

THE LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE

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Summary

This chapter deals with the legal regime that has been progressively codified since the 1980s to deal with the global consequences of climate change. Broadly speaking, the chapter can be divided into three parts: the first deals with the general principles of international law that have a bearing on the responsibility of states to act in the interest of a sustainable global atmosphere; the second covers the treaty law and other developments specific to the issue of climate change; and the third provides an overview of the possible linkages between climate change, biodiversity, trade and investment, and human rights. The contents of the chapter illustrate the role of multilateral environmental agreements in addressing climate change effects, the nature and role of the institutional mechanisms in ensuring state compliance with the relevant treaty obligations and the interrelatedness of the climate change regime with other areas that have become the subject-matter of international law-making.

1. Introduction

Depletion of the ozone layer and climate change are the two main threats to the composition of and natural changes in the global atmosphere, a phenomenon that is now indisputably linked to the production and use of ozone depleting chemicals and anthropogenic increases in greenhouse gases. From a legal regulatory point of view the global atmosphere is not susceptible to a conceptualization that depicts it as “common property” or a “common heritage”. Rather, it has a distinct status which requires it to be treated as a global unity with the result that any measurable threat to its sustainability is treated as a common concern of mankind. The status of common concern is especially significant in understanding the current approach to prevention of harm and the enforcement of compliance with legal principles as matters in which all states have a legal interest as part of their global environmental responsibility and from which they derive common benefits. Therefore, the concept of ‘common concern’ does not so much refer to certain areas or resources but to specific environmental processes or protective actions in response to changes in the atmosphere and the harmful effects thereof. This also explains one of the key elements of any common concern regime, namely the regulation of an equitable sharing of the burdens and responsibilities of cooperation and commitments.

Since the 1970s the very nature of the phenomena of ozone depletion and climate change has brought into sharp focus the legal complexity surrounding the protection of the atmosphere as well as the difficult choices states, that find themselves at different levels of economic and industrial development, are bound to make in complying with their national and international obligations. At the same time legal scholarship has extensively debated the question whether general international law principles provide adequate legal restraints on the production of harmful substances and emission levels or whether such restraints could only come about through international agreements in the form of multilateral conventions containing detailed and binding commitments agreed to by states and implemented under an international supervisory and monitoring treaty mechanism. Such agreements are often referred to as multilateral environmental agreements (MEA's). In practice both the issue of ozone layer depletion and climate change, like many other environmental issues, have become the subject-matter of MEA's, a development that has been motivated, amongst others, by the need for legal certainty and greater clarity with regard to the obligations assumed by the states parties to the agreement. In the case of the ozone layer the seminal MEA is the 1985 Vienna Convention for the Protection of the Ozone Layer which was negotiated under the auspices of the United Nations Environmental Programme (UNEP) and supplemented in 1987 by the Montreal Protocol on Substances that Deplete the Ozone Layer. These multilateral instruments entered into force on 22 September 1989 and 1 September 1989 respectively, and by 2010 had 196 ratifications each. For climate change the corresponding instruments are the United Nations Framework Convention on Climate Change (FCCC) of 1992 and the Kyoto Protocol of 1997. The former entered into force on 21 March 1994 and by 2010 had 194 ratifications. The Protocol, with its current 192 ratifications, entered into force on 16 February 2005. The most notable non-participant in the Kyoto process is the USA which alone is responsible for 25% of the world's greenhouse gas emissions. Neither of the above instruments should be seen as presenting a comprehensive and detailed regulation of the atmosphere. They are

designed as international framework instruments, establishing a process by means of which further agreement by the parties on specific climate change measures and policies, is supposed to come about.

