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Where are we now with global forest regulation and governance?

Insights from a 'Global Public Goods' Perspective



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1. *Introduction*

For decades now, world's forests have been on the international political agenda¹. As a result, a «multi-layered and complex edifice of global forest governance» has come into existence², composed by a variety of legal instruments and institutions, established for the purpose – or otherwise having the effect – of promoting the conservation and sustainable utilisation of forests³.

Yet, even if an encouraging tendency has recently been observed towards a reduction in the rates of global deforestation, the extent and quality of forests continue to decline in many regions of the world, with alarming consequences on

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¹ See D. HUMPHREYS, *Logjam: Deforestation and the Crisis of Global Governance*, Earthscan Publications Ltd, London, 2006, p. 22.

² E. ROESSING NETO, *REDD+ as a Tool of Global Forest Governance*, in *The International Spectator*, 2015, p. 60 ff., p. 60.

³ For an overview, see J. RAYNER - A. BUCK - P. KATILA (eds.), *Embracing Complexity: Meeting the Challenges of International Forest Governance*, International Union of Forest Research Organizations (IUFRO), Vienna, 2010; R. MAGUIRE, *Global Forest Governance: Legal Concepts and Policy Trends*, Edward Elgar, Cheltenham, 2012; A. EIKERMANN, *Forests in International Law. Is There Really a Need for an International Forest Convention?*, Springer, Cham, 2015. See also, among earlier studies, M. PRIEUR (ed.), *Forêts et environnement en droit comparé et droit international*, Presses Universitaires de France, Paris, 1984; D. VANDERZWAAG - P. M. SAUNDERS (eds.), *Global Forests and International Environmental Law*, Kluwer Law International London, 1996; R. G. TARASOFSKY (ed.), *Assessing the International Forest Regime*, IUCN, Environmental Law Centre, Gland, 1999.

the functioning of global hydrological cycles, the conservation of the world's biological diversity, and the fight against climate change⁴.

Two main interconnected reasons have generally been put forward in the literature to explain why the current framework of global forest governance is not having the effects that it should: the failure of the world's governments to establish a comprehensive, stand-alone international forest convention, and the high degree of fragmentation of existing international bodies and instruments dealing, at various degrees, with forest matters⁵. With few exceptions, in this context, the conclusion of a forest convention has been advocated as the best way to increase the effectiveness of global forest governance, by eliminating inconsistencies and duplications between existing processes and instruments, by resolving ambiguities, and by ensuring a new, purposeful and cohesive regulatory framework for the sector⁶.

Be that as it may, the outcomes of the most recent international negotiations on forests suggest that political will is still lacking for a global forest convention to materialise, and that, at least in the next future, alternative paths should be explored to further global forest regulation and governance⁷.

⁴ According to the most recent figures of the United Nations Food and Agriculture Organization (FAO), some 129 million hectares of forest have been lost between 1990 and 2015, resulting in a decrease of forest cover from 31.6 percent to 30.6 percent of the global land area. See FAO, *Global Forest Resources Assessment 2015 – How are the World's Forests Changing?*, FAO, Rome, 2015, pp. v and 3.

⁵ See recently C. P. MACKENZIE, *Future Prospects for International Forest Law*, in *International Forest Review*, 2012, p. 249 ff.; H. VAN ASSELT, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, in *New York University Journal of International Law and Politics*, 2012, p. 1205 ff.; L. GIESSEN, *Reviewing the Main Characteristics of the International Forest Regime Complex and Partial Explanations for its Fragmentation*, in *International Forest Review*, 2013, p. 60 ff. See also already D. VANDERZWAAG - D. MACKINLAY, *Towards a Global Forest Convention: Getting out of the Woods and Barking up the Right Tree*, in S. JOHNSON (ed.), *Global Forests and International Environmental Law*, Kluwer Law International, Boston, 1996, pp. 1-4, AND J. BRUNNÉE - A. NOLLKAEMPER, *Between the Forests and the Trees: an Emerging International Forest Law*, in *Environmental Conservation*, 1997, p. 304 ff., p. 312.

⁶ Exceptions include, for instance, B. H. DESAI, *Forests, International Protection*, in R. WOLFRUM. (ed), *Max Planck Encyclopedia of Public International Law*, 2011, at <www.mpepil.com>, pp. 8-9; and C.P. MACKENZIE, *Future Prospects for International Forest Law*, in *International Forestry Review*, 2012, p. 249 ff.

⁷ See M. SCHWOERER, *What is Happening in the International Forest Regime?*, in *Environmental Policy and Law*, 2015, p. 281 ff.; and D. HUMPHREYS, *Negotiating the Future under the Shadow of the Past: The Eleventh Session of the United Nations Forum on Forests and the 2015 Renewal of the International Arrangement on Forests*, in *International Forestry Review*, 2015, p. 385 ff.

The aim of the present article is to contribute to this endeavour by identifying the weaknesses of, and the areas for improvement in, the current global forest regulatory and institutional framework, through an analysis conducted using the lens of the concept of global public goods as transposed into, and shaped by, the discipline of international law. To this end, Section 2 starts by providing an overview of the origins of the concept of global public goods in political science and economy. Section 3 brings to the fore the value that the international legal discipline might add to the global public goods discourse. Section 4 proceeds by explaining forest sustainable management protection as a global public good. Section 5 assesses the current status of global forest governance from a global public goods analytical perspective. Section 6 finally builds on the earlier findings to draw some concluding remarks about the shortcomings of current global forest governance and the possible ways forward.

The expected contribution of this analysis is twofold. First, it aims at enriching the ongoing debate on global forest governance with insights from an enquiry conducted through a theoretical lens, that of global public goods, which is increasingly discussed by international legal scholars as a valuable frame to understand pressing global problems, but has never been comprehensively applied to forest loss and degradation⁸. Secondly, and more generally, it seeks to provide for a better understanding of how the concept of global public goods fits within, and might be informed by, the discipline of international law, and particularly of what content the latter is able to give to the former and with what implications.

2. Defining Global Public Goods

The theory of global public goods flourished under a project undertaken at the beginning of the '90s by a team of renowned political scientists and political economists supported by the United Nations Development Programme (UNDP), who in turn drew on the neoclassical economic idea of public goods⁹.

⁸ See generally T. TIETENBERG - L. LEWIS, *Environmental & Natural Resource Economics*, John Wiley & Sons, Hoboken, 2012, pp. 31-32; M. J. KOTCHEN, *Public Goods*, in T. C. HAAB - J. C. WHITEHEAD (eds.), *Environmental and Natural Resource Economics: An Encyclopedia*, ABC-CLIO Publishers, Santa Barbara, 2014, p. 271 ff.; B. FIELD - M. K. FIELD, *Environmental Economics: An Introduction*, McGraw-Hill, New York, 2016, p. 74 ff.

⁹ I. KAUL - I. GRUNBERG - M. STERN (eds.), *Global Public Goods: International Cooperation in the 21st Century*, Oxford University Press, Oxford, New York, 1999. See also I. KAUL ET AL. (eds.),

A public good, in contrast to a private one, is a good whose benefits are non-rivalrous (which means that one's enjoyment does not detract from or prevent anyone else's) and non-excludable (meaning that no one can be excluded from enjoying them)¹⁰. Because of these two particular properties – the first resulting in that the marginal cost of an additional individual enjoying the good is zero, and the second in that individuals have incentive not to pay for the good and to free ride instead on the payments of others – public goods represent a paradigmatic case of market failure – in the sense that the market either will supply them in an inefficient amount or will not supply them at all – and a rationale for State intervention, that is, a rationale for the State to step in and ensure their provision via taxation and regulation¹¹.

As for global public goods, the concept is used to describe an increasing range of goods –such as the maintenance of peace, the protection of the ozone layer, the fight against corruption or the eradication of infectious diseases – whose benefits, besides displaying the properties of non-rivalry and non-excludability described above, «affect all countries or, haphazardly, anyone, anywhere»¹².

