Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 3, n. 5 (2013) – Human Rights and the Environment: In Search of a New Relationship
ISSN: 2079-5971

Factors in the Development of a Global Substantive Environmental Right

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Turner, S.J., 2013. Factors in the Development of a Global Substantive Environmental Right. *Oñati Socio-Legal Series* [online], 3 (5), 893-907. Available from: http://ssrn.com/abstract=2247839

Abstract

Owing to the fact that there is currently no international treaty that provides a globally accepted substantive human right for the protection of the environment (Anton and Shelton 2011, Turner 2009) there is a case for considering how such a right could or should be developed. This paper considers certain aspects of the potential development of such a right by focussing on key non-state actors that make decisions, which can affect the environment. Consideration is given to three different types of non-state actors: companies (corporations), the World Trade Organisation (WTO) and multilateral development banks (MDBs). It specifically examines their 'constitutional' purposes and the overall legal constraints that their decision-makers are bound to comply with, and where applicable, the legal obligations that they impose upon their members.

Therefore, this approach to the issue focuses on the legal foundations that determine how such actors make decisions and how that can affect the environment. This paper provides a broad perspective to illustrate the commonalities between the actors that are discussed in relation to their decision-making processes. Ultimately it provides an argument in support of the formal development of an international treaty that would create a global substantive environmental right. However it posits that such a treaty should *inter alia* be designed and framed in a manner, that would develop reformed legal obligations for the types of non-state actors discussed.

Key words

Sustainable Development; Environmental Rights; Non-State Actors; companies; corporations; WTO; Multilateral Development Banks

Resumen

Debido al hecho de que actualmente no existe ningún tratado internacional que proporcione un derecho humano globalmente aceptado para la protección del medio

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Article resulting from the paper presented at the workshop "Human Rights and the Environment: In Search of a New Relationship" held in the International Institute for the Sociology of Law, Oñati, Spain, 14-15 June 2012, and coordinated by Anna Grear (Cardiff University).
The author wishes to thank Associate Prof. Anna Grear for helpful comments on an earlier draft.
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ambiente (Anton y Shelton 2011, Turner 2009) hay un argumento para considerar cómo podría o debería desarrollarse tal derecho. Este documento considera algunos aspectos del desarrollo potencial de tal derecho, centrándose en los principales actores no estatales que toman decisiones que pueden afectar el medio ambiente. Se consideran tres tipos de actores no estatales: las empresas (corporaciones), la World Trade Organisation (WTO, Organización Mundial del Comercio) y los bancos de desarrollo multilateral (MDB, Multilateral Development Banks). Se examinan específicamente sus propósitos "constitucionales" y las restricciones legales generales que están obligados a cumplir quienes toman las decisiones, y cuando sea aplicable, las obligaciones legales que imponen a sus miembros.

Por lo tanto, este enfoque de la cuestión se centra en los fundamentos jurídicos que determinan cómo estos actores toman decisiones y cómo eso puede afectar al medio ambiente. Este documento ofrece una perspectiva amplia para ilustrar los puntos en común entre los actores que se analizan, en relación con sus procesos de toma de decisiones. En última instancia, proporciona un argumento en apoyo del desarrollo formal de un tratado internacional que crearía un derecho ambiental sustantivo global. Sin embargo, plantea que dicho tratado debe entre otras cosas, estar diseñado y enmarcado de manera que desarrollaría obligaciones legales reformadas para los actores no estatales analizados.

Palabras clave

Desarrollo sostenible; derechos ambientales; actores no-estatales; empresas; corporaciones; Organización Mundial del Comercio (WTO); bancos de desarrollo multilateral (MDB)

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1. Introduction

At this time, there is no international treaty that provides a globally accepted substantive human right for the protection of the environment (Anton and Shelton, 2011, Turner, 2009). This paper considers certain aspects of the potential future development of such a right. It considers different types of actors that make decisions that can affect the environment and the extent to which such actors are currently 'constitutionally' bound to protect it. In examining this question the argument to be offered here highlights the potential for the development of a global substantive environmental right to be framed in terms of the 'duties of all decision-makers' towards the environment.

To facilitate this argument, consideration is given to three key actors: companies (corporations), the World Trade Organisation (WTO) and multilateral development banks (MDBs). Therefore the approach to be offered focuses on the legal foundations that determine how such actors make decisions and how that can affect the environment. This paper provides a broad perspective to provide an overview; more detailed analysis of the decision-making functions of each of these actors has been covered in earlier (more extensive) work, along with an examination of how reform might be implemented (Turner 2009). Here, I trace out the broad case for the appropriateness of a global substantive environmental right as a way of developing meaningful duties for these non-state actors.

