ENVIRONMENTAL IMPACT ASSESSMENT IN INDIA: REVIEWING TWO DECADES OF JURISPRUDENCE

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Abstract

This short note reviews two decades of significant case law developments in the environmental impact assessment process in India. EIA was first introduced as a regulatory requirement in 1994. EIA reflects the constant struggle to balance economic development with ecological integrity in the context of a developing country. The Courts have developed a rich jurisprudence thereby considerably deepening and widening the EIA process.

Note

The primary aim of EIA procedures is to gauge the potential environmental impact of an economic project so as to allow for measures to minimize that impact. The methodology adopted is that of self-assessment by the project proponent followed by review and project approval by the regulators. The EIA notification[1] was first issued in 1994[2] by the Central Government (Ministry of Environment and Forests (MOEF)) in exercise of its power to take any measure to protect and improve the environment as provided under Section 3 of *the Environment Protection Act, 1986*. It introduced a process for prior environmental approval[3] of certain kind of projects (specified in Schedule 1).[4] The project proponents were required to submit an environmental assessment report, environmental management plan and the details of the public hearing conducted in the vicinity of the project (exceptions to these

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[1] Notification is an executive order passed by a Government Department on any issue and is applicable to the general public. The competence of the executive to pass a notification is always based on a statutory provision.
[2] Environment Impact Assessment Notification S.O.60 (E), dated 27/01/1994. http://envfor.nic.in/legis/eia/so-60(e).html.
[3] The term used in the notification is that of 'environmental clearance'.
[4] These included *inter alia* projects in river valleys, nuclear power, exploration of oil and gas, ports, petroleum refineries, mining (major minerals), thermal power, highway roads etc.

requirements were permitted for certain projects). The MOEF would function as Impact Assessment Agency which could consult a Committee of Experts set up for this purpose.

Three significant changes were initiated through the 2006 amendment[5] that superseded the 1994 notification. First, the decentralization of regulatory functions to State level Environment Impact Assessment Agencies (SEIAAs).[6] SEIAAs were to oversee smaller scale projects (Category 'B') and the MOEF would continue to regulate larger scale projects (Category 'A'). Second, although the final regulatory approval would be decided by the MOEF or the concerned SEIAA, they in turn were to base their approvals on the recommendations of the State Expert Appraisal Committee (SEAC) and the Expert Appraisal Committee (EAC) functioning in the MOEF. Third, the State Pollution Control Boards (SPCB) or the Union Territory Pollution Control Committee (UTPCC) were given the responsibility for conducting the public hearing, taking responsibility away from the project proponents. These three changes were designed to make the appraisal process more streamlined, transparent and independent of politicking.

The Courts have subsequently expanded upon and deepened the impact of these changes through their decisions which developed key aspects of the EIA process.

In *Sterlite Industries (India) Ltd. v. Union of India*[7] the Supreme Court discussed the specific grounds on which administrative action involving the grant of environmental approval could be challenged. The grounds for judicial review were illegality, irrationality and procedural impropriety. Thus the granting of environmental approval by the competent authority outside the powers given to the authority by law, would be grounds for illegality. If the decision were to suffer from Wednesbury unreasonableness,[8] the Court could interfere on grounds of irrationality. Last, an approval can be challenged on the grounds that it has been granted in breach of proper procedure.[9] Nevertheless the Court has not restrained itself, in cases where it found that the SEAC had recommended approvals without any application of

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[5] Environmental Impact Assessment Notification S.O. 1533(E) dated 14/09/2006. http://www.moef.nic.in/legis/eia/so1533.pdf

[6] The growing number of projects requiring environmental approvals along with the need to decentralize the process via engagement of environments departments of the states prompted this step.

[7] 2013 AIR SCW 3231.

[8] The Wednesbury principle means that only an administrative decision that is unreasonable to an extreme degree can be brought under the legitimate scope of judicial review. The principle is generally considered as a reason for courts not to interfere in administrative body decisions. Non-applicability of the principle would imply that courts will be less hesitant in interfering in such decisions.

[9] The procedural breach has to be of a mandatory requirement in the procedure.

mind.[10] Thus in *Gram Panchayat Navlakh Umbre v. Union of India and Ors,*[11] the Court held that the

> *"decision making process of those authorities besides being transparent must result in a reasoned conclusion which is reflective of a due application of mind to the diverse concerns arising from a project such as the present. The mere fact that a body is comprised of experts is not sufficient a safeguard to ensure that the conclusion of its deliberations is just and proper."*[12]

In *Utkarsh Mandal v. Union of India*[13] the Delhi High Court had held that the EAC was bound to disclose the reasons underlying its decision following the principle enunciated by the Supreme Court that quasi-judicial and administrative bodies have to disclose reasons for reaching a particular conclusion. Further the Court has emphasized the need for a detailed analysis of facts and reasoning. The National Green Tribunal (NGT) has held that the

> *"appraisal is not a mere formality and it requires detailed scrutiny by EAC and SEAC of the application as well as the documents filed, the final decision for either rejecting or granting an EC vests with the Regulatory Authority concerned viz., SEIAA or MOEF, but the task of appraisal is vested with EAC/SEAC and not with the regulatory authority."* [14]

In *Samata and Forum of Sustainable Development v. Union of India & Ors* the NGT held that

