



## ***Legal Strategies for Climate Change Adaptation by Vulnerable Communities***

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### **Course Objective:**

To explore the governance challenges related to climate change adaptation that are shared by vulnerable communities in Small Island Developing States, the Least Developed Countries, as well as vulnerable communities, such as the Canadian Inuit, who reside within developed nations.

## Overview:

Global climate change is already bringing about dramatic and far-reaching changes in many parts of the globe.

Beyond the direct, physical impacts, there are also various indirect, secondary impacts, such as cultural, social and economic reverberations from climate change. Climate change has the potential to trigger a period of great instability and uncertainty for many vulnerable communities.

This course identifies and explores the governance challenges of implementing adaptation measures to manage climate change impacts and offers legal strategies to assist.

## Introduction to the CISDL



- **An Independent Legal Research Centre, whose partners include McGill University Faculty of Law (Montreal, Canada) & Cambridge University Law Faculty (UK).**
- **Mission:** To promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

# Sustainable Development Law on Climate Change & Adaptation

## Part I: International Law on Sustainable Development



## The Concept of SD

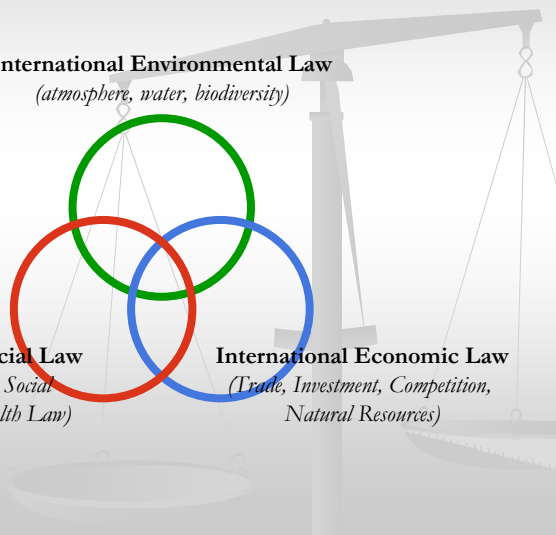
### Sustainable Development Law

Law at the area of  
intersection between  
three fields, broader  
purpose: “development  
that can last.”

International Environmental Law  
*(atmosphere, water, biodiversity)*

International Social Law  
*(Human Rights, Social  
Development, Health Law)*

International Economic Law  
*(Trade, Investment, Competition,  
Natural Resources)*



## The Concept of SD

- *1987 Brundtland Report*: SD is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”
- *1992 Rio Declaration*:
  - Principle 4: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”
- *2002 WSSD*:
  - Declaration, para. 5: “a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels”
  - Plan of Implementation, para. 163: All countries called to “promote sustainable development at the national level by, inter alia, enacting and enforcing clear and effective laws that support sustainable development.”

## The Principles of ISDL

### ILA New Delhi 2002 Declaration of Principles of International Law Relating to Sustainable Development

1. *The duty of States to ensure sustainable use of natural resources*
  - extension of ‘good neighbour’ principle with regards to common resources, reflected in many treaties.
2. *The principle of equity (inter and intra-generational equity) and the eradication of poverty*
  - central to treaties such as climate change, and biodiversity, seeks to ensure that benefits of development are shared.

## The Principles of ISDL



3. *The principle of common but differentiated responsibilities*

- recognition of historical burdens and differences of technology, finances, with regard to common challenges, related to 'special & differential treatment' in trade treaties

4. *The precautionary approach to human health, natural resources and ecosystems*

- transfers the burden of addressing scientific uncertainty onto the proponent (e.g. for projects and new technologies).

## The Principles of ISDL



5. *The principle of public participation, access to information and to justice*

- most international treaties make provision for public participation, transparency is required under trade law, access to information and legal remedies are recognized in many human rights and environmental laws.

6. *The principle of good governance*

- definition and scope still emerging, relates to rule of law, predictable decision-making, multi-stakeholder processes (consultation) and independence of decision-making bodies, also anti-corruption measures.

## The Principles of ISDL

7. *The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives*

- development planning & laws should integrate / accommodate / reconcile social, economic & environmental priorities.

- in treaties, different degrees of integration can be observed (ranging from nearly separate, to parallel but interrelated, to partially integrated, to fully integrated).

## Sustainable Development Law on Climate Change & Adaptation

### Part II: Sustainable Development Law & Climate Change



## References to Sustainable Development in the UNFCCC

Art. 2: one objective is to “enable economic development to proceed in a sustainable manner.”

Art. 3(4): “The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.”

Art 3(5): “The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.”

