

## CONCEPT OF COMMON BUT DIFFERENTIATED RESPONSIBILITY IN CLIMATE NEGOTIATIONS

*P. Leelakerishnan\* and V. R. Jayadevan#*

### Abstract

Positive efforts for protecting environment had started with the Sockholm Conference in 1972. The impact of industrialisation led to international concern on fixing liabilities on nations to mitigate global warming and climate change. In this context, UNFCCC in 1992 laid the foundation for Common But Differentiated Responsibilities (CBDRs) which denotes higher responsibilities for the industrialized countries than others to retrieve the planet from climate disasters. The conferences of parties went into the different dimensions of CBDR. This paper examines how these nuances do help achieve climate justice.

### I Introduction

EQUALITY OF men and women and equality among human beings are values developed and fostered over the centuries. While affirming faith in them, the United Nations recognizes 'equal rights of nations large and small based on the sovereign equality of all its members'.<sup>1</sup> Does this concept of equal rights impose on all nations common responsibility among themselves, if the act of one or more countries turns to harm others? This question is relevant to protect environmental crisis.<sup>2</sup> Does the country that causes the harm not have a direct and higher responsibility for its mitigation? The question leads to the emergence of the concept of Common but Differentiated Responsibility (CBDR). It explains that though all countries contributed to environmental changes, the developed countries are more accountable than the developing countries for the harm they have caused in their flight for rapid development.

### II Climate as common heritage of mankind (CHM)

Climate being essential to sustain life on earth, its conservation and protection are contemplated as part of the common heritage of mankind (CHM).<sup>3</sup> The global

---

\* Professor Emeritus, Cochin University of Science and Technology.

# Professor, National University of Advanced Legal Studies.

1 The United Nations Charter 1945, The Preamble and art. 2.

2 See, generally, Philippe Cullet, "Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations" 10 *EJIL* 549 (1999).

3 The concept of CHM, formulated for the purpose of protecting natural resources as the property of the entire mankind, had its origin and growth with the recognition of cultural property in armed conflicts and extends to the seabed and ocean floor and subsoil, thereof, beyond the limits of national jurisdiction and even to celestial bodies whose exploration and uses are not allowed without the approval or benefit of other states. See the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and United Nations General Assembly Resolution 2749 on the Declaration of Principles Governing the Seabed and Ocean Floor, 1970.

environment is viewed as a physical common as what happens in one part of the globe may affect the environment in other parts.<sup>4</sup> No wonder that in 1988 the UN General Assembly passed an important resolution that necessary and timely action should be taken to deal with climate change within a global framework.<sup>5</sup> In the long history of mankind there were disasters that led the global commons in distress. Being against the interests of all nations, the tragedies could never be dealt with in an isolated manner, nor could the nations shirk their shared responsibility to prevent those tragedies that may occur in future. The UN Conference on Human Environment at Stockholm in 1972, concerned with the fast changes happening to the global environment, became aware of the need to have a common outlook and to formulate common principles for the preservation and enhancement of the human environment<sup>6</sup> and hence called upon the states to develop the law on the liability for environmental damage beyond political borders.<sup>7</sup> The conference was fully conscious also of the difference in the systems of values and standards of action between and among the countries as the Stockholm declaration goes to say,<sup>8</sup>

Without prejudice to such criteria as may be agreed upon by the international community, or to the standards which shall be determined nationally, it will be essential in all cases to consider the systems of values providing in each country, and the extent of the applicability of the standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Recognition of this differentiated approach discloses that the liabilities for environmental faults may vary from one country to another depending on whether it is 'advanced' or 'developing' and according to the systems of values followed and standards of action adopted by each of them.

---

4 Edith Brown, "Common but Differential Responsibilities in Perspective", 96 *American Society of International Law Proceedings* 366, (2002).

5 GA Res Resolution A/RES/43/53 Dec. 6, 1988. Recognizing that climate is a common concern of mankind (art.1) that climate is essential condition which sustains life on earth (art. 2), the resolution (art. 5) endorsed the action of World Meteorological Organization (WMO) and United Nations Environment Programme (UNEP) in jointly establishing an Intergovernmental Panel on Climate Change (IPCC) to provide internationally co-ordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies and expressed appreciation for the work already initiated by the panel.

6 The Stockholm Declaration 1972, The Preamble.

7 *Id.* Principle 22. The states shall cooperate to develop international law regarding liability and compensation for the environmental damage created by them to areas beyond their jurisdiction.

8 *Id.* Principle 23.

### III Climate change and industrialization: the International Concern

The industrial revolution that started in the midst of the Eighteenth century led to rapid economic growth and in this stride a few countries became rich with more and more industries by burning of fossil fuels and emitting of greenhouse gases in an abnormal manner.<sup>9</sup> Excessive release of these gases from the earth to the atmosphere prevents the diversion of sunlight to space, traps radiation, causes global warming and unsettles the global climate in an alarming degree. It makes hot regions hotter and bitterly cold regions cooler.<sup>10</sup> Obviously, the phenomenon of climate variation affects wind and rainfall patterns sufficiently to threaten food production as well as forest and marine systems.<sup>11</sup> It radically changes weather-dependent life styles, impedes tree growth, reduces photosynthesis and disrupts the global environment in its totality including 'human beings, other living creatures, plants and microorganisms'.<sup>12</sup>

The direct linkage between industrial development and greenhousegas (GHG) emissions resulting in climate imbalance having been established beyond challenge raises a persistent question whether the countries that became rich and highly developed by emitting dangerous gases causing global warming and climate change should be liable for mitigation of the crises. The non-developed countries which had not followed this course, produced nil or less GHG emissions and enjoyed none of the benefits of development also had to suffer the impact of global warming caused by the developed countries. Should not the developed countries that had caused the harm and monopolized the atmosphere for years give due space to the other countries to develop? Underscoring the spirit of partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem, the historic Rio Conference on Environment and Development in 1992 declared,<sup>13</sup>

...In view of the different contributions to global environmental degradation, States have common and 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 technologies and financial resources they command.

---

9 Centre for Science and Environment, *Climate Change: Politics and Facts* 3 (New Delhi, 2009).

10 See Christopher Flavin, "Global Temperature Rises" in Lester Brown, Christopher Flavin *et al.*, (eds), *Vital Signs* 58 (World Watch Institute, Washington DC ,1992).

11 *Supra* note 9.

12 Such changes lead to diverse kinds of violation of human rights creating what is called "climate refugees". See, Paramjit S. Jaswal and Stellina Jolly, "Climate Refugees: Challenges and Opportunities for International Law" 55 *JILL* 45 (2013).

