

# PARIS AGREEMENT AND HISTORICAL RESPONSIBILITY OF DEVELOPED COUNTRIES TOWARDS ENVIRONMENT

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## ABSTRACT

Environment is an essential thing for humans because the existence of the world depends very much on the environment. It is getting polluted every day and creating global problems. The countries have developed through the industrialization but this development did not come alone. The world had to give a cost because countries got their development by harming the environment over the decades. The countries have some obligations towards environment on the basis of contribution of harming environment. This paper aims to find out those responsibilities of developed countries under different principles. Also, this paper tries to analyze their obligation and responsibility under the legal framework of *Paris Agreement*.

## INTRODUCTION

In the past, the world environment had changed naturally but in last two hundred years, it changed faster with a destructive way. The changed mostly started from the industrialization period and still continuing. The industrial revolution was making the countries rich and the countries were producing things through harming the environment. In the last two hundred years, most of the pollution came from developed states and by polluting the environment they became wealthier. The world is not only made for them rather every country has the same right to use the world resources and live with a sound environment. The developed states used the resources in such a way that small countries are now facing problems and feeling discrimination behavior in the process of development. The current status of the world environment takes place where a state cannot face this problem alone. All the states need to come forward and work together to reduce the environmental problem but the question arises that is every state has the same responsibility to address this problem? The reason is all the states have not harmed the environment in same degree. The developed states harm the environment most and for their conduct, the other states are facing many environmental problems. So, the amount of responsibility of developed states should be higher than other states.

In this research paper, I try to find out the responsibility of the developed states on the basis of different principles. Later, I try to discuss the struggle of imposing responsibility under legal mechanisms. Then finally, I discuss the *Paris Agreement* with loopholes and its possible future.

## OVERVIEW OF CLIMATE REGULATORY REGIME

The world was started to understand that climate change is a serious threat to the universe and as a result in 1979, the first climate conference occurred at International Conference Centre in Geneva. It was attended by people from several countries, organizations and a wide range of disciplines like water resources, agriculture, energy, environment fisheries, etc.<sup>i</sup> The second world climate conference took place on 1990. Then UN general Assembly established intergovernmental negotiation committee and under this on May 9, 1992 United Nation Framework Convention on Climate Change (UNFCCC) has adopted.<sup>ii</sup>

The development of the united nation climate change regime can be divided into different phases. The first phase was about negotiation, adoption, and entry into force of the UNFCCC from 1990 to 1995. The second phase was about the initiation of the *Kyoto Protocol* negotiations to its entry into force. The current phase is about *Paris Agreement* which focused on developing a more global approach to reduce the greenhouse gas (GHG) emissions all over the world. The negotiation of *Paris Agreement* effectively started in 2005 when question arise about the situation of post-2012, after the *Kyoto Protocol's* first commitment period ended. Later, the Bali Action Plan, Cancun Agreements, Durban Platform and Copenhagen Conference which helped to finalize the *Paris Agreement*.<sup>iii</sup>

## **PRINCIPLES OF RESPONSIBILITY**

It is an established and scientifically proved thing that global warming is a result of increased greenhouse gas in the atmosphere over the time. The major emitters of past need to take responsibility for the reductions of emissions in the future because they are liable for this condition.<sup>iv</sup> The responsibility and obligations cannot be given them by just saying rather it needs to have some reasons to impose. I have tried to find out their responsibility by discussing some principles of international law and as well as international environmental law.

## **POLLUTER PAYS PRINCIPLE & EQUALITY OF OPPORTUNITY**

Polluter pays principle means whoever polluted the environment will pay for their pollution. This principle has been mentioned in many international legal agreements. The organizations like economic co-operation and development (OECD) recommended polluter pays principle. Also, European Union, Council of Ministers passed directive regarding polluter pays principle. As the developed states harm the environment, it is their responsibility to bear compensation of aggrieved countries. On the other side, these polluter countries also have the capability to pay, so they should not give any excuse to take responsibility.<sup>v</sup>

A famous international environment case named the trail smelter arbitration where the polluter pays principle can be found. In this case the British Columbia was operated by the mining and smelting company since 1896. The smoke from the smelter caused damage to forests and crops in the surrounding area and also across the Canada USA border in Washington. It distressed residents and resulting in complaints for demanding compensation. Latter USA and Canada came into arbitration to solve this problem. Canada held liable and said to pay damages to USA.<sup>vi</sup> In the case another principle also established that the states have no rights to use its territory in a manner that causes injury through fume in another territory.<sup>vii</sup>

In my opinion, if states follow polluter pays principle from the beginning, then the world environment situation may not happen like this. Even now the polluter pays principle need to apply in developed states activities and the important environmental agreements have to make bound developed states to take responsibility under this principle in precise language.