Providing Global Public Goods: Managing Globalization, Oxford University Press, New York, 2003. The concept of 'public goods' first appeared in international relations literature in the early 1970s. V., for instance, B. M. RUSSETT - J. D. SULLIVAN, *Collective Goods and International Organization*, in *International Organization*, 1971, p. 845 ff.; M. OLSON, *Increasing the Incentives for International Cooperation*, *ibid.*, p. 866 ff. For a critique of the concept, on the other hand, see D. LONG - F. WOOLEY, *Global Public Goods: Critique of a UN Discourse*, in *Global Governance*, 2009, p. 107 ff.; and J. COUSSY, *The Adventure of a Concept: Is Neo-Classical Theory Suitable for Defining Global Public Goods?*, in *Review of International Political Economy*, 2005, p. 177 ff.

¹⁰ The classic example of a public good are lighthouses. Although a lighthouse can be privately owned, the benefits it bestows are public goods: its ability to guide a ship at the entrance to the harbor is not reduced if other ships benefit from its light (non-rivalry) and no sailor can be prevented from using its light as a navigational aid (non-excludability). The origins of the concept are often traced back to P. A. SAMUELSON, *The Pure Theory of Public Expenditure*, in *The Review of Economics and Statistics*, 1954, p. 387 ff. But see R. STURN, 'Public Goods' before Samuelson: *Interwar Finanzwissenschaft and Musgrave's Synthesis*, in *European Journal of the History of Economic Thought*, 2010, p. 279 ff.

¹¹ See, for instance, K. HEATHER, *Economics: Theory in Action*, Financial Times Prentice, Harlow, 2004, p. 213 ff.; P. A. SAMUELSON - W. D. NORDHAUS, *Economics*, McGraw-Hill, New York, 2010, pp. 36-37 and p. 272; D. ACEMOGLU - D. LAIBSON - J. LIST, *Microeconomics*, Pearson Education, Harlow, 2016 (2nd ed.), p. 244 ff.

¹² I. KAUL, *Global Public Goods: Explaining their Underprovision*, in E.-U. PETERSMANN (ed.), *Multilevel Governance of Interdependent Public Good: Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century*, EUI, Fiesole, 2012, p. 41 ff., p. 41. For a general account on global public goods, in addition to references above, at n. 9, see T. SANDLER, *Global Collective Action*, Cambridge University Press, Cambridge, 2004; S. BARRETT, *Why Cooperate?*

Like public goods in general, global public goods are assumed not to be adequately provided by the market and, accordingly, to call for public provision¹³. Because at the global level, however, there is no State-like entity endowed with general taxing and regulatory powers, global public goods cannot but depend upon the voluntary cooperation between States and face, therefore, greater provisional challenges than their domestic counterparts: since individual States are primarily concerned with, and tend to act in pursuit of, their national interest, and since, as a consequence, international negotiations are often like «political markets» where delegates bargain in accordance with their own State's particularistic advantage, global public goods may suffer from a «dual» – political as well as, and in addition to, economic – «market failure»¹⁴.

The lack of a global State-like entity (referred to as «jurisdictional gap») is not, however, the only relevant problem, and when explaining the causes of today's underprovision of many global public goods, the theory of global public goods points, as well, to two alleged significant weaknesses in the existing global regulatory and institutional frameworks: on the one hand, the exclusion (or limited involvement) of important new global actors, especially civil society and the private sector, from the decision-making processes dealing with the production of global public goods («participation gap»); and on the other hand, the absence of policy options that, creating net benefits to, and being perceived as fair by, all major concerned actors, make cooperation in the production of global public goods the most favourable strategy for all of them («incentive gap»). Without participation and just distribution of burdens and benefits – it is argued – international cooperation for global public goods is unlikely to be

The Incentive to Supply Global Public Goods, Oxford University Press, Oxford, 2007; E. BROUSSEAU - T. DEDEURWAERDERE - B. SIEBENHÜNER (eds.), *Reflexive Governance for Global Public Goods*, MIT press, Cambridge, MA, 2012.

¹³ See K. E. MASKUS - J. H. REICHMAN, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in *Journal of International Economic Law*, 2004, p. 279 ff., p. 284; J. E. STIGLITZ, *Global Public Goods and Global Finance: Does Global Governance Ensure that the Global Public Interest is Served?*, in B. GAZIER - J.-P. TOUFFUT (eds.), *Advancing Public Goods*, Edward Elgar, Cheltenham, 2006, p. 149 ff., p. 151; W. NORDHAUS, *Paul Samuelson and Global Public Goods*, in M. SZENBERG - L. RAMRATTAN - A. A. GOTTESMAN (eds.), *Samuelsonian Economics and the Twenty-first Century*, Oxford University Press, Oxford, 2006, p. 88 ff.; S. DENEULIN - N. TOWNSEND, *Public Goods, Global Public Goods and the Common Good*, in *International Journal of Social Economics*, 2007, p. 19 ff., p. 23.

¹⁴ I. KAUL, *Global Public Goods: Explaining their Underprovision*, above, n. 12, p. 47.

perceived as legitimate and, consequently, to generate support and yield its expected results¹⁵.

3. *Rethinking the Governance for Global Public Goods from an International Legal Perspective*

Whereas for some years economists and political scientists were its only users, from the late 2000s global public goods have progressively and increasingly entered the discourse of international legal scholarship¹⁶.

With few exception, however, scholars have focused their attention on the contribution that the GPG theory might provide to the discipline of international law and applied the concept of global public goods as a useful analytical frame for identifying the challenges raised for international law by the collective action problems underlying the governance of many of today's most pressing global matters¹⁷. Much less consideration has instead been devoted to

¹⁵ I. KAUL - I. GRUNBERG - M. STERN, *Introduction*, in IDS. (eds.), *Global Public Goods: International Cooperation in the 21st Century*, above, n. 9, p. xix ff., p. xxvi. See likewise E. BROUSSEAU - T. DEDEURWAERDERE, *Global Public Goods: The Participatory Governance Challenges*, in E. BROUSSEAU - T. DEDEURWAERDERE - B. SIEBENHÜNER (eds.), *Reflexive Governance for Global Public Goods*, above, n. 12, p. 21 ff.

¹⁶ Many of the contributions on the subject matter can be traced back to five symposia or collection: (i) R. M. BRATSPIE (ed.), *Providing Global Public Goods under International Law*, in *American Society of International Law Proceedings*, 2010, p. 147 ss.; (ii) E.-U. PETERSMANN, *Mini-Symposium on Multilevel Governance of Interdependent Public Goods*, in *Journal of International Economic Law*, 2012, p. 709 ff.; (iii) C. ESPOSITO - A. GARCIMARTIN (eds.), *La protección de bienes jurídicos globales*, UAM-BOE, Madrid, 2012; and (iv) F. CAFAGGI - D. D. CARON, *Global Public Goods Amidst a Plurality of Legal Orders: A Symposium*, in *European Journal of International Law*, 2012, p. 643 ff. See also the recent contributions by D. AUGENSTEIN, *To Whom It May Concern: International Human Rights Law and Global Public Goods*, in *Indiana Journal of Global Legal Studies*, 2016, p. 225 ff., and N. WALKER, *Human Rights and Global Public Goods: The Sound of One Hand Clapping?*, *ibidem*, p. 249 ff.

¹⁷ A 'global public goods' perspective has been applied, for example, in the fields of the international protection of cultural property and cultural heritage (see F. FRANCONI, *Public and Private in the International Protection of Global Cultural Goods*, in *European Journal of International Law*, 2012, p. 719 ff., and V. VADI, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge University Press, Cambridge, 2014, pp. 29-34), international investment law (see B. CHOUDHURY, *International Investment Law as a Global Public Good*, in *Lewis & Clark Law Review*, 2013, p. 481 ff.), free trade (see P. C. MAVROIDIS, *Free Lunches? WTO as Public Good, and the WTO's View of Public Goods*, in *European Journal of International Law*, 2012, p. 731 ff.); international environmental law (see E. HEY, *Conceptualizing Global Natural Resources: Global Public Goods Theory and International Legal Concepts*, in H. HESTERMEYER *et al.* (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Martinus Nijhoff, Leiden, 2012, p. 881 ff.; and E. MORGERA, *Bilateralism at the Service of Community*

the contribution that, vice versa, the discipline of international law can make to the analytical framework of global public goods by unpacking the governance challenges diagnosed by GPG theorists and by translating these challenges into concrete opportunities for legal and institutional reform. Which is precisely what we turn to now, by relying on two competing theoretical approaches that have been recently advanced by international legal scholarship to further the current global governance architecture: Global Administrative Law (GAL) and Cosmopolitanism¹⁸.