## Principles of ISDL & the UNFCCC

### 1. Sustainable use of natural resources

Preambular references to the duty to develop sustainably and the duty not to cause environmental transboundary harm

Art. 4(1)(d): reference to the “sustainable management” of carbon sinks and reservoirs

### 2. Equity

Preamble: recalling the “protection of global climate for present and future generations of mankind”

Preamble: “Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,”

## Principles of ISDL & the UNFCCC

### 2. Equity (con'd)

Art. 3(1) “the Parties should protect the climate system for the benefit of the present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country parties should take the lead in combating climate change and the adverse effects thereof.

## ISDL Principles & the UNFCCC

### 3. Common but differentiated responsibilities

Preamble: “Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs,”

Preamble: “ Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,”

Art. 3(2): “The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.”



## ISDL Principles & the UNFCCC

### 3. Common but differentiated responsibilities

Art. 4(5): “The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to other Parties(...)”

Art. 4(6): “...a certain degree of flexibility shall be allowed by the Conference of the Parties to the Parties ...undergoing the process of transition to a market economy (...)”

Art. 4(7): “The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.”

## ISDL Principles & the UNFCCC

### 4. Precautionary approach to human health, natural resources and ecosystems

Preamble: “Noting that there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof,”

Art. 3(3): “The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.”

Reflected in research commitments in article 5 and the creation of a subsidiary scientific body

## ISDL Principles & the UNFCCC

### 5. The principle of public participation, access to information and to justice

Access to information and public awareness measures in Art.6

CDM and JI mechanisms have access to information and public participation measures throughout the life of a project

Access to justice remains limited

### 6. The principle of good governance

Informs the Climate Change regime on the whole, but is not specifically mentioned

## ISDL Principles & the UNFCCC

### 7. Integration

Art. 4(1)(f), “Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;”

## Sustainable Development Law on Climate Change & Adaptation

### Part III: Defining Adaptation and Vulnerability



### DEFINITION: “Adaptation”

- Adaptation to climate is the process through which people reduce the adverse effects of climate on their health and well-being, and take advantage of the opportunities that their climatic environment provides (Burton 1992)
- Adaptation involves adjustments to enhance the viability of social and economic activities and to reduce their vulnerability to climate, including its current variability and extreme events as well as longer-term climate change (Smit 1993)

## How does adaptation happen?

- adaptation can be planned or spontaneous; passive, reactive or anticipatory
- planned, anticipatory adaptations that are undertaken by governments, local institutions or NGOs as a policy initiative (as opposed to those that are autonomous and/or mainly reactive) attract the most attention

## DEFINITION: “Vulnerability”

At the COP6 to the UNFCCC,

Robert T. Watson, Chair of the IPCC, defined vulnerability as

- the extent to which a natural or social system is susceptible to sustaining damage from climate change, and is a function of the magnitude of climate change, the sensitivity of the system to changes in climate and the ability to adapt the system to changes in climate.

## Poverty limits adaptive capacity

- The IPCC report, *The Regional Impacts of Climate Change: An Assessment of Vulnerability* (Watson et al.1998), suggests that the **vulnerability** of a region depends to a great extent on its wealth, and that poverty limits adaptive capabilities.
- According to the Second Assessment Report, vulnerability depends on the level of economic development and the quality of institutions.
- Socio-economic systems “typically are more vulnerable in developing countries where economic and institutional circumstances are less favourable”.

## Impacts will be uneven

- A common theme in the climate change impacts and vulnerability literature is the idea that countries, regions, economic sectors and social groups differ in their degree of vulnerability to climate change
- This is due partly to the fact that changes in temperature and precipitation will occur unevenly, and partly due to the fact that resources and wealth are distributed unevenly
- Though vulnerability differs substantially across regions, it is also recognized that “even within regions... impacts, adaptive capacity and vulnerability will vary” (IPCC 2001)

## Vulnerability depends on the past (and the future)

- Kelly and Adger (2000: 328) define vulnerability as “the ability or inability of individuals or social groupings to respond to, in the sense of cope with, recover from or adapt to, any external stress placed on their livelihoods and well-being.”
- Their approach focuses on existing “wounds” (or prior damage), which might limit capacity to respond to stresses and are independent of future threats.

## There are vulnerable regions and populations throughout the globe

- Sea-level rise represents the most significant implication of climate change for small-island developing states, as many important economic activities tend to be concentrated in their coastal areas
- The economic vulnerability of many South Pacific small-island developing states is related to the increasing reliance on imported food products and a result of relatively narrow resource bases. Resource degradation appears to be contributing to increasing vulnerability among these countries.
- Drought (and food insecurity) represents the most serious predicted impact of climate change on the African continent

## Adaptation in International Climate Law

- Under Article 4.1 of the UNFCCC, Parties are committed to:
  - Formulate, implement, publish and regularly update national and...regional programmes containing measures... to facilitate adequate adaptation to climate change (Art. 4.1. (b)); and
  - Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods (Art. 4.1 (e)).
- Article 4.4 states that:

The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects.

