

The Climate Change Conundrum: A Case for Course Correction in the Global Regulatory Approach^{\$}

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Abstract. The Conference of Parties (COP) of the multilateral environmental agreements (MEAs) provides a platform at a specific periodicity (one, two or three years) to review work of the Convention in question. The UN Framework Convention on Climate Change (UNFCCC) is a ‘universal’ convention with 198 parties. The 28th annual meeting of the COP (UNFCCC) was held in Dubai (UAE) during 30 November - 13 December 2023. The UN provides ‘secretariat’ support to the UNFCCC, hence the usage of prefix ‘United Nations’. It is called a ‘framework convention’ since it was adopted with a bare skeleton on 09 May 1992. It required ‘fleshing out’ of the UNFCCC with required elements to make it work for the “‘ultimate objective’ of ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’” (Article 2). It led to the adoption of the (“related legal instruments”) 1997 Kyoto Protocol and 2015 Paris Agreement. The climate change regime now comprises these three legal instruments that seek to address the global climate *problematique*. Whereas COP27 (Sharm El-Shaik; 06–21 November 2022) was known for adoption of the decision on “loss and damage” funding for vulnerable countries hit hard by climate disasters, COP28 unveiled the first global climate ‘stocktake’. This took place on the heels of UNEP *Emissions Gap Report* (20 November 2023) that issued warning that “world is heading for a temperature rise far above the Paris Agreement goals unless countries deliver more than they have promised”. The UNEP report called for the GHG emissions (by 2030) to “fall by 28 per cent for the Paris Agreement 2°C pathway and 42 per cent for the 1.5°C pathway”. Thus, there is a big chasm between what is laid down in the climate change regulatory framework, what is scientifically ordained and what is actually given effect on the ground by the states Parties. After 30 years (1994–2024), the resultant ‘conundrum’ presents a challenge at this juncture of planetary crisis. It calls for the state Parties to the global climate change regime to engage in a major course correction in the current global climate change regulatory approaches for securing our planetary future.

Keywords: UNFCCC, stabilization, GHG emissions, common concern, Paris Agreement, multilateral environmental agreements, global stocktake, planetary concern, course correction

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1. Introduction

At the beginning of 2024, as the 6th session of the UN Environment Assembly (UNEA6)¹ drew to a close, the UN Secretary-General (UNSG) Antonio Guterres issued a clarion call “to tackle the environmental crises we face” since “Our planet is on the brink. Ecosystems are collapsing. Our climate is imploding”.² The UNSG has kept up the trend set in motion since his election. During the year 2023, the UNSG played the role of a conscience keeper of the world organization. It came to be vividly reflected in a series of alarm bells the UNSG assiduously pressed for the “triple planetary crisis”³ in various global forums including at the 2022 Stockholm + 50 Conference⁴ wherein he pleaded that:

“Earth’s natural systems cannot keep up with our demands. We are consuming at the rate of 1.7 planets a year. If global consumption were at the level of the world’s richest countries, we would need more than three planet Earths. We face a triple planetary crisis. A climate emergency that is killing and displacing ever more people each year.”

Similarly, in a powerful symbolic message on 25 November 2023 the UNSG said: “What happens in Antarctica doesn’t stay in Antarctica”.⁵ It was a wake-up call for the humankind since climate chaos has awakened Antarctica. This message came just five days ahead of the 28th meeting of the Conference of Parties (COP) to the 1992 UN Framework Convention on Climate Change (UNFCCC)⁶ held in Dubai (30 November - 13 December 2023).⁷ It became yet another annual gathering of States Parties in the long line up of COP meetings that have so far mysteriously been unable to address the “climate change conundrum”⁸ through the global regulatory instruments over 30 years (1994–2024). The UNSG was on a three-day official visit to Antarctica. He was accompanied by the Chilean President Gabriel Boric on a visit to Chile’s Eduardo Frei Air Force Base on King George Island. Reflecting on the unprecedented rate of ice melt in Antarctica, Guterres said that “We are witnessing an acceleration that is absolutely devastating.”

The above dire warnings, in essence, have vindicated one of the scholarly prognoses on the nature of the global environmental crisis, at the time of making of the UNFCCC, preparatory to the 1992 Rio Earth Summit:

“much of the developmental process in the world today does not appear to be sustainable. Many of our economic, monetary and trade policies in sectors such as energy, agriculture, forestry and human settlements tend to induce and reinforce non-sustainable development patterns and practices. Apart from the irreversible squandering of our biological capital, we are confronting a growing problem of environmental refugees - people who are forced to abandon their traditional habitat because of adverse environmental conditions - which is also peculiar to our age. In fact, the human quest to conquer nature through science and technology

- 1 UNEP (2024), *The Sixth Session of the United Nations Environment Assembly (UNEA-6)*, 26 February-1 March 2024; available at: The sixth session of the United Nations Environment Assembly (UNEA-6) (unep.org).
- 2 UN (2024), Secretary-General’s Video Message to the 6th United Nations Environment Assembly, Nairobi, 29 February 2024; available at: Secretary-General’s video message to the 6th United Nations Environment Assembly[.
- 3 UN (2022), *Secretary-General’s Remarks to Stockholm + 50 International Meeting*, 02 June 2022; Secretary-General’s remarks to Stockholm + 50 international meeting | United Nations Secretary-General. Also see UN News (2022), “Rescue us from the Environmental Mess, UN Chief urges Stockholm Summit”, 02 June 2022; available at: Rescue us from our environmental ‘mess’, UN chief urges Stockholm summit (stockholm50.global).
- 4 UNEP (2022), Stockholm + 50, 2-3 June 2022; Stockholm + 50.
- 5 Maria José Torres Macho (2023), “What Happens in Antarctica Doesn’t Stay in Antarctica: A Blog from the RC Chile”, United Nations Development Coordination Office, 29 November 2023; available at: <https://un-dco.org/stories/what-happens-antarctica-doesnt-stay-antarctica-blog-rc-chile>.
- 6 UNFCCC (1992), *United Nations Framework Convention on Climate Change*; available at: [conveng.pdf \(unfccc.int\)](https://unfccc.int).
- 7 Jay Desai (2024), Dubai Climate COP28: Defining Moment for Addressing Climate Change, *The Print*, 07 January; available at: Dubai Climate COP28: Defining Moment for Addressing Climate Change (theprint.in).
- 8 Bharat H. Desai (2022), “The Climate Change Conundrum”, *Environmental Policy and Law* 52(5-6): pp. 327-328; available at: The Climate Change Conundrum - IOS Press.

