

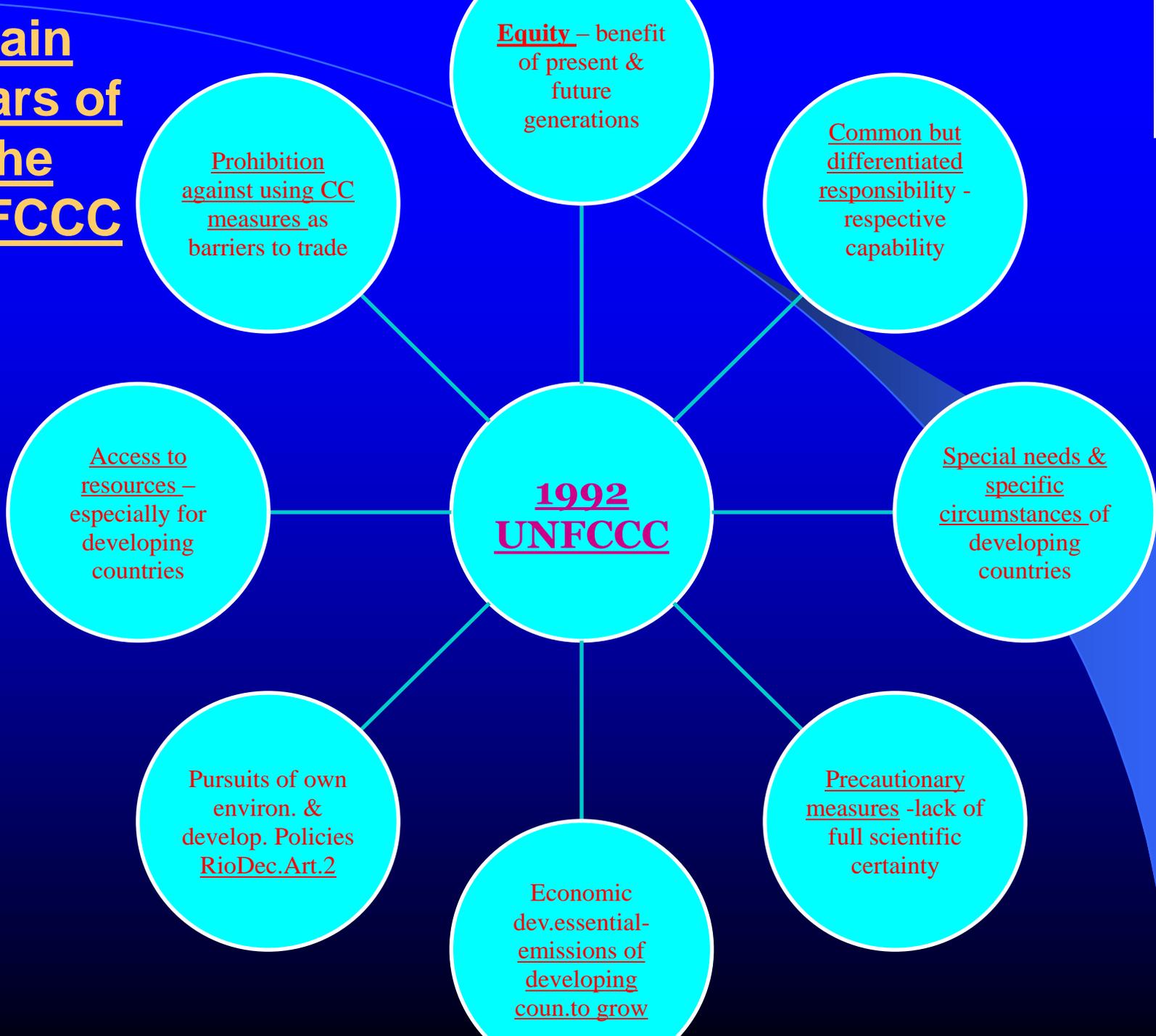


Changing the 'Climate' for Climate Change Law-Making 'Process'



By Professor Dr. Bharat H. Desai
Chairman, Centre for International Legal Studies (SIS) &
Jawaharlal Nehru Chair in International Environmental Law
Jawaharlal Nehru University, New Delhi
E-mail: desai@mail.jnu.ac.in

Main Pillars of the UNFCCC



Why We Disagree? - I



- ❑ Historical fault-lines in the North-South discourse: (i) bitterness of the colonial legacy (ii) past exploitation of the natural resource base of the developing countries (iii) refusal of the North to make available transfer of technology and funding [e.g. burial of NIEO] (iv) 'difficulty' to see developmental needs of the developing countries.
- ❑ Pollution of poverty and pollution of affluence [Indira Gandhi, 1972]
- ❑ Profligate lifestyles and wasteful patterns of consumption.
- ❑ Lack of sincerity of commitments: (i) sharp decline in ODA from .34% (1997) to approx. 0.18% today (ii) Johannesburg 2002 (iii) no environment funding as a right – forcing into the 'debt trap'.
- ❑ Efforts to 'engage' the developing countries in multilateral environmental negotiations have increased their misery: enormous burden on their developmental efforts; resources; capacity.
- ❑ Environmental issues for 'scare mongering'; promote business?