> *"In order to demonstrate [the] threadbare nature of discussions while considering a project for giving its recommendation, it is essential that the views, opinions, comments and suggestions made by each and every member of the committee are recorded in a structured manifest/ format."*[15]

Conduct of public hearings in an improper manner has also emerged as a common ground for challenging environmental approvals. In *Adivasi Majdoor kisan Ekta Sangathan and Another v. Ministry of Environment and Forest and Others*[16] the evidence of persons who voiced their opposition to the project was not recorded and no summary of the public hearing

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[10] This phrase is frequently used in law to refer to the failure of administrative authority to actively consider all aspects and issues while arriving at a particular decision.
[11] Public Interest Litigation No. 115 of 2010. Judgment of Bombay High Court on June 28, 2012.
[12] Paragraph 26 ibid.
[13] Writ Petition (Civil) No. 9340 of 2009. Judgment of Delhi High Court on November 26, 2009.
[14] Gau Raxa Hitraxak Manch and Gaucher Paryavaran Bachav Trust, Rajula v. Union of India and Others, Appeal No. 47/2012. Judgment of NGT on August 22, 2013.
[15] Appeal No. 9 of 2011. Judgment of NGT (Southern Zone, Chennai) on December 13, 2013.
[16] Appeal No. 3/2011 (T) (NEAA No. 26 of 2009). Judgment of Principal Bench of the National Green Tribunal on April 20, 2012.

was prepared in the local language nor was it made public. Therefore the Court declared the approval invalid.

Attempts at circumvention by breaking up land parcels so as to escape the minimum land area cut off requirement of five hectares for the conduct of EIAs have also been addressed by the Court. In *Deepak Kumar v. State of Haryana and Ors,* [17] referring to the recommendations of the Committee on Minor Minerals,[18] the court underlined that state governments should be discouraged from granting a mining license/lease to plots less than five hectares so as to reduce circumvention and ensure sustainable mining. Further, where land is broken up into smaller parcels, prior environmental approvals should be sought from the MOEF.

The role of private expert bodies and consultants conducting the EIA has also attracted judicial scrutiny. Furnishing of false information by the consultant has been deemed by the Court professional misconduct and it has recommended strict action in such cases.[19]

While all the cases referred to point to issues and approaches to EIA that would be generally recognizable in other States, a further development by the Court in India has involved the confirmation of the role of community actors. In this the Indian Court may be some way ahead of the courts of other States. The Gram Sabha[20] is obligated to safeguard the traditions and customs of the scheduled tribes and other forest dwellers as mandated under both *the Forest Rights Act 2006* and the PESA Panchayats (Extension to Scheduled Areas) Act 1996. Underlining this role of the Gram Sabha in *Orissa Mining Corporation Ltd. v. MOEF and Ors*,[21] the Supreme Court has ruled that the religious rights of individuals and communities to be determined by the Gram Sabha would have to be protected and therefore the decision of the Gram Sabha would have to be considered before the MOEF grants environmental approvals for developmental projects in forests or scheduled areas.[22]

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[17] Special Leave Petition (Civil) No. 19628-19629 of 2009. Judgment of Supreme Court on February 27, 2012.
[18] Committee set up by the MOEF. http://www.indiaenvironmentportal.org.in/files/file/mining_minor%20minerals_sand_India_moef.pdf
[19] V. Srinivasan v. UOI, Appeal No. 18 of 2011 (T), Judgment of Principal Bench of the National Green Tribunal on February 24, 2012.
[20] Section 2 (g) of the Forest Rights Act 2006 defined Gram Sabha as " a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women."
[21] Writ Petition (Civil) No. 180 of 2011. Judgment of the Supreme Court of India on April 18, 2013.
[22] Schedule areas are areas which are declared as such by the President of India. Such areas usually have a preponderance of tribal population and are relatively economically underdeveloped. See http://www.tribal.nic.in/Content/DefinitionofScheduledAreasProfiles.aspx.

Another innovation follows the reservations expressed by a number of courts about the present institutional arrangements governing EIA. Ultimately frustrated by these structural limitations, the Supreme Court (confirming its earlier judgment[23]) has recently ordered the appointment of a national environmental regulator to oversee this process. It held that the:

> *"present mechanism under the EIA Notification … is deficient in many respects and what is required is a Regulator at the national level ….which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the Environmental Clearances."*[24]

The EIA process is India faces several critical challenges,[25] the primary being the need for greater transparency, ensuring accountability of regulators and improving the quality of public participation. The Court's interventions in various cases have sought to address each of these challenges. The recent order to establish an independent national environmental regulator to oversee the EIA process is a reflection of the Court's frustration with the piecemeal nature of policy reforms and an attempt to provide a clear institutional framework for addressing the existing challenges. Although some may criticize this as an example of the judiciary stepping into the policy sphere, nevertheless the Court's commitment towards making the EIA process more effective deserves to be applauded.

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[23] Lafarge Umiam Mining Private Limited v. Union of India & Ors. ((2011) 7 SCC 338).
[24] T N Godavarman v. Union of India. Order of the Supreme Court on January 6, 2014 in I.A. Nos. I.A. NOs.1868, 2091, 2225-2227, 2380, 2568 and 2937 in Writ Petition (Civil) No. 202 of 1995.
[25] The fact that more than a hundred changes have been made to the EIA process has also contributed to these challenges. See http://www.hindustantimes.com/india-news/environment-impact-assessment-changed-100-times-in-less-than-7-years/article1-1149633.aspx.