

ANALYSING THE EVOLVING CONTOURS OF ENVIRONMENTAL IMPACT ASSESSMENT

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I. INTRODUCTION

“Today our planet and our world are experiencing the best of times, and the worst of times. The world is experiencing unprecedented prosperity, while the planet is under unprecedented stress.”¹

We are undoubtedly living in best of times and the worst of times! And it is not hard to find and extrapolate the reasons for the axiom which forewarns lurking grim reality. The human civilization which is bursting with enormous progress and development is being actualized by consistently feeding on the natural resources. This current scale of developmental paradigm would not find any parallel in the annals of human history and it is this trend which is asphyxiating planet earth. This planet is awash with the effects seen due to incessant human developmental activity which leads to calamitous pollution of natural environment. So, while humans have made massive stride in growth and prosperity enabling them to live life in excesses; at the same time, on the other hand the environment is tremendously trampled upon and rendered emaciated. It cannot be denied that the sheer ingenuity of human civilization is unrivalled in terms of dominance it wields over the natural resources and consequently on this planet earth. Therefore, to state that the fate of this planet squarely hinges on the conscientious choices the human is to state the obvious. Unfortunately, the story thus far is hardly propitious. The civilization paradigm for growth hitherto has been marked by obsession for seeing things mostly in binaries such as profit and loss and has been directed towards shoring up trade and business and associated activities. The prejudiced reverence for industrialization, urbanization *inter-alia* veritably constricts the space for the sacrosanct environment. It is in these contexts that the role of *Environmental Impact Assessment* must be emphasized. It is a mechanism devised to bring environment as an inescapable and intrinsic element of State policy and to buttress sustainable development. It is pertinent to mention that developmental trajectory in the 20th century has shown least concern for the environment and was commonly seen in every part of the world. The objectification of natural resources espoused by the developed economy spurred unprecedented exploitation of resources. And this pattern unfortunately was emulated by the rest of the other nations as they endeavour to script their own developmental story. Environmental Impact Assessment is a unique intervention aimed at putting the check on reckless development where the environment is unabashedly desecrated. Environment impact assessment (EIA) epitomizes the principle, i.e., prevention is better than cure by assessing the consequences of any planned activity on the environment beforehand.²

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¹ United Nations Secretary-General's High-level Panel on Global Sustainability, *Resilient People, Resilient Planet: A future worth choosing* 10 (United Nations, New York, 2012).

² John Glasson, Riki Therivel, *et.al.*, *Introduction to Environmental Impact Assessment* (Routledge, 2nd edn., 1999).

Any developmental activities come with cost. The effect of these activities does not confine to mere environment. The fallout can be seen - most definitely - in the physical environment becoming penurious; but at the same time the social and economic aspects also get deeply affected. Various countries have adapted different setting to plan and offset the adverse effect of developmental actions. Invariably most of these settings have accounted for and considered *socio-economic assessment* as an integral part of environmental impact assessment. It is a veritable fact that the developmental activities impinge deeply on almost every facet of human society. And therefore, effort has been laid to design a comprehensive method to deal with human activity. One method which of late has gained huge credence is strategic environmental assessment. It is often contrasted with environmental impact assessment. Ideally environmental impact assessment is confined to specific project. Strategic impact assessment expands the confines of environmental impact assessment into the realm of policies, plans and programmes. Strategic environmental assessment is gaining lot of traction in developed economy. Initiation of impact assessment which begins with - ‘policies’ and thereafter ‘plans,’ then ‘programmes’ and eventually for ‘projects’ are perfect recipe for the holistic *developmental-plan*. But generally, especially in developing economy the impact assessment of individual projects is the most commonly seen phenomenon. Similar to environmental impact assessment and strategic impact assessment there has been profusion of many disparate methods such as risk assessment, health impact assessment, psychological impact assessment, gender impact assessment, climate impact assessment which is being evolved as a set of tools to assess environment *vis-à-vis* relevant thematic areas.³

It is not hard to see the reason why EIA is hailed as one of the most notable policy innovations designed for the conservation of environment.⁴ This mechanism found footing and popularity in many different countries as they seek to adopt EIA into their setup. Countries irrespective of their different levels of “development, types of government and cultural traditions” went ahead with this.⁵ It is worthwhile to mention that Rio Declaration (Conference on Environment and Development, UNCED), also underlined the importance of EIA and its components in some of its principles, such as Principles 10, 15 and 17.⁶ These principles were aimed at ramping up the efforts of sustainability and reducing the severity of environmental impacts due to developmental activities.⁷ Principle 17 of the Rio Declaration specifically outlines the contour of EIA and exhorts to integrate EIA by percolating into the domestic instrument - directing it to be used for “such propositions, which if not tested timely, could have a significant adverse impact on the environment”⁸ EIA necessarily involves a sound strategy to acquire and assess environmental information. It is widely used as a *consent procedure* throughout the world for specified individual project. Each country

³*Ibid.*

⁴ Centre for Science and Environment, “Understanding EIA”, available at: <https://www.cseindia.org/understanding-eia-383> (last visited on Sep. 30, 2019).