The advantage of placing these actors together within the same discussion is that common features within their respective legal frameworks can be identified and emphasized. The approach taken is intended to assist in finding a consistent method to inform the potential development of an environmental duty for all actors which is responsive to their potential to negatively affect the environment.

The paper begins with a contextualizing section discussing the development of existing substantive environmental rights, conceived of as being rights that relate to the relationship between citizens and the 'state' actor.

2. Existing rights and duties

There have already been numerous developments within the field of substantive environmental rights (Turner 2009) – including significant developments at a regional and national level – which demonstrate the plausibility of the use of such rights for the purposes of environmental protection. On a regional level there are articles within existing treaties which provide substantive environmental rights: Article 24 of the African Charter of Human and Peoples' Rights[2] and Article 11 of the Protocol of San Salvador to the American Convention on Human Rights.[3] Additionally, mention can be made of Article 38 of the Arab Charter on Human Rights, although at this time this system does not have a complaints procedure and a committee to receive reports.[4]

At the national level, from the 1970s onwards some governments began to amend their constitutions to include environmental provisions. Currently, 147 nations out of the 193 recognized by the United Nations include a provision or provisions containing some type of environmental right or duty (Boyd 2012 p. 47).[5] This

[2] The African Charter on Human and Peoples' Rights (Banjul) 27 June 1981, in force 21 October 1986, 21 ILM. 59 (1982).

[3] The Additional Protocol to the American Convention on Human Rights (ACHR) in the Area of Economic, Social and Cultural Rights (The Protocol of San Salvador) 1989. 28 ILM. 156 (1989), OAS Treaty Series 69.

[4] League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), in force March 15, 2008.

[5] It should be noted that not all constitutional environmental provisions are substantive rights. Some provide procedural rights, which can generally provide the right holder with the right to: access to information; or, access to justice; or, the right to participate in decision-making processes (or a combination of all three). Additionally it must be noted that even though there may be what appears to

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development has prompted numerous studies analysing the potential and effectiveness of these types of provisions (see Fabra and Arnal 2002, Razzaque 2004, Larmuseau 2007, Turner 2009, p. 27-38, Boyd 2012, p. 117-230). Developments in this sphere have also included the adoption in Ecuador's national constitution of the right of nature to exist[6] and also a new law passed in Bolivia, which also grants rights to nature.[7]

In addition there have been initiatives at the UN level, such as that of the evolution of the 'right to water'[8] which it can be argued, falls into the category of a development within the field of substantive environmental rights. However, it is not possible within the scope of this paper to discuss all of those initiatives in depth.

Yet, despite the many developments within the field of substantive environmental rights, they are hampered in their application for a number of reasons. Prime amongst these is the fact that whether at national or regional levels, environmental rights do not exist in isolation. In practice, rights generally represent one of a number of considerations informing decision-making processes, the complexities of which can often lead to compromises between environmental protection and economic development. Within the context of litigation for example, in order to achieve a 'fair balance', the courts exercise discretion.[9] This often results in permitting the relevant governmental authority to carry out a process of 'balancing of interests' (Turner 2009, p. 86) between the goals of business development and protection of the environment. This can mean that a degree of environmental degradation occurs. As this process of environmental attrition takes place on a global scale, the net result can be a gradual, continual, overall decline in the quality of the environment (Millennium Ecosystem Assessment, UN 2005).

Therefore, existing methods of decision-making can ultimately lead to environmental harm which affects people's human rights, including their rights to life and health (Anton and Shelton 2011, p. 436-544, Turner 2009, p. 58-61). The limitations of existing rights that are used for the protection of the environment in litigation, have meant that there is a higher prospect of success in cases of extreme environmental harm than in less extreme cases where environmental degradation is often accepted by a court as a necessary by-product of industry or economic development (Anton and Shelton 2011, p. 436-544, Turner, 2009, p. 27-38). This places environmental rights and interests in something of a bind. As such, the balance between environmental concerns and economic impulses is a factor affecting a wide range of situations and actors, including non-state actors.

