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THE GLOBAL CLIMATE CHANGE REGIME AND FAIRNESS IN INTERNATIONAL ENVIRONMENTAL LAW: INDIAN EXPERIENCE

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2013

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Chapter I

Fairness in International Climate Change Regulatory Regime: An Introduction

> *Those of us who live on small specks of land, . . . in the Caribbean, have not agreed to be sacrificial lambs on the altar of success of industrial civilization.*[1]

> *There is no guarantee that the Kyoto Protocol will continue into the next commitment period in this text . . . And we see there is money put before us. Can I suggest, in biblical terms, it looks like we are being offered 30 pieces of silver to betray our people and our future. Mr President, our future is not for sale. I regret to inform you that Tuvalu cannot accept this document*.[2]

There is broad consensus among all those who are concerned about the future of our planet that climate change is inevitable and, by and large, irreversible - a fact that has been scientifically corroborated.[3] An overwhelming body of scientific evidence now clearly indicates that

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1 Statement by Ambassador Lionel Hurst of Antigua and Barbuda at the International Red Cross Conference on Climate Change and Natural Disasters, Hague, June 28, 2002 as quoted in Muller, Benito (2002): "Equity in Climate Change: The Great Divide", available at http://www.oxfordclimatepolicy.org/publications/documents/EV31.pdf (accessed on 21/03/2010).

2 Statement made by the representative of the island nation Tuvalu on Copenhagen Accord at United Nations Climate Change Conference, 2009 held at Copenhagen. Incidentally Tuvalu, an island nation will be the first one to be immersed in the sea as a consequence of global warming. As quoted in Dimitrov, Radoslav S. (2009): "Inside UN Climate Change Negotiations: The Copenhagen Conference," *Review of Policy Research,* University of Western Ontario, available at http://politicalscience.uwo.ca/faculty/dimitrov/climate%20negotiations%20RPR.pdf (accessed on 20/03/2010).

3 The IPCC Third Assessment Report: Climate Change 2011 as quoted in Jaswal, Paramjit S. and Jolly, Stellina (2010): "Fairness and Rule of Law in Climate Discourse: A Critical Analysis," *Journal of the Indian Law Institute*, 52: 366, at 370.

environmental degradation in general and climate change in particular is a serious and urgent issue.[4] "Climate change will affect the basic elements of life of people around the world (such as) access to water, food production, health and the environment."[5] Such veracity forces the decision makers at the national and international level to make difficult choices.[6] Confronted with competing demands and interests, countries are now faced with committing resources to avoid consequences which, while beginning to be felt now, will only manifest themselves for decades and, in some cases, centuries from now.[7] A study of the international efforts to combat climate change reveals that a key part of the discussion and controversy revolves around the contested concept of fairness.[8] Even the United Nations Framework Convention on Climate Change (hereinafter referred to as UNFCCC), which is the first multilateral basis for action to combat climate change itself, assigns a prominent place to equity and fairness.[9] In this context it is important to study the different contours of fairness in global climate change negotiations.

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4 Nicholas, Stern (2006): *The Economics of Climate Change: The Stern Review*, Cambridge: Cambridge University Press, at p. 3.

5 *Ibid.*

6 *Supra* note 3 at 371.

7 *Ibid.*

8 *Ibid.* A substantial body of scholarship and policy advocacy has been developed that discusses fairness in the climate change context. For example see Agarwal, Anil and Narain, Sunita (1991): *Global Warming in an Unequal World: A Case of Environmental Colonialism*, New Delhi: Centre for Science and Environment; Shue, Henry (1992): "The Unavoidability of Justice," in Andrew Hurrel and Benedict Kingsburry (eds.), *International Politics of the Environment: Actors, Interests and Institutions*, Oxford: Oxford University Press, at p. 373.

9 Article 3 (1) of UNFCC, 1992 says, "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."

1.1 Emergence and Expansion of *Global Environment Regulatory Regimes*[10]

Global Environment Regulatory Regime (hereinafter referred to as GERR), a species of *Global Regulatory Regime* (hereinafter referred to as GRR)[11], focuses on laying down regulatory standards in the area of environmental protection. Although environmental protection gained attention much earlier, its *Regimization*[12], though gradually, began in the year 1972, the year in

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[10] A detailed analysis of emergence of Global Environment Regulatory Regimes will be dealt with in Chapter 2 of the thesis.

[11] *Global Regulatory Regime* (GRR) or *Global Governance Regime* is a phrase used by contemporary scholars. Traditionally, the purpose of international law and its institutions were to prescribe moral standards, the obedience to which is the option of the member-states. This category of international legal instruments may be called as *Soft Law* and is considered to be weaker when compared to the *Binding Law* (occasionally called as *Hard Law*), which aims at regulating and enforcing the legal standards laid at the international arena. The emergence of GRR primarily challenges traditional notions of state sovereignty and few scholars call it as the beginning of the emergence of a 'Global State'. See generally Chimni, B. S. (2004): "International Institutions Today: An Imperial Global State in the Making," *European Journal of International Law*, 15: 1. He argues that a mounting network of international institutions (economic, social as well as political institutions) constitute a embryonic *Global State* for realizing the interests of an emerging *Trans-National Capitalist Class* in the international system to the disadvantage of subaltern classes in the third and first worlds. He further argues that the evolving *Global State* formation has an imperial character, which underpins substantive democracy at both inter-state and intra–state levels. According to him, this *Global State* or *Global Regulatory Regime* is a web of sub-national authorities and spaces that represent, along with non-governmental organizations, other international organisations, inter-governmental organisations, regional organisations and sometimes even private organisations. See also generally Fischer-Lescano, Andreas and Teubner, Gunther (2004): "Regime Collisions: The Vein Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law*, 25, 999.

[12] According to Stephen D. Krasner "regimes are sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." He says that international institutions are regarded as having a potentially positive effect on compliance with the rules because they expand or shrink the options available to rational state actors, which are constantly attempting to maximize their respective self-interests. For details see Krasner, Stephen D. (1982): "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization*, 36(2): 185. Regimization to mean a systematic effort to create Regimes, where the political conditions and governance structure are favourable for some definite end. See generally Sik Kim, Gimgeunsik

which the Declaration of the United Nations Conference on the Human Environment was adopted in Stockholm. Before which environmental protection, essentially, remained as a subject of *soft law*[13] and hence without much binding force. Pre-1972, International Environmental Law was left in the cold by policy makers and scholars, manifest by the fact that there were less than three-dozen multilateral agreements concerning environment,[14] whereas, at present, there are approximately nine hundred international legal instruments directly or indirectly related with environmental issues at the multilateral level.[15] It is also certain and beyond doubt that this explosion of legal instruments will continue in the future.

Without doubt prior to 1900 there were very few multilateral / bilateral agreements relating to the environment and its protection. The existing agreements primarily focused on and were formulated on the basis of uncontrolled sovereignty of the nation states over natural resources,[16] and were essentially on boundary waters, navigation through international waters and fishing rights. These instruments did not, in its true sense address the

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Keun (2011): "Human Rights Regime in North East Asia and North Korea: Implications," *Korea Political Studies*, 20 (1): 109.

13 Soft law means the legal or policy instruments that do not have any binding force. Examples are the resolutions of the various organs of the United Nations. Viewed from this perspective even Universal Declaration of Human Rights is a soft law instrument though it received enforceability to a greater extent because it achieved the status of customary international law. See generally Boyle, Alan (1999): "Some Reflections on the Relationship of Treaties and Soft Law," *International and Comparative Law Quarterly*, 48: 901; Chinkin, C. M. (1989): "The Challenge of Soft Law: Development and Change in International Law," *International and Comparative Law Quarterly*, 38:850; Christians, Allison, "Hard Law & Soft Law," *Wisconsin International Law Journal*, 25 (2):235.; Goldmann, Matthias (2012): "We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law," *Leiden J. Int'l Law*, 25:335; Guzman, Andrew T. & Meyer, Timothy L. (2010): "International Soft Law," *Journal Legal Analysis*, 2:171.

14 Weiss, Edith Brown (1993): "International Environmental Law: Contemporary Issues and the Emergence of a New World Order," *Georgetown Law Journal*, 81:675.

15 *Ibid*.

16 *Ibid.*

issues of pollution or deforestation and other ecological issues of serious nature; and hence concerns of the contemporary world were left untouched.[17] Essentially, these legal instruments were pieces of 'soft law', or in other words, they were mere normative standards, and their enforceability remained as an option for the signatory States.

Subsequently, the focus of international environmental law was widened post-1900 wherein nation states started making far-reaching international agreements with wider focus like conventions aiming to protect species of animals, birds and plants, *etc*.[18] During the mid 20th century the states woke up to the realization of protecting natural resources. This resulted in numerous agreements and negotiations related to these aspects of the environment.[19] The enforceability of these instruments again remained as an option for the states. The notable aspect, however, was that for the first time there was felt an emergence of 'hard law' at the global level, wherein, in certain cases, customary principles of international law were used for enforcing international obligations against particular states. For example, in the famous *Trail Smelter Arbitration*[20] between Canada and the United States, Canada was held responsible for the damage from copper smelter fumes that spread into United States territory. This decision was made on the

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17 There is probably only one exception to this pattern. In the United States-United Kingdom Boundary Waters Treaty, Article IV says that "water shall not be polluted on either side to the injury of health or property on the other".

18 Examples are the Convention for the Protection of Birds Useful to Agriculture 1902; the Convention for the Protection of Migratory Birds in the United States and Canada, 1916; the Treaty for the Preservation and Protection of Fur Seals, 1911; the London Convention for the Protection of Wild Animals, Birds and Fish in Africa, 1900 *etc*.

19 For example the London Convention on Preservation of Fauna and Flora in their Natural State, 1933; the Washington Convention on Nature Protection and Wild Life Preservation, 1940 *etc.*

20 For details see *Trail smelter case* (*United States* v. *Canada*), 16 April 1938 and 11 March 1941 VOLUME III pp. 1905-1982, available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf (accessed on 12/04/2010).

basis of a customary principle, which says that the state is responsible to its neighbours for environmental damage caused by it due to the activities within its borders.[21] It was also during this period that awareness grew about the need of environmental protection and subsequently emerged and strengthened.[22] It was again during this period, in the United States, the waves of environmentalism led to the enactment of the National Environmental Policy Act in the year 1969, which for the first time introduced the concept of *Environmental Impact Assessment*. However, the fundamental characteristic of the international environmental law remained the same, as a set of soft laws.[23]

The next phase in the development of international environmental law began with the creation of the United Nations and its specialised agencies since 1945. During this period various international organisations at the regional and international level started addressing the issues of environmental degradation.[24] It was during this period the relationship between economic development and environmental protection was recognised at least in a limited way.[25] However, none of the Articles of the United Nations Charter had a specific provision on environmental protection other than Article 1(3), which included 'international cooperation in solving international economic, social, cultural or humanitarian problems' as one of the purposes of establishing the United Nations. In fact this has provided the

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21 *Good Neighbourliness* is a principle of international law with great relevance to international environmental law. It says that there is an obligation on states to reconcile their interests with the interests of neighbouring states. See Note (1973): "New Perspectives on International Environmental Law," *The Yale Law Journal* 82 (8): 1664.

22 *Supra* note 14 at pp. 702-10.

23 *Ibid.*

24 Phillippe Sands, (2003): *Principles of International Environmental Law*, Cambridge: Cambridge University Press, at p 31.

25 *Ibid.*

basis for subsequent environmental activities by the UN.[26] It is also to be noted that the UN charter in the beginning created no specialised organ or agency for protecting the environment. However, in the year 1948, a Conference was convened with the assistance of the UNESCO, which resulted in the creation of the International Union for the Protection of the Nature (IUPN)[27] with the aim of promoting the preservation of wildlife and the natural environment, public knowledge, education, scientific knowledge and research and legislation.

Thereafter in the year 1947, the Economic and Social Council (ECOSOC) took interest in convening the United Nations Conference on the Conservation and Utilisation of Resources (UNCCUR), which *inter alia* emphasised the need for international action to establish balanced approach to the management and conservation of natural resources. It also emphasised the competence of the United Nations over environmental matters.[28] Thereafter many resolutions were passed and conferences were convened at the auspices of the UN.[29] Similarly in the year 1949 the International Court of Justice confirmed 'every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states'[30]. In *Lac Lanoux Arbitration*[31] the arbitral tribunal affirmed the principles concerning the limitations on the right of States in their use of shared rivers and asserted the importance of cooperation among states.

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26 *Ibid.*

27 Currently the International Union for Conservation of Nature (IUCN).

28 *Supra* n.24 at p. 32.

29 Conference on the Conservation of the Living Resources of the Sea, 1954; International Convention for the Prevention of Pollution by Sea by Oil, 1954 *etc*. Various other resolutions adopted included the ones on the environmental impacts of oil pollution and nuclear activities.

30 (1949) ICJ Reports 4.

31 *France* v. *Spain*; 24.I.L.R. 101.

1.1.1 The United Nations Conference on the Human Environment, Stockholm, 1972

The Stockholm Conference held in December 1972 under the auspices of the United Nations General Assembly adopted three non-binding instruments, *viz*. (a) Resolution on Institutional and Financial Arrangements;[32] (b) Declaration on the UN Conference on the Human Environment (containing 26 Principles)[33]and (c) Action Plan (containing 109 recommendations).[34] As one scholar commented, "Stockholm enlarged and facilitated means toward international action previously limited by inadequate perception of environmental issues and by restrictive concepts of national sovereignty… There were significant elements of innovation in (1) the re-definition of international issues, (2) the rationale for cooperation, (3) the approach to international responsibility and (4) the conceptualisation of international organisational relationships."[35] Analysed from a legal perspective, the significant developments were the recommendations for the creation of new institutions and the establishment of coordinating mechanisms amongst the existing institutions (the Action Plan); the definition of a framework for future actions to be taken by the

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[32] It proposed that action be taken by the UN General Assembly to establish four institutional arrangements, *viz*. an intergovernmental Governing Council for Environmental Programs; An environmental secretariat; an environmental fund to provide financing for environmental programs and also an inter-agency environmental coordinating board to ensure cooperation and coordination among all bodies concerned in the implementation of UN environmental programs.

[33] See Chapter 2 for a detailed analysis.

[34] The 109 Recommendations were generally accepted by consensus and it reflected six main subject areas. (1) Planning and Management of Human Settlements for Environmental Quality (2) Environmental Aspects of Natural Resources Management (3) Identification and Control of Pollutants and Nuisances of Broad International Significance (4) Educational, Informational, Social and Cultural Aspects of Environmental Issues (5) Development and Environment; and (6) International Organisational Implications of Action Proposals.

[35] Louis B Sohn, (1973): "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal* 14, 423.

international community (the Recommendations) and the adoption of general guiding principles (the Declaration).[36]

The Post-Stockholm Declaration also witnessed the emergence of various legal instruments like the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, the World Heritage Convention 1972, *etc*. The principal characteristic of all these instruments was that they were legally non-binding on the signatory states.

The Stockholm Conference was the starting point for environmental activities at both regional and international level.[37] This period witnessed unprecedented proliferation of international environmental organisations some of which were established through treaties. Again, during this period the existing international organisations addressed the environmental issues more aggressively. [38]

It is generally believed that the creation of the United Nations Environment Programme (UNEP) and the adoption of Principle 21 were the most significant developments of the Stockholm Conference.[39] Further, it was during this period that many treaties were adopted by the United Nations, the most prominent one being the United Nations Convention on the Laws of the Sea 1982 (UNCLOS)[40]. This period also witnessed the

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36 Phillippe Sands, 2003: *Principles of International Environmental Law*, New Delhi: Cambridge University Press, at p. 37.

37 *Id*. at 40.

38 *Ibid.*

39 *Ibid.*

40 The UNCLOS established a comprehensive framework for the establishment of global rules on the protection of marine environment and marine living resources. It also included detailed and important institutional arrangements and provisions for

Montevideo Programme for the Development and Periodic Review of the Environmental Law. Another milestone was the World Charter for Nature 1982, which set forth 'principles of conservation by which all human conduct affecting nature is to be guided and judged.' The most important point to be noted is that this document deviated from the anthropocentric approach to environmental protection while emphasising the importance of protecting environment for the environment itself.

Another significant development of this era was the Report of the World Commission on Environment and Development 1983, commonly known as the Brundtland Report in honour of its chairman, the then Norwegian Prime Minister Gro Harlem Brundtland. The Commission, which was established outside the control of governments and the UN system had three objectives, *viz.* (i) to re-examine critical environment and development issues and formulate realistic proposals for dealing with them; (ii) to propose new forms of international cooperation on these issues that would influence policies and events in the direction of needed changes; and (iii) to raise levels of understanding and commitment to action of individuals, voluntary organisations, businesses, institutions and governments.[41] This Report also identified six priority areas for legal/institutional change and identified the existing legal order as a part of the problem.[42] They were:

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environmental assessment, technology transfer, liability and dispute settlement. The others being the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78); Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 and the UNESCO World Heritage Convention, 1972.

41 *Supra* n. 39 at p. 48.

42 *Id*. at p. 49.

(a) Governments, regional organisations and international organisations and agencies were called upon to support development which would be economically and ecologically sustainable, to integrate the environment fully into their goals and activities and also to improve coordination and cooperation.

(b) It demanded a reinforcement of the roles and capacities of environmental protection and resource management agencies to deal with effects, including a strengthened UNEP as the principle source of data, assessment and reporting and also as the principal advocate for change in international cooperation.

(c) The Report also called for an extension of the capacity of the international community to identify, assess and report global risks of irreversible environmental damage, including a new international programme for cooperation among non-governmental organisation, scientific bodies and industry groups.

(d) It also recognised the need to expand the rights, roles and participation in development planning, decision–making and project implementation, of the public, non-governmental organisations, the scientific community and industry.

(e) Fifthly and most importantly, in recognising that international law is being rapidly out-distanced by the accelerating pace and expanding scale of impacts on the ecological basis of the development, the Report called for filling gaps in national and international law related to environment in order to find ways to recognise and protect the

rights of present and future generations[43] to an environment adequate for their health and well-being; to prepare a universal declaration on environmental protection and sustainable development and also to strengthen procedures for avoiding or resolving disputes on environment and resource management issues.

(f) The Report also emphasised the need for investing in pollution control with the financial assistance from the World Bank, IMF and other regional development banks. It also called for the UN Programme for Sustainable Development and follow-up arrangements.

This period also witnessed other developments such as adoption of the Framework Guidelines titled as "Environmental Perspectives to the Year 2000 and Beyond" by the UN General Assembly, which apart from the above six key areas, identified four more areas that require attention, *viz*. (i) Oceans and Seas; (ii) Outer Space (iii) Biological Diversity, and (iv) Security of the Environment.

1.1.2 The UN Conference on Environment and Development, Rio De Janeiro (UNCED), 1992

The UNCED was organised by the United Nations as a follow-up action to the previous developments regarding environmental protection and with a purpose to 'elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of strengthened national and international efforts to promote sustainable and environmentally sound

[43] In this context it defines sustainable development as "…development that meets the needs of the present without compromising the ability of future generations to meet their own needs". For details see the Report of the World Commission on Environment and Development, (1983): "Our Common Future, Chapter 2: Towards Sustainable Development" World Commission on Sustainable Development.

developments in all countries.'[44] The UNCED adopted another set of three non-legally binding instruments. They are (i) the Rio Declaration on Environment and Development (The Rio Declaration); (ii) Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest (The UNCED Forest Principles), and (iii) Agenda 21. In addition to this, two more treaties were also adopted and opened for signature namely, (i) The Convention on Biological Diversity[45], and (ii) the UN Framework Convention on Climate Change.[46]

The UNCED was concerned with striking a balance between environmental protection and economic development. The main idea was to integrate environmental protection into economic and development activities.[47] The Conference of 1992 also accepted that environmental issues could not be effectively understood and solved in isolation without analysing the connected economic and political issues.[48] The main focus was on taking stringent measures in combating environmental pollution and associated matters rather than merely laying down standards and prescribing mechanisms for monitoring and researching about the environmental risks.[49]

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44 UNGA Res. 44/228, para 3.

45 The Convention on Biological Diversity has three main aims *viz*. (a) conservation of biological diversity (b) sustainable use of its components; and (c) fair and equitable sharing of benefits arising from genetic resources. It aims to develop national strategies for the conservation and sustainable use of biological diversity.

46 See for detailed analysis Chapter 3.

47 *Supra* n. 39 at p. 53.

48 *Ibid.*

49 For example the Protocol on Sulphur Dioxide to the United Nations Economic Commission for Europe (U.N.-ECE) Convention on Long-Range Transboundary Air Pollution aims at a 30% reduction in national annual sulphur emissions on their transboundary fluxes by 1993. Similarly, the Montreal Protocol on Substances that Deplete the Ozone Layer requires that chlorofluorocarbons and halons, except for essential uses, be phased out by the year 2000. This process is continuing.

Though this Conference did not result in any binding legal instruments, it is generally held to be a success.[50]

1.1.3 Modern Era of International Environmental Law and the emergence of *Global Environment Regulatory Regime*

The era after the United Nations Stockholm Conference on Human Environment 1972 and United Nations Conference on Environment and Development 1992, can be called the modern era of International Environmental Law. During this period, the focus of the international instruments on environmental law was totally different. There was little resemblance with regard to their focus between the agreements concluded after 1972. The earlier ones focused on subject matters that were mostly specific to the particular region in which it was made (like boundary rivers, fishing rights) or a particular subject matter (For example, as an endeavour to protect the endangered plants and animals from the poachers). The legal instruments that were negotiated and concluded after 1972 and 1992 focused on issues of greater importance like pollution control, deforestation, ozone depletion, *etc.* and were concluded with provisions for enforcing them.

As the international community grew sensitive towards the fact that the capacity of the environment to absorb the harmful by-products of industrialisation and other activities is reducing day by day, the awareness and attempts to standardise principles of international environmental law were strengthened.[51] The same trend was visible at regional levels too.[52] For

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50 *Supra* n. 47 at p. 53.

51 It is evident from the fact that after 1972, the international community have negotiated large number of agreements. Examples are the Vienna Convention on the Protection of the Ozone Layer, 1985; the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, with the London Adjustments, 199, and other amendments; the Protocols on Environmental Protection (1991 and 1998, with annexes) to the Antarctic Treaty,1959; the Basel Convention on the Transboundary Movements of Hazardous

example, in Europe, the European Communities Act 1972 provides clear authority for the European Community to act on environmental and natural resource related issues.

Other notable developments during this period are the UN Convention on Drought and Desertification 1992; the UN Conference on Straddling and Highly Migratory Fish Stocks 1992; Convention for the Protection of the Marine Environment of the North-East Atlantic 1992; the 2000 Bio-safety Protocol to the 1992 Biodiversity Convention 1997; Kyoto Protocol to the UNFCCC, *etc.* It may be noted that these instruments "reflect new thinking in the approach to international regulations and the role of new actors including that of private actors."[53] The key development of this period was the World Summit on Sustainable Development held at Johannesburg to mark the tenth anniversary of the UNCED. Though adopted the Declaration on Sustainable Development, the Summit did not adopt any convention or statement of principles. Though the Johannesburg Declaration noted that global environment continues to suffer, it proposed no specific actions beyond the general commitment to sustainable development.

Wastes and Their Disposal, 1989; the two International Atomic Energy Agency (IAEA) Conventions on Early Notification of a Nuclear Accident, 1986 and on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986; the International Convention on Oil Pollution Preparedness, Response and Co-operation,1990; the Framework Convention on Climate Change, 1992; the Convention on Biological Diversity,1992; the Principles on Forests; the Non-binding Legal Instrument of the Arctic Environmental Protection Strategy, 1993; and the London Guidelines for the Exchange of Information on Chemicals in International Trade,1989.

52 For example, the members of the United Nations Economic Commission for Europe concluded three protocols to the UN-ECE Convention on Long-Range Transboundary Air Pollution aiming at reducing trans-border fluxes of sulphur dioxides at less than 30%. Similar examples can be seen in other continents too.

53 *Supra* n. 50 at 64. For a detailed analysis of the developments during this period refer *Id.* at pp.65-69.

It is apparent that during this period the rules of international environmental law have become increasingly complex and technical as environmental considerations are being linked with economic and social considerations. Environmental issues are increasingly integrated into various aspects of economic and development and law, in particular trade, development lending and intellectual property. The result is that international environmental law is no more exclusively concerned with adoption of normative standards to guide the behaviour of various stakeholders. This has resulted in adoption of new techniques of regulation and new compliance mechanisms including the compliance through economic instruments.[54]

1.1.4 Emergence of *Global Climate Change Regulatory Regime*

Parallelly, the Global Climate Change Regulatory Regime (hereinafter referred to as GCCRR) emerged in the battle against climate change. A consensus emerged among various stakeholders with conflicting interest that threats posed by the greenhouse gas emissions and the resulting climate change are imminent, a mention of which appeared first at the international policy-making level in the First Assessment Report (FAR)[55] of the

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54 *Id*. at p.69.

55 The FAR was the basis of the United Nations Framework Convention on Climate Change (UNFCCC). The FAR came out in three main sections *viz.* (a) Scientific Assessment of Climate Change (b) Impacts Assessment of Climate Change, and (c) The IPCC Response Strategies. The FAR admits that there exists a phenomenon, which can be called as 'natural greenhouse effect', which is caused by the emissions resulting from human activities, which substantially increase the atmospheric concentrations of the greenhouse gases like CO_2, methane, CFCs and nitrous oxide. The FAR says that this increase will enhance the greenhouse effect, resulting in an additional warming of the earth's surface. It further says that "…based on current models, we predict…increase of global mean temperature during the 21st century of about 0.3 ^{o}C per decade (with an uncertainty range of 0.2 to 0.5 ^{o}C per decade). This is greater than that seen over the past 10,000 years." It also says that "…there are many uncertainties in our predictions particularly with regard to the timing, magnitude and regional patterns of climate change, due to our incomplete understanding of sources and sinks of GHGs; clouds; oceans and polar ice sheets. Our judgement is that: global mean surface air temperature

Intergovernmental Panel on Climate Change (IPCC)[56] in the year 1990. The FAR approached the issue as a subject "in need of a political platform".[57] These observations of the IPCC in FAR 'spurred the beginning of the climate change negotiations'[58] from the year 1991 onwards.[59]

1.2 Regimes in International Law Making Process and Question of fairness in the GERR and GCCRR

As a consequence of the GERR and GCCRR, the question of fairness is of paramount importance. Consideration arises regarding the extent of interests of all the stakeholders including the developed, developing and underdeveloped nations while negotiating these instruments. Traditionally, scholars analysed only the sovereign right of the nation-state to exploit resources within its jurisdiction and their rights to shared resources.[60]

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has increased by 0.3 to 0.6 ºC over the last 100 years." For details, see the FAR available at http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1 (accessed on 12/03/2010).

56 The IPCC was formed in the year 1988 by the World Meteorological Organisation and the United Nations Environment Program (UNEP) for providing comprehensive assessments of scientific, technical and socio-economic information globally with an intention to study about the risk of climate change caused by human activity, its potential environmental and socio-economic consequences, and possible options for adapting to these consequences or mitigating the effects. See Principles Governing IPCC Work (Approved at the Fourteenth Session (Vienna, 1-3 October 1998) on 1 October 1998, amended at the Twenty-First Session (Vienna, 3 and 6-7 November 2003), the Twenty-Fifth Session (Mauritius, 26-28 April 2006) and the Thirty-Fifth Session (Geneva, 6-9 June 2012). For details, see the Principles Governing IPCC Work as amended in June, 2012, available at http://www.ipcc.ch/pdf/ipcc-principles/ipcc-principles.pdf (accessed on 13/03/2010).

57 King, David and Richards, Kenneth *et al.*(2011): *International Climate Change Negotiations: Key Lessons and Next Steps*, University of Oxford: Smith School of Enterprise and the Environment, at p. 7.

58 *Ibid.*

59 A detailed analysis of GCCRR has been made in Chapter 3 of the thesis.

60 Known as the Principle of Permanent Sovereignty over Natural Resources. For the definition of this Principle see for example Principle 21 of the Stockholm Declaration, 1972 which says that "States have, in accordance with the Charter of the United Nations and the Principles of International Law, the sovereign right to exploit their own resources pursuant to their environmental policies…". It further links this principle with good neighbourliness principle by saying that "…and the responsibility to ensure that

However, the question of fairness has now crept in the usage of natural resources as well as regarding the question of sharing of burden in mitigating environmental pollution. Though the definition of fairness might require a fresh approach and perspective, it essentially involves the burden of equitable sharing of the resources and pollution control. The following aspects may be considered while analysing the concept of fairness.

1.2.1 Sovereign Equality of the State

The United Nations Charter stipulates that each state should be sovereign and no state should violate the sovereignty of another state.[61] Though this principle assumes legal equality within its ambit, practically it cannot even be assumed that the states are equal in every sense. They are different in terms of their political and economic power. Hence, to put it simply, sovereignty means that a state has the capacity to govern itself. However, it is another disturbing fact that many states do not actually possess this ability. It is also true that some of the states are even weaker than a few corporations and Non-Governmental Organizations (NGOs) in terms of wealth, while other states have more bargaining power and thus can influence the negotiation of international treaty making processes in particular and all other sectors of international relations in general. Such a disparity is evident in the UN Charter itself. For example, the UN Security Council comprises major powers that won the Second World War.[62] This proves that even the UN is not an exception to the importance of power in the making of strategic decisions relating to international relations. Sometimes this power turns authoritative

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activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction."

61 The United Nations Charter, 1945, Art. 2(1) & (4), available at http://www.un.org/aboutun/charter (accessed on 24/04/2010).

62 *Id*. at Art. 23, Permanent members of the Security Council are China, France, Russia, the United Kingdom, and the United States.

and in many other cases, it lacks legitimacy but could still be effective in shaping the future of international order.[63]

Additionally, the principle of sovereignty requires the states to "…refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[64] However, exceptions are present; for example, the use of force, self defence[65] or anticipatory defence[66] have been carved out in the UN Charter itself. The UN Charter also prescribes that the United Nations shall not intervene "in matters which are essentially within the domestic jurisdiction of any state. . . . "[67] Furthermore, the International Court of Justice in the *Tunis-Morocco Nationality Decrees* case,[68] ruled that the "scope of a state's domestic jurisdiction is relative and depends on the development of international law".[69] It may also be noted that the United Nations has intervened in many activities, which traditionally fell within the jurisdiction of a sovereign state. For instance, these include issues relating to self-determination, racial discrimination, mass starvation, environmental regulation *etc*.

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63 Reisman, W. Michael (1982): "Law from the Policy Perspective," in Myres S. McDougal and W. Michael Reisman (eds.) *International Law Essays*: *A Supplement to International Law: Contemporary* Perspectives, New York: Yale University Press.

64 *Supra* n. 62 at Art. 2(4).

65 *Id*. at Art. 51.

66 McDougal, Myres S. and Feliciano, Florentino P. (1961): *Law and the Minimum World Public Order: The Legal Regulation of Coercion*, New York: Yale University Press. See also Jessup, Philip C. (1948): *A Modern Law of Nations,* New York: Orth Press; Schachter, Oscar (1984): "The Rights of States to Use Armed Force," *Michigan Law Review*, 82, 1620 at p. 1633.

67 *Supra* n. 65 at Art. 2(7).

68 *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, International Court of Justice (ICJ), 7 February 1923, available at http://www.unhcr.org/refworld/docid/44e5c9fc4.html (accessed on 21/04/2010).

69 *Ibid.*

This shows that the international system at least informally has already recognised that there exists an unequal distribution of power. This disparity has been formalised to a great extent with the division of the globe into *haves* and *have-nots* and its relationship in the development of customary international law. For example, the Nuclear Non-Proliferation Treaty[70] recognises the customary international law, giving the powerful countries the right to possess nuclear weapons but at the same time prohibits and restricts the less powerful countries in doing so.[71]

1.2.2 Club Model of International Cooperation and Resulting Intricacies of International Relations

The end of colonisation resulted in the emergence and formation of new states, which led to new demands and claims. An example is the claim of the new state's to make the rules of environmental protection to be in sync with their legitimate right to development. This is more important since the *divide* amongst developed and developing states has become an established feature of international relations. This has intensified the demands of the developing nations for sharing the opportunity of wealth creation. Undoubtedly, the club model of international cooperation and the resulting intricacies of international relations have made the scenario more complex and complicated.

It is an accepted fact that states do not possess equal power in international relations. Cooperation among states is advocated and encouraged, as war is not an option to resolve the differences of opinion. The

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70 Treaty On The Non-Proliferation Of Nuclear Weapons, 1970, Available at http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml (accessed on 12/04/2010).

71 Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, reprinted in 729 UNTS 161. See also Miles, Edward L. (2002): "Nuclear Non-proliferation, 1945 to 1995," in Edward L. Miles *et al*., (eds), *Environmental Regime Effectiveness: Confronting Theory with Evidence*, New York: MIT Press, p. 273.

result of cooperation is the establishment of *groups* or *clubs* among the states; for example, the North Atlantic Treaty Organization (NATO) or BRICS[72]. This *club model of international cooperation,* though criticised by many, gives an extra footage to the claims made by them.[73] Some scholars have commented, "In the club-like institutions that emerged, cabinet ministers or the equivalent…from a relatively small number of rich countries, got together to make rules. Trade ministers dominated GATT; finance ministers ran the IMF; defense and foreign ministers met at NATO; central bankers at the Bank for International Settlements (BIS). They negotiated in secret, then reported their agreements to national legislatures and public."[74] Further, it is said that under this model "…*lack of transparency to functional outsiders* was a key to political efficacy. Protected by lack of transparency, ministers could make package deals that were difficult to disaggregate or even sometimes to understand."[75] Such cooperation is more critical in cases of environmental problems, which are trans-border in nature. This has strengthened the efforts of cooperation since the states have understood that common rules and common standards are more effective than any unilateral action.

1.2.3 Participation of Non-State Actors in the Lawmaking Process

The question of fairness in the international law-making process is also important in the context of recognition of the role of non-state actors

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72 BRICS is a club of emerging economies comprising Brazil, Russia, India, China and South Africa.

73 For a detailed analysis on Club model of multilateral cooperation and the resulting intricacies see Robert O. Keohane and Joseph S. Nye Jr., (2001): "Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy", *Harvard University John F. Kennedy School of Government Faculty Research Working Papers Series.*

74 *Id* at p. 4.

75 *Id* at p.5.

such as Non-Governmental Organisations (NGOs) and For-Profit Organisations in such a process. The role of NGOs in the law making process was recognised particularly during the UNCED and thereafter.[76] A particular case is that of the UNFCCC which recognised the role of NGOs in the adoption and implementation of laws.[77] For example, NGOs were actively involved in the preparatory processes in the capacity of experts in working groups and thereby contributed to the drafting of texts of the legal instruments that were adopted at the UNCED.

Similarly, the For-Profit organisations also have their stake in the law-making process. The business organisations had an important role in the negotiation processes at par with NGOs, the Kyoto Protocol is a very good example.[78] It is said: "…many of them used the same methods of action in their attempts first to thwart the chances of reaching an agreement and then to influence the form and contents of the commitments."[79]

However, such involvements are criticised by many for multiple reasons. The main criticism is that the legitimacy, accountability and transparency of such non-state actors are complex and open to questioning.[80] The legitimacy of these actors are questionable particularly because they are 'unelected elite organisations' which are many a times without any

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76 H. French, (1996): "The Role of Non-State Actors" in J Werksman (ed.), *Greening International Institutions*, London; Erathscan, at p. 254.

77 See UNFCCC Articles 4(1); 7.2 (1) and 7.6.

78 C. Giorgetti, (1997): "From Rio to Kyoto: A study of the Involvement of Non-Governmental Organisations in the Negotiations of Climate Change" *NYU Environmental law Journal* 7: 201 at p.220.

79 Grubb et al, (1999): *The Kyoto Protocol: A Guide and Assessment,* United Kingdom, The Royal Institute of International Affairs, at p. 261.

80 P.J. Spiro, (1997): "New Players in the International Stage," *Hofstra law and Policy Symposium* 2: 19 at p. 53.

legitimacy from the civil society whom they claim to represent.[81] In the opinion of a writer, the following are the problems in integrating Non-State Actors in the international law-making processes:[82]

> First, the vast number of NGOs makes deeper participation impractical. Second, because many NGOs are from industrial countries, they amplify certain views -- for example, on human rights or the environment -- that may not be reflective of the views of developing countries. NGOs from developing countries may also be less financed than their industrial country counterparts and therefore may not be able to participate effectively. Third, and more fundamentally, some government officials argue that NGO involvement in International organisations is unnecessary because NGOs can seek influence through their own governments.

The case being so, it is also important to analyse the question of fairness in the international environmental governance.

1.3 Conceptual Analysis of Fairness

Various philosophers from the distant past have attempted to define the concept of fairness. Those philosophers have used terms like *justice*, *equity* or *fairness* interchangeably[83] to mean 'the quality of being fair or

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81 K. Anderson, (2000): "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organisations and the Idea of International Civil Society", *European Journal of International Law* 11: 91 at pp. 117-118.

82 S. Charnovitz, (1997): "Two Centuries of Participation: NGOs and International Governance", *Michigan Journal of International Law* 18:183, at pp. 275-276.

83 Shue, Henry (1999): "Global Environment and International Inequality," *International Affairs*, 75(3): 531. Here the author says that what diplomats and lawyers call equity is what ordinary people everywhere call fairness.

impartial,' or 'something that is fair and just.'[84] For some of them, justness relates to the lawfulness and fairness, while unjustness is unfairness.[85]

For Aristotle, fairness could be equated with equity and higher justice, and also as an essential element of law.[86] In Chapter V of the *Nicomachean Ethics*, he defines justice as a state of character, which makes people to act justly.[87] Similarly, the concept of equity by H. L. A. Hart assumes that equity is subjective and arbitrary unlike legal justice, which is objective and reasonable.[88] He asserts that fairness is basically important in two circumstances; firstly when distributing the burden or benefit amongst a class of persons and secondly where compensation or redress is claimed for an injury or wrong.[89] The first circumstance is normally referred to as 'distributive justice' or 'distributive fairness' and the second instance is known as 'corrective fairness' or 'corrective justice'. According to him, it is also important to treat like cases alike, an aspect Aristotle also emphasied.[90] The crux of this principle is that fundamentally, impartiality and consistency are the underlying philosophy of fairness and justice. However, it does not give any coherent advice as to when cases are to be treated as like or alike.

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84 Banuri, Tariq, (1996): "Equity and Social Considerations in Climate Change", in James P.Bruce *et al.* (eds.), *Economic and Social Dimensions of Climate Change*, Intergovernmental Panel on Climate Change at p. 85.

85 Padjen, I.L. (1996), "Fairness as an Essential Element of Law," *Politika misao* , 33: 108.

86 Jaswal, Paramjit S. and Jolly, Stellina (2010): "Fairness and Rule of Law in Climate Discourse: A Critical Analysis," *Journal of the Indian Law Institute*, 52, 366 at p. 368.

87 *Id*. at p. 369.

88 *Ibid.*

89 Hart, HLA (2012): *The Concept of Law*, New Delhi, Oxford University Press, at p. 154.

90 Aristotle, *Nicomachean Ethics*, W. D. Ross Trans, at. Book 5, Chap. 9, available at http://www.ilt.columbia.edu/publications/artistotle.html (accessed on 23/05/2010).

Like distributive justice, equity also includes the idea of providing individualized justice.[91] Aristotle considers equity as a factor that mitigates the excesses implied by law's absoluteness to facilitate the application of the law to an actual case.[92] In this regard equity serves as a corrective measure to the harshness or injustice that may result from the rigid application of a law. Hence, the basic purpose of equity is to prevent injustice and promote fairness.

Similarly Ronald Dworkin attributes fairness as an essential element of law. He points out: "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."[93] Needless to add, fairness, unlike discretion is not comparable to a hole![94] Dworkin distinguishes to account for the fact that discretion is also guided by the expediency between the two standards that guides the exercise of discretion, *viz*., principles, which are the requirements of justice or fairness and morality or policies in setting out economic or similar goals to be attained.[95] These approaches are criticized as they fail to bring out the contents of fairness.[96]

For Lon L. Fuller, to a great extent, law is built in on the contents of fairness through his requirement of *Inner morality* of law.[97] He wrote about

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91 Shelton, Dinah (2007): "Equity," in Daniel Badonsky, Jutta Brunnee *et al.* (eds.), *The Oxford Handbook of International Environmental Law*, New Delhi: Oxford University Press at 639, 640.

92 *Supra* note 90 at Book 5, Chap. 10.

93 Dworkin, Ronald (1998): *Taking Rights Seriously*, Cambridge: Harvard University Press at p. 369-71.

94 *Supra* n. 86.

95 *Ibid.*

96 *Ibid*.

97 Fuller, Lon L. (1969): *The Morality of Law*, New York: Yale University Press, at pp 33-38.

Eight Routes for Failure of any Legal system, which included the following:[98]

(a) The lack of rules or law, which leads to *ad-hoc* and inconsistent adjudication;

(b) Failure to publicize or make known the rules of law;

(c) Unclear or obscure legislation that is impossible to understand;

(d) Retroactive legislation;

(e) Contradictions in the law;

(f) Demands that are beyond the power of the subjects and the ruled;

(g) Unstable legislation or frequent revision of laws;

(h) Divergence between adjudication/administration and legislation.

According to Fuller, any legal system to be called fair, needs to satisfy these eight conditions of inner morality.

Similarly, Utilitarianism, whose chief proponent is Jeremy Bentham, places morally right act or policy as the one that leads to the greatest happiness or utility for the members of the society[99] and further maximum happiness to maximum number of people.[100] The advantage of utilitarianism is that it measures the merit of an action based on consequences and not on abstract moral theories.[101] In this way, it contradicts moral theories that primarily require compliance with certain abstract standards, giving only

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98 *Ibid.*

99 Soltau, Friedrich, (2009): *Fairness in International Climate Change Law and Policy*, Cambridge: Cambridge University Press, at p.10.

100 *Ibid*.

101 *Id*. at 11.

secondary importance to consequences.[102] Because of the ways in which utilitarianism estimates utility, it is often criticized for being unaccommodative to the notion of justice or fairness.[103] Utilitarianism justifies the policies that maximize collective good or aggregate utility, but is not sensitive to the distribution of burdens and benefits across individuals or countries.[104] As for example, it engages economic approach to resource allocation and thus pulls back debates on the costs and benefits of various non-economic proposals made to combat climate change.[105] The claims of inhabitants of small, low-lying island nations for equal consideration; appeals of conservationists for the protection of species and ecosystems free from their value on economic terms and right of future generations to enjoy the benefits of nature as the present generation *etc.* are not supported by utilitarianism if they are not converted into economic terms.[106]

John Rawls and his *Difference Principle* of Distributive Justice is one of the most influential theories of justice or fairness. According to him, there are two fundamental principles of justice:

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102 Moral theories based on rules are generally known as deontological theories.

103 Soltau, Friedrich, (2009): *Fairness in International Climate Change Law and Policy*, Cambridge: Cambridge University Press, at pp. 41–45. For defences of Utilitarianism, See Lyons, David, (1965): *Forms and Limits of Utilitarianism*, Oxford: Clarendon Press; and Hare, R. M. (1981): *Moral Thinking*. For an Attempt to Apply Utilitarianism to a Range of Global Problems Including Climate Change, United States of America: Harvard University Press; Singer, Peter (2002): *One World: The Ethics of Globalization*, United States of America: Yale University Press.

104 *Supra* note 103 at 138.

105 Bert Metz *et al*. (eds.) (2007): Intergovernmental Panel on Climate Change, Climate Change: Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, at p.144.

106 Weiss, Edith Brown (1992): "In Fairness to Future Generations and Sustainable Development," *American University International Law Review*, 8:1, 19-26.

(i) Every individual in a just society has an equal right to a fully adequate scheme of equal basic liberties consistent with a similar scheme for everyone;

(ii) Social and economic inequalities must satisfy two conditions; firstly that such inequalities must be attached to offices and positions open to all under conditions of fair equality of opportunity, and secondly, that they must be to the greatest benefit to the least advantaged members of society.[107]

Amongst these, the latter is known as *Difference Principle*, according to which the primary objective is "…not to eradicate all inequality, but instead to permit only those inequalities that benefit everyone in society by promoting socially useful talent and initiatives."[108]This principle does not allow unequal distributive outcomes not compatible with the principles of equality of opportunity, that in itself, a foundational belief concerning justice.[109]

Further Robert Nozick in his Entitlement Theory holds that a distribution is just and fair if everyone is entitled to the goods that they currently possess.[110] According to him, just distribution flows from the free exchange of goods originally acquired and then successively transferred by legitimate means.[111] If the goods are unjustly acquired or transferred, a *Principle of Rectification* of these violations operates. Broadly, his theory stipulates that countries have legitimately acquired a share of the atmosphere's capacity to serve as a sink for pollution. There are two

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[107] Schwarzschild, Maimon (1999): "Constitutional Law and Equality," in Dennis Patterson (ed.) *A Companion to Philosophy of Law and Legal Theory*, Australia: Blackwell Publishing, at pp 156- 165.

[108] *Supra* n. 104.

[109] *Ibid.*

observations made by him *viz.* (a) the world is initially not owned by anyone and the atmospheric sink is a *terra nullius*; (b) an unjust acquisition, for example by force taints the title and is subject to rectification.[112]

However, most of these analyses were concerned only about fairness in the domestic laws and not in international law, the reason being that those scholars lived in an era during which the law meant just municipal or domestic law and definitely not the international law. For some of them, international law was nothing more than a 'positive morality.'[113]

1.4 Conceptual Analysis of Fairness in International Law

Subsequently, it was Thomas M. Franck who initiated the concept of fairness in international law. For him, international law has entered a 'post-ontological' age, an era in which it is no longer necessary to defend the status of international law as a law, but where the vital task is to analyze its fairness.[114] In attempting an answer to the question 'Is international law fair?', Franck invoked a broad notion of fairness that encompasses two distinct and sometimes competing values; legitimacy (procedural fairness) and distributive justice (substantive fairness).[115] The former expresses the idea that 'for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how those rules are made,

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110 Nozick, Robert (1974): *Anarchy, State, and Utopia,* New York: Basic Books, at pp. 150–51.

111 *Supra* n. 109.

112 *Id*. at 230–31.

113 See generally for example Austin, J., (1954) *The Province of Jurisprudence Determined*. London: Weidenfeld & Nicolson.

114 Phillippe Sands, (2003): *Principles of International Environmental Law*, New Delhi: Cambridge University Press, at p.6.

115 Franck, Thomas M. (1998): *Fairness in International Law and Institutions*, Oxford: Oxford University Press, at p. 8.

interpreted and applied'[116] The latter is defined, initially, as amounting to 'moral rightness' in general. When he said that fairness is 'not out there' waiting to be discovered, he brings in the sociological aspect of fairness.[117] In this context an Indian author states that "what the deep contextuality of all notions of fairness does tell us is that fairness is relative and subjective[118]; not as St. Thomas Aquinas hoped, a divine given inculcated into the nature of things to be discovered or intuited by right thinking humans."[119] He further adds that "If fairness is not a rationally detectable *dictum* woven into the fabric of the universe, it does not follow that all judgements about it are simply arbitrary expressions of individual or collective preferences and prejudices."[120] In this context, Franck says that 'fairness is a human, subjective, contingent quality which merely captures in one word, a process of discourse, reasoning and negotiation leading, if successful to an agreed formula located at a conceptual intersection between various plausible formulas for allocation."[121]

Franck attaches the Right Process to legitimacy *i.e.* the outcome of a fair process to decisions or allocations that are legitimate.[122] Applying the same logic, if a rule is legitimate, it necessarily implies that the rule was made in accordance with the right process and because it is legitimate, it requires voluntary compliance.[123] Franck further states that "any analysis of fairness must include consideration of the consequential effects of a law: its

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116 *Ibid.*
117 *Supra* n. 94.
118 *Ibid*.
119 *Ibid*.
120 *Ibid.*
121 Phillippe Sands, 2003: *Principles of International Environmental Law*, New Delhi: Cambridge University Press.
122 See Franck, Thomas (1990): *The Power of Legitimacy among Nations*, New York: Oxford University Press.
123 *Supra* n. 121at 26.

distributive justice."[124] Franck considers the "growing awareness of irrefutable interdependence" as a proof of the emergence of global community.[125] As various rules apply in a global community for allocation of resources, arriving at a common consensus for rule of fairness is a tedious task. He concludes by saying that there is no single conception of fairness, but rather that fairness "is a product of social context and history" that "captures in one word a process of discourse, reasoning and negotiation."[126] For deciding what is fair, Franck postulates two assumptions. The first stipulates that there is no *trumping rule*, which says that no participant may raise a principle (whether religious, philosophical, or ideological) that is non-negotiable and the second rule postulates about the *maximin* principle, which holds that "unequal distribution is justifiable only if it narrows, or does not widen, the existing inequality of persons' and/or states' entitlements."[127] Both the developed and the developing countries criticize Franck and his postulates while stating that fairness is too narrow to serve as a standard for an ethical evaluation of the international law.[128]

1.4.1 Conceptual Analysis of Fairness in International Law and its Relevance in GERR and GCCRR[129]

When matters of environmental protection arise at international as well as national negotiations, one of the most important questions that arises is generally about fairness and justice. From what we have discussed earlier,

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124 *Id*. at 8.

125 *Ibid*.

126 Soltau, Friedrich (2009): *Fairness in International Climate Change Law and Policy*, London: Cambridge University Press, at p. 138.

127 *Ibid.*

128 *Supra* note 120. He provides a more closely argued criticism of the primacy Franck assigns to the *maximin* principle, pointing out that in Rawls's account, it is subordinate to the first principle of the equal right to liberty.

129 This research does not attempt to justify any particular conception of justice or its implementation. Rather, the focus is to identify and apply principles of fairness evaluation to international climate law and policy.

it is determinable that there is no single definition for it; rather, it cannot be contained and defined in a single definition. As is rightly said by an author, "…it is a deeply contested concept, one that reasonable persons can understand it in inconsistent and even incompatible ways."[130] The greatest dilemma of scholars and policy makers is that fairness is an abstract concept whereas the climate change involves the 'practical and real world questions'.[131] It is in this context that a scrutiny of the concept of fairness is important for analyzing the international environmental negotiations.

1.4.2 Fairness for Whom?

While making norms in the area of climate change at the international level, the question of 'fairness to whom?' generally crops up. The answer often relates to the 'fairness between nations' or the 'international justice'.[132] However, the 'international justice' involves the paradigm of various sub-national groups and tribes who have different levels of exposure to climate change. Another important feature is that relates the question as to how far the concept of fairness and justice among the various nations can be extended to the international level where not many institutions can sustain the elements of fairness evolved in a sub national set up.[133]

The liberal concepts of justice and fairness emphasize that the 'naturally arbitrary circumstances of birth like race, sex, class *etc*' should not decide the fate of any individual. Fairness in such a situation is ensured by

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130 *Supra*. n. 126 at p.133

131 *Ibid*.