There is an argument against the polluter pays principle that the environment pollution is happening for a long time. The actors of the pollution are different people and entities of different times which are all not alive or exist now. It is unfair that their responsibilities have given to the current citizens who have not done anything.<sup>viii</sup> Another argument that past emissions consider as harmful but not wrongful. The people have done the emission in ignorance and are not aware of the consequence of its to the future generations.

These arguments cannot be last much because the living people of the world is getting better lives for the activities of their ancestors who damaged the environment.<sup>ix</sup> Also, there is an established principle that ignorance does not exempt people from liability. It is followed by almost every legal system of the world and this principle can be seen with the issue of environmental problem.<sup>x</sup>

The principle of equality of opportunity allows using a certain amount of greenhouse gas emission by everyone to get benefits because everyone has the right to use the earth. Under this principle, whoever uses it and get benefits have some responsibility. The developed states were succeeded to use it and got huge benefits where other did not get enough opportunity. As the developed states used the resources and got benefit, then under this principle they have

responsibility towards the environment and as well as to those countries who are facing environmental problems because of their actions.<sup>xi</sup>

## **NO HARM PRINCIPLE**

No Harm Principle is a very well recognized in customary international law. This Principle also came from the Trail Smelter case. After this in many cases and international documents again established this principle. Like in Corfu Channel case the ICJ recognized it.<sup>xii</sup> Even in the case of Gabčíkovo and other international documents of International environmental law have recognized the principle.<sup>xiii</sup>

No Harm Principle means that no states have rights or permit to use its territory in such a manner that would harm the other states or persons.<sup>xiv</sup> In the no harm principle, it deals with the process of preventing and minimizing the risk of harm. If it failed to do so then the burden of the responsibility would go to that state.<sup>xv</sup> This principle applies to state actions individually or jointly which totally depends on the action have taken by the states.<sup>xvi</sup>

## **BENEFICIARY PRINCIPLE**

The beneficiary principle means that a state will pay because of getting benefit from injustice. Elaborately it can be said that if a state or an individual gets benefit from the pollution of others then the person or that state has some responsibility to the environment. An example can be given where A did an action which harms C but B gets benefit without doing anything. Then the responsibility will go to both A and B.<sup>xvii</sup>

Another opinion of this principle where it says that as long as the perpetrator is alive the beneficiary from the pollution need not to pay but if the causer died or happened something, then the beneficiary got responsibility. This makes problem to give obligation to the beneficiary. If any responsibility imposes on beneficiary, then that should have happened in both situations of the existence of perpetrator and nonexistence of the perpetrator. Also, the

amount of compensation should be fixed by considering fair share of benefits getting by an individual or a state.<sup>xviii</sup> Also, some scholars is against of paying compensation of the previous generation actions. They think that it would be unfair that current generation pays all the compensation for previous generations activities which they have not done<sup>xix</sup>.

The beneficiary principle developed in some other ways for making people liable. One of the ideas is qualified beneficiary pays principle. To make liable and protect the beneficiary principle the idea of qualified beneficiary pay principle developed.<sup>xx</sup> It says if the main polluter failed to pay all compensation, then the beneficiary will pay it to the affected one unless beneficiary's condition falls below its capacity.<sup>xxi</sup>

## **PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITY**

The common but differentiated responsibility is a well-known principle in the area of international law. This principle just not deal with climate change but also deal global welfare of peoples matters related peace, health and terrorism.<sup>xxii</sup>

This principle can be categorized with two major elements. The first one is that all the states have same responsibility to protect the environment nationally, regionally and internationally. The second one is need to pay attention to the different circumstances specifically every state's contribution to evolution of a particular environment problem and its capability to prevent, reduce and control the problem.<sup>xxiii</sup> More elaborately, the common responsibility indicates the share obligation of states for protecting a particular resource of environment and the resource would not be controlled under any state. On the other side differentiated responsibility determine on the basis of needs, economic development, historical contributions of harming environment and other circumstances.<sup>xxiv</sup>

