Chapter – III: Legal Regime of EIA - Comparison and Analysis

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3.1 The Evolution of EIA Policy at the Global level

As Plato has rightly suggested that;

“…if law is the master of the government and the government is its slave, then situation is full of promise and men enjoy all the blessings that Gods shower on a state.”

The above statement made by Plato has very aptly suggested that whenever any state is under the rule of law, it is govern more effectively and judiciously. The situation is ideal for its citizens to be governed by the will of law rather the will of its political masters. Thus, legislative development in any sphere of governance plays a crucial role in smooth functioning of a state and its well-being.

The legislative inception of an EIA study as a decision making tool is considered to have been first adopted in the Unites States of America during 1970s. Among the other environmental policy initiatives, in India the EIA process is basically envisaged as a ‘National Instrument’.

In nutshell the EIA study includes the following ingredients:

➢ A detail description of the proposed project, its objective, purpose with adequate technical details about material resources, manpower as well as energy to be utilized.

➢ The details of utilization of the ecological resources like water, land, minerals, etc.


59 P. B. Sahasranaman, Handbook of Environmental Law, Oxford University Press, New Delhi, 2009, p 82.
Any potential adverse impact of the said proposed project on the local biodiversity and environment, including the land, water, flora-fauna, human population, etc.

The technical details of the proposed plan of action and mitigation measures to avoid or minimize any potential adverse ecological impacts.

The glimpse of the environmental management plan for such proposed project including the environmental planning, monitoring, assessment, utilization and conservation by sustainable use of resources.

Therefore, an EIA is a study of the probable changes in the various socio-economic and biophysical attributes of the environment, which may result from a proposed activity. The application of the law depends upon the determination of the significant potential impact of the proposed developmental project through the EIA process. The onus lies on the ‘competent authority’ to decide this matter.\(^\text{60}\)

The EIA process includes EIS\(^\text{61}\), which is a report based on the studies, disclosing the likely or certain environmental consequences of a proposed action, thus, enabling the stakeholders of EIA such as the decision-makers, the regulators, the project proponents and the affected people to minimize the environmental risks involved, to take more informed decisions, or perhaps to reject or to defer the proposed action or to grant conditional clearance, subject to compliance, with certain specific conditions and suggested measures.

The EIA process is considered as one of the successful and significant policy innovations of the 20th Century for environmental conservation and preservation.

\(^{60}\text{Principle 16 of the Rio Declaration, 1992.}\)

About three decades ago, there was no such concept in application. However, EIA at present has emerged as a formal process in many countries and is currently practiced in more than 100 countries around the world. EIA, which is basically considered as a mandatory regulatory procedure, had originated way back in the early 1970s. It is said that with the implementation of the NEPA in the United States, this concept was perceived. During the mid-seventies, the countries, like Canada, Australia, Japan, Netherlands and New Zealand were the first ones to take the EIA policy initiatives. The European Community issued a directive making EIA mandatory for certain categories of projects in its jurisdiction.

However, there were some developing countries as well which introduced the EIA norms relatively early. The real momentum in the development and further evolution in the EIA initiatives came only after the mid-1980s. Even the premier financial institution like the World Bank had adopted the EIA methodology for the assessment and support of the major development projects which mandates the borrower country to undertake an EIA under the World Bank’s own supervision.

Herein after, we are referring to comprehensive a table comprising of the various stages and showing the evolution of the EIA policy as it emerged in the various parts of the world which is illustrated in the table given hereinafter.

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### Table Illustrating Evolution of Legislative Framework in EIA

<table>
<thead>
<tr>
<th>Years</th>
<th>Developmental stages of EIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-1970</td>
<td>➢ Project review based on the technical/engineering and economic analysis. ➢ Limited consideration given to environmental consequences.</td>
</tr>
<tr>
<td>Early/mid – 1970s</td>
<td>➢ EIA introduced by NEPA in 1970 in US. ➢ Basic principle: Guidelines, procedures including public participation requirement instituted. ➢ Standard methodologies for impact analysis developed (e.g. matrix, checklist and network). ➢ Canada, Australia and New Zealand became the first countries to follow NEPA in 1973-1974. Unlike Australia, which legislated EIA, Canada and New Zealand established administrative procedures. ➢ Major public inquires help shape the process's development.</td>
</tr>
<tr>
<td>Late 1970 and early 1980s</td>
<td>➢ More formalised guidance. ➢ Other industrial and developing countries introduced formal EIA requirements (France, 1976; Philippines, 1977), began to use the process informally or experimentally (Netherlands, 1978) or adopted elements, such as impact statements or reports, as part of development applications for planning permission (German states [lander], Ireland). ➢ Use of EA by developing countries (Brazil, Philippines, China, Indonesia) ➢ Strategic Environment Assessment (SEA), risk analysis</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Parna Mukherjee</th>
<th>Doctoral Thesis-Law</th>
<th>Suarashtra University</th>
<th>2013</th>
</tr>
</thead>
</table>
| included in EA processes. The table lists several key developments in environmental assessment (EA) processes over different periods:

- **Mid 1980s to end of decade**
  - Greater emphasis on ecological modelling, prediction and evaluation methods.
  - Provision for public involvement.
  - Coordination of EA with land use planning processes.
  - In Europe, EC Directive on EIA establishes basic principle and procedural requirements for all member states.
  - Increasing efforts to address cumulative effects.
  - World Bank and other leading international aid agencies establish EA requirements.
  - Spread of EIA process in Asia.

- **1990s**
  - Requirement to consider trans-boundary effects under Espoo convention. Increased use of GIS and other information technologies. Sustainability principal and global issues receive increased attention.
  - India also adopted the EIA formally.
  - Formulation of EA legislation by many developing countries.
  - Rapid growth in EA training.

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68 Definition of Risk Assessment: An instrument for estimating the probability of harm occurring from the presence of dangerous conditions or materials at a project site. Risk represents the likelihood and significance of a potential hazard being realized, available at http://www.cseindia.org/node/383, [retrieved on July, 2012].
3.2 The Stockholm Conference and Origin of EIA Mechanism

The Conference on the Human Environment, held in Stockholm in 1972, asserted the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction as per Principle 21 of the said declaration.  

Further, Principles 22, 23 and 24 have also incorporated the various mandates to encourage the precautionary approach for the mitigation of adverse environmental transboundary effects. In 1975, the Final Act of the Conference on Security and Cooperation in Europe was referred to ECE to follow up on the concept of EIA. By

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69 Stockholm Declaration, 1972, Principle 21 - “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” Available at http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503, [last visited on June, 2010].

70 Principle 22- States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

Principle 23- Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Principle 24 - International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States, available at http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503, [last visited on June, 2010].

71 Fundamental Research, Monitoring, Forecasting and Assessment of Environmental Changes - Study of changes in climate, landscapes and ecological balances under the impact of both natural factors and human activities; forecasting of possible genetic changes in flora and fauna as a result of environmental pollution; harmonization of statistical data, development of scientific concepts and systems of monitoring networks, standardized methods of observation, measurement and assessment of changes in the biosphere; assessment of the effects of environmental pollution levels and degradation of the environment upon human health; study and development of criteria and standards for various environmental pollutants and regulation regarding production and use of various products; available at http://www1.umn.edu/humanrts/osce/basics/finacl.htm, [visited on last on June, 2010].
the early 1980s, EIA procedures were in place in a number of ECE member States and, in 1982, a Group of Experts on EIA was established under the Senior Advisers to ECE Governments on Environmental and Water Problems. In January 1987, the UNEP Group of Experts on Environmental Law elaborated the concept of EIA in a transboundary context.

Further, in 1987 the ECE Group of Experts held a seminar on EIA in Warsaw. The rapporteur for the topic "EIA in Specific Circumstances" was Robert Connelly from Canada. However, in the absence of papers from member States, Mr. Connelly drafted a summary focusing on EIA in a transboundary context. The Group of Experts recommended to the Senior Advisers to develop a framework agreement on EIA in a transboundary context. The Senior Advisers subsequently agreed to establish an ad hoc meeting to elaborate a draft. Six negotiating meetings followed, from October 1988 to September 1990.

The Senior Advisers, at their fourth session held in Espoo, Finland, during 25 February to 1 March 1991, adopted the Convention on 25 February, 1991\(^\text{72}\). This was followed by the Convention’s signature by the present European Union and twenty-nine States during the period up to 2 September, 1991. The Convention was opened for ratification, acceptance, approval and accession from 3 September 1991. Poland was the sixteenth State to ratify the Convention on 12 June, 1997 and the Convention entered into force ninety days later on 10 September, 1997. A table given hereinafter explains the important milestone in the development of EIA policy domain.

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\(^{72}\)Espoo Convention, 1991 adopted \textit{vide} session report ECE/ENVWA/18.
4 Table illustrating the important milestones of the EIA policy development\textsuperscript{73}

<table>
<thead>
<tr>
<th>Year</th>
<th>Subsequent development</th>
<th>Number of Parties to Convention</th>
<th>Number of Parties to Protocol</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>First Meeting of the Parties in Oslo, 18-20 March, 1998.</td>
<td>20</td>
<td>-</td>
</tr>
<tr>
<td>2001</td>
<td>Second Meeting of the Parties in Sofia, 26-27 February, 2001, included adoption of the first amendment to the Convention.</td>
<td>32</td>
<td>-</td>
</tr>
<tr>
<td>2003</td>
<td>Extraordinary Meeting of the Parties in Kyiv, 21 May, 2003, for the adoption and signature of the Protocol on Strategic Environmental Assessment.</td>
<td>40</td>
<td>-</td>
</tr>
<tr>
<td>2004</td>
<td>Third Meeting of the Parties in Cavtat (Croatia), 1-4 June, 2004, included adoption of the second amendment to the Convention.</td>
<td>40</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>Fourth Meeting of the Parties in Bucharest, 19-21 May, 2008.</td>
<td>42</td>
<td>7</td>
</tr>
<tr>
<td>2011</td>
<td>Fifth Meeting of the Parties to the Convention, and first to the Protocol in Geneva, 20-23, June 2011.</td>
<td>45</td>
<td>22</td>
</tr>
</tbody>
</table>

3.3 The Convention on EIA in a Transboundary Context, (ESPOO) 1991:

The classic Trail Smelter case at I.C.J., in the late 1950’s, had raised the issue of transboundary pollution between US and Canada. In this case, it was damage caused by one state to the environment of the other that triggered the legal claim. Legally the issue was not viewed as different from damage caused to the public or private property, for instance by the inadvertent penetration of a foreign state’s territory by armed forces. For the first time, an international tribunal propounded the principle that;

“*The State may not use, or allow its nationals to use, its own territory in such a manner so as to cause injury to a neighbouring country.*”

In the year 1991, the Espoo Convention on EIA was held at the city of Espoo, Finland with the similar objective to strengthen the scope of application of the EIA process in the transboundary jurisdictional matters. The Convention was a response to a growing concern about transboundary emissions and the emergence of EIA process as a tool to reduce the negative environmental effects arising out of any new projects/activities.

This convention has set out the obligations on the contracting parties to adopt the precautionary approach and assess the environmental impact of certain activities at an early stage of planning itself. It also laid down the general obligations of States to compulsorily notify and consult each other on all major projects under consideration,

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which may have the potential of any significant adverse environmental impact across boundaries. The convention had drawn its strength from two of the most important principles\textsuperscript{77} of the \textit{Rio Declaration}, which are Principles 17 and 19. The Convention was adopted in 1991 and then on 10 September, 1997, it entered into force. Since then the number of parties and the practical application of the Convention have increased steadily. Later, even two major amendments were adopted by the contracting parties to give more effect as well as flexibility for the better implementation of the said convention. The first amendment was in 2001, followed by the second amendment in 2004\textsuperscript{78}.

Recently, giving Article 11\textsuperscript{79} effect in June, 2011, the fifth session of the Meeting of the Parties\textsuperscript{80} to the Convention took place in Geneva. According to the mandate of the said convention, the parties may enter into either lateral or multilateral treaties

\textsuperscript{77} Rio Declaration, 1992, Economic and Social Council, E/CN.17/1997/8: Principle 17: “\textit{Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”}

Principle 19: “\textit{States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith},” available at \url{http://www.un.org/esa/documents/ecosoc/cn17/1997/ecn171997-8.htm}, [last visited on June, 2010].

\textsuperscript{78} United Nations Economic Commission For Europe, 1\textsuperscript{st} and 2\textsuperscript{nd} Amendments in 2001 and 2004 has allowed the followings:
\begin{itemize}
  \item Allow, as appropriate, affected Parties to participate in scoping
  \item Require reviews of compliance
  \item Revise the Appendix I (list of activities)
\end{itemize}
as available at \url{http://www.unece.org/env/eia/about/amendment.html}, [visited on June, 2012].