has brought us on to the present brink. The threats to our eco-system essentially emanate from human activities in almost every sector.”⁹

The root cause of many of the present-day ecological upheavals¹⁰ lay in this environmental disequilibrium prevailing in the world. It is a cumulative effect of the humankind’s ability to transform the earth’s fragile essential ecological processes. They underscore strong indications of a simmering global environmental crisis at work.

2. The Climate Change Regulatory Framework

A. 1992 UNFCCC

Among the three planetary level crisis, climate change has emerged as the predominant challenge largely induced by an unprecedented human developmental enterprise on the planet earth. Notwithstanding the global regulatory juggernaut at work in the last three decades, the climate crisis has only worsened. The 1992 UNFCCC was crystallized after the UN General Assembly (UNGA) took charge of the challenge in 1988 by designating it as one of the “common concerns of mankind since climate is an essential condition that sustains life on earth.”¹¹ Subsequently, the UNGA set in motion an intergovernmental negotiation process as a preparatory to the 1992 Rio Earth Summit. The UNFCCC is a *framework convention* seeking “stabilization of greenhouse gas (GHG) concentrations in the atmosphere . . .”. However, the Convention does not define what that phrase connotes. Article 2 of the Convention prescribes the “ultimate objective” of the Convention as “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”. This level is expected to be achieved “within a time frame sufficient to allow ecosystems to adapt naturally to climate change . . . and to enable economic development to proceed in a sustainable manner”.

The Convention is a “hard-legal instrument with a soft belly”.¹² It is a first step in the process of combating the challenge of climate change. This process would have been incomplete in the absence of subsequent ‘protocols’ adopted by the Parties (Article 17). The Convention reflects a major initiative set into motion by the UNGA (resolutions: 43/53, 44/207, 45/212, 46/169). It has heralded a new phrase in the lexicon of international environmental law, negotiations and governance: “common concern of humankind” (Preamble). The inclusion of Article 3 on ‘general principles’ was made upon the insistence of the developing country Parties so as to serve as a compass to guide the parties in implementing and developing the Convention.¹³ It seems, negotiating tactics used by the developed country Parties pushed back heavy reliance on these principles. This was achieved by modifications to Article 3, in the form of replacement of the term “states” with “parties” and insertion of “inter alia” to the chapeau to indicate that parties may consider principles other than those listed in Article 3 for implementation of the Convention.

The architecture of the UNFCCC comprise these main pillars:¹⁴ (i) Equity (ii) Common but differentiated responsibility with developed countries Parties taking the lead (iii) Full consideration for the specific needs and special circumstances of developing country Parties (iv) Precautionary measures (v) Economic development essential for addressing climate change – emissions in developing countries to grow to meet social and developmental needs (vi) Pursuit of own environmental and developmental policies (vii) Access to resources

9 Bharat H. Desai (1992), “Threats to the World Eco-System: A Role for the Social Scientists”, *Social Science & Medicine*, 35(4): pp. 589-596 at 590.

10 Bharat H. Desai (1990), “Managing Ecological Upheavals: A Third World Perspective”, *Social Science & Medicine*, 30(10): pp. 1065-1072.

11 UN (1988), “Protection of Global Climate for Present and Future Generations of Mankind”, General Assembly Resolution 43/53 of 6 December 1988; available at: Protection of global climate for present and future generations of mankind: (un.org).

12 Bharat H. Desai (2004), *Institutionalizing International Environmental Law*, Chapter 4, p. 112. Ardsley, New York: Transnational Publishers.

13 An article on general principles was first proposed by China; see Set of Informal Papers provided by Delegations, Revision to Addendum 4, INC/FCCC, 3rd Session; Provisional Agenda Item 2, at 2, U.N. Doc A/AC. 237/Misc.1/ Add. 4/Rev.1 (1991). Articles on such principles are relatively rare in international treaty law. For instance, the 1945 UN Charter, Article 2; 1979 LRTAP, Articles 2–5; CITES, Article 11; 1979 CMS (Bonn) Convention, Article 11.

14 Bharat H. Desai (2013), “India: Greenhouse Gas Mitigation”, *Environmental Policy and Law*, 43(4–5): 238-252.

for developing countries (viii) Prohibition on use of measures to combat climate change as barriers to trade. The “commitments” (Article 4) laid down in the UNFCCC are of two types. The first set of commitments is for “all Parties” and another set of duties applicable only to “developed country Parties and other Parties included in Annex I”¹⁵. As a corollary, the key duties of “all Parties” are:

- (i) Develop, periodically update, publish and make available to COP national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases;
- (ii) Formulate, implement, publish and regularly update measures to mitigate climate change and measures to facilitate adequate adaptation to climate change;
- (iii) There are other duties such as related to technology transfer, conservation and enhance of sinks and reservoirs. However, they are framed in a ‘soft’ language, for instance as a duty to ‘promote and cooperate’.
- (iv) The duties applicable to ‘all parties’ are subject to CBDR& RC and developmental priorities of individual state parties.

