

# A CISDL LEGAL BRIEF



## Canada's International Legal Obligations with regard to Climate Change

Montreal, November 25, 2002

This brief<sup>1</sup> outlines Canada's (and other developed countries') international legal obligations to effectively address climate change under the *United Nations Framework Convention on Climate Change*<sup>2</sup>, the *Kyoto Protocol*<sup>3</sup> and international human rights, trade and investment and environmental law. The CISDL suggests that the manner in which Canada's ratification and compliance plan is implemented will profoundly influence the sustainability and effectiveness of the effort.

The CISDL advises that international legal obligations be taken into consideration in domestic decision-making on climate change. It raises the need for international legal obligations to be taken into account in debates relating to the ratification and implementation of the *Kyoto Protocol*. It highlights key legal issues in the design of the ratification plan which will profoundly affect the potential for sustainable Canadian compliance with the Protocol.

### I. Global Impacts of Climate Change

The effects of climate change due to anthropogenic greenhouse gas emissions have been scientifically demonstrated on an international level. The Intergovernmental Panel on Climate Change<sup>4</sup> (IPCC), comprising the world's leading experts on climate change, has set out projected adverse impacts<sup>5</sup> of climate change caused by human activities. They highlight that these activities have increased greenhouse gas emissions by 31% since the Industrial Revolution.<sup>6</sup>

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<sup>2</sup> U.N. Doc. A/AC 237/18 (Part II)(Add.1), 31 I.L.M. 848. Adopted at the 1992 UN Conference on Environment and Development in Rio de Janeiro.

<sup>3</sup> COP3 report, document FCCC/CP/1997/7/Add.1, online: <http://unfccc.int/resource/convkp.html>. Adopted at the third Conference of the Parties to the UNFCCC in Kyoto, Japan, 1997.

<sup>4</sup> The World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) established the Intergovernmental Panel on Climate Change (IPCC) in 1988. It is open to all members of the UNEP and WMO. The role of the IPCC is to assess the scientific, technical and socio-economic information relevant for the understanding of the risk of human-induced climate change. The IPCC's *Second Assessment Report*, Climate Change 1995, provided key input to the negotiations of the UNFCCC, which led to the adoption of the *Kyoto Protocol* in 1997. See: <http://www.ipcc.ch/about/about.htm> for more information.

<sup>5</sup> Intergovernmental Panel on Climate Change, *Third Assessment Report (TAR)*, *Climate Change 2001- Impacts, Adaptation and Vulnerability Report*, online at <http://www.ipcc.ch/activity/tar.htm>, at Point 4.1 to 4.7. This report publishes the results of three working groups under the IPCC. These groups looked at 1) The Scientific Basis of Climate Change, 2) Impacts Adaptation and Vulnerability, and 3) Mitigation. It should be noted that there are also certain beneficial impacts of climate change to certain regions, but the IPCC reports that more people will be harmed than benefited by climate change (Point 2.8).

<sup>6</sup> *Ibid.*

Impacts that will result from temperature changes include the following:

- Rise in sea levels, causing loss of coastlines worldwide. Inhabitants of these coastlands will be vulnerable to floods, loss of land, salinization of aquifers, and pollution exposure. According to UNEP, as of 1990, about half of the world's population lived in coastal areas.
- Changes in weather patterns ultimately increase the frequency and severity of extreme weather events such as storms, hurricanes, droughts and heat waves. A predicted consequence is a widespread increase in the risk of flooding for many human settlements, affecting 75 to 200 million people depending on adaptive responses.
- Effects on human health, including an increase in diseases such as malaria and cholera as well as an increase in heat stress mortality. Changes in weather patterns will exacerbate problems such as water scarcity in already vulnerable areas including sub-tropic regions, contributing to this increase in health problems.
- Impacts on agriculture and food security, including regional shifts in agricultural productivity. Models show that the shift in agricultural belts will decrease food production in areas where it is most needed. This effect will lead to losses of human lives, especially in the least developed countries.<sup>7</sup>

Most of these changes will take their greatest toll on the developing world, even though this part of the world has made the least contribution to greenhouse gas emissions. The IPCC has stated that in addition to taking measures to adapt to the effects of climate change, the developed world must put mechanisms in place to mitigate greenhouse gas emissions.<sup>8</sup> According to the IPCC, the stabilization of carbon emissions in the atmosphere would require significant reductions below 1990 levels.<sup>9</sup>

## II. International Legal Obligations

Canada has clear international legal obligations to effectively address climate change under the *United Nations Framework Convention on Climate Change* (UNFCCC) and the *Kyoto Protocol* and international human rights, trade and investment and environmental law.