Although formal and binding instruments such as these are now the preferred method of law-making in the international community, many of the principles we find in such instruments are general international law principles developed by and drawn from a variety of sources. These sources derive their existence and authority from Article 38(1) of the Statute of the International Court of Justice as the sources the ICJ would normally look at in determining whether a particular rule or principle has binding legal force. The sources listed in Article 38(1) are international conventions establishing rules explicitly recognized by the states parties; international customary law as evidence of a general practice accepted as law; general principles of law; and, finally, subsidiary sources, namely judicial decisions and the writings of recognized jurists. However, it is generally accepted that this provision, dating from 1945, does not reflect other sources of obligation modern state practice is making use of, especially in international environmental law. For instance, beyond the listed sources of 'hard law', which contain legally binding obligations, a significant part of international environmental law has grown out of so-called 'soft law' principles which are not *per se* binding but which have laid the foundation for future legally binding obligations either because they have attained the status of customary international law over time or because they were codified in legally binding international conventions. The most widely recognized 'soft law' instruments that fall into this category are the Stockholm Declaration of the United Nations Conference on the Human Environment (1972) and the Rio Declaration on Environment and Development (1992) adopted by the United Nations Conference on Environment and Development (UNCED). The combination of traditional sources of international law and of specific environmental law sources, binding as well as non-binding, has given rise to a large body of legal obligations which directly or indirectly determine the rights and duties of states with regard to the protection of the environment.

2. Relevant Rules of General International Law

2.1. The Law of Treaties

The primary source on the conclusion, entry into force, interpretation, enforcement, invalidity and termination of treaties is the 1969 Vienna Convention on the Law of Treaties. It defines a treaty as a written agreement between states which is governed by international law whatever its particular designation. This explains why the term 'treaty' is often used interchangeably with 'convention', 'agreement', 'protocol' or 'charter'. What counts are the substantive requirements and not the formal designation. For purposes of this chapter only a few *essentialia* of the law of treaties need to be singled out.

At the international level a state establishes its consent to be bound by a treaty through ratification, acceptance, approval or accession. For a treaty to have domestic legal effect an additional act of incorporation in accordance with national law is usually required.

This often takes the form of parliamentary legislation by means of which the treaty will be given domestic legal effect.

Once a treaty is in force and binding on a state that state is under a legal obligation to perform the treaty in good faith. The 'good faith' obligation is considered as one of the basic principles governing the creation and performance of legal obligations in international law, irrespective of the source of the legal obligation. The principles of trust and confidence that underlie this obligation are inherent in international cooperation, which in many fields, is becoming increasingly essential, no less in matters involving the protection of the environment. The good faith obligation further means that a state may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

The termination or suspension of a treaty must be effected in accordance with the prescriptions of the Vienna Convention on the Law of Treaties and of the treaty to be terminated or suspended. Non-compliance with this rule or the violation of a treaty provision essential for the accomplishment of the object or purpose of a treaty will constitute a material breach of the treaty. Such a breach will entitle the other parties to terminate the treaty or suspend its operation in whole or in part. Under certain conditions a state party may also invoke the disappearance or destruction of an object indispensable for the execution of the treaty, or a fundamental change of circumstances which has occurred since the time of conclusion of the treaty and not foreseen by the parties at the time as a ground for withdrawing from the treaty. The latter rule will only apply if the circumstances in question constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change will radically transform the extent of the obligations still to be performed by the parties in terms of the treaty.

2.2. State Responsibility

The concept of state responsibility in international law is used in the objective sense of breach of an obligation, which obligation could derive from either treaty law or customary international law. The principles relating to this concept have been subject to a codification process by the International Law Commission (ILC) which commenced in 1956 and which ended in 2001 with the publication of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts.

The basic approach to state responsibility is that any act or omission which constitutes a breach of an international obligation and which can be attributed to the state will render the state responsible in international law. Acts or omissions which can be attributed to the state are those of organs of the state; of persons or entities, which, although not organs of the state, are empowered by the law of the state to perform governmental functions; or of a person or group of persons acting on the instructions of, or under the direction or control of the state.

A state which is responsible for an internationally wrongful conduct is under an obligation to make restitution to the injured state which means that the situation must be restored to what it was before the wrongful conduct occurred. Restitution as a form of reparation in international law falls away if it is materially impossible to achieve or if it

involves a burden out of proportion to the benefit that could be derived from it. In such instances the responsible state is under an obligation to compensate the injured state for any financially assessable damage not covered under the restitution option. In the last instance, reparation may also take the form of satisfaction given by a state and which may take the form of an acknowledgment of the breach, an expression of regret, or a formal apology.

These well-established principles of state responsibility in international law may encounter serious obstacles in the context of the climate change phenomenon. Since a variety of state and non-state entities may contribute in various ways to factors causing climate change, determining whose wrongful conduct can causally be linked to the harmful consequence is virtually impossible. In the second instance, since it is the atmosphere which is affected and not necessarily a specific state interest, identifying the injured state for purposes of reparation becomes equally problematic.

