

Draft Articles on the Legal
Principles related to climate
change

International Law Association

Overview

- Background
- Scope and purpose
- Principles
- CBDRRC
- 2015 Agreement

Background

- International Law Association (ILA)
- Committee: The legal principles related to climate change
- Draft articles and commentaries
- Jurisprudence, treaties and state practice
- <http://www.ila-hq.org/en/committees/index.cfm/cid/1029>

Scope & purpose

- Public international law
- Draft legal instrument?
- Human activities
- Emerging and legally binding principles - not consequences and compliance
- Overlap with existing “law” (UNFCCC, Kyoto Protocol, COP & CMP decisions)
- Influence climate negotiations and 2015 agreement (substance)

Principles

- Sustainable development (draft Art.3)
- Equity (draft Art.4)
- CBDRRC (draft Art.5)
- Special circumstances and vulnerability (draft Art.6)
- Prevention (draft Art.7A)
- Precaution (draft Art.7B)
- International cooperation (draft Art.8)
- Good faith (draft Art.9)
- Inter-relationship (draft Art.10)

Prevention (draft Art.7A)

- Prevention or “no harm” principle applicable to climate change
- Duty to regulate and control with due diligence
- Balance with right to development and other interests
- Prevention and precaution as a continuum (7 A&B)
- Draft Article specifies substantive and procedural elements of prevention and precaution in the climate change context

Prevention & Precaution

▶ Substantive Obligations

- ▶ Prevention – *due diligence* to avoid, minimize and reduce likelihood of harm through climate change
 - ▶ Factors for judging whether due diligence standard met in 7A.3
- ▶ Precaution - obligation to act where – (a) reasonable foreseeability of damage falling short of conclusive scientific proof and (2) a threat of serious or irreversible damage

▶ Procedural obligations

- ▶ Need for ongoing assessment of adequacy of measures in light of new scientific knowledge
- ▶ Environmental impact assessment
 - ▶ Encompasses situations of precaution as well as prevention
- ▶ Notification and consultation
 - ▶ Duties activated where assessment indicates reasonably foreseeable threat of serious damage through climate change

Sustainable Development (draft Art.3)

- ILA 2002 New Delhi Declaration on Principles of International Law relating to Sustainable Development
- Climate system is “common natural resource”
- Balancing economic and social development and the protection of the climate system (3.3)
- Development plans, programmes and policies and projects “must be integrated with climate change responses” (3.4)
- Overriding due diligence obligation to mitigate significant climate change impacts (3.5)

International Cooperation (draft Art.8)

- “Underlying” & “foundational” principle
- Development and implementation of climate change regime (8.2)
- Enhancing scientific knowledge & transfer of technology “if requested” (8.4)
- Outside “traditional” climate regime:
 - disaster response (8.6)
 - threats to peace and security (8.7)
 - cross cutting development of law in response to climate change (8.8)

Equity (draft Art.4)

- Equity and CBDRRC (4.1.)
- Intra and inter-generational equity (4.2)
- “Multilaterally agreed global goal”
- Equity and urgency – delay will shift focus of action from mitigation to adaptation and impact to the most vulnerable and least responsible (4.3)

CBDRRC (draft Art.5)

- ‘Common responsibility’ to cooperate in developing an equitable and effective climate change regime applicable to all
- States’ commitments – fall along a spectrum – and shall evolve over time as contributions, capabilities, economic fortunes and national circumstances evolve (5.4)
- Differentiated responsibilities, due to differing:
 - Historical, current and future contributions to climate change
 - Technological, financial and infrastructural capabilities
 - National circumstances (and constraints)
- Differentiated responsibilities translate into:
 - Developed country leadership: more stringent mitigation commitments and assisting developing countries
 - Developing countries, in particular LDCs, SIDs and other vulnerable countries, subject to less stringent mitigation commitments, and to benefit from financial and technological assistance

Special Circumstances & Vulnerability (draft Art.6)

- Priority for developing countries particularly vulnerable to the effects of climate change (Principle 6 Rio Declaration) - not response measures
- A qualitative criterion for differentiation between developing countries
- Guides the application of CBDRRC, provision of support and other principles
- Insurance schemes will require the involvement of the private sector but developed countries have to provide start-up finance, credit insurance and additional support where the development of commercial products is problematic

New agreement

- Developed countries accept liability for (certain) anthropogenic GHG emissions, “make up for it” to developing countries and from 2020 the remaining atmospheric space is managed as a common natural resource.
- Move away from formal differentiation
- Flexible framework to encourage best effort
- Responsibility for GHG emissions crucial component
- Performance under UNFCCC and Kyoto Protocol
- Obligation to provide resources and technologies