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

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 desertification 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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\textsuperscript{9} because it had failed to include binding stabilization and reduction

\textsuperscript{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.
\textsuperscript{7} The UNFCCC, Article 9.
\textsuperscript{8} \textit{Ibid}.
\textsuperscript{9} \textit{Supra} n. 5 at pp. 458-71.
commitment and suggests only vague commitments.\textsuperscript{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.\textsuperscript{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.’\textsuperscript{12} Thus in the making of the GCCRR,\textsuperscript{13} there was a visible confrontation between the developed countries and the developing countries.\textsuperscript{14} This chapter aims at analyzing this confrontation through the lenses of fairness.\textsuperscript{15}


\textsuperscript{12} The UNFCCC, Article 2.

\textsuperscript{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.

\textsuperscript{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.”

\textsuperscript{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 the preparations for negotiating an international convention on climate change.

[^16]: Supra n. 11.
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.\textsuperscript{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’.\textsuperscript{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.”\textsuperscript{22} Thereafter the UNGA established the INC with a mandate to pursue “a single intergovernmental negotiating process under the auspices of the General Assembly.”\textsuperscript{23}


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

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, \textit{i.e.}, the year 1990.\(^25\)

\(^24\) 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 \textit{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): \textit{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”, \textit{Yearbook of International Environmental Law}, 16:81; Joyner, C.C. (2002): “Common But Differentiated Responsibilities”, \textit{American Society of International Law Proceedings}, 96:358.

\(^25\) \textit{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.  

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 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’. 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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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\textsuperscript{29}, objective of the UNFCCC\textsuperscript{30} and the principles guiding the implementation of UNFCCC.\textsuperscript{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\textsuperscript{32} and the special vulnerability to the impacts of climate change of low-lying, small island developing countries.\textsuperscript{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.\textsuperscript{34}

\textsuperscript{29} The UNFCCC Article 1.

\textsuperscript{30} Id. at Article 2.

\textsuperscript{31} Id. at Article 3.

\textsuperscript{32} Id. at Preamble, paras. 6 and 23.

\textsuperscript{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.

\textsuperscript{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…”

114
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\textsuperscript{35}) as far as the international agreements are concerned. The UNFCCC is an exception to this rule, by providing varied rights and obligations,\textsuperscript{36} though it is not the first international environmental instrument that provides such a differentiated treatment.\textsuperscript{37} The principles that are recognized under the UNFCCC include:\textsuperscript{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);\textsuperscript{39}

(ii) The Principle of Equity (Equitable Distribution);\textsuperscript{40}

\textsuperscript{35} In reality states vary with respect to their economic power, military might and the strength of their institutions.

\textsuperscript{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.”

\textsuperscript{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 on 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.

\textsuperscript{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.

\textsuperscript{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.”

\textsuperscript{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.”

115
(iii) The Principle of ‘Common But Differentiated Responsibilities’ (CBDR)\textsuperscript{41};

(iv) The Principle of Sustainable Development;\textsuperscript{42} and

(v) The Precautionary Principle.\textsuperscript{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.”\textsuperscript{44}

\textsuperscript{41} \textit{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.”

\textsuperscript{42} \textit{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.”

\textsuperscript{43} \textit{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.”

\textsuperscript{44} \textit{Supra} n. 25 at p.55.
Further the scope of CBDR as recognized by article 3 of UNFCCC\textsuperscript{45}, is different from the CBDR that is recognized in Articles 6 and 7 of Rio Declaration.\textsuperscript{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’.”\textsuperscript{47} At the same time it could be argued that the CBDR under

\textsuperscript{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.”

\textsuperscript{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.”