\textsuperscript{79} Article 11 – Meeting of the Parties: “1. \textit{The Parties shall meet, so far as possible, in connection with the annual sessions of the Senior Advisers to ECE Governments on Environmental and Water Problems. The first meeting of the Parties shall be convened not later than one year after the date of the entry into force of this Convention. Thereafter, meetings of the Parties shall be held at such other times as may be deemed necessary by a meeting of the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to them by the secretariat, it is supported by at least one third of the Parties};” available at \url{http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf}, [last visited on June, 2012].

between themselves to resolve the issues of transboundary pollutions. In practice this means that all procedural stages should be documented and also clear responsibilities should be identified in advance for all the stages of the application of the said convention. All the stakeholders like the any local, regional, state or national authorities, Non-Governmental Organisations, International Financing Institutions and even the general local public who are likely to become involved are to be allowed to play a participatory role as per the scope of the said convention.

The Second Meeting of the Parties of the Convention on EIA in a Transboundary Context was held in Sofia in February, 2001. The target was to include the elaboration of guidance on practical application of the convention, and on bilateral and multilateral agreements and arrangements in the work plan during 2001-2004. The states like Netherlands, Finland, and Sweden took the responsibility of acting as lead countries for the purpose of the said meeting. Thus, these lead countries contracted the Finnish Environment Institute (SYKE) to co-ordinate the practical work.\(^81\)

According to the objectives of the Espoo Convention, the Neighbouring Parties can substantially reduce difficulties that arise due to differences in legislation and practice by increasing the exchange of information on their respective legislation and practices. At times, some difficulty in applying the said convention has also arisen due to complicated or poor organisation within a party or state. Thus, clear rules, well defined nature of procedures and clearly identified responsibilities to organise the transboundary assessments have proved to be helpful in carrying out the assessments process smoothly.\(^82\)


\(^{82}\) Ibid.
With a proper and systematic approach, the transboundary assessments must cover the analysis of the entire spatial scale of impacts. In addition, transboundary assessments mitigate tension between concerned parties by providing information before rumours develop and by letting citizens and affected party present their opinions on activities that may have an impact on their environment.

It is known that the EIA process needs a multidisciplinary approach to have a holistic scrutiny of any proposed project or activity. Thus, the level of knowledge, access to information, understanding and inputs by the different stakeholders and the public are important for carrying out the implementation of the EIA process successfully. EIAs as transboundary assessments are even more complex. In case of Neighbouring parties, the EIA process may be differently structured in legislation or carried out differently in practice, depending on the historical and cultural background of the state party. Differences are commonly seen in criteria for identifying activities that should be subject to EIA, in the criteria for what is regarded as a significant environmental impact and in the philosophy of EIA including issues such as the role of EIA in decision making and the role of the public in the EIA.83

The Neighbouring parties can reduce difficulties that arise due to differences in legislation and practice by increasing the exchange of information on legislation and practices. The said convention introduced a new way of dealing with transboundary impacts. EIA process existed in the national legislation of most state parties, and thus it was technically quite possible to extend the assessment across the border under the said convention. This extension had also been made in the Council Directive 84 on the

83 Ibid.

assessment of the effects of certain public and private projects on the environment, as amended 85 by Council Directive of the European Union and demanded its extension to all the parties to the convention.

Although the Espoo Convention is the most specific piece of international legislation for mitigating the effects of the transboundary impacts, however, there are several other international instruments related to the EIA process, which have been created and executed with the similar objectives. Some of them are enumerated as under:

- The Convention on long-range Transboundary Air Pollution, 1979,
- The Convention on early notification on Nuclear Accidents, 1986, 86
- The Basel Convention, 1989. 87

Besides these, there are also three UN/ECE environmental conventions that refer to EIA process and Espoo Convention, they are as follows:

- The Convention on the Transboundary Effects of Industrial Accidents, 1992, 88
- The Convention of the Protection and Use of Transboundary Watercourses and International Lakes, 1992, 89

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Other than these, many general environmental global conventions, such as the CBD, have set requirements for EIAs and have also explicitly encouraged transboundary assessments.

3.4 The Rio Convention, 1992

In 1992, a United Nations Convention was held at Rio de Janeiro in Brazil, where a Declaration on Environment and Development was executed with the objective to integrate the concept of “Environmental Protection with Needs of the Human Development”.

It also reaffirmed the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June, 1972, and was seeking to build upon it. It also recognised and asserted the integral and interdependent nature of the Earth as our home. Further, Principle 3 of the said Declaration has laid emphasis specifically on the need of implementing the goal of sustainable development for

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maintaining the quality of life of mankind on earth. Similarly, Principle 4\textsuperscript{94} reveals the crux of sustainable development. The most important provisions related to the procedural aspects of sustainable development have been embedded in Principles 15 and 16.\textsuperscript{95} Here it would be pertinent to also mention Principle 17, which envisaged that EIA, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

3.5 The ARRHAS Convention, 1998\textsuperscript{96}

As we have already discussed in the above stated paras around the Rio Conference, the concept of EIA had developed quite a bit and was widely adopted \textit{vide} legislative implementations in the various parts of the world. However, it was observed that certain bottlenecks had emerged which were responsible for the non-compliance of the EIA process. Among the important bottlenecks were the issue of lack of information available to the public in order to enable them to participate in decision


\textsuperscript{95} Principle 15: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”


\textsuperscript{96} Convention On Access To Justice To Information, Public Participation In Decision Making And Access To Justice In Environmental Matters, Aarhus, Denmark, on 25 June 1998, also known as The Aarhus Convention available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf, [as visited on June, 2012].
making, lack of transparency, lack of access to justice redressal system in case of violations of the EIA norms either substantial or procedural, etc.

Thus, it was the ARRHAS convention where it was considered the scope for public to play a participatory role by way of asserting his/her right and to observe duty as responsible public and it was realised that citizens must have access to information. In order to participate in decision-making and have access to justice in environmental matters, citizens may need assistance in order to exercise their rights. The said convention recognized that if the access to information is improved, then, in turn, it will enhance the public participation in decision-making, both in terms of its frequency as well as quality. Additionally, this would also boost the effective implementation of decisions and contribute in creating public awareness on environmental issues which may affect their life.

The objective was to give the public the actual opportunity to raise their concerns, which would then enable public authorities to take due account of such concerns in the field of the environment. It, thereby, aimed to further the accountability and transparency in decision-making and also to strengthen public support for any decisions on the environmental front. It recognized the desirability of transparency in all branches of government and invited legislative bodies to implement the principles of the said convention in their proceedings. It further recognized that the public needs to be aware of the procedures for participation in environmental decision-making, and must have free access to them and know how to use them.
The very objective of the said convention as illustrated in Article 1\(^{97}\) of the said declaration highlights the need for enhancing the core factors, like the need to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters which are *sine qua non* for the effective implementation of the EIA regulations.

Thus, the text of the said convention also includes the definition of essential terms like; “*Environmental Information*”\(^ {98}\) and “*Public Concerned*”\(^ {99}\), which are the two most determinants factor for the environmental good governance in any state. It is very interesting to note that the scope of these definitions is quite wide and inclusive in nature to meet the diverse needs of the present technologically advance society. The objective is to create awareness among the locals and public who have a legitimate stake in any such developmental projects.

\(^{97}\) Article 1: Objective: “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.” The Convention On Access To Justice To Information, Public Participation In Decision Making And Access To Justice In Environmental Matters, Aarhus, Denmark, on 25 June 1998, also known as the Arhus Convention, is available at [http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf), [last visited on June, 2012.]

\(^{98}\) Article 2(3)(a)-(c): “Environmental information” means any information in written, visual, aural, electronic or any other material form on.”

- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph(a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.” The Arhus Convention is available at [http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf), [retrieved on June, 2012.]

\(^{99}\) Article 2(5) “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.” The Arhus Convention available at [http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf), [last visited on June 2012.]
Further, the Articles 4 and 5 respectively deals with the various facets of the environmental information and its access, collections, dissemination, etc. Here, Article 4 specifically mandates that any environmental information which is already defined under Article 2(3) (a)-(c) of the said convention, related to the environmental decision making, must be made available vide legislative framework or domestic policy to the public for their access and information in any format. Exemption is granted only in such cases where the information solicited is already available in public domain. It must be a statutory obligation on the state officials to facilitate the public with adequate information, in order to enable them to play a participatory role in the environmental decision making. Also the Article 6 (6) has included similar provisions for fair and non-partial disclosure of the information to the relevant affected parties well within reasonable time.

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100 Article 4: “Access to Environmental Information: 1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information: (a) Without an interest having to be stated; (b) In the form requested unless: (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or (ii) The information is already publicly available in another form.”

101 Article 6(6): “Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with Article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of Article 4.”
In tune with this, Article 6 also elaborates the various procedural prerequisites of the EIA procedure. Accordingly, the list, Annexure I, includes many such activities which may have a significant effect on the local environment. The only exemption granted is for such activities which are crucial from the defence and national security point of view.\textsuperscript{102} Article 6 (1) (c) suggests that it is more appropriate to decide each case on a case-by-case basis, weighing both its pros and cons. Other than that, Article 6 (2)\textsuperscript{103} also emphasises that the public must be informed, well in advance, the details along with its timing, date, venue, etc. regarding the procedure of the environmental clearance and the opportunities for decision making. Further, Article 6 (7) and (8)\textsuperscript{104} very rationally lays down the mandate for the ensuring that the public hearing must be held in true spirit and be successful in achieving the objectives of its legislative intent.

\textsuperscript{102} Article 6: “Public Participation in Decisions on Specific Activities: 1. Each Party: (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I; (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions.” The Arhus Convention is available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf [last visited on June 2012.]

\textsuperscript{103} Article 6 (2): “The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of: (a) The proposed activity and the application on which a decision will be taken; (b) The nature of possible decisions or the draft decision; (c) The public authority responsible for making the decision; (d) The envisaged procedure, including, as and when this information can be provided: (i) The commencement of the procedure; (ii) The opportunities for the public to participate; (iii) The time and venue of any envisaged public hearing; (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public; (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and (vi) An indication of what environmental information relevant to the proposed activity is available; and (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.”

\textsuperscript{104} Article 6(7): “Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.”

Article 6(8): “Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.”
However, the *Article 6 (11)* specifically puts an obligation on the states who are parties to the said convention, to take utmost care and adopt a precautionary approach wherever any issue of releasing of the GMO in the local environment is involved. It has been suggested that the concerned state must frame policies and appropriate legislative instruments to regulate the aforesaid issue of GMOs for the preservation and protection of the natural bio-diversity of the local environment.\(^{105}\)

In *Article 7* of the said convention, the scope for the conducting the various plans and programmes for the making the EIA process more participatory is included, which in practise needs to read with *Clauses (3), (4) and (8) of Article 6* for its harmonious effect.\(^{106}\) It was also interesting to note that *Article 8*\(^{107}\) goes a step further and suggests that the state must ensure that the public participation must not be restricted only to individual proceeding like EIA; rather it needs to be extended to even exercise of the creation of domestic statutory enactments and legislative reforms.

\(^{105}\) *Article 6 (11):* “*Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.*” The Arhus Convention is available at [http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf), [last visited on June, 2012].

\(^{106}\) *Article 7:* Public Participation Concerning Plans, Programmes and Policies Relating to the Environment: “*Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, Article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.*”

\(^{107}\) *Article 8:* Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments: “*Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken: (a) Time-frames sufficient for effective participation should be fixed; (b) Draft rules should be published or otherwise made publicly available; and (c) The public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible.*” The Arhus Convention is available at [http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf), [last visited on June 2012].
Lastly, the convention in its concluding para *vide Article 15* urges to the all the contracting parties to mutually co-operate and meet periodically to hold the review meetings for assessing the compliance and implementation of the mandate of the convention. It is further suggested that the respective parties should put effort to seek the public opinion with respect to the review and analysis of the compliance. The purpose of this convention is to also provide a coordinated support for the compliance of the other instruments of EIA, like the *Espoo* Convention done earlier in 1991, executed to deal with the issues related with the Convention on EIA in a Transboundary Context, the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes in 1992.

### 3.6 Protocol on Strategic Environmental Assessment (*Kyiv, 2003*)

The Protocol on Strategic Environmental Assessment (herein after referred as SEA) was held in *Kyiv*, Ukraine, augments the *Espoo* Convention by ensuring that individual parties integrate environmental assessment into their plans and programs at the earliest stages and thus helped in laying the groundwork for Sustainable Development.

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108 Article 15: Review of Compliance: “*The Meeting of the Parties shall establish, on a consensus basis, Optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.*” The Arhus Convention is available at [http://www.unece.org/fileadmin/DAM/env/pp/documents/ce_p43e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/documents/ce_p43e.pdf), last visited on June 2012.

