Chapter 6:
In Search of An Ideal Legal Framework: A Comparative Analysis of the Endangered Species Act of USA (1973) and the Wildlife (Protection) Act (1972) of India

Management of threatened and endangered species requires decision making in the face of uncertainty. This gives rise to two needs: understanding the decision context of threatened species management, and understanding how to make decisions when we do not know everything we would like to know (Runge 2011). The legal and policy framework thus assigned towards such management provides a key indicator towards such decision making.

The United States of America and India are both important countries from the perspective of wildlife trade. India, a mega diverse country, is the source for many of the rare and endangered wildlife species and their derivatives that command a high value in the international market. The USA is largely driving this trade (U.S. House of Representatives, Sep 16, 2008, Serial 110-84) and is acknowledged as a primary destination for wildlife and wildlife products from legal and illegal sources (Crawford Allan 2008 in testimony before U.S. House of Representatives, Sep 16). As such, the policies and practices of both have considerable significance for the future of many wild species.

This chapter seeks to evaluate and compare the legislative and implementation characteristics of wildlife conservation including trade regulation across both countries.

As two of the world’s largest democracies, it is interesting to note that the umbrella legislations for conservation of wild species found their way into the statute books at around the same time. The Wildlife (Protection) Act- WLPA was enacted in India in 1972 while the Endangered Species Act (ESA) was enacted in the USA in 1973.

The ESA is seen as an example of an international legislative framework for the protection of species as the United States has one of the most
sophisticated CITES implementation programs and it can legitimately claim to have implemented CITES longer than any of the other member-parties (Daniel 1999).

**WLPA- the Early Days:**
When the WLPA was first enacted in 1972, the culture of *shikar* or game hunting was still largely prevalent across India. Thanks to a global outcry, tiger hunting had just been prohibited, but not before many such sport hunters and hunting outfits protested against loss of valuable foreign exchange due to such a ban. “Project Tiger”, globally acknowledged as the largest species conservation programme of its kind, was launched on 1st April 1973 in Corbett National Park, India and mainland Asia’s first National Park established in 1936.

It is interesting to note that the preamble to the first version of the WLPA in 1972 mentioned that whereas it is expedient to provide for the protection of wild animals and birds and for matters connected therewith or ancillary or incidental thereto; Parliament has no power to make laws for the States with respect to any of the matters aforesaid except as provided in Articles 249 and 250 of the Constitution. This is because the subject of “wildlife” was part of the State list. It was moved to the “Concurrent list” by the 42nd Amendment to the Constitution of India in 1976, thus empowering Parliament to enact laws related to wildlife without taking recourse to Article 252(1) (Divan et al 1995). By an amendment in 1991, Parliament also extended the operation of the WLPA to the whole of India except the State of Jammu and Kashmir, which has its own Wildlife Act. (Act 44 of 1991, Sec.4 (w.e.f. 2.10.91).

The WLPA defined "wild animal" to mean any animal found wild in nature and includes any animal specified in Schedule I, II, III or IV of the Act.

This initial definition had a very wide scope under law. Thus, while any species listed under the various schedules so described above were included under the definition of ‘wild animal”, this was not limited to just those species. The choice
of the word “includes” indicated that the primary definition was of “any animal found wild in nature”.

The Act also provided for “hunting” of wild animals specified in Schedule 11, Schedule III, or Schedule IV under a licence granted by the Chief Wild Life Warden or any other officer who may be authorised by the State Government in this behalf. These could be issued as (a) Special game hunting licence, (b) Big game hunting licence, (c) Small game hunting licence or (d) Wild animal trapping licence.

The hunting of young and female of wild animals other than vermin and of any deer with antlers in velvet was prohibited. The State Government was authorised to declare certain times of the year and certain areas as “closed” for any such wild animal and no hunting of such animal would be permitted, during the said period, in the area specified in the notification.

Wild animals could not be hunted from or by means of, a wheeled or a mechanically propelled vehicle on water or land, or by aircraft, or with chemicals, explosives, nets, pitfalls, poisons, poisoned-weapons, snares or traps, except when provided under a Wild Animal Trapping Licence. Special or big game could be hunted only with a rifle. Use of any artificial light for the purpose of hunting, and hunting any wild animal between sunset and sunrise was also prohibited. Wild animals could also not be hunted on a salt-lick or water hole or other drinking place or on path or approach to the same, except sandgrouse and water-birds.

WLPA Today:
Since its first enactment, the WLPA has undergone several amendments in 1982, 1986, 1991, 2003 and 2006. More recently, a comprehensive amendment is under consideration of the Government of India. The amendments have in many ways, drastically altered the structure of the WLPA. This is first reflected in the change to its preamble which now reads “...An Act to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring
the ecological and environmental security of the country." (amended vide Act 16 of 2002, Sec 3 (w.e.f. 1.4.03)).

