

INDIA'S TREATY PRACTICE IN CLIMATE CHANGE

Abstract

The objective of this paper is identifying India's treaty-practice in the field of climate change in response to the still evolving climate change regime. As regards tackling global environmental problems in general and climate change in particular, India's treaty practice is governed by the principle of equity. The equity principle enshrined in the United Nations Framework Convention on Climate Change and in the Kyoto Protocol does not bind mitigation commitments but still it imposes obligations which are applicable to all the parties to the UNFCCC. India is fulfilling those obligations through an executive act without passing a law in pursuance of those obligations.

The paper is aimed at tracing India's treaty practice, though not driven by the concerns of mitigation commitments, but contributes to mitigation of greenhouse gases. The purpose of the paper is to see how India's treaty-practice in the field of climate change is reflected in all the three branches of government-legislative, judiciary and executive.

I Conceptual foundations

THERE IS wide-spread understanding established by the successive Inter governmental Panel on Climate Change (IPCC) reports and also supplemented by the scientists in their individual capacity that the climate change poses existential threat to humankind.¹ In order to deal with the threat, one of the most important global efforts is the international climate change regime comprising rules, norms, principles and procedures where the expectations are from the state actors to regulate their policy and behaviour. Over the past decades, key components of the global climate change regime have been the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, which served as the backdrop for the subsequent efforts to advance the international climate change regime.

There are two broad objectives of this paper: (a) identifying India's treaty-practice in the field of climate change in response to the still evolving climate change regime (b) tracing India's treaty practice, though not driven by the concerns of mitigation commitments, but contributes to mitigation of greenhouse gases.

It makes one to ponder as to why Indian policy-makers are getting influenced to a limited extent in terms of addressing climate change whose origin lies in the over consumption of the industrialized countries. One of the obvious ways in which the policy-makers are influenced is the established principles of conservation and sustainable development that serve as conceptual foundations for change in the domestic laws. The policy makers are susceptible to the three separate phenomenon

1 World Resources Institute Issue Brief: Climate Science 2008-Major New Discoveries, *available at*: <http://www.wri.org>. (last visited on Jan. 31, 2012).

that are taking place as international environmental law matures: “globalization, internationalization, and regionalization”. As part of internationalization, countries are looking externally to environmental conventions, declarations and agreements to guide their own policies and laws.

As a result of increasing number of multilateral environmental agreements, boundaries of common responsibility have been expanded. The United Nations Conference on Environment and Development endorsed the general principle that states have a “common responsibility” for environmental protection and sustainable development. More recently the concept of “common concern” has been developed and applied; the 1992 UNFCCC acknowledges that change in the earth’s climate and its adverse effects are a common concern of humankind. The effects of climate change transcend the boundaries of a single state and require collective action in response; no single state can resolve the problems they pose or receive all the benefits that they provide. The concept of common concern is supported in a major judicial pronouncement where Weeramantry J in his separate opinion in the *Gabcikovo/Nagymaros* case,² speculated that “we have entered an era of international law in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare”.

After independence, India’s pattern of development was largely socialistic. Of course, it chose the path of industrialization using capitalism in limited way, as one of the tools of development. India did not show any particular concern about environment except acts that dealt with mainly safety and health issues. Indian policy-makers and legislators swung into action in the aftermath of the Stockholm Conference in 1972 and passed the Water Act in 1974 and the Air Act in 1981. The latter is the Indian Parliament’s first implementation of environmental legislation using article 253 of the Indian Constitution, citing preservation of natural resources of the Earth enunciated at the Stockholm Conference on the Human Environment.³ In the absence of article 253, Parliament’s authority to legislate on air quality issue is questionable. Parliament enacted the Air Act, unlike the Water Act, without the consent of the states. Moreover, air pollution is not a subject specified on any of the constitutional lists.

2 *International Legal Materials* 162 (International Court of Justice (1998)).

3 The Preamble of the Air Act cites the Stockholm Conference. Art. 253 of the Indian Constitution states: “Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body”. Corresponding to this provision is entry 13 of the Union list in the seventh schedule to the Constitution which reads as follows: “Participation in international conferences, associations and other bodies and implementing of decisions made thereat”.

