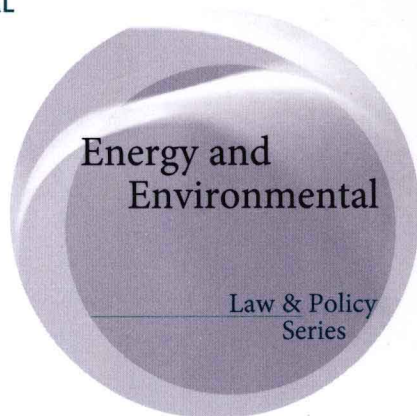


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A Substantive Environmental Right

An Examination of the Legal Obligations of
Decision-Makers towards the Environment

By Stephen J. Turner



Wolters Kluwer

Law & Business

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For my parents

Foreword

It is a great pleasure and an honour for me to write a few words about this book written by Dr Stephen Turner, who has invested a significant amount of his time and energy over the past few years to produce such a thought-provoking study. This book emanates from the PhD thesis that the author submitted to Queen Mary University of London. It is designed to examine the extent to which environmental degradation could be prevented by providing for a substantive human right to a good or clean and healthy environment in international law.

The study looks at various cases of environmental degradation around the globe and presents the situation in the Camisea Project, a mineral extraction industry in Peru, as a major case study. On the basis of his critical analysis of various issues both in law and practice, the author makes his own proposal for the creation of a human right to a good environment by placing environmental obligations on decision-makers, whether state or non-state actors.

The book presents an interesting analysis of different issues within international law in general and international environmental law in particular to build a case for a substantive environmental right. It makes an attempt to demonstrate that the obligations that the author proposes to place on decision-makers towards the environment flow from various international legal instruments and other State practice. It brings together different strands of thought from a wide spectrum of areas within international law, ranging from WTO law to international human rights law and international environmental law to build a case for such a substantive right.

It is an extensively researched piece of work which is interesting intellectually, pleasant to read and easy to follow. The book demonstrates the care and skill that Dr Turner has applied in presenting an analysis of some of the difficult issues of elastic character within international law to come up with a comprehensive study of the subject matter. It has made a major contribution to the body of

knowledge on the subject matter and has significantly enhanced our understanding of the issues examined. It can happily be recommended as a valuable study of its kind to anyone interested in the legal techniques that could be employed to protect the environment.

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Professor of International Law
University of Leeds, UK

Preface

In modern society, there are numerous ways in which existing human rights are affected through degradation of the environment. Owing to an increased awareness of the importance of the environment over the last thirty or forty years, there have also been arguments that the environment should be protected as a human right. Therefore, it is necessary to examine how existing human rights are capable of responding to environmental degradation. It is also necessary to analyze whether or not new rights and obligations should be developed to protect the environment, and if so, what form they should take.

This book examines these questions. It looks at the deficits and *lacunae* that exist in the current law and makes proposals as to how the law should be reformed. It examines state and non-state actors that make decisions which affect the environment, to determine the extent to which they are bound by legal responsibilities to protect it. As part of this examination, it analyzes the legal obligations of decision-makers within states, companies, multilateral development banks and the World Trade Organization. The book examines each of these areas to examine how, if at all, it would be possible for a substantive human right to be integrated in such a manner that decision-makers would be under a legal obligation to protect the environment.

This book presents a draft substantive environmental right that would create duties for all decision-makers that can affect the environment. Such a right would be designed with the purpose of ensuring that a good, clean and healthy environment, in which all ecosystems and natural systems are protected, could be enjoyed by all peoples. The proposed right is as follows:

The Human Right to a Good Environment

Any decision by a person, group of people, organization or government that brings about or could bring about degradation of the environment is contrary to the human right to a good environment and as such is fundamentally

unlawful. It is a human right to be able to challenge such decisions throughout the process of decision-making and in courts of law and tribunals. Environmental degradation may be rendered lawful when brought about to satisfy other basic human rights and where other less environmentally-degrading alternatives are not viable. In the event that such decisions are sanctioned on the grounds that it is necessary to cause environmental degradation to satisfy other basic human rights, the degradation must be tied to an equitable form of compensation that, in at least equal measure, benefits the environment of the community or the area of land, air, sea, ecosystem or water that is suffering or would suffer that degradation or risk of degradation.

The book proceeds to examine how such a right could be instituted and work in practice.