Whereas both approaches are inherently normative, GAL is concerned with the processes through which global governance occurs, and focuses on the legitimacy-enhancing role of procedural values such as transparency, inclusiveness and accountability, while Cosmopolitanism's emphasis is on the content of global governance regulation and on the legitimacy potential of substantive values such as equality, fairness, and distributive justice. For this reason, even if they are often viewed as alternatives to think about global governance, GAL and Cosmopolitanism are considered here as complementary and mutually reinforcing perspectives from which to enrich the theoretical framework for thinking about global public goods, with the former used to elucidate and address the «participation gap» deemed to permeate institutions and decision-making processes governing global public goods, and the latter to illuminate and deal with the «incentive gap» allegedly affecting relevant regulatory arrangements.

3.1. *The Cosmopolitan Approach*

Cosmopolitans profess a departure from the traditional, state-centered paradigm of international law towards a new comprehensive legal order having

Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law, in *European Journal of International Law*, 2012, p. 743 ff.); and global health (see D. GARTNER, *Global Public Goods and Global Health*, in *Duke Journal of Comparative & International Law*, 2012, p. 303 ss.).

¹⁸ Compare with G. SHAFFER, *International Law and Global Public Goods in a Legal Pluralist World*, in *European Journal of International Law*, 2012, p. 699 ff., discussing global public goods from the perspective of Global Constitutionalism, Global Administrative Law and Legal Pluralism, and with S. COGOLATI - L. HAMID - N. VANSTAPPEN, *Global Public Goods and Democracy: What Role for International Law?*, Leuven Centre for Global Governance Studies Working Paper No. 159, May 2015, at <ww.ghum.kuleuven.be>, employing the lens of Global Administrative Law and Global Constitutionalism.

individuals, in the role of *kosmopolitês*, that is, citizens of the world, as its key point of reference, and informed by three core elements or principles: the status of human beings as the ultimate units of concern (normative individualism); the equal moral worth of all human beings and their entitlement to equal consideration (all-inclusiveness); and the global force of the status of human beings as ultimate units of concern and the existence of obligations on all to preserve the equal moral worth of every human being (generality)¹⁹. They envisage a «universal and egalitarian law» reflecting a «substantive code of political morality» nearly universally shared and promoting the realisation of cosmopolitan ideals such as equity, global justice, and solidarity²⁰, but they generally reject the proposals for the creation of a single world government endowed with centralised legislative, adjudicative and enforcement authority, and advocate, instead, the existence of a complex web of multiple and countervailing governance institutions, operating at local, national, regional, and global levels²¹.

Transposed in the cosmopolitan context, the notion of global public goods identifies all those goods, from the eradication of global poverty and the reduction of carbon dioxide emissions, to the respect of the transnational rule of law and the existence of legitimate and effective global institutions, that are essential to human beings, and whose benefits should reach the global human

¹⁹ For a general account, see R. PIERIK - W. WERNER, *Cosmopolitanism in Context: An Introduction*, in IDS. (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*, Cambridge university press, Cambridge, 2010, p. 1 ff.; W. WERNER - G. GORDON, *Kant, Cosmopolitanism, and International Law*, in A. ORFORD - F. HOFFMAN (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016, p. 505 ff. An overview of the historical roots of cosmopolitanism, its central tenets, as well as of its main varieties, can be found in T. POGGE, *Cosmopolitanism*, in R. E. GOODIN - P. PETTIT - T. POGGE (eds.), *A Companion to Contemporary Political Philosophy*, Blackwell Publishing, Oxford, 2007, p. 312 ff.; N. DOWER, *Questioning the Questioning of Cosmopolitanism*, in S. VAN HOOF - W. VANDEKERCKHOVE (eds.), *Questioning Cosmopolitanism*, Springer, Dordrecht, 2010, p. 3 ff.; G. BROCK, *Cosmopolitanism*, in M. BEVIR (ed.), *Encyclopedia of Political Theory*, Sage, Thousand Oaks, 2010, p. 315 ff.

²⁰ P. ELEFThERiADIS, *Cosmopolitan Law*, in *European Law Journal*, 2003, p. 241 ff., p. 251.

²¹ See, on this point, R. PIERIK - W. WERNER, *Cosmopolitanism in Context*, above, n. 19, pp. 5-6; and S. DOUGLAS-SCOTT, *Law after Modernity*, Hart Publishing, Oxford, 2013, p. 330. See, more extensively, among others, T. W. POGGE, *Cosmopolitanism and Sovereignty*, in C. BROWN (ed.), *Political Restructuring in Europe: Ethical Perspectives*, Routledge, London, 1994, p. 89 ff.; A. KUPER, *Rawlsian Global Justice: Beyond The Law of Peoples to a Cosmopolitan Law of Persons*, in *Political Theory*, 2000, p. 640 ff., pp. 647 ff.; D. HELD, *Cosmopolitanism, Democracy and the Global Order*, in M. ROVISCO - M. NOWICKA (eds.), *The Ashgate Research Companion to Cosmopolitanism*, Ashgate, Farnham, 2011, p. 163 ff.

community transpatially, that is, across national boundaries, and transtemporally, that is, across generations²². Since none of these goods can adequately be provided by one State acting alone, they share the need for joint and cooperative endeavours on the part of all States, acting together in their instrumental function of «guardians of the rights and interests of individuals, future generations, and mankind as a whole»²³.

What Cosmopolitanism can contribute to address the challenges of global public goods production pointed out by the GPG theory is, as anticipated above, to help elucidating and filling the «incentive gap» of relevant regulatory arrangements through the identification of policy options that, by promoting a fair distribution of burden and benefits among all relevant parties, may help align incentives and render cooperation for global public goods a preferred strategy for all of them. Its most important suggestions revolve around two main point. First, the governance of global public goods should be conducted with the aim of promoting intra-generational and inter-generational equity, that is, respectively, an equitable distribution of burdens and benefits between people of the same generation, with a special concern for the situation of the least the least well-off in international society, and a fair balance between the interests of the present generation and the future generations. Secondly, in order for collective action for global public goods to be successful, requirements of both distributive and compensatory justice are to be met across national borders, implying, on the one hand, the adjustment of existing inequalities among States through the creation of a framework of preferential treatments and differential obligations and, on the

²² See, among the earliest accounts, R. FALK, *On Humane Governance: Toward a New Global Politics*, Polity Press, Cambridge, 1995, pp. 74-78. More recently, see S. CANEY, *Justice Beyond Borders*, Oxford University Press, Oxford, 2005, p. 160; D. HELD, *Cosmopolitanism: Ideals and Realities*, Polity Press, Cambridge, 2010, pp. 163-164 and pp. 186-187; and, from the perspective of 'cosmopolitan constitutionalism', E.-U. PETERSMANN, *Constituting, Limiting, Regulating and Justifying Multilevel Governance of Interdependent Public Goods: Methodological Problems of International Economic Law Research*, EUI LAW Working Paper No. 2013/08, at <www.cadmus.eui.eu/handle/1814/27559>.

²³ R. PIERIK - W. WERNER, *Can Cosmopolitanism Survive Institutionalization?*, in IDS. (eds.), *Cosmopolitanism in Context*, cit., p. 277 ff., pp. 283-284, adding that «[t]he relationship between cosmopolitanism and State sovereignty is complex and somewhat paradoxical. On the one hand, cosmopolitanism seeks to go beyond the boundaries of sovereign States, as to include rights and interests of individuals and global society as a whole. (...) On the other hand, sovereign States remain the primary entities that are supposed to act upon and enforce cosmopolitan values».

other hand, the compensation on the part of the wrongdoers of those States, particularly the least developed, who have suffered undue harms in the past²⁴.