### A. International Treaty Law Obligations

#### i). *The United Nations Framework Convention on Climate Change*

Canada, with the unanimous endorsement of the Provincial Ministers at the time, signed and ratified the UNFCCC in 1992. The Convention came into force on March 21<sup>st</sup>, 1994. Under this convention, Canada has made several commitments, which include ensuring that the government's actions will be guided by the principles of *inter-generational equity*, *common but differentiated responsibilities*, *precaution* and *sustainable development* (UNFCCC Art.3). More importantly, Canada (and the other Parties to the Convention) have explicitly committed to “*taking into account [the] common but differentiated responsibilities*” of all Parties (UNFCCC Art.4). These principles also exist as obligations of customary international law, addressed in Section III below.

The principle of common but differentiated responsibilities<sup>10</sup> is a particular manifestation of general principles of equity in international law.<sup>11</sup> It is a principle that continues to be confirmed as an international standard; recently in the *Leipzig*

<sup>7</sup> TAR, *supra* note 5.

<sup>8</sup> TAR, *ibid* at point 2.8. Adaptation involves adjusting to climate change (including climate variability and extremes), moderate potential damages, to take advantage of opportunities, and to cope with the consequences. Box SPM-1 of TAR. See, [http://www.grida.no/climate/ipcc\\_tar/wg2/008.htm#24](http://www.grida.no/climate/ipcc_tar/wg2/008.htm#24) Mitigation involves taking measures with an objective to prevent further global warming and stabilize greenhouse gas emissions. See: TAR on Mitigation: [http://www.grida.no/climate/ipcc\\_tar/wg3/index.htm](http://www.grida.no/climate/ipcc_tar/wg3/index.htm).

<sup>9</sup> TAR, *supra* note 5. Canada's emissions levels are at approximately 25% above the 1990 emissions level.

<sup>10</sup> For greater detail, see CISDL Legal Brief: “The Principle of Common But Differentiated Responsibilities: Origins and Scope” (August, 2002) Available at [www.cisd.org](http://www.cisd.org).

<sup>11</sup> M.C. Cordonier Segger, A. Khalfan & S. Nakhjavani, *Weaving the Rules for Our Common Future: Principles, Practices & Prospects of an International Sustainable Development Law* (Montreal: CISDL, 2002) at 66.

*Declaration on Conservation and Sustainable Utilization of Plant Genetic Resources*.<sup>12</sup> In addition to being reflected in the UNFCCC, it was also set out in the *Rio Declaration*<sup>13</sup> and noted in the *Stockholm Declaration*.<sup>14</sup> It involves the common responsibility of States for the protection of the environment at the national, regional and global levels, and the need to take into account their different circumstances, particularly each State's contribution to the evolution of a particular problem and its ability to prevent, reduce and control a threat.<sup>15</sup> This principle also reflects the core elements of equity, placing an increased responsibility on wealthier countries and those most responsible for causing specific global environmental problems.<sup>16</sup>

As a result of Article 4 of the UNFCCC, Canada is under an obligation to take action to mitigate the affects of climate change in proportion to the extent to which Canada has contributed to climate change. In other words, under this principle, Canada is under an obligation to take action to reduce greenhouse gas emissions and enhance sinks and reservoirs. Canada has the resources to take a lead in this area, not the least with regard to sinks and reservoirs, in light of Canada's jurisdiction over vast forested territories. In addition, Canada has the duty to contribute to the ability of developing countries to address their climate change responsibilities. Specifically, Canada must:

- “[P]romote and cooperate in the development (...) [and] transfer of technologies that control, reduce or prevent anthropogenic emissions...”(UNFCCC Art.4(1)(c)), for example, by investing in renewable energy research or transferring technical knowledge to the developing world;
- “[P]romote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations” (UNFCCC Art.4(1)(i)), for example, by promoting a more energy efficient society;
- “[P]romote sustainable management (...) of sinks and reservoirs of all greenhouse gases (...)” (UNFCCC Art.4(1)(d)), for example, by preventing deforestation; and
- “[T]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and action...”(UNFCCC Art.4(1)(f)).

