ENSURING COMPLIANCE WITH ENVIRONMENTAL REGULATIONS: LEARNINGS FROM A MULTIFACETED OVERVIEW

Submitted by: Sankalp Srivastava

Year of study: 2019-20

Dissertation submitted in the partial fulfilment of the requirements for the Post Graduate Diploma

In

Environmental Law (PGDEL)

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY,

BENGALURU

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Reports

Books

Articles

News Reports

Conventions

COP Decisions

ABBREVIATIONS

Short-form	Full-form
BMW	Bio-Medical Waste
CAG	Comptroller and Auditor General
CBD	Convention on Biological Diversity
CDM	Clean Development Mechanism
CFC	Chloroflourocarbon
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CNG	European Union
COP	Conference of Parties
EC	Environment Clearance
EEZ	Exclusive Economic Zone
EIA	Environment Impact Assessment
EU	European Union
GHG	Greenhouse Gas
ICJ	International Court of Justice
MEA	Multilateral Environmental Agreement
MoEF	Ministry of Environment and Forests

MoEFCC	Ministry of Environment, Forests and Climate Change
NDC	Nationally Determined Contribution
NGO	Non-Governmental Organisation
NGT	National Green Tribunal
PCC	Pollution Control Committee
PIL	Public Interest Litigation
SDG	Sustainable Development Goal
SEIAA	State Environment Impact Assessment Authority
SPCB	State Pollution Control Board
UNFCCC	United Nations Framework Convention on Climate Change
USA	United States of America
WJP	World Justice Project

LIST OF FIGURES

ACKNOWLEDGMENTS

I would like to sincerely thank my professors at the Distance Education Department, NLSIU, Bengaluru, for giving me the opportunity to write this dissertation. I would also like to thank Ms. Geethanjali K.V from the Centre for Environmental Law Education, Research and Advocacy who gave me permission to proceed with a topic of my choice, and helped me narrow down my research questions.

This dissertation would not have been possible without the support of my parents and sister, who provided me with the resources to conduct my research and were patient with me while I worked upon it.

RESEARCH METHODOLOGY

The Research was done in a descriptive manner, by searching for secondary sources and preliminary reports, as far as possible for identifying the topics which needed further research in. Thus, for example, the chapter on Compliance in Philippe Sands' textbook on International Environmental Law was studied before conducting any further research on that topic. This provided a theoretical grounding and gave a broad overview of the subject.

Following this, key areas of research were identified and official legal sources such as the UN website, indiacode.nic.in, were studied for an overview of the legal texts of the conventions and statutes respectively. Wherever there was mention of any caselaw or further legal document, all effort has been made to retrieve it in its original form and most of the citations thus reflect the reference to these original documents in the format of the Bluebook (20^{th} edition).

The above efforts were supplemented by covering general online databases through keyword searches on relevant topics (for e.g. indiaenvironmentportal.org.in was perused for results on the Draft EIA notification, 2020).

CHAPTER 1: INTRODUCTION

"People of Orphalese, you can muffle the drum, and you can loosen the strings of the lyre, but who shall command the skylark not to sing?"

-Kahlil Gibran, The Prophet (On Laws)

The idea that ecological conservation is tied inextricably to humanity's survival is now more prevalent than ever. With the sense of urgency, one would assume, would also come a sense of abeyance to nature's will, of community, and of public participation. To the contrary, one can find many examples of non-conformity to the hallowed standards of Rule of Law, in as much as it binds citizens and authorities alike.

This leads one to be curious about what mechanism is put in place to deal with the question of non-compliance of laws that hold immense social value, given the context on which they operate. Is it just predicated on the moral values of people who must follow and manage these systems, or is there something larger running behind the scenes of the many-headed hydra that a system of laws may constitute? Does the system of laws that is formulated to deal with these issues have a grounding in allied fields such as economics, environmental psychology and public spheres of activism? This is the question that is sought to be researched into in Chapter 2, where some attention is also paid as to how these fields react.

In Chapter 3, the example of India as a country which implements its own compliance mechanisms, with its endemic problems towards implementation, and a large system of regulatory bodies, judicial bodies is taken and studied. Case studies from historical implementations of EIA regimes, and judiciary's response to the problem of implementation

is gone into with a look at how effective it has all been in preventing the state of India's environment from declining.

In Chapter 4, some effort is taken to categorise and describe the various kinds of implementation mechanisms that international jurists and bodies formed under different MEAs have sought to innovate on. Since international law is a field with its own unique diplomatic effects placing a hold on it, these limitations are recognised while studying the negotiations that affect the formulation of compliance mechanisms. The study of this field is gone into detail with respect to two different framework conventions.

Chapter 5 is where the author offers some concluding thoughts on what the learnings from a multi-faceted overview such as the present study point towards.

CHAPTER 2: DIFFERENT FACETS OF UNDERSTANDING COMPLIANCE WITH ENVIRONMENTAL LAW

From discussing "change management theory" to explain the internal institutional strife within the NGT, to a Weberian critique of the PIL jurisprudence in India, theorisations everywhere have sought to understand the compliance regimes and gauge their efficacy using wide tools. Thus, it would be remiss to conduct any analysis without a theoretical framework within which to proceed.

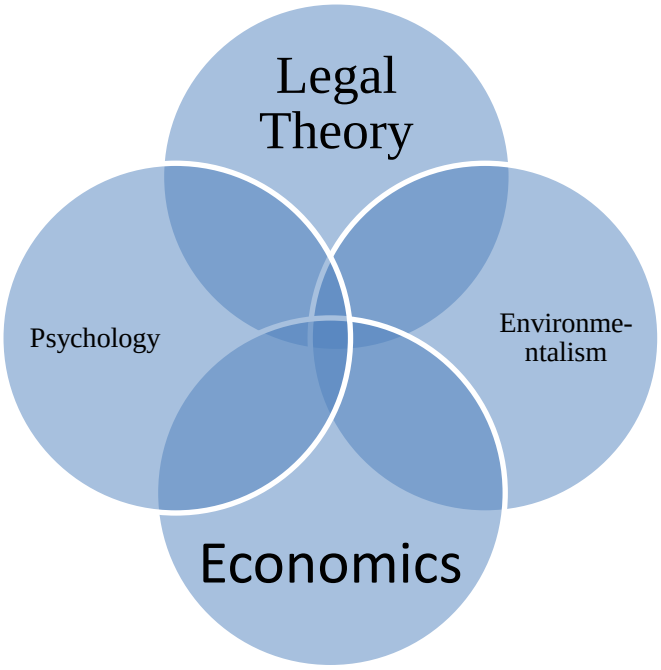

Figure 5: The interactivity amongst different approaches

This chapter will deal with the theoretical grounding to an multi-disciplinary understanding of the issues perceived with compliance.

I. Legal Theory

There are various approaches to legal theory that are relevant to understanding the system within which environmental regulations can exist. Thus, most legal theorisations answer the general question of "What is law?" and in doing so, these jurists give a conceptualisation of

the legal framework that can answer broader questions, while specific queries into fields such as "compliance jurisprudence" and the "commodity theory of law" give further insight. Throughout the traversal across these juristic theories hereunder, an effort is made to provide context by referring to the factual work laid down in previous chapters.

HLA Hart speaks of the "internal aspect" or the "inner point of view" that human beings take towards the rules of a legal system.[1] He incorporated this in his analysis of primary and secondary legal rules, where primary rules are those that impose duties, may generally involve physical change, and are to be complied with irrespective of the individual's will. Whereas, secondary rules are seen as dependent upon primary rules, not merely physical, and conferring powers such as those to change primary rules. Thus, he stated that in a society which has only primary rules, it is necessary for citizens to have an internal point of view, viewing such rules as common standards of behaviour whose violation will be criticised. However, in legal systems, very often it is possible that citizens don't have an inner point of view about primary rules, Hart stated that in such cases, it will be the view taken by the officials of the system, which must involve a conscious acceptance of those rules.

Hart's view about the "inner point of view" does well to complement the view taken by environmental psychology thinkers, that there are values and norms which exist internally and guide each persons motivation to comply environmental norms[2]. Thus, ina study on compliance of environmental norms by Danish farmers, it was found that the farmers perceived a moral obligation to comply with norms, and researchers found that perceived fairness of rules was one of the criteria which affected their compliance.[3]

---

1 HLA HART, THE CONCEPT OF LAW 207 (1994).
2 *Infra*, Chapter 3, Part IV.
3 S. Winter and P. May, *Motivation for compliance with environmental regulations.* 20 (4) JOURNAL OF POLICY ANALYSIS AND MANAGEMENT, 675 (2001).

Further, the requirements for an inner conscientiousness about their role and obligations play an important part, as has been highlighted by some people giving factual data on the same. In other words, it could be said that studies which report on "administrative lethargy"[4], lack of will to monitor,[5] and a culture of "casual compliance"[6] is antithetical to the formulation by Hart about what is necessary for a legal system to function effectively. Indeed, this idea of the institutions of government and the people who occupy them being the determinants is also accepted by Laski and Dewey[7]

The requirement of "inner morality" for Hart, has also lent itself to a study based on the study of morality and the structural theory of psychoanalysis – i.e, the idea that the reflective personality of an individual can be divided into three processes – the *id*, which is the unconscious mind, and represents an individual's most primitive and need-gratifying impulses; the *ego*, which is the source of the individual's spontaneous attitude towards the outer world, and the *superego,* which is the moral part of a human's mind. Thus, a researcher analysed a person, in absence of command, would look to the collective patterns of behaviour which serve as standards for his behaviour.[8] These collective standards inform his own *superego*, which is guided by law as it serves as the focal point for the convergence of this behaviour.[9]Further, language was seen as having an instrumental role in the shaping of laws, morality and even common standards in this researcher's paradigm. This was because of language's overarching role in the framing of legislations, politics, and occupation of the

---

4 Gitanjali Gill, The National Green Tribunal: Evolving Adjudicatory Mechanisms, 49 (2-3) ENVIRONMENTAL POLICY AND LAW 153 (2019).

5 KANCHI KOHLI & MANJU MENON, KALPAVRIKSH ENVIRONMENTAL ACTION GROUP, ELEVEN YEARS OF ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION: HOW EFFECTIVE HAS IT BEEN? 26 (2005)

6 Pranav Sinha, et al., *Environmental Compliance in India through the Auditor's Lens*,https://www.researchgate.net/publication/332211986_India_Environmental_Compliance_through_an_Auditor's_Lens, (May 2016).

7 VD MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 452 (1987).

8 S.G. Srejith, *Compliance Jurisprudence*, 48 (3) JOURNAL OF THE INDIAN LAW INSTITUTE 333, 346 (2006).

9 *Id.* at 348.

psychological plane of individual's lives.[10] Thus, according to this researcher, individual noncompliance with law was also a matter of the *superego* of that individual conflicting with the rationalisation provided by the law, which may at times be inadequate, due to a failure in communication about the spirit of the law.[11]

Kelsen, on the other hand, who wrote about the "pure theory of law", wanted law to be separate from sociology, ethics, psychology and other social sciences. However, his theory rested upon the idea of a fundamental norm, from which all norms emanate, the *Grundnorm*. This theory has been invoked by environmental law researchers to interpret the need for a global priority goal as the "*protection of bio-physical preconditions that are essential for long-term development*"[12]. This indicates an eagerness on part of environmentalists, which is also found in their movements, to give primacy to their goals above socio-economic indicators for some, and for some, the growth of economies themselves.[13]

According to Bentham, more often than not, parts of a law "lie scattered up and down at random", which having been brought into existence by different bodies at different times, need to be coordinated before a law could be said to be complete.[14]This observation at once becomes apparent when studying the mammoth Indian legal regime that provides compliance obligations. The need to standardise and rationalise laws is also frequently cited by lawmakers, however, whether this is actually the effect achieved is circumspect owing in large part to the fact that there is too vast a body of subject matters that are regulated by environmental regulations.

---

10 *Id.* at 349.
11 *Id.* at 351-352.
12 Kim and Bosselmann, *Operationalising Sustainable Development: Ecological Integrity as a Grundnorm of International Law*, 24 (2) REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 207 (2015).
13 *Infra*, Part III.
14 JEREMY BENTHAM, OF LAWS IN GENERAL 159 (HLA Hart, ed., 2nd ed. 1970);*Supra,* note 7 at p. 444.

II. Environmental psychology

The different frameworks in this discipline are enumerated hereunder:

1. Three kinds of values, i.e "*desirable trans-situational goals that vary in importance and serve as guiding principles in the life of a person or other social entities"* are identified by a group of researchers. These are egoistic (people who consider self-interest as primary), altruistic (people who regard the benefits and costs of other people or the community as primary) and biospheric (people who regard the benefits to the ecosystem as primary).[15] All three values may guide environmental compliance. However, the linkages with "self-concept" are necessary, since this may provide for the subjective experience of the individual within specific situations to activate these values, and, providing cognitive support in the form of rationalisation are seen as particularly effective ways to achieve compliance.[16]
2. Social norms are considered to be "*rules and standards that are understood by members of a group, and that guide and/or constrain human behaviour without the force of laws"*.[17] Within this part of the framework, a "focus theory of normative conduct" proposes that norms need to be activated in order to motivate behaviour of people.[18] These norms can be either descriptive – which refers to the behaviour shown by most group members, or injunctive – which refer to behaviour most commonly approved or disapproved.[19]

   Notably, it is found that when an injunctive norm is tied with a descriptive counterpart, there is an increased influence of these norms in a conjoint manner. Thus,

---

15 BRITISH PSYCHOLOGICAL SOCIETY, ENVIRONMENTAL PSYCHOLOGY: AN INTRODUCTION 146 (Linda Steg, et al., eds. 2013)
16 *Id,* at p. 148.
17 *Id,* at p. 154.
18 *Id,* at p. 157.
19 *Id,* at p. 154.

the fact that people were found to litter more in a littered setting is indicative of the "cross-norm inhibition effect" where the general injunctive norm that one should not litter is supplemented by the descriptive norm of no-litter in that surrounding.[20]

3. The study also delves into "social dilemmas" such as the tragedy of the commons stated by Garrett Hardin, when all individuals in a group act together for their self-interest, bringing a "ruin to all". Three conflicting motives in social dilemmas are presented – greed, which operates on the basis of competition and survival instincts; efficiency, which restrains greed by motivating towards collective outcomes; and fairness, which further has three principles.[21]

   The three principles of fairness are, equity (distributing resources according to input), equality (resources being distributed equally), and need (when others in need or jeopardy are helped). Awareness and information about norms are seen as further qualifications in the study of environmental psychology that can positively affect the compliance with environmental norms.[22]

4. In terms of strategically utilising the insight offered by this discipline of psychology, Prof. Linda Steg's research provides some details for this. It is suggested that, to combat the information saturation, some degree of tailored information should be provided about environmental norms.[23]The problem perceived with using monetary rewards to reward pro-environmental behaviour is that it may lead to cancelling of people's moral motivation to act. However, this can be countered with reinforcement

---

[20] *Id*, at p. 159.
[21] *Id*, at p. 179.
[22] *Id*, at p. 183, 265.
[23] *Id*, at p. 230.

of the inherent morality of the decision being communicated as the aspect being rewarded, rather than the economic consequences of such a decision.[24]

III. Environmentalism

The movement to fight against climate change has grown across leaps and bounds and has indeed caused insurmountable pressure leading to change in governmental decisions. The study of these movements gives us an idea of where the will to enforce the norm lies, amongst laypeople. It also provides us a coherent framework of what movements can qualify as successful, which, in collaboration with epistemic communities have been credited with positively affecting the change required.[25]

One of the frameworks that takes into account the varying forces that the environmentalists have to factor in, is articulated by Dr. Vandana Shiva in her "Earth Democracy". It successfully shows the relationship between economics, systems of international trade and national political governance, and ecological units such as farms, soil and the environment generally.