⁵ UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (2004), available at: <https://unep.ch/etu/publications/text/ONUBr.pdf> (last visited on July 31, 2019).

⁶ Principle 10: Each individual shall have the opportunity to participate in decision-making processes, facilitated by the widespread availability of information.

Principle 15: 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.

Principle 17: EIA, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment; also see *Supra* note 5 at 3.

⁷ EIA Training Resource Manual (UNEP), *Introduction and Overview of EIA* 104 (2002), available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/26503/EIA_Training_Resource_Manual.pdf?sequence=1&isAllowed=y (last visited on Sep. 30, 2019).

⁸*Ibid.*

over the years has evolved its own methods and terminology for EIA. Depending upon the interpretation of ‘environment’ and involvement of other terms such as social, economic, cultural, and ecological consideration - the process of EIA firmed up distinctly in each country. Though, some similar and relatable steps could be seen across the board.⁹

II. ENVIRONMENT IMPACT ASSESSMENT – SETTING THE CONTEXT

The concept of Assessment of an activity, and its impact on environment as a national instrument began in United State of America in the year 1969. From there it diffused across Europe through EC directive on EIA in the year 1985.¹⁰ National Environmental Policy Act of 1969 (NEPA) can be hailed as the landmark legislation which accorded environment an important and intrinsic space in the infrastructural and developmental processes in America. The failure of “large infrastructural agencies in charge of water resources projects, highways, and energy facilities” in protecting environment spurred widespread consternation. It was soon followed by the surge in awareness concerning the consequences of severe environmental hazards posed by unchecked developmental activities. Not surprisingly, during those decades and up till then environment was considered as an extraneous factor and non-essential consideration in the infrastructural or developmental activity. It inevitably gave rise to various environmental issues. National Environmental Policy Act was an attempt to preclude unabated environmental exploitation and related problems.¹¹ NEPA in its wake brought tremendous change. It mandated all federal agencies to bring into equation the environmental factors resulting from their decisions.¹² This legislation can be seen as a watershed event which brought environment at the forefront and eventfully by 1990s as many as 40 countries had adopted EIA in their respective national instrument.¹³ EIA in its wake helped in establishing new paradigm wherein “environmentally sensitive decisions and the integration of environmental and social consideration in development planning” were foregrounded and duly prioritized. These new initiatives consolidated synergy between various agencies such as private sector and government instrumentality. These changes helped in entrenching transparency in the “decision making process during the development, implementation, monitoring and follow-up stages of a development project.”¹⁴ EIA has cemented its position as a mandatory regulatory procedure in USA. As stated before, various other countries took the leaf out of America’s book as they sought to take advantage of the environmental impact assessment model. It is striking but not strange to observe that the initial evolution and development of EIA happened mostly in high-income countries such as Australia, Canada, New Zealand etc. while very few developing economies such as Philippines, Columbia also followed the suit and experimented with the EIA early-on.¹⁵ The National Environmental Policy Act (NEPA) is often considered as the Magna Carta which bolstered the cause of environment in America. The core of this act was to enable synergized and “balanced decision making regarding the environment occurs in the total public interest.” Efforts were laid to integrate “technical, economic, environmental, social and other factors.”

⁹ UNDP/UNEP/GEF Biodiversity Planning Support Programme (BPSP), “Integrating Biodiversity with National Environmental Assessment Processes: A Review of Experiences and Methods”, available at: <https://www.cbd.int/doc/nbsap/EIA/EIA-Main-Report.pdf> (last visited on Sep. 30, 2019).

¹⁰ *Supra* note 2.

¹¹ Leonard Ortolano & Anne Shepherd, “Environmental Impact Assessment: Challenges and Opportunities” 13 *Impact Assessment* 5 (1995).

¹² *Ibid.*

¹³ *Id.* at 6.

¹⁴ See https://unep.ch/etu/publications/UNEP_EIA_Manual.pdf (last visited on Sep. 30, 2019).

¹⁵ *Supra* note 4.

Focus which was confined to the technical and economic factors in decision making process shifted to ‘the three Es’ i.e., engineering, economics, and the environment.¹⁶

A. EIA Paradigm

Environmental Impact Assessment can be seen as a potent tool for realizing informed decision making.¹⁷ It is a decision-making tool which predicts the impact of any proposed project on the overall environment. It is a process wherein various alternatives for a project are assessed and the best suitable option is identified which would augur well for every distinct parameter such as environment and economic and associated costs and benefits.¹⁸ UNEP on relevance of EIA lays down that, “it provides a legal sanctity for organizing an integrated approach which projects a strategy while integrating the modes of analysis as a tool for decision-making, whereby demonstrating benefits of environmentally sound development along with new policy values backed by professional and institutional capacity enhancement.”¹⁹