This principle wants to achieve equity, justice, and fairness in international environment relations through balancing states responsibility to prevent global environment issues along with states right to development.<sup>xxv</sup> The Common but Differentiate Principle says that all the states are liable for environmental issues but some states are more responsible than others for

this global problem. It also indicates that all states need to take responsibility for protecting the global environment based on their contributions regarding harming the environment as developed and developing country.<sup>xxvi</sup>

## **LOSS AND DAMAGE PRINCIPLE**

Loss means a thing which is completely lost and cannot be recoverable. The damage indicates a partial loss which can be recovered. In climate change loss and damage refers to a permanent loss in countries which cannot be avoided or repaired through the mitigation process. Another important view about the principle that indicates compensation which relates to loss and damage principle. The damaged part of the principle is considered as tort or liability where monetary will be provided for the compensation to the developing countries and also remedial measures will be offered for the infrastructure and property.<sup>xxvii</sup>

In climate change regime, the loss and damage principle developed because of vulnerable countries specifically small island developing states (SIDS)) who wanted a recognition from the international community that they are facing problems because of past human-induced climate change activities and they are obliged to get support with an equity-based approach.<sup>xxviii</sup>

## **DEBATE ON HISTORICAL RESPONSIBILITY AND NEGOTIATION OF PARIS AGREEMENT**

The principles discussed would be valueless until or unless take them under a legal mechanism. After the nineties, considering the historical emission done by developed states the world tried to impose obligation to them in different treaties based on these principles.

*Kyoto Protocol* is one of the greatest treaties to address the environmental problem or more specifically saying climate change. The Berlin mandate played a significant role to happen *Kyoto protocol*. In 1995 the parties were seated in Berlin and discussed to find out the non-precise language of the UNFCCC convention. This Conference of Parties (COP) decided to

make a solid mechanism named top-down approach to reduce the emissions of GHGs in a specified time by the Annex 1 industrialized countries. This process did not introduce any new commitments for developing countries but it gives pressure to fulfil the existing commitments of UNFCCC.<sup>xxix</sup>

The *Kyoto Protocol* has characterized with joint implementation, clean development mechanism and assign amount trading. To make success *Kyoto Protocol*, at that time the industrialized countries agreed to reduce GHG emissions with a target which latter did not happen much.<sup>xxx</sup>

Regarding distributing responsibility, the developed and developing countries had different views. The developed countries wanted that the responsibility would be equally distributed where the developing countries did not want to bear equal responsibility.<sup>xxxi</sup>

After *Kyoto protocol* Copenhagen Conference had high expectations because this was going to decide the mechanism of addressing climate problem of post 2012. It was getting difficult to get result from the conference and on the last day, the head of the states of USA, India, China, Brazil and South Africa sat together and the America's President Barac Obama declared the accord.<sup>xxxii</sup> The accord has no legal value rather can consider as political thing. The expectation of having legal document to address the post *Kyoto Protocol* did not happen but came with a political solution.<sup>xxxiii</sup>

In 2010 Cancun Agreements occurred after failure of Copenhagen Conference. In Cancun Agreements countries committed for the first time to keep global temperature increases below 2°C. Also, the green climate fund established to assist the developing countries for mitigating and adapting to climate change. Then the conference of Durban in 2011, the conference of Doha, COP18 in 2012 and the conference of Warsaw, COP19 in 2013 played important role to happen *Paris Agreement* in 2015, which can consider as most important global climate agreement in history.<sup>xxxiv</sup>



## ASSESSMENT OF THE PROVISION OF PARIS AGREEMENT

The *Paris Agreement* is a historic treaty with binding and non-binding obligation to address environment problem. It has featured with bottom-up approach for reducing emissions which is opposite of *Kyoto Protocol*.<sup>xxxv</sup> It has a goal to hold the temperature globally below 2 degrees Celsius, pursuing a limit of 1.5 degrees Celsius. The parties will communicate through preparing under the domestic policy and report the emission target in every five years. It has also another characteristic to support poor and vulnerable countries for cutting their emissions and preparation to address the consequences of climate change.<sup>xxxvi</sup>

The language of the *Paris Agreement* is not precise. Some of the provision gives legal binding and some are not. Though it is the nature of international law of having vague words so more parties can part of the treaty but in *Paris Agreement* there are some places where the vague words should have avoided. The use of words like “should,” “may,” “encourage” and some other words make the treaty with soft approach in the form of obligation.<sup>xxxvii</sup>