Another crucial framework identified by environmentalists has been liberal environmentalism, which has been defined as the "norm-complex" of market forces, redistributive policies, and environmental interventions.[26]This framework has been revealed to be founded systematically on ambiguities that have been expressed in its founding institutes, namely, the United Nations and the OECD.[27]It has been perceived as ignorant of the realities of the "enterprising nature" approach to capitalism which grows evermore on the

---

[24] *Id,* at p. 240.

[25] ,Leslie Mabon, et al., *What is the role of epistemic communities in shaping local environmental policy? Managing environmental change through planning and greenspace in Fukuoka City, Japan*, 104 GEOFORUM 158 (2019); STEVEN BERNSTEIN, THE COMPROMISE OF LIBERAL ENVIRONMENTALISM 212 (2001).

[26] STEVEN BERNSTEIN, THE COMPROMISE OF LIBERAL ENVIRONMENTALISM 120 (2001).

[27] *Id,* at p. 220.

backs of exploited labour and unflinching commodity production.[28] Liberal environmentalism is also perceived as singularising the costs of environmental crises using economics-based calculations that focus more on "*sustaining the liberal economic order, than pollution abatement or environmental quality*".[29]

Perhaps the most radically liberal of all frameworks that can be discussed in this regard is that of the "Green New Deal", which was proposed by senators in the US to make effective a 100% commitment to energy generation by renewable energy in that country, cause a spurring of massive growth in clean manufacturing, job-guarantees, overhauling transportation systems, to name a few.[30] However, this too has been criticised for being unaware of the impact of the growth-driven approach to changing society towards ecological sustainability. It merely provides for a reinvestment of resources within the existing structure. The liberal guarantees of "sustainable development" are seen as not being sufficient as they prove to lead to policies that cause a greenwashing of the global system of production that is inherently deficit.[31]Thus, the left-wing version of the Green New Deal that can be ascertained from different individuals' and organisations' contributions contains a more radical, effective set of propositions. This may extend to, for example, precise targets for the guarantees of auto-mobile industry's upheaval towards a system of collective mobility, de-carbonisation of industrial production, and also efforts to democratise the workplace.[32]

Thus, the "metabolic rift" that is envisioned by some critics of capitalism needs to be taken into account. In other words, as man draws increasingly from nature, beyond the capacities of

---

28 Jessica Dempsey, *The tragedy of liberal environmentalism*, 51 (2) CANADIAN DIMENSION 21 (2017).
29 *Supra*, note 26 at p.232.
30 Recognising the duty of the Federal Government to create a Green New Deal, H.R. 109, 116th Cong. (2019).
31 John Bellamy Foster, *Marx's Ecology in Historical Perspective,* https://www.marxists.org/history/etol/newspape/isj2/2002/isj2-096/foster.htm (Accessed on 23rd Dec., 2020).
32 Bernd Riexinger, *A Left Wing Green New Deal*,https://www.rosalux.de/en/publication/id/42875/a-left-wing-green-new-deal (Aug., 2020).

nature to provide for this increase in demand, there is damage caused due to this process of dramatic increase since the industrial revolution. Consequently a sobering of the industrial demands for commodities needs to take place, alongside all the radical liberal ideas for environmental change.

IV. Economic analyses

It is no secret that the factoring in of the costs, and conducting an economical analysis of the effects of environmental regulations is done, in primacy to other fields of analysis. The interplay between the fields of environmental regulation and economics is conducted in order to give an account of what may influence the corporates who are influential players when talking about environmental regulation.

Thus, a preliminary study of the literature on the economics of environmental compliance can be summarised as hereunder:

1. Rational choice theory, which states that the actions of private individuals in complying, or not complying with any environmental regulation depends on an analysis of the costs and benefits of doing so. This is generally limited to the ascertainable, direct effects of the actions.[33] However, it has also been extended in studies where the regime being studied makes differing strictness in inspections and penalties. Thus, it can also include the factoring in of the general leniency in regulatory authorities in response to compliance effectuated by an enterprise.[34]
2. The socio-behavioural paradigm put forth by some scholars is one which seeks to take into account motivations that are not accounted for in the rational actor models. Thus,

---

[33] James Alm & Jay Shimshack, *Environmental Enforcement and Compliance: Lessons from Pollution, Safety, and Tax Settings*, 10 (4) FOUNDATIONS AND TRENDS IN MICROECONOMICS 209, 248 (2014).

[34] *Id* at p. 250.

the "social pressures" such as investor preferences, managerial preferences, employee preferences, consumer pressures, and activist pressures were found to influence managerial decisions in industrial establishments.[35]In the same study, it was also found that there were indicators such as, the effect of activists on the economic viability of the firm, which point to the theory of a "coordinated mechanism".[36]

3. The role of regulatory authorities in enforcing compliance via disclosure of audits that yield environmental concerns was also cited as a strategy by one set of researchers.[37] In addition, the role of employees was highlighted. Their education, training and monitoring were all seen as essential, while rewarding them for exemplary pro-environmental performance and suggestions was seen as maintaining awareness and motivating.

---

35 Robert A. Kagan, et al., *Explaining Corporate Environmental performance: How Does Regulation Matter?* 37(1) LAW AND SOCIETY REVIEW 51, 68 (2003).

36 *Id,* at p. 84.

37 John Voorhees, An Evaluation and Survey of 42 Current Corporate Environmental Policy Statements, 13 PREVENTIVE LAW REPORTER 14 (1994).

CHAPTER 3: COMPLIANCE MECHANISMS IN INDIA

"Compliance mechanism" is defined as a mechanism which "*reviews the implementation of a contracting party's obligations*".[38] Although this definition also does not exclude the assessment of national law and practice, this is done with the aim of implementation of international obligations. For the purposes of this section of the dissertation, however, the author seeks to study similar mechanisms, which review the implementation of the Indian state's obligations towards its own citizens.

Indeed, the role of the government in implementing the very laws it enacts, was seen as an important duty of the government which it must abide by by the Supreme Court of India, in an order providing for the creation of the Monitoring Committee to assist with the control of misuse of residential properties in Delhi.[39] The following paragraph is indicative of the compliance deficit in the Indian scenario being recognised by the Supreme Court of India early on:

> "*What happens when violators and/or abettors of the violations are those, who have been entrusted by law with a duty to protect these rights? ... The problem is not of the absence of law, but of its implementation.*"[40]

I. An introduction to existing compliance mechanisms in Indian laws

Before delving into the status of compliance, it is important to outline the compliance mechanisms in place by taking note of the legal framework for it. There are various duties which fall on users/consumers/people who otherwise can be considered third-parties, with

---

38 Tim Enderlin, *A Different Compliance Mechanism*, 33 ENVIRONMENTAL POLICY AND LAW 155 (2003).
39 *M.C. Mehta v. Union of India*, AIR 2006 SC 1325.
40 *M.C. Mehta v. Union of India*, AIR 2006 SC 1325, ¶1.

respect to the persons who shall putatively owe a fiduciary duty towards maintaining the environment because of their relation as producers/occupiers/operators etc.

Thus, the awareness required to implement these laws is immensely important. In fact, it has been observed that public participation plays a key role with public awareness in making environmental regulations more efficient.[41] However, a case study done in Ludhiana revealed that public participation was severely lacking in proportion to the number of persons who were willing to participate. The reasons attributed were lack of information and awareness about environmental activities in general.

A multi-faceted environmental regime could have the benefit of tackling all problems in a highly nuanced manner, and if implemented accurately can achieve the goals of environmental regulation, which are ostensibly to provide for sustainable development. However, if the compliance mechanism is such that it requires active participation by communities of end users, producers and middlemen, as seen in the case of the rules framed under the Environment Protection Act, 1986, then public participation becomes doubly important. Non-participation can lead to issues of environmental injustice as well due to lack of accessibility of the regulatory mechanism to affected communities.[42]

II. Regulatory organisations and their role

The role played by various regulatory organisations is not to be understated. The quasi-federal nature of decentralisation of authority amongst environmental regulatory bodies has been criticised for a top-heavy approach which does not conform with the principles of

---

[41] Namita Gupta, *Environmental Awareness Policies and its Effectiveness: A study of Ludhiana City (India)*, 5 (1) ENVIRONMENT AND URBANISATION ASIA.

[42] SANJAY UPADHYAY & SUPARNA JAIN,INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, LEGAL ADVICE FOR ENVIRONMENTAL JUSTICE: EXPERIENCE FROM EASTERN INDIA (2015).

federalism.[43] The system itself is plagued by an opacity and lack of human resources, which has been the subject of many a study/recommendation.[44]

The examination of the regulatory structure is nevertheless important to get an overview of how the regulatory mechanism functions. The following discussion gives a picture of the various supervising and monitoring roles played by different regulatory organisations within the domestic Indian regulatory framework.

1. Ministry of Environment, Forests and Climate Change

The ministry exercises a lot of power in terms of changing the policy of the Central Government towards Environmental Law. It is the nodal agency in the Central Government for overseeing the implementation of India's environment and forest policies and programmes. It is also the nodal agency for various international programmes such as the UNEP, South Asia Co-operative Environment Programme (SACEP), International Centre for Integrated Mountain Development (ICIMOD). The Ministry has also been recognizing Environmental Laboratories and Government Analyst(s) under Environment (Protection) Act, 1986 with the aim of increasing facilities for analysis of environmental samples.

2. Regulatory bodies that deal with the pollution crisis in Delhi NCR:

A study of the regulatory bodies that have been formed solely to monitor and prevent pollution in the Delhi NCR is hereby undertaken.

---

[43] Sanjay Sharma & Ajay K. Singh, *Environmental Regulatory Authorities in India: An Analysis*, 64 (3) INDIAN JOURNAL OF PUBLIC ADMINISTRATION 1 (2018).

[44] P. M. Prasad, *Environment Protection: Role of Regulatory System in India*, 41 (13) ECONOMIC AND POLITICAL WEEKLY 1278 (2006); GOVERNMENT OF INDIA, REPORT OF WORKING GROUP ON ENVIRONMENT & ENVIRONMENTAL REGULATORY MECHANISMS IN ENVIRONMENT & FORESTS FOR THE ELEVENTH FIVE YEAR PLAN (2007-2012) at p. 42, https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/wrkgrp11/wg_envtal.pdf (Aug., 2007).

a. Commission for Air Quality Management in National Capital Region and Adjoining Areas.

As recently as 2020, on October 28, 2020 an Ordinance was promulgated by the Central Government, acting through the MoEFCC to form a Commission for Air Quality Management in National Capital Region and Adjoining Areas. While the commission's functions include co-ordination of state government actions, planning and executing plans, providing a framework, training and creating a special workforce, preparation of action plans; all of these are to be exercised for regulating the air pollution in the Delhi NCR region. The Ordinance's Preamble states that it has been formed to ensure more inter-state co-ordination and to fulfil the objectives of monitoring, compliance and enforcement of the laws made.[45] Effectively, a body which replaces the previous committees and task forces that were incorporated by constitutional courts, or governments at the Centre and State levels, is sought to be brought into force.

This commission has been given expansive powers to deal with all matters including restriction of activities influencing air quality, investigation and conducting research, preparation of codes and guidelines, and even implementing the National Clean Air Programme, National Air Quality Monitoring Programme, National Ambient Air Quality Standards. The commission also has the power of giving directions, failure to comply with which can lead to imprisonment of upto five years and/or with fine upto Rs. 1 crore. This is a hefty upper limit for the fines that can be imposed for non-compliance and presumably, is done with an intent of providing deterrence in the form of exemplary punishment.

---

[45] Preamble, The Commission for Air Quality Management in National Capital Region and Adjoining Areas, 2020, Gazette of India – Extraordinary, Part II, Sec. 1 (Oct. 28, 2020).

The committee is said to consist of members selected by a Selection Committee chaired by Minister in charge of MoEFCC and will consist of Ministers in charge of three other ministries (Ministry of Commerce and Industry, Ministry of Road Transport and Highways and Ministry of Science and Technology). This Committee shall select a Chairperson, two Joint Secretaries from the Central Government, three independent technical members, and three members from NGOs. It will also include ex-officio members from the central and state governments, and from CPCB, ISRO and Niti Aayog.

Although there are three sub-committees (one each on Monitoring and Identification; Safeguarding and Enforcement; and Research and Development), the extremely wide ambit of the Commission, which includes everything from laying down regulations in the form of delegated legislation[46] to source identification of air pollutants, to even specific research and development, could lead to issues in finally implementing these issues. In fact, most of the committee and sub-committee members are governmental or bureaucratic representatives, leaving space only for three representatives for NGO in the commission itself, but not in the sub-committees.[47]This amounts to an absence of public participation in one of the most crucial environmental bodies in the Delhi NCR whose enacting law has an overriding effect on all other laws, and whose decisions are appeallable only before the NGT.

Prior to the aforementioned commission, there were various bodies dealing with the air pollution in Delhi NCR, which included:-

b. The Environmental Pollution (Prevention and Control) Authority, 1998,

---

[46] Section 23, The Commission for Air Quality Management in National Capital Region and Adjoining Areas, 2020, Gazette of India – Extraordinary, Part II, Sec. 1 (Oct. 28, 2020).

[47] Section 4, 11, The Commission for Air Quality Management in National Capital Region and Adjoining Areas, 2020, Gazette of India – Extraordinary, Part II, Sec. 1 (Oct. 28, 2020).

This was formed pursuant to an order of the Supreme Court of India in writ petition (C) No. 13029. This body, in addition to dealing with air pollution, also deals with standards for quality of environment, standards for emission or discharge, restriction of areas in which any processes, industries, operations or class thereof shall not be carried out subject to certain safeguards. It also has the power to regulate procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for the same; and also it may regulate on handling of hazardous substances.

c. Central Control Room (CCR) for managing Quick Graded Response to control Air pollution in Delhi-NCR

Under this programme, Central and State Governments have set up 50 continuous ambient air quality monitoring stations in addition to 10 operated by Indian Meteorology Department in Delhi NCR. The CPCB contributes to this by collating the data for the use of different municipal stakeholders such as Delhi Development Authority, Public Works Department, Department of Transport and Delhi Traffic Police. There is also a mechanism for receiving complaints from the public.[48] In addition to this, the CPCB organised a Clean Air Campaign to check air polluting activities pre and post Diwali.[49]

Evidently, this regulatory body has a wider ambit since it deals with all kinds of pollution, not just air pollution which confines the newer Commission for Air Quality Management. However, it has taken significant steps even within the confines of regulation of air pollution, such as formation of Graded Action Response Plan for urgent remedial steps for air pollution, Comprehensive Action Plan to lay out different sources of pollution and measures that need

---

[48] CENTRAL POLLUTION CONTROL BOARD, ANNUAL REPORT 2018-19, at 40, 43 (accessed at: https://cpcb.nic.in/annual-report.php).

[49] *Id*, at 42.

to be taken, and various infrastructural and implementation level changes to combat vehicular emissions. [50]

3. Central Pollution Control Board (CPCB)

This was constituted under the provisions of the Water (Prevention and Control of Pollution) Act, 1974 by the Central Government. Since then, it has been entrusted responsibilities under the Air (Prevention and Control of Pollution) Act, 1981 and several rules under the Environment (Protection) Act, 1986. The CPCB has nine Expert Groups that provide advice on technical and environmental management issues.

The CPCB also has the following Programmes under a "Water, Air and Noise Monitoring Network":-

1) National Water Quality Monitoring Programme, which is a network of 3500 stations in 29 states and 6 UT's. Under this programme, the CPCB conducts a water quality assessment and identification of polluted river stretches under which it also assesses water quality of status of ground water in Delhi and rest of India separately. [51]

2) National Ambient Air Quality Monitoring Programmeis developed to measure and regulate pollutants in the air. With respect to its objectives, they are enumerated as determination of the status and trends of air quality, ascertainment of air quality standards being violated, identification of non-attainment cities with respect to national standards, and to obtain the knowledge and understanding necessary for developing preventive and

---

[50] Environment Pollution (Prevention and Control) Authority, *Letter from Bhure Lal Ji (Chairperson) and Ms. Sunita Narain (Member) to The Minister Of Environment, Forests and Climate Change* (accessed at :https://www.epca.org.in/epcadirection/Letter-to-Honble-Minister-of-Environment-Forest-Climate-Change.pdf).

