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“PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITY: Assessing its Legal Status and Implementation after thirty Years of UNFCCC”

Usha Tandon* & Amrendra Kumar*

[Abstract: Global climate change legal regime has witnessed remarkable progress till date with the United Nations Framework Convention on Climate Change (UNFCCC) and its other related legal instruments in its achievement of emission reduction targets reducing greenhouse gas (GHGs). With due course of time, there has been substantial shift in the global climate commitment and governance, specifically on the principle of common but differentiated responsibility (CBDR). Instead of adopting more ambitious and time framed emission reduction targets, developed nations are contesting this established principle of CBDR in changing paradigm. Several contestations and contradictions have emerged between developed and developing nations for development and implementation of the principle of CBDR during the journey of thirty years of UNFCCC. In view of this, this article analysis the legal status and implementation of principle of CBDR under UNFCCC since last thirty years. The article in its central parts deals with principle of CBDR, its progressive development under UNFCCC legal regime and critical assessment on its implementation in last thirty years].

Keywords: *Global Climate Change Governance, Global Climate Change Commitment, Global Climate Change Negotiations, Common but Differentiated Responsibility.*

I

Introduction

Since the year 1992, the global climate change legal regime has witnessed remarkable progress in its achievement of emission reduction targets to reduce the greenhouse gases (GHGs). The global legal regime on combating the climate change has taken shape with

* Senor Professor, Campus Law Center, Faculty of Law, University of Delhi, Delhi

* Assistant Professor (Senior Scale), Law Center-II, Faculty of Law, University of Delhi, Delhi.

'the core legal instruments of the United Nation Framework Convention on Climate Change (1992), its Kyoto Protocol (1997), and Paris Agreement (2015).'¹The periodical negotiations also takes place in its Conference of Parties (COP) meeting to intensify the domestic commitments and measures among the member nations under the principle of common but differentiated responsibility (CBDR). Interestingly, there has been substantial shift in compliance of the global climate commitment accorded to develop and developing countries specifically on the principle of CBDR.² The differentiation of duties and responsibilities of member countries is the key component of global climate governance based on socio-economic conditions and fairness concerns among them. Instead of adopting more ambitious commitments and time framed emission reduction of GHGs, developed countries are contesting the established norms and principles of global climate change regime specifically principle of CBDR. Recent commitments adopted in the Paris Agreement clearly shows that 'binding targets and time limits for emission reduction have been out of symmetry in climate negotiations between developed and developing countries especially for new post-2020 climate legal regime.'³ Even post-2020 UNFCCC COP meetings held in Madrid (2019), Glasgow (2021) and Sherm el-Sheikh (2022) did not addressed adequately the concerns and commitments as assigned to the developed countries towards developing countries on the vital matters such as finance, technology transfer, loss and damage fund and others for combating the adverse impact of climate change.

¹UN Framework Convention on Climate Change 31 ILM, 568 (1992), (April 5, 2023, 11.05 AM) available at: http://www.unfccc.int/essential_background/convention/6026.php; Kyoto Protocol to the UN Framework Convention on Climate Change, 1997, ILM, Vol. 37 (1998); (April 5, 2023, 11.10 AM) available at: http://www.unfccc.int/key_documents/kyoto_protocol/items/6445.php; The Paris Agreement under UN Framework Convention on Climate Change, UNFCCC/CP/2015/10/Add.1 (May, 2015), (April 5, 2023, 11.20 AM) also available at: <https://unfccc.int/sites/default/files/resource/parisagreement.pdf>

² Jeffrey McGee and Jens Steffek, 'The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law,' 28, *Journal of Environmental Law*, 37(2016)

³*Ibid* at p.40

Consequently, there has been found new tension or contestation between developed and developing countries on the principle of CBDR which needs to be examined on its existence of thirty years under UNFCCC legal regime. In view of this, legal status and implementation of the principle of CBDR has been examined for GHGs emission mitigation and adaptation since last thirty years. The paper proposes that concerted and coordinated cooperation among the developing nations would essentially help in effective compliance and implementation of the principle of CBDR in post-2020 UNFCCC legal regime. For this purpose, the article in its central parts deals with principle of CBDR under UNFCCC legal regime, its progressive development and implementation among the member nations since last thirty year, and its critical assessment for future pathways for this new decade and beyond.