## ii). ***The Kyoto Protocol***

The *Kyoto Protocol* was designed to strengthen and operationalise the UNFCCC. UN member states adopted it by consensus in 1997. Canada signed it in 1998, and is now in the process of ratification. Under the *Kyoto Protocol*, developed countries commit to reduce their greenhouse gas emissions by, on average, 5.2% below the 1990 level by 2012. There are also obligations to enhance energy efficiency, to protect and enhance sinks and reservoirs of greenhouse gases and to implement policies and measures to minimise adverse effects, including those of climate change, on international trade, as well as social, environmental and economic adverse effects on other Parties.<sup>17</sup> The Protocol contains flexibility mechanisms such as joint implementation, emission trading and the Clean Development Mechanism (CDM). While some express concern that these schemes might not reduce overall global emissions, “carbon credits” primarily apply only to concrete reductions. In a CDM project, for example, certified emissions reductions (CERs) can only be “earned” to the extent that a cleaner project and investment actually reduces emissions above and beyond a credible baseline.

<sup>12</sup> International Technical Conference on Plant Genetic Resources. Leipzig, Germany, 17-23 June 1996. Adopted 23 June 1996. Online : Food an Agriculture Organization of the United Nations, [www.fao.org](http://www.fao.org).

<sup>13</sup> Principle 7 of the *Rio Declaration* provides that “[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technological and financial resources they command.”; *Rio Declaration on Environment and Development*, Report of United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1, (1992), 31 I.L.M. 874 (1992).

<sup>14</sup> The *Stockholm Declaration* emphasises the need to consider “the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries”. *Report of the United Nations Conference on the Human Environment* (Stockholm, 1972), online: United Nations Environment Programme, [www.unep.org](http://www.unep.org).

<sup>15</sup> CISDL Legal Brief: Common but Differentiated Responsibilities, *supra* note 10 at 1.

<sup>16</sup> CISDL Legal Brief, *ibid* at 2.

<sup>17</sup> The *Kyoto Protocol*, *supra* note 3 at Art.2§3.

The *Kyoto Protocol* has not yet entered into force.<sup>18</sup> However, once a State has signed a treaty, in customary international law, it is under a good faith obligation to refrain from acts calculated to frustrate the objects of the treaty.<sup>19</sup>

### **iii). Human Rights Treaty Obligations**

The effects of climate change can undermine a number of human rights, in particular economic, social and cultural rights, recognized in international treaties such as the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, the *Convention on the Rights of the Child*, and related declarations such as the *Universal Declaration on Human Rights*.

As outlined in Section I, climate change will significantly impinge on the *right to an adequate standard of living*, since it will lead to a general reduction in crop yields in most tropical and sub-tropical regions. Climate change will reduce the access to food of families that depend on farming, either as a source of food or as a source of core income. In addition, flooding caused by anthropogenic climate change could displace between 75 million and 200 million people, in most cases destroying their shelter and means of livelihood. Climate change reverses the realisation of the *right to health* by increasing the number of people exposed to vector-borne diseases, such as malaria, and water-borne diseases, such as cholera. In general, the impacts of climate change are expected to fall disproportionately on the poor. This is in part because tropical regions, and primarily Africa, will be the most affected by climate change, and further because poorer peoples and states are less able to adapt to climate change.<sup>20</sup>

Under the *ICESCR*, states commit to national efforts and international cooperation to realize economic, social and cultural rights, to the maximum of available resources. The Covenant requires that measures be taken immediately with a view to progressively realising the rights contained in the *ICESCR*.<sup>21</sup> Obligations exist nationally and internationally to *respect* these rights, by refraining from interfering with them; to *protect* these rights, by preventing third parties, such as private actors within their jurisdiction and sphere of influence, from interfering with them;<sup>22</sup> and to progressively *fulfil* the full realisation of economic, social and cultural rights. States responsible for unsustainable levels of greenhouse gas emissions are therefore failing to *respect* and *protect* the economic, social and cultural rights of persons affected by climate change, in particular the most vulnerable. The Covenant therefore would require reductions in levels of emissions to sustainable levels. As noted by the IPCC, effectively addressing climate change at the global level requires significant reductions in greenhouse gas emissions below 1990 levels.<sup>23</sup> There is therefore a strong argument for the proposition that states are legally obligated under human rights law to reduce emissions levels further than those envisaged in the Kyoto Protocol.