13 The Rio Declaration 1992, Principle 7.

The Rio vision for a global partnership found CBDR as a crucial principle to balance the duty of states to conserve the environment meeting the requirements of the poor nations for differential treatment.<sup>14</sup> In fact, the message of the polluter pays principle,<sup>15</sup> reinforced by the Rio declaration, urges also that those responsible for the historical contribution to climate change should mitigate the tragedy.

#### IV Mitigation of Climate Impact :Rio Initiates CBDR

The Inter-governmental Panel for Climate Change (IPCC)<sup>16</sup> presented a clear and up-to-date report of the scientific knowledge of climate change and projected that global temperature would rise between 1.5 and 4.5 degrees Celsius by 2050 as a result of doubling of carbon dioxide concentration.<sup>17</sup> Based on this report, the UN conference in Rio sought to impose greater responsibility on the developed countries that had contributed to climate change to clean the system and help others achieve sustainable development in a suitable environment. In this background, the UN Framework Convention on Climate Change (UNFCCC)<sup>18</sup> took its shape with the objective to stabilize greenhouse gas concentration at a level that would prevent dangerous anthropogenic interference with the climate system in a time frame that would allow the ecosystem to adapt to the climate change.<sup>19</sup> As stated earlier,<sup>20</sup> it was to protect and restore the ecosystem that the Rio Declaration had stressed on common and differentiated responsibilities. UNFCCC went for an extra mile. According to the convention, the state parties had to protect the climate system ‘for the benefit of the

---

14 Fabio Morosini, Trade and Climate Change: Unveiling the Principle of Common but Differentiated Responsibilities from the WTO Agreements, 42 *The Geo. Wash. Int’l L. Rev.* 713, 719 (2010). See also Arvind Jasrotia, “Environmental Development and Sustainable Development: Exploring the Dynamics of Ethics and Law” 49 *JILI* 30 (2007).

15 *Supra* note 13, Principle 16. It reads, “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.”

16 *Supra* note 5

17 In 1992 the IPCC, which included 100 leading scientists, concluded that such a rapid warming could disrupt water and food supplies for millions of people, and threaten the very survival of many plant and animal species. See *supra* note 9.

18 UNFCCC entered into force on Mar. 21, 1994 when 50 countries had rendered their ratification. By Dec. 2007, it had been ratified by 192 countries.

19 UNFCCC 1992, art. 2 notes, “The ultimate objective of this Convention and any related instrument of the Conference of Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas 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.”

20 See *supra* note 13 .

present and future generations of mankind, on the basis of equity and in accordance with their common and differentiated responsibilities and respective capabilities.’ Conspicuously, the developed countries had to ‘take the lead in combating climate change and the adverse effects.’<sup>21</sup>

Even though CBDR comes under the caption ‘principles,’<sup>22</sup> ‘respective capabilities’ add-on clause in UNFCCC was noticed as tilting towards ‘mitigation’ and reducing the significance of historical responsibilities of the developed countries.<sup>23</sup> On the other hand, the first unambiguous adoption of CBDR is said to be reiterated in UNFCCC.<sup>24</sup> CBDR is considered not as a stand-alone concept but as part of a combined concept of CBDRRC, *i.e.*, Common But Differentiated Responsibilities and Respective Capabilities.<sup>25</sup> Nations can work for developing a better climate system only according to their capacities and the conditions available with them within the domestic regime. There is no reason to reduce the importance of CBDR because of the add-on ‘respective capabilities clause’ in the UNFCCC. It goes without saying that one’s responsibilities can be carried out only within one’s capabilities. The ‘add-on clause’ hardly impinge on the extent of a state’s responsibilities. The extra mile of UNFCCC over the Rio concept is not a renunciation of the historical liability of the developed countries. All parties should take into consideration their CBDRs as well as their specific national and regional development priorities, objectives and circumstances in carrying out their commitments.<sup>26</sup>

For the purpose of fixing their responsibilities,<sup>27</sup> UNFCCC categorizes the developed countries as annex I and annex II countries. annex I countries,<sup>28</sup> (41 in number) are

---

21 UNFCCC 1992, Principle 3.1.

22 Art. 3.1 of UNFCCC does not refer to CBDR as a legal principle even though the whole Art. 3 is titled as “Principles”.

23 See the Discussion Paper “Different perspectives on differentiated responsibilities: A state-of-the-art review of the notion of common but differentiated responsibilities in international law”, Discussion Paper 6/2014, 6, German Development Institute, (2014) available at: [https://www.die-gdi.de/uploads/media/DP\\_6.2014..pdf](https://www.die-gdi.de/uploads/media/DP_6.2014..pdf) (last visited on December 30, 2018) (Hereinafter cited as Discussion Paper).

24 Christopher D. Stone, “Common but Differentiated Responsibilities in International Law” 98 *AJIL* 276,279 (2004).

25 Lavanya Rajamani, ‘Differentiation in the Emerging Climate Regime’ 14 *Theor Inq L* at 151, 154,158, (2013). Cited hereafter as Rajamani.

26 UNFCCC 1992, art. 4.1(a) – 4.1(f). They include publication of inventories of emissions, formulation and updating of programs for mitigation of climate change by addressing anthropogenic emissions, cooperation in development programs, including transfer of technology that control anthropogenic emissions, promotion of sustainable development and conservation and adaptation in response to the effects on the climate change impacts. The commitments also extend to exchanging information on several matters.

27 UNFCCC 1992, art. 4.1(a) – (10)

required to limit anthropogenic emissions of GHGs, enhance 'sinks' and to co-ordinate work among themselves for reduction of emissions to 1990 levels. Twenty-four out of the annex I countries, specified as the annex II countries<sup>29</sup> are the major ones responsible for the historic pollution. They should provide the developing countries with finance and costs including those for transfer of technology.<sup>30</sup> They should also meet the specific needs of the developing countries and assist them in adaptation in natural and human systems in response to the effects on the climate change impacts and in transfer of environmentally sound technology.<sup>31</sup>

It was envisaged that the later Conferences of Parties (COPs) shall allow certain degree of flexibility to those annex I countries undergoing transition to market economy<sup>32</sup> in order to enhance their ability to address climate change. The developed countries shall provide funding and transfer of technology to the countries located in ecologically sensitive regions,<sup>33</sup> namely, small islands, states in low-lying, arid, semi-arid or forested areas or those prone to natural disasters or liable to desertification or urban pollution and countries with fragile ecosystems including mountainous regions and landlocked countries. The convention also stipulates that the specific needs of least developed countries (LDCs) should be taken care of.<sup>34</sup>

It cannot be gainsaid that the categorizing the countries and fixing responsibilities are made on the basis of CBDR even though respective capabilities and social and economic

28 *Id.*, art. 4(2) and Annex I. Annex I countries - Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Czechoslovakia, Denmark, Croatia, EEC, Estonia, Finland, France, Germany, Greece, Hungary\*, Iceland, Ireland, Italy, Japan, Latvia\*, Liechtenstein\*, Lithuania\*, Luxembourg, Monaco\*, Netherlands, New Zealand, Norway, Poland\*, Portugal, Romania\*, Russian Federation\*, Slovakia\*, Spain, Sweden, Switzerland, Turkey\*, Ukraine\* United Kingdom and United States are the Annex-I countries.