132 *Ibid*

133 See Kritsiotis, Dino (2002): "Imagining the International Community," *European Journal of International Law*, 13, 961. See also Rawls, John (1999): "The Law of Peoples," University of Chicago Law Review, 64(3), 1.; Kymlicka, Will (2002): *Contemporary Political Philosophy: An Introduction*, London: Oxford University Press at p. 255; Nagel, Thomas (2005): "The Problem of Global Justice," *Philosophy & Public Affairs*, 33(2), 113.

the State at the national level by offering a 'level playing field.' In India, for example, reservation policies under Article 15 and 16 of the Constitution aim at offering this level-playing field. There are now many policies implemented by the national governments aimed at providing 'equality of opportunity'. The important question as to what extent such conceptualization of justice or efforts to achieve justice can be taken to the international level. This question is yet more significant in the light of the fact that the geographic location of the country such as island or a coastal country[134] or the economic growth of the country is critically vulnerable to the aftermaths of climate change. Thus, a serious effort to conceptualize the international justice is imperative to overcome the effects of these naturally arbitrary circumstances.

1.4.3 International Relations and International Law-Making

Such an analysis is furthermore important, particularly in the context that most of the international agreements are deliberated and concluded at the behest of an economically powerful State or group of States or by International Organizations led by them. It is not necessary that they look into the interest of the developing and underdeveloped countries. As Thomas Franck observed:[135]

> *The questions to which the international lawyer must now be prepared to respond are different from traditional inquiry: (like) whether international law is law. Instead, we are now*

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134 For example, the representative of Tuvalu, one of Island States at Copen Hagen said that it "...is one of the most vulnerable countries in the world to climate change, and our future rests on the outcome of this meeting" and when deliberating on a consensus it was said that "It looks like we are being offered 30 pieces of silver to betray our people and our future... Our future is not for sale. I regret to inform you that Tuvalu cannot accept this document."

135 *Supra* note 131at 6.

> *asked: Is International law effective? Is it enforceable? Is it understood? and, the most important question: Is International Law fair?*

Friedrich Soltau adds, "…international climate law may be many things, but it arguably does not aspire simply to set the rules of the game, demarcate minimum standards, or express the raw reality of power politics."[136]

Also, issues of fairness regarding the GERR and the GCCRR require two-dimensional answers. The answers should essentially put fairness in the general background of these regimes and look into the challenges that are specific to the problem at hand.[137] If the parties are in unequal bargaining positions, the basic presumption is in favor of unfairness. As stated by some scholars, "…it could be argued that relations between states are not structured in a neutral fashion, and there does exist a 'Global Basic Structure' of economic and political rules and relationships, which has distributional effects on states *inter se* as well as on individuals within states".[138] But unfortunately a similar 'Global Basic Structure' does not exist in the case of fairness and justice. Scholars in the field also contend that this lack of 'Global Basic Structure' in fairness and justice is particularly revealed in the context of 'unequal relations between the states, with the key aspects of the international system skewed in favor of the affluent and the powerful states.'[139]

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136 *Id.* at 135

137 Shue, Henry (1996): 'Environmental Change and Varieties of Justice," in Fen Osler Hampson & Judith Reppy (eds), *Earthly Goods: Environmental Change and Social Justice*, London: Cornell University Press at pp. 9-13

138 Buchanan, Allen (2000): "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics*, 110(4): 697 at 705–6.

139 Tasioulas, John (2003): "International Law and the Limits of Fairness," *European Journal of International Law*, 13: 993 at 1009.

Any analysis of fairness has to take into account the role being played by the vested interests in negotiations and formation of international agreements. Parties would accept the terms of the agreement only if it satisfies their own national interest whether be it political, economical or even religious. This in essence, makes the references to fairness a futile exercise.[140] So it is not far from the truth when scholars argue that vested interest "…holds as a key tenet that the basic laws of the international system flows from the relative distribution of capabilities (power) across the system."[141] In this context, it is necessary to comprehend how different schools of International Relations understand the role of international law making processes.

Amongst the Positivist theories of International Relations, Realism holds that States are power oriented. The basic assumption of realism is that states are rational actors and they seek to further their interests ultimately with little regard for the international law. Realists are skeptical of the idea that states can cooperate in international institutions to advance the common interests.[142] Proponents of this school say that states are self-interested, power-seeking rational actors. Classical positivist realists like E.H. Carr argue that international relations are struggle amongst the economically powerful (*have* powers) and the economically disadvantaged (*have not*

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[140] See, for the classic exposition, Morgenthau, Hans J. (1967): *Politics Among Nations: The Struggle for Power and Peace*, London, McGraw Hill ; See also Victor, David (1999): "The Regulation of Greenhouse Gases: Does Fairness Matter," in Toth (*ed.*), *Fair Weather: Equity Concerns in Climate Change* , London: Earthscan Publications

[141] *Supra* n 136 at 136.

[142] *Ibid.*

powers).[143] They say that, "the statesman must think in terms of the national interest, conceived as power among the other powers."[144]

Similarly, the Liberal Theory of International Relations maintains that the states get benefits from cooperation and non-cooperation.[145] But the liberalism has been criticised by scholars like E.H. Carr who called it as idealism. At the same time, another school, the Neo-liberalism proposes that states are the key actors in international relations. However, they also maintain that the non-state actors such as Non-Governmental Organisations and also For-Profit Corporations and Inter-Governmental Organisations are also important in the international law-making processes.

Another approach is the regime theory,[146]which lays minimum emphasis on the power disparity, and instead draws attention to the role of international regimes and institutions in assisting the states to realize their common interests. The proponents of this theory share the realism's commitment to a theory of rational, self-interested actors, but favor regimes and institutions stating that it helps the states in coordinating their behavior and achieving the mutually beneficial outcomes.[147]

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143 E.H.Carr, (2001): *The Twenty Years' Crisis, 1919-1939,* New York: Perennial Books. In this book he argues that *politics are not a function of ethics, but ethics of politics. Men are kept honest by constraint." He further says that "Morality is the product of power".*

144 Hans Morgenthau & Kenneth Thompson, (1985): *Politics Among Nations*, New York: McGraw-Hill at p. 165.

145 Angell, Norman, (1914): *Arms and Industry: A Study of the Foundations of International Policy*, New York: Putnam.

146 A key text is Keohane, Robert (2005): *After Hegemony: Cooperation and Discord in the World Political Economy,* New Jersey: Princeton University Press.

147 *Supra* n. 136.

1.4.4 Adaptation of Fairness Requirements in the various Principles Related to GERR and GCCRR

Any use of natural resources both for subsistence and for industrialization involves the issues of distribution. If the distribution is to be fair, it has to take into consideration the interests of all the stakeholders. Similarly, allocating costs of mitigation and adaptation measures among the countries including developed, underdeveloped and developing is also a dilemma in the analysis of fairness, as these measures raise concerns regarding both the procedural and the substantive fairness.[148] Fairness issues are relevant while sharing the burden and benefits among the States and while studying the conditions under which distributions or allocation are made.

Similarly, it is under the background of procedural fairness that any international law-making processes must take place. Any condition restricting participation of all stakeholders, their access to information, exclusion of coercive tactics, *etc.* should be avoided. The general ability of all the parties to bargain on roughly equal terms should be encouraged.[149] These rules are recognized by Principle 10 of the Rio Declaration[150] as important procedural rights. They are again recognized by the *Aarhus*

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148 See Adger, W.N, Paavola, J. Huq *et al.* (*eds.*) (2006): *Fairness in Adaptation to Climate Change*, MIT Press, Cambridge at p. 64

149 *Supra* n. 147.

150 Principle 10 of the Rio Declaration on Environment and Development, 1992 says that "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Convention,[151]which establishes comprehensive and binding standards.[152] Even though *Aarhus Convention* is criticized for its Euro-centric core, it is also true that it provides standards that can be applied at the global level.[153]

The elements of procedural fairness are also derived from the *Doctrine of Sovereign Equality* of states, according to which each and every member country is equally entitled to participate in the treaty-making process at the international level. However, such a substantive equality is grossly affected by the inequalities among the states. It is true that developed countries have "…superior ability to design and analyze the policy proposals, availability of the technical expertise, and negotiating experience. The negotiating structure and bargaining process can be structured to incorporate the various aspects of procedural justice, for instance, by formulating a broad and inclusive agenda, choosing clear and transparent rules, and giving all parties a say in selecting procedures."[154] It is not only the developed countries that achieve the national interest using their strength but the groups of developing countries also. They try to achieve common aims by lobbying at international negotiations. They compete with the industrialized countries that "…possess advantages in terms of resources – size of delegations, experts, and ability to design and evaluate technical proposals –

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151 The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.

152 *Supra* n. 149.

153 International Council on Human Rights Policy, (2008): "Climate Change and Human Rights: A Rough Guide." Available at http://www.ichrp.org/files/summaries/35/136_summary.pdf (accessed on 10/06/2010). The study points out that Article 3(7) of the Aarhus Convention states that "each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment." The suggestion is that this constitutes an affirmative duty applicable to Aarhus Convention parties in the context of the UNFCCC negotiations. See, *id*. at 50.

154 Albin, Cecilia (2003): "Getting to Fairness: Negotiations over Global Public Goods,*"* in Inge Kaul *et al.* (eds.) *Providing Global Public Goods: Managing Globalization*, New York: UNDP, p 263.

that most developing countries generally cannot match."[155] These factors make an international treaty-making process, comprehensive of a number of inordinately technical and complex issues that weaken the effective participation by all, and the ultimate object of achieving the standards of global justice. Though the importance of information creation and its sharing done by various UN agencies, Non Governmental Organizations, Research Organizations, *etc*. cannot be undermined, very often, its impartial analyses are missing. "Especially with respect to adaptation, poor and vulnerable countries need to have access to reliable data to formulate policies and then seek international assistance to support their implementation."[156] These issues plaguing fairness in the negotiating processes will ultimately decline trust and affect compliance of the agreement.

It is in this context that the following Principles related to GERR and GCCRR are gaining importance. It may be seen that there have been efforts to include conceptually the elements of fairness in the various principles at the minimum level.

1.4.5 Egalitarian Principles

Egalitarian principles such as the sustainable development[157], the inter-generational equity and the intra-generational equity[158], mandate equal entitlement of persons to a *good*, opportunity to avail the *good* and to enjoy them. In the context of climate change, the egalitarian principles hold that

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155 *Supra* n. 152.

156 *Ibid*.

157 Sustainable Development as defined by Brudtland Commission means it is "…development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

158 Intra-generational equity is the requirement of fairness in interactions between people of the same generation. At the same time intergenerational equity is about equity between present and future generations. In the context of this thesis, Intergenerational equity includes considerations of distribution of resources and fairness between nations.

all humans have an equal right in the *good* of nature; it prescribes an equal share in the total atmospheric capacity to safely absorb Greenhouse Gas (hereinafter referred to as GHG) emissions. But "…the formal rule of equal treatment or equal shares alone is insufficient because that very much depends on the substantive rule by which one is entitled to equal treatment and in what circumstances."[159] As discussed in the earlier part of this chapter, this is primarily because natural factors relating to weather, location, and level of social and economic development differ between nations, thereby resulting in varied costs and gains, which in turn make a strict and fair allocation very difficult. In such a context, "one possibility is to interpret equality as equality of opportunity, thus giving all persons an equal possibility of benefiting from the absorptive or *sink* capacity of the biosphere. Such a conception moves away from an insistence on equal shares toward a definition of a share in the atmosphere that is commensurate with setting a fair starting point."[160] This line of thinking recognizes that the unequal access to the *atmospheric sink* prevents countries from having a fair opportunity to develop and prosper.[161]

1.4.6 Need-Based Principle

The need-based principle argues that distribution of benefits and burden shall give priority to countries that are the poorest and/or at most risk. According to this principle, a distribution is fair only to the extent that it benefits the most disadvantaged. Unlike egalitarianism, this approach is not

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[159] For the argument that equality lacks any independent force, see Westen, Peter (1982): "The Empty Idea of Equality," *Harvard Law Review*, 95: 537. See also Chemerinsky, Erwin (1982-1983) : In Defence of Equality: A Reply to Professor Westen," *Michigan Law Review*, 81: 575.

[160] *Supra* n. 156 at 140.

[161] Posner, Eric A. and Sunstein, Cass (2008): "Climate Change Justice," *Georgetown Law Journal*, 96,1565 at pp 1583–86 . It is argued that if redistribution and improved welfare are the aim, direct transfers are preferable to emission entitlements.

concerned with the comparative properties of distributive outcomes; but says that it is morally relevant that some persons are disadvantaged as such.[162] In this regard, a few scholars say that such a position is "…insensitive to the origin of the unfair distribution, as it is not concerned with making good inequality resulting from some wrong."[163] In the case of GCCRR, the contention will be that every one has the right to emit GHG to the least level to secure their basic human needs. This will result in a larger share of resources to the most vulnerable countries and to the poorest populations.[164] Hence, this theory essentially says that a fair GCCRR should, at a minimum, help the efforts of the poorest countries in meeting the basic needs of their citizens.[165]

1.4.7 Responsibility-Based Principles or Polluter Pays Principle

According to the IPCC, 20% of the population of the developed countries emits 46 percentage of GHG while 80% in the developing countries are responsible for only 54 percentage.[166] This disparity in GHG emissions is frequently raised in global climate change negotiations.[167] In this context, the proposition can be that those who have caused a problem

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[162] Page, Edward A. (2007): "Justice between Generations: Investigating a Sufficientarian Approach," *Journal of Global Ethics*, 3(1): 3, at p. 7.

[163] *Supra* n. 160 at 141.

[164] See Manne, Alan and Mendelsohn, Robert (2004): "Climate Change Alternative Approaches*,'* in Bjorn Lomborg (ed.), *Global Crises, Global Solutions*, Cambridge: Cambridge University Press, at p. 44.

[165] Ashton, John and Wang, Xueman (2003): "Equity and Climate: In Principle and Practice" *Pew Center on Global Climate Change,* at p. 5, available at http://stephenschneider.stanford.edu/Publications/PDF_Papers/EquityandClimate.pdf (accessed on 24/12/2009).

[166] Yvo de Boer (2007): "Briefing on the Intergovernmental Panel on Climate Change," UNFCCC, Twenty-sixth session of the Subsidiary Bodies ; Fourth Assessment Report , Bonn, at p.30, available at http://unfccc.int/files/press/news_room/statements/application/pdf/070512_ipcc_statement_ydb.pdf (accessed on 12/12/2009).

[167] Kevin A Baumert and Tim Herzeg, (2005): *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy,* United States of America: World Resources Institute.

shall be responsible for it. This is, in effect, reflected in the *Polluter Pays Principle*.[168] Nevertheless, there exist criticisms against the responsibility principle as well.[169]

The first criticism to this line of argument is in relation to the 'responsibility across generations'. Fairness with respect to the future generations faces many problems. It includes (a) Non-identity Problem, which argues that policies that may harm the future generations will infact harm only a few of them. It is because the same policies are necessary conditions for the future generation to come into existence.[170] In the context of climate change, it can be said that "the emissions that contributed to the emergence of climate change as a global problem originated in the acts and policies that have affected the size and composition of the subsequent generations, such that a very few members of the present generation can plausibly argue that they have been harmed, or made worse off, by the historical greenhouse gas emissions associated with industrialization."[171] "In short, individuals of a future generation cannot argue that climate change has harmed them because without it, they (that particular group of persons) would not have been born."[172] Though this argument seems to be just, it essentially questions the fundamental *Doctrine of Intergenerational Equity.*

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168 Birnie, Patricia and Boyle, Alan (2002): *International Law and the Environment*, London: Oxford University Press at pp. 92–95.

169 For a list of criticisms and rebuttals, see, Neumayer, Eric (2000): "In Defence of Historical Accountability for Greenhouse Gas Emissions," *Ecological Economics*, 33(2): 185. See also Caney, Simon (2005): "Cosmopolitan Justice, Responsibility and Global Climate Change," *Leiden Journal of International Law*, 18: 747.

170 *Supra* n. 125 at 132. About the problem in the context of ethics and philosophy, see Parfit, Derek (1984): *Reasons and Persons*, Oxford: Oxford University Press, at p. 351–59.

171 *Supra* n. 170 at 170.

172 *Supra* n. 163 at 143.

Another criticism raises a question *viz*.; "Is it fair to assign responsibility for consequences of actions that were not considered harmful at the time they took place?"[173] The main reason for the increased GHG emissions is social and economic development. Even if there was ignorance or no knowledge of fact that the GHG emissions were harmful, when subsequently it is proved harmful can the innocent victims claim remedial action including compensation? For example, the pesticide *Endosulphan* has been widely used and aerially sprayed in the cashew farms of the Plantation Corporation of Kerala for increasing the productivity. Consequently, it resulted in various health hazards for the innocent people inhabiting in that area. It is a widely acknowledged fact that *Endosulfan* is one of the most toxic pesticides present in the market today, responsible for many fatal pesticide-poisoning incidents around the world. It is also a *xenoestrogen*, a synthetic substance that imitates or enhances the effect of estrogens and it can act as an endocrine disruptor, causing reproductive and developmental damage in both animals and humans. Despite constant demands from the public and the various social action groups, the Government has not yet taken any concrete steps to ensure a total ban of the product even in the affected areas.

Here, the pertinent issue is that, by applying the non-identity rule to this problem, can the polluter claim exemption from the liability for the total and irreparable loss caused to the environment. Further, in such a scenario, to what extent is it justifiable in saying that the Plantation Corporation of Kerala, a public sector undertaking, is not accountable and responsible for compensating the consequential loss?

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[173] *Ibid.*

1.4.8 Capability-Based Principles

Capability as the basis of distributing the burden of mitigation and adaptation in climate change forms the pillar of another set of philosophical argument. This is evident in UNFCCC approach, when it says that the developed countries should take the lead in adaptation and mitigation activities. It says that in securing the global public good, countries that are most able in terms of technologically, financially and in terms of human resources should contribute more when compared to the less able countries.[174] The basis of such an approach is an implicit assumption that those who have the capability to address the global environmental problems are also the ones that caused them.[175]

The Per Capita Income or the Gross Domestic Product (GDP) are the commonly used yardstick of capability. The indices such as the UN Development Programme's Human Development Index may also be used.[176] Scholars also argue for defining the capability in non-economic terms like health and education, enjoyment of economic and social security, and the freedom to engage in economic interchange and social decision-making.[177] An analysis of capability as fairness might be important when the able and the developed countries are given more responsibility in combating climate change.

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174 Weiss, Edith Brown (1993): "International Environmental Law: Contemporary Issues and the Emergence of a New World Order," *Georgetown Law Journal*, 81:675.

175 *Supra* note 172 at 144.

176 See UNDP, (2007): *Fighting Climate Change: Human Solidarity in a Divided World,* Human Development Report 2007/2008.

177 See Sen, Amartya K. (2001): *Development as Freedom*, London:Oxford University Press.

1.4.9 Principles of Welfare Economics

The aim of welfare economics is to frame policies that would maximize the 'maximum social welfare.'[178] As already stated, the developing countries will be the hardest hit by climate change as a consequence, particularly of their lack of wealth. Climate change will also strengthen the existing global inequalities in welfare. In this context, it is the purpose of welfare economics to convert the impacts of climate change into economic terms and evenly distribute it among all countries according to their capabilities. But this approach has its own demerits.[179] Firstly, it is not clear as to how the impacts on different countries can be compared and aggregated and a blanket measure of global welfare can be arrived at. Normally, economists calculate the aggregate measure in terms of the real income,[180] but in climate change, such a process would also involve summing the well being of diverse people and valuing the effects of the utility of consumption for these individuals. This approach is, however, not devoid of any demerit. As put aptly by a scholar: expressing well-being in terms of income raises the question of how to value impacts on the environment and health, especially human life.[181] Such a problem arises because in order to make a cost-benefit comparison, a monetary value must be assigned to human life, usually arrived at in relation to per capita GDP, yielding the result that the life of a person in a developed country is usually 'worth' more than that of a person living in a developing country.[182] In economic terms, it may not be objectionable since the cost of sustaining life

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178 *Supra* note 4 at 28.
179 Grubb, Michael (1995): "Seeking Fair Weather: Ethics and the International Debate on Climate Change," *International Affairs*, 71: 463, at p. 470.
180 *Supra* n. 178 at 30.
181 *Supra* n. 172 at 144.
182 *Ibid*.

would be practically different in different places, as for example; a poor country cannot afford to spend the same amount on medical care as a rich country. There is, however, a concern over the fairness in such a calculation. Such a problem is more complex if the value of non-market goods is taken into account; like, how the value of the lost coral reefs or cultural practices associated with a way of life can be calculated? [183]

Intergenerational equity is another concern in relation to economics and climate change. Questions as to how much the present generation should pay to save the future generations from the impacts of climate change arise here.[184] Put in other words, climate change is to involve mitigation costs to the present generation for preventing disastrous consequences to the future generations. However, a method of comparing these distant benefits and present costs are not available as of today. According to a few scholars "…economics applies a discount rate to determine at what point it is socially more beneficial to spend money on, say, education, rather than increasing the share of renewable energy to avoid emissions of carbon dioxide, and therefore future damages from the climate change. A low discount rate results in a higher net present value for future damages, justifying more mitigation action; a high discount rate favours allocating the resources to other socially useful priorities over climate change mitigation."[185] But such an approach has far-reaching implications on the principles of equity and fairness.[186] An economic analysis of climate change policies is a must for estimating its cost-effectiveness and for evaluating the overall economic

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183 Weiss, Edith Brown (1993): "International Environmental Law: Contemporary Issues and the Emergence of a New World Order," *Georgetown Law Journal*, 81, at pp. 675-84.

184 *Supra* note 182 at 145.

185 *Id.* at p 145.

186 *Supra* n. 4 at 31. The Human Development Report at *Supra* 176, provides an excellent and accessible overview of the issues.

impact. However such an approach may give rise to serious ethical concerns as well.[187]

The following table[188] serves as an easy reference of these principles in its relations to the environmental protection.

Table 1: Principles of fairness in Relation to Environmental Protection

Fairness Principle	Contents of the Principle
Egalitarian Principle	Every Individual has an equal right to pollute or to be protected from pollution.
Sovereignty based Principle	Current level of emission constitutes a *status quo* right; every country has an equal right to pollute or be protected from pollution.
Capability based Principle	The greater the ability to pollute, the greater the economic burden to recoup the loss.
Needs based Principle	Prioritize and maximize benefits for the poorest nations.
Responsibility based Principles	Economic burden is proportional to emissions, thus polluter pays. Narrow version of this approach covers current acts of emission only. But the broader one covers past acts of emission also

1.5 Conclusion

Looking at the current international scenario, it can be seen that the scholars from the developing and the underdeveloped countries have further expanded the scope of objectivity being applied to the subject of climate change. This is being done primarily to bring about an order and structure for the international law based on fairness and for it to be not influenced by the powerful states. Third World Scholars like *Prof. B.S. Chimni* say that it is

[187] *Ibid.*

[188] Soltau, Friiedrich, (2009): *Fairness in International Climate Change Law and Policy*, New Delhi: Cambridge University Press, at p. 164.

extremely significant to analyse the role of capitalist economist structure in supporting or distorting the operation of the international law.[189] According to him, an analysis of fairness is a question as to 'what constitutes a good law?' A special emphasis on allocation of the natural resources and sharing the burden of causing the pollution makes this question more relevant. There are two important truths that have to be considered by the policy makers at this level: (a) there is not enough resources on this planet to satisfy every one's desire to the fullest extent; (b) the very existence of greed amongst human beings threats the earth's environment.[190]

It is widely accepted that environmental issues are of global nature and they cannot be resolved by a single State or a small group of States. In this context, Edith Brown Weiss says that there should be "an incentive for all the countries to reach to a consensus on an equitable and effective basis for allocating responsibility for maintaining the planet"[191]. This is indeed a fact that has now been universally accepted. It is imperative that International Environmental Law should lay down standards to effectively allocate natural resources not only within the boundaries of specific countries but also globally. Hence, the need of the hour is to evolve an International Regulatory Regime that can act as a social tool for regulating

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189 Chimni, B.S. (1993): *International Law and World Order, A Critique of Contemporary Approaches*, New Delhi: Sage Publications, at pp. 11-12.

190 Bishop, Kirsten (1998): "Liberalised Trade and International Environmental Law and Policy: Australia's Negotiations under Kyoto Protocol," *Canadian Yearbook of International Law*, 16: 181, 185. Also see the unpublished paper by the same author "Fairness in International Environmental Law: Accommodation of the concerns of the Developing Countries in Climate Change Regime," Institute of Comparative Law, McGill University, Montrael, available at http://www.mcgill.ca/icl/kirsten/fairness (accessed 12/08/2011).

191 Weiss, Edith Brown (1993): "International Environmental Law, Contemporary Issues and the Emergence of a New World Order," *Geo. L.J.,* 18: 675 at 706.

environmentally harmful behaviours in a fair manner. As Thomas Franck says: [192]

> Between the polarities of plenitude and deprivation is a vast spectrum of conditions in which everyone cannot have everything they want, but where there is enough to meet 'reasonable' expectations, if the goods are allocated by an agreed rule which is perceived to be fair.

It is a fact that any mode of allocation of resources without a mutual agreement among all the stakeholders *viz*., developed, developing and underdeveloped countries cannot be fair. The question hence arises as to why the developing and underdeveloped countries need to be given such a special consideration. The reasons could be many. It includes that (a) these countries are already highly populated and are at a rapid pace of increase in its population. An increase in population will naturally increase the scale of human suffering, thereby resulting in unrest in the society, therein laying its stress on the environment;[193] (b) There are also arguments that the present 'Global Regulatory Regime' are not as flat as it is claimed to be.[194] The developing countries may have to bear the impact of climate change particularly due to their dependence on agriculture and limited capacity in terms of various other factors including the technology and the finance. Infact this has been acknowledged by the Executive Secretary of the UNFCCC Fourth Assessment Report in the year 2007.[195] Another UN

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192 *Supra* note 54 at 11.

193 *Supra* note 150 at 185.

194 Friedman, Thomas (2007): The World Is Flat: A Brief History of Twenty First Centuary, New Delhi: Penguin.

195 Yvo de Boer (2007): "Briefing on the Intergovernmental Panel on Climate Change," UNFCCC, Twenty-sixth session of the Subsidiary Bodies ; Fourth Assessment Report ,

Document[196] in this connection says "…the global nature of the problem of climate change…requires the equitable participation of all countries in a global strategy to deal with it." It is also important to note that majority of the nations located below the sea level and island nations fall under the category of developing nations. Climate Change and Global Warming is again crucial because it is linked to the most other environmental concerns.[197] This is also recognised by the UNFCCC when it acknowledged "… that the global nature of climate change calls for the widest possible cooperation by all the countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions."[198]

The practical considerations are based on two factors as already stated in this chapter. Firstly, there are simply not enough resources on earth to satisfy everyone's desire to satisfy his full greed and secondly, the threat due to climate change is global.[199] No single country or even small groups of countries can handle the situation alone and infact this should encourage what has already been stated *viz*., that all the countries should reach a

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Bonn, available at http://unfccc.int/files/press/news_room/statements/application/pdf/070512_ipcc_statement_ydb.pdf. (accessed on 08/06/2012).

196 Report Of The Conference Of The Parties On Its Fourth Session, Held At Buenos Aires from 2 to 14 November 1998 FCCC/CP/1998/16/Add.1.

197 For a detailed analysis of the negative effects of climate change see, generally Stone, Christopher D. (1992): "Beyond Rio: 'Insuring' Against Global Warming," *AJIL*, 86: 445 at 448-449 and also Panjabi, Ranee Khooshie Lal (1993): "Can International Law Improve the Climate? An analysis of the United Nations Framework Convention on Climate Change Signed at Rio Summit in 1992," *N.C.J. In't Law & Com. Reg*., 18: 491 at 497-500.

198 See the preamble of the UNFCCC.

199 See *Supra* note 192 at 9 where he also refers to the condition of 'moderate scarcity' as described by Rawls in John Rawls, (1971): *A Theory of Justice,* New York: Harvard University Press at 127. As Franck notes, 'we may by now have progressed beyond moderate scarcity into a situation of more urgency'.

consensus on an equitable and effective basis for allocating the responsibility for maintaining the planet".[200] To achieve this goal, the international legal system should contain effective regulatory mechanism to control the behaviour of the users in a 'morally acceptable and fair way.'[201]However, even while measuring this morally acceptable or fair step, the system needs to take into consideration the concerns of developing and underdeveloped countries and their specific needs among the other issues.[202] This is because we are living in a globe that is not equal but diverse in every respect.

200 *Supra* note 151 at 706.
201 *Supra* note 193.
202 See Brunnée, Jutta (1995): "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?," *Fordham International Law Journal*, 18: 1742.

Chapter II

Global Environment Regulatory Regime: An Analysis

The question of legitimacy would emerge from the shadows and become a central issue in international environmental law.[1]

International Law was all about war and peace before the two World Wars, and before the World War I, hence the States had the liberty to choose between war and peace.[2] After World War I, the League of Nations was established but was unsuccessful in preventing war and it eventually failed. However, it may be noted that the League of Nations condemned any form of external aggression against the territorial integrity of its members.[3] After the (hereinafter referred to as UN) World War II, the United Nations Organisation was established to restore peace and harmony among nations. When it was established, its primary objective was to sustain peace and outlaw war.[4]

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1 Bodansky, Daniel (1999): "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?", *American Journal of International Law*, 93: 596, at p.596.

2 Louka, Elli (2006): *International Environmental Law: Fairness, Effectiveness and World Order*, Cambridge: Cambridge University Press, at p. 5.

3 Another contribution of this system was the establishment of the Permanent Court of International Justice and the International Labour Organisation.

4 United Nations Charter, Article 1 reads thus: "(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without any distinction as to race, sex, language, or religion; and (4) To be a centre for harmonizing the actions of nations in the attainment of these common ends." Though this Article of the UN Charter

Today, after 67 years of its establishment, it can be seen that maintenance of peace and prevention of war is just one of the many objectives of the UN. The other objectives are to "...achieve international co-operation in solving problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without any distinction as to race, sex, language, or religion".[5] Later on, with the passage of time, these objectives of the UN were further extended to other areas. Now it is the UN and its associate bodies that are taking special interest in international standard setting process in areas, which are not expressly stated in Article 1 of the UN Charter. Examples include the efforts to strengthen international trade law or intellectual property rights law through various legal instruments. To administer and supervise these standards, many specialized organizations and agencies were established. In the area of environmental protection also similar international standards and organizations were established.[6] In the course of time, substantial changes were brought into the general characteristics of International law. For instance, the question of 'Subjects of International Law' previously covered only sovereign States, whereas now 'persons[7] including individuals and corporations' are also the subjects of international law. The following part of this thesis attempts a brief analysis of some of these subjects of International Law, whose involvement and participation is relevant for environmental protection.

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speaks about objectives such as 'encouraging respect for human rights and for fundamental freedoms', the general language is intended at resolving problems without resorting to war.

5 UN Charter, Article 1(3).

6 Starke, J.G (1999): *An Introduction to International Law*, New Delhi: Butterworths, at pp.78–81.

7 Includes all types of legal persons covering individuals, corporations and others.

2.1 Actors/Stakeholders in International Environmental Law

Any analysis of the involvement of various stakeholders in international environmental law would include three broad categories, *viz*. (i) the international organisatio[8] including the intergovernmental organisations[9] and regional organisations;[10] (ii) the state actors, and; (iii) the non-state actors.[11] Selected on the basis of importance, the following part of the chapter examines their role and describes their practical potentials.

The Security Council of the United Nations, which comprises the victor states of World War II and China as permanent members having veto power, is one of the primary organs of the UN, whose main task is to deal with matters of war and peace.[12] It may also be noted that the Security Council is conferred with extensive powers and its decisions are binding on the States.[13] Though the Security Council is not normally involved in environmental matters, there were exceptions too. For example, when Iraq invaded Kuwait, the Security Council held the former liable on various grounds including damage to the environment.[14] Now, considering the following facts, any concern pertaining to fairness is justified when looked from the perspective of a less-industrialised State.

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8 For example the various organs and agencies under the United Nations System.

9 Such as Afro-Asian Legal Consultative Committee (AALCO).

10 Such as European Union (EU) or African Union (AU).

11 Which includes various legal persons such as Individuals, Non Governmental Organisations, For Profit Organisations *etc*.

12 UN Charter, Article 24 (1). It reads thus: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security…".

13 *Id*. at article 25 which reads thus: "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Similarly article 103 says that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

14 UN (1991): *UN Security Council Resolution*, 687, S/RES/687, April 3, 1991.

(a) The permanent members of the Security Council are also heavily industrialised, whose *per capita* pollution rates are higher than those of the other states;
(b) they have the veto power in the UN Security Council;
(c) the decisions of the Security Council are binding on all States; and
(d) most importantly, the Security Council also has started addressing the issues of environmental protection.

If this indicates the growth of International Law, where the UN Security Council will have a major stake in international environmental law making, it surely raises a few issues of fairness from the perspective of non-permanent and non-members of the UN Security Council.

Similarly, the General Assembly of the United Nations (hereinafter referred to as UNGA) is a democratic institution comprising all the members of United Nations as its members with one vote each. The UNGA issues resolutions and recommendations that are generally binding, but are definitely sources of international law. The powers of the UNGA include the powers to deal with matters pertaining to economic, social, educational, cultural, health and human rights related issues. The UNGA have been involving itself in a number of environmental issues since its establishment. The Stockholm Conference 1972; the Rio Conference 1992; the Johannesburg Conference 2002, *etc.* were all convened under the auspices of the UNGA. The UNGA also has created two organs, the United Nations Environment Programme (hereinafter referred to as UNEP) and the United Nations Development Programme (hereinafter referred to as UNDP). Both these organisations have played important roles in the development of international environmental law. The Commission on Sustainable Development, which was created in the UNCED 1992 also functions under the auspices of the UNGA.

Another important organ of the UN is the International Court of Justice (hereinafter referred to as ICJ). The ICJ is the principal judicial organ of the United Nations and all State parties are *ipso facto* parties to the Statute of the International Court of Justice. In the past, the ICJ had decided on many disputes pertaining to environmental issues including in the matter of UNGA Advisory Opinion in the Matter of Legality of the Threat or Use of Nuclear Weapons.[15]

Apart from these organs of the UN, other international organisations such as the UNEP, the International Maritime Organisation (also known as IMO), the International Atomic Energy Agency (also known as IAEA), the World Meteorological Organisation (also known as WMO), the Food and Agricultural Organisation (also known as FAO), the World Health Organisation (also known as WHO), etc. have different roles in the development of international environmental law. They coordinate various conferences and create various venues where environmental issues are deliberated upon and various stakeholders could attempt consensus. The best example would be the case of UNEP, which has provided venues for negotiating many international treaties such as the Basel Convention[16], the Biodiversity Convention,[17] etc. Apart from these organisations whose main area of function is closely related to environmental protection, there are other organisations or institutions for whom the policy of environmental protection is only incidental. Examples include the World Bank, the International Bank for Reconstruction and Development (also known as IBRD), the World Trade Organisation (hereinafter referred to as WTO), etc. This abundance of

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15 International Court of Justice, (1996): Advisory Opinion, July 8, 1996, *ICJ Reports* 226.

16 The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989.

17 The Convention on Biological Diversity, 1992.

international organisations with overlapping capacities and responsibilities has in fact generated varying demands as to rationalise the international system for the protection of the environment.[18] Here lies also an associated issue of overlapping jurisdiction, which invariably results in forum shopping in many cases involving the resolution of environmental disputes.[19] Such cases of overlapping jurisdiction and opportunity for forum shopping could sometimes be disadvantageous for the weaker party.

The list of stakeholders in the development of international environmental law also includes various non-state actors, the categories of 'persons' to whom the law has vested various legal rights and duties akin to those of natural person. The examples for such legal persons are corporations, societies or trusts, which are incorporated under the laws of that particular country. Once they are incorporated, they will enjoy all the legal rights and privileges unless those rights and privileges are specified to the citizens. The non-governmental organisations (in India they are generally incorporated under the Societies Registration Act, 1860) and the for-profit corporations (in India they are incorporated under the Companies Act 1956) are the two major kinds of non-state actors who has stake in the international environmental issues. The non-governmental organisations (hereinafter referred to as NGOs) may also be further divided into (a) mainstream environmentalists who try to balance environmental protection with that of other interests including that of economics and (b) the *deep ecologists* for

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18 *Supra* n. 2 at p. 15.

19 Various judicial forums vested with jurisdiction to resolve environmental dispute resolution are as follows; (i) International Court of Justice, (ii) International Tribunal for Law of the Sea; (iii) World Bank Administrative Tribunal (iv) European Court of Justice (v) WTO Dispute Resolution system (vi) European Patent Office (vii) European Court/Commission of Human Rights (viii) Inter American Commission on Human Rights and numerous other tribunals established under the various multilateral and bilateral treaties and the national courts.

whom the requirement of environmental protection is absolute and 'the environment is protected for the environment' itself'.[20] The *deep ecology* approach is also reflected in the process of international environmental law making. The absolute ban on trading in animals that are on the verge of extinction,[21] or laws and policies that prohibit animal hunting even if it might be the sole source of income for the local or indigenous communities are some of the finest examples in this regard. Some scholars argue that such deep-ecology approach to environmental protection may also raise question of fairness in some cases, particularly when poor the countries are in the process of industrialisation.[22]

Another issue pertaining to the NGOs is the lack of transparency in their financial arrangements. It is stated, "…much of the funding for the NGOs in developing countries comes from the developed country foundations."[23] Economists like Jagdish Bhagwati contend that the NGOs from the developed countries have been able to set the agenda for the developing country NGOs and thus such agenda have little to do with the interests of the developing countries whom those NGOs represent. As a result, the issues specific to the developing countries such as inadequate supply of drinking water and malnutrition are not adequately addressed in the international law-making process.[24] This is a pertinent issue while dealing with fairness in international environmental law.

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20 *Supra* n. 18 at 16.

21 See, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973.

22 See, Kay, James (1993): "On the Nature of Ecological Integrity: Some Closing Comments," in Stephen Woodley, James Kay *et al.* (eds.) *Ecological Integrity and Management of Ecosystems*, United States of America: St.Lucie Press.

23 *Supra* n. 20 at p. 18.

24 Bhagwati, Jagdish (2004): *In Defense of Globalisation*, New Delhi: Oxford University Press, at p. 47.

2.2 Sources of International Environmental Law

Before going into the specific topic of the growth of Global Environment Regulatory Regime, an analysis of the various sources of international law is very crucial. This would help in identifying the role played by each of these sources in developing the GERR. The sources of international law according to Article 38 of the Statute of the International Court of Justice are as follows;[25]

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

b. International custom, as evidence of general practice and accepted as law;

c. The general principles of law recognized by the civilized nations;

d. Judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law.

2.2.1 International Conventions

An international Convention,[26] which is a source of international law according Article 38(1) of the Statute of the International Court of Justice, can be either bilateral[27] or multilateral. In the case of a multilateral treaty usually, the states will request an international organization having specialized knowledge in the area to establish a working group to draft a

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25 The Statute of the International Court of Justice, Article. 38(d).

26 Also known as treaties, covenants or charters.

27 Bilateral treaties are treated more or less like contracts in domestic law, as having binding effect between the parties that signed them.

treaty on any issue of international importance. Once it is drafted[28], negotiations will start among the States to reach a consensus on each issue in the draft treaty.[29] Lack of consensus weakens the objectives of the treaty, as it would lead to refusal by the states to ratify it or at least delay the ratification. [30]

Sovereign states are also at liberty to make reservations on any specific article or articles in the treaty.[31] But it is opined that these reservations might affect the 'authoritative character of the treaty'.[32] This has resulted in another situation, wherein the reservations are prohibited for enhancing the effectiveness of the treaty. But at the same time it indicates, as some of the authors call it, a *democracy deficit* in the treaty. [33]

Once a treaty is signed by the States, it has to be ratified[34] by those States. A convention would also specify the number of states whose

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28 The Vienna Convention on the Law of the Treaties, 1969 is the document used frequently to interpret the text of many international treaties. The Vienna Convention has codified some of the general principles that are enshrined in the law of the treaties such as *pacta sunt servanda* and that treaties must not in principle have retroactive character. The Vienna Convention demonstrates a preference for the peaceful settlement of disputes and requires the parties to perform their treaty.

29 *Supra* n. 23 at p.21.

30 Ratification is a process through which it is implemented or at least statutory provisions has been made for such implementation. Where as signing a treaty implies the act of signing the treaty document immediately after the negotiation for such treaty is over.

31 The Vienna Convention on the Law of Treaties, 1969, Article 2(9).

32 *Supra* n. 29 at p. 22.

33 Shearman, David and Wayne Smith, Joseph, (2007): *The Climate Change Challenge and the Failure of Democracy,* London: Praeger. The authors argue that "it is fair to say that whatever environmental parameter is being assessed is a remorseless deterioration. Degradation is the express train, remediation is the slow train, stopping and starting and never catching up." The reason being the current complex democratic process where, "everyday decisions are made to delay the slow train even further…"due to complex decision making processes in democracy "…based on values and cultural, political, and corporate influence."

34 This means that states must ask their legislative organs (e.g., a parliament) to adopt the convention and to incorporate it into the domestic legal order. Unless a state ratifies a convention, the convention does not have binding effects on that state provided that the rules included in the convention have not become a rule of customary law.

ratification is required to make the treaty an enforceable one.[35] The act of ratification is mostly the result of diplomacy and international relations among the States.[36] It also happens that some of these treaties act as umbrella framework that sets out the parameters for action at the international as well as at the municipal level. In such cases, a treaty may also be followed by protocols that set the parameters of further specific action. The best example for this would be the UNFCCC and the Kyoto Protocol. It has been stated that the"…rationale behind the framework-protocol approach is for states to commit to engage, initially, in cooperative behavior to manage what seems to be an emerging environmental problem through a framework convention. As scientific evidence accumulates or the political will manifests to tackle the problem more decisively, further specific regulatory protocols can be adopted."[37]

In the case of an international convention, there are two models available to be adopted. The first one is the command and control model,[38] where there is a centralized regulatory body, which administers and supervises the convention. The second one is the soft law model where there is a declaration, like the Universal Declaration of Human Rights, 1948,[39] or an umbrella convention like the United Nations Framework Convention on

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35 The Vienna Convention on the Law of Treaties, 1969, Article 24.

36 For example for the Kyoto Protocol to come into force, a total 55 developed countries and all countries who are contributing to 55 per cent of the developed country pollution were required to sign. Though the Protocol was adopted in 1997, it entered into force only after the Russian Federation signed it in the year 2004. To reach this level much of the negotiation took place between 1997 and 2004.

37 *Supra* n. 32 at pp. 22-23.

38 In domestic arenas, significant emphasis has been placed on regulatory approaches, called *Command-and-Control* approach, that specify the standards and often the procedures that should be adopted in order to be in compliance.

39 Commonly referred to as the UDHR.

Climate Change 1972[40] or a model law which sovereign states may follow with or without changes like the UNCITRAL Model Law on Electronic Commerce 1996.

It was the soft law model that was traditionally used in the international law. States were encouraged to obey the provisions of the law. The 'state reporting mechanism' under some conventions is an example for how the states are encouraged to incorporate the provisions of the convention. If any state, which is a party to the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) does not effectively incorporate its provisions into their municipal law, it will be 'shamed' when it submits the State Reports at the review meetings. During these meetings, various international NGOs also might come up with more elaborate counter reports about the human rights scenario in that particular state. It may also be possible that the international media also give wide publicity to it. This is infact an encouragement through the 'sanction of shame'. So basically in this model the international instruments are usually encouraged obedience through various incentives including monetary as well as political. An example for economic incentive for industries to adopt an environment friendly technology is tradable emission allowances that have been implemented in some of the developed countries as a way to reduce the costs of pollution prevention techniques\.[41]

Many international environmental treaties are umbrella framework treaties that establish parameters of international environmental action and would be followed by protocols that define specific standards of behavior from the state parties. "The rationale behind the framework-protocol

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40 For a detailed analysis of the Convention , see chapter 3.

41 *Supra* n. 37 at p. 27.

approach is for states to commit to reengage, initially, in cooperative behavior to manage what seems to be an emerging environmental problem through a framework convention. As scientific evidence accumulates or the political will manifests to tackle the problem more decisively, further specific regulatory protocols can be adopted."[42] It also may be noted that the Framework-Protocol approach is not the only regulatory process for the management of environmental problems. There are specific conventions adopted such as the London Dumping Convention, 1972.[43]

2.2.2 Custom or 'Customary Principles of International Law' as a source of law

There are differences among the scholars about custom as an authoritative source of international law. One school of thought argues that it is an authoritative source of international law, whereas the other group argues "custom is anachronistic and even hard to prove in bilateral and multilateral agreements among states."[44]

For establishing an international custom, there are two requirements, *viz;* General Practice and *Opinio Juris*.[45] General practice of a custom at international level requires the observance and propagation in domestic law and policy, whereas *Opinio Juris* mandates the states to "behave in a certain way under the stated belief, which does not have to be a genuine belief, that

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42 *Id*. at pp. 22-23.

43 It is one of the first global conventions to protect the marine environment from human activities and has been in force since 1975. Its objective is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by dumping of wastes and other matter.

44 D'Amato, Anthony (1971): *The Concept of Custom in International Law,* United States of America: Cornell University Press.

45 The Statute of the International Court of Justice, Article 38.

their behavior is law or is becoming law.[46]" Normally, if a number of states consistently follow a pattern and such observance has an "impact on the international relations because of the authoritative influence of these states",[47] it can be said to be a valid custom. Best examples are the role of maritime states in establishing the customary principles of the law of the sea and the role of the United States and the erstwhile Soviet Union in the development of space law.[48] It is also said that for the practice of a state to develop into custom, it is not necessary for it to believe that its behavior constitutes law but that its behavior remains unchallenged by the other states.[49] The *Doctrine of Persistent Objector*, at the same time, says that if a state had consistently objected to the creation of a customary principle of international law, then normally the applicability of such custom to that state is invalid.[50]

It is also to be noted that if half of the states of the world observes a certain custom, then it is sufficient for establishing its force. This raises another serious concern. In the modern day 'club model of multilateral cooperation', any group of states may create a custom so that it could be a valid defence against another state or other states. There are scholars who opine that the customary sources of international law also as a set of informal rules.[51] According to them, such rules are usually unwritten and they do not

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46 Shaw, Malcom (2003): *International Law,* Cambridge: Cambridge University Press, at p. 71-73.

47 *Supra* n. 42 at p. 23

48 *Id*. at p 24.

49 Akehust, Michael (1974-75): "Custom as a Source of International Law," *British Yearbook of International Law*, 47:1.

50 Brownlie, Ian (1998): *Principles of Public International Law,* London: Oxford University Press, at p. 10.

51 *Supra* n. 48 at p. 60.

change even when formal rules change.[52] Thus it would be misguiding for a scholar to focus on the formal rules and to neglect the informal rules of conduct. Michel Reisman says that one must verify words against practice before pretending to understand the norms according to which social groups, including the international society, operate.[53]

2.2.3 General Principles of Law Observed by Civilized Nations

It also has been said that the general principles of law that are observed by civilized nations have become a part of the international law. A question that can be raised in this context is regarding the requirement of observance by the 'civilized nations' *i.e.* whether civility has any connection with economic development? If a general principle of law is observed by an economically underdeveloped country in Asia or Africa, will it be a general principle of law observed by the civilized nations? For example, equity or fairness as a principle of international law is not accepted by the same developed nations where as it can be found in the legal principles of certain other states.[54] Economically developed States often argue that the fairness or equity is an all-encompassing concept and if that is accepted, as a source of international law that would introduce unacceptable amount of uncertainty in international law.[55]

2.2.4 Judicial Decisions as a Source of International Law

The decisions of the various forums such as the International Court of Justice, various tribunals including arbitral tribunal are also considered as a

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52 *Ibid.*

53 Reisman, W.M (1981): "Law from the Policy Perspective,' in Myres S McDougal and W. Michael Reisman, (*eds*.), *International Law Essays: A Supplement to International Law in Contemporary Perspective*, at pp. 1-3.

54 Franck, Thomas M. (1998): *Fairness in International Law and Institutions*, Oxford: Oxford University Press, at pp. 15-75.

55 Higgins, Royal (1991): *International Trade law and Avoidance, Containment and Resolution of Disputes*, General Course in Public International Law: Hague Academy of International Law.

source of international law though they act as subsidiary sources of international law with only persuasive value. But, at the same time they are important in creating legitimacy while increasing the chances of winning the case in various claims made by the different parties before these tribunals. Though the international law is not bound by the *Principle of Stare Decisis*, the parties to the disputes frequently refer to precedents, so that the court may be persuaded to decide similarly in the subsequent disputes.

Another issue pertaining to judicial decisions as a source of international law is the multiplicity of judicial forums. There exist a large number of judicial forums with varying jurisdiction to resolve environmental disputes. The list includes (i) the International Court of Justice, (ii) the International Tribunal for Law of the Sea, (iii) the World Bank Administrative Tribunal, (iv) the European Court of Justice, (v) the WTO Dispute Resolution System, (vi) the European Patent Office, (vii) the European Court/Commission of Human Rights, (viii) the Inter American Commission on Human Rights, and numerous other tribunals established under the various multilateral and bilateral treaties and the national courts. Some of these forums have overlapping jurisdiction which *prima-facie* raises the question of fairness. This scenario also gives an opportunity of *forum shopping* for the parties.

2.3 Global Environmental Regulatory Regime and Sector Specific Regulatory Regimes

International environmental aw is an interdisciplinary area as it overlaps with other areas of research such as economics, political science and international relations, ecology, human rights, etc. As seen in chapter 1, until 1972 this field of law narrowly defined the term environment and its

scope and ambit for its protection was for specific purposes. [56] However, from the Stockholm Declaration of the United Nations Conference on Human Environment 1972 onwards the focus of international environmental law was widened. This branch of law also started reflecting a desire to limit environmental damages. There are many international agreements that were concluded with such a changed focus. The above stated sources of standards[57] (may be evolved through international treaties, customary principles of international law, judicial decisions, or any other standard setting processes) have created the GERR, which includes various other Issue Specific Regulatory Regimes (ISRRs). Various actors/stakeholders of International law/ International environmental law also have got their roles in these ISRRs. Some of the key ISRRs are as follows:

(a) The '*Marine Pollution Regime* as articulated in the United Nations Convention on the Law of the Sea 1973; the Convention on Pollution from Ships (also known as MARPOL 73/78); the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972; and many other regional conventions.