The EIA process can be considered as “an objective analysis of the probable changes in the physical, bio-physical, and socio-economic characteristics of the environment from a proposed project.”²⁰ Contextualizing the foregoing description and about the relevancy of EIA; this process can be stated as, “being a process, which systematically examines the adversities as well as beneficial consequences of a project design, and taking them into account, while implementing the project. The consequential results being to identify both the effects in a project, but keeping in mind to mitigate the adverse effects and predictions as far as possible, during and even after the implementation of the project. The identification of adverse environmental predictions at the early stages of a project planning and its cycle with mitigative measures, environmental assessment helps gain benefits such as environmental protection, optimum utilisation of resources and saving of time and cost of the project.”²¹

Pioneers of environmental projects, Armin Rosencranz and Shyam Divan have explained EIA as,²² “an effort to anticipate measure and weigh the socio-economic and bio-physical changes that may result from a proposed project. It assists decision-makers in considering the proposed project’s environmental costs and benefits. Where the benefits sufficiently exceed the costs, the project can be viewed as environmentally justified.”

The foregoing definitions aptly explicate the fundamental aspects of Environmental Impact Assessment. Extrapolating these definitions, it can be inferred that this instrument is a formidable planning tool. As a planning tool it helps in assessing and evaluating impacts of proposed projects and suggests sound alternatives.²³ This instrument – as it has been – underscores environmental issues which should be prioritised and mooted before arriving at

¹⁶ Larry W. Canter, *Environmental Impact Assessment* 1 (McGraw-Hill Publishing Company, New York, 2nd edn., 1996).

¹⁷ *Supra* note 14.

¹⁸ *Supra* note 4.

¹⁹ *Supra* note 5.

²⁰ Pramod Kumar & Kumar Nikhil, “Environmental Impact Assessment (EIA) Study of Non-Metal Mines: A Critical Review” 2(5) *International Journal of Engineering and Technical Research* 324 (2014).

²¹ *Supra* note 18.

²² Shyam Divan and Armin Rosencranz, *Environmental Law and Policy In India* 417 (Oxford University Press, New Delhi, 2001).

²³ *Supra* note 11 at 3.

any decisions and thereby requires informing interested parties who are likely to be affected by the proposed developmental project.²⁴ EIA therefore could be understood as a systematic process which involves plumbing and assessing environmental consequences of developmental activity in advance.²⁵ Simply put, we may see EIA as an innovative approach which evaluate, predict and identify environmental effects of proposed developmental projects. It entails identifying, evaluating, and predicting the effects caused due to proposed projects. These entire processes kick in prior to the major decision making on the developmental project. Attention is given to offsetting, preventing, and mitigating the adverse effects of proposed projects. It strives to glean relevant information pertaining environmental consequences of developmental undertaking to enable astute decision making and bolster sustainable development through identification of suitable measures.²⁶

B. EIA – Aims and Objectives

The overarching purpose of EIA is to facilitate the involvement of environmental issues as an intrinsic part in decision making process. This involves collating and assessing information pertaining potential environmental effects of a given developmental proposals. This further involves finding suitable measures to preclude or mitigate harmful effects by delineating specific do's and don'ts. It becomes but obvious that the decision-making process in EIA would warrant meticulous involvement from the very first stage of project initiation to the implementation and post EIA and monitoring process. EIA is always subject to the formal approval by the competent authority. They are vested with the power to accept or reject the project and setting terms and conditions for the approved project.²⁷ EIA as process performs several important purposes. First and foremost, it is an important aid in decision-making. For decision makers it offer reliable set of information regarding the environmental implication of a given project and provides inputs on suitable alternative to facilitate better decision.²⁸ Unfortunately many have casted aspersion on the entire EIA process. It is often seen as the time consuming and costly affair. It is in this context it must be brought up that the EIA is a formidable tool for the sustainable development. Even if the process gets protracted it is still the surest and safest way to safeguard environment and life existence for which EIA is aimed for. The various aims and objective of EIA as enshrined in international instrument make it amply clear.²⁹ EIA as it is, operates under two categories of different time-lines. The first category explicates aims and objectives which are 'immediate' in nature and the second revolves around 'ultimate or long-term' aims and objectives. "The first strive to identify potentially significant environmental fallout and associated risk of the given developmental projects and the second pertains to nurturing sustainable development by ensuring that the given developmental projects do not threaten critical resources, ecology, livelihood, and the well-being of the people".³⁰ The immediate aim lays the foundation and constitute as a critical and fundamental to EIA in ensuring many things. As they function to improve environmental design of the project. It strives to ensure that the resources are judiciously and efficiently used. It further aims at identifying suitable mitigating measure and

²⁴*Id.* at 4.

²⁵*Supra* note 2.

²⁶*Supra* note 7.

²⁷*Supra* note 5 at 40.

²⁸*Supra* note 2.

²⁹ John Glasson, Riki Therivel, *et.al.*, *Introduction to Environmental Impact Assessment* 8 (Routledge Taylor & Francis Group, London, 2005).