[51] *Supra,* note 48 at p. 7.

corrective measures.[52] Further, under the National Clean Air Programme (NCAP), the tentative national level target of 20%-30% reduction of PM concentration is proposed under the NCAP taking the 2017 as the base year. [53]

3) National Ambient Noise Monitoring Network

The CPCB, in association with SPCBs monitors the noise levels in 7 metropolitan cities through 70 noise monitoring systems.[54]

4. State Pollution Control Boards

Section 4 of the Water (Prevention and Control of Pollution) Act provides for the constitution of a State Pollution Control Board, and thus these boards in each state act as the nodal body for implementing the aforementioned act, along with the Air (Prevention and Control of Pollution) Act, 1981 and Environment Protection Act, 1986 along with various rules framed thereunder.

5. National Coastal Zone Management Authority:

This was formed by an amendment to the 1991 CRZ notification made in pursuance of a Supreme Court judgment which directed the Central Government to set up a National and State Level Coastal Zone Management Authorities.[55] Subsequently, a committee was formed (under the chairmanship of Dr. Shailesh Nayak) which submitted its report in 2015. Although all of its recommendations were not incorporated directly in the CRZ notification of 2018, most notably this committee also did not involve any public participation. In fact, the Terms

---

52 *Id.*, at p. 32.
53 *Id.*, at p. 43.
54 *Ibid.*
55 Indian Council for Enviro-Legal Action v. Union of India and Ors., (1996) 5 SCC 281.

of Reference of the committee which asked it to go into the demands of the State Governments of Maharashtra, Karnataka and Kerala were strictly adhered to. To ensure that making way for eco-tourism doesn't result in environmental degradation, the steps that need to be taken, can include, as it has in other countries: a third-party certification scheme (such as an eco-label) and, indeed, monitoring of all areas where such kind of tourism occurs, in order to make it sustainable and amenable for tourism.[56]

The committee made a recommendation to the Central Government to utilise models such as that of the IUCN in making a model for identifying, conserving and drawing up concrete framework for conservation, protection and promotion of eco-tourism. However, the new CRZ notification, notified in 2018 contains no reference to the IUCN/any other model. In the absence of any regulatory mechanism to assign the benefits of eco-tourism to local communities, these will naturally flow to the corporations that use their resources to set up shop there.[57] This is an occurrance that has been admitted by the IUCN itself as well.[58]

6. Central Ground Water Board

This authority was formed by an order of the Supreme Court of India in *M.C. Mehta v. Union of India*,[59]urgent need for regulating the indiscriminate boring and withdrawal of underground water in the country. However, there is a case ongoing where the National Green Tribunal is overseeing the implementation of it's previous orders relating to groundwater management since there has been lacklustre observance by this authority

---

[56] Roberto Merli, et al., *The impact of green practices in coastal management: An empirical investigation of an eco-labelled beach club*, INTERNATIONAL JOURNAL OF HOSPITALITY MANAGEMENT, https://doi.org/10.1016/j.ijhm.2018.08.011 (2018).

[57] Anna Poelina & Johan Nordensvard, *Sustainable Luxury Tourism, Indigenous Communities and Governance* in ENVIRONMENT FOOTPRINTS AND ECO-DESIGN OF PRODUCTS AND PROCESSES 162 (Miguel A. Gardetti & Subramanian Senthikannan) (2017).

[58] PAUL F. J. EAGLES, ET AL., WORLD COMMISSION ON PROTECTED AREAS, SUSTAINABLE TOURISM IN PROTECTED AREAS 159.

[59] M.C. Mehta v. Union of India & Ors. (1997) 11 SCC 312.

towards its duty, in the tribunal's view.[60] In the course of proceedings, the Tribunal has struck down a 2018 notification which liberalised groundwater extraction without any impact assessment and effective checks, as being against the law.[61]The Tribunal also noted the lacklustre compliance by industries of the conditions for groundwater extraction, and hence ordered an annual review by independent experts which will audit and reviewthe same along with ground water levels. [62]

7. National Biodiversity Authority

NBA is a body corporate established in accordance with the provisions of Section 8 of BD Act. It is an autonomous, statutory and regulatory organization which is intended to implement the provisions of BD Act. There are also State Biodiversity Boards and Biodiversity Management Committees at the State and District Levels respectively.

8. Wildlife Crime Control Bureau

This is established under the MoEFCC, to complement the efforts of the State agencies and coordinate the actions of Central & State agencies in enforcement of the provisions of the Wildlife Protection Act, 1972.

9. Central Zoo Authority

This is constituted under Chapter IVA of the Wildlife Protection Act, 1972. Objectives are to, complement and strengthen the efforts in conservation of biodiversity, and enforcing

---

60 Shailesh Singh v. Hotel Holiday Regency, Moradabad & Ors., Original Application No. 176/2015, (National Green Tribunal, Delhi, July 20, 2020).
61 *Id*, ¶15
62 *Id*,¶39

minimum standards and norms for upkeep and healthcare of animals in Indian zoos and to control the planning of zoos in various ways.

10. Other regulatory bodies

State/UT Environment Impact Assessment Authorities are formed under the EIA regime to monitor category 'B' projects.

National Afforestation and Eco-development Board (NAEB):- it was formed in order to promote afforestation, tree planting, ecological restoration and eco-development activities in the country.

Compensatory Afforestation Fund Management and Planning Authority (CAMPA) which replaces the ad-hoc statewise CAMPA since 2018, the day when the Compensatory Afforestation Act, 2016 and its rules came into effect.

III. RULE OF LAW

1. THE RULE OF LAW - INTRODUCTION

The concept of Rule of Law, as formulated by A.V. Dicey consists of the folowing three principles[63]:-

1) The absolute supremacy of the law as opposed to dominance of arbitrary power.

2) Equality before the law, or the equal subjection of all classes of people to 'ordinary' law courts.

---

[63] AV DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202.

3) He also states that the "predominance of legal spirit" within English institutions which was apparent from the general principles of the constitution being inferred from the juridical decisions of courts in private cases brought before it, rather than the derivation of private persons' rights being done from the constitution, as in other countries.

The abovestated definition of Dicey in his treatise "*Introduction to the Study of the Law of the Constitution"* published in 1885 has been expanded upon by several other jurists in the modern era after the formulation given by Dicey. However, this is not to say that the Rule of Law is a strictly modern concept. It has been the subject of Greek and medieval era philosophers as well. For instance, Montesquieu wrote about the value of complexity in giving shelter to property ownership from political pressures. John Locke also gave priority to the value of property which no "Supreme Power" may interfere with. Here, we see an inclination towards protection of property.

Later, jurists like Lon Fuller would conceive of the principles of "inner morality" of the law, and ascribe to this principle certain procedural safeguards in a formalist way. HLA Hart would have his own theory on the internal psychological resonance of law in opposition to Fuller's. This is a debate which, admittedly remains politically, philosophically and culturally relevant to the administration of any legal system. However, for the purposes of this section of the dissertation, the conception of Rule of Law that arose out of debates that occurred in the modern era are more relevant.

In the modern era, Joseph Raz is mostly credited, or criticised for the idea that the rule of law is positivist in nature and does not have any bearing on whether the governance in accordance

with it is "democratic" or "authoritarian", observing human rights or not, and so on.[64]Another important point made by Raz is that law must surely consist of general, open principles but also there must be an array of particular provisions that act as tools in the hands of the judiciary and legal framework in administering justice or governing. Further, when Raz mentioned the lack of enforcement, he saw it as a "frustrated expectation" arising due to the shattering of the appearance of stability which made people rely on the law. This frustrated expectation, he categorised as a violation of the Rule of Law, which he saw as a greater evil than concrete harm as it offends dignity of people and entraps them in obeyance of a legal system in which the assurances made to the people are dishonestly withdrawn.

This principle of enforcement being a vital component of law has found some resonance amongst other authors as well,[65]while others still, have sought to criticise the conception of the Rule of Law as being separate from that of the normative conception of what a 'fair' and 'just' law is.

From the point of view of studying environmental Rule of Law, there has most notably been an emphasis on the subaltern consciousness, or in the words of Prof. Upendra Baxi, the Rule of Law discourseconstitues a "*a terrain of peoples' struggle incrementally to make power accountable, governance just, and state ethical."*[66]Prof. Baxi and other authors have stressed

---

64 JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 223 (1979).

65 J. J. Spigelman, The Rule of Law and Enforcement, 26 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 200, 203 (2003).

66 Upendra Baxi, The Rule of Law in India, 6 SUR - INTERNATIONAL JOURNAL ON HUMAN RIGHTS 7 (2007).

on Citizen-Suits as being essential components of Environmental Rule of Law in developing countries such as India.[67]

2. INDIA'S RULE OF LAW DEFICIT

India's Rule of Law deficit has been widely acknowledged and, indeed, has manifested itself in abysmal rankings on the Rule of Law Index prepared by the World Justice Project. This report is prepared independently by taking into consideration the performance of each country on the following metrics: 1) Constraints on Government Powers; 2) Absence of Corruption; 3) Open Government; 4) Fundamental Rights; 5) Order and Security; 6) Regulatory Enforcement; 7) Civil Justice; 8) Criminal Justice.

Amongst the various parameters reported on, the one that is the most relevant for the scope of this study is metric number 6, namely "Regulatory Enforcement". The data collated therein indicates that "Enforcement of regulations" is one of India's weakest points amongst the six components of the metric. Thus, India ranks 104th out of 128 countries in this sub-metric with a meagre score of 0.41 out of 1.[68]

---

[67] Irene Villanueva Nemesio, Strengthening Environmental Rule of Law: Enforcement, Combating Corruption, and Encouraging Citizen Suits , 27 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 321 (2015).

[68] *WJP Rule of Law Index*, WORLD JUSTICE PROJECT https://worldjusticeproject.org/rule-of-law-index/factors/2020/India/Regulatory%20Enforcement/ (last visited Dec. 23, 2020).

	Factor Score	Score Change	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	0.61	0.00	1/6	3/30	41/128
Absence of Corruption	0.42	-0.01	2/6	9/30	85/128
Open Government	0.61	0.00	1/6	1/30	32/128
Fundamental Rights	0.51	-0.02	3/6	10/30	84/128
Order and Security	0.59	0.00	4/6	24/30	114/128
Regulatory Enforcement	0.49	0.00	2/6	8/30	74/128
Civil Justice	0.45	0.00	2/6	18/30	98/128
Criminal Justice	0.40	0.00	3/6	9/30	78/128

* Indicates statistically significant change at the 10 percent level

Low Medium High

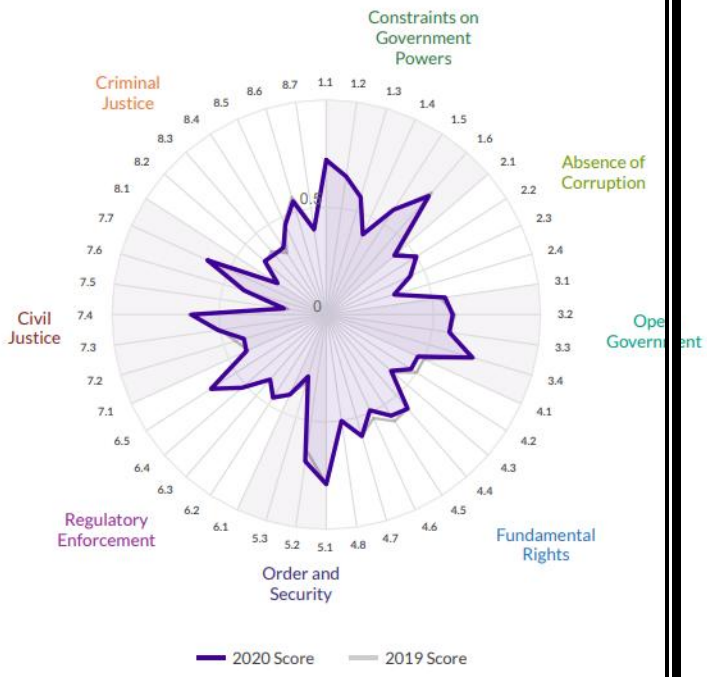

Figure 6: India's score on various metrics within the WJP Rule of Law Index

This goes to show that the problem of enforcement, and indeed, observance of Rule of Law is a systemic one for the country. As such, an inquiry into how environmental regulations fare in terms of enforcement, must also take into account the fact that the country faces a general deficit in the metric of Rule of Law and more specifically, in Regulatory Enforcement.

Acknowledging this would open up the option of interpolating observations about the General Rule of Law deficit in the specific study of Environmental Rule of Law. As such, the study of Environmental Rule of Law benefits from the legal theory linked with General Rule of Law. However, Environmental Rule of Law differs from the General Rule of Law due to the fact that it has heightened material consequences if not followed, not to mention the international acceptance of the urgency to act on the framing and enforcement of the rules in this more specific category. In the next section, we shall see how much of this need has been acknowledged by the Indian government post-1947.

IV. A REVIEW OF TWO PREVIOUS EIA REGIMES (1994-2006 AND 2006-2020) FROM A COMPLIANCE STANDPOINT

It is well acknowledged that environmental governance took root in the era of the Stockholm conference of 1972, with the legislation that was drafted thereafter, and the development of jurisprudence that allowed for the import of the principles of 'polluter pays', 'sustainable development' et al into Indian Environmental Law.[69] From a compliance and enforcement standpoint, however, the critical study of the rules framed for monitoring such as those under the EIA notifications; that of the role of the courts as administrators in PILs; and a wider study of governmental policiesbecomes crucial to undertake. This is because, as we shall discuss hereunder, the sheer volume of governance that takes place under the EIA regime and in PILs is vast.[70]

To begin with, the pre-existing literature on the EIA is examined. Thus, two comprehensive reports by Kalpavriksh Environment Action Group, are most relevant in this regard. The first report is from 2005 titled, "*Eleven Years of Environment Impact Assessment Notification: How Effective Has It Been?*". Upon a perusal of this report, it becomes apparent that through continuous amendments to the EIA there has been a dilution of the norms formulated under the EIA formulated in 1994 by the Ministry of Environment and Forests right from the point of the first notification, in as much as it differed from the draft notification (the main difference highlighted was restrictions of applicability of the EIA notification finally notified which were not included in the draft notification).

The dilution of the EIA notification through twelve amendments uptil the date of publication is traced in this report, and it becomes apparent that there has been constant enlargement of

---

[69] Vellore Citizens' Welfare Forum v. Union of India, AIR 1996 SC 2715.
[70] *See infra*, Parts IV and V.

the activities that are considered as necessary to be excluded from public consultation or the EIA process itself. The report notes that in some cases, such as defence related road constructions being excluded, there is a large ecological impact since the areas to which the exception applies see road construction primarily through such projects only.

There were several issues with the EIA process noted by the authors of this report, which primarily included a lack of quality (of the EIA notification's provisions, the reports submitted and the public hearings), a lack of institutional capacity (for redressal), lack of capacity building and lapses in composition of expert committees.