II

Principle of Common but Differentiated Responsibility: The Foundation of Global Climate Change Legal Regime

Climate Change though emerged initially as an environmental problem now impinges commonly to every human life affecting the internal and international peace and security. Climate change as such poses unprecedented challenges impacting different nations differently depending upon their geographical location, economic development and social advancement.⁴ Though, global climate change negotiations among the nations are going since decades. There has been changing paradigm on the responsibility and liability with regard to shared commitments to mitigate the adverse effects of climate change by binding GHGs emissions reductions. For the shared responsibility, the principle of common but differentiated responsibility was adopted in the United Nations Framework Convention on Climate Change (UNFCCC) dealing with obligations and responsibilities for emission reduction of greenhouse gases in United

⁴ Amrendra Kumar, 'Mitigation of Climate Change: Exploring Laws and Policies of India and China in Changing Paradigm' in Usha Tandon et. al. (ed.), *Climate Change: Law, Policy and Governance*, p.77 (Eastern Book Company, 2015)

Nations Conference on Environment and Development (UNCED) held as 'Earth Summit' in Rio de Janeiro, Brazil.⁵

It acknowledged the adverse effect of climate change by stating that 'the Earth's Climate Change and its adverse effects are common concern of mankind'. Its preamble proclaims that it is the 'human activities which substantially increased atmospheric concentrations of greenhouse gases' and 'the largest share of historical emissions originated from developed countries.'⁶ Not only this, preamble reminds the developed countries to take immediate action in flexible manner to reduce the GHGs emissions based on relevant scientific, technical and economic considerations. The basic objective of this convention has been 'the stabilization of greenhouse gas concentration 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...'⁷To achieve this objective and to implement the provisions, the member nations have to be guided by several principles such as precautionary principle, principle of sustainable development, principle of cooperation and principle of equity including principle of common but differentiated responsibility.

Its Article 3 clearly states that:

'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 the adverse effects thereof.'⁸ (*Emphasis added*)

⁵ United Nations Conference on Environment and Development (UNCED), Rio Declaration on Environment and Development, A/CONF/151/26 (June 14, 1992); (April 6, 2023, 10.20 AM) available at: <https://www.un.org/en/conferences/environment/rio1992.html>

⁶ UNFCCC, *Supra* note 1, Preamble

⁷*Ibid*, UNFCCC, art. 2

⁸*Id.* UNFCCC, art. 3

Such notion has also been outlined in the Rio Declaration in its Principle 7 that:

‘States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. *In view of the different contributions to global environment degradation, States have common but differentiated responsibilities.* The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command’.⁹(*Emphasis added*)

This principle of common but differentiated responsibility has evolved from the concept of ‘common heritage of mankind’ and ‘equitable obligations’ as explained in international law. This principle firmly recognizes ‘the historical differences in the contributions of developed and developing countries to global environmental problems and differences in their respective economic and technical capacity to tackle these problems.’¹⁰ Hence, it includes first the ‘common’ responsibility of all nations to protect the environment or atmosphere at national, regional and global levels; secondly, accords ‘differentiated’ responsibilities to developed countries only on the basis of their historical contributions, economic capacities and political positions.¹¹ In other words, all the nations have common responsibilities to protect the environment and to combat the climate change, but due to different political, economic, social and geographical situations, there have been accorded different responsibilities among them. The ‘differentiated responsibilities’, ‘respective capabilities’ and ‘equity’ herein mean that the responsibility for national measures should be differentiated between developing nations and developed nations. This principle maintains core element of equity by

⁹ Rio Declaration 1992, *Supra* note 5, Principle 7

¹⁰ CISDL, ‘The Principle of Common but Differential Responsibilities: Origin and Scope’, Legal Brief for the World Summit on Sustainable Development (2002); (April 6, 2023, 10.30 AM) available at: <https://www.cisd.org/category/publications/sdg-13/CBDR.pdf>

¹¹*Ibid.*

placing more and urgent responsibility to developed countries due to their historical contribution to global problem of climate change.

In accordance with this principle, the member countries are given common commitments to take specific measures in their domestic jurisdiction through national development policies, priorities, and circumstances to combat the adverse effects of climate change.¹² Besides this, the convention demands all the member nations to adopt precautionary measures to prevent or minimize the cause of climate change and mitigate its adverse effects within time frame given. Herein, the developed country Parties have been specifically asked to take 'lead' in combating the adverse effects of climate change through continuous readiness to take the necessary measures on the basis of legally binding obligations. The convention requires all developed nations and other nations as listed in Annex I to commit themselves specifically as:

'...to adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer term trends in anthropogenic emissions consistent with the objective of the Convention...'¹³

In compliance to this end, they are also required to communicate detailed information on its policies and measures reducing anthropogenic emissions by sources and removal by sinks of GHGs. It imposes the duties to all developed nations to take measures in their domestic jurisdiction to reduce the green house gas emissions to 1990 levels till the period year 2000.¹⁴ The detail information submitted by them is reviewed by the Conference of Parties in the light of the best available scientific information and assessment on climate change and its impacts. After this, the Conference of Parties has

¹² UNFCCC, *Supra* note 1, art. 4(1)

¹³ *Ibid*, art. 4 (2)

¹⁴ *Id.*

the power to take actions, as appropriate in this regard. Though, this commitment was not fully met by them and even no enforcement action strictly was taken against them.