The *Paris Agreement* talks about nationally determined contributions (NDC) and country’s role to implement it. According to this agreement the parties will submit NDC on a periodic basis with transparency system of reporting and review.<sup>xxxviii</sup>

In article 4.3 the NDC is under the principle of common but differentiated responsibility and respective capabilities in the light of different national circumstances which means to have NDC from different countries with different targets based on their capabilities and national situation. In article 4.4 where the developed countries should continue taking lead on the matter of economy-wide absolute emissions reduction targets. On the other side, it only encourages developing countries to move towards economy-wide targets over time. Also, under Article 4.5 the developing parties will get support to implement mitigation commitment. Apart from these, reading article 4.6, it can understand that least developed countries and small-island developing countries get flexibility.<sup>xxxix</sup>

The *Paris Agreement* introduces a ratchet-up mechanism. This mechanism will be operated in every five years. In Article 14.1 says that the meeting of the parties will assess collective progress regarding achieving long term goals in every five years which referred as global stocktake. This stocktakes will not just mitigate climate change but also take steps on adaption,

finance, technology transfer and capacity building. This will be done accordance with the equity and existence of science. Also, in Article 4.3 an expectation given by saying of a progression than the previous NDC of the state and the successive one expected its highest possible ambition.<sup>xi</sup>

Another feature of this agreement is adaption which considers as countries self-interest. In mitigation, countries are taking collective action because emission reductions problem cannot be solved alone and it is welfare for everyone. As adaption is countries local problem so they will try to adapt and take necessary steps instead of not depending and seeing other countries activities. The *Paris Agreement* in article 7 gives softer approach to encourage to take greater adaption steps. The acknowledgement, recognizes the importance of support, strengthen the cooperation on adaptation and submit adaptation communications discussed in article 7.2,7.6, 7. 7, 7.10 which are considered as quite ordinary and also not clear about the effectiveness.<sup>xli</sup> Apart from these Articles two other provisions in article 14 where global stocktakes discussed which will help to ensure regular attention to the issue and in Article 9.4 about scaled-up financial resources in order to achieve balance between adaption and mitigation and also specifically recognize the need for public and grant based resources for adaption.<sup>xlii</sup>

In the mobilization of climate finance, developed countries need to take the lead as a part of their global effort.<sup>xliii</sup> Article 9.1 talks about the developed countries to provide financial resources. It says that developed country parties will assist developing country parties with financial resources in case of mitigation and adaptation.<sup>xliiv</sup>

The loss and damage are retrospective and concerns harms which already happened. The developed countries have tendency to avoid the loss and damage because these developed states believe it may take them to pay compensation to the victim countries.<sup>xliv</sup>

Article 8 of *Paris Agreement* talks about loss and damage. This Article has some importance because of bringing issue of loss and damage under the scope of *Paris Agreement* and also it is a long sought of developing states but this Article does not have very much new of substance. The United States made a comment on this that “Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.” In this article some cooperation and

facilitation have featured name early warning systems, emergency preparedness, and comprehensive risk assessment and management. As already said, this Article has not much new substance but is significant for the small states because they can use it to take this issue forward.<sup>xlvi</sup>

The capacity and ability will increase of developing, least developed countries and particularly vulnerable to the adverse effects of climate change countries by taking different climate change steps under Article 11.1. Then in Article 11.3 says that all countries should cooperate to enhance the capacity of developing countries.<sup>xlvii</sup> On the other side a new compliance mechanism introduced in under Article 15 of *Paris Agreement*. It consists of a committee with expert based, transparent, non-punitive, non-adversarial and report system. The committee will give particular attention to the respective national capabilities and circumstances of Parties.<sup>xlviii</sup>

## **USA WITHDRAWAL & RE-JOINED IN THE PARIS AGREEMENT**

The United States of America withdrew and re-joined in the *Paris Agreement*. The former President Donald Trump made USA withdraw from *Paris Agreement* and later the new President Biden re-joined USA in *Paris Agreement* on February 19, 2021. This makes USA once again part of the global climate solution.<sup>xlix</sup>

The return of USA is a relief for the world because few years back, when trump administration gave declaration of being not wanted a party of the agreement made a massive impact in the total governance of climate change. The reason is that the USA had a supplier role to respond to climate governance but tuned into the consumer role after withdrawal. As a developed state USA had responsibility to contribute more to address climate change problem but decision of withdrew created possibilities of not happening. Also, the other big suppliers got wrong message and would feel discouraged from making big contributions which affect the efficacy of *Paris Agreement*.<sup>1</sup>

The good thing is USA is back and it will increase the energy of *Paris Agreement*. Also, it will give the confidence to the agreement to work properly. Apart from this, the other countries who may feel discouraged to contribute will be motivated to work together under this agreement.