(b) The *Shared Watercourses Regime* that evolved as a result of the UN Convention on International Watercourses and Integrated Water Management 1997. This also includes other sources of international environmental law related to the specific sector.

(c) The *Fisheries Resources Regime* that focuses on a number of instruments such as the UNCLOS and the UN Straddling Fish Stocks

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56 Kiss, Alexandre and Shelton, Dinah (2007): *Guide to International Environmental Law,* Boston: Martinus Nijhoff Publishers, at p. 32.

57 It may be noted that these Standards need not be legal standards always. It could be economical, scientifical or any other standards.

Agreement 1995 and other sources.

(d) The *Plant Genetic Resources Regime* that is evolved around the Convention on Biological Diversity 1992 and various other Intellectual Property Rights Agreements and Principles.

(e) The *Waste Management Regime* that has evolved after the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1992 and other relevant sources.

(f) The *Climate Change Regime* that is evolved through the UN Framework Convention on Climate Change 1992 and various other agreements and Protocols including the Kyoto Protocol.

However, the main emphasis of the study is on analysing the GERR in general and GCCRR in particular. This would also include an indepth analysis of the various concepts including the fairness in international environmental law.

2.3.1 Evolution and Growth of Global Environmental Regulatory Regimes

As already observed, the GERR comprises many Issue Specific Regulatory Regimes (hereinafter referred to as ISSRs). However, these ISSRs are complex and involve many sub-regulatory regimes focusing on various sub-issues. For example, the GCCRR though *prima facie* appears to be issue focused, includes many sub-issues such as the Clean Development Mechanism, Joint Implementation, Tradable Allowances, etc. that makes the system so complex and complicated.[58] Similarly, there are other regimes, which are complex because they are highly interrelated to the other regimes

[58] *Supra* n. 52 at p.62.

or are highly interdisciplinary in nature. The best example would be the *Plant Genetic Resources Regime* that is primarily developed as a result of the Biodiversity Convention, 1992. However, this Regime is closely connected to various other Regimes, stakeholders and soft norms and hard laws such as the Global Intellectual Property Regime, the International Trade Regime, and the International Human Rights Regime and consequently to actors such as the World Intellectual Property Organization, the World Trade Organization, etc. The situation becomes more complex given the fact that many regional conventions have also been adopted, which make the Plant Genetic Resources Regime extremely complex. The situation further becomes tragic when the actors dissatisfied with the outcome on an international issue or dispute engage in *Regime Shifting* or *Forum Shopping*.[59]

It is in this context that the political processes of international lawmaking, particularly in the area of environment and sustainable development become so complex and the weaker parties increasingly become susceptible to be the victims of unfairness.[60] The contribution of the UN in standard setting in the event of such a crisis is unparallel. To cite an example, the UN Conference on the Human Environment, Stockholm has taken measures to create awareness about environmental degradation at a higher level where the underlining principle was in favor of regulating the use of natural resources with a requirement of providing developmental

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[59] See, Raustiala, Kal and Victor, David G (2004): "The Regime Complex for Plant Genetic Resources," *International Organisation,* 58: 277-309.

[60] Soltau, Friedrich (2009): *Fairness in International Climate Change Law and Policy*, Cambridge: Cambridge University Press, at p.172.

opportunities for the developing countries.[61] The same has been discussed in detail in the following part of the study.

2.4 United Nations Conference on Human Environment, Stockholm, 1972

The United Nations Conference on the Human Environment 1972 was a milestone in the development of international environmental law and also in the development of international environmental politics.[62] The Conference was convened with the objective to "create a basis for a comprehensive consideration within the United Nations of the problems of human environment" and to "focus the attention of governments and public opinion in various countries on the importance of the problem."[63] Representatives from 113 countries, 19 inter-governmental agencies and approximately 400 non-governmental organizations participated in the Conference. The major absentees included the Communist countries such as the Soviet Union, Cuba and other Eastern European countries with the exceptions of Romania and Yugoslavia.[64] The Conference was concluded with a Declaration of the United Nations Conference on the Human Environment containing 26 Principles and an Action Plan with 109 Recommendations. At Stockholm the representatives from the developed countries argued for a *deep ecology based approach*, putting environment in

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61 Birnie, Patricia and Boyle, Alan (2002): *International Law and the Environment*, Oxford: Oxford University Press.

62 Baylis, John and Smith, Steve (2005): *The Globalisation of World Politics*, Oxford: Oxford University Press, at pp. 454-455.

63 UN ECOSOC, Agenda Item 12 (doc. E/4466/Add.I) at 2 (1968).

64 Sohn, Louis (1973): "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal* 14: 423 at p. 431. These countries boycotted the Conference to protest the exclusion of East Germany.

the focal point.[65] But, against such an argument, the declaration adopted an anthropocentric approach as demanded by the representatives from the developing countries. This is evident from the full title of the Declaration, which reads: "Declaration of the United Nations Conference on the Human Environment."[66] Through such an anthropocentric approach, an open linkage has been formulated between the human rights and the conditions of living in an environment of quality.[67]

The greatest contribution of the Stockholm Conference is the Stockholm Declaration, which is hailed as "a first step toward the development of international environmental law"[68]. It contains a set of 'common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment'.[69] The Declaration was prepared by an 'Inter-governmental Working Group for the Preparation of the Draft Declaration' headed by the Italian scholar *Migliuolo*. From the very beginning, it was pointed out that the Declaration by its very nature should not formulate any legally binding provisions especially in relation to states with that of the individual.[70] Once the final Draft of the Declaration was finalized, it was forwarded to all the delegates of the Conference who were free to submit any drafting suggestions, interpretative statements or even substantive amendments. Some delegations, particularly from the developed countries urged that the Draft Declaration be adopted "without any amendments, in order not imperil the fragile consensus achieved in Pre-

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65 *Supra* n. 58 at p.30.
66 The Stockholm Declaration on Human Environment, 1972.
67 *Ibid*. According to Principle 1; "Man has a fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being."
68 U.N. Doc. A/CONF.48/14, at 113-19 and Annex II (1972).
69 *Supra* n. 64.
70 See, U.N. Doc.A/CONF.48/PC/Paras. 27-32 (1971).

Conference consultations."[71] But, many other parties expressed dissatisfaction with its inadequate treatment of the needs of the developing countries.[72] They also expressed that they were not given a chance to express their views during the preparatory processes.[73] Hence, during the negotiations many countries raised their opinions, concerns, objections and amendments, which were deliberated, and the final Declaration was adopted with 103 votes in favor, 12 abstentions (the Soviet bloc and South Africa[74]) and without any negative votes.

The Declaration consists of a detailed preamble and a set of 26 principles. As noted in the Preamble,[75] the object of the Declaration was to provide both inspiration and guidelines for the governments and the people of the world. While the Declaration was being drafted, the main concern for the Committee was whether it should contain, as argued by the representatives from developing countries, a 'fairly concise text which could easily be disseminated by mass media and could also serve as a convenient instrument of education' or it should contain more 'elaborate statement, couched in a more legalistic language, with consequent loss of public appeal' as advocated by the representatives from the developed countries.[76] Finally, a balanced approach was adopted by finalizing a 'more literate preamble' and other 'legalistic principles'. However, it has been criticized that in doing so

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71 *Supra* n. 69 at p. 430.

72 *Ibid.*

73 See U.N.Doc.A/CONF.48/14, at 83 (1972).

74 South Africa was absent from the voting because it alleged that the Declaration unnecessarily interfered with the internal policies of the state.

75 The Stockholm Declaration, Preamble reads thus: "The United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972, having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment."

76 *Supra* n. 71 at p. 435.

'neither of the two goal was really achieved.'[77]

Another dilemma before the drafting committee was regarding the addressees of the Declaration. The specific question was, should it be addressed to the governments of the world or to the people of the world? Consequently, should it take man as its measure and speak of his rights and duties or should it in a traditional fashion deal only with the governments, their shortcomings, their responsibilities and their rights? The representatives from the developing countries preferred the addressees to be the governments, whereas the delegates from the developed world were in favor of addressing it to the people directly.[78] Finally, apart from Paragraph 7 of the Preamble, which uses individuals, organizations, local and national governments and international institutions, the rest is addressed to the 'people of the world'.[79] Nonetheless the same line of debate persisted throughout the negotiation processes of the Declaration.

Principle 1 of the Declaration says that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."

During the negotiation processes, the main points of debate were as

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77 *Ibid*.

78 *Ibid.*

79 See, full text at http://www.unep.org/Documents.Multilingual/Default.asp? Documented =97 & articleid=1503 (accessed on 12/10.2012).

follows; "should the Principles be limited to interstate relations, or should they also deal with relations between the individuals and the states, or even between the individuals themselves? Or, in other words, should they spell out the rights and duties of man, states and the international community respectively? Should they stress on the environmental rights or should they emphasise on the responsibilities with regard to the protection and enhancement of human environment?"[80] To answer these questions, various actors had responded in different ways. The developed countries demanded the recognition of every human being's 'right to a wholesome environment.' They asserted that such a right is already recognised by the UDHR.[81] Thereafter, the usage 'right to a wholesome environment' was substituted with the phrase 'working environment', to which the International Labour Organisation (hereinafter referred to as ILO) had objected. The ILO wanted it to be substituted with 'physical working conditions' as the earlier phrase was too wide. At the same time, a new draft was presented jointly by Brazil, Costa Rica, Egypt, Yugoslavia and Zambia, which, instead of the aforesaid phrases, included "an environment of a quality".[82] After all the deliberations, the final text was adopted.

2.4.1 Responsibility to Conserve Nature and Fairness

Similarly, the finalization of the language of Principle 2 of the Declaration was also not easy. Principle 2, which reads: "the natural resources of the earth, including the air, water, land, flora and fauna and especially the representative samples of the natural ecosystems, must be

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80 *Supra* n.78 at p.452.

81 UDHR, Article 25(1) : "Every one has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing …"*etc*.

82 U.N. Doc.A/Conf.48/4, Annex, at 2 (1972).

safeguarded for the benefit of present and future generations through careful planning or management as appropriate", also saw frictions between the developed and developing countries regarding assigning of duty to protect the environment. Before reaching this final version of the principle, severe negotiation took place amongst various stakeholders. The original draft of the principle said that it is the "…duty of all nations to carefully husband their natural resources …"[83], which was objected to by the representatives of the developing countries, who demanded the omission of any such specific obligation. [84] They contended that it was 'unduly restrictive of the concept of national sovereignty' and is discriminative against the developing countries, which are now only entering upon their development processes.[85] After such debates the final version was adopted, which is more neutral. There is no emphasis on the duty of the Nation States to protect the environment. At the same time, the most striking omission in the final text is the vague notion of 'unspecified somebody' protecting the environment instead of assigning the responsibility to any specific group.

2.4.2 Low Prices for the Environmental Products from the Developing Countries and Fairness

Another question pertained to the capacity of the earth to produce vital renewable resources. Though there was consensus that the earth's resources are depleting and are non-renewable, the debate was pertaining to the nature of the duty to conserve those resources. The Declaration in its Principle 3 says that "The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved." During the negotiation stages the developing countries argued that the degradation of the

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83 *Supra* n. 80 at p.456.
84 *Ibid.*
85 *Ibid.*

environment in the developing countries is because of the low prices for their products.[86] Their claim was that the developing countries are over-exploiting the resources because of the fact that the developed countries are exploiting them by paying low prices for their products. Though there is veracity in their argument, somehow it was not included in the final version of the Declaration.

2.4.3 Control of Environmental Pollution and Fairness

The Stockholm Declaration in its Principle 6 mandates the reduction of pollution. In this regard it says, "The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the people of all countries against pollution should be supported." Though there was a general agreement amongst all the stakeholders on the special danger to human health and eco-systems due to pollution, there was no attempt to embody a stronger obligation on the states for the reduction of the same. It merely stated that pollution must be stopped to ensure that serious and irreversible damage is not inflicted upon ecosystems.

At the same time, Principle 7 says that, "States shall take all possible steps to prevent pollution of the sea by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea." This Principle, unlike Principle 6, imposes an obligation on the states by the use of the word 'shall', though its scope is limited by the word 'possible steps.'

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86 It was mooted by Algeria. See, U.N. Doc. A/CONF.48/WG.I/CRP.17 (1972).

When Principles 6 and 7 are compared there exists a difference.[87] While Principle 6 is limited to pollution which might inflict serious or irreversible damage upon eco-systems, Principle 7 applies more broadly to pollution caused by substances not only liable to create hazards to human health, to harm living resources and marine life but also anything that is likely to damage amenities or to interfere with the legitimate uses of the sea.[88] Looking at the fact that it is the industrialised developed countries that have various technological amenities at the sea, this also might go against the interest of the developing countries. Given this scenario, there is a high chance that the developing countries could be absolutely made responsible for any harm caused to those amenities.

2.4.4 Economic Development *vis a vis* Social Development

It was argued that the major environmental problems of the developing countries are not so much caused by the economic development but by the lack of it. It is not merely the quality of life but life itself is endangered by poor water, housing, sanitation and nutrition, sickness and diseases and by other natural disasters. Hence, as far as developing countries are concerned, economic "development has become essentially a cure for their major environmental problems."[89] This was recognized by Principle 8 of the Declaration that "economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life."

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87 *Supra* n. 85 at p. 463.

88 *Id*. at p.464.

89 Report of a panel of Experts, (1971): *Development and Environment*, Switzerland: Founex, at pp. 4-12. See also, Araujo Castro, (1972): "Environment and Development, the Case of Developing Countries," *International Organisation* 26:401.

This also has been recognised by Principle 9 of the Declaration, that environmental deficiencies generated by under-development and natural disasters pose grave problems. Further, this principle suggests that such problems must be remedied by accelerated development through the transfer of financial and technological assistance to the developing countries. This Principle is further supported by the Principle 12, which says that resources should be made available to the developing countries to preserve and improve the environment so that the international environmental standards can be adequately incorporated into their developmental planning, but upon their request.

2.4.5 Population, Urbanisation and Environment

Principles 15[90] and 16[91] of the Declaration speak about population explosion, urbanisation and the consequential environmental degradation. It advocates for implementing demographic policies that will not prejudice the basic human rights if the population explosion is likely to have adverse effects on the environment or development. In this context, the developing countries contended that on many occasions it is not over population; but, low population density that prevents improvement of the human environment and impede development.[92] Principle 15 says that as planning would obtain maximum social, economic and environmental benefits for all; it must be

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90 Stockholm Declaration, Principle 15 says thus: "Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which arc designed for colonialist and racist domination must be abandoned."

91 Stockholm Declaration, Principle 16 says thus: "Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the human environment and impede development."

92 *Supra* n. 88 at p. 476.

applied to human settlements and urbanisation as well. In this regard, it condemns any projects that are designed for colonialist and racist domination such as the *Bantustans*[93] in South Africa. Against this, the South Africa abstained itself from the voting of the Declaration alleging that such wordings of the Declaration unnecessarily interferes with the internal policies of South Africa.

The requirement that the demographic policies should be in consonance with the basic human rights requirement safeguards the rights of individuals to decide on the size of their families and protects them against governmental interferences compelling, families to restrict the number of members.

2.4.6 Role of Scientific Research and Education in Planning, Managing and Controlling of Environmental Resources

Principles 17 to 20 of the Declaration speak about the planning of environmental resources with a view to enhancing its quality.[94] It further speaks about the role of scientific research[95] and education[96] in planning. It

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93 *Bantustans* is the term for referring to territories, set aside for black inhabitants of South Africa and Namibia as part of the policy of apartheid. Ten *Bantustans* were established in South Africa, and ten in Namibia, which was, then under the South African administration.

94 Stockholm Declaration, Principle 17 says thus: "Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of States with a view to enhancing environmental quality."

95 *Id*. at Principle 18 says thus: "Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind."

96 *Id*. at Principle 19 says thus: "Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary,

also says that scientific research must be promoted for striking a balance between the environmental problems and the development, both at national and international level.[97] Further, it advocates the free flow of up-to-date scientific information and transfer of technology and experience from developed countries to developing countries for solving the environmental problems.[98] At the same time, there exists strong criticism that the present day international patent regime frustrates any such transfer of technology and the know-how or experience from the developed country to the developing country.[99]

2.4.7 Permanent Sovereignty over Natural Resources and the Principle of Good Neighborliness

The Principle 21 of the Declaration, which, is hailed as one of the most important contributions of the Stockholm Conference, says that "states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." This principle is the formal recognition of two principles that were previously part of the customary international law, *viz*. the *Principle of Permanent Sovereignty over Natural Resources* and the *Principle of Good Neighborliness*, which are briefly discussed below.

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disseminates information of an educational nature on the need to project and improve the environment in order to enable man to develop in every respect."

97 *Id*. at Principle 20.

98 *Ibid*.

99 See for example, Gupta, Joyeeta (2006): "The Global Environment Facility in its North-South Context," in Piers H.G. Stephens *et al*. (eds.) *Contemporary Environmental Politics: From Margins to Mainstream,* London: Rutledge Research in Environmental Politics at pp. 231-251.

The *Principle of Permanent Sovereignty over Natural Resources* is one of the fundamental principles of international environmental law. The said principle actually emerged in the 1950's in parallel with the beginning of decolonisation as the basic constituent of the right to self-determination, a right that is essential and inherent in the element of state sovereignty.[100] The developing nations, rich with natural resources, wished to avoid the inequitable and onerous arrangements imposed upon their unwary and vulnerable governments during the colonial period.[101] It necessarily invoked major concerns about the relationship between the developing states rich with natural resources and the multinational corporations, which are exploiting such resources. The United Nations[102] declares that the "right of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and for the well-being of the people of the State concerned." It further says, "The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions of the host state.

Thus it makes an inherent and overriding right of a state to control the exploitation and the use of its natural resources for ensuring the welfare of its citizens.[103] The multinational corporations claimed that their right to exploit another nation's natural resources, already acquired during the colonial period, continued after the independence of the formerly colonized nations.[104] In

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100 Perrez, Franz Xaver (1996): "The Relationship between *Permanent Sovereignty* and the Obligation Not To Cause Transboundary Environmental Damage," *Environmental Law* 26: 1190 at p. 1190.

101 *Ibid.*

102 United Nations (U.N.) General Assembly Resolution 1803 (XVII).

103 *Supra* n. 101.

104 *Ibid*.

opposition, the developing nations argued that permanent sovereignty over natural resources is necessary to protect their economic sovereignty. Further, developing nations claimed that the permanent sovereignty includes the right to take expropriate action against the foreign enterprises.

This principle was for the first time recognised in the landmark case of *Trail Smelter* between the United States and Canada, which was regarding the question of damage to United States caused by Canada by trans-border emission of *sulphur dioxide*. When the dispute arose, both the parties agreed to submit the dispute to arbitration. The arbitration panel concluded that: "…under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes into the territory of another or to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[105]

Here, the tribunal had stated that the liability arises only if "the case is of serious consequence" and when the injury can be proved by "… clear and convincing evidence." These requirements set a high threshold level for a state to be liable for trans-boundary emissions of pollutants. In this case, the tribunal awarded damages for the specific injury suffered by the United States, but not for the injury suffered by the environment. The tribunal held it as too remote. However, for the purpose of the implication of the decision it is stated that, "although the tribunal was conservative in the award of damages, it played a more decisive and regulatory role. The tribunal ordered Canada to establish controls on the emissions of *sulphur dioxide* by providing for

[105] *Trail smelter case* (*United States* v. *Canada*), 16 April 1938 and 11 March 1941 VOLUME III pp. 1905-1982, available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf (accessed on 13/04/2012).

maximum permissible *sulfur* emissions including the detailed requirements for hourly emissions."[106] This principle has been expressly recognised by Principle 21 of the Declaration. However, such a right is restricted by another principle, which is known as the *Principle of Good Neighbourliness*.

Good Neighbourliness as general principle of international law has got particular importance in the field of international environmental law. According to this principle, there is an obligation on states to try to reconcile their interests with the interests of the neighbouring states. In *Trail Smelter* case when the Tribunal decided that Canada's right to exploit its natural resources is subject to its negative consequences on the United States, this Principle was also recognised.

Various other international judicial forums and tribunals have also recognised this principle on various occasions. For example, in *Lac Lanoux* case, a river known as Carol passed through France and Spain. France was the upstream state and Spain the downstream state. France decided to build a dam across the river for hydroelectricity generation. Thereafter according to plans, France would divert the water back to the river so that it could be used by Spain for irrigation. Spain alleged that this was against their interest as diversion of water back to the river was to be done at the discretion of France. Spain alleged that this was against some of the treaties between the two states. The Court held that France was entitled to the right to water without ignoring the interests of Spain. It was held that "subjecting a state's right to use its watercourses to the completion of a prior agreement with another state would give that other state essentially 'a right to veto' that paralyzes the exercise of territorial competence of one state at the discretion

[106] Louka, Elli (2006): *International Environmental Law: Fairness, Effectiveness and World Order*, Cambridge: Cambridge University Press, at p. 42.

of another state."[107] It was further held that "the rule according to which States may utilize the hydraulic force of international watercourses only on condition of a prior agreement between the interested States can neither be established as a custom, nor even less as a general principle of international law."[108] One of the issues involved in this case was the issue of fairness among the riparian states. In this regard, the Court upheld the sovereignty and the ensuing rights of upstream states, though it held that such sovereignty is not absolute as an upstream state should take care of the interests of downstream state.

Further, in *Behring Sea Seals* cases between the United States of America and the United Kingdom, the important question of law was whether a particular state can extend its jurisdiction to high seas to protect marine animals which are in danger of extinction or not. While, declaring the freedom of high seas, the tribunal rejected the claims of the United States. The tribunal held that there are no property rights over common property resources in the high sea. But the tribunal mandated the regulatory standards for the protection of seals.[109]

Similarly in *Oder*[110] case, which involved the questions relating to the use of trans-boundary rivers, the upheld the equal right of all riparian states and "the exclusion of any preferential privilege to any one riparian state in relation to the others."[111] Regarding the main issue, the court held that the jurisdiction of the *International Oder Commission* is extended to the

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107 *Ibid*.
108 *Ibid.*
109 Myres, McDouga and Burke, William (1962): *The Public Order of the Oceans*, London: Martinus Nijhoff Publishers, at pp. 948-50.
110 Territorial jurisdiction of the International Commission of the River *Oder* (*Denmark, Czechoslovakia, France, Germany, the United Kingdom and Sweden* v. *Poland*) September 10, 1929 PCIJ Series A. No. 23.
111 *Ibid* at 27.

sections of Oder located within the Polish territory. This decision is in fact seen as the precursor of the principle of equitable utilization of water resources.

Another instance of judicial interference was the *Meuse* case, which involved the question of apportionment of shared water resources. A treaty was signed by the Netherlands and Belgium regarding the use of the river *Meuse* for irrigation and navigation. According to the treaty, each state could have one canal that would feed all the other canals. But when the water shortage became acute, both the Netherlands and Belgium began the construction of new canals. Both the states went against each other and claimed the act of the other as the violation of the treaty. Rejecting the claims of the parties, the Court held thus: "As regards such canals, each of the two States is at liberty, in its own territory, to modify them…provided that the diversion of water and the volume of water to be discharged there from to maintain the normal level and flow is not affected….."Judge Hudson, who also concurred with the majority, but based on the principles of equity, said thus: "A sharp division between law and equity . . . should find no place in international jurisprudence."[112] He said that based on equity, the states generally cannot ask the other to discontinue their act. Though the principle of equity is fluid since it depends on the circumstances of the case, it has played a crucial role in shaping the perceptions of legitimacy in sharing of international waters.

Another case, where the said principles were again emphasized by

[112] The *Division of Water from the Meuse* Case, June 28, 1937, (1937) PCIJ Series A/B, No.70.

the Court was the famous *Corfu Channel Case.*[113] This case came up immediately after the World War II before the International Court of Justice was between the United Kingdom and Albania. The case was related to the alleged damage to ships and injuries to British Naval officers by mines planted by Albania in the *Corfu* Strait. The UK alleged that Albania should have notified the UK about such landmines, which prevented them from exercising their right to innocent passage. Albania, however, claimed that it had not planted the landmines and they were innocent. However, the International Court of Justice (ICJ) on the basis of evidence decided that Albania should have notified the UK warships of the existence of land-minefield.

The ICJ held that such obligations need not always be based on an international treaty. It can also be based on the recognized principles of law at the international level like the considerations of humanity. It also considered the principles of freedom of maritime communication and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[114] Hence, the *ratio decidendi* of this case was that every state has an obligation not to allow its territory to be used for acts contrary to the rights of other states. This ratio has been frequently relied on in various other cases related to environmental pollution. In the case of environmental law, this "…implies a duty of a polluting state to notify other states of the acts that it knows happen within its territory and can adversely affect other states."[115]

Principle 21 of the Stockholm Declaration attempts to balance these

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113 *Corfu Channel* Case, (*UK* v. *Albania*), April 9, 1949, (1949) ICJ Reports 4.
114 *Id.* at p.22.
115 *Id.* at p.195.

two principles. The second part of Principle 21 was considered very important by many delegations. For example, the Canadian delegation commented that this principle reflected the existing rules of international law with the first element stressing on the rights of States while the second element making it clear that those rights must be limited or balanced by the responsibility to ensure that the exercise of rights did not result in damage to others.[116] The balancing of rights and responsibility was essential "to reconcile the national interests and those of the international community."[117] Principle 21 makes it clear that the rule of responsibility applies not only to the damage caused to the environment of other states but also to any injury inflicted on the environment of 'areas beyond the limits of national jurisdiction' such as high seas or Antarctica. Principle 22, though it does not prescribe compensation as a right, says that the states shall further cooperate to develop the international law regarding the liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States or to areas beyond their jurisdiction.

2.4.8 International Cooperation in Environmental Matters with due Respect to the Values of Each Country

Principles 23 to 25 of the Declaration emphasize the requirement of cooperative spirit by all countries, big or small, on equal footing.[118] At the

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116 *Supra* n. 106 at p. 40.

117 United Nations (1972): U.N. Doc. A/AC.138/SC.III/SR.20 at 4.

118 Stockholm Declaration, Principle 24 reads thus: "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States" and Principle 25 says that "states

same time, it notes that when a particular country attempts to determine the domestic legal standards, it has to consider the systems of values prevailing in each country.[119]

2.4.9 Weapons of Mass Destruction and the Environment

Principle 26 says that the States should strive to reach an agreement to save man and environment from the effects of nuclear weapons and all other means of mass destruction.[120] In this context it may be relevant to examine the ICJ Advisory Opinion on the use of Nuclear Weapons.

In this case the UN General Assembly requested the ICJ to give its advice on the legality of use of nuclear weapons.[121] Rejecting the contention that the use of nuclear weapons violated the right to life as enshrined in the International Covenant on Civil and Political Rights (ICCPR), the Court held that "…arbitrary deprivation of life cannot be judged by simply using the Covenant but also by referring to the law applicable in armed conflict."[122] It also said that the right to self-defense does not prevent the use of nuclear weapons.

Regarding the environmental protection, the ICJ held that "…the

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shall ensure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment."

119 *Id*. at Principle 23 reads thus: "Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries."

120 *Id*. at Principle 26 reads thus: "Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons."

121 *Legality of the Use of Nuclear Weapons, (Advisory Opinion),* July 8, 1996 (1996) ICJ Reports 226.

122 *Id.* at para 24-25.

environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment."[123] It further said, "…the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[124] The Court also said: "…although environmental treaties do not deprive the states of their right to self-defence, the states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."[125] The Court concluded that international environmental law does not specifically prohibit the use of nuclear weapons but provides important environmental factors to be taken into account in the implementation of principles that apply to armed conflict.[126]

2.4.10 Effects of the Stockholm Declaration

Many scholars have criticized the Stockholm Declaration. It is said that while one could not quarrel with the sequence of idea, it would have been better if the rights and duties of men had been enumerated.[127] As far as the form is concerned, only Principles 7, 22, and 25 are stated in an obligatory form using the word 'shall'. Most of the Principles use, the next

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123 *Id.* at para 29.
124 *Ibid.*
125 *Id.* at para 30.
126 *Id.* at para 33.
127 *Supra* n. 116 at p.512.

best 'should' or 'must' in their language. However, taking the Declaration as a whole, it is surprising that despite the generality of some provisions and their uncertain phrasing, the general tone is one of a strong sense of dedication to the idea of establishing the basic rules of international environmental law. The United States Report on the Stockholm Conference states that, though the Declaration 'preserves a number of extremely important principles of conduct for States in dealing with environmental problems of international significance', it is, however, less balanced and less focused on international environmental concerns.[128] It also lays down the idea that international law should no longer be purely an interstate system but should bring both the individuals and the international organizations into picture.[129]

2.5 World Charter for Nature and *Brundtland* Commission and Publication of "Our Common Future"[130]

The World Charter for Nature sponsored by thirty-four developing nations was drafted by the International Union for the Conservation of Nature (hereinafter referred to as IUCN) and the other independent experts. It was adopted by the General Assembly in the year 1982. General Principles of this Charter says that that nature must be respected and the habitat and life

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128 United States Report on the Stockholm Conference, Department of State, Office of Media Services, Results of the U.N. Conference on the Human Environment, 1972.

129 *Supra* n. 127 at p. 514.

130 The United Nations World Commission on Environment and Development's first report published in 1987 is titled as '*Our Common Future'* or *as Brundtland* Report in memory of its chairman Gro Harlem Brundtland, the former prime minister of Norway. The report aims to consider environment and development as a single issue. The Report recognises that human resource development (by poverty alleviation, gender equity, and wealth redistribution) is critical for formulating effective strategies for environmental conservation. It also defines 'sustainable development' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'

forms must be safeguarded to ensure their survival.[131] It recommends regulating economic development to support long-term capacity of ecosystems to support human use.[132] It further encourages the states to adopt measures such as municipal and international legal framework for environmental awareness and public participation, for establishing administrative regulations and machineries; for assessing the impact of military activities on the environment *etc*. Most importantly, it also recommends for the 'Environmental Impact Assessment (hereinafter referred to as EIA)' before any project is initiated. Some developing countries were against the inclusion of EIA on the ground that they do not have the necessary technologies to conduct EIA to the extent of developed countries.[133] Their claim was that it makes the developing countries dependant on the developed countries for the technology transfer.[134]

The constitution of *Brundtland* Commission and the publication of its report "Our Common Future" was another milestone in the development of the international environmental law. It gives a detailed overview of the various international environmental issues. The most important concept that was forwarded by 'Our Common Future' was the 'Sustainable Development'. It is defined as: "the development that satisfies the needs of present generations without jeopardizing the ability of future generations to meet their needs."[135]

2.6 UN Conference on Environment and Development 1992, Rio de Janeiro

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131 World Charter for Nature, 1982, Principle 2.
132 *Id.* at Principle 8.
133 *Supra* n. 106 at p.32.
134 *Ibid*.
135 WCED, (1987): *Our Common Future (Brundtland Report)*, World Commission on Environment and Development.

The United Nations Conference on Environment and Development (hereinafter referred to as the UNCED), 1992, is also known as the Rio Summit or the Rio Conference or the Earth Summit. Representatives of 172 states, more than 2000 representatives from non-governmental organizations attended the Summit. The main issues that were discussed at the Conference are as follows;

(a) Systematic scrutiny of patterns of production, particularly the production of toxic components, such as lead or poisonous waste including the radioactive chemicals

(b) Alternative sources of energy to replace the use of fossil fuels, which are linked to the climate change.

(c) Reliance on public transportation systems in order to reduce the vehicle emissions, congestion in cities and the health problems caused by pollution.

(d) Growing water scarcity.

The results of the Rio Conference are *inter alia* (a) the Rio Declaration on Environment and Development; (b) the Agenda 21; and (c) the Forest Principles. The UN Convention on Biological Diversity and The Framework Convention on Climate Change (also known as UNFCCC) were also opened for signature at the Summit.

Similar to the Stockholm Conference, the UNCED was also concerned with the balance between the environmental protection and the economic development. Since the environmental concerns have been marginal in the broader scheme of the international legal and institutional arrangements, the main idea was to influence and create behaviour to integrate environmental protection into the economical and the

developmental activities.

The Rio Declaration on Environment and Development, which consists of 27 principles, represents a series of compromises between the developed and the developing countries and also a balance between the objectives of the environmental protection and the economic development.[136] Unlike the Stockholm Declaration, the Rio Declaration was not opened for negotiation at the Rio Conference. The final draft prepared by the Fourth Preparatory Committee in April 1992 was adopted without negotiation, thus not giving an opportunity for the countries to raise their concerns.[137] The following are the key features of the Declaration:

2.6.1 Shift from Anthropocentric Approach to Environmental and Developmental Issues

The Rio Declaration says that human beings are at the centre of concerns for sustainable development and that they are entitled to a healthy and productive life only in harmony with the nature. [138] Though like Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration[139] reiterated the *Principle of Permanent Sovereignty over Natural Resources* and *Principle of Good Neighborliness*, it added the word development to it. It is criticized that the addition of this word to Principle 2 is for stronger emphasis on development and this 'upsets the delicate balance

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136 Porras, Ileana (1992): "The Rio Declaration: A New Basis for International Cooperation" *RECIEL* 1:245.

137 Sands, Phillippe (2003): *Principles of International Environmental Law*, Cambridge: Cambridge University Press, at p. 54.

138 *Ibid.*

139 The Rio Declaration, Principle 2 reads thus: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and *developmental policies*, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

struck in Stockholm Declaration between the sovereign use of natural resources and the duty of care for the environment."[140]

Principle 3 provides that the right to development must be fulfilled so as to equitably meet the developmental and other environmental needs of the present and the future generations.'[141]This has been held to be a victory for the developing countries since their claim that development is a prerequisite for environmental protection was recognized. However, the developed countries also had their share of joy. In return to Principle 3, the developed countries extracted Principle 4, which provides that in order to achieve the sustainable development, environmental protection shall constitute an integral part of the development processes and cannot be considered in isolation from it.[142] In practical terms, Principle 4 can be read as permission or a condition that has to be satisfied for any developmental activities.[143]

2.6.2 Principles of Environmental Law Recognized in the Rio Declaration

The Rio Declaration expressly recognizes many principles of international environmental law, which were earlier regarded as a part of only the customary principles. By doing so, it intends to create the procedural support to the substantive principles adopted in the Stockholm Declaration. Those principles are explained below;

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140 Pallemaers, Marc (1992): 'International Environmental Law from Stockholm to Rio: Back to the Future?,' *Review of European Community and International Environmental Law* 1:254 at p. 256.

141 *Supra* n. 139 at Principle 3 says thus: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

142 *Id*. at Principle 4 reads thus: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

143 *Supra* n. 137 at p.55.

The principle of Common But Differentiated Responsibility (hereinafter referred to as CBDR) is one of the principles of international environmental law, which, has its foundation in the concept of equity. It has two levels of approach. The first one is the idea of 'common responsibility' based on the 'common heritage and common concern of humankind' where States have a duty to equally share the resources and protect the environment. The second is of *Differentiated Responsibility* that speaks about substantive equality. It is accepted that issues like unequal resources; social and economic situations, etc. prevent states from having the same effectiveness in combating the environmental degradation. Thus, it demands an equitable allocation of the costs of the environmental protection. The CBDR also has been expressly recognized by the Rio Declaration in its Principle 7, which says:

> 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 environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Hence Principle 11 of the Rio Declaration commits all states to enact 'effective environmental legislation' for the standards, objectives and priorities, which should reflect the environmental and developmental

context in which they apply.[144] It also recognizes that standards applied by some countries 'may be inappropriate and of unwarranted economic and social cost to other countries, in particular the developing countries.'

The next important contribution of the Rio Conference is the Principles of Preventive Action and Precaution.[145] The basic idea of the preventive approach is the idea of the saying that 'Prevention is better than Cure.' It says that it is always better to prevent harm to environment than thinking about the ways in which it can be restored later. This is also known as the *Precautionary Principle*. The Precautionary Principle generally says that every "action on environmental matters should be taken even if there is a lack of total scientific certainty, often reversing the burden of proof and placing it on those who claim that an activity is not damaging."[146] In most cases, a harm done to environment due to an action may not be visible immediately. For example, in the case of use of hazardous substances and its impact on the environment, it often happens that scientific evidence may not be conclusive to prove the harm done to the environment. In such cases, the precautionary principle advocates for preventing the harm rather than mitigating the harm subsequently. The development of this principle was in response to the arguments earlier raised by some states that their action was

144 *Id*. at 56.

145 *Supra* n. 141 at Principle 15 states thus: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

146 *Supra* n. 61. See also, James Cameroon and Julie Abouchar, (1991): "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment," *Boston College International and Comparative Law Review,* 14(1):1; Lothar Gundling, (1990): "The Status in International Law of the Principle of Precautionary Action," *International Journal of Estuarine and Coastal Law*, 5:23.

due to "the lack of scientific certainty". The United States has taken a skeptical approach towards the precautionary principle viewing it almost as a protectionist principle, a new non-tariff barrier to trade.[147] The European Union, on the other extreme, has transformed the principle into a constitutional principle,[148] favouring a strong version of the principle.[149]

Similarly, the Rio Declaration also recognizes "the polluter pays principle" in its Principle 16 which says that, "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"

The polluter pays principle demands the person who is in charge of polluting activities to be financially responsible for the damage that he causes. Some scholars contented that the argument has merely a rhetoric value because most of the polluters will be able to pass the costs of pollution onto the consumers.[150] In many cases of pollution it will also be difficult to identify the polluter.[151] The International Law Commission guidelines on *the prevention of trans-boundary harm from hazardous activities not prohibited by international law,* refer to the factors that must be taken into account for an equitable balance of interests between a

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147 Vogel, David (2002): "The WHO, International Trade and protection: European and American Perspectives," *European University Institute*, *Robert Schuman Centre for Advanced Studies, EUI Working paper-13.*

148 Treaty Establishing the European Economic Community, 1957, Article 174(2).

149 Esty, Daniel (2002): "Thickening the International Environmental Regime," *European University Institute, Robert Schuman Centre for Advanced Studies, Policy paper-5.*

150 Louka, Elli (1993): "Bringing Polluters before Transnational Courts: Why Industry Should Demand Strict and Unlimited Liability for Transnational Movements of Hazardous and Radioactive Wastes," *Denver Journal of International Law and Policy*, 22:63.

151 *Ibid.*

polluting State and a State that is the recipient of that trans-boundary pollution. In more detail, it is provided that for an equitable balance of interests between these two States to be achieved, "the degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention" must be taken into account."[152] This equitable balance of interests between the polluting State and the affected States seems to contradict the *polluter pays principle*.[153]

Though the term sustainable development[154] is included in the Rio Declaration on Environment and Development, it was for the first time expressed in the *Brundtland* Report. It says that Sustainable Development means development that satisfies the needs of present generations without jeopardizing the ability of future generations to meet their own needs.[155] Thereafter in the World Summit on Sustainable Development 2002, it was further articulated that sustainable development has three pillars, *viz*. the economic development, the social development, and the environmental protection.[156]

Similarly, the Principle of Equitable Utilization[157] of resources has

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152 Rio Declaration, Article 2 and 10(d).

153 *Ibid.*

154 The Principle of Sustainable Development is recognised by the Rio Declaration in Principles 12,20,21,22,24 and 27.

155 See, the *Brundtland* Report.

156 Louka, Elli (2006): *International Environmental Law: Fairness, Effectiveness and World Order*, Cambridge: Cambridge University Press, at p. 52.

157 It has been recognised generally in the Rio Declaration. However it was expressly stated in the Preamble when it says that the Rio Conference was convened with the aim of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people. See also, Principle 3, which reads thus: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

been developed through judicial decisions such as the *Lac Lanoux* case[158]. As already discussed, in this case it was held that each and every State has a duty to take into account the interests of other States before any attempt is made to exploit resources through negotiations and consultations. Similarly in the *Oder and Meuse* cases, the Permanent Court of International Justice referred to the right to equality of riparian states in sharing river water. The UN Watercourses Convention 1997 also refers to the *principle of equitable utilization of watercourses*.

However, what is 'equity' remains an unanswered question as discussed in the previous chapter. A few scholars have viewed it as a defining concept of international law.[159] But a few others have argued that equity considerations introduce the subjective element while interpreting international law[160]and should be avoided. Some others have also stated that "…equity would mean a fifty-fifty allocation of the resources; to others, those with priority in use must be protected; to still others, equitable allocation must be based on the needs independent of the extent to which a resource is located within the national boundaries."[161]

2.7 The Stockholm Declaration and the Rio Declaration: A Comparative Analysis

The following part analyses the Stockholm Declaration and Rio Declaration in a comparative perspective to facilitate an easy reference.

(i) *Anthropocentricism in Rio Declaration and Stockholm Declaration*: Theoretically both Stockholm Declaration and the Rio Declaration are

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158 *France* v. *Spain*; 24.I.L.R. 101.

159 Franck, Thomas M. (1998): *Fairness in International Law and Institutions*, Oxford: Oxford University Press, at p. 79.

160 Rosalyn Higgins, (1999): "International Trade Law and Avoidance, Containment and Resolution of Disputes," *General Crouse in Public International Law,* 230.

161 *Supra* n. 156 at p. 53.

not binding documents, but it is widely accepted that the principles enunciated in these Declarations were already in existence as the part of the customary principles of international law. Both the documents exhibit a strong anthropocentric approach to environmental protection, though the Rio Declaration places the "human beings … at the centre of concerns for sustainable development".

(ii) *Prevention of Environmental Harm:* The Stockholm Declaration in Principle 21 and Rio Declaration in Principle 2 recognize that a state has a responsibility to ensure that any activity within its jurisdiction does not cause damage to the environment of other States or to areas beyond national jurisdiction or control. The only difference is that Rio Declaration places more prominence on balancing of environment and the development.[162]

(iii) *Right to Development in an Environmental Context*: At both Stockholm and Rio Declarations, the relationship between the environment and development was one of the most sensitive challenges.[163] Initially the developed countries came up with more 'ecology oriented' drafts, which was successfully opposed by the developing countries, who wanted the Declarations to be made from a developmental perspective. In this regard, the Principle 8 of the Stockholm Declaration says that "the economic and social development" is essential. Here it is pertinent to note that Principle 3 of the Rio Declaration emphasizes that the

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[162] This obligation is balanced by the declarations' recognition, in the first part of the respective principles, of a State's sovereign right to "exploit" its natural resources according to its "environmental" (Stockholm Declaration) and "environmental and developmental" policies (Rio Declaration).

[163] Gunther Handl, Declaration of the United Nations Conference on Human Environment and Rio Declaration on the Environment and Development, http://untreaty.un.org/cod/avl/ha/dunche/dunche.html (accessed on 23/08/2011).

"right to development must be fulfilled so as to equitably meet the developmental and environmental needs of the present and the future generations".

(iv) *Precautionary Action:* Though the Rio Declaration in its Principle 15 provides that "the precautionary approach shall be widely applied by the States according to their capabilities", there is no parallel to it in the Stockholm Declaration. This principle says that "whenever there are threats of serious or irreversible damage, a lack of full scientific certainty shall not excuse States from taking cost-effective measures to prevent environmental degradation."[164]Though it is accepted as a principle of the international law, some of the states still question its status as a principle of international law on the ground that there is no authoritative definition for this.[165]

(v) *Common But Differentiated Responsibilities:* Principle 7 of the Rio Declaration says that "in view of the different contributions to global environmental degradations, States have common but differentiated responsibilities". Since then, this has been a matter of controversy. Gunther Handl says that "specifically, taken at face value the formula seems to imply a causal relationship between the environmental degradation and the degree of responsibility. However, the "differential responsibilities" has also been considered as a function of "capability" that is reflective of a state's developmental status. Unlike the essentially contemporaneous provision in the United Nations Framework Convention on Climate Change, 1992, which refers to the "States' *common but differentiated responsibilities and respective*

164 *Ibid*.
165 *Ibid.*

capabilities", Principle, 7 omits any reference to the capabilities in relation to developing countries".[166] What remains unclear, at any rate, is whether CBRD implies that 'developing country status' in and of itself entails a potential diminution of environmental legal obligations beyond, what a contextually determined due diligence standard would indicate as appropriate for the particular country concerned.[167]

(vi) *Procedural Safeguards:* The Stockholm Declaration modestly emphasizes the need for environmental and developmental planning.[168] On the contrary, the Rio Declaration unequivocally calls upon States to assess and to inform and consult with the other potentially affected States, whenever there is a risk of significantly harmful effects on the environment.[169]

(vii) *Public Participation:* Principle 10 of the Rio Declaration says that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level". Thereafter it calls upon States to ensure that each individual has access to information, public participation in decision-making and justice in environmental matters.[170]

(viii) *The Interface of Trade and Environment:* Principle 12 of the Rio Declaration seeks to address the issues pertaining to the interrelationship between international trade and environmental conservation and protection. After exhorting the States to avoid trade

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166 *Ibid.*
167 *Ibid.*
168 Rio Declaration, Principles 13 to 15 and 17-18.
169 Principle 17 calls for environmental impact assessment; Principle 18 for emergency notification and Principle 19 for (routine) notification and consultation.
170 *Supra* n. 167.

policy measures for environmental purposes as "a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade," it goes against the extra-jurisdictional unilateral action of the states. [171] It says that "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided". As a response to the adoption of the Principle 12, the "United States offered an interpretative statement that asserted that in certain circumstances, trade measures could be an effective and appropriate means of addressing environmental concerns outside the national jurisdiction. This US position has now been fully vindicated. As the World Trade Organization Appellate Body first acknowledged in the *Shrimp-Turtle* case[172], unilateral trade measures to address extraterritorial environmental problems may indeed be a "common aspect" of measures in restraint of international trade exceptionally authorized by the Article XX of the GATT."[173]

(ix) *Indigenous People*: Principle 22 of the Rio Declaration recognizes the role of indigenous people in the environmental protection. It says that the "vital role of indigenous people and their communities and other local communities" in the conservation and sustainable management of the environment, given their knowledge and traditional practices is important. Thereafter, it recommends that the "States shall recognize and duly support their identity, culture and interests and enable their effective

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171 Language that closely follows Article XX of the General Agreement on Tariffs and Trade (GATT, 1994).

172 *India etc.* v. *United States of America* (Case relating to import prohibition of shrimp and shrimp products by the USA); WTO case No 58 and 61 (1998).

173 *Supra* n. 170.

participation in the achievement of sustainable development". [174]

(x) *Women in Development*: The Rio Declaration in its Principle 20 says that the empowerment of women and their ability to effectively participate in their countries' economic and social processes is an essential condition for sustainable development. It also says that women have a "vital role in the environmental management and development" and hence, there is a consequent need for "their full participation."

(xi) *Environmental Liability and Compensation***:** Another important aspect of both Rio Declaration and the Stockholm Declaration is their call for the further development of the law bearing on environmental liability and compensation. Though Principle 22 of the Stockholm Declaration speaks about the commitment in international law only, Principle 13 of the Rio Declaration speaks about both national and international law.

2.8 Conclusion

From the above discussion, it is apparent that with the evolution of the Global Environment Law, the regulatory regimes have become increasingly complex and technical. It is mainly because of the fact that the environmental considerations are coupled with various other social issues such as development, poverty, human rights, technology, *etc*. It is certain that GERR is no more laying down mere normative standards but demonstrates the vital implications of the environmental degradation and the need for responsive action by the member countries.

However, the major challenge for international environmental law is globalization. The notion of globalization has formally entered the vocabulary of international environmental law with the World Summit on Sustainable

[174] *Supra* n.170.

Development in the year 2002 (hereinafter referred to as WSSD). It says that "globalization offers opportunities and challenges for the sustainable development…globalization and interdependence are offering new opportunities to trade, investment capital flows and advances in technology, including information technology, for the growth of the world economy, development and the improvement of living standards around the world."[175]

Further, the WSSD says that "globalization *should be fully inclusive and equitable,* and there is a strong need for policies and measures at the national and international levels, formulated and implemented with the full and effective participation of the developing countries and countries with economies in transition, to help them to respond effectively to those challenges and opportunities."[176] The international law, especially GERR when it comes to climate change and global environmental governance, should be one, capable of dealing the problem of increasing 'gap between rich and the poor', the unfair labor standards in the developing world, and the deterioration of the environment.

[175] The World Summit on Sustainable Development, 2002, Plan of Implementation: Sustainable Development in a Globalised World, Para 45.
[176] *Ibid.*

Chapter III

Fairness in Global Climate Change Regulatory Regime: An Analysis

The economy is a wholly owned subsidiary of the environment and not the other way around.[1]

The threat of climate change was sufficiently established through scientific evidence by the 1980's, which pressurized the policy makers around the world to search for various options.[2] They were also aware that, as a global phenomenon, climate change would hit both the developing and the developed countries with no particular preference. It is also a documented fact that the developing countries are likely to be the most vulnerable to the impact of climate change due to their general dependence on agriculture and more significantly for their limited capacity to adapt to the changed environmental demands.[3] The fact that the majority of low-lying and island nations fall within the Third World also entails a more obvious susceptibility to climate change for developing countries.[4] It also appears that the international

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1 Nelson, Gaylord (2002): *Beyond the Earth Day: Fulfilling the Promise*, Madison: The University of Wisconsin Press, at p. 16.

2 The Impact of Climate Change has been described as quite broad ranging, covering sea level rise, changes in weather patterns and the various adverse effects on living conditions such as dessertification and disease migration. The causes and effects of the greenhouse effect are multiple and complex and hence a detailed analysis is beyond the scope of this thesis. For an overview of the problems of climate change, see, Horsch, Richard and Richards, Joseph (1998): "Does Kyoto Protocol fall Short of the Mark?," *New York Law Journal* 4:22.

3 In fact this has been acknowledged by the Executive Secretary of the UNFCCC Fourth Conference of Parties. See Statement by the Executive Secretary, (1998): "Report of the Conference of the Parties," Fourth Session of COP (Buneoos Aires). U.N. Doc. FCCC/CP/1998/16 (1998).

4 Panjabi, Rani Khooshie Lal (1993): "Can International Law Improve the Climate? An Analysis of the United Nations Framework Convention on Climate Change signed at the Rio Summit in 1992", *North Carolina Journal of International Law and Commercial Regulation* 18: 491, at pp. 532-536.

response to climate change will have major impact on life-style choices of individuals to the extent that it would require significant modifications in practices relating to consumption of resources. All of this will incur huge cost and would therefore have impact on international trade and the state of economy worldwide.[5]

Responding to these concerns, the UN General Assembly (hereinafter referred to as UNGA) established the 'Intergovernmental Negotiating Committee' (hereinafter referred to as INC) for drafting a global legal standard in December 1990. The INC submitted the draft UN Framework Convention on Climate Change (UNFCCC) to the UNGA, which was adopted and opened for signature at the UNCED, 1992.[6] The UNFCCC fundamentally aims at stabilizing the concentration of Greenhouse Gases (GHGs) in the atmosphere of the earth at a level that will prevent irreversible or dangerous interference with the global climate.[7] A timeframe is also set for such a stabilization so as to be "sufficient to allow the 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."[8]

However, the non-binding nature of the language of UFCCC has been a reason for many authors to criticize it. For some scholars, the UNFCCC was disappointing[9] because it had failed to include binding stabilization and reduction

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5 Bodansky, Daniel (1993): "The United Nations Framework Convention on Climate Change: A Commentary" *Yale Journal of International law* 18: 451 at pp. 475-476.