³⁰*Supra* note 7.

facilitates informed decision-making processes by listing out litany of environmental terms and condition for the execution of the developmental projects. On the other hand, the long-term objectives aim at protecting human health and to avert irreversible changes and protecting environment from irreparable damage. It shields natural resources and ecosystem from ruination. It facilitates in synchronizing the proposal within the complex and diverse paradigm of social set-up.³¹

C. EIA Processes

EIA serves various important purposes. The overarching benefit of this important instrument helps in decision making processes. This invariably helps to prevent project with adverse environmental impact which could induce irreparable damage. EIA process entails a very extensive analysis which targets at ‘prevention’. And as a corollary this entire process enables the state to acquire ‘proactive’ position than ‘reactive’ in controlling the damage subsequent to bearing considerable environmental loss. The overarching EIA framework actively involves number of steps which are: “a) Screening b) Scoping, consideration of alternatives and public consultation c) Impact analysis and Mitigation d) Environmental assessment report e) Review/Appraisal f) Decision-making and g) compliance and monitoring the clearances condition”.³² Each of these steps enables EIA process to buttress sustainable development. These series of steps brings about various advantages, such as: improving project design; enabling more informed decision-making by bringing public involvement; ensuring environmentally sensitive decisions; enhancement of accountability and transparency; establishing integration of developmental project with every important and divergent settings such as social, environment, *inter-alia*; lessening of environmental damage; and to entrench sustainable development.³³ Environmental assessment is used as a policy tool to stave off negative environmental effect of developmental activities and to bolster sustainable development.³⁴ EIA entails meticulous planning. It begins even before fixing the site location. It commences way before any given project’s imprint becomes conspicuously visible in altering the physical characteristics of an earmarked place. Any alteration or changes in the environment without proper impact assessment holds the danger of causing irreversible change. EIA as a matter-of-factly is a ‘continuous-process’ than a mere ‘one-time-activity’. It cannot be circumscribed in its scope - as it envelops the entire ‘action’ which goes into making and actualizing a developmental project. Therefore, EIA oversee various steps which obviously are spanned over a considerable period of time.³⁵ It can be stated that EIA is a multi-stage process. These different stages inevitably benefit from adhering to and adopting multi-disciplinary approach. It draws from innumerable inputs stemming from experts such as wildlife experts, sociologist, economist, agricultural scientist, forestry experts, and geologist *inter-alia*.³⁶ This multi-stage process involving methods such as screening, scoping, public hearing, impact prediction, monitoring and clearances conditions etc. are fundamental in nature. Every environmental assessment begins with the process known as ‘screening’. This step involves determining whether EIA is needed or not

³¹*Id.* at 105.

³²*Supra* note 20.

³³*Supra* note 5 at 7-8.

³⁴ ECSSD, World Bank, “Environmental Impact Assessment Systems in Europe and Central Asia Countries” 1 (2002).

³⁵*Supra* note 5 at 41.

³⁶*Supra* note 22 at 418.

for a given project.³⁷It aims to establish the requirement of full, comprehensive, limited or no environmental assessment for any given project. Screening criteria are intrinsically connected to – a) location of development b) types of development and c) scale of investment.³⁸Screening is followed by ‘Scoping’. It begins once the screening is complete. It is very crucial step in EIA. This step involves setting down the content and scope of an EIA report. It delimits the boundary and provides the time-frame of the study.³⁹ Scoping helps in classifying all relevant concerns and issues which required to be addressed for a given project. Most importantly, it determines Terms of Reference (TOR) for preparation of Environment Impact Assessment Report.⁴⁰ Scoping could be closed scoping wherein developer and the competent authority get involved via consultation in drafting EIA report which is pre-determined by law. And it could also be an open/public scoping wherein public consultation is required. The scoping does take into account – a) the physical and chemical environment; b) the biological environment; c) the human (social) environment; d) the human (economic) environment as a crucial *marker* while identifying ‘key-issues’ for the preparation of term of reference.⁴¹Based on the terms of reference – draft EIA is prepared which is essential for holding Public Consultation. In this process public is duly involved. It is done by organizing meetings and public hearing to seek comments, concerns, and suggestion from the public. The project proponents are bound do give detailed and correct information regarding the project to the people during this process. ‘Impact Analysis’ and ‘mitigation’ help in predicting the effect of developmental project and assess their significance and to plan out measures to thwart, trim down or compensate the ill-effect of the project. These foregoing processes culminate in the drafting of ‘report’ which is known as ‘EIA Report’. It is often known by different names such as ‘environmental impact assessment report’; ‘environment impact assessment’; ‘environmental effect statement’; ‘environmental statement’ ‘environmental assessment report’ etc. The content of the report includes: description about the project, environmental impact, measures to prevent or offset adverse environmental effect, *inter-alia*.⁴²This EIA report is evaluated in the next step which is referred as ‘review’/ ‘appraisal’. Often taken up by environmental agency, appraisal committee; assessment authority; or designated panel - this stage involves detailed scrutiny of every document including the EIA report and the proceedings of the public hearing. The final stages involve ‘the final decision’ and ‘compliance and monitoring’. Final decision has to be taken by the ‘regulator’. It minutely looks into the recommendation of the appraisal committee and decide upon it by either accepting the recommendation (along with stipulating conditions) or rejecting the developmental proposal of project proponent. Monitoring constitutes the post clearance process of the project. It warrants project proponent to submit time-bound report on steps taken for compliance and on imposed condition. It also involves periodic checks and third-party audits.⁴³

³⁷ Bikram Kumar Dutta, Sanhita Bandyopadhyay, “Environmental Impact Assessment and Social Impact Assessment - Decision Making Tools for Project Appraisal in India” 5(6) *International Journal of Human and Social Sciences*352 (2010).