Along with them, the developing nations have been equally assigned with such responsibility despite their low per capita emissions of GHGs, to take the measures in their domestic jurisdiction according to their respective capabilities and their social and economic conditions.¹⁵ It has been considered appropriate as the standard applied by some nations may not be suitable to or warranted to other nations particularly to developing nations. Any such response to climate change has to be coordinated with social and economic development in an integrated manner taking into full account the legitimate priority needs of developing nations.¹⁶ Besides, developing nations would always in need of access to resources and energy to achieve sustainable social and economic development. Hence, there has been asked to give full consideration by the developed nation on 'the specific needs and special circumstances of developing member nations those are particularly vulnerable to the adverse effects of climate change.'¹⁷ They have to 'cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development of developing nations.'¹⁸ The developed nations and other developed nations listed in Annex II have 'to provide all assistance to developing nations who are parties to this convention particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects' and to take all practicable steps 'to promote, facilitate and finance, as appropriate the transfer of or access to, environmentally sound technologies and know-how to developing nations.'¹⁹ This obligation has been preconditioned with specific provision as such:

¹⁵*Id.* UNFCCC, art. 4(10)

¹⁶*Id.*

¹⁷*Id.* UNFCCC, art. 4(8)

¹⁸*Id.* UNFCCC, art. 3(5)

¹⁹*Id.* UNFCCC, art. 4(3)

‘The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.’²⁰

The climate related commitments of the developing nations are dependent on the effective implementation of commitments of developed nations specifically related to financial assistance and transfer of technology. The policies and measures as adopted and implemented by developed nation would further demonstrate the ‘leading action and assistance’ in their mitigation, adaptation and cooperation efforts for combating the adverse of climate change as well as enhancing the capacities of developing nations in this regard. They have been supportive with provision of financial resources and technological assistance towards participating developing countries in compliance to the principle of common but differentiated responsibilities.²¹ In this regard, it has been outlined that ‘the attribution of primary responsibility to developed nation yields their accountability not just for internal mitigation and adaptation action as internationally agreed, but also for support for emission reduction efforts in developing nations. The secondary or subsequent responsibility has been assigned to developing nations on the basis of their less contribution in emitting GHGs and lack of their capacities in adaptation measures.’²²

Further, its Kyoto Protocol implemented this principle of common but differentiated responsibility by establishing time table and quantified emission reduction

²⁰*Id.* UNFCCC, art. 4(7)

²¹Harald Winkler and LavanyaRajamani, ‘*CBDR&RC in a Regime Applicable to All*’, 14, *Climate Policy*, 103(2014);See also, LavanayaRajamani, *Differential Treatment in International Environmental Law*, 8 (OUP: London, 2006)

²² Volker Roeben, ‘Responsibility in International Law’, in A. Von Bogdandy and R. Wolform (eds.), *Max Planck Textbook of United Nations Law*, 116, (Brills: Leiden, 2016)

commitments for Annex I countries till the period year 2012.²³This protocol prescribed three flexible mechanisms namely 'joint implementation', 'clean development mechanism', and 'emission trading' to promote cost effective and innovative solutions for combating the climate change. Article 3 of this Protocol clearly states that:

'The Parties included in Annex I shall individually or jointly ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amount, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gas by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.'²⁴

Herein, most of the developed nations are listed in Annex I who either individually or jointly can reduce emissions of GHGs as listed in its Annex A aiming to bring the overall emissions of such gas below 1990 levels till the year 2012. However, all the parties have to formulate the national and regional programme for 'improvement of the quality of local emission factors', 'mitigation and adaptation measures', 'transfer of finance and technology', and 'promotion of research, education, capacity and training' under this Protocol. Such programmes initiated and implemented must be prepared taking into account their common but differentiated responsibilities in consonance to Article 4 of the UNFCCC. Specifically, the developed nations list in Annex I and other developed nations included in Annex II to this Convention under this Kyoto Protocol have to provide new and additional financial resources to meet the agreed full costs incurred by developing nations for the implementation of the commitments given under the Convention.²⁵

²³ Kyoto Protocol on the UN Framework Convention on Climate Change, 1997 (adopted on 11 December, 1997, entered into force on 21 May, 1994) 2303 UNTS 148

²⁴*Ibid*, art. 3

²⁵*Id.* art. 4

The implementation of these existing commitments would be dependent on the adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among developed nations.²⁶ Compliance to the principle of the Convention specially the CBDR principle has also been reiterated in future COP negotiations and decisions under the UNFCCC. 'Developing nations have advocated that any future climate change legal regime should be created on the basis of the principles of UNFCCC and specifically to CBDR principle. On the other hand, developed nations admitting the relevance of CBDR principle has taken the stand that its application needs to be reconsidered and diversified.'²⁷ This has created a kind of dilemma at the centre of several negotiations in the COP of UNFCCC.