29 *Ibid.* The countries without \* marks are Annex II countries. Australia, Austria, Belgium, , Canada, Croatia, Denmark, , EEC, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States.

30 *Supra* note 27 art. 4.3.

31 *Id.* art. 4.4.

32 *Supra* note 28. Those with \* marks, and excluded from annex II group, are countries undergoing the process of transition to a market economy. Mostly, these countries belonged to the former Soviet Socialist block. They are Belarus, Bulgaria, Czechoslovakia, Croatia, Estonia, Hungary, Latvia, Liechtenstein, Lithuania, Monaco, Poland, Romania, Russian Federation, Slovakia, Turkey and Ukraine. See Art. 4.6. Later, Kyoto Protocol reiterated this relaxation. See Art. 3.6, Kyoto Protocol.

33 UNFCCC 1992, art. 4.8.

34 *Id.* art. 4.9.

35 *Id.* art. 3.1. It is also mentioned that the developed country Parties should take the lead in

conditions also are considered in support. UNFCCC explicitly mentions that all parties should protect the climate system taking into account their CBDRs and respective capabilities<sup>35</sup> and clearly addresses the equitable principles of international environmental law<sup>36</sup> such as the principles of intergenerational equity,<sup>37</sup> intra-generational equity,<sup>38</sup> precautionary measures<sup>39</sup> and sustainable development.<sup>40</sup> As indicated in the Rio Declaration,<sup>41</sup> a reasonable use of the polluter pays principle would be to impose limitations on emitting GHGs on all major emitters regardless of developmental status. The aforesaid principles in their totality may go to demonstrate the scope and limits of CBDR which had its rise and fall in the conferences of the parties of UNFCCC met almost every year while they examined the experiences in scientific knowledge, promoted measures for better climate and made recommendations necessary for their implementation. Has CBDR proved itself in these proceedings as a fitting and suitable instrument for the nations occupying different levels of development to do away with environmental anarchy?

#### V Ups and Downs of the Concept : Conferences of Parties (COPs)

---

combating climate change and the adverse effects thereof.

- 36 Justin Lee, "Rooting the Concept of Common but Differentiated Responsibilities in Established Principles of International Environmental Law" 27 (17) *Vt.J.Env'tl.L* 41-47(2015)
- 37 *Id.* at 41-42. The efforts in the conference of parties to reduce GHG emissions and to hold up the rising temperature highlight intergenerational equity for the health and comfort of people to live in the planet. Allocation of responsibility must be in a manner that takes into account future generations. developing countries should commit to developing in a manner that will not offset efforts made by developed countries. Also see K.I. Vibhute, "Environment, Present and Future Generations: Intergenerational Equity, Justice and Responsibility" 39 *JILJ* 281 (1997)
- 38 *Id.* at 43-44. Countries most likely to suffer adverse effects of climate change including small island countries, countries with low-lying coastal areas, and those prone to natural disasters, drought and desertification are being given full consideration including funding, insurance and the transfer of technology. See UNFCCC 1992, art. 3(2) and art. 4 (8), (9) and (10),.
- 39 *Id.* at 44-45. The precautionary principle to prevent irreversible damage to the environment is the central condition to guaranteeing the right a habitable planet left for future generations. The interpretation implications on CBDR with regards to responsibility allocation should, thus, be the same limitation as intergenerational equity. See , UNFCCC 1992, art. 3.
- 40 *Id.* at 45-46. With the mandatory consideration of present and future generational needs, exploitation of natural resources is limited, allocation of burdens in addressing environmental problems shall be fair and the integration of the environment and development are the primary objective. Thus, poor developing countries may continue to prioritize development in order to eradicate poverty and grow their economies but must do so sustainably. See also Art. 3.4, UNFCCC.
- 41 The Rio Declaration 1992, Principle 16. For the text see *supra* note15.
- 42 The COP 3 in Kyoto (Dec. 1 to 10, 1997).

The foremost attempt to evolve a global regime to stabilize GHG emissions with common but differential responsibilities is found in the Kyoto Protocol of 1997<sup>42</sup> of UNFCCC. The crux of conference deliberations is found in the provision<sup>43</sup> that asks the developed countries<sup>44</sup> to ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of GHGs<sup>45</sup> do not exceed their assigned amounts calculated pursuant to their quantified emission limitation and reduction commitments<sup>46</sup> with a view to reducing the overall emissions to 5% less of the 1990 level by the period 2008-2012. For meeting these targets, the protocol formulated several strategies.<sup>47</sup> They include joint implementation and cooperation among Annex I countries for reduction of emission,<sup>48</sup> a clean development mechanism (CDM) by funding certified projects in developing countries to achieve sustainable development, thereby helping annex I countries to reach targets<sup>49</sup> and an emission trading device among the developed countries to fulfil their commitments.<sup>50</sup> Some of the developed countries<sup>51</sup> were not willing to approve Kyoto Protocol saying that differentiation in liabilities between the annex I and non-annex countries on the basis of historical emissions was unacceptable.

---

43 The Kyoto Protocol of UNFCCC 1997, Art. 3.1.

44 *Ibid.* The assurances were to be given by 39 out of the 41 State Parties of Annex I UNFCCC (excluding Belarus and Turkey). They were listed in annex B to Kyoto Protocol with their stipulated targets of quantified emission limitations or reduction commitment. For the UNFCCC annex 1 countries, see *supra* note 27.

45 Carbon dioxide (CO<sub>2</sub>), Methane (CH<sub>4</sub>), Nitrous oxide (N<sub>2</sub>O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs) and Sulphur hexafluoride (SF<sub>6</sub>). Energy, fuel combustion, industrial processes, solvent and other product use, agriculture and waste are also noted as other sectors/source categories, see of Kyoto Protocol of UNFCCC 1997, annex A.

46 *Ibid.* Further annex B to the protocol also specifies the quantified emission limitation or the reduction commitment against each of the 39 countries.

47 The Kyoto Protocol to the UNFCCC 1997, art. 3.3. The net changes in GHG emissions by sources and removals by sinks resulting from direct human-induced change in land-use and forestry activities limited to afforestation, reforestation and deforestation since 1990, measured as verifiable changes in carbon stocks in each commitment period, shall be used to meet the commitments of each developing UNFCCC annex I state party. Those changes resulting from direct human-induced change in land-use and forestry activities limited to afforestation, reforestation and deforestation since 1990 are measured as verifiable changes in carbon stocks in each commitment period.