This change is extremely significant, as it acknowledges for the first time that the protection of wild species and their habitats has a bearing on the ecological and environmental security of India.

Amongst other significant features of the WLPA as it now stands, "wild animal" means any animal specified in Schedules I to IV and found wild in nature; Section 2(36).

"Wild life" includes any animal, aquatic or land vegetation which forms part of any habitat; Sec 2(37).

Most provisions enabling hunting such as for “Closed Areas, Big game etc. now stand deleted.

Several authorities and bodies have been constituted under the provisions of the Act. Thus, the National Board for Wildlife is chaired by the Prime Minister and is the highest body mandated with the task of promoting the conservation and development of wildlife and forests by such measures as it thinks fit (Sec 5A, B &C). Similarly, States are required to have a State Board for Wildlife to be chaired by the Chief Minister of the state.

Species are listed under various Schedules. All species listed under Schedule I to IV receive protection as “wild animals’ irrespective of where they are found and cannot be hunted (Sec 9) except in special conditions as provided under Sec. 11 & 12 of the WLPA.

A new Chapter III A introduced in 1991 has included a new Schedule VI listing certain species of plants under the WLPA. The WLPA (Sec 17A) provides that no person shall wilfully pick, uproot, damage destroy, acquire or collect any specified plant listed in Schedule VI from any forest land and area as notified, or possess, sell, offer for sale, or transfer by way of gift or otherwise, or
transport any specified plant, whether alive or dead, or part or derivative thereof.

The WLPA also lays down the process of law to establish various Protected Areas including Sanctuaries, National Parks, Conservation Reserves and Community Reserves. It also lays down the various activities which are regulated or prohibited in such areas and the punishments for violation of such provisions, which could include penalties and imprisonment.

The Act has also provided for the establishment of a National Tiger Conservation Authority and a Wildlife Crime Control Bureau. It is of interest to note here that of the 800 plus species listed under various Schedules under the WLPA, the tiger, India’s national animal is the only one which has a statutory body specifically mandated to protect its interests.

Wildlife trade in species listed under Schedule I to IV has also received attention and the WLPA provides for specific provisions on trading in scheduled species and/or their parts and derivatives. There is also a provision for forfeiture of property derived from illegal hunting and trade.

As regards changes in the list of species on various Schedules of the WLPA, the Central Government is empowered to add or delete any entry to or from any Schedule or transfer any entry from one part of the schedule to another part of the same Schedule or from one Schedule to another.

The Central Government, and in certain cases the State government is empowered to make rules for various matters related to the implementation of the WLPA (Sec 63 & 64).

Two other important aspects of the WLPA merit attention;

- The officers or other employees of the Central Government or the State Government and the Central or the State Government themselves have legal protection against any suit, prosecution, or other legal proceeding
for anything which is done or intended to be done under this Act in good faith, including for any damage caused or likely to be caused by any such action.

- Also, several provisions of the WLPA carry timelines (e.g. Sec 5A, Sec 6, Sec 7, Sec 18 B, Sec 21, Sec 25A, Sec 34). However, in most such cases, the timeline is for appointment of an authority or a body (e.g. Sec 5A, Sec 18B) but when it is with respect to completion of certain processes, the WLPA liberally precedes the prescribed time limit with the words “...as far as possible (e.g. Sec 25A)”

The Endangered Species Act (ESA)
The U.S. has a long history of legislation to protect wildlife, beginning with the Lacey Act of 1900. There are now over 170 Federal laws that regulate environmental activities, which may affect wildlife. (Fairbrother 2009).

The Endangered Species Act (ESA) is considered as the most important piece of legislation in the USA aimed at conserving wild species. It is also one of the most controversial pieces of endangered species legislation and has been the topic of much criticism (Daniel 1999). In the opinion of the U.S. Supreme Court, the ESA represents the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. (437 U.S. 153 (1978) Tennesee Valley Authority vs Hill et al. No. 76-1701. Supreme Court of United States ). It has also been described as the “pit bull of environmental laws” (Ruhl 2012).

ESA is a federal law which largely impinges upon federal agencies to implement its various provisions. Supporters call the ESA the “crown jewel” of the nation's environmental legislation and an absolutely essential tool for protecting biodiversity. Opponents claim that the ESA imposes unreasonable costs on society while delivering few benefits (Ferraro et al 2007). Arguments for and against the ESA vary. Those against include the Act's species-level rather than ecosystem-level focus, vague or contradictory legislative rulings,
interest group pressures that warp listing decisions, and landowner actions that pre-emptively harm species and their habitat in order to avoid regulatory burdens. As further evidence against the Act’s effectiveness, critics cite the paucity of delisted species and of recovering species as defined by the US Fish and Wildlife Service (USFWS). Evidence in favour of the ESA are the Act’s strong regulatory powers (particularly Sections 7 and 9), the recovery funds allocated by Congress annually and the arguments that the ESA has prevented extinctions and that there is a positive correlation between government funding and reported FWS status (Ferraro et al 2007).