In order to ascertain a country's treaty-practice, lawyers tend to focus on compliance, which is a function of two factors: first, the obligations established by a rule (what the rule requires states or other states or other actors to do or to achieve) and second, the actual conduct or results of those subject to those obligations. The objective is to analyze the obligations imposed by the UNFCCC on India and the actual conduct of India to those obligations. As neither the UNFCCC nor Kyoto Protocol imposes green house emission reduction commitment on a developing country party like India, the objective of this paper is not to prove effectiveness of India's treaty-practice in terms of mitigation of greenhouse gases resulting in stabilization of climate system.⁴ Even if climate system stabilizes or destabilizes, it is difficult to determine the cause since the harm to a matter of common concern is widespread and diffuse in origin. Another yardstick of understanding treaty-practice is to identify policies in India, though not driven by climate concerns, but contribute to the goals of Framework Conversation on Climate Change and Kyoto Protocol by reducing or avoiding green house gases (GHG) emissions. India's treaty-practice can be located in the following domain: (a) executive action (b) judicial steps (c) policies, though not driven by climate concerns, but contribute to climate change.

II Constituent elements of treaty-practice

Shaping of a policy and its subsequent pronouncement at an international conference is contingent on domestic political will. In India, politicians give development precedence over environment and any change in energy strategy that is likely to lower agricultural and industrial production or affect gross domestic product in short-term or long-term is opposed by the domestic actors. Rapid development is not only an economic and social imperative, but also an essential requirement for building up a coping capacity against the adverse impacts of climate change.⁵ The echo of India's domestic political will, which still represents India's perspective on climate change, found its official expression at the 1989 Noordwijk Conference on Climate Change. At that conference Mahesh Prasad, the then Secretary to the Indian Ministry of Environment and Forests, stated that "the problem is global. Solutions must therefore be global...It is our conviction that the goals have to be set with the utmost care, taking full account of the technical and financial capabilities of individual countries, and their own economic needs and priorities. It may be equally counter-

4 Art. 2 of the UNFCCC establishes the "ultimate" objective of the convention as the stabilization of greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system.

5 Indian submission on "Shared Vision", *available at*: http://unfccc.int/files/kyoto_protocol/application/pdf/indiashared_vision2.pdf. (last visited on Feb. 10, 2014.)

productive to reach agreements to combat climate change, without devising mechanisms to ensure global participation”.⁶ The position taken at the 1989 conference has been bench mark of India’s position on climate change throughout the climate change negotiations in the run-up to the finalization of the UNFCCC and afterwards. Here the term “afterwards” means India’s position followed by the UNFCCC and the position getting articulation under the umbrella of BASIC countries.⁷

The position finds its legal expression in article 3(1) of the UNFCCC:⁸

The Parties should protect the climate system for the benefit of 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 adverse effects thereof.

India has consistently maintained that climate change is the historic responsibility of the industrialized north. Indian position on climate change is also guided by the argument of per capita rights to global environmental resources.

The operational arm of the said principle commonly referred to as the common but differentiated responsibilities and respective capabilities is article 4(7), which says:

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 related to financial resources and technology.

The combined effect of both articles 3(1) and 4(7) can be further understood from the differentiated commitments in the UNFCCC and the Kyoto Protocol for developing and developed states. There are general commitments, which apply to all parties, both developed and developing; specific commitments on sources and sinks

6 Joyeeta Gupta, “India and Climate Change Policy: Between Diplomatic Defensiveness and Industrial Transformation” 12 *Energy & Environment* 218(2001).

7 BASIC stands for Brazil, South Africa, India and China. The BASIC is a grouping of emerging economies which is being pressured to bear greenhouse gas mitigation commitment by the industrialized countries during the post-Kyoto phase. It takes a common stand on the issue of green house gas mitigation which is principally guided by the principle of equity. The grouping came into existence during the Copenhagen Climate Change Conference. The 11th BASIC Ministerial Meeting on Climate Change concluded with the adoption of joint statement in which the leaders reaffirm that the Durban Platform process and outcome shall be under the convention, in full accordance with all its principles and provisions, in particular the principles of equity and common but differentiated responsibilities and respective capabilities. The news is available at: <http://climate-iiisd.org/news/basic-countries-call-for-focus-on-implementation/> (last visited on July 18,2012).

8 31 *International Legal Materials* 854 (1992)

apply to the parties listed in annex I (Organization of Economic Cooperation and Development (OECD) member states and the former Eastern bloc); specific commitments on financial resources and transfer of technology apply to the parties listed in annex II (OECD countries).

