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Research Paper

Tracing Applicability of CBDR in Pre Paris Climate Change Regime

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Abstract
In global climate change discourse, the issues related to fairness and equity has been core issues of contentions. How to assign responsibility of global climate change and how to share burden of mitigation efforts are still big roadblocks to achieve the rise in global average below 2°C by the end of this century. The global climate change regime which begun from 1992 is still going on with just a hope of below 2°C which is quite suspicious to be achieved. The Paris Agreement, which has announced as the landmark success indeed depends on the mercy of emitter countries. There are no defined targets, obligations and responsibilities in Paris Climate Agreement. The principle of the UNFCCC, CBDR is subtle or almost wiped out from the Paris Agreement. Before the Paris, there were efforts to create explicit differentiations among countries, under the light of CBDR to achieve the fairness and equity. In present paper attempt has been made to explore the various area of differentiations among developing and developed countries with respect to the CBDR principal in the foundation of the UNFCCC and the Kyoto Protocol.

Keywords: *Climate Change, Regime, UNFCCC, CBDR, Kyoto Protocol, GHGs,*

I. Introduction

The Industrial revolution, which later resulted in capitalist model of development, was predominately fueled by the carbon fuels. Abundant use of fossil fuels liberated the buried carbon (in soil, woods, coal and crude oil) into the atmosphere. Thus, the excessive emission of greenhouse has begun to trap the visible solar radiations into the atmosphere resulting in global warming. The global warming has cascading impacts that can have serious implications for the existence of life on the Earth.

Since the climate era that was begun in 1972 at United Nations Conference on the Environment in Stockholm, the climate regime is all about to decide the rules, principles, norms, mechanism and compliance for a comprehensive action plan to avert climate change. Essentially, it a political issue as far as the decision making process is concern in the climate regime. No country is willing to leave cheap and abundantly available traditional source of energy like coal and oil. It is the reason why developed nations are always taking back seats when it comes to take responsibility of degrading the environment by excessive emission on per capita basis or as whole unit nation. The issues of equity and fairness were attempted to address with the introduction of Common But Differentiated Responsibilities which was taken as a guiding principle in climate change regime.

The CBDR principle has been placed in Article 3 paragraph 1, "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."[1] Thus, this principle clearly distinguishes nations on the basis of their capabilities and accordingly makes proportional responsibilities in climate change regime. The Kyoto Protocol was formulated on the basis of CBDR, assigned mitigation responsibilities to developed nations i.e. Annex 1 party. However, thereafter developed nations continuously attempted and eventually succeeded in Paris Agreement in 2015.

II. Methodology

An analytical approach has been adopted to trace the applicability of the CBDR principle in climate change regime. The United Nations Framework Convention on Climate Change and Kyoto Protocol has been selected for analysis. Their various provisions which manifest differentiations are taken as applications of the CBDR. The main focus has been kept on the provisions which depict how the objectives of the treaty and

Protocol would be achieved. The provisions which are closely manifest the implementation of treaty and Protocol has been predominantly selected for analysis.

Provision that Differentiate between nations in context of Implementation of treaty and Kyoto Protocol

Provisions that differentiate responsibilities in context of implementation of treaty are discussed in five categories.

A. Provisions that constitute preamble and operational procedures: Differential treatment in context of implementation of the treaty can be deduced from the preamble of the UNFCCC. The preamble of the UNFCCC clearly acknowledged historical and current GHG emission that has been mainly originated in developed world. It further emphasized that climate change is a global problem, requires global participation from all states according to their individual circumstances and capabilities. The principle of CBDR is regarded as a compromise formula between developed and developing countries. The inclusion of CBDR-RC in the UNFCCC was a significant move to reflect the main 'responsibility principle', which determines that climate change is primarily caused by the luxurious lifestyle of developed countries; hence they are primarily responsible for mitigation efforts.

It is very clear from the preamble of the UNFCCC that developing countries are kept aside in context of mitigation responsibility. The preamble of The UNFCCC upholds the 'per capita' norms and affirms that emission of developing states is comparatively masculine (on per capita basis) and expected to grow to fulfill their socio-economic and development objectives.

During the UNFCCC negotiations, Indian proposal argued the notion of per capita which is based on the assumption that GHGs emissions of developed and developing countries should converge at common per capita level. The UNFCCC acknowledged that emission from developing countries has to grow and decrease in developed countries, at a point (on the basis of per capita indicator) convergence of GHG will arise and then all countries contract their emission to keep the world under threshold limit of 2°C temperatures.

