Chapter VI

Conclusions and Suggestions

There will come a time when the Earth grows sick, and when it does, a tribe will gather from all the cultures of the world who believe in deeds and not the words. They will work to heal it and they will be known as the ‘Warriors of the Rainbow’.¹

This prophecy of the Canadian First People became true finally, but only in part. The earth has grown sick, but no tribe, as stated in the prophecy, emerged. None of the contemporary specialised organs or agencies created, at the international level; with a duty to act against the climate change and the environmental degradation resemble such a tribe. If they were, they would have been more proactive in resolving these problems. This chapter intend to explain this point, by drawing together the analysis made in the preceding chapters of the thesis.

In the previous chapters, the claims and demands of the developing and least developed countries to build GERR and GCCRR on the foundations of Common But Differentiated Responsibility (CBDR) and respective capabilities has been discussed. The fact that majority of these countries have been under colonial governance until a few decades ago, and most of their resources were looted by their colonial rulers, are sufficient reasons for considering their

demands as fair. They argue that the environmental degradation in their territories was/is due to the lack of economic development, rather than the presence of any developmental activities based on industrial revolution. The hard reality, like the ever mounting population and the expansion of agricultural land add to the agony. For the same reason, their desire to advance their economic development through rapid industrialisation and poverty eradication is rightful and justified. The fact that the GHG emissions from these developing and least developed countries are from the sustenance activities rather than any ‘luxury’ and ‘life style choices’ would also corroborate this stand. At the same time, it remains a fact that the climate change is an apocalypse in the making, which if happens would be disastrous for the entire globe that includes both the so-called developing and the least developed countries. It is definite that the various sub-national groups in these countries would fall prey to the vulnerability before anyone else and would face the horrendous devastation than ever before. The reparation might incur them enormous cost that would certainly go beyond their affordable limits. If such a tragedy happens, their priority shall change, and thereafter, the economic development would definitely be not the focus, but disaster management would be.

Similarly, the constricted stand taken by the developed countries that the environmental degradation and the consequential climate change is a global problem and unless there is an equal and ‘common responsibility’ to fix it, they would not accept any absolute and binding emission reduction targets has proved the scenario more complicated. Further, their resistance and lack of motivation in transferring the Environmentally Sustainable Technology (EST) and financial resources to the global needy also contribute to the growing
anxiety and concern of the developing and the least developed countries. Thus, the fact that these powerful economies are attempting to use the *Kyoto* flexibility mechanisms, designed for reducing the aggregate global GHG emissions, with an ulterior objective to gain preferably, the economic profits to the environmental profits is really condemning. It is pertinent to note here that, only for the reason that they are the major source of global environmental degradation based on their past and present anthropogenic GHG emissions; the developed countries are increasingly bound by the rule of *differentiated responsibilities*.

Scientific evidence proves beyond doubt that the phenomenon of climate change would hit the entire globe, developed, developing and least developed countries irrespective of their economic might. The lack of cooperation currently existing amongst the countries in laying down a solid and effective GCCRR that would actually reduce the GHG emission to a level that earth’s sinks could neutralise, is highly unjust and unfair. It is an equally reproachful fact that each of these countries frames the environmental policies according to its own self-interest and in a manner absolutely insensitive to the interest of the planet. The changing notions of the practice of environmental colonialism and the new configuration of geopolitical alliance have in fact brought about substantial modifications to the concept of fairness in the global environmental law. In this backdrop, the study that seeks to analyse the Global Environment Regulatory Regime (GERR) and Global Climate Change Regulatory Regime (GCCRR) from the perspective of fairness, intends to answer the following research questions.
(i) What is the meaning of the term ‘fairness’ and how effectively, it has been reflected and practised in the international environmental law? How far a deeper understanding of the concept of fairness would help in identifying and resolving the various issues pertaining to GERR and GCCRR?

(ii) Whether the contemporary GERR in general and GCCRR in specific, has been fair enough to meet the varying needs and demands of a wide range of stakeholders including the developed, developing and least developed states, geographically alienated states, various sub-national groups etc.?