The said protocol also provides for extensive public participation in the governmental decision-making process. This Protocol has entered into force recently, in 11 July, 2010.\textsuperscript{110}

3.7 \textit{Akwé: Kon (Voluntary) Guidelines CBD, 2004}\textsuperscript{111}

As we are aware that the CBD, 1992, which is the binding instrument of \textit{Rio Conference} has two primary objectives which are as follows:

- The need to ensure the equitable sharing of benefits arising from the utilization of traditional knowledge,\textsuperscript{112}

- Maintain traditional knowledge relevant for the conservation and sustainable use of biological diversity, and to promote its wider application.

On the basis of recommendations by the Open-ended Working Group on Article 8 (j)\textsuperscript{113} and related provisions, in seventh meeting in 2004, adopted the \textit{Akwé: Kon} Voluntary Guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.\textsuperscript{114}


\textsuperscript{112} CBD, 1992, Article 8(j): “to respect, preserve and maintain traditional knowledge relevant for the conservation and sustainable use of biological diversity, and to promote its wider application.”

\textsuperscript{113} Article 8(j), “Parties to the Convention decided to develop, in cooperation with indigenous and local communities, guidelines for the conduct of cultural, environmental and social impact assessments regarding such developments.”

\textsuperscript{114} \textit{Ibid} \textit{Akwé: Kon} (Voluntary) Guideline CBD, 2004.
According the said guideline, it is expected that impact assessment procedures and methodologies embodied in the said Voluntary Guidelines will play a key role in providing information on the cultural, environmental and social impacts of proposed developments and, thereby, help to prevent their potential adverse impacts on the livelihoods of indigenous and local communities concerned.

Thus, we can say that the whole concept of impact assessment has come a long way, and has evolved diversely since its inception. As we have observed that the earlier EIA studies were only concerned with the ecological impacts of any projects whereas, now we are focusing on the more holistic assessment of any project and have included the other significant parameters for impact assessment like the social, cultural and anthropological, etc aspects. A table is enclosed hereinafter to illustrate the country-wise evolution of the concept of EIA process.

5 Table illustrating Evolution of EIA process in various countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Basis of Implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Environmental Protection (Impact of Prediction) Act, 1974, Commonwealth of Australia.</td>
</tr>
<tr>
<td>California</td>
<td>California Environmental Quality Act (CEQA) of 1971.</td>
</tr>
<tr>
<td>China</td>
<td>Environmental Protection Law, 1979.</td>
</tr>
<tr>
<td>Common Wealth</td>
<td>Environment Protection (Impact of Proposals)</td>
</tr>
<tr>
<td>Japan</td>
<td>Principles for Implementing EIA by Environment Agency,</td>
</tr>
</tbody>
</table>

1984.

<table>
<thead>
<tr>
<th>Country</th>
<th>Legal Enactment</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Zealand</td>
<td>Resource Management Act, 1991, New Zealand</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>EIA Policy, 1986.</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Environmental Protection Act, 1986, Western Australia.</td>
</tr>
<tr>
<td>West Germany</td>
<td>Cabinet Resolution September, 1975.</td>
</tr>
</tbody>
</table>

3.8 The Comparative Analysis of the EIA Policy in Other Countries

To understand the evolution of EIA system in comparative manner in context of developing versus developed states a table is referred herein below to show the gradual growth of EIA vide legal enactments in the various countries globally:

6 Table illustrating Comparative review of EIA procedures and practices

<table>
<thead>
<tr>
<th>Developed Countries</th>
<th>EIA in Developing Countries</th>
<th>EIA in India</th>
</tr>
</thead>
<tbody>
<tr>
<td>Well-framed EIA legislation in place. For instance, in Canada, the Canadian Environmental Assessment Act regulates EIA while EU countries are guided</td>
<td>Lack of formal EIA legislation in many developing countries. For instance, EIA is not mandatory in many African</td>
<td>Formal legislation for EIA. It has been enacted by making an amendment in the Environment Protection Act, 1986.</td>
</tr>
</tbody>
</table>

In developed countries, there is active involvement of all participants including competent authority, government agencies and affected people at early stages of the EIA. This makes the process more robust and gives a fair idea of issues which need to be addressed in the initial phase of EIA.

Limited involvement of public and government agencies in the initial phases. This often results in poor representation of the issues and impacts in the report, adversely affecting the quality of the report.

Integrated approach to EIA followed. All aspects including social and health taken into account.

Mainly environmental aspects considered. Poor on social or health aspects.

Proper consideration of alternatives in EIA.

The consideration of alternatives in developing countries is more or less absent.

The process of screening is well defined. For instance, in EU countries, competent authorities decide whether EIA is required after seeking advice from developer, NGO and statutory consultees. In Japan, screening decision is made by the authorizing agency with respect to certain criteria. In Canada, federal authority determines whether an environmental assessment is

<table>
<thead>
<tr>
<th>In developed countries</th>
<th>In developing countries</th>
<th>In developing countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited involvement of public and government agencies in the initial phases. This often results in poor representation of the issues and impacts in the report, adversely affecting the quality of the report.</td>
<td>Mainly environmental aspects considered. Poor on social or health aspects.</td>
<td>No provision in place to cover landscape and visual impacts in the Indian EIA regulations.</td>
</tr>
<tr>
<td>Integrated approach to EIA followed. All aspects including social and health taken into account.</td>
<td>The consideration of alternatives in developing countries is more or less absent.</td>
<td>Same as developing countries.</td>
</tr>
<tr>
<td>The process of screening is well defined. For instance, in EU countries, competent authorities decide whether EIA is required after seeking advice from developer, NGO and statutory consultees. In Japan, screening decision is made by the authorizing agency with respect to certain criteria. In Canada, federal authority determines whether an environmental assessment is</td>
<td>In developing countries, screening practice in EIA is weak. In most cases, there is a list of activities that require EIA but without any threshold values.</td>
<td>Screening done on the basis of a defined list. Threshold value on the size of the project has been used to decide whether the project will be cleared by the state government or the central government.</td>
</tr>
<tr>
<td>Scoping process is comprehensive and involves consultation with all the stakeholders. In countries like US, Netherlands, Canada and many European countries, the involvement of the public and their concern are addressed in the scoping exercise. Besides this, funding organisations such as World Bank, ADB and ERDB have provision for consultation with the affected people and NGOs during identification of issues in the scoping exercise.</td>
<td>Scoping process in most developing countries is very poorly defined. In many countries including China, and Pakistan, there is no provision for scoping. In some countries, like in Nigeria and Indonesia, a term of reference is followed for scoping while in some countries, like Ghana, Taiwan and Chile, a general checklist is followed. In countries where it is undertaken, there is no public consultation during scoping. Moreover, in most developing countries, scoping is often directed towards meeting pollution control requirements, rather than addressing the full range of potential environmental impacts from a proposed development.</td>
<td>Earlier scoping was done by a consultant or proponent with an inclination towards meeting pollution control requirements, rather than addressing the full range of potential environmental impacts from a proposed development. However, the new notification has put the onus of scoping on the expert committee based on the information provided by the proponent. Consultation with public is optional and depends on the discretion of the expert committee.</td>
</tr>
<tr>
<td>Most reports are in local languages.</td>
<td>Most reports are in English and not in the local languages.</td>
<td>Most reports are in English and not in the local languages. In some case, executive summary is translated into local languages.</td>
</tr>
<tr>
<td>A multi-disciplinary approach</td>
<td>Lack of trained EIA</td>
<td>Same in India.</td>
</tr>
</tbody>
</table>
is undertaken. There is involvement of an expert with expertise in different areas. Preparation of EIA is done by consultants. Therefore, the selection criterion for the organisation is fees/cost rather than the expertise of EIA team.

| Expertise in EIA: The International Association for Impact Assessment (AIA) and other organisations demonstrate that there are a large number of individuals with the capability to design, conduct, review and evaluate EIAs from countries of the North. The major portion of teaching about environmental assessment also takes place in industrial countries. | Poor review or monitoring. In India too, EIA review is not up to the marks. The review agency called Impact Assessment Agency (IAA) lacks inter-disciplinary capacity. There is no representation made by the NGO in IAA, which is a violation of the EIA notification. |

| There is a two-tier system for the EIA review; one is conducted after the completion of EIA to check the adequacy and effectiveness of EIA, and the second done before decision-making. | The expertise in EIA is slowly developing. In most cases, students from the developing countries go to the developed countries to gain knowledge of the subject. |

| Professionals often leads to the preparation of inadequate and irrelevant EIA reports in developing countries. | Expertise in this area is developing. |
3.9. The Evolution of EIA Policy in India

The EIA norms are considered to be an important milestone towards achieving environmental good governance in India. However, the development of the EIA legal regime in India is said to have evolved through three important phases\textsuperscript{117}:

- Phase – I: Consisting of Pre-1994 Era
- Phase – II: Consisting of 1994-2006 Era
- Phase – III: Consisting of Post 2006 Era

Hereinafter detailed analysis of the above mentioned phases chronologically has been provided to understand the gradual evolution of the EIA policy in India.

Phase – I: Consisting of Pre-1994 Era

The genesis of the EIA norms in India can be traced back to the years 1976-77, when the then Planning Commission had delegated the Department of Science and Technology, at that time to examination the various potential adverse effects of the river valley projects on the natural environment. Since its inception, the scope of EIA norms in India has gone through massive transformation, for example, in pre-1994 it was only applicable to government projects. The scope of the EIA norms in the said era appears to be very narrow, as its application was restricted and it was only applicable for river valley projects. It was also considered to be more or less an administrative decision. Hence, it is often critically remarked that, till 1980s most of the developmental projects in India were implemented with very little environmental concern. It is also criticised that the working of the EIA norms in this era, being based

on the *Discretionary Model*, was suffering with the problems such as lack of transparency, etc.

**Phase – II: Consisting of 1994-2006 Era**

The NCEPC\(^{118}\) was set up to create a paradigm shift in the area of environmental clearances for the various developmental projects. In 1984, the *Bhopal Gas Disaster* raised a plethora of issues, related to serious lapses in granting of the environmental clearances in India. Later, it was only in the year 1994, when the EIA Notification was framed, within the scope of delegated power under the *‘necessary and proper clause’* \(^{119}\), for seeking the environmental clearance of the developmental projects within India. *Vide* the said notification, the MoEF made environmental clearances mandatory for all such projects which are listed in the Schedule I enclosed with the said notification. The basic objective of the said law was to provide integrated as well as co-ordinated approach to examine the various potential social as well as ecological impacts of any developmental project/activity.\(^{120}\)

Thereafter, the EIA notification in India has come a long way and have been tailored and reengineered\(^ {121}\) through several successive amendments. The reason for such quick amendments was that EIA notification was once again under severe criticism, and this time it was from the development and economical lobby. The objection was raised alleging that the existing EIA process is complex and as well as time

\(^{118}\) The National Committee on Environmental Planning and Co-ordination Committee Report *(During 4th Five Year Plan 1969-1978 in India.)*

\(^{119}\) The 1997 Amendments of the existing EIA Notification of 1994, incorporated Public Hearing as a compulsory component for seeking environmental clearances.


\(^{121}\) The Amendments of 2006, was a result based on the recommendations of the Govindrajan Committee, on improvement foreign investments in India and pressure from the international financial institution such as the World Bank, etc.
consuming. Keeping in mind these two aspects, the review committee, from the investment approval and project implementational point of view, suggested that the process of environmental clearances needed to be more quick and simple.

**Phase – III: Consisting of Post-2006 Era**

The next major amendment to the said EIA Notification was made in 2006, with the few objectives like; to offer a more transparency, allow decentralisation and an efficient regulatory mechanism. There are certain factors that led to the review of the exiting notification and also emphasised public participation in environmental decision making related to the EIA process. The said amendment also aimed for creating a paradigm shift in deciding the criteria for the applying of the EIA norms from investment to adverse environmental impacts.

To understand the existing EIA process and its various stages at a glance in India a flow chart has been given hereinafter for illustration purpose.

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3.9.1 The Salient Features of the EIA Notification, 1994

The EIA Notification of 1994 was the first specific legislative instrument created by the Government of India, for the implementation of the EIA procedure for various developmental projects and activities. However, immediately after its enactment, the

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said notification was again successively amended within a short span of time. The said notification was issued within the scope of Rule 5(3) of the Environment (Protection) Rules, 1986. The objectives of the said notification were as follows:

- The legislative intent behind the notification was to fulfil the mandate of the Rio Conference, 1992, to achieve the environmental good governance in India.
- To push for more sustainable industrialisation process in India.
- The objective was also to impose restriction on any kind of developmental, expansion and modernisation activity or industry, or induction of any new projects, which should be only allowed after the environmental clearance, has been duly taken from the respective authority, either at the state or central level, as per the existing norms of the said notification.

For the purpose of the clarification and to avoid any kind of ambiguity, the said notification has exclusively enclosed a list of all such activities/ projects in Schedule I. There were a total of 31 components mentioned in the Schedule I and one more was later added vide amendment of 2004. The said notification also proposed for creating a regulatory authority namely; Impact Assessment Agency (hereinafter referred as IAA) to review the on behalf of the MoEF for EIA process.