Acknowledgements

The majority of the research for this book was carried out whilst undertaking a PhD research programme at London University (Queen Mary). Therefore, first and foremost I would like to thank Professor Malgosia Fitzmaurice for her guidance and instruction throughout that process. I am particularly grateful to her for the amount of time that she kindly dedicated towards reading earlier drafts and for mentoring, inspiring and advising me throughout. I would also like to thank her for encouraging me to embark upon the project and London University (Queen Mary) itself for granting me the funding, without which it would not have been possible. I would also like to thank Professor Surya Subedi and Dr Philippe Cullet who kindly examined my PhD thesis and who also provided insightful comments and suggestions. In addition, I wish to thank Professor Subedi for the honour of writing the foreword.

Whilst conducting the research for this book, I read the works of many lawyers and other experts of their fields; the knowledge and understanding accrued from them has naturally been extremely influential. They are listed in the bibliography and I am most respectfully grateful to them. I am also grateful to the many lawyers and academics with whom I have exchanged ideas or who have assisted in broadening my outlook within and beyond the areas that I have been researching. I would especially like to thank Dr Mijin Cha, Dr Olga Martin-Ortega, Dr Muzaffer Eroglu, Ms Feja Lesniewska and Mr Duncan Richards for reading through sections and providing helpful comments.

The work for this book has primarily been library-based research. I have worked mainly at the Institute of Advanced Legal Studies in Russell Square, London. The library staff have been extremely helpful; I am very grateful to them for all of their assistance. In particular, a debt of gratitude is owed to Mr Andres Piscioti and Mr Narayana Harave for translating and technical assistance, respectively.

To research the case study, I was particularly fortunate to be able to meet and/or interview a number of Peruvian lawyers, representatives from government and industry, representatives from NGOs and also representatives from indigenous and vulnerable groups affected by the Camisea Project. Therefore, I would like to thank Sr Mariano Castro Sánchez-Moreno for his hospitality at the Peruvian environment agency (CONAM) and for permitting me to attend its stakeholder meetings relating to the Camisea Project. I am particularly grateful to Sra Patricia Iturregui (CONAM) who introduced me to a number of Peruvian lawyers, read through sections relating to Peruvian law and advised me on those aspects. I also thank Sr Hildebrando Castro Pozo Diaz (Lawyer), Ms Cathy Ross (Oxfam America), Mr Alan Dabbs (Social Capital Group), Sr Victor Morales (CONAM), Sr Daniel Revilla, Ms Carolyn Stephens (London School of Hygiene and Tropical Medicine), Sra Adriana Bejvano (SPDA), Sra Karina Livschitz (SPDA), Mr Gregor McLennan (Serjali), Ms Dora Napolitana (Serjali), Sr Gonzalo Morante (Pluspetrol), Sr Ciro Miranda (CEDIA), Sr Roger Rivas (COMARU) and Sr Walter Kategari (COMARU), all of whom helped me in understanding the Camisea Project and its effects or the law relating to it. I am also grateful to COMARU for allowing me to attend meetings of the community leaders in Quillabamba. Additionally, I thank Sr Angel Cavero, the leader of the Shima community, for his hospitality and for showing me the pipeline route that traverses the lands of his community. Special thanks are due to Mr Peter Kostishack (Amazon Alliance) who was extremely helpful in providing information and contacts.

Sra Marlene Lopéz (Project Peru) assisted me by translating documents and acting as an interpreter both in Lima and in the Camisea region of the Peruvian Amazon. I cannot thank her enough for this but also for her friendship, patience and good humour. Project Peru is a charity that does incredible work with children at a refuge in Zappalal just north of Lima. I especially want to thank Mrs Carole Hudson, the leader of Project Peru in the UK and her husband David for their example, their support and for paving the way for Marlene to work with me.

Thanks are also due to Mr William Halpern, Dr Martin Lau, Professor Stephen Stec, Mrs Elizabeth Hatten, Mr Michael Woods, Sra Ida Quintin, Sra Lara Kretzer and everyone at Taylor Nichol Solicitors for practical help and advice. I thank Mr Ed Bossman and Ms Julia Newman-Carr for vital assistance with technical matters. My thanks also go to Sr José Jurado Aranda, Srta Celia Rivas, Sra Lourdes Ramirez and Miss Sarah Whyberd for their help in translating documents.