The general commitments are qualitative not quantitative in nature and relate to such matters as preparation of greenhouse gas inventories, national strategies, reporting, cooperation in scientific research, and information exchange. The reporting requirements for annex I and non-annex I nations are different. Annex I nations are required to report annual inventories whilst non-annex I party has to submit an initial communication within three years of the entry into force of the Convention for it. These inventories lay the basis for national planning and to provide more accurate information for use in future scientific assessments of the greenhouse problem.

III National implementation of UNFCCC obligations

International environmental law treaties are generally not self-executing. Implementation of it depends on the degree to which it is domesticated. National implementation means involving the contributions of all the branches of government the legislative, judiciary executive and administrative level (central, state and local). In India, the practice of domesticating an international legal obligation is done through passing of an enabling legislation. India did not pass an enabling legislation, likewise of the National Biodiversity Act, 2002, to domesticate the UNFCCC obligations, which is perhaps attributable to the following reasons: (a) a treaty focusing on governmental actions such as reporting, can be performed by the executive branch on its own authority, without any need for a separate legislation or legislative approval (b) imposition of general obligations did not require specific acts of implementation *i.e.* mitigation of greenhouse gases. Article 4(1) (b) of the convention requires each party to develop, periodically update, and publish national inventories of greenhouse gas emissions and removals by sinks, using comparable methodologies to be agreed on by the conference of the parties (“taking into account their specific national and regional development priorities, objectives and circumstances”). Article 12(1)(a) requires communicating the following elements of information to the conference of the parties, as set out in article 4 (1) of the convention:

- (a) A national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, to the extent its capacities permit, using comparable methodologies to be promoted and agreed upon by the conference of the parties;
- (b) A general description of steps taken or envisaged by the party to implement the convention;

- (c) Any other information that the non-annex I party considers relevant to the achievement of the objectives of the convention and suitable for inclusion in its communication, including, if feasible, material relevant for calculations of global emission trends.

India had already taken initiative of stock-taking of its GHG before it became party to the United Nations Framework Convention on Climate Change on June 10, 1992 and subsequently ratifying it on November 1, 1993.⁹ The preparation of inventories of greenhouse gases by India in 1991 for the year 1990; the second in 1996 and the third in 1998 under the aegis of Asia Least Cost Greenhouse Gas Abatement Project (ALGAS) contributed richly to the cause and final submission of India's initial National Communication in June 2004.¹⁰ The exercise of inventory preparation in the year 1996 and 1998 improved upon the first one in a number of ways: (a) the number greenhouse gas responsible for climate change was gradually increased for GHG inventory preparation as compared to the previous one; (b) the methodology adopted for the exercise also improved and in the third GHG inventory preparation, it was IPCC 1996 guidelines that was used. For a transparent and comparable inventory, the revised IPCC guidelines prescribed for development of national GHG inventories was used for preparation of India's initial national communication.

The formal initiative to prepare India's initial national communication to UNFCCC (NATCOM project) started after receiving Global Environment Facility (GEF) funding in 2001. The Ministry of Environment & Forests (MOEF), Government of India served as the implementing and executing agency for this project.

India's commitment to FCCC is reflected in various initiatives taken nationally, such as including climate change in the Indian planning process and resource allocation with the guidelines of IPCC 1996.¹¹ The preparation of inventories of greenhouse gases as part of its Initial National Communication by India has been financed in accordance with article 4(3) by the designated financial mechanism of the UNFCCC, that is GEF.

India will endeavour to reduce emissions intensity of its GDP by 20-25% by 2020 in comparison to the 2005 level. The proposed domestic actions are voluntary in nature and will not have a legally binding character. Further, these actions will be implemented in accordance with the provisions of the relevant national legislations

9 The UNFCCC entered into force on Mar. 21, 1994. As of Nov. 2006, 189 states have ratified the convention.

10 The inventory was prepared for the year 1994.

11 It is officially known as the IPCC 1996 Revised Guidelines for National Greenhouse Gas Inventories. These are common methodologies and reporting formats devised by the IPCC and endorsed by the COP for calculating emissions data and compiling GHG inventories.

and policies as well as the principles and provisions of the UNFCCC, particularly its article 4, paragraph 7. This communication is made in accordance with the provisions of article 12(1) (b), article 12(4) and 10 2(a) of the UNFCCC.

