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Governing the Environment without CoPs – The Case of Water

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Abstract
CoPs have played a key role in governing the environment. Yet, CoPs have only provided the institutional framework for governing issues falling under existing treaty regimes. They have not been able to go beyond the regimes they govern. In the case of water, the absence of a well-developed treaty regime has opened the door to new non-governmental institutions taking the lead. This happens to coincide in part with the framework proposed by global administrative law that sees governance as a set of largely non-hierarchical relationships where states are not necessarily dominant. This article critically analyses the contribution that global administrative law makes to our understanding of environmental stewardship, and looks at ongoing institutional reforms in the water sector that are not based on CoPs being the main actor.

Keywords
international environmental law; environmental governance; water governance; private governance; water law and policy

1. Introduction

Environmental stewardship has developed in a variety of ways over the past two decades. The early years of international environmental law saw the relatively fast creation of principles, norms and standards, at least up to the United Nations Conference on Environment and Development (UNCED) and the adoption of the Rio Declaration.[1]

The spurt of standard creation progressively gave way to a period of consolidation during which a number of existing regimes have grown internally both institutionally and substantively. It is in this context that conferences of the parties to various environmental treaties have made an immense contribution, as reflected in the various papers published in this issue.

The contribution of conferences of the parties to environmental stewardship notwithstanding, some separate developments can also be highlighted. Indeed, the

[1] Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/26 (Vol. I).

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environment, like other sectors, has been subject to tremendous pressure over the past couple of decades in the context of neoliberal reforms. This is in particular true with regard to the progressive diminution of the importance of states as the primary actors of governance and the growing emphasis given to the role of non-state actors, in particular the private sector and civil society.[2] This has had an impact on the role played by states and state-led institutions, such as conferences of the parties. This was illustrated recently at the Rio+20 summit where some participants did not believe or expect that states were the main actors.[3]

Within the environment sector, some areas have never developed entirely along the traditional model centred around a treaty and a conference of the parties. This is, for instance, the case of water. In the water sector, a superficial reading of the situation indicates that there is one main water treaty, the UN Watercourses Convention.[4] Yet, this treaty is not a framework water treaty since it focuses specifically on watercourses. Further, despite more than 25 years of preparation, the treaty adopted in 1997 is still not in force, thus leaving a gaping hole in the legal framework at the international level. While hard law is sparse in this area, there has been a sustained effort to develop legal instruments in this field. The peculiarities of the water sector is that some of the key developments have taken place outside of the UN, in institutions set up specifically to provide more direct representation to non-state actors.[5] Further, instruments adopted are all soft law. Yet, the informality of these arrangements masks their effectiveness on the ground since the international water policy consensus has become part of the core fabric of the water sector in many countries of the South. This highlights some of the new ways in which the national mixes with the international in the context of issues, which are local, national and global at the same time, such as water or climate change.

This article first highlights some of the patterns of change that can be identified in environmental stewardship over the past two decades. It then examines the contribution that global administrative law makes to our understanding of environmental stewardship. The next section then analyses specifically the water sector, one of the areas of the broader environmental sector that best highlights some of the most significant changes that have taken place in recent years.

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2) E.g., Robert Falkner, 'Private Environmental Governance and International Relations – Exploring the Links', 3(2) *Global Envtl Politics* (2003) 72.

3) Herbert Docena, From Culprits to Saviors: The Triumph of Green Capital at the Rio+20 (4 July 2012), available at http://www.isa-sociology.org/global-dialogue/2012/07/from-culprits-to-saviors-the-triumph-of-green-capital-at-the-rio20-july-4-2012/.

4) Convention on the Law of the Non-navigational Uses of International Watercourses, New York, 21 May 1997, UN Doc. A/51/869 (not in force).

5) This is, for instance, the case of the World Water Council, about which see text at note 45.

2. Evolution of Environmental Stewardship

Stewardship of the environment at the international level has witnessed a significant evolution over the past four decades. The environment sector is of particular interest because it has evolved partly in tandem with other sectors and partly by developing its own special framework.