The abovementioned commitments need to be understood in the context of an acknowledgement (in the Preamble) that “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries”. Thus, the *lead* that developed country Parties are expected to take is premised on their *historical contribution* to the problem as well as their *capacity* (economic and technological) to address the problem. These factors do not apply to developing country Parties *per se*. This is further reflected in the preambular statement that “the share of global emissions originating in developing countries will grow to meet their social and development needs”. In fact, it is explicitly recognized that implementation of duties by developing countries Parties depends upon an effective implementation of commitments by the developed country Parties¹⁶. As a corollary, the primary responsibility to achieve the objectives of the Convention remains on the developed country Parties. The second part deals with duties applicable to “developed country Parties and other Parties included in Annex I” [Article 4(2)]¹⁷:

- (i) Duty to adopt policies and corresponding measures to reduce emission of GHGs and to protect GHG sinks and reservoirs. Developed countries are dutybound to report periodically the policies and measures taken at the domestic level and this is subject to review by COP.
- (ii) Duty to provide ‘new and additional’ financial resources to developing country parties. The purpose of this duty is to assist developing country parties to meet the cost of fulfilling their obligations under the Convention, which means the cost of reporting and adoption and implementation of mitigation measures.
- (iii) Duty to assist developing countries in meeting the cost of adaptation.
- (iv) Duty to take ‘all practical steps’ to promote, facilitate and finance technology transfer.

The duties specified under this category mainly comprise two aspects. *Firstly*, the duty to take measures to adopt policies and corresponding measures at the domestic level to reduce emissions of GHGs. The provision, however, does not spell out in detail as to what are those ‘policies’ and ‘measures’. It appears to be within the discretion of the concerned developed country Parties. Such a scenario makes it difficult to monitor the level of compliance by the Parties, although the provision makes it a duty of the developed country Parties to report periodically the policies and measures adopted. Those initiatives are subject to review by the COP and the envisaged review process seems to put soft pressure on the developed country Parties to comply with the UNFCCC obligations *per se* rather than fixing state responsibility. It probably made sense for the UNFCCC as a *framework convention* to follow this strategy in the larger interest of moving towards an effective climate change mitigation and adaptation

15 UNFCCC (1992), “What is the United Nations Framework Convention on Climate Change?”; available at: <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change>.

16 UNFCCC (1992), n. 6, Article 4(7).

17 *Ibid*, n. 6. Article 4 (2) provides: “The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:”. *Annex I* (to the UNFCCC) mentioned in this provision comprises a list of 41 developed country Parties (Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, European Economic Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America). Six countries (Croatia, Czech Republic, Liechtenstein, Monaco, Slovakia, and Slovenia) were added to the list in Annex I *vide* an amendment to the UNFCCC (pursuant to decision 4/CP.3 adopted at COP.3) that entered into force on 13 August 1998.

with the participation of a larger number of States Parties. This approach made sense considering the fact that climate change is a global issue with common interest and requires sincere participation (in good faith) of all the countries guided by the cardinal principle of CBDR& RC.

Secondly, the provision also creates obligations of the developed country Parties vis-à-vis the developing country Parties. The duties in this category mainly comprise providing financial assistance and technology transfer. In essence, this reflects the principle of CBDR& RC and an articulation of a legal duty on the basis of the *historical contribution* of the developed country Parties to the problem of climate change. It is also based on the understanding that the developed country Parties have been the beneficiaries of activities harmful to the environment in general and climate system in particular. Therefore, these duties could also be seen as a manifestation of a historical ecological debt owed to all other countries who were not part of the developmental ladder.

The UNFCCC explicitly provides that the “developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1.”¹⁸ Such assistance must be “new and additional”. The term “new and additional” clearly prevents the developed country Parties from repackaging their existing overseas developmental assistance as initiatives to comply with this obligation under the Convention. The duty to facilitate transfer of technology is, however, couched in a soft language. The effectiveness of this provision is contingent on what is “practical” for the developed country Parties to do. It probably reflects the reality that the ownership of environmentally sound technologies is mainly with private corporations in the developed country Parties. The Convention underlines the principle that “measures taken to combat climate change . . . should not constitute a means of arbitrary or unjustifiable or a disguised restriction on international trade”.¹⁹ Thus, it appears, the duty to facilitate transfer of environmentally sound technologies is subject to international trade law rules. In other words, the ‘softness’ of this obligation may make it almost redundant unless developed country Parties take it seriously.

B. 2015 Paris Agreement

The Paris Agreement²⁰ marks a significant departure in the regulatory approach for global governance of climate change mitigation and adaptation. *Firstly*, the extent of the obligation to reduce the emission of GHGs was “internationally determined”²¹ under the 1997 Kyoto Protocol, whereas it is meant to be “nationally determined”²² under the 2015 Paris Agreement. Thus, it has shifted the onus on the sensitivities and vagaries of the individual countries rather than on the premise of historicity, contribution and capacity of the countries in addressing the challenge of climate change. *Secondly*, the Paris Agreement has created a flexible mechanism, as compared to the Kyoto Protocol, concerning the obligation to reduce the emission of GHGs. It is clear move away from the prior laid down quantified GHG emission reduction obligation to a system of obligations determined by the concerned parties themselves – the ‘ambition’ oriented system of Nationally Determined Contributions (NDCs). *Thirdly*, the UNFCCC and the Kyoto Protocol have been very clear about the principle of CBDR& RC with concrete and enhanced obligations for the developed country Parties wherein the developing country Parties were left to adopt measures in accordance with their capacities and developmental priorities. The Paris Agreement has not completely jettisoned the principle of CBDR& RC or made it ineffective. There have been *pro forma* reiterations of the CBDR& RC. Still, all indications show that this foundational principle of the UNFCCC has, for all practical purposes, been placed on the back burner.