Judicial pronouncement

In most cases, the courts become involved in the implementation process through their role in applying a state's domestic law. Since there is no legislation dealing with the subject of climate change in India, the role of Indian judiciary has been minimal in pointing out the steps that India needs to take to prevent the threats of climate change. Still on the basis of some cases, the judicial response to climate change can be divided into two parts: (a) there are some judgments directing the executive to improve the deteriorating air quality or to enforce emission norms to control vehicular pollution; (b) there are some cases where the Supreme Court has acknowledged the adverse effects of climate change.

The Supreme Court issued various directions to the governmental authorities about the measures to be taken to reduce the air pollution, especially in the National Capital Region (NCR). In a major judgment the Supreme Court used the recommendations of Environment Pollution (Prevention and Control) Authority to convert all the diesel buses of Delhi converted to Compressed Natural Gas (CNG) by December 2002. Some of the orders of the apex court at various stages under the *M.C. Mehta v. Union of India (Vehicular Pollution)* case¹² underline one thing very strongly those vehicles should convert to cleaner fuel and old vehicles to be phased out.

In *Balachandra Bhikaji Nalwade v. Union of India*,¹³ the Delhi High Court, while discussing the precautionary principle reiterated the UNFCCC which provides that the states parties should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects.¹⁴ The court further stated that efforts to address climate change should be carried out cooperatively by interested parties. It is the application of precautionary principle that is very useful in tackling of climate change rather than Air Act, 1981. As compared to many other air pollutants causing respiratory ailments when they are inhaled, or they irritate peoples' eyes, or they interfere with the aesthetic enjoyment of desired views, carbon dioxide

12 (1998) 8 SCC 648. Also see Armin Rosencranz & Michael Jackson, "The Delhi Pollution Case: The Supreme Court of India and the limits of Justicial Power" *Columbia Journal of Environment Law* 223. (2003)

13 170 (2009) DLT 251.

14 Though not pertaining to climate change, the Supreme Court's decision in the *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647 has underlined the importance of precautionary principle by describing it part of customary international law.

produces different harm and it produces them indirectly by trapping heat from escaping the atmosphere.

National implementation of Kyoto Protocol obligations

Kyoto Protocol that sets legally binding commitments for the annex I parties to reduce greenhouse gases provides in its article 12 Clean Development Mechanism (CDM). Under the mechanism developing countries have to also participate in the global efforts to reduce greenhouse gases by hosting a project to be funded by investors (both public and private) that aims at achieving the twin objectives (a) facilitating the annex I parties to meet a part of their commitments of reducing GHG (b) assisting the developing country parties to achieve sustainable development. Participation in the CDM project is voluntary, but in order for a developing country to host a CDM project, the host country is required to:

- (i) Ratify the Kyoto Protocol; and
- (ii) Designate a national authority for the CDM.

If the host country decides to allow private or public entities to participate in the CDM within its jurisdiction, the host country is also required to authorize such participation.

India became party to the Kyoto Protocol by acceding on August 26, 2002 and it did also set up designated national authority (DNA) to participate in the CDM projects. Setting up of DNA did not require legislative approval; it just involved executive and administrative implementation. In India, it is an inter-ministerial committee with single window clearance. The committee is made up of representatives from any ministry with an interest in CDM projects. It shows that India wants to involve various ministries to achieve the goal of sustainable development rather than allowing the various ministries to work at cross-purposes.

IV India's treaty practice not driven by climate concerns

India's treaty practice not driven by climate concerns can be divided into three parts: (a) resource allocation in planning process; (b) legislative implementation; (c) action plan on climate change; (d) India's carbon markets.

Resource allocation in planning process

India has taken a number of policy decisions and set up institutions to promote renewable energy and energy efficiency standards thereby reducing complete reliance on fossil-fuel energy. In 1992, a separate Ministry for Non-Conventional energy sources was established. The eighth five year plan (1992-1997) included plans for implementing

renewable energy. The ninth five year plan (1997-2002) integrated the issue of carbon dioxide emissions in its discussions on energy policy, but did not make any major recommendations except on the demand and supply side of energy and to promote renewable energy and nuclear energy.¹⁵ The tenth five year plan projects Coal Bed Methane (CBM) providing up to 19,620 MW of power generation. The CBM policy 1997 incentivizes investors to develop CBM commercially by providing liberal fiscal reforms.¹⁶ The eleventh five year plan that covers 2007-2012 sets a target of increasing the installed a capacity to 23,500MW by 2012, or more than 10% of total installed capacity, with wind comprising 72% and biomass and hydro power about 14% each.