Most notably, the report mentions that there is a lack of monitoring and compliance of the conditions under which the EC is granted. While analysing this issue in detail, the report mentions another report by the Expert Committee (formed under the EIA notification) which states that non-compliance of EC conditions in case of river valley projects between 1978 and 1995 was upto 90%.[71] The reasons ascribed for this deficit of compliance are that there is a lack of transparency of the project's EC conditions, which is plausible given the fact there is reference to instances where public participation is held in a questionable manner,[72] and that there is no mention of non-compliance in the compliance reports for some blatantly defiant projects obtained under the RTI by the authors.[73]

Thus, since a loss of inclusion of the local communities leads to a state of unarming in case of EC violations, the inclusion of such locals who are affected by the repercussions of such violations must be put in motion by transparent, accessible information to them, since they

---

71 KANCHI KOHLI & MANJU MENON, KALPAVRIKSH ENVIRONMENTAL ACTION GROUP, ELEVEN YEARS OF ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION: HOW EFFECTIVE HAS IT BEEN? 26 (2005) [hereinafter KALPAVRIKSH – I].

72 *Ibid.*

73 KALPAVRIKSH – I, *supra* note 9 at 27.

are primary stakeholders in such situations.[74] The report also recommends widening of the scope of public hearings, with a more detailed conduct of the same, in a multi-phased manner. Independence in the conduct of the EIA itself (which is conducted by project proponents and hence cannot be unbiased), and accountability of the proponents is also given due regard in the report.

The second report is from 2009 titled '*Calling the Bluff: Revealing the State of Monitoring and Compliance of Environmental Clearance Conditions'.* The methodology consisted of reviewing compliance and monitoring reports of projects, interviews, in-depth field investigations, and written responses from the MoEF.

The report aimed to analyse the then well-acknowledged problem of non-compliance with EC's due to lack of monitoring by the MoEF. While introducing their report, the authors point out the important issue of unreliable compliance/monitoring reports, due to their investigative analysis in the five cases they did a field-investigation, presenting a different situation on ground as compared to what was observed in the compliance report by the authorities and MoEF.[75]

At this juncture, it is important to remember the distinction between a compliance and monitoring report, the former being mandated by the EIA notification of 2006 in Clause no. 10, titled "*Post Environmental Clearance Monitoring*" under which the project authorities are mandated to "submit half-yearly compliance reports in respect of the stipulated prior environmental clearance terms and conditions in hard and soft copies to the regulatory

---

[74] KALPAVRIKSH – I, *supra* note 9 at 78.

[75] KANCHI KOHLI AND MANJU MENON, KALPAVRIKSH ENVIRONMENTAL ACTION GROUP, CALLING THE BLUFF: REVEALING THE STATE OF MONITORING AND COMPLIANCE OF ENVIRONMENTAL CONDITIONS 9 (2009) [hereinafter KALPAVRIKSH – II].

authority concerned, on 1st June and 1st December of each calendar year."[76]The latter, that is "monitoring reports" are those conducted by the MoEFCC through its regional offices, for projects that lie under each of their respective territorial jurisdictions.

The report mentions that there are glaring discrepancies amongst the compliance and monitoring reports themselves and between each other as well.[77] Additionally, there are many cases observed where the reports filed are copies of each other for projects in the same area/conducted by the same project proponents, such as those observed by the authors of the report in the GIDC estate in Gujarat.[78] This contributed to the apathy in compliance with EC conditions which is clearly seen as a mere administrative formality by both the MoEFCC and project proponents too.

An analysis of the projects in this report reveals that there is a blatant defiance of EC conditions, and even in cases of refusal of EC projects begin work.[79] This has an aggravated impact due to the authorities in the Regional Offices being rendered toothless while enforcing environmental regulations against deviant project proponents. They have only been granted the power to issue show-cause notices, while further powers to prosecute or revoke clearances rests with the MoEFCC.[80] The court cases in themselves can prove to be a problem due to the judicial ambivalence at the NGT,[81] which is exacerbated by the general Rule of Law deficit contributing as it does to a judicial backlog.

---

[76] Paragraph 10 (i), Notification issued by Ministry of Environment and Forests, Gazette of India, pt. II, sec.3, sub-sec. (ii) (Sep. 14, 2006).
[77] KALPAVRIKSH – II, *supra* note 13, at 24.
[78] KALPAVRIKSH – II, *supra* note 13, at 25.
[79] KALPAVRIKSH – II, *supra* note 13, at 14.
[80] KALPAVRIKSH – II, *supra* note 13, at 26.
[81] *See*, text accompanying notes 112-127.

The capacity of the MoEFCC is seen as limited,[82] and not just by the authors of this report but also by other governmental reports,[83] and indeed even the NGT's Principal Bench.[84] Due to this limited capacity, the impact on monitoring and compliance of the EC conditions is hindered greatly, since at the time of writing the report, there were over 6,000 projects that were under the purview of the MoEFCC. Surely, the sheer amplitude of the scope of work requires more than two or three scientists in each regional office apiece.[85]

V. THE CURRENT STATUS OF COMPLIANCE

1. Sandeep Mittal v. Union of India (OA 837/2018)

In the case of *Sandeep Mittal v. Union of India*, that is currently pending at the NGT at its Principal Bench in New Delhi, some very valuable observations regarding the state of compliance and monitoring have been made. In this case, the repercussions of the decisions of the NGT and the MoEFCC on compliance and monitoring were rightly observed by the NGT as having an effect on the "Environmental Rule of Law"[86]

The case was originally brought by the petitioner, Sandeep Mittal to seek remedy against the Environment Clearance (EC) granted by the State Level Environment Impact Assessment Authority for construction on fertile cultivatable land in a village in Haryana, for which it was feared that groundwater depletion would also be caused. The NGT initiated a review into the

---

82 KALPAVRIKSH – II, *supra* note 13, at 8.

83 GOVERNMENT OF INDIA, REPORT OF THE STEERING COMMITTEE ON THE ENVIRONMENT AND FORESTS SECTOR FOR THE ELEVENTH FIVE YEAR PLAN (2007-2012), https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/strgrp11/str11_EF.pdf (Mar. 2007).

84 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi).

85 KALPAVRIKSH – II, *supra* note 13, at 11.

86 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, Apr. 29, 2019), ¶7.

monitoring mechanism, seeking a reply from the MoEFCC, on the grounds that, conditions imposed by EC's are "flouted with impunity, in absence of any monitoring mechanism".[87]

As the proceedings went on over the next couple of years, the NGT questioned the MoEFCC on various grounds regarding compliance and monitoring of EC's. It became quickly apparent to the NGT that the MoEFCC either "withheld data" or gave an inadequate response, especially when it merely gave a figure of total projects being monitored year-wise in response to the NGT's query about furnishing data regarding the compliance mechanism.[88]Thus, the NGT summoned the officer who had submitted this data.

It was submitted by the officers of the MoEFCC that monitoring has been done in respect of 8% of the projects of category-B and 67% of the projects of category-A for the period from 2013-2019. The NGT took notice of the fact that monitoring mechanism only involves issuance of show cause notices and seeking action taken reports but there is no application of 'Polluter Pays' principleby assessing and recovering compensation where violations are found.[89]Thus, the NGT ordered following remedial measures:- compensation to be payable for violation, maintenance of online data separately for A & B projects and 100% checking of category A projects, with a reasonable percentage of category B.[90]

---

87 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, Oct. 30, 2019).

88 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, Mar. 14, 2019).

89 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, Apr. 29, 2019), ¶4

90 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, Apr. 29, 2019), ¶5.

Later, it also took not of the submission regarding shortage of staff and permitted the outsourcing of validation functions.[91]At the same hearing, submissions made by the Environment Ministry were pertaining to third-party monitoring mechanisms. It will consist of governmental institutes, universities, NGOs, mainly for monitoring of category 'B' projects. Tribunal further directed that for category 'A', MOEFCC's duty to conduct data validation. For category 'B', such data validation may be done by SEIAA (and SPCB).

Later, the MoEFCC submitted that for inspection of all EC's granted from 2013-2019 only, it would take 2.5 years, that too with a 50% increase in staff. The present manpower capacity at the time of making submissions allowed it only to complete such an inspection within 4.5 years. Whereas, if all EC's granted since 1994 onwards were taken, these numbers changed to 6.5 years and 13 years respectively. This submission was considered by the tribunal to be a "mockery of the law" and the Six Monthly Action Plan submitted by the MoEFCC was also chided as being of "no value unless it is resulting in improvement on the ground".[92]

Further, the NGT referred to a Supreme Court order given in the case of *T.N. Godavarman Thirumulpad v. Union of India & Ors.*[93] where a similar observation was made, viz. Gaps in monitoring and compliance defeat the purpose of the conditional EC. The NGT also spoke of need to prioritise projects where environmental degradation may be higher due to nature of activity or ecological sensitivity. The NGT's remedial actions ordered at this hearing were to

---

91 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, July 23, 2019), ¶6.

92 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, Nov. 22, 2019), ¶15.

93 T.N. Godavarman Thirumulpad v. Union of India & Ors., (2014) 4 SCC 61.

have Category A projects monitored twice in a year and all Category B projects are monitored not less than once in a year.[94]

At the last hearing in this case, the NGT observed that, despite repeated directions and pleas to have merely having proposals and enactments, without enforcement on the ground amounted to "insensitivity to the vital constitutional obligations". Unfortunately, no steps being brought on affidavit to enforce compliance at the hearing on 31st July, 2020 (which also had the most recent order passed), the court listed the matter for further consideration on 17th December, 2020. This was adjourned for hearing at 1st February, 2021.

2. The EIA draft notification, 2020

The MoEFCC, with a view to amending the EIA notification, 2006 with the purported object of, inter alia, making it more transparent, rationalised and standardised, notified the Draft EIA notification. The provisions of the notification, however, drew the ire of varied groups (including a women's rights organisation,[95] student unions,[96] farmers[97] and fishermen[98] to name a few). Thus, it has been argued that women are most affected by the degradation of natural resources that results in men travelling for work, and consequently more burden on women to manage degraded lands and impoverished households. It is important to consider

---

94 *Sandeep Mittal v. Union of India*, Original Application 837/2018 (National Green Tribunal, Delhi, Nov. 22, 2019), ¶15.

95 A. Tsuha, et al, A gendered perspective on draft EIA notification, 55 (32-33) ECONOMIC AND POLITICAL WEEKLY (2008).

96 *NSUI drive against EIA notification*, ASSAM TRIBUNE (Aug. 10, 2020), *http://www.assamtribune.com/scripts/detailsnew.asp?id=aug1120/city052*.

97 *Draft EIA notification anti-farmer,* THE HINDU, (July 27, 2020), https://www.thehindu.com/news/cities/Coimbatore/draft-eia-notification-anti-farmer/article32206524.ece

98 *Fishworkers forum demands complete withdrawal of EIA 2020*, THE HINDU (Aug. 11, 2020), https://www.thehindu.com/news/national/tamil-nadu/fishworkers-forum-demands-complete-withdrawal-of-draft-eia-2020/article32321320.ece

the impact that any policy level change can have on marginalised communities of people, and hence the criticism by their rights' groups becomes more important.

The substantive legal portions of the various criticisms of the EIA have been reproduced hereunder:-

a) *Ex-post facto clearance for projects*

The draft EIA provides for ex-post facto clearance of projects. To be specific, under the provisions dealing with violation cases, there has been two pathways formulated for cases of violation, whose cognisance may be taken *suo moto* by the application of the project proponent, report by any Government Authority (the SPCB/PCC's inspections would fall under this), or it is found during the appraisal by the appraisal committee, or during the processing of the application. In any case, these cases of violation are proposed to be placed before an appraisal committee. However, the issue lies with the post-facto clearance that can be granted in case the project has been constructed or carried on at a site, where it could have been done lawfully or sustainably, and "in compliance of environmental norms with adequate environmental safeguards".[99]

The safeguards in the above provision are that only those projects that were legal at the time of construction can be given a clearance, in addition to being non-degrading of the environment. Additionally, the provision for ex-post facto clearance provides for the prescription of specific Terms of Reference on an assessment. However, the objection to this provision arises from the fact that allowing for such a procedure

---

[99] Notification to be published in the Gazette of India, Extraordinary, Part II, Sec. 3, sub-sec. (ii), http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf, ¶22(3) [hereinafter, "Draft EIA"].

essentially gives impunity to project proponents to disregard the EC regime if they can satisfy a subjective requirement of being environmentally sound. This also allows them to bypass the route of public participation, scoping and all the other assessments that may done in an EIA such as prefeasibility report, and other approvals from authorities.

This procedure also allows the imposition of a penalty either of 1.5 or 2 times the amount of ecological damage caused and economic benefit derived, depending on whether the cognisance is suo moto or not. However, it is the author's submission that the "polluter pays principle" is not meant to normalise the violation of environmental regulations. It has the specific mandate of providing for compensation and preventing the harm caused to the environment.[100] Incorporating it as part of regular procedure, would also defeat the purpose of avoiding externalisation of costs and allocation of responsibilities,[101] towards serving a purpose similar to that of exemplary punishment.[102]

It is also unclear what the status of compliance and monitoring for a project granted ex-post facto clearance would be, since many of the provisions relating to a putative EC have been discarded for an expedited procedure of ex-post facto clearance for violators. There may or may not be the same kind of data related to the impact of the project furnished by the project proponents, as has been in the case of an EC normally granted. In fact, the job of collection and processing of data required to assess the

---

[100] MC Mehta v. Union of India, AIR 1987 SC 965.
[101] *See*, M. KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW (2009).
[102] MC Mehta v. Kamal Nath and Ors., (1997) 1 SCC 388.

damage has been bestowed upon government and accredited/recognised laboratories. This further creates a bureaucratic burden for providing a post-facto clearance.

The Supreme Court, as recently as in 2020, in the case of *Alembic Pharmaceuticals v. Rohit Prajapati*,[103]held that the "*concept of an ex-post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January, 1994*".[104] The reasons attributed by the court for this being so were that, contrary to the procedure laid down in the notification, doing so would absolve the careful application of mind and study into consequences of a proposed activity on the environment. Thus, the court found that such an allowance would be contra to the precautionary principle and the need for sustainable development. In doing so, the court affirmed an earlier decision.[105]

b) The draft EIA exempts certain categories of projects from the requirement of a prior EC. This has been done under the broad categorisation of B2 projects where the procedure has been shortened to three steps (Preparation of Environment Management Plan report, appraisal and finally, grant/rejection of EC).

c) Public participation diluted:

The draft EIA exempts certain categories of projects from a public hearing. This includes all category B2 projects, and category A and category B1 projects seeking expansion or modernisation with a capacity increase of up to 50%. There are also

---

[103] Alembic Pharmaceuticals v. Rohit Prajapati, [2020] INSC 311.
[104] Alembic Pharmaceuticals v. Rohit Prajapati, [2020] INSC 311, ¶23.
[105] Common Cause v. Union of India, (2017) 9 SCC 499.

some more specific projects included in the list of projects exempt from public consultations.[106]

Admittedly, there were certain defects in public participation as it was ongoing under the 2006 notification already. These were also caused by the procedural oversight in placing the public consultation as a requirement, after the scoping and draft EIA report is prepared, making the incentive to incorporate public concerns minimal. [107]

Thus, researchers studying the incumbent state of the EIA regime, have posited that increased public participation which would include access to more information, involvement and participation assistance, would be necessary to remedy the detrimental effects of an ineffective public participation regime (as per a case study done in Gujarat).[108]

However, in the draft notification there has been no remedy to these documented problems. Instead, the time granted for the affected citizens to raise their concerns has also been reduced from 30 days to 20 days, for those located in close proximity to the site. This has also been perceived as being harmful to the public participation process because, the need was instead for specification of a minimum time period for disclosing the EIA report to the affected parties. In absence of such specification, there is a recorded history of the necessary details being furnished to the affected parties as late as 4 days before the hearing. The Delhi High Court has also addressed the issue of faulty public hearings due to lack of opportunities of the public to

---

106 Draft EIA, *supra*, note 98 ¶14(2).

107 Ariane Dilay, et al., *Environmental Justice in India: a case study of environmental impact assessment, community engagement and public interest litigation*, IMPACT ASSESSMENT AND PROJECT APPRAISAL, https://doi.org/10.1080/14615517.2019.1611035 (May 6. 2019).