The 'Contraction and Convergence' approach was first proposed by London based Global Common Institute (GCI) in early 1990, as a mean to achieve 'justice without vengeance'. The 'contraction and convergence' and 'carbon space' are similar budget based approaches. The carbon space notion is developed by Indian scientist of the Tata Institute of Social Science and supported by Indian government. Both the approaches have similar assumption that there is a limited amount of carbon space is left and this remaining carbon space is to be reserved for the development of poor countries.[2] Both the approaches depend on the per capita emission. Under contraction and convergence, per capita is used to estimate equal emission rights for each individual at the point of convergence. In carbon space approach fair allocation of share is explicitly based on the size of population. The carbon space approach defines equity as 'equal division of the available carbon space among all nations based on their respective population.[3]

The next set of provisions in the preamble of the UNFCCC, which acknowledge particular circumstances and special needs of developing countries. There has been lot of controversy over the provisions containing the CBDR principle. Article 3 of the UNFCCC was a centre of debate and mostly opposed by developed countries on the basis that Article 3 as operational (rather than preambular provision) creates uncertainty regarding UNFCCC obligations. The US objected Ar.3 by arguing that this article imposes specific commitments beyond those set out in Article 4 titled commitments.

The US introduced various amendments to weaken the legal power of the Article 3: a chapeau was suffixed, which sounds that the principles were adopted to 'guide' the efforts of the parties under UNFCCC; the term 'inter alia' was added to weaken the exclusiveness of the Article 3. The addition of 'inter alia' indicates that in implementation of the UNFCCC obligations, parties may consider principle other than those containing Article 3.Another amendment was the replacement of the term 'state' with the term 'parties' included.[4]

The rationale behind these modifications to the Article 3 indicates the intention of developed countries to forestall the arguments that the principle which constitute Ar.3 are generally bind states and part of customary[5] international law. The US also objected any reference to the phrase 'principles' in the UNFCCC. As a result, this reflects only title of Article 3 of the UNFCCC. Again on the US insistence, a footnote was placed to indicate that titles are only for readers' assistance.[6]

The above analysis shows that the language of Article 3 is more discretionary and guiding instead of prescriptive. For instance, Ar. 3 contains "parties should protect the climate system". The use of word 'should' indicates guiding nature rather than prescriptive nature of the article. Despite the fact that these notions are neither customary international law (as some claim) nor legally binding, still holds strong voice of equity and fairness in climate change regime..The notion of CBDR manifested in Ar.3 has significant legal implications. It provides context in which responsibilities are to be distributed among nations according to their respective capacities. It provides the concrete foundation to climate change regime by forming the basis for interpretation of existing and future obligations.

The UNFCCC underscored the need of special consideration to Varity of country groups regarding action related to insurance, funding and transfer of technology. According to Article 4.8 of the UNFCCC "These

groups include mainly Small Island Countries; low-lying coastal nations; Nations with arid and semi-arid areas, countries with huge forest areas; countries with high vulnerability to natural disasters; countries with liable to drought and desertification; countries with area of high urban atmospheric pollution; countries with areas with fragile ecosystem; countries whose economies heavily depended on fossil fuel production and export or consumption of fossil fuel and associated energy-intensive products; landlocked and transit countries."[7] The special circumstances and requirements of LDCs are also considered in context of financial and technological assistance.[8]

Similarly, KP also mentioned these groups in Article 2(3) and 3(14) of the protocol. These articles required that KP commitments would be implemented with the aim to reduce negative impacts on developing countries, recognized in article 4.8 and 4.9 of the UNFCCC.[9] The UNFCCC and the KP both acknowledged the special consideration of Economies in transition (EITs). The Article 4(6) of the UNFCCC and Article 3(6) of the KP, both have considered the transitional phase of their market economy and therefore, allowed some degree of flexibility in accordance of their respective capacity in meeting of UNFCCC commitments. the EITs were placed as Annex I parties to the UNFCCC and hence they are also liable to take mitigation efforts like other Annex I parties, but EITs were excluded from Annex II category, considering the transitional phase of their economies from centrally operated to open economy due to the collapse of the USSR. Thus, according to the principle of CBDR, the UNFCCC recognized the need of funding and technology for these EITs and they are also allowed as recipient of financial and technological assistance from industrialized countries.

Category B: Flexible Language

This category identifies provisions that contain with the language which permit flexibility to meet obligations under the UNFCCC and KP. The Differential treatment is incorporated in different provisions of the UNFCCC and the KP which can be explore in the flexible language of the Convention and the protocol.

The UNFCCC Article 4.1 says "all parties taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances".[10] Thus, UNFCCC considered different circumstances of different countries.