In relation to the obligation to *fulfil* economic, social and cultural rights, the international community, and developed states in particular, have a general responsibility under the *ICESCR* to assist developing states in times of emergency.<sup>24</sup> Under the Covenant, it is particularly incumbent on states which are in a position to help to provide international assistance and cooperation, in order to help developing countries fulfil core obligations, such as basic shelter, health care and adequate food.<sup>25</sup> In the context of climate change, developed states, therefore, have a dual responsibility to reduce greenhouse gas emissions to sustainable levels and to assist developing countries in efforts to address the consequences of climate change, such as desertification, health emergencies and flooding.

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<sup>18</sup> The *Kyoto Protocol* will come into force once it is signed and ratified by at least 55 countries, whose total emissions represent 55% of the emissions of the Annex I countries in 1990. Annex I countries signify developed countries.

<sup>19</sup> I. Brownlie, *Principles of Public International Law*, (Oxford, 1998) at p. 611; see also the *Vienna Convention on the Law of Treaties*, Article 18.

<sup>20</sup> *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, (1976), 993 U.N.T.S. 3, Art. 2 (1).

<sup>21</sup> Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 2000, UN Doc. E/C.12/2000/4, at para. 39. The General Comments are prepared made by the Committee of independent experts elected by UN member states to supervise the Covenant. The comments are viewed as highly persuasive interpretations of the Covenant.

<sup>22</sup> *Ibid.*

<sup>23</sup> TAR, *supra* note 5.

<sup>24</sup> CESCR, *General Comment No. 14*, *supra* note 21 at para. 40.

<sup>25</sup> *Ibid.* at para. 45. For more specific definitions of core obligations by the Committee, see also paras. 43-44 of the same comment, as well as *General Comment No.3: The Nature of State Parties Obligations*, UN ESCOR, 1990, UN Doc. E /1991/23 at para. 10 and *General Comment No.13: The Right to Education*, UN ESCOR, 1999, UN Doc. E/C 12/1999/10 at para. 57.

A general principle of human rights law is that states are bound to take account of the needs of the most vulnerable in society. They are therefore required to assess the impact that resulting economic transformations may have on lower income communities and to develop a comprehensive programme to address such effects. States have flexibility in designing such measures, which may include, for example, worker re-training schemes and tax credits for low-income groups to compensate for any carbon taxes. Another issue that may be raised is the right to property, contained in the *Universal Declaration on Human Rights*,<sup>26</sup> which requires states to refrain from arbitrarily depriving persons of their property. In taking account of this right, Canada should ensure that emissions reductions measures are carried out as part of legislative and policy measures. If these are generally applicable to all similarly situated individuals and corporations, they would not be arbitrary.

#### ***iv). Conflicting International Trade or Investment Treaty Law Obligations?***

Should ratification occur, could domestic legal measures to implement the *Kyoto Protocol* conflict with Canada's trade or investment obligations? Canada is a member of the World Trade Organisation (WTO) and party to the *North American Free Trade Agreement* (NAFTA). This raises two questions: first, whether a non-party to the *Kyoto Protocol* (such as the U.S.A.) could use international investment or trade law to undermine Canada's implementation regime of Kyoto; and second, would national compliance policies have a trade or investment aspect?

The *Kyoto Protocol* has few trade implications, but it does fundamentally change investment laws and seeks to re-direct flows of investment.<sup>27</sup> However, an appropriately constructed Kyoto regime need not be vulnerable to challenges under current WTO or NAFTA law. Current trade and investment law does not prevent a country from adopting Kyoto trade or investment measures.

While the relationship between the WTO and Multilateral Environmental Agreements (MEAs) is still being debated among WTO members, the Appellate Body has ruled that under Art. XX of the *General Agreement on Tariffs and Trade* (GATT), measures can be justified as non-arbitrary and non-discriminatory if the member undertook "ongoing serious good faith efforts to reach a multilateral agreement."<sup>28</sup> Once such an agreement has been achieved, a party will find it difficult to challenge measures taken under that agreement.

