

Making Sense of Post-2012 Climate Change Regulatory Process: Some Reflections



By Professor Dr. Bharat H. Desai
Professor of International Law

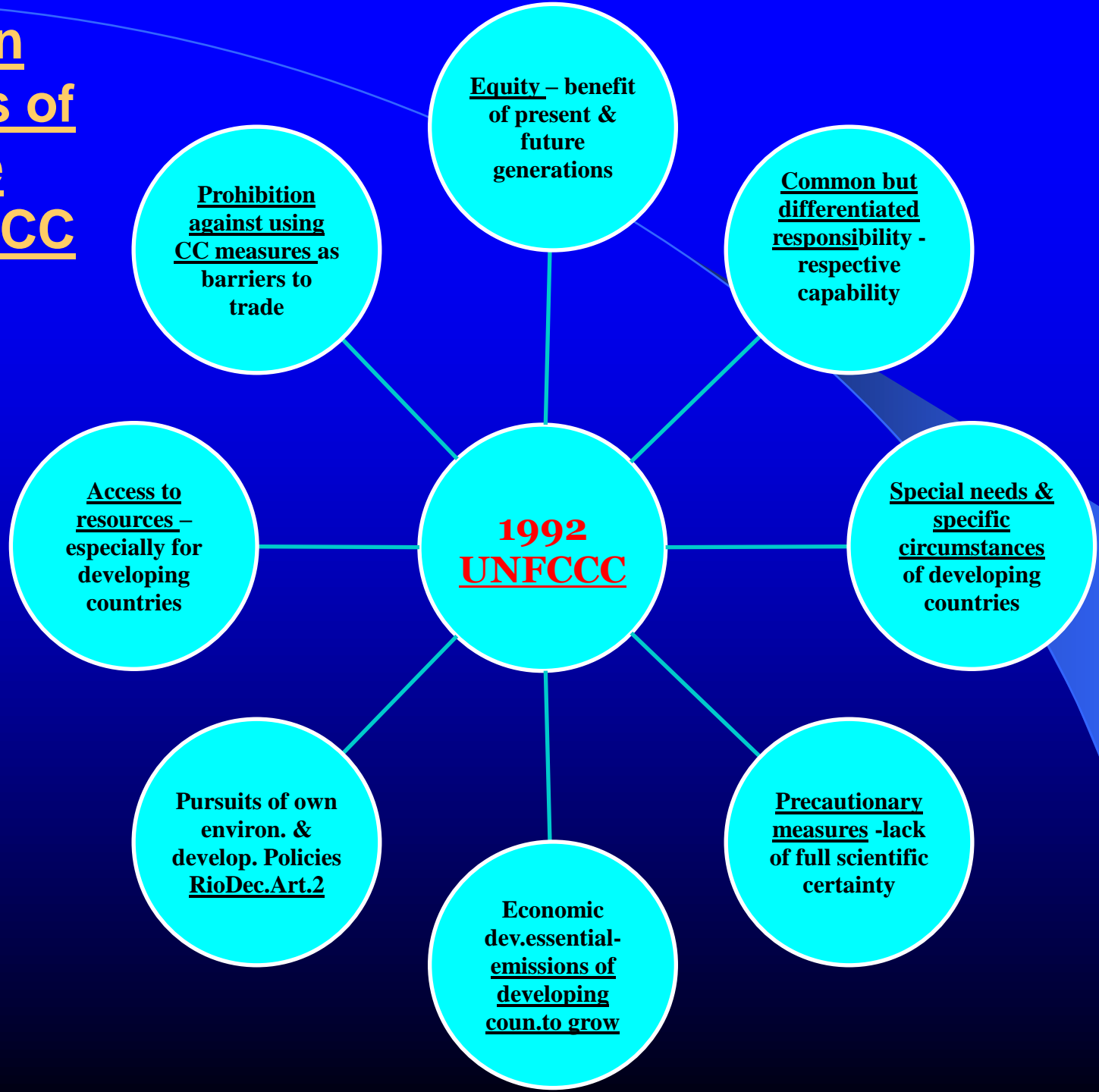
Jawaharlal Nehru Chair in International Environmental Law

Centre for International Legal Studies (SIS)
Jawaharlal Nehru University, New Delhi