6 The United Nations Framework Convention on Climate Change, adopted on May 9, 1992, [1771 UNTS 164, 31 ILM 851]. Hereinafter referred to as UNFCCC.

7 The UNFCCC, Article 9.

8 *Ibid.*

9 *Supra* n. 5 at pp. 458-71.

commitment and suggests only vague commitments.[10] They also pointed out its failure to include a global climate change mitigation fund and a mechanism for transferring technology as sought by the developing nations. However it was also supported by many authors as a success mainly because of the fact that it unambiguously recognized the climate change as a threat.[11] Another merit of UNFCCC was that it set long-term goals to stabilize GHG emissions 'at a level that would prevent dangerous anthropogenic interference with the climate system.' [12] Thus in the making of the GCCRR, [13] there was a visible confrontation between the developed countries and the developing countries.[14] This chapter aims at analyzing this confrontation through the lenses of fairness.[15]

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10 See also, Kerr, Richard (1991): "U.S. Bites Greenhouse Bullet and Gags," *Science* 251: 868; Gutfeld, Rose (1991): "Climate Change Pact is Reached by 143 Nations-Treaty Begins Initial Attack on Global Warming," *Wall Street Journal*, May 11, at p. A7.

11 Soltau, Friedrich (2009): *Fairness in International Climate Change Law and Policy*, Cambridge: Cambridge University Press, at p.51.

12 The UNFCCC, Article 2.

13 The Global Climate Change Regulatory Regime includes the United Nations Framework Convention on Climate Change, 1992; the Kyoto Protocol, 1997 and other relevant and related documentation that lays down the normative standards in this area.

14 In fact it has been suggested, "It is virtually impossible to analyse any international law today without considering the North-South confrontation and examining how the particular treaty fits into that context. The relationship between the developed and the developing nations has become the most important global issue since end of cold war." Says, Panjabi. See *Supra* n. 4 at p. 515. See also, Marc Williams, (1993): "Rearticulating the Third World Coalition: The Role of Environmental Agenda," *Third World Quarterly*, 14:7, at p. 25. It says that "the North-South issues are inscribed in the international environmental agenda at two structural levels. In the equality of responsibility for environmental degradation and in the relative abilities to cope with these problems…the central issue concerns the way in which North-South issues are raised, the prominence given to them and their impact on the bargaining process."

15 International law being subjected to a fairness test might be selfishly motivated to the extent that it helps to maintain a level of international and national peace and security and may result in an improved standard of living for particular states/individuals. Selfless motivations stem from a desire to see the international law regulate and implement what is right and just, for the sake of global community, irrespective of the particular outcome for the state/individual in question. On the issue of environmental concern as an issue of international security, see, Gunther Handl, (1991): "Environmental Security and Global Change: The Challenge to International Law," *Year Book of International Environmental Law* 1: 3.

3.1 The United Nations Framework Convention on Climate Change (UNFCCC), 1992

The negotiating history of the UNFCCC roughly began in the year 1988 when the Intergovernmental Panel on Climate Change (hereinafter referred to as IPCC) was created under the joint patronage of the World Meteorological Organization (hereinafter referred to as WMO) and the UN Environment Programme (hereinafter referred to as UNEP).[16] The purposes of the creation of the IPCC were aptly identified by the UNGA in its resolution endorsing the establishment of IPCC. It said that "the identification and possible strengthening of the relevant existing international legal instruments having a bearing on climate . . . (and) elements for inclusion in a possible future international convention on climate change" were the purposes of IPCC.[17] However, the IPCC was severely also criticized from the very beginning. Since the majority of the members of the IPCC were from developed countries, the developing countries opposed the new climate convention being negotiated and drafted under the auspices of IPCC.[18]

The year 1989 was another milestone in the history of GCCRR. It was during this period that many powerful industrial houses in the USA, worried about the ill consequences of climate change on their business, started lobbying and pressurizing the USA for supporting the creation of new climate change regime.[19] As a consequence of the efforts of USA, the UNEP Governing Council adopted a resolution mandating the UNEP to commence

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16 *Supra* n. 11.

17 UNGA Res. 53, UN GAOR, Forty-Third Session, UN Doc. A/RES/43/53/(1988).

18 UNGA Res. 207, UN GAOR, Forty-Fourth Session, UN Doc. A/RES/44/207 (1989), at preamble para. 9.

19 Bodansky, Daniel (1994): "Prologue to the Climate Change Convention," in Irving L.Minzer and J. Amber Leonard (eds.,) *Negotiating Climate Change: The Inside Story of Rio Convention*, Cambridge: Cambridge University Press.

the preparations for negotiating an international convention on climate change. However, because of the depth and ambit of the problem known as climate change, there was soon a consensus that such a negotiation should take place under the auspices of the UNGA and not under a specialized agency/organ like the UNEP or the WMO.[20] It was mainly because of the concerns of the developing countries that the IPCC 'did not ensure their participation in the process and did not adequately represent their interests'.[21]

The negotiating history also shows that there were two options available for the stakeholders. One was to have a framework convention with additional binding protocols and the other one was to have a specific binding convention. The UN, under pressure from the developed countries, supported the former and called on states to "prepare, as a matter of urgency, a framework convention on climate change and associated protocols containing concrete commitments in the light of priorities that may be authoritatively identified on the basis of sound scientific knowledge, and taking into account the specific developmental needs of the developing countries."[22] Thereafter the UNGA established the INC with a mandate to pursue "a single intergovernmental negotiating process under the auspices of the General Assembly."[23]

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20 Delphine Borione and Jean Ripert, (1994): "Exercising Common but Differentiated Responsibility," in Irving L. Minzer & J. Amber Leonard (eds.,) *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press.

21 See, Protection of Global Climate for Present and Future Generations of Mankind, GA Res. 44/207, UN GAOR, 44th Sess., Supp. No.49, UN Doc. A/res/44/207 (1989) 130.

22 UNGA Res. 207, UN GAOR, Forty-Fourth Sess., UN Doc. A/RES/44/207 (1989), at preamble para. 9.

23 UNGA Res. 212, UN GAOR, Forty-Fifth Sess., UN Doc. A/RES/45/212 (1990). See also, Ahmed Djoghlaf, (1994): "The Beginnings of an International Climate Law," in Irving L. Minzer & J. Amber Leonard (eds.,) *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press.

Throughout the negotiations, the USA, as supported by the various European States, opposed the inclusion of any binding targets for stabilization and reduction of emission. The various clubs of developed countries demanded that the rule of 'Common Responsibility'[24] should be the basis of emission reduction under the UNFCCC. Their main contention was that climate change is a global threat and all the countries have an equal responsibility towards its mitigation and prevention. However, the developing nations demanded a different treatment altogether. Instead of 'Common Responsibility', they demanded 'Common But Differentiated Responsibility' (CBDR) to be the foundational rule of UNFCCC. They also urged that the responsibility should be fixed after considering, (i) each state's contribution to environmental harm in the past, and (ii) their respective capabilities based on equitable grounds of fairness and justice. This continued until the last session of the INC, during which a compromise was reached and CBDR was opted to be the foundational principle. However as part of the compromise, targets and timetables were replaced by a more soft, non-binding language, according to which the industrialized countries need to report on their policies and measures to reduce emissions, with the aim of returning emissions to their base-year levels, *i.e.*, the year 1990.[25]

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[24] The term 'Common Responsibility' derived its meaning from the notions of 'Common Concerns' or 'Common Heritage of Mankind'. In this sense, the 'Common Responsibility' gives all parties the right as well as obligations in the collective and individual interest in the enforcement of a treaty. This further indicates the existence of an *erga omnes* obligations (obligation towards all) and thus creates greater accountability in the regime building process. For a detailed analysis on this topic; see, Rajamani, L. (2006): *Differential Treatment in International Law,* Oxford: Oxford University Press; Rajamani, L. (2007): "The Nature, Promise and Limits of Differential Treatment in the Climate Change Regime", *Yearbook of International Environmental Law*, 16:81.; Joyner, C.C. (2002): "Common But Differentiated Responsibilities", *American Society of International Law Proceedings,* 96:358.

[25] *Supra* n. 16 at p. 53.

Nevertheless, during this stage the developing countries contended that they have no sufficient resources and hence the proposed convention should give priority to their economic development. In this regard, they demanded the transfer of technology and the transfer of finance to bring in the idea of distributive fairness or equitable sharing of the burden of environmental protection. The developed countries opposed this requirement since they were well aware of the financial burden and other related liabilities this would attach with them. Instead they pleaded for a contributory funding mechanism, which they called the 'Global Environment Facility (hereinafter referred to as GEF)'. But the developing countries were skeptical of this suggestion as the governance structure of the GEF was proposed to be under the control of the developed countries.[26] However, there was no consensus among the developing countries during this period also. For instance, the island and small low-lying states formed a club of their own known as the 'Alliance of Small Island States' and demanded more stringent provisions for financial support and transfer of technology in the proposed GCCRR.

Though the UNFCCC[27] is referred to as an umbrella convention, it according to some authors, 'falls somewhere between a framework and a substantive convention'. That is because it establishes more comprehensive obligations than the usual umbrella conventions and at the same time, 'falling short of the detailed commitments'.[28] The provisions of UNFCCC, which contains a total of twenty-six articles and three Annexes, may be roughly clubbed under the following four headings:

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26 Elizabeth Dowdeswell and Richard J. Kinley (1994): "Constructive Damage to the Status Quo," in Irving L. Minzer & J. Amber Leonard (eds.,) *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press.

27 The UNFCCC was adopted at UNCED, 1992 at Rio De Janeiro in it entered into force in March 1994.

28 *Supra* n. 5 at pp. 458-71.

i. Introductory Provisions;

ii. Commitments and Associated Provisions;

iii. Institutions established by UNFCCC; and

iv. Provisions relating to amendments *etc*.

The Introductory Provisions consist of the preamble, definitions[29], objective of the UNFCCC [30] and the principles guiding the implementation of UNFCCC.[31] The Preamble of the UNFCCC notes "…that the largest share of the historical and current global emissions of greenhouse gases has originated in developed countries, that *per capita* emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and developmental needs." Thus it places an important space for the issue of fairness. Importance is also given to the principle of CBDR[32] and the special vulnerability to the impacts of climate change of low-lying, small island developing countries.[33] Though the language of the Preamble is only inspirational, it definitely forms part of the context in which the other provisions of the UNFCCC could be interpreted and particularly, in the light of Article 31 of the Vienna Convention on the Law of Treaties, 1969.[34]

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29 The UNFCCC Article 1.

30 *Id.* at Article 2.

31 *Id*. at Article 3.

32 *Id*. at Preamble , paras. 6 and 23.

33 *Id*. at Preamble, para 24. Paragraphs 25 and 26 also speak about the special vulnerability of countries 'whose economies are particularly dependent on fossil fuel production,' like the Organisation of Petroleum Exporting Countries (OPEC) states.

34 Vienna Convention on the Law of Treaties, 1969. Article 31 states, "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purposes of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes…."

In this context, it is interesting to note that *sovereign equality* of states, which is the hallmark of international law, stipulates that states are bound as equals (at least theoretically[35]) as far as the international agreements are concerned. The UNFCCC is an exception to this rule, by providing varied rights and obligations,[36] though it is not the first international environmental instrument that provides such a differentiated treatment.[37]The principles that are recognized under the UNFCCC include:[38]

(i) The principle of protection of the climate system for the benefit of the present and the future generations of humankind (Inter-generational and Intra-generational Equity);[39]

(ii) The Principle of Equity (Equitable Distribution);[40]

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35 In realty states vary with respect to their economic power, military might and the strength of their institutions.

36 But such exceptions existed earlier also. For example, the General Agreements of Tariffs and Trade, 1947 which recognised the disadvantaged position of less developed countries, stating in Article XXXVI, sub-para.8 that "the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties."

37 The Stockholm Declaration stressed on the need to consider, "the applicability of standards which are valid for the most advanced countries but which may be inappropriate and unwarranted social cost for the developing countries." See, the Report of the United Nations Conference on the Human Environment, UN Conference n the Human Environment, 26th Session Princ. 23, UN Doc. A/CONF.48/14 (1972); 11cILM 1416, 142. Similarly Ri Conference, 1992 was conspicuous for its endorsement of the differentiated responsibilities between the developed and the developing countries.

38 For a detailed analysis of these Principles; see, chapter 2. This Chapter focuses on the Principle of 'Common But Differentiated Responsibility' as applicable to GCCRR from a fairness perspective.

39 *Supra* n. 29 at Article 3 (1) which reads thus: " 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."

40 *Id*. at Article 3 (2) reads thus: "The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration."

(iii) The Principle of 'Common But Differentiated Responsibilities' (CBDR)[41];

(iv) The Principle of Sustainable Development;[42] and

(v) The Precautionary Principle.[43]

Regarding these Principles as enunciated in the UNFCCC, it has been opined that "considered overall, the phrasing of the principles reveals several, sometimes opposing strands. For example, phrases emphasizing environmental integrity are linked to the cost-effectiveness of measures. Similarly, the mitigation measures should not come at the cost of development for the developing countries, and mitigation measures should not constitute an unjustifiable restriction on the international trade."[44]

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41 *Id*. at Article 3 (5) reads thus: "The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."

42 *Id*. at Article 3 (4) reads thus: "The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change."

43 *Id*. at Article 3 (3) says that "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties."

44 *Supra* n. 25 at p.55.

Further the scope of CBDR as recognized by article 3 of UNFCCC[45], is different from the CBDR that is recognized in Articles 6 and 7 of Rio Declaration.[46] The CBDR recognized under *Rio* assigns a leadership role to the developed countries based on their enhanced contribution to environmental degradation in the past. But the CBDR under UNFCCC contains no reference to such enhanced contributions from developed countries based on environmental degradation that they have caused in the past. As noted by a writer, the "…ambiguity created in the notion of CBDR due to differing terms of the UNFCCC Article 3 and Rio Principle 7 has resulted in two incompatible views on the basis on which responsibilities between Parties are 'differentiated'. One, that the CBDR principle is based on the differences that exist with regard to the level of economic development alone'. And, the other that the CBDR principle is based on 'differing contributions to global environmental degradation and not in different levels of development'."[47]At the same time it could be argued that the CBDR under

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45 The UNFCCC, 1992. Article 3 says that '(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 impacts thereof." Clause 2 further says that "The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse impacts of climate change, and those parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration."

46 See Rio Declaration, 1992. Article 6 states that "the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given priority. Similarly Principle 7 says that the States shall cooperate in the spirit of global partnership t conserve, protect and restore the health and integrity of the Earth's ecosystem. In the view of different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of pressures their societies place on the global environment and the technologies and financial resources they command."

47 Rajamani, L. (2012): "Common But Differentiated Responsibilities", in Navroz K. Dubash, *Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at p. 121.

UNFCCC is enriched by the CBDR under Rio Declaration, resulting in contribution based responsibility even under the former. However, despite the possibility of broad interpretation of CBDR under UNFCCC, the language used in Article 3 ensures that it is applied only to parties and only in relation to UNFCCC, not as a general law.[48]

Further, the use of the world *should* in UNFCCC Article 3, rather than *shall* indicates that the obligation of the developed countries should not be misunderstood in binding legal terms. Even at the time of drafting, developing countries had argued that developed countries should assume leadership in climate actions because they, through their high *per capita* energy consumption, historically bear the main responsibility for rising concentrations of GHGs.[49] However, the unsuccessful attempt to include a language to this effect and the reference to 'respective capabilities' that was inserted to underline that capabilities, instead of the differential contribution to global emissions, are the main reasons for the developed countries taking the lead in combating climate change.[50]

Article 2 of the UNFCCC, which the IPCC calls as *Ultimate Objective of UNFCCC*,[51] states its objectives as "the stabilization of greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system". It is also mandated that this 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

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48 *Supra* n. 28 at p.451.
49 *Supra* n. 44 at p.191.
50 *Ibid.*
51 See IPCC Working Group III (2007): *Mitigation of Climate Change, a*vailable at: http://www.ipcc.ch/publications_and_data/ar4/wg3/en/ch1s1-2.html (accessed on 22/ 06/ 2011).

manner." However, it is not clear as to whether the wordings of Article 2 cast as an obligation on the polluting states or as a collective commitment of all states to strive, in good faith, to stabilize GHG concentrations through the implementation of UNFCCC and subsequent protocols.[52] However, even after two decades of the adoption of UNFCCC, it remains a fact that, 'anthropogenic climate change' still adversely affects the environment. But at the same time, any costly mitigation measures might also adversely effect the economic development. Since the inception of the UNFCCC, this has been remaining as the major dilemma for the policymakers around the world.

3.1.1 Commitments of State Parties under the UNFCCC and Fairness Divide

Towards achieving the objective enunciated in Article 2, but based on the Principle of CBDR, the UNFCCC classifies its signatories mainly into two groups. However, the countries that do not fall in either of these two groups are generally considered as the third group. The following table shows the classification in detail.

Table 2: Classification of State Parties under the UNFCCC

Sl. No	Classification	Details
1	Annex I countries	Industrialized countries and economies in transition
2	Annex II Countries	Developed countries who pay for the costs of developing countries
3	Non-Annex I countries	Developing Countries and the Least Developed Countries

[52] *Supr*a n. 48 at p. 500.

This classification aims at bridging the economic divide amongst signatories by stipulating the common but differentiated responsibility as the foundational rule of global emission reduction. Differentiation exists with respect to emission reduction and reporting obligations of Annex I countries. UNFCCC also provides that Annex II countries (a subset of Annex I countries, essentially the members of the Organization for Economic Co-operation and Development known as OECD) have special responsibilities to assist the developing countries in meeting their commitments. Article 4(3) provides that Annex II parties "shall provide new and additional financial resources to meet the agreed full costs incurred by the developing country Parties" in complying with their reporting obligations. Annex-II countries are also required to take all practicable measures, to promote and finance the transfer of environmentally sound technologies to the developing countries. The notion is that in the absence of such differentiated responsibility, it would not be fair to expect the developing countries to shoulder their share of the mitigation burden.

According to the UNFCCC, the following are the general commitments,[53] *i.e.* the common responsibility of all the signatory states. However, such a commitment is subject to the 'differentiated responsibility' after considering each country's specific national as well as regional developmental priorities and objectives.[54]

(a) To prepare a 'National Inventory of Anthropogenic Emissions' for identifying the sources from which this emissions takes place. However, such a calculation has to be done by the 'Comparable

[53] *Supra* n. 43 at Article 4.
[54] *Id*. at Article 4(1).

Methodologies' that is agreed by the parties to the UNFCCC.[55]

(b) The State parties also have a responsibility to formulate, implement, publish and regularly update the various measures taken by them to mitigate the anthropogenic emissions.[56]

(c) Promote practices that would mitigate anthropogenic emissions including the transfer of technology[57]

(d) Promote and cooperate in the sustainable management and conservation and the enhancement of sinks and reservoirs such as biomass, forests and oceans.[58]

(e) Cooperate in preparing for the adaptation strategies to the impacts of climate change by developing the appropriate and integrated plans.[59]

(f) Take the climate change considerations into account, in their relevant social, economic and environmental policies and actions.

(g) Promote and cooperate in scientific, technological, technical, socio-economic and other research [60] and exchange the relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change.[61]

(h) Promote education, training and public awareness relating to the climate change.

However, as already noted above, the article 4(2) of the UNFCCC assigns to

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55 *Id*. at Article 4(1) (a).
56 *Id*. at Article 4(1)(b).
57 *Id*. at Article 4(1) (c).
58 *Id*. at Article 4 (1)(d).
59 *Id*. at Article 4 (1)(e).
60 *Id*. at Article 4 (1)(f).
61 *Id*. at Article 4 (1)(g).

the developed countries listed in Annex 2, special commitments towards this end and they also have a responsibility to lead with their own commitment. They are committed to adopting national policies and taking corresponding measures on the mitigation of climate change by limiting anthropogenic emissions of GHGs and protecting the *sinks*. The Annex I countries are also required to report periodically on the preceding policies undertaken by them, "with the aim of returning individually or jointly to their 1990 levels of these anthropogenic emissions of carbon dioxide and other greenhouse gases." [62] It is commented that though it is a binding obligation, it is rather a weak and diluted one.[63] According to another view, even when these countries met the record, it was not because of their commitment to the UNFCCC, but because of the economic factors that were unrelated to the mitigation measures, such as economic collapse and recession that eventually lead to the closure of many industries in those countries.[64]

With regard to the reporting mechanism, similar to other international conventions such as the ICCPR, the UNFCCC also has an inbuilt State Reporting and Communication Mechanism.[65] Under this mechanism, each state is required to report the inventories and the applicable methodologies that reinforce the Conference of Parties (hereinafter referred to as COP) through the Secretariat. While the requirement of reporting is on all parties, the Annex I countries must also include in their reports and communications, the detailed descriptions of policies and measures to mitigate climate change. [66] However, the developing countries have a 'Differentiated

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62 *Id*. at Article 4 (2)(b).
63 *Supra* n. 52 at p. 516.
64 For example the collapse of USSR led to the closure of many industries which eventually resulted in reduction in emission.
65 *Supra* n. 62 at Article 12.
66 *Id.* at Article 12 (2).

Responsibility'. They are required to submit their first national communication either within three years of the entry into force of the UNFCCC or when sufficient financial resources are available with them. However, the Least Developed Countries (LDCs) may submit their national communications at their discretion.[67] This mechanism forms a fundamental part of the UNFCCC, as reporting and monitoring mechanisms are vital for measuring the progress. They also facilitate the development of common standards and build trust among the parties. Reporting and monitoring mechanism has become the notable feature of multilateral environmental agreements, like treaties relating to human rights. While the UNFCCC does not explicitly empower any of its institutions to review compliance with its provisions, the COP has elaborated a process of in-depth expert review of Annex I and Annex II Parties' Reports.[68] However, concerns still exist about the effectiveness of the reporting procedures also. It can be seen that, very often, countries tend to submit their reports concealing the actual facts that would go against their interest.[69]

The commitment to transfer technology from the developed countries to the developing countries and the least developed countries (hereinafter referred to as LDC) includes "…processes covering the flows of know-how, experience, and equipment for mitigating and adapting to climate change among the different stakeholders such as governments, private sector entities, financial institutions, non-governmental organizations, and research/ education institutions."[70] Questions pertaining to transfer of technology are

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67 *Id.* at Article 12 (5).

68 Jacob Werksman, (1999): "Compliance and the Kyoto Protocol: Building a Backbone into a Flexible Regime," in Jutta Brunnee and Ellen Hay (eds.) *Yearbook of International Environmental Law*, 9:48 at pp.65-66.

69 *Supra* n. 16 at p.191.

70 *Id*. at p. 194.

related to the international environmental law and the principle of CBDR in a number of ways. Firstly, to manage the emission of GHGs at minimum, it is critical that resource-intensive, less polluting technologies are used in economic and industrial activities globally. If the developing countries continue to use the polluting technology, contending that the developed countries used such polluting technologies in the past, its impact on global climate would be disastrous. It would again be unfair and inequitable, if the developing countries were asked to reduce/stop their economic activities simply because their technology is out-dated and polluting. Transfer of technology is the only answer to such a problem. As discussed earlier in this chapter, the UNFCCC requires the Annex II countries to transfer Environmentally Sound Technologies (hereinafter referred to as ESTs) to developing countries. [71] Prior to the emergence of GCCRR, the GERR also contained provisions regarding transferring the ESTs.[71a]These commitments are generally casted in terms of a commitment by the developed countries to promote, facilitate, or finance the transfer of technology to the developing countries.[72] But it appears that generally, these commitments have seldom gone beyond the rhetorical to the real transfer of ESTs.[73] The provision of technology transfer under the UNFCCC does not even mandate the transfer of

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[71] The UNFCCC, 1992. Article 4(5) provides that the "…developed country parties…shall take all practicable steps t promote and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know –how to other parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this processes, the developed country parties shall support the development and enhancement of endogenous capacities and technologies of developing country parties."

[71a] See for example Principle 20 of the Stockholm Declaration, 1972; Principle 9 of the Rio Declaration, 1992, and chapter 34 of the Agenda 21).

[72] Verhoosel, Gatan (1998): "Beyond the Unsustainable Rhetoric of Sustainable Development: Transfer of Environmentally Sound Technologies*", Georgetown International and Environmental Law Review,* 11: 49.

[73] *Id.* at pp. 49-51.

technology as a binding obligation, rather requires the parties to take 'all practicable' steps. Similarly, the Agreement on Trade-Related Aspects of Intellectual Property Rights (also known as TRIPS), which sets out the standards of protection for intellectual property, have also proved to be an obstacle in the effective transfer of ESTs.

In such a grossly unfair move, the USA filed a case at the WTO challenging India's use of subsidies and 'stipulations to buy domestic products' in its solar programme under its National Solar Mission.[74] Prior to 2013, India had permitted the use of imported 'thin film solar cells' to be used in large-scale solar projects owing to the low domestic capacity to manufacture such cells. The USA was the largest beneficiary of such a policy and its exports of thin film solar cells had dominated the solar markets in India. Meanwhile, India changed its policy and stipulated that even the 'thin film solar cells' used in solar projects should be manufactured domestically and cannot be imported from other countries to avail the subsidies. The US with a fear to lose the largest solar energy market in the world[75], filed the case with WTO alleging that India have violated the General Agreement on Trade and Tariffs (hereinafter referred to as GATT), [76] the Agreement on Trade-Related Investment Measures (also known as TRIMS)[77], and the Agreement on Subsidies and Countervailing Measures (also known as

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74 *USA* v. *India* (On Certain Measures Relating to Solar Cells and Solar Modules, filed on 11 February 2013) WT/DS456/1, G/L/1023, G/TRIMS/D/35, G/SCM/D96/1.

75 India aims at developing 20,000 megawatts of solar power capacity by 2022.

76 Under Article III: 4 of the GATT 1994. The USA alleges that India's acts appear to provide less favourable treatment to imported solar cells and solar modules than that accorded to like products originating in India.

77 Under Article 2.1 of the TRIMs Agreement. The allegation is that because the measures appear to be trade-related investment measures inconsistent with Article III of the GATT 1994.

SCMs),[78] while providing a more favourable treatment to domestic solar producers and products than to foreign ones. This undoubtedly goes against the fundamentals of international climate change law.

3.1.2 Institutional Arrangements under the UNFCCC

While analyzing the fairness in the climate change regime, it is also important to consider the nature of its supplementing institutions. The is mainly because of the fact that once a new set of rules are established in a regime, the ongoing level of fairness will be greatly influenced by the structure and functioning of its various organizational, administrative and advisory bodies.[79] Thomas Franck, in this regard states thus:[80]

> The extent to which institutions …are able t do these things [*i.e*. identifying issues, negotiating terms, monitoring compliance, reporting violations, adjudicating disputes *etc*.] will help shape the texture of the normative system and the capacity of the rules to pull towards compliance. The capacity of an institution to support a system of norms will depend, significantly, on whether it is perceived as a legitimate institution operating fairly.

In this regard the UNFCCC establishes various organs such as the COP, the Secretariat, the Subsidiary Body for Scientific and Technological Advice (also

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78 Under Articles 3.1(b) and 3.2 of the SCM Agreement because the measures appear to provide a subsidy contingent upon the use of domestic over imported goods; and Articles 5(c), 6.3(a), and 6.3(c) of the SCM Agreement because the measures appear to cause serious prejudice to the interests of the United States through displacement or impedance of imports of U.S. solar cells and solar modules into India and through lost sales of U.S. solar cells and solar modules in India.

79 Kirsten Bishop, (2000): "Fairness in International Environmental Law: Accommodation of the Concerns of Developing Countries in the Climate Change Regime", Institute of Comparative Law: McGill University, at p. 36.

80 Franck, Thomas M (1995): Fairness in International Law and Institutions, Oxford: Clarendon Press, at p. 35.

known as SBSTA), the Subsidiary Body for Implementation, and the Financial Mechanism and the Global Environmental Facility (also known as GEF). The COP was created under article 7 of the UNFCCC as the supreme body of the UNFCCC, which shall meet every year. The COP is empowered to make decisions to promote the effective implementation of the UNFCCC, including "exercising such other functions as are required for the achievement of the objectives of the Convention."[81] The COP is also entrusted with such open-ended powers necessary to implement the UNFCCC. It is also provided that the COP shall take decisions on the basis of consensus.[82] However, this has resulted in a situation where parties who do not support a particular decision could block the consensus. This was the case at the COP-I, with the result that the rules of procedure have, at every meeting, been applied, without ever having been formally adopted.[83] In this context it is commented that the, "exponents of delay and obfuscation were thus handed a veto because the rule of consensus applies."[84] The COP is beneficial, as it involves the parties in an ongoing multilateral, quasi-legislative process that is time-efficient, flexible and effective. Kirsten Bishop also says that these meetings are useful as they provide a regular forum for the elaboration of climate change policy, providing an avenue for involvement by NGOs and a focal point for public attention.[85] At the same time, fairness in the decisions made by the COP are to be ensured because as has been stated, "the institutional dynamics of multilateral regimes…, may be such as to de-couple decision making within the regime

81 *Supra* n. 67 at Article 7 (2)(m).
82 *Id*. at Article 7 (2) (k).
83 Sebastian Oberthur and Hermann E. Ott (1999): "The Kyoto Protocol: International Climate Policy for the 21st Century," *International and European Environmental Policy Studies*, Heidelberg: Springer.
84 *Supra* n. 69 at p.59.
85 Kirsten Bishop, (2000): "Fairness in International Environmental Law: Accommodation of the Concerns of Developing Countries in the Climate Change Regime", Institute of Comparative Law: McGill University, at p. 37.

from the traditional national processes of control and supervision. In this sense, the new type of environmental regime may signal an emerging *democratic deficit*"[86]

Similarly, the UNFCCC under article 8 creates a Secretariat, which will act under the COP. The main functions of the secretariat are to make arrangements for the sessions of the COP and also to provide all other assistance and coordination. The UNFCCC is committed to make a contribution to the sustainable development through the support for action to mitigate and to adapt to climate change at the global, regional and national level. It also provides the support to the intergovernmental process in the context of the UNFCCC and the Kyoto Protocol for creating and maintaining the necessary conditions for an early, effective and efficient implementation of the same. It is also aimed at providing and disseminating high-quality, understandable and reliable information and data on climate change and on efforts to address it. Further more, it promotes and enhances the active engagement of NGOs, business sectors and industry, the scientific community and other relevant stakeholders in their work and processes, including an effective communication.[87]

Another subsidiary organ under the COP is the Subsidiary Body for Scientific and Technological Advice established under article 9. It comprises government representatives who are competent in their relevant field of expertise. As its name denotes, the important responsibilities of this organ are to provide scientific assistance to the COP. Hence, the major task of the SBSTA is to provide the COP with advice on scientific, technological

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86 Handl, Gunther (1991): "Environmental Security and Global Change: The Challenge to International Law", *Year Book of International Environmental Law* 1: 3, at pp. 6-7.

87 See, also the text of UNFCCC, available at http://unfccc.int/essential_background/ convention/background/ items/ 1349.php.

and methodological matters. The two key areas of work in this regard are promoting the development and transfer of ESTs and conducting technical work to improve the guidelines for preparing the national communications and emission inventories.[88]

Through the creation of SBSTA, the GCCRR is able to establish a "a body of commonly agreed-upon technical knowledge that is widely accepted as a valid basis for the political negotiations."[89] The expectations of sharing the scientific knowledge by establishing SBSTA, infact sets the "base for the regime's priorities, policies and strategies."[90] Peter Hass says that the SBSTA and also IPCC are institutional representatives of the community of climate change scientists who play a vital role "in articulating the cause-and-effect relationships of complex problems, helping states identify their interests, framing the issues for collective debate, proposing specific policies, and identifying salient points of negotiation."[91] The involvement of scientific institutions such as SBSTA is expected to enhance the perception of fairness within the GCCRR by increasing the diversity of participants and assisting in consensus building, especially in relation to matters that are highly technical. However, there is also a risk that the developed countries might dominate the SBSTA and thereby reflecting their policy perspectives on climate change

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88 The SBSTA also carries out methodological work in specific areas, such as the LULUCF sector, HFCs and PFCs, and adaptation and vulnerability. In addition, the SBSTA plays an important role as the link between the scientific information provided by expert sources such as the IPCC on the one hand, and the policy-oriented needs of the COP on the other. It works closely with the IPCC, sometimes requesting specific information or reports from it, and also collaborates with other relevant international organizations that share the common objective of sustainable development.

89 Gehring, Thomas (1990): "International Environmental Regimes: Dynamic Sectoral Legal Systems" *Year Book of International Environmental Law*, 1:35 at p.41.

90 *Id*. at 32-43.

91 Hass, Peter M (1992): "Introduction: Epistemic Communities and International Policy Coordination", *International Organisation* 46: 1, at p.3.

negotiations as well.[92]

The Subsidiary Body for Implementation (also known SBI) is another organ of the UNFCCC, established under article 10 to assist the COP in the assessment and review of the effective implementation of the Convention. The SBI gives advice to the COP on all matters concerning the implementation of the Convention. A particularly important task in this respect is to examine the information provided in the national communications and emission inventories submitted by the parties in order to assess the Convention's overall effectiveness. The SBI reviews the financial assistance given to non-Annex I parties to help them implement their Convention commitments, and provides advice to the COP on guidance to the financial mechanism as operated by the GEF. The SBI also advises the COP on budgetary and administrative matters.

Further the UNFCCC has also created a Financial Mechanism. The contribution of countries to climate change, and their capacity to prevent and cope up with its consequences, varies enormously. The UNFCCC and the Protocol, therefore, foresee financial assistance from the Parties with more resources to those less endowed and more vulnerable. Developed country parties i.e. the Annex II parties shall provide the financial resources to assist developing country parties in implementing the Convention. To facilitate this, the Convention established a financial mechanism to provide funds to the developing country parties under article 11 of the UNFCCC. Thus it creates a mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology, which also will function under the guidance of and be accountable to the COP. Currently, the operation of the

92 *Supra* n. 79 at p.41.

financial mechanism is partly entrusted to the GEF on an on-going basis, subject to review in every four years. The financial mechanism is accountable to the COP, which decides on its climate change policies, programme priorities and eligibility criteria for funding, based on advice from the SBI[93].

The GEF to which the financial mechanism of the GCCRR is entrusted was established in the year 1991 by the World Bank. It has been described as the World Bank's most significant effort to proactively protect the environment.[94] Since the very beginning, both the developing and the developed countries had been concerned about the lack of transparency and democracy within the GEF.[95] As a result the GEF underwent a restructuring in the year 1994 and reduced the decision-making powers of the World Bank and created an independent governance mechanism.

3.2 The Kyoto Protocol, 1997

The Kyoto Protocol[96] is a protocol to the UNFCCC which sets out binding obligations on the industrialized countries to reduce their emissions of the GHGs. It was adopted in the year 1997 at Kyoto in Japan, and it was entered into force in the year 2005. As of today, 191 states have signed this Protocol. Barring the USA, Afghanistan, Andorra and South Sudan all other UN members have ratified this Protocol.[97] Under this Protocol, Annex I countries, which include Thirty-Seven industrialized countries and the European Union, commit themselves to limiting or reducing their emissions of

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93 See, the text of UNFCCC, available at http://unfccc.int/essential_background /convention/ background/items/1349.php (accessed 11/12/2009).

94 *Supra* n. 92 at p. 42.

95 *Id*. at p. 43.

96 Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 1997, 2303 UNTS 148, 37 ILM 22, text, available at http://unfccc.int/kyoto_ protocol/items/2830.php (accessed on 11/12/2009).

97 Canada and Australia withdrew from the Protocol in 2004.

GHGs at a stipulated percentage on the basis of the base year 1990. Whereas other members have only general commitments, the Annex I countries under this Protocol had agreed to reduce the GHGs at 5.2% of their 1990 emission rate (base year) during the period 2008-2012,[98] which was not achieved and Kyoto entered into the second commitment period at Doha from 2013 to 2020.

When the first COP met at Berlin in the year 1995, it had reviewed the goal of 'emission reduction to 1990 base year level by the year 2000' as provided under article 4(2) of the UNFCCC. In the said meeting, projections indicated that it was very unlikely that the Annex I parties were going to meet that goal.[99] It was also evident that commitments with a horizon of the year 2000 were not sufficient to combat climate change in a meaningful manner. Given the work of the IPCC, policy makers were also quite certain that for the realization of the targets, binding commitments would be required. But the introduction of such binding commitments was opposed by the clubs of oil producing and exporting countries as well as by the some powerful interest groups such as the US industrial lobby.[100] However, rejecting such opposition, COP-I reached an agreement, which is called the *Berlin Mandate*. This *Mandate* set in motion a process to reinforce the UNFCCC's commitments by means of additional protocols or other instruments. It was done with the objective of elaborating policies and measures and setting quantified limitation and reduction objectives within the specified time frames for different classes of States.[101] It was also decided that the negotiations on the said Protocol were to be completed by 1997, so that it could be reported to the third session of the COP. However, the developing countries from the

98 *Supra* n. 57.
99 First Review of Information Communicated by Each Party Included in Annex I to the Convention, UN Doc. A/AC.237/81 (1994).
100 *Supra* n. 79 at pp. 60-61.
101 *Id*. at p 61.

beginning objected that in accordance with the principle of CBDR, the proposed protocol should not introduce any new commitments for them.[102] Thereafter, a negotiating body, known as the *Ad Hoc Group on the Berlin Mandate* (also known as AGBM), was established to oversee the negotiation of the new instrument. The AGBM met eight times between 1995 and 1997 and produced a timely drafting of the provisions for the COP-3 in Kyoto. The key issues before the AGBM may be grouped under three broad headings as follows:[103]

(1) Specific policies and measures that might be included;

(2) Targets for emission reduction commitments; and

(3) Concerns of the developing country particularly relating to financial support and technology transfer.

During this stage, the EU suggested elaborate policies and measures for mitigating climate change, ranging from the mandatory energy efficiency appliance labeling to carbon taxes. But this regulatory approach in the nature of 'command and control' was rejected by the USA, which preferred to retain flexibility with respect to choice of the mitigation mechanisms.[104] The EU proposal did not find any support from the OPEC states also regarding the carbon tax. However, after much negotiation the USA also conceded to the binding targets at COP-2 that took place at Geneva.

Article 2(1) sets out a menu of polices and measures to be adopted by the Annex I countries, which are phrased in non-binding terms and in accordance with its national circumstances. The policies covered include, the

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102 *Ibid*.
103 *Id.* at p. 62.
104 *Id.* at p. 62.

enhancement of energy efficiency, the protection and enhancement of sinks and reservoirs, the development of renewable forms of energy, and the reduction or phasing out of market imperfections and subsidies that run counter to the objectives of the UNFCCC.[105] Article 2 (2) further, calls upon Annex I parties to pursue the reduction of GHG emissions from aviation and marine bunker fuels, working through the International Civil Aviation Organization (also known as ICAO) and the International Maritime Organization (also known as IMO), which are the international organizations that deal with these sectors. International bunker fuel emissions were not included in Annex I parties' Kyoto targets, because no agreement could be reached on how to ascribe the responsibility for such emissions.[106] Accordingly, while Annex I parties must tally these emissions in their GHG inventories, they are excluded from the national totals and are reported separately.[107]

The agreement on binding quantified emission targets and the creation of a timetable for their achievement represent the heart of the Kyoto Protocol. Under article 3, the Annex I parties, as a group, committed themselves to individual and differentiated emission targets, which they would have to meet with a view to reducing their overall emissions of the applicable GHGs by at least 5 percent below the 1990 levels. However, a resolution adopted at COP-3 also provides that emissions trading schemes should only be implemented with mutual consent of the states concerned, which again gives flexibility despite using the obligatory language in the text of Kyoto Protocol. It may also

105 The UNFCCC, Article 2(1)(a).
106 *Supra* n. 100 at p. 64.
107 *Id.* at p 65.

be noted that throughout the negotiations, the question of formulating the schemes on the basis of historical emissions never arose.[108]

3.2.1 Flexibility Mechanisms under the Kyoto Protocol

The Kyoto Protocol introduces three flexible trading mechanisms *viz*., (i) the Joint Implementation; (ii) the Clean Development Mechanism, and (iii) the International Emissions Trading. The following part of the thesis would be an attempt to examine these three mechanisms in detail to understand its merits and demerits.

3.2.2 Joint Implementation

Joint Implementation (hereinafter referred to JI) is a project-based mechanism by which emission reductions are achieved in accordance with the projects implemented in an Annex I country by investors from another Annex I country. The investor country can then claim the resulting emission reduction to sell on the market or credit it against the investor country's target. JI has its roots in articles 4(2)(a)[109] and (d)[110] of the UNFCCC.[111] The basic

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[108] *Id.* at p. 67.

[109] UNFCCC, Article 4 (2)(a) says that "Each of these Parties shall adopt national1 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, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph"

[110] *Id*. at Article 4 (2)(d) thus says: "The Conference of the Parties shall, at its first session, review the adequacy of subparagraphs (a) and (b) above. Such review shall be carried out

eligibility requirements for JI projects are set out in article 6 (1) of the Protocol.[112] Those projects require the approval of both the countries involved *i.e.* the host and the investor, that any reduction in emissions by sources or removal by sinks must be additional to any that would otherwise occur, and that the countries maintain proper inventories and comply with the Protocol's reporting obligations. Article 6(3)[113] provides that the private sector entities may, subject to the authorization of the country concerned, participate in JI projects. During the negotiations, it was also envisaged that the private sector would have a key role to play as an investor in and the developer of JI projects. However, since JI projects result in a subtraction from a host country's allocation of Assigned Amount Units (also known as AAUs) of carbon emission with potential consequences for compliance with its emission

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in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic information. Based on this review, the Conference of the Parties shall take appropriate action, which may include the adoption of amendments to the commitments in subparagraphs (a) and (b) above. The Conference of the Parties, at its first session, shall also take decisions regarding criteria for joint implementation as indicated in subparagraph (a) above. A second review of subparagraphs (a) and (b) shall take place not later than 31 December 1998, and thereafter at regular intervals determined by the Conference of the Parties, until the objective of the Convention is met.'

111 *Supra* n. 11 at p. 75.

112 The Kyoto Protocol, 1997; Article 6 (1)reads thus: " For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that: (a) any such project has the approval of the Parties involved;(b) any such project provides a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any that would otherwise occur; (c) it does not acquire any emission reduction units if it is not in compliance with its obligations under Articles 5 and 7; and (d) the acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3."

113 *Id.* at Article 6 (3): "A Party included in Annex I may authorize legal entities to participate, under its responsibility, in actions leading to the generation, transfer or acquisition under this Article of emission reduction units."

reduction commitments, government supervision is important.[114] Hence private sector participation is subject to the authorization and the requirement that both the host and the purchasing country must approve the project.

As noted earlier, the developers of JI projects must demonstrate additionality; in other words, they must make the case that the project emissions will be lower than a credible baseline, which would have applied but for the project.[115] The Protocol does not address the process for verifying additionality and other requirements for JI projects, but simply states that the parties "may . . . further elaborate guidelines for the implementation of this article, including for verification and reporting."[116] For Annex I countries that are not on track to meet their Kyoto commitments from action alone, the attraction of JI stems from the lower mitigation the costs in the countries of Eastern Europe, as compared with costs in the more advanced industrialized economies.[117]

3.2.3 Clean Development Mechanism

The second flexibility mechanism under the Kyoto Protocol is the 'Clean Development Mechanism' (hereinafter referred to as CDM) that is established under Article 12.[118] It serves the twin goals of assisting the

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114 *Supra* n. 100 at p. 79.

115 *Ibid*.

116 *Supra* n. 113 at Article 6(2).

117 See for example the Japanese economy is already very energy-efficient and has low carbon intensity. Therefore domestic abatement costs are high, and Japan is an active participant in the market to acquire JI and CDM credits.

118 *Supra* n. 116 at Article 12 which says thus: "(1) A clean development mechanism is hereby defined. (2). The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3. (3) Under the clean development mechanism: (a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and (b) Parties included in Annex I may use the certified emission reductions accruing from such project

developing countries in achieving sustainable development and also aiding Annex I states in meeting their emission limitation and reduction commitments.[119] The CDM has been developed from a proposal by Brazil for creating a 'Clean Development Fund', which was to be financed from fines levied on Annex I parties for non-compliance with the binding targets under the Kyoto.[120] This proposal now has been incorporated into the CDM.[121] Like the JI, the CDM is also a project-based mechanism, but executed for credits

activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol. (4) The clean development mechanism shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Protocol and be supervised by an executive board of the clean development mechanism. (5) Emission reductions resulting from each project activity shall be certified by operational entities to be designated by the Conference of the Parties serving as the meeting of the Parties to this Protocol, on the basis of: (a) Voluntary participation approved by each Party involved; (b) Real, measurable, and long-term benefits related to the mitigation of climate change; and (c) Reductions in emissions that are additional to any that would occur in the absence of the certified project activity. (6) The clean development mechanism shall assist in arranging funding of certified project activities as necessary. (7)The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, elaborate modalities and procedures with the objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities. (8) The Conference of the Parties serving as the meeting of the Parties to this Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation. (9) Participation under the clean development mechanism, including in activities mentioned in paragraph 3(a) above and in the acquisition of certified emission reductions, may involve private and/or public entities, and is to be subject to whatever guidance may be provided by the executive board of the clean development mechanism. (10) Certified emission reductions obtained during the period from the year 2000 up to the beginning of the first commitment period can be used to assist in achieving compliance in the first commitment period."

119 Mark Kenber, (2005): "The Clean Development Mechanism: A Tool for Promoting Long-Term Climate Protection and Sustainable Development?," in Farhana Yamin (ed.), *Climate Change and Carbon Markes: A Hanbook of Emission Reduction Mechanisms,* United Kingdom: Earthscan.

120 Sebastian Oberthur and Hermann E. Ott, (1999): "The Kyoto Protocol: International Climate Policy for the 21st Century," *International and European Environmental Policy Studies*, Heidelberg: Springer.

121 Naoki Matsuo, (2003): "CDM in the Kyoto Negotiations: How CDM Has Worked as a Bridge between Developed and Developing Worlds?," *Mitigation and Adaptation Strategies for Global Change*, 8: 191 at p. 197.

earned in developing countries. Unlike JI, for each Certified Emission Reduction (hereinafter referred to as CER) [122]an Annex I party increases its cap. In this context the CDMs are integral to environmental protection.[123] However the only stipulation is that resulting GHG reductions must be real and measurable and additional to any that would occur in the absence of the certified project sanctioned under the CDM.[124] This ensures that the "CDM projects must demonstrate that its reduction in GHG emissions goes beyond business as usual, which involves emission reductions generated by the project in addition to any that would have occurred in the project's absence".[125] This is called the *Additionality Criterion* of the CDM.[126]

For the proper and effective administration of CDM, the COP has developed detailed Rules.[127] The implementation of CDM projects are overseen by the CDM Executive Board (hereinafter referred to as CDM-EB), which is composed of 20 members who represent both Annex I and non–Annex I (the developing) countries.[128] The CDM has created interest

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122 Every Certified Emission Reduction (CER) is equal to a ton of CO2.

123 Ernestine Meijer and Jacob Werksman, (2005): "Keeping It Clean – Safeguarding the Environmental Integrity of the Clean Development Mechanism," in David Freestone and Charlotte Streck (eds.) *Legal Aspects of Implementing the Kyoto Protocol*: *Making Kyoto Work*, USA: Oxford University Press.

124 The Kyoto Protocol, Art. 12(5).

125 *Supra* n. 11 at p. 80.

126 Axel Michaelowa, (2005): "Determination of Baselines and Additionality for the CDM: A Crucial Element of the Credibility of the Climate Regime," in Farhana Yamin. (eds.) *Climate Change and Carbon Markets: A Handbook of Emission Reduction Mechanisms*, United Kingdom: Earthscan.

127 For a summary of the CDM project cycle; see, Farhana Yamin, (2005): "The International Rules of the Kyoto Mechanisms," in Farhana Yamin. (eds.) *Climate Change and Carbon Markets: A Handbook of Emission Reduction Mechanisms*, United Kingdom: Earthscan; See also, Maria Netto and Kai-Uwe Barani Schmidt, CDM Project Cycle and the Role of the UNFCCC," in David Freestone and Charlotte Streck (eds.) *Legal Aspects of Implementing the Kyoto Protocol*: *Making Kyoto Work*, USA: Oxford University Press, at p.175.

128 Report of the Conference of the Parties, (2002): Decision No. 17/CP.7, Conference of the Parties, Seventh Session, Addendum. Also see Part II: Action Taken by the Conference of the

among both the developed countries and among the developing countries. Developing countries see a potential influx of technology and resources. At the same time, the developed countries see the cheaper compliance and opportunities for their private sectors in banking, advising, and legal services.[129] At the same time, the project developers and investors in the carbon market are critical of the CDM-EB for applying overly stringent project approval criteria for its lack of transparency, insufficient resources and incapacity with the negative consequences on the ability to cope up with its workload.[130] Various studies have also pointed out problems with the CDM market, particularly with respect to the additionality of some CDM credits.[131] It is also stated that "…as it is not possible to ensure that every credit from …the CDM represents a real, measurable, and long-term reduction in emissions, the use of carbon offsets in a cap-and-trade system can potentially undermine the system's integrity."[132] The CDM has also been criticized for its uneven regional distribution. The following table gives an idea about the regional distribution of CDMs as of 2012 (calculated in terms of CERs):[133]

Table 3: Regional Distribution of Global CDMs

Asia Pacific	79.7%
Latin America and Caribbean	15%
Africa	3%

Parties, Vol. II, Annex, Modalities and Procedures for a Clean Development Mechanism, FCCC/CP/2001/13/Add.2 (2002).

129 *Supra* n. 125 at p. 82.

130 For an expression of such views, see, International Emissions Trading Association, (2006): "State of The CDM," *IETA Position on The CDM for CoP-12/MoP-2*.

131 Axel Michaelowa and Pallav Purohit, (2007): "Additionality Determination of Indian CDM Projects: Can Indian CDM Project Developers Outwit the CDM Executive Board," *Discussion Paper CDM-I, University of Zurich, Institute for Political Science,* available at http://www.internationalrivers.org/files/attached-files/additionality-cdm-india-cs-version9-07.pdf (accessed on 12/11/2012).

132 *Supra* n. 129 at pp. 81-82.

133 *Id*. at p. 82.