In the early 1970s, the shaping of the stewardship of the environment was based, as for other sectors, on an institutional framework centred around states and UN institutions. At the same time, the environmental sector was from the start distinct from other sectors. This is in part the case because states never gave environmental governance a strong centre in the form of a world environment organisation.[6] The setting up of the UN Environment Programme (UNEP) was a very powerful statement by UN member states that the environment had become a key issue at the international level. Yet, the specific way in which UNEP was set up made it a relatively weak institution from the outset.[7]

The lack of a clear power centre for environmental issues soon led to a process of fragmentation within what was still a traditional model where state-led institutions were at the centre. One of the hallmarks of the fragmentation affecting the environmental sector has been the growing role of the Conference of the Parties (COP)/Meeting of the Parties (MOP) in fostering the implementation of treaties and the further development of the regime to which they are attached. COP/MOPs have thus played a key role both in relatively specific treaties, such as the Whaling Convention,[8] or in the case of framework conventions, such as the climate change and biodiversity conventions.[9] They have helped to strengthen treaties from within in different ways: This has included giving specificity to the treaty where it was lacking, as in the case of the Ramsar Convention's listing criteria.[10] In other cases, the COP/MOP has contributed to the implementation of the treaty through the development of provisions insufficiently articulated in the main instrument. This was, for instance, the case of articles 6, 12 and 18 of the Kyoto Protocol.[11] Further, COP/MOPs have also contributed to the development

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6) E.g., Nils Meyer-Ohlendorf, 'Would a United Nations Environment Organization Help to Achieve the Millennium Development Goals?', 15(1) *Rev. Eur. Community & Int'l Envtl. L.* (2006)23.

7) E.g., Bharat H. Desai, 'UNEP: A Global Environmental Authority?', 36(3–4) *Envtl Poly & L.* (2006) 137, 140.

8) International Convention for the Regulation of Whaling, Washington, 2 December 1946.

9) United Nations Framework Convention on Climate Change, New York, 9 May 1992 and Convention on Biological Diversity, Rio de Janeiro, 5 June 1992.

10) E.g., Annecoos Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements', 31 *Mich. J. Int'l L.* (2009) 231.

11) Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997 and decisions 15/CP.7, 16/CP.7 & 17/CP.7, *in* Report of the Conference of the Parties on its Seventh Session, Marrakesh, 29 October-10 November 2001, UN Doc. FCCC/CP/2001/13/Add.2.

of additional legal instruments, as in the case of the protocols to the Biodiversity Convention.[12]

The environmental framework has evolved alongside the increasing complexity of the issues addressed and attempts to bring more specificity to the implementation of existing treaties. In a context where international environmental institutions do not necessarily have the financial, human or administrative resources to perform all the tasks associated with the implementation of a particular treaty, an increasingly complex web of relationships between international regimes and member states has developed. This can already be identified in an early convention such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora that specifically relies on a close collaboration between its own institutions and national level management and scientific authorities.[13] Ongoing globalisation has further reinforced the web of links between the national and international levels. The basic cooperation between national and international authorities has given way to a broader array of relationships, including a variety of non-state actors contributing to setting up and implementing environmental regimes in formal and informal contexts.

Over the past couple of decades significant changes have taken place in the way the environment sector is governed. The central role that states played has increasingly been challenged in a variety of ways. Firstly, COP/MOPs have had to gradually share their central position with a broader range of actors. This participates of a broader process whereby non-state actors have been taking increasingly visible roles in international affairs. In the environmental context, this includes the progressively much more direct involvement of the private sector in negotiating rooms, such as in the context of the Biodiversity Convention.[14] A much more visible change can be identified in the climate change regime. The UN Framework Convention on Climate Change included a relatively innocuous provision that provided the basis for Activities Implemented Jointly.[15] This subsequently led to the development of the three Kyoto mechanisms directly involving the private sector.[16] Interestingly, the Kyoto mechanisms turned out in the

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12) Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 20 January 2000 and Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010.

13) Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, Art 1(f) and (g). See also Christine Fuchs, 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – Conservation Efforts Undermine the Legality Principle', 9 *German L.J.* (2008) 1565.

14) E.g., Natasha Affolder, 'The Market for Treaties', 11 *Chi. J. Int'l L.* (2010) 159.

15) United Nations Framework Convention on Climate Change, New York, 9 May 1992, Art. 4(2)(a). See also Donald M. Goldberg and Glenn M. Wiser, 'Rethinking The JI Pilot Phase: A Call for Independent Evaluation and a Legal Framework', 3-*FALL Widener L. Symp. J.* (1998) 385, 388.

16) E.g., Irja Vormedal 'The Influence of Business and Industry NGOs in the Negotiation of the Kyoto Mechanisms: The Case of Carbon Capture and Storage in the CDM', 8/4 *Global Environmental Politics* 36 (2008).

intervening period to be one of the linchpins of the whole climate change regime. This confirms that forms of public-private governance have started to impact significantly traditional international environmental stewardship.

Secondly, there has been evolution in the range of institutions involved in the stewardship of the environment at the international level. While a majority of key developments in the 1970s and 1980s originated in the context of UN institutions or forums constituted of states, their grip has progressively weakened over the past two decades. In particular, private environmental governance has rapidly developed.[17] This includes initiatives from organisations with a general mandate, like the International Organisation for Standardisation that has also addressed environmental issues through the creation of a global standard for environmental management systems.[18] There are also organisations focusing specifically on the environment, such as the World Water Council, an organisation with a broad membership but with an important representation of the private sector as well as professional organisations,[19] which have played a key role in the development of water-specific soft law.

3. Global Administrative Law and Stewardship of the Environment

Evolving environmental stewardship can be analysed within the field of international environmental law as well as in relation to developments elsewhere. In a context where an increasing array of issues are analysed through the lens of globalisation, it is important to take stock of the contribution that broader debates can make to an understanding of environmental stewardship. Indeed, the environment is one of the quintessential case studies of globalisation. This is not only due to the fact that a number of environmental problems are truly global in scale but also because sustainable and equitable solutions to these problems require taking action at the same time from the most local level to the global level.

The debates on something identified as 'global administrative law' constitute one of the entry points for identifying lessons that may be learnt for the further development of environmental stewardship. This section reviews and critically analyses some of the key features of global administrative law from the standpoint of environmental stewardship.

At the outset, global administrative law can be identified as an extension of an older phenomenon called international administrative law that was seen as encompassing legal rules at the national and international levels dealing with

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17) E.g., Falkner, *supra* note 2.

18) E.g., ISO Standards, ISO 14001:2004.

19) For the list of members as of July 2012, see http://www.worldwatercouncil.org/fileadmin/wwc/Membership/WWC_List-of-Members_July-2012.pdf.

administrative activity on the international plane.[20] Global administrative law is the twenty-first century avatar, based on the idea that much of global governance can be analysed as administration.[21] One of the key elements highlighted is the idea that there is a global administrative space that brings together private, local, national and inter-state regulation in a context including international institutions, transnational networks and domestic administrative bodies.[22] One of the distinguishing features of global administrative law is that it includes a much broader array of actors and institutions that go beyond traditional state-based instruments and institutions. It also highlights the increasing engagement of administrative bodies at the national and international levels in regulatory cooperation and in implementation.[23]

One of the key features of global administrative law is that it is not structured around a hierarchical system.[24] In fact, it specifically moves away from the existing structured and hierarchical system of norms and institutions towards recognising a set of looser relationships, wherein a UN Security Council resolution can be put side by side with a resolution of the World Water Forum,[25] without prejudging their respective weight or legitimacy. In some extent, global administrative law entirely rethinks the international governance framework by moving beyond existing legal and institutional structures. This impacts not only international governance but also domestic administration. Indeed, the basic concept seems to put all administrators on the same plane. This not only puts domestic and international regulators in a new relationship but also implies that various forms of administration, in particular private governance are to be factored in on a level of equality with states. This reconstitution of relations between the national and international level has the potential to ensure that global institutions do not undermine national institutions. Yet, this has been increasingly controversial as international institutions are strengthened, while state institutions – in particular in the South – are losing part of their regulatory and financial capacity to administer. Further, the global administrative law project has the potential to undermine democratic institutions by putting all administrative structures in a parallel

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[20] E.g., Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law', 20 *Eur. J. Int'l L.* (2009) 23.