Now the NDCs, as ordained in the 2015 Paris Agreement, are the key mechanism through which the basic objectives of the parent regulatory instrument (1992 UNFCCC) are required to be achieved. All the States Parties, including the developing country Parties, are obliged to prepare the NDCs. It is expected to be a continuous activity with an obligation to periodically update NDCs at an interval of every five years [Article 4(2)]. The successive

18 UNFCCC (1992), n. 6, Article 4(3).

19 UNFCCC (1992), n. 6, Article 3(5).

20 UNFCCC (2016), *The Paris Agreement*; available at: [parisagreement_publication.pdf](https://unfccc.int/publication/paris-agreement) (unfccc.int).

21 UNFCCC (1997), *Kyoto Protocol to the United Nations Framework Convention on Climate Change*; Conference of the Parties, Third session, Kyoto, 1-10 December 1997; available at: [A:\cpl07a01.wpd](https://unfccc.int/publication/kyoto-protocol) (unfccc.int). Also see: “What is the Kyoto Protocol?”; available at: <https://unfccc.int/kyoto-protocol>.

22 John McCloy (2020), available at: “Kyoto Protocol vs Paris Agreement: Key Differences to Know”, Green Coast, 18 February 2020; available at: <https://greencoast.org/kyoto-protocol-vs-paris-agreement/>.

NDCs are expected to meet the requirements of ‘progression’ in ‘ambition’ as compared to the previous NDCs [Article 4(3)]. Thus, the NDCs are also expected to meet the requirement of “highest possible ambition” without considering either the historical contribution or the lead as it has been required under the UNFCCC. The flexibility and the decentralised nature of the system of NDCs do not mean that it lacks monitoring and accountability. The States Parties are duty bound to communicate their NDCs to the Secretariat. This process is governed by the principles of clarity, transparency and accountability [Article 4(9) as well as the Decision 1/CP. 21].²³ The details of NDCs may include:

“quantifiable information on the reference point (including, as appropriate, a base year), time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions and, as appropriate, removals, and how the Party considers that its nationally determined contribution is fair and ambitious, in the light of its national circumstances, and how it contributes towards achieving the objective of the Convention as set out in its Article 2.”²⁴

The Parties could modify their NDCs in accordance with the guidance adopted by CoPs.²⁵ In a way, the Paris Agreement factors in the principle of CBDR& RC in certain aspects. In the context of NDCs, developed country Parties are expected to undertake economy-wide absolute GHG emission reduction targets, whereas developing country Parties are expected to “continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances”.²⁶ Significantly, it needs to be noted that this provision does not make it a mandatory obligation for the developed country Parties to undertake economy-wide absolute emission reduction targets.

The language of the provision is ‘persuasive’ or ‘expectational’ in nature. It falls short of a mandatory legal obligation that could lead to hard legal consequences in cases of violations. Nevertheless, it may serve the purpose of exerting pressure on the Parties, especially on the developed country Parties, for compliance. The NDCs are subject to reporting and reviewing. It appears that the provision is dependent on the soft method of compliance rather than the conventional hard law method of fixing legal liability and the consequent legal remedies. As a result, the Paris Agreement explicitly states that the enforcement is meant to be “facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties”²⁷. This approach is further reflected in the provision which envisages stocktaking as a method of collective progress instead of individual progress.²⁸

The Paris Agreement keeps the option of “internationally transferred mitigation outcomes” open for parties in order to meet their obligations and achieve targets under their respective NDCs. However, this is subject to an obligation to avoid double counting. In doing so, however, the Paris Agreement does not disturb the ‘Kyoto Flexibility Mechanisms’.²⁹ It allows the parties, mainly the developed country Parties, to continue engaging in market oriented initiatives to comply with their respective obligations. While the Market Mechanisms under the Kyoto Protocol were meant for the developed countries Parties, the Paris Agreement, in principle, expands its scope to all the state Parties. The Paris Agreement recognises the importance of adaptation. It envisages adaptation measures to be:

“a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge

23 UNFCCC (2015), *Decisions Adopted by the Conference of the Parties*, “Adoption of the Paris Agreement”, *Report of the Conference of the Parties on its Twenty-first Session*, held in Paris from 30 November to 13 December 2015 Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session; available at: <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2>.

24 *Ibid*, Decision 1/CP. 21, para 27.

25 UNFCCC (2016), n. 19, Article 4(11).

26 *Ibid*, Article 4(4).

27 *Ibid*, Article 13(3).

28 *Ibid*, Article 13(1).

29 UNFCCC (1997), n. 20; “Mechanisms under the Kyoto Protocol”; available at: <https://unfccc.int/process/the-kyoto-protocol/mechanisms>.

systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.”³⁰

Thus, the state Parties are obliged to plan and implement adaptation measures. However, the usage of soft formulation in the provision enables the parties to decide as they deem appropriate. The adaptation measures are subject to scrutiny, review and need to be communicated to the Secretariat.³¹ The concerns of the developing country Parties are reflected as it provides that “continuous and enhanced international support shall be provided to developing country Parties”³². Such financial assistance is expected to grow continuously and developed country Parties are obliged to communicate the details of financial assistance provided to the developing country Parties³³.