However, rider clause attached was also attached to the said notification, according to which it was held that all such clearances can be only granted after consideration and disposal of all the objections arose in any proposed project. Later, to facilitate the

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126 Power is conferred on the central as well as the state government vide Sections 3(1) and 3(2)(v) of the Environment (Protection) Act, 1986 r/w Rule 5(3)(d) of the Environment (Protection) Rules, 1986, for granting the environmental clearance.
procedural fairness, the provision of conducting a public hearing was added in 

*Schedule VI*\(^{27}\) of the said notification in 1997.


“(1) Process of Public Hearing: - Whoever apply for environmental clearance of projects, shall submit to the concerned State Pollution Control Board twenty sets of the following documents namely: -

i. An executive summary containing the salient features of the project both in English as well as the local language along with Environmental Impact Assessment (EIA). However, for pipeline project, Environmental Impact Assessment report will not be required. But Environmental Management Plan including risk mitigation measures is required.

ii. Form XIII prescribed under Water (Prevention and Control of Pollution) Rules, 1975 where discharge of sewage, trade effluents, treatment of water in any form, is required.

iii. Form I prescribed under Air (Prevention and Control of Pollution) Union Territory Rules, 1983 where discharge of emissions are involved in any process, operation or industry.

iv. Any other information or document which is necessary in the opinion of the Board for their final disposal of the application.

(2) Notice of Publics Hearing: (i) The State Pollution Control Board shall cause a notice for environmental public hearing which shall be published in at least two newspapers widely circulated in the region around the project, one of which shall be in the vernacular language of the locality concerned. State Pollution Control Board shall mention the date, time and place of public hearing. Suggestions, views, comments and objections of the public shall be invited within thirty days from the date of publication of the notification.

(ii) All persons including bona fide residents, environmental groups and others located at the project site/sites of displacement/sites likely to be affected can participate in the public hearing. They can also make oral/written suggestions to the State Pollution Control Board.

Explanation: - For the purpose of the paragraph person means: -

a. any person who is likely to be affected by the grant of environmental clearance;

b. any person who owns or has control over the project with respect to which an application has been submitted for environmental clearance;

c. any association of persons whether incorporated or not like to be affected by the project and/or functioning in the field of environment;

d. any local authority within any part of whose local limits is within the neighborhood wherein the project is proposed to be located.

(3) Composition of public hearing panel: - The composition of Public Hearing Panel may consist of the following, namely: -

i. Representative of State Pollution Control Board;

ii. District Collector or his nominee;

iii. Representative of State Government dealing with the subject;

iv. Representative of Department of the State Government dealing with Environment;

v. Not more than three representatives of the local bodies such as Municipalities or panchayats;

vi. Not more than three senior citizens of the area nominated by the District Collector.

(4) Access to the Executive Summary and EIA Report:- The concerned persons shall be provided access to the Executive Summary and Environmental Impact Assessment report of the project at the following places, namely:-

i. District Collector Office;

ii. District Industry Centre;

iii. In the Office of the Chief Executive Officers of Zila Praishad or Commissioner of the Municipal Corporation/Local body as the case may be;

iv. In the head office of the concerned State Pollution Control Board and its concerned Regional Office;

v. In the concerned Department of the State Government dealing with the subject of environment.

(5) Time period for completion of public hearing: The public hearing shall be completed within a period of 60 days from the date of receipt of complete documents as required under paragraph 1.
However, in following cases, exemption\textsuperscript{128} has been granted and public hearing are not required to be conducted:

1. Small scale industrial undertakings located in,
2. Notified/designated industrial areas/industrial estates or,
3. Areas earmarked for industries under the jurisdiction of industrial development authorities;
4. Widening and strengthening of highways;
5. Mining projects (major minerals) with lease area up to 25 hectares,
6. Units located in Export Processing Zones, Special Economic Zones and
7. Modernization of existing irrigation projects.

Further, the said notification also laid down in detail the procedural steps that need to be followed by the respective project proponents. For example, if the proposed activity is listed in \textit{Schedule I}\textsuperscript{129}, then application must be made according to the

\begin{itemize}
\item[1.\textsuperscript{\textsuperscript{129}}] Nuclear Power and related projects such as Heavy Water Plants, nuclear fuel complex, Rare Earths.
\item[2.\textsuperscript{\textsuperscript{129}}] River Valley projects including hydel power, major Irrigation and their combination including flood control.
\item[3.\textsuperscript{\textsuperscript{129}}] Ports, Harbours, Airports (except minor ports and harbours).
\item[4.\textsuperscript{\textsuperscript{129}}] Petroleum Refineries including crude and product pipelines.
\item[5.\textsuperscript{\textsuperscript{129}}] Chemical Fertilizers (Nitrogenous and Phosphatic other than single superphosphate).
\item[6.\textsuperscript{\textsuperscript{129}}] Pesticides (Technical).
\item[7.\textsuperscript{\textsuperscript{129}}] Petrochemical complexes (Both Olefinic and Aromatic) and Petro-chemical intermediates such as DMT, Caprolactam, LAB etc. and production of basic plastics such as LLDPE, HDPE, PP, PVC.
\item[8.\textsuperscript{\textsuperscript{129}}] Bulk drugs and pharmaceuticals.
\item[9.\textsuperscript{\textsuperscript{129}}] Exploration for oil and gas and their production, transportation and storage.
\item[10.\textsuperscript{\textsuperscript{129}}] Synthetic Rubber.
\item[11.\textsuperscript{\textsuperscript{129}}] Asbestos and Asbestos products.
\item[12.\textsuperscript{\textsuperscript{129}}] Hydrocyanic acid and its derivatives.
\item[13.\textsuperscript{\textsuperscript{129}}] (a) Primary metallurgical industries (such as production of Iron and Steel, Aluminium, Copper, Zinc, Lead and Ferro Alloys).
\item[13.\textsuperscript{\textsuperscript{129}}] (b) Electric arc furnaces (Mini Steel Plants).
\item[14.\textsuperscript{\textsuperscript{129}}] Chlor alkali industry.
\end{itemize}

\textsuperscript{128} Provided that for pipeline projects, Environmental Impact Assessment report will not be required: Provided further, that for pipeline and highway projects, public hearing shall be conducted in each district through which the pipeline or highway passes through.

\textsuperscript{129} Schedule – I: List of Projects Requiring Environmental Clearance from the Central Government (EIA, Notification, 1994, MoEF, India, available at \url{http://envfor.nic.in/legis/eia/so-60(e).html}, [visited on last July, 2012].)
prescribed rules\textsuperscript{130} of the said notification, needs to be submitted to the Secretary of the MoEF, New Delhi. Additionally, the said notification laid down that, if any incomplete submission is made by the project proponent, then it is liable to be rejected on the ground of insufficiency of documentation. The said rejection can be revoked later once the relevant data is submitted, but no further relief is granted if similar insufficiency is still found in the submission made for the second time, as then the respective IAA will have the power to reject the application summarily.

The said notification for rejection of an application for EIA has specified few grounds which are as follows;

a. False information
b. False data
c. Engineered Reports
d. Concealment of facts

\textsuperscript{130} Rule 1(1)(a): “The application shall be made in the proforma specified in Schedule-II of this notification and shall be accompanied by a project report which shall, inter alia, include an Environmental Impact Assessment Report, Environment Management Plan and details of public hearing as specified in Schedule-IV prepared in accordance with the guidelines issued by the Central Government in the Ministry of Environment and Forests from time to time.”
e. False recommendations

The said notification specified that a proponent must apply for the EC as per the given norms lid in the Schedule II of the said Notification and also submit the following documents as specified in Schedule IV;

i. The EIA report
ii. The EMP report
iii. The details of Public hearing

An additional condition precedent for seeking site clearance has been laid down for certain projects\(^{131}\); there is a need for detailed site investigation and local survey to be done by the MoEF. The said site clearance can be granted within thirty days, only for a limited period of five years for commencing the construction, operation or mining on the basis of its sanctioned capacity. Prior to granting of the clearance, for the purpose of general assessment and scrutiny, the said notification has delegated the power to the IAA. However, in case of need, the said notification has also made provisions for making a reference for consultations with the expert committee.\(^{132}\)

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\(^{131}\) R II. In case of the following site specific projects and prospecting and exploration of major minerals in areas above 500 hectares for:
- a. mining;
- b. pit-head thermal power stations;
- c. hydro-power, major irrigation projects and/or their combination including flood control;
- d. ports and harbours (excluding minor ports);

\(^{132}\) R III. (a) The reports submitted with the application shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary it may consult a committee of Experts, having a composition as specified in Schedule-III of this Notification. The Impact Assessment Agency (IAA) would be the Union Ministry of Environment and Forests. The Committee of Experts mentioned above shall be constituted by the Impact Assessment Agency or such other body under the Central Government authorized by the Impact Assessment Agency in this regard. (EIA Notification, 1994, MoEF, India, available at [http://envfor.nic.in/legis/eia/eianot.html](http://envfor.nic.in/legis/eia/eianot.html), [last retrieved on July, 2012])
The detailed composition and the essentials of the expert committee are prescribed in Schedule III of the said notification. The said expert committee has been vested with all the necessary powers for conducting any kind of inquiry and also has the power of entry, inspection, search, etc. The expert committee will be also liable for preparing concluding report after the investigation is done, considering all the aspects of its investigation as well as the outcome of the public hearing, wherever it is applicable. The deadline for the completion of the assessment is 90 days and the clearance shall be valid for a period of only five years. The nature of the clearance is not absolute rather it is subjected to various condition precedents as well as condition subsequent which have to be complied with.

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1. The Committees will consist of experts in the following disciplines:
   i. Eco-system Management
   ii. Air/Water Pollution Control
   iii. Water Resource Management
   iv. Flora/Fauna conservation and management
   v. Land Use Planning
   vi. Social Sciences/Rehabilitation
   vii. Project Appraisal
   viii. Ecology
   ix. Environmental Health
   x. Subject Area Specialists
   xi. Representatives of NGOs/persons concerned with environmental issues.

2. The Chairman will be an outstanding and experienced ecologist or environmentalist or technical professional with wide managerial experience in the relevant development sector.

3. The representative of Impact Assessment Agency will act as a Member-Secretary.

4. Chairman and Members will serve in their individual capacities except those specifically nominated as representatives.

5. The Membership of a Committee shall not exceed 15.

134 The assessment shall be completed within a period of ninety days from receipt of the requisite documents and data from the project authorities and completion of public hearing and decision conveyed within thirty days thereafter. The clearance granted shall be valid for a period of five years for commencement of the construction or operation of the project.

135 R IV – In order to enable the Impact Assessment Agency to monitor effectively the implementation of the recommendations and conditions subject to which the environmental clearance has been given, the project authorities concerned shall submit a half yearly report to the Impact Assessment Agency. Subject to the public interest, the Impact Assessment Agency shall make compliance reports publicly available.
Lastly, the said notification includes an important provision\(^{136}\) on the aspect of “Deemed Consent”, where it laid down that if the project proponent receives no intimation of either acceptance or denial or any other comments from the regulatory authority, then the proponent will have a right to presume that the consent is granted in his/her favour and can accordingly proceed with the further developmental activities needed for the given project/activity.

The said notification further laid down that any clearance granted can be either revoked or rejected either at the initial stage itself when the application for the clearance is made or even after the clearance is granted on the following grounds:

- If the documents enclosed are not sufficient, or
- If the documents submitted are not authentic or are false.

The said notification also made provision for granting exemption to various projects on following stated grounds:

- The project is listed among the various entries under Schedule I\(^{137}\), which have less than Rs. 100 crores investments, for any proposed new project and less than Rs. 50 crores for modernization or expansion of the any existing projects.

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\(^{136}\) R V – If no comments from the Impact Assessment Agency are received within the time limit, the project would be deemed to have been approved as proposed by project authorities. (MoEF, India, [http://mines.nic.in/writereaddatafilelinks/e7e1e94_6.html](http://mines.nic.in/writereaddatafilelinks/e7e1e94_6.html), [last visited on July, 2012.])

\(^{137}\) (1) Nothing contained in this Notification shall apply to:

a. any item falling under entry No. 3, 18 and 20 of the Schedule-I to be located or proposed to be located in the areas covered by the Notifications S.O. No. 102 (E) dated 1\(^{st}\) February, 1989, S.O. 114 (E) dated 20\(^{th}\) February, 1991; S.O. No. 416 (E) dated 20\(^{th}\) June, 1991 and S.O. No. 319 (E) dated 7\(^{th}\) May, 1992.

b. any item falling under entry no.1,2,3,4,5,7,9,10,13,14,16,17,19,21,25,27 of Schedule-I if the investment is less than Rs.100 crores for new projects and less than Rs. 50 crores for expansion / modernization projects.

c. defense related road construction projects in border areas.

d. any item falling under entry no. 8 of Schedule-I, if that product is covered by the notification G.S.R. 1037(E) dated 5\(^{th}\) December 1989.

e. Modernization projects in irrigation sector if additional command area is less than 10,000 hectares or project cost is less than Rs. 100 crores.
Any small scale industry with an investment of less than Rs. 1 crore.
Any project related to construction of roads for defense purpose.
Any irrigational project for the development of the command area up to 10,000 hectares or project cost is less than Rs.100 crores

Thus, the EIA Notification of 1994 was primarily aimed to boost the momentum of the industrial process by providing a more comprehensive clearance process, balancing both, the needs of ecology and economy.

