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