3. The role of non-state actors in relation to environmental rights

Often when the environment is negatively affected through industry or development and where peoples' existing rights are affected, there are a number of actors involved, which lends considerable complexity to such matters. In processes

be a substantive environmental right within a constitution, it may not be justiciable. In other words it may not entitle citizens or members of a community to take legal action to attempt to enforce it; such provisions are often referred to as 'policy statements'. The nature of a provision will depend on the individual constitution, the intentions of the government concerned and the manner in which the provision is interpreted by the courts.

[6] Title II, Chapter 7, Rights of Nature chapter of the Constitution of Ecuador, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 11th May 2012;

[7] Ley de derechos de la Madre Tierra (Law 071 of the Plurinational State 2010) <http://www.scribd.com/Gobernabilidad/d/44900268-Ley-de-Derechos-de-la-Madre-Tierra-Estado-Plurinacional-de-Bolivia> accessed 11th May 2012.

[8] General Comment No. 15 to the International Covenant on Economic, Social and Cultural Rights states that all peoples have a right to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Additionally in 2010 the United Nations General Assembly made a resolution which stated that access to clean water and adequate sanitation is a human right G.A. Res. A/Res/64/292. U.N. G.A., July 2010.

[9] See for example Hatton and Others v The United Kingdom, App. No. 36022/97 (ECHR 20 July, 2003) para. 119.

of business and commerce, actors such as companies, the WTO and banking institutions, in particular, have pivotal roles to play. However, the substantive environmental rights that have developed to date are not directly applicable to 'non-state' actors such as these.[10] As a result of this, there has been research examining the case for the direct application of rights-based duties to these 'non-state' actors, owing to the effects that their decisions can have.[11] This important issue forms the focus of the present paper.

It can be argued that in practice, rights are at their most effective when they are manifested through a range of legal duties placed upon those decision-makers that can affect them. Therefore, research in this area has focused on exploring a basis for developing a contemporary human right for the protection of the environment based on the premise that there should be an overarching duty for *all* decision-makers ('state' and 'non-state' alike) not to cause harm to the environment (Turner 2009). The remainder of this paper will focus on 'non-state' actors as 'decision-makers' with the potential to affect the environment, providing a summary of the core legal analysis involved in assessing the fundamental 'constitutional' responsibilities that such 'non-state' actors currently have and the ways in which the formulation of their responsibilities can affect the prospects of their decisions respecting the environment.

4. Companies and company directors

The first actor to be examined is the company (or corporation). Companies are subject to the company law of whichever jurisdiction they are registered and operating in. Having said this, company law regimes around the world are remarkably similar regardless of their jurisdiction (Gevurtz 2000, Backer 2002, Mayson, French and Ryan 2010). Accordingly, it is possible to identify key features, exhibited within the large majority of jurisdictions, which are fundamental to the way in which decision-makers within companies generally have to operate.

One key feature of company law is that companies worldwide are generally comprised of two main bodies. These are the body of members (the shareholders) and the directors (who manage the company). This framework has developed in different ways in different jurisdictions since the nineteenth century (Gevurtz 2000, Backer 2002, Mayson, French and Ryan 2010), and enables individuals and organisations to invest in business ventures (as shareholders) without having to manage those business operations themselves. Given that it is the directors of companies who have conduct of the management of such operations, it is important to understand the legal responsibilities of directors if we are to appreciate the relationship between corporate decision-making and the environment.

Company law in most jurisdictions has developed in such a way that directors have specific duties with which they must comply.[12] In Britain for example, company directors traditionally have had the obligation to act in the 'best interests of the company'. This legal duty creates a safeguard for shareholders who place their funds in the hands of company directors. Although for reasons of space it is not

[10] Under the Westphalian system of international law, international human rights regimes are applicable between states and do not directly apply to other actors. Additionally, national constitutions create rights and responsibilities for the state itself in relation to its citizens. There have been numerous initiatives on an international level to attempt to address this issue. One of the most recent of these has concerned the relationship that businesses have with human rights: John Ruggie (United Nations Special Representative) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples> These have now been adopted by the UN Human Rights Council. For a critique of the aforementioned, see Simons (2012).

[11] See generally, Turner (2009), Clapham (2006), De Schutter (2006), Alston (2005), Catá Backer (2006).

[12] See Cahn and Donald (2010, pp. 332ff), Andenas and Woolridge (2009), Hopt (2006, p. 1161), Omar (2000), Mayson, French and Ryan (2010), Backer (2002).