³⁸ Saswati G, “Stages of Environmental Impact Assessment”,*available at:* <http://www.environmentalpollution.in/eia-2/stages-of-environmental-impact-assessment-environment/4428> (last visited on Sep. 30, 2019).

³⁹ See https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm (last visited on Sep. 30, 2019).

⁴⁰*Supra* note 37.

⁴¹ See <https://www.lakeheadu.ca/sites/default/files/uploads/53/outlines/201314/GEOG1120/Week%209b.pdf> (last visited on Sep. 30, 2019).

⁴²*Ibid.*

⁴³ United Nations Environment Program (UNEP), Geneva, *available at:* https://unep.ch/etu/publications/EIA_ovrhd/top02.pdf (last visited on Sep. 30, 2019).

III. EIA LEGAL FRAMEWORK

A. The Background

The process to assessing the impact of environment was first introduced courtesy of Central Water Commission. The commission in the year 1975 issued guidelines for conducting investigations for hydroelectric and irrigation projects. However, the firm rooting of EIA process can be said that it began in the year 1976-77 when the planning commission asked the Department of Science and Technology to examine 'river-valley' projects. This project which many feared would jeopardize environment forced the government to initiate the assessment of environmental impact of the impending project. Later, this kind of assessment was extended to also include many of those projects which required approval of Public Investment Board. These however, were primarily administrative decisions without any legislative support.⁴⁴ Up till 1994 Ministry of Environment and Forest mandated submitting environmental information by filling out questionnaires for 'Environmental Clearance'. It was predominantly done under the administrative guidelines which required project proponents to secure clearance from the Union Ministry of Environment and Forest. This clearance was overseen by the ministry's Environmental Appraisal Committee. It must be stated here that during the decades of 1970s and 80s India witnessed rising concern being voiced against many developmental projects. Different stakeholders pitched their voice and battled against various project proposals. River valley was one such project. So, in the year 1977-78 Indian government took to itself the task of appraising river valley project. River valley project in its wake prompted the Department of Environment and Forest, Government of India to issue guidelines requiring studies pertaining the effect of this project on wildlife and forest, aquatic ecosystem, seismicity, and the related other concerns. This resulted in various other projects which were also brought within the purview of environmental assessment.⁴⁵ Consequently, the Environmental Protection Act, 1986 brought paradigm shift. It is this umbrella legislation which helped in institutionalizing *environmental impact assessment* process in India.

B. EIA Notification

The legislative measure which spurred the legal course and validated environmental assessment stemmed from section 3 of Environment Protection Act, 1986 read with rule 5 of the Environment Protection Rule, 1986.⁴⁶ The afore-mentioned provisions broadly delineate

⁴⁴ Devarshi Tathagat and Dr. Ramesh D. Dod, "The Inception and Evolution of EIA and Environmental Clearance Process – Laying Emphasis on Sustainable Development and Construction" 5 *International Journal of Engineering Research and Applications* 23 (2015).

⁴⁵ George Cyriac and Shamik Sanjanwala "Environmental Impact Assessment in India: An Appraisal" 10 *The Student Advocate* 74-75 (1998).

⁴⁶ The Environmental Protection Act 1986, s. 3(1): Power of Central Government to take Measures to Protect and Improve Environment. - (1) Subject to the provisions of this Act, the Central Government, shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. s. 3(2): In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:-- (v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards; The Environmental Protection Rules 1986, rule 5(3)(a): Prohibition and Restriction on the Location of Industries and the Carrying on Processes and Operations in Different Areas. - Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the locations of an industry or the carrying on of processes and operations in an area, it may by

the environmental assessment law in India wherein Indian government notified two principal environmental impact notifications i.e., on in the year 1994 which was superseded by another notification in the year 2006. It is interesting to see various amendment, guidelines, official memoranda, and circulars have followed the principal notification. As per the tenor of notification various stakeholders are mandated with certain roles and responsibilities such as:

(i) Roles of different actors in the EIA process

- a. The Project Proponent: The entire process of environmental impact assessment begins with the project proponent. They are required to furnish feasibility report, detailed project report which should incorporate the information on project and the findings of EIA study. This document should be available to the concerned public. Proponents has to initiate public hearing with due approval. Consequently, they are required to submit application for environmental clearance to the concerned authority.⁴⁷
- b. The Environmental Consultants: An environmental consultant plays a crucial role in the impact assessment processes. It is required of them to fully familiar with the legal norms and procedural requirements required for obtaining environmental clearance for the proposed project. Project proponent facilitate the project proponent from the very outset starting from screening process up till *right at the end* when the regulator peruses through the environmental assessment report for the proposed project. The consultants are responsible to provide all the necessary information sought by pollution control board and regulator.⁴⁸
- c. The State Pollution Control Board / Pollution Control Committees (PCCs): It is vested with the responsibility of facilitating public hearing and giving NOC to the concerned project. Though pollution control board has no direct role in the Environmental consultation process, it does identify critically polluted areas and industrial clusters. These are relevant information which helps in determining the grant of Environmental Consultation.⁴⁹
- d. The Public: They constitute the most important factor in the entire process. They are required to review information as furnished by the proponent and voice all their concerns regarding the developmental project. They are required to examine minutely all the positive and negative consequences of the project.
- e. The Impact Assessment Agency: They are vested with the power to assess EIA report. They are required to prepare list of recommendations and set of clearance condition in case they approve the project. Environmental monitoring process is also overseen by the agency.⁵⁰

C. Salient features of the 1994 and the 2006 Notification

(i) 1994

notification in the Official Gazette and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so.

⁴⁷WWF India, "Session 13: National Legal Policy/ Framework/ Processes: Environmental Impact Assessment", available at: http://awsassets.wwfindia.org/downloads/session_13_1.pdf (last visited on Sep. 30, 2019).

⁴⁸*Ibid.*

⁴⁹ Shibani Ghosh, "Demystifying the Environmental Clearance Process in India" 6 *NUJS Law Review* 439 (2013).

⁵⁰*Supra* note 47.

Ministry of Environment & Forests notified mandatory EIA for 29 designated projects on 27th January 1994 under rule 5 of Environmental Protection Rules, 1986. The notification made mandatory for the project proponent to prepare environmental impact assessment report so as ensure a) proper prediction of impact caused to the environment by the project b) to mitigate its adverse effect c) to mould the project in sync with the local environment and to d) provide sufficient room to predict and afford alternative options before the decision makers. The 1994 notification called for certain mandates related to projects which are listed in Schedule 1 for obtaining an environmental clearance from the authorities.⁵¹

(ii)2006

The 2006 notification superseded previous notification. Significant changes were introduced under the new notification. Decentralization of the regulatory function is the major hallmark of the current notification. The State level environment impact assessment agencies were vested with the responsibility to oversee small scale projects i.e., Category 'B' whereas MOEF are to regulate category 'A' which is larger scale projects. The Environmental ministry at the centre and the respective state are required to base their approval on the recommendations of the Expert Appraisal Committee (EAC) and State Expert Appraisal Committee (SEAC).⁵² The State Pollution Control Board and the Union Territory Pollution Control Committee (UTPCC) were tasked with the major responsibility for conducting public hearing. The current notification has brought in many greater numbers of projects under the purview of environmental clearance process. Emphasis has been laid on to the size or capacity of the project rather than based on investment in the current notification.

IV. EIA - PUBLIC CONSULTATION, EIA REPORT AND JUDICIAL DECISIONS

Public consultation is a very crucial component in the EIA process. It may be hailed as the most fundamental determinant for a required and necessary *consummate-impact-assessment*. It veritably embodies the virtues of the principle of natural justice. This stage affords the people the necessary forum to participate and raise concerns. Any developmental project *directly or indirectly* affects people. These developments may give rise to expected/anticipated situations or many a times would also result in unintended and unwarranted consequences. Public consultation is mechanism to address and thwart the possibility of unintended consequences. Therefore, it must be said that involving public becomes cornerstone to any given EIA process.⁵³

The United Nations Environment Program has in its report, "emphasized the importance of public involvement, as an indispensable part of implementing procedural principles and the objectives which are substantive in nature for the EIA process. The requisite of making information available to the affected or concerned public, who would express their views or comments about the project, would help in achieving the goals of EIA procedures being implemented in an accountable, open, and a transparent manner. It further promulgates and encourages the preparation of EIA studies and reports in a robust and defensible manner. On the other hand, previous studies indicate that such public participation has proven useful for EIA processes which involve scoping, impact identification, examination of alternatives and taking mitigation measures for environmental protection.

⁵¹See <http://cesorissa.org/PDF/EIA.pdf> (last visited on Sep. 30, 2019).

⁵²*Ibid.*

⁵³*Supra* note 5 at 28.