Further, the UNFCCC Article 4.1 (f) , says that parties are required to "take climate consideration into account to the extent feasible in their relevant economic, social and environmental policies and actions…"[11] Similarly in line with article 4 of the UNFCCC, the article 12.1(a) permits flexibility in submission of national inventories due to anthropogenic emissions in context of respective capacities.[12]

The rationale behind the use of such flexible language is to provide flexibility to developing countries with respect to GHG inventories data collection, calculation and submission. This flexibility is also extended to developed countries with regard to implementation of technology transfer commitment. The Article 4(5) of the UNFCCC requires developed countries to "take all practicable steps to promote, finance, facilitate, as appropriate, the access to, or the transfer of, environmentally sound technologies… particularly developing country Parties, to enable them to implement the provisions of the Convention."[13] The same language is also retained in Article 10(c) of the KP. The underlined phrases ' respective capacities' and 'as appropriate' clearly exhibits that certain degree of flexibility is given to the parties of the UNFCCC, in fulfilling their obligations under the convention.

The Article 10 of the Protocol does not allow any new commitment for non-Annex I parties, but reaffirms existing commitment under Article 4(1) of the convention. The Developing block of countries urged for the inclusion of language providing a context of differential treatment in Article 10 of the KP, comprising obligations for all parties. The sub paragraphs of the Article 10 of the KP were drafted in flexible language to provide some degree of relaxation to the developing countries regarding their implementation obligations. Article 10(a) and 10 (b)(ii) contain the phrase 'where appropriate and to the extent possible' clearly shows the flexible nature of language used.[14]

The negotiating history of the Article 10 of the KP revels that developing countries emphasized on the proportionate linkage between existing commitments under Article.10 of the KP, which are applicable to all parties, and financial commitment by the developed countries. The Article 10 was placed prior to Article 11 of the Protocol; Article 11 is about the financial mechanism of the protocol. This arrangement was a deliberated move to reflect that both the articles are inter- related: advancing commitments for developing nations would require enhance financial support from developed countries.[15]

Category C: Flexibility in Adopting Base year

This category contains the provisions that grant flexibility in adopting base year to reduce GHG emission under KP. The Kyoto Protocol was adopted the year 1990 as a base year to reduce GHG emission below 5 % of the base year. However, flexibility was given to EITs in choosing different base year in accordance of the UNFCCC Article 4(6). The KP was also recognized the need of flexibility in choosing different base year for EITs under the article 3(5).

The setting of base year was a critical issue in KP negotiations. The year 1990 had a significant value in climate change as IPCC had presented its first report and the issue of climate change got a formal recognition

as a serious issue by international community and initiated negotiation to the 'Earth Summit'. Although The US and Japan insisted on 1995 as a base year due to the fact that their GHG emission had risen since 1990.Eventually, The US proposal was rejected with the argument that this would reward the US and Japan as they had not done anything to reduce GHG emission since the negotiation process was initiated.[16]

The year 1990 as base year for KP was controversial in context of EITs; concerns were particularly raised by the EU with respect to wind fall gain of Assigned Amount Units (AAU) credits given to former USSR bloc (EITs). These AAU credits are called 'Hot Air' in context of the former USSR Block. The concerns regarding the excess AAU (hot air) of EITs had been contentious issue in climate regime since the enforcement of the KP. After collapse of the USSR in 1990, these centrally operated economies were going through the process of transition to open market economies. The GHG emission of these EITs was approximately 30% below of the base year 1990 of KP. For instance, two major EIT Russia and Ukraine were 34% and 59% respectively lower by 2010 in terms of Co2 emission due to the restructuring of their economies.

The GHG stabilizing targets, which are zero % in case of the Russia and Ukraine to the reference year 1990, imply that EITs would have huge surplus unused emission credits (Hot Air) that they could bank or trade. The potential trade of this so called 'Hot Air' was particular targeted by EU and Canada. After the refusal of the US to ratify the Protocol, only Russia had the survival key of the Protocol. According to the Article 25(1) of the KP a minimum 55 countries ratification were needed "incorporating Parties included in Annex I which accounted in total for at least 55% of the total carbon dioxide emissions for 1990 of the Annex I countries..."[17]

With the ratification of Iceland on 23 May 2002, requirement of 55 countries had been completed but the 55% of total emission requirement was depended on Russia (accounting 17% of Annex I emission) ratification due to refusal of The US accounting 36% of GHG emission. In December 2002, total 41% had been covered falling short of 14% to enforce KP. Thus, Russian ratification was inevitable to the survival of the protocol. The Russia used this fate deciding opportunity to bargain with EU and ultimately the EU had to drop its opposition to the so called 'Hot Air' trade and Russian entry into WTO. Russia, eventually ratified the protocol on 18 November 2004 and the minimum requirement of 55% was satisfied with this ratification and KP came into force on 16th of February 2004.

