

Paris Climate change Agreement and the Status of Achieving the Goal of Sustainable Development: A Legal Analysis from the Perspective of Developing Countries

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Abstract—*The Paris agreement on climate change is really the most significant step forward in regard to climate change negotiations, in which now the responsibility for emissions shall no more be based on 'historical responsibility', but shall be shared by every country of the world, once the agreement comes into force.*

The agreement while shifting a significant amount of burden towards developing countries seems to depart from the principle of 'historical responsibility' which was being advocated by developing countries and was already accepted under the climate change discourse and various such dispensations in last two decades causing the apprehension of altering the balance of achieving sustainable development with equitable justice in the world. Bottom up approach in form of fixing Intended Nationally Determined Contributions (INDCs) mandatory for every party countries is not only one such tool through which the already accepted principle of 'common but differentiated responsibilities' under Kyoto Protocol has been diluted but also, there is no trace of any legally binding commitment towards any financial help or transferring green technologies to developing countries for meeting their goals towards climate change mitigation. However, the inclusion of some of the phrases and principles which were being advocated by developing countries, like "climate justice" and "sustainable lifestyle and consumption" may give some leverage to developing countries for future negotiations which will take place before the implementation of the agreement and fixing the modalities further in effort of achieving the goal of sustainable development.

This paper has made an effort to evaluate the legal status of the agreement along with the identification of the changing balance in respect to responsibilities among developed and developing countries to achieve the goal of sustainable development. The paper has also made an attempt to analyze the effect of Paris agreement on developing countries while appraising the implementing status of the principle of historic responsibility and will suggest a way forward for developing countries.

1. INTRODUCTION

The Paris agreement on climate change is the first document of its kind since international climate negotiations began more

than two decades back in which every country irrespective of being developed or developing have taken responsibility of reducing the emission of green house gases (GHGs). Under this agreement now the responsibility for emissions will not be based on 'historical' emissions as enshrined in the Kyoto Protocol, but shall be shared by every country of the world, once the agreement comes into force. A substantives part of the agreement document which is extended in thirty two pages is full of non-operatives having addressed many key issues in very general terms as COP decisions with 140 deliberations without defining any specific rights and obligations of the parties in such regard. In nutshell, with combination of non-binding obligations, increased emphasis on review and monitoring mechanism along with many deliberations to work out the specifics for achieving the objective set under the agreement, the Paris Agreement is a new 'framework agreement' agreed among the parties under the UN Framework Convention on Climate Change (UNFCCC), which requires a multitude of further substantive decisions to be taken. Shifting the burden towards developing nations and denying the scope of carbon space and carbon budgeting, the agreement seems to fail in giving a balanced approach towards achieving a goal of sustainable development.

2. RATIFICATION, CONDITIONS FOR COMING INTO FORCE AND WITHDRAWAL OF PARTIES

The Article 21 of the agreement sets out conditions of coming the agreement into force, which requires to be ratified by at least 55 parties to the United Nations Framework Convention on Climate Change (UNFCCC) representing 55% of total global greenhouse gas emissions to come into force on the 13th day of achieving such ratifications.¹ In accordance of the Article 20 of the agreement ratification process has already started from 22 April, 2016, and the agreement will remain

open for the same till 21 April, 2017, at the UN headquarters in New York.ⁱⁱ

Failing short of taking any lesson from the failure of Kyoto Protocol due to backtracking of countries like USAⁱⁱⁱ and later Canada^{iv}, the agreement is open for withdrawal of the parties with a notice. After the commencement of three years from the date of the enforcement of Agreement any Party may withdraw itself with a written notice to the depositary.^v

3. LEGAL STATUS AND DETERMINATION OF RIGHTS AND OBLIGATIONS

The agreement has set to achieve the objective of holding the global average temperature increase to well below 2 °C above pre-industrial levels and to pursue further efforts for limiting it to 1.5 °C.^{vi} However, any mechanism to achieve such objective and fixation of any meaningful target to reduce the emissions as well as other efforts in such regard are missing from the Agreement. The agreement has relied largely on the bottom up voluntary approach of the INDC, which seems far from the set objective, as even if countries follow such pledge made in their INDCs, the average temperature will rise 2.7 – 3.5 degree C.^{vii} In response to the goal set in Article 2 the agreement under fixes a vague time frame of “as soon as possible”^{viii} under Article 4 of the agreement.