48 *Id.*, art. 6

49 *Id.*, art. 12.

50 *Id.*, art. 17. In addition to domestically quantified emission limitation and reduction commitments for fulfilling their commitments, the developed countries in Annex B could be engaged in emission trading to fulfil their commitments.

51 For example, the United States. US President Clinton had signed the protocol but the US Congress did not ratify the treaty. Later in 2001, the Bush administration explicitly rejected the protocol.

52 COP 4, Buenos Aires, Argentina (Nov. 1998), adopted a 2-year plan to devise mechanisms to be



Embroiled in intense debates and discussions, later conferences of parties were making their earnest attempts to improve and reconcile the global control over climate imbalance. In the initial conferences, the complexity and difficulty of reaching an agreement seemed insurmountable.<sup>52</sup> The financial assistance for the developing countries to deal with adverse effects was a toilsome task in the conferences. In one of them,<sup>53</sup> the developed countries were allowed to earn eligible carbon credits from use of the flexible mechanisms of Joint Implementation and Clean Development Mechanism (CDM), provided their domestic action met the targets inscribed in annex B of Kyoto Protocol. In another,<sup>54</sup> it was laid down that the developed countries should make their 'efforts' to transfer technology and minimize the impact of climate change on developing countries. Conferences after conferences focussed on adaptation.<sup>55</sup> Could the adaptation funds be used by the developed countries for capacity building and a plan of action made promote them adapt climate change in a better manner?

In the intense international relations of the past, the nations of the world had no major occasion to meet jointly the extra-ordinary problem of climate change. Though they seemed to be groping in the dark for eight years, the state parties had succeeded in getting the required number of parties to ratify<sup>56</sup> the Kyoto Protocol bringing it into force in 2005 in the Montreal conference.<sup>57</sup>

## VI Changing Dimensions of CBDR

---

completed by 2000. COP 5, Bonn (25 Oct. and 5 Nov. 1999), was reduced to a technical meeting reaching no major conclusions. COP 6 in the Hague (13–25 November 2000), failed to reach agreements. COP 6 continued in Bonn, Germany (17–27 July 2001) with the question on giving credits for carbon "sinks" in forests and agricultural lands remaining unsolved.

53 COP 7, Marrakech, Morocco (2001), operational rules and accounting procedures were evolved for the flexibility mechanisms of emissions trading, CDM and joint implementation.

54 COP 8, New Delhi (23 Oct. to 1 Nov. 2002)

55 COP 9 Milan (1–12 Dec. 2003), the use of the Adaptation Fund for capacity-building through technology transfer was adverted to. The problems in COP 10 in Buenos Aires (6–17 December 2004) werelinked with how to promote developing countries adapt to climate change and how to allocate emission reduction obligations following the year 2012 when the first commitment period UNFCCC ended. COP 13 in Bali in 2007 also highlights establishing an Adaptation Fund. COP 12 in Nairobi (6–17 Nov. 2006) had adopted a five-year plan of work to support climate change adaptation by developing countries and agreed on the procedures and modalities for the Adaptation Fundwith improvement of the projects for CDM.

56 As per Kyoto Protocol of UNFCCC 1997, art. 25(1) it came into force when 55 countries, including countries responsible for 55 per cent of the developed world's 1990 carbon dioxide emissions ratified.

57 COP 11/CMP 2, Montreal (28 Nov. and 9 Dec. 2005).

58 COP 13/CMP 3, Bali (3–17 December 2007). The conference drew up a road map for deep

Negotiations are necessary when there is difference of opinion. Later conferences came across a deviation of the bases for negotiations as the commentators described the change as erosion of CBDR and rising trends of parallelism between developed and developing countries in liabilities. The Bali meeting in 2007 advocated a comprehensive process to reach an 'agreed outcome' with a 'shared vision for long-term cooperative action,' particularly, in accordance with the principle of CBDR and respective capabilities taking into account social and economic conditions in addition to launching an action plan to enable implementation of UNFCCC up to and beyond 2012.<sup>58</sup> The plan visualized further that both developed and developing countries would implement "nationally appropriate mitigation actions" voluntarily.<sup>59</sup> Does this vision erode CBDR? Or does it find out new vistas?<sup>60</sup> It is true that in the succeeding year, the conference at Poznan laid down the norm for funding the poorest nations to cope with the effects of climate change.<sup>61</sup> In 2009 at Copenhagen,<sup>62</sup> it was clarified that both developed countries and developing countries were to take pledges for reducing greenhouse gas emissions by 2020.<sup>63</sup> Notably, the major-emitting, emerging economies, like China and India took an active role in Copenhagen. This signals a more nuanced categorization of CBDR which according to the observers on the global climate negotiations, leads to a feasible regime to fight the adverse impact of climate change.<sup>64</sup>

---

cuts in global emissions including reduction on emissions from deforestation and forest degradation (REDD) as well as enhancement of forest carbon stock in developing countries.

59 *Ibid.* Also, Parallel responsibilities are slowly emerging. All developed countries would be making their 'measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives,' while ensuring the comparability of efforts among them, taking into account differences in their national circumstances. At the same time, developing countries were allowed to take 'nationally appropriate mitigation actions in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner'.

60 See *Supra* note 25 at 155-159; Also, *Supra* note 36 at 35.

61 COP 14/CMP 4, Poznan (1–12 Dec. 2008). The conference approved a mechanism to incorporate forest protection into the international efforts to combat climate change.

62 COP 15/CMP 5, Copenhagen (7–18 Dec. 2009). The negotiations were not within the UNFCCC process but a 'collective commitment' was made by the developed countries for new and additional resources and investments through international institutions for the period 2010–2012. It held, "To achieve the ultimate objective of the Convention to stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we shall, recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius, on the basis of equity and in the context of sustainable development, enhance our long-term cooperative action to combat climate change."