This process further promotes informed and equitable choices along with acceptable and environmental outcomes for such activities.”⁵⁴

The report further outlines that - through public consultation - which warrant disclosure of information via public notification along with providing access to EIA documents various purposes are achieved which are central to an ‘active’ EIA. The good practice would lay emphasis on active and participative public consultation than mere ‘passive’ EIA and so therefore various stakeholders should be brought into for consultation and dissemination of information. Especially disadvantaged community interests should be considered in the public consultation process.⁵⁵ Here it would be worthwhile to quote Principle 10 of the Rio Declaration (1992), which emphasizes on, “Environmental matters being at a good footing when such matters involve all concerned citizens participating at all relevant levels. The National level involvement is appreciated, when citizens have access to information on environment which is in the fold of public authorities and they provide it to the public for hazardous materials and activities involving their communities along with the opportunity to participate in decision-making processes. It also entails the States to encourage and facilitate participation of the public and creating awareness among them by the public having access to all environmental information. This is further promoted when the public also has access to judicial and administrative proceedings where remedies and redressal is also provided to them.”⁵⁶

The United Nations Environment Program has underlined aims and objectives of public involvement which inter-alia include: “allowing the public to express its view on the scope and content of an EIA (and the proposed development action); obtaining local and traditional knowledge (corrective and creative) before decision-making; allowing more sensitive consideration of alternatives, mitigation measures and trade-offs; ensuring that important impacts are not overlooked and benefits are maximized; reducing conflict through the early identification of contentious issues; influencing project design in a positive manner (thereby creating a sense of ownership of the proposal); improving transparency and accountability of decision-making; and increasing public confidence in the EIA/SEA process.”⁵⁷

The discussion, has outlined the importance of ‘active’ public consultation which is *sine qua non* for a robust EIA. The 2006 EIA notification, has emphasized that that EIA process should take into account all concerns of those citizens or stakeholders, who are affected by the outcomes of such projects or activities, and which involves an impact assessment to be carried out before starting this activity.⁵⁸ The notification also states that “all Category ‘A’ and Category B1 projects or activities shall undertake Public Consultation”.⁵⁹ However, there are many projects which are exempted under the notification.⁶⁰ The 2006 notification,⁶¹ states that - the *public consultation* constitutes of two component i.e. public hearing and obtaining written responses.

⁵⁴*Ibid.*

⁵⁵*Ibid.*

⁵⁶ The Rio Declaration on Environment and Development (1992), available at: http://www.unesco.org/education/pdf/RIO_E.PDF (last visited on Sep., 30, 2019).

⁵⁷*Supra* note 5 at 66.

⁵⁸ Para 7(i)(III)(i).

⁵⁹ Para 7(i)(III)(i).

⁶⁰*Supra* note 49.

⁶¹Para 7[i] [III] [3] [i] SO 1533.

As stated in the foregoing paragraphs –it is seen – that that Indian courts and tribunals in the similar tenor has been giving due emphasis to the ‘active’ public consultation.⁶² Supreme Court, High courts and National Green Tribunal have adjudicated upon the validity of Environmental Clearance wherein the impugned public consultation processes in various developmental projects were minutely assessed. It must be stated here that the Supreme Court, High Court and NGT are vested with power to adjudicate upon the validity of Environmental Clearance “on the ground of illegality or irregularity in public hearings.⁶³ Public hearing can be challenged for the want of “procedural impropriety; adequate and authentic information; place of hearing and adequate consideration”.⁶⁴

Similarly, the Apex Court on numerous occasions has opined in favour of the pivotal nature of EIA report. The Apex Court has displayed its acute exasperation over distorted, manipulative, and evasive environmental impact assessment report. As recently the Supreme Court in the case of *Hanuman Laxman Aroskar v. Union of India*⁶⁵ expressed its displeasure, in the manner in which the EIA report was described as an attempt to overlook the existence of trees. The report further misguided the observation by mentioning the existence of only a few trees and bushes and being very sparse at the site. Further evidence displayed the fabrication of the fact that the proposed activity involved felling of 54,676 trees. The explanations given after these facts were exposed displayed a failure of the due process in matters related to environment and its governance. The Supreme Court then set aside, suspended, and even annulled environmental clearance due to the shortcomings in public consultation and faulty EIA report.⁶⁶

Supreme Court in Vedanta case i.e., *Orissa Mining Corporation Ltd. v. Ministry of Environment & Forests*⁶⁷ has stated that as per the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Panchayats (Extension to Scheduled Areas) Act, 1996 – these laws mandate scheduled tribes and traditional forest dwellers right to protect their custom and traditions and therefore their opinion becomes valuable, paramount and indispensable for any decision taken for the diversion of forest land

⁶² Justice D Y. Chandrachud in the case of *Hanuman Laxman Aroskar v. Union of India* writing the judgment states that: “The importance of public consultation is underscored by the 2006 notification. Public consultation, as it states, is ‘the process by which the concerns of local affected persons and others who have a plausible stake in the environmental impacts of the project or activity are ascertained with a view to take into account all the material concerns in the project or activity design as appropriate’. This postulates two elements. They have both, an intrinsic and an instrumental character. The intrinsic character of public consultation is that there is a value in seeking the views of those in the local area as well as beyond, who have a plausible stake in the project or activity. Public consultation is a process which is designed to hear the voices of those communities which would be affected by the activity”. See also *Adivasi Majdoor Kisan Ekta Sangthan v. MoEF* (2011), *Jeet Singh Kanwar v. Union of India* (2011).