In view of the fact that adaptation is a serious concern and a challenge for developing country Parties, they need financial and technical assistance. However, the vagueness in the legal provision *per se* may not benefit all the developing country Parties. This provision needs to be read along with Article 9 of the Paris Agreement that makes it obligatory for developed country Parties to provide financial resources to assist developing country Parties for both mitigation and adaptation. The UNFCCC has already underlined the duties of developing country Parties in this regard to bring about clarity.

3. Dubai COP28: Unrealistic Expectations

The COP of the multilateral environmental agreements (MEAs)³⁴ provides a platform at regular intervals (one, two or three years) to review work of the Convention in question. The UNFCCC is a “universal” convention with participation by 198 parties. The United Nations provides ‘secretariat’ support to the UNFCCC, hence the usage of the prefix ‘United Nations’. It is called a ‘framework convention’ since it was adopted with a bare skeleton treaty on 09 May 1992. It necessitated ‘fleshing out’ of the UNFCCC with required elements to make it work for realization of the “ultimate objective” of the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”. It led to the adoption of the (“related legal instruments”) 1997 Kyoto Protocol and 2015 Paris Agreement. The climate change regime now comprises these three legal instruments that seek to address the global climate *problematique*.

In the backdrop of the above multilateral climate change regulatory framework that has been at work for over 30 years (1994–2024), the results on the ground are rather disappointing. They are far from attaining the UNFCCC objective of “stabilization” of GHG concentrations (Article 2) in the atmosphere. The growing scientific findings and studies have indicated gravity of the global warming at work. It has, in turn, triggered alarm bells for a planetary level crisis.

While 2022 COP27 (Sharm El-Sheikh)³⁵ came to be known for adoption of the decision on “loss and damage” funding for vulnerable countries hit hard by climate disasters, 2023 COP28 (Dubai)³⁶ witnessed the first global climate “stocktake.” This took place on the heels of the UNEP’s Emissions Gap Report 2023³⁷ that issued a warning that “the world is heading for a temperature rise far above the Paris Agreement goals unless countries deliver more than they have promised.” The UNEP report has predicted that by 2030 the GHG emissions must “fall by 28% for the Paris Agreement 2°C pathway and 42% for the 1.5°C pathway.” Thus, the task before the assembled States Parties at COP28 was to walk-the-talk. However, expectations for some major rejig on the GHG

30 UNFCCC (2016), n. 19, Article 7(5).

31 *Ibid*, Article 7(5), (10) & (11).

32 *Ibid*, Article 7(13).

33 *Ibid*, Article 9 (3), 9(5) & (7).

34 Bharat H. Desai (2010, 2013), *Multilateral Environmental Agreements: Legal Status of the Secretariats* (Cambridge: CUP); available at: Multilateral environmental agreements legal status secretariats | Cambridge University Press.

35 UNFCCC (2022), *Sharm El-Sheikh Climate Change Conference (COP27)*, 6-20 November 2022; available at: Sharm el-Sheikh Climate Change Conference - November 2022 | UNFCCC.

36 UNFCCC (2023), *Dubai Climate Change Conference (COP27)*, 30 November – 13 December 2023; available at: COP28 UAE | COP28 delivers historic consensus in Dubai to accelerate climate action.

37 UNEP (2023), *Emissions Gap Report 2023*, UNEP, 20 November 2023; available at: <https://www.unep.org/resources/emissions-gap-report-2023>.

reduction targets were unrealistic. COP28 became one more annual ritual. As things stand, fully implementing unconditional NDCs, made under the Paris Agreement, would put the world on track for limiting temperature rise to 2.9°C above pre-industrial levels in the 21st century. In fact, fully implementing conditional NDCs would also lower this only to 2.5°C. It does reflect the limits of the current quantified emissions reduction driven regulatory approach.

Thus, from all accounts, climate change has become an undeniable reality. All states and peoples are victims of climate change though the Global South is much more vulnerable to adverse effects of climate change. The contribution of different states (historical as well as current) to the problem is well-documented. The harm caused by climate change is of planetary nature and scale. From the legal standpoint, the key question is whether it amounts to a legally actionable injury. The general International Law obligations as well as the obligations prescribed in climate change regime (1992 UNFCCC; 1997 Kyoto Protocol; 2015 Paris Agreement) have indeed prescribed a range of legal obligations for the States Parties. Have all the States Parties failed in fulfilling their obligations (fully or partly)? It is necessary to examine the nature of legal consequences emanating from the breach of these legal obligations of states. This crucial question of “obligations of States in respect of climate change” has been referred by the UNGA³⁸ for an advisory opinion of the International Court of Justice (ICJ), the principal judicial organ of the UN.

The air was heavy at Dubai COP28, due to unrealistically high expectations and the increasingly bleak prospects of realizing the 1.5°C GHG emission reduction target. The vital question remains as to what the UNFCCC parties need to do for phase-out of fossil fuel in the face of a climate emergency as one of the main drivers of the planetary crisis. It is widely accepted that, in order to limit global warming to 1.5°C, GHG emissions must peak before 2025 at the latest and decline by 43% by 2030.³⁹ In the absence of a major trigger event and a planetary miracle, at the current rate and in view of the dithering exhibited by the state Parties, all indicators show that this goal is unrealistic and unattainable. It raises the frightening prospect of a literally burning planet that has often led the conscientious UNSG running from pillar to post. He has spoken in a series of whistle-blowing speeches, ranging from the Stockholm + 50 Conference (02 June 2022)⁴⁰ to the cry for help from Syangboche (the Everest region of Nepal) in the Himalayas (30 October 2023) to the latest visit to Antarctica (25 November 2023). Hence, it calls for making the International Law instruments work on an urgent basis.