I also wish to thank those who, though not named here in person, know that through the years, they too have given me instruction, guidance, help and assistance, which somehow will have become woven inextricably into the pages of this book.

I thank Mr Karel van der Linde, Professor Kurt Deketelaere, Ms Hanneke Verbeek and the staff at Kluwer Law International for their kind support and guidance through the publishing process. Needless to say, any errors or omissions that may have occurred are my own responsibility.

On a purely personal level, I also wish to thank Alison, Jon, Philip and Sarah and all of my friends and family, who have shown great patience for my absences and great encouragement for me with this endeavour.

Stephen Turner
London, 1 June 2008

Abbreviations

AB	Appellate Body
ACHR	American Convention on Human Rights
ADB	Asian Development Bank
AFCHPR	African Charter of Human and Peoples' Rights
AFCmHPR	African Commission on Human and Peoples' Rights
AFDB	African Development Bank
AM	Accountability Mechanism
ATCA	Alien Tort Claims Act
BIC	Bank Information Centre
BP	Bank Procedure
CBD	Convention on Biological Diversity
CECONAMA	Congress of the Centre of the Machiguenga Native Communities (Peru)
CEDIA	Centre for the Development of the Indigenous Amazon (Peru)
CERES	Coalition of Environmentally Responsible Economies
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COMARU	Machiguenga Council of the River Urubamba (Peru)
CONAM	The National Council for the Environment (Peru)
CONAP	Confederation for the Amazonian Nationals of Peru
CRC	Convention on the Rights of a Child
CSR	Corporate Social Responsibility
CTE	Committee on Trade and the Environment (WTO)
DGAEE	Director General of the Environmental Issues for Energy (Peru)
DPSP	Directive Principles of State Policy
DSU	Dispute Settlement Understanding
EA	Environmental Assessment

EBRD	European Bank of Reconstruction and Development
ECA	Export Credit Agency
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
EP	Environmental Policy
ESIA	Environmental and Social Impact Assessment
ESCP	Environmental and Safeguards Compliance Policy
ESAP	Environmental and Social Assessment Procedures
EU	European Union
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FECONAYY	Federation of the Native Communities of the Yine Yami (Peru)
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GEF	Global Environment Facility
GOP	Government of Peru
GP	Good Practices
GTCI	Technical Group of Inter-Institutional Coordination (Peru)
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank of Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IDB	Inter-American Development Bank
IFAD	International Fund for Agriculture and Development
IFC	International Finance Corporation
IFI	International Financial Institution
IIM	Independent Inspection Mechanism
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
INRENA	National Institute for Natural Resources (Peru)
IP	Inspection Panel
IRM	Independent Recourse Mechanism
ISO	International Standards Organization
MEA	Multilateral Environmental Agreement
MFI	Multilateral Financing Institution
MME	Ministry of Mines and Energy (Peru)
MNC	Multinational Corporation

MNE	Multinational Enterprise
MOP	Meeting of the Parties
NAAEC	North American Agreement on Environmental Cooperation
NGO	Non-Governmental Organization
NIEO	New International Economic Order
NIS	Newly Independent State
OECD	Organization of Economic Cooperation and Development
OHCHR	Office of the High Commissioner of Human Rights
OM	Operational Manual
OMPADEC	Oil and Mineral Producing Areas Development Commission.
OMS	Operational Manual Statement
OP	Operational Policy
OSINERG	Supervisory Committee of Energy Investment (Peru)
PMA	Environmental Management Plan (Peru)
PRTR	Pollutant Release and Transfer Register
ROW	Right of Way
SEA	Strategic Environmental Assessment
SPDA	Peruvian Society for Environmental Law
SRS	Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises
TED	Turtle Excluder Device
TGP	Transportadora de Gas del Peru S.A.
TLA	Timber License Agreement
TNC	Trans-National Corporation
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNCHE	United Nations Conference on the Human Environment
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNICEF	United Nations International Children's Emergency Fund
USAID	United States Agency for International Development
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WHO	World Health Organization
WRI	World Resources Institute
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