III

Principle of Common but Differentiated Responsibility: It's Progressive Development under Global Climate Change Legal Regime

The Conference of Parties (COP) is an institutional set up established under framework of the UNFCCC to make progressive development and to promote effective implementation of the principle of CBDR.²⁸ In this regard, it used to convene regular session of meetings with all member nations addressing critical issues and future plans or pathways for combating the climate change on the basis of principle of CBDR. After the COP meetings held in Kyoto in year 1997, the other major decisions were taken in some of the landmark meetings such as in Bali, Copenhagen, Cancun, and Paris for institutionalizing the principle of CBDR. But, it was the Copenhagen COP Fifteenth Meeting (2009) held in Copenhagen witnessed the substantial shift in the global climate commitment and governance based on principle of common but differentiated

²⁶*Id.*

²⁷*Id.* art. 10

²⁸*Id.* art. 7

responsibility between developed and developing countries.²⁹In this COP meeting, the 'accord' prepared specifically by the developed nations allowed the member nations to simply make 'non-binding pledges' for the period 2013-20 avoiding the binding targets and timetables for emission reduction. It was totally different proposal for the future global climate governance from the norms or commitments as adopted under the Kyoto Protocol. Hence, it becomes necessary to assess the development held in these specific UNFCCC COP meetings and decisions to outline the 'remarkable' or 'substantial' shift in compliance to the 'principle of common but differentiated responsibility' under the global governance of climate change.

To begin with, the COP Thirteenth Meeting (2007) held in Bali prepared the 'Bali Action Plan'³⁰ setting out broadly the parameters for future possible legal obligations between developed and developing nations separately and differently. This future possible obligation had to be based on the same principle of common but differentiated responsibility. The Bali Action Plan required enhanced national action on mitigation of climate change in consideration of:

'Measureable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, *by all developed country Parties*, while insuring the comparability of efforts among them, taking into account differences in their national circumstances.'³¹(*Emphasis added*)

'Nationally appropriate mitigation actions *by developing country Parties* in the context of sustainable development, supported and enabled by technology, finance and

²⁹See, *Supra* note 2

³⁰ The 'Bali Action Plan' was prepared through the decisions of the Conference of Parties in its thirteenth meeting held in Bali in December, 2007; UN Doc FCCC/CP/2007/6/Add.1, (April 6, 2023, 10.40 AM); See, available at: <https://unfccc.int/process-and-meetings/conference/past-conference/bali-climate-conference-december-2007.html>

³¹*Id.* para 1(b)(i)

capacity building, in a measurable, reportable and verifiable manner..³²(*Emphasis added*)

Herein, there is clear demand for national appropriate mitigation actions (NAMAs) by all member nations through measurable, reportable and verifiable (MRV) manner. The difference is responsibility of the developing nations is precondition in the context of sustainable development, technology transfer, finance and capacity building measures. There is clear intention of giving soft obligation to developing nations without adding the word 'commitment' for them. Still, the developing nations have the responsibility to mitigate the climate change as 'common responsibility' assigned under the principle of common but differentiated responsibility.

The COP Fifteenth Meeting (2009) held in Copenhagen arrived at an 'Copenhagen Accord'³³ as political agreement setting out the long term goal of limiting climate change by 'reducing global emissions by 50% till 2050'; 'voluntary pledge and review system' for mitigation commitments or actions; and 'new financial resource for developing nations'. The key elements of this accord for mitigation have been included as:

*'Annex I Parties commit to implement individually or jointly the quantified economy wide emissions targets for 2020, to be submitted in the format given in Appendix I by Annex I Parties to the secretariat by 31 January 2010 for compilation in an INF document. Annex I Parties that are Party to the Kyoto Protocol will thereby further strengthen the emissions reductions initiated by the Kyoto Protocol..'*³⁴(*Emphasis added*)

'Non-Annex I Parties to the Convention will implement mitigation actions, including those to be submitted to the secretariat by non-Annex I Parties in the format given

³²*Id.* para 1(b)(ii)

³³ The 'Copenhagen Accord' was the decisions of the Conference of Parties in its fifteenth meeting held in Copenhagen in December, 2009, UN Doc. FCCC/CP/2009/11/Add.1, (April 6, 2023, 10.50 AM) See, detail available at: <https://unfccc.int/process-and-meetings/conference/past-conference/copenhagen-climate-conference-december-2009.html>

³⁴*Ibid.* para 4

in Appendix II by 31 January 2010, for compilation in an INF document, *consistent with Article 4.1 and Article 4.7 and in the context of sustainable development*. Least developed countries and Small Island developing States may undertake actions voluntarily and on the basis of support...'³⁵(*Emphasis added*)

There has been found substantial shift in the political and legal commitments on the principle of CBDR for the reduction of GHGs in this Copenhagen Accord. The binding targets and timeframes for the developed nations for emission reduction were replaced by nation's own nationally determined contributions. The baseline year 1990 for calculating emission reduction goals as set out in the Kyoto was also abandoned. Instead of having strict and binding commitments on emission reduction targets first by developed nations and later on by developing nations, the member nations have been kept free to achieve 'voluntary and non-binding pledges' to reduce the emissions of GHGs.³⁶ Not only this, it reflected clear differentiation in the emission reduction obligations between developed and developing nations under the contours of CBDR principle.