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

48 Supra n. 28 at p.451.
49 Supra n. 44 at p.191.
50 Ibid.
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. 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

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<th>Sl. No</th>
<th>Classification</th>
<th>Details</th>
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<tbody>
<tr>
<td>1</td>
<td>Annex I countries</td>
<td>Industrialized countries and economies in transition</td>
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<td>2</td>
<td>Annex II Countries</td>
<td>Developed countries who pay for the costs of developing countries</td>
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<tr>
<td>3</td>
<td>Non-Annex I countries</td>
<td>Developing Countries and the Least Developed Countries</td>
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52 Supra 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, 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.

(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

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53 Supra n. 43 at Article 4.
54 Id. at Article 4(1).
Methodologies’ that is agreed by the parties to the UNFCCC.\textsuperscript{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.\textsuperscript{56}

(c) Promote practices that would mitigate anthropogenic emissions including the transfer of technology\textsuperscript{57}

(d) Promote and cooperate in the sustainable management and conservation and the enhancement of sinks and reservoirs such as biomass, forests and oceans.\textsuperscript{58}

(e) Cooperate in preparing for the adaptation strategies to the impacts of climate change by developing the appropriate and integrated plans.\textsuperscript{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\textsuperscript{60} and exchange the relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change.\textsuperscript{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

\textsuperscript{55} Id. at Article 4(1) (a).
\textsuperscript{56} Id. at Article 4(1)(b).
\textsuperscript{57} Id. at Article 4(1) (c).
\textsuperscript{58} Id. at Article 4 (1)(d).
\textsuperscript{59} Id. at Article 4 (1)(e).
\textsuperscript{60} Id. at Article 4 (1)(f).
\textsuperscript{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.”

It is commented that though it is a binding obligation, it is rather a weak and diluted one. 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.

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. 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. 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

\(^{67}\) Id. at Article 12 (5).


\(^{69}\) 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. Prior to the emergence of GCCRR, the GERR also contained provisions regarding transferring the ESTs. 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. But it appears that generally, these commitments have seldom gone beyond the rhetorical to the real transfer of ESTs. 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 to 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 process, 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).


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.\textsuperscript{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\textsuperscript{75}, filed the case with WTO alleging that India have violated the General Agreement on Trade and Tariffs (hereinafter referred to as GATT),\textsuperscript{76} the Agreement on Trade-Related Investment Measures (also known as TRIMS)\textsuperscript{77}, and the Agreement on Subsidies and Countervailing Measures (also known as

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\textsuperscript{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.

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

\textsuperscript{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.

\textsuperscript{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), 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. Thomas Franck, in this regard states thus:

> The extent to which institutions …are able to 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.
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.” 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. 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. In this context it is commented that the, “exponents of delay and obfuscation were thus handed a veto because the rule of consensus applies.” 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. 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).
84 Supra n. 69 at p.59.
from the traditional national processes of control and supervision. In this sense, the new type of environmental regime may signal an emerging *democratic deficit*.”

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. Furthermore, 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.

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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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.  

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.” The expectations of sharing the scientific knowledge by establishing SBSTA, in fact sets the “base for the regime’s priorities, policies and strategies.” 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.” 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.


90 Id. at 32-43.

negotiations as well.\textsuperscript{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

\textsuperscript{92} \textit{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 Protocol96 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

94 Supra n. 92 at p. 42.
95 Id. at p. 43.
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 \textit{Berlin Mandate}. This \textit{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

\(^{98}\) \textit{Supra} n. 57.


\(^{100}\) \textit{Supra} n. 79 at pp. 60-61.

