ENVIRONMENTAL IMPACT ASSESSMENT IN INDIA: AN APPRAISAL

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An Environmental Impact Assessment (EIA) is a process of predicting and evaluating an action's impact on the environment, the conclusions of which are to be used as a tool in decision making. It essentially attempts to reconcile development values and environmental values with 'sustainable development' as the aim. The development of EIAs started with the National Environmental Policy Act of 1969[1] (NEPA) in the US which provided for EIAs in the case of federal projects. EIAs are now an integral part of the process of project clearance in most developed countries. They have also been recognised in various international instruments.[2]

LAW RELATING TO EIA IN INDIA

In India, EIAs of development projects were first started in 1977-78 when the Department of Science and Technology took up environmental appraisal of river valley projects. Subsequently, various other projects were brought under the purview of EIA. It was, however, with the enactment of the Environment Protection Act, 1986, that there was a broad move towards institutionalising environmental procedures. The Central Government, under S. 3(1) and S. 3(2) of the Environment Protection Act, 1986, and under Rule 5(3)(a) of the Environment Protection Rules, 1986, issued a draft notification in 1992[3] laying down norms and procedures for impact assessment. This was followed by a final notification in 1994[4] and two other notifications amending it.[5] This broadly constitutes the law relating to EIAs in India. The procedure established by these notifications, and the alterations that these procedures have undergone in a short time have been examined here.

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1 42 U.S.C.A.S. 1540.

2 Principle 17 of the Rio Declaration adopted at the United Nations Conference on Environment and Development, 1992 states, "Environment Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment." These principles are also contained in Agenda 21, an action plan elaborating strategies and integrated programmes to halt and reverse the effects of environmental degradation and to promote sustainable development.

3 No. S.O. 85(E), 1992 CCL III 59.

4 No. S.O. 60(E), 1994 CCL III 131.

5 No. S.O. 230(E), 1994 CCL III 220, No. S.O. 356(E), 1994 CCL III 200.

LEGAL PROCEDURE FOR CLEARANCE UNDER DRAFT NOTIFICATION OF 1992

As per this notification, the expansion or modernisation of any existing industry, or the establishment of new projects listed in Schedules I and II to the 1992 Notification shall not be undertaken without obtaining an environmental clearance from the Central Government and the State Governments respectively. An application submitted to the appropriate authority should include an EIA Report and an Environmental Management Plan (EMP) prepared in accordance with the guidelines issued by the Central Government. These reports are then assessed by the Impact Assessment Agency (IAA) which is the Ministry of Environment and Forests at the Central and the State levels in consultation with a committee of experts.

The IAA will then prepare a set of recommendations based on technical assessment of documents and data furnished by project authorities, supplemented by data collected during visits to the sites or factory and interaction with affected population and environmental groups. The clearance is then given subject to these recommendations. Monitoring is done by the IAA by means of a half yearly report to be submitted to the agency by the project authorities. The legal framework created is clearly inadequate for reasons to be shortly examined. The position has also been exacerbated by the final notification which has eroded many of the positive aspects of the draft notification.

ALTERED PROCEDURE UNDER FINAL NOTIFICATION

The Final Notification issued in 1994[6] made the following substantial alterations to the earlier provisions:

1) The two schedules setting out projects which require clearance from the Central and State Governments have been substituted by a single one whereby only Central Government clearance is required. The schedule itself has been considerably shortened leaving out many crucial projects and for 16 projects, clearance is required only if the investment is in excess of 50 crore. The small scale sector is also exempt.

2) While earlier it was required that a detailed project report be submitted consisting of the EIA and the Environmental Management Plan, now only a summary feasibility report is required to be submitted.

3) The EIA, EMP and the conditions subject to which the clearance is given are now available to environmental groups and other concerned groups as well and not to the concerned parties alone. Furthermore, comments of the public may be solicited, *if so recommended by the IAA* in public hearings.

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6 No. S.O. 60(E), 1994 CCL III 131.

4) The public shall also be provided access to a summary of the EIA and the EMP at the headquarters of the IAA.

Interestingly, the provisions of this notification have also been altered subsequently in May, 1994.

Further alterations in procedure persuant to the amendments[7] -

1) The IAA is no longer bound to visit the sites or factories and interact with the affected population or environmental groups. Hence the clearance and recommendations given by it may now be based solely on a technical assessment of the documents and data furnished by the project authorities.