63 Forty-two industrialized countries and forty four developing countries submitted their pledges.

64 Mary J. Bortschellor says that going forward at post-Copenhagen conferences, China and the

In the climate meet in Cancun,<sup>65</sup> a year later, the parties reiterated the IPCC Fourth Assessment Report for keeping the global temperature to a maximum of 2°C above the pre-industrial levels in line with the earlier deliberations and called for imperative action to meet the goal. The conference designed the structure of the Green Climate Fund as an operating entity of the financial mechanism of the UNFCCC<sup>66</sup> with \$ 100 billion per annum to help the developing nations adapt the impact of climate change and pursue low-carbon development path. Indisputably, finance plays a key role for mitigation and adaptation in developing countries which as part of CBDR, can flow only from the countries with 'respective capabilities.' Nevertheless, working out the details of funding GCF was still to be cracked. The Cancun conference formally recognised 'pledges' and desired that developing countries would take 'nationally appropriate mitigation actions' (NAMAs) in the context of sustainable development.<sup>67</sup> Pledges made by several developing nations for emission reduction lead to a conclusion that the contours of CBDR principle are changing.<sup>68</sup> One may consider the change inevitable for safeguarding the globe and its inhabitants as the parties shared a vision for a 'long-term co-operative action' towards the convention goal on the basis of equity and in accordance with CBDRs and respective capabilities.

The Durban Conference<sup>69</sup> in 2011 was not far behind. It attempted to strengthen the multilateral, rules-based, UNFCCC regime in fulfilling its ultimate objective with an implicit recognition of CBDR specified in the Convention.<sup>70</sup> On a plea for a binding

---

rest of the world must re-examine the current interpretation of CBDR, and realize that a more nuanced categorization model is necessary. See Mary J. Bortschellor, "Equitable But Ineffective: How the Principle of Common But Differentiated Responsibility Hobbled the Global Fight against Climate Change", 49(10) *Sustainable Dev. L. & Pol'y*, 53 (2010).

65 COP 16/CMP 6, Cancun (28 November to 10 December 2010). The main worry of the conference was about possible efforts to bring down the average temperature below 1.5°C as desired by vulnerable developing countries. Greenhouse gas emissions should peak as soon as possible but the time frame for peaking will be longer in developing countries, since social and economic development and poverty eradication are the first and overriding priorities of developing countries. The emissions shall slow down subsequently. This idea was later incorporated in the Paris Pact.

66 UNFCCC 1992, art.11. The financial mechanism with resources on a grant or concessional basis, including the transfer of technology shall be provided. It shall function under the guidance of, and be accountable to, COPs, which shall decide on its policies, programme priorities and eligibility criteria related to the Convention.

67 *Supra* note 65, The sustainable development that is supported and enabled by technology, financing and capacity-building, aimed at achieving a deviation in emissions relative to "business as usual" emissions in 2020.

68 *Supra* note 36 at, 35-36 (2015).

69 COP 17 Durban (28 Nov. to 9 Dec. 2011). The convention designed management framework for GCF. However, scientists and environmental groups warned that the GCF was not sufficient to avoid global warming beyond 2 °C as more urgent action is needed.

70 *Supra*, note 36 at 36.

agreement,<sup>71</sup> the conference established an Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) which would have a new round of negotiations aimed at developing “a protocol, another legal instrument or an agreed outcome with legal force.”<sup>72</sup> A time table for adopting this agreement by 2015 was drawn up in 2012 in the Doha Conference<sup>73</sup> where certain developed countries expressed reluctance to reduce the emissions on the ground that the fast developing countries were not subject to emissions control. The conference is also known for its direction to countries failing to curb their carbon emissions to financially compensate the countries vulnerable to climate change in future by accepting CBDR and respective capabilities, social and economic conditions and other relevant factors.<sup>74</sup> The Warsaw Conference<sup>75</sup> in 2013 also strikes a *de facto* differentiation, though it avoids explicit terms such as CBDR or equity.<sup>76</sup> The developed countries were urged to implement their reduction targets and augment the mitigation ambition of developing countries by sharing technology, finance and capacity-building support. On the other hand, the developing countries were asked only to implement their nationally appropriate mitigation action for attaining sustainable development with the support of technology, finance and capacity-building thus shared. Warsaw reiterated the work done on the Durban Platform (ADP) and looked forward to an ambitious agreement in 2015 in the conference of parties in Paris.<sup>77</sup>

Strategically mooted by a few developed countries, the concept of differentiation in

---

71 Brazil, China, India, Small Island developing states (SIDS) and the European Union pleaded for a binding agreement.

72 A work plan was also launched to explore the options for closing the ambition gaps with a view to ensuring the highest possible mitigation efforts by all parties.

73 COP 18/CMP 8, Doha (26 Nov. to 7 Dec. 2012). Japan, Russia, Belarus, Ukraine, New Zealand, the United States and Canada were unwilling to limit to 15% of the global carbon dioxide emissions on the ground that developing countries like China (the world's largest emitter of the time), India and Brazil were not subject to any emissions reductions under the Kyoto Protocol.

74 *Supra* note 36 at 37.

75 COP 19/CMP 9, Warsaw (11 to 23 Nov. 2013). The developed countries were urged to implement their reduction targets and augment the mitigation ambition of developing countries by sharing technology, finance and capacity-building support. On the other hand, the developing countries were asked only to implement their nationally appropriate mitigation action for attaining sustainable development with the support of technology, finance and capacity-building thus shared.

76 *Supra* note 23 at 17.

77 In between, the conference in Lima in 2014 worried over how to fill the existing gap between the aggregate effect of mitigation pledges and the aggregate emission pathways for holding up global average temperature increase below 2°C or 1.5 °C above pre-industrial levels. COP 20/CMP 10, Lima (1–12 Dec. 2014).

78 *Supra* note 25 at 151, 170. For the changes in the words and phrases used in COPs, see *supra*,

CBDR slowly and gradually passed on to new dimensions, even to a close parity between the developed and the fast-growing countries for liability for climate change. This parallelism is said to have unfairly limited the legitimate aspirations of the developing world.<sup>78</sup> Going through the conferences replete with declarations of voluntary emission reductions, it is a matter of joy and cheer for the climate watchers if the new scenario of liabilities reflects unity and comity of the nations for getting a safer and more comfortable planet to live in. The journey towards for achieving equality between the developed and fast developing countries is tedious, but it is essential to maintain the felt needs of a planet striving for healthier climate.

### VII Light at the End of the Tunnel

The strenuous climate negotiations for more than a couple of decades reached a remarkable landmark towards “climate justice” on the basis of equity, CBDR and respective capabilities at Paris in 2015.<sup>79</sup> The most outstanding resolution of the conference is that the States will voluntarily cut emissions through intended “nationally determined contributions” (NDCs) allowing individual countries to peak their greenhouse gas emissions for some time and then to reduce them – a scheme to achieve sustainable development and poverty eradication.<sup>80</sup> Peaking will take longer for developing countries which should undertake rapid reductions thereafter in the second half of this century in accordance with best available science to achieve a balance between anthropogenic emissions and removal of greenhouse gases.<sup>81</sup> Needless to say, that the NDCs echo a new phase of CBDR and respective capabilities that encompass the developing countries, thus reflecting the responsibilities of all parties to formulate and communicate long-term low emission development strategies in the light of different national circumstances.<sup>82</sup> Enhancement of sinks and reservoirs of greenhouse gases do have their own functions. Forests as sinks of GHGs help reduce environmental

---

notes 58- 63 , 67-68, 76 .