3.2. *The Global Administrative Law Approach*

Global Administrative Law, for its part, is based on two main tenets²⁵. The first is that much of contemporary global governance takes the form of regulatory and administrative decision-making, performed in a fragmented and decentralised fashion by a vast range of different actors and institutions – ranging from formal intergovernmental organizations to informal transnational networks of domestic regulatory officials, from private agencies to hybrid public-private regulatory bodies composed of non-state actors, governments and/or international organizations – operating outside the direct control of States²⁶. The second tenet is that, removed from the control of States, the exercise of this global administrative regulation falls short of the classic legitimacy source of international law-making, i.e. State consent, and that, in response of this legitimacy deficit, a refined set of transparency, inclusiveness, and accountability-promoting tools, analogous to those operating in domestic

²⁴ See S. CANEY, *Justice Beyond Borders*, above, n. 22; C. BARRY - T. POGGE (eds.), *Global Institutions and Responsibilities: Achieving Global Justice*, Blackwell Publishing, Malden, MA, 2005; G. BROCK, *Global Justice: A Cosmopolitan Account*, Oxford University Press, Oxford, 2009; R. MILLER, *Globalizing Justice: The Ethics of Poverty and Power*, Oxford University Press, Oxford, 2010; N. HASSOUN, *Globalization and Global Justice: Shrinking Distance, Expanding Obligations*, Cambridge University Press, Cambridge, 2012.

²⁵ See, for the seminal texts, B. KINGSBURY - N. KRISCH - R. B. STEWART, *The Emergence of Global Administrative Law*, in B. KINGSBURY - N. KRISCH - R. B. STEWART - J. B. WIENER (eds.), *Special Issue on "The Emergence of Global Administrative Law"*, *Law and Contemporary Problems*, 2005, p. 15 ff.; and N. KRISCH - B. KINGSBURY, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, in IDS. (eds.), *Symposium on "Global Governance and Global Administrative Law in the International Legal Order"*, *European Journal of International Law*, 2006, p. 1 ff. See also S. CASSESE, *Is There a Global Administrative Law?*, in A. VON BOGDANDY - R. WOLFRUM - J. VON BERNSTORFF - P. DANN - M. GOLDMANN (eds.), *The Exercise of Public Authority by International Institutions*, Springer, Heidelberg, 2010, p. 210 ff., as well as, for a general overview, B. KINGSBURY - M. DONALDSON, *Global Administrative Law*, in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, 2011, at <www.mpepil.com>; S. CASSESE - E. D'ALTERIO, *Introduction: The Development of Global Administrative Law*, in S. CASSESE (ed.), *Research Handbook on Global Administrative Law*, Edward Elgar Publishing, Cheltenham, 2016, p. 1 ff.

²⁶ For a recent, full account see L. CASINI, *The Expansion of the Material Scope of Global Law*, in S. CASSESE (ed.), *Research Handbook on Global Administrative Law*, n. 25 above, p. 25 ff., and S. BATTINI, *The Proliferation of Global Regulatory Regimes*, *ibid.*, p. 45 ff.

administrative law systems, is progressively emerging at the global level²⁷. The description of these administrative law-type tools and the promotion of their further development are GAL project's main objectives²⁸.

The notion of global public goods, in this context, is used broadly, to encompass all those goods and services of general interest – in fields such diverse as, to name but a very few, security and arms control, public health, environmental protection, trade, intellectual property, telecommunication and internet governance, energy, banking and financial regulation – in whose regard, due to the processes of globalisation and the resulting global interdependence, national regulation has progressively become ill-suited, and which, as a consequence, have come to be addressed at the global level²⁹.

Whereas Cosmopolitanism can help addressing the «incentive gap» of global public goods regulations, Global Administrative Law seems to offer valuable insights on how to deal with the «participation gap» of relevant institutional and decisionmaking structures through inclusiveness-enhancing administrative law-type tools and mechanisms³⁰. In particular, GAL appears

²⁷ See extensively, on these good governance values, B. KINGSBURY - N. KRISCH - R. B. STEWART, *The Emergence of Global Administrative Law*, n. 24 above, p. 37 ff.; R. B. STEWART, *U.S. Administrative Law: A Model for Global Administrative Law*, in *Law and Contemporary Problems*, 2005, p. 63 ff.; D. C. ESTY, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, in *The Yale Law Journal*, 2006, p. 1490 ff., p. 1523 ff.; S. CASSESE, *A Global Due Process of Law?*, in G. ANTHONY - J.-B. AUBY - J. MORISON - T. ZWART (eds.), *Values in Global Administrative Law*, Hart Publishing, Oxford, 2011, p. 17 ff. But see also, for a critical perspective, cautioning about possible ideologies informing GAL's values and objectives, B.S. CHIMNI, *Co-optation and Resistance: Two Faces of Global Administrative Law*, in *New York University Journal of International Law and Politics*, 2005, p. 799 ff.; C. HARLOW, *Global Administrative Law: The Quest for Principles and Values*, in *European Journal of International Law*, 2006, p. 187 ff.

²⁸ According to S. MARKS, *Naming Global Administrative Law*, in *New York University Journal of International Law & Politics*, 2005, p. 995 ff., p. 995, for example, «[w]ith “global administrative law” comes an agenda for conceptual reflection, empirical study, and institutional redesign». See also B. KINGSBURY - M. DONALDSON - R. VALLEJO, *Global Administrative Law and Deliberative Democracy*, in A. ORFORD - M. CLARK - F. HOFFMANN (eds.), *The Oxford Handbook of the Theory of International Law*, p. 526 ff., p. 528, and, more extensively, L. Casini, *Global Administrative Law Scholarship*, in S. CASSESE (ed.), *Research Handbook on Global Administrative Law*, n. 25 above, p. 548 ff.

²⁹ See generally J. B. AUBY, *Public Goods and Global Administrative Law*, in G. ANTHONY - J.-B. AUBY - J. MORISON - T. ZWART (eds.), *Values in Global Administrative Law*, above, n. 27, p. 239 ff.

³⁰ See J. B. AUBY, *Public Goods and Global Administrative Law*, n. 29 above, p. 245. For an account on global administrative law's approach to global public goods, see also G. SHAFFER, *International Law and Global Public Goods in a Legal Pluralist World*, above, n. 18, pp. 688-689; and S. COGOLATI - L. HAMID - N. VANSTAPPEN, *Global Public Goods and Democracy: What Role for International Law?*, above, n. 18, pp. 17-19.

valuable in that it identifies several different types of measures that may bring about more inclusive decisionmaking processes and ensure, as a result, an enhanced consideration by decisionmakers of the concerns of all those affected by decisions. These measures, substantially shaped by the paradigm "good governance", include: a) transparency and public availability of information, ensuring all interested parties the possibility, firstly, to meaningfully participate in global public goods regulation and, then, to effectively track and evaluate the conduct of regulators³¹; b) opportunities for participation, including attendance at meetings, membership on advisory bodies, and submission of arguments, comments and proposals, enabling those concerned to contribute to, and influence, the content of decisions³²; d) and review mechanisms, ensuring the accountability of decision-makers³³.

4. *Qualifying Forest Sustainable Management and Protection as Global Public Goods*

Having this conceptual framework in place, we can now turn to its application to forest governance and regulation. Before delving into this analysis, however, a clarification is due with regard to the possible categorisation of forest sustainable management and protection as 'global public goods'.

True, from an economic perspective, forests do not exhibit the properties of the goods in question. According to the international legal principle of permanent sovereignty over natural resources, and as expressly stated in international legal instruments on forests' protection, they remain the property, and are subject to the exclusive and independent control, of the States in whose

³¹ See C. I. FUENTES, *Transparency as a Global Goal: Towards an Unity of Principles in Global Administrative Law*, Paper presented at the Fourth Viterbo Seminar on Global Administrative Law, June 13-14, 2008, at < www.irpa.eu/gal-section/gal-seminars/viterbo-iv-2008>; and M. MACCHIA, *The Rule of Law and Transparency in the Global Space*, in S. CASSESE (ed.), *Research Handbook on Global Administrative Law*, n. 28 above, p. 261 ff.

³² On the attributes, but also on the potential pitfalls, of participation in global decision-making processes, see R. STEWART, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, in *American Journal of International Law*, 2014, p. 211 ff., p. 236 ff.

³³ See D. DYZENHAUS, *Accountability and the Concept of (Global) Administrative Law*, in *Acta Juridica*, 2009, p. 3 ff.; D. H RACHED, *Doomed Aspiration of Pure Instrumentality: Global Administrative Law and Accountability*, in *Global Constitutionalism*, 2014, p. 338 ff.; Y. OKITSU, *Accountability as a Key Concept for Global Administrative Law: A Good Governance Mantra or a Globalized Legal Principle?*, in *Kobe University Law Review*, 2015, p. 99 ff.

national territories they are located³⁴. Therefore, they cannot but be considered, on the international plane, as rival in use and excludable in ownership.