In the case of NAFTA, the situation is more complex. NAFTA's impact on trade measures are in essence the same,<sup>29</sup> but it contains special rules for investment.<sup>30</sup> Certain investor-state arbitration awards have given rise to serious concerns regarding the environment.<sup>31</sup> Art. 1114 of NAFTA provides an exception that is formulated even more broadly than Art. XX of the GATT. It stipulates that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." As such, investment-related measures can still be part of the national implementation of the *Kyoto Protocol*, although these measures will need to be carefully designed. They certainly need to observe a strict non-discrimination standard, not giving rise to the assumption that the law might (in addition to its environmental purpose) violate investment provisions.

<sup>26</sup> *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217 A, UN GAOR, 3d Sess., pt. I, Resolutions, at 71, UN Doc. A/810 (1948), Art. 17. The UDHR carries more legal weight than ordinary General Assembly resolutions, and has been said to form part of international customary law binding on all states. See A. Eide & G. Alfredsson, "Introduction" in A. Eide & G. Alfredsson, eds. *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff, 1999) at xxx-xxxii.

<sup>27</sup> See W. B. Chambers, *Inter-linkages – The Kyoto Protocol and the International Trade and Investment Regimes* (Tokyo, New York, Paris: United Nations University Press, 2001) 69 at 2.

<sup>28</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia (Complaint by Malaysia)* (2001), WTO Doc. WT/DS58/AB/RW at 153. (Appellate Body Report), online WTO <docsonline.wto.org>.

<sup>29</sup> Each party is free to apply environmental measures but must follow the disciplines of Art. XX GATT, and Art. 2102 NAFTA clearly states that these exemptions can be granted for environmental reasons.

<sup>30</sup> Chapter 11 lays out objectives, national treatment provisions, minimum international standards, performance requirement prohibitions and expropriation provisions which have been interpreted (in recent state-investor arbitration) to grant a high degree of protection to investors.

<sup>31</sup> See M. Araya & H. Mann, "An Investment Regime for the Americas: Challenges and Opportunities for Environmental Sustainability" in C. Deere & D. Esty, eds., *Greening the Americas* (Cambridge, MA: MIT Press 2002) 163.

How much regulatory freedom do members of the WTO or NAFTA, such as Canada, have to implement Kyoto measures? Each individual measure taken will face some scrutiny. If the regime is carefully designed, this brief suggests that it will not only hold up under review, but it will be found consistent with Canada's human rights, environment and economic legal obligations.

Greenhouse gas emission reductions might cause cost increases, and Canada may need to consider special state aid or other subsidies. Unfortunately, the WTO exception for environmental subsidies was not renewed,<sup>32</sup> so any government contribution in this area might be covered by WTO prohibitions on certain subsidies, and could be challenged in the GATT.

So how could Canada ensure fair competition between Canadian companies, and competitors from non-parties (such as the U.S.A.) who are not bound by the same obligations? Perhaps the most serious concern is that Canadian producers (for example, in greenhouse gas intensive sectors such as cement factories), could suffer serious competitive disadvantages, due to an 'un-level playing field' created by a climate regime.

Intelligent tax policy, giving tax advantages to producers which perform well, provides ways to avoid the subsidies problem of (in)direct governmental aid. Antidumping measures against the products which receive these tax benefits are likely to be unsuccessful, as higher production costs can outweigh the privileges.

Free trade in goods from non-parties could also undermine overall climate performance, if these products contained greenhouse gases, or emitted them upon disposal. (Emissions during production and processing cannot be attributed to the Kyoto Protocol country but only the producing country). A product ban or quantitative restriction of carbon-based products could also be challenged under the GATT. However, while imports cannot easily be hindered, the products themselves can be taxed in a non-discriminatory way, as they lead to the emission of greenhouse gases. This would not raise WTO concerns<sup>33</sup> and tax policy is generally exempted under NAFTA (as long as it does not discriminate in a manner covered by Art. III GATT).