(i) What are India’s Climate Change Policies and Strategies and how far these unique policies and strategies have been effectively negotiated at the international law making forums particularly in the backdrop of a fairness divide that exists in the contemporary international law making process?

The work sought to answer these questions by analysing the Indian legal and policy experiences relating to environmental protection and climate change actions in the context of GERR and GCCRR, through a doctrinal study based on an interdisciplinary research. This research built on the premises of ‘politics of law’ makes the following findings.
Research Question 1: What is the meaning of the term ‘fairness’ and how effectively, it has been reflected and practised in the international environmental law? How far a deeper understanding of the concept of fairness would help in identifying and resolving the various issues pertaining to GERR and GCCRR?

The philosophical investigation into the concept of fairness and its importance in properly understanding and effectively resolving the various issues pertaining to GERR and GCCRR as done in chapter 1 of this thesis was highly challenging. The study concluded that fairness (which is often synonymously used with terms like justice, equity etc.) has always been a prerequisite of any good legal system throughout the world and during all ages. Fairness is important in analysing the quality and effectiveness of both domestic and international law. At the same time, the study evidenced that the term is highly abstract. For different schools of law and different scholars it meant differently. For some of them fairness was important in its distributive perspective, but for a few others it was important from the substantive and procedural viewpoint. Several other scholars analysed the concept of fairness from its corrective functional angle. For some of them, obeying the command of the sovereign’ were fair but for others the same ‘command of the sovereign’ was required to be in consonance with a higher standard to be called as fair. For Aristotle, it was the quality of being impartial that was fair. However, H.L.A. Hart, the legal positivist, assumes that equity is subjective and arbitrary and different from the legal justice, which is objective and reasonable. He asserts that fairness is fundamentally important in two circumstances; firstly in the case of distributive justice and secondly in the case of corrective justice. For him, it
was important to treat like cases alike and impartiality and consistency were fundamental to the concept of fairness.

For naturalists like Lon L. Fuller, any law to be called as fair should contain essentially the *inner morality* of law. According to him, the presence of eight elements\(^2\) in a legal system indicates its unfairness. He further argues that any legal system to be called as fair needs to satisfy these eight conditions. At the same time, for Utilitarian like Bentham, the greatest happiness of greatest number of people, with less friction and minimum waste was fairness. For John Rawls, ‘justice is the first virtue of social institutions, as truth is of systems of thought’ and his difference principle is one of the most influential theories of justice. According to him, there are two fundamental principles of justice, *viz*; (i) every individual in a just society has an equal right to a fully adequate scheme of basic liberties at par with others in the society, and (ii) the social and economic inequalities must satisfy two conditions; firstly, the equality of opportunity is a condition precedent for any system to be called as fair, and secondly, that they must be to the greatest benefit to the least advantaged members of the society. Further, Robert Nozick in his *entitlement theory* holds that a distribution is just and fair, if everyone is entitled to the goods that he currently possesses. According to him, just distribution flows from the free exchange of goods originally acquired and then successively transferred by legitimate means. If the

\(^2\) (i) The lack of rules or law, which leads to *ad-hoc* and inconsistent adjudication; (ii) Failure to publicize or make known the rules of law; (iii) Unclear or obscure legislation that is impossible to understand; (iv) Retroactive legislation; (v) Contradictions in the law; (vi) Demands that are beyond the power of the subjects and the ruled; (vii) Unstable legislation (like the daily or frequent revision of laws); and (viii) Divergence between adjudication/administration and legislation.
goods are unjustly acquired or transferred, a principle of rectification of those violations operates.

Hence, the thesis also concludes that, similar to municipal law, fairness is also very crucial in analysing the international law, mainly due to three reasons. Firstly, the international community consists of nations that are competing for resources and those resources are scarce and limited. Secondly, the nature and scope of international law has been changed considerably and particularly, in the recent past with the advent of globalisation. From the soft law model, it has moved to the command and control model. The international law is no more mere positive morality and is increasingly becoming enforceable. Despite the allegations of violating the sovereignty of states, and being a source of democracy deficit, these command and control model is gaining strength than ever before. Further, it has been well explained under the multilateral regime of the WTO. Thirdly, the rich and powerful states of the international community exercise their supremacy in the making of international law. This conclusion is also supported by Thomas M. Franck who says that the international law has entered a post-ontological age, an era in which, it is no longer necessary to defend the status of international law as a law, but where the vital task is to analyse its fairness. While attempting to answer the question, ‘is international law fair?’ he invokes a broad notion of fairness that encompasses two distinct and sometimes competing values; procedural fairness and substantive fairness in which the former expresses the idea that ‘for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how those rules are made, interpreted and applied’.