The Endangered Species Act primarily aims to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species...”. Further, the ESA goes on to explicitly state that “The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” Successful conservation thus, equals recovery (Goble 2009).

The main tool for biodiversity protection under the ESA is the placement of individual species on the official list of species that are either in danger of extinction or under the threat of becoming endangered (i.e., “threatened or endangered”). The list is maintained by the two federal agencies with the primary responsibility for ESA implementation and enforcement: the U.S. Fish and Wildlife Service for land and freshwater species and National Marine Fisheries Service for marine and anadromous species (Benson 2012).

Some important aspects of the ESA are discussed below.

The ESA mentions the following as a finding of the US Congress:

(1) Various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
(2) Other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) These species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

Thus, the rock bed of the legislation of the ESA is the acknowledgment of the threat of extinction to various species in absence of adequate concern and conservation and also, more importantly, that these species of wildlife have "value" to the nation and its people.

It is also explicitly stated that "the purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."

The Act goes on to state that "it is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."

It is also important to note that the ESA also makes an acknowledgement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and its appendices. This is especially significant considering that the CITES Convention was signed by the first set of signatories only on March 3, 1973 and became operational only in 1975.

The ESA also lists species as threatened or endangered and provides for the establishment of Critical habitats for them. It also lays down detailed processes to determine whether any species is an endangered species or a threatened species because of any of the following factors:
(A) any present or threatened destruction, modification, or curtailment of its habit or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence.

It is required by law that such designation of species as endangered or threatened are to be done solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species (Sec 4 (B) b).

The ESA also provides for any “Interested Person” to petition the government to add a species to, or to remove a species from its list of endangered or threatened species. Such a petition may be evaluated to see if it presents substantial scientific or commercial information indicating substantive action. In such case, a much more detailed review may be carried out, leading to a final decision on such listing. In case of any negative finding, it shall be subject to judicial review.

This particular aspect of the listing process is unique in that any such petition from a citizen to list a particular species triggers a series of processes and activities linked with deadlines. Judicial review, as mentioned earlier is often brought into play at various stages. It is also interesting to note here that with regard to many of the deadlines, if they are missed by the Government itself, it comes in violation of the ESA and is liable to be prosecuted.

It is important to note here that the ESA does not limit itself to species found in the USA. As of January 2013, the FWS has listed 2,328 species worldwide as endangered or threatened, of which 1,652 occur in the United States. Of these 1,652 species, 1158 have an active Recovery Plan (USFWS 2017).
It has been stated that larger animals from higher forms of life (mammal, birds) were more likely to be listed. It is also stated that such species are likely to be "charismatic," and thus enjoy stronger political support than others. Also, species in conflict may generate extra political attention (Metrick and Weitzman 1996).

The primary reason for considering listing and funding together arises from the fact that many listed species get no more than their names in the Federal Register and a nominal amount of money for recovery efforts. In most years since 1989, fewer than 10% of the listed species received 90% of the available funds (Ferraro et al 2007).

The ESA also provides that once every five years, a review of all species included in the list of endangered or threatened species and on the basis of such review, for a decision to be taken whether any such species should —

(i) be removed from such list;

(ii) undergo a change in status from an endangered species to a threatened species; or

(iii) undergo a change in status from a threatened species to an endangered species.

In case any species so closely resembles in appearance, any species which has been listed under ESA to the extent that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species, such species may be ordered to be treated as an endangered or threatened species even though it may not be listed as one.

The ESA also provides for the development and implementation of "recovery plans” for each listed species, unless it is determined that such a plan would not be useful. For such plans, priority is given to those endangered species or threatened species that are most likely to benefit from such plans.
Each plan would carry a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species. It would also lay down a comprehensive set of objective, measurable criteria which, when met, would result in a decision that the species be removed from the list. Services of appropriate public and private agencies and institutions, and other qualified persons may also be obtained in developing and implementing such recovery plans.

For the purposes of the implementation of the ESA, the Federal Government may establish a mechanism for cooperation with various states of the Union. Such cooperation may include consultation with the states concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species, any form of agreements for the administration and management of any such area established for the conservation of endangered species or threatened species or any cooperative agreements for the purpose of assisting in implementation of any state run programs for the conservation of endangered species and threatened species.

The Federal Government also provides funds to various agencies and states towards the achievement of the goals of this legislation.

The ESA makes it mandatory ("shall") for all Federal agencies to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any critical habitat of such species, unless a specific exemption has been obtained towards the same (Sec 7(2).