108 *Id*, at p. 10.

participate effectively when the details are furnished less than 30 days before the hearing, also terming the hearing a "public act" for the purposes of administrative law.[109] However, this issue has not been dealt with by the Draft EIA notification.

In the draft notification, there is also a provision that provides for bypassing the public consultation phase even if the project falls under the category not exempt from it, if the authorities feel that it is not possible to conduct the public consultation in a manner in which people's views can be heard.[110] This provision can very likely be misused to quell legitimate expression of dissent against massive industrial projects being undertaken, since the issue of taking over of environmentally sensitive land for "development" is one which can be polarising very often. It may also lead arbitrariness due to the non-specification of criteria with which the state can exercise this discretion.

d) The problems related to compliance in the EIA regime has been discussed in detail previously.[111]To reiterate, the sheer lack of monitoring reports and institutional mechanism to conduct such monitoring means that there is often a glaring omission of compliance of EC conditions altogether. The MoEFCC has also represented in the NGT that it may take steps to tackle such issues. In the draft EIA 2020 notification, however, there is a relaxation of the requirement for compliance and monitoring reports, with the biannual requirement being replaced for an annual commitment.
e) Collection of baseline data by the project proponent has been reduced to one season, except for monsoon in most cases. This affects the legitimacy of the data, since data

---

[109] Utkarsh Mandal v Union of India, [2009] INDLHC 4909.
[110] Draft EIA, *supra*, note 98 at ¶14(8).
[111] *See*, *supra*, Part IV.

across seasons is required for. Additionally, the compliance monitoring that is required to be done as per the EIA notification, by the MoEFCC or the pollution control boards, shall be done against this baseline information.[112]

3. THE JUDICIAL MECHANISM TO ENFORCE COMPLIANCE

a) The National Green Tribunal

The need for a specialised court to deal with environmental matters in the country was first articulated by the Supreme Court of India.[113] The Law Commission Report. The NGT's responsiveness to environmental concerns was considered remarkable in a study covering judgments from 2011 to 2016.[114]

Prof. Gitanjali Gill provides a historical account of the NGT's functioning in her wide-ranging work on this adjudicatory institution. In a book review of her work on the NGT by the Chief Justice of the Third Environmental Court in Chile, we find that he agrees with her evaluation that the inclusion of scientific/technical members on the bench to adjudicate decisions in environmental law is necessary to give effective decisions, since in environmental law, one must solve problems beyond the law itself.[115]The NGT has won international commendation for it's work in innovations such as expanding its jurisdiction by way of diluting *locus standi* norms, effectively making the court more accessible.[116]

---

[112] Draft EIA, *supra*, note 98 at ¶20(11).

[113] M.C. Mehta v. Union of India (1986) 2 SCC 176; Indian Council for Enviro-Legal Action v. Union of India (1986) 3 SCC 212; A.P. Pollution Control Board v. M.V. Nayudu (1999) 2 SCC 718.

[114] Sridhar Rengarajan, et al., *National Green Tribunal of India – an observation from environmental judgments*, 25 ENVIRONMENTAL SCIENCE AND POLLUTION RESEARCH 11313 (2018).

[115] Hantke-Domas, Michael. 2017. *Environmental justice in india: The national green tribunal*, 6 (3) (11): TRANSNATIONAL ENVIRONMENTAL LAW, 557.

[116] Gitanjali Gill, The National Green Tribunal: Evolving Adjudicatory Mechanisms, 49 (2-3) ENVIRONMENTAL POLICY AND LAW 153, 153 (2019).

It has also conferred upon itself the power of judicial review by an expansive interpretation of Section 14,[117] which section defines the original jurisdiction of the NGT as being over all civil cases where a substantial question relating to the environment is involved. Thus, the NGT has rationalised its powers of judicial review by stating that this will effectively ameliorate the conditions of judicial backlog present in the High Court, and will also lead to filtering out of frivolous claims by the NGT, whose decision can ultimately be appealled before the High Court equipped with a statement on the merits of the case.[118]

This has, however been a highly contested enlargement of the tribunal's powers, which has found itself the condemnation of the Bombay High Court, who found that such a power was contrary to the scheme enacted in the Act itself.[119]In another instance, the High Court found that the NGT issuing orders in a case which was formerly being heard by the High Court would "not be in the interests of justice" and thus, sought to conserve its power of judicial review over all tribunals that are situated within its jurisdiction.[120]

The NGT has also been criticised for conferring upon itself the power to institute cases *suo motu,* which led to the Madras High Court restraining the Southern Bench for a temporary period from taking any such action [121]

To go into the matter of compliance of the NGT's decisions, it is severely deficient when enforcing penalties, due to the "absence of a centralised system and poor response of

---

117 Section 14, The National Green Tribunal Act, 2010, No. 19 of 2010.

118 Wilfred J. S/o John Netto and Ors. v. Ministry of Environment and Forests, New Delhi and Ors., M.A No. 182 of 2014 in Appeal no. 14 of 2014, (National Green Tribunal, Delhi, 17 July, 2014) at ¶91.

119 Central India AYUSH Drugs Manufacturers Association and Ors. v. State of Maharashtra, AIR 2016 BOM 261 at ¶27.

120 Court on its own motion v. National Highway Authority of India, Nagpur and Ors., 2015 IndLaw Mum 1649.

121 P. Sundararajan and Ors. v. Deputy Registrar, National Green Tribunal Chennai and Ors., 2015 (4) CTC 353.

authorities". The penalties themselves have been criticised for being stop-gap payments. [122] Indeed, this criticism towards the financial mechanisms being defunct has been levied by the NGT with respect to the Environment Relief Fund incorporated under the Public Liabilities Insurance Act, 1991.[123] It may also be noted that the amount of compensation collected for harm caused to environment by the NGT itself may also be remitted to this fund.[124] However, there have been no persons, authority or purpose prescribed for this fund, despite it being designated so in the act.

It has been noted that the new chairperson of the NGT took steps to remedy the backlog, such as mandating an advance service of notice to government authorities when they are to be impleaded as respondents. Once again, this step was taken to remedy the increase in frivolous litigation and has resulted in an increased number of cases being disposed.[125]

The NGT has formulated a "Stakeholder Consultative Process in Adjudication" with the stated intent of knowing the "*intent of the executives and the political will of the representative States who were required to take steps in that direction*". Thus, a host of governmental stakeholders such as Secretaries from the Central Government, Chief Secretaries from the State Governments, officers of the SPCBs, were all heard alongside the representatives from the private sector, and persons involving lesser stakes as well.

Thus, for example, the continuing mandamus in the case involving a suo motu cognisance of a news report has also reflected that the NGT is committed to bringing to attention the urgent

---

[122] Gitanjali Gill, The National Green Tribunal: Evolving Adjudicatory Mechanisms, 49 (2-3) ENVIRONMENTAL POLICY AND LAW 153, 156 n. 65. (2019).
[123] Gyan Prakash v. MoEFCC, OA No. 86/2020 (National Green Tribunal, Delhi, Nov. 20, 2020) ¶7.
[124] Section 24 (1), The National Green Tribunal Act, 2010, No. 19 of 2010.
[125] Gitanjali Gill, The National Green Tribunal: Evolving Adjudicatory Mechanisms, 49 (2-3) ENVIRONMENTAL POLICY AND LAW 153, 157 (2019).

need for action by all parties, which includes state governments, CPCB, SPCBs, PCCs, the MoEFCC, and other local authorities and bureaucrats.[126]

However, the problem with respect to staffing of the NGT has been considered by Prof. Gill to reflect the political apathy towards the need to equip the institution which seeks to bring environmental justice.[127]Thus, questions have been raised also regarding the appointment of bureaucratic officers from the Indian Forest Service as Expert Members on the grounds that there will be a conflict of interest, and their qualifications would be limited, rendering them unable to serve the function of an Expert Member.[128]

b) The PIL procedure

The procedure for PIL which was a judicial innovation of the 1980s is founded on the principle of relaxation of "locus standi" rules, with the stated intent of "*democratisation of judicial remedies, and removal of technical barriers against easy accessibility to justice*"[129]. Under this approach to adjudication, the Supreme Court has passed judgments with wide-ranging implications on environmental policy. Thus, the Supreme Court has taken suo-motu cognisance of the pollution of river Yamuna in a case which is still pending disposal at the NGT, to which it was transferred. In this case, the court took cognisance of a newspaper report, in the year 1994 that reported on pollution in the river. However, this case has seen the Supreme Court issuing many directions, inter alia, such as issuing orders for an action plan

---

126 In re: Suo motu cognisance of News item published in 'The Times of India' authored by Shri. Vishwa Mohan titled "NCAP with multiple timelines to clear air in 102 cities to be released around 2015", Original Application No. 681 of 2018 (National Green Tribunal, Delhi, Oct. 8, 2018).

127 Gitanjali Gill, *Mapping the Power Struggles of the National Green Tribunal of India: Rise and Fall?,* 7 ASIAN JOURNAL OF LAW AND SOCIETY 85, 114, 118-119 (2020).

128 Ritwick Dutta, *Woes of the National Green Tribunal: Are the recent appointments unconstitutional?,* BAR AND BENCH, https://www.barandbench.com/columns/new-appointments-national-green-tribunal-unconstitutional-judicial-independence (Oct. 09, 2019).

129 S.P. Gupta v. Union of India, AIR 1982 SC 149 ¶13.

that "*may help in achieving results at the ground level*",[130] supervised desilting of the trunk sewers,[131] and even called for formation of a Committee with representatives from different institutes and state governments for the purpose of removing the pollution and rejuvenating the river.[132]However, thereafter, there have been several reports of the river having deteriorated in quality since the matter was taken up by the court, and the NGT found that "*There is a continued failure of compliance by the authorities inspite of repeated directions of the Hon'ble Supreme Court and this Tribunal in the last more than twenty five years*" when reviewing the report of the Yamuna Monitoring Committee, a body of its own creation. [133] The Supreme Court, while it was hearing the aforementioned case, also took note of the President's address regarding the need for inter-linking of rivers, and issued notice to the respondents, while making the issue of river linking a separate PIL case before itself in 2002.[134] After various orders and directions given, the Supreme Court in its final order in the inter-linking matter, considered it to be a project outside its own jurisdiction, in 2012, called for the creation of another body to look into it, viz., "The Special Committee for Inter-Linking of Rivers". The order stated the existence of discretion, and wide national dimensions and ramifications as reasons for the court to not take the matter any further.[135]This act of suo motu initiating what would become India's largest engineering project if implemented, has been criticised for being an overreach of judicial authority,

---

130 In Re: News Item published in Hindustan Times titled "And Quiet Flows the Maily Yamuna", (2004) 8 SCC 638.

131 In Re: News Item published in Hindustan Times titled "And Quiet Flows the Maily Yamuna", (2009) 17 SCC 455.

132 In Re: News Item published in Hindustan Times titled "And Quiet Flows the Maily Yamuna", 2012 IndLaw SCO 1691.

133 Manoj Mishra v. Union of India & Ors., Original Application No. 06/2012 at para 7 (National Green Tribunal, Delhi, July 6, 2020).

134 In Re: News Item published in Hindustan Times titled "And Quiet Flows the Maily Yamuna", I.A No. 27 in Writ Petition (Civil) No. 725/1994 (Supreme Court, Sept. 16, 2002).

135 In Re: Networking of Rivers, (2012) 4 SCC 51.

raising questions about whether such proceedings can be considered an adjudicative proceeding.[136]

Another case that has received similar criticism is the "Delhi Vehicular Pollution Case". This case is known for mandating that all public transport in Delhi be converted to run on CNG, a controversial decision because the science behind it was contested.[137] Further, the socio-economic consequences of the decisions of the court in this case were immense. For example, the limits posed on auto-rickshaw drivers permits led to the rise of black markets in their public transport vehicle permits, and was often done without consulting the auto-rickshaw drivers themselves. This unpredicted change occurred while the presence of private vehicles grew, even as the amicus curiae of the court argued against public transport (i.e, the increase of permits to auto-rickshaws).[138]

In another case, filed by the same petitioner (M.C. Mehta), the Supreme Court began with tackling industrial pollution in the Delhi NCR. However, compliance issues such as the non-implementation of the Supreme Court's orders with respect to payment of workers' dues were found in this case.[139] The Supreme Court was quick to jump into the questions of town planning as the question of making Delhi a "world class city" arose before it, thus the Supreme Court thereby acted upon converting the erstwhile PIL tackling industrial pollution in Delhi, to tackle this inquiry of town planning. A perceived one-sidedness in hearing the parties to the dispute, led to a perception of unfairness in the public's mind. Once again,

---

136 ANUJ BHUWANIA, COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA 44 (2020)
137 *See*, *Id*, at 53.
138 *Id*, at p. 56.
139 *Id*, at p. 60.

people on the lower rung of the socio-economic ladder were most affected, and there were violent protests against the "sealing plan" of the Supreme Court.

Thus, this case has been criticised on similar lines as the above, and one must bear in mind that the genesis of such PIL's is environmental causes of action, however the wide ambit of powers that the Supreme Court has conferred upon it leads to a sacrifice of formalism.[140]Supreme Court also found, as recently as in August, 2020, that the Monitoring Committee exceeded its mandate while dealing with the buildings on private land, which are not demarcated for commercial use, but used as such.[141]

4. SOME METRICS ON THE INDIAN ENVIRONMENT

In order to understand the intended effect of laws, metrics on the current state of India's environment are hereby perused, along with some factual reference.

1. India has been recording an increase in PM 2.5 pollution since 2010 according to the State of Global Air 2020, released on 21 Oct 2020.[142] Out of the 20 most populous countries, 14 have recorded a gradual improvement in air quality but India, Bangladesh, Niger, Pakistan and Japan are among those that have recorded a modest increase in air pollution levels.

---

[140] *See*, *Id*, at p. 134-142.
[141] M.C. Mehta v. Union of India and Ors., 2020 IndLaw SC 415.
[142] HEALTH EFFECTS INSTITUTE, STATE OF GLOBAL AIR 2020 (2020).

2. India is amongst the 10 least peaceful countries to face the highest number of ecological threat and population growth, placing it in a precarious position due to the predicted impacts on food security, increase in civil unrest and mass displacement.[143]
3. Data reveals that, "Over 90 per cent court cases remain unresolved under five of the seven acts related to forests, wildlife, environment protection and pollution"[144]

VI. CONCLUSION FOR THE CHAPTER

As observed hereinabove in this chapter, the problem of compliance with laws in India. The problem itself has been endemic, with repeated governmental reports going into it too. In recent times, this has included the Steering Committee on The Environment and Forests Sector for the Eleventh Five Year Plan (2007-2012) and the Report of the CAG on Environmental Clearance and Post Clearance Monitoring. In the former report, observations regarding lack of institutional capacity, and understaffing of SPCBs was made. However, this was not remedied, and thus the same observations were made again in the CAG report, which also added recommendations for more coordination amongst regulatory bodies, surprise checks, and to streamline the monitoring process and make it more transparent.[145] The stark reality of noncompliance is known by the regulatory bodies themselves, as well. For example, the CPCB noted that most states have not taken the steps necessary to implement the Municipal Solid Waste management rules at their respective levels.[146]

---

143 INSTITUTE FOR ECONOMICS AND PEACE, ECOLOGICAL THREAT REGISTER 2020: UNDERSTANDING ECOLOGICAL THREATS, RESILIENCE AND PEACE, http://visionofhumanity.org/reports (2020).

144 KIRAN PANDEY & RANJIT SENGUPTA, DOWN TO EARTH, STATE OF INDIA'S ENVIRONMENT: 2020 IN FIGURES 20 (Sunita Narain & Richard Mahapatra, eds., 2020)

145 REPORT OF THE COMPTROLLER AND AUDITOR GENERAL ON ENVIRONMENTAL CLEARANCE AND POST CLEARANCE MONITORING, REPORT NO. 39 OF 2016 (2017).