4. Making International-Law Instruments Work

The UNFCCC was designed as a ‘framework convention’. It became one of the first global instruments to designate climate change as a *common concern of humankind*.⁴¹ It is worth to mentioning that the COP of the multilateral environmental agreements provides a platform at a specific periodicity (one, two or three years) to review the work of the convention in question.

On 20 March 2023, the IPCC AR6 Synthesis Report explicitly underscored that “Average annual GHG emissions during 2010–2019 were higher than in any previous decade on record” and observed:

“Global net anthropogenic GHG emissions have been estimated to be 59 ± 6.6 GtCO₂-eq⁹ in 2019, about 12% (6.5 GtCO₂-eq) higher than in 2010 and 54% (21 GtCO₂-eq) higher than in 1990, with the largest share and growth in gross GHG emissions occurring in CO₂ from fossil-fuel combustion and industrial processes (CO₂-FFI)” ... Average annual GHG emissions during 2010–2019 were higher than in any previous decade on

38 UN (2023), *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, General Assembly resolution 77/276 (A/77/L.58), adopted without a vote, on 29 March 2023; UN Doc. A/RES/77/276, 4 April 2023; Resolutions of the 77th Session - UN General Assembly.

39 UNFCCC (2016), n. 20.

40 UN (2022), *Stockholm + 50 Report*, Stockholm + 50: a healthy planet for the prosperity of all – our responsibility, our opportunity Stockholm, 2-3 June 2022; UN Doc. A/CONF/ 238/9 of 01 August 2022; available at: A/CONF.238/9 (undocs.org); NATIONS UNIES.

41 Richard Horton (2015), “Offline: Climate—a Common Concern of Humankind”, *The Lancet*, 19 December 2015, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)01237-4/fulltext?code=lancet-site](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)01237-4/fulltext?code=lancet-site).

record, while the rate of growth between 2010 and 2019 (1.3% yr-1) was lower than that between 2000 and 2009 (2.1% yr-1).⁴² In view of this, the near-future regulatory goal has been pegged at 1.5°C global warming by 2050. The UNSG, in his address at the Stockholm + 50 Conference (2 June 2022)⁴³ issued a clarion call to address climate change as one of the “triple planetary crises”. The UNEP’s *Emissions Gap Report 2022*⁴⁴ reinforced global concerns that “the international community is falling far short of the Paris goals, with no credible pathway to 1.5°C in place. Only an urgent system-wide transformation can avoid climate disaster”. This prognosis and the subsequent projections have set the stage for exploring possible options for averting the climate-change catastrophe.

Whereas Sharm El-Shaik COP27 was known for the adoption of the decision on “loss and damage” funding for vulnerable countries hit hard by climate disasters, the CMA⁴⁵ (Dubai COP28) adopted the first global climate ‘stocktake’ that was mandated *vide* Decision 19/CMA.1 (2018). In essence, this “stocktake”, in a 5-year ambition cycle, entails “a Party-driven process conducted in a transparent manner and with the participation of non-Party stakeholders.”⁴⁶ It is expected to enhance NDCs and enhancing international cooperation for climate action. This will be a comprehensive assessment of the progress in climate-change action since the adoption of the 2015 Paris Agreement. The Dubai COP28 issued the warning that “the world is heading for a temperature rise far above the Paris Agreement goals unless countries deliver more than they have promised”. The UNEP report has predicted that by 2030, the GHG emissions must “fall by 28% for the Paris Agreement 2°C pathway and 42% for the 1.5°C pathway”.

In view of the gravity of this planetary-level crisis, together with its implications for humankind and the planet, there is a need for urgently exploring concrete workable options in a time-bound way through the instrumentalities of International Law as well as make them work.

5. Addressing the Climate Change Conundrum

Over the years, the primary legal bulwark for addressing the issues of equity and climate justice in the global climate-change discourse has been the criteria of *differentiation* (CBDR& RC).⁴⁷ It was a negotiating masterstroke amid the rush to adopt the UNFCCC before the 1992 Rio Earth Summit (UNCED). It emanated from razor-sharp clarity and strategizing by some ace negotiators from the developing countries. However, efforts were swiftly underway to blunt the edges and dilute the core of this fundamental criterion of *differentiation* to establish state responsibility for harm (adverse impacts) caused to the global atmosphere (“the largest share of historical and current global emissions of greenhouse gases has originated in developed countries”; *Preamble*, para 3).

Many scholars, bureaucrats and civil-society groups from the developing countries were co-opted in this process. These subtle efforts have been at work at various COP meetings, in other intergovernmental processes, and on the sidelines. It led to the 1997 Kyoto Protocol being given a decent burial once it became clear that none of

42 IPCC (2023), *IPCC Synthesis Report: Climate Change 2023*, p. 4, paragraph A.1.4; available at: Report for the Sixth Assessment Report during the Panel’s 58th Session held in Interlaken, Switzerland from 13 - 19 March 2023; available at: AR6 Synthesis Report: Climate Change 2023 — IPCC.

43 UN (2022), n. 3.

44 UNEP (2022), *Emissions Gap Report 2022*, 27 October 2022; available at: <https://www.unep.org/resources/emissions-gap-report-2022>.

45 UNFCCC (2023), “Outcome of the First Global Stocktake”, Decision 1/CMA.5 of 13 December 2023; *Decisions adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, pp. 2-22; Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023; UN Doc. FCCC/PA/CMA/2023/16/Add.1, 15 March 2024; available at: Decisions | UNFCCC; UN Climate Change Conference - United Arab Emirates.