## FINDINGS AND DISCUSSION

The *Paris Agreement* has come with new features and an ambition to fight against climate change but there are some loopholes. In past, one of the main reasons behind failed of *Kyoto Protocol* was the top-down approach where the binding target of reducing GHG had given to the developed states. Considering past result, *Paris Agreement* introduced the bottom-up approach where all the parties fixed their NDCs target by itself and will try to achieve it with reporting process. The bottom-up approach is flexible and provides discretionary power to the states which are opposite of *Kyoto Protocol*. It may seem perfect but also provide options to the parties to misuse. If parties get the freedom to fix their targets, then they may not give fair target compare to their capability which means states have options to provide less target than their capability and many would use it in a wrong way.

Another problem in the agreement that it did not give the definition or categorized the countries in developed and developing. In previous, the UNFCCC had annex I and annex II which categorized the countries. Later in *Kyoto Protocol* gave annexure b categorized of developed countries with the targets. So the question arises in *Paris Agreement* who will play the role of different countries under different categorizations. It can be said as *Paris Agreement* happened under the UNFCCC, so may be the categorizations of countries can be taken from there but the problem is it would left some capable countries. In current days some new countries have hugely harmed the environment and also have enough capability to compensate their actions. Also, there is another argument that since NDC-related provisions are applicable to all countries, so now emerging economies can no longer hide behind their status as developing countries. The reality is it only increases the participation of countries but may not much effective because the discretionary power to determine NDC is also in the hands of these states. Also, the other vague texts in the agreement give these capable countries scope to remain silent. It would be better by providing categorizations of countries in the text of this agreement which

could create better impact to make countries responsible to perform their duties. The categorizations can be taken from some other sources where developed and developing countries statuses have given but country may not follow those classifications by willingly and also not bound to follow them. In that situation, if the treaty itself described the countries positions then this problem would not come.

The shame policy is another way where states do many things in the fear of it. It is another argument that the developed and responsible countries for climate change are known to the world and for that reason the categorization is not needed. Considering the shame policy, the developed states may take their obligation seriously, but in practice, the shame policy always did not effective much. It has examples of past where countries did not care about shame and withdrew themselves. In *Paris Agreement* there is possibility of happening same thing that countries will not consider the prestige issues and may take advantage regarding not fulfilling their responsibility against their actions.

There are sentences that are less legal and non-legal bindings to the parties. It can be presumed that the makers of the agreement had a clear purpose to provide flexibility to the states but there were some places where some words should have changed and made the sentences in precise language. The vague words give scope states to not perform properly because states have tendency to avoid their liability. In *Paris Agreement* parties can do the same thing and take the benefits of vague words.

There is no enforcement mechanism in the *Paris Agreement*. If any mechanism like international court could include through the agreement to address world environment issues then may the countries would behave more responsible. Yes, it is very difficult to make functional because countries want to have freedom but having enforcement mechanism may give extra significance to the climate change issue around the world.

The *Paris Agreement* is a hope for climate change issue but it is less legal binding rather parties are expected to respect and perform their commitments in good faith to fulfil the objectives of the agreement.

## CONCLUSION

It has been decades of struggling under different treaties with an expectation that developed states would come forward and take responsibility towards environment for their historical emission. In reality, the developed states do not want to take responsibility and want to refuse their historical liability. They always show unwillingness and use the power of the international politics to avoid their responsibility. The *Paris Agreement* has some great features to fight against climate change but cannot deny the possibility of failing. The willingness of the states especially from the developed states are essential. If these states understand the importance of the climate issue, accept historical emissions and perform their responsibility under the *Paris Agreement*, then it can be successful. It needs to realize that if states have the willingness, then any environmental treaty can be successful. So, it is the willingness that can execute *Paris Agreement* successfully to address the climate issue.

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