146 CENTRAL POLLUTION CONTROL BOARD, ANNUAL REPORT FOR THE YEAR 2018-19 ON IMPLEMENTATION OF SOLID WASTE MANAGEMENT RULES https://cpcb.nic.in/uploads/MSW/MSW_AnnualReport_2018-19.pdf , (2019).

This constant observation of non-compliance has now translated into sheer apathy on part of the executive and political leadership. A decentralisation of monitoring duties and powers to conclude the process of apprehending the perpetrators, with well-staffed RO's seems to be the solution. This would also require a systematic push by the executive at the topmost level, which will not be an easy task to undertake. This is especially so when considering that the constant dilution of environmental norms, such as the EIA is taking place, in contravention to decisions made very recently, by the NGT in this regard.[147]

With respect to the judiciary's approach, the reality is that in the cases involving "continuing mandamus" such as those under the PIL jurisdiction of the Supreme Court, the rate of implementation is much lesser as it involves the Supreme Court or the NGT, as the case may be, stepping into the shoes of the executive.[148] This overbroad construction of its own powers by the Supreme Court does not lend well to the concept of executive responsibility, and has hence, rightfully earned its own critics.

---

[147] Society for Protection of Environment & Biodiversity and Ors. v. Union of India and Ors., Original Application No. 677 of 2016 (National Green Tribunal, Delhi, Dec. 8, 2017).

[148] Armin Rosencraz & Mukta Batra, *The Supreme Court of India on development and environment from 2001 to 2017*, 6 ENVIRONMENTAL LAW AND PRACTICE REVIEW 1, 22 (2018).

CHAPTER 4: INTERNATIONAL ENVIRONMENTAL LAW – FROM A REGULATORY PERSPECTIVE

Existing as it does, within the confines of Public International Law as a whole, the ambiguities related to the theoretical and even the practical foundations of the system of laws known as Public International Law certainly apply even to the field of International Environmental Law. These may include issues ranging from whether this field constitutes law in itself to issues that are characteristic of the field of Public International Law such as *erga omnes* obligations, and the lack of a universal enforcement authority.

There are also critiques from the postcolonial studies which examine the very basis of the functioning of the international legal order and the interlinked role this area of law plays in colonial expansion. Of particular relevance are the debates surrounding PSOE – "Permanent Sovereignty Over Natural Resources", where the notion of a decolonised state exercising sovereign control over its own resources is seen as, being not only a shield against colonial expansion but also, at times a sword against indigenous peoples belonging to the same countries themselves (due to the justification of sovereign state being separate from the existence of indigenous peoples).[149]

The scope of international law and the inherent limitations in its practice has many contours, which are listed in brief, as hereunder:

1. The ambiguity surrounding the scope of an international court means that it is hard to tell whether the MEAs that are negotiated can have a separate consequence for non-

[149] *See*,ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

compliance in the form of a separate judicial body to deal with such cases. It is thus functionally dissimilar to the regime existent in municipal laws.

2. At the very least, it conceptualises a new area of law which presumably can inspire national legislation and policies, but also create its own mandatory requirements. These requirements are then enforced through a variety of methods which are covered below.[150]

3. The body of MEAs, bilateral and regional agreements covering the subject matters relating to environment and resources number into several hundreds.[151] Here, a study of some of the important international agreements and their compliance mechanisms gives insight that, apart from having inherent value in regulating nation-states and their activities, also gives further data to draw conclusions regarding the feasibility of different mechanisms from.

4. The enforcement procedure in some cases includes economic sanctions, incentives and financial and technical assistance. Thus, the multi-disciplinarity of the field of compliance is once again revealed, and it goes without saying that actions of nation-states is governed in large part due to political interests as well. In fact, the rationalist school of thought argues that states participate in a regime of compliance if the "net benefits outweigh those of unilateral action".[152] There is also the argument of constructivists, who state that "international law can exert independent compliance pull when it meets particular legitimacy requirements."

---

150 *See, infra,* Part I.

151 Elizabeth M. Mrema, *Cross-cutting Issues Related to Ensuring Compliance with MEAs, in* 2 ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS 202 (Ulrich Beyerlin, et al. eds., 2006).

152 Jutta Brunnee, *Enforcement Mechanisms in International Law and International Environmental Law, in* 2 ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS 9 (Ulrich Beyerlin, et al. eds., 2006)

The dominating fields are however the managerial approach and the sanction-oriented approach. The former states that a co-operation amongst different bodies and efforts towards capacity building, dispute settlement and transparency leading to more of a co-operative problem solving approach should be the focus of compliance strategies. The latter argues that for deep co-operation, and when strong incentives exist for non-compliance, there is a need for sanctions, that can be a broad range of measures that create costs or remove benefits.

5. MEAs themselves contribute to the creation of an environment of "shared understandings", and "culture of compliance" through the fostering of the legitimacy of lawmaking processes. This occurs due to the decreased relevance of bilateral treaties in the face of lack of resources, and the fact that judicial decisions may not contribute effectively in a complex regime such as that governed by MEAs. The issues of causation, due diligence, and lack of state responsibility in issues relating to *erga omnes* obligations renders most of the self-help techniques further irrelevant, giving impetus to a managerial and constructivist approach.

I. Categorisation of Compliance Mechanisms within International Environmental Law

1. Philippe Sands' categorisation.

In his chapter titled "*Compliance: implementation, enforcement, dispute settlement*" in his treatise on Principles of International Environmental Law, Philippe Sands gives a good overview of the state of non-compliance in International Environmental Law.[153]

He states that non-compliance may be a breach of substantive (as in the case of limitation of the atmospheric emmissions of greenhouse gasses), procedural (as in the case of consulting a neighbouring state on the construction of a new plant); or institutional obligation (submission of an annual report). According to him, the issues raised by non-compliance are threefold and they relate distinctly to implementation, enforcement and conflict resolution. The questions he asks are similar for all three issues, and they relate to the steps, persons or procedures that may implement, enforce international law or resolve disputes occurring in it.

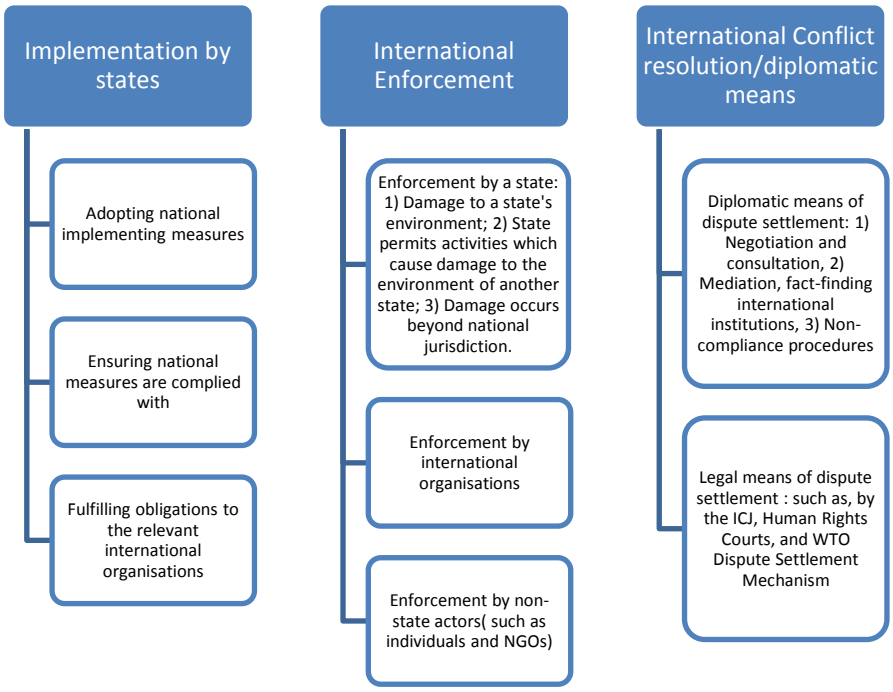

Figure 7: Categorisation by Philippe Sands

2. Categorisation by Jacobson and Weiss

---

[153] *See*, PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 135-181 (Cambridge University Press, 2012) (1994).

Harold K. Jacobson and Edith Brown Weiss have also contributed to the discussion on compliance with Multilateral Environment Agreements (MEAs) with their project that sought to assess "how and the extent to which countries implement and comply" such instruments.[154] They categorised the factors which affect implementation and compliance of such instruments into four broad categories, which shall be useful to produce in detail.

a) Characteristics of the activity that the accord deals with:

Thus, activities that an accord (an MEA) may deal with varies in terms of economic importance, ease of monitoring, costs and benefits of regulating and the distribution of these sub-factors amongst various social classes and geographical regions.[155] Jacobson and Weiss, also while evaluating took into consideration the net of activities that such instruments sought to regulate, and how they affected their implementation.[156]

With activities such as those involving diverse players and individuals (e.g. the CITES convention's intended targeted activities has more individuals) being more difficult to enforce than those that are homogenous in terms of their targeted activities. Even the scope of the countries they studied was found to be huge. Thus, they studied seven large political units – India, China, Brazil, the US, Russia, the EU and Japan and found that "the aggregate effect of the actions of these countries had a determining effect on overall compliance with the accords." This is not in contradiction with the reports of the SDG Index which also gives due

---

154 Harold K. Jacobson & Edith B. Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project,* 1 GLOBAL GOVERNANCE, 119 (1995) [hereinafter, *Preliminary Observations*].

155 *Preliminary observations*, *Id*, at 125.

156 Harold K. Jacobson and Edith B. Weiss, *Assessing the Record and Designing Strategies to Engage Countries,* in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 94 (Edith B. Weiss & Harold K. Jacobson, eds., 1998) [hereinafter ENGAGING COUNTRIES]

importance to countries such as India and China and the weightage they have in the necessary aggregate improvement of SDG indices such as poverty and nutrition.[157]

b) Characteristics of the accord:

The process of the negotiations, along with substantive characteristics such as the nature of the duties (general or precise, binding or hortatory), compliance mechanisms that are contained in the accords, consequences for non-compliance, and how effective other features are in inducing compliance.[158]The authors note, further, that the fairness or equity is another important characteristic of the accord that must be taken into consideration. Indeed, this is an important factor, especially considering the principle of "*common but differentiated responsibility*", which can be deduced from the researchers' mention of the Montreal Protocol being adopted late by India and China until compensatory financing had been agreed to be included.[159] This principle states that nation-states who are historically responsible for anthropogenic emissions of ozone depleting substances, for instance, in the industrial periods, are those that should bear the primary cost of this.

Additionally, the reporting requirement in various is also seen as serving an essential function, but problematic in some cases due to perceptibly being a burden and the governmental secretariats overseeing this having a limited capacity. The authors propose that standardised forms shall help countries with this hindrance,[160] however, there is also the factoring in of nuanced differences amongst countries that could be overlooked. Thus, for example, the approach of some governments towards preparing country-wide assessments

---

[157] JEFFEREY SACHS ET AL., SUSTAINABLE DEVELOPMENT SOLUTIONS NETWORK, SUSTAINABLE DEVELOPMENT REPORT 2020, at p. 46.
[158] *Preliminary observations*, *supra*, note 152 at 125.
[159] ENGAGING COUNTRIES, *supra*, note 154 at p. 95.
[160] ENGAGING COUNTRIES, *supra*, note 154 at p. 97.

with qualitative analysis should not be foregone. Sanctions and incentives being included in the provisions of such instruments is also to be taken into account.

c) **Characteristics of the country, or political unit, that is a party to the accord;**

The questions raised by the authors under this category are relevant as they seek to take into account country characteristics such as cultural traditions, political systems, bureaucratic efficacy and strength, nature of the legal system, etc. There are also other relevant characteristics such as policy history, leaders and availability of information that are considered.[161]

The researchers further observed the direct causation between more democracy and more enforcement, but also noted that a downside of public participation is that the importance of economic development is highlighted more than environmental development. The promises of sustainable development can be met only if there is social equity along with environmental equity, and this may involve the public perception of environment being changed. In that respect, it may be better to ask "What kind of development do we require?" rather than "Do we require economic development or environmental protection?" since increasingly there are solutions being framed to answer the former question which may include policies borne out of environmentalist movements such as the Green New Deal in the U.S.A.

However, what is also paid attention to by the authors is the administrative capacity, knowledge and training of personnel, since this can lead to a better job in meeting the duties enshrined in such MEAs.

d) Factors in the international environment.

---

[161] *Preliminary observations*, *supra*, note 152 at p. 126.

Under this criteria, the actions of other states makes a difference, since governments do not want their countries to be seen as laggards. The outdating of technology caused by the Montreal and Kyoto protocols made it apparent that the major countries would stop producing and consuming CFCs, which prompted others to follow suit.[162]

3. Categorisation by Implementation Committee of Montreal Protocol.

The Implementation Committeeof the Montreal Protocol has published, in July 2019, a note which lists out the different kinds of compliance mechanisms put in place by Multilateral Environment Agreements (MEAs).[163] The categorisation of these mechanisms is done into five processes which is as follows:

a) Reporting, monitoring, verification and implementation review

Self-reporting by parties or member states is seen as an effective tool for gaining information. However, some treaties also adopt third-party monitoring, in the form of third party verification and review processes.

b) Participation through membership in non-compliance bodies and their processes.

Specialised bodies that are meant to deal with compliance, which operate in a facilitative and co-operative manner are incorporated in most conventions (e.g., the Basel, Minamata and Rotterdam conventions, the Cartagena and Nagoya protocols, and the Paris Agreement). There may be increased independence of the members of these committees, with the members serving as independent members, rather than as representatives of parties (e.g., the

---

[162] ENGAGING COUNTRIES, *supra*, note 154 at p. 99.

[163] Report of the Implementation Committee under the Non-Compliance Procedure of the Montreal Protocol Sixty-Third Meeting, UNEP/OzL.Pro/ImpCom/63/6 (Nov. 3, 2019).

Aarhus and Basel conventions, the Cartagena, Kyoto and Nagoya protocols, and the Paris Agreement)

c) Triggering of the non-compliance procedure

Although provisions exist in the Kyoto and Montreal Protocols for member states to trigger the non-compliance procedure, this has not been resorted to. Nevertheless, several treaties allow mostly for the Secretariat to trigger the procedure, or may extend this to independent expert review bodies. The governing bodies of the treaties and the compliance and implementation committees may also trigger this mechanism in some treaties. There is a limited right for members of the public to trigger this mechanism, however, a number of treaties allow for intergovernmental organisations and NGOs to provide information regarding a party's compliance and implementation.

d) Decision-making and consequences of non-compliance

The decision making competence is mostly shared between the governing body and the compliance and implementation committees in most MEAs. Once again, the responses to non-compliance are mostly facilitative, and assistive, however, some MEAs allow for more punitive measures, such as the suspension of rights and privileges, the issuance of cautions and the publication of cases of non-compliance.(e.g. Kyoto Protocol, Montreal Protocol and CITES convention)

e) Role of the secretariat

It has an instrumental role in nearly all MEAs in providing administrative and technical assistance. It may also play the role of verifying and reviewing the information provided by parties. In some treaties (e.g. CITES, the Aarhus, Basel and Rotterdam conventions, and the

Montreal and Nagoya protocols), the noncompliance procedure can be triggered by the Secretariat.

4. The categorisation given by another author is as follows:

1) Mechanisms which tend towards "partnership solutions"; i.e those that can be considered as being more facilitative. Thus the previous categorisation of participation through membership in non-compliance bodies and their processes which is indicative of a facilitative approach would fall under this.[164]

2) Mechanisms which have a confrontational character; i.e those that can be considered as compelling Parties to behave in a certain way, even without their consent and cooperation. There are not many mechanisms that come under this category, but the Dispute Settlement Procedures that can be triggered by certain treaty mechanisms can be brought under this, in as much as the treaty party is threatened of adjudicatory mechanism being initiated against them.