46 UNFCCC (2023), *The Global Stocktake*; *The Global Stocktake.pdf* (unfccc.int).

47 UNFCCC (1992), n. 6. *Preamble para 7* states as follows: “Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.” *Principles* in Article 3 (1) also emphatically provides: “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”.

the Annex - I countries were prepared to comply with their respective legal obligations. It was followed by bringing in a new voluntary criterion, as set out in the 2015 Paris Agreement, of “nationally determined contributions” requiring “all parties to undertake and communicate ambitious efforts” (Article 3, Paris Agreement). The direct effect of these NDCs, was to knock-out the principle of equity that required only equals to be treated equally (since developed and developing countries are *not equal* in their contribution to the atmospheric harm caused). As a result, the UNFCCC’s basic premise 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 development needs” (*Preamble*, paragraph 4) was also sidelined.

Notwithstanding the fact that responsibility for global climate change is common, it was to be given effect in a differentiated, stratified, and staggered way. The UNFCCC’s leadership principle called for the “developed countries parties should take the lead” (Article 3.1) as a *condition precedent*⁴⁸ before the developing countries were called upon to reduce their part of the GHG emissions. However, this crucial legal requirement has been crucified. In fact, in the last 30 years of the UNFCCC, the stage never came for working out the criteria and elements for determining whether any such *lead* has been taken by the developed-country Parties.

A look back at the actual working (1994–2024) of the above legal stratagems and the crafting of tools and techniques to attain “stabilization” (UNFCCC Article 2, Objective) of GHG emissions as enshrined in the three legal instruments, shows that the regulatory approach appears to be floundering. In one of the last scholarly writings to the EPL, late Meinhard Doelle, took the view that the UNFCCC regime was “at a crossroads” and posed a question: “can you trust anyone over 30?”⁴⁹ Thus, what is on trial is nothing less than humankind’s basic approach to environmental governance in general and climate governance in particular over the past 50 years⁵⁰. A sort of ‘fatigue effect’ seems to have set in; a proliferation of national climate-change litigations has sprouted and an exasperated move by the UNGA (*vide* resolution 77/276 of 29 March 2023)⁵¹ to seek an advisory opinion of the International Court of Justice (ICJ). The ICJ, if it accepts jurisdiction and agrees to provide an opinion to the UNGA, will be required to provide an answer to two specific questions: (i) what are the legal obligations of states under international law for protection of the climate system from emissions of GHG and (ii) what are the legal consequences for states under these obligations?

The ICJ extended the time-limit to 22 March 2024 within which “all written statements on the questions may be presented to the Court (in accordance with Article 66, paragraph 2, of the Statute)” as well as extended to 24 June 2024 the time-limit within which “States and organizations having presented written statements may submit written comments on the other written statements (in accordance with Article 66, paragraph 4, of the Statute)”.⁵² If the ICJ decides to give an advisory opinion on the requested questions, it remains to be seen as to what will be the nature and content of the Court’s observations, assessment as regards the “obligations of states in respect of climate change” and attendant legal reasoning deduced to support the resultant opinion. What can the principal legal organ (ICJ) of the UN do to nudge the States Parties as well as provide guidance to the plenary organ (UNGA) in taking time bound political initiatives for resolving the global climate change conundrum?

48 UNFCCC (1992), n. 3. Article 4 (7) explicitly provides: “extent to which developing country parties will effectively implement their commitments under the convention will depend on the effective implementation by developed country parties of their commitments under the convention”.

49 Meinhard Doelle (2022), “The UNFCCC Regime at a Crossroads: Can You Trust Anyone Over 30?” *Environmental Policy and Law* 52(2022): 349–358; available at: The UNFCCC Regime at a Crossroads: Can You Trust Anyone Over 30?.

50 Bharat H. Desai (2022), “The Stockholm Moment,” *Environmental Policy and Law*, 52(2022): 171–172; available at: epl219042 (iospress.com).

51 UN (2023), n. 36; available at: Resolutions of the 77th Session - UN General Assembly.

52 ICJ (2023), *Obligations of States in Respect of Climate Change (Request for Advisory Opinion)*, ICJ Order of 15 December 2023; Order of 15 December 2023 (icj-cij.org). A total of 91 written statements, largest ever in an ICJ advisory proceeding, were filed by the last date of 22 March 2024 in the Registry of the ICJ. On an exceptional basis, the Court authorized the late filing of the statements by Nepal (27 March 2024); Burkina Faso (2 April 2024) and The Gambia (2 April 2024); available at: Filing of written statements (icj-cij.org) .

6. Conclusion

Since it adopted the famous resolution 43/53 of 8 December 1988,⁵³ the UNGA has been the principal conductor⁵⁴ of the grand climate-change orchestra. It has invoked the normativity of ‘common concern’ and triggered the process for the UNFCCC negotiations (1990–1992). After full three decades (1994–2024) of the entry into force of the UNFCCC, it is high time that the UNGA rises to the occasion and elevates *common concern* to the higher pedestal of *planetary concern* to provide future direction to the 1992 UNFCCC and the 2015 Paris Agreement processes. Some breakthrough took place on the opening day (30 November 2023) of the Dubai COP28 resulting in initial funding assurance of US \$475 million for “loss and damage” fund (agreed at COP27) as well as the “UAE Declaration on a New Global Climate Finance Framework”⁵⁵. Still, there have been some concerns of the Global South as regards, urgency of making the means of implementation, particularly climate finance, available to the developing countries to achieve their climate ambitions and implement their NDCs.