Yet, forests perform a variety of crucial environmental functions, especially (but not exclusively) in relation to biodiversity conservation, soil protection and climate change mitigation³⁵. They are the most biologically rich terrestrial ecosystems in the world, providing habitat for about 80 percent of the world's terrestrial flora and fauna³⁶. They prevent land degradation and desertification by preventing erosion, enhancing the land's capacity to store water and preserving nutrient cycling and fertility³⁷. And they are one of the most fundamental carbon sinks on the planet, absorbing as much as 30% of annual global anthropogenic CO₂ emissions carbon dioxide from the atmosphere and converting it to biomass³⁸.

These fundamental environmental functions are precisely what allows forest sustainable management and protection to be categorized as 'global public goods' challenges and to lend themselves, accordingly, to a 'global public goods'

³⁴ B. H. DESAI, *Forests, International Protection*, above, n. 6, p. 3. The most prominent statement of the principle of national sovereignty over natural resources is found in Principle 21 of the Stockholm Declaration: «States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies». See *Report of the UN Conference on the Human Environment, Stockholm*, June 5-16, 1972, UN Doc. A/CONF.48/14/Rev.1. In the forest sector, the principle is stated in Art. 2(a) of the 1992 *Nonlegally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, and in the Preamble the 2007 *Non-Legally Binding Instrument on All Types of Forests* (see infra, nn. 45 and 46 and accompanying text). For a scholarly account, see P. SANDS - J. PEEL, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2012, pp. 190-191; P. NANDA - G. PRING, *International Environmental Law and Policy for the 21st Century*, Martinus Nijhoff, Leiden, 2013, p. 20; T. KOIVUROVA, *Introduction to International Environmental Law*, Routledge, London, 2014, pp. 90-91 and 105-106.

³⁵ See generally Secretariat of the United Nations Framework on Climate Change, Secretariat of the United Nations Convention to Combat Desertification, *Forests: Climate Change, Biodiversity and Land Degradation*, 2009, available at <www.unfccc.int/resource/docs/publications/forest_eng.pdf>.

³⁶ Convention on Biological Diversity, *About Forest Biodiversity*, at <www.cbd.int/forest/about.shtml>.

³⁷ United Nations Convention to Combat Desertification, *Forests*, at <www.unccd.int/en/programmes/Thematic-Priorities/Forest/Pages/default.aspx>. See also Food and Agriculture Organization, *State of the World's Forests 2016 – Forests and Agriculture: Land-Use Challenges and Opportunities*, at <www.fao.org/publications/sofo/2016/en>.

³⁸ United Nations Framework Convention on Climate Change, *Land Use, Land-Use Change and Forestry*, at <www.unfccc.int/land_use_and_climate_change/lulucf/items/1084.php>. See also Food and Agriculture Organization, *Roles of Forests in Climate Change*, <www.fao.org/forestry/climatechange/en>.

analysis. As a matter of fact, these functions provide benefits to States other than those in whose territories forests are located; and no State, irrespective of whether it actually contributes to preserving them through the sustainable management and protection of forests, can be prevented from enjoying their benefits³⁹. Therefore, when it comes to forest sustainable management and protection, each State has strong incentives to free-ride on – i.e., to benefit at no national economic and political expenses from – other States' efforts; with the consequence – as it happens with global public goods generally – that sustainable management and protection are likely, in the absence of an effective framework of global regulation and governance, to be under-provided in comparison to what would be collectively desirable or not provided at all⁴⁰.

5. Assessing the Current Status of Global Forest Regulation and Governance from a Global Public Goods Perspective

It remains now to assess the current status of global forest regulation and governance from a 'global public goods' analytical perspective as shaped, and enriched, by insights from Cosmopolitanism and Global Administrative Law. In the following, a concise overview is provided about the existing framework of global forest regulation and governance. Thereafter, the substantive and procedural aspects of this framework are analysed with the aim of identifying its weaknesses and the potential areas for improvement. The questions to be asked are first, whether, and to what extent, global forest regulation is informed by, and reflective of, equity and justice ideals advocated for by Cosmopolitanism; and, secondly, whether, and to what extent, global forest governance is driven by requirements of transparency, participation and accountability promoted by Global Administrative Law.

5.1. Global Forest Regulation and Governance: An Overview

³⁹ See D. HUMPHREY, *Logjam: Deforestation and Crisis of Global Governance*, Earthscan, London, 2006, p. 4; and more generally, on the possible categorisation of international ecosystem services as public goods, J. TOUZA MONTERO, C. PERRINGS, *The Provision of International Environmental Public Goods*, United Nations Environment Programme (UNEP), Ecosystem Services Economics (ESE) Working Paper Series, Paper N° 16, October 2012, pp. 3-5.

⁴⁰ See D. HUMPHREYS, *International Forest Politics*, in G. KUTTING (ed.), *Global Environmental Politics: Concepts, Theories and Case Studies*, Routledge, London, New York, 2012, p. 135 ff.

The current international regulation on forests is composed of several different legal instruments, some of which are legally binding and some of which are not. They can be distinguished as 'forest-focused' or 'forest-related', depending on whether they are directly and exclusively centred on forests or, although not having forests as their focus, they produce indirect impacts, in one way or another, on their management and utilisation⁴¹.

Since efforts to negotiate a global treaty on forests – dating from the 1992 United Nations Conference on Environment and Development and still ongoing – have so far been futile, the two most important existing international 'forest-focused' instruments pertain to the realm of soft law⁴². The first, in chronological order, is the Nonlegally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests ('Forest Principles'), adopted in Rio in 1992⁴³. The second is the Non-Legally Binding Instrument on All Types of Forests ('NLBI'), adopted by the United Nations General Assembly in 2007, after three intense years of negotiations⁴⁴.

More numerous are 'forest-related' international legal instruments. They can be divided in instruments covering only specific, geographically-limited subsets of the total world forest areas, on the one hand, and instruments capturing only one or more specific forest ecological functions, on the other. The former category includes the World Heritage Convention (WHC), whose Members are committed to the conservation of the most remarkable examples of the world's natural and cultural heritage, including forests of "outstanding universal value"⁴⁵; and the United Nations Convention to Combat Desertification (UNCCD), promoting the preservation of the soil protective functions of forests, specially

⁴¹ See, for this classification, see C. HAUG - J. GUPTA, *Global Forest Governance*, in J. GUPTA et al. (eds.), *Climate Change, Forests and REDD: Lessons for Institutional Design*, Routledge, London, New York, 2013, p. 60 ff.

⁴² For an overview of international forest law since 1992, see B. H. DESAI, *Forests, International Protection*, *supra*, n. 3, and C. P. MACKENZIE, *Lessons from Forestry for International Environmental Law*, in *Review of European Community & International Environmental Law*, 2012, p. 114 ff.

⁴³ *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, United Nations Conference on Environment and Development, 3-13 June 1992, Rio de Janeiro, Brazil.

⁴⁴ *Non-Legally Binding Instrument on all Types of Forests*, United Nations General Assembly, 62nd session, Agenda item 54, 31 January 2008, UN Doc. A/RES/62/98.

⁴⁵ *Convention for the Protection of the World Cultural and Natural Heritage*, Paris, 16 November 1972, UNTS, Vol. 1037, p. 151 ff.

forests located nearby areas that are desertified or prone to desertification⁴⁶. The latter comprises the Convention on Biological Diversity (CBD), recognising the fundamental importance of forest biodiversity and promoting its protection, recovery and sustainable use⁴⁷; and the United Nations Framework Convention on Climate Change (UNFCCC), which addresses the role of forests as both sources and sinks for greenhouse gases⁴⁸.

In the same manner as regulatory instruments, relevant governance institutions and bodies can be distinguished along the line between those whose mandate is centred directly and exclusively on forests, and those which, while having a different focus, produce indirect impacts on forests and the various services they provide⁴⁹.