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possible to provide a comparative analysis here, it can be said that the duty of a director to act in the 'best interests of the company' (or in other words in the 'company's interests') is well established and mirrored in jurisdictions around the globe. The duty provides a straightforward and logical mechanism that creates accountability for company directors to the owners of the company (the shareholders) (Hansman and Kraakman 2004).

For centuries, investors have sought to make profit through investing in business enterprises. Therefore, it comes as little surprise that the usual interpretation of what is in the 'best interests of the company' are those acts and decisions which amount to profit maximization or which increase the value of the company (Davies 2008, p. 506ff, Mortimore 2009, p. 254). In practice, this 'best interest' duty results in decision-making which is continually seeking to reduce overheads and unnecessary costs. This can mean that a director of a company has a legal obligation to make decisions, which are not necessarily in the interests of the environment. Although around the world the duties that directors have generally follow this pattern, there have been some fairly isolated and limited developments in certain jurisdictions, which indicate that some governments are prepared to consider attempting to reform this aspect of their company law to provide an expectation that directors take into account the interests of other stakeholders rather than solely those of shareholders.[13]

In recent years, the concept of 'corporate social responsibility' has gained widespread acceptance (Kerr, Janda and Pitts 2009). Linked to this is an increasing awareness on the part of consumers of the effects that products and production processes can have on the environment (generally, Boeger, Murray and Villiers 2008). However, it is important to note that, legally, directors should only take such factors into account to the extent that it is in the 'company's interests' to do so. So long as directors are acting within the law, considerations of environmental protection do not amend or change the duties that directors have to the companies that they work for. Therefore, for the majority of businesses, the overriding factors usually affecting decision-making are those of financial performance and price.

As a result, under the current system, a director interested in making a decision which is less profitable for a company in financial terms – but which is more environmentally friendly – could be criticized in his/her decision-making, if that decision was not seen as being consistent with the 'interests of the company' (Davies 2008, p. 576ff). This could mean that a director would be seen as failing to meet his or her legal responsibilities towards the company – a situation mirrored in most jurisdictions.[14] Such a director would be accountable to his or her fellow directors within the company itself and specifically within directors' board meetings (Elhauge 2005). Additionally, a board of directors is itself accountable to the members of the company (the shareholders) at the annual general meeting. Since those investing in a company are usually concerned with maximizing their investments, a board of directors that had made decisions which were environmentally friendly but less profitable would have to justify this to the members. The board may also ultimately have to justify any resultant lack of competitiveness, loss of orders and resultant fall in the value of the company. At this time there is nothing in the framework of company law in any jurisdiction to state that directors' decisions should be in the 'best interests of the environment'. A

[13] For example in the UK, the government introduced The Companies Act 2006 which provided in s. 172 for what is known as the 'enlightened shareholder value' (ESV) approach to directors' duties. This was designed to provide an expectation that directors took into account issues in their decision-making other than profit for the company. Therefore under this legislation, they are expected to take into account the effect of their decisions on local communities and the environment for example. However, it can be argued that close scrutiny of the wording of the legislation reveals little practical change to the overall duties that directors have towards the maximization of profit for the shareholders (Mortimore 2009, p. 254, Davies 2008, p. 506ff).

[14] See, n. 11 above.

director that consistently made decisions which were not seen to be in the interests of the company that he or she was working for could ultimately face losing their job. Clearly such pressures act as a considerable disincentive towards the prioritization of environmental concerns.

Naturally, companies also have to comply with other national laws of the jurisdiction within which they are operating. While a variety of sanctions can be imposed on companies and sometimes also on company directors personally for failure to comply with environmental laws (Bell and McGillivray 2008, p. 266), these laws do not change the fundamental duty of company directors to serve the best interests of the company that they work for.

5. The WTO

Environmental protection was not at the top of the list of priorities for those attempting to plan for an international economy at the end of World War II. Unsurprisingly, in its context, the emphasis of the General Agreement on Tariffs and Trade 1947 (GATT),[15] was to lay the foundations for a step-by-step programme of trade liberalization. Nor could it have been expected that early economic analysis would emphasize the links between trade and environmental degradation (Smith 1776, Ricardo, 1817). Although by the 1990s much greater awareness of the severity of the environmental degradation that the planet faced had taken root, the establishment of the WTO in 1994[16] (rightly or wrongly) reflected a continuation and strengthening of the legal regime that had begun with the GATT, rather than the creation of a new regime that would fully integrate into its concerns the protection of the environment.