## Adaptation in International Climate Law

- Articles 4.8 and 4.9 of the Convention make specific reference to developing country Parties, in particular least developed countries.
- These articles explicitly mention funding and transfer of technology “to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change”
- Special attention is given to those countries considered most vulnerable— small-island states, those with arid or semi-arid areas, etc.

## Adaptation in International Climate Law

- Provisions also exist in the Kyoto Protocol for the funding of adaptation activities in the most vulnerable states
- Funding is to be raised through activities under the clean development mechanism (CDM).
- In particular, Art.12.8 of the Protocol states that:
  - The COP... shall ensure that a share of the proceeds from certified project activities is used to... assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation

## Adaptation Fund under the GEF

- The Adaptation Fund was established (DECISION 10/CP.7) to finance concrete adaptation projects and programmes in developing countries that are Parties to the Kyoto Protocol.
- The Fund is primarily financed with a share of proceeds from clean development mechanism (CDM) project activities (the share of proceeds amounts to 2% of certified emission reductions (CERs) issued for a CDM project activity.)



## Adaptation in International Climate Law

- SUMMARIZE: The UNFCCC, the Kyoto Protocol, and COP decisions resolve that developed countries have to assist developing countries -- particularly the vulnerable and least developed ones – to adapt by providing finance, insurance and the transfer of technology.
- The preamble justifies this commitment with reference to the importance of *collective action* – the widest possible cooperation by all countries "in accordance with their the common but differentiated responsibilities and respective capabilities and their social and economic conditions."

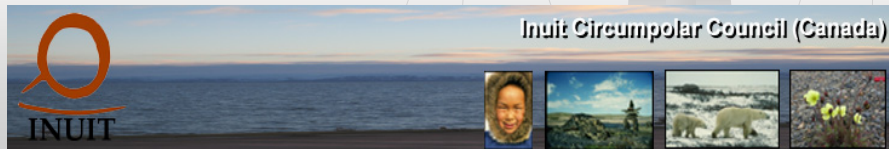
## Sustainable Development Law on Climate Change & Adaptation

### Part IV: Legal Strategies for Vulnerable Communities



## Human Rights Strategies to Climate Change Adaptation

- EXAMPLE: The Inuit Circumpolar Conference (ICC) petition to the Inter-American Commission on Human Rights



## The “Right to Keep Cold”

- The language of “climate justice”



## Critical Assessment of Human Rights Strategies



- 1) How might **international human rights law** support and influence our adaptation efforts?
- 2) Can “vulnerable communities” **mobilize human rights law** ‘on their own terms’?  
  
How can international human rights claims best be mobilized and harnessed as part of political and awareness-raising strategies?  
  
In and of itself, will advocating the human rights impacts from climate change be sufficient to help communities adapt to climate change, and if not, how can such claims form part of a broader local, national and international strategy?
- 3) What **remedies** might be sought in such claims, and how can emerging concepts of compensation and collective responsibility, developed in other areas of law, inform the arguments of vulnerable communities?

## Critical Assessment of Human Rights Strategies



- Climate change is tied up in a range of social and cultural challenges and difficult to untangle specifically from them.

## Tools and Mechanisms in International Environmental Law



- Art.2 of the UNFCCC:

### OBJECTIVE

The ultimate objective of this Convention and any related legal instruments that the COP may adopt is to achieve...stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

## Tools and Mechanisms in International Environmental Law



What constitutes “dangerous anthropogenic interference”?

## Sustainable Development Law on Climate Change & Adaptation



IPCC Report April 2007

[John Drexhage](#), director of climate change and energy for the International Institute for Sustainable Development:

"This IPCC report confirms a message we have been stating loud and clear for a few years now: namely that those least responsible for global warming — the poor, the indigenous communities — are the ones to be the most immediately and severely impacted by it. This is a core equity issue that must be addressed in the international negotiations."

## Adaptation carries costs

- According to the IPCC Third Assessment Report, adaptation "has the potential to reduce adverse impacts of climate change and to enhance beneficial impacts, but will incur costs and will not prevent all damages."

## Adaptation v. Mitigation

- Tom Downing, director of the Oxford office of the Stockholm Environment Institute and a lead author of the IPCC report:

"Many of these linkages are opportunities to promote sustainable development and alleviate poverty. We found relatively few examples where decision-makers made explicit, economic trade-offs between mitigation and adaptation."

## Tips for the Design of Effective Adaptation Strategies

- 1) Apply a *broad social and cultural lens*
- 2) Keep the focus on *adaptation* strategies
- 3) Be sensitive to specific contexts and places
- 4) Pay attention to the *dynamic between the international legal order, the national legal regime and local adaptation strategies*
- 5) Take a *governance* approach



**Questions?**

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