The Agreement is hardly creating any legally binding obligation with any enforceable legal mechanism neither in regard to emission reduction, nor any penal provision or penalty mechanism in case of non-compliance by the member states. The agreement does not use the word “shall” for making obligatory to developed countries, whereas it directs that “the developed country Parties “should” continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels...”^{ix} However, the agreement has been orchestrated in a way that it allows parties with significant flexibilities for achieving their emission targets and mitigation efforts, along with a strong reporting and review mechanism^x for ensuring accountability by “naming and shaming” mechanism.

4. WHY NO LEGAL OBLIGATION IN REGARD TO THE SET TARGET?

The legal status of the Agreement as an legally binding international treaty was a sensitive issue during the negotiation process as in case of USA being the largest per capita emitter^{xi} and one of the most significant player, treaty (for the purpose of The constitution of USA) with any legally binding obligation in regard to emission reduction or any spending of money would have required legislative consent with at least two-third majority vote of the Senate before the ratification by the president.^{xii} To save the Agreement from any such legislative requirement to be followed for the ratification by the USA, the Agreement has intentionally been kept with non-binding obligations, so that in case of which, the President of

USA himself can enter into the agreement and carry out the climate commitments by the virtue of Clean Air Act of 1963^{xiii}, without going for the two-third majority approval of senate. The present Obama administration had no hope of any such approval for the purpose of ratification by the present republican dominated senate, in a case if such Agreement would have created any legal obligation as a legally binding international treaty under the constitution of USA, and in consonance of which, the word ‘shall’ was replaced by ‘should’ in Article 4 of the final draft, safeguarding the agreement from the scrutiny of American Senate. However, some aspects of the agreement which does not require any such obligations will be legally binding, such as submitting an emissions reduction target and the regular review of that goal which was not mandatory for developing country in earlier Kyoto protocol.

In case of India, under Article 73(1) (b) of the Constitution^{xiv}, the President of India can ratify any international agreement or treaty, however further it requires to be codified in legislation by the Parliament exercising the power given under Article 253^{xv}, to make it enforceable before the court of law.

5. PRINCIPLE OF HISTORICAL RESPONSIBILITY AND COMMON BUT DIFFERENTIATED RESPONSIBILITY (CBDR)

Though the Agreement has expressed the acknowledgement of the principle “Common but differentiate responsibility” (CBDR) at some places and has kept a differentiation between developed and developing countries in many parts of the text, particularly in respect of finance, but in actual sense it has made a significant departure in comparison to the earlier Kyoto position in case of implementation of such principle. The agreement has replaced the principle of “Historic responsibility” with new expression of “respective capabilities”^{xvi} at various places deleting the differentiation between developed and developing countries while weakening the obligations of developed countries in regard to various obligations. The agreement seems to interpret “equity” in light of ‘respective capabilities and national circumstances’. Dilution of the notion of Historic responsibility is imminently visible when text of the agreement has gone up to the extent of mentioning that the loss and damage due to climate change “does not involve or provide a basis for any liability or compensation”^{xvii}.

Specific mention of “Equity” and “common but differentiated responsibility” (CBDR)” principles under Article 2 (2) emphasized by developing countries along with specific mention of “Climate justice^{xviii}” and “sustainable lifestyle^{xix}” among COP deliberations under the agreement can be noted. However, the earlier basis of differentiation has surely been diluted by shifting from “historical responsibility” to the “respective capabilities”^{xx} by adding this phrase (respective capabilities) with CBDR in Article 2(2) and other places wherever CBDR has been used. Further, unlike before as in

case of Kyoto, the differentiation has been lifted in case of obligations regarding reporting, inventory of greenhouse gases and progress made in implementation of Intended Nationally Determined Contributions (INDCs), while making it, mandatory obligation for all Parties irrespective of being developed or developing, whereas the phrases like “equity”, “CBDR”, “Climate Justice” and “sustainable lifestyle” have been placed only for aesthetic value in the agreement without any real meaning or creating any legal obligation in such regard.