The only intergovernmental body tackling the full range of forest issues in a comprehensive and integrated manner is the United Nations Forum on Forests (UNFF), established in 2000 as a subsidiary body of the Economic and Social Council in order to foster a common understanding on sustainable forest management, promote policy development on forest issues, and facilitate the implementation of international forest-related commitments⁵⁰. Numerous forest-focused initiatives have progressively been consolidating, on the other hand, both in the realm of hybrid public-private cooperation, in the form of partnerships bringing together states, international agencies, corporations and civil society organizations to implement programs for the sustainable management of forests; and in the realm of private, non-governmental organisations, especially in the form of forest certification schemes, setting standards for responsible forest

⁴⁶ *Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, Paris, 14 October 1994, UNTS, Vol. 1954, p. 3 ff.

⁴⁷ *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, UNTS, Vol. 1760, p. 79 ff.

⁴⁸ *United Nations Framework Convention on Climate Change*, New York, 9 May 1992, UNTS, Vol. 1771, p. 107 ff.

⁴⁹ See generally C. L. McDERMOTT, *Mapping the Core Actors and Issues Defining International Forest Governance*, in J. RAYNER et al. (eds.), *Embracing Complexity: Meeting the Challenges of International Forest Governance – A Global Assessment Report Prepared by the Global Forest Expert Panel on the International Forest Regime*, IUFRO World Series vol. 28, Vienna, 2010, p. 19 ff.; P. GLÜCK - J. RAYNER - B. CASHORE, *Changes in the Governance of Forest Resources*, in G. MERY et al. (eds.), *Forests in the Global Balance – Changing Paradigms*, IUFRO World Series vol. 17, Helsinki, 2005, p. 51 ff.

⁵⁰ The UNFF is assisted by the Collaborative Partnership on Forests (CPF), an informal coordination mechanism uniting 14 major forest-focused and forest-related inter-governmental and non-governmental organizations, with the aim of strengthening collaboration and maximizing efficiencies in forest governance. For more information, see, respectively, <www.un.org/esa/forests> and <www.cpfweb.org>.

management and implementing them through licensing systems and inspection programmes⁵¹.

Specific aspects of forest governance are covered both by international agencies and by relevant treaty bodies, programs and initiatives. The former includes the Food and Agriculture Organization, whose Committee on Forestry (COFO) provides states with information, policy advice and technical assistance on international forestry problems⁵²; the United Nations Development Programme (UNDP), helping countries in the development and implementation of policies of sustainable forest management⁵³; and the United Nations Environment Programme (UNEP), engaged in relevant cross-sectoral partnerships and investments⁵⁴. The latter comprises the initiative on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD+ Programme), launched under the UNFCCC to incentivise developing countries to make wise forest use through financial rewards for emissions reductions associated with decreases in deforestation⁵⁵; the Expanded Programme of Work on Forest Biological Diversity, created by the Conference of State Parties to the CBD in order to promote the conservation and sustainable use of forest biodiversity and the improvement of forest classification systems and assessment methods⁵⁶; and the World Heritage Forest Programme, promoted by the World Heritage Committee, coordinating the efforts of the WHC bodies to ensure that the Convention be leveraged to further forest conservation on a global scale⁵⁷.

5.2. Substantive Rules

Taken together, the existing aggregate of forest-focused and forest-related binding and non-binding instruments testifies for the emergence for a set

⁵¹ See L. H. GULBRANDSEN, *Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?*, in *Global Environmental Politics*, 2004, p. 75 ff.; S. GUENEAU, *Certification as a New Private Global Forest Governance System: The Regulatory Potential of the Forest Stewardship Council*, in A. PETERS et al. (eds.), *Non-State Actors as Standard Setters*, Cambridge University Press, Cambridge, New York, 2012, p. 379 ff.

⁵² See at <www.fao.org/forestry/57758/en>.

⁵³ See at <www.undp.org>.

⁵⁴ See at <www.unep.org/forests>.

⁵⁵ See at <www.un-redd.org>.

⁵⁶ See at <www.cbd.int/doc/publications/for-pow-en.pdf>.

⁵⁷ See at <www.whc.unesco.org/en/forests>.

of interrelated concepts and principles enshrining a shared global responsibility for forest protection, and more particularly calling on 'forest States' to preserve the forests located within their own territory and on all the other States to assist them in their preservation efforts. Absent a global forest treaty, these concepts and principles fulfil the important functions of defining the contours of the current international legal regulation on forest protection and setting the path for its future development. As yet, however, their content and their practical implications remain vague and subject to disagreement.

The notion of 'common concern of humankind' serves as the overarching conceptual framework⁵⁸. It expresses the interest of the entire international community in certain environmental matters that affect all States and that can only be tackled through a cooperative effort on the part of them all; it does not impinge on the ownership of natural resources, but only on certain aspects of their utilisation, resulting in a compromise between States' desire to preserve their sovereignty over such resources and the interests of the international community in their protection. Its main implications are twofold. On the one hand, it requires those States in whose territories natural resources are located to use them pursuant to the principle of sustainable development, and on the other it calls upon all the other member states of the international community to contribute to the costs associated with the conservation and sustainable use of the concerned resources in accordance with the principle of common but differentiated responsibilities⁵⁹.

⁵⁸ True, there is still no international legal instrument that employs the notion of common concern in connection to forests. However, there seems to be sufficient evidence that, because of the crucial role which forests perform in global ecological processes, their protection has acquired the status of a 'common concern' under customary international law. Express support for this contention is provided by forest-focused instruments, such as the 1992 Principles or the 2007 NLBI, which, along with stressing the principle of States' sovereignty over domestic resources, recognise the crucial value of forests' services to the protection of the global environment and express concern over the worldwide impacts of fast-growing deforestation. Implicit indications to the same effect can be found in forest-related instruments, such as the UNFCCC or the CBD, which, designing climate change and the conservation of biodiversity as common concerns of humankind, and asserting the instrumental importance of forests as, respectively, sinks for carbon dioxide and habitat to rich varieties of wildlife species, clearly suggest that forest protection should be considered as the object of a common concern, too.

⁵⁹ See generally A. KISS, *Economic Globalization and the Common Concern of Humanity*, in A. KISS et al. (eds.), *Economic Globalization and Compliance with International Environmental Agreements*, Kluwer Law International, The Hague, 2003, p. 3 ff.; J. BRUNNÉE, *Common Areas, Common Heritage, and Common Concern*, in D. BODANSKY et al. (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2007, p. 550 ff.

The principles of sustainable development and of common but differentiated responsibilities represent the clearest expression, in international environmental law, of the notions of equity and justice advocated for by Cosmopolitans.

The principle of sustainable development enshrines the concept of intergenerational equity⁶⁰. In its most frequently quoted definition, elaborated in 1987 by the United Nations World Commission on Environment and Development, it demands the use of natural resources to meet «the needs of the present without compromising the ability of future generations to meet their own needs», and calls more specifically upon current generations to pass natural resources on to future generations «in no worse condition that it was received» or without «exceed[ing]» the resources' «reasonable capacity to replace» themselves in the future⁶¹.

Forest-focused instruments make explicit reference to the need to preserve forests for the benefits of future generations in connection with the requirement that forest use be sustainable. The Forest Principles and the NLBI emphasises, respectively, that forest resources «should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations», and that «sustainable forest management, as a dynamic and evolving concept, aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations»⁶². Also forest-related instruments explicitly acknowledge the need of promoting the sustainable use of the natural environment for the purpose of meeting the interests of both present and future generations. Under the rubric of 'sustainable development', for example, the CBD, requires States to the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations; and the WHC

⁶⁰ See P. SANDS, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2003, p. 253; and more extensively, E. BROWN WEISS, *Implementing Intergenerational Equity*, in M. FITZMAURICE - D. M. ONG - P. MERKOURIS (eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishing, Cheltenham, 2010, p. 100 ff.

⁶¹ World Commission on Environment and Development, *Our Common Future*, Oxford, 1987 (Brundtland Report), p. 65.

⁶² See, respectively, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, above, n. 44, Art. 2, lett. b; and *Non-Legally Binding Instrument on all Types of Forests*, above, n. 45, Preamble.

establishes the States Parties' obligation of ensuring the identification, protection and conservation of the cultural and natural heritage situated on their national territories, in order for it to be transmitted to future generations⁶³.