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Further, the study also concludes that the fairness is questionable in GERR and GCCRR, which are two species of international legal regimes, particularly considering the fact that the natural resources, including the atmospheric sinks, are scarce and limited. At the same time the competition for acquiring these resources turn out to be gruesome very often. The study also supports the view that, since the natural resources were not initially owned by some one in particular, any act of unjust acquisition, say for example through force, taints the title and is subject to rectification. In this context, the historical pollution of the developed countries ought to be rectified and thus the principle of CBDR is fair. Further, the research also finds that the GERR or the GCCRR could be called as fair only if it overcomes the naturally arbitrary circumstances, such as geographic location of an island or coastal country, by taking the social minimum rule to these countries. It is also concluded that a GERR or GCCRR that does not consider the interests of all the stakeholders viz., the developed, the developing and the underdeveloped countries, and the various classes or groups of people living in those countries, could not be fair. In essence, the research concludes that the contemporary GERR and GCCRR are not as flat as it is claims to be and questions of fairness are loud and clear while the answers are not.

*Research Question 2: Whether the contemporary GERR in general and GCCRR in specific, has been fair enough to meet the varying needs and demands of a wide range of stakeholders including the developed, developing and least developed states, geographically alienated states, various sub-national groups etc.?*
Having found that fairness is equally important for both the domestic and international law with the GERR and GCCRR are taken as examples, the study proceeded to the actual practices under these regimes. The pertinent question was that whether GERR and GCCRR are fair enough in meeting the varying needs and demands of a range of stakeholders including the developed, the developing and the least developed states, geographically alienated states and various sub-national groups? This question has been discussed in detail in chapters 2 and 3 of the thesis. A deeper analysis into the nature of GERR and GCCRR proves the fact that these regimes have become increasingly complex and technical for the reason that the environmental considerations are invariably coupled with the various other social issues such as development, poverty, human rights, technology, international trade etc. In this regard, it is significant to note that the GERR is no more laying down merely normative standards but certainly demonstrates the vital implications of environmental degradation and the need for a prompt responsive action by the member countries.

As stated earlier, one of the major issues of fairness in the making of GCCRR is the intensity of growing non-cooperation that exists amongst the multiple stakeholders. As a result, the club model of international politics, along with its merits and demerits, slow down or halts the negotiations very often. For instance, the Kyoto Protocol, which was adopted in the year 1997 but came into force only in the year 2005 undoubtedly, substantiates this point. It is certain that the elongated break was the direct result of the lack of cooperation from the various clubs of developed countries against the inclusion of the binding targets.
Looking at a practical perspective, this delay is not only unfair to the developing countries but also to the global environment as a whole. The same trend was also evident in the Doha Conference of Parties convened in the month of December 2012. The developed countries vehemently resisted the extension of the Kyoto Protocol beyond the year 2012 *i.e.*, for the second commitment period from the year 2013 to 2020 (also known as KP2). Eventually, though the Protocol was extended, it could be called as an incremental victory because amongst the developed countries only a few countries *viz.*, the EU, Australia, Switzerland, and Norway agreed for KP2. Thus, the end result in terms of an impact on environment could be stated to be a meagre 15 percent of the total developed country emissions.