Why We Disagree? - II



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

Common But Differentiated Responsibility & Respective Capability



- ❑ Key to the issue of *burden sharing* in climate change mitigation.
- ❑ “Effective and appropriate international response” [Preamble] in consonance with the principle of CBDR&RC
- ❑ Reconciles environmental responsibility of developed countries for their historical contribution, right to development of developing countries and issue of burden sharing.
- ❑ Responsibility sought to be ‘stratified’ – developed countries ‘should take the lead’; but developing countries are not to be irresponsible.

- ❑ Twin criteria—responsibility and capability for actions:
 - (i) first criterion underscores industrialized countries' responsibility for the accumulation of GHGs in the atmosphere;
 - (ii) second criterion - capability to protect the climate - places special onus for action on developed countries – larger capability, larger responsibility.
- ❑ Respective capacities of countries in mitigating climate change - caveat of “social and economic conditions”.

Principle of Equity



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



Precautionary Approach

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



Specific Needs & Circumstance of Developing Countries

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

Issue of Funding



- ❑ Annex II Parties to provide financial assistance to developing countries to help address climate change and adapt to its adverse effects (Article 4.3 and 4.4).
- ❑ Global Environment Facility focal area funding on climate change has very limited range for the developing countries.
- ❑ The Bonn Agreements and related decisions provide for the establishment of **three new funds**: (i) special climate change fund; (ii) least developed countries fund under the Convention, and (iii) adaptation fund under the Kyoto Protocol.
- ❑ Poznan COP 14 [2008] gave finishing touches to Kyoto Protocol's Adaptation Fund – to receive fund from proceeds of CDM but not from Joint Implementation and Emissions Trading.
- ❑ Continuing sharp decline in Overseas Development Assistance (ODA) from 0.34% of GNP of industrialized countries in 1994 to around 0.18% today is a cause of great concern – nowhere near the UN target of 0.7% [barring Scandinavian countries].

Post-2012 Scenario



- ❑ Short-term focus on developing country commitments could be politically expedient for those who intend to upset the Kyoto appplecart - **no one acts, and everyone loses.**
- ❑ The insistence on burden sharing by the “key developing countries” is a tactical **subterfuge to shift the focus** from the basic requirement to take the lead at ‘home’ as per the Kyoto Protocol. Targets not likely to be realized during 2008-2012 period.
- ❑ Except the European Union, there appears **little evidence of ‘leadership’ by the industrialized countries.**
- ❑ Urgent need for ‘formal’ UNFCCC assessment as regards the **‘criteria’ of judging the ‘lead’ to be taken** by the developed countries as per Art.3 (1).
- ❑ In view of substantial rise in emissions of major Annex I countries, **Kyoto is almost dead** – unprecedented breach of treaty obligation.

Changing the 'Climate': Key Elements



- Building Blocks as identified under the Bali Action Plan, 2007: Mitigation, Adaptation, Transfer of technology, Funding – Position of Indian PM at CHOGM, Port of Spain, 29 Nov. 2009
- The principle of “CBDR&RC” needs to be adhered to in sharing burden of the GHG emission mitigation.
- The Annex I developed countries need to take the lead in mitigating GHG emissions by taking up enhanced mandatory QELAR targets .
- The flexibility mechanisms under the KP need to be strengthened further to help the Annex I countries meet their targets in a cost-effective manner.
- Mainstream climate change issues into a broader and comprehensive sustainable development framework.

Bumpy Road to Copenhagen



- ❑ *Ad-hoc Working Group on Long-term Cooperative Action under cloud. Future of the 'Kyoto Track' bleak since GHG reduction targets not likely to be realized by 2012.*
- ❑ Negotiations have become contentious and divisive: stalemate over industrialized countries' insistence on inclusion of major developing countries in post-2012 Deal.
- ❑ Group of 77/China have insisted that the existing regime only provides for two groups of countries – developed and developing countries: there is no scope for a 'mezzanine floor.'
- ❑ Obama Administration could make a dramatic re-entry?
“seek global solutions to climate change” [Inaugural Speech, Washington D.C., 20 Jan. 2009]
- ❑ **India and China could stage a walk out – if pushed into the corner.**