The foundations of the GATT reside in its non-discrimination provisions. Firstly, Article I, provides for most favoured nation treatment (MFN),[17] meaning that contracting parties should provide equal market access (in terms of duties and charges) to 'like' products from all member states. Secondly, Article III provides for national treatment which bars contracting parties from any discrimination between parties' own products and those 'like' products of other member states.[18] Additionally, Article XI provides a general prohibition on non-tariff barriers to trade.[19] These provisions provided a basis for the large-scale consensus between states which also provided the cornerstones for the WTO.

In 1994 the growing understanding of the links between trade and environmental degradation were acknowledged, albeit to a limited degree, within the Preamble of the Agreement Establishing the WTO. The Preamble states that:

> *[r]ecognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[20]

This language has been significant in influencing certain aspects of the functioning of the WTO. For example, it has influenced the decision-making of the Dispute Settlement Body in its treatment of disputes relating to the meaning of the Article

[15] General Agreement on Tariffs and Trade (Geneva) 30 October 1947, not yet in force [hereinafter GATT]; 55 UNTS 194 (in force provisionally since 1 January 1948 under the 1947 Protocol of Application, 55 UNTS 308) (The GATT); See, Esty, 1994, p.9.
[16] Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994 in force 1 January 1995, 33 ILM. 1143 (1994) (WTO Agreement).
[17] The GATT (n. 15) Art. I
[18] The GATT (n. 15) Art. III
[19] General Elimination of Quantitive Restrictions, Art. XI GATT (1947)
[20] WTO Agreement (n. 16) 1144.

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XX exceptions to the GATT.[21] Despite this, it should be remembered that the Preamble is not legally binding on members and represents the sole reference to the protection of the environment and to sustainable development in the whole agreement. It appears that the founding members of the WTO envisaged that the organization would have a limited role in terms of the protection of the environment. Additionally, the agreement does not create responsibilities for member states to protect the environment. Instead, the WTO requires that states, in pursuing their own environmental policies, do not contravene their commitments under the range of WTO agreements that they are party to.[22]

There is on-going research on the effects that both trade and trade liberalisation can have upon the environment. To generalise the insights emerging from this body of literature, it can be asserted that there can be positive, negative or neutral effects upon the environment as a result of trade and trade liberalisation.[23] Having said this, it is also important to acknowledge that the relationships between trade and the environment are complex because there are numerous factors that can influence the state of the environment, and these include the economic stage of development of a state, which in turn can be influenced by the quantities of goods traded and the levels of trade liberalization in specific goods or services.[24]

Traditionally, the approach of the WTO to the relationship between trade and the environment is reflected in the Decision on Trade and Environment which stated that "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other".[25]

At the time that the WTO was formed, the links between trade and the environment were acknowledged in the Marrakesh Decision on Trade and Environment. This resulted in the formation of the Committee on Trade and the Environment (CTE).[26] The CTE's role has been limited. It essentially had two main purposes. These were to:

1) identify the relationship between trade measures and environmental measures in order to promote sustainable development; and

2) make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system.[27]

[21] See Halle (2008 pp. 196, 199); Appellate Body in Shrimp Turtle I: United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, (12 Oct. 1998) para. 129; also the Panel in Brazilian Tyres: Brazil – Measures Affecting Imports of Retreaded Tyres WT/DS 332/R (12 Jun. 2007) at para. 7.112.

[22] The nature of the rights and obligations that states become subject to as a result of their membership of the WTO has been described as both 'reciprocal' and 'integral'. When a relationship under a treaty is between individual states and they grant each other privileges, a reciprocal relationship has been formed. When a group of countries have obligations that are owed universally to all other member states, then those obligations are regarded as 'integral' in nature. In the case of the WTO, states undertake both types of obligations. See, Pauwelyn (2003, p. 76.

[23] There is much research in this area. See for example: Frankel, J. Environmental Effects of International Trade. Expert Report No 31 to Sweden's Globalisation Council. Stockholm: Sweden's Globalisation Council (2009) 17; See also Yale Center for Environmental Law and Policy, Yale University / Center for International Earth Science Information Network, Columbia University. Environmental Performance Index and Pilot Trend Environmental Performance Index (2012).

[24] Ibid.

[25] Decision on Trade and Environment, 14 April 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 ILM. 1267 (1994).

[26] Ibid.

[27] World Trade Organization, 'Items on the CTE's Work Programme' < http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm > accessed 12th May 2012.