[21] For a definition of global governance that shares a lot with that of global administrative law, E.g., Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9/11 *German Law Journal* (2008) 1375.

[22] E.g., Kingsbury *supra* note 20, 24.

[23] E.g., Alexander Somek, 'The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *Eur. J. Int'l L.* (2009) 985.

[24] *Ibid.*, 986.

[25] On the World Water Forum, see *infra* note 52.

framework where nations' states do not play a dominant role but are not replaced by other democratic structures.[26]

Another dimension of global administrative law is its emphasis on process rather than substance. On the one hand, it emphasises procedural fairness, transparency and accountability. On the other hand, it functions largely as a pragmatic tool rather than proposing a set of basic principles for equitable and sustainable governance.[27] In general, global administrative law seeks to enhance the legitimacy of global administration but does this in a manner, which removes it from traditional political processes.[28] Thus, while it seeks to foster more legitimacy in global administration it may at the same time undermine existing democratic processes. In other words, global administrative law may have positive impacts for the management of regimes but does not address underlying politics.[29] This participates of a trend that portrays governance as largely apolitical.[30]

Global administrative law situates itself in a context where nation states are in retreat. It thus assumes that the world has entered a post-Westphalian status wherein a range of other actors have challenged nation states' supremacy and have acquired the legitimacy to take on specific roles in global administration. This brings a new plurality to international governance. This plurality of actors involved in global administration brings with it a concomitant informality insofar as the traditional formal structures, such as UN institutions, are sidelined.

The recognition of these trends is a welcome step that needs to be emphasised. Global administrative law, however, fails to address these developments with a critical eye. Firstly, plurality implies for all practical purposes a much stronger role of private actors in global governance. Global administrative law seems to simply assume that what is in effect a trend towards forms of privatisation of global governance is to be welcomed and that private legitimacy can replace public legitimacy without affecting the bases of global governance.[31] Secondly, it seems to imply that informality is a step forward in ensuring more rational outcomes. Here, global administrative law fails to critically examine the consequences of dismantling existing frameworks of governance without replacing them with another set of basic principles ensuring fairness and equity.[32]

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[26] E.g., Ming-Sung Kuo, 'Between Fragmentation and Unity: The Uneasy Relationship between Global Administrative Law and Global Constitutionalism', 10 *San Diego Int'l L.J.* (2009) 439.
[27] *Ibid.*, 447.
[28] *Ibid.*, 456.
[29] E.g., David Kennedy, 'The TWAIL Conference: Keynote Address Albany, New York April 2007', 9 *International Community Law Review* (2007) 333.
[30] E.g., Matthew Paterson, David Humphreys and Lloyd Pettiford, 'Conceptualizing Global Environmental Governance – From Interstate Regimes to Counter-Hegemonic Struggles', 3(2) *Global Envtl Politics* (2003) 1.
[31] E.g., Ming-Sung Kuo, 'The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *Eur. J. Int'l L.* 7 (2009) 99.
[32] C.f. Kuo *supra* note 26, 445.

From the point of view of environmental stewardship, the understanding fostered by global administrative law is important. Indeed, the framework proposed by global administrative law coincides in part with developments in environmental stewardship over the past couple of decades. At the same time, global administrative law neither effectively describes evolving environmental governance nor provides an appropriate framework for reform. The point concerning fragmentation is, for instance, of particular interest in the context of environmental stewardship that has been affected by this phenomenon more or less since its inception. However, environmental governance's fragmentation started before private sector actors began playing a more formal role in environmental governance and is thus more complex than what global administrative law describes. Indeed, environmental stewardship is today both fragmented within the traditional governance framework centred around nation states and with regard to recent developments where non-state actors have started playing an increasingly important role in the administration of environmental regimes.