Next COP Sixteenth Meeting (2010) held in Cancun adopted 'Cancun Agreement'³⁷ as comprehensive international response or compromise by all nations for combating climate change with commitment to lowering the maximum to 1.5 degree temperature by emission reduction targets, use climate friendly technologies, establishment of Green Climate Fund and new adaptation framework. It specifically mentioned in its provision that 'Emphasizing the need for deep cuts in global greenhouse gas emissions and early

³⁵*Id.* para 5

³⁶*See Supra* note 2

³⁷ Cancun Agreement was an outcome document of the decisions taken by the Conference of Parties in its sixteenth meeting held in Cancun in November, 2010, UN Doc FCCC/CP/2010/10/Add.1; (April 6, 2023, 11.05 AM) See, detail available at: <https://unfccc.int/process-and-meetings/conference/past-conference/cancun-climate-conference-november-2010.html>

and urgent undertakings to accelerate and enhance the implementation of the Convention by all Parties, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.³⁸The emphasis was on the basis or criteria on the principles of 'equity' and 'common but differentiated responsibilities and respective capabilities.' The enhanced mitigation measures through reduction of GHGs emissions urgently were required by developed nations; hence the Cancun Agreement specifically urged that:

*'Developed country Parties to increase the ambition of their economy-wide emission reduction targets, with a view to reducing their aggregate anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol to a level consistent with that recommended by the Fourth Assessment Report of the Intergovernmental Panel on Climate Change.'*³⁹*(Emphasis added)*

It further recognized that developing country parties also continue to contribute towards global mitigation efforts in accordance with common but differentiated responsibilities and enhance their mitigation actions depending on the provisions of finance, technology and capacity building support provided by developed country parties. It was further agreed for developing nations that 'developing country Parties will take nationally appropriate mitigation actions in the context of sustainable development, supported and enabled by technology, financing and capacity-building, aimed at achieving a deviation in emissions relative to 'business as usual' emissions in 2020.'⁴⁰In this way, the agreement provided the obligation for action to reduce emission by both developed and developing nations and confirmed the continuation of emissions trading and project based mechanism as provided in Kyoto Protocol. Besides, it established a 'Green Climate Fund' for financial assistance as well as 'Technology Network' to support the low carbon technology in developing nations. Though, this

³⁸*Ibid.*

³⁹*Id.* para 37

⁴⁰*Id.* para 48

agreement was not legally binding instrument, still restore the faith and legitimacy in the UNFCCC COP negotiations for proper implementation of the principle of CBDR.

Another landmark meeting, the COP Twenty First Meeting (2015) held in Paris was historical event in the climate change negotiation and governance with the outcome of legally binding instrument 'Paris Agreement'.⁴¹ In contrast to substantial shift in Copenhagen Accord, the Paris Agreement was outcome of great diplomatic negotiations and faith in United Nations system wherein it achieved what the Copenhagen could not achieved an inclusive binding deal. It is an international treaty signed by most countries and legally binding on the parties that ratify it. It states that 'this Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.'⁴² It aims to strengthen the global response to the threat of climate change by holding the increase in global average temperature to well below 2 degree Celsius and to limit it to 1.5 degree Celsius above pre industrial levels.⁴³In this regard, it accords the obligations or commitments as such:

'In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, *recognizing that peaking will take longer for developing country Parties*, and to 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

⁴¹ The Paris Agreement was a legally binding instrument as an outcome document of the decisions of the Conference of Parties taken in the twenty first meetings at Paris in November, 2015; UN Doc FCCC/CP/2015/L.9/Rev.1; (April 6, 2023, 11.20 AM) See, detail available at: <https://unfccc.int/process-and-meetings/conference/past-conference/paris-climate-conference-November-2015.html>

⁴²*Ibid.* art. 2(2)

⁴³*Id.* art. 2(1)

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.*⁴⁴(*Emphasis added*)

In compliance to this, all the Parties to this Paris Agreement are required to prepare and communicate their nationally determined contributions (NDCs) which they intent to achieve in future through domestic mitigation measures to reduce the GHGs emissions. In pursuance of this, the agreement put in additional commitments to both nations as:

*'Developed country Parties should continue taking the lead by undertaking economy wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.'*⁴⁵(*Emphasis added*)

To take the lead in GHGs emission reduction targets, the developed nations have been again given the primary responsibility under this Paris Agreement entered in year 2015. However, developing nations have been asked to enhance the mitigation efforts in this regard in view of their national circumstances. The application to the principle of CBDR in this Paris Agreement is also qualified with the words 'in light of national circumstances'⁴⁶ which further indicate formal differentiation between developed and developing nations. The effectiveness of this obligation would depend on 'the extent to which parties follow up all these targets depending upon the nationally determined targets ambitions, their participation and compliance in future.'⁴⁷ In this regard, 'the first stock taking process will take place in year 2023 which will have profound influence on

⁴⁴*Id.* art. 4(1)

⁴⁵*Id.* art. 4(4)

⁴⁶*Id.* art. 4(3)

⁴⁷ Christina Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement', 25(2) RECIEL, Special Issue: The Paris Agreement, 161(2016)

the future mitigation efforts of both developed and developing nations.⁴⁸ The subsequent COP meetings held recently have not contributed remarkably due to deadlock on several issues between developed and developing countries including on principle of CBDR.