Category D: Reporting of National GHG Inventories

This category identifies those provisions which differentiate developed and developing countries with respect to the reporting of the National GHG inventories. Article 12(1)(a) of the UNFCCC requires that "each party shall communicate to the Conference of Party, a National Inventories of anthropogenic emission by source and removal by sinks of all GHGs not controlled by Montreal Protocol, to the extent its capacities permit".[18] Further, Article 12(1) (b) requires that "party shall communicate a general description of step taken or envisaged by the party to implement the convention".[19]

The Annex I parties were given a timeline of six months to make their national communication from the date of UNFCCC ratification by that party. All other Non Annex parties (barring LDC) were liable to make their initial national communications within 3 years from the date of ratification by that party. The Least Developed countries were given special treatment in submitting their National Communication as they make their initial communication at their discretion. (Article 12 (5), UNFCCC). It is clear from the above paragraphs that UNFCCC recognized the different circumstances and capacities of the parties to the UNFCCC and accordingly, differentiated timelines are given in submitting their national GHG inventories information.

Category E: Differentiated Compliance Procedures

The provisions analyzed in this category are related to the differentiated compliance procedures for developed and developing countries with respect to the implementation of the convention and protocol.

The Kyoto Protocol established compliance mechanism to deal with the issue related to the compliance targets of the protocol. The compliance mechanism of the protocol works with the two branches, Enforcement Branch and Facilitative Branch. The Enforcement Branch deals with the potential case of the non-compliance of developed countries, while facilitative Branch is to provide advice and promote compliance by applying consequences of soft nature. The facilitative branch is responsible to provide technical and financial grant or advice by taking in consideration of the CBDR principle as mentioned in Article 3.1 of the UNFCCC.[20]

The decision taken by COP7, Markesh was highly criticized by developed nations, especially, the US and Australia raised the question regarding the inclusion of the CBDR principle in compliance system of the protocol. Australia presented its opposition by questioning the role of the CBDR-RC in compliance system.[21] The US also argued against the inclusion of CBDR-RC in KP's compliance system. The US argued that inclusion of the CBDR-RC is serving the purpose of some parties as they may have different substantive obligation or they have same obligations but might be treated differently in term of non-compliance. Further, the US insisted for equal treatment for parties of equal obligation, in case of non-compliance.[22]

Saudi Arabia advocated the inclusion of CBDR-RC in Compliance system of the KP by arguing that mechanism and procedures along with their implementation must be fair and equitable. Saudi Arabia furthered recognized

the need of consideration of party's social and economical condition in context of implementation of compliance procedures of the KP.[23]

China's view on the guiding principal of the compliance system can be assume closer to G-77.China strongly advocated CBDR-RC in compliance system by marking it as a "corner stone of the system". China underscored the significance of differentiated responsibilities of Annex I and non-Annex parties. China further stressed that "consequences of non compliance should be proportional to the type and nature of the obligations in question".[24]

The inclusion of CBDR in compliance system of the KP gathered enormous support from developing countries. Rajamani has given the potential explanation of such support. It is that in future if, developing countries have to take mitigation efforts as non-Annex parties, they would subject to only facilitative Branch (not Enforcement Branch) in case of non-compliance with the mitigation commitments. Thus, it clear that consequences for non-compliance would be soft in terms of facilitative, promote and advisory.[25]

III. Conclusion

After analysis of various provisions, it can be said that developed countries are to be held responsible for larger portion of GHGs emission. It is well acknowledged in the UNFCCC text that major portion of GHG emission was originated in developed countries. Further the UNFCCC acknowledged that anthropogenic activities are responsible for climate change. The UNFCCC expected developed countries to take lead in dealing with climate change. It can be said that implicitly developed countries are held responsible for climate change. The differentiation of parties with respect to mitigation commitments in the UNFCCC and Kyoto Protocol shows the historical responsibility of developed countries. In the KP, only Annex I parties were under legal obligations to reduce the GHG emission 5% below of 1990 level. The CBDR-RC which was strictly applied to the KP, itself, mirrors the historical responsibility of developed countries.

In pre Paris climate change regime, equity predominantly implies equal right to global atmosphere as global atmosphere is regarded as common heritage and resource of mankind. Implementation of equity has been emerged as a big challenge in climate change regime. India and China along with other developing countries have been struggled to ensure that equity should be kept in any agreement. For developing countries, the CBDR is the fundamental principle to ensure equity in climate change regime. However, after Paris CBDR based equity and fairness has lost their shine because now differentiation in context of mitigation efforts or responsibility are only to be determine by nation itself through respective Nationally determined contributions (NDCs)

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