6. CLIMATE FINANCE AND FINANCIAL AID

Following the principle of “historic responsibility” and “CBDR” enshrined in Article 4 of the Kyoto Protocol developing countries have been arguing for a climate fund with contribution from developed countries to support them in combating the menace of climate change. The Paris Agreement using a vague language without giving any burden sharing formula or providing any binding financial arrangement, has intended to resolve for setting a new collective quantified goal from a floor of USD 100 billion per year, prior to 2025.^{xxi} The gravity of commitment towards such financial aid which is part of the historic responsibility can be well understood from the fact that, it could not get any place in the operative part of the Agreement under any Article, however has found mention only in Para 54 and 115 of the non-operative part of the Agreement.

The Agreement allowing the existing Warsaw mechanism to operate, includes, the mention of ‘loss and damage’ in the case of devastating effects of climate change, but without any firm financial commitment while denying any notion of historical responsibility going to the extent of mentioning in the corresponding part of accompanying COP decision in Para.52, that the loss and damage due to climate change “does not involve or provide a basis for any liability or compensation”.^{xxii}

7. TRANSPARENCY, REVIEW AND EFFECTIVENESS

The parties irrespective of developed or developing, without any differentiation are under mandatory obligation to account for their INDCs with accuracy and transparency Under of the Agreement.^{xxiii} A transparency framework has been placed under Article 13, which requires biennial reporting with updates regarding their mitigation efforts and in case of developed countries, the financial support and technology transfer to developing nations.^{xxiv} Moreover, all submissions under this framework are subject to a Technical Expert Review, which will analyze their authenticity and identify areas for improvement. A mechanism, to facilitate implementation of and to promote the compliance, has been established under Article 15 of the Agreement. The agreement also provides for a “global stocktake” mechanism

for assessing the implementation in interest of equity and in light of the latest research reports.^{xxv} The first such stocktake will take place in 2018 at the 24th session of the COP and the global stocktake in 2023 and thereafter at the gap of every five years.^{xxvi}

8. PARADISE FOR FINANCIAL MARKET PLAYERS AND THE GOAL OF SUSTAINABLE DEVELOPMENT IN PERIL

The Agreement has opened the door even wider than the Kyoto Protocol while agreeing upon opening a voluntary carbon market to buy and sell carbon credits creating carbon markets with financial speculations where parties can trade carbon bonds. With this trading mechanism, developed countries shall be allowed to buy cheap emission reduction options, leaving even lesser option for the developing countries. Unlike Kyoto, under the Paris Agreement, developing countries having legal commitments through their own INDCs will have not only to reduce their own emissions to meet their commitments but also have to work for reduction, to meet the obligations of developed countries, as they can buy such reduction for their own emission. Such mechanism with creating even more pressure on developing countries will put the goal of achieving sustainable development in peril as developed countries will get a carbon market, through which they can offset their emissions, so they will make hardly any effort towards the emission reduction and will keep polluting more while they will buy carbon credits from developing countries and developing countries will keep cutting their emission to meet the target of developed countries. Achieving the goal of sustainable development looks hardly possible without carbon budgeting which could have made a balance among different countries considering the factor being developed and developing, whereas there is no any reference to the “carbon budgeting” and again developed countries are free to to disproportionately appropriate carbon space in the future like what they have done in past.

There may be combination of positives and negatives for different groups of countries however the real winner without any ambiguity at Paris are Multinational corporations and international financial institutions for whom more business in terms of the use of technologies and huge investments in innovations and carbon credit market have been ensured in the agreement.