Recently, the COP Twenty Sixth Meeting (2019) held in Glasgow came up with the 'Glasgow Climate Pact' requesting the parties to revisit and strengthen their 2030 targets to align with Paris Agreement.⁴⁹ Most of member nations who had not submitted their new and updated NDCs during this period were requested to do it. It also urged the member nations to develop long term strategies towards just transition to net-zero emissions especially to developed nations. Further, the COP Twenty Seventh Meeting (2022) held in Sharm el-Sheikh concluded with historic breakthrough to constitute the 'loss and damage fund' for developing and vulnerable countries against the impacts of climate change.⁵⁰ In this meeting, it was also asked to the member nations to define 'Global Goal on Adaptation' and provided pledge of US\$ 230 million from Adaptation Fund. Most importantly, it reflected the developing nations' concerns about the commitment to provide US\$ 100 billion by the developed nations was not yet met out. These all developments taken place in compliance to the principle of CBDR has not been found satisfactory by the experts and scholars in their periodic assessment done in different annual and special reports on climate change, crisis and casualty.

⁴⁸ Peter Christoff, *'The Promissory Note: COP 21 and The Paris Climate Agreement,'* 25(5), *Environmental Politics*, 765(2016); Clive Spash, *'These Changes Nothing: The Paris Agreement to Ignore Reality,'* 13(6), *Globalizations*, 928(2016)

⁴⁹ UNFCCC, Glasgow Climate Pact, 2021 (December 13, 2021) UNFCCC/CMA.3/2021, (April 6, 2023, 11.20 AM), See also, available at: https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf

⁵⁰ UNFCCC, Sharm-el-Sheikh Agreement, 2022, (March 17, 2023) UNFCCC/CP/2022/10/Add.1, (April 6, 2023, 11.20 AM), See also, available at: https://unfccc.int/sites/default/files/resource/cp2022_10a01_adv.pdf

IV

Principle of Common but Differentiated Responsibility: Critical Assessment on its Legal Status and Implementation after thirty Years of UNFCCC

The critical assessment on the principle of CBDR could be outlined on the basis of its legal status, progressive development and proper implementation held in last thirty years of the UNFCCC legal regime. The Principle of CBDR finds its legal origin and development under United Nations System through different conventions, declarations and resolutions. Initially in year 1970, the concept of ‘common heritage of mankind’ was adopted in UN General Assembly by developing nations against unilateral commodification of natural resources by the developed nations.⁵¹ It was in year 1988, when United Nations General Assembly (UNGA) modified this concept as ‘common concerns of mankind’ recognizing the common obligation of all nations to protect the atmosphere by addressing climate change.⁵² Then in year 1992, the one of its Convention adopted the ‘principle of common but differentiated responsibilities’ to protect the climate system for the benefit of present and future generations of humankind.⁵³

The legal status of the principle of CBDR is debatable issue under international environmental law due to different interpretations and contentions. Even included in number of multilateral environmental agreements, the principle of CBDR as independent principle is considered only as ‘soft law’.⁵⁴ The UNFCCC under its Article 3 uses the word “should” for the Parties to protect climate system on the basis of principle of CBDR. Besides, this principle has not been elevated to the status of a customary

⁵¹UNO, UNGA Resolution 2749/XXV (December 12, 1970), UN Doc A/RES/25/2749; (April 6, 2023, 11.20 AM) see, available at: <https://digitallibrary.un.org/record/201718?ln=en.pdf>

⁵²UNO, UNGA Resolution A/43/251/L.17, (26 October, 1988); (April 6, 2023, 11.30 AM) available at: <http://www.digitallibrary.un.org/record/un.pdf>.

⁵³ UNFCCC, *Supra* note 1. Art. 3

⁵⁴MalgosiaFitzmourice, *Responsibility and Climate Change*, 53 German Yearbook of International Law, 106 (2010); as cited in Siddharth Singh, *Tracing the Common but Differentiated Responsibilities Principle under Climate Change Regime*, 13(2), Indian Journal of Law and Justice, 260 (2015)

principle of international law because its breach is not considered yet any 'wrongful act of State' or 'attribution to State' under international law.⁵⁵ Not only this, this principle lacks the common understanding between developed and developing nations to consider it as 'legal obligations' rather than 'moral obligations'. However, it may be said that the legal status of principle of CBDR may be debatable not being prescriptive, but the legal significance of it under international climate change regime cannot be denied.