To promote the worldwide protection of endangered species and threatened species, the ESA empowers the federal Government to engage with foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species, enter into bilateral or multilateral agreements with such foreign countries and provide support including financial support towards the same (Sec 8).
The ESA also provides a framework for the implementation of CITES and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. (Sec 8A). Thus, it provides a firm legal basis for regulating trade in species listed under CITES and in strengthening CITES compliance in general.

The violation of various provisions of the ESA provides for both civil and criminal penalties (Sec 11).

Researchers have described the ESA as a straightforward statute, influential in part because of its linear and uncompromising approach to species protection (Scott et al 2005). This can be best described as Evaluate-Enlist-Protect - Recover-Review-Delist.

In effect, the ESA considers a progression of conservation efforts ultimately leading to the final goal of conservation of the species. This progression leads from a “risk assessment” of species which may lead to its “listing” as endangered or threatened. Once so listed, the next logical steps of risk management would work on preventing extinction and promoting recovery. Once the species is sufficiently “Recovered”, it can be reviewed and finally delisted.

While such recovery is an avowed legal goal of the ESA, in criticism it is stated that Recovery is an elusive concept (Goble 2009).

However, while this may appear to be simple, in practice it is not at all so. The legally enforceable automatic deadlines that get triggered along various steps of this seemingly simple linear progression have led to the EPA being one of the most litigated laws in the USA (Benson 2012). This also makes it amongst the most controversial.
ESA, WLPA and the Courts:
The Federal Courts have a major role to steer the direction of implementation of any law. This is clearly evident in the way the US Supreme Court has dealt with questions regarding the ESA and the Supreme Court of India has dealt with questions involving the WLPA and other related issues.

ESA and the US Supreme Court:
It comes as a surprise that despite being one of the most controversial and litigated legislations on board, there appear to be only five cases involving the ESA that have been decided upon by the US Supreme Court.

Thus, in Tennessee Valley Authority vs. Hill, the court was asked to adjudicate upon the fact whether a dam being built by the Federal Government nearing completion having already spent a large sum of money, should be allowed to impound water, considering that it was likely to submerge what was then known as the only remaining habitat of a small fish, the snail darter. The issue before the court was, a) if by completing the dam, the TVA would violate the ESA? and b) if the TVA’s actions would indeed offend the Act, would an injunction be the appropriate remedy?

By a majority judgment, the court answered “yes” to both questions. The majority ruling also found that the “language laid down in Section 7 of the ESA did not admit of any exception”. The court went on to add that the ESA was “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation” and was intended to halt and reverse species extinction, “whatever the cost”(Coggins et al 1993).

Considering the economic significance of the project and how far construction had already progressed, the decision would likely have far reaching implications and was widely watched across society, including in the US Congress and Senate. In fact, a dissenting note on this judgement, mentioned clearly that “.....I have little doubt that Congress will amend the ESA to prevent the grave consequences made possible by today’s decision. Few if any members of that body will wish to defend an interpretation of the Act that
requires the waste of at least 53 million USD....” (TVA vs Hill, Supreme Court of the United States, 1978, 437 U.S. 153).
This judgment rightfully finds its place in the annals of environmental jurisprudence as the classic David vs Goliath.

While the fate of endangered species under the ESA has been debated across various courts in the USA (eg Northern Spotted Owl vs Hodel, US District Court, Western District of Washington 1988, 716, F. Supp 479), it comes as a surprise that substantive issues regarding this "pit bull of environmental statutes" have been discussed by the US Supreme Court only five times so far.

In Babbitt vs Sweet Home, decided on June 29, 1995, Justice Stevens delivered the majority opinion of the US Supreme Court.

The issue before the court was that the Endangered Species Act of 1973 contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9 of the Act makes it unlawful for any person to "take" any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife." This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

Thus, while the Act does not further define the terms it uses to define "take," the Interior Department regulations that implement the statute, define the statutory term "harm":

"Harm in the definition of `take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioural patterns, including breeding, feeding, or sheltering."
Respondents in this action included small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests who challenged the statutory validity of the Secretary’s regulation defining “harm,” particularly the inclusion of habitat modification and degradation in the definition on the ground that it injured them economically. In its ruling, the US Supreme Court concluded that the Secretary’s interpretation is reasonable, primarily because “…an ordinary understanding of the word “harm” supports it. The dictionary definition of the verb form of “harm” is “to cause hurt or damage to: injure.” Webster’s Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.”

It also agreed that “…the broad purpose of the ESA supports the Secretary’s decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.”

In Bennett vs Spear, decided on March 19, 1997, the US Supreme Court addressed a challenge to a biological opinion issued by the Fish and Wildlife Service in accordance with the ESA concerning the operation of the Klamath Irrigation Project by the Bureau of Reclamation, and the project’s impact on two varieties of endangered fish. The question for decision was whether the petitioners, who claimed competing economic and other interests in Klamath Project water, had standing to seek judicial review of the biological opinion under the citizen-suit provision of the ESA. It is interesting to note that the plaintiffs in this matter were seeking to prevent application of environmental restrictions rather than to implement them, under the very provisions of the ESA.

The court reiterated that to satisfy the “…irreducible constitutional minimum” of standing, a plaintiff must, generally speaking, demonstrate that he has suffered “injury in fact,” that the injury is “fairly traceable” to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.”
Interestingly, the court allowed petitioners to use the existing provisions of the ESA empowering any citizen to bring a legal suit against any person, including the United States and any other governmental instrumentality or agency who is alleged to be in violation of any provision of the ESA or against the Secretary of Commerce or the Interior for an alleged failure to perform any act or duty under provisions of the Act, to sue the Secretary for what they perceived as “over enforcement” of the ESA’s regulatory provisions!

The court found that “The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”

Overall, it is perceived that the ESA has worked well on lands that are federally owned but runs into problems the moment it is perceived to impact individual landowners interests. In essence, there is a widespread notion that private landowners are on many occasions likely to surreptitiously destroy endangered species and their habitats on their land if they think that the discovery could adversely impact their ownership rights. In a society as fiercely protective of the rights of the individual above everything else, this does not come as a surprise.

**WLPA and the Supreme Court of India**

At first instance, the WLPA is a curious mixture of legislation. It begins life as a civil code dealing with land management issues but soon evolves into a criminal code where elements such as hunting of scheduled species and destruction etc. inside Protected Areas are criminal acts dealt with appropriate criminal processes and penalties.
Given the Indian legal system where every civil or criminal prosecution can potentially lead to the Supreme Court for a final view, the WLPA has been dealt with by the Supreme Court on numerous occasions.

In T.N. Godavarman ... vs Union Of India and others, K.M. Chinnappa vs Union of India & others in I.A. no 670 of 2001 in Writ Petition (C) no 202/1995 decided on 30 October, 2002, the Hon. Supreme Court opined “By destroying nature, environment, man is committing matricide, having in a way killed Mother Earth. Technological excellence, growth of industries, economical gains have led to depletion of natural resources irreversibly. Indifference to the grave consequences, lack of concern and foresight have contributed in large measures to the alarming position.” (I.A. no 670 of 2001 in Writ Petition (C) no 202/1995.

The judgment goes on to state, “....The seminal issue involved is whether the approach should be "dollar friendly" or "eco friendly".

'Environment' is a difficult word to define. Its normal meaning relates to the surroundings, but obviously that is a concept which is relatable to whatever object it is which is surrounded. Einstein had once observed, "The environment is everything that isn't me." About one and half century ago, in 1854, as the famous story goes the wise Indian Chief of Seattle replied to the offer of the great White Chief in Washington to buy their land. The reply is profound. It is beautiful. It is timeless. It contains the wisdom of the ages. It is the first ever and the most understanding statement on environment. The whole of it is worth quoting as any extract from it is to destroy its beauty.

"How can you buy or sell the sky, the warmth of the land? The idea is strange to us.

If we do not own the freshness of the air and the sparkle of the water, how can you buy them?

Every part of the earth is sacred to my people.
Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man.

'the white man's dead forget the country of their birth when they go to walk among the stars. Our dead never forget this beautiful earth, for it is the mother of the red man. We are part of the earth and it is part of us. The perfumed flowers are our sisters; the horse, the great eagle, these are our brothers. The rocky crests, the juices in the meadows, the body heat of the pony, and man all belong to the same family.'

So, when the Great Chief in Washington sends word and he wishes to buy our land, he asks much of us. The Great Chief sends word he will reserve us a place so that we can live comfortably to ourselves. He will be our father and we will be his children. So we will consider your offer to buy our land. But it will not be easy. For this land is sacred to us.

This shining water moves is the streams and rivers is not just water but the blood of our ancestors. If we sell you land, you must remember that it is sacred, and you must teach your children that it is sacred and that each ghostly reflection in the clear water of the lakes tells of events and memories in the life of my people. The water's murmur is the voice of my father's father.

The rivers are our brothers, they quench our thirst. The rivers carry our canoes, and feed our children. If we sell you our land you must remember, and teach your children, that the rivers are our brothers, and yours and you must henceforth give the kindness you would give any brother.

We know that the white man does not understand our ways. One portion of land is the same to him as the next, for he is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother but his enemy and when he has conquered it, he moves on. He leaves his father's graves behind, and he does not care.
He kidnaps the earth from his children. His father's grave and his children's birthright are forgotten. He treats his mother, the earth, and his brother, the sky, as things to be bought, plundered, sold like sheep or bright beads. His appetite will devour the earth and leave behind only a desert.

I do not know. Our ways are different from your ways. The sight of your cities pains the eyes of the red man. But perhaps it is because the red man is a savage and does not understand.

There is no quiet place in the white man's cities. No place to hear the unfurling of leaves in spring or the rustle of insect's wings. But perhaps it is because I am a savage and do not understand. The clatter only seems to insult the ears. And what is there in life if a man cannot hear the lonely cry of the whippoorwill or the arguments of the frogs around a pond at night? I am a red man and do not understand. The Indian prefers the soft sound of the wind darting over the face of a pond, and the smell of the wind itself, cleansed by a mid-day rain, or scented with the pinon pine.

The air is precious to the red man, for all things share the same breath the beast, the tree, the man, they all share the same breath. The white man does not seem to notice the air he breathes. Like a man lying for many days, he is numb to the stench. But if we sell you our land, you must remember that the air is precious to us, that the air shares its spirit with all the life it supports. The wind that gave our grandfather his first breath also receives the last sign. And if we sell you our land, you must keep it apart and sacred as a place where even the white man can go to taste the wind that is sweetened by the meadow's flowers.

So we will consider your offer to buy our land. If we decide to accept, I will make one condition. The white man must treat the beasts of this land as his brothers.

I am a savage and I do not understand any other way. I have seen thousand rotting buffaloes on the prairie, left by the white man who shot them from a
passing train. I am a savage and I do not understand how the smoking iron horse can be more important than the buffalo that we kill only to stay alive.

What is man without the beasts? If all the beasts were gone, man would die from a great loneliness of spirit. For whatever happens to the beasts soon happens to man. All things are connected.

You must teach your children that the ground beneath their feet is the ashes of our grandfathers, so that they will respect the land. Tell your children that the earth is rich with the lives of our kin. Teach your children what we have taught our children, that the earth is our mother. Whatever befalls the earth befalls the sons of the earth. If man spit upon the ground, they spit upon themselves.

This we know: The earth does not belong to man, man belongs to the earth. This we know: All things are connected like the blood which unites one family. All things are connected.

Whatever befalls the earth befalls the sons of the earth. Man did not wave the web of life; he is merely a strand in it. Whatever he does to the web he does to himself.

Even the white man, whose God walks and talks with him as friend to friend cannot be exempt from the common destiny. We may be brothers after all. We shall see. One thing we know, which the white man may one day discover our God is the same God. You may think now that you own him as you wish to own our land; but you cannot. He is the God of man, and his compassion is equal for the red man and the white. This earth is precious to him, and to harm the earth is to heap contempt on the creator. The white too shall pass perhaps sooner than all other tribes. Contaminate your bed and you will one night suffocate in your own waste.

But in your perishing you will shine brightly, fired by the strength of the God who brought you this land and for some special purpose gave you dominion over this land and over the red man. That destiny is a mystery to us, for we do
not understand when the wild buffaloes are slaughtered, the wild horses are tamed, the secret corners of the forest heavy with scent of many men and the view of the ripe hills blotted by talking wires. Where is the thicket? Gone, where is the eagle? Gone. The end of living and the beginning of survival." (Supreme Court of India 10 SCC 606)

The judgement also goes on to emphatically state "Nature hates monopolies and knows no exception. It has always some levelling agency that puts the overbearing, the strong, the rich, the fortunate substantially on the same ground with all others" said Zarathustra. Environment is polycentric and multi-facet problem affecting the human existence. The Stockholm Declaration of United Nations on Human Environment, 1972, reads its Principle No.3, interalia, thus: "Man has the fundamental right to freedom, equality, and adequate conditions of life in an environment of equality that permits a life of dignity and well being and bears a solemn responsibility to protect and improve the environment for present and future generations." (Supreme Court of India 10 SCC 606)

In the matter of Sansar Chand vs State of Rajasthan decided on 20 October, 2010, the Honourable Apex Court lamented “...how avaricious and rapacious persons have by organized crime destroyed large parts of the wild life of India and brought many animals e.g. tigers, leopards, bison, etc. almost to the brink of extinction, thereby seriously jeopardizing and destroying the ecological chain and ecological balance in our environment.” The judgment also emphasised that “the Preservation of wild life is important for maintaining the ecological balance in the environment and sustaining the ecological chain.” It went on to state that “...when dealing with tiger and leopard poachers and traders, it is therefore important to bear in mind that one is dealing with trans-national organized crime.” ( Criminal Appeal no. 2024 of 2010, arising out of Special Leave Petition (Crl.) No.5599 of 2009)
In the concluding remarks in its judgment, the Honorable apex court went on to state as follows, “Before we part with this case, we would like to request the Central and State Governments and their agencies to make all efforts to preserve the wild life of the country and take stringent actions against those who are violating the provisions of the Wildlife (Protection) Act, as this is necessary for maintaining the ecological balance in our country.”

More recently, in the matter of Centre for Environment Law, WWF-India vs Union of India & others (I.A. No. 100 In Writ Petition (Civil) No. 337 of 1995, with I.A. no 3452 in WP(C) No.202 of 1995, decided on 15th April 2013, the Supreme Court was called upon “...to decide the necessity of a second home for Asiatic Lion (Panthera leo persica), an endangered species, for its long term survival and to protect the species from extinction as issue rooted on eco-centrism, which supports the protection of all wildlife forms, not just those which are of instrumental value to humans but those which have intrinsic worth.”

In deciding this, the court took into consideration not only the constitutional and the legal framework but also complex ecological questions and divergent scientific opinion that were brought before it. It stated that, “While giving effect to the various provisions of the Wildlife Protection Act, the Centrally Sponsored Scheme 2009, the NWAP 2002-2016 our approach should be eco-centric and not anthropocentric.” It further went on to reiterate that “....while examining the necessity of a second home for the Asiatic lions, we must apply the “species best interest standard”, that is the best interest of the Asiatic lions. We must focus our attention to safeguard the interest of species, as species has equal rights to exist on this earth.”

It reiterated the recognition in International Law that the conservation of biological diversity is “a common concern of human kind” and is an integral part of the development process.

In effect, the Supreme Court of India has strongly stood behind the Wildlife Protection Act, combining it with constitutional provisions and that of other
legislation such as the Indian Forest Act 1927, the Environmental (Protection Act) 1986, the Air (Prevention and Control of Pollution) Act 1981, the Water (Prevention and Control of Pollution) Act 1974 and the Biological Diversity Act 2002 to help secure threatened and endangered species and their habitats. Such strong support from the apex court of the land does auger well for the future of conservation in India.

**Discussion:**
While both the ESA and the WLPA have evolved concurrently, their trajectory reflects the socio cultural context in which they are rooted. Thus, for a country with about one third the people and three times the land mass of India, one would likely presume that the application of high environmental standard would come easily. That does not necessarily seem to be the case always. While the ESA is rooted very strongly in well defined procedures and also has an open role for citizen engagement at every step, it does not necessarily make things easier. In effect, the implementation of the ESA involves many legally enforceable deadlines, the missing of any of which places the government in violation of the ESA and thus open to litigation.

The process of listing species under the ESA is largely transparent and according to well defined scientific criterion which has to be necessarily, demonstrably met before any listing or delisting of species can occur. By contrast, the WLPA does not provide any process for listing or delisting of species in its schedules or their transfer between schedules. The complete authority for this very important activity has been left to the discretion of the Central government. Thus, the rationale, scientific or otherwise, for any such changes in the various schedules of the WLPA is generally far removed from public domain. On one hand, this distances the public from this entire important process, on the other hand it also pulls down a cloak of secrecy on the validity of the scientific information, if any, that drives such decision making.

The listing of a species under the WLPA does not necessarily effectively change anything on the ground as such a listing may not be followed by any supporting action including provision of central or state level funding support.
Unlike the ESA, the WLPA does not necessarily link listing with “recovery”. It may also not lead to any increased awareness amongst various enforcement agencies mandated to extend such protection to a listed species or amongst the public at large. This is further compounded by the fact that there is no prescribed timeline or process of periodic review of the status of a listed species. As such, it is not often possible to determine the impact of such listing on such a species. In effect, most species on the schedules of the WLPA have been there since the Act was first enacted in 1972 but there is little consolidated empirical evidence on the change, if any on the status of such species, thanks to such listing.

Acutely conscious of this gap, the Hon’ble Apex Court in its judgement in the lion case as quoted above went on to order as follows, “The Government of India and the MoEF are directed to identify, as already highlighted by NWAP, all endangered species of flora and fauna, study their needs and survey their environs and habitats to establish the current level of security and the nature of threats. They should also conduct periodic reviews of flora and fauna species status, and correlate the same with the IUCN Red Data List every three years.

Like the rest of its order in the lion case, this part of the Honourable Apex Court’s judgment still awaits compliance.

The challenge to measure effectiveness of listing is not limited to the WLPA alone; it is also one of the major issues surrounding the ESA. The key issue here is the absence of appropriate indicators that can provide answers to the question “what if” i.e how a species would have fared if it was not listed under the ESA. Of course, such a response would be impacted by factors including, but not necessarily limited to species biology, its status at the time of listing and funds made available for implementing recovery plans.

Despite being one of the earliest signatories to CITES, India’s WLPA does not have any mention of CITES. As such, the world view of this important legislation is limited only to species found wild in India and listed under its various Schedules. Any violations of CITES provisions is so far dealt under the
Customs Act as a violation of the EXIM (Export Import) Policy laid down by the Ministry of Commerce.

While the National Board for Wildlife is headed by the Prime Minister and state level boards are headed by respective Chief Ministers, the implementation of various purposes and performance of various duties under the WLPA rest mostly with the Forest Department, with some role functions also provided to agencies like the Police. Thus, various actions, which may be considered of immediate significance under the WLPA may not necessarily attract compliance or even attention from other agencies. Thus, most ecological provisions of the WLPA would play out only on specially designated Forest and Protected Areas. This has of recent times considerably expanded, thanks mostly due to judicial interventions from India's Hon'ble Apex Court where need for mandatory Environmental Impact Assessments and clearances on wildlife norms have been prescribed to ensure that large scale land use changes do not undermine the larger conservation landscape. Thus, many of the objectives of the WLPA can now be said to be met and complemented by use of provisions under other legislations such as the Environment Protection Act 1986 and the Forest Conservation Act 1980.

By contrast the ESA specifically mandates “All other federal agencies” to work for the furtherance of this Act (Sec 7). However, one would do well to remember that land management across the USA is spread across several agencies including the US Fish and Wildlife Service, the US National Park Service, the US Forest Service, the Bureau of Land Management and various state agencies. Coordination and collaboration amongst such diverse agencies is not the easiest task at hand.

An important consideration here would be the comparison of “take” under the ESA vis-a-vis “hunting” under the WLPA.

Take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” Through regulations, the term “harm” is defined as “an act which actually kills or injures
wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” (USFWS January 2013).

The WLPA defines hunting with its grammatical variations and cognate expressions, to include,

“(a) killing or poisoning of any wild animal or captive animal and every attempt to do so;
(b) capturing, coursing, snaring, trapping, driving or baiting any wild or captive animal and every attempt to do so;
(c) injuring or destroying or taking any part of the body of any such animal, or in the case of wild birds or reptiles, damaging the eggs of such birds or reptiles, or disturbing the eggs or nests of such birds or reptiles; (MoEF 2013).

In a sense, both the ESA and the WLPA appear to be on the same page on this, as they define a series of activities that can be construed as directly causing harm to listed wild species as well as any attempt to do so. The WLPA has a much-detailed classification of what constitutes “hunting”, even though the deliberate choice of the word “includes” suggests that this is at best an open list and not an exhaustive one. The protection to eggs and nests of birds and reptiles stands out as a special feature of the WLPA. The WLPA also extends protection to most listed species “wherever found’, but protects their habitat only within PAs. For listed birds and reptiles, damaging their eggs or disturbing their eggs or nests is prohibited irrespective of location. As such, the WLPA appears to provide a higher level of protection to birds and reptiles.

The ESA has expanded the original definition of “take” by means of other administrative regulations defining “harm”.
However, such regulation seems to have expanded the scope of the ESA to apply to even acts of habitat modification and degradation, irrespective of where they might occur, including on private lands. This has very serious implications for the implementation of the ESA as this Act does not distinguish between different ownership of land for application of its statutes for strengthening conservation to a listed species.

In the opinion of some scholars, the ESA began life very differently from other similar environmental legislations in the USA. Thus, when enacted, the ESA did not provide any specific regulatory regime, had no regulatory provisions of any command and control scope and weight and did not have a statutorily defined geographic domain and was drafted in generalised policy terms, not detailed regulatory script (Ruhl 2012). As such, at least in the initial years, its implementation has been driven by opportunistic and citizen driven litigation, one creek, one cave, one valley at a time. The case of Tennessee Valley Authority vs. Hill is a classic pointer in this direction, where the snail darter, a small fish came in the way of a large dam nearing completion.

The WLPA would do good to consider increasing opportunities for direct public engagement in implementation of various provisions of the act. The “list and forget approach” does not really enhance the conservation value of most of the over 800 species listed under the WLPA. There is no structured mechanism to periodically evaluate impacts of such listing on species or even the scientific basis of such listing by a “Public Hearing”.

While such a step is likely to increase the costs of litigation as interest groups including animal welfare groups are likely to approach the courts on several grounds, in the longer run, it is likely to increase public buy-in of the entire conservation process.

Also, the WLPA could consider broad basing itself to include species beyond those found in the wild in India, as this would strengthen enforcement against illegal wildlife trade, now widely acknowledged as a form of organised transnational crime.
Overall, these two pieces of legislation from two of the largest democracies of the world share a common goal, yet differing approaches. The ESA began with a “whatever the cost” approach which has now been considerably mellowed to acknowledge private interests. It also acknowledges partnerships more than when it began life. Yet, it remains one of the strongest legislations of its kind globally, spreading its reach to species and habitats not just in the USA but globally. Thus, despite its perceived shortcomings, it still remains a global standard.

The WLPA has largely taken a top heavy approach where the decision making process has not always been seen as transparent and in public domain except where spirited individuals and institutions have used provisions of the Right to Information Act. That is largely seen to change where decisions are more routinely being placed in the public domain. However, given the exclusionary model of conservation that is statutorily mandated under the WLPA, the days ahead indicate a stronger conflict between ‘Science Based” and “Rights Based” conservation models.