⁶³ M P Ram Mohan, Himanshu Pabreja “Public Hearings in Environmental Clearance Process Review of Judicial Intervention” 50 *Economic & Political Weekly* (2016): “The Supreme Court (under Article 32, 136, Constitution of India [1950] and Section 22, National Green Tribunal Act [2010]), High Courts (under Article 226, Constitution of India), and NGT (constituted under National Green Tribunal Act [2010]) have the power to adjudge the validity of ECs on the grounds of illegality or irregularity in public hearings”.

⁶⁴ *Ibid*; See *Samata v. Union of India* (2011); *Adivasi Majdoor Kisan Ekta Sangthan v. MoEF* (2011); *Utkarsh Mandal v. Union of India* (2009); *T Mohana Rao v. Ministry of Environment & Forests* (2011); *Ramesh Agrawal v. State level Environment Impact Assessment Authority* (2011).

⁶⁵ M.A. No. 965 of 2019, Civil Appeal No. 12251 of 2018; Judgement delivered by the Supreme Court of India on March 29, 2019.

⁶⁶ On the ground of maintainability, Supreme Court in February 18, 2019 has set aside the judgement of NGT and refused to open the copper smelter plant in Tuticorin in the case of *Tamil Nadu Pollution Control Board v. Sterlite Industries (I) Ltd. & Ors.* (2019) SCC OnLine SC 221.

⁶⁷ Writ Petition (Civil) No. 180 of 2011; (2013) 6 S.C.R. 881.

for non-forest purposes. In *Lafarge Umiam Mining v Union of India*,⁶⁸ the Apex Court stated that both the earlier notification (EIA notification 1994 as amended in 1997) and 2006 notification make public hearing a mandatory aspect for the EIA process.⁶⁹ Further in the case of *Orissa Mining Corporation v Ministry of Environment and Forest*,⁷⁰ the Court observed that even for the expansion and modernization sought for the existing project environmental clearance should be taken from the appropriate authorities.⁷¹ In *Alaknanda Hydro Power Company v. Anuj Joshi*,⁷² case the Apex Court observed that the avowed and intended purpose of public hearing is to forge a proper and holistic environmental management plan.⁷³ The foregoing proposition was further cemented in the case of *Electrotherm (India) Ltd v. Patel Vipulkumar Ramjibhai*,⁷⁴ wherein the Supreme Court stated that public hearing forms an integral part and a prior requirement for granting an environmental clearance certificate. Further in the case of *Talaulicar & Sons v. Union of India*,⁷⁵ the Supreme Court emphasized on the effective public hearing. The Court stated that public hearing is *sine qua non* process which must be done in letter and spirit before the grant of environmental clearance. The improper method would only vitiate the entire process and the impugned public hearing would frustrate the environmental clearance.

V. CONCLUSION

EIA in its variegated form faces enormous challenges. Irrefutably, in almost every country EIA is besieged by the naysayer and detractors. For EIA to find a foothold is a continuous and daunting task – especially in the wake of - blind eulogization of *development* and *development project*. Development with blatant disregard and shorn of environment concerns seems ubiquitous. For many detractors who swear by developmental plank they have consistently peddled EIA as inordinately lengthy and time-consuming exercise. They regard it as an anti-development. No doubt these narratives are far stronger, entrenched, and pervasive. It is for these reasons it seems that the EIA has had far less influence than the supporter had hoped for. Nevertheless, it must be categorically stated that EIA when sought and done properly and diligently manages to lessen the possible conflicts. EIA when done with the able community participation and buttressed by *relevant information* aids in promoting sustainable development. It veritably becomes important instrument which render and metamorphose any given project into a – *environmentally sound developmental projects*. Experience with EIA has been a unique tryst for India! She is uniquely placed in terms of aspiring millions for prosperity in contrast with the pangs of reality. In her ponderous stride, EIA do come as an able enabler – a formidable starting point and a *desired innovative instrument*. EIA as practiced in India faces some of the unique challenges: such as EIA report being highly technical which disable the people in understanding the nuances of the report. It has also been seen – many a times – during public participation that the people end up asking for jobs and facilities instead of understanding the implications of the project. Supreme Court has able to secure moderate success in thwarting environmental deterioration. EIA - as a matter of fact - has received ample support and patronage from the Apex Court. The Supreme Court in its catena of cases has reinvigorated the tenor of EIA. It has pushed for the

⁶⁸AIR 2011 SC 2781.

⁶⁹Arup Poddar, “Public hearing and environmental protection” 3(3) *International Journal of Law* 67 (2017).

⁷⁰(2013) 6 SCC 476.

⁷¹*Ibid.*

⁷²(2014) SCC 769.

⁷³*Ibid.*

⁷⁴AIR 2016 SC 3563.

⁷⁵AIR 2016 SC 3351.

compliance of EIA. It has invoked the – *rigours of EIA* – as the touchstone for the grant of environmental clearance. It is a foregone conclusion that the principles of EIA if not duly complied with would be ominous for the sustainability of life. Environment bears no responsibility if it becomes penurious and too infirm to sustain life as it exists now. EIA is a good starting point!