would act as a trustee for environmental issues that cannot be solved locally, such as climate change, ozone depletion, ocean pollution and fisheries depletion.<sup>114</sup> The organisation's constitutive treaty could provide for an overriding principle of strong sustainability, which states would have to comply with. Under this umbrella, more specific multilateral agreements, negotiated in good faith, could inform the precise content of a state's obligations.<sup>115</sup> Moreover, as part of the duty to act fairly and reasonably the principle of common but differentiated responsibility must be considered. That principle acknowledges that while developing states must engage in strong sustainability, they must also ensure their citizens' standard of living is not threatened by stringent environmental regulations.<sup>116</sup>

Such a model recognises that each state owes a fiduciary obligation to the present and future citizens of other states to protect the environment. Realistically, the only way states can discharge such an onerous duty is with the assistance of an institution where states can collectively contribute to environmental decision-making.

A fiduciary model also has implications for who might participate in such an organisation. As a body overseeing and enforcing state fiduciary obligations, the organisation must itself act in a fiduciary manner.<sup>117</sup> Environmental groups have been concerned that a possible environmental organisation might, like the WTO, have a democratic gap that prevents civil society from contributing to environmental policy.<sup>118</sup> According to the fiduciary theory, an effective world environmental organisation cannot be governed by states alone. All states have fundamental conflicts of interest between their own political interests and the maintenance of a healthy environment. States should not be arbiters in their own cause. These conflicts of interest should be balanced out by including other interested parties within the institutional framework. The organisation's guardians should come from diverse interest groups that are dedicated to environmental sustainability. Guardians might include representatives from existing international agencies, such as the UNEP, as well as non-governmental organisations and environmental activists, ensuring balance between the parties' interests. The International Labour Organisation, in a similar way, uses a tripartite model where "workers and employers participate equally with government representatives".<sup>119</sup>

A fiduciary duty would therefore encourage states to treat the environment as more than a secondary concern. Domestically, it would

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113 Klaus Bosselmann, Peter G Brown and Brendan Mackey "Enabling a Flourishing Earth: Challenges for the Green Economy, Opportunities for Global Governance" (2012) 21 *RECIEL* 23 at 27.

114 Charnovitz, above n 112, at 95.

115 Biermann and Bauer, above n 110, at 9.

116 See *Rio Declaration on Environment and Development*, above n 58, principle 7.

117 Donald Feaver "Fiduciary Principles and International Organizations" in Ken Coghill, Charles Sampford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Farnham, 2012) 165 at 167.

118 Charnovitz, above n 112, at 94.

119 At 97–98.

influence regulatory protection of the environment within state borders. More importantly, however, it would provide an imperative for a global partnership protecting the environment against the destructive pursuit of short-term interests. Further, it would inform the design of an international organisation to regulate this partnership.

## VI CONCLUSION

The fiduciary conception of state legal authority strengthens environmental interests. On a Kantian analysis there is a sufficient moral basis for extending the fiduciary relationship to the state. The state's fiduciary duty towards its citizens is constitutive of, rather than inconsistent, with its sovereignty. State legitimacy becomes questionable when the fiduciary duty is breached.

The fiduciary principle should include a cosmopolitan duty extending to the citizens of other states, as a state's actions towards the environment may affect citizens beyond its own borders. Further, any fiduciary duty to protect environmental interests cannot be short-term; states should owe a duty to consider future generations' interests and needs when making decisions that concern the environment.

Examining the content of the environmental obligation shows that the fiduciary duty's correlative right is the right to a healthy environment. The state must implement strong sustainability in decision-making, which promotes economic and social development within ecological limits. In doing so, the state will have to reconcile the interests of its citizens, other states' citizens and future citizens. Domestically, the state will be subject to both negative and positive duties to advance strong sustainability. Internationally, the state's duty amounts to a joint trusteeship of the world's ecosystems for the benefit of present and future generations.

Although states should have a fiduciary duty to protect the environment, the purpose of that duty is not for it to be taken to court and litigated. Rather, its goal is to preserve a healthy environment by guiding and constraining government policy. Reconceptualising state authority will benefit not only the environment, but also all those living, both now and in the future.