In addition, the Kyoto flexibility mechanisms largely exclude non-parties from participation. Could this violate the broad trade principle of non-discrimination? The object of trading or the Clean Development Mechanism (CDM) is some sort of permission or right, called carbon credits or CERs (with regard to the CDM). As tradable tender, these are legally closer to money than to a good. As such, it can be convincingly argued that an entire Kyoto regime is not covered by trade in goods provisions. Trade in services provisions (GATS, or Part V NAFTA) might be applicable, if emission traders, bankers, brokers were banned from participation in the regime. But these services would need to be specifically covered by Canada's commitments, and in any case, broader trade in carbon credits would actually help Canada contribute to its reduction target.

The 'polluter pays' principle of international environmental law provides useful guidance on the optimum distribution of costs of mitigating climate change. This principle is formulated in Art. 16 of the Rio Declaration, which states "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."<sup>34</sup> In accordance with this principle, Canada has few obligations to compensate polluters. Rather, producers of high levels of greenhouse gases can be asked to contribute towards reduction commitments, in proportion to the benefits they have received to date. Conflicting property rights claims should be weighted against this principle.

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<sup>32</sup> Production subsidies are actionable under the WTO *Agreement on Safeguards and Countervailing Measures*, WTO online: <[http://www.wto.org/english/docs\\_e/legal\\_e/24-scm\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm)>. The Agreement as it originally entered into force contained a third category — non-actionable subsidies. This category (along with a provision establishing a presumption of serious prejudice in respect of certain specified types of actionable subsidies) applied provisionally for five years ending 31 December 1999, and pursuant to Article 31 of the Agreement, could be extended by consensus of the SCM Committee. As of 31 December 1999, no such consensus had been reached.

<sup>33</sup> G. Sampson, "WTO Rules and Climate Change: The Need for Policy Coherence" in W. B. Chambers, *Inter-linkages – The Kyoto Protocol and the International Trade and Investment Regimes* (Tokyo, New York, Paris: United Nations University Press, 2001) 69 at 77.

<sup>34</sup> *Supra* note 13.

## B. Principles of International Sustainable Development Law

Customary international law consists of norms of state behaviour that are consistent and widespread, where states act on the basis that they are legally bound by such a norm.<sup>35</sup> Customary international law is of significance to the issue of climate change. Certain principles are arguably becoming customary international law and, as such, are relevant to the issue of climate change.

### i). *Duty of states to ensure Sustainable Use of Natural Resources*

Principle 21 of the Stockholm Declaration of 1972 establishes the responsibility of states to ensure that activities within their jurisdiction or control do not cause harm to the environments of others. There is widespread consensus that this principle constitutes customary international law.<sup>36</sup> Principle 2 of the Rio Declaration on Environment and Development indicates that states have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.<sup>37</sup>

Although it may, in some circumstances, be difficult to prove that a particular state has caused a particular environmental injury to another, the duty of sustainable use of natural resources stipulates that States should implement measures to prevent actions within its borders that cause environmental damage in other states.<sup>38</sup> The effects of climate change produce environmental and social damage beyond the borders of each state, affecting the security and livelihood of millions of people. As such, this duty should be taken into account.

### ii). *Precaution*<sup>39</sup>

Precaution is expressed as one of the guiding principles of the UNFCCC (Art.3.3), and requires Parties to “take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects”. The most cited definition of the principle, however, is set out in the *Rio Declaration*, Principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>40</sup> This principle was reaffirmed in Johannesburg at the World Summit for Sustainable Development.<sup>41</sup>

The status of this principle in customary law is under much debate. Precaution has been included in international treaties since the early 1980’s,<sup>42</sup> and it has been persuasively argued this is now a guiding principle of international environmental law.<sup>43</sup> Indeed, the principle arose in the WTO *Hormones* case<sup>44</sup> where the Appellate Body noted that some regard the precautionary

<sup>35</sup> Brownlie, *supra* note 19 at 4.

<sup>36</sup> Apart from evidence demonstrating state practice and *opinio juris* regarding Principle 21, supported by individual and collective government statements on the matter, since 1972, Stockholm Principle 21 has been included in the following international treaties: 1) the 1985 *Vienna Convention for the Protection of the Ozone Layer*, 2) the 1979 *Convention on Long-Range Transboundary Air Pollution*, 3) the 1972 *London Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter*, 4) The 1982 UNCLOS 1982, Article 193, 5) the CBD and 6) the UNFCCC.