During 2022–2023 at the EPL, there have been a series of scholarly processes, including the 2022 *EPL Special Issue* [53 (5-6) 2022]⁵⁶, the 2023 IOS Press book on *Regulating Global Climate Change*⁵⁷, blog articles,⁵⁸ a special *EPL landing page for Dubai COP28*⁵⁹ and moderation of the global webinar on *Averting the Global Climate Catastrophe* (December 10, 2023).⁶⁰ Cumulatively, these scholarly processes sought to sow some ideational seeds to find answers to the global climate *problematique*. Notwithstanding the annual ritual wherein a galaxy of heads of state and government make a beeline, the actual action on the ground for reduction of GHG emissions (to attain UNFCCC objective of stabilization) takes place at a snail’s pace. The entire regulatory process (through three global instruments) seems to be entangled in the quagmire of protecting national interests by the States Parties.

In order to ensure its legitimacy after 30 years, the global climate change regime urgently needs to show concrete results as ordained in scientific studies as well as premised upon the principle of equity, climate justice and differentiation. After missing the 50 years milestone (1972–2022) at the Stockholm + 50 Conference wherein it was acknowledged that things went gone wrong leading to global environmental deterioration. Yet the assembled global leaders lacked courage for a decisive course correction for the survival of the planet.⁶¹ To begin with, the UNGA needs to take the generational initiative by ushering the regulatory approach into a higher

53 UN (1988), *Protection of Global Climate for Present and Future Generations of Mankind*, General Assembly resolution 43/53 (A/43/PV.70), adopted without a vote, 6 December 1988; available at: 43rd Session (1988-1989) - UN General Assembly Resolutions - United Nations Dag Hammarskjöld Library.

54 Bharat H. Desai (2004), n. 12, p.172.

55 UAE COP28 (2023), *UAE Leaders’ Declaration on a Global Climate Finance*, 13 December 2023; available at: COP28 Declaration on a Global Climate Finance Framework.

56 Bharat H. Desai (2023), “The Climate Change Conundrum”, Preface, *Environmental Policy and Law*, 52(2022): 327–328; available at: epl219054 (iospress.com).

57 Bharat H. Desai (2023), Ed., *Regulating Global Climate Change: From Common Concern to Planetary Concern*. IOS Press: Amsterdam; available at: *Regulating Global Climate Change* | IOS Press.

58 IOS Press (2023), *EPL Supports COP28*; available at: *EPL Supports COP28* | Environmental Policy and Law.

59 Bharat H. Desai (2023), “Averting the Climate Change Catastrophe @COP28 and Beyond: A Wake-up Call by the UN Secretary-General”, *EPL Blog*, 4 December 2023; available at: *Averting the Climate Change Catastrophe @COP28 and Beyond: A Wake-up Call by the UN Secretary-General* | Environmental Policy and Law; Bharat H. Desai (2023), “Blog Special: Averting the Climate Change Catastrophe: Making International Law Work – Part II”, *SIS Blog*, 30 November 2023; available at: *Blog Special: Averting the Climate Change Catastrophe: Making International Law Work – Part II* (sisblogjnu.wixsite.com); Bharat H. Desai (2023), “Global Climate Change as a Planetary Concern: A Wake-Up Call for the Decision-Makers”, *Green Diplomacy*, 14 February 2023; available at: *Global Climate Change as a Planetary Concern: A Wake-Up Call for the Decision-makers* — Green Diplomacy; Bharat H. Desai (2023), “Global Climate Change as a Planetary Concern: A Wake-Up Call for the Decision-makers”, *EPL Blog*, 5 January 2023; available at: *Global Climate Change as a Planetary Concern: A Wake-Up Call for the Decision-makers* | Environmental Policy and Law.

60 EPL (2023), “Averting the Climate Change Catastrophe: Dubai COP28 and Beyond”, *EPL Webinar*, 10 December 2023; available at: *Averting the Climate Change Catastrophe: Dubai COP28 and Beyond* | Environmental Policy and Law; Video recording: *EPL Webinar*: (youtube.com)

61 Bharat H. Desai (2022), n. 50.

gear by elevating climate change from *common concern of humankind* to *planetary concern of humankind*.⁶² Moreover, the climate change regulatory process needs make International Law work by earnestly requiring the states Parties primarily responsible for causing the climate change problem in the first place to take the *lead* by complying with all legal obligations, consequences and requirements.

In the era of a planetary crisis⁶³, as we look ahead, it is high time for the States Parties to the climate change regime (1992 UNFCCC, 1997 Kyoto Protocol and 2015 Paris Agreement) to engage in a major course correction in their respective current regulatory approaches – as preliminarily spelled out above, within the limits of time and space – for securing our planetary future. Time holds the key.

62 Bharat H. Desai (2022), “Regulating Global Climate Change: From Common Concern to Planetary Concern,” *Environmental Policy and Law*, 52(5-6): 331-347; available at: [Regulating Global Climate Change: From Common Concern to Planetary Concern - IOS Press](#).

63 Bharat H. Desai (2024), “The Audacity of Hope for People and Planet: 2023 New York SDG Summit Outcome and Beyond: Part – II”, *EPL Blog*, 25 January 2024; available at: [The Audacity of Hope for People and Planet: 2023 New York SDG Summit Outcome and Beyond: Part – II \(iospress.com\)](#); Bharat H. Desai (2023), “Global Climate Change as a Planetary Concern: A Wake-Up Call for the Decision-Makers”, *Green Diplomacy*, 14 February 2023; available at: [Global Climate Change as a Planetary Concern: A Wake-Up Call for the Decision-makers — Green Diplomacy](#)