Arguably, the CTE's achievements have been very modest and it has not resulted in any major changes in the approach of the WTO to the issue (Sampson 2005, p. 30-33).

The Doha Ministerial Declaration of 2001 re-affirmed the WTO's position in relation to its responsibilities towards the environment and the autonomy that states have within the system to determine their own environmental policies. It stated that:

> [w]e strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.[28]

The sources reviewed above suggest that the WTO is a significant actor in terms of the effect that its trade disciplines have upon the environment.[29] Yet, under its current 'constitution' there are no clear legal obligations upon member states or upon the WTO itself to ensure that the environment is protected in the course of the trade which is subject to WTO disciplines. The overall legal position of the WTO is that states are free to adopt their own environmental measures, but only to the extent that they do not contravene WTO rules.

6. Multilateral Development Banks

Multilateral Development Banks (MDBs) are established under charters or agreements between member states. These charters or agreements are international treaties, akin to constitutions (Shihata 1991, p. 11), by which MDBs are bound to abide or run the risk of acting *ultra vires* the terms upon which they were founded. Therefore, in analyzing the responsibilities that MDBs have towards the environment, it is crucial to consider these constitutional foundations.

It is also important to point out that, as has been noted with the GATT and the legal frameworks under which companies operate, most MDBs were created prior to contemporary concerns for the environment. Therefore, there are usually no environmental provisions within the charters or agreements under which they were established.[30] The World Bank (WB) has had a major influence on other international financial institutions (IFIs), so the charters or agreements of the other MDBs often mirror the corresponding provisions of the WB. The WB's purposes are set out in Art. 1 of the International Bank of Reconstruction and Development's (IBRD) Articles of Agreement.[31] They are geared towards, "facilitating the

[28] Ministerial Declaration, Ministerial Conference – Fourth Session, Doha, Qatar (14 November 2001) WTO Doc. WT/MIN(01)/DEC/W/1.
[29] See n. 23.
[30] The European Bank for Reconstruction and Development (EBRD) is the exception to this, as it does create an obligation on the organization to 'promote' sustainable development and environmentally sound activities. Art. 2(1) vii of the Agreement Establishing the EBRD states that one of its purposes is to, "promote in the full range of its activities environmentally sound and sustainable development". However, it can be argued that such wording only creates a soft obligation open to wide interpretation. See <http://www.ebrd.com > accessed 12th May 2012.
[31] IBRD Articles of Agreement: Art 1. The purposes of the Bank are: (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less-developed countries. (ii) To promote private foreign investment by means

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investment of capital for productive purposes",[32] promoting "foreign investment",[33] promoting "the long-range balanced growth of international trade"[34] and having "due regard to the effect of international investment business conditions in the territories of members".[35] These purposes reflected the need to reconstruct the economies of countries that had suffered heavily during World War II, but do not, as is clear, show any awareness of the need to respond to environmental degradation.

The purposes of the Inter-American Development Bank (IDB), found in the Agreement Establishing the IDB,[36] provide another example. This agreement also has no mention of the protection of the environment. In Art. I s.1 its purpose is stated as being "to contribute to the acceleration of the process of economic and social development of the regional developing member countries, individually and collectively".[37]

Art. I s.2 states that:

a) To implement its purpose, the Bank shall have the following functions:
    i. to promote the investment of public and private capital for development purposes;
    ii. to utilize its own capital, funds raised by it in financial markets, and other available resources, for financing the development of the member countries, giving priority to those loans and guarantees that will contribute most effectively to their economic growth;
    iii to encourage private investment in projects, enterprises, and activities contributing to economic development and to supplement private investment when private capital is not available on reasonable terms and conditions;
    iv. to cooperate with the member countries to orient their development policies toward better utilization of their resources, in a manner consistent with the objectives of making their economies more complementary and of fostering the orderly growth of their foreign trade; and
    v. to provide technical assistance for the preparation, financing, and implementation of development plans and projects, including the study of priorities and the formulation of specific project proposals.
b) In carrying out its functions, the Bank shall cooperate as far as possible with national and international institutions and with private sources supplying investment capital.[38]

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of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources. (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories. (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first. (v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy. The Bank shall be guided in all its decisions by the purposes set forth above.
Available at: http://web.worldbank.org .