E-mail: desai@mail.jnu.ac.in



Main Pillars of the UNFCCC





Why the Disagreement? - I

- ❑ Historical fault-lines in the North-South discourse: (i) bitterness of the colonial legacy (ii) past exploitation of the natural resource base of the developing countries (iii) refusal of the North to make available transfer of technology and funding [e.g. burial of NIEO] (iv) 'difficulty' to see developmental needs of the developing countries.
- ❑ Pollution of poverty and pollution of affluence [Indira Gandhi, 1972]
- ❑ Profligate lifestyles and wasteful patterns of consumption.
- ❑ Lack of sincerity of commitments: (i) sharp decline in ODA from 0.34% (1997) to approx. 0.18% today (ii) Johannesburg 2002 (iii) no environment funding as a right – forcing into the 'debt trap'.
- ❑ Efforts to 'engage' the developing countries in multilateral environmental negotiations have increased their misery: enormous burden on their developmental efforts; resources; capacity.
- ❑ Environmental issues for 'scare mongering'; promote business?

Why the Disagreement? - II



- ❑ Efforts made for developing country commitments – politically expedient for those who intend to upset the Kyoto applecart - **no one acts, and everyone loses.**
- ❑ Insistence on burden sharing by the “key developing countries” as a tactical **subterfuge to shift the focus** from the basic requirement to take the Annex –I countries’ lead at ‘home’ as per the Kyoto Protocol. Targets NOT realized during 2008-2012 period.
- ❑ Except the European Union, there appears **little evidence of ‘leadership’ by the industrialized countries.** Efforts to write ‘obituary’ of the Kyoto Protocol.
- ❑ Urgent need for ‘formal’ UNFCCC assessment as regards the **‘criteria’ of judging the ‘lead’ to be taken** by the developed countries as per Art.3 (1).
- ❑ Continuing countries have continuing responsibilities: Question of **‘debt’ repayment for the historical emissions** due to benefits to the present generation.

Common But Differentiated Responsibility & Respective Capability



- ❑ “Effective and appropriate international response” [Preamble] in consonance with the principle of CBDR&RC
- ❑ Reconciles environmental responsibility of developed countries for their historical contribution, right of the developing countries to develop and the issue of burden sharing.
- ❑ Responsibility is ‘stratified’ – developed countries *‘should take the lead’*; but developing countries are not to be irresponsible.
- ❑ Twin criteria—responsibility and capability for actions:
 - (i) first criterion underscores industrialized countries' responsibility for the accumulation of GHGs in the atmosphere;
 - (ii) second criterion - capability to protect the climate - places special onus for action on developed countries – ***larger the capability, larger the responsibility***.
- ❑ *Respective capacities of countries in mitigating climate change - caveat of “social and economic conditions”.*

Principle of Equity



- ❑ Need to maintain equity in the international economic relationship - Article 3 of the UNFCCC .
- ❑ Parties required to rely on the principle of equity for **'burden sharing' for mitigation.**
- ❑ **Operationalization of equity** into practice through:
 - (i) *common but differentiated responsibility* and respective capability; and
 - (ii) consideration of the specific needs and special situation of developing countries.
- ❑ Equity dictates that **only 'equals' can be treated equally** for apportionment of responsibility for GHG reductions
- ❑ Issues of life styles and consumption patterns.

Precautionary Approach



- ❑ Clear legal distinction need to be made between terms ‘precautionary approach’ and ‘principle’.
- ❑ State practice does not yet testify it to be a principle of international law.
- ❑ Developing countries’ consider ‘precaution’ merely as an ‘approach to development’.
- ❑ Taking “cost-effective (measures) so as to ensure global benefits at the lowest possible cost”.
- ❑ Taking into account different socio-economic contexts, be comprehensive, cover all relevant GHG sources, sinks and reservoirs and adaptation, and comprise all economic sectors.

Specific Needs & Circumstances of Developing Countries



- ❑ Issue of funding & environmental friendly technologies.
- ❑ GHG 'survival' emissions as a necessity - not a luxury: Issues of poverty and underdevelopment.
- ❑ Article 4(8) and Preamble's paragraphs 19 and 20 provide: the parties should give "full consideration" to the specific needs of developing countries which are vulnerable to adverse effects of climate change.
- ❑ Much of the damage from the climate change is likely to fall on developing countries and many small coastal states that are least able to cope up with.
- ❑ Special consideration to low lying countries and small island states that are more vulnerable by (i) climate change itself, or (ii) by the response measures taken to mitigate climate change.