\(^{101}\) \textit{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.\textsuperscript{102}

Thereafter, a negotiating body, known as the \textit{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:\textsuperscript{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.\textsuperscript{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 enhancement of energy efficiency, the protection and enhancement of sinks

\textsuperscript{102} \textit{Ibid.}.
\textsuperscript{103} \textit{Id.} at p. 62.
\textsuperscript{104} \textit{Id.} at p. 62.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 be noted that throughout the negotiations, the question of formulating the schemes on the basis of historical emissions never arose.\textsuperscript{108}

\textsuperscript{105} The UNFCCC, Article 2(1)(a).
\textsuperscript{106} Supra n. 100 at p. 64.
\textsuperscript{107} Id. at p 65.
\textsuperscript{108} Id. at p. 67.
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)\textsuperscript{109} and (d)\textsuperscript{110} of the UNFCCC.\textsuperscript{111} The basic

\textsuperscript{109} UNFCCC, Article 4 (2)(a) says that “Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, 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”

\textsuperscript{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 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
eligibility requirements for JI projects are set out in article 6 (1) of the Protocol. 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) 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 reduction commitments, government supervision is important. Hence private sector participation is subject to the authorization and the requirement that both the host and the purchasing country must approve the project.

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.’

Supra n. 11 at p. 75.

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.”

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.”

Supra n. 100 at p. 79.
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.\footnote{Ibid.} 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.”\footnote{Supra n. 113 at Article 6(2).} 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.\footnote{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.}

### 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.\footnote{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 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
developing countries in achieving sustainable development and also aiding Annex I states in meeting their emission limitation and reduction commitments. 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. This proposal now has been incorporated into the CDM. Like the JI, the CDM is also a project-based mechanism, but executed for credits earned in developing countries. Unlike JI, for each Certified Emission Reduction (hereinafter referred to as CER) an Annex I party increases its

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.”


122 Every Certified Emission Reduction (CER) is equal to a ton of CO2.
cap. In this context the CDMs are integral to environmental protection. 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. 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”. This is called the Additionality Criterion of the CDM.

For the proper and effective administration of CDM, the COP has developed detailed Rules. 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. The CDM has created interest among both the developed countries and among the developing countries. Developing countries see a potential influx of technology and resources. At

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124 The Kyoto Protocol, Art. 12(5).
125 Supra n. 11 at p. 80.
the same time, the developed countries see the cheaper compliance and opportunities for their private sectors in banking, advising, and legal services. 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. Various studies have also pointed out problems with the CDM market, particularly with respect to the additionality of some CDM credits. 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.” 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):

Table 3: Regional Distribution of Global CDMs

<table>
<thead>
<tr>
<th>Region</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asia Pacific</td>
<td>79.7%</td>
</tr>
<tr>
<td>Latin America and Caribbean</td>
<td>15%</td>
</tr>
<tr>
<td>Africa</td>
<td>3%</td>
</tr>
<tr>
<td>Europe and Central Asia</td>
<td>1%</td>
</tr>
<tr>
<td>Middle East</td>
<td>1%</td>
</tr>
</tbody>
</table>

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129 Supra n. 125 at p. 82.
132 Supra n. 129 at pp. 81-82.
133 Id. at p. 82.
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. 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.

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 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

\[\text{Ibid.}\]
\[\text{Ibid.}\]
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 Protocol137. The concept of international emission trading was introduced in the negotiations by the USA supported by the members of the JUSSCANNZ club138. This movement was 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,


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
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. 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

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

139 Supra n. 132 at pp. 84-85.
‘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.” Together with the market-based flexibility mechanisms, the compliance mechanism of the Kyoto Protocol has been hailed as unique to the international environmental law.

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. 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. Under such circumstances, a process resting on monitoring, supervision, and management is a preferred means of achieving the objectives of the instrument concerned and more particularly in environmental protection.

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 Birmie, 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.
144 Supra n. 142 at p.86.
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. 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 and fairness 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.” 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. At the 2001 COP-7 in Marrakech, the parties agreed that the compliance mechanism would consist of a

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


\(^{152}\) They are African Group, Latin American and Caribbean, Asian Group, Eastern European, and Western Europe and Others.

\(^{153}\) *Supra* n. 144.
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. 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. 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.