Another significant issue is the absence of mutual trust and commitment to the subject matter that ought to have been there across the globe. The Annex I parties’ targets under the Kyoto Protocol in the first commitment period illustrates this point very well. Even considering the fact that the period was of considerably shorter duration (2008-2012), the failure to comply with the target requirement cannot be justified. Hence, this procedural lapse in maintaining the adequate accounting standards for the GHG emissions is indisputably an issue of fairness and equity. The combination of the very modest environmental impact and the fact that some Annex I parties are not on track to meet their targets may appear to give credence to this view. Although the GCCRR ensures universal participation, in reality, a small group of some 15 large emitters are bound by the commitments under the current GCCRR.
The patterns of fairness divide are evident from the very outset *viz.*., the dialogue or drafting phase of the international documents. As can be seen in the Stockholm Declaration that while it was being drafted, the developed countries argued that the Draft Declaration be adopted “without any amendments, in order not to imperil the fragile consensus achieved in the pre-conference consultations.” This is particularly important, keeping in view the allegation made by many developing countries that they were not consulted at any stage of the drafting of the Declaration. Similarly, it is interesting to note that the final draft of the Rio Declaration was also adopted without any sort of meaningful negotiations despite the criticism that some of the developing countries were not even consulted in the process. In an international legal system that is based on the fundamental principle of sovereign equality of nations, such a non-participatory process without giving any room for the constructive negotiation to the member countries is absolutely erroneous and grossly undemocratic.

It is also an accepted fact that even during the drafting of these multilateral treaties many genuine concerns raised by the developing countries were not incorporated in the final text. For example, during the negotiation stages of article 3 of the Stockholm Declaration the developing countries argued that the degradation of the environment in the developing countries is primarily because of the low prices fixed and paid for their products by the developed countries. Thus, the developing countries claim that they are forced to do activities amounting to the over-exploitation of the natural resources to outweigh the unfair practices including the low pricing adopted by the developed countries. Correspondingly, during the negotiation of article 3 of the UNFCCC, the developing countries wanted the developed countries to take the leadership
based on their respective contribution to the environmental degradation in the past. However, this demand was not accepted and it contradicted article 7 of the Rio Declaration, which assigned a leadership role to the developed countries.

Another striking finding that is revealed through this research is that even the Security Council of the United Nations is slowly gaining jurisdiction in the environmental disputes. The Security Council of the United Nations, which comprises the victor states of World War-II as permanent members having veto power, is one of the primary organs of the United Nations whose main task is to deal with the matters of war and peace. Though the Security Council is generally not involved in the decision making process in the disputes relating to environmental matters, there were particular exceptions too. For example, when Iraq invaded Kuwait, the Security Council held the former liable on various grounds including the damage to the environment. It may also be noted here that the Security Council is conferred with very wide powers and its decisions are binding on the member States. Now, considering the following facts, any concern pertaining to fairness is justified when approached from the perspective of a less-industrialised State.

(i) The permanent members of the Security Council are heavily industrialised States whose per capita GHG emission rates are higher than that of other States.

(ii) These Permanent Members have Veto Power in the UN Security Council;

(iii) The decisions of the Security Council are binding on all States; and
(iv) Most importantly, the Security Council has slowly started gaining momentum in effectively addressing the issues of environmental protection.

Given an indication of the growth of International environmental law, where the UN Security Council will also have a major stake in international environmental law making, it surely raises certain fundamental questions about the standards of fairness. It is more important than ever before in the light of the fact that the need of the hour is to protect the interests of the less industrialised, developing or least developed countries. Hence, the research has identified a major concern of fairness in the working of the present international environmental law from the perspective of the non-permanent and non-members of the UN Security Council.

Another issue of fairness in the GERR is the option of the flexible rule of forum shopping available to the developed countries. The GERR at present provides many Issue Specific Regulatory Regimes (hereinafter referred to as ISRRs). The GCCRR is only one of them. Thus, the ISRRs are so complex and involve many sub-regulatory regimes focusing on various sub-issues. For instance, the GCCRR though prima facie appears to be core-issue focused, it includes many sub-issue regimes such as the Clean Development Mechanism, Joint Implementation, Tradable Allowances etc. This gives the regime, a character that is complex and complicated in every respect. To ensure an effective functioning within this regime, any state would require an advanced technical knowledge and scientific support with it. But unfortunately, majority
of the developing and least developed countries lack such *know-how* and technological advancements.