Europe and Central Asia	1%
Middle East	1%

This table shows that the geographic distributions of CDM projects are very uneven with Asia and Latin America which are accounting for a major share. In this context, many countries that have so far been less benefited from the CDM, such as sub-Saharan Africa, have called for measures to promote a more equitable distribution of projects.[134] However, it is not surprising that India and China lead in the number of projects. Given the high transaction costs associated with the CDM, the project size (because the formula is, *more tons abated equals more credits*), and economies of scale in many similar projects, the investors are seemingly more interested in those countries. It is because the ability to attract CDM investment depends on the existing emission reduction potential, even among the developing countries. Project developers generally look out for host countries offering the lowest cost-mitigation opportunities because the underlying logic based on efficiency and not based on equity or fairness. It is said that efficiency and effectiveness of the CDM do not actually permit it to have an equitable distribution of projects.[135]

Although there are many similarities, the CDM and JI are not the same. JI projects take place amongst the Annex I countries, and the mechanism is intended to assist the Annex I parties in complying with their emission reduction obligations under article 3 of the Protocol. The CDM has a dual purpose: (i) to assist the Annex I countries in meeting their emission limitation and reduction obligations, and (ii) to promote the sustainable development in the host countries for instance, by promoting the transfer of

134 *Ibid.*
135 *Ibid.*

clean technology. Since JI projects are implemented in Annex I countries, the credits earned from a given project are deducted from the host country's Kyoto allowance, known as Assigned Amount Units (hereinafter referred to as AAUs). This means that as JI projects do not introduce additional allowances into the system, the overall amount of emissions under the cap does not increase. Environmental integrity is safeguarded by the requirement that a JI host country maintain an appropriate inventory of GHG sources and sinks as well as an accounting system for the additions and subtractions from its allocation of AAUs. This contrasts with the CDM, where there is no deduction from an allocation of allowances because projects are located in developing countries with no Kyoto target. To maintain the environmental integrity of the CDM *i.e*, to avoid the issuing of credits not based on real emission reductions, the verification, monitoring, and the certification requirements under the CDM are more onerous than the equivalent JI provisions.[136]

3.2.4 International Emission Trading

The International Emission Trading is another flexible mechanism as recognized by Article 17 of the Kyoto Protocol[137]. The concept of international emission trading was introduced in the negotiations by the USA supported by the members of the JUSSCANNZ club[138]. This movement was

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[136] Charlotte Streck, (2005): "Joint Implementation: History, Requirements and Challenges," in David Freestone and Charlotte Streck (eds.) *Legal Aspects of Implementing the Kyoto Protocol*: *Making Kyoto Work*, USA: Oxford University Press.

[137] Kyoto Protocol, 1997, Article 17 says thus: "The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to the domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article."

[138] Members of this club are Japan, United States, Canada, Australia, Norway, New Zealand, Iceland, Mexico, and South Korea

in fact the result of the realization that at least for many countries, it would be politically difficult to obtain the significant domestic emission cut. So, instead, they regarded emission trading as critical in meeting the emission targets under the Protocol. An emission trading is a purely market-based approach for achieving the reductions in the anthropogenic emissions. The limit or cap for each country prescribes the amount of pollutant that may be emitted by them. If that country does not reach this cap, or if there is surplus as a result of the JI or CDM, it is allocated or sold to the firms in the form of *Emissions Permits* that represent the right to emit or discharge a specific volume of the specified pollutant. Though a firm can hold a number of permits, the total number of permits however, cannot exceed the cap, limiting the total emissions within the permissible level.

The most serious opposition came from the developing countries, which argued that trading would allow the United States, the largest emitter of the GHGs, to avoid meaningful domestic action.[139] This also threatened the position of China and India, which, at time, advocated the position that over a period of time, the *per capita* emissions of the industrialized countries should decrease, eventually converging at equal *per capita* levels with those of the developing countries. They feared that under emission trading, the Russian Federation potentially stood to gain from trading with its large number of surplus AAUs, which would have flooded the market with AAUs. Flooding the market with AAUs would also have the effect of depressing the price of CERs generated by the CDM projects in developing countries.

3.2.5 Compliance Mechanism

[139] *Supra* n. 132 at pp. 84-85.

Article 18 of the Protocol requires the COP to "approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the Provisions of the Protocol." Regarding 'consequences' for non-compliance, there were many objections from the developed countries. They did not want an inclusion of consequences in the Protocol. However, these objections to the proposal for binding penalties were avoided with the insertion of the final sentence of the article, providing that "any procedures or mechanisms…entailing binding consequences shall be adopted by means of an amendment."[140] Together with the market-based flexibility mechanisms, the compliance mechanism of the Kyoto Protocol has been hailed as unique to the international environmental law.[141]

The International law entitles the aggrieved party to reparation or compensation in the event of a wrong committed by the parties to the dispute while arguing their case before an independent third party. However, in truth, this third-party dispute resolution is not so common in international law, and even more so in international environmental law.[142] States generally prefer negotiations as a mode of dispute resolution. Some scholars have also commented that the traditional dispute settlement, *akin* to domestic tort action, is simply not appropriate for harms involving a wide range of actors.[143] Under such circumstances, a process resting on monitoring, supervision, and

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140 Jacob Werksman, (2005): "The Negotiation of a Kyoto Compliance System," in Olaf Schramm Stokke *et al.* (eds.) *Implementing the Climate Regime: International Compliance*, United Kingdom: Earthscan.

141 *Ibid.*

142 *Supra* n. 139 at p. 87.

143 Birnie, Patricia and Boyle, Alan (2002): *International Law and the Environment*, London: Oxford University Press. See also, Hari M. Osofsky, (2009): "Is Climate Change *International*?: Litigation's Diagonal Regulatory Role," *Virginia Journal of International Law*, 49(3): 587. These authors contend that climate change regulation necessitates *multiscalar* legal approaches *i.e.* is the approach which, simultaneously engage more than one level of governance.

management is a preferred means of achieving the objectives of the instrument concerned and more particularly in environmental protection.[144]

However, another group of scholars consider the enforcement and the calculations underlying the compliance and participation as central to the design of effective international regimes.[145] The advocates of this school of thought generally argue that the states choose to participate only in treaties in which, the compliance imposes little or no cost. Some scholars argue that the perceived legitimacy[146] and fairness[147] of a particular rule will influence the parties' compliance.

In the Kyoto Protocol, the process of drawing up the rules for a compliance mechanism began at Fourth COP. *The Buenos Aires Programme of Work on Adaptation and Response Measures*, adopted at COP-4 in 1998, established the 'Joint Working Group on Compliance' that was mandated to articulate procedures by which "compliance with the obligations under the Kyoto Protocol should be addressed."[148] Thereafter at 2001 COP-6 in Bonn, an agreement was reached, among other things, on the objectives of the mechanism, the consequences of enforcement, the scope of the enforcement, and the conditions for lodging appeals.[149] At the 2001 COP-7 in Marrakech,

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144 *Supra* n. 142 at p.86.

145 Scott Barrett, (2003): "Increasing Participation and Compliance in International Climate Change Agreements," *International Environmental Agreements: Politics, Law and Economics* 3: 349.

146 Franck, Thomas (1990): *The Power of Legitimacy among Nations*, New York: Oxford University Press.

147 Franck, Thomas M. (1998): *Fairness in International Law and Institutions*, Oxford: Oxford University Press.

148 Report of the Conference of Parties, (1999): Decision 8/CP.4, in Report of the Conference of the Parties on its Fourth Session, Addendum, Part II: Action Taken by the Conference of the Parties, Annex 2, FCCC/CP/1998/16/Add.1.

149 Report of the Conference of Parties (2006): Decision 27/CMP.1, in Report of the Conference of the Parties Serving as the Meeting of the Parties, Addendum, Part II:

the parties agreed that the compliance mechanism would consist of a Compliance Committee, with two functioning branches: a *Facilitative Branch* and an *Enforcement Branch*.[150]

The Compliance Committee (hereinafter referred to as CC) consists of 20 members, with 10 elected members to serve in each respective branch. It is stipulated that the members who serve in their individual capacities must have recognized "the competence relating to climate change in relevant fields such as the scientific, technical, socio-economic or legal fields"[151] Membership in each branch is composed of as follows, one member from each of the five regional groups of the UN,[152]one member from the small island developing states, two members from the parties included in Annex I, and two members the from non–Annex I parties. Though *prima facie* it appears that the developing countries have a majority representation in the committee, it is also a fact that for all practical purposes, some of the members act as mere puppets in the hands of the developed countries.

The CC is required to make "every effort to reach an agreement on any decision by consensus."[153] Where this fails, the decisions shall be adopted by a majority of three-fourths of the members present and voting. However, as Annex I parties were unwilling to permit the developing country members to have the final say in the Enforcement Branch, a double majority provision

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Action Taken by the Conference of the Parties Serving as the Meeting of the Parties, FCCC/KP/CMP/2005/8/Add.3.

150 Report of the Conference of Parties, (2002): Decision 24/CP.7, in Report of the Conference of the Parties, Addendum, Part II: Action Taken by the Conference of the Parties, vol. III, Annex, FCCC/CP/2001/13/Add.3.

151 Report of the Conference of Parties, (2002): Decision 24/CP.7, in Report of the Conference of the Parties, Addendum, Part II: Action Taken by the Conference of the Parties, vol. III, Annex, FCCC/CP/2001/13/Add.3.

152 They are African Group, Latin American and Caribbean, Asian Group, Eastern European, and Western Europe and Others.

153 *Supra* n. 144.

applies whereby decisions also require a three-fourths majority of the members of Annex I parties.

3.3 The Conference of Parties (COP) and the Implementation of Kyoto Protocol

The Kyoto Protocol, which is extended till 2020 after the recent COP-18 at Doha in 2012, was adopted in 1997 and entered into force in 2005[154]. This Protocol sets out the targets and timetables of emission reduction for the States. However, the technical details to bring the overall framework into operation did not find a place in the Protocol itself. This task remained with the Conference of Parties.[155] In this regard it is said that like the UNFCCC, the Protocol is also, in many respects, a framework instrument with the drafters having left many details to the subsequent negotiation including the following;

(a) The rules for the market-based flexibility mechanisms remained as a task of COP to be elaborated.[156]

(b) Further the basic operational details relating to the reporting and the accounting for emissions; financial assistance and transfer of technology for developing countries; and the compliance mechanism were also under the purview of COP to be clarified.

The details of the COP held after the adoption of the Kyoto Protocol at the third COP in 1997 are as follows:

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[154] Some critics had predicted its failure even when it was entered in to force in the year 2005. See, David Victor, (2001): *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming*, USA: Princeton University Press.

[155] Report of the Conference of Parties, 1998): Decision 1/CP.3, in Report of the Conference of the Parties on its Third Session, Addendum, Part II: Action Taken by the Conference of the Parties, FCCC/CP/1997/7/Add.1 (1998).

[156] Such as JI, CDM and International Emission Trading.

(i) *COP 4, Buenos Aires, Argentina* (1998): The Fourth COP after the adoption of Kyoto Protocol was an opportunity to deal with the unfinished business of climate negotiations.[157] The parties adopted a number of decisions including the *Buenos Aires Plan of Action* that established a negotiating agenda for the coming into operation of the Protocol.[158] The Plan covered a number of issues, including the financial mechanism, the development and transfer of technology, the implementation of the Convention and the Protocol, articles concerning adverse effects of climate change on the developing countries, and the Kyoto mechanisms.[159] The conference highlighted once again the persistent fault line between the industrialized countries and the developing countries, which came to the front with a proposal to place the issue of voluntary commitments for developing countries on the agenda.[160] The proposal faced immediate and fierce resistance from the G-77 countries and China, representing the developing countries. Amongst the developing countries Argentina pledged that his country would assume a voluntary target by 1999. The same issue, *i.e*. voluntary commitments of the developing countries were taken up later also. For instance in COP-12 which held at Nairobi in the year 2006, the Russian Federation raised this issue again. In this regard Soltau says "In legal terms-and consistent with the principle of common but differentiated responsibilities-the protocol does not provide for negotiation or assumption of voluntary commitments. Discussion of

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157 For a summary of the meeting, see also, Report of the Fourth Conference of the Parties to the Framework Convention on Climate Change, (1998): *Earth Negotiations Bulletin*, available at http://www.iisd.ca/vol12/ (accessed on 23/01/2011).

158 Report of the Conference of Parties, (1999): Decision 1/CP.4, in Report of the Conference of the Parties on its Fourth Session, Addendum, Part II: Action Taken by the Conference of the Parties, FCCC/CP/1998/16/Add.1 (accessed on 23/01/2011).

159 *Supra* n. 144 at 93.

160 *Ibid.*

such commitments engenders enormous suspicion among developing countries, which regard them as a *slippery slope* to binding commitments, as well as undermining the principle of common but differentiated responsibilities."[161]

Another critical aspect that was deliberated at COP-4 was regarding the review of the adequacy of commitments under the UNFCCC.[162] While there was an agreement on the inadequacy of commitments, the parties could not reach a consensus with the developing countries that were constantly criticizing the insufficient emission mitigation by the industrialized countries for various reasons.[163]

(ii) *COP-5, Bonn, Germany*(1999)*:* COP-5 adopted a number of important decisions on technical issues such as guidelines for the reporting of annual inventories by Annex I countries[164] and guidelines for expert review of inventories submitted by the Annex I countries.[165] It is said that these decisions contributed to the transparency, integrity, and comparability of emissions data, which are all critical qualities in the negotiations on climate change.[166] The modalities and procedures for the flexibility mechanisms, particularly the CDM, and the design of the compliance mechanism were also discussed in detail. With respect to the CDM, the nuclear powers wanted the nuclear energy as an option that can be traded.

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161 Soltau, Friedrich, (2009): *Fairness in International Climate Change Law and Policy*, Cambridge: Cambridge University Press, at p. 95.
162 The UNFCCC, Art. 4(2)(d).
163 *Supra* n. 161 at p. 95.
164 *Supra* n. 161.
165 *Ibid*.
166 *Id*. at p. 97.

However the, non-governmental organizations were critical of such a move.[167]

(iii) *COP-6 (Part-I), The Hague, Netherlands* (2000)*:* COP-6 was convened in the Hague, with the aim of completing the negotiations on the topics under the *Buenos Aires Plan of Action*. Despite vigorous attempts to rescue the meeting,[168] the COP-6 ended as a failure, as parties were unable to reach an agreement on a number of issues.[169] Among the issues that derailed the negotiations were, those disagreements on the extent to which CDM and JI should be supplemental to the domestic action by the Annex I countries;[170] how much credit each country should get for the carbon dioxide absorbed by the forests and grasslands,[171] and the compliance mechanism.[172]

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167 *Ibid.*

168 See, Summary of the Sixth Conference of the Parties to the Framework Convention on Climate Change, (2000): *Earth Negotiations Bulletin*, 12(163). When negotiations stalled, the president submitted, in his personal capacity, a note with proposals designed to achieve a breakthrough. See, Decision 1/CP.6, in Report of the Conference of the Parties on its Sixth Session, Addendum, Part II: Action Taken by the Conference of the Parties, Vol. II, Annex, FCCC/CP/2000/2/Add.2 (2001).

169 Andrew C. Revkin, (2000): "Odd Culprits in Collapse of Climate Talks," *New York Times*, November 28. See also Suraje Dessai, (2001): "The Climate Regime from the Hague to Marrakech: Saving or Sinking the Kyoto Protocol?," *Tyndall Centre Working Paper* 12, available at http://www.tyndall.ac.uk/publications/working_papers/wp12.pdf (accessed on 12/03/2009); Christian Egenhofer and Jan Cornillie, (2001): "Reinventing the Climate Negotiations: An Analysis of COP 6," *CEPS Policy Brief* 1, available at http://www.ceps.be (accessed on 12/03/2009).

170 Art. 6(1)(d) of the Protocol provides that the acquisition of ERUs from JI projects should be "supplemental to domestic action" for the purposes of meeting emission reduction commitments. Similarly, Art. 12(3)(b) states that Annex I countries may use CERs from CDM projects "to contribute to compliance with part of their emission reduction obligations." The *supplementarity* proviso was supported by the EU and others concerned that the uncapped recourse to the flexibility mechanisms would allow Annex I countries to avoid taking domestic action to reduce emissions. However the exact meaning of 'supplemental' and 'Part of' provisions remained contested.

171 The technical term of art is land use, land-use change, and forestry (LULUCF). Under Art. 3(3), Annex I parties can count removals by sinks resulting from direct human-induced LULUCF activities "limited to afforestation, deforestation and reforestation since 1990." This approach entails methodological and measurement

Because of many roadblocks, the COP suspended its sessions and requested that the president "seek advice on the desirability of resuming that session in May/June 2001 in order to complete the work."[173] The observers have identified that 'the sheer scale of the agenda and the lack of trust and understanding among the parties as reasons for the failure.' [174]

(iv) *COP-6 (Part II), Bonn, Germany and America's Rejection of the Kyoto Protocol* (2001)*:* COP-6 was resumed after a year at Bonn, Germany, where negotiators managed to reach an agreement on most of the critical political issues relating to the implementation of the Kyoto Protocol. This could happen even when the USA rejected the Kyoto Protocol.[175] Despite the US position and the gap that it created in the relations between the US and the Europe, the Cop-6 (part II) made progress regarding the following four main areas *viz*., (i) the rules for emission trading and the flexibility mechanisms; (ii) the eligibility of forestry projects under the CDM and rules on the counting of forestry management; (iii) funding and capacity

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difficulties of its own, but the clear limitation in Art. 3(3) is muddied somewhat by Art. 3(4), which directs the COP to decide on rules and guidelines for counting "additional human-induced activities," such as forestry management and cropland management. The United States advocated for the recognition of what it claimed to be extensive CO2 savings from sinks through forestry management, while the EU preferred much more limited recognition of sink activities. See Suraje Dessai, (2001): "The Climate Regime from the Hague to Marrakech: Saving or Sinking the Kyoto Protocol?," *Tyndall Centre Working Paper* 12, available at http://www.tyndall.ac.uk/publications/ working_papers/ wp12.pdf (accessed on 11/12/2012).

172 While the EU argued for a binding compliance mechanism, countries such as Australia, Japan, and the Russian Federation preferred a non-binding system. The parties also disagreed over the composition of compliance bodies, with the Annex I countries unwilling to accept equal regional representation as advanced by the G-77 group.

173 Decision 1/CP.6, in Report of the Conference of the Parties on its Sixth Session, (2000): *Earth Negotiations Bulletin* 12 (188).

174 *Supra* n. 167 at p. 97.

175 The US stand was that the Kyoto Protocol exempted major emitters and would harm the US economy. See, Bush, G.W. (2001): "Letter to Senators Helms, Craig, Hegel, and Roberts", available at: http://www.gcrio.org/OnLnDoc/pdf/bush_letter010313.pdf (accessed on 11/04/2010).

building for developing countries to combat climate change; and (iv) formulating the compliance mechanism.

Another significant contribution of this Conference was a political statement titled as the *Bonn Agreement.* The Bonn Agreement settled certain issues that had arisen at COP-6 (Part I) held in the Hague. One of the key features of the Bonn Agreement was that the flexibility mechanisms "shall be supplemental to the domestic action, and that domestic action shall thus constitute a significant element" of the effort made by the Annex I parties to meet their emission reduction commitments.[176] It also stated that the Annex I parties 'are to refrain from' using JI and CDM credits from nuclear facilities to meet their commitments, thus effectively ensuring that the nuclear energy projects would not be eligible under these mechanisms.[177] The parties, in COP 6 (Part II) also agreed that the forestry projects could be included in the CDM. Despite all these efforts, a consensus could not be achieved on whether the consequences of non-compliance should be binding or not.[178]

(v) *COP-7, Marrakech, Morocco* (2001): The main success of COP-7 was that it succeeded in translating a political agreement known as *Bonn Agreement* into a legal text.[179] Many decisions were prepared with respect to the issues such as the rules and procedures applicable to the systems and inventories relating to GHG emissions and removals by *sinks*.[180] Along

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176 *Supra* n. 174.
177 *Ibid*.
178 *Ibid.*
179 Summary of the Seventh Conference of the Parties to the UN Convention on Climate Change, (2001): *Earth Negotiations Bulletin* 12: 189.
180 Decisions 20/CP.7, 21/CP.7, 22/CP.7, and 23/CP.7, (2002): Report of the Conference of the Parties on its Seventh Session, Addendum, Part II: Action Taken by the Conference of the Parties, Vol. III, FCCC/CP/2001/13/Add.3 (2002).

with this the compliance regime;[181] guidelines and procedures for the implementation of the flexibility mechanisms;[182] and the land-use and forestry as sinks for the removal of GHGs[183] were the other important decisions that the parties took at this Conference. Altogether all these deliberations and decisions comprised more than two hundred pages, which is commonly known as the *Kyoto Rule-book*.[184] However it was at COP –7, the parties with surplus allowances and credits in the first commitment period were allowed to bank them for the subsequent commitment period and thereby substantially watering down the environmental integrity of the protocol.

(vi) *COP-8, New Delhi, India* (2002): The COP at New Delhi saw the concerns of developing countries taking the center stage.[185] The main issues were the adaptation, which was an immediate concern for the developing countries, but an issue that has generally played the second fiddle to the mitigation in the climate negotiations.[186] The documentary record that was produced is known as *Delhi Declaration on Climate Change and Sustainable Development*, which reaffirms that development and poverty eradication are the overwhelming priorities of the developing countries.[187] It emphasizes that the climate change should be addressed while meeting the requirements of the sustainable development and the need to integrate measures to combat climate change into the national development

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181 See, Decision 24/CP.7, in Report of the Conference of the Parties on its Seventh Session.
182 *Supra* n. 143 at Decisions 15/CP.7, 16/CP.7, 17/CP.7, 18/COP.7, and 19/CP.7.
183 *Id*. at Decisions 11/CP.7 and 12/CP.7.
184 *Supra* n. 138.
185 Summary of the Eighth Conference of the Parties to the UN Convention on Climate Change, (2002): *Earth Negotiations Bulletin* 12:209.
186 Andrew C. Revkin, (2002): "Climate Talks Shift Focus to How to Deal with Changes," *New York Times*, November 3.
187 Report of the Conference of the Parties on its Eighth Session, (2002): Addendum, Part II: Action Taken by the Conference of the Parties, 3, FCCC/CP/2002/7/Add.1.

programs. It stresses the importance of adaptation to the impacts of climate change for all countries, noting that developing countries are particularly vulnerable, and calls upon industrialized countries to further implement their commitments relating to the financing, capacity building, and the technology transfer.[188]

(vii) *COP-9, Milan, Italy* (2003)*:* The unfortunate fate of the Kyoto Protocol prevailed at Milan also. The Protocol that was still not entered into force was at the mercy of the Russian Federation, which sent mixed but largely negative signals on this point.[189] This Conference also decided that the adaptation would enjoy the priority in the allocation of resources and that the technology transfer and the associated capacity building would also be covered. [190] The adaptation activities included water resources management, agriculture, integrated coastal zone management, coping with the disasters caused by the extreme weather events *etc*.[191]

(viii) *COP-10, Buenos Aires, Argentina* (2004): The most important feature of COP 10 was the Russian Federation's decision to ratify the Protocol, which in turn validated it as a legal instrument. A major outcome of this meeting was the adoption of the *Buenos Aires Programme of Work on Adaptation and Response Measures,* which covered the following areas *viz*., the adverse effects of climate change, impact of the implementation of response measures, to develop a structured program of work on the

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188 *Supra* n. 121.

189 Steven Lee Myers and Andrew C. Revkin, (2003): "Russia to Reject Pact on Climate Putin Aide Says," *New York Times*, December 3.

190 Decision 5/CP.9, in Report of the Conference of the Parties on its Ninth Session, (2004): Addendum, Part II: Action Taken by the Conference of the Parties, Vol. I, 11–12, FCCC/CP/2003/6/Add.1.

191 *Supra* n. 188.

scientific, technical, and the socioeconomic aspects of impacts, vulnerability, and adaptation to climate change.[192]

(viii) *COP-11/MOP-I, Montreal, Canada* (2005)*:* This was the first COP after the enforcement of the Kyoto Protocol in February 2006. In that sense, it was also the first Meeting of the Parties (hereinafter referred to as MOP-1) of the Protocol. It was therefore, considered as one of the largest intergovernmental conferences on climate change ever held, hosting over 10,000 delegates. The Montreal meeting was historic on several counts. Firstly, it was the first meeting of the supreme body of the Kyoto Protocol, the MOP; secondly, it formally adopted the draft decisions that constituted the *Kyoto Rulebook* agreed at the *Marrakech Accords* and the subsequent COPs.[193]

The parties also initiated the mandate of reviewing the Protocol Commitments of the Annex I parties by establishing the *Ad Hoc Working Group* (AWG). The review of Annex I commitments was also triggered by article 3.9 of the Protocol, which requires that the COP/MOP shall initiate the consideration of Annex I commitments at least seven years before the end of the first commitment period, in other words, by 2005. The developing countries proposed that the negotiations on the second commitment period should conclude in 2008 and argued that it was incumbent on the industrialized countries to demonstrate the leadership on mitigation. For their part, the Annex I parties, excluding the USA which is not a party to the Protocol, resisted the establishment of a timeline.

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[192] Decision 1/CP.10, in Report of the Conference of the Parties on its Tenth Session, (2005): Addendum, Part II: Action Taken by the Conference of the Parties, Vol. I, FCCC/CP/2004/10/Add.1.

[193] A total of nineteen draft decisions were recommended for adoption by the COP/MOP at its first session, as contained in the reports of COP-7, COP-8, COP-9, and COP-10.

Eventually, the parties settled on the less-specific language stating that the negotiations on the Annex I commitments should be completed in time to ensure that there was no gap between the first and second commitment periods.[194]

(ix) *COP-12/MOP 2, Nairobi, Kenya* (2006): As COP 12 is the first COP to be held in Africa, the Nairobi conference was naturally expected to advance the adaptation agenda. At Nairobi, the progress was made on the establishment of the *Adaptation Fund* and the work program of the 'Subsidiary Body for Scientific and Technological Advise (SBTA)' on impacts, vulnerability, and adaptation. The '*Ad Hoc Working Group on Annex I commitments*' also held its second session at Nairobi agreeing that the future work would proceed under various headings *viz*., the analysis of mitigation potential and the ranges of emission reduction objectives.[195]

The mandatory review of the Protocol commitments under article 9(2) kept the negotiators busy throughout the conference. The developing countries, particularly the African group and China, advocated the conclusion of the review at the meeting without any further commitments from them, while the EU wanted to launch a continuing review process. In the end, the developing countries obtained the assurance that the review would not lead to new commitments. At the same time, the Russian proposal to amend the Protocol to allow for voluntary commitments by the non–Annex I parties again kept negotiators busy until the final hours of the conference.[196]

(x) *COP-13/MOP 3, Bali, Indonesia* (2007)*:* At Bali, an agreement on a timeline and structured negotiation on the post-2012 framework *i.e*., at the

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194 The COP-18 at Doha extended Kyoto Protocol for the Second Commitment Period from 2013 to 2020.

195 *Supra* n. 191.

196 *Ibid.*

end of the first commitment period of the Kyoto Protocol, was achieved with the adoption of the *Bali Action Plan.*[197] An *Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (also known as AWG-LCA) was also established as a subsidiary body to conduct the negotiations aimed at urgently enhancing the implementation of the Convention up to and beyond the year 2012. Developments also happened outside the COP. In April 2007, the UN Security Council for the first time convened for a debate over climate change.[198] Similarly, the UNGA also convened a thematic debate on climate change, which saw an almost exhaustive list of countries addressing the topic.[199] At this meeting, as before, the EU reiterated its position of a 20 percentage cut by 2020, to be deepened to 30 percentage, if the other major actors were committed to serious mitigation action. Later, the UN Secretary-General convened a one-day, high-level event on climate change, which was organized around the four themes of adaptation, mitigation, technology, and finance and which drew the participation of almost 80 heads of States or Governments.[200] The key outcome of this Conference was the *Bali Action Plan*, launching a negotiating process for beyond 2012.

(xi) *COP-14/MOP 4, Poznan, Poland* (2008): This Conference took place in the context of an ever-deepening global financial crisis. Since it was already clear that the technology transfer and finance would be two serious issues, developing countries tabled a proposal that included a *Multilateral Climate Technology Fund*, by which the Annex I governments would use the

197 *Supra* n. 155. Decision 1/CP.13.
198 See, Reuters, (2007): "U.N. Council Hits Impasse over Climate Change," *New York Times*, April 17.
199 For the details of speakers and statements, http://www.un.org/ga/president/61/followup/thematic-climate.shtml (accessed on 12/04/2010).
200 *Supra* n. 195.

finances from environmental and energy taxes and the auctioning of pollution rights to fund the technology transfer. They would also use the public financing to promote public-private partnerships, including enterprises as well as the research and the development institutions. The aim of this mechanism is to address the cooperation on the technology research as well as development, diffusion, and transfer.

(xii) *COP 15/MOP 5, Copenhagen, Denmark* (2009): One of the main challenges at the Copenhagen was to establish an ambitious binding climate agreement for the period from 2012, once the first commitment period under the Kyoto Protocol expires. However, there were parallel movements from the developed countries to bring a less specific, non-binding international agreement. It was evident that the many Annex 1 industrialized countries are now reluctant to fulfill the commitments under the Kyoto Protocol. Consequently, the Copenhagen did not achieve any agreement for any long-term action.

(xiii) *COP 16/MOP 6, Cancun, Mexico* (2010): The result of this Conference was the creation of a '*Green Climate Fund'* and a '*Climate Technology Center*.' But at the same time, the funding of the 'Green Climate Fund' was not agreed upon. The commitment to the second period of the Kyoto Protocol also could not be agreed upon, though there was a little consensus that the base year shall be 1990 and IPCC shall continue to provide the global warming information.

(xiv) *COP 17/MOP 7, Durban, South Africa* (2011): The Durban Conference agreed to have a legally binding agreement for the post 2012 period that would be prepared by the year 2015, and to take effect in 2020. The Conference also saw the development regarding the creation of a *Green*

Climate Fund, which will distribute more than US$100 billion per year as an aid for the poor countries in their efforts to adapt to climate impacts.

(xv) *COP 18/MOP 8, Doha, Qatar* (December 2012): The main agenda for the Doha Conference that took place at Doha, Qatar were as follows:[201]

(i) To seek the extension of the Kyoto Protocol that would expire at the end of the year 2012 after its first commitment period (2008-2012). The developed countries also sought negotiation of a new Protocol instead of the Kyoto protocol.

(ii) To address the further development of the *2011 Durban Platform* for a post Kyoto Protocol to be developed by the year 2015 and be in force by the year 2020.

(iii) To analyse the progress in the development and funding of the *Green Climate Fund* that was created at COP 17.

After the conclusion of COP-18 some remarked that it was successful but only incrementally. [202] At Doha, the developed countries had argued for a new legal instrument with the expectation that Kyoto Protocol will not be extended for a second commitment period with the three core components: (i) legally binding; (ii) widest possible participation by all the Parties; and (iii) mandates the increase in global temperature below 2 degree Celsius.. The Second Commitment Period for the Kyoto Protocol (hereinafter referred to as KP2) was finally agreed upon, allowing it to move forward for another eight-year period *i.e.* from 2013 to 2020. Among the developed countries, only the EU, Australia,

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[201] Provisional Agenda for COP 18. FCCC/CP/2012/1, available at http://unfccc.int/resource/docs/2012/cop18/eng/01.pdf (accessed on 12/05/2010).

[202] Jennifer Morgan, (2012): "Reflections On COP 18 In Doha: Negotiators Made Only Incremental Progress," *World Resource Institute Insights*, available at http://insights.wri.org/news/2012/12/reflections-cop-18-doha-negotiators-made-only-incremental-progress (accessed on 12/02/2012).

Switzerland, and Norway agreed for the KP2 thus making it only participation a meagre 15 percent of the developed country emissions.[203] The *Doha* was also successful in the non-KP2 developed countries such as Canada, Japan, Russia, New Zealand *etc.* to restrict their eligibility to the flexible market mechanisms. In other words, although they can 'participate' in the CDM projects, they cannot transfer the resulting Emission Reduction Units against their emission targets.[204]

In cases where mitigation and adaptation fail, people affected by the impact of climate change may be subject to untold suffering. In this regard, Parties at Doha began addressing a new issue known as the 'loss and damage.' Until this year, the developed country Parties had resisted any concrete decision on this issue on account of challenges associated with attributing specific losses and damages directly to the climate change. But under persistent pressure from the Least Developed Countries (also known as LDCs) and the island states, the Parties agreed to establish by COP-19, the Institutional Arrangements that would help the developing countries deal with the irrecoverable losses and damage from the climate change.[205] With regard to the adaptation, the COP at Doha also launched a new set of adaptation planning by approving a set of technical guidelines to help the Parties to develop the National Adaptation Plans (also known as NAPs)[206]. This is a departure from the adaptation planning approach taken in the past. As expected, the principle of CBDR was at the heart of the discussions at Doha also. Though the negotiations at the Doha also failed in resolving this issue, there was an agreement that the governments and the

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203 *Ibid.*
204 *Ibid.*
205 *Ibid.*
206 NAPs are envisioned as long-term, flexible, and iterative planning processes to help build adaptive capacity and respond to climate change.

observer organizations shall submit proposals to the UNFCCC by the year 2013.

3.4 North-South Divide and Fairness in Climate Change Negotiations

An in-depth analysis of the developments in the area of climate change raises the most fundamental question *i.e.* who gained from these negotiations; the South or the North? According to Gunther Handl, "any gain by either side, but at the cost of the other is selfishness.[207] But if the gainer is the environment, the planet earth, the solar system, then it is fairness. But such selfless motivations stem from the desire to see the international law regulate and implement what is right and just, for the sake of the global community, irrespective of the particular outcome for the state/individual in question."[208] Unlike Handl, majority of the scholars follow one-sided arguments s in analyzing fairness in climate change negotiations from a North-South perspective.

Kirsten Bishop also contends, "Given the substantive outcome of climate change negotiations…it would seem that the developing countries were quite successful in having their fairness claims addressed at the procedural stage of the regimes development."[209] However, some others have an altogether different approach to this question. For example, Ntambireweki says, "the lack of environmental activism in developing country governments…speaks volumes about the missed opportunities" and "as long as the South fails to

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207 Gunther Handl,(1991): "Environmental Security and Global Change: The Challenge to International Law" *Year Book on International Environmental Law* 1: 3.

208 *Ibid.*

209 Kirsten Bishop, (2000): "Fairness in International Environmental Law: Accommodation of the Concerns of Developing Countries in the Climate Change Regime", Institute of Comparative Law: McGill University.

articulate its problems, however, it is a duty, born out of a common humanity, for the North to champion the cause of a better world in a holistic sense."[210]

On the other hand, RKL Panjabi claims that the attention given to the concerns of the developing countries might be excessive. It is argued that, "…with some justifiable cynicism that the South's Agenda in the Pre-UNCED process boiled down to acquiring as much money as possible from the North for environmental projects. It could also be argued that the UNFCCC reflected and catered to the South's needs more than to the over-all cause of reducing greenhouse gas emissions globally."[211]

Whatever may be the contentions, the truth is that the content and implementation of the UNFCCC and the Kyoto Protocol have been, and will continue to be, heavily influenced by the political will and the determination of the major powers, particularly the USA, which also happens to be the largest contributor of greenhouse gas emissions.[212] Considering the fact that the bargaining power within multilateral negotiations is far from the balanced, the conflicting trade policies of certain individual countries like the USA will continue to have the potential to completely frustrate the negotiations and the subsequent enforcement of the resulting agreements. To consider an example, the USA and its desire to ensure the existence of an emission trading scheme to

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[210] John Ntambireweki, (1991): "The Developing Countries in the Evolution of International Environmental Law," *Hastings International and Comparative Law Review* 14:905 at pp 927-298. The same view also has been expressed by Bodansky who observes that "Although industrialised countries recognised from the start the North-South Dimension of the climate change issue and thus paid lip service to the interest of the developing countries, the south did not forcefully express its own perspective until later in the process" See also, Daniel Bodansky, (1993): "The United Nations Framework Convention on Climate Change: A Commentary" *Yale Journal of International law* 18: 451 at 470.

[211] Rani Khooshie Lal Panjabi, (1993): "Can International Law Improve the Climate? An Analysis of the United Nations Framework Convention on Climate Change Signed at the Rio Summit in 1992", *N.C.J. International Law and Com. Register*, 18:491 at p 521.

[212] *Supra* n. 172 at p. 30.

make implementation of the Kyoto Protocol more economically palatable, it has been noted that "…if viable rules for trading of emission reductions are not adopted by the international agreement, the US electricity sector will not be able to afford the Kyoto Protocol, and the prospects for its ratification by the Senate will dwindle."[213]

3.5 Conclusion

Drawing together the analysis made in this chapter, this section attempts to briefly assess the aspect of fairness in the climate change regime and the way forward. As already discussed in the earlier part, states have steadily though slowly built the GCCRR through the successive Conference of Parties. Beginning with the historic UNFCCC, and the Kyoto Protocol and other documents, states have already established an impressive and intricate multilateral regime. However, the multifaceted nature of the political issues and the technical complexity of many of the issues dealt with are quite staggering. These complexities stem from various factors, some of which are examined below.

Though the UNFCCC and the Protocol are environmental treaties in reality, they have profound social and economic implications. The future division of the mitigation burden between the industrialized and the developing countries cuts to the core of disagreements on global development and fairness in the relations between the States. The industrialized countries have attempted to extend the binding commitments to the developing countries, which, in turn, have invoked the principle of CBDR, underlining the historical responsibility of the developed countries.

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[213] Mark L. Perlis, (1998): "The Kyoto Protocol's Mandate To Reduce Greenhouse Gases, The Electric Industry Must Turn to International Emission Trading," *Legal Times* 13:32.

Another significant issue is the absence of mutual trust and commitment to the issue. An example is the binding nature of the Annex I parties' targets under the Kyoto Protocol. Even considering the fact that the period was of considerably short duration *i.e.* from 2008 to 2012, the failure to comply with this requirement cannot be justified. The procedural lapse to maintain adequate accounting standards for the GHG emissions and removals is also becoming an issue of fairness and equity. The combination of the very modest environmental impact and the fact that some Annex I parties are not on track to meet their targets may appear to give credence to the critics' arguments. Though the GCCRR has universal participation, in reality a small group of some 15 large emitters are responsible for more than seventy five percent of the global emissions. Unless and until there is willingness among these emitters, nothing could succeed.

Chapter IV

India's Climate Change Policies and Negotiation Strategies: A Critical Analysis

The Idea that developing countries like India and China must share the blame for heating up the earth and destabilising its climate…is an excellent example of environmental colonialism[1]

As discussed in the preceding chapters, climate change concerns have been increasing in leaps and bounds across the globe. Its reflections are loudly echoed in India too. The legitimate need to take part in the cross-border negotiation and the discourse as to how to control and cope up with the dynamics of climate change have been brought to the forefront in India as early as the late 1980's. During all these years, India has been finding it difficult to effectively tackle the complexities of the so-called North-South divide as it has to take a Policy, both externally in its relations with other states and internally at the national level. Adoption of any such policy statement is not a simple task as the processes of deliberation and negotiations, which are considered to be the primary principles of democracy, has to be in consonance with the requirements of fairness and justice. While keeping in tune with the requirements of economic development and poverty eradication on one hand, these policy statements also should be capable of protecting the environment and its resources for the use of future generations. It also has to *social engineer*[2] the interests of all

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1 Agarwal, Anil and Narain, Sunita (2003): *Global warming in an Unequal World: A Case of Environmental Colonialism,* New Delhi: Centre for Science and Environment, at p. 1.

2 'Social Engineering' is a concept that is used in social sciences including the political science and the law. In political science it is referred as *political engineering* and refers to the efforts to influence the attitudes and social behaviors of masses. For further

stakeholders including those of various sub-national groups. One cannot expect these policies to be substantively fair unless the requirements of procedural fairness are complied with.

The fundamental assumption of fairness in relation to public policy is the view "that a political community should seek to ensure that its members are all able to enjoy at least a *social minimum*."[3] The concept of *social minimum* invariably is based on the idea of 'distributive justice' and refers to the "bundle of resources [and opportunities] that a person needs in order to lead a minimally decent life in their society."[4] Any given society or regime, to be called fair, should assure the same through transparent and democratic institutions, policies and laws. It means that in the community of states, each and every state has the right to *social minimum,* which is again the right of every single individual when it comes to governance of a state.

However, in view of the abstractness of this concept, the greatest challenge for policy-makers is in determining as to what is the level in which these resources and opportunities should reach the needy. Different scholars have attempted to answer this question in different ways. One approach is *welfarism*. For Utilitarianism, welfare is "happiness which is the net balance of pleasure over pain that the individual experiences".[5] In this regard,

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reading on the subject see, Noam Chomsky, (1998): *Manufacturing Consent: The Political Economy of the Mass Media*, New York: Pantheon Books. In law, according to Roscoe Pound social engineering means the use of law for resolving the conflicts in the society. Law is used as a tool to shape and regulate people's behavior in a society. It is all about finding a balance between the competing interests in society. See also, Roscoe Pound (1921): *The Spirit of Common Law*, New Hampshire: Marshall Jones Company.

3 White, Stuart (2008): "Social Minimum", in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy,* available at http://plato.stanford.edu/archives/fall2008/entries/social-minimum .

4 *Ibid.*

5 Bentham, Jeremy (1789); "Introduction to the Principles of Morals and Legislation", in Mary Warnock, (ed.,) *John Stuart Mill's Utilitarianism*, Glasgow: William Collins.

considering the existing divide in accessing resources, utilitarianism has to be understood in the light of 'adaptive preferences'[6] which is the tendency of human beings (and states when it comes to global governance) that, if they "are born into deprived circumstances, then they might adjust their expectations so that they are satisfied with their lot. Even though they are poor, they are happy, or don't suffer from much frustration of desire, because they have adapted to life in which they have a few resources at their command."[7] At the same time, Amartya Sen argues that simply because a person is happy and satisfied it cannot be presumed that the system is fair.[8] He argues that a person's well-being is more than mere adaptive happiness and it is the actual condition in which his requirements are fulfilled.[9] Further, the next question that arises in this regard is pertaining to gauges of measuring equality. The branch of political philosophy known as *recourcism,* attempts to assess the respective advantage enjoyed by the different states/people in a neutral way.[10] According to *recoursists* even if the two states/people have equal access to resources or opportunities, a disability that one of them suffers shall make them vulnerable in achieving the desired objectives. In this regard, the *resourcist* Ronald Dworkin argues that a disabled state/person has practically less access to resources or opportunities than the other.[11] Any policy to be called as fair should consider these factors.

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6 *Supra* n.3.

7 *Ibid.*

8 Sen, Amartya (1987): *The Standard of Living*, Cambridge: Cambridge University Press, at p. 8.

9 Sen, Amartya (1992): *Inequality Reexamined* ,Oxford: Clarendon Press, at p. 39. See also Sen, Amartya (2009): *The Idea of Justice,* New Delhi: Penguin.

10 *Supra* n. 6.

11 Dworkin, Ronald (2000): *Sovereign Virtue: The Theory and Practice of Equality*, Cambridge: Harvard University Press, See, chapters 3 and 4.

The evolution and the growth of the law and policy relating to Climate Change have already been analysed in Chapter 3. In continuity, this Chapter analyses, India's Climate Change Policy, its evolution, changes and reasons for such changes from a critical perspective. The chapter is divided into two parts. The first part critically analyses India's Domestic Policy Statements on environmental protection and the second part makes an attempt to critically examine India's Foreign Policy regarding environmental protection generally, and Climate Change Policies particularly.

4.1 India's Internal Policy on Environment and Climate Change

The questions of fairness in managing natural resources were prominent even during the colonial days. When India was under the British rule, Britain had emerged as the world leader in deforestation, devastating forests for shipbuilding, iron smelting and farming.[12] On certain occasions the destruction of forests was used by the British to symbolize the political victory.[13] This as some authors opine indicate 'the destructive energy of the British race all over the world' by converting forests into deserts.[14] It is also stated that during those days search parties were sent by the British to teak plantations for locating the most durable timber that could be used for building warships. All through this time, a great chunks of forest resources were destroyed and no supervision was exercised for this illegitimate cutting of trees.[15]

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12 Gadgil, Madhav and Ramachandra, Guha, (1993): *This Fissured Land: An Ecological History of India*, New Delhi: Oxford University Press, at p. 118.

13 *Ibid*. For example, in the early 19th century and following its defeat of Marathas, the East India Company razed to the ground teak plantations in *Ratnagiri* that were nurtured and grown by the legendary Maratha Admiral *Kanhoji Angre.*

14 *Supra* n. 12.

15 *Ibid*.

The British administration also felt the need for introducing appropriate laws to prevent the deforestation, but again for asserting its unfair monopoly in forests against the legitimate rights of the local community. In furtherance, the first Forest Department was formed in India in the year 1864[16] and the Indian Forest Act[17] was enacted in 1865, which sought to assert the absolute claims of the State over forests. The key foundation of the environmental policy of the British was its claim that "the right of the state to dispose of or retain for public use the waste and forest area, is among the most ancient and undisputed features in oriental sovereignty." [18] On the basis of this claim, the State was supposed to be the owner of all natural resources. The Forest Act of 1878, which substituted the Forest Act of 1865, also continued this policy and obliterated the customary use of the forests by rural population.[19] It provided for three classes of forests. The *reserve forest* consisted of compact and valuable areas, well connected to towns upon which, the total state control was safeguarded by extinguishing all private rights.[20] In the second category included *protected forests* through which state control was again firmly maintained by outlining the detailed provisions for the reservation of particular tree species as and when they became commercially valuable. The third category was the *village forests*, where again the same policy was continued. Further the National Forest Policy of 1894, again asserted that 'state is the owner for all the

16 Divan, Shyam and Rosencranz, Armin (2008): *Environmental Law and Policy in India*, New Delhi: Oxford University Press, at p. 28.
17 Which was later substituted with Indian Forest Act, 1927.
18 *Supra* n. 15.
19 *Supra* n. 16.
20 *Ibid.*

forests' who may at their liberty exploit these resources for any purposes including commercial.[21]

Thereafter when India became independent, the National Forest Policy, 1952 was formulated. Unfortunately, it also upheld the unfair policies of its predecessor, the Forest Policy, 1894, *viz*., the exclusive power and control of the states over the forest, its produces and the management.[22] A change was seen in the year 1988 when India announced its National Forest Policy, which endeavours to strike a balance between conservation and commercial exploitation of forest resources and the rights of local communities. However the fundamental problem was that there were no corresponding changes made in the statutory law. Even today, the Forest Act, 1927 is the statute through which the National Forest Policy is implemented in India. It may be noted that there is a striking contradiction between the foundations of the Act of 1927 and the Policy of 1988. As long the state considers natural resources to be under its absolute monopoly, at the cost of legitimate use of these resources by the community, it fails in rendering the *social minimum* and hence becomes unfair.[23]

4.1.1 The Stockholm Conference and its Impact on the Environment Policy in India

The year 1972 marked a watershed in the history of environmental policy in India. Prior to 1972, environmental concerns such as sewage disposal, sanitation and public health were under the control of various Ministries of the Government and each pursued functions related to these

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21 *Ibid.*

22 *Ibid.*

23 The Indian Supreme Court through judicial activism replaced the 'state monopoly' over forest and natural resources by the public trust doctrine to some extent in *M. C. Mehta v. Kamal Nath* [(1997) 1 SCC 388. It is passed on the idea that the state is holding the forest and other natural resources in trust for the public.

subjects according to their own discretion in the absence of a proper coordination system at Union or State level.[24] Very often, in India, this lack of coordination and bureaucratic *red tapism* caused hurdles in achieving the desired objectives and the resultant fairness. During the preparatory stages of Stockholm Conference, 1972, the UN General Assembly had requested a report from each of its members on the state of environment in their country. Responding to this call, a Committee on Human Environment[25] was set up to prepare the report. Accordingly the Committee prepared three Reports *viz*. (i) Report on Some Aspects of Environmental Degradation and its Control in India; (ii) Report on Some Aspects of Problems of Human Settlement in India; and (iii) Report on Some Aspects of Rational Management of Natural Resources. The impact of population explosion on the natural environment were also analysed with the help of these reports[26] and the National Committee on Environmental Planning and Coordination (NCEPC) was established in the year 1972.[27] However it also appeared to be another bureaucratic set up without much activities and support from the other Ministries. Later on it was replaced by the National Committee on Environmental Planning (NCEP) in the year 1981 with almost similar functions.

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24 Dwivedi, O.P (1997): *India's Environmental Policies, Programmes and Stewardship*, New York: St. Martins Press, at p. 54.

25 Under the Chairmanship of Mr. Pitamber Pant, the then Member of the Planning Commission of India.

26 *Supra* n. 24.

27 The NCEPC was an apex advisory body in matters relating to environmental protection and improvement. The Committee was to plan and coordinate, but the responsibility of execution was with various ministries and other government agencies.

The continuing decline of the quality of the environment, together with the tragedy at Bhopal[28] has spurred the Indian policy makers to change the policies. The requirement of strong environmental protection laws was strongly felt which, resulted in the enactment of the Environmental Protection Act, 1986. Thereafter many statutes were enacted in India with the aim of ratifying the various international environmental conventions. The following table indicates the statutes enacted in India in furtherance to its obligation under the international environmental law.

Table 4: International Environmental Laws and corresponding Indian Statutes

	International Environmental Laws	Corresponding Indian Environmental Statutes
1	The Stockholm Conference, 1972 and the Stockholm Declaration.	The Air Act, 1981 and the Environmental Protection Act, 1986
2	The Rio Conference, 1992 and the Rio Declaration	The Public Liability Insurance Act, 1991 and the National Environmental Tribunal Act, 1995
3	Convention of Biological Diversity, 1992.	The Biological Diversity Act, 2002
4	Convention of International Trade in Endangered Species of Wild Fauna and Flora, 1973.	The Wild Life Protection (Amendment) Act, 2002

The following are certain policy documents pertaining to environmental protection generally and climate change particularly in India.

4.1.2 The Constitution of India

Indian Constitution is one of the first Constitutions in the world having a specific provision on environmental protection. The Constitutional

[28] See for example Baxi, Upendra and Paul, Thomas (1986): *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* New Delhi: Indian Law Institute.

amendment was brought in the year 1976, inserting 48A and 51A (g). Article 48A, a Directive Principle of State Policy, states: "States shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country." Similarly article 51A (g) which is a fundamental duty reads: "It shall be the duty of every citizen of India to protect and improve the natural environment including the forests, lakes, rivers and wild life, and to have compassion for the living creatures." So protection of the environment and safeguarding of forests is a goal under the constitution and also a fundamental duty of the citizens. The duty has cast on the citizens to follow sustainable conduct oriented towards the protection and improvement of environment and the forests and have a compassion for the living creatures. These constitutional provisions do reflect the State's concern and the citizen's desire towards the protection of environment and curb the activities and interventions causing adverse impacts on climate and the biotic diversities.