The *modus operandi* of the notification was to impose restrictions, and in turn, safeguard against potential environmental hazards for any proposed developmental activities. Further, the said notification created a regulatory sub-agency, “IAA”\(^\text{138}\), under the MoEF for the regulation of the clearance process in India. Ample scope was given under the said notification to the proponent to apply for a review in case the application for clearance was rejected. The process was supposedly very efficiently designed, for example, in case of any incomplete data or lack of any factual information; it would automatically reject the application.

Hereinafter, for the purpose of illustration a linear diagram has been referred show the various the stages of an EPH along with its time durations.

\(^{138}\) Impact Assessment Agency.
8 Linear diagram illustrating Anatomy of EPH at a glance\textsuperscript{139}

Application to the MS, GPCB, seeking PH date from the respective District Collector / DM

Notice of PH & Wide Publicity to the draft EIA Report

Public Hearing

PH proceedings & Signature of DM/ADM

Total time for the EPH = 45 days

GPCB

MoEF, GOI, for 'A'

SEIAA for 'B'

7 days

30 days

Same day

8 days

\textsuperscript{139} Executive Report of the \textit{Prayavaran Mitra} Journey of 10 years in EIA in Gujarat, NGO, based in Ahmedabad, Gujarat, India.
3.9.2 Successive Amendments in existing EIA Law

Since 1994, i.e., when the 1\textsuperscript{st} original EIA Notification came into existence, several changes were made to it. It is has been already amended more than a dozen times. However, most of the amendments have to some extent diluted the existing process of environmental clearance and only a few of such amendments which have strengthened the EIA process.

3.9.2.1 The Amendments during 1994-1997

The environment impact process was integrated into the Indian legal system in 1994 when EIA Notification came into existence. However, it was amended from time to time. Immediately, within a very few months of passing of the original notification itself, it was amended for the first time on 4\textsuperscript{th} May, 1994.\textsuperscript{140}

The major changes brought by the first amendment are as follows:

1. The said amendment gave relaxation to the proponents and deleted the word “Details” in context of the term “Project Report” from the text of the original notification.
2. The application of the said notification was made restricted only to the “Major Minerals” with an area of 500 hectares.
3. The assessment of the report was made not mandatory for the scrutiny by the IAA and “If deemed Necessary” clause was inserted to make the law more favourable for the proponents.

\textsuperscript{140} EIA Notification Amendment \textit{vide} S.O No.( E ) dated 4\textsuperscript{th} May, 1994.
4. Similarly, the mandatory provision for the site visit as given in the original notification was made optional and hence the discretion was left on the regulator to decide on the same.

Thus, the said amendment seems to have marked the beginning of dilution of the existing EIA law right from its commencement year itself.

Important changes were brought vide the next significant amendment made to the EIA Notification, *i.e.*, in the year 1997. The decentralisation process was initiated and the states were delegated power to grant clearance for few projects like,

- All cogeneration power plants, whatever may be their capacity
- Coal based power plants with various capacities
- Gas or Naphtha based plants

The most crucial outcome of the said amendment was the introduction of the EPH\textsuperscript{141} process as a determinant factor for granting environmental clearances. The SPCBs were held responsible as the regulator for conducting the hearings. Further, it was also stated that the composition of the hearing committee must ensure fair and transparent hearing process. Additionally, certain suggestions were also made for the environment clearance with respect to the power plants.\textsuperscript{142}

It would apt to mention here the landmark case of *Centre for Social Justice v. UOI*\textsuperscript{143}. The Division Bench of the Hon’ble Gujarat High Court issued the following

\textsuperscript{141} Environmental Public Hearing.


important directions to the local pollution control boards for streamlining the process of Public Hearing in India:

“(i) The venue of public hearing as prescribed in the Central Government Notification dated 10-4-1997 shall be as near as possible to the site of the proposed project or to the affected village and in any case the venue of hearing shall ordinarily not be farther away from the headquarters of the taluka in which the proposed project is coining up or of the taluka which includes most of the affected villages.

(ii) The GPCB shall cause the notice of public hearing to be published in at least two newspapers widely circulated in the region around the project, one of which shall be in the vernacular language of the locality concerned. This would mean that the GPCB is at liberty to publish the notice even in more than two newspapers. Moreover, a newspaper widely circulated in the region around the project does not necessarily mean the newspaper which is being published from the region around the project. All that it means is that the newspaper is widely circulated in the region around the project, even if the newspaper is published from outside the region. For the purposes of finding out the figures of circulation, the GPCB may of course treat the taluka in which the project is coming up or the taluka in which the affected villages fall as a region around the project, but it is the circulation which matters and not the place of publication as already stated above. The GPCB shall also send a copy of the public notice about the public hearing to the Gram Panchayat/Nagar Panchayat/Municipality of each of the villages/towns likely to be affected by the project with a request to bring it to the notice of the people likely to be affected by the project.
(iii) The date of first public hearing in connection with any project requiring environmental clearance certificate has to be after at least 30 days from the date of publication of the notice in the newspapers. This will be minimum period and it is open to the GPCB to fix the public hearing after a longer period but in any case the GPCB shall make sure that the copies of the executive summary of the project furnished by the unit to the GPCB are made available at all local places mentioned in the notification at least 30 days prior to the date of public hearing. As far as the Environment Impact Assessment report submitted by the unit to the GPCB along with the application for clearance certificates is concerned, the summary of such Environment Impact Assessment report in the local language shall also be made available to the concerned persons on demand and if further demanded, a copy of the Environment impact Assessment report also shall be made available by the GPCB. It will be open to the GPCB to charge reasonable amount for supplying copies of such summary or copies of the report, but in any case the request shall be acceded to within one week from the date of the demand. The GPCB shall bear in mind the following observations made by the Central Government in its letter dated 13-7-1998:

"We are often receiving requests from Non-Governmental Organizations for providing them copies of proceedings according environmental clearance to projects. You are advised to make copies of environmental clearance proceedings available in your office on request to Non-Governmental Organizations."

(iv) As far as the quorum of the Committee is concerned, for the Committee to hold valid hearing, at least one half of the members of the Committee shall have to remain

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\(^{144}\) Ibid at para 17.
present and at least the following members of the Committee shall also have to remain present for the hearing to be considered as valid public hearing\(^{145}\):

1. The officer from the GPCB

2. The Officer from the Department of Environment & Forest of the State Government.

3. One of the three senior citizens nominated by the Collector.

This direction shall be read along with the observations made in para 9 hereinabove.

(v) The minutes of the public hearing shall be furnished by the GPCB on demand and on payment of reasonable charges. When any demand for such minutes is made and the charges specified therefor are paid, the minutes shall be supplied as expeditiously as possible and in any case within one fortnight from the date on which the minutes are sent to the Environment Impact Agency or to the Central Government in the Ministry of Environment & Forest. The GPCB shall bear in mind the following observations made by the Central Government in its letter dated 13-7-1998: "We are often receiving requests from Non-Governmental Organizations for providing them copies of proceedings according environmental clearance to projects. You are advised to make copies of environmental clearance proceedings available in your office on request to Non-Governmental Organizations."

(vi) As far as the number of public hearings which may be held by the Committee per day, there cannot be any hard and fast rule, but looking to the site of the project and considering the impact on the environmental front, the Committee shall consider whether the number of public hearings is consistent with the object with which the

\(^{145}\) Ibid at para 17.
public hearing is to be held. The Committee shall also consider the following observations made by the Central Government in its letter dated 17-7-1998 for fixing the venue and number of public hearings for certain projects which require environmental clearance: "In respect of certain projects such as laying of pipelines, Highways and projects located in inaccessible regions, clarification has been sought whether the public hearing should be conducted in one place or number of places etc. The matter has been examined. It has been decided that venue and number of public hearing to be conducted for a particular proposal may be left to the discretion of State Pollution Control Board. State Pollution Control Boards/Pollution Control Committees may take a decision on the venue and number of public hearings for projects which require environmental clearance as per provisions of EIA Notification keeping in view the nature of the project, its environmental ramification and feasibility of grouping of people at nearest convenient locations."

(vii) As far as the Environment Clearance certificate is concerned, as soon as such clearance is granted, the State Government or the Central Government, as the case may be, shall cause publication of the gist of such clearance certificate in the newspapers in which the notice for public hearing was published by the GPCB for the particular project in question.

(viii) It is clarified that since the GPCB is the agency which is to fix the venues and the date of hearing and also to cause publication of the notices for public hearing as per the notification dated 10-4-1997, there is nothing to prevent the GPCB from charging the applicant-unit fees for this exercise nor is there anything to prevent the Central Government from charging any fees or expenses for granting the environmental clearance certificates. These observations are made in order to see

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146 Ibid at para 17.
that for the purpose of giving wider publicity to the notice for public hearings, the GPCB does not feel handicapped in the matter of incurring expenses for publication of such notices in newspapers with wider circulation which would normally charge higher rates than the newspapers with less circulation and also to make sure that if more than one public hearings are required to be held, the administrative expenses incurred for such hearings are taken care of and also for supplying copies of documents which may be demanded by the affected people or Non-Governmental Organizations. “\textsuperscript{147}

Thus, the said amendment of 1997 still stands as a very significant milestone in introducing the democratic process of public participation in EIA process in India vide public hearing.


Once again in the year 2000\textsuperscript{148} another amendment was passed which inserted the expression “\textit{submission of incomplete data or plans for the second time would itself be sufficient reason for the IAA to reject the case summarily}\textsuperscript{149},” in the original notification. Also some more projects were exempted which were under the category of Small Scale Units, highways projects, etc.

\textsuperscript{147} Ibid at para 17.

\textsuperscript{148} Vide S.O. No. 1119(E ), dated 27\textsuperscript{th} Jan, 2000.

\textsuperscript{149} The original notification had the expression “ If insufficient or inadequate data and action plans, etc will be rejected back to the project proponent.”
Consecutively, again in December 2000, another amendment\(^{150}\) was passed to further relax the scope for the pre-existing exemptions for roads in the border areas and defence purpose in the name of national security.

Next year in 2001 *vide* another amendment\(^{151}\) made few minor changes related to exclusion of the “*Bulk Drugs and Pharmaceuticals*” from the *Schedule I* of the original notification and also inserted in *Schedule IV* the time limit for conducting the Public Hearing within 60 days from the date of the receipt of the application from the proponent.

In a further amendment made in the subsequent year of 2002\(^{152}\), a significant change was introduced to make the EIA process a bit more democratic and allowed the Executive Summary of the projects to be available to those only who may be interested in attending the EPH. Also for certain projects like pipelines, highway etc. it was made mandatory to hold EPH in all such districts from where the project would pass territorially. Thus, in contrast to the earlier amendments, the said amendment of 2002 has been more significant as it strengthened the existing EIA laws to some extent.

Thereafter, again in the year 2003, an amendment\(^{153}\) to the said notification was passed. The said new amendment, once again tried to make the existing EIA law more relaxed and pro-developmental, thus it can be said that it essentially lacked environmental concern and merely on the basis of the investment involved, the

\(^{150}\) S.O No 1191 (E ) dated 13\(^{th}\) Dec, 2000

\(^{151}\) S.O. No.737 (E ) dated 1\(^{st}\) August, 2001.

\(^{152}\) S.O. No. 632 (E )dated 13\(^{th}\) June, 2002.

Following projects were exempted from the scope of environmental clearance process:

- It exempted pipeline and highway projects from preparing the EIA report, but these projects would have to conduct public hearings in all the districts through which the pipeline or highway passes.
- A number of projects were totally exempted from the said Notification if the investment was less than Rs. 100 crore for new projects and less than Rs. 50 crore for expansion/modernization projects.
- Most of the industries exempted from the clearance process had a very high social and environmental impact even if the investment was less than Rs. 100 crore. For example, in case of Hydel Power projects, irrespective of the investment, there will be social impacts due to displacement.
- No EIA was required for modernisation projects in irrigation sector if additional command area was less than 10,000 hectares or project cost was less than Rs. 100 crore.

In the longer run, above stated amendment had proved to be completely fatal for the regulation of the EIA process and defeated the very objective of it. However, later again in the 2003\textsuperscript{154} the existing EIA notification was amended by the MoEF to add an additional consideration based on location–sensitivity regarding the environmental process in operation in specified areas of the Aravalli range.