Another example that renders support to this finding is the Plant Genetic Resources Regime, which is closely connected to various other ISRRs such as the Global Intellectual Property Regime, International Trade Regime, International Human Rights Regime *etc.* Each of these regimes also consists of a judicial forum to resolve the disputes, and some of them may also attempt to resolve the related environmental disputes. The various international forums having jurisdiction in environmental matters include the: (i) International Court of Justice, (ii) International Tribunal for the Law of the Sea; (iii) World Bank Administrative Tribunal (iv) European Court of Justice (v) Dispute Resolution Body under the WTO (vi) European Patent Office (vii) European Court/Commission of Human Rights (viii) Inter American Commission on Human Rights and numerous other tribunals or forums established under the various multilateral or bilateral treaties and under the respective national courts. This would invariably give a wider scope and freedom for the art of *forum shopping* being practiced by the developed countries.

Yet another major challenge to fairness in GERR and GCCRR is globalization, which offers both opportunities as well as challenges to the principle of sustainable development. The interdependence that is the result of globalization offers new opportunities to trade; investment capital flows and advances in technology, including the information technology. This, if properly used could be beneficial for the growth of the world economy, development and the improvement of living standards of the people around the world. However,
globalization is not always equitable. The best example would be the recent consultation of US to the WTO/DSB against India’s stipulation to use ‘thin film cells made in India’ in the solar energy projects in India. The US, which lost the trade prospects from the Indian market because of such a restriction in the domestic level, claimed that this was against the rules of free trade, *viz.*, the *Principle of National Treatment* under the GATT Agreement. Similarly, it is an accepted fact that the new international patent regime under the TRIPS also poses as an obstacle in the transfer of Environmentally Sustainable Technologies (also known as the ESTs). Hence, it can be undoubtedly stated that the contemporary GERR and the GCCRR has not been fair enough to meet the varying needs and demands of a range of stakeholders including the developed, developing and the least developed states, geographically alienated states and the various other sub-national groups.

**Research Question 3:** What are India’s Climate Change Policies and Strategies and how far these unique policies and strategies have been effectively negotiated at the international law making forums particularly in the backdrop of a fairness divide that exists in the contemporary international law making process?

Contrary to the common perception that the developing countries are only the *rule takers* rather than the *rule makers* in the international system *vis-a-vis* the developed world, the present study concludes that India has been a major international force ever since the inception of the climate change negotiations. It has played a constructive role in building up the international climate change regime, its norms, rules and institutions. It has also played a key role in the
international climate negotiations over the last two decades by exercising an influential voice and acting as a defender of the global south, both as a coalition builder and as an aggressive protector of its own interests. India is also considered to be an important producer of ideas in setting out the international law on climate change and has assumed the role of a blocking power in many multilateral treaty negotiations. To a great extent, India has been successful in defending the unfair strategies of the developed countries and in making them responsible for the environmental degradation and damage being caused by their acts.

India’s foreign policy on climate change also witnessed major shifts during the period. The original policy (1998-2006) that was based on the historical pollution and high \textit{per capita} emission of the industrialised countries stated that the requirements of corrective fairness demanded that the industrialised countries should be held responsible for the emission reduction and not the developing countries. Throughout that phase, India’s main contention was that poverty was the main hindrance for the economic development and it strongly opposed the ‘Common Responsibility' argument of the North and instead advocated for CBDR. Thereafter, between the year 2007 and 2009, India gradually started modifying its domestic policy for reducing the emission. But at the same time, India was not ready to make any changes in her foreign policy. It was after 2009 and during the COP at Copenhagen, India was ready to change its foreign policy by shifting its stand to \textit{per capita plus}. According to the then Minister of Environment and Forests, Jairam Ramesh,
India “…want to be aggressive on domestic obligation and want to be pro-active on international obligation.”