[32] Ibid. Art. 1(i).
[33] Ibid. Art. 1(ii).
[34] Ibid. Art. 1(iii).
[35] Ibid. Art. 1(iv).
[36] The Agreement Establishing the Inter-American Development Bank, http://www.iadb.org/leg/Documents/Pdf/Convenio-Eng.Pdf accessed 13th May 2012.
[37] Ibid.
[38] Ibid.

In s.2(a)iv it does state that the organization should "cooperate with member countries to orient their development policies toward better utilization of their resources".[39] However, it can be argued that this is a mild reference which leaves the bank with significant discretion in practice.

As treaty provisions, the articles of the various charters and agreements establishing the MDBs should be interpreted in accordance with applicable rules of international law.[40] It could be argued that this allows for the integration of international norms of international environmental law, but it should also be noted that the charters or agreements of MDBs commonly provide that the banks themselves deal with matters of interpretation of their constitutional provisions.[41] What is clear is that (with the *caveat* provided above)[42] MDBs in their operations, do not have constitutional obligations to ensure that the environment is protected.

7. The development of a global substantive environmental right

Having considered companies, the WTO and MDBs, there are two key commonalities that they all have which are pertinent to the development of environmental rights. The first is that they are all subject to legal frameworks, which act very much like (or could be considered to be) constitutional frameworks. In other words each is subject to a legal framework, which governs how the decisions of the decision-makers within those institutions are constrained or directed. The second commonality is that within each of those legal frameworks, environmental protection is not a priority and in fact other interests can and very often do prevail.

The above stated analysis which is detailed in the book *A Substantive Environmental Right* (Turner 2009) led to the development of the basis for a draft right for the protection of the environment founded on the basis that *all* actors (whether 'state' or 'non-state') should be under a duty to ensure that the environment is protected. Therefore whereas existing environmental rights are usually based on the rights of individuals *vis à vis* states, the proposed draft right is formulated on the basis of a common duty of all 'decision-makers' to ensure that the environment is not degraded. As such, the basis of the draft right is formulated as follows:

> [a]ny 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 can 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 (Turner 2009, p. 73).

It is not possible within the context of this paper to discuss all of the implications related to the proposed draft right; more detailed legal analysis has been carried out elsewhere (Turner 2009) and ongoing work will illustrate how the proposed

[39] Ibid.
[40] Many of the MDBs and their charters came about prior to the Convention of the Law of Treaties 1969, 23 May 1969, 1155 UNTS 331. However, this convention is widely regarded as reflecting the applicable customary international law relating to treaty interpretation at the relevant times. See Ciorciari (2000, p. 339.
[41] Of the different agreements establishing the various MDBs, see IBRD Art. IX; IDB Art. XIII; Asian Development Bank Art. 60; African Development Bank Art. 61; EBRD Chapter IX.
[42] n. 30.

Oñati Socio-Legal Series, v. 3, n. 5 (2013), 893-907
ISSN: 2079-5971

right could be further developed and operate in practice (Turner 2014). However, for present purposes, a highly relevant implication of the draft right is that the duty imposed by it provides a basis upon which the existing legal architecture shaping 'non-state' actors could be reformed to ensure that their operations are consistent with a substantive environmental right of all peoples. In short, the draft right provided above could provide a legal basis for addressing precisely the current lack of legal obligations towards the environment to be found within the 'constitutions' of companies, the WTO and MDBs.

8. Conclusion

There is a strong argument that degradation of the environment is a human rights issue owing to the impact that degradation of the environment can have on existing human rights such as the right to life and the right to health. Degradation of the environment is largely caused through human decision-making processes. If the development of a substantive environmental right is to have a sufficiently meaningful effect on the lives and health of individuals and communities impacted by degradation of the environment, then it will need to create duties not only for 'state' actors but for 'non-state' actors too – and to transform the decision making processes currently governing their operations.

What this paper has attempted to illustrate is that there are numerous significant 'non-state' actors making decisions relating to the environment that do not have responsibilities within their own constitutions to protect it. In this regard, it is salient, that the constitutional or decision-making foundations of companies, the GATT and most MDBs were designed and developed a long time prior to contemporary concerns for the environment. This in itself provides a sound reason why the legal architecture upon which such non-state actors are based should now be amended to take into account urgent and important contemporary environmental concerns. Such *lacunae* in the law reveal a challenge to redesign the 'constitutions' of influential non-state actors to conform with the type of environmental rights based duty envisaged in this paper. It is argued that this process should become an integral element in the development of a globally acceptable and effective substantive environmental right.

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