79 The Paris agreement , Preamble and art. 2.2, 4.3 and 4.19. COP 21/CMP 11, Paris (30 Nov. – 12 Dec. 2015).

80 *Id.* art. 3-5. In order to achieve the long-term temperature goal, the agreement aims to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and that they undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.(Article 3.1)

81 *Ibid.*

82 *Id.*, art. 4.3 and 4.19. Parties recognize the importance of integrated, holistic and balanced non-market approaches in the implementation of their nationally determined contributions, in the context of sustainable development and poverty eradication.

83 *Id.*, art. 5.

damage from deforestation and forest degradation. Conservation and sustainable management of forests result in enhancement of forest carbon stocks in developing countries. Laying emphasis on these functions, parties are encouraged to implement activities relating to reducing emissions from deforestation and forest degradation.<sup>83</sup>

The Paris Pact shall be a global challenge for a gender-responsive, participatory and fully transparent adaptation action to protect people, livelihood and ecosystems, in view of the urgent needs of adaptation, strengthening resilience and reducing vulnerability to climate change.<sup>84</sup> Developed countries shall provide financial resources to assist developing countries under UNFCCC obligations and take the lead in mobilizing climate finance from a wide variety of sources.<sup>85</sup> Thus, Paris strengthened the previous proposals for GCF with \$100 billion to be implemented per year by 2020. The world has to maintain the momentum on climate finance for mitigation and adaptation in so far as a funding is crucial for poorer countries that may find it difficult to cope with extreme weather and sharp variations in food production caused by climatic imbalances. For, effective action against climate change decisions were taken also to capacity-building of developing countries, in particular, the least developed countries and those vulnerable to the adverse effects of climate change, such as small island-developing states.<sup>86</sup> An expert, facilitative, transparent, non-adversarial and non-punitive mechanism will enable implementation of, and promote compliance with, the provisions of the agreement. It was resolved also COPs shall keep Paris Agreement under regular review and shall make, within its mandate, decisions necessary to promote its effective implementation.<sup>87</sup>

No doubt, a free, unbiased and objective approach helps world nations in finding tangible solutions to the wide-ranging problems discussed and digested over the years. Countries come closer. Goodwill, pragmatism and the need for cooperation prevail over them when they decide to switch over to renewable energy for climate-proofing and climate resilience. Emission of GHGs shall be limited if future regimes take particular care to see that the natural sinks such as trees, soil and oceans absorb them in course of time. The Paris Agreement received support from all around the world.<sup>88</sup>

---

84 *Id.*, art. 7.1, 7.2, 7.4 and 7.5.

85 *Id.*, art. 9.1 and 9.2

86 *Id.*, art. 11

87 *Id.*, art. 14, 15 and 16. Periodical stock take of the implementation is to be made. COPs shall keep Paris Agreement under regular review and shall make, within its mandate, decisions necessary to promote its effective implementation.

88 It is reported that many individual states and cities in the U.S., the European Union and China,

Underpinning the UN climate framework and casting a duty on the industrial powers to mitigate the impact on climate change, CBDR has been growing to its new frontiers as the annual conferences of parties proceeded. Declaration of the intended nationally determined mitigation strategies indicates its recent growth. Without staking the national interests to development, some of the fast growing countries came forward to assure compliance with the resolutions of the Paris conference and its commitments.<sup>89</sup> Propagation of a healthy and sustainable way of living and adoption of a climate-friendly development route are attempts at such commitments.<sup>90</sup> To meet the Paris goals, a few nations focus their pledges on renewable energy.<sup>91</sup> They support formation of the International Solar Alliance (ISA),<sup>92</sup> a revolutionary and need based attempt to have collective use of solar energy. The alliance of more than 121 countries, most of them being 'sunshine' countries, lying between the Tropic of Cancer and the Tropic of Capricorn, may attract also countries that do not fall within the Tropics that can enjoy all benefits as other members.

---

which together represent a good deal of man-made emissions, now effectively lead the effort to cut greenhouse gases. 'We need Paris,' Editorial, *The Hindu* (June 3, 2017).

- 89 Niklas Höhne, *et.al.* "Action by China and India slows emissions growth, President Trump's Policies likely to Cause US Emissions to Flatten Climate Action Tracker Update", available at [https://climateanalytics.org/media/cat\\_2017-05-15\\_briefing\\_india-china-usa.pdf](https://climateanalytics.org/media/cat_2017-05-15_briefing_india-china-usa.pdf) (Last visited on Nov. 26, 2018).
- 90 The path is made by reducing emission intensity of its GDP by 33-35% by 2030 from that in 2005. See, Government of India, *India's Intended Nationally Determined Contribution: Working Towards Climate Justice*, (UNFCCC.int, 2015). <http://www4.unfccc.int/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf>. (Last visited on Dec. 24, 2018)
- 91 The Government of India, for example, resolved to generate electric power from non-fossil-fuel power, create carbon sink of 2.5 to 3 billion tons of carbon dioxide by additional forest and tree cover, adapt to climate change by enhancing investments in development programmes in sectors vulnerable to climate change such as agriculture, Himalayan and coastal regions, mobilize domestic funds from developed countries and to create framework for diffusion of modern climate technology for the future. These changes shall be achieved by 2030. See, available at : <https://www.nrdc.org/sites/default/files/paris-climate-conference-India-IB.pdf>. (Last visited on Nov. 23, 2018).
- 92 The International Solar Alliance (ISA) opened for signatures in Marrakech, Morocco in Nov. 2016, on the side-lines of the Marrakech Climate Change Conference (COP 22), is an alliance of more than 121 countries, most of them being 'sunshine' countries, lying either completely or partly between the Tropic of Cancer and the Tropic of Capricorn. The alliance is a treaty-based inter-governmental organization. Countries that do not fall within the Tropics can join the alliance and enjoy all benefits as other members, with the exception of voting rights available at [https://ipfs.io/ipfs/QmXoyvizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXW66uco/wiki/International\\_Solar\\_Alliance.html](https://ipfs.io/ipfs/QmXoyvizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXW66uco/wiki/International_Solar_Alliance.html) (Last visited on Dec. 20, 2018)

### VIII Erosion of CBDR or Welcome Change?

As highlighted early,<sup>93</sup> CBDR raises issues relating to inter-generational and intra-generational fairness on historical commitments and liability<sup>94</sup> and it evidently plays a considerable role in meeting them. It compelled the privileged rich countries to account for the harm done by them to the climate system, put technology and finance to a green economy towards sustainable development, led the way for a just and safe future and brought all nations as actors on the world stage.<sup>95</sup> When developed countries, the past occupants of two-thirds of carbon space allow room for others to grow by providing necessary finance and technology, the world situation changes fast enabling some of the developing countries move towards a greener economy and play their role in moulding an ambient climate in the planet. Such a progress towards climate equilibrium is essential to safeguard the rights of the most vulnerable peoples, oblige the nations to share the impact of climate change equitably and fairly and to set up an unbiased and judicious stewardship of the world's resources.