At the same time, the domestic policy regime in India pertaining to climate change is gradually becoming problematic instead of being aggressive. Though the constitution of India recognizes the state’s responsibility to protect the environment, it has been placed under the head of Directive Principles of State Policy and the Fundamental Duties, which are non-justiciable. The research has also identified a contradiction between the forest policy in India and the Forest Act, 1927. When the former emphasised on conservation, the latter has been premised on the state monopoly over forests. Despite the fact that there exist a plethora of judgments by the Indian Supreme Court declaring the right to clean environment to be a part of the Right to Life under article 21 and hence enforceable, practically speaking, Indian Government has miserably failed in taking the ‘social minimum’ to the masses. The main reason for such a failure is that judiciary in India do not have its own enforcement division and it relies on the executive branch for the said purpose of implementation of its directions. At the same time, it is also a hard reality that the executive branch in India is not free from the clutches of corruption and bureaucratic delays and that itself has become one of the major challenges for an effective environmental protection and climate change actions in India. As a result, the various policies promulgated by the government with regard to environment and climate change have also been often criticized for its lack of vision and unfairness.

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6.1 The Way Forward

Having found that a ‘Fairness Divide’ actually exists in the contemporary GERR and GCCRR, it is imperative to state that the main reason for the exasperation of the developing and the least developed countries rests in their incapacity to perform effectively at the multilateral venues. Most of these countries do not have the sufficient knowledge about the technical and subject specific international regimes that exist today. For ensuing fairness in the working of the global legal system, the first priority should be given for generating awareness amongst these states about the significance of the current multilateral legal and policy framework and the need for an effective participation in the international law making process. At the same time, the very fact that many of them have adequate technical resources and human expertise in conducting sufficiently constructive research in the area of climate change and environmental protection and are also able to send their experts as a part of the delegations to the multilateral venues should not be ignored. Hence, giving them an effective opportunity of representation and participation would definitely improve the degree of support coming from the developing and least developed countries.

In the same way, imminent steps are to be taken for the resurrection of mutual trust and cooperation, as it is an indispensable requirement that the states must move ahead in a spirit of compromise on issues of universal claims. Though the assertions of the developing countries based on the principles of common but differentiated responsibilities and respective capabilities may look fair and reasonable, it is also an indisputable fact that these principles can no
longer be the policy driver, if the planet has to be saved from the perils of climate change. The principle of sustainable development must be imbedded in the multilateral negotiations on climate change and environmental protection. The developing countries should also adopt a stand that the principles of intellectual property or international trade law should be used as an effective mechanism for transferring Environmentally Sustainable Technologies instead of creating hurdles in the implementation of mutually advantageous policies while trying to defend their scrupulous self interests. This has to be further supported by the flexible standards taken and commonly accepted by the developed countries regarding the concept of international transfer of technology from the economically advanced countries to the less advanced regions and the least developed countries.

With regard to India, the standards of fairness simply does not mean the demands put up in the negotiations before the multilateral forums, but the acceptance and the practice of the same by the international community in consonance with India’s unique social, cultural and economic needs. This would definitely bring in positive changes in the cultural normative shelters and would act as a ground for individual emancipation for all the developing countries including India. However, the protection of environment and climate action throws up innumerable challenges for any developing nation and hence, viable administrative and legislative norms and strategies do play an essential role in creating a concord between the environmental values and the developmental needs of the state. In this background, it is essential that the concurrences and contradictions existing in the area of the principle of universalism vis-a-vis cultural relativism should be given a harmonious interpretation to prevent
further harm to the global environment. Thus, it is necessary that the external policies of the state should be formulated in tune with the hopes and aspirations of the present and the future generations. It is suggested here that in re-determining the scope of the powers and functions of the various organs of the government, the Constitution of India may be amended to include a positive duty on the part of the State for protecting the environment and a concurrent negative duty to refrain from taking any steps that would adversely affect the environment. A further change may be introduced by a constitutional amendment to the VII th Schedule to the effect that the subject matter of environment and its protection are specifically included in the List I i.e., the Union List as against the present system of reading it into all the entries alike. Correspondingly, given the decentralised perspective of Indian polity, the anti-corruption laws should be strengthened and vigorously implemented for an effective climate action. There has to be a consensus created for legislating an effective anti-corruption law in India with specific reference to the environmental corruption. Most importantly, the awareness among the various stakeholders including the central government, the state governments, the various local bodies and the community in general that the protection and improvement of environment is a mandate of every institution of public governance and that it stands supported by the law of humanity is the crucial need of the hour.