The principle of common but differentiated responsibilities, on the other hand, is an articulation of the concept of intra-generational equity, and is predicated upon notions of both corrective and distributive justice⁶⁴. It recognises the need both to adjust existing inequalities between developed and developing States, and to compensate the latter for the damages incurred as a consequence of the past conduct of the former. In this sense, it entails that those States which have contributed the most to the creation of certain environmental problems, and have more resources to address their adverse effects, should shoulder the major burden of environmental protection. Its main implications are the duty of developed countries to provide financial and technological assistance to developing countries who forgo the exploitation of their natural resources in meeting their conservation commitments, and the subordination of these conservation commitments to the requirement that developed countries fulfil their assistance duties⁶⁵.

In the forest context, the principle of common but differentiated responsibilities translates in «different types and levels of national responsibility for addressing and reversing deforestation»⁶⁶. Forest-focused instruments acknowledge the need for the efforts of developing countries to sustainably use their forest resources to be supported by the international community, and call for the provision of new and additional financial resources, and for the transfer of

⁶³ See, respectively, *Convention on Biological Diversity*, above, n. 48, Art. 2; and *Convention for the Protection of the World Cultural and Natural Heritage*, above, n. 46, Art. 4

⁶⁴ See D. SHELTON, *Equity*, in D. BONDANSKY et al. (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2007, p. 639 ff., at pp. 656-658; and P. CULLET, *Common but Differentiated Responsibilities*, in *Research Handbook on International Environmental Law*, above, n. 61, p. 161 ff., pp. 163-164.

⁶⁵ See generally C. D. STONE, *Common but Differentiated Responsibilities in International Law*, in *American Journal of International Law*, 2004, p. 276 ff.; and E. HEY, *Common but Differentiated Responsibilities*, in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, 2012 (online edition). With a focus on financial assistance obligations, M. GESTRI, *Transferts internationaux pour protéger des ressources d'intérêt commun: qui doit payer pour la préservation des forêts tropicales?*, in M. BOTHE et al. (eds.), *La politique de l'environnement - De la réglementation aux instruments économiques*, Martinus Nijhoff Publishers, The Hague, 2003, p. 297 ff., p. 335 ff.

⁶⁶ C. HAUG - J. GUPTA, *Global Forest Governance*, in J. GUPTA - NI. VAN DER GRIJP - O. KUIK (eds.), *Climate Change, Forests and REDD Lessons for Institutional Design*, Routledge, New York, 2013, p. 52 ff., p. 64.

environmentally sound technologies and corresponding know-how on favourable terms, to developing countries with significant forest resources⁶⁷. Forest-related instruments too, including the UNCCD, the CBD and the UNFCCC, call likewise on developed States to provide substantial financial resources and other forms of assistance, including the transfer of technology, to developing States in the implementation of their environmental conservation commitments⁶⁸.

As yet, however, despite their widespread international acceptance, both the principle of sustainable development and the principle of common but differentiated responsibilities are uncertain in their normative content, in general, as well as in the particular context of forest regulation. Apart from a generic requirement, respectively, that forests be used in way and at a rate that does not cause their long-term depletion, and that States should cooperate to promote a supportive framework in order for developing countries to fulfil their conservation commitments, the substantive scope of these principles remain rather elusive and controversial, especially for what concerns the details of its implementation⁶⁹. Relevant regulatory instruments lack specific criteria and guidance on how environmental factors should be integrated into development policies, and fall short likewise of providing indications on how assistance burdens should be shared among developed States and how financial and other resources should be allocated among developing States. As a consequence, the practical application of the principles under consideration cannot but be rather limited and their impact, as a result, modest.

5.3. Procedures

It has been widely recognised that the goals enshrined in international forest instruments cannot be achieved without good governance and, in particular,

⁶⁷ *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, above, n. 44, Arts. 9 (a), 10 and 11; and *Non-Legally Binding Instrument on all Types of Forests*, above, n. 45, Preamble, Arts. 2 (d) and 7(a).

⁶⁸ See *Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, above, n. 47, Art.6; *Convention on Biological Diversity*, above, n. 48, Art. 20; and *United Nations Framework Convention on Climate Change*, above, n. 49, Art. 4.3.

⁶⁹ See, for instance, D. FRENCH, *Sustainable Development*, in *Research Handbook on International Environmental Law*, above, n. 62, p. 51 ff., p. 54 ff.; and P. CULLET, *Common but Differentiated Responsibilities*, above, n. 65, p. 178.

that sustainable forest initiatives are only likely to succeed if all relevant stakeholders are actively involved and public institutions are accountable for their performance. However, even though, following the good governance agenda which has emerged during the last decades within the international environmental arena, various steps have been made towards the realisation of a more transparent, participatory, and accountable global forest governance, significant shortcomings still remain in relevant decision-making bodies and procedures.

First, all forest institutions and bodies have established websites sharing general information on internal decisions and decision-making procedures, introduced publications (including brochures, folders, programmes) serving informational, awareness-raising and educational purposes, and created online mechanisms allowing the public to easily request and receive relevant data and information. Transparency, nevertheless, is only provided on a *de facto* basis: with the only exception of the Forest Principles, which lay down that «[t]he provision of timely, reliable and accurate information on forests and forest ecosystems is essential for public understanding and informed decision-making and should be ensured»⁷⁰, forest-focused and forest-related instruments generally lack specific provisions calling for transparency towards the public. Access to information is ensured in a flexible, often informal and discretionary manner. None of the relevant instruments provides for specific standards on adequate levels of transparency, and none recognises enforceable access to information rights upon interested individuals and groups.

Secondly, public participation has been widely acknowledged, within both forest-focused and forest-related regimes, as a key ingredient of successful governance⁷¹. All major forest institutions involve affected parties and

⁷⁰ See *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, above, n. 44, Art. 2(c).

⁷¹ The Forest Principles, for example, acknowledge «the need for equitable participation of all stakeholders, including local communities, indigenous people, industries, labour, non-governmental organizations and individuals, forest dwellers and women», and the NLBI lays down that «[m]ajor groups as identified in Agenda 21, local communities, forest owners and other relevant stakeholders contribute to achieving sustainable forest management and should be involved in a transparent and participatory way in forest decision-making processes that affect them, as well as in implementing sustainable forest management, in accordance with national legislation». See, respectively, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, above, n. 44, Arts. 2 (d), 10 and 11; and *Non-Legally Binding Instrument on all Types of Forests*, above, n. 45, Art. 2 (c).

stakeholders in their internal processes of decision-making and promote their 'grass roots' contribution to the implementation, at the national and local levels, of their policies and decisions. The UNFF, for example, encourages the participation of a wide range of stakeholders – identified with the 'Major Groups' as defined in Agenda 21, that is, Business and Industry, Children and Youth, Farmers, Indigenous People, Non-governmental Organizations, Local Authorities, Scientific and Technological Community, Women, Workers and Trade Unions, and having consultative status with the Economic and Social Council of the United Nations – in its sessions and inter-sessional meetings⁷². The UNFCCC, the CBD and the CITES, recognise non-governmental organisations having activities in their respective fields of application the status of observers, entailing the opportunity to attend meetings and to submit documents and proposals for consideration by States⁷³. Both the WHC and the UNCCD engage in partnerships with a diverse range of stakeholders, civil society and the private sector, to promote their involvement in the implementation of policies and programmes at the national level⁷⁴. The UNEP has introduced various forms of discussion forums and multi-stakeholders thematic consultations⁷⁵; and the UNDP has established an advisory organ – the Civil Society Advisory Committee – to systematize the consultation process with civil society actors at the global level⁷⁶. The FAO is engaged with the World Bank and the International Union

⁷² In advance of the Forum session, Major Groups are invited by the Secretariat of the Forum to submit their inputs, through their Major Groups Focal Points. A Multi-Stakeholder Dialogue (MSD), which provide an opportunity for dialogue between Member States of the UNFF and representatives of Major Groups, is a regular component of the UNFF sessions. See at <www.un.org/esa/forests/major-groups/index.html> and at <www.un.org/esa/forests/major-groups/multi-stakeholder-dialogue/index.html>.

⁷³ Relevant information can be found, respectively, at <www.unfccc.int/parties_and_observers/observerorganizations/items/9523.php>; <www.cbd.int/ngo/meetings.shtml>; and <www.fws.gov/international/pdf/ob.pdf>.

⁷⁴ Consult, respectively, <www.whc.unesco.org/en/partnerships> and <www2.unccd.int/convention/stakeholders>.