2) The summary of the reports, recommendations and conditions subject to which clearance is given, shall now be made available to the concerned parties and environmental groups "subject to the public interest".

3) Even access for the public, to the above documents is now "subject to the public interest".

4) Similarly, the compliance reports submitted half yearly is accessible to the public "subject to the public interest".

It is submitted that the framework as it exists now are far from satisfactory and raises various issues, especially in the light of the objectives for which an EIA was conceived.

CENTRALISED SYSTEM

The system of clearances envisaged is a highly centralised one involving only clearance from the Central Government. The State Government and the local bodies have no role to play in the whole process. In fact the draft notification had provided for State Government clearance in the case of certain projects, but even this was modified to vest the power of clearance with the Central Government alone. Hence this does not provide for a situation where the Central and State Governments may be in conflict over a particular project as is often the case.

Such a move appears anomalous, especially when the trend worldwide is towards vesting decision making powers at the local level, more so when the issue is one which has a significant impact on the local population. Even the Constitution of India reflects this trend in the light of the 73rd and 74th Amendments whereby panchayats and municipalities are expected to bring about local self governance and are consequently to be vested with powers to further this end. In England for example, the requirement for an Environmental Impact

7 No. S.O. 230(E), 1994 CCL III 220, No. S.O. 356(E), 1994 CCL III 200.

Statement is contained in the Town and Country Planing Act[8] and the clearances therefore have to be given by the local authorities. Hence, the decision making process remains at the local level and local authorities will have to take responsibility for projects coming up in their region. A possible criticism is that the local authorities lack the expertise to evaluate these reports. Hence there is a proposal in the UK that a Council for Environmental Assessment be set up which could assist the local bodies in the process.[9]

CRITERIA FOR IDENTIFICATION OF PROJECTS

The draft notification had two schedules, the first prescribing 24 industries which required Central Government clearance, and the second which enumerated 45 industries which required State Government clearance. The final notification has only one Schedule which contains a considerably shortened list of only 29 industries which require clearance from the Central Government alone. Furthermore, the notification contains an exclusionary clause to the effect that it would not apply in the case of certain projects if the investment is less than 50 crores or if it is reserved for the small scale sector with investment of less than 1 crore. It is submitted that it is the capacity of a plant to pollute and its likelihood of doing so that should be the criteria and not the quantum of the investment. In the US, the procedure laid down by the National Environmental Policy Act is that an Environmental Assessment (EA), is conducted at the outset based on which it is decided whether or not to require an Environmental Impact Statement (EIS) which is similar to an EIA. If it is concluded that it is not required, then a finding of No Significant Impact is prepared. The agency shall then make available this finding to the general public and the public response is to be considered before a final determination is made as to whether an EIS is required or not.[10] Hence there are no fixed categories of projects which require an EIA and the determination in this regard also takes into account the views of the public.

PUBLIC PARTICIPATION AND THE RIGHT TO KNOW

The Final Notification provided that comments from the public may be solicited if the IAA so determines, which in itself was a dilution of the Draft Notification which had mandated this. However, the position as it stands now is that the IAA no longer has to even visit the site and can base its recommendations on the technical reports submitted by the project proponent. The availability of documents to the general public is also now made "subject to the public interest". The public right to know is a growing area of concern in environmental law. In

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8 The requirement of an Environmental Impact Statement in the UK was as a result of EC Directive 85/337. Consequent to this, the Town and Country Planning (Assessment of Environment Effects) Regulations, 1988 (SI 1988 No. 1199), were passed.

9 Simon Ball & Stuart Bell, *Environmental Law: The Law and Policy Relating to the Protection of the Environment* 248 (1991).

10 42 U.S.C.A. S. 1501.

India as well, public hearings in the case of certain major projects is a mandatory requirement. This is a positive step.

In the US, under the Freedom of Information Act,[11] any person has the right to obtain a copy of nearly any document in the possession of any federal agency. Furthermore, any public interest group intending to use the documents to benefit the general public has the right to get the materials free of charge. The Act even permits a request stated in broad, categorical terms and the federal agencies have a duty to comply. At the State level, the Public Records Act accomplishes the same purpose. In India too, the Right to Information Bill is a positive step in this direction.