The multilateral nature of contemporary legal obligations, especially in the context of the notion of 'common concern' which has given rise to the legitimate interest of the international community as a whole (i.e. *erga omnes* obligations) has in some way been recognized by Article 48 of the ILC's Draft Articles. In terms of this provision any state other than an injured state, may invoke a remedy if the obligation breached is owed to a group of states and is aimed at the protection of the collective interests of the group, or, if the obligation is owed to the international community as a whole. In such instances the state invoking the breach may claim from the responsible state the cessation of the wrongful act, an assurance of non-repetition of the wrongful conduct and the performance of any applicable obligation of reparation in terms of the Draft Articles. Despite the concession made to claims by non-injured states and the concept of a collective interest, this article has not overcome the problems associated with identifying a responsible state and with the classical forms of reparation which are still based on bilateral relationships between states.

It is for these reasons that the current climate change regime has opted for multilateral compliance procedures established in terms of the relevant treaties themselves and aimed at an agreed and negotiated implementation of the states parties' differentiated responsibilities under a treaty-based monitoring mechanism. These procedures, discussed later on in this chapter, do not replace but supplement the ordinary, strictly judicial remedies for dispute settlement in international law.

2.3. The Principle of Good Neighborliness

The fundamental rule in international law that states are prohibited from using or threatening force against another state is also the basis for the rule that a state must not allow its territory to be used for acts that could compromise the territorial integrity or political independence of another state. What lies behind these rules is the principle of good neighborliness which has also assumed significant importance in environmental law. Consequently, it is now an established principle of customary international law and a cornerstone of international environmental law that states have, in accordance with the United Nations Charter and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies. At the

same time, and as an integral part of this right, states have the duty to ensure that activities within their jurisdiction or control do not cause harm to the environment of other states or of areas beyond the limits of national jurisdiction.

The duty of a state to exercise control over activities under its jurisdiction or control is closely linked to the duty, in both the Stockholm and Rio Declarations, to develop, through international cooperation, international as well as national law regarding liability and compensation for the victims of pollution and other environmental damage, even if it occurs in areas beyond their jurisdiction. The responsibility of states in this regard accords with the general obligation, especially well-settled in human rights law, to ensure that effective remedies are available for someone seeking redress for the violation of a right or interest.

The principle of good neighborliness further requires preventive measures to be taken by a state when necessary to avoid activities which take place in its territory or under its control or jurisdiction and which may cause significant damage to the environment of another state or to areas beyond its jurisdiction. In both the Nuclear Weapons case (ICJ Advisory Opinion, 1996) and the Pulp Mills case (Argentina v Uruguay, ICJ case no 135, 20 April 2010) the International Court of Justice has affirmed the customary law status of the principle of prevention.

To act preventively, states may be required to adopt a precautionary approach to the assessment of the risk of future harm which could necessitate the taking of anticipatory action. In its present form the precautionary approach originates from the *Vorzorgeprinzip* in German law and since the 1980s has become explicitly accepted in several national legal systems and in environmental law treaties for the purpose of assessing and managing environmental risk in circumstances of scientific uncertainty.

Applying the precautionary approach could involve a complex balancing act between costs and risks, between the overall economic and social advantages of the activity and its potential harm and between the degree of risk of significant harm and the availability of means to prevent the harm from occurring, etc.

In essence the obligation of a state to take preventive action is one of due diligence against which the conduct of the state in question must be examined. At the national level this will involve an enquiry about the appropriateness and effectiveness of the state's legal, governance and administrative system to achieve the necessary objectives, while at the international level it is a question about the state's compliance with its obligation to cooperate with other states in good faith, which is universally recognized as one of the basic principles governing the creation and performance of all legal obligations in international law. In the environmental law field, this obligation has often been applied in relation to the exchange of information, notification, consultation and monitoring when activities over which states exercise control involve a significant risk of environmental harm.

3. Specifics of the Climate Change Regime

3.1. The Ozone Layer Convention

3.1.1 General

The primary source of legal obligations for the protection of the ozone layer is the 1985 Vienna Convention for the Protection of the Ozone Layer which was supplemented in 1987 by the Montreal Protocol on Substances that Deplete the Ozone Layer as adjusted or amended in 1990, 1992, 1995, 1997 and 1999.