Issue of Funding



- ❑ Annex II Parties to provide financial assistance to developing countries to help address climate change and adapt to its adverse effects (Article 4.3 and 4.4).
- ❑ Global Environment Facility focal area funding on climate change has very limited range for the developing countries.
- ❑ The Bonn Agreements and related decisions provided for the establishment of three new funds: (i) special climate change fund; (ii) least developed countries fund under the Convention, and (iii) adaptation fund under the Kyoto Protocol.
- ❑ Continuing sharp decline in Overseas Development Assistance (ODA) from 0.34% (1994) of GNP of industrialized countries to around 0.18% today is a cause of great concern – nowhere near the UN target of 0.7% [except the Scandinavian countries].
- ❑ Question of the Green Climate Fund – will promised funds flow?

The Climate Quagmire: Copenhagen-I



- ❑ 13 day climate show came to bizarre end after just deciding to “take note” of the three-page five nation [US, Brazil, South Africa, India and China] document.
- ❑ Danish Prime Minister Lars Rasmussen observed: “If we strictly stick to the principle of consensus, this (the US-BASIC accord) cannot be adopted. I really regret it for this reason that we cannot adopt this document. It is true that this document cannot be put into operational effect. It is true but it is a reality”
- ❑ Accord not a formal COP decision and has no legal sanctity. But a one line decision “takes note of the Copenhagen Accord of 18 December 2009”
- ❑ End product was ‘parachuted’ through a non-transparent process to obtain ‘consent’ of the large number of reluctant sovereign states. The language in the political instrument (called ‘Accord’) remains quite 'soft'.
- ❑ Serious questions arise as regards the legitimacy and status of a COP decision that defied consensus against wish of a huge majority. It negated the basic principle of consensual decision in multilateral environmental treaty-making.

The Climate Quagmire: Durban-II



- ❑ *Ad Hoc Working Group on the Durban Platform* (AWG-DP) was to work in first half of 2012 up to 2015 to adopt a protocol, legal instrument or agreed outcome with legal force at COP 21.
- ❑ It effectively endorsed the European Union proposal.
- ❑ Explore options for a range of actions to ensure highest possible mitigation efforts by ALL THE PARTIES
- ❑ As per the Stockholm Environment Institute, Cancun pledges (2010) show developing countries were to make 30% - 50% more cuts than the rich – the rich were able to avoid taking any action.
- ❑ CMP decided on the Second Commitment Period of the Kyoto Protocol to begin on 1 January 2013 and end on 31 December 2020.
- ❑ Was 'historical responsibility' and 'differentiation' jettisoned?

The Climate Quagmire: Doha –III



- ❑ **Doha Amendment**: Article 20 and 21 of the Kyoto Protocol: Second Commitment Period [01 January 2013 – 31 December 2020]
- ❑ **Revisiting QELRC** by each party listed in Annex I latest by 2014: increase ambition in commitment – *to decrease percentage inscribed in 3rd column of Annex B in line with aggregate reduction of GHGs of at least 25 to 40% below 1990 levels by 2010:*
- ❑ *Information to be submitted to the Secretariat by 30 April 2014 – classic case of voluntary commitment to the fore?*
- ❑ **Recalcitrant Parties**: (i) Canada has withdrawn from the Kyoto Protocol; (ii) Non-renewal by Japan and Russia for the second commitment period; (iii) EU's conditional acceptance.
- ❑ No concrete financial commitment to the developing countries.
- ❑ Ensuring continuity between first and second commitment period.

Post-2012 Scenario



- ❑ Substantial rise in emissions of major Annex I countries, under Phase – I of the Kyoto Protocol. **Unprecedented breach of treaty obligations?**
- ❑ Did the desert sand create the 'Doha miasma'? Moving towards a universal climate agreement by 2015? Untimely demise of AWG-LCA queers pitch for the AWG Durban Platform negotiations?
- ❑ Is the Annex –I 'user syndrome' at work? Taking benefits of flexible mechanisms under but reluctant to take more commitments?
- ❑ Drift at work: Finding solution in drafting special national legislation [e.g. Climate Change Act 2008 by UK] and domestic legal remedies?
- ❑ Future role of the BASIC countries: Has the time come to share equal responsibility?
- ❑ **Is the UNFCCC losing steam to secure effective global response for stabilizing climate change? Time for alternative solutions? What could that be?**