However, besides obtaining information from the Government, greater transparency is also needed in the whole process of project clearance. In England, it is required that a non-technical summary of the information should accompany the Environmental Statement to enable non-experts to understand its findings.[12] Besides this, an extensive consultation process is envisaged. The US NEPA also provides that the Environmental Statement shall be analytical, concise and that it should be written in a manner so as to enable the general public to understand it as well. It also provides for public hearings notice and public access to documents. It even goes as far as to require the agency to mail notice of hearings to those who request.[13] Transparency is a hallmark of the procedure followed here. There are detailed rules on the conduct of these hearings. The public is entitled to copies of any comments made by other statutory consultees on the draft report. The Indian law is clearly lacking in these respects.

INSUFFICIENT CONSIDERATION OF ALTERNATIVES

In the US, the heart of the EIS is the section dealing with alternatives to the proposed action. The regulations mandate that the agencies rigourously explore all reasonable alternatives and devote attention to each alternative in detail so that reviewers may consider their comparative merits. The regulations provide for the circulation of the EIS to federal agencies and to any person, organisation or agency requesting it. The federal agencies especially have a statutory duty to respond and the agency preparing the final EIS shall consider the comments and -

1. Modify the proposed action, or
2. Develop and evaluate alternatives not seriously considered earlier, or
3. Supplement, modify or improve its analysis, or
4. Explain why the comments do not warrant further agency response.[14]

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11 John Bonnie, *Freedom of Information and Public Interest Environmental Litigation, Asia Pacific Peoples Environmental Network* 703 (1988).

12 Simon Ball & Stuart Bell, *supra* n. 9 at 242.

13 42 U.S.C.A. S. 1502.25.

14 42 U.S.C.A. S. 1502.14.

In England as well, 'alternative site selection' is an essential component of an Environmental Assessment as it is necessary to examine the rationale behind why a different site was not chosen. In India, the EMPs are hardly substitutes for these. The project in all its respects, is taken as an underlying assumption and recommendations are only aimed at mitigating the adverse impacts. Alternatives are not suggested.

INADEQUATE IMPLEMENTATION

The primary problem in the implementation process is the excessive reliance placed on reports of the project proponent and the agency which carries out the EIA. Clearance may be given based on the report of the project proponent and the EIA itself is carried out by an agency appointed by the project proponent. Hence the assessment cannot be said to take an impartial view of the project. Furthermore, the only method of monitoring the implementation of the recommendations and conditions subject to which clearance is given, is by means of half yearly reports that are to be submitted to the IAA by the project authorities. This again lacks objectivity and in any case, past practice shows that the IAA does not take any action in this respect.

There have also been problems that have cropped up in actual implementation of EIA.

* EIAs are expensive to carry out, are time consuming and often take upto a year. Hence while the requirement that only larger projects carry out EIAs has come in for criticism, it may be unrealistic to expect small projects to undergo a detailed EIA procedure.

* The objectivity and thoroughness of an EIA are influenced by the agency carrying it out. The agency, being hired by the developer usually does not present a correct picture.

* The predictions in an EIA are rarely tested against what actually happens. Hence, impact predicitons have little chance of being improved.

* The information required in an EIA is often limited as the regulations or guidelines may not require the full range of potential impacts to be addressed.

In view of these defects, an emerging concept is that of a Strategic Environmental Assessment (SEA). The important differences between this and the EIA are -

* EIAs do not consider the cumulative impacts of more than a single project, i.e., the question of a synergistic impact - whether the total impact of several projects exceeds the sum of their individual impacts. EIAs do not usually consider this due to lack of knowledge concerning other developmental projects.

* EIAs also do not adequately discuss alternatives extensively as they are reactive in nature. An SEA takes place at the conceptualisation stage and hence this difficulty may be overcome.

* An SEA would also take into account the secondary socio-economic effects of a project such as population displacement, economic hardship etc.[15]

While this cannot be an answer to all the problems discussed, it would make the exercise more meaningful. In India, there has been some response to these trends. If one were to examine the Siting Guidelines for Industries,[16] it is clear that the cumulative impact of various industries should be taken into account when preparing an EIA. However, it is clear when examining the defects in our laws and implementation machinery, especially when compared to those of the developing countries, we still have a long way to go in giving effect to the concept of an Environmental Impact Assessment.

15 M.R. Srikrishna, *Environmental Impact Assessment, the Way to the Future*, 9 NLSJ 126 (1997).

16 *Handbook of Environmental Procedures and Guidelines*, Government of India, Ministry of Environment and Forests, 1994.