\textsuperscript{154} EIA Notification (Amendment), 28 February, 2003 \textit{vide} Notification No- S.O. 1236 (E) available at http://www.moef.nic.in/legis/env_clr.htm, [last visited on Jan, 2013].
Further, it was May, 2003\textsuperscript{155}, when another quick successive amendment was made to the said notification, where the objective was to make the scope of the developmental activities wider, to include more and more such activities which may have potential risks or hazards involved from the environmental point. Thus, developmental activities which were added were river valley projects, including hydel power projects, major irrigation projects and their combination, flood control project except projects relating to improvement work including widening and strengthening of existing canals with land acquisition upto a maximum of 20 metres, (both sides put together) along the existing alignments, provided such canals do not pass through ecologically sensitive areas such as national parks, sanctuaries, tiger reserves and reserve forests.

Immediately in the same year, another amendment\textsuperscript{156} was passed. This exercise was almost a said to be repetition of the EIA amendment of 2003, where effort was made to incorporate the locational-sensitivity approach for considering the environmental clearances. Thus, under this amendment, it was held that the states having any such project located within a radius of 15 km from any ecologically sensitive area like a forest area, a national parks, sanctuaries, bio-reserves or even in a polluted area will mandatorily need to obtain the environmental clearance from the Central Government.


The legal reformation regarding environmental clearances in India further continued when again in 2003 itself another amendment\(^{157}\) was proposed. The objective of this amendment was to introduce the concept of “Site Clearance”, for a few projects like green field airports, petrochemical complexes and refineries. The said amendment also relaxed the rules for projects involving offshore exploration activities, projects located beyond 10 km from the nearest habitation or near the village boundary; projects located near ecologically sensitive areas such as mangroves (with a minimum area of 1,000 m\(^2\)), aquatic corals, coral reefs; projects located close to national parks, marine parks, sanctuaries, reserve forests; and projects located near breeding and spawning grounds of fish and other marine life and also exempted them from the mandatory requirement of public hearing. Thus, even though the said area was supposed to be ecologically sensitive area, yet the exemption was granted to increase the favour towards the developmental lobby.

In contrast to aforesaid amendment, next amendment\(^{158}\) passed by the MoEF in 2004 only inserted few changes and held that the EIA process for all construction and industrial estate developmental projects was mandatory.\(^{159}\)


\(^{159}\) EIA Notification (Amendment), vide S.O.801 (E), 7 July, 2004. In the said notification, proposed insertion was in para 3 was as follows:

\(\text{(g)}\) .....any construction project falling under entry 31 of Schedule-I including new townships, industrial townships, settlement colonies, commercial complexes, hotel complexes, hospitals and office complexes for 1,000 (one thousand) persons or below or discharging sewage of 50,000 (fifty thousand) litres per day or below or with an investment of Rs.50,00,00,000/- (Rupees fifty crores) or below.

\(\text{(h)}\) .....any industrial estate falling under entry 32 of Schedule-I including industrial estates accommodating industrial units in an area of 50 hectares or below but excluding the industrial estates irrespective of area if their pollution potential is high.

Explanation:

i) New construction projects which were undertaken without obtaining the clearance required under this notification, and where construction work has not come up to the plinth level, shall require clearance under this notification with effect from the 7\(^{th}\) day of July, 2004.
Thereafter, the 13th amendment proposed in the year 2005;\textsuperscript{160} where the objective of the law was again to relax the EIA regulation to facilitate the socio-economic developmental activities, even at the cost of any potential environmental damage. In this regard exemption was granted to all such projects which mainly involved expansion or modernisation of various projects.\textsuperscript{161} The EIA was made applicable on case to case basis and it was left to the discretion of the MoEF to decide and take a call on the said issue. In the said amendment another favour was granted to proponents where the regulator could even grant temporary work permission without any clearance for a maximum period of two years.

The amendment also suggested that the proponent should not presume that the temporary work permission assures environmental clearance necessarily in their favour. We can say that the said ‘so called safeguard’ appears to be inadequate. It is also environmentally quite conflicting as to what would happen in a case, if after two years it is found that the project, which has already commenced without the clearance, has made significant environmental damage. In such cases, it is also not clear whether retrospectively any action would be taken? Hence, a widespread criticism started emerging against the said amendment among the activist \textit{via} media. One of such criticism held that;

\begin{itemize}
\item[ii)] In the case of new Industrial Estates which were undertaken without obtaining the clearance required under this notification and where the construction work has not commenced or the expenditure does not exceed 25\% of the total sanctioned cost, shall require clearance under this notification with effect from the 7th day of July, 2004.
\item[iii)] Any project proponent intending to implement the proposed project under sub-paras (g) and (h) in a phased manner or in modules, shall be required to submit the details of the entire project covering all phases or modules for appraisal under this notification.
\end{itemize}

\textsuperscript{160} EIA Notification (Amendment), \textit{vide} S.O.942 (E), 4 July, 2005, available at \url{http://envfor.nic.in/divisions/iass/notif/so942(e).html}, [last visited on January, 2013]

\textsuperscript{161} EIA Notification (Amendment), \textit{vide} S.O. 942 (E), 4 July, 2005 – The amendment provided that projects related to expansion or modernization of nuclear power and related project, river valley project, ports, harbours and airports, thermal power plants and mining projects with a lease area of more than 5 hectares could be taken up without prior environmental clearance, available at \url{http://envfor.nic.in/divisions/iass/notif/so942(e).html}, [last visited on January, 2013].
“This flies in the face of the on-going case in the SC by Goa Foundation, wherein EC violations are the focus. When the Court has been so strong in its directions, even ordering closure of units that have violated EC conditions, which in effect is an indictment of the capacity (or the lack thereof) of MoEF in monitoring and regulating, the latest amendment is evidence of its arrogance in the face of evidence of its gross failure. I think this is a fit case for an Open Letter immediately, followed by possibly an IA by many groups from across the country in the Goa Foundation case asking the Court to strike down this amendment as being unconstitutional and against the principles, spirit and what have you of the EP Act, etc.”

“Some of you might be aware about the thirteenth amendment in EIA notification, 1994 made on 4th July 2005 in Gazette no. S.O. 942 (E).

It says that any expansion or modernization project of item 1,2,3,19,20 - Nuclear, river valley, ports & harbours, thermal power plant and mining projects may obtain temporary working permission of maximum two years till it gets environmental condition. The amendment is in name of public interest. Isn’t it to benefit large-scale govt. projects? What about ministry’s circular dated 31 March 2003 which warned the industries to get post facto environmental clearance?”

Thus, there was wide spread opinion that the said EIA Notification amendment was, by and large, unable to address all the concerns and had several weaknesses which were making the entire clearance process faulty. This was the reason why MoEF initiated further process of bringing in some significant modifications in the existing

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163 Mahesh Pandya, Prayavaran Mitra, Ahmedabad, India, supra.
environment clearance process. Thereafter, a draft notification was published on September 15, 2005, and was put up for public comment for a year and then it was notified in September, 2006.

### 3.9.2.3 The Amendments during 2006

The MoEF on 14 September, 2006, the MoEF issued the draft notification\(^{164}\) under Rule 5(3) of the Environment (Protection) Rules, 1986, to further regularise the existing EIA laws. There were certain factors which were responsible for the said amendment and among them the following are the two most prominent ones;

2. The financial assistance from World Bank and suggestion for the review and revival of the existing EIA norms in India.

#### 3.9.2.3.1 Salient Features of the EIA Notification, 2006

The EIA Notification amended in the year 2006 is commonly referred as the “Re-engineered EIA law” in India. The silent features of the said notifications in brief are as follows:

- The main objective behind the said notification was to introduce imposition of restrictions within the territorial jurisdiction\(^{165}\) of India on basis of the following parameters:


\(^{165}\) Inclusive of the territorial waters.
1. For all new projects/activities

2. On expansion / modernisation of any existing projects / activities.

3. For any change proposed in the existing product-mix in an existing manufacturing unit included in the Schedule beyond the specified range,

In all such above cases, it was held that the concerned proponent must seek environmental clearance from the central government or state government as the case may be. EC should be obtained as per the mandate of the EIA Notification and in accordance with the National Environmental Policy, 2006.

- Requirements of Prior Environmental Clearance: It was made mandatory that the all the projects falling under the category “A” of the EIA Schedule must seek environmental clearance from its respective SEIAA and similarly, any projects falling under the category “B” of the schedule must be cleared by the MoEF, after securing the land and before initiating any kind of developmental work, construction or any other pre-project preparations. This seems to be a very significant development for effective implementation of the EIA laws in India.

- Additionally, it was laid down that a specially dedicated agency, namely ‘The Environment Impact Assessment Authority’, must be constituted both at the central as well as the state level as mandated under Section 3(3) of the EPA, 1986. In response to this said draft, the government also invited comments, suggestions or any objections from public and all stakeholders with a span of 60 days.

166 State Environment Impact Assessment Authority.
The said draft also contained all the detailed essentials with regard to the constitution of the SEIAA, its composition, appointment of its members, terms of their appointments, etc. Most importantly, it laid down that all the decisions pertaining to the environmental clearance must be unanimously taken in the meeting held for the said purpose.

Another significant factor proposed in the said draft was that the SEIAA before arriving at a decision must consider the expert opinion of the State or Union territory level Expert Appraisal Committee (SEAC) as to be constituted to achieve the purpose of the said proposed notification. In the absence of a duly constituted SEIAA or SEAC, a Category ‘B’ project shall be treated as a Category ‘A’ project. All the powers related to the various scrutinizing processes like screening, scoping, etc., for granting the environmental clearance, was delegated to the EACs at the central government level and SEACs at the state or the UT level. The EAC and SEAC shall be reconstituted after every three years.

The Application Formalities Prior Environmental Clearance: It was prescribed, in the said draft, that prior to seeking the environmental clearance, every project proponent must make an application as prescribed in the Format. The applicant shall furnish, along with the application, a copy of the pre-feasibility project report, except in the case of construction projects or activities.

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167 The composition of the EAC was given in Appendix VI of the said draft.
168 Hereinafter referred to as EAC and SEAC.
169 As annexed in the draft Form 1 and Supplementary Form 1A, if applicable, as given in Appendix II.
170 Item 8 of the Schedule, in addition to Form 1 and the Supplementary Form 1A.
The most significant change that this notification introduced is that environmental clearance must be taken only after the identification of prospective site(s) for the project and/or activities, but compulsorily before commencing any kind of construction activity or preparation of land, at the site by the applicant. A copy of the conceptual plan shall also be provided, instead of the pre-feasibility report.

The said notification for the purpose granting EC also proposed few changes with regard to its essential stages, especially for the newly proposed projects. Thus, this amended the notification would be applicable in a prospective course for all such new projects proposed only after it is implemented. As per the said draft there are four essential stages to be followed for any new future project, and the same have been enumerated as under:

1. Stage 1 – Screening (Only applicable in case projects/activities belongs to Category ‘B’)
2. Stage 2 – Scoping
3. Stage 3 – Public Consultation
4. Stage 4 – Appraisal

We can now have a brief discussion on the above stages and its specific role in the process of environmental clearance, for the better understanding of the EIA legal domain.
Screening stage: This is designed to begin with scrutiny of the application of the project proponent to be done by the respective SEAC. The purpose of this scrutiny is to decide whether or not the given project, seeking environmental clearance, needs any further EIA studies to be conducted. The two most determining factors in this context are the nature of the project/activity proposed as well as its locational aspect. After this initial scrutiny for determining the scope and applicability of the EIA report, the proposed projects are further categorised into two distinct categories B1 and B2.¹⁷¹

Scoping Stage: The most significant aspect of this stage to determine the detail and comprehensive TOR¹⁷², which would in turn guide the final clearance with regard to any proposed project/activity. Thus, the focus of this stage is to raise all the relevant concerns from the environmental point. This stage is also applicable to all such projects which involve any kind of expansion, modernisation or change in product mix of existing projects/activities. It has also been mandated in this notification that besides taking the guidance from the submitted application and the detail mentioned¹⁷³ there, if necessary the


¹⁷² Terms of Reference - addressing all relevant environmental concerns for the preparation of an Environment Impact Assessment (EIA) Report in respect of the project or activity for which prior environmental clearance is sought, as described in the draft of EIA Notification, 2006, released by MOEF.

¹⁷³ The Expert Appraisal Committee or State level Expert Appraisal Committee concerned shall determine the Terms of Reference on the basis of the information furnished in the prescribed application Form1/Form 1A including Terms of Reference proposed by the applicant, a site visit by a sub- group of Expert Appraisal Committee or State level Expert Appraisal Committee concerned only if considered necessary by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, Terms of Reference suggested by the applicant if furnished and other information that may be available with the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned. All projects and activities listed as Category ‘B’ in Item 8 of the Schedule (Construction/Township/Commercial Complexes /Housing) shall not require Scoping and will be appraised on the basis of Form 1/ Form 1A and the conceptual plan., as mentioned in II (ii) in the draft
respective EAC may also do a local site inspection to determine the relevant TORs in each case. Most important part is that the whole executive process has been prescribed as a time bound exercise, in both cases, of either acceptance or rejection under this stage. Accordingly, the applicant here has been given the right to presume the “Deemed Consent” in case no communication from the regulatory authorities.