Though these provisions of the Constitution of India cannot be enforced in a court of law, the Indian judiciary, through a creative interpretation of article 21[29] of the constitution expanded the scope of the 'right to life' to include environmental protection. The Indian Judiciary have strengthened article 21 in two ways. First, procedurally, by requiring the laws affecting personal liberty to pass the tests of articles 14 and 19[30], it attempted that the procedure depriving a person of his right to life or liberty should be fair and just.[31] Similarly the judiciary also recognized several

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[29] Article 21 reads thus: "No Person shall be deprived of his life or personal liberty except according to the procedure established by law."

[30] Article 14 enshrines the right to equality before law and protects a person against arbitrary or unreasonable state action. Article 19 enumerates certain fundamental rights such as the right to freedom of speech and expression.

[31] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

unarticulated substantive liberties to be implied by article 21 including the right to a wholesome environment. For example in *Rural Litigation and Entitlement Kendra, Dehradun* v. *State of Uttar Pradesh*[32], the court recognized the right to environment as an integral part of the right to life under article 21. Further in *Subhash Kumar* v. *State of Bihar*[33] the court held that right to life includes the right to enjoy unpolluted air and water. The court said that if anything endangers the right to life through environmental degradation, a citizen has a right to move the Supreme Court under article 32 of the constitution. Further in *Virender Gaur* v. *State of Haryana*[34] the court observed:

> Article 21 protects the right to life as a fundamental right. Enjoyment of life …includes the right to live with human dignity which encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation *etc*, without which life cannot be enjoyed…There is a constitutional imperative on the state government and the municipalities not only to ensure and safeguard the environment but also to take adequate measures

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32 AIR 1988 SC 2187.

33 AIR 1991 SC 420. See also, *M.C. Mehta* v. *Union of India (Delhi Stone Crushing Case)* 1992 (3) SCC 256; *Chameli Singh* v. *State of Uttar Pradesh*, AIR 1996 SC 1051; *Shantistar Bulders* v. *Narayan K. Totame*, AIR 1990 SC 630.

34 1995(2) SCC 577. See also, several other decisions in this regard. For example, *T.Damodar Rao* v. *The Special Officer, Municipal Corporation of Hyderabad*, AIR 1987 AP 171; *L.K Koolwal* v. *State of Rajathan,* AIR 1988 Raj 2; *Arvind Textiles* v. *State of Rajasthan*, AIR 1994 Raj 195; *Madhavi* v. *Tikan,* 1988 (2) KLT 730; *Attakoya Thangal* v. *Union of India,* 1990 (1) KLT 580; *Law Society of India* v. *Fertilisers and Chemicals Travancore Ltd,* AIR 1994 Ker 308; *Kinkri Devi* v. *State of Karnataka*, AIR 1994 Kar 57; *V. Lakshmipathy* v. *State of Karnataka*, AIR 1994 Kar 57; *K.C. Malhotra* v. *State of Madhya Pradesh*, AIR 1994 MP 48, *Hamid Khan* v. *State of Madhya Pradesh*, AIR 1997 MP 191.

> to promote, protect and improve both man made and natural environment.[35]

Similarly in *Olga Tellis* v. *Bombay Municipal Corporation*[36] the Supreme Court reiterated the stand that a person's 'right to life' cannot be taken away except according to a just and fair procedure. The same position was reiterated in *Banawasi Seva Ashram* v. *Union of Uttar Pradesh*[37] where the Supreme Court of India drafted detailed safeguards to protect the forest dwellers including the tribal people from being ousted from the forestland for developmental activities. Though in this case, the court kept the objectives of development ahead of protecting the environment, it was directed that it could be done only after satisfactorily relocating the forest dwellers. Such an interpretation at least theoretically helped to check the government actions that threaten poor people from displacement hazards and also have an environmental impact. However, according to the estimates, out of India's more than 16 million people displaced for developmental activities not more than a 4 million are satisfactorily rehabilitated.[38] In *Sardar Sarovar Project*, it has been commented that the 'record of resettlement and rehabilitation in India…has been unsatisfactory in virtually every project with a large resettlement component'.[39] This again indicates that there exists a fairness divide in the policies regarding developmental activities in India.

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35 *Id.* at 580.

36 AIR 1986 SC 180.

37 AIR 1987 SC 374. See also *Karanjan Jalasay Yasas Samiti* v. *State of Gujarat*, AIR 1987 SC 532; *Gramin Sewa Sanstha* v. *State of Uttar Pradesh*, 1986 (Supp) SCC 578.

38 Divan, Shyam and Rosencranz, Armin (2008): *Environmental Law and Policy in India*, New Delhi: Oxford University Press, at p. 32.

39 Bradford Morse, (1992): *Sardar Sarovar: Report of the Independent Review,* (The World Bank).

The recent incidents in *Nandigram*[40] and *Yamuna Expressway*[41] reaffirms the fact that despite these rules made by the Indian judiciary, practically there exists a substantial fairness divide. It may be noted that in cases, where the government permits a particular developmental activity without undergoing adequate Environmental Impact Analysis (EIA) and public scrutiny, such an action of the state can never be fair.

The aspect of fairness is also at stake when these judicial decisions are to be implemented. Apart from the theoretical criticisms such as, charges of judicial legislation, violation of separation of powers, encroachment on administration, and judicial despotism[42] *etc.* are the practical constraints that make these decisions less effective. The issues such as long pendency of the cases, and the lack of implementing mechanism with the judiciary are some of the other constraints. If pollution of river *Yamuna* is taken as an example, despite judicial supervision, the city of Delhi alone dumps millions of litre of sewage into the river on every day. The *Yamuna Action Plan* (YAP), which has been implemented since 1993 by the government of India, has become a futile exercise. In the year 2009, Jairam Ramesh, the then Minister of Environment and Forests, admitted in the *Lok Sabha* about the failure of YAP saying that "river is no cleaner now than two decades ago" despite spending millions of rupees to control pollution. He again said: "The

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40 Nandigram is a village in the State of West Bengal where a large area of land was acquired by the State for 'public purposes' as defined in the Land Acquisition Act, 1894 without giving the land owners an 'opportunity to be heard' and adequately compensating them. In fact the land was meant for allotting to the private companies to start their industries. This has led to a large-scale revolt and violence in the area.

41 Similarly during the construction of Yamuna Express Way, a high-speed road connecting New Delhi to Agra by a private company, land was acquired by the State for 'public purposes.' Since no adequate compensation was given to the landowners they revolted and the consequential violence still continues.

42 Jamie Cassels, (1989): "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *The American Journal of Comparative Law*, 37: 495, at p. 507.

honourable Member has raised questions on whether…the Yamuna quality has improved. I would like to say that I can always give you figures to show that it has improved. But the true test is, does the Yamuna look cleaner today than 20 years ago. The answer is, 'No'."[43]

Another issue of fairness in relation to the implementation of these constitutionally recognised rights arises specifically in the area of climate change. As discussed in Chapter 1, the aggregate environmental pollution in other parts of the world, also causes environmental degradation in India. This, which is called as the *ecological shadow,* challenges the enforcement of the constitutionally protected rights in India since these rights bind only the Republic of India and not foreign states that are responsible for the dangerous levels of GHG accumulations. Though theoretically, the liability for 'trans-national environmental harm' had been recognised as early as 1938[44] practically it has been a continuing problem ever since.

4.1.3 Other Policy Documents Pertaining to Environmental Protection and Climate Change

In the year 1992, the Government of India adopted the National Conservation Strategy and the Policy Statement on Environment and Development (hereinafter referred to as the NCS)[45] and the Policy for the Abatement of Pollution.[46]The NCS adopts the policy of sustainable development and declares India's commitment to re-orient policies and

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43 Jairam Ramesh, "Debate on Pollution of Rivers and Lakes in the Country", *Lok Sabha Debates* (17 July 2009), available at : http://164.100.47.132/LssNew/psearch/ Result15.aspx?dbsl=478 (accessed on 23/12/2012).

44 *Trail Smelter Arbitration* For details see *Trail smelter case* (*United States* v. *Canada*), 16 April 1938 and 11 March 1941 VOLUME III pp. 1905-1982, available at http://untreaty. un.org/cod/ riaa/cases/vol_III/1905-1982.pdf (accessed on 12/05/2010).

45 Ministry of Environment and Forests (1992): *National Conservation Strategy and Policy Statement on Environment and Development*, New Delhi: Government of India.

46 Ministry of Environment and Forests (1992): *Policy Statement for Abatement of pollution*, New Delhi: Government of India..

action in unison with the environmental perspective.[47] The NCS proceeds to recognise the enormous dimensions of the environmental problems that are being faced by India and declares strategies for action in various spheres such as agriculture, forestry, industrial development, mining and tourism. The NCS also deals with the rehabilitation of persons ousted by the developmental projects, the role of non-governmental organisations and also about the special relationship between woman and the environment. The policy for the abatement of pollution declares India's objective to integrate environmental considerations into decision making at all levels. To achieve this goal, it adopts certain fundamental guiding principles[48] such as (i) the prevention of pollution at source; (ii) the adoption of the best available technology; (iii) the polluter pays principle; and (iv) the public participation in decision-making[49]. However, these policy instruments remained powerful only in books. Even after the promulgation of these principles, no polluter is made to pay for the pollution caused by him. Public participation in decision-making processes in these areas has also more or less remained as a myth.

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47 See the Preamble, Paragraph 1.1 and paragraph 1.4 of the NCS.

48 *Ibid*. Paragraph 10.1 says thus: "The objective is to integrate environmental considerations into decision making at all levels. To achieve this, steps have to be taken to: (i) prevent pollution at source; (ii) encourage, develop and apply the best available practicable technical solutions; (iii) ensure that the polluter pays for the pollution and control arrangements; (iv) focus protection on heavily polluted areas and river stretches; and (v) involve the public in decision making.

49 *Ibid*. Paragraph 11.1 says: "The public must be made aware in order to be able to make informed choices. A high governmental priority will be to educate citizens about environmental risks, the economic and health dangers of resource degradation and the real cost of natural resources. Information about the environment will be published periodically. Affected citizens and the non-governmental organisations play a role in environmental monitoring and therefore allowing them to supplement the regulatory system and recognising their expertise where such exists and their commitments and vigilance will also be cost effective. Access to information to enable public monitoring of environmental concerns, will be provided for" And paragraph 11.2 says thus: "Public interest litigation has successfully demonstrated that responsible non-governmental organisations and public spirited individuals can bring about significant pressure on polluting units for adopting abatement measures. This commitment and expertise will be encouraged and their practical work supported."

The National Environment Policy, 2006 (hereinafter referred to as NEP)[50] is another important policy drafted in India. It aims at reviewing of the existing legislation and also the enactment of new legislation if required. NEP also seeks to encourage partnership of various stakeholders, *viz*. the public agencies, the local communities, the academia and the scientific and research institutions, the investment community, and the international development partners in harnessing their respective resources and strengths for the conservation of the environment. The NEP also seeks to achieve a balance and harmony between the conservation and the development.[51] The NEP prescribes that human beings are at the centre of concern for sustainable development and entitled to a healthy and productive life in harmony with nature.[52] It also says that while conservation of the environmental resources is necessary to secure the livelihood and well being of all, the most secure basis for conservation is to ensure that the people dependent on particular resources obtain better livelihood from the fact of conservation, than from the degradation of the resource. The NEP aims at mainstreaming environmental concerns in all developmental activities.

Similarly the National Forest Policy, 1988, proposes to ensure environmental stability and maintenance of ecological balance including the atmospheric equilibrium, which is vital for sustenance of all life forms, human, animal and plant. The derivation of the direct economic benefit must be subordinated to this principal aim.[53] The national goal was, therefore, to have 33 per cent of the total land area of the country under the forest or tree cover by 2012 to ensure stability of the fragile ecosystem. Forest land and

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50 Ministry of Environment and Forests (2006): *The National Environment Policy*, New Delhi: Government of India.

51 *Id*. at p.3.

52 *Id*. at preamble.

53 *Supra* n. 46.

the land with tree cover should not be treated merely as a resource readily available to be utilized for various projects and programmes, but as a national asset which requires to be properly safeguarded for providing the sustained benefits to the entire community. Diversion of forestland for any non-forest purpose should be subject to the most careful examinations. Construction of dams and reservoirs, mining, industrial development and expansion of agriculture should be consistent with the needs for conservation of trees and forests. Projects which involve such diversion should at least provide in their investment budget, funds for afforestation.[54]

Apart from the ineffectiveness of implementation of these policy statements, the goals of fairness are also challenged when they are analysed in the light of the new economic policies adopted in India since 1991 to spur economic development by integrating the Indian economy with the global trade. The government has reduced the industrial regulation, lowered international trade and investment barriers and encouraged the export-oriented enterprises. The entire environmental framework including these environmental policies and the various other legislations has in effect become less useful in such cases.

The Government of India has promulgated policy statements that are specific to Climate Change. The National Action Plan on Climate Change (hereinafter referred to as NAPCC) was adopted in the year 2008. It aims at protecting the poor through an inclusive and sustainable development strategy, sensitive to climate change and achieving the national growth and poverty alleviation objectives while ensuring ecological sustainability. It speaks about efficient and cost-effective strategies for end-use as well as extensive and

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[54] Prime Ministers Council on Climate Change (2008): *National Action Plan on Climate Change*, New Delhi: Government of India.

accelerated deployment of appropriate technologies for the adaptation and the mitigation of climate change. It identifies measures that promote India's developmental objectives while yielding co-benefits for addressing the issues of climate change effectively. It outlines a number of steps to be taken simultaneously to advance India's development and balance it with the climate change-related objectives of adaptation and mitigation.[55] Its main focus is based eight missions *viz.* (i) The National Solar Mission; (ii) the National Mission for Enhanced Energy Efficiency; (iii) the National Mission on Sustainable Habitat; (iv) the National Water Mission; (v) the National Mission for Sustaining the Himalayan Ecosystem; (vi) the National Mission for Sustainable Agriculture; and (vii) the National Mission on Strategic Knowledge for Climate Change.

(i) National Solar Mission: The NAPCC aims to promote the development and use of solar energy for power generation and other uses, with the ultimate objective of making solar energy competitive with fossil-based energy options. It also includes the establishment of a solar research centre, increased international collaboration on technology development, strengthening of domestic manufacturing capacity, and increased government funding and international support.[56]

(ii) National Mission for Enhanced Energy Efficiency: This national mission brings within its fold, the Energy Conservation Act, 2001 which provides a

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[55] Prodipto Ghosh, (2009): *National Action Plan on Climate Change*, available at http://moef.nic.in/downloads/others/CC_ghosh.pdf (accessed on 25/05/2012).

[56] The Mission portrays the following: (a) Solar energy permits decentralization of the distribution of energy and thereby empowers people at the grassroots level; (b) Photovoltaic cells are becoming cheaper with new technology and these newer, reflector-based technologies could be used for setting up megawatt scale solar power plants across the country; (c)Launch of major R&D programme in relation to solar energy is also proposed, which could draw upon international cooperation as well, to enable the creation of more affordable, more convenient solar power systems, and to promote innovations that enable the storage of solar power for sustained, long-term use.

legal mandate for the implementation of the energy efficiency measures through the institutional mechanism of the Bureau of Energy Efficiency (also known as BEE) in the Central Government and the designated agencies in each State. A number of schemes and programmes were initiated and it was anticipated that these would have resulted in a saving of 10,000 MW by the end of 11th Five Year Plan in 2012. To enhance the energy efficiency, four new initiatives are said to be put in place. These are:[57]

a. A market based mechanism to enhance the cost effectiveness of improvements in energy efficiency in energy-intensive large industries and facilities, through certification of energy savings that could be traded;

b. Accelerating the shift to energy efficient appliances in designated sectors through innovative measures to make the products more affordable;

c. Creation of mechanisms that would help financing programmes in all sectors by capturing the future energy savings;

d. Developing fiscal instruments to promote energy efficiency.

(iii) National Mission on Sustainable Habitat: Through this National Mission, the NAPCC aims at promoting energy efficiency as a core component of urban planning by extending the existing Energy Conservation Building Code, strengthening the enforcement of automotive fuel economy standards, and using the pricing measures to encourage the purchase of efficient vehicles and incentives for the use of

[57] Bureau of Energy Efficiency (2012): *Perform, Achieve and Trade (PAT),* New Delhi: Ministry of Power, Government of India.

public transportation.[58] The NAPCC also emphasizes on the waste management and recycling. To promote the energy efficiency as a core component of urban planning, the Mission calls for:[59]

a. Extending the existing Energy Conservation Building Code;

b. A greater emphasis on urban waste management and recycling, including the power production from waste;

c. Strengthening the enforcement of automotive fuel economy standards and using the pricing measures to encourage the purchase of efficient vehicles; and

d. Incentives for the use of public transportation.[60]

(iv) National Water Mission: The National Water Mission sets a goal of 20% improvement in water use efficiency through pricing and other measures to deal with issue of water scarcity as a consequence of climate change. The mission plan states that a National Water Mission will be mounted to ensure integrated water resource management that helps to conserve water, minimize wastage and ensure more equitable distribution both across and within the states.[61] Further, the Mission will take into account the provisions of the National Water Policy and develop a framework to optimize water use by increasing the water use efficiency by 20% through regulatory mechanisms with differential entitlements and pricing.[62] It seeks to ensure that a considerable share of the water needs

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58 Ministry of Urban Development (2011): *National Mission on Sustainable Habitat*, New Delhi: Government of India, at p. 35.

59 *Id*. at p.15.

60 *Ibid.*

61 Ministry of Water Resources (2011): *National Water Mission*, New Delhi: Government of India, at p.3.

62 *Ibid.*

of urban areas are met through recycling of waste water and the water requirements of coastal cities with inadequate alternative sources of water are met through the adoption of new and appropriate technologies such as low temperature desalination technologies that allow for the use of ocean water.[63]

The National Water Policy would also include the enhanced storage both above and below the ground, rainwater harvesting, coupled with the equitable and efficient management structures. The Mission also aims at developing new regulatory structures, combined with the appropriate entitlements and pricing. This would also help to optimise the efficiency of the existing irrigation systems including the rehabilitation of systems that have been run down and also to expand irrigation, where feasible, with a special effort to increase storage capacity. Incentive structures would also be designed to promote water-neutral or water-positive technologies, recharging of underground water sources and adoption of large-scale irrigation programmes, which rely on sprinklers, drip irrigation and ridge and furrow irrigation.[64]

(v) National Mission for Sustaining the Himalayan Ecosystem: This unique mission sets the goal to prevent the melting of the Himalayan glaciers and to protect the biodiversity in the Himalayan region. The plan aims to conserve the biodiversity, the forest cover, and other ecological values in the Himalayan region, where glaciers that are a major source of India's water supply are projected to recede as a result of global warming. This mission is to evolve the management measures for sustaining and safeguarding the Himalayan glacier and mountain eco-system. Himalayas,

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63 *Ibid.*
64 *Ibid.*

being the source of the key perennial rivers, importance should be given to the fact of recession in these glaciers which will in turn require the joint effort of the climatologists, glaciologists and other experts coupled with exchange of information with the South Asian countries and the countries sharing the Himalayan ecology[65]. In mountainous regions, this mission aims to maintain two-thirds of the area under forest cover in order to prevent erosion and land degradation and ensure the stability of the fragile eco-system.[66]

(vi) Green India Mission: The NAPCC in this mission aims at afforestation of 6 million hectares of degraded forestlands and expanding forest cover from 23 to 33% of India's territory. This national mission seeks to enhance the ecosystem services including the carbon sinks. Forests play an indispensable role in the preservation of ecological balance and maintenance of bio-diversity. Forests also constitute one of the most effective carbon-sinks. It also aims at rejuvenating degraded forestland through direct action by the communities organized through the Joint Forest Management Committees and guided by the Department of Forest in state governments.[67]

(vii) National Mission for Sustainable Agriculture: The NAPCC aims to support climate adaptation in agriculture through the development of climate-resilient crops, expansion of weather insurance mechanisms, and agricultural practices. This mission would devise strategies to make the Indian agriculture more resilient to climate change and to identify and

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65 Department of Science and Technology, (2010): *National Mission for Sustaining the Himalayan Ecosystem,* New Delhi: Government of India.

66 *Ibid.*

67 Ministry of Environment and Forests, (2011): *Green India Mission*, New Delhi: Government of India.

develop new varieties of crops and especially thermal resistant crops and alternative cropping patterns, capable of withstanding extremes of weather, long dry spells, flooding, and variable moisture availability.[68] This is to be supported by the convergence and integration of the traditional knowledge and practice systems, information technology, *geospatial* technologies and biotechnology. Under this mission, a new credit and insurance mechanism would be devised to facilitate the adoption of desired practices. Focus would be on improving the productivity of rainfed agriculture. India would certainly spearhead the efforts at the international level to work towards an ecologically sustainable green revolution.[69]

(viii) National Mission on Strategic Knowledge for Climate Change: To gain a better understanding of the climate science, impacts, and challenges, the plan envisions a new Climate Science Research Fund, improved climate modelling, and increased international collaboration.[70] It also encourages the private sector initiatives to develop adaptation and mitigation technologies through venture capital funds.[71] To enlist the global community in research and technology development and ensure collaboration through mechanisms including open source platforms, a Strategic Knowledge Mission is proposed in this National Mission. This is expected to identify the challenges of and the responses to climate

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68 Department of Agriculture and Cooperation, (2010): *National Mission for Sustainable Agriculture: Strategies for Meeting the Challenges of Climate Change,* New Delhi: Government of India.

69 *Id*. at p. 34.

70 Department of Science and Technology, (2010): *National Mission on Strategic Knowledge for Climate Change,* New Delhi: Government of India.

71 *Ibid.*

change. It would ensure the issue of funding of high quality and focused research into various aspects of climate change.

The Mission, on its research agenda would look into the socio-economic impacts of the climate change including impact on health, demography, migration patterns and livelihoods of coastal communities. It also supports the establishment of dedicated climate change related academic units in Universities and other academic and scientific research institutions in the country that would be further networked. There has also been a proposal to generate a Climate Science Research Fund under the Mission to support research. Private sector initiatives for the development of innovative technologies for adaptation and mitigation would be encouraged through venture capital funds. Research to support policy and implementation would be undertaken through identified centres. The Mission also focuses on dissemination of new knowledge based on research findings.

The NAPCC also describes other ongoing initiatives that are as follows[72]:

a. *Power Generation*: The government is mandating the retirement of inefficient coal-fired power plants and supporting the research and development of Integrated Gasification Combined Cycle (IGCC) and ultra modern technologies.

b. *Renewable Energy* Under the Electricity Act 2003 and the National Tariff Policy 2006, the central and the state electricity regulatory commissions must purchase a certain percentage of grid-based power from renewable sources.

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[72] Prime Ministers Council on Climate Change (2008): *National Action Plan on Climate Change*, New Delhi: Government of India.

c. *Energy Efficiency:* Under the Energy Conservation Act 2001, large energy-consuming industries are required to undertake energy audits and an energy-labelling program for appliances that have been introduced.

d. *Proposals for Health Sector:* The proposed program comprises two main components, namely, provision of enhanced public health care services and assessment of increased burden of diseases due to climate change.

Ministries with lead responsibility for each of the mission are directed to develop the objectives, implementation strategies, timelines, and monitoring and evaluation criteria to be submitted to the Prime Minister's Council on Climate Change. The Council would also be responsible for periodically reviewing and reporting on each mission's progress. To be able to quantify the progress, appropriate indicators and methodologies would be developed to assess both avoided emissions and adaptation benefits.[73]

However, these Policy Statements are themselves not enforceable in a court of law though they can be effective tools of interpretation.[74] These statements represent a broad political consensus and amplify the duties of the Government under Part IV of the Indian Constitution stating the Directive Principles of State Policy. These policy instruments will help the legislature in

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[73] *Ibid.* See also Summary of India's Climate Change Plan, available at http://www.c2es.org/ international/key-country-policies/india/climate-plan-summary (accessed on 06/12/2012)

[74] See for example, *State of Himachal Pradesh* v. *Ganesh Wood Product*, 1995 SCC (6) 363. In this case the Supreme Court of India relied upon the National Forest Policy and the State Forest Policy of Himachal Pradesh to invalidate a decision taken by the State Industrial Project Authority. The Authority approved the establishment of units which manufactured '*katha*' from the scarce *khair tree* without considering factors such as the availability of *khair trees* and the adverse impacts on forests. The court held that the policy of economic liberalisation has to be understood in the light of National Forest Policy and forest laws enacted by the State.

enacting better laws and also the judiciary as a tool of interpretation to prefer an environment friendly interpretation to a more conservative approach.[75] These Policies are implemented through the following methods in India:

(i) *Implementation through Statutes and Authorities:* Detailed legislation and Rules have been enacted by the legislatures in India for implementing these Policy Statements such as the Air Act[76], the Bio-Diversity Act[77], the Environment Protection Act[78], the Forest Conservation Act[79] *etc*. with many other legislations and corresponding Rules. Various Authorities have also been setup under these Statutes and Rules for the effective implementation of the policies. This shall be discussed in detail under Chapter V.

(ii) *Implementation through the Courts:* In the recent past the judicial forums in India have become extremely vigilant in protecting the environment. This is reflected in the number and range of decisions from the various Indian Courts. The detailed analysis shall be done in Chapter 5.

4.1.4 Fairness and Environmental Policy in India

The greatest advantage for India is that, the country is in its early stages of economic development and it can grow differently. In other words, it can create a low carbon economy using the high-end and emerging

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75 Along with these general policies pertaining to environmental conservation there are few sector specific policies as well such as the National Agriculture Policy, 2000; the National Population Policy, 2000; the National Water Policy, 2002; the National Zoo Policy, 1998; the Wild Life Conservation Strategy, 2002 *etc*.

76 The Air (Prevention And Control) Act, 1981.

77 The Biodiversity Act, 2002.

78 The Environment (Protection) Act, 1986.

79 The Forest Conservation Act, 1980

technologies.[80] By putting economic development ahead of the emission reduction targets, the environment and climate policies in India make a case for the right of emerging economies to pursue development and growth to alleviate poverty without being worried about the volume of atmospheric emissions they generate in the process.[81] However, few others say that these policies have no durable plan of action. For example the NAPCC has a basket of eight *Missions* and but no plan that will fetch the *social minimum* to the poorest and most vulnerable. A policy that deals with a new set of circumstances and factors has necessarily to take into its consideration the interest of the poor as well.[82]

Greenpeace considers the focus on solar energy as the highlight of India's policies. According to this organisation, the emphasis on solar energy shows India's foresight in energy planning and its intention to capitalize on the country's potential for solar energy. At the same time Greenpeace, states that on the energy-efficiency front, the plan is both unambitious and vague about what the country is setting out to achieve. Though the Federation of Indian Chambers of Commerce and Industry (FICCI) have supported the Policy, saying that eight missions will be important to leverage for energy

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80 Narain, Sunita (2008): "The Mean World of Climate Change", *Down To Earth* (2008), available at http://www.downtoearth.org.in/content/mean-world-climate-change (accessed on 16/02/2011).

81 Sudhirendar Sharma, (2008): "Missing the Mountain for the Snow", *India Together,* available at http://www.indiatogether.org/2008/jul/env-napcc.htm (accessed on 26/02/ 2011).

82 Rahul Goswami, (2008): "Blind spots in India? New National Action Plan on Climate Change", *InfoChangeIndia*, available at http://www.infochangeindia.org/ environment/ analysis/blind-spots-in-indias-new-national-action-plan-on-climate-change.html (accessed on 13/12/2010).

efficiency across the industry sectors,[83] a few others have stated that adeqauate awareness must also be created among the general population.[84]

Further, the scope of implementation of the NAPCC remains limited, as government ministries have been unable to get clearance from the political and developmental barriers. Part of the problem lies in the fact that a number of key ministries including the Water Ministry come under the purview of the states, (in List II of Schedule 7 of the Constitution), and not under the central government. The disparity in development and economic growth among the various states in India also results in differing standards of environmental commitment. While some states have enforced renewable energy targets and are attempting to exploit their renewable resources, other states lag behind. [85]

India has consistently emphasized on the importance of integrating climate change policy with the country's need for rapid economic growth and development, arguing that as a developing country, sustained development is vital for India to build up capacities to counter the effects of climate change and reduce its overall vulnerability.[86] In this light, the NAPCC seeks to reduce its greenhouse gas emissions not through setting targets but by prioritizing renewable energy and reducing India's

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83 Sonu Jain, (2008): "India's Climate Change Action-Plan Takes the Safe Way: No to Caps, Yes to Efficiency", *The Indian Express online*, available at http://www. indianexpress.com/news/indias-climate-change-actionplan-takes-the-safe-way-no-to-caps-yes-to-efficiency/318373/2 (accessed on 13/12/2010).

84 Pandve, Harshal (2008): "Global initiatives to Prevent Climate Change", *Indian Journal of Occupational and Environmental Medicine,* 12, 96-7.

85 Times News Network, (2008): "5% Energy to Come From Renewable Sources From 2009-2010", *Times of India*, (31 December 2008), available at http://articles .timesofindia. indiatimes.com/2008-12-31/pune/27893549_1_renewable-energy-energy-efficiency-solar-energy (accessed 13/12/2010).

86 Prime Ministers Council on Climate Change (2008): *National Action Plan on Climate Change*, New Delhi: Government of India.

dependency on fossil fuels. As stated earlier the enthusiasm and aspiration for achieving sustainable economic growth also varies from state to state. For example, the state of Gujarat has established a number of renewable energy plants while most other states are far behind in this aim.[87] Even in the case of Gujarat, establishment of such renewable energy plants would undoubtedly reduce the potential GHG emissions, but it remains unclear as to the exact level of GHG reductions that these projects are achieving.[88]

The NAPCC has also been criticized for not establishing hard targets, particularly in the crucial area of water management.[89] Until now, India has addressing climate change predominantly in the energy sector and the water resource sector has not received the priority attention that it deserves. There is a growing shortfall of water in the Indian subcontinent. Indeed, the World Bank also has warned that India is on the brink of severe water crises with most of its states living under the stress of water scarcity.[90] The National Water Mission component of the NAPCC proposes enacting a new national water policy to combat, mitigate, and adapt to water scarcity scenarios that may arise out of the climate change. It says that if climate change uncertainties are to be integrated into water management planning, there is an urgent need to augment the water storage capacity, consider reducing the

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87 Business Standard, (2009): "Astonfield to Pump in RS 3600 Crore for Solar Project in Gujarat", *Business Standard,* (5 February 2009), available at: http://www.business-standard.com/article/companies/astonfield-to-pump-in-rs-3600-crore-for-solar-project-in-gujarat-109020500067_1.html (accessed 13/12/2010).

88 Krittivas Mukherjee, (2008): "Indian Politics said to Make Climate a Tough Sell", *REUTERS*, (October 8, 2008), available at: http://www.reuters.com/article/ 2008/10/08/ us-summit-india-climate-idUSTRE4971320081008 (accessed 13/12/2010).

89 Viswanathan, Radhika and Sridhar, Aparna (2009): "Assessing National Climate Policy November 2008-February 2009", Climate Analysis, 50-54, available at www. climaticoanalysis.org (accessed on 14/12/2010).

90 Chandan Mahanta (2009): "Cliamte Change Threats to India's Water Resources and Emerging Policy Responses" *The Henry L. Stimson Center*, available at: http://www. isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=110861 (accessed 14/12/2010).

subsidies that encourage over consumption, and practice more judicious use of the ground and surface water. For India to sustain its growth rate an efficient water management is mandatory.[91] But at the same time privatisation of water management and increasing the cost of drinking water is grossly unfair and against the fundamental right to life.[92] Further it is also said that the focus of the policy is unduly prescriptive in using the command and control approach and less of participatory approaches, which is totally unfair in a democracy. It focuses less on community participation, which would bring the masses to have enough bargaining capacity and force the regulatory bodies to respond to the problem effectively.[93]

4.2 India's Foreign Policy on Environmental Protection and Climate Change

In the Stockholm Conference on Human Environment, 1972, the then Prime Minister of India, Mrs Indira Gandhi had also participated along with official from 113 countries (she was the only head of the State who had participated in the Conference which itself was appreciated and interpreted as India's concern for the environment). Her speech at the Conference is considered to be the best source for identifying India's Foreign Policy on Environmental Protection. She said thus:[94]

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91 David Michel and Amit Pandya (2009): *Indian Climate Policy: Choices and Challenges*, Washington: The Henry L. Stimson Center, p. 5.

92 *Id*. at p. 25.

93 Gupta, Vijay (2011): "A Critical Assessment of Climate Impacts, Vulnerability and Policy in India", *Present Environment and Sustainable Development*, 5(1), 11 at p. 19.

94 Address of Prime Minister of India Smt. Indira Gandhi, at the United Nations Conference on Human Environment, Stockholm, 14 June 1972. available at http:// lasulawsenvironmental.blogspot.in/2012/07/indira-gandhis-speech-at-stockholm.html (accessed on 15/12/2010).

On the one hand the rich look askance at our continuing poverty-on other, they warn us against their own methods. We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large number of people. Are poverty and need the greatest polluters? For instance, unless we are in a position to provide employment and purchasing power for the daily necessities of the tribal people and those who live in or around our jungles, we cannot prevent them from combing the forest for food and livelihood; from poaching and from despoiling the vegetation. When they themselves feel deprived, how can we urge the preservation of animals? How can we speak to those who live in villages and in slums about keeping the oceans, the rivers and the air clean when their own lives are contaminated at the source? The Environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.

There are grave misgivings that the discussion on ecology may be designed to distract attention from the problems of war and poverty. We have to prove to the disinherited majority of the world that ecology and conservation will not work against their interest but will bring an improvement in their lives. To withhold technology from them would deprive them of vast resources of energy and knowledge. This is no longer feasible nor will be acceptable.

The environmental problems of developing countries are not the side effects of excessive industrialisation but reflect the inadequacy of development. The rich countries may look upon development as the cause of environmental destruction, but to us it is one of the primary means of improving the environment for living, of providing food, water, sanitation and shelter, of making the desert green and the mountains habitable.

The ecological crises should not add to the burden of the weaker nations by introducing new considerations in the political and trade policies of rich nations. It would be ironic if the fight against pollution were to be converted into another business, out of which a few companies, corporations, or nations would make profit at the cost of the many.

It has been my experience that people who are at cross purposes with nature are cynical about mankind and ill-at-ease with themselves. Modern man must re-establish an unbroken link with nature and with life. He must again learn to invoke the energy of growing things and to recognise as did the ancients in India centuries ago, that one can take from the Earth and the atmosphere only so much as one puts back to them. In their hymn to Earth, the sages of *Atharva Veda* chanted: I quote, 'What of thee I dig out, let that quickly grow over, Let me not hit thy vitals, or thy heart.

Through this speech Mrs. Gandhi made India's Foreign Policy on environmental protection very clear. Its basic presumption was that the environmental problems in India are not caused by industrialisation and other economic activities but by the lack of it. People are tempted to over exploit and pollute the environment when there are absolutely no means for them to earn for subsistence. Hence there cannot be any fruitful efforts of environmental protection without eradicating poverty and ensuring the people of their livelihood or in other words rendering them the *social minimum*. Thus, it can easily be said that India's foreign policy on environmental protection was on the basis of a balance between sustainable development and equity on one hand and poverty and underdevelopment on the other hand.[95]

4.2.1 India's Foreign Policy on Climate Change: An Analysis

There are very few international instruments that are negotiated as expeditiously as the UN Framework Convention on Climate Change.[96] During the drafting stages of the UNFCCC as well as later on at the negotiation table, the fundamental approach of the developing countries was clear. It was based on equity, a policy that reflects the fact that anthropogenic climate change was the result of cumulative emissions of GHGs that originated/originating in developed countries in the past as well in the present. On the other hand, the developed countries had a different approach. They contended that since climate change is a global problem, there has to be a 'Common Responsibility' in mitigating the harmful effects of climate change. In other words, they sought to minimize the link between the commitments under the UNFCCC and Kyoto Protocol and the responsibility

[95] This continues to be India's foreign policy on environment even today.
[96] The Negotiations commenced in February 1991 were completed by May 1992.

for causing climate change.[97] For example, the USA refused to recognise the link altogether, maintaining that countries should contribute to an international effort in accordance with the means at their disposal and their respective capabilities.[98]

Where as the argument of India and other developing countries were different. Their stand was based on the Principle of Common But Differentiated Responsibility (CBDR).[99] To explain further, India at Rio stated thus:[100]

> The problem of global warming is caused not just by emissions of greenhouse gases but by excessive levels of *per capita* emissions of these gases. If *per capita* emissions of all countries had been on the same level as those of the developing countries, the world would not…have faced the threat of global warming. It follows, therefore, that developed countries with high *per capita* emission levels of greenhouse gases are responsible for incremental global warming.
>
> In these negotiations, the principle of equity should be the touchstone for judging any proposal. Those responsible for environmental degradation should also be responsible for taking corrective measures. Since developed countries with high per capita emissions of greenhouse gases are responsible

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97 Dasgupta, Chandrasekhar (2012): "Present at the Creation: The Making of the UN Framework Convention on Climate Change" in Navroz K. Dubash, *Handbook of Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at page 89.

98 United States of America (1991): Submission of the United States to the Intergovernmental Negotiating Committee on Climate Change, UN Doc. A/AC.237? Misc.1/Add.1.pp.89-95.

99 For a detailed discussion on CBDR see ;Chapter 2.

100 *Supra* n. 97.

> for the incremental global warming, it follows that they have a corresponding obligation to take corrective action. Moreover, these are also countries, which have the greatest capacity to bear the burden. It is they who possess financial resources and the technology needed for corrective action. This further reinforces their obligations regarding corrective action.

In the backdrop of this objective, India proposed that:[101]

> Developed country parties shall, as immediate measures: (a) declare, adopt and implement national strategies to stabilize and reduce their per capita emissions of greenhouse gases, particularly carbon dioxide; stabilisation …should be achieved by developed country parties at the latest by the year 2000 and should be set out at 1990 emission levels, with the goal of achieving at least a 20% to 50% reduction on these stabilised levels by the year 2005; (b) provide new and additional financial resources for developing country parties for the said objective…(c) provide assured access to appropriate environmentally sound technology on preferential and non-commercial terms to developing countries; and (d) to support developing countries in their efforts to create and develop their endogenous capacities in scientific and technological research and development directed at combating climate change.

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[101] *Ibid.*

> Developing countries may, in accordance with their national development plans, priorities and objectives, consider feasible measures with regard to climate change provided that the full incremental costs are met by provision of new and additional financial resources from the developed countries.

These positions of India at the negotiating tables of UNFCCC owed much to its geo-political assessment of the stance taken by the developed countries in many different arena of multilateral engagement.[102] There was strong evidence that the developed countries were approaching the climate change issue through a prism of global domination and advancement of self-interests.

These proposals were generally welcomed by all developing countries at Geneva. At the same time generally most[103] of the developed countries were against such a proposal. The United States simply refused to recognise the question of historical responsibility.[104] However, the developing countries formed a single coalition under the leadership of India and China on these specific fundamental issues and lobbied. India along with 53 other developing countries submitted a common text on 'commitments', which, called on the developed countries on the basis of assessed

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[102] See for example, the UN Conference on Human Environment, 1972, the UN Convention on Environment and Development, 1992.

[103] In this regard, Germany recognised that developed countries have a 'special reasonability since these countries have been the main sources of the increase in atmospheric concentrations of climate-relevant gases. See, Germany (1991): Non-Paper:l Important Elements for an International Climate Convention in INCFCCC Preparation of a Framework Convention on Climate Change. A/AC.237/Misc.1?Add.1. pp.15-23.

[104] *Supra* n. 81. See also Rajan, M.G. (1997): *Global Environment Politics: India and the North –South Politics of Global Environmental Issues*, New Delhi: Oxford University Press.

contributions to GHG emission, to provide on grant basis new, adequate and additional financial resources to meet the full incremental costs of the developing country parties' in connection with the mitigation and adaptation measures. [105]

In the beginning, it was proposed that the task of drafting the convention on climate change would be done at the Intergovernmental Panels on Climate Change (IPCC). But the IPCC then were represented by experts from the developed countries and its First Assessment Report had said that both the North and the South have 'common responsibilities' on the fight against climate change. In this context, India also worked closely with other countries from the South to ensure that this was amended to 'Common but Differentiated responsibility' of industrialised and developed countries.[106] Further, worried about the presence of representatives from the developed countries in the IPCC it had worked along with Brazil for shifting of climate negotiations to be held outside the IPCC. Thereafter, it was shifted to the United Nations General Assembly (UNGA) to ensure 'openness, transparency, universality and legitimacy' and full cooperation of all states[107]and thereby helping to create a level playing field.

4.2.2 India's Key Strategies in International Climate Law Making

During the making of the international law on climate change as discussed in the earlier part this thesis, India took a very proactive step from the very beginning. Another most important point that may be noted here is

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[105] General Assembly, (1991): *Draft Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change*, United Nations, A/AC.237/Misc. 1/Add.1.pp.10-14.

[106] Rajan, M.G. (1997): *Global Environment Politics: India and the North–South Politics of Global Environmental Issues*, New Delhi: Oxford University Press, at p.108.

[107] *Ibid.*

that its policies on climate change were consistent on international negotiation tables' from the submission of the First Assessment Report by IPCC in the year 1990, to, the Rio De Janeiro in the year 1992, to, Kyoto Protocol in the year 1997 and up to 2007. At the 2007, G8+5 Summit at Germany, India's Climate Policy indicated a change. The Prime Minister of India, Mr. Manmohan Singh made a unilateral and voluntary announcement that India's per capita GHG emissions would never exceed that of the developed world[108]. Thereafter at the 2009, G-8 Summit held in Italy, India recognised for the first time that the rise in global temperature 'ought not to exceed 2 degree Celsius' and that India would work together to identify a global goal to reduce 'global emissions by 2050'. Though it was only a political declaration without any legal binding in India, it is signalled as India's willingness to concede, in theory at least, an implicit cap on future emissions.[109] The same trend was more audible at the Copenhagen also during the 15th Conference of Parties. India stated that since she is highly vulnerable to the issue of climate change, she is required to be a 'leader, as a proactive player as somebody who is shaping the solution', It changed its position from earlier '*Per Capita Convergence'* to '*Per Capita Plus'* approach. India also said that it can through a domestic legislation or executive action put a maximum ceiling to the key sectors in the country such as energy, industry, transportation *etc*. It also said that it could even allow external reviews of India's domestic mitigation actions through a more detailed national communication to the UNFCCC. At Copenhagen, India also made it clear that, flexibility is its policy except in the case of three

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[108] Sengupta.Sandeep (2012): "International Climate Negotiations and India's Role" in Navroz K. Dubash, *Handbook of Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at p.104.

[109] *Id*. at pp. 104-110.

'*Non-Negotiables'* that it would not compromise. The three 'Non-Negotiables' are:[110]

(a) It shall not accept any legally binding emission reduction cut;

(b) It shall not accept any 'peaking year'; and

(c) It shall permit scrutiny in unsupported mitigation processes at par with externally supported mitigation processes.

Thereafter in the year 2009, the Government of India declared in the *Lok Sabha* that India would voluntarily reduce the 'emissions intensity' by 20-25 per cent by 2020 compared to its 2005 level through domestic mitigation actions.[111] In this regard the following table gives an analysis of India's policies pertaining to climate change during the period from 1988 to 2012.

Table 5: India's key contribution at important events of International Climate Change Negotiations[112]

Year	International Events	India's Policies & Strategies
1988-1989	IPCC was established and UNGA Res. 43/53 recognised climate change as 'concern of mankind.' Thereafter the UNGA Resolution 44/207 Called for a Framework Convention on Climate Change	Ministry of Environment and Forests constituted an 'Expert Advisory Committee' on Global Environmental Issues.

[110] Ramesh, Jairam (2009): "Parliamentary Debates on Climate Change Pre-Copenhagen", Lok Sabha, Session XV-III (On Thursday, 3 December 2009).

[111] *Supra* n. 108.

[112] This table has been derived from data taken from Agarwal., Narain, S, and Sharma, A. (eds.) (1999): *Green Politics: Global Environmental Negotiations*, New Delhi: Centre for Science and Environment, p.44; Paterson, M (1996): *Global Warming and Global Politics*, London: Routledge; ; Sengupta.Sandeep (2012): "International Climate Negotiations and India's Role" in Navroz K. Dubash, *Handbook of Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press.

1990	IPCC First Assessment Report calling for 'Common Responsibility' among all nations since Climate Change is a 'Global Concern'	India successfully built a coalition of developing countries and successfully substituted 'Common Responsibility' with 'Common But Differentiated Responsibility (CBDR)'. India also successfully lobbied for shifting climate negotiations from IPCC dominated by 'developed countries' to UNGA where there is a level paying field.
1991-92	UNFCCC Negotiations	India successfully campaigned in making *equity* and CBDR as fundamental principles of GCCRR. But at the same time India and other developing countries could not get any concrete emission reduction commitments from the North
1995	COP-I, Berlin	India successfully defended the demand for mandatory commitments from the advanced developing countries with emission reduction commitments (Thereafter in every COP this conflict arose between North and South and the South successfully defended it.)
1995-1997	Kyoto Protocol Negotiation	The North generally wanted the Protocol be without any binding commitments with 'targets and time tables' on them. But India successfully lobbied for the inclusion of binding commitments in the Protocol but without any additional commitments from the South.
1995-2001	Negotiations at Berlin to Marrakech regarding Kyoto Flexibility Mechanisms	India initially was a strong opponent of all the three flexibility mechanisms saying it is another attempt by North to avoid taking any serious domestic emission reductions of their own. Later on by COP at Marrakech (2001) India understood the potential of flexibility mechanisms. Now all most 20% of the global CDMs are implemented in India.
2007	G8+5 Summit, Germany	India made a unilateral and voluntary announcement that India's *per capita* GHG emissions would never exceed that of the developed world.
2007	COP at Bali and *Bali Action Plan*	India successfully made attempts to make the conditions under which any international measurement, reporting and verification of developing country mitigation actions would be permitted.

2009	G-8 Summit, Italy	India specifically recognised for the first time that the rise in global temperature 'ought not to exceed 2 degree Celsius' and that India would work together to identify a global goal to reduce 'global emissions by 2050'. Though it was only a political declaration without any legal binding in India, it is signalled as India's willingness to concede, in theory at least, an implicit cap on future emissions.
2009	COP 15; Copenhagen	India stated that since it is highly vulnerable to climate change and hence it is required to be a 'leader, as a proactive player as somebody who is shaping the solution', It changed its position from earlier '*Per Capita Convergence'* to '*Per Capita Plus*' approach. India also said that it can through a domestic legislation or executive action put a maximum ceiling to the key sectors in the country such as energy, industry, transportation *etc*. It also said that it could even allow external reviews of India's domestic mitigation actions through a more detailed national communication to the UNFCCC. According to India, flexibility is its policy, though there are three 'Non-Negotiables' that it would not compromise on (a) It shall not accept any legally binding emission reduction cut; (b) It shall not accept any 'peaking year'; and (c) It shall permit scrutiny in unsupported mitigation processes at par with externally supported mitigation processes. In the year 2009 the Government of India declared in the *Lok Sabha* that India would voluntarily reduce the 'emissions intensity' by 20-25 per cent by 2020 compared to its 2005 level through domestic mitigation actions.
2009-2012	Post-Kyoto Negotiations and COP 18; Doha	After 2012, the expiry of Kyoto Protocol, the North demanded for an 'undifferentiated international agreement on climate change, where all major GHG emitters, the developed and developing alike, would have similar mitigation obligations subject to similar levels of scrutiny.' India and its alliance, the BASIC Club (Brazil, Argentina, South Africa, India, China) successfully opposed these attempts of the North to bypass Kyoto.

4.2.3 Reasons for Shift in Indian Climate Policy

India's international behavior on climate change has deep historical roots and has been intimately shaped by how it has conceptualized its overall national interest's overtime. Its primary concern was to eradicate poverty and achieve modernization and development through the well-trodden western model of modernization and development. It was during this time that environmental issues grabbed global concern and the North demanded a need for 'limits to growth'. India and generally all developing countries took this 'limits to growth' approach as unfair and neo-colonial. Similar to other developing countries, the argument was based on the principle of 'Sovereignty'. So there was a consensus that any international agreement to curb GHG emissions, which were intrinsically connected to the national energy use, economic growth and development, would not just be an environmental treaty but rather a 'major multilateral economic agreement' where, 'the sharing of costs and benefits implied …could significantly alter the economic destinies of individual countries.'[113]Another important reason in determining India's position at the climate change negotiations was the extremely weak and vulnerable position that it found itself in following its economic crisis of 1991. Another reason is that it was the time in which, the cold war ended, and the USA was at the peak of its 'unipolar' moment. At this moment it was entirely rational for India's negations to use principled arguments based on equity and justice.[114]

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[113] Dasgupta, C. (1994) "The Climate Change Negotiations", in I.M. Mintzer and J.A. Leonard (eds) *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press, at p. 131.

[114] *Ibid.*

Thereafter, until 2008-09 India had also continued the same foreign policy on climate change. The main reasons for such a continuity are as foolows:[115]

(i) There were little efforts from the North to actually deliver what had been actually promised at Rio. The international law being on their side, there was little reason for the developing countries including India to unilaterally become proactive.

(ii) During this period there was a consensus among the general public, among government negotiators; political parties; environmental NGOs; business groups; scientists; and the media that India's external policy on climate change is legitimate and valid.

(iii) Finally, an important structural reason for the continuity seen in India's foreign policy on climate change is the inherent nature of international system itself, where the primary motivation of all states has been to safeguard their own economic competitiveness and their relative positions in the hierarchy of nations, rather than to collectively and meaningfully address the problem of climate change.

As noted earlier in this chapter, India's foreign policy on climate change has now been transitioned into very significant changes. These changes may be divided into three eras as given in the below table.

[115] *Id*. at p.113.

Table 6: Changes in India's Climate Change Policy

Stages	India's Strategic Perspective
First Stage	*Growth-First* Perspective: During the period 1988 to 2006-07, India's main contention was that poverty is main hindrance for economic development. India strongly opposed the 'Common Responsibility' argument of the North and instead advocated CBDR. India further demanded concrete emission commitments from the North.
Second Stage	*Sustainable Development* Perspective: During 2007 to 2009, India gradually started changing its domestic policy for reducing the emission. But at the same time she was not ready to make any changes in her foreign policy.
Third Stage	*Sustainable Development Internationalist* Perspective: After 2009, India along with her readiness to make changes in the domestic policies regarding climate change, communicated to the world that India was ready to make changes in its foreign policy also.