As far as its implementation is concerned, all the nations have 'common' reasonability to take part in joint efforts to protect the climate or combat the climate change, but 'differentiated' responsibility have been on the developed nations 'to take the lead' in those efforts on international and regional levels. However, it is unclear that how the developed countries would 'take the lead' in reducing GHGs emissions. It may be interpreted as either exempting or assisting the developing nations in reducing GHGs emissions because of three reasons: 'firstly they are historically the major contributors of such emissions; secondly, they have better capacity to tackle this problem; and thirdly, they will remotely suffer the immediate effects of the climate change.'⁵⁶

Besides this, the Kyoto Protocol has been adopted for binding GHGs emission reduction targets by all the nations specifically by developed nations to comply in the first commitment period of 2008-12. But, developing nations has been exempted from this GHGs emission targets for the first commitment period of this Kyoto Protocol despite resistance by some developed nations like USA. The Kyoto Protocol has 'differentiated targets and timeframe', 'common baseline of year 1990' and 'flexible mechanism for international cooperation' replaced by 'individual', 'voluntary', 'non-binding pledge'

⁵⁵ Rowena Maguire, *The Role of Common but Differentiated Responsibility in the 2020 Climate Change Regime*, 4, Carbon and Climate Law Review, 263 (2013)

⁵⁶ Godwell Nhamo and Senia Nhamo, 'One Global Deal from Paris 2015: Convergence and Contestations on the Future Climate Mitigation Agenda', 23(3), South African Journal of International Affairs, 323(2016).

model of Copenhagen Accord to reduce the emissions of GHGs.⁵⁷ Subsequently, 'By allowing Parties, developed and developing alike, to self-select and list mitigation commitments and actions, the Copenhagen Accord effectively substitutes a regime of differentiation in favor of developing countries with a regime of differentiation for all countries providing flexibility for all. This, through architectural sleight of hand, recasts the contours of the CBDRRC principle.'⁵⁸ Thus, the 'Copenhagen Accord', completely changed the nature of the obligations and commitments made by developed countries about reducing greenhouse gas emissions. Instead of requiring developed countries to adopt more ambitious and legally binding emission reduction targets, the Copenhagen Accord invited all countries to make non-binding pledges for the period 2013–20.⁵⁹

However, the Paris Agreement has maintained the differentiation between developed and developing nations in the several provisions on the demand of developing nations. They have defended successfully the application of common but differentiated responsibility at large extent, though with addition of respective national capabilities. The developed nations have to take the lead in mitigation measures and financial assistance to developing nations as well. Their technology transfer or assistance along with promoting the capacity building would also help the developing nations in compliance to the climate commitments. Instead, they are putting the pressure on developing nations to have 'differentiation for all' or 'common responsibility' in future mitigation actions.

The subsequent COP meetings held in post-2020 climate negotiations have not been satisfactory for developing countries on critical aspects of the principle of CBDR. Developed countries have pushed them in the trap of regular NDCs, but themselves side

⁵⁷ Shirley V. Scott, *Does the UNFCCC Fulfill the Functions Required of a Framework Convention? Why Abandoning the United Nations Framework Convention on Climate Change Might Constitute a Long Overdue Step Forward?* 27, *Journal of Environmental Law*, 69(2015)

⁵⁸ 'LavanayaRajamani, *'Differentiation in the Emerging Climate Regime'*, 14 *Theoretical Inquiries in Law*, 160(2013); LavanayaRajamani, *'The Making and Unmaking of the Copenhagen Accord'* 59 *International Comparative Law Quarterly*, 824(2010)

⁵⁹ See *Supra* note 2.

tracked the sacrosanct principle of CBDR.⁶⁰ It has generated the kind of impression that ‘the developed countries have been backtracking on almost every commitment made by them in various Conference of Parties.’⁶¹ Failure to comply with first commitment period of the Kyoto Protocol followed by the second commitment period of developed countries has queered the pitch for dissent and tension among the developing countries. Hence, future of the climate change legal regime remains bleak due to non-compliance or enforcement of the principle of CBDR in the new climate crisis scenario.

The enforcement mechanism for the effective implementation has been constituted under the Conference of Parties by doing the review periodically. The enforcement measures include diverse procedures and actions to be followed and used by the member Parties or other regional organizations to ensure that any member countries potentially failing to comply with implementing the principle and provision of UNFCCC, and can be compelled to either do so or punished through civil or criminal action. Accordingly, the UNFCCC establishes the ‘Subsidiary Body for Implementation’ to assist the COP in the assessment and review of the effective implementation of the Convention.⁶² Besides, the Convention also asked the COP to establish ‘Multilateral Consultative Process’ for the resolution on the questions regarding the non-implementation of the Convention.⁶³ However, any dispute on interpretation and implementation, if arises between two or more member nations, has to be resolved through negotiation and other peaceful means such arbitration and conciliation. The dispute may also be submitted in International Court of Justice by any Party if applicable.⁶⁴ In support of this, Kyoto Protocol provides power to the COP to approve appropriate and effective mechanism or procedures to determine or address non-

⁶⁰Denial Bodansky, *The UN Climate Change Regime Thirty Years On: A Retrospective and Assessment*, 53 Environmental Policy and Law, 19-33, (2023)

⁶¹Bharat H. Desai, *Regulating Global Climate Change: From Common Concern to Planetary Concern*, 52 Environmental Policy and Law, 33-347 (2022)

⁶² UNFCCC, *Supra* note 1, art.10

⁶³ UNFCCC, *Supra* note 1, art.13

⁶⁴ UNFCCC, *Supra* note 1, art.14

compliance of the provision and principle of CBDR.⁶⁵ Paris Agreement further created 'new implementation mechanism constituting a 'Committee' 'to facilitate implementation and promote compliance in manner that is transparent, non-adversarial and non-punitive'.⁶⁶In view of this, these provisions and mechanisms give little impressions and expectations that there would be immediate and adequate affords and measures in full and effective compliance and enforcement of the principle of CBDR even after thirty years of the UNFCCC.

