



Environmental and Human Rights Obligations of Non-state Actors (Private Enterprises) Under International Law

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ADB

Topics Covered:

- Derivative fundamental / human rights approach to climate change and environmental law in the Asia-Pacific region
- Direct v. indirect obligations of non-state actors (private enterprises) under international environmental and human rights law
- Moving forward: The Global Pact and the TCAT Treaty

Types of ‘fundamental’ environmental rights

- ***Substantive environmental rights***
 - guarantee citizens an environment of a certain quality (e.g. clean, healthy, sustainable, ecologically balanced).
- ***Procedural environmental rights***
 - provisions for broad public participation in decisionmaking.
- ***Derivative environmental rights***
 - fundamental rights that courts have determined encompass substantive environmental protections.

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- ***Statement of public policy***
 - Directives or guidelines for governmental action or objective state goals

Environmental Constitutionalism in the Asia-Pacific Region

- Substantive environmental rights – 16 of 58 countries
 - e.g.: Fiji, Georgia, Indonesia, Philippines, Korea, Russia, Timor-Leste, Viet Nam
- Procedural environmental rights – 6 of 58 countries
 - e.g.: Armenia, Azerbaijan, Georgia, Kyrgyzstan, Nepal, Russia
- Statement of public policy – 19 of 58 countries
 - e.g.: Afghanistan, Bangladesh, Cambodia, China, Indonesia, Maldives, Mongolia, Palau, Thailand

Source: Joshua Gellers, *The Global Emergence of Constitutional Environmental Rights*, 2018.

Country	SER	PER	SPP	Country	SER	PER	SPP	Country	SER	PER	SPP
Afghanistan	0	0	1	Japan	0	0	0	PNG	0	0	0
Am. Samoa	0	0	0	Kazakhstan	0	0	0	Philippines	1	0	1
Armenia	1	1	1	Kiribati	0	0	0	South Korea	1	0	1
Australia	0	0	0	Kyrgyzstan	1	1	0	Russia	1	1	1
Azerbaijan	1	1	0	Lao PDR	0	0	0	Samoa	0	0	0
Bangladesh	0	0	1	Macau (China)	0	0	0	Singapore	0	0	0
Bhutan	0	0	0	Malaysia	0	0	0	Solomon Is.	0	0	0
Brunei	0	0	0	Maldives	1	0	1	Sri Lanka	0	0	0
Cambodia	0	0	1	Marshall Is.	0	0	0	Tajikistan	0	0	0
China	0	0	1	FSM	0	0	0	Thailand	0	0	1
Cook Is.	0	0	0	Mongolia	1	0	1	Timor-Leste	1	0	1
North Korea	0	0	0	Myanmar	0	0	0	Tonga	0	0	0
Fiji	1	0	0	Nauru	0	0	0	Turkey	1	0	1
F. Polynesia	0	0	0	Nepal	1	1	1	Turkmenistan	1	0	1
Georgia	1	1	1	New Caled.	0	0	0	Tuvalu	0	0	0
Guam	0	0	0	New Zealand	0	0	0	Uzbekistan	0	0	0
HK (China)	0	0	0	Niue	0	0	0	Vanuatu	0	0	0
India	0	0	0	N. Mariana Is.	0	0	0	Viet Nam	1	0	1
Indonesia	1	0	1	Pakistan	0	0	0				
Iran	0	0	0	Palau	0	0	1	TOTAL	16	6	19

Do international environmental law and international human rights law impose obligations on private enterprises?

- UN Guiding Principles on Business and Human Rights
 - ‘Corporate responsibility to respect human rights’
 - Access to remedies
- OECD Guidelines for Multinational Enterprises
 - Respect human rights; remediation of adverse human rights impacts; environmental management system; access to information; EIAs; precautionary approach; improvement of corporate environmental performance at the level of the enterprise and its supply chain
 - Reach: Practically global
 - National Contact Points + OECD Investment Committee

Moving Forward

- **Global Pact on the Environment**

- Aims to unify international environmental governance and codify a human right to the environment in international law
- UN GA Resolution → created an ad hoc open-ended working group which will consider the need for and possible form and content of any UN Pact; decision out by Q2 2019
- “Draft Global Pact”:
 - Art. 2 – Duty to take care of the environment: “Every State or international institution, *every person, natural or legal, public or private*, has the duty to take care of the environment.
 - Art. 14 on non-state actors
 - Art. 21 on compliance mechanisms: “transparent, non-adversarial and non-punitive”

Moving Forward

- **Draft Treaty Title:** Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises
 - AKA: Transnational Corporate Accountability Treaty
- Important provisions:
 - Scope: human rights violations in the context of any business activities of a transnational character (IHRL + domestic law)
 - Definition: any **for-profit** economic activity, including but not limited to productive or commercial activity, undertaken by a natural or **legal person**, including activities undertaken by electronic means, that take place or involve actions, persons or impact **in two or more national jurisdictions**
 - Jurisdiction
 - Rights of victims
 - Corporate HR due diligence obligation
 - Civil and criminal liability of natural and legal persons