CBDR in its new incarnation is a sure guide and an inclusive mechanism not only for drawing responsibilities from the fast-growing developing countries within their respective capabilities but also for motivating international agreement of domestic commitments of all nations whether they are developing or developed.<sup>96</sup> It had its direct or indirect impact in all facets of negotiations, such as giving aid to or sharing technology with developing countries, encouraging maintenance of sinks for carbon absorption, adopting market mechanisms of carbon trading, resorting to adaptation and resilience methods or framing and recasting forest policies within a country. The prophecy<sup>97</sup> on its eve that Paris Conference would base CBDR to hammer out a hopefully ambitious new deal to stabilize the planet's climate seems to have come true. One also may not be oblivious to the proposal in the past to amend Kyoto protocol for graduating the fast-developing countries as 'Annex C' parties with commitments and liabilities.<sup>98</sup> The

93 *Supra* notes 36 - 40.

94 This is explicit in Principle 7 of the Rio Declaration and is the basis for the differentiated obligations contained in the UNFCCC and the Kyoto Protocol. Edith Brown, "Common but Differentiated Responsibilities in Perspective", 96 *American Society of International Law Proceedings* 366, 368 (2002)

95 See Anam Soormro, "Climate Change, Migration and Environmental Justice" in Usha Tandon, (ed.), *Climate Change, Law, policy and Government* 222, 234 (Eastern, 2016).

96 See Shabnam, "Revisiting the No-responsibility for Climate Change under Common but Differentiated Responsibility" in *id.* at 31, 44, 45.

97 *Supra* note 36 at 38.

98 Anita M. Halvorsen, "Common, but Differentiated Commitments in the Future Climate Change Regime Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund," 18 *Colo. J. Int'l Envtl. L. & Pol'y.*, 247- 264 (2007) .



suggestion might have been looked down upon then but a incisive observer would endorse the change finding out some glaring disparities UNFCCC classification annex and non-annex countries.<sup>99</sup> Lack of correct perception for classifying nations as developed and developing at the time of UNFCCC was perhaps a restraint on the implementation of CBDR principle in its full vigour to reflect greater equity and better outcome for the global environment. The developed-developing dichotomy for measuring historical emissions and imposing liability was said to have created another inequality of retaining the fast-developing countries still in the group of non-advanced countries with fewer liabilities.<sup>100</sup> A study on the liability puzzle suggests that annex 1 countries have not yet lived up to their promises and time has come for the fast growing non-annex developing countries with increasing emissions to commit themselves to emission reduction, protect the earth from climate chaos and to establish the equity principles among themselves.<sup>101</sup> The exclusive contours of CBDR in the standards of development and causes of GHG emissions of the past may not fully help formulate a climate regime for the present times as during the decades of climate negotiations unprecedented and quicker industrial growth have been pursued by some of the countries not hitherto regarded as developed ones under UNFCCC. A re-vamping of the concept of CBDR adding new dimensions of responsibilities for the frontline

---

99 A number of 'really' developed countries receive preferential treatment as they are not annexed but are deemed developing countries under UNFCCC. The OPEC countries with high development indexes (HDIs) are not annexed. Small Island States like Singapore, Bahamas, Antigua and Barbuda, and Trinidad and Tobago, who are very rich with high annual per capita emissions and high HDIs and other islands that are very poor, are placed in the same category. Mexico and the Republic of Korea, now members of the OECD still claim developing status. Cyprus and Malta, EU member States in 2004 remain as non-advanced. There are inconsistencies between the developing and least developed categories. The Maldives, currently classified as an LDC, but with a higher income per capita and HDI ranking than India, is still in the category of developing countries. See Rachel Boyte, "Common but Differentiated Responsibilities: Adjusting the 'Developing'/'Developed' Dichotomy in International Environmental Law", 14 *NZJ Emvtl. L.*, 63, 84-85 (2010).

100 *Id.*, at 100, 101. Justin Lee says that CBDR does not regulate sizeable, emerging (but still "developing") economies like Brazil, South Africa, India, and China (collectively referred to as "BASIC") all of which are now among the world's largest GHG polluters still excluded from liabilities. See, also, *supra* note 36 at 30.

101 Parikh, Litul Baruah, "Common but Differentiated Responsibilities among non-annex I Countries of UNFCCC" 47 *EPW*, 67, 70-71, (2012). The study classifies the group of 20 countries capable of reducing their emissions along with developed countries. The group includes East Asian countries like China, Taipei, Korea and Malaysia and restructuring economies like Kazakhstan, Serbia, Turkmenistan, Uzbekistan and South Africa. Compared to the other developing countries, they are the countries with higher level of GDP, higher foreign exchange benefits and higher technological abilities.

developing countries put forward several times in the past<sup>102</sup> is nearing fulfilment with the acceptance of voluntary submissions of INDCs of all countries reflecting their respective capabilities for cooperation in the numerous fields of climate control.

With an innovative dialogue,<sup>103</sup> the UNFCCC negotiations entered into a new stage of a global coalition of actors. and introduced the practice of taking stock of the progress on collective efforts for achieving Paris goals.<sup>104</sup> This dialogue facilitates state parties, national and sub-national governments, private sector companies, the investment community, civil society and all other non-party stakeholders to have their initiatives and play their due role for meeting the climate change challenge and supplementing the climate actions taken so far. The private sector leaders, the drivers of change, can work and contribute in many ways to restore the climate; the business community go ahead establishing technology and science-based targets and transition plans; the civil society marshal the public and political general will in pursuit of the goals; and the spiritual leaders can help their followers reconnect with the wonders of nature and creation, nurture love for the planet and foster compassion and reconciliation.<sup>105</sup> The private and non-state actors taking up their role of meeting the challenge, CBDR extends its influence into new areas rendering equal importance to both respective capabilities and differentiated responsibilities as the concept of respective capabilities rules out neither equality nor differentiation.

One may not forget also the specific provision in the Paris Agreement for the developing countries to peak emissions for a longer period than that allowed for developed countries for achieving ‘sustainable development.’<sup>106</sup> Perhaps this may be the finest moment for developing countries and it shows another contour of the differentiation principle. Free and mutual understanding of the capabilities and deficiencies, participatory

---

102 *Supra* note 23 at 50-54.