9. CONCLUSION AND WAY FORWARD

In the Agreement, developing countries have got “words” and “promise of money” while developed countries have finally got rid of their historical responsibility, but the biggest gain has been achieved by the world and mankind when for the first time almost all countries of the world have agreed to make a

public commitment to reduce greenhouse gas emission in direction to mitigate the climate change.

Developing countries, succeeded in getting mentioned the terms like “climate justice”, “sustainable lifestyle and consumption” in the text, which are though not in the operational part of the agreement and presently are not backed by any obligatory commitments but must be useful and work as leverage in favor of developing countries for further negotiations to ensure the sustainable development, as the Paris Agreement is not the end, but the beginning of negotiating future actions, where the review followed by ratcheting up of INDC’s commitments, finance mechanism, reporting and transparency mechanism, functioning of carbon market etc. are still to be negotiated in coming years.

ⁱ “This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.”

Article 21 (1), The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

ⁱⁱ Article 20(1), The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

ⁱⁱⁱ Kyoto: Why did the US pull out? BBC World Service, March 30, (2001).

Available at: <http://news.bbc.co.uk/2/hi/americas/1248757.stm>

^{iv} Canada pulls out of Kyoto protocol, The Guardian, Dec 13 (2011)

Available at:

<http://www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol>

^v Article 28, The Paris Climate Change Agreement, UNFCCC, 2015.

^{vi} “This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;”

Article 2 (1), The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

^{vii} National pledges 'far from enough' to halt global warming: UN, Business Insider, Nov 6, (2015).

Available at: <http://www.businessinsider.com/afp-national-pledges-far-from-enough-to-halt-global-warming-un-2015-11?IR=T>

^{viii} Article 4.1, The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

^{ix} Article 9.3, The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

^x Article 13, The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

^{xi} Each Country's Share of CO2 Emissions, Union of Concerned Scientists.

Available at:

http://www.ucsusa.org/global_warming/science_and_impacts/science/each-countrys-share-of-co2.html#.V1CrODV95dg

^{xii} Article II §2(2), The Constitution of USA

^{xiii} Inimai M. Chettiar and Jason A. Schwarz, The Road Ahead: EPA’s Options and Obligations for Regulating Greenhouse Gases, New York University School of Law, Institute for Policy Integrity p 68-70, April (2009).

^{xiv} Article 73, The Constitution of India.

^{xv} Article 253, The Constitution of India.

^{xvi} Article 2(2), The Paris Agreement on Climate Change, UNFCCC, FCCC/CP/2015/L.9 (2015).

^{xvii} Decisions to give effect to the Agreement, Para 52, The Paris Climate Change Agreement, UNFCCC, 2015, p.7, FCCC/CP/2015/L.9, (2015).

^{xviii} “The Parties to this Agreement

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Noting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of “climate justice”, when taking action to address climate change.”

The Paris Climate Change Agreement, UNFCCC, 2015, p 21, FCCC/CP/2015/L.9, (2015).

^{xix} “The Parties to this Agreement

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Also recognizing that sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change,....”

The Paris Climate Change Agreement, UNFCCC, 2015, p 21, FCCC/CP/2015/L.9, (2015).

^{xx} “ This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

Article 2 (2), The Paris Climate Change Agreement, UNFCCC, 2015, p 21, FCCC/CP/2015/L.9, (2015).

^{xxi} Para 54 & 115, Decisions to give effect to the Agreement, The Paris Climate Change Agreement, UNFCCC, p.7, FCCC/CP/2015/L.9, (2015).

^{xxii} Para 52, Decisions to give effect to the Agreement, The Paris Climate Change Agreement, UNFCCC, p.7, FCCC/CP/2015/L.9, (2015).

^{xxiii} Article 4(13), The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

^{xxiv} Article 13, The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

^{xxv} Article 15, The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).

^{xxvi} Article 14 (2), The Paris Climate Change Agreement, UNFCCC, FCCC/CP/2015/L.9 (2015).