⁷⁵ A Major Groups Facilitating Committee, composed of two representatives of each of the nine Major Groups identified by Agenda 21, has been created in order to provide guidance and coordinate the engagement of civil society in the Programme's activities. See at <www.web.unep.org/about/majorgroups/modalities/major-groups-facilitating-committee> and <www.unep.org/about/majorgroups/stakeholder-engagement-handbook>.

⁷⁶ According to the UNDP, «[b]y contributing independent perspectives and critical analyses on different aspects of [Programme's] work, the [Committee] has had, over the years, a significant positive impact on the organization...this resulted in a strengthening of the civic engagement dimension of UNDP's policies and programmes, as well as in greater collaboration between UNDP and a broad range of civil society constituencies». See at

for Conservation of Nature in a programme – the Growing Forest Partnerships Initiative – aimed at improving collaboration between family forest owners, community forestry and forest-dependent tribal and indigenous peoples in the realization of sustainable forest management and forest rehabilitation⁷⁷. The REDD+ Programme supports several different activities, including awareness raising and grants funding, to build the capacity of forest sector grassroots stakeholders to engage in the design, implementation and monitoring of its policies and strategies at the national and local levels⁷⁸.

Notwithstanding these elements, however, questions remain on the effectiveness of this participatory framework. Three major shortcomings can be detected. The first regards the legal basis for public participation: apart from generic clauses in relevant treaties, participation is regulated by policy documents, guidelines and recommendations of relevant governing bodies, often resulting in a complicated, confused and fragmented plethora of standards, which are, furthermore, easily subject to review and change. Relevant provisions do not confer legally enforceable rights but merely capacities and opportunities. The second major shortcoming refers to the format of participatory processes: engagement at both international decision-making and national implementation levels often practically boil down to processes of comment submissions or statement presentations, having a limited role in the context of inter-governmental bargaining and, consequently, a small influence on decisions. Alongside formal practices, moreover, informal patterns of participation have been developing, threatening the transparency of decision-making and often having an unintended exclusionary effect on less-organised and less-resourced stakeholders. The third shortcoming lies in the modalities of participants' selection: accreditation procedures are cumbersome and often left in the hands of States, who are usually free to take decisions discretionally and according to political considerations. Selection tends to favour professionalised organisations whose representativeness and accountability to memberships or local

<www.undp.org/content/undp/en/home/partners/civil_society_organizations/advisorycommittee.html>.

⁷⁷ See at <www.growingforestpartnerships.org>.

⁷⁸ Consult <www.unredd.net/knowledge/redd-plus-technical-issues/stakeholder-engagement.html>. For an academic account, see W. D. NARTLEY, *A Redd Solution to a Green Problem: Using Redd Plus to Address Deforestation in Ghana Through Benefit Sharing and Community Self-Empowerment*, in *African Journal of International and Comparative Law*, 2014, p. 80 ff.

communities are doubtful. And there is generally no opportunity for interested parties and stakeholders to have decisions regarding their participation appealed.

Finally, with the only exception of private forest certification bodies establishing procedures for filing complaints against the outcomes of their evaluations⁷⁹, the global forest governance system lacks institutionalized procedures providing for accountability towards affected communities and individuals. Contrary to what happens in other areas of global regulation, neither there are mechanisms that, on an ad hoc basis, can be triggered to challenge the acts and decisions of global regulators by private actors who suffer the adverse effects of those acts and decisions, nor are there permanent review systems providing for evaluation by independent bodies on regulators' determinations and activities.

6. Conclusions

The theory of global public goods offers a useful framework for understanding the key challenges involved in responding to pressing global problems. Yet the theory is less helpful in illuminate the nature of these challenges and providing for relevant solutions in legal and institutional terms. Something for which the discipline of international law can provide valuable insights.

Starting from this premise, the present article sought to identify the central weaknesses of the current framework of global forest governance, and the possible way forward, based on an analysis conducted through the lens of global public goods, as shaped and enriched by two competing theoretical approaches to global governance recently emerged in international legal scholarship: Cosmopolitanism and Global Administrative Law. The resulting picture is as follows.

As far as the content of relevant regulation is concerned, the analysis has revealed that cosmopolitan ideals have increasingly found their way into both forest-focused and forest-related instruments: the widespread acceptance of the principles of sustainable development and common but differentiated responsibilities appear a noteworthy development in this regard, in that it paves

⁷⁹ An example is provided by the Dispute Resolution System of the Forest Stewardship Council. See at <www.ic.fsc.org/en/submit-a-dispute>.

the way for the identification of regulatory options that, by fostering equity and justice, could align incentives among States to cooperate effectively in sustainable forest management and protection. These principles, however, have not yet fully translated into norms laying down precise obligations for States. Apart from a generic requirement that forest use should not cause long-term depletion, and that developed States should support developing States to carry out their conservation efforts, the normative content of both sustainable development and common but differentiated responsibilities remain elusive and controversial, hindering their practical application and, as a result, limiting their utility in shaping forest regulation.

As far as the structure and functioning of relevant decision-making processes are concerned, on the other hand, the analysis has shown that some administrative law-type mechanisms and tools have been adopted by both forest-focused and forest-related governing bodies. Measures aimed, in particular, at promoting greater transparency and participation have increasingly been emerging, which, by promoting an enhanced consideration of the concerns of interested individuals and communities, could bring about more legitimate decision-making and outcomes. Notwithstanding this development, nevertheless, global forest governance is still far from meeting the requirements of good governance. Key gaps and uncertainties remain: access to information is ensured in a flexible, often informal and discretionary manner, participatory opportunities are limited in scope and impact, and accountability mechanisms, moreover, are still lacking, meaning that there is no opportunity for those affected to challenge global regulators' actions and decisions.

It is not until these two major weaknesses have been properly addressed that, when examined through the analytical lens of global public goods, global forest regulation and governance appear likely to yield the expected results. The progress made thus far has not been sufficient, and further steps should be taken to improve the existing system. Sustainable development and common but differentiated responsibilities needs to be translated into clear standards and obligations for States to meet, and good governance requirements of transparency, inclusiveness and accountability are to be fully fulfilled, in order for relevant regulation and governance to succeed in reducing the current rates of global forest loss and degradation, and ensuring the preservation of the crucial environmental functions that forests provide for the wider ecosystem.

ABSTRACT

Enzamaría Tramontana - *Where are we now with global forest regulation and governance? Insights from a 'Global Public Goods' Perspective*

Even if an encouraging tendency has recently been observed towards a reduction in the rates of global deforestation, the extent and quality of forests continue to decline in many regions of the world, with alarming consequences on the functioning of global hydrological cycles, the conservation of the world's biological diversity, and the fight against climate change. Against this background, the aim of the present article is to investigate the weaknesses of, and the areas for improvement in, the current framework of global forest governance, through an analysis conducted using the lens of the concept of «global public goods» as transposed into, and shaped by, two competing theoretical approaches that have been recently advanced by legal scholarship to further the current global governance architecture: Global Administrative Law and Cosmopolitanism.

KEYWORDS: *Global Public Goods; Forest Sustainable Management; Forest Law; Global Administrative Law; Cosmopolitanism.*

Enzamaría Tramontana – *Qual è il punto della situazione con riferimento alla regolazione e alla governance globale delle foreste? Approfondimenti nella prospettiva dei “Beni Pubblici Globali”*

Sebbene si sia recentemente registrata una riduzione del tasso di deforestazione globale, l'estensione e la qualità delle foreste continuano a diminuire in diverse regioni del mondo, con conseguenze allarmanti sul mantenimento dei cicli idrologici, sulla conservazione della biodiversità e sul cambiamento climatico. Alla luce di ciò, il presente contributo si propone di investigare i limiti, e le possibili prospettive di miglioramento, dell'attuale sistema di *governance* globale delle foreste, attraverso una analisi condotta utilizzando la nozione di «beni pubblici globali», trasposta nel quadro di due

differenti prospettive teoriche recentemente avanzate dalla dottrina giuridica: il Diritto amministrativo globale e il Cosmopolitismo.

PAROLE-CHIAVE: *beni pubblici globali; gestione sostenibile delle foreste; diritto forestale; diritto amministrativo globale; cosmopolitismo.*