Legislative implementation

India has pursued various policies and publicly funded programmes focusing in particular on energy conservation and deployment of renewable energy technologies. The Energy Conservation Act (2001) established a National Bureau of Energy Efficiency (BEE) with the objective of improving energy efficiency in various sectors. BEE has developed energy efficiency labels for refrigerators and other appliances, conducted mandatory energy audits of large energy-consuming industries, developed demand-side management programmes, and established benchmarks for industrial energy use. In 2007, the Energy Conservation Building Code was introduced, initially on a voluntary basis, to establish energy performance requirements for commercial buildings with loads of 500KW and above.

Reforming energy markets (Electricity Act, 2005, Tariff Policy, 2003, Petroleum & Natural Gas Regulatory Board Act, 2006, *etc.*) involving removal of entry barriers in exploration, extraction, transmission and distribution of primary and secondary energy; Introducing price reform and tax reforms to encourage optimal fuel prices; providing feed in tariffs for renewable energy like solar, wind and biomass; and New and Renewable Energy Policy, 2005 promoting use of sustainable and renewable energy sources, and facilitating speedy deployment of renewable technology through indigenous design, and manufacturing; Rural Electrification Policy, 2006, encouraging renewable energy technologies where grid connectivity is not feasible or cost effective.

Action plan on climate change

In 2008, India launched its first National Action Plan on Climate Change (NAPCC) outlining existing and future policies and programmes addressing climate mitigation

15 *Supra* note 6 at 226.

16 “Climate Change Mitigation Measures in India” *International Brief 2* (Pew Centre on Global Climate Change, Sep. 2008).

and adaptation. The NAPCC comprises eight national missions running through 2017 and directs ministries to submit detailed implementation plans to the Prime Minister's Council on Climate Change. The following are the missions: (i) National Solar Mission; (ii) National Mission for Enhanced Energy Efficiency; (iii) National Mission on Sustainable Habitat; (iv) National Mission for Sustaining the Himalayan Ecosystem; (v) National Mission for a "Green India"; (vi) National Mission for Sustainable Agriculture; (vii) National Mission on Strategic Knowledge for Climate Change.¹⁷

V India's carbon markets

The carbon markets have proved to be a significant tool to mitigate greenhouse gases. The carbon market in India comprises CDM projects registered with the CDM Executive Board (CDM-EB), as well as a few scattered voluntary carbon reduction projects. The CDM has been fairly successful in promoting investment in sustainable projects in India, and at present India is the second largest supplier of Certified Emission Reductions Units (CERUs) in the world after China, with 18.8% of the 420 million CERUs issued so far (UNFCCC, 2010). Wind, biomass, hydro and energy efficiency form the major chunk of CDM projects originating from India.¹⁸ Most projects in India are undertaken on a unilateral basis—developed independently by local stakeholders without the direct involvement of annex I countries.

The National Mission on Enhanced Energy Efficiency aims at introducing trading in energy saving certificate in nine designated industries. Under the scheme, a goal of energy consumption target is set for each plant. The target specifies by which percentage a plant has to improve its energy intensity from the baseline value in a period of three years (2009-2012). Within the said period the designated consumers try to reduce their energy intensity according to their target. Those consumers who exceed their specific energy consumption target are credited tradable energy permits. These permits are sold to designated consumers who fail to meet their target. Designated consumers who fail to achieve their target have to compensate for this failure by buying permits. If they fail to do either of these, they may have to pay penalties.

VI Conclusion

Treaty practice is a very comprehensive exercise involving steps other than sending of national communication to the climate change secretariat about the general measures

17 See National Action Plan on Climate Change, 2008.

18 See Prabhat Upadhyaya, "Is emission trading a possible policy option for India?" 10 *Climate Policy* 560-74(2010)

taken to combat climate change legislative approval, judicial practice, administrative implementation, and resource allocation in planning process, implementation of national action plans and creation of carbon markets. India being a non-annex I party is not required to reduce greenhouse gases. Therefore, it did not pass a law to implement the obligations relating to mitigation commitment. India has taken a number of steps though not driven by climate concerns that contribute to mitigation of greenhouse gases. The emergence of carbon markets is a very new development unthinkable two decades back underlines India's preparedness within its limited capacity to go beyond sending of national communication.

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