<sup>37</sup> *Supra* note 13.

<sup>38</sup> N. Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties*, (Cambridge University Press, 1997), at p. 390.

<sup>39</sup> For greater detail, see CISDL Legal Brief: “Precaution in International Sustainable Development Law.” (August, 2002) Available at [www.cisd.org](http://www.cisd.org).

<sup>40</sup> *Supra* note 13.

<sup>41</sup> World Summit of Sustainable Development, *Plan of Implementation*, 4 September 2002, IISD online:

< <http://www.iisd.ca/linkages/2002/wssd/PlanFinal.pdf>>, at para. 103 f.

<sup>42</sup> Including the *Convention on the Protection of the Ozone Layer*, 1985; the 1992 *Biodiversity Convention*; and there is even precautionary language in the 1994 Sanitary and Phytosanitary Measures Agreement under the WTO *acquis*.

<sup>43</sup> D. Freestone, and E. Hey, *The Precautionary Principle and International Law. The Challenge of Implementaion.*, (The Hague, Kluwer International, 1996).

<sup>44</sup> *EC Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998, WT/DS26/AB/R,WT/DS48/AB/R

principle as having reached the level of custom in the field of international environmental law.<sup>45</sup> Additionally, Canada has recognised the principle domestically in the recent case of *Canada Ltée*.<sup>46</sup> The *ratio decidendi* indicated a recognition of the principle, as such, in Canadian law.<sup>47</sup> The Canadian government needs to consider such a principle *in nascendo* when developing policies to address climate change and to ensure that action is taken to avoid furthering climate change impacts.

## Conclusion

The combination of international treaty law in the areas of climate change specifically and international human rights and environmental law indicates that Canada has clear international legal obligations to effectively address climate change. In addition, the Canadian climate regime must be carefully designed to ensure that it can be sustainable from a perspective of trade, investment and human rights law.

While it might be incorrect to state that Canada is required under international law to ratify and implement the *Kyoto Protocol* and its precise terms, it can be convincingly argued that Canada has an obligation to effectively address climate change. Certain established and emerging principles of international customary law are also relevant in this debate. As noted by the IPCC, effectively addressing climate change at the global level requires significant reductions in greenhouse gas emissions below 1990 levels.<sup>48</sup> The emissions reductions target in the *Kyoto Protocol*, of 5.2% below 1990 levels, helps to address the obligation to act under international law.

Beyond the emissions reductions it requires, the *Kyoto Protocol's* contribution to international law is in the framework for international cooperation that it creates. It provides a plan for nations to work together through emissions trading and international development activities, for example on clean energy technology transfers, or on conservation of forests and other carbon sinks.

Canada's design of compliance measures will be extremely important over the long term. This raises many international and domestic legal issues beyond the scope of this brief. However, in the examples considered above, relating to the use of certain trade or investment measures and subsidies, as well as investment laws and tax policies, it is clear that in spite of international economic obligations, the Canadian policy and instrument tool kit is far from empty. It is possible to ratify the *Kyoto Protocol* and set a national and provincial implementation strategy in place which complies with, and indeed takes advantage of, Canadian commitments under international economic and human rights law. This will be important in ensuring that the strategy is not only socially and environmentally sound, but also viable over the long term.

The Centre for International Sustainable Development Law (CISDL) is based in the McGill University Faculty of Law (founded in Montreal, Canada, in 1849), works in cooperation with the McGill School of the Environment, the Université de Montreal Faculty of Law, and the Université de Québec à Montreal, with guidance from the three Montreal-based multilateral environmental accords (the NAFTA Commission for Environmental Cooperation, the UNEP Biodiversity Convention, and the Montreal Protocol multilateral fund). Its mission is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

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<sup>45</sup> The Appellate Body went on to say, however, that it would be unnecessary to take a position on whether this had yet been authoritatively formulated as a general principle of international customary law. CISDL Legal Brief: Precaution, *supra* note 39 at 3.

<sup>46</sup> 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Tomn)* [2001] S.C.J. No.42.

<sup>47</sup> CISDL Legal Brief: Precaution, *supra* note 39 at 4.

<sup>48</sup> TAR, *supra* note 5.