Scientific discoveries in the seventies confirmed that a range of substances containing the chemical elements of carbon, nitrogen, chlorine, bromine and hydrogen have the potential of modifying the chemical and physical properties of the ozone layer which is located in the earth's stratosphere some twelve to forty kilometers above the earth's surface and which serves to protect life on the planet from the damaging consequences of the sun's ultraviolet radiation. The adverse effects which the Ozone Convention sets out to address are changes in the physical environment, including climatic changes which have significant harmful consequences for human health or for natural and managed ecosystems(Art 1(2)). In providing a framework for measures to be taken in addressing these adverse effects, the Convention confirms that the right to exploit natural resources is coupled with the obligation of states to prevent harm ensuing from activities under their control; that precautionary measures need to be taken and that the measures envisaged by the Convention require international cooperation and action.

3.1.2. The Nature and Scope of the Convention Obligations

It is required under Article 2 of the Convention that states parties take *appropriate measures* against the adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. The emphasis on *appropriate measures* implies that the measures chosen and adopted by the state in question must be *suitable* to the achievement of the objective, i.e, reducing or eliminating the use of substances that cause the adverse effects. Measures must furthermore be based on relevant scientific and technical considerations and may differ depending on the means at the disposal of states and on their capabilities.

In complying with these obligation states parties must cooperate in assessing the effects of human activities on the ozone layer and in the formulation of agreed measures and standards for the implementation of the convention. At the domestic level states parties are required to adopt such legislative, administrative and policy measures that are appropriate for the control, limitation, reduction or prevention of human activities under their jurisdiction or control when such activities are likely to adversely affect or modify the ozone layer.

The scientific assessment and systematic monitoring of the physical and chemical processes that may affect the ozone layer states parties are required to conduct research and cooperate on, (Article 3 read with Annex I) relate to what the convention identifies as 'major scientific issues'. The areas in which these issues occur are: the physics and chemistry of the atmosphere; health, biological and photo-degradation effects; and effects on climate change. In complying with their duties in this regard, states parties must take into consideration the particular needs of developing countries when

promoting the appropriate scientific and technical training necessary for participating in the research and observations relating to the above issues.

A corresponding obligation is to cooperate in the legal, scientific and technical fields in terms of which parties must facilitate the exchange of scientific, socio-economic, commercial and legal information (Article 4 read with Annex II). The exchange of information and the cooperation required by the convention in facilitating such exchange remain subject to and must be consistent with national laws, policies and practices regarding patents, trade secrets and protection of confidentiality. Parties must further take into account the relationship between the information and the need for implementing the objectives of the convention, the cost involved in obtaining the information and whether any measures taken in complying with the obligation to cooperate in these areas are appropriate and equitable.

3.1.3. Enforcement and Compliance Mechanism

Provision is made in Article 6 of the convention for the establishment of a Conference of the Parties (COP) which meets in ordinary sessions at such regular intervals as determined by the COP as well as in such extraordinary sessions as may be deemed necessary from time to time. The function of the COP, which is assisted by a secretariat, is to keep under continuous review the implementation of the convention and for that purpose it may take any action required for the achievement of the objectives of the convention. In addition to this general function, the COP is also empowered to perform a number of additional functions relating to the assessment and exchange of scientific and other information, the harmonization of measures aimed at minimizing the effects of substances harmful to the ozone layer, the adoption of programmes for research and the consideration and adoption of amendments, protocols and annexes to the convention. The United Nations, its specialized agencies as well as any state not party to the convention, or any governmental or non-governmental agency may be represented at meetings of the COP and enjoy observer status unless objected to by one third of the parties present.

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Biographical Sketch

Hendrik A. Strydom, born in 1956 in South Africa, studied law and philosophy in South Africa and later specialized in Public International Law. He currently holds the chair for Public International Law at the University of Johannesburg. His research has focused on general principles of Public International Law, Humanitarian Law, Environmental Law, Human Rights Law and Regional Peace and Security and he has published extensively in these areas. He is also the chief editor of Fuggle&Rabie's *Environmental Management in South Africa* (2009, Juta & Co), a standard work which deals with environmental management from both a purely environmental and legal point of view. He is an Alexander von Humboldt scholar and has undertaken numerous research visits to the Max Planck Institute for Comparative Public Law and Public International Law in Heidelberg, Germany. He is currently the President of the South African Branch of the International Law Association and a member of the association's climate change committee.