More broadly, global administrative law fails to engage with some of the basic issues that underlie most of international environmental stewardship. In particular, the attempt to assume that the world is post-Westphalian does not answer any of the difficult questions concerning the North-South dimension of virtually every environmental problem addressed at the international level. Indeed, one of the basic unresolved issues is that the framework through which states engage with each other assumes that they are equal from the negotiation to the implementation stage, when states are in fact unequal. International environmental stewardship has in part shown a method of redefining the way in which international regulation is conceived. The concept of differential treatment, which seeks to move beyond traditional categories of international governance, constitutes a first step forward in attempting to redress procedural and substantive inequity in the existing international governance framework, in particular between developed and developing countries.[33] Global administrative law does not address this contribution of environmental governance to tackling basic shortcomings of the Westphalian model in the context of global issues. Further, it does not propose an alternative that would provide a set of substantive principles to move forward. In fact, it has the potential to make the system more inequitable because least developed states that benefit today from a basic level of support in the intergovernmental environmental stewardship context consistently fare badly in existing private environmental governance contexts.[34]

On the whole, the contribution of global administrative law seems to be limited to highlighting on-going patterns of change that affect various areas of global

[33] E.g., Philippe Cullet, 'Common but Differentiated Responsibilities', *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds.), *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010), p. 161

[34] E.g., Falkner, *supra* note 2, 78.

governance, including environmental stewardship. Since it does not engage with substantive issues in any depth, the only way to approach the issue in more detail is by looking at areas where some of the development of plurality and informality as conceived by global administrative law is most visible. In an environmental context, this happens to be in the area of water, which is examined in more detail in the next section.

4. Evolving Stewardship – The Case of Water

As indicated at the outset, water is a sector where there is little international law, as confirmed by the fact that the only global convention identified as a water convention has not even come into force. The lack of a well-established state-based multilateral regime of the kind found in environmental law by the beginning of the last decade of the twentieth century provided an apt ground for significant reforms in the water sector, given the important regulatory gaps at the international level.

The lack of a comprehensive treaty regime in the water sector can be explained in part by the fact that water is often considered as part of environmental law. While this is correct and many environmental law treaties include a water dimension, this does not provide the basis for addressing all the various issues related to water. Thus, approaching water from an environmental law perspective does not provide a comprehensive basis for either addressing drinking water or irrigation. In addition, current environmental law has failed to address in enough specificity issues related to the global dimension of water (the global water cycle) that is intrinsically linked to global environmental change but also needs to be addressed separately.

The absence of a wide-ranging body of water law at the international law level in a context where water is increasingly important in international relations points to a significant gap in governance. This has not remained unnoticed by actors with growing vested interests in this sector. The increasing importance of water for business at the national and international levels has thus led to a flurry of activity that largely takes place in parallel with traditional state-based institutions. This does not mean that the UN system has no stake in the water sector, as highlighted by the setting up of the coordinating structure known as UN-Water. Yet, the latter does little more than profiling existing activities of UN organisations concerning water. It is thus specifically tasked with enhancing the 'coherence, credibility and visibility' of the UN system in the water sector but does not have a mandate to take forward water policy development.[35]

[35] UN Water, Terms of Reference, version of 25 August 2012, para. 11.