The various reasons for change of India's Policy on Climate Change may be identified as follows:

(i) The consensus on the climate policy is not very solid as it used to be. There are dissenting opinions emerging from the academia, the civil society and from many other sectors.[116]

(ii) India has changed significantly over the last two decades. From being in a position of severe economic vulnerability at the end of cold war in 1991, it has now emerged as a powerful economic and political actor on the global stage. This has led to increased calls from its counterparts for India to do more on climate change, which also eventually reflected in the thinking of Indian political leadership and policymakers.

(iii) The fact that its fellow emerging powers in the international system like China, Brazil and South Africa have all announced voluntary mitigation targets of their own, generated a considerable peer pressure

[116] Rajamani, Lavanya (2007): "India's Negotiating Position on Climate Change: Legitimate but Not Sagacious", *CPR Issue Brief*, No. 2, Centre for Policy Research, New Delhi.

on India also to do so. This was further driven by a fear that unless India was seen to be acting progressively on the issue, it could be isolated and blamed internationally in the event of any failure, which would risk its reputation and desire to be seen as a globally responsible state.

(iv) The changing configuration of global geopolitical alliances has also had its impact on India's thinking and policies on this issue. Some groups have criticized and attributed the recent shifts in India's climate change policies to the growing bilateral ties between India and the USA. [117]

(v) India has sufficiently reaped the benefit from the past external affairs policy on climate change in terms of, among other things, the economic development. India now cannot afford to ignore the emergence of new scientific evidence on climate change and the pressing question of its own vulnerability. Equally, it cannot also afford to ignore the domestic voices that may be at variance with its traditional stance on this issue.

4.3 Conclusion

Contrary to the common perception that developing countries are mere rule takers rather than rule makers in the international system *vis-a-vis* the developed world,[118]India has been a major international force since the earliest days of the negotiations. It has played the constructive role in building the

[117] Raghunandan, D (2010): "Kyoto is Dead, Long Live Durban?", Economic and political Weekly. XlV (52).

[118] Hurrel, A and Woods, N. (eds) (1999): *Inequality, Globalization and World Politics*, Oxford: Oxford University Press.

international climate change regime, its norms and rules and institutions.[119] It also played a key role in international climate negotiations over the last two decades by having an influential voice as a defender of the global south, as a coalition builder and an aggressive protector of its own interests. India is also considered to be an important producer of ideas in setting international law on climate change. [120] India has become successful in defending the unfair strategies of the developed countries in making the developing countries responsible for the environmental degradation caused by them.

Being the world's second most populous nation, an emerging economic power and a significant future emitter of GHGs, India will doubtlessly continue to remain a major force in the international climate negotiations. Like in the past, where India has played a major role in developing the architecture, norms and rules of the climate regime, to suit its own interests and that of its coalition partners, India will continue its efforts at the global level.It has been rightly noted that, "if India's national legislation on climate change is to be best served, then it must combine aggressive domestic action to combat climate change with tough and clear eyed bargaining in its international negotiations. Equally, as its attempts to play a new bridging role between the North and the South, India needs to manage its various alliances, old and new in a sensible manner, based on its

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[119] Sengupta.Sandeep (2012): "International Climate Negotiations and India's Role" in Navroz K. Dubash, *Handbook of Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at p. 101.

[120] *Id*. at p. 104. For example, India was the first developing country that practically built a 'southern coalition'. India has been always emphasising that the primary responsibility for reducing GHGs emissions belonged to the North and that no emission reduction obligation could be accepted by the South; and that the developed world would have to provide developing countries with both clean technology and finance to help them address this challenge.

own interests, but also keeping in mind its professed values of securing a fairer GCCRR that will protect the weaker nations against the strong."[121]

At the same time, the domestic policy regime in India pertaining to climate change is not free from issues. Though the constitution of India recognizes the state's responsibility to protect environment, it is placed under the Directive Principles of State Policy, which are *non-justiciable*. Despite the fact that the Indian judiciary, through the technique of creative interpretation in cases known as *public interest litigation*, declaring it to be enforceable, practically this again failed in taking the 'social minimum' to the masses. Further the various policies promulgated by the state with regard to environment and climate change are also heavily criticized for failing to be fair.

[121] *Id*. at p. 116.

Chapter V

India, Global Climate Change Regime and Fairness Divide

> *Persuading polluters to pay for the damage they cause…will be a major challenge in coming decades. Burden sharing is a very complex issue, and frankly I don't see much sign of it happening yet*.[1]

The debate on multilateral action on climate change has been a polarised one since the beginning. It consistently brought the 'development' and the 'poverty eradication' argument on one side of the debate and 'aggressive action for emission reduction' on the other side. Naturally, India along with other developing countries was on the former side of the debate and developed countries on the latter side. The developed countries argued that the energy consumption in 'key developing countries'[2] in recent times would lead to such massive quantities of GHG emissions, that no matter how stringent the emission curbs in the developed countries, the planet's climate would be at severe risk.[3] They also criticised the present method of calculating emissions on *per capita* basis and instead argued for measuring it on absolute terms. Responding to these, the developing countries pointed out

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1 Pachauri, Rajendra as quoted in Laurie, Goering (2007): "Warming to the Challenge of Climate Change", *Chicago Tribune*, (April.29, 2007), available at: http://inel. wordpress.com/2007/04/29/rajendra-pachauris-3-points-on-climate-change/. (accessed on 12/09/2012)

2 Key developing countries on the basis of their GDP growth rates in recent times includes; India, China, Brazil, South Africa and Mexico.

3 Ghosh, Prodipto (2012): "Climate Change Debate: The Rationale of India's Position", in Navroz K. Dubash (ed.) *Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at p.157.

that that they are still very poor[4] and though some of them experienced impressive GDP growth rates in the recent past, their *per capita* GHG emission is just a fraction of those of the developed countries.[5] Thus, they argue "in terms of the accumulations of GHGs in the atmosphere, which, is what actually leads to climate change, their responsibility is miniscule or negative."[6] With this background, this chapter analyses India's current domestic policy in comparison with the actual practices of environmental protection and emission reduction.

India's contemporary domestic and foreign policy on climate change could be understood from the statement made by the Minister for Environment and Forests in the *Lok Sabha* during the Pre-Copenhagen Debates in 2009. He said: [7]

> When I took over as Minister of Environment and Forests…the Prime Minister's instructions to me were, 'India has not caused the problem of global warming. But try and make sure that India is part of the solution. Be Constructive;

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4 According to the Human Development Index 2011, the following are the positions of these key developing countries: Brazil-85; India-134; China-101 and South Africa-123. For details see, the Human Development Index, (2011): United Nations Development Programme, pp 127-130.

5 The developing countries argue that, "the history of world's economic development indicates that economic growth and GHG emissions follow a certain rule. Emissions of CO2 and other GHGs increase as the economy develops. When the development reaches a certain level, CO2 emissions will level off and the turning point will appear. After a period of stationary phase, the emissions start to fall." They feel that it is unfair and unreasonable to ask them to start absolute emission reduction before achieving such a stationary phase. See, Xie Zhenhua (2012): "Absolute Emission Cuts is Unfair to China at Present", *China Council for International Cooperation on Environment and Development,* available at: http://www.cciced.net/encciced/newscenter/latestnews/201211/t20121123_242582.html (accessed on 11/12/2012).

6 *Supra* n. 3 at p. 158.

7 Ramesh, Jairam (2009): Parliamentary Debates on Climate Change Pre-Copenhagen, *Lok Sabha*, (Session XV-III, 19th November-18th December, 2009).

> be Pro-active'. Then I asked myself, what is India's position when it comes to international negotiations? The only position India had: 'Our *per capita* is very low; your *per capita* is very high; therefore we would not do anything.' Sir, *per capita* is an accident of history. It so happened that we could not control our population. That is why, we get the benefit of *per capita*…It is an important point because *per capita* is the only instrument of ensuring equitable distribution. But it cannot be the only point. …So, when I first started looking at the international canvas, I was struck by the fact that India's position was: 'Our *per capita* is low and, therefore, we are entitled to pollute more till we reach your *per capita* levels. Since you have caused the problem, you must fix the problem.

Continuing further he said: [8]

> So, I ask my self this question: can we go beyond the *per capita*? *Per capita* is the basic position. Our *per capita* is low. Our Prime Minister has said that our *per capita* emissions will never exceed the *per capita* emissions of the developed world. My friends from the Left Parties accused me of compromising the Prime Minister's statement. Sir, this is English language. This is semantics…To my simple mind, I do not see any difference between 'will not exceed' and 'will remain below'. It is the same thing. Sir, there are some non-negotiables for us at Copenhagen. Let me categorically

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[8] *Ibid.*

> state what these non-negotiables are…The first non-negotiable is that India will not accept a legally binding emission reduction cut…I want to say this absolutely, clearly and categorically. There is no question of India accepting a legally binding emission reduction target… Second, there are some attempts by some countries to say that developing countries should announce when their emissions will peak. Let me say that this is the second non-negotiable for us. We will not accept under any circumstances an agreement, which stipulates a peaking year for India… There is a third non-negotiable. Today, it is non-negotiable, but depends on the concessions that we can get from the western countries. Perhaps, we could modulate our position in consultation with China, Brazil and South Africa.[9] We are prepared to subject all our mitigation actions, whatever we do, which is supported by international finance and technology to international review. There is nothing wrong with it, as we are getting money from outside and we are getting technology from outside…The problem arises on the mitigation actions, which are unsupported, that is, that which we are doing on our own. We certainly would not like the unsupported actions to be subject to the same type of scrutiny that the supported actions are subject to…

and therefore: [10]

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[9] Members of the BRICS club.
[10] *Supra* n. 7.

> I separate the domestic responsibility from international obligations. I want to be aggressive on domestic obligation and I want to be pro-active on international obligation because in International obligation there is only one thing that counts. Ultimately, when I go to Copenhagen, it is not G-77 or China or America or Brazil or South Africa, it is India's interest that counts.

In continuation with these statements, India at the 2009 Copenhagen Summit, announced that it would voluntarily reduce its emissions intensity between 20 and 25% below the 2005 levels by the year 2020.[11] The statement made by the Minister in the Parliament and the subsequent change in the policy indicates a shift in India's foreign policy in relation to the climate change. Earlier the consensus amongst the Indian policy makers was that 'India does not have the responsibility because we did not pollute in the past'. Traditionally, such a stand was considered to be in tune with India's national interest. After more than two decades of economic liberalisation, the same policy makers have started thinking that India's national interest demands more commitment. A commitment that is more constructive and proactive. A commitment that is *per capita plus*. In this context, the important question is as to what extend the commitment to be 'aggressive on domestic obligation' made to the lower house of the Parliament is reflected in India's various policies regarding the protection of the environment.

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[11] UNFCCC (2010): "Letter including India's Domestic Mitigation Actions", available at: http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/indiacphaccord_app2.pdf (accessed on 12/11/2011).

During the past more than two decades, India has made impressive drive towards constructing and adopting various Policy Statements, both foreign and domestic, pertaining to the various aspects of environmental protection including climate change.[12] Efforts were also made for changing and modifying these Policies according to the circumstances. Attempts were also made to carry forward these policies, externally in its relations with other states through various diplomatic efforts[13] and internally through the enactment of various statutes,[14] framing various rules and regulations and

12 See, Chapter 4 for a detailed analysis of these Policy Statements.

13 See, Chapter 2 and 3 for a detailed analysis on this point.

14 In India, Article 53 of the Constitution of India vests the executive power in the President of India, though article 74(1) requires the President to act in accordance with the advice of Council of Ministers. Further the legislative power is contained in the Schedule 7, which includes three lists (List I-Union List; List II-State List and List III-Concurrent List), each of which set out the matters in respect of which relevant federal and state legislatures can make laws. Article 73 and 246(1) read in conjunction with the relevant items on the Union List, give the executive all the powers to negotiate, enter into and ratify treaties. Article 53 requires that the entry into and implementation of treaties and other international obligations with other countries be carried out in the name of the President. It is important that in India, states do not enjoy the power to enter into treaties in India. It is the exclusive power of the federal government. It is also important to note that the Parliament has, by virtue of articles 245 and 246 read in conjunction with Entry 97 of List-I, residual power to make laws with respect to any matter not mentioned in List-II and List-III. Further, article 253 of the Constitution provides that the Parliament has the power, "to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made by any international conference, association or other body." It is also important to note that the negotiation and entering into treaties and other international agreements are not listed in either the state or concurrent lists. In most cases, ratification is sufficient to make the terms of the treaty a part of India's domestic law. However, legislative implementation of these treaties is required where the terms would affect the rights of individuals, result in public expenditure or result in changes to existing domestic law. [See Seervai, H.M. (1983): *Constitutional Law of India: A Critical Commentary*, Bombay: N.M. Tripathi Private Ltd.]. However, the fundamental question was relating to importance of domestic law in relation with international law. The Indian Judiciary in this regard, in *Birma* v. *State,* AIR 1951 Raj. 127, held that international law do not form part of the law of the land unless expressely made so by the legislature. [See also, Charles Henry Alexandrowicz, (1957): *Constitutional Developments in India*, London: Oxford University Press, at p. 217.]. Further in *Maganbhai Ishwarbhai Patel* v. *Union of India*, AIR 1969 SC 783,

also through judicial decisions. In this context, there are a few questions that are required to be answered. They include the following;

(a) Are these policies and the outcome of the efforts of their implementation fair? How do they attempt to *social engineer* the conflicting interests of various sub-national groups and take the *social minimum* to the needy?

(b) Are these policies and the implementation schemes have achieved its desired objectives? If no, what were the reasons for such a failure?

This Chapter is an effort to answer these questions. While doing the analysis, the emphasis will be on the Indian forest laws and pollution laws.

Justice Hidayatullah held that "…the position maybe summed up thus: there is a distinction between (1) the formation, and (2) the performance of the obligation. The first is an executive act, the second a legal act if a law is required. The performance then has no force apart from a law that is to say unless the Parliament assents to it and the Parliament then accords its approval to the first executive act. The treaties created by executive action bind the contracting parties, and therefore, means must be found for their implementation within the law." In *P.B. Sawant* v. *Union of India*, AIR 1994 Bom. 323, the court again addressed the nuances regarding treaty-making power in India while it held that entering into treaties was a policy decision which the courts should not interfere under article 226. *Birendra Bahadur Pandey* v. *Gramophone Co. Of India Ltd*, AIR 1984 Cal 69, the court held that in India "…the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings, which can be properly ascribed, is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning, which is consonant, is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had in municipal law."

5.1 Why Environmental Protection and Climate Change Mitigation is Important for India?

As has already been discussed in the previous chapters, the term climate change refers to the long-term changes in the temperature, humidity, clouds and rainfall and not the day-to-day variations. [15] Regional climate change is caused by both local and global factors.[16] Such a difference is extremely important because if a regional climate change occurs on account of local factors, then these changes can be mitigated by the local action. For example, if Kerala is getting warmer because of the failure of the proper implementation of the local emission laws, then mitigation efforts cannot do without successfully implementing the laws with or without changes. At the same time, if the entire country is getting warmer because of the increased pollution in India, then the corresponding changes have to be made in the environmental laws of the entire country. At the same time, if the reasons for climate change were global *i.e.* the aggregate emission from the other countries (known as *ecological shadow*[17]), then the idea of bringing emission

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15 IPCC (2007): *Climate Change: Scientific Basis*, Cambridge: Cambridge University Press.

16 Srinivasan, J (2012): "Impacts of Climate Change in India", in Navroz K. Dubash (ed.) *Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at p. 29.

17 The term *ecological shadow* came into prominent usage when it was for the first time used in Jim Macneil, Peter Winsemius, and Taizo Yadushiji, (1991): *Beyond Interdependence; The Meshing of the World's Economy and the Earth's Ecology,* Oxford: Oxford University Press. The book was concerned with the interconnections across boundaries and suggested that industrialised countries "draw upon the ecological capital of all other nations to provide food for their populations, energy and materials for their economies and even land, air and water to assimilate their waste by-products. This ecological capital, which may be found thousands of miles from their regions in which it is used, forms the shadow ecology of an economy…In essence, the ecological shadow of a country is the environmental resources it draws from other countries and the global commons." If the state that draws resources from elsewhere does not in some way ensure the sustainability of the resource base that it draws upon, then extraction of resources causes a shadow to fall over the ecology of another state. In Jennifer Clapp

reduction through a global consensus would gain importance. It has already been stated that India is the leader and voice of developing countries, when it comes multilateral action in climate change. The Country has been successful, through such proactive steps in preventing the extremely unfair standards from finding a place in the rulebooks. However, India has not shown the same level of caution in laying down the rules internally and implementing them effectively.

The important question is as to why India should be more concerned about the issue of climate change in comparison to other Countries? The answer lies in the fact that India is the second most populous country in the world and majority of its population lives far below or somewhere near the poverty line. This population is also unique in the world due to its extreme variations in accessibility to the resources. As has already stated, regional climate is influenced not only by the global increase in emission, but also by the regional change in the use of land and other natural resources.[18] Such changes increase the *all India mean surface temperature* which was the highest in 2010[19] and it has increased by 0.51°C in the past 106 years.[20] It is also projected that the maximum temperature might increase by 2 - 4°C by

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and Peter Dauvergne (2005): *Paths to Green World: The Political Economy of the Global Environment,* Cambridge: MIT Press, it is elaborated by saying that the ecological shadow is more than merely the aggregate of trees, soil, minerals and air or an area that is destroyed; it should also include the price paid for this destruction and the related impacts on resources management. See, Simon Dalby, (2002): *Environmental Security*, Minneapolis: University of Minnesota Press.

18 Marshal, C.H. and Pielke R.A. *et al* (2004): "The Impact of Anthropogenic Land-Cover Change on Warm Season Sensible Weather and Sea-Breeze Convection Over the Florida Peninsula", *Monthly Weather Review*, 132:28, at p. 32.

19 Indian Meteorological Department (2010): *Annual Climate Summary*, Pune: National Climate Centre.

20 Rupa Kumar, Krishna Kumar *et al.* (2002): "Climate Change in India: Observations and Model Projections", in *Climate Change in India: Issues, Concerns and Opportunities,* P.R. Shukla *et. al* New Delhi: Tata McGraw-Hill Publishing Co.Ltd.

2050s.[21] This is of particular importance considering the fact that, even relatively small climatic changes can have a huge impact on the water resources, particularly in arid and semi-arid regions such as the northwest India.[22] There were also fluctuations in the increase in the annual mean temperature in various states and regions.

The increase in emission has reflected in the fluctuation of rainfall also. An increase in the rainfall has been observed along the west coast, northern Andhra Pradesh and northwest India at 10 to 12 percent over the last 100 years. At the same time a decrease has been observed over the east Madhya Pradesh, northeast India and some parts of Gujarat and Kerala at 6 to 8 percent.[23] Such fluctuations in the temperature or rainfall will seriously affect in a harmful manner certain classes of people like the Indian farmers who are highly dependent on agriculture and Indian women, particularly rural women, who are living below or near the poverty line.

There is a lot of concern about the impact of global warming on glaciers. In most parts of the world, glaciers are retreating. During the past 50 years, many glaciers have retreated at an average of 10 metres per year[24] due to the anthropogenic reasons.[25]This is much faster than the gradual retreat of glaciers due to natural causes. This also will have an impact on the availability of fresh water since glaciers form the main source of water for

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21 Government of India (2004): "Initial National Communication to the UNFCCC", available at: http://unfccc.int/resource/docs/natc/indnc1.pdf (accessed on 03/02/2010).

22 Government of India (2009):"'State of Environment Report", available at http://moef.gov.in/soer/2009/SoE%20Report_2009.pdf (accessed on 03/02/2010).

23 Government of India (2008): "National Action Plan on Climate Change (NAPCC)", available at http://pmindia.nic.in/Pg01-52.pdf (accessed on 03/02/2010).

24 Kulkarni, A.V. and Bahuguna, I.M., *et al* (2007): "Glacial Retreat in Himalaya using Indian Remote Sensing Satellite Data", *Current Science*, 92: 69.

25 *Supra* 15 at p. 33.

the key perennial rivers such as the *Indus*, *Ganga* and *Brahmaputra*. Almost 67 percent of the glaciers in the Himalayan mountain ranges have retreated in the past decade and will continue to retreat, diminishing the flow of the aforementioned rivers and leading to severe water shortage as well as potential food insecurity and diminished energy security including the hydropower generation.[26]

Similarly the rise in the sea level is another serious concern pertaining to the global warming. An increase in sea surface temperature will lead to an expansion of seawater and hence an increase in the sea level. In addition, ice melting from glaciers also has led to further increase in the sea level. During the past 100 years, the global sea level has increased by around 170 millimetres.[27] Such an increase in the sea level is a major concern because a large fraction of India's population resides within 50 kilometres of the seacoast.[28] It is also predicted that an increase in the global mean temperature by 1 degree celsius will raise the sea level by 25 metres. In India, West Bengal and Gujarat are the most vulnerable states to sea level rise. An increase of one metre sea level will submerge, almost 6000 square kilometres of land in India.[29] The observed rate of sea level rise along the Indian coast has been estimated between 1.06 and 1.75 millimetres per year. The highest recorded rise has been along the coast of West Bengal. A sea level rise of 0.4 to 2.0 millimetres has been recorded along the Gulf of Kutch. Along the Karnataka coast there has been a relative decrease in sea

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26 Institute for Defence Studies and Analyses, (2009): *Security Implications of Climate Change for India*, New Delhi: IDSA.

27 *Supra* 21.

28 McGranahan, Balk and Anderosn (2007): "The Rising Tide: Assessing The Risk of Climate Change and Human Settlements in Low Elevation Coastal Zones", *Environment and Urbanization,* 19:17.

29 *Supra* 23 at p. 34.

level.[30] Rising sea levels will lead to salt intrusion into the coastal fresh water sources and thus, threaten water availability.[31]

These facts and figures have created lots of fear in the minds of people in India. An examination of these concerns are important in the light of the research and study revealing that more than 80 percent of Indians regard climate change as posing a serious threat to themselves and their families and that more than 40 percent, infact wish to see their government consider climate change at an even higher priority than it does.[32] However, when one speaks about the background of climate change policy and strategies of India, it is imperative to know as to what is the *per capita* GHG emission of India in comparison with the other major countries. The following table compares India's *per capita* GHG Emissions with a few major industrialized countries.[33]

Table 7: India's per capita GHG emissions in comparison with other countries

Country	Per-capita GHG emission (In Metric Tones)
USA	20.01
EU	9.40
Japan	9.87
China	3.60
Russia	11.71
India	1.02
World Average	**4.25**

30 *Supra* 23.
31 *Supra* 19.
32 David Michel and Amit Pandya (eds), (2009): *Indian Climate Policy*, Washington DC: The Henry L. Stimson Center.
33 Government of India (2008): "National Action Plan on Climate Change (NAPCC)", available at http://pmindia.nic.in/Pg01-52.pdf (accessed on 12/03/2010).

The above table reveals that despite the fact that India is a fast growing economy in the world, it is still causing less than a fourth of the world average of GHG emission, when quantified on *per capita* basis, which is much below the *per capita* level of emission in the developed nations.[34] Despite these figures, 'there is no country more vulnerable to climate change than India, on so many fonts'. There are mainly four points of vulnerability that are particularly worth mentioning here. [35] They are the following.

(a) The first major point of vulnerability arises from India's heavy dependence on the monsoons. India's economic and agricultural systems are closely tied to it. Two out of three people in India are either directly or indirectly depend on agriculture for employment. An indifferent monsoon brings down India's economic performance, but more importantly affects the low-income groups the most. An analysis of data over the last 50 years shows that nearly half of our fluctuations in GDP are related to the variations in the monsoon. It may be said that, what happens to the monsoon is the single largest determinant of prosperity in India.[36]

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34 Therefore, it is argued that "India's position, …stands vindicated as it is not committed to any legal obligation but, volunteers to reciprocate as a responsible nation and member of all international conventions adopted to cop up with the situations."; See, Ali Mehdi, (2010): "Climate Change and Biodiversity: India's Perspective and Legal Framework' *Journal of the Indian Law Institute* (Special Issue on Climate Change and Environmental Law) 52:343 at p. 356. The per capita emission for India would still be 2.56 tons-CO2 equivalent in 2030, which would be significantly below the global average. See also, Vijay Gupta (2011): "A Critical Assessment of Climate Change Impacts, Vulnerability and Policy in India", *Present Environment and sustainable Development,* 5:15.

35 Ramesh, Jairam (2012): "Forword", in Navroz K. Dubash (ed.) *Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at p.xx.

36 *Ibid*.

(b) The second point of vulnerability is India's coastline. It is one of the longest in the world and more than 250 million people live there. A large proportion of them are dependent on climate sensitive livelihoods such as agriculture or fishing. Hence a sea level rise of even one meter would have serious implications on people living in the cost.

(c) The third vulnerability comes from the threat of Himalayan Glaciers. While glacial movement is a highly complex phenomenon, it is unequivocal that in general, the health of our glacier is threatened. Melting glaciers will have a direct impact on water availability to hundreds of millions people across the *gangetic* belt, disrupting crop production and affecting rainfall patterns.

(d) The fourth major point of India's vulnerability is India's dependence on extraction of the natural resources. Most of India's core mining areas are in the heart of densest forests. This simply means that the more mining, the more forests are destroyed and more additions are made to GHG emissions.

As noted above, the majority of the Indian population lives below the poverty line[37] and they are the most vulnerable to issues of climate change. They will be severely affected by the adverse impacts of climate change such as droughts, floods, and risks to human health, food security, lives or livelihood in the economy. Another sub-national group that will suffer due to the climate change is the farming community. It is predicted that, the climate change can cause a loss of 10% to 40% crop production by 2100 and reduce farm income between 4% and 26% in India with a decline in forest

37 *Supra* n. 33.

productivity.[38] It also will have serious impact on the cost of energy, which will in turn affect the agriculture and industrial sector. It may also be noted that in recent years, India's primary energy consumption has been increasing due to population growth.[39] Extreme weather events would also create health problems. Serious contamination of freshwater supplies with human waste and bacteria would be one of such reasons.[40] Glacial retreat, decreased rainfall and increased flooding in certain areas will threaten the water availability, access and quality. The per capita availability of freshwater in India is expected to drop from around 1,820 cubic metres currently to below 1,000 cubic metres by 2025 as a result of the combined effects of population growth and climate change.[41]

5.2 Environmental Protection and GHG Emission Reduction: Effectiveness of the Legal Mechanisms in India

India's environmental statutes mainly employ the system of licensing and criminal sanctions to preserve the natural resources and regulate their use.[42] Civil compensation is only recovered in suits filed by private

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38 *Ibid.*

39 The Energy-GDP elasticity during 1953–2001 has been above unity. The total installed power capacity in the country as on March, 2008 is 1,43,061 MW, 64.2% of which is thermal, 25.1% hydro, 7.8% renewable, and around 4% nuclear energy. India plans to enhance energy capacity by 78,520 MW by 2012-13, to electrify the rest of 20% of villages, to meet the additional demand. See, Vijay Gupta (2011): "A Critical Assessment of Climate Change Impacts, Vulnerability and Policy in India", *Present Environment and sustainable Development,* 5:15.

40 *Ibid*.

41 Intergovernmental Panel on Climate Change (2008): "Climate Change and Water", IPCC Technical Paper VI, Available at http://www.ipcc.ch/pdf/technical-papers/climate-change-water-en.pdf (accessed 08/07/2012). See also, Dennis Taenzler, Lukas Ruettinger,*et al* (2011): "Water, Crisis and Climate Change in India: A Policy Brief", *Adelphi,* available at: http://www.adelphi.de/files/uploads/andere/pdf/ application/pdf/2011_water_crisis_and_climate_change_in_ india_a_policy_brief.pdf (accessed on 08/07/2012).

42 Shyam Divan and Armin Roasencranz (2008): *Environmental Law and Policy in India*, New Delhi: Oxford University Press, at p. 40.

individuals and this remedy is negligible when compared to the other remedies.[43] Under the various statutes enacted for the protection of environment, the authorities are empowered to even shut down polluting industries and stop the supply of water and power.[44] At least in theory, this enforcement method assures quick results because it combines the judicial and administrative powers in a single authority that can take quick decisions. However in practice the case is different. As opined by Shyam Divan, the performance of most of these authorities, such as pollution control boards, forest authorities or town planning authorities has been disappointing because they are not very proactive in most cases unless there is a judicial supervision.

The legislatures and executive measures in India are adopted in accordance with the constitutional policy and also in pursuance of various declarations, conventions, and instruments adopted by India. India has been proactive in the formulation of policy into binding rules[45] of conduct as well the constitution of various authorities to execute and achieve the goal of reduction of GHG emission. A survey of environmental legislation in India reflects our concerns to the environment. The following section outlines the various legislations, which are presently relevant in this regard.

5.2.1 Legislative Powers under the Indian Constitution and Environmental Protection

The Constituent Assembly that drafted the Constitution of India did not discuss specifically about environmental matters and its inclusion in the

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43 *Ibid.*

44 See, the Environment (Protection) Act, 1986, Chapter III.

45 See, Bimal N. Patel, (2008): *India and International Law (Vol: 2)*, Netherlands: Martinus Nijhoff Publishers, at p. 21.

Constitution.[46] It was the Government of India Act, 1935 that had infact discussed about the environmental matters, particularly with reference to the distribution of environmental subjects into three lists.[47] However, the Forty Second Amendment to the Constitution of the year 1976, which was in fact incorporated as a result of the Stockholm Declaration, introduced certain provisions with the aim of protecting the environment. Nevertheless, such provisions are unique features of Indian Constitution, when compared to other world constitutions. The Directive Principles of State Policy in Article 48A[48] and the Fundamental Duties under Chapter in Article 51-A (g)[49] expressly require the state and its citizens to act for the protection of environment.[50] However, the fact that the Directive Principle State Policy (DPSP)[51] and Fundamental Duties Chapter are non enforceable in a court of

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46 *Supra* n. 40 at p. 43.

47 H. M Seervai, (1991): *Constitutional Law of India: A Critical Commentary* (Vol.1), New Delhi: Universal Law Publishing Company, at pp. 164-71. See also, B. Shiva Rao (1968): *The Framing of India's Constitution: Select Documents*, New Delhi: Indian Institute of Public Administration at p.315.

48 Article 48 A says thus: "Protection and Improvement of environment and safeguarding of forests and wild life: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

49 Article 51 A (g) says thus: "It shall be the duty of every Citizen in India, to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures."

50 The wordings of Article 48-A were subject to much debate in the Indian Parliament. One Amendment that was proposed, required the state to 'conserve and develop water, soil and other natural resources' to be included in Article 48-A. Another demand was that this Article should also ensure that any effort by the State to protect and improve the environment would not harm the tribal forest dwellers. (See, the *Lok Sabha* Debates, Eighteenth Session, Fifth Series, Vol.LXV,No.5, October 29,1976, Columns 94-116.). In the *Rajya Sabha* also there were similar demands. Some of members of the *Rajya Sabha* wanted Article 48-A to specifically include 'Mineral wealth' and a specific requirement on the Government to 'undertake adequate and effective measures to check environmental pollution' (See, Parliamentary Debate: *Rajya Sabha*: Official Report, Vol.XCVIII, No.5, November 9, 1976, Columns 158-171).

51 The Directive Principles of State Policy (also known as DPSP) are given in Part IV of the Indian Constitution. The DPSP are those principles that could not be guaranteed by the State because of many reasons including economical reasons. However, they are

law under Article 32 or 226, remains as an obstacle for the effective enforcement of these provisions. But, at the same time the Indian judiciary has increasingly interpreted the Article 21[52] of the Constitution to mean that 'Right to Life' includes various aspects of the concept of clean environment. Regarding the importance of the DPSP the Supreme Court of India in *Sachidananda Pandey's* case[53] held thus:[54]

> Whenever a problem of ecology is brought before the Court, the Court is to bear in mind, Article 48-A of the Constitution of India….and Article 51 A(g) …When the Court is called upon to give effect to the Directive Principle and the Fundamental Duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the Policy-Making authority. The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevances excluded. In appropriate cases the court may go further, but how much further will depend on the circumstances of the case.

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intended to be achieved by the State in the later years when the States economic power improves. Though the DPSP are not directly enforceable in the Court of law, the judiciary enforces them indirectly, by using them as tools of interpretation for the Fundamental Rights under part III of the Indian Constitution. For example, see, *Virender Gaur* v. *State of Haryana*, 1995 (2) SCC 571; *Indian Council for Environ Legal Action* v. *Union of India*, AIR 1996 SC 1446; *M.C. Mehta* v. *State of Uttar Pradesh*, AIR 1988 SC 2187; *Kinkeri Devi* v. *State of Himachal Pradesh*, AIR 1988 HP 4 *etc.*

52 Article 21 says; "No person shall be deprived of his life or personal liberty except according to the procedure established by Law."

53 *Sachidanda Pandey* v. *State of West Bengal*, AIR 1987 SC 1109. On this point see also, *T. Damodar Rao* v. *The Special Officer, Municipal Council of Hyderabad*, AIR 1987 AP 171 at 181.

54 *Id*. at p1114-15.

Under India's unique federal form of the government, the legislative power is shared between the Central Government (the Parliament) and the State Governments (State Legislatures) according to Part XI of the Indian Constitution. While the Parliament makes law for the entire country, the state makes laws for that particular state. Article 246 of the Indian Constitution bifurcate the subject areas of legislation between the Parliament and the state legislatures. Similarly the Seventh Schedule of the Constitution provides for three lists. The List I (also known as Union list) identifies areas, where the Parliament only can make laws, where as List II (also known as State List) contains areas, where the states can make laws. While List I includes areas such as foreign affairs, atomic Energy, interstate transportation, shipping, major ports, regulation of air-traffic, regulation and development of oilfields, mines and mineral development and interstate rivers; the List II includes subject areas such as public health and sanitation, agriculture, water supplies, irrigation and drainage and fisheries. List III also known as Concurrent List contains 52 areas where both Parliament and State Legislatures can enact laws. This includes forests, the protection of wildlife, mines and mineral development not covered in the Union list, Population Control and Family Planning, Minor Ports and Factories. The parliament may, in addition to those subject areas detailed in List I may also legislate in the following circumstances;

(a) The Parliament has the residual power under the Indian Constitution, to legislate on subjects not covered by any of these three lists.[55]

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55 Constitution of India, Article 248.

(b) The Parliament may also legislate on any matters that are important from the perspective of 'national interest' on any matters that are enumerated in the state list.[56]

(c) It may also enact laws on the state subjects, for states whose legislatures have consented to central legislations. One example for such a central legislation is the Water (Prevention and Control of Pollution) Act, 1974, when twelve states gave their consent for such legislation.

The Forty Second Amendment to the Indian Constitution in the year 1976, also made new entries like 'Population Control and family Planning' in the Concurrent List, while 'Forests' and 'Protection of Wild Animals and Birds' were moved from the State List to the Concurrent List. Looking from the environmental perspective, this division of legislative power is important. It is because some environmental problems such as sanitation and waste disposal can be effectively tackled at the local level rather than at the central level, whereas few other issues, such as the water pollution and the wildlife protection can be better managed by statutes enacted at the central level.[57]

Many changes followed the *'Stockholm Spirit of Compromise'*[58] across the globe. Many environmental statutes were enacted in various countries. It is observed that during 1971-75, thirty-one major national environmental laws were enacted in countries that are members of the Organization for Economic Cooperation and Development (also known as OECD) alone, when compared to just four during the period 1956-60, ten during

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56 *Id.* at Article 249.
57 *Supra* n. 40 at p.43.
58 UNEP, (2003): "Integrating Environment and Development: 1972-2002", available at http://www.unep.org/geo/geo3/pdfs/Chapter1.pdf (accessed on 25/06/2011).

the years 1960-65 and eighteen from the year 1966 to the year 1970.[59] This trend was followed in India also. The Government with the help of Article 253[60] of the Indian Constitution read with Entry 13[61] of the Union List /List I have legislated many statutes for the protection of environment. Article 253 empowers the Central Government to enact laws on virtually anything, including areas that are listed in the State List, if it is for implementing an international obligation. Using these powers the Parliament enacted the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986. The Preamble to both these Statutes says that they were enacted to implement the decisions reached at the United Nations Conference on Human Environment, 1972, the Stockholm Conference.

5.2.2 India's Federalism and Environmental Protection

The above-analysed federalist structure of law making in India also has created many tensions, particularly the ones related to the regional development and the preservation of natural resources.[62] For example the tensions were evident in regulating the coastal development and the commercial exploitation of mineral resources. Another example for such a tension is in the case of town planning, building regulations and local

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59 Long, B.L. (2000): *International Environmental Issues and the OECD 1950-2000: A Historical Perspective,* Paris: Organization for Economic Cooperation and Development.

60 The Constitution of India, Article 253 reads thus: "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has Power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or Convention with any other country or countries or any decision made at the International Conference."

61 *Ibid*. Entry 13 of the List I includes to the prerogative of the Union Government to "participation in International Conferences, Associations and Other Bodies and implementing of Decisions made thereat."

62 *Supra* n. 40 at p. 47.

zoning.[63] As a result, the laws pertaining to these subjects are found in the law books of various states. But there were many problems with these State Laws. Some of them were extremely ambiguous while others were rarely enforced. To cure such defects with regard to regulating the construction in coastal zones, the Central Government imposed the Coastal Zone Regulations in 1991which was amended in 2000.[64] This was subsequently replaced by the Coastal Regulation Zone (CRZ) Notification, 2011. The CRZ regulation restricts construction in a 500 metre wide strip along the Indian coast, which provoked many coastal states. These states were disturbed by the sweeping nature of power as assumed by the Central Government with the help of Article 253 read with Item 13 in List 1, particularly on a subject in which they are entitled to make laws according to the constitutional scheme. However in *S. Jagannath* v. *Union of India*[65], the Supreme Court of India ratified the power of the Central Government to make such laws since it was construed as another international obligation on India as a result of the *Stockholm Declaration.* It may also be noted that the Court went to extent of saying that CRZ Regulations 'shall have an overriding effect and shall prevail over the law made by legislatures of the States.'[66] Despite such efforts, the fact that there is no single entry in List I of Schedule XII pertaining to environment makes the task of law making difficult. Currently, most of the subjects are included in the state list, which is one of the fundamental reasons for disparity in the effectiveness of laws made in India.

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63 The Constitution of India. Item 5 and 18 of List II.

64 Ministry of Environment and Forests, (2011): "Coastal Regulation Zone Notification-2011", available at http://moef.nic.in/downloads/public-information/CRZ-Notification-2011.pdf (accessed on 04/02/2012).

65 AIR 1997 SC 811.It is commonly referred to as the *Shrimp Culture* case.

66 *Id*. at 846.

The following section enumerates certain legislations made by the Parliament with the aim of protecting the environment.

5.2.3 Public Nuisance and Civil Remedies and *Social Minimum*

The common law concept of nuisance is one of the most traditional remedies available against the environmental protection. This also has been recognized by some of the environmental statutes in India, which gives it the colour of a statutory remedy as well. For example, the definition of pollution under the water (Prevention and Control) Act, 1974 says that contamination of water can be said to be pollution, when it may or is likely to create a nuisance.[67] In India, the law of easements ensures the owner of a land, beneficial enjoyment thereof free from air, water or noise pollution.[68] This enables an aggrieved person to challenge any act of pollution[69] and to move to the Court under the provisions of the Code of Civil Procedure, 1908 (CPC)[70] and also under section 133 of the Code of Criminal Procedure, 1973.

Under section 9 of CPC, whenever there is a nuisance created through pollution, the court can order relief in the form of damages, injunction, interim orders, declaration and decree. When the harm affects many people, this attains the character of a public nuisance. In such cases,

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67 Nuisance may be divided into two types *viz*., Public Nuisance and Private Nuisance. While private nuisance is interference with use of land; public nuisance means an interference with a right common to the general public. Though both these types are important for environmental management, the law of public nuisance has a predominant connection with the environmental law.

68 The Indian Easement Act, 1882. Section 7, Illustrations (b)to (f) and (h).

69 See, cases like *Guhiram* v. *Uday Chandra*, AIR 1963 Pat 455; *Kailash Chand* v. *Gudi*, 1990 HP 17 *etc*.

70 Code of Civil Procedure, Section 9. This section empowers the court to try all suits of a civil nature and reads thus: "The Court shall…have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred."

the Advocate General or any one with the leave of the court[71] or two or more persons can institute a suit irrespective of whether the special damage is caused to such people. In such cases, the remedy may be either a declaration or injunction or any other relief as may be appropriate in the circumstances of the case.[72] In *Perumal Naicker* v. *Rathina Naicker*,[73] the Court held that the provision deals with public nuisance is a combination of both civil and criminal remedy, which makes both the civil action and the criminal action possible in such cases. Though the law of nuisance is a 'reservoir for class action' it is not widely used in India. It is necessary to develop this remedy as a potent weapon against ecological maladies that may spring up in the form of public nuisance.[74] The lack of awareness and the lack of environmental consciences make these provisions a failure, which shows that there are no proactive steps from the government of India in ensuring the protection of environment in this regard.

In the series of *Bhopal Gas Tragedy* cases,[75] another strategy was used to overcome the problems in the Class Actions. The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, was adopted by the Parliament conferring on the Central Government, the exclusive right to represent the claims of the victims in cases involving issues of *parens patriae*. The main purpose was to secure the claims of the victims that are dealt 'speedily, effectively, equitably' and not to the best advantage of the claimants.

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71 Code of Civil Procedure, 1908, Section 91.

72 P. Leelakrishan (2010): *Environmental Law in India*, New Delhi: LexisNexis Butterworths Wadhwa, at p. 16.

73 AIR 2004 Mad 492.

74 *Supra* n. 70.

75 *Union of India* v. *Union Carbide Corporation* (1986) 2 Com LJ 169; *Union Carbide Corporation* v. *Union of India*, AIR 1990 SC 271; *Charan Lal Sahu* v. *Union of India*, AIR 1990 SC 1480.

However, in this case, which was the worst industrial disaster of its kind in the human history, the Government of India, severely failed in not only preventing the accident but also in doing justice to the victims. It is a clear case of the failure of the working of the Environment Impact Assessment in India. The facts show that when a license was applied for the starting the operations of the carbide plants, many factors were overlooked or ignored. There were many houses in the locality, the Bhopal railway station and a busy market situated a couple of kilometers from the proposed site. None of these factors were taken into consideration when the license was issued.[76] The licensing authorities were not interested in the future effects and the availability of safety mechanisms in the site. It was also alleged that the approval was given to a plant, whose design was defective from the standpoint of safety and that a project of identical design had reportedly been rejected by Canada.[77] Moreover, many accidents were frequently reported, but no action was taken. There was no transparency in the operation of the plant and everything was masked in secrecy.[78] It is reported that even the doctors in the carbide factory hospital did know the antidote to the *Methyl Isocynate* that caused the accident.[79]

The Bhopal disaster discloses the malady of a legal system that failed to stress on the mandatory need for an open, fair and effective Environment Impact Assessment (EIA). This incident is an indication of the failures of our legal and governance system. A system that is corrupt, unscientific and ineffective. The lesson unlearned from the Bhopal disaster is particularly

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76 Vijay Shankar Varma, (1986): "Bhopal: The Unfolding of a Tragedy", *Alternative*s XI:133 at p. 140.
77 *Supra* n. 70 at p. 321.
78 *Ibid*.
79 *Ibid.*

alarming, considering the fact that India is planning and opening up nuclear power plants in various parts of the country.[80]

The Indian Penal Code, 1860 also makes the public nuisance an offence. Section 268 of the Indian Penal Code, 1860 states that "a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage." Similarly, any negligent act resulting in an infection that is dangerous to life[81] and the acts of food adulteration[82] are also offences coming under the purview of IPC. Also, contaminating the water of a public spring or reservoir to make it unfit for ordinary use[83] or poisoning the atmosphere to the detriment of persons living in the neighbourhood[84] are also punishable offences under the Indian Penal Code. Negligence in the use of poisonous substance, fire and combustible matter,

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80 Greepeace, (2012): "Next *Bhopal* will be Atomic Energy Dept's Fault", The Indian Express, (December 03 2012), available at http://www.indianexpress.com/news/next-bhopal-will-be-atomic-energy-depts-fault-greenpeace/1039764 (accessed on 03/10/2012).

81 The Indian Penal Code, 1860. Section 269 IPC says that "whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six month, or with fine, or with both."

82 *Id.* at Sections 272 to 276.

83 *Id.* at section 277.

84 *Id.* at Section 278.

explosive substances and machinery are also punishable offences, if it results in danger to the human life.[85]

Similarly the Code of Criminal Procedure, 1973, also contains provisions that can be used for environment protection. Under section 133 of the Cr.PC[86] an executive magistrate can interfere and remove a public

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85 Id. at Sections 184-287.

86 Code of Criminal Procedure, 1973, Section 133 says that "(1) whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers -- (a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel, which is or may be lawfully used by the public; or (b) that the conduct of any trade or occupation or the keeping of any goods or merchandise; is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such, goods or merchandise should be removed or the keeping thereof regulated; or (c) that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or (d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighborhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or (e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or (f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

Such magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within time to be fixed in the order-(i) to remove such obstruction or nuisance; or (ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or (iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or (iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or (v) to fence such tank, well or excavation; or (vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do, to appear before himself or some other Executive Magistrate Subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any civil court.

nuisance in the first instance with a conditional order and then with a permanent one. He can adopt immediate measures to prevent the danger or injury of a serious kind to the public. In *Deshi Sugar Mill* v. *Tupsi Kahar*[87], the Patna High Court categorically stated that under this provision the District Magistrate is empowered to take action. However, this right has been used by only in a few cases. In some of them, the respondents instead of removing the public nuisance went up to the Supreme Court of India spending many thousand of rupees. Thereafter in *Municipal Council, Ratlam* v. *Vardhichand*[88] the residents of *Ratlam Municipality* was suffering for a long time from pungent smell emanating from open drains. The odour caused by human excretion in slums and the liquids flowing on to the street from distilleries forced the people to approach the magistrate for a remedy. Following a direction from the magistrate to remove the drain, the Municipal Council, instead of complying with the order challenged it right up to the Supreme Court. The Supreme Court emphasised the responsibilities of local bodies towards the protection of environment and developed the law of public nuisance in the Cr.PC as a potent instrument for enforcement of their duties. According to the Court, the imperative tone of these provisions demands a mandatory duty also. The court held that when an executive magistrate passes an order under section 133 of the code of criminal procedure, the local administration cannot take the plea of financial inability in implementing such order. Justice Krishna Iyer held that the section 133 operates against the local administration regardless of cash in their funds,

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An *Explanation* to the section reads thus: "public place" includes also property belonging to the state, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

87 AIR 1926 Pat. 506.

88 AIR 1980 SC 1622.

because human rights have to be respected by the state irrespective of budgetary provisions. He observed:[89]

> Decency and dignity are non-negotiable facets of human rights and are first charge on the local self-governing bodies. Similarly, providing drainage not pompous and attractive, but in working condition and sufficient to meet the needs of the people-cannot be evaded if the municipality is to justify its existence.

The verdict in *Ratlam* is a significant milestone in the path of environmental protection. However, the doubt remains is that how many local bodies will actually have the financial ability to go for such an infrastructure project. This might make similar orders from the court unenforceable. Another issue is pertaining to the interest or awareness of executive magistrates in effectively using this provision. [90]

5.2.4 Protection of Forests and its Habitat in India: A Critical Analysis from a Fairness Perspective

Forests help in maintaining the ecological balance. They render the climate equitable, add to the fertility of the soil, prevent soil erosion and promote the perennial stream flow in the rain fed rivers. [91] They also shelter wild animals, preserve the gene pool and also protect the tribal population. Forests also bring revenue to the state, supply raw material to the industries,

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89 *Id*. at. 1629.

90 See also, *State of Madhya Pradesh* v. *Kedia Leather and Liqour Ltd,* (2003) 7 SCC 389; *Krishna Gopal* v. *State of Madhya Pradesh*, (1986) Cr LJ 396; *Himmath Singh* v. *Bhagwana,* (1988) Cr LJ 614; *Jayakrishna Panigarhi* v. *Hrishikesh Panda*, (1992) Cr.LJ 1054 *etc*.

91 VP Agarwala,(1985): *Forests in India: Environmental and Production Frontiers,* New Delhi: Oxford & IBH Publishing, at p 3; AK Singh, (1987): *Forest Resources. Economy and Environment*, New Delhi: Concept Publishing Company, at p.15.

and act as a source of fuel and fodder.[92] It is the same reason due to which forest management always gives rise to conflicts. An example of such a conflict is the developmental activities like the construction of dam in a forest area that raises questions as to the violation of forest laws. The following is an enumeration of various laws pertaining to forest in India.

The Forest Act, 1927[93] is a comprehensive legislation relating to the forest management that consolidated all the pre-existing laws. This Act, a product of British colonial days reflects the exploitative intentions of the colonial and the feudal society of the time, rather than the environmental and ecological interests. Based on a revenue-oriented policy, its main object is to regulate the dealings in forest produce and augment the public exchequer by levy of duties on timber.[94] This Act contains provisions pertaining to the reserve forests, whereby the state government could constitute any forestland or wasteland as a reserve forest by notification. Thereafter, the government would be entitled to any product of such forests. Activities in the reserve forest are regulated. Rights over land and rights to forest produce and watercourse can be exercised only subject to regulation. Any clearing or felling of trees, trespass *etc* are strictly prohibited. The second kind of forest described under the Act is the protected forest. It is observed that, through the division of forests into reserve forest and protected forest and the processes of governmental control over the natural resources give an impression that the Act is environment oriented. However the impact of the

92 *Supra* n. 70 at p. 39.

93 The first Indian Forest Act was enacted in the year 1865 through which the state declared that the forests belong to the state and state can commercially exploit it to any extent. Later on the Forest Act, 1878 was enacted. The Forest Act, 1927 repealed both these laws.

94 *Supra* n. 89 at p. 40.

Forest Act was so devastating that it shook the foundation of the ecological system.[95] Such a process of reservation also deprived the tribal population of their traditional rights and privileges. As some authors said the "tribal looked upon forest, the nature's gift, as their own property and they had unfettered freedom to do so as they pleased. But the situation continued to change after the enactment of Indian Forest Act. The tribal who is supposed to be the master of forest is now no more than a wage earner."[96] Reservation of forests also led to their commercialisation with the intention to supply raw materials for industries.[97] By an inequitable privatisation of forest resources in favour of a small section of the society, the law infact, worked against the interests of the rural and tribal population whose very existence was, to a substantial extent, dependent upon those resources.[98] The Forest Act does not look at the forests from the ecological perspective. In this context it is commented that "the revenue oriented approach, not conducive to the efficient eco-management continued for a long time…the repercussions were rampant, illegal felling and encroachment."[99] However the Indian Judiciary is attempting to give a new phase to the Forest Act, 1927. In *State of Tripura* v. *Sudhir Kumar Ranjan Nath,*[100]the Supreme Court said that the Indian Forest Act is one that intends to preserve, protect and promote the forest wealth in the interest of the nation. This is entirely a new eco-friendly

95 *Id*. at p. 42.
96 VS Saxena, (1986): "Social Forestry in Tribal Development" in Deshbandhu and RK Garg, *Social Forestry and Tribal Development*, New Delhi: Indian Environment Society, at pp 38-9.
97 P.Leelakrishnan (1992): "Forest Conservation: Dawn of Awareness", in P Leelakrishnan, *Law of Environment*, New Delhi: Eastern Book Company, at pp 51-52.
98 Chhattrapathi Singh, (1986): *Common Property and Common Poverty: Indian Forest Dwellers and the Law*, New Delhi: Clarendon Press, at pp. 6-21.
99 *Supra* n. 92.
100 AIR 1997 SC 1168.

approach, which of course, is different from the purpose that it had when it was enacted.