(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:

(i) COP 4, Buenos Aires, Argentina (1998): The Fourth COP after the adoption of Kyoto Protocol was an opportunity to deal with the unfinished

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156 Such as JI, CDM and International Emission Trading.
business of climate negotiations. 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. 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. 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. 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 such commitments engenders enormous suspicion among developing countries, which regard them as a slippery slope to binding commitments,

159 Supra n. 144 at 93.
160 Ibid.
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. However the, non-governmental organizations were critical of such a move.\(^ {167}\)

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\(^{162}\) The UNFCCC, Art. 4(2)(d).

\(^{163}\) Supra n. 161 at p. 95.

\(^{164}\) Supra n. 161.

\(^{165}\) Ibid.

\(^{166}\) Id. at p. 97.

\(^{167}\) Ibid.
(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, the COP-6 ended as a failure, as parties were unable to reach an agreement on a number of issues. 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; how much credit each country should get for the carbon dioxide absorbed by the forests and grasslands, and the compliance mechanism.


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 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
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.”

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.’

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


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.


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. 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. 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.

(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. 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*. Along with this the compliance regime, guidelines and procedures for the

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176 Supra n. 174.
177 Ibid.
178 Ibid.
181 See, Decision 24/CP.7, in Report of the Conference of the Parties on its Seventh Session.
implementation of the flexibility mechanisms;\textsuperscript{182} and the land-use and forestry as sinks for the removal of GHGs\textsuperscript{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 \textit{Kyoto Rule-book}.\textsuperscript{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) \textit{COP-8, New Delhi, India (2002):} The COP at New Delhi saw the concerns of developing countries taking the center stage.\textsuperscript{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.\textsuperscript{186} The documentary record that was produced is known as \textit{Delhi Declaration on Climate Change and Sustainable Development}, which reaffirms that development and poverty eradication are the overwhelming priorities of the developing countries.\textsuperscript{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 programs. It stresses the importance of adaptation to the impacts of climate

\textsuperscript{182} Supra n. 143 at Decisions 15/CP.7, 16/CP.7, 17/CP.7, 18/COP.7, and 19/CP.7.
\textsuperscript{183} \textit{Id.} at Decisions 11/CP.7 and 12/CP.7.
\textsuperscript{184} Supra n. 138.
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.\textsuperscript{188}

(vii) \textit{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.\textsuperscript{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.\textsuperscript{190} The adaptation activities included water resources management, agriculture, integrated coastal zone management, coping with the disasters caused by the extreme weather events \textit{etc}.\textsuperscript{191}

(viii) \textit{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 \textit{Buenos Aires Programme of Work on Adaptation and Response Measures}, which covered the following areas \textit{viz.}, the adverse effects of climate change, impact of the implementation of response measures, to develop a structured program of work on the

\textsuperscript{188} \textit{Supra} n. 121.
\textsuperscript{191} \textit{Supra} n. 188.
scientific, technical, and the socioeconomic aspects of impacts, vulnerability, and adaptation to climate change.\textsuperscript{192}

(viii) \textit{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 \textit{Kyoto Rulebook} agreed at the \textit{Marrakech Accords} and the subsequent COPs.\textsuperscript{193}

The parties also initiated the mandate of reviewing the Protocol Commitments of the Annex I parties by establishing the \textit{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.


\textsuperscript{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*.\textsuperscript{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.\textsuperscript{198} Similarly, the UNGA also convened a thematic debate on climate change, which saw an almost exhaustive list of countries addressing the topic.\textsuperscript{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.\textsuperscript{200} The key outcome of this Conference was the *Bali Action Plan*, launching a negotiating process for beyond 2012.

(xii) *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

\textsuperscript{197} Supra n. 155. Decision 1/CP.13.


\textsuperscript{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:

(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. 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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Switzerland, and Norway agreed for the KP2 thus making it only 15 percent of the developed country emissions. 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.

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. 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). 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.” 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.”

Unlike Handl, majority of the scholars follow one-sided arguments 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.” 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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208 Ibid.
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.”

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.”

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. 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

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.


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.”

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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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.