The governance framework for water at the international level in effect started shifting away from the UN in the early 1990s while the preparations for UNCED were taking place. Water was one of the important issues addressed at UNCED, as reflected, for instance, in the fact that Agenda 21 devoted its whole chapter 18 to water.[36] Yet, within the water sector, it is not chapter 18 that has had the most influence on subsequent policy developments at the national and international levels. It is rather the Dublin Statement adopted at the International Conference on Water and the Environment (Dublin Conference) that has come to dominate water policy, in particular its call for water in 'all its competing uses' to be recognised as an economic good.[37]

In view of the key role of the Dublin Statement in the past two decades, further background on its adoption is required. The Dublin Conference was organised in the context of the preparations for the UNCED but was separate from the meetings of the Preparatory Committee. This was due in part to the fact that UNEP and the WMO had planned on organizing a technical conference before international policy attention focused on the preparations for UNCED.[38] This led to a hybrid formula. On the one hand, the proposed conference was to act as the formal entry for issues related to water for UNCED.[39] On the other hand, representation in the conference was not organized according to the practice that the UN General Assembly followed, for instance, in the Preparatory Committee for UNCED.[40] Indeed, the conference was not attended by government representatives but by a diverse mix of people, focusing on expert participants.[41]

The choice of experts to attend the Dublin Conference was not inappropriate considering that it was meant to be a technical conference in the first instance. What is more surprising is that a technical meeting attended mostly by experts adopted a policy statement that has come to be regarded as the definitive international water policy statement. The fact that the Dublin Statement had little legitimacy in itself was recognized from the outset. Indeed, the statement was only 'commended' to government representatives attending UNCED.[42]

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36) Agenda 21, Report of the UNCED, Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1, Annex II) c 18.

37) Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992, principle 4.

38) Letter from GOP Obasi to J Pérez de Cuéllar, No 37.760/H/S-118, dated Geneva, 23 October 1990.

39) Preparatory Committee for the UNCED, Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources, UN Doc. A/CONF.151/PC/73 (1991) 3.

40) E.g., United Nations General Assembly Resolution 44/228, United Nations Conference on Environment and Development, 22 December 1989, UN Doc. A/RES/44/228, II.1.

41) Preparatory Committee for the UNCED, *supra* note 39, 5.

42) *See* Introduction to the Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992.

In addition to procedural issues, the language of Agenda 21 and the Dublin Statement differ. There is thus no basis in Agenda 21 to assume that the international community believes that water is an economic good in all its dimensions since it uses a much more balanced formulation.[43] It is thus surprising that the principles contained in the Dublin Statement are today often referred to as the Dublin-Rio principles.[44] This would be of little consequence if these principles had been subsequently widely debated in UN forums. In practice, however, international water policy has evolved since 1992 largely through meetings organized outside of a UN context. Further, it is instruments adopted outside of the UN that have been the most influential, even if they lack in formal legitimacy.

The evolving international water policy has been driven in part by two institutions set up in the aftermath of UNCED. The World Water Council is usually described as a think-tank and is constituted in the form of an association under French law.[45] Its objectives include the development of 'a common strategic vision on integrated water resources management on a sustainable basis' as well as the promotion of 'the implementation of effective policies and strategies worldwide'.[46] One of its main activities has been the organization of the World Water Forum. The second is the Global Water Partnership (GWP), which was set up by the World Bank, UNDP and the Swedish International Development Agency.[47] The arrangement was formalized in 2002 with the establishment of a GWP Organization whose mandate is to support the GWP Network.[48] The GWP is based on the 'simple concept' that 'freshwater resources are finite and their various uses are interdependent, but most of the water management activities carried out at the national or international level do not recognize these interdependencies'.[49] This is reflected in the statutes of the GPW Network, which determine that the single objective of the Network is to develop and promote the principles of integrated water resource management.[50]

One of the objectives behind the setting up of these two new bodies has been to provide new platforms where a greater number of entities involved in the water

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43) Agenda 21, Report of the UNCED, Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1, Annex II) c 18(68) reads '[w]ater should be regarded as a finite resource having an economic value with significant social and economic implications reflecting the importance of meeting basic needs'.

44) E.g., R Hoare et al., External Review of Global Water Partnership – Final Report (2003) 4.

45) World Water Council Constitution, 14 June 1996 (as amended).

46) *Ibid.*, Art. 2(3).

47) E.g., Hoare, *supra* note 44, 4.