3) Mechanisms for which it is not clear whether they are confrontational or non-confrontational fall under this category, for which the author cites mechanisms that exist across different treaties as general obligations to ensure compliance with MEAs. These may include conceding information rights, according standing in judicial review procedures, good governance and human rights. One may even think of general issues such as the procedures of internationalism that may include trade sanctions or condemnation at the General Assembly of the United Nations.

---

[164] Astrid Epiney, *The Role of NGOs in the Process of Ensuring Compliance with MEAs in* 2 ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS 324 (Ulrich Beyerlin, et al. eds., 2006)

II. AN ANALYSIS OF THE MECHANISMS UNDER TWO DIFFERENT FRAMEWORK CONVENTIONS

1. The mechanism under the UNFCCC

At the Rio Conference on the Environment and Development held in 1992, the UNFCCC was one of several agreements to be signed. As a result of prior negotiations occurring which indicated that there was a difference of opinion in how climate change was viewed amongst the North and South, the principles of sustainable development and equity were enshrined in this agreement. Most notably, the principle of common but differentiated responsibilities,[165] which is essentially an acknowledgment of the resources of the developed countries being accumulated through historical contribution to the levels of greenhouse gasses in the atmosphere.[166] This principle of equity is reflected across the different agreements formed under this framework convention and, indeed, is enshrined in the *Rio Declaration on Development and the Environment*.[167]

The framework convention provides for the formation of a Secretariat which shall provide assistance to the Parties and ensure a smooth flow of information in a co-ordinated manner.[168] It also provides for the creation of two permanent, subsidiary bodies for scientific and technological advice, and implementation respectively. The former provides technical advice and information, and provide assessment of the state of scientific knowledge relating to

---

165 Article 4, United Nations Framework Convention on Climate Change, 1771 U.N.T.S 107 (Adopted on May 9, 1992).

166 The Report of the United Nations Conference on Environment and Development, at 9, A/CONF.151/26/Rev.1(Vol.I) (1993).

167 *Ibid.*

168 Article 8, United Nations Framework Convention on Climate Change, 1771 U.N.T.S 107 (Adopted on May 9, 1992).

climate change and its effects and other related functions.[169] The latter shall assist the COP in assisting and reviewing the effective implementation of the Convention. Specifically, it is this subsidiary body's job to assess the information submitted by parties regarding national inventories of anthropogenic emissions and removals by sinks; steps taken to implement the Convention; description of policies taken to implement commitments and estimates of effects of policies.[170]

Apart from the above, the framework convention also lays down a financial mechanism for "provision of financial resources on a grant or concessional basis, including for the transfer of technology".[171]Also, the convention provides for a robust system of information provision by parties, which shall generally be made public subject to a provision of confidentiality.[172]

a) Kyoto Protocol

The Kyoto Protocol was signed in response to the growing need to curb emission of certain greenhouse gasses to at least 5 percent below 1990 levels in the first commitment period. Although it had a turbulent negotiating history,[173] it ultimately led to an incorporation of an obligation upon the most developed countries (included in Annex I of the protocol) to meet their targets.

---

169 Article 9, United Nations Framework Convention on Climate Change, 1771 U.N.T.S 107 (Adopted on May 9, 1992).

170 Article 10, United Nations Framework Convention on Climate Change, 1771 U.N.T.S 107 (Adopted on May 9, 1992).

171 Article 11, United Nations Framework Convention on Climate Change, 1771 U.N.T.S 107 (Adopted on May 9, 1992).

172 Article 12 (10), United Nations Framework Convention on Climate Change, 1771 U.N.T.S 107 (Adopted on May 9, 1992).

173 Laurence Boisson de Chazournes, UN Audiovisual Library of International Law, Introductory Note to the Kyoto Protocol to the United Nations Framework on Climate Change (2008), https://legal.un.org/avl/pdf/ha/kpccc/kpccc_e.pdf.

On the technical front, it formed a national system similar to that of the UNFCCC for the purposes of estimation.[174]The innovative flexible market-based mechanisms to enable Annex I countries to meet their targets is the highlight of this protocol. The three mechanisms are listed hereunder:

i) Joint implementation: This mechanism allows for the trading of emission reduction units between two Annex I parties from projects that lead to reduction in anthropogenic emissions or enhance the removal by sinks of greenhouse gases. These are considered supplemental to domestic actions.[175]

ii) The clean development mechanism ("CDM"): This enables Annex I parties to achieve their commitments by financing projects that are voluntary; and lead to real, measurable and long-term benefits towards mitigating climate change.[176]

iii) Emissions Trading: This simply allows parties to engage in emission trading to achieve their respective commitments.[177]

The details for these market trading mechanisms were contained in the "Marrakesh Accords" adopted at the first meeting of the COP serving as the Meeting of the Parties to the Kyoto Protocol, in Montreal in 2005. While the decision on the principle, nature and scope of these mechanisms alludes mostly to Articles 3 and 4 containing the sub-provisions for the

---

174 Article 5, Kyoto Protocol to the United Nations Framework on Climate Change, 2303 U.N.T.S 162 (Adopted on Feb. 16, 2005).

175 Article 6, Kyoto Protocol to the United Nations Framework on Climate Change, 2303 U.N.T.S 162 (Adopted on Feb. 16, 2005).

176 Article 12 (5), Kyoto Protocol to the United Nations Framework on Climate Change, 2303 U.N.T.S 162 (Adopted on Feb. 16, 2005).

177 Article 17, Kyoto Protocol to the United Nations Framework on Climate Change, 2303 U.N.T.S 162 (Adopted on Feb. 16, 2005).

accounting of these units,[178]the decision on the modalities of the CDM is substantiated separately.[179]

The text of the Kyoto Protocol delegates the formulation of the compliance mechanism to the first meeting of the COP serving as the Meeting of the Parties.[180]In the Marrakesh Accords, thus, we find that it is decided that there shall be an enforcement branch and a facilitative branch, in the compliance committee.[181]

The consequences that the facilitative branch can engage in after a case of non-compliance occurs is to provide advice and facilitation of assistance to state parties to implement the protocol. Additionally, technology transfer and capacity building can be done, both using the provisions of the convention and from other sources.

Whereas, the enforcement branch, can, if it finds that the party has not put in place a national system for estimation, or of information in the annual inventory, issue a declaration of non-compliance. This declaration may be followed by a plan to remedy the situation within a year after analysing to be prepared and submitted by the party contravening itself. This procedure of declaration and preparation of a plan is also to be followed if the party exceeds the assigned amount of emissions, in addition to a deduction from the party's assigned amount for the second commitment period. Additionally, the enforcement branch may also suspend a party from participating in the market-mechanisms.

---

178 Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Decision 2/CMP.1, FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006).

179 *Ibid.*

180 Article 18, Kyoto Protocol to the United Nations Framework on Climate Change, 2303 U.N.T.S 162 (Adopted on Feb. 16, 2005).

181 Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Decision 27/CMP.1, FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006).

Although empirical studies reveal that the agreement did result in a drop in carbon emissions,[182] the success of this agreement was highly contested, because the regime of international law arguably gave leeway to both industrialised nations such as United States and Canada to not participate, and some nations that are considered industrialised were not included in Annex-I.[183] As a result, the countries that participated contribute to less than 20% of the global emissions, making it presumably a failure of international negotiations.[184]That being said, the Kyoto Protocol's compliance mechanism complements its market-based mechanism, and has been accredited with secondary effects such as political risk weighing in on investments because of suspension of eligibility by the Compliance Committee.[185]

b) **The Paris Agreement**

This is the current agreement governing anthropogenic climate changing emissions on the international level. A merit of this agreement is the broad global participation, with 196 parties adopting it in 2016, but with the withdrawal in 2019 of the United States. This agreement sets a quantifiable global target, i.e parties have agreed to limit the increase in global temperatures to well below 2 degrees Celsius above pre-industrial levels, as well as to pursue measures to limit the increase to below 1.5 degrees Celsius.[186]

The Paris Agreement reaffirms some of the obligations stated in the UNFCCC, such as the listing of measures for conservation and enhancement of sinks and reservoirs of GHG's; providing for financial resources and assistance to developing countries with respect to

---

[182] Rahel Aichele & Gabriel Felbermayr, *The Effect of the Kyoto Protocol on Carbon Emissions*, 32 (4) JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 731 (2013).

[183] *See*, supra, note 171.

[184] Guri Bang, et al., *The Paris Agreement: Short-Term and Long-Term Effectiveness*, 4 (3) POLITICS AND GOVERNANCE 209, 211 (2016).

[185] Uloma Onuma, *Suspension of Eligibility to Use of the Kyoto Flexible Mechanisms: A Review of Substantive Issues (Part 1)*, 3(2) CARBON & CLIMATE LAW REVIEW 198 (2009).

[186] Article 2, Paris Agreement (https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf) at p. 29 (Adopted on Nov. 4, 2016) [hereinafter, Paris Agreement]

mitigation and adaptation; technology development and transfer; capacity building; co-operation for education and awareness.

It also substantively adds to the mechanisms by providing for a system of Nationally Determined Contributions (NDC's) to fulfil the various obligations,[187] which shall be accounted for, by the parties, while ensuring the avoidance of double counting.[188] Further, the agreement provides for an enhanced transparency framework which shall take into account the differing circumstances of developing, least developed and small island states while providing flexibility in a facilitative approach.[189] This facilitative approach shall also extend to a facilitative, multilateral consideration of progress.[190] Under this framework, each party is required to provide a national inventory report, and information necessary to track it.[191] This information shall then undergo a technical expert review, which shall also identify further areas of improvement for the Party.[192]While the transparency framework provides for support to be given to developing countries, it does not provide for any consequences for non-compliance, or lack of reporting.

Additionally, the Agreement also provides for a mechanism to contribute to the mitigation of GHG's and support sustainable development.[193]Further, the Accord also provides for the establishment of a global goal on adaptation, while existing alongside the Cancun framework. The agreement also mandates every party to engage in adaptation planning processes. There is also a provision for a framework of integrated, holistic and non-market based approaches with the purpose of promoting mitigation and adaptation ambition, enhancing participation,

---

187 Article 3, Paris Agreement, *Id*, at p. 29.
188 Article 4(13), Paris Agreement, *Id*, at p. 31.
189 Article 13 (2) and (3), Paris Agreement, *Id*, at p. 42.
190 Article 13 (11), Paris Agreement, *Id*, at p. 44.
191 Article 13 (7), Paris Agreement, *Id*, at p. 43.
192 Article 13 (12), Paris Agreement, *Id*, at p. 44.
193 Article 6 (4), Paris Agreement, *Id*, at p. 33.

and enabling opportunities.[194]The provision for a global stocktake of the implementation of the Agreement and its long-term goals is also present, with the specification for the first such exercise to be conducted in 2023.[195]

The compliance mechanism formulated by this Agreement is expert-based and facilitative in nature, with the functioning specified as "transparent, non-adversarial and non-punitive".[196] Further, at the first COP serving as the Meeting of the Parties to the Paris Agreement, the modalities and procedures for effective operation of the committee specified in Article 15, paragraph 2 of the Paris Agreement were specified. It stated that the committee shall consider issues in cases where the Party has not communicated or maintained an NDC; participated in the facilitative, multilateral consideration of progress; or submitted a mandatory report or communication of information as mentioned for developed countries while they provide support, or the national inventory report and information necessary to track progress under the transparency framework.[197] It may also take up the issue of persistent inconsistencies of the transparency information provided by a Party, which shall be based on the recommendations made by the technical expert review reports.[198]

The measures that the committee can take in such cases that come up before it, shall necessarily take into account the subjective situation of the Party concerned, taking into consideration national capabilities and other particular needs or challenges.[199]These measures are, engaging in dialogue with the party concerned, assisting the party concerned, both of

---

194 Article 6 (8), Paris Agreement, *Id,* at p. 34.
195 Article 14, Paris Agreement, *Id,* at p. 44.
196 Article 15, Paris Agreement, *Id,* at p. 45.
197 Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 20/CMA.1 at ¶22(a) FCCC/PA/CMA/2018/3/Add.2 (Mar. 19, 2019).
198 *Id,* at ¶22 (b).
199 *Id,* at ¶29 (b).

which shall aim to achieve finance, technological and capacity-building support.[200] It may make recommendations to other bodies with the consent of the party, who shall be informed of such recommendations too. It may also recommend the development of an action plan and, if so requested, assist the Party concerned in developing the plan. The issuance of findings of fact can also be done by the committee.

While there are innovations made and the regime of multilateralism is uniquely comprehensive, there has been equal parts skepticism and hope with regards to whether the agreement shall succeed in creating an effective mechanism to meet its short-term and long-term objectives.[201]The hope is that with the inclusion of non-market based approaches, robust accounting and facilitative support from developed countries with respect to capacity-building, finance and technology, etc., listed above, the Paris Agreement will be able to overcome the shortcomings of the previous system (under the Kyoto Protocol). Whereas, the skepticism arises from the fact that the primary means of determining a state's commitments towards mitigating climate change, is through the NDC's, they are not legally binding with the same strictness that was given to the Kyoto targets.[202]

The agreement relies heavily on the existence of a facilitative, managerial approach towards problem solving. This requires the participation in good will of the major polluting and industrialising nations, failing which it is expected that the same facilitative approach will be able to meet the challenges faced by non-participation. However, since the withdrawal of the United States, the country which, along with the European Union, led the negotiations, and is the most developed, the success of this agreement is once again called into question.

---

200 *Id*, at ¶30.
201 *See*, ZERRIN SAVASAN, PARIS CLIMATE AGREEMENT: A DEAL FOR BETTER COMPLIANCE? 275-278 (2019).
202 *See generally, supra*, note 182.

Additionally, the collectivisation of obligations under this agreement leads to apathy by individual states in implementing the provisions of the Agreement. In other words, by holding everyone responsible for climate change, we end up having no state responsibility at all.[203] This is an issue that MEAs must be specifically aware of, being as it is, an issue endemic to their regimes.

2. The targets set by the secretariat of the CBD

In 2002, at the Sixth meeting of the Conference of Parties, the decision was made to make a Strategic Plan to guide further implementation at all levels. The stated purpose was to effectively halt the loss of biodiversity while meeting the three objectives of the CBD: conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits arising out of the utilization of genetic resources. [204]Along with this, the COP laid down targets for the member states to achieve in the form of four Goals. These were relating to Convention's role itself; parties' capacities to implement the Convention; provision of national frameworks; and better understanding of the importance of biodiversity with better engagement.

However, in the Global Biodiversity Outlook 3 report it was reported that the 2010 targets were all not met, and hence at the Tenth meeting of the Conference of Parties of the CBD, a decision was made to implement a "Strategic Plan for Biodiversity 2011-2020" and the "Aichi Biodiversity Targets" were laid down. The former included goals such as addressing the underlying causes of biodiversity loss; reduction in the direct pressures on biodiversity and promotion of sustainable use; improvement of the status of biodiversity by safeguarding

---

[203] See, Alexander Zahar, *Collective Obligation and Individual Ambition in the Paris Agreement*, 9 (1) TRANSNATIONAL ENVIRONMENTAL LAW 165 (2019).

[204] Conference of the Parties to the Convention on Biological Diversity, Decision VI/26, (https://www.cbd.int/decision/cop/?id=7200).

ecosystems; enhancing the benefits to all; and most importantly it also aimed to enhance implementation through participatory planning, knowledge management and capacity building. Under this last strategic goal, four targets were laid down for the development of policy instruments nationwise. Also, the traditional knowledge, innovations and practices of indigenous and local communities are respected, and integrated with their participation being provided for. The other two targets relate to building of scientific and technological capacity, as well as mobilisation of financial resources to meet the Aichi targets themselves.