➢ Public Consultation Stage: This stage allows public participation into the environmental decision-making process. Hence, this stage is considered as a very crucial stage. Thus, the said notification prescribed that all Category ‘A’ and Category ‘B1’ projects/activities shall undertake Public Consultation, except wherein exemption can be granted in the following cases:

a) Modernization of irrigation projects (item 1(c) (ii) of the Schedule).

b) All projects or activities located within industrial estates or parks (item 7(c) of the Schedule) approved by the concerned authorities, and which are not disallowed in such approvals.

c) Expansion of Roads and Highways (item 7 (f) of the Schedule) which do not involve any further acquisition of land.

d) All Building/ Construction projects/ Area Development projects and Townships (item 8).

e) All Category ‘B2’ projects and activities.

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f) All projects/activities concerning national defence and security or involving other strategic considerations as determined by the Central Government.\footnote{EIA Notification, 2006, MoEF, India, available at http://envfor.nic.in/divisions/iass/eia/Annex1.htm, [last visited on July, 2012]}

Further, according to the mandate of the EIA Notification, 2006, the site and the venue of the public hearing must be in accordance with the guidelines as given in the Appendix IV of the said notification. All the persons having a stake shall have the right to submit their responses or objections to the respective local regulator.\footnote{The public hearing at, or in close proximity to, the site(s) in all cases shall be conducted by the State Pollution Control Board (SPCB) or the Union territory Pollution Control Committee (UTPCC) concerned in the specified manner and forward the proceedings to the regulatory authority concerned within 45(forty five ) of a request to the effect from the applicant. Cl 3, Sub. Cl (iii), EIA Notification, 2006, MoEF, India, available at http://envfor.nic.in/divisions/iass/eia/Annex1.htm, [last visited on July, 2012]} There were also few guidelines given for the certain exigencies, like in case of failure to conduct the public hearing within the stipulated time of 45 days and then it must be communicated to the respective locals. In case of unavailability of any authority or quorum, any other authority but not below the rank of the regulator can be deputed to complete the proceeding. In all such cases, due to lapse of the stipulated time, a fresh time line will run.\footnote{Ibid Cl 3, sub cl. iv.}

The condition precedent for the public hearing is that there should be to access to information with regard to the said decision making process. All relevant information about the project, like the applicant with summary report, etc. must be made available at the website of the respective local regulator, inviting the objections. However, this excludes any part of such information, related to the proposed project, which is or can be covered under Intellectual Property Rights.
As a safeguard, the notification also suggests to make all necessary communication through the quickest possible way. After completion of the public hearing, the proponent needs to submit the final EIA and EMP report, with the appropriate changes made to substantiate the concerns raised during the public hearing, to the regulator for the final review of the application.\footnote{Ibid Cl 3, sub cl. vii.}

- **Appraisal stage** is the fourth and last stage of the EIA process. In this stage, the credible EAC/SEAC is delegated to scrutinize all project details as per the mandate of the EIA norms and then finally decide on whether to grant or not to grant the EC. The final decision then is taken in a meeting, scheduled with the members of the said EAC/SEAC and the proponent or his representative in person. Thus, whether the clearance is granted or rejected, in both the cases, the committee needs to give the reasons for their decision. Further, in case of conditional clearances, all the required conditions and terms have to be clearly put forward before granting the clearance.\footnote{Ibid Cl. 4(i).}

### 3.9.2.3.2 Analysis of the EIA Notification, 2006

A detailed and further study of the said notification helps us evaluate it on the basis of various qualitative aspects and following has emerges as the main lacunas of the said notification:

1. The said notification has been criticized by the experts and researchers on the ground that it seems to have failed to qualify on the basic parameter of following a proper law making process. As suggested by the critics that as per
the Ministry’s own submission the consultations on the said draft notification was done merely for just a namesake purpose as it only included the representatives of industry and central government agencies. State governments, Panchayats and municipalities, NGOs, trade unions and local community groups, etc. were partially or completely kept out of this consultative process. This inherent bias of the Ministry, to negotiate with industry on what an environment regulation should be, clearly carries through the text of the notification as well.

2. Further, we observe that the categorization of projects in the notification, into “A” and “B”, has been done based on “spatial extent of potential impacts on human health and natural and man-made resources.” The Category “A” projects are to be clearance by the MoEF, while Category “B” projects are to be cleared by the State Environment Impact Assessment Authority (SEIAA). In this context, it has been criticized that the central government has merely delegated the power to conduct EIA process without providing any of support to the states, for institutional and capacity building to handle the environmental clearances smoothly and effectively. Additionally, it is suggested that the responsibility of granting clearance has been handed over to the state governments for a large number of projects without any proper guideline or system of checks and counter checks determined by the central government.

3. There is another interesting dimension involved in the said notification related to the conflict of interest, where in the state on one hand is involved as the regulator to grant the clearances and, on the other hand, in many instances, the state government itself is directly involved in seeking investments. Hence, it is very obvious that given the economic priorities of the state; handing over the
entire function of environment regulation into their hands will most certainly mean that projects are cleared indiscriminately.  

4. There is also lack of clarity with regards to the SEIAA, which is created as a body to grant clearance at the state level on the following aspects:

- Where will this authority be housed and who will it be accountable to?
- Can the decisions of the Authority be challenged in the existing Environment Appellate Authority or will it be some other body?

Responses to the said questions are not known. Unless this is figured out and incorporated in the notification, this body cannot be allowed to grant clearances.

5. Another anomaly observed in the said notification is related to “Exclusion of Large Capacity” and “Impact Projects” from EIA, for example the construction projects need not go through the stages of screening or scoping because they are exempted from doing EIA studies. They also do not need to conduct the process of public consultation. Hence, they are considered in the EIA notification only to be cleared by the SEIAA solely on the basis of the application form. Thus, they remain a category in the notification purely for cosmetic reasons and several large capacity projects are left out of the scope of the notification altogether. All building and construction projects with less than 20,000 m² built up area like the one in Vasant Kunj Square Mall, Delhi, which is exempted from the EC. According to the June 2006 Rapid EIA report, the total built up area in the said mall is 19021.108 m². There are several such complexes being constructed in cities and towns today and would be totally exempted from the scope EIA notification.

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179 Ibid.
6. It also alleged that whether thermal power projects less than 500 MW or cement plants less than 1 MTPA do not require any environment clearance at all? Or will state governments follow a separate set of rules for grant of clearance to these projects since the EIA notification does not deal with them? If indeed it is the former that is true, then this notification will in no way achieve environment impact regulation.¹⁸⁰

7. The new notification deals only with process of grant of environment clearance, which is further divided into 4 stages: Screening, Scoping, Public consultation and Appraisal and it stops there. The most critical issue of monitoring and compliance which is an integral part of the EC regime is dealt with precisely three sentences. There is only a mention of the six monthly compliance reports which are to be submitted by the project proponent. The EIA Notification, 1994 mandated the MoEF to maintain its independent monitoring report. This role of the MoEF finds no mention whatsoever in the said new notification. This can be interpreted in several ways, such as the MoEF does not see the need to independently monitor the projects once they are cleared by them and that its function ends merely with granting clearances or two that MoEF feels that the project proponents will be monitor themselves adequately, periodically and diligently. Such lacunas further results in lack of compliance and monitoring in the post EC phase in India.

8. It should be noted that either of these assumptions is in sheer contrast to the experiences of compliance of projects on the ground. Project proponents are being continuously pulled up by local governments for violating state and central laws and for non-compliance of clearance conditions. Also several of the

¹⁸⁰ Ibid.
Ministry’s own monitoring reports indicate non-compliance on which it has most often failed to take action, for example; in the case of *Teesta-V* Hydroelectric Project in the state of Sikkim.

9. The notification is also remains silent on the point of who would be the monitoring agency for projects cleared by the state government. Will it be the SEIAA or will these projects be self-monitored?\(^{181}\) It is absurd if the latter is what is expected to take place. Also, there lack of any scope for local community groups to be involved in monitoring of projects.

10. In the screening stage, the decision as to whether a project falls within the category “B1” or “B2” is to be determined on the basis of the information provided by the applicant in an application (*Form 1* or *Form 1A* in case of construction projects). For example; it is very shocking to note that a 450 MW Thermal Power Plant, can based on the information provided by the project proponent, be allowed to go through the clearance process without an EIA!\(^{182}\)

11. In the present situation where fraudulent EIAs have been exposed at public hearings and decisions to clear the project have also been made on the basis of such reports, it is rather ironic that the Ministry believes that any decision can be made on the basis of the application form, which may not be done after some amount of investigation by an environment consultant (as in the case of an EIA report) and does not go through any public scrutiny.

12. Another more serious problem related to this notification is that there is nothing yet in the notification or the *Form 1* or *1A* that could stop the SEIAA from

\(^{181}\) *Ibid.*

\(^{182}\) *Ibid.*
transferring all projects to category “B2”, and therefore, doing away with the need for EIAs and public hearings. The notification only vaguely states that the Ministry will issue guidelines from time to time for the categorization of “B1” and “B2” projects. If most projects of Category “B1” do end up in the “B2” list, then they will be appraised (which is the stage 4 of the clearance process) and granted clearance on the basis of information in the application form and discretionary site visits.

13. Further, as we know that scoping stage is the one which determines the various aspects that need to be studied in the EIA report. However, Construction/townships/commercial complexes/housing that fall in Item 8 category “B” of the schedule have been exempted from the need to do EIAs and are to be cleared on the basis of information in Form 1/Form 1A. Is it because these projects do not or cannot have any environmental impact? Or is it because that it is presumed that the potential environment impacts can be analysed in the conceptual plan documents of the project? Thus, the said notification appears to be salient on this matter.

14. The said notification has also proposed to grant exemption from Public Consultation in certain cases. There are 6 sets of activities included in this notification, which have been exempted from the process of public consultation completely. There is no explanation whatsoever as to why these projects have been exempted from this an extremely crucial step in the EC process. Since, this is a step to ascertain “the concerns of locally affected persons and others”, its exemption means that the Ministry is not interested in ascertaining the concerns of locally affected persons and others while clearing these projects.
15. The Public Consultation process as laid out in the said EIA notification is severely flawed and clearly limits public participation on few grounds. For example, it is stated that only a draft EIA report will be available to the locally affected persons at the time of the public hearing. Hence, it is clear that the citizens will now not get to see the final EIA document on the basis of which the final decision on the project will be made. There are enough examples from the last 12 years of the existence of the EIA notification, when project proponents have sought clearance on the basis of incomplete and misleading data. The MoEF has not only failed to take punitive action against erring agencies but also gone ahead and cleared projects based on such incredible reports. This practice will only grow if the final EIA report is not open for public scrutiny.

16. Further, in Appendix IV of the said notification the states that the ‘draft EIA report with the generic structure...’” is to be available to the public prior to the hearing. This does not ensure that the draft report will have an adequate description of the potential adverse impacts of the project, such that they can be understood by readers. If the draft is very rudimentary, the public hearing will be a waste of public time and money. The notification should have either laid down details of the degree of information that the draft report should contain, or should have introduced clauses of punitive action if the draft allows only an ineffective public hearing due to being uninformative or less informative.\textsuperscript{183}

17. Additionally, it has been also observed that the public will have no control over whether or not their inputs and concerns get incorporated in the EIA report and influence the decision making process. The time period for which the draft EIA

\textsuperscript{183} \textit{Ibid.}
report will be available, prior to the hearing, is not mentioned in the notification. The 1994 Notification mandated that it be available for a period of 30 days prior to the hearing.

18. Further, on the issue related to the cancellations of Public Hearing, it is alleged that this clause, which requires the public hearing to be cancelled if the local conditions are not conducive. It has been often misused by the project proponents and regulatory authorities as well. This point was also raised in the comments sent by several civil society organizations to the MoEF, which have not been considered yet. The inclusion of this clause is a severe setback to the notification as it has, in effect, made the public hearing procedure a discretionary procedure, when it was mandatory until now.

19. It is provided that no postponement of public hearing can be made except in exceptional circumstances and unless there is some untoward emergency. Can the non-availability of the EIA report for enough time or inadequate draft EIA be reason for the cancellation or postponement of the public hearing? 184 In various cases this has been a common reason why local communities have demanded the same.