The wide spread concern for large-scale deforestation resulting in the ecological imbalance and the environmental degradation made the policy makers to think over a new law. Forests have been identified as the richest source, amongst the natural resources, to be exploited for commercial gain as well as for the infrastructure development by the colonial rulers. Hence, the British, in order to monopolize the control over forest, introduced the first Forest Act, 1865, having the right of ownership on themselves. Such protectionist approach failed because the local people lost interest in taking care of the forests, as they were not the direct beneficiaries. Post–Colonial governments also continued this practice[101] until it was realized to have a law in the form of Forest (Conservation) Act, 1980 providing for the conservation of forests. The underlining object of the law was to impose restrictions on use of forestland for non-forest purpose and also to protect and conserve the green cover essential for the trapping of carbon-dioxide.

The Forest Conservation Act restricts the de-reservation of forest or use of forest or forestlands for non-forest purpose. It says that no state government can without the prior approval of the central government, make any order to (i) de-reserve forest; (ii) use any forest land for non-forest purpose; (iii) lease out forest land to a private agency (iv) cut naturally grown trees in forest land for the purpose of using it for reforestation.[102] The

101 National Forest Policy, 1952, which is the first Forest Policy of independent India.
102 The Forest Conservation Act, 1980, Sections 2 and 69.

phrase ‘non-forest purpose’ may also include clearing of forest for the cultivation of tea, coffee, spices rubber, palms *etc*.[103]

Similar to this another important milestone in the law regarding forest is the Supreme Court’s decision in *TN Godavarman Tirumilpad* v. *Union of India*[104]. The concept of sustainable development as defined by the international law was illustrated specifically with regard to the forests. The decision of the court may be summarised as follows;

(i) Forest includes the area noted in the government records as forest irrespective of ownership

(ii) Mining licence in such an area without the prior approval is the violation of the Forest Conservation Act, 1980. All ongoing activities under such invalid licence must cease. The State governments will have to take the necessary remedial measures.

(iii) Running sawmills of any kind is a non-forest activity. All timber mills within a distance of 100 kms from the border of the state of *Arunachal Pradesh* are to be wound up.

(iv) Responsibility is imposed on each state government to prepare a report on the number of sawmills; actual capacity of timber mills, proximity to the nearest forest and their sources of timber.

(v) Complete ban on felling of trees in the tropical wet evergreen forest in Arunachal Pradesh is essential due to their significance to maintain ecological balance and preservation of biodiversity.’ Felling of trees

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103 *Id*. at section 2, *Explanation.*
104 AIR 1997 SC 1228.

in the forests in other states, except in accordance with permission is suspended.

(vi) Movement of cut trees and timber is banned with the exception of certified timber required for defence purposes.

(vii) Each State Government should constitute an expert committee to identify the forest areas and to assess the sustainable capacity of the forest *qua* sawmills.

(viii) In the State of *Jammu and Kashmir,* no private agencies should deal in felled trees or in timber. No permission should be given for sawmills within a distance of eight kilometres from the boundary of demarcated forest area.

(ix) In *Tamil Nadu,* the tribals who are a part of the social forestry programme in respect of *patta* lands other than the forests may continue to grow and cut trees according to the government scheme and in accordance with the law applicable.

(x) Plantations are not allowed to expand further and encroach upon forests by way of clearing or otherwise.

When the case came up before the court, a high power committee was constituted to oversee the strict and faithful implementation of its orders. The *Godavarman's* case is important in many respects. Similar to section 49-B (3) of the Wild Life Protection Act, 1972, which restricts trade and commerce in wild animals, animal articles *etc.* only through a state corporation, *Godavarmans* case stipulates that sale of timber and felled trees shall also take place through state corporations, and not through private channels. In furtherance the court also appointed a Central Empowered Committee (CEC), which would function for five years, studying all the

problems relating to conversion of forest for non-forest purposes and report the same to the Court.[105]

Another major development is the enactment of the Biological Diversity Act, 2002. India is one of the few countries to have enacted such a legislation. The Union Ministry of Environment and Forest (MoEF), the nodal agency for implementing provisions of CBD, has developed a strategy for biodiversity conservation at macro-level in 1999 and has enacted the Biological Diversity Act in the year 2002. The Act provides for the conservation of biodiversity within species, between species, ecosystem and the traditional knowledge connected therewith. This Act primarily aims at giving effect to the provisions of Convention on Biodiversity, 1992, *i.e.* conservation of biological diversity, sustainable use of its components, fair and equitable sharing of the benefits arising out of utilization of genetic resources, and also regulates the access to biological resources and associated traditional knowledge. Under this law, three tier bodies are constituted for the effective enforcement of its provisions. Another very significant feature of the Act is that it lays down the duty [106]of the Central Government to develop the national strategies, plans, and programmes for the conservation, promotion and sustainable use of the biological diversity including the measures for identification and monitoring of areas rich in biological resources. It speaks of promotion of *in situ* and *ex situ* conservation of biological resources, incentive for research, training and

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105 *TN Godavarman Thirumulpad* v. *Union of India*, AIR 2000 SC 1636. For the influence of *Godavarman* on the various High Courts in India, see also; *Niyamavedi* v. *State of Kerala*, AIR 1993 Ker. 262; *Goa Foundation* v. *Conservator of Forests, Panaji*, AIR 1999 Bom 177; *Banswara Marble Mines* v. *Union of India,* AIR 1999 Raj 154; *Kamal Kishore* v. *State of Madhya Pradesh*, AIR 2006 MP 167.

106 The Biological Diversity Act, 2002, Section 36.

public education to increase awareness with respect to the biodiversity. Under section 37 of the Act, the state government may, in consultation with the local bodies, notify areas of biodiversity importance as *biodiversity heritage sites*. The Act also empowers the Central Government, in consultation with the concerned State Government to notify any species which is on the verge of extinction or is likely to become extinct in their near future, as a threatened species and prohibit or regulate the collection thereof, for any purpose and take appropriate steps to rehabilitate and preserve those species.[107] The Biodiversity Act has multifaceted scope and utility ranging from regulating the activities in biodiversity rich area to casting duties on the government to adopt measures to conserve the diversity in the living organisms.

Another important issue that is crucial from the fairness perspective is the rights of forest dwellers. According to the policy of the British, they had no right to access the resources of forests. When a developmental activity takes place, the location of development projects on or near forest area raises complex questions such as conflict between the short-term benefits and the long term tangible and intangible losses, the social impact, rehabilitation of the local population and re-forestation. In *Banwasi Seva Ashram* v. *State of Uttar Pradesh*[108] the court held that "indisputably, forests are a much wanted national assets. On account of the depletion thereof the ecology has been disturbed; climate has undergone major changes and rains have become scanty. These have long-term adverse effects on national economy as also on the living process. At the same time, we cannot lose sight of the fact that for industrial growth and also for the provision of

107 *Id.* at section 38.
108 AIR 1987 SC 374.

improved living facilities, there is a great demand in this country for energy such as electricity." The court further said that, the *oustees* of such developmental activities should be rehabilitated after examining their rights. When the matter came up again before the Court,[109] it was held that the state has the responsibility to find out alternative plots, render resettlement and subsistence allowance, give free transportation, reserve jobs and provide facilities of roads, water supply, health care and electricity.

However, in *Pradeep Krishen* v. *Union of India*,[110] the Supreme Court held that "if one of the reasons for the shrinkage is the entry of villagers and tribes living in and around the sanctuaries and the national parks, there can be no doubt that urgent steps must be taken to prevent any destruction or damage to the environment, the flora and fauna and wildlife in these areas."[111]The Court also ruled that "…while every attempt must be made to preserve the fragile ecology of the forest area and protect the Tiger Reserve, the right of the tribals formally living in the area to keep body and soul together must be given proper consideration. Undoubtedly, every effort should be made to ensure that the tribals, when resettled, are in a position to earn their livelihood." The same issue again came up before the Supreme Court in *Narmada Bachao Andolan* v. *Union of India.*[112] It was alleged that several villagers and few towns in Gujarat and Rajasthan might be benefited by the augmentation of water supply, when the height of Reservoir was

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109 *Banwasi Seva Ashram* v. *State of Uttar Pradesh,* (1992) 2 SCC 202, pp 204-206. See also, *Fatesang Gimba Vasava* v. *State of Gujarat*, AIR 1987 Guj 9; *Suresh Lohiya* v. *State of Maharashtra*, (1996) 10 SCC 397; *M Prabhakar Reddy* v. *Andhra Pradesh,* AIR 2006 AP 386;

110 AIR 1997 SC 2040. See also, *Animal and Environment Legal Defence Fund* v. *Union of India*, AIR 1997 SC 1071.

111 *Id*. at p. 2047.

112 AIR 2000 SC 3751.

raised. However, the rehabilitation of tribal people ousted from their habitat was a serious problem. The Supreme Court insisted that the tribal should be given better land at an equal measurement. At the same time, the major obstacle in the case of the resettlement of the tribal people is the non-enforcement and rampant corruption. Whatever may the laws, only a few are implemented and even among the ones that are implemented only a very few benefits reach the tribal people.

An important development in this regard is the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2007. This Act explicitly identifies the community-based conservation as a legitimate right. The Act also has specific provisions for empowering those who hold forest rights, checking activities detrimental to the forest and biodiversity. [113] The forest people and the forest have inalienable linkages and having regard to the symbiotic relationship between the tribal people and forests, the primary task of all agencies responsible for forest management should be to associate the tribal people closely in promotion, regeneration and development of forests. The Act also focuses on the need to give special attention to the alternative sources of domestic energy on a subsidized basis to reduce the pressure on the existing forest areas. The holders of customary rights and concessions in forest are motivated to identify themselves with the protection, conservation and development of forests from which they derive out their livelihood and benefit. This would in return demand that they must keep the biodiversity intact.

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113 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2007, Section 5.

Similarly, the Wild Life (Protection) Act, 1972 is enacted in pursuance to Article 252(1) of the Constitution of India[114] and is the first of its kind providing for the protection of wild animals, birds and plants. It is interesting to note here that the Act was enacted at a time when there was no much discussion about the climate change. Hunting of Wild Animals specified in the Schedules under the Act is prohibited[115]unless the animal has become dangerous to human life or is disabled or diseased as to be beyond recovery or is required for education or research purposes. Further, the Act prohibits picking, uprooting, damaging, acquiring or collecting any specified plant[116], from any forest land unless permitted by the concerned authority for certain definite purposes. The Central and State Governments may by notification, declare any such area as sanctuary[117]or park[118] if the idea is of adequate ecological, faunal, floral, geo-morphological or of natural significance, for the purpose of protecting, propagating or developing wild life or its environment. However, despite these provisions the situation is really panicky.[119] More and more wild animals are being hunted and many

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114 The Constitution of India. Article 252 (1) says thus: "If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the House of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State'

115 The Wild Life Protection Act, 1972 at Section 9.

116 *Id*. at section 17A.

117 *Id*. at section 18.

118 *Id*. at section 35.

119 The problems pertaining to the enforcement have been discussed by the courts in many cases. See for example, *Chandamari Tea* v. *State of Assam*, AIR 2000 Gau 13; *Consumer Education and Research Society* v. *Union of India,* AIR 2000 SC 975; *Bombay Burmah Trading Corporation* v. *Field Director Project Tiger and Conservator*

are facing the threat of extinction.[120] This clearly shows that the Wild life Act has not produced its desired results.

5.2.5 Control of Pollution and Indian Environmental Law

Various statutes have been enacted in India aiming at controlling pollution. It is in fact one of the traditional responsibilities of a local body to ensure cleanliness of water and air in its territories. They can exercise regulatory control to prevent and abate nuisance from the water pools, which adversely affects agriculture. Contaminated water supply, noxious vegetation, harmful dust and smoke or unsanitary conditions of buildings *etc.,*[121] were of much concern to the local bodies and sanctions were imposed against persons who violated the regulations.[122] Below given are some of the important legislative measures made for curtailing pollution.

The Water (Prevention and Control of Pollution) Act (also knows as the Water Act) was enacted in the year 1974. This development was invoked in the year 1974 during which period the country was in the path of industrialization and urbanization in pursuance of Article 252(1) of the Constitution of India for enforcing effluent standards for factories discharging pollutants[123] into water bodies. Pollution of streams, rivers and

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of Forests, AIR 2000 Mad 163; *Tarun Bharat Singh, Alwar* v. *Union of India*, AIR 1992 SC 514 *etc.*

120 Groombridge, B., and Jenkins, M.D., (2002): *The World Atlas on Biodiversity*, United Nations Environment Programme and World Conservation Monitoring Centre. available at http://www.unep-wcmc.org/world-atlas-biodiversity-_92.html (accessed on 16/02/2009).

121 Though the control of pollution encompasses many issues this Chapter only covers the Water Act and the Air Act within in its ambit.

122 *Supra* n. 92 at p.159.

123 Section 2(e) of Water Act says thus, "Pollution means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a

other water bodies reduced the quality of vegetation and other living creatures in water. Such consequences had far reaching impact on the society. The authorities created under the Water Act had the responsibility of implementing this duty assigned to them.[124] Prior to the amendment in the year 1988, the enforcement under Water Act was through criminal prosecutions initiated by the Boards. After the Amendment, the Board may close a defaulting industrial plant or withdraw its supply of power or water. However, the discretion to give or not to give consent for the discharge of trade effluents is vested in the Pollution Control Boards. No doubt, such a regulatory power is the most potent weapon in the attempt to control of the pollution. The power to withdraw consent, when conditions are violated is also treated as an effective measure under the Act. However, the conglomeration of too many powers in the Board seems to reduce the effectiveness of the Board with respect to its various powers.

Another legislation that has to read along with the Water Act is the Water (Prevention and Control of pollution) Cess Act, 1977. The Cess Act creates certain economic incentives for pollution control through a differential tax structure with high rates applicable to polluting units and to pay increased cess for water consumption.[125] However, both these legislations have also been not very ineffective to prevent water pollution and as a result India's water bodies are being increasingly polluted. The Comptroller and Auditor General's Report in the year 2011 on the subject

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nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms."

124 The Water (Prevention and Control of Pollution) Act, 1974.See Chapter IV also.

125 Shyam Divan and Armin Roasencranz (2008): *Environmental Law and Policy in India*, New Delhi: Oxford University Press, at p. 61.

make it very clear that this statute has been a futile attempt for all these years.[126]

Similarly, the Air (Prevention and Control of Pollution) Act[127] (also known as the Air Act) was enacted by the Parliament in the year 1981 to implement the decisions taken at the *Stockholm Declaration.* The Air Act provides for prevention, control and abatement of air pollution with a broader approach for the preservation of natural resources on the earth including the preservation of quality of air and the establishment of the Air Pollution Control Boards to carry out its objectives. It says that 'emission' means any solid or liquid or gaseous substance coming out of any chimney, duct or flue or any other outlet.[128] The Authorities created under the Act *viz.,* Central Air Pollution Board or State Air Pollution Control Board are authorized to lay down standards for emission of air pollutants into the atmosphere from industrial plants, automobiles or from any other source not being a ship or an aircraft. The Boards are empowered to issue directions to the persons violating the law and also lodge complains against such persons before a competent court of law.[129] The air Act also stipulates that all industries operating within the designated 'air pollution control areas'[130] must obtain consent from the State Boards. Though the 1987 amendment to the Air Act strengthened the enforcement mechanisms, particularly by

126 Bharat Lal Seth (2011): "Audit of India's Water Bodies Confirms their Polluted Status," *Down To Earth* (December 26 2011), available at: http://www.downtoearth.org.in/content/audit-indias-water-bodies-confirms-their-polluted-status (accessed on 23/11/ 2012).

127 Along with the Air (Prevention and Control of pollution) Rules, 1982 and Air (Prevention and Control of pollution-Union Territory) Rules, 1983.

128 The Air (Prevention and Control of Pollution) Act, 1981, Section 2(j).

129 *Ibid.* See also, Chapter II of Act.

130 *Id.* at section 19.

increasing the penalties for violation, even today it remains to be an ineffective tool for reducing the emission in many respects.[131]

Further to implement the decisions of the *Stockholm Conference*, in so far as they relate to the protection and improvement of the human environment and the prevention of hazards to human beings, other living creatures, plants and property, the Environmental Protection Act (hereinafter referred to as the EPA) was enacted in the year 1986.[132] The EPA is an umbrella legislation that provides a framework for the central government for the coordination of activities of various authorities created under the special legislations such as the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 *etc*. The EPA is a comprehensive legislation empowering the central government to take measures to protect and improve the quality of environment by constituting an authority[133], which was non-existent under the previous legislations. This feature distinguishes the EPA from other laws. Further, the Act empowers[134]the Central government to make rules for carrying out the purposes of the Act. By invoking these powers, the Central Government has constituted several authorities such as the Environment Pollution (Prevention and Control) Authority, Loss of Ecology (Prevention and Payment of Compensation) Authority, Environment Impact Assessment Authority *etc*; with different terms of references to lessen the pollution load and also

131 Chetan Chauhan, (2012): "India Tops China in Air Pollution Level Increase", *Hindustan Times* (November 30, 2012), available at: http://www.hindustantimes.com/India-news/NewDelhi/India-tops-China-in-air-pollution-level-increase/Article1-966208.aspx (accessed on 24/11/2012).

132 The Environmental Protection Act, 1986. The Preamble.

133 *Id*. at section 3 (3).

134 *Id.* at section 25.

suggest viable options to avoid the impact of restrictions imposed to protect and improve the environment.

Under the rule making power, the central government, has also made rules and regulations covering the biological diversity[135]and the Ozone Rules[136], giving the Act, a status of umbrella legislation. The Ozone Rules are relating to the control of ozone depletion[137] and provide for the prohibition of new investments with ozone depleting substances[138], regulation of sale, purchase, use of ozone depleting substances and the control of production[139] and the consumption of ozone depleting substances. There is also the regulation of import, export and sale of products made with or containing ozone –depleting substances.[140] These regulations are also on recovery and destruction of ozone depleting substances and on manufacture, import and export of compressors.[141]

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135 The Environment Impact Assessment Regulation, 2006, makes mandatory for the proponent of the project, under paragraph 6 read with appendix II, to point out categorically about the threat to biodiversity and energy conservation.

136 The Ozone Depleting Substances (Regulation band Control) Rules 2000.

137 *Id*. at Rule 2 (d) reads thus: Consumption with respect to any ozone depleting substance means the amount of that substance produced in India in addition to that amount imported, less the amount exported; Rule 2 (f) reads thus: calculated level of consumption shall be determined by adding together calculated levels of production and imports and subtracting calculated level of exports.

138 *Id*. at Rule 3(1) reads thus: "No person shall produce or cause to produce any ozone depleting substance after the date specified in column (5) of schedule 5, unless he is registered with the authority specified in column (4) of that schedule.

139 *Id*. at Rule 2(i) reads thus: 'Ozone depleting substance means the ozone depleting substances specified in column (2) of schedule I, whether existing by itself or in a mixture, excluding any such substance or mixture (blend) which is manufactured product other than a container used for the transportation or storage of such substance.

140 *Id*. at Rule 10(1) reads thus: "No person shall import or cause to import any product specified in column (2) of schedule VII which are made with or contain ozone depleting substances specified in column (3) after the date specified in column (4) of that Schedule unless he obtains a licence issued by that authority.

141 *Id*. at Rule 12 (1) reads thus: "No person shall manufacture, import or export compressors after the date specified in column (5) of Schedule V unless he is registered with the authority specified in column (4) of that Schedule.

5.3 *Fairness Divide* and India's Environmental Degradation

Despite this large number of laws and policies and the presence of an active judiciary, India's environment is still under threat. The state has failed miserably in implementing these laws and policies. As M.C. Mehta says, "There is no excuse good enough, no obstacle obtrusive enough, and no circumstance restrictive enough to exonerate the government from failing to perform its statutory duty to arrest the environmental decline."[142] Out of the three branches of the government, *viz;* the legislature, the judiciary and the executive, it is the executive branch that is main culprit by 'passively allowing or actively contributing'[143] to the environmental tragedy in India.

Though there are many reasons for the failure of the executive branch, the issue of corruption stands out as the most threatening. According to the *Transparency International*, India is on the top of the list of the 'most corrupt' nations.[144] The plethora of bureaucratic rules and regulations (in other words *red tapism*) provides ample scope for the executive branch to be corrupt.[145] Though corruption exists in every country, the situation in India is different. As observed by the *Centre for Science and Environment*, "Experiences from abroad…have something to teach us. The United States, Japan and South Korea are among the most dynamic countries in the world, but their higher political echelons are riddled with corrupt practices. What

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142 M.C. Mehta, (2006): The Accountability Principle: Legal Solutions to Break Corruptions impact on India's Environment", *Journal of Environmental Law & Litigation,* 21: 141, at p. 141.

143 *Id*. at p. 142.

144 R.B. Jain and P.S. Bawa, (2003): "National Integrity Systems: Country Study Report: India", *Transparency International.* According to Transparency International's 2005 World Corruption Index, India scored only a 2.9 out of 10 (10 being least corrupt).

145 See also, Asian Development Bank, (2004): "Anti-Corruption Policies in Asia and the Pacific", *Legal and Institutional Frameworks for Fighting Corruption in Twenty-One Asian and Pacific Countries.*

differentiates these countries from India is that once a politician is enmeshed in a corruption scandal, regardless of whether that politician is a president or prime minister, he/she pays a price."[146] However, this has not been the practice in India. Here the corrupt person are protected by all possible means.

Corruption has its huge impact on rendering the *social minimum* to the needy. It is the antithesis of human rights and constitutional freedoms. It also has its impact in making the system unfair. Corruption in environmental decision making processes directly encourage the spread of pollution and the liquidation of natural resources, but at the cost of the nature itself. It can be easily said that corruption has the most direct impact on fairness because for those who have the resources to bribe, corruption involves only a 'transaction cost', but for the poor who cannot afford the 'transaction cost' corruption is tantamount to oppression and violence. [147]

Corruption is largely becoming the greatest challenge in the fight against climate change also. The efforts of offsetting the effects of climate change involve huge expenses, which according to some estimates would be almost equal to US $ 700 billion by the year 2020. Most of these funds, according to experts, would flow through new and uncoordinated channels.[148] The risks of corruption are also high because of the level of complexity, uncertainty and novelty that surrounds climate issues. Early evidence presented by the *Transparency International* suggests that there are

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[146] Centre for Science and Environment, (1999): "The Citizens' Fifth Report: National Overview", at p. 391.

[147] *Id.* at p. 392.

[148] Transparency International, (2011): *Global Corruption Report and Climate Change,* London: Earthscan, at p. xxvi.

many regulatory grey zones and loopholes that are at the risk of being exploited by the corrupt interests.[149]

In India also, the climate change is becoming a new haven for the corrupt. An example is the Kyoto protocol's Clean Development Mechanism. As discussed earlier in this thesis, India is one of the highest beneficiaries of CDM by gaining almost 20 percent of the global CDM projects. In this context, it is observed that, some business interests and civil society groups have been quietly lobbying with the government in recent years to unduly take advantage of important climate related financial opportunities.[150]

Corruption in climate change that is offsetting the fair procedures also challenges the idea of justice. Since it is the indigenous and rural poor communities in remote locations, the urban poor living in precarious settlements, and displaced persons who require resettlement *etc*., who bear the brunt of the effects of climate change; they are meant to be the main beneficiaries of adaptive action; and yet they are usually the most marginalized voices in the political system. And the main reason is corruption. This starkly highlights the need for a fair, transparent and accountable climate governance.

5.4 Conclusion

'Therefore I am convinced that acting on climate change is a national propriety; we need to act, for our own sake, not because of the sake of anyone else. We need an aggressive domestic agenda that addresses the

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[149] *Ibid.*

[150] Sudhir Chella Rajan (2011): "Vested or Public Interest: The Case of India", in Transparency International, *Global Corruption Report: Climate Change,* London: Earthscan, at p 56.

vulnerabilities, the climate change may pose, an agenda-that produces substantive policy action in the short as well as the medium term."[151] But, such an aggressive domestic agenda continues to be a myth. The environmental laws and regulations that would help the climate change mitigation, largely remains as an ineffective tool in that direction. The issues such as, ambiguity in the legislative power under the Indian Constitution, corruption, lack of awareness among the general public, lack of coordination *etc.* create a fairness divide in the efforts of mitigating the effects of climate change. The system also has failed in taking the *social minimum* to the various sub-national groups, who bear the brunt of the effects of climate change as noted above. The basic procedural requirements such as Environmental Impact Assessment and public participation in the environmental decision-making processes are not followed at all.

This fairness divide that exist in environmental and climate change actions in India can be better illustrated with the example of the case of the displaced tribal people of *Narmada valley* Project where even after more than two decades the displaced people are yet not rehabilitated.[152] As, Mehta says; "The truth is that the environment is not the government's priority. The poor are not a priority. Our international commitments are not a priority.

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151 Ramesh, Jairam (2012): "Forword", in Navroz K. Dubash (ed.) *Climate Change and India: Development, Politics and Governance,* New Delhi: Oxford University Press, at p.xx.

152 *Narmada Bachao Andolan* v. *Union of India*; AIR 2000 SC 3751. In this case, the Supreme Court ordered that the tribals who are displaced for the developmental activities shall be provided with lands of quality at least equal to that of lands previously occupied by them, suitable to provide for their present needs and future development. Even after ten years of the decision, over 200,000 *Narmada Dam Oustees* are still to be rehabilitated. It has become a crime that goes unpunished for the last 25 Years. See also, Devinder Sharma, (2010): "Over 200,000 Narmada Dam Oustees Still To Be Rehabilitated: A Crime That Goes Unpunished For 25 Years", *Counter Currents*, (26 June 2010), available at http://www.countercurrents.org/dsharma260610.htm (accessed on 26/10/2012).

Our public health is not a priority. Our fundamental rights are not a priority. Instead our leadership is narrowly focused on rapid, unsustainable developmental programmes, on expansion of nuclear energy, on exploitation of resources, and on building unviable large-scale dams."[153]

[153] *Id*. at pp. 142-43.

Chapter VI

Conclusions and Suggestions

> *There will come a time when the Earth grows sick, and when it does, a tribe will gather from all the cultures of the world who believe in deeds and not the words. They will work to heal it and they will be known as the 'Warriors of the Rainbow'.*[1]

This prophecy of the *Canadian First People* became true finally, but only in part. The earth has grown sick, but no tribe, as stated in the prophecy, emerged. None of the contemporary specialised organs or agencies created, at the international level; with a duty to act against the climate change and the environmental degradation resemble such a *tribe*. If they were, they would have been more proactive in resolving these problems. This chapter intend to explain this point, by drawing together the analysis made in the preceding chapters of the thesis.

In the previous chapters, the claims and demands of the developing and least developed countries to build GERR and GCCRR on the foundations of Common But Differentiated Responsibility (CBDR) and respective capabilities has been discussed. The fact that majority of these countries have been under colonial governance until a few decades ago, and most of their resources were looted by their colonial rulers, are sufficient reasons for considering their

[1] Prophecy of Canadian First Nation's People, quoted in, Kumi Naidoo,(2011): "Forword", in Transparency International, (2011): *Global Corruption Report and Climate Change,* London: Earthscan, at p. xiv.

demands as fair. They argue that the environmental degradation in their territories was/is due to the lack of economic development, rather than the presence of any developmental activities based on industrial revolution. The hard reality, like the ever mounting population and the expansion of agricultural land add to the agony. For the same reason, their desire to advance their economic development through rapid industrialisation and poverty eradication is rightful and justified. The fact that the GHG emissions from these developing and least developed countries are from the sustenance activities rather than any 'luxury' and 'life style choices' would also corroborate this stand. At the same time, it remains a fact that the climate change is an *apocalypse* in the making, which if happens would be disastrous for the entire globe that includes both the so-called developing and the least developed countries. It is definite that the various sub-national groups in these countries would fall prey to the vulnerability before anyone else and would face the horrendous devastation than ever before. The reparation might incur them enormous cost that would certainly go beyond their affordable limits. If such a tragedy happens, their priority shall change, and thereafter, the economic development would definitely be not the focus, but disaster management would be.

Similarly, the constricted stand taken by the developed countries that the environmental degradation and the consequential climate change is a global problem and unless there is an equal and 'common responsibility' to fix it, they would not accept any absolute and binding emission reduction targets has proved the scenario more complicated. Further, their resistance and lack of motivation in transferring the Environmentally Sustainable Technology (EST) and financial resources to the *global needy* also contribute to the growing

anxiety and concern of the developing and the least developed countries. Thus, the fact that these powerful economies are attempting to use the *Kyoto* flexibility mechanisms, designed for reducing the aggregate global GHG emissions, with an ulterior objective to gain preferably, the economic profits to the environmental profits is really condemning. It is pertinent to note here that, only for the reason that they are the major source of global environmental degradation based on their past and present anthropogenic GHG emissions; the developed countries are increasingly bound by the rule of *differentiated responsibilities*.

Scientific evidence proves beyond doubt that the phenomenon of climate change would hit the entire globe, developed, developing and least developed countries irrespective of their economic might. The lack of cooperation currently existing amongst the countries in laying down a solid and effective GCCRR that would actually reduce the GHG emission to a level that earth's sinks could neutralise, is highly unjust and unfair. It is an equally reproachful fact that each of these countries frames the environmental policies according to its own self-interest and in a manner absolutely insensitive to the interest of the planet. The changing notions of the practice of environmental colonialism and the new configuration of geopolitical alliance have infact brought about substantial modifications to the concept of fairness in the global environmental law. In this backdrop, the study that seeks to analyse the Global Environment Regulatory Regime (GERR) and Global Climate Change Regulatory Regime (GCCRR) from the perspective of fairness, intends to answer the following research questions.

(i) What is the meaning of the term 'fairness' and how effectively, it has been reflected and practised in the international environmental law? How far a deeper understanding of the concept of fairness would help in identifying and resolving the various issues pertaining to GERR and GCCRR?

(ii) Whether the contemporary GERR in general and GCCRR in specific, has been fair enough to meet the varying needs and demands of a wide range of stakeholders including the developed, developing and least developed states, geographically alienated states, various sub-national groups *etc*.?

(i) What are India's Climate Change Policies and Strategies and how far these unique policies and strategies have been effectively negotiated at the international law making forums particularly in the backdrop of a *fairness divide* that exists in the contemporary international law making process?

The work sought to answer these questions by analysing the Indian legal and policy experiences relating to environmental protection and climate change actions in the context of GERR and GCCRR, through a doctrinal study based on an interdisciplinary research. This research built on the premises of 'politics of law' makes the following findings.

Research Question 1: What is the meaning of the term 'fairness' and how effectively, it has been reflected and practised in the international environmental law? How far a deeper understanding of the concept of fairness would help in identifying and resolving the various issues pertaining to GERR and GCCRR?

The philosophical investigation into the concept of fairness and its importance in properly understanding and effectively resolving the various issues pertaining to GERR and GCCRR as done in chapter 1 of this thesis was highly challenging. The study concluded that fairness (which is often synonymously used with terms like justice, equity *etc*.) has always been a prerequisite of any good legal system throughout the world and during all ages. Fairness is important in analysing the quality and effectiveness of both domestic and international law. At the same time, the study evidenced that the term is highly abstract. For different schools of law and different scholars it meant differently. For some of them fairness was important in its distributive perspective, but for a few others it was important from the substantive and procedural viewpoint. Several other scholars analysed the concept of fairness from its corrective functional angle. For some of them, obeying the command of the sovereign' were fair but for others the same 'command of the sovereign' was required to be in consonance with a higher standard to be called as fair. For Aristotle, it was the quality of being impartial that was fair. However, H.L.A. Hart, the legal positivist, assumes that equity is subjective and arbitrary and different from the legal justice, which is objective and reasonable. He asserts that fairness is fundamentally important in two circumstances; firstly in the case of distributive justice and secondly in the case of corrective justice. For him, it

was important to treat like cases alike and impartiality and consistency were fundamental to the concept of fairness.

For naturalists like Lon L. Fuller, any law to be called as fair should contain essentially the *inner morality* of law. According to him, the presence of eight elements[2] in a legal system indicates its unfairness. He further argues that any legal system to be called as fair needs to satisfy these eight conditions. At the same time, for Utilitarian like Bentham, the greatest happiness of greatest number of people, with less friction and minimum waste was fairness. For John Rawls, 'justice is the first virtue of social institutions, as truth is of systems of thought' and his difference principle is one of the most influential theories of justice. According to him, there are two fundamental principles of justice, *viz*; (i) every individual in a just society has an equal right to a fully adequate scheme of basic liberties at par with others in the society, and (ii) the social and economic inequalities must satisfy two conditions; firstly, the equality of opportunity is a condition precedent for any system to be called as fair, and secondly, that they must be to the greatest benefit to the least advantaged members of the society. Further, Robert Nozick in his *entitlement theory* holds that a distribution is just and fair, if everyone is entitled to the goods that he currently possesses. According to him, just distribution flows from the free exchange of goods originally acquired and then successively transferred by legitimate means. If the

[2] (i) The lack of rules or law, which leads to *ad-hoc* and inconsistent adjudication; (ii) Failure to publicize or make known the rules of law; (iii) Unclear or obscure legislation that is impossible to understand; (iv) Retroactive legislation; (v) Contradictions in the law; (vi) Demands that are beyond the power of the subjects and the ruled; (vii) Unstable legislation (like the daily or frequent revision of laws); and (viii) Divergence between adjudication/administration and legislation.

goods are unjustly acquired or transferred, a principle of rectification of those violations operates.

Hence, the thesis also concludes that, similar to municipal law, fairness is also very crucial in analysing the international law, mainly due to three reasons. Firstly, the international community consists of nations that are competing for resources and those resources are scarce and limited. Secondly, the nature and scope of international law has been changed considerably and particularly, in the recent past with the advent of globalisation. From the *soft law* model, it has moved to the *command and control* model. The international law is no more mere *positive morality* and is increasingly becoming enforceable. Despite the allegations of violating the sovereignty of states, and being a source of *democracy deficit*, these *command and control* model is gaining strength than ever before. Further, it has been well explained under the multilateral regime of the WTO. Thirdly, the rich and powerful states of the international community exercise their supremacy in the making of international law. This conclusion is also supported by Thomas M. Franck who says that the international law has entered a *post-ontological* age, an era in which, it is no longer necessary to defend the status of international law as a law, but where the vital task is to analyse its fairness. While attempting to answer the question, 'is international law fair?' he invokes a broad notion of fairness that encompasses two distinct and sometimes competing values; procedural fairness and substantive fairness in which the former expresses the idea that 'for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how those rules are made, interpreted and applied'.

Further, the study also concludes that the fairness is questionable in GERR and GCCRR, which are two species of international legal regimes, particularly considering the fact that the natural resources, including the atmospheric sinks, are scarce and limited. At the same time the competition for acquiring these resources turn out to be gruesome very often. The study also supports the view that, since the natural resources were not initially owned by some one in particular, any act of unjust acquisition, say for example through force, taints the title and is subject to rectification. In this context, the historical pollution of the developed countries ought to be rectified and thus the principle of CBDR is fair. Further, the research also finds that the GERR or the GCCRR could be called as fair only if it overcomes the naturally arbitrary circumstances, such as geographic location of an island or coastal country, by taking the *social minimum rule* to these countries. It is also concluded that a GERR or GCCRR that does not consider the interests of all the stakeholders *viz*., the developed, the developing and the underdeveloped countries, and the various classes or groups of people living in those countries, could not be fair. In essence, the research concludes that the contemporary GERR and GCCRR are not as flat as it is claims to be and questions of fairness are loud and clear while the answers are not.

Research Question 2: Whether the contemporary GERR in general and GCCRR in specific, has been fair enough to meet the varying needs and demands of a wide range of stakeholders including the developed, developing and least developed states, geographically alienated states, various sub-national groups etc.?

Having found that fairness is equally important for both the domestic and international law with the GERR and GCCRR are taken as examples, the study proceeded to the actual practices under these regimes. The pertinent question was that whether GERR and GCCRR are fair enough in meeting the varying needs and demands of a range of stakeholders including the developed, the developing and the least developed states, geographically alienated states and various sub-national groups? This question has been discussed in detail in chapters 2 and 3 of the thesis. A deeper analysis into the nature of GERR and GCCRR proves the fact that these regimes have become increasingly complex and technical for the reason that the environmental considerations are invariably coupled with the various other social issues such as development, poverty, human rights, technology, international trade *etc*. In this regard, it is significant to note that the GERR is no more laying down merely normative standards but certainly demonstrates the vital implications of environmental degradation and the need for a prompt responsive action by the member countries.

As stated earlier, one of the major issues of fairness in the making of GCCRR is the intensity of growing non-cooperation that exists amongst the multiple stakeholders. As a result, the club model of international politics, along with its merits and demerits, slow down or halts the negotiations very often. For instance, the Kyoto Protocol, which was adopted in the year 1997 but came into force only in the year 2005 undoubtedly, substantiates this point. It is certain that the elongated break was the direct result of the lack of cooperation from the various clubs of developed countries against the inclusion of the binding targets.

Looking at a practical perspective, this delay is not only unfair to the developing countries but also to the global environment as a whole. The same trend was also evident in the Doha Conference of Parties convened in the month of December 2012. The developed countries vehemently resisted the extension of the Kyoto Protocol beyond the year 2012 *i.e*., for the second commitment period from the year 2013 to 2020 (also known as KP2). Eventually, though the Protocol was extended, it could be called as an incremental victory because amongst the developed countries only a few countries *viz*., the EU, Australia, Switzerland, and Norway agreed for KP2. Thus, the end result in terms of an impact on environment could be stated to be a meagre 15 percent of the total developed country emissions.

Another significant issue is the absence of mutual trust and commitment to the subject matter that ought to have been there across the globe. The Annex I parties' targets under the Kyoto Protocol in the first commitment period illustrates this point very well. Even considering the fact that the period was of considerably shorter duration (2008-2012), the failure to comply with the target requirement cannot be justified. Hence, this procedural lapse in maintaining the adequate accounting standards for the GHG emissions is indisputably an issue of fairness and equity. The combination of the very modest environmental impact and the fact that some Annex I parties are not on track to meet their targets may appear to give credence to this view. Although the GCCRR ensures universal participation, in reality, a small group of some 15 large emitters are bound by the commitments under the current GCCRR.

The patterns of fairness divide are evident from the very outset *viz*., the dialogue or drafting phase of the international documents. As can be seen in the Stockholm Declaration that while it was being drafted, the developed countries argued that the Draft Declaration be adopted "without any amendments, in order not to imperil the fragile consensus achieved in the pre-conference consultations." This is particularly important, keeping in view the allegation made by many developing countries that they were not consulted at any stage of the drafting of the Declaration. Similarly, it is interesting to note that the final draft of the Rio Declaration was also adopted without any sort of meaningful negotiations despite the criticism that some of the developing countries were not even consulted in the process. In an international legal system that is based on the fundamental principle of sovereign equality of nations, such a non-participatory process without giving any room for the constructive negotiation to the member countries is absolutely erroneous and grossly undemocratic.

It is also an accepted fact that even during the drafting of these multilateral treaties many genuine concerns raised by the developing countries were not incorporated in the final text. For example, during the negotiation stages of article 3 of the Stockholm Declaration the developing countries argued that the degradation of the environment in the developing countries is primarily because of the low prices fixed and paid for their products by the developed countries. Thus, the developing countries claim that they are forced to do activities amounting to the over-exploitation of the natural resources to outweigh the unfair practices including the low pricing adopted by the developed countries. Correspondingly, during the negotiation of article 3 of the UNFCCC, the developing countries wanted the developed countries to take the leadership

based on their respective contribution to the environmental degradation in the past. However, this demand was not accepted and it contradicted article 7 of the Rio Declaration, which assigned a leadership role to the developed countries.

Another striking finding that is revealed through this research is that even the Security Council of the United Nations is slowly gaining jurisdiction in the environmental disputes. The Security Council of the United Nations, which comprises the victor states of World War-II as permanent members having veto power, is one of the primary organs of the United Nations whose main task is to deal with the matters of war and peace. Though the Security Council is generally not involved in the decision making process in the disputes relating to environmental matters, there were particular exceptions too. For example, when Iraq invaded Kuwait, the Security Council held the former liable on various grounds including the damage to the environment. It may also be noted here that the Security Council is conferred with very wide powers and its decisions are binding on the member States. Now, considering the following facts, any concern pertaining to fairness is justified when approached from the perspective of a less-industrialised State.

(i) The permanent members of the Security Council are heavily industrialised States whose *per capita* GHG emission rates are higher than that of other States.

(ii) These Permanent Members have Veto Power in the UN Security Council;

(iii) The decisions of the Security Council are binding on all States; and

(iv) Most importantly, the Security Council has slowly started gaining momentum in effectively addressing the issues of environmental protection.

Given an indication of the growth of International environmental law, where the UN Security Council will also have a major stake in international environmental law making, it surely raises certain fundamental questions about the standards of fairness. It is more important than ever before in the light of the fact that the need of the hour is to protect the interests of the less industrialised, developing or least developed countries. Hence, the research has identified a major concern of fairness in the working of the present international environmental law from the perspective of the non-permanent and non-members of the UN Security Council.

Another issue of fairness in the GERR is the option of the flexible rule of *forum shopping* available to the developed countries. The GERR at present provides many Issue Specific Regulatory Regimes (hereinafter referred to as ISRRs). The GCCRR is only one of them. Thus, the ISRRs are so complex and involve many sub-regulatory regimes focusing on various sub-issues. For instance, the GCCRR though *prima facie* appears to be core-issue focused, it includes many sub-issue regimes such as the Clean Development Mechanism, Joint Implementation, Tradable Allowances *etc*. This gives the regime, a character that is complex and complicated in every respect. To ensure an effective functioning within this regime, any state would require an advanced technical knowledge and scientific support with it. But unfortunately, majority

of the developing and least developed countries lack such *know-how* and technological advancements.

Another example that renders support to this finding is the Plant Genetic Resources Regime, which is closely connected to various other ISRRs such as the Global Intellectual Property Regime, International Trade Regime, International Human Rights Regime *etc*. Each of these regimes also consists of a judicial forum to resolve the disputes, and some of them may also attempt to resolve the related environmental disputes. The various international forums having jurisdiction in environmental matters include the: (i) International Court of Justice, (ii) International Tribunal for the Law of the Sea; (iii) World Bank Administrative Tribunal (iv) European Court of Justice (v) Dispute Resolution Body under the WTO (vi) European Patent Office (vii) European Court/Commission of Human Rights (viii) Inter American Commission on Human Rights and numerous other tribunals or forums established under the various multilateral or bilateral treaties and under the respective national courts. This would invariably give a wider scope and freedom for the art of *forum shopping* being practiced by the developed countries.

Yet another major challenge to fairness in GERR and GCCRR is globalization, which offers both opportunities as well as challenges to the principle of sustainable development. The interdependence that is the result of globalization offers new opportunities to trade; investment capital flows and advances in technology, including the information technology. This, if properly used could be beneficial for the growth of the world economy, development and the improvement of living standards of the people around the world. However,

globalization is not always equitable. The best example would be the recent consultation of US to the WTO/DSB against India's stipulation to use 'thin film cells made in India' in the solar energy projects in India. The US, which lost the trade prospects from the Indian market because of such a restriction in the domestic level, claimed that this was against the rules of free trade, *viz.,* the *Principle of National Treatment* under the GATT Agreement. Similarly, it is an accepted fact that the new international patent regime under the TRIPS also poses as an obstacle in the transfer of Environmentally Sustainable Technologies (also known as the ESTs). Hence, it can be undoubtedly stated that the contemporary GERR and the GCCRR has not been fair enough to meet the varying needs and demands of a range of stakeholders including the developed, developing and the least developed states, geographically alienated states and the various other sub-national groups.

Research Question 3: What are India's Climate Change Policies and Strategies and how far these unique policies and strategies have been effectively negotiated at the international law making forums particularly in the backdrop of a fairness divide that exists in the contemporary international law making process?

Contrary to the common perception that the developing countries are only the *rule takers* rather than the *rule makers* in the international system *vis-a-vis* the developed world, the present study concludes that India has been a major international force ever since the inception of the climate change negotiations. It has played a constructive role in building up the international climate change regime, its norms, rules and institutions. It has also played a key role in the

international climate negotiations over the last two decades by exercising an influential voice and acting as a defender of the global south, both as a coalition builder and as an aggressive protector of its own interests. India is also considered to be an important producer of ideas in setting out the international law on climate change and has assumed the role of a blocking power in many multilateral treaty negotiations. To a great extent, India has been successful in defending the unfair strategies of the developed countries and in making them responsible for the environmental degradation and damage being caused by their acts.

India's foreign policy on climate change also witnessed major shifts during the period. The original policy (1998-2006) that was based on the historical pollution and high *per capita* emission of the industrialised countries stated that the requirements of corrective fairness demanded that the industrialised countries should be held responsible for the emission reduction and not the developing countries. Throughout that phase, India's main contention was that poverty was the main hindrance for the economic development and it strongly opposed the 'Common Responsibility' argument of the North and instead advocated for CBDR. Thereafter, between the year 2007 and 2009, India gradually started modifying its domestic policy for reducing the emission. But at the same time, India was not ready to make any changes in her foreign policy. It was after 2009 and during the COP at Copenhagen, India was ready to change its foreign policy by shifting its stand to *per capita plus*. According to the then Minister of Environment and Forests, Jairam Ramesh,

India "…want to be aggressive on domestic obligation and want to be pro-active on international obligation."[3]

At the same time, the domestic policy regime in India pertaining to climate change is gradually becoming problematic instead of being aggressive. Though the constitution of India recognizes the state's responsibility to protect the environment, it has been placed under the head of Directive Principles of State Policy and the Fundamental Duties, which are *non-justiciable*. The research has also identified a contradiction between the forest policy in India and the Forest Act, 1927. When the former emphasised on conservation, the latter has been premised on the state monopoly over forests. Despite the fact that there exist a plethora of judgments by the Indian Supreme Court declaring the right to clean environment to be a part of the *Right to Life* under article 21 and hence enforceable, practically speaking, Indian Government has miserably failed in taking the 'social minimum' to the masses. The main reason for such a failure is that judiciary in India do not have its own enforcement division and it relies on the executive branch for the said purpose of implementation of its directions. At the same time, it is also a hard reality that the executive branch in India is not free from the clutches of corruption and bureaucratic delays and that itself has become one of the major challenges for an effective environmental protection and climate change actions in India. As a result, the various policies promulgated by the government with regard to environment and climate change have also been often criticized for its lack of vision and unfairness.

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[3] Ramesh, Jairam (2009): Parliamentary Debates on Climate Change Pre-Copenhagen, *Lok Sabha*, (Session XV-III, 19th November-18th December, 2009).

6.1 The Way Forward

Having found that a 'Fairness Divide' actually exists in the contemporary GERR and GCCRR, it is imperative to state that the main reason for the exasperation of the developing and the least developed countries rests in their incapacity to perform effectively at the multilateral venues. Most of these countries do not have the sufficient knowledge about the technical and subject specific international regimes that exist today. For ensuing fairness in the working of the global legal system, the first priority should be given for generating awareness amongst these states about the significance of the current multilateral legal and policy framework and the need for an effective participation in the international law making process. At the same time, the very fact that many of them have adequate technical resources and human expertise in conducting sufficiently constructive research in the area of climate change and environmental protection and are also able to send their experts as a part of the delegations to the multilateral venues should not be ignored. Hence, giving them an effective opportunity of representation and participation would definitely improve the degree of support coming from the developing and least developed countries.

In the same way, imminent steps are to be taken for the resurrection of mutual trust and cooperation, as it is an indispensable requirement that the states must move ahead in a spirit of compromise on issues of universal claims. Though the assertions of the developing countries based on the principles of common but differentiated responsibilities and respective capabilities may look fair and reasonable, it is also an indisputable fact that these principles can no

longer be the policy driver, if the planet has to be saved from the perils of climate change. The principle of sustainable development must be imbedded in the multilateral negotiations on climate change and environmental protection. The developing countries should also adopt a stand that the principles of intellectual property or international trade law should be used as an effective mechanism for transferring Environmentally Sustainable Technologies instead of creating hurdles in the implementation of mutually advantageous policies while trying to defend their scrupulous self interests. This has to be further supported by the flexible standards taken and commonly accepted by the developed countries regarding the concept of international transfer of technology from the economically advanced countries to the less advanced regions and the least developed countries.

With regard to India, the standards of fairness simply does not mean the demands put up in the negotiations before the multilateral forums, but the acceptance and the practice of the same by the international community in consonance with India's unique social, cultural and economic needs. This would definitely bring in positive changes in the cultural normative shelters and would act as a ground for individual emancipation for all the developing countries including India. However, the protection of environment and climate action throws up innumerable challenges for any developing nation and hence, viable administrative and legislative norms and strategies do play an essential role in creating a concord between the environmental values and the developmental needs of the state. In this background, it is essential that the concurrences and contradictions existing in the area of the principle of universalism *vis-a vis* cultural relativism should be given a harmonious interpretation to prevent

further harm to the global environment. Thus, it is necessary that the external policies of the state should be formulated in tune with the hopes and aspirations of the present and the future generations. It is suggested here that in re-determining the scope of the powers and functions of the various organs of the government, the Constitution of India may be amended to include a positive duty on the part of the State for protecting the environment and a concurrent negative duty to refrain from taking any steps that would adversely affect the environment. A further change may be introduced by a constitutional amendment to the VII th Schedule to the effect that the subject matter of environment and its protection are specifically included in the List I *i.e.,* the Union List as against the present system of reading it into all the entries alike. Correspondingly, given the decentralised perspective of Indian polity, the anti-corruption laws should be strengthened and vigorously implemented for an effective climate action. There has to be a consensus created for legislating an effective anti-corruption law in India with specific reference to the environmental corruption. Most importantly, the awareness among the various stakeholders including the central government, the state governments, the various local bodies and the community in general that the protection and improvement of environment is a mandate of every institution of public governance and that it stands supported by the *law of humanity* is the crucial need of the hour.

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