103 A Fijian expression *Talanoa* reflects an inclusive, participatory and transparent dialogue sharing stories, building empathy and making wise decisions for the collective good. Sharing of ideas, skills and experience through storytelling, the *Talanoa* concept fosters stability and inclusiveness in dialogue, by creating a safe space that embraces mutual respect for a platform for decision making for a greater good. <https://unfccc.int/topics/2018-talanoa-dialogue-platform> (Last visited on January 03, 2019).

104 The Presidents of conferences in Marrakech (COP22, 7-18, Nov. 2016) and in Bonn (COP23, 6-17, Nov. 2017) were the designers of *Talanoa* Dialogue for facilitating an effective implementation of Paris Pact, available at: <https://unfccc.int/sites/default/files/resource/Talanoa%20Call%20for%20Action.pdf>. (Last visited on January 3, 2019.)

105 *Ibid.* Reminding that time is running out, the presidents concluded, “We call upon everyone to act with urgency and recognize that we are in a race against time – we must act now to ensure sustainable development and the preservation of life on earth as we know it.”

106 *Supra* note 80.

interaction among world nations for a just and equitable share of benefits and burdens and protection of human rights and right to development are a *sine quo non* for achieving climate justice, especially to keep the increase of temperature well below 2° centigrade over the pre-industrial levels. Often this truth is forgotten.<sup>107</sup> The fund earmarked for climate retrieval is stated to be much less than the annual global military spending.<sup>108</sup> The world cannot afford to forget the eternal truth, as the journey towards climate justice, though tiring and with several roadblocks, shall never go off the track as the Damocles' sword hanging on its head and as the people are fully aware of the dire consequences and total chaos if the climate scenario goes from bad to worse.

### IX CBDR – A living doctrine

Criticism is also levelled against negotiations pointing out that the pledges are only promises not firm commitments and hence not binding in international law, and that voluntary caps on emissions with no guidance seem to be insufficient mandate. Though non-binding soft law,<sup>109</sup> norms embodied in resolutions, declarations, statements, principles, objectives, guidelines and action plans formulated at international environmental forums, especially, to check climate woes whose impact directly affects every nation alike, do not afford the states to leave gaps in their enforcement. The emergency for cooperative efforts to save the planet being critical there is an obvious compulsion to respect and implement the environmental norms accepted at the transnational level. Even states which do not ratify the climate convention and protocols participate in the conferences of parties as observers and influence the course of discussions.<sup>110</sup> The dissenters cannot go on shutting their eyes for long to the views of

---

107 Justin Lee observes, “Our de facto global goal has been to keep the increase in the planet’s temperatures below two degrees Celsius-beyond which change, a dangerous impact on humans is expected. However, all international attempts to date have fallen short of securing a toward limiting global temperatures below the two degrees goal.” See, *Supra* note 36 at 28.

108 It is pointed out that the Green Clean Fund of \$100bn is under 8% of the annual global military spending and that Scientists and environmentalists warned this fund insufficient to avoid global warming which has increased beyond 2°C. See COP 17 Durban, South Africa, 28 Nov. to 9 Dec. 2011.

109 “It is sometimes argued more generally that particular non-binding instruments or documents or non-binding provisions in treaties form a special category that may be termed as ‘soft law’.” Malcolm N. Shaw, *International Law* 87 ( Cambridge University Press, Cambridge, 8th edn., 2017) .

110 For example, the US had walked out of the Kyoto Protocol but had been associating with the conferences as an observer. Throughout they were pleading that there should not be two distinct categories of countries having different responsibility and that the differentiation instead should be according to the circumstances, abilities and responsibilities of the states and not on a group of countries taking a more dominant responsibility. One can hardly dispense with the plea while the scenario of the fast-developing nations has emerged. The US had to meet a new and different experience in Paris.

the public within and outside their country. Enlightened world opinion is always a stimulus for formulation of the law of nations. The totality of global security and protection, prevention of rise in global temperature and its horrible consequences and the continued existence of life on earth, require more attention and immediate action on climate change than on any other issue of transnational dimensions. The apprehension in the past that UNFCCC would reach a stalemate or collapse while the world would continue to warm<sup>111</sup> seems to be out of place as now it is so evident that declaration of their INDCs goes a long way to iron out the differences among the countries of the world, developed and developing, rich and the poor and that the Paris Agreement sounds a different note of consensus at global level with the hope of eliminating a dangerous future. It is interesting to note that some dissenters who abandoned the pact had built up a domestic regime for environment protection long before the climate problem was detected as incurring international repercussions or even before the world environmental consciousness aroused by the Stockholm conference in 1972.<sup>112</sup> One cannot close one's eyes on the acknowledged scientific predictions on carbon emission impact as the industry all the world over is getting convinced of the realities of the present times to go for green innovations. Every successive year is becoming hotter than the previous one, and glaciers in the north and south poles, which control sea levels, have started melting out. In this global scenario the major polluters do have a responsibility to mitigate the woes instead of creating obstacles in the way, especially while the major developing countries have already declared their nationally agreed contributions. This demonstrates that CBDR is a living doctrine capable of adjusting itself to the changing situations and a reliable weapon for saving the present and succeeding generations from the climate calamity. In the present globalized world, states, big or small, developed or developing, rich or poor, are interdependent on various zones of actions.<sup>113</sup> CBDR has application in all those

---

111 Christopher D. Stone, "Common but Differentiated Responsibilities in International Law" 98 *Am. J. Int'l L.*, 276 (2004).

112 The United State is the forerunner bringing environmental regimes domestically within the country even before the Stockholm Conference on Human Environment in 1972 aroused world consciousness for protecting and improving the environment. The National Environmental Policy Act 1969 (NEPA) insisting for environment impact assessment, is a pioneering pre-Stockholm legislation in the US and acts as model EIA process for other countries.

113 Decolonization, end of the cold war, disintegration of European hegemony and increasing representation of new and developing countries in the world organizations are the very factors that led to a new globalized world where states, big or small, became interdependent on various areas of interaction. Philippe Cullet, "Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations" 10 *EJIL* 549 (1999)

areas where solving of the issues may benefit from collective actions ranging from maintenance of peace and control of terrorism to regulation of epidemics and trade; it does so very much when the urgent need to repair global environment arises.<sup>114</sup> Common but differentiated responsibilities and respective capabilities have developed as part of principle of equity. Hence, all countries have to cooperate in combating climate change and its impact and in moulding an international climate regime for the sake of mankind. The gains of the significant developments towards ambitioning for a healthy and balanced climate are to be protected by each country, without any distinction in the level of development or in geographical location, by keeping and strengthening its own domestic environmental administration in tact.

---

114 *Id.* at 276, 299.