Table of Contents

Foreword	xiii
Preface	xv
Acknowledgements	xvii
Abbreviations	xxi
Chapter 1	
Introduction	1
Chapter 2	
The Current Status of the Development of Environmental Rights at National and International Levels	5
2.1 Introduction	5
2.2 International Environmental Law	6
2.2.1 The Status of the Development of Substantive Environmental Rights within International Environmental Law	7
2.2.2 Sovereignty	10
2.2.3 The Development of Procedural Environmental Rights	11
2.3 Human Rights Law	15
2.3.1 Different Classifications of Human Rights	16
2.3.2 Substantive Environmental Rights as Part of International and Regional Human Rights Law	17
2.3.3 Other Human Rights that can Provide Protection of the Environment	19

2.3.4	Existing 'Non-environmental' Human Rights that can be of use in the Protection of the Environment	19
2.3.5	The Status of the Development of the Right to a 'Clean' or 'Healthy' Environment	26
2.4	Constitutional Rights	27
2.5	Work of the United Nations	38
2.6	The International Court of Justice	41
2.7	Conclusions	42

Chapter 3

The Debate Relating to the Potential Development of a Substantive Environmental Right and the Proposed Design of Such a Right

3.1	Introduction	45
3.2	The Case against the Development of a Substantive Environmental Right	45
3.2.1	Lack of Certainty Relating to the Legal Development	48
3.2.2	Anthropocentricity and Differing Theories of Environmental Rights	49
3.2.3	Competing Issues and Decision-Making	51
3.2.4	Redundancy	53
3.2.5	Effectiveness in Operation	53
3.2.6	Cultural Issues	54
3.2.7	The Time it takes to develop a Right	55
3.2.8	The Scope of Human Rights under International Law	55
3.3	The Case for the Development of a Substantive Environmental Right	56
3.3.1	Background	56
3.3.2	Scientific Reasons	58
3.3.3	Institutional Recognition for the Link between the Environment and Man's Welfare	61
3.3.4	Realization of Intergenerational Equity	63
3.3.5	The Realization of the Potential of Procedural Rights	64
3.3.6	Issues Relating to 'Sustainable Development'	64
3.3.7	Providing a Balance to a State's Sovereignty over Natural Resources	65
3.3.8	The Need for Positive Duties for All Decision-Makers to Protect the Environment	66
3.3.9	The Development of International Law in Relation to Environmental Harm Caused by Non-state Actors	70
3.3.10	The Protection of Indigenous and Vulnerable Communities	71
3.4	The Design of a Substantive Environmental Right	72
3.4.1	The Proposed Right has the Status of a Human Right	73

<i>Table of Contents</i>	ix
3.4.2 The Proposed Right is not solely Anthropocentric	74
3.4.3 The Proposed Right Includes a Mechanism to Deal with its Relationship with other Human Rights	75
3.4.4 The Proposed Right Applies to both State and Non-state Actors	75
3.4.5 The Proposed Right Operates by Creating Clear Legal Duties and Obligations	76
3.4.6 The Proposed Right Provides an Equitable Mechanism for the Internalization of Compensation for Environmental Degradation	76
3.4.7 The Proposed Right Provides a Straightforward Process for Dealing with Decision-Making that Affects the Environment	77
3.4.8 Why the 'Human Right to a <i>Good</i> Environment'	78
3.5 Conclusion	78
Chapter 4	
A Substantive Environmental Right and the State Actor	81
4.1 Introduction	81
4.2 Provisions of State Constitutions that Relate to the Environment	82
4.2.1 The Constitutional Provisions Relating to the Environment of South Africa, Spain, India and Peru	82
4.2.2 Key Features of Constitutional Environmental Rights	86
4.3 The Effect of Vague and Conflicting Constitutional Provisions on Legislative and Policy Decision-Making that Can Affect the Environment	87
4.3.1 The Constitutional Provisions	88
4.3.2 Environmental Laws	89
4.3.3 Law Creating Institutional Frameworks for Decision-Making	91
4.3.4 Laws Relating to the Hydrocarbon Industry	93
4.3.5 Environmental Impact Assessments (EIAs)	96
4.3.5.1 EIA Law	96
4.3.5.2 The Stage at which the EIA occurs	97
4.3.5.3 The Lack of Independence of the EIA	98
4.3.5.4 Public Participation within the EIA process	98
4.3.6 Public Participation in Decision-Making	100
4.4 Case Study: The Camisea Project: The Practical Problems for the Environment that can be Associated with Weak Environmental Provisions within Constitutions	101