The implementation of these targets was specifically provided for through the allocation of financial resources as stated above by the parties themselves, in addition to national policies. A participative environment was envisaged for all local stakeholders during implementation. Also, flexibility across countries to allow them to make their own localised plans was included in the Strategic Plan.[205]

Apart from the above, there were also generally recommendations to parties "to encourage" political support for the strategic plan amongst parliamentarians. In similar language, it was stated that partnerships "at all levels are required" for the implementation of this plan.

In terms of mandating obligations, the state parties were mandated to merely inform the COP of the national targets or commitments and policy instruments they adopt to implement the Strategic Plan. There was no requirement to actually make these instruments or commitments in national strategy. Similarly, the COP along with the Ad Hoc Open-ended Working Group on Review of Implementation of the Convention, was mandated to keep under review implementation of this Strategic Plan but given the power merely to provide recommendations and guidelines. This essentially meant that the convention which had lofty

---

[205] Conference of the Parties to the Convention on Biological Diversity, Decision X/2, UNEP/CBD/COP/DEC/X/2 (Oct. 29, 2010).

goals and specific targets was reduced to a rhetorical commitment by the state parties, there being no consequences for non-compliance. Additionally, a cost-benefit analysis of the Aichi 2020 targets that were quantifiable according to a researcher, reveals that the benefits generally outweigh the costs by many times with the benefit:cost ratio being as high as 137 in some cases[206] and never being negative.

However, even the Aichi targets were not met. The Global Biodiversity Outlook 5 developed by the Secretariat of Convention on Biological Diversity categorically states that, **"***At the global level none of the 20 targets have been fully achieved, though six targets have been partially achieved (Targets 9, 11, 16, 17, 19 and 20).*" Furthermore, there has been a lack of ambition of national targets with the global ones, and they are generally poorly aligned in this respect (less than 23% of the targets are properly aligned).

There is now another set of transitional goals,[207] and broad targets being formulated,[208] taking into consideration the 2050 Vision of the Strategic Plan for Biodiversity which was a part of the same COP decision as the Strategic Plan for 2011-2020. Thus, the process of deliberation amongst state parties continues, where issues are raised including regarding how to increase the effectiveness of the national policies in addressing the 2020 targets while considering a post-2020 global biodiversity framework.[209]

---

206 Anil Markandya, Center for International Forestry Research, *Benefits and Costs of the Biodiversity Targets for the Post-2015 Development Agenda*, https://www.copenhagenconsensus.com/sites/default/files/biodiversity_assessment_-_markandya.pdf (Oct. 21, 2014).

207 SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, GLOBAL BIODIVERSITY OUTLOOK 5, at pp.18-20 (2020), https://www.cbd.int/gbo/gbo5/publication/gbo-5-en.pdf.

208 *Towards the vision 2050 on biodiversity: living in harmony with nature*, UN ENVIRONMENT PROGRAMME, (July 17, 2019), https://www.unenvironment.org/news-and-stories/story/towards-vision-2050-biodiversity-living-harmony-nature.

209 Executive Secretary of the Convention of Biological Diversity's Secretariat, Post-2020 Global Biodiversity Framework: Discussion Paper, CBD/POST2020/PREP/1/1 (Jan. 25, 2019).

The following table offers an overview of the compliance mechanism studied under different MEAs hereinabove.

Name of MEA	Details of compliance mechanism
UNFCCC	Complementary mechanisms of consultation and dispute settlement (Articles 13 and 14)
Kyoto Protocol to the UNFCCC	Three Market-Based Mechanisms: Joint Implementation, (Article 6) CDM (Article 12) and Emission Trading (Article 17) along with requirements for national measures form the basis of the implementation measures. Compliance is effectuated through two branches in the overall Compliance Committee – the Facilitative branch (providing advice and assistance to parties on implementation) and the Enforcement Branch (imposing consequences for non-compliance that may include those that incorporate repercussions for a state's use of the market mechanisms)
Paris Agreement under the UNFCC	Each Treaty party shall make their NDC's ("Nationally Determined Contributions") by 2020 which shall contain their own ambitious efforts and targets that are to be met with a view of achieving the purpose of the Agreement.[210] The Agreement broadly provides for reporting under a transparency framework,

[210] Article 3, Paris Agreement, *supra,* note 184 at p. 28.

	and a global stocktake. However, the non-compliance procedure is fairly limited, and the agreement puts a lot of hope on a managerial, facilitative approach towards solving the climate crisis at the multilateral level.
Convention on Biological Diversity	National Targets were to be maintained in consonance with Global Targets (also known as the Aichi Targets). Reporting mechanism was present, but only to the extent of updating the Secretariat regarding the NBSAPs (National Biodiversity Strategies and Action Plans). The secretariat's role was also limited to giving guidance and recommendations. A mechanism for the post-2020 biodiversity global framework is purportedly being designed.

III. OBSERVATIONS FOR THIS CHAPTER

The Secretary-General of the UN, in a report published to gauge the success of the SDG Goals for the year 2030, observed that there is a downward trend in nearly all the goals where metrics are being reported by the state parties to the Agenda for 2030 themselves.[211] This co-incides with the Global Biodiversity Outlook 5, which report saw the announcement of the failure to meet the Aichi targets for 2020 and predicted a downward trend in global biodiversity if present conditions continued, as is apparent from the graph reproduced below.

---

[211] *See*, Secretary General of the United Nations, *Progress towards Sustainable Development Goals* (2020), https://sustainabledevelopment.un.org/content/documents/26158Final_SG_SDG_Progress_Report_14052020.pdf.

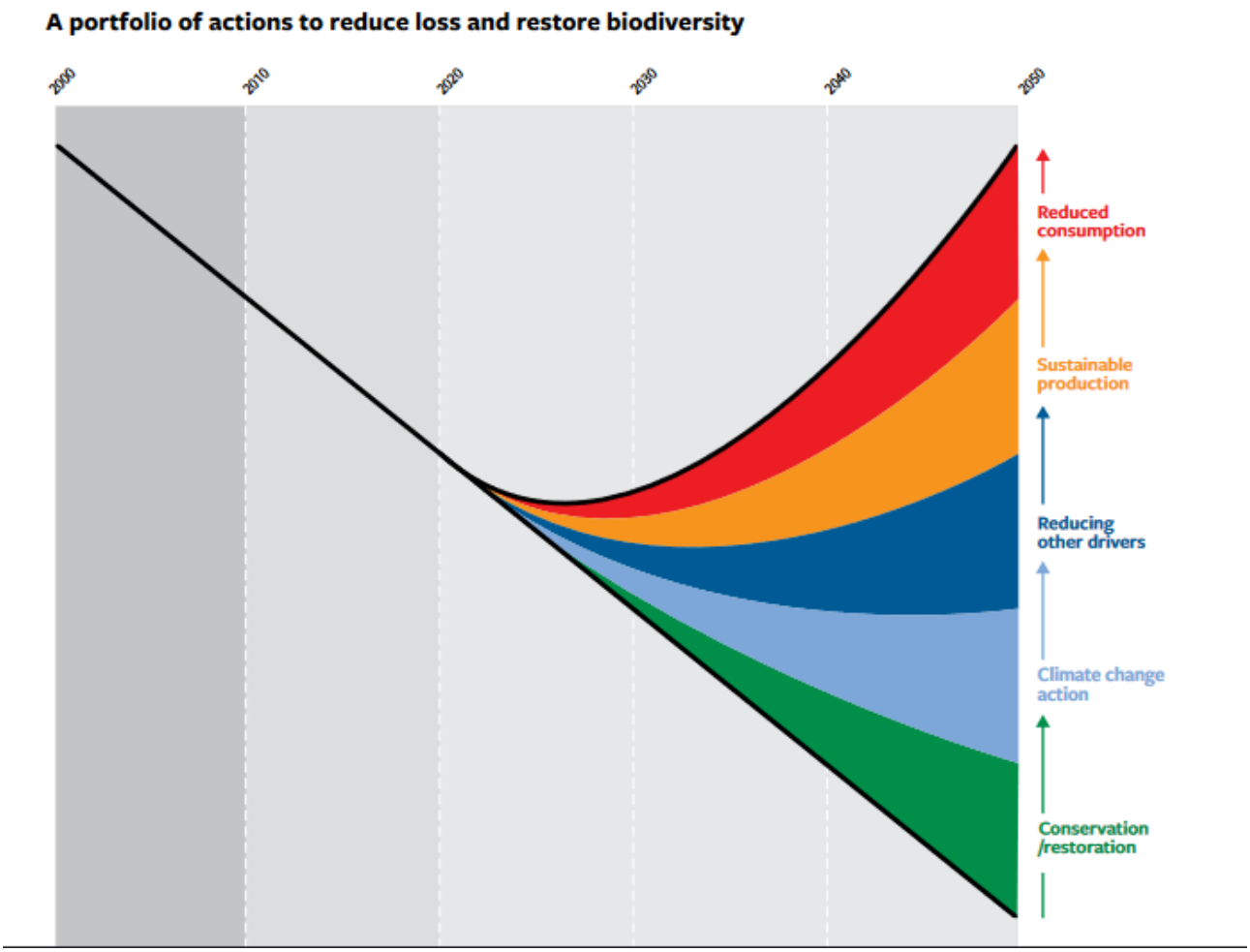

Figure 8: Projections of the differing trajectories corresponding to different levels of human activity. Source: Global Biodiviersity Outlook 5

It was observed that International Environmental Law exists in a unique space in as much as the mechanisms of its parent field operates with some ambiguities that co-exist along with the influence of the realm of international politics. It is also observed that although there exist procedures that are more confrontational methods, states, keeping in line with the principles of state sovereignty, are hesitant towards taking on obligations that would hold them liable to a strict noncompliance procedure and this is reflected in the negotiating procedures of the MEAs and their provisions themselves.

Thus, there is a shift towards facilitative procedures that depends on the assumption that the goodwill of countries will be able to maintain their obligations, without a breakdown of the

negotiation process. However, the fact that there is no provision for verification, and the Implementation Committee of the Montreal Protocol is only able to undertake information gathering at the request of parties is seen as a limitation of the Implementation Committee of the Montreal Protocol, on the basis of which many other mechanisms have seemingly been modelled.[212]

The criteria that some authors have adopted to gauge the effectiveness of MEAs is threefold.[213] It must firstly have broad participation, second, it must reflect high ambitions, and thirdly it must achieve high compliance rates. It is observed that the issue of complying with treaties raises issues across the board, which may relate to perception of inequality in obligations, states not achieving targets, even if they are not ambitious;[214] lack of enforceability for complex issues like illegal trade;[215] and the compliance mechanism may in itself be lacking the necessary push required to be given to states to comply with targets. In the case of illegal trade, the lack of a definition has particularly been noted to have an adverse consequence when coupled with the regime for sharing of information which is seen to have more of a voluntary character under the Montreal Protocol.[216]

The three-tiered mechanism of formulating international agreements through a framework convention, a protocol and rules framed thereunder, may prove to be flexible. It is the author's submission that this mechanism adopted across different conventions should be made more accessible to members of the public. Inspiration in this regard could likely be taken from the World Bank's Inspection and Dispute Settlement Procedures, which leads to a

---

212 Edith Brown Weiss, UN Audiovisual Library of International Law, Introductory Note to the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer https://legal.un.org/avl/pdf/ha/vcpol/vcpol_e.pdf (2009).

213 *Supra,* note 184 at p. 210.

214 *See*, *supra*, note 205.

215 *Supra*,note 210.

216 *Supra,* note 161 at p. 14.

corollary loss in revenue and investments for state parties if there is a damage caused to the state's environment.[217]

CHAPTER 5: CONCLUSION

Throughout the analysis of compliance mechanisms in various spheres, national and international, there were different approaches seen to tackling the omnipresent problem of affecting compliance with the environmental norms that may be present here.

I. LIMITATIONS

Before beginning with a substantive conclusion, the author would like to clarify the objectives which he sought to fulfill through this dissertation. In writing this dissertation, the author of this dissertation was well aware of the limitations that an independent researcher such as himself would face when treading into this kind of research. The resources available to the author were limited, with a limited access to research and pre-existing literature being a stand-out limitation. However, the accessible data itself was so vast, that many of the topics studied by the author had to be left incomplete, but may pose further questions for research, such as the role a "Commodity Theory of Law" can play, and more analysis into the different forms of compliance mechanisms present in MEAs.

The subjective experience and standpoint of the author also plays an influence in the research conducted herein, and the author locates this as particularly influential in the depth to which the fields/disciplines chosen are studied. An effort has been made to incorporate a study of environmentalism, economics, sociology, political science, law and legal theory, and psychology with an aim to study the issues of environmental compliance from their combined

---

[217] Yvonne Wong & Benoit Mayer, *The World Bank's Inspection Panel: A Tool for Accountability?* 6 THE WORLD BANK LEGAL REVIEW 495.

lens. As a further disclaimer, the author states that the research herein is not best viewed as a definitive answer to the questions posed for research. This dissertation was prepared primarily with the aim of enhancing knowledge pertaining to environmental regulations from a multidisciplinarian standpoint. It also serves as some guidance for further research into this topic.

II. CONCLUDING THOUGHTS

As a conclusion, the author would like to state that the main barriers across different fields could be summarised as systemic problems. Thus, for example, in India, we see the presence of a systemic malfunctioning encapsulated by state apathy towards implementing the environmental regulations. In fact, it is a long documented problem for the country as has been observed in Chapter 3.

Towards this, international law would profess to contribute using its characteristic facilitative, co-operative and non-confrontational approach. For example, being a developing country with the diplomatic stance, of faith in the international legal system, would make it a very feasible candidate to be on the receiving end of international legal system's assistance. Further, the Indian citizenry can be said to have a decent enough presence of biospheric values as their inherent psychological values, if one were to go by the rise in environmentalism and activism in recent times. However, despite these favouring circumstances, there has been a lack of environmental compliance in India, with the problems faced being attributed to the "culture of non-compliance" and the political situation. Rather than the aforementioned favourable scenario materialising, one can possibly attribute a "frustrated expectation" arising due to the shattering of the appearance of stability which made people rely on the law in the sense foreseen by Joseph Raz.

There are a few concepts that are repeated across the different facets of study in this dissertation, that point towards the need for multi-disciplinary collaboration and analysis of the factors contributing to compliance of environmental regulations.

Thus, we can relate the social values and norms that contribute to a "cross-norm inhibition effect" in Environmental Psychology with the need for co-operative facilitation along with enforcement in International Environmental Law. That these two (facilitation and enforcement) work best when applied together is not to be mistaken for an extrapolation of Environmental Psychology to a field where individuals (being the subjects of Psychology) have no say. As HLA Hart shows us, in societies with mostly primary rules only, it is necessary for officials to have an "inner point of view" about the laws they are to implement. In the case of International Environmental Law, the "officials" whose inner point of view shall matter can thus range from the executive to bureaucrats, each of which have a considerable pull to realise with respect to the decisions made at the negotiating tables for MEAs.

Perhaps it is then time to look to what is being overlooked in the legal framework, i.e, whether having the executive take its responsibility more actively, through the putative system of collective responsibility in the parliament would be better than looking for enforcement through judicial adjudication, viz., through the route of PILs and citizen suits in the NGT.

However, while doing so, it would also be better to think of this as strengthening our legal systems to make better the age-old standards of transparency and accessibility in governance. Citizen participation should as always be encouraged, but adjudication should not be the only means to address issues with such wide-ranging policy implications as environmental policy.

Similarly, international compliance mechanisms can be strengthened through the same standards. Ensuring that countries remain more participative in MEAs is an endemic feature of the larger Public International Law regime, and thus the discussion on how to make the regime more effective will be an important one to have. As also will the role of non-state actors and institutions in translating their environmentalism into public accountability.