V

Conclusion: Future Pathways

The global climate change legal regime has achieved several milestones in the implementation and enforcement of the principle of common but differentiated responsibility for combating the adverse effect of climate change. The journey to these millstones has been uneven with several twists and turns during the engagement and negotiation between the developed and developing nations while putting the responsibility on the basis of CBDR principle. Firstly, the UNFCCC included the 'principle of common but differentiated responsibilities' for the member nations to protect the climate system for the benefit of present and future generations of humankind. Then, its Kyoto Protocol concretized this principle with legally binding responsibility to reduce the GHGs emissions with given targets and timeframes. The Kyoto Protocol has differentiated targets and timeframes which has been subsequently replaced with individual, voluntary, non-binding pledge in Copenhagen Accord for both developed and developing nations. Since Copenhagen Accord to Paris Agreement, the binding targets and time limits for GHGs emission reduction fixed on the principle of CBDR have been out of symmetry in global climate change negotiations. There have been witnessed new claims or contestations between developed and developing nations

⁶⁵Kyoto Protocol, *Supra* note 23, art. 18

⁶⁶Paris Agreement, *Supra* note 41, art. 15

to adopt future approach and pathway for implementation of the principle of CBDR in post-2020 global climate legal regime.

The future approach and pathway could be dependent upon the efforts and actions required under the climate commitment to effectively and continuously implement and enforce the provision of the UNFCCC legal regime including the principle of CBDR. The UNFCCC legal regime provides both bilateral and multilateral mode of dispute settlement mechanism between or among the member nations in this regard. For compliance and implementation of the principle of CBDR, this regime encourages the settlement of disputes through court procedure or arbitration and conciliation, but does not specify the specific rules of procedure on the question of non-compliance.⁶⁷ Further, Paris Agreement has diluted the obligation of strict compliance or effective implementation by assigning functions to a 'Committee' to facilitate this in non-adversarial and non-punitive manner.⁶⁸ It means that enforcement and implementation of the principle of CBDR remains facilitative rather than prescriptive. It would be difficult to any member nations or international institutions to compel the developed or most emitting countries to comply with their obligations under the principle of CBDR to reduce excessive GHGs emissions and pay adequate reparation or financial assistance to developing countries.

In this context, it is herein proposed that concerted and coordinated cooperation among the developing nations would essentially help in effective compliance and implementation of the principle of CBDR in post-2020 UNFCCC legal regime. The developing nations should make the developed nations responsible through enforcement measures or dispute settlement mechanism for non-implementation of the principle of CBDR. The basic principle of international law could be derived from 'treaty

⁶⁷ Benoit Mayer, *Construing International Climate Change Law as Compliance Regime*, (July, 2018) 17 (April 8, 2023, 11.10 AM) available at: <http://benoitmayer.com/wp-content/uploads/2018/07/Construing-International-Climate-Change-Law-as-a-Compliance-Regime.pdf>

⁶⁸ *Ibid.*

obligations (trade, environment and human rights)', 'customary norm of international law (sustainable development or international cooperation)' or 'unilateral declaration or state practice (domestic judicial or executive act)'.⁶⁹In this regard, the concrete effort should be made for viable and successful climate litigation by devising mechanism for 'assessment of climate related harms, contribution in the injury or damage and apportion of the compensation afterwards.'⁷⁰ Besides, it is also suggested that developing nations should take serious initiatives and leadership in the global climate change negotiations to reinforce the principle of CBDR;and continuously demand adequate assistance for finance and technology from developed nations to takeefficientand consistent mitigation actions to combat the adverse effects of climate change.

⁶⁹ Asian Development Bank, *Climate Change Coming Soon to a Court Near You: International Climate Change Legal Frameworks*, (December, 2020) 122 (April 8, 2023, 11.20 AM) available at: <https://www.adb.org/sites/default/files/publication/international-climate-change-legal-frameworks.pdf>

⁷⁰ MaikoMuguro, *Litigating Climate Change through International Law: Obligations Strategy and Right Strategy*, 33, *Leiden Journal of International Law*, 933 (2020)(April 14, 2023, 4.20 PM) available at: <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/litigating-climate-change-through-international-law.pdf>

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All queries regarding JEDM may be addressed to:

Editor

The HPNLU Journal of Environment and Disaster Management

Himachal Pradesh National Law University, Shimla

16 Mile, Shimla-Mandi National Highway, Ghandal, District Shimla Himachal Pradesh-171014. (India)

Website: <http://hpnlu.ac.in>

E-mail: editorjedm@hpnlu.ac.in

Tel No.: 0177-2779803; Fax: 0177-2779802