48) Statutes for the Global Water Partnership Network and the Global Water Partnership Organisation, 12 December 2002.

49) S. Özgediz and B. Axelsson, Report of the Management Advisory Review of the Global Water Partnership (Stockholm: Global Water Partnership, 1998) 2.

50) Statutes for the Global Water Partnership Network and the Global Water Partnership Organisation, 12 December 2002, Art 2.

sector can be involved, in particular private sector water companies.[51] This need not be particularly significant, since there have been organisations of the private sector lobbying states for quite some time. The actual importance of these developments is however highlighted in the context of the World Water Forum. The World Water Forum is organised every three years by the World Water Council. It brings together a selection of private sector, non-governmental actors and elected officials, including ministers. While the World Water Forum is not an inter-governmental meeting, its outcomes, such as the ministerial declarations, acquire a kind of state-sanctioned legitimacy because of the presence of ministers.[52]

Another crucial aspect of the evolving international water policy model is that it blends different actors together without formal acknowledgment of the same. The Dublin Statement that was adopted in a meeting of technical experts in the run up to an intergovernmental conference has been repeated and strengthened through meetings such as the World Water Forum. The principles expounded in the Dublin Statement are on the whole the same set of policy prescriptions that the World Bank has adopted internally and exports to borrowing countries through its loans.[53] This leads to undesirable but possibly not unexpected results. The policy consensus existing at the international level among a limited set of actors is increasingly identified as the basis for law and policy reforms in many countries of the South.[54] This has happened in part through direct conditionality of institutions like the World Bank,[55] and in part through much more diffuse policy advice to developing countries.

5. Concluding Remarks

The case of water highlighted in this paper shows that environmental stewardship has evolved significantly in certain sectors. This is a worrying development because it takes the framework for governance away from the gains that had been achieved in earlier decades. This is, for instance, the case with regard to the principle differential treatment for the South that has become a hallmark of international environmental law and ensures that the specific situation of developing countries is at least partly taken into account in international legal frameworks.

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51) E.g., R Petrella, *The Water Manifesto: Arguments for a World Water Contract* (London: Zed, 2001) 23; and M Finger and J Allouche, *Water Privatization – Trans-National Corporations and the Re-Regulation of the Water Industry* (London: Spon Press, 2002) 28.

52) E.g., Ministerial Declaration, 6th World Water Forum, Marseilles, 13 March 2012.

53) E.g., World Bank, Water Resources Sector Strategy, 2004.

54) E.g., Philippe Cullet, *Water Law, Poverty and Development – Water Law Reforms in India* (Oxford: Oxford University Press, 2009).

55) E.g., Videh Upadhyay, *Law under Globalization – Assessing 'Donor Supported' Law Making and Judicial Behavior in India* (Delhi: National Social Watch Coalition, 2008).

One of the key problems is that the new model of governance in the water sector does not follow established governance structures at the international level that have at least some potential in ensuring that the interests of the weakest states are not ignored. Further, while none of the instruments adopted through this new governance framework are binding in terms of the existing categories of lawmaking at the international level, an examination of water law and policy in a number of countries of the South would leave any uninformed observer assuming that these countries are striving to implement international law commitments they have undertaken.

A number of reasons may explain why countries of the South would put so much energy into implementing frameworks which have no force of law in existing environmental governance frameworks. Yet, it is undisputable that the return of agencies like the World Bank to law conditionality requesting borrowing states to adopt certain specific water laws has a lot to do with this level of 'compliance' with soft law frameworks.

The new environmental stewardship in the context of water is thus one where existing categories have both imploded and exploded. This leaves developing countries generally, and least developed countries in particular, exposed to outcomes that are neither equitable nor environmentally sustainable. Further reforms are needed to take into account the reality of international governance that has seen the private sector making significant inroads into the existing framework, while ensuring that no change comes at the expense of the weakest states. Further, the primacy of the realisation of the right to water, and more broadly the right to a clean environment, needs to be reasserted so that everyone's individual basic rights take precedence over other elements, such as efficiency concerns.