20. Also the said notification held that no quorum required for attendance to start the proceedings, which is a bit ambiguous. Does this imply that public hearing can start with the public hearing panel being incomplete? This completely goes against directions issued by the Gujarat High Court in its judgment in the PIL filed by an NGO Janvikas. 185

184 Ibid.

21. Further, the notification states that the public hearing will be primarily for the purpose of ascertaining concerns of local affected persons. Other concerned persons who have “plausible stake” in the environmental impacts can make submissions in writing. This clearly limits the participation of public groups and civil society organizations, which have over the last decades raised critical concerns at the time of the public hearing. Further, if the SEAC or EAC feels that a certain person or organization does not have a plausible stake in the environmental impacts, then they have the discretion of not accepting even a written submission from them. However, restricting all such organisations is completely discriminatory and undemocratic in nature and very opposite to the objective of the EIA process itself.

22. In context of the final Appraisal stage it is said that the projects which do not need to conduct EIA studies or go through public consultation will be appraised only on the basis of information in the application form and discretionary site visits. Hence, there is no scope for public participation in such cases. As a result, citizens will not get to see the final documents on the basis of which the Appraisal Committee will recommend clearance to the project; such may be bias or arbitrary in nature.

23. Another lacuna in the said notification is that the Screening, Scoping and Appraisal committees do not include social scientists, ecosystem experts or even NGOs, etc. These groups were included in the composition of Appraisal Committees in the 1994 Notification. There is also no mention of the need to have any women members in the said committees. None of these concerns have been addressed, in spite of several representations made with detailed research on past committees and their problems, being sent to the MoEF.
24. With regard to the issue of grant of clearance the said notification needs to specify as to when the clearance letter granted to a project will be made public and how this will be done. Validity of environmental clearance granted for hydro projects will now be for 10 years and will be a maximum of 30 years, in case of mining projects. This is a big change from the original position of 1994 notification which allowed a validity period only for 5 years. The increase in the validity period may have a big effect on the environmental impact of the project as the developer may start work on the project just before the expiry of the period, and by that time, the parameters of the EIA study (such as demographic or ecological) may have altered significantly, making the of old EIA studies redundant and out-dated.

25. Both the form and the generic format for EIAs are lacking on several counts. An example of this can be that a mention regarding impact on biodiversity and people’s livelihoods still continues to be missing from Form 1 or format of the EIA report. This is a suggestion that has been repeatedly sent to the MoEF for over several years but continues to be ignored. In Section 2, regarding the use of natural resources, there is only a mention of land, water and so on. In these, forests have been clubbed with timber, limiting the ecological and biodiversity value of the same. Also, there is no information sought on the ethnography of the people of the area and their natural resource dependencies. Moreover, there is no scope of presenting socio-economic data in Form 1.

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186 Ibid.
26. Another anomaly of the said notification is whether we can justify the proposed concept fast track clearances at the cost of environment assessments? The EIA notification, 2006, states that the EAC or SEAC will convey the terms of reference within 60 days of the receipt of Form 1. While the notification clearly lays down guidelines on how long it should take for each of the 4 stages to be completed for the grant of environment clearance, there is no mention or record of the minimum time that must be spent on putting together a comprehensive EIA report. The quality of EIA reports was one of the major concerns with the implementation of the EIA notification from the very beginning. This has also been repeatedly pointed out to the MoEF and concerned authorities. The quality of EIA reports was severely compromised and they were called Rapid or Single Season EIA Report. The new notification should have specified the time needed between the grant of TOR and the completion of at least a four season EIA report.

27. Lastly, as per the said notification it is held that only a draft EIA report will be available to the locally affected persons at the time of the public hearing. At the time, when citizens are celebrating the use of their right to information, this retrograde step denies the affected persons access to the final impact assessment based on which clearances will be granted to projects.

Unless these EIA procedures are revised altogether with the open and free participation of the project-affected people, environmental and human rights groups and representatives of local self-governments; developmental projects will unleash

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187 Ibid.
tremendous and widespread negative consequences on the poor and marginalised citizens of India. The poor and disempowered people will have no option but to retaliate with violence to save the ground beneath their feet. This is not a scenario of the future, but is of the present. \(^{188}\)

### 3.9.2.4 The Amendments during 2009

Further, after 2006, the next important milestone in amending the EIA law was passed in the year 2009 by the MoEF. The objective, *vide* notification \(^{189}\), was to introduce an obligation on the project proponent to mandatorily publish information for the public, the terms on the basis of which the said environmental clearance is granted to them by the respective regulator and also must bear its financial cost. The said publication needs to be made in any of the two local newspapers where the proposed project is located, for the purpose of giving it wider publicity among the locals and the plausible stakeholders.

Additionally, the said notification also imposed the condition \(^{190}\) that as a prospective effect of this notification, it would be mandatory for all the such projects, which are specified in the schedule of the this notification, having any requirements of either expansion or modernization of any existing project/activity or any construction required for meeting the change in technology used or product mix, etc. All such


\(^{190}\) Under S. I.1533 (E), 14 September, 2006, issued under Section 3(1) and 3(2)(v) of the Environment (Protection) Act, 1986 r/w Rule 5(3)(d) of the Environment (Protection) Rules, 1986.
cases shall be only permitted with the prior permission from the Central Government or the respective state government, as the case may be. Thus, we can say that the said amendment, once again, aimed to revive a strict regulation of the EIA regime in India to curb the existing shortcomings related to its procedural aspects.

After having discussion on both the original EIA laws of 1994 and its amended version of 2006, hereinafter a table is referred to further illustrate the comparative aspects of both the said notifications.

9 Table illustrating Major differences in EIA Notification 2006 vis-a-vis Notification 1994:

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>EIA Notification, 2006</th>
<th>EIA Notification, 1994 (Including Amendments)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Projects in Schedule I have been divided into two categories, Category A and B. Category A project will require clearance from Central Government (MoEF). Category B will require clearance from State Government. However, the State Government will first classify if the Category B project falls under B1 or B2 category. B1 projects will require preparation of EIA reports while remaining projects will be termed as B2 projects and will not require EIA report. This has the potential of being a good move as decentralization of power may speed up the project clearance process. However, it may be misused and there is an</td>
<td>Proponent desiring to undertake any project listed in Schedule I had to obtain clearance from the Central Government.</td>
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<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>urgent need to build the capacity of the state regulators to deal with their new responsibilities.</td>
</tr>
</tbody>
</table>
| 2     | Well defined screening process with projects divided into two categories:  
Category A: All projects and activities require EIA study and clearance from central government.  
Category B: Application reviewed by the State Level Expert Appraisal Committee into two categories - B1 (which will require EIA study) and B2, which does not require EIA study. |
|       | In screening, the project proponent assesses if the proposed activity/project falls under the purview of environmental clearance, and then the proponent conducts an EIA study either directly or through a consultant. |
| 3     | Scoping has been defined in the new Notification. However, the entire responsibility of determining the terms of reference (TOR) will depend on the Expert Appraisal Committee. This will be done in case of Category A and Category B1 projects. However, the finalisation of TOR by the EACs will depend on the information provided by the project proponent. There is, however, a provision that the EACs may visit the site, hold public consultation and meet experts to decide the TOR. However, if the EACs do not specify the TOR within 60 days, the proponent can go ahead with their own TOR. The final TOR shall be displayed on the website of the MoEF and concerned SEIAA. |
|       | Scoping was not applicable. The terms of reference was completely decided by the proponent without any public consultation. |
| 4     | Public Consultation - All Category A and |
|       | The project proponent has to |
Category B1 projects or activities have to undertake public consultation, except the 6 activities which have been exempted. Some of the projects exempted include expansion of roads and highways, modernization of irrigation projects, etc. Some of these may have potential social and environmental impact.

The responsibility for conducting the public hearing still lies with the SPCBs. Secretary of the concerned SPCB or Union Territory Pollution Control Committee has to finalise the date, time and exact venue for the conduct of public hearing within 30 days of the date of receipt of the draft EIA report, and advertise the same in one major National Daily and one Regional Vernacular Daily. A minimum notice period of 30 days will be given to the public for furnishing their responses.

The public consultation will essentially consist of two components – a public hearing to ascertain the views of local people and obtaining written responses of interested parties.

There are no clear guidelines like these in earlier Notification as to who all can attend the public hearing. The use of “local people” for public hearing raises doubt whether the hearing can be attended by interested parties write to SPCB to conduct public hearing.

It was the responsibility of the SPCBs to publish notice for environmental public hearing in at least two newspaper widely circulated in the region around the project, one of which shall be in the vernacular language of the locality concerned.
The role of NGOs/experts is limited to sending written letters/feedback to the SPCB?

The Notification makes provision that MoEF shall promptly display the Summary of the draft EIA report on its website, and also make the full draft EIA available in Ministry’s Library at New Delhi for reference.

No postponement of the time, venue of the public hearing shall be undertaken, unless some untoward emergence situation occurs and only on the recommendation of the concerned District Magistrate. This was not a part of the earlier Notification.

The SPCBs or Union Territory Pollution Control Committee shall arrange to video film the entire proceedings. This was also absent in the earlier notification and may be considered as a good move to ensure that public hearing is proper.

Unlike the earlier notification, no quorum is required for starting the proceedings. This may be misused by the project proponents.
3.9.2.5. The Amendments during 2011

In 2011, the MoEF initiated another amendment *vide* its 2001 amendment, wherein collaboration with the QCI, it tried to introduce the aspect of quality assurance in environmental clearance process in India. Accordingly, to achieve this objective in letter and spirit, the MoEF passed amendment in EIA Notification in the year 2011. The said notification stated that it would be mandatory for all the proponents to engage for getting their EMP done only from such reputed consultants who are duly accredited by the QCI.

Thus, *vide* the said notification, the objective of the MoEF was to bring qualitative standardization in the EIA process in India and also tried to eliminate the occurrence the EIA scams. This notification also aimed at imposing professional obligations and legal liabilities on the EIA consultants who act as service providers in the EIA field on a commercial basis. Since then, the MoEF, on its official website, has provided an updated listing of the accredited EIA consultants in India for public information.

3.9.2.6 Latest Amendment in 2012.

In recent times, the MoEF has become more serious in fixing the gaps in the governance of EIA process in India. Even the Central Information Commissioner,

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India (hereinafter referred as CIC) vide a circular in 2012,\textsuperscript{195} directed that all the stakeholders of EIA\textsuperscript{196} to submit all the documents and important information related to any proposed project/activity which is relevant for seeking environmental clearance, both in electronic format and in hard copy format to the CIC. Recently, the MoEF made another significant effort and issue directions\textsuperscript{197} for the reconstruction of the EACs in the industrial sector, for assisting the EIA process in India.

3.10 Pitfalls and Challenges of the EIA Laws in India

Thus, the EIA laws in India have come a long way. It has probably been through the largest numbers of successive amendments since its inception way back in 1994. It is very distressing to see that, the main objective with which the EIA regulations were first introduced in India, were in the later stage, by and large, diluted vide the numerous amendments to facilitate the developmental lobby. Thereafter, only since 2006, due to several criticism raised by the activists against such constant dilution in laws and wide spread occurrence of EIA scams that the regulators were forced to ultimately reform the EIA norms in favour of environment.


\textsuperscript{196} CIC directed that all SPCBs/UTPCCs shall ensure that the proceedings of public hearing conducted in terms of the provisions of the EIA Notification, 2006 are displayed regularly and with due priority on their respective websites. This order may also be displayed on this website.

In this regard, it was very aptly stated that,\textsuperscript{198} 

“\textit{Such approvals have socio-political ramifications. Every EIA based environmental clearance allows diversion of land from its existing use or extraction of minerals and water to support such industrial activity. There is also relocation of people from the site where construction is to take place. When EIAs deliberately underplay these interactions they do so at a future cost which unfolds in unexpected scenarios.”}

The above article further highlighted the inadequacies of the existing EIA consultants’ accredited scheme by citing an example of a firm called \textit{B. S. Envitech Ltd.}, based in \textit{Hyderabad}. This firm was Consultant number six in the MoEF’s accredited list. This EIA consulting firm had carried out the EIA for the \textit{Bhavanapadu} Thermal Power Project having a capacity of 2640 MW located in \textit{Kakrapalli} village, \textit{Santha Bomalli Mandal} in \textit{Srikakulam} district, \textit{Andhra Pradesh}. Initially, on the basis of the said EIA report, the environmental clearance was granted.

Later, on 28\textsuperscript{th} February, 2011, the people of the area protested against the construction of the said thermal power plant and also faced police aggression leading to severe casualties. The main cause of concern was that the construction of the power plant and creation of bunds that would impact inland fishing activities. However, the very next day, the MoEF, which had granted environment clearance based on a grossly inadequate EIA, issued a statement in Parliament and also issued an order asking \textit{East Coast Energy Pvt. Ltd.} (ECEPL) to suspend work on the power project.\textsuperscript{199} In this given situation, it can be very clearly understood that the both, EIA consultants and


the regulators, *i.e.*, MoEF, often indulge in violating substantial as well as procedural requirements of the existing EIA norms and only wakes up when the public protests or agitates. Such cases